

TOPICAL INDEX TO BRIEF

PAGE NO.

<u>TABLE OF CITATIONS</u>	v
<u>STATEMENT OF THE CASE</u>	1
<u>STATEMENT OF FACTS</u>	2
A. <u>TRIAL</u>	2
B. <u>PENALTY PHASE</u>	6
<u>SUMMARY OF ARGUMENT</u>	32
[ISSUE I] THE PROSECUTOR'S SUCCESSFUL SECOND PEREMPTORY STRIKE AGAINST AFRICAN-AMERICAN JUROR KIMBERLY JAMES - - AFTER HER FIRST ATTEMPT TO STRIKE THAT JUROR WAS DENIED BECAUSE THE TRIAL JUDGE WAS NOT SATISFIED THAT THE ARTICULATED REASON WAS GENUINE - - WAS BASED ON A PRETEXTUAL AFTERTHOUGHT, AND AMOUNTED TO RACIAL DISCRIMINATION IN JURY SELECTION IN VIOLATION OF UNITED STATES AND FLORIDA CONSTITUTIONAL PROTECTIONS AFFORDED LITIGANTS, JURORS, AND THE COMMUNITY AT LARGE	33
A. <u>PREFATORY STATEMENT</u>	33
B. <u>RACIAL DISCRIMINATION IN THE EXERCISE OF PEREMPTORY CHALLENGES IS CONSTITUTIONALLY IMPERMISSIBLE</u>	35
C. <u>THE PROSECUTOR'S TWO PEREMPTORY STRIKES OF MS. JAMES</u> ...	37
D. <u>THE SUBSTITUTE RATIONALE</u>	41
E. <u>THE ORIGINAL RATIONALE</u>	45

[ISSUE II] THE PRETEXTUAL NATURE OF THE PROSECUTOR'S PEREMPTORY STRIKE OF JUROR JAMES IS EVEN MORE BLATANT WHEN VIEWED IN LIGHT OF THE VOIR DIRE RESPONSES OF MR. KELLY, MS. STANLEY, AND MR. MAMULA, EACH OF WHOM SERVED ON THE JURY WHICH CONVICTED GORDON AND RETURNED DEATH PENALTY VERDICTS 52

A. PROFFERED REASONS FOR STRIKE EQUALLY APPLICABLE - - OR MORE APPLICABLE - - TO UNCHALLENGED JURORS 52

B. JUROR KELLY 53

C. JUROR STANLEY 54

D. JUROR MAMULA 55

E. POTENTIAL ROADBLOCKS TO FULL APPELLATE REVIEW 59

F. GORDON SHOULD NOT BE PRECLUDED FROM AN OPPORTUNITY TO ESTABLISH A CRITICAL FACT - - ONE WHICH WAS READILY OBSERVABLE TO THE COURT BELOW - - THAT JURORS KELLY, STANLEY, AND MAMULA ARE WHITE 60

G. WHEN NECESSARY FOR A REVIEWING COURT TO CONSIDER ALL OF THE CIRCUMSTANCES IN A JURY SELECTION PROCEEDING BEARING ON THE QUESTION OF WHETHER A PEREMPTORY STRIKE WAS MADE FOR A RACIALLY DISCRIMINATORY PURPOSE, COMPARATIVE ANALYSIS IS CONSTITUTIONALLY REQUIRED 62

[ISSUE III] BY ABANDONING PROPORTIONALITY REVIEW IN LAWRENCE V. STATE (OCTOBER 29, 2020) (2020 WL 6325895) THIS COURT HAS MISCONSTRUED THE UNITED STATES SUPREME COURT'S DECISION IN PULLEY V. HARRIS, 465 U.S. 37(1984) AND RENDERED FLORIDA'S CAPITAL SENTENCING SYSTEM ARBITRARY, CAPRICIOUS, AND UNCONSTITUTIONAL 68

A. RISE AND FALL OF PROPORTIONALITY REVIEW - FURMAN TO LAWRENCE 68

<u>B. BECAUSE FLORIDA'S CAPITAL SENTENCING SCHEME</u> <u>(ESPECIALLY AS CONSTRUED BY THIS COURT SINCE 2019) - -</u> <u>IN CONTRAST TO THE 1977 CALIFORNIA SCHEME WHICH WAS AT</u> <u>ISSUE IN PULLEY V. HARRIS - - DOES NOT PROVIDE ADEQUATE</u> <u>SAFEGUARDS AGAINST ARBITRARY INFLECTION OF THE DEATH</u> <u>PENALTY, THIS COURT'S ABANDONMENT OF PROPORTIONALITY</u> <u>REVIEW RENDERS FLORIDA'S SYSTEM UNCONSTITUTIONAL</u>	79
[ISSUE IV] GORDON'S DEATH SENTENCE SHOULD BE REDUCED TO LIFE IMPRISONMENT BECAUSE THIS IS NOT AMONG THE LEAST MITIGATED OF FIRST DEGREE MURDERS	86
[ISSUE V] THE TRIAL COURT'S SUPERFICIAL AND DISMISSIVE TREATMENT OF THE MITIGATING EVIDENCE IS INADEQUATE UNDER FLORIDA LAW, AND FAILS TO COMPLY WITH THE EIGHTH AMENDMENT'S REQUIREMENT OF HEIGHTENED RELIABILITY IN CAPITAL SENTENCING	90
[ISSUE VI] THE EIGHTH AMENDMENT BARS THE EXECUTION OF INDIVIDUALS LIKE GORDON WHO SUFFER FROM SEVERE MENTAL ILLNESS AND BRAIN DAMAGE	100
[ISSUE VII] AS TO COUNTS ELEVEN AND TWELVE, CHARGING GORDON WITH ATTEMPTED FIRST DEGREE MURDER OF DEPUTY QUINTANA-RIVERA AND OFFICER NICKELS, THE STATE FAILED TO PRESENT COMPETENT, SUBSTANTIAL EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD FIND PREMEDIATATION, OR ANY INTENT TO KILL	103
<u>CONCLUSION</u>	110
<u>CERTIFICATE OF SERVICE</u>	110
<u>CERTIFICATION OF FONT SIZE</u>	110

TABLE OF CITATIONS

	<u>PAGE NO.</u>
<u>Abshire v. State,</u> 642 So.2d 542 (Fla. 1994)	36
<u>Allen v. Butterworth,</u> 756 So.2d 52 (Fla. 2000)	78, 90
<u>Almeida v. State,</u> 748 So.3d 922 (Fla. 1999)	87
<u>Atkins v. Virginia,</u> 536 U.S. 304 (2002)	101-102
<u>Baptiste v. State,</u> 995 So.2d 285 (Fla. 2008)	108
<u>Batson v. Kentucky,</u> 476 U.S. 79 (1986)	2, 35-44, 51, 62-63
<u>Booker v. State,</u> 441 So.2d 148 (Fla. 1983)	70-71
<u>Bradley v. State,</u> 787 So.2d 732 (Fla. 2001)	104
<u>Bradwell v. State,</u> 300 So.3d 325 (Fla. 1st DCA 2020)	104
<u>Bright v. State,</u> 299 So.3d 985 (Fla. 2020)	83, 88
<u>Bush v. State,</u> 295 So.3d 179 (Fla. 2020)	83, 104
<u>Campbell v. State,</u> 571 So.2d 415 (Fla. 1990)	77-78, 91
<u>Chamberlin v. Fisher,</u> 855 F.3d 832 (5th Cir. 2018)	66
<u>Clark v. State,</u> 609 So.2d 513 (Fla. 1992)	97, 99
<u>Coday v State,</u> 946 So.2d 988 (Fla. 2006)	88

<u>Colley v. State</u> , __ So.3d (Fla. 2020) [2020 WL 6948844]	83
<u>Conner v. State</u> , 327 P.3d 503 (Nev.2014)	52
<u>Cooper v. State</u> , 739 So.2d 82 (1999)	69, 87
<u>Craft v. State</u> , __ So.3d __ (Fla. 2020) [2020 WL 6788794]	83
<u>Craven v. State</u> , __ So.3d __, (2020) [2020 WL 6166336]	51, 83
<u>Crook v. State</u> , 908 So.2d 350 (Fla. 2005)	68-69, 87-88
<u>Crump v. State</u> , 654 So.2d 545 (Fla. 1995)	77-78, 92
<u>Cullen v. Pinholster</u> , 563 U.S. 170 (2011)	61
<u>Daubert v. Merrell Dow Pharmaceuticals</u> , 509 U.S. 579 (1993)	16
<u>Davis v. State</u> , 121 So.3d 462 (Fla. 2013)	69, 87
<u>Davis v. State</u> , 691 So.2d 1180 (Fla. 3d DCA 1997)	64
<u>Delgado v. State</u> , 162 So.3d 971 (Fla. 2015)	74, 87
<u>Dobek v. Ans</u> , 475 So.2d 1266 (Fla. 4th DCA 1985)	38
<u>Dorsey v. State</u> , 868 So.2d 1192 (Fla. 2003)	51, 63, 65
<u>Doty v. State</u> , __ So.3d __, (Fla. 2020) [2020 WL 717815]	83
<u>Eddings v. Oklahoma</u> , 455 U.S. 104 (1982)	90
<u>Ellis v. State</u> , 152 So.3d 683 (Fla. 3d DCA 2014)	40-41, 44, 52

<u>Ex parte Panetti,</u> 2014 WL 6734357 (Tex.Crim.App.2014)	102
<u>Florida Dept. of State v. Mangat,</u> 43 So.3d 642 (Fla. 2010)	108
<u>Flowers v. Mississippi,</u> 139 S.Ct. 2228 (2019)	35
<u>Foster v. Chatman,</u> 136 S.Ct. 1737 (2016)	35, 50
<u>Foster v. State,</u> 132 So.3d 40 (Fla. 2013)	108
<u>Furman v. Georgia,</u> 408 U.S. 238 (1972)	68-69, 73, 79, 81-85, 100
<u>Georgia v. McCollum,</u> 505 U.S. 42 (1992)	36
<u>Glinton v. State,</u> 956 So.2d 497 (Fla. 4th DCA 2007)	44
<u>Glover v. State,</u> 226 So.3d 795 (Fla. 2017)	104
<u>Gregg v. Georgia,</u> 428 U.S. 153 (1976)	68, 73, 100
<u>Griffin v. State,</u> 820 So.2d 906 (Fla. 2002)	91, 99
<u>Hayes v. State,</u> 94 So.3d 452 (Fla. 2012)	38, 63
<u>Hayes v. Thaler,</u> 361 F.App'x 563 (5 th Cir. 2018)	61
<u>Higgins v. Cain,</u> 720 F.3d 255 (5th Cir. 2013)	60
<u>Hojan v. State, So.3d</u> (Fla. 2020) [2020 WL 7062475]	83
<u>Hoskins v. State,</u> 965 So.2d 1 (Fla. 2007)	64
<u>Hurst v. Florida,</u> 577 U.S. 92 (2016)	80, 84-85

<u>Hurst v. State,</u> 202 So.2d 40 (Fla. 2016)	84, 85, 102
<u>J.A.R. v. State,</u> __So.3d__ (Fla. 2d DCA 2020) [2020 WL 6106031]	104
<u>Jackson v. State,</u> 704 So.2d 500 (Fla. 1997)	91, 99
<u>Jamerson v. Runnels,</u> 713 F.3d 1218 (9 th Cir.2013)	60-61, 65-67
<u>Jefferson v. State,</u> 595 So.2d 38 (Fla. 1992)	38
<u>Joiner v. State,</u> 618 So.2d 174 (Fla. 1993)	35, 40
<u>Jones v. State,</u> 297 So.3d 685 (Fla. 1st DCA 2020)	104
<u>Jones v. State,</u> 705 So.2d 1364 (Fla. 1998)	82
<u>Jones v. State,</u> 923 So.2d 486 (Fla. 2006)	63
<u>Jones v. State,</u> 431 S.W.3d 149 (Tex.App.-Houston 2013)	64
<u>Kaczmar v. State,</u> 104 So.3d 990 (Fla. 2012)	72
<u>King v. State,</u> 89 So.3d 209 (Fla. 2012)	64
<u>Landis v. State,</u> 143 So.3d 974 (Fla. 4th DCA 2014)	44, 52
<u>Lawrence v. State, __So.3d__</u> (Fla. 2020) [2020 WL 6325895]	68-69, 74-79, 82, 89, 102
<u>Lightbourne v. McCullum,</u> 969 So.2d 326 (2007)	72
<u>Lott v. State,</u> __So.3d__ (Fla. 2020) [2020 WL 5553384]	80
<u>Lowe v. State,</u> 259 So.3d 23 (Fla. 2018)	96

<u>Mahn v. State,</u> 714 So.2d 391 (Fla. 1998)	97
<u>McCoy v. State,</u> 132 So.3d 756 (Fla. 2013)	100
<u>McCray v. State,</u> 220 So.3d 1119 (Fla. 2017)	38
<u>McDaniels v. Kirkland,</u> 813 F.3d 770- (9th Cir. 2015)	66-67
<u>Melbourne v. State,</u> 679 So.2d 759 (Fla. 1996)	35, 51-52
<u>Miller v. State,</u> 373 So.2d 882 (Fla. 1979)	87
<u>Miller-El v. Cockrell,</u> 537 U.S. 322 (2003)	63, 65
<u>Miller-El v. Dretke,</u> 545 U.S. 231 (2005)	33-44, 51, 62-63
<u>Mitchell v. State,</u> 620 So.2d 1008 (Fla. 1993)	40
<u>Morrison v. State,</u> 818 So.2d 432 (Fla. 2002)	49
<u>Murray v. State,</u> 3 So.3d 1108 (Fla. 2009)	37
<u>Newberry v. State,</u> 288 So.3d 1040 (Fla. 2019)	83
<u>Nibert v. State,</u> 574 So.2d 1059 (Fla. 1990)	87
<u>Nowell v. State,</u> 998 So.2d 587 (Fla. 2008)	49, 52, 63
<u>Oliver v. State,</u> 214 So.3d 606 (Fla. 2017)	104
<u>Olsen v. State,</u> 67 P.3d 536 (Wyo.2003)	70, 83
<u>Oyola v. State,</u> 99 So.3d 431 (Fla. 2012)	77-78, 99

<u>People v. Corona,</u> 2009 WL 783024, (Cal.App.5th Dist.2005)	108
<u>People v. Gutierrez,</u> 395 P.3d 186 (Cal. 2017)	64
<u>People v. Lenix,</u> 187 P.3d 946 (Cal. 2008)	64-65
<u>People v. Presswood,</u> 2018 WL 5276305 (Mich.App.2018)	108
<u>Pham v. State,</u> 70 So.3d 485 (Fla. 2011)	80
<u>Phillips v. State,</u> 207 So.3d 212 (Fla. 2016)	99
<u>Poole v. State,</u> 151 So.3d 402 (Fla. 2014)	49, 64
<u>Powers v. Ohio,</u> 499 U.S. 400 (1991)	36
<u>Proffitt v. Florida,</u> 428 U.S. 242 (1976)	70, 73, 83, 100
<u>Pulley v. Harris,</u> 460 U.S. 1036 (1983)	70
<u>Pulley v. Harris,</u> 465 U.S. 37 (1984)	70-73, 79-80, 82, 86
<u>Ramey v. Davis,</u> 942 F.3d 241 (5th Cir. 2019)	60, 66
<u>Reed v. Quarterman,</u> 555 F.3d 364 (5th Cir. 2008)	66
<u>Rhoads v. Davis,</u> 914 F.3d 357 (5th Cir. 2019)	66
<u>Rivera v. Illinois,</u> 556 U.S. 148 (2009)	52
<u>Rogers v. State,</u> 285 So.3d 872 (Fla. 2019)	78, 83, 99-100, 102
<u>Roper v. Simmons,</u> 543 U.S. 551 (2005)	102

<u>San Martin v. State,</u> 705 So.2d 1337 (Fla. 1998)	49
<u>Santiago-Gonzalez v. State,</u> 301 So.3d 157 (Fla. 2020)	83
<u>Schoenwetter v. State,</u> 931 So.2d 857 (Fla. 2006)	96
<u>Siegle v. Progressive Consumers Ins. Co.,</u> 819 So.2d 732 (Fla. 2002)	108
<u>Smallwood v. State,</u> 113 So.3d 724 (Fla. 2013)	72, 108
<u>Smiley v. State,</u> 295 So.3d 156 (Fla. 2020)	83
<u>Smith v. State,</u> 170 So.3d 745 (Fla. 2015)	88
<u>Snyder v. Louisiana,</u> 552 U.S. 472 (2008)	35, 46, 53, 64
<u>Spencer v. State,</u> 238 So.3d 708 (Fla. 2018)	43
<u>State v. Alen,</u> 616 So.2d 452 (Fla. 1993)	36
<u>State v. Dixon,</u> 283 So.2d 1 (Fla. 1973)	68, 73, 78, 81
<u>State v. Ivey,</u> 285 So.3d 281 (Fla. 2019)	40
<u>State v. Kahler,</u> 410 P.3d 105 (Kan.2018)	102
<u>State v. Kirk,</u> 145 N.E.3d 1092 (Ohio App.8th Dist. 2019)	52
<u>State v. Martinez,</u> 71 So.3d 945 (Fla. 3d DCA 2011)	108
<u>State v. Michel,</u> 257 So.3d 3 (Fla. 2018)	72
<u>State v. Neil,</u> 457 So.2d 481 (Fla. 1984)	36

<u>State v. Perkins,</u> 760 So.2d 85 (Fla. 2000)	108
<u>State v. Poole,</u> 297 So.3d 487 (Fla. 2020)	84-85, 102
<u>State v. Slappy,</u> 522 So.2d 18 (Fla. 1988)	35, 44, 52
<u>State v. Steele,</u> 921 So.2d 538 (Fla. 2005)	84
<u>State v. Welcome,</u> 458 So.2d 1235 (La. 1984)	71
<u>Sumner v. Shuman,</u> 483 U.S. 66 (1987)	90
<u>Tennard v. Dretke,</u> 542 U.S. 274 (2004)	99
<u>United States v. Analetto,</u> 807 F.3d 423 (1st Cir. 2015)	39
<u>United States v. Atkins,</u> 843 F.3d 625 (6th Cir. 2016)	34, 65-66
<u>United States v. Barnette,</u> 644 F.3d 192, (4th Cir. 2011)	63
<u>United States v. Tomlinson,</u> 764 F.3d 535 (6th Cir. 2014)	39
<u>Urbin v. State,</u> 714 So.2d 411 (Fla. 1998)	68-69
<u>Ventura v. State,</u> 794 So.2d 553 (Fla. 2001)	108
<u>Visiting Nurse Ass'n of Florida, Inc. v. Jupiter Medical Center,</u> <u>Inc.,</u> 154 So.3d 1115 (Fla. 2014)	108
<u>Walker v. Georgia,</u> 555 U.S. 979 (2008)	71
<u>Walker v. State,</u> 707 So.2d 300 (Fla. 1997)	78, 91-92, 99
<u>Watkins v. State,</u> 245 S.W.3d 444 (Tex.Crim.App.2008)	64

<u>Weatherspoon v. State,</u> 214 So.3d 578 (Fla. 2017)	103
<u>Weaver v. Massachusetts,</u> 137 S.Ct. 1899 (2017)	52
<u>Wicks v. Publix Supermarkets, Inc.,</u> 908 So.2d 1190 (Fla. 2d DCA 2005)	63-64
<u>Williams v. State,</u> 37 So.3d 187 (Fla. 2010)	96
<u>Winston v. Boatwright,</u> 649 F.3d 618 (7th Cir. 2011)	52
<u>Woodel v. State,</u> 804 So.2d 316 (Fla. 2001)	77-78, 91, 96, 99
<u>Woodson v. North Carolina,</u> 428 U.S. 280 (1976)	89
<u>Wright v. State,</u> 221 So.3d 512 (Fla. 2017)	104
<u>Wright v. State,</u> 586 So.2d 1024 (Fla. 1991)	43
<u>Yacob v. State,</u> 136 So.3d 539 (Fla. 2014)	73-74, 83-85, 102
<u>Young v. State,</u> 744 So.2d 1077 (Fla. 4th DCA 1999)	51
Article 1 §12, Florida Constitution	72
Article 1 §17, Florida Constitution	72
§921.141, Florida Statutes	80-81
Sharon, <u>The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Senten- cing Statutes,</u> 46 Harv.C.R.-C.L. L.Rev. 223 (Winter 2011) ..	81-82
Shatz, <u>The American Death Penalty: Past, Present, and Future,</u> 53 Tulsa L.Rev 349 (2018)	81
Steiker and Steiker, <u>Courting Death: The Supreme Court and Capital Punishment</u> (2016)	82

STATEMENT OF THE CASE

Appellant, MICHAEL A. GORDON, was charged in a fifteen count indictment filed on February 3, 2015 in Polk County with the following offenses, all alleged to have been committed on January 15 of that year:

[Counts 1 and 2] First degree murder (with a knife or sharp instrument) of Patricia Moran and Deborah Royal.

[Count 3] Burglary (with assault or battery) of a dwelling belonging to Ms. Moran or Ms. Royal.

[Count 4] Conspiracy to commit armed robbery (with alleged co-conspirators Jovan Lamb, Terrell Williams, and/or Devonere McCune).

[Count 5] Robbery (with a firearm) of Chad O'Brien and/or Richie Soto.

[Count 6] Grand theft of jewelry and other property of Cash America Pawn Shop.

[Count 7] High-speed fleeing to elude law enforcement officers.

[Counts 8,9,and 10] Attempted first degree murder (with discharge of a firearm) of police officers Jeff Moore, David Smith, and Ronald Adams.

[Counts 11,12,and 13] Attempted first degree murder (with a weapon: to wit, a vehicle) of deputy sheriff [Jonathan] Quintana Rivera and police officers Eric Nickels and Jorge Gill.

[Count 14] Grand theft of a motor vehicle belonging to Patricia Moran.

[Count 15] Possession of a firearm by a convicted felon.

(R72-81).

After Count 15 was severed, the case proceeded to trial on January 14-February 18, 2019 before Circuit Judge Jalal Harb and a jury. At the close of the state's case, Judge Harb granted the defense's motion for judgment of acquittal on Count 13 (attempted

first degree murder with a vehicle of Officer Gill, who had died -
- of causes unrelated to this case - - before the trial (T4370-72;
see T2363,4348-49,4360-62). The trial resulted in verdicts of
guilty as charged on the thirteen remaining counts (R4566-78;
T4871-74). At the conclusion of the penalty phase the jury returned
verdicts finding that Gordon should be sentenced to death for both
murder convictions (R4634-43; T6000-10), and on February 7, 2020
Judge Harb imposed two death sentences (along with prison sentences
on the remaining counts) (R6760-90; T7188-7203).¹

STATEMENT OF FACTS

TRIAL

While Gordon does not concede guilt, he acknowledges through
undersigned appellate counsel that the circumstantial evidence pre-
sented by the state is legally sufficient to withstand a motion for
judgment of acquittal as to eleven of the thirteen convictions. See
Bush v. State, 295 So.3d 179 (Fla. 2016).[Counts 11 and 12 - - the
convictions for attempted first degree murder (with a vehicle) of
Deputy Quintana-Rivera and Officer Nickels - - are the exceptions;
the legal sufficiency of those convictions is challenged in Issue
VII, infra]. The only issue raised on appeal directed to the mur-
der convictions is a Batson² argument that the prosecutor's assert-
ed reasons for striking juror James were a pretext for racial dis-
crimination [Issues I and II, infra]. For purposes of this appeal,

¹ Judge Harb's findings of aggravating and mitigating factors are
discussed in Issue V, infra.

² Batson v. Kentucky, 476 U.S. 79 (1986).

and to keep the length of the brief as close as possible to the page limit, the undersigned accepts the statement contained in the state's sentencing memorandum as a substantially accurate summary of the guilt-phase evidence presented by the state, as follows:

Both Richie Soto and Chad O'Brien were employees at the Cash America Pawn at the time of the robbery. Both men were working the time of the robbery. Both men testified they were on a conference call within the office of the pawn shop when three armed suspects rushed into the pawn shop. Each suspect had their faces concealed. One suspect was armed with a long gun. Based on the evidence the suspect with the long gun is believed to be the defendant. One suspect was armed with a handgun. One suspect was armed with a crowbar. The defendant pointed the long gun at Chad O'Brien forcing him to the ground in the front area of the pawn shop. The suspect with the handgun pointed it at Richie Soto forcing him to the ground in the office of the pawn shop. The suspect with the crowbar used it to attempt to break into the jewelry display case. At the same time the defendant makes numerous threats to the victim[s]. Each victim testified they feared for their lives. The suspect with the crowbar is unsuccessful in breaking into the jewelry display case so the defendant forces Chad O'Brien to unlock the display case at which time the defendant and the man with the crowbar proceeded to load a black garbage bag full with the jewelry from within the display case. Shortly thereafter the three suspects fled the pawn shop. They returned to the SUV driven by the fourth suspect and fled the scene.

After fleeing the pawn shop, a 911 call was placed by Richie Soto. In addition, unbeknownst to the suspects, the jewelry display cases they stole during the robbery contained a GPS tracking device. The company that maintains the device also notified law enforcement of the activation of the device. As a result law enforcement officers were able to locate the suspect vehicle within minutes of the robbery.

Officer Jeff Moore was the first officer to see the suspect vehicle. Initially it was his intent to follow from a safe distance until he got [backup]. That strategy changed when he began taking gunfire from the suspect vehicle. It was around that same time [backup] officers David Smith and Ronald Adams approached the suspect vehicle. They too took gunfire from the suspect vehicle. All three officers testified they observed gunfire coming from the suspect vehicle and being directed at them. All three law enforcement vehicles were struck by gun-

fire. The suspect vehicle fled into the [Chanler] Ridge subdivision where it crashed. All four suspects fled the vehicle.

A search of the suspect vehicle was conducted. Numerous evidentiary items were locat[ed] within or around the suspect vehicle, to include the following: a handgun matching the handgun used during the robbery, clothing matching that worn by the suspects during the robbery, and green latex gloves matching those worn by two of the suspects during the robbery. The DNA of two of the suspects later apprehended near the crashed suspect vehicle was located on each of the green latex gloves. [. . . [J]ewelry] and jewelry display cases, most of which still had "Cash America Pawn" tags on the items, was found within and around the crashed suspect vehicle. The suspect vehicle was registered to the defendant. [Next sentence omitted].

After the defendant fled from the suspect vehicle, he entered the residence of Patricia Moran and Deborah Royal. There is no evidence to suggest that the defendant knew either Patricia Moran or Deborah Royal. Nor was evidence presented that the defendant was invited into their home. To the contrary a neighbor, Sandra Cox, testified it was not uncommon for the victim[s] to keep their front door unlocked.

Shortly after the suspect vehicle crash a 911 call was placed by the neighbor of Patricia Moran and Deborah Royal [. . .]; Sandra Cox. She conveyed to the dispatcher that she heard screams coming from within the victim[s'] residence. As a result, law enforcement quickly surrounded the residence.

In one last attempt to get away from law enforcement the defendant stole the victim[s'] vehicle and drove it out of the victim[s'] garage. The defendant drove in a direct path towards Officers Quintana Rivera and Eric Nickels, both of whom had surrounded the residence as a result of Ms. Cox's 911 call. Both officers testified that they had to jump out of the way to avoid being struck by the vehicle driven by the defendant. As a result, several officers discharged their weapons at the vehicle. The vehicle crashed a short distance from the victim[s'] residence. The defendant was the only occupant of the vehicle. The defendant was still wearing the same unique jeans that can be seen on the video during the robbery. Based on what the defendant was wearing, it was clear he was the one who held the long gun during the robbery at the pawn shop. The long gun was found in close proximity to Patricia Moran and Deborah Royal's residence. Chad O'Brien identified the long gun as the one used during the course of the robbery.

As law enforcement was in the process of arresting the defendant, other officers entered the residence of Patricia Moran and Deborah Royal. Both victim[s'] bodies were located within the residence they shared. Both were found nude or partially nude on the floor of the living room. Both victim[s] suffered multiple stab wounds. The defendant's clothing was found within the victim[s'] washing machine. The clothing had the blood/DNA of both Patricia Moran and Deborah Royal on it. Gloves matching those worn by the defendant during the robbery were located within the victim[s'] residence. A shoe matching those worn by the defendant during the robbery was located within the victim[s'] residence.

(Supplemental record, p.7574-77)

Of the three other suspects, one (Devonere McCune) was apprehended soon after the SUV crashed, near the scene of the crash (T2534-36), and two (Jovan Lamb and Terrell Williams) were apprehended, still in the Chanler Ridge subdivision, the next morning after Michael Gordon's arrest (T3589,3591,3611,3747-49).

Defense counsel did not concede that Gordon participated in any of the charged offenses (see T4564,4568-72,4590-92,4611-12). On the charges involving the murders of Ms. Moran and Ms. Royal, counsel argued to the jury that one or both of the other two suspects, Lamb and Williams, who were still at large in the neighborhood, or another individual named Tony Wright,³ could have been

³ When Gordon was taken into custody, Officer Harrison read him his Miranda rights and asked him if there was anyone else in the house. Gordon said his homeboy Tony Wright, and two other people who were family members of Tony Wright, were in the house (T3566-72). Later, two neighbors of Ms. Moran and Ms. Royal, who, around the time of the murders, had had an odd encounter with an unknown black male who falsely claimed to live in the neighborhood and then headed in the direction of the Moran/Royal residence, were shown photo packs containing Tony Wright's picture. Each identified the photo of Wright as the person they saw (T2666-70,2693-94,4374-81,4388-95;see T4515-17,4579-81).

inside the house and killed the two women (see T2202,2204-05,2208-09,4567,4581-82,4584,4601-03,4607-08,4610). The prosecutor asserted that nobody other than the two deceased women were found inside the house, and that the perimeter set up by law enforcement would have prevented anyone from leaving the house unseen (see T4613-15,4619-20), while defense counsel contended that there were gaps in the perimeter which could have allowed somebody to escape, and/or that the murders may have already occurred before the officers surrounded the house (see T4573-75,4577-78,4584-89,4591).

PENALTY PHASE

The state introduced Michael Gordon's prior convictions - - and testimony regarding the circumstances of those convictions - - of aggravated battery with a firearm (2004 non-fatal shooting of William Jovan Hicks(T4929-79)); aggravated battery in a county jail or detention facility (2005 stabbing of Rasmes Simeon)(T4979-5037); and felony battery and domestic battery by strangulation (T5076-5102). Regarding the latter offenses the state called Shannon Miller, who is the mother of Michael Gordon's daughter Mikasia (T5078-80). Shortly after Mikasia was born Michael went to prison for ten years (T5091). When he was released in 2004 they reconnected (T5091-92). Michael was excited to see Shannon and their daughter, and he was wanting to do better in life (T5098-5100). This made Shannon wanted to help him get back into society (T5098-99). She helped him fill out job applications, which was a struggle for him, and she tried to help him get a driver's license, but he repeatedly failed the test (T5098-99).

When Michael first came home he brought with him "a lot of psych meds" that he had been receiving in prison, including schizophrenic medicines and antidepressants (T5101). Shannon would take him to Peace River for his mental health treatment appointments (T5098). They gave the doctor at Peace River a list of the medications from the prison, but the doctor said "what they're giving in prison we don't have out here to give you", so different medications were prescribed (T5102).

During the ensuing months Shannon noticed that Michael's behavior and demeanor were changing; "I won't say it was aggressive or anything like that", but something wasn't right; he wasn't the same as when he came home and "he became somebody I didn't know" (T5079,5100-02). She attributed this to the change in medications (T5102).

One late afternoon in September 2014 Michael told Mikasia (eleven years old at the time) to get the dishes out of the dishwasher, and when she had an attitude about it Michael said he was going to "whoop [her] ass" (T5079-80,5088-89,5091). Shannon (who was on the phone with her sister) heard a commotion, like some dishes fell, and she heard her daughter "like, kind of make a cry out" (T5080,5082). Shannon told her sister to call the police, and went to the kitchen opening to see what was going on (T5080,5082). Michael slapped her on the side of her face, told her not to question him about his daughter, and pulled her about five feet back into the living room (T5080,5082-84). He was "just, like, flipped. Like, I didn't know who he was at that time" (T5080). Shannon was trying to calm him down and not be confrontational ("at this rate

he's, like, at a 10. So I need to be more on a 1 to bring him down" (T5082-85). Michael got on top of her, restraining her on the couch, and he had his hands on her neck "like he was trying to choke me in a sense" (T5080,5083-85). She wasn't sure how long he was restraining her but it was "[n]ot like minutes or anything like that", and she was able to talk him into stopping (T5085).

When Shannon's sister called back she and Michael got into a verbal altercation on the phone (T5081,5089-90). Eventually the police came and arrested him (T5081,5087). Afterwards Shannon noticed that Mikasia had a busted lip and a mark on her back from the kitchen counter (T5081-82).

The state introduced, in support of the HAC aggravating factor, the testimony of associate medical examiner Vera Volnikh regarding the pain the victims would have experienced from the multiple stabbing and cutting wounds which caused their deaths (T5038-48). The state also presented victim impact letters - - some accompanied by family photographs - - from Tiffany and Christopher Royal (Deborah Royal's children and Patricia Moran's grandchildren); Marilee Feiock (Patricia's granddaughter and Deborah's niece); Lois Ann Apple (a friend whose son is Tiffany Royal's long-time companion); Robert and Linda Vogel (the adoptive parents of Deborah's daughter Sarah; letter read by Tiffany); and Justine Clifton (Tiffany Royal's best friend; letter ready by Tiffany) (T5104-27).

Dr. Michele Quiroga, a neuropsychologist (T5145-49), did a diagnostic interview of Michael Gordon consisting of several visits, and she administered a full battery of neuropsychological testing

(T5149-51). Altogether she spent about 24 hours with him (T5151). Dr. Quiroga was able to determine from the testing that Michael was not malingering, and he was not faking cognitive deficits or psychological deficits (T5156-57,5162). During the interviews "[i]t took a long time to establish rapport with him because he was very paranoid", and he didn't readily reveal information to her; "[i]t took time" (T5242). While interviewing Michael Dr. Quiroga observed hallucinations (T5154).

Dr. Quiroga also interviewed Michael's mother, father, sister (Teresa), two aunts, and two cousins, and she reviewed the deposition of Shannon Miller (T5151,5198-99,5233). She reviewed numerous records, including Social Security records, school records, jail records, medical and mental health records from Peace River Center and the Bartow and Lakeland hospitals after his release from prison, and pharmacy records (the latter showing that he was prescribed heavy psychotropic medications) (T5154-55). Dr. Quiroga was provided with all existing relevant records, but hospitals are only required to keep records for seven years, so older records often no longer exist (T5156,5267-68).

Michael's mother was forced to work in the agricultural fields from a very young age, and she was exposed to pesticides during all of her pregnancies (T5170,5198-99). This can result in brain damage in the children (T5170). Michael had high fevers, nightmares, and incidents of sleepwalking when he was young, and he has suffered from chronic headaches all his life (T5152,5186-88). He did not meet developmental milestones, and he had difficulties with speech (T5169).

Throughout his childhood and adolescence Michael experienced multiple traumatic head injuries (T5152,5186-87). When he was an infant he was dropped on his head by a nine-year-old cousin; at age seven he was beaten up and hit in the head with a bat, resulting in unconsciousness; at age eight he was nearly drowned; at eleven he was assaulted by peers and was struck in the head with a brick; and at twelve "he was shot with a BB gun, and the metal piece is still in his brain" (T5187; see 5184).

All of these factors, along with the neuropsychological testing she conducted, caused Dr. Quiroga to believe that Michael Gordon might have brain damage (T5171-72). She recommended radiological studies, which were subsequently done by other doctors (T5171-72).

Dr. Quiroga's testing showed that Michael Gordon's adult IQ is 70 (T5159-60;5162). That is only one point higher than the cutoff for being "intellectually disabled, formerly known as retarded" (T5152,5159-60). Based on her testing and Michael's school records, Dr. Quiroga was able to rule out malingering (T5162). Michael had "specific learning disorders in all areas" (T5152). He only completed sixth grade; then he attended seventh grade for two years but was unable to pass it (T5224). [His academic achievement was even lower; at a fourth-grade level overall and a fifth-grade level for math (T5161-62)]. After leaving school around age twelve or thirteen, Michael was supposedly homeschooled for a little while, but there was a severe level of neglect in his home (see T5174, 5178-80), and Dr. Quiroga had no idea who did the homeschooling (T5225-26). Michael soon left the house and became homeless,

sleeping on the streets of Lakeland (T5226).

School records from the years he was enrolled showed that Michael was always placed in special education and emotionally handicapped classes, where he was very impulsive and disruptive in class and needed one-on-one attention in order to be able to focus (T5183). Dr. Quiroga's testing established that he meets the criteria for attention deficit hyperactivity disorder (ADHD) (T5152-53). While people with higher intelligence can sometimes compensate for ADHD and be successful in life, Michael's combination of ADHD and a 70 IQ prevents this (T5168).

The records reviewed by Dr. Quiroga showed a variety of mental health diagnoses, including schizophrenia, schizoaffective disorder depressive type, bipolar disorder, and psychosis NOA (not otherwise specified) (T5154, 5265-66). Michael told Dr. Quiroga that when he was around eleven or twelve years old he was hearing voices in his head telling him to hurt other people or (occasionally) to hurt himself (T5217-19). He reported experiencing hallucinations while in prison (T5217), and Dr. Quiroga observed hallucinations during her interviews with him (T5154).

Michael Gordon's jail records showed that he had also been diagnosed with post-traumatic stress disorder (PTSD) (which, according to Dr. Quiroga, is a diagnosis rarely seen in jail records) (T5183). His PTSD developed as a result of the severe physical and emotional abuse and neglect he experienced at home, and chronic bullying inflicted on him by his peers (see T5172-74, 5188-89, 5203-04, 5217-19).

Michael's father had forced his wife to give up her firstborn child for adoption because "he didn't like his first child" (T5200)

While Mary Gordon was allowed to keep her second child (Teresa) and third child (Michael), the father didn't like Michael either (T5178,5185). Dr Quiroga obtained information about Michael's upbringing from family members, and it took time and effort for her to gain their trust (T5172-73). Michael's mother was an especially difficult interview, and she would not speak in front of her husband because she is fearful of him (T5198; see 5173). Nevertheless, the family members (with the exception of Gordon, Sr.) eventually revealed a relentless history of physical and emotional abuse and neglect experienced by Michael and his mother and his sister (T5172-74,5177-82,5184-85,5198-5205).

Gordon, Sr. was "an angry man", and "he was head of the house and whatever he said was done" (T5201-02). Everyone in the household suffered from physical and verbal abuse, but Michael would get the worst of the beatings because his father didn't like him (T5172,5174, 5177-78,5200,5203). Because Michael - - as his peers put it - - "was in those retarded classes at school", other kids would bully him there and then beat him up when he was walking home (T5173-74,5180). Then when he got home his dad would beat him up (T5174,5180).

Michael was experiencing hallucinations as early as age eleven or twelve (T5172). Gordon, Sr. was ashamed to have a son who was mentally ill, and he refused to allow his wife to take him for therapy (T5182) Instead they used herbs and home remedies which were prevalent in their Jamaican culture, and Gordon, Sr. "tried to beat. . . the evil spirits out of him" (T5172,5182).

In addition to the beatings at home and on the way home from

school, Michael (and his sister) also received beatings at the hands of a babysitter that they were left with while the parents were at work (T5179).

Michael also witnessed his mother being severely beaten by his father (T5179,5200). This got to the point where other male family members intervened and asked Gordon, Sr. to "tone it down" (T5179).

Michael's sister Teresa, who is one year older, was sexually abused by the father (T5180,5203). The mother, "a very weak person who could not even protect herself", did not protect either of her children (T5180,5203). By the time Teresa was eleven or twelve she left the house and was prostituting for money and drugs (T5180,5203). She felt very guilty for leaving her younger brother Michael alone, but she couldn't take it any more (T5203).

Michael soon - - at age eleven or twelve - - began running away, and his parents neither knew nor cared where he was (T5178). Sometimes he would spend the night in a drug hole, and one time he ended up in the hospital (T5178,5184). [In one of Dr. Quiroga's interviews with Michael and Teresa she asked if there were any Amber Alerts back then; they both laughed and said "They didn't care if. . . we come home or not"(T5178)]. By age twelve or thirteen Michael was homeless; sleeping on the streets and showering at friends' houses (T5226).

The one family member Dr. Quiroga interviewed who provided a different account was Gordon, Sr. (T5200-03). He was "very guarded" and wouldn't reveal specifics (T5201-02). He did acknowledge that he hit Michael, but "[n]ot to the extent that other interviews revealed" (T5202-03). Gordon, Sr. told Dr. Quiroga that he always

tried to maintain a job and support his family (T5201-02). [Other people in the family told Dr. Quiroga that the "money went to alcohol, his extramarital affairs, and going to clubs" (T5202). The described him as an angry man who always had an attitude (T5202)]. Gordon, Sr. told Dr. Quiroga he consumed alcohol daily, and that he never considered getting mental health assistance for Michael (T5201). Instead Michael was given herbs from the backyard and homemade tea, because that is their culture (T5201).

In addition to all of his other mental health diagnoses (T5154, 5192), Dr. Quiroga determined that Michael - - as a result of everything that has happened to him in his childhood and adolescence - - suffers from (and has long suffered from) post-traumatic stress disorder (T5153-54, 5189, 5192). He experiences crying spells, depressed mood, night terrors, flashbacks, and social isolation (T5153, 5189). His hallucinations, which began around age eleven, increased in frequency and intensity and became more paranoid by age fourteen (T5189-90; see T5154, 5217-19).

According to Dr. Quiroga, genetic factors and family patterns across generations contributed to Michael's mental health issues (T5189-90). His father is an alcoholic; his mother suffers from depression and battered woman syndrome; his sister has "been psychiatrically hospitalized and in drug treatment and has been diagnosed with bipolar disorder"; an aunt is schizophrenic and bipolar and receives psychotropic medications, and a cousin is also bipolar (T5189-90).

Michael started drinking alcohol with his father at age ten

(T5190). By twelve he was smoking highly potent marijuana (T5191). By eighteen he was doing 10-15 pills of Ecstasy daily, and then would use Xanax to calm down and go to sleep (T5191). In his twenties he was using cocaine (T5191). Then, after his release from prison in 2014 he started smoking K2 (a synthetic cannabinoid also known as Spice) all day long (T5191). [While drug testing administered after Michael's arrest in this case showed only marijuana, Dr. Quiroga noted that spice or K2 ordinarily does not show up in drug testing (T5211-12,5261-62)].

Due in large part to the combination of his brain impairment, low intelligence, and learning disorders, Michael lacked the necessary skills to make a successful adjustment after his release from prison (T5185,5192-94). He failed in multiple attempts to pass his driver's license examination because he could not learn the material (T5193-94). Because he couldn't fill out job applications, pay his bills, or remember appointments, his girlfriend Shannon had to assist him with all of these tasks (T5194). Shannon took him to his psychiatric appointments and purchased the medications for him to take, but he had a hard time dealing with the strong side effects, and he began mixing them with illegal drugs like K2 and marijuana (T5196-98,5215-16). Shannon noticed him getting irritable and having mood swings (T5196). His inability to deal with stress culminated in his rage reaction when he struck his daughter, and slapped and choked Shannon, over the dishes not being put away (T5195-96). It is common, Dr. Quiroga explained, for a person who was abused as a child to become an abuser, because the way they learn to cope is by hitting and screaming and belittling (T5195-96).

Dr. Quiroga's attention was directed on cross to a series of jail disciplinary reports involving threats, possession of sharp weapons, and striking other inmates (T5235-41). She stated that there is a correlation between Michael Gordon's mental health issues and the manner in which he acts violently toward other people (T5241).

Dr. Quiroga summarized her findings as follows: (1) Michael Gordon suffers from severe mental illness; (2) he has sustained multiple traumatic brain injuries throughout his life; (3) he experienced "a tremendous amount of developmental trauma, including abuse at the hands of an alcoholic father, neglect by both parents, bullying by peers, and exposure to violence at a very early age; (4) he has low intelligence, learning disabilities, and ADHD; and (5) he began using drugs and alcohol at a young age (T5203-04).

Dr. Joseph Wu is a psychiatrist who specializes in brain imaging (T5271-73). PET (positron emission tomography) and CAT scans of Michael Gordon's brain were conducted, and Dr. Wu analyzed the results (T5277,5293-95,5306-07). Dr. Wu explained that CAT and MRI scans show brain structure, while PET scans show brain function (T5274,5306,5341-42). [An MRI, which uses magnets, could not be done because Michael has metal fragments in his head from a previous incident involving a BB gun (T5273-74;5306). Dr. Wu testified, without a Frye or Daubert⁴ objection by the state, that PET scans have been used for decades, and they are generally accepted in the medical community as the "gold standard" for assessing brain func-

⁴ Frye v. United States, 293 F.1013 (D.C. Cir.1923); Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

tion (T5284-85) He explained to the jury how a PET scan works (T5277-84), and he illustrated his ensuing testimony regarding his analysis of both the PET and CAT scans with Powerpoint slides (T5271; see 5286-5333).

Because Dr. Wu is based in California he needed to have a Florida physician write a prescription for a PET scan here (T5243). In this case that was done by Dr. Mark Rubino [see Dr. Rubino's testimony, infra], a neurologist who met with and evaluated Michael Gordon, and who reviewed the history of head trauma and the "multiple evidence of neuropsychological abnormalities" developed by Dr. Quiroga (T5293-94). The PET scan itself is taken under the supervision of a radiologist (T5294). Dr. Wu does his assessment analysis of the PET scan results without reviewing the individual's medical history or clinical records; "I look at those only after I completed my review of the PET scan" (T5294). Nor does he preview the radiologist's report, because "I like to look at the images without seeing what anyone else has said about it first" (T5294).

Michael Gordon's PET scan showed "a significant abnormality" consistent with CTE (chronic traumatic encephalopathy) (T5301-02, 5306). While a definitive diagnosis of CTE cannot be made until the patient is dead and an autopsy is performed (T5342-43, 5372-73), "the kind of pattern that I've observed in the PET scan would be very consistent with someone who has sustained widespread damage throughout his neocortex" from multiple head traumas (T5306). The traumatic injuries "unleash a process that starts to unfold over years" (T5301). With CTE, even though the damage may have occurred long ago, there is an "insidious ongoing" deterioration of the

brain (T5302). This widespread atrophy is associated with significant behavioral abnormalities, the most striking of which is a breakdown of the person's ability to regulate aggressive impulses (T5302).

Michael Gordon's CAT scan, depicting his brain structure, "showed clear evidence of frontal and temporal lobe atrophy", which is very abnormal for someone his age (T5306-07, 5314, 5320-27). Dr. Wu testified that "the brain shrinks or atrophies when you have had multiple head trauma. And the frontal lobe is an especially important part of the brain" (T5307). The frontal lobe is very involved with the regulation of aggression; when it is damaged it is "like driving a car with faulty brakes where you can't stop or slow down" (T5307-08). A second key part of the brain which involves the regulation of aggressive impulses is the temporal lobe, and Michael "shows significant abnormality in that region as well" (T5320-23).

Dr. Wu presented a computer-generated statistical analysis which showed that there was an abnormal decrease in brain activity throughout most of Michael Gordon's brain, but at the same time it showed an abnormal increase (a three standard deviation increase that would occur in one in a thousand individuals) in one specific area of the left temporal lobe called the amygdala and the thalamus (to which it is connected) (T5322-26). Such an increase is consistent with epilepsy spectrum disorder, which is a consequence of traumatic brain injury, and which - - when a person is under stress and producing a lot of adrenaline - - can trigger irrational aggressive action (T5324-26, 5330).

Only after analyzing the PET and CAT scan results did Dr. Wu

review Michael Gordon's neuropsychological records, school records, and the transcripts of the interviews conducted by Dr. Quiroga and others (T5303-04). From these sources Dr. Wu ascertained that Michael "has a clear history of multiple head traumas"; most of them sustained at a very young age from accidents and beatings (T5304-06). A growing child's brain is especially vulnerable, and kids who have brain trauma before age twelve are much more likely to develop CTE (T5304-06). "And so his history would certainly be consistent with the kind of pathology I observed on the PET scan" (T5306), as well as on the CAT scan (T5306-07).

Dr. Wu explained that brain injury significantly increases the likelihood of developing other psychiatric disorders, including schizophrenia and bipolar disorder (T5310). Michael's history is consistent with that; he has had multiple psychiatric diagnoses including both schizophrenia and bipolar disorder, he began experiencing hallucinations in his early teens, and he has later been prescribed psychotropic medications (T5310-12,5328). The effects of Michael's brain damage were likely compounded by the abuse and neglect he experienced throughout his childhood (T5329-32).

Brain damage caused by head trauma "can also cause significant cognitive impairment", and Michael's school records confirmed that he has been severely impaired since very early childhood (T5308-09,5327-28, 5362-63). He was placed in special education classes, and he was diagnosed with learning disorders and attentional impairment (T5308,5327) In the second grade Michael's IQ was 80, and by the time he was tested by Dr. Quiroga as an adult his IQ had dropped to 70 ("right on the cusp of being mentally re-

tarded") (T5309,5333,5362-63,5371-73). Normally IQ scores are fairly stable, and in Dr. Wu's medical opinion the ten-point drop over a thirty year period was consistent with mental deterioration as a result of CTE (T5309,5363,5372-73). Other factors which likely contributed to the drop in Michael's IQ are the additional incidents of head trauma which occurred after the second grade (T5309,5333,5372), and drug use (T5372).

Substance abuse, Dr. Wu explained, "is a common behavioral consequence that follows after traumatic brain injury", because brain damage impairs judgment and impulse control (T5310,5312,5363,5373-74). Michael Gordon had "a history of struggling with substance abuse from a very early age"; as young as ten (T5311). He progressed through multiple substances, and at the time of the murders he was using K2, a synthetic marijuana which is associated with impairment of the ability to control impulses (T5311-12, 5328, 5364). Dr. Wu analogized the combination of K2 and traumatic brain injury to "pouring gasoline on a fire" (T5312,5328).

Dr. Wu had no doubt that there is widespread and extensive damage throughout Michael's cortex, including the frontal and temporal lobes, and that brain damage has been present for a long time (T5340,5370). It would be impossible for him to fake the results of the brain scans (T5340). Dr. Wu described the combination of risk factors as a "perfect storm" which caused a "catastrophic breakdown in [his] neurobiological ability to regulate impulses" (T5332-33). Regarding the relation between brain damage and the factual circumstances of the murders, Dr. Wu explained that people with CTE are known to overreact to stimuli: "if someone yells and you have an

impaired brain that is very reactive and impulsive . . . you might react with an extreme fight-or-flight kind of behavior", with little or no ability to inhibit that reaction or to exercise reason or judgment (T5367-69,5374-76) .

Dr. Mark Rubino is the clinical and forensic neurologist who ordered the PET scan, which was administered by a radiologist (T5378-82,5389-95,5397,5417) . Dr. Rubino analyzed the PET and CAT scan results, and he prepared a PowerPoint presentation to illustrate his findings (T5395, see 5396-5410) .

Dr. Rubino's findings paralleled those of Dr. Wu: the PET and CAT scans showed significant damage to the frontal and temporal lobes of Michael Gordon's brain, as well as the amygdala (T5398-5407,5409-10) . Dr. Rubino had "no doubt that there's brain impairment, and it's been present for a long time" (T5409-10) . He observed atrophy and calcification which takes a long time to develop; at least five years at minimum, and possibly as much as thirty years, or even neonatal (T5402-07) Dr. Rubino could tell from the calcification of the cerebellum that Michael had sustained at least one "really bad" coup-contrecoup injury, which is where the skull hits the brain and then the brain rebounds back and hits the skull (T5402-03,5406-07) .

Taken as a whole, Dr. Rubino testified, the PET and CAT scans showed traumatic brain injury which would have resulted in impulsiveness, aggressiveness, lack of judgment (especially when under stress), and would have "greatly altered" Michael Gordon's behavior and actions (T5405-07,5410) .

Dr. Rubino's decision to order the PET scan in the first place was based on his interview with Michael and the results of his neurological examination (T5382-84); Michael informed him of a number of incidents in which he sustained head injuries, including (at age 11 or 12) being jumped by a bunch of kids and getting hit in the head with a brick, which knocked him unconscious and sent him to the hospital (T5384-86). [Dr. Rubino stated that since hospital records are usually maintained for only seven years it was very unlikely that a record of that hospital visit would exist (T5385, 5415)]. Michael also told Dr. Rubino that he was hit in the head and robbed when he was fifteen, that he was in a car accident at nineteen, and that he was always getting in fights where he was hit in the head, but he never had anything negative to say about either of his parents (T5386-87). On the neurological examination Michael did poorly, indicating to Dr. Rubino that he had cognitive impairment (T5388-89). These deficits included language, short-term memory, and visual, spatial, and executive function (T5388). He also had decreased reflexes, and Dr. Rubino determined that he had a peripheral neuropathy. Dr. Rubino learned that Michael had been exposed to pesticides as a child, which can cause peripheral neuropathy (T5339,5409,5423)

Dr. Daniel Buffington, a clinical pharmacologist, reviewed Michael Gordon's medication records from his prison term which ended on May 23, 2014 (T5562-67,5609-12,5657). For years Michael was "receiving a variety of medications for his psychiatric conditions and other medical disorders" (T5567,5590). These included Risperdal ("a very potent antipsychotic agent"); Prozac (a common antidepres-

sant); and Remeron (a much stronger antidepressant used for bipolar disorder and - - often in combination with Prozac - - for very severe depression) (T5570-71, 5579-80, 5583-85, 5610, 5624, 5642-43). These psychotropic medications often have serious adverse (and overlapping) side effects (T5571-72, 5582-83, 5633-41), and they would not be prescribed to an inmate who was not mentally ill (T5657; see 5590).

In addition, medications Michael was receiving for hypothyroidism and high blood pressure may interact with the psychotropic meds and produce psychiatric side effects (T5571, 5585-88).

In the less than thirty day interval between Michael's release from prison and his follow-up appointment at the Peace River Center (a psychiatric and substance abuse facility) "they were already documenting that he had a reemergence of psychiatric symptoms, and there were quite a few" (T5568, 5573, 5613). "[H]e was already experiencing what they documented [as] auditory hallucinations, depression, anxiety, paranoia, irritability" (T5573). Peace River reinitiated the same medications he was previously receiving while incarcerated (T5568, 5614).

Dr. Buffington testified that many psychiatric patients - - well over half - - will try to reduce their prescribed medications because of the adverse side effects ("[t]hese are not medications that are easy to take"), and instead they frequently will self-medicate with alcohol and other substances (T5575-76, 5582). In his interview with Dr. Buffington, Michael Gordon told him he had been experiencing confusion, memory problems, anxiety, depression, insomnia, and blackouts, all of which were interfering with his abil-

ity to work or carry out his everyday activities (T5571-72,5633-41). During the period of time leading up to the criminal episode for which he was on trial, Michael took his prescribed medications only sporadically, and increasingly used substances including alcohol, marijuana, K2/Spice (a synthetic cannabinoid), Ecstasy, opiates, and cocaine (T5566-67,5576, 5627-28,5646-47,5659-60).

Dr. Buffington explained that neurotransmitters are chemicals naturally produced in the brain cells, which "are responsible for our normal mood, affect, judgment, [and] cognitive status" (T5588). Normal levels "are imperative to psychiatric stability" (T5589). When those become unbalanced, psychiatric medications are used to try to correct the problem (T5588-89). Traumatic brain injury, thyroid levels, environmental stress, and alcohol and drug abuse interfere with proper functioning and can cause a chaotic mental state which Dr. Buffington refers to as a "neurotransmitter storm"; the effects of which may include impaired memory, poor decision-making, sleep disorders, headaches, pain, mood swings, irritability, paranoia, PTSD, impulsivity, and psychosis (T5588-93).

Michael told Dr. Buffington that on the day of the crimes, January 15, 2015, he was using alcohol and K2 (T5647-49). K2 (which would not commonly show up separately from marijuana in a hospital drug test, absent a special request) was described by Dr. Buffington as a "Molotov cocktail" because you never know what you're going to get. Depending on the dose and strength "you may have an extremely aberrant reaction" and violent behavior (T5659-60; see 5577-79).

Dr. Buffington testified that, during the period of time after his arrest and continuing to the time of the trial, Michael is once again taking his prescribed medications on a daily basis in the controlled jail setting, and he is "doing fine and stable" (T5629). There has been one change in his medication; he is now on Zyprexa, which is a "very potent antipsychotic agent", even stronger than the one he was prescribed during his previous prison stay (T5630).

Summarizing his findings, Dr. Buffington said they presented a "catastrophic picture" of "profound psychiatric instability" resulting from the combination of preexisting traumatic brain injuries, inconsistency of psychiatric treatment, adverse side effects of prescribed medication, and the destabilizing effects of alcohol and other illegal drugs (T5593-96).

Dr. Jethro Toomer, a forensic psychologist, interviewed Michael Gordon in person and other family members (including his mother and his sister Theresa) by phone (T5697-77, 5725-29). He did not speak with Michael's father, who wouldn't return his call (T5729). Everyone Dr. Toomer spoke to, as well as the sources he reviewed, confirmed that Michael and other members of the household were physically and emotionally abused by the father (T5712-13). Gordon, Sr. was embarrassed by his son, and saw his mental health deficits as being the work of the devil (T5713-14). He regularly consulted a voodoo priestess (T5713).

Dr. Toomer also reviewed the reports prepared by Drs. Quiroga, Wu, and Rubino (T5700). From these sources, along with the interviews he conducted, Dr. Toomer concluded that Michael's documented serious mental illness, his brain damage, his low intellectual

functioning, and the toxic stress syndrome which he developed as a result of his traumatic childhood and adolescence, impaired Michael's judgment and adversely influenced his actions during the criminal episode which culminated in the murders (T5700-04,5720-23,5736-38,5745). "Michael Gordon has all the strikes against him basically", and the combination of these factors resulted in impulsiveness, poor decision-making, and inability to weigh alternatives or project consequences (T5721-23,5736-37). Asked by the prosecutor on cross whether "[i]f it was determined that the reason that he killed [the two women] was because they were beginning to scream and shout to alert the officers that were beginning to come in the area, would that show some type of a purposeful goal-directed thinking and action?", Dr. Toomer answered that it showed his impulsivity and easily triggered vulnerability to stressors; and were consistent with toxic stress syndrome, as well as Michael's other diagnoses (T5743-44, see 5721).

Toxic stress syndrome, Dr. Toomer explained, is a subset of PTSD (post-traumatic stress disorder); it is a very serious condition and it affects all components of behavior (T5710,5720-22). "Mr. Gordon's history reflects the manifestation of toxic stress syndrome over most of his life", due to the constant and devastating abuse, neglect, and instability he experienced (T5704,5715; see 5704-10). As a result, the developmental process is sabotaged (T5702); "[y]ou continued to grow chronologically, but all the other skills you need to function and survive are shortchanged. You don't have time to worry about weighing or learning to weigh alternatives and project consequences and what have you. You're worried

about whether I'm going to have food to eat. You're worried about whether I'm going to get beaten up. You're worried about whether I'm going to see violence" (T5708). You're focused simply on surviving from one day to the next (T5709).

On cross the prosecutor asked Dr. Toomer whether Michael Gordon was suffering from toxic stress syndrome at the time he shot and wounded William Hicks in 2004, or when he stabbed another inmate in the Polk County Jail in 2005, or when he received disciplinary reports for violent behavior while incarcerated (T5731-34). Dr. Toomer answered yes, he has been suffering from the effects of that syndrome, "which is a degree of PTSD, for a good part of his life"; not just with respect to his violent acts, but as to the totality of his cognition and behavior (T5732-34). Asked if it's "a situation that it's never going to go away? He's always going to have toxic stress syndrome?", Dr. Toomer replied, "[I]t never goes away with anyone" (T5734-35).

Ron McAndrew retired after a long career with the Florida Department of Corrections; beginning as a correctional officer with everyday contact with inmates, and culminating as warden of three Florida prisons, including Florida State Prison in Starke (T5458-63, 5546-47). He described for the jury the differences in daily activities and work opportunities for inmates serving life imprisonment as compared with those on death row (T5463-70). Based on his interview with Michael Gordon and his review of his prison records, McAndrew stated his opinion that Michael could work and contribute if sentenced to life imprisonment (T5471-74, 5479-81, 5536, 5550). His mental health medications will be reliably administered

in the prison setting (although inmates are not ordinarily forced to take them), and Michael feels that the most recent medications he has been receiving in the Polk County Jail have benefited him greatly (T5478-79,5536-39). On cross, the prosecutor brought out a number of disciplinary reports Michael has received in prison and in jail for infractions involving the use or threat of violence (T5509-35). On redirect, McAndrew stated that, while the number of infractions during a seven year period might be a little higher than average, given his young age at the time "I would expect more" (T5555). Those inmates who are the most unmanageable are placed in close confinement, and Michael did not end up there for any extended time period (T5555-56).

Theresa Gordon is Michael's sister, who is a year older (T5661-62). Their father, Michael Gordon, Sr.⁵, was someone who - according to Theresa - - "shouldn't have been allowed to have kids" (T5670-71). He drank to excess every day, habitually beat his wife and son, and sexually abused his daughter (T5663-66,5678-80).

Michael, Jr. was beaten by his father "a lot"; maybe every other day ever since Theresa can remember (T5663). Michael, Sr. would get mad and hit him in the face or the back of his head with a closed fist, or he would hit him with a belt buckle or an extension cord "wherever" (T5663,5680). This went on for years (T5663,5680).

⁵ The father's full name is David Michael Gordon, and he is referred to by the prosecutor as Michael Gordon, Sr. (T5803,5818). Appellant is Michael Anthony Gordon (T5824). For clarity, they will be referred to in the next several pages as Michael, Sr. and Michael, Jr.

Michael, Sr. also beat his wife - - Theresa and Michael, Jr.'s mother - - in front of the children on a near-daily basis (T5663-64,5678). "She was always bloody and hurt and broke up" (T5678). "[W]henver my mom got beat up, it was bad. She always had bruises. She was beat all the time" (T5878-79). Sometimes she was injured to the point of needing medical attention, but when the police would come to the house they didn't arrest Michael, Sr. "[b]ecause my mom would take up for him" (T5679). Theresa surmised that other people probably called the police (T5679). Asked whether their mom ever tried to fight back, Theresa answered, "No. . . She knew better" (T5679).

Theresa left home at an early age, eleven or twelve, "[b]ecause I got tired of my dad touching me and having sex with me" (T5664-66). The touching began when Theresa was four or five years old (T5665). By the time she was nine or ten it had progressed to her father having sex with her, which occurred "throughout the week" (T5665). She tried to tell her mom, who told her to say it in front of her dad, but "the way he looked at me" she was too scared (T5665-66). She did not report it to the police because she was told not to say anything (T5665).

Instead she left home, and she initially stayed with relatives in Pennsylvania, where she was molested by an older female cousin (T5668,5681-82). She called her mom to bring her back to Florida, but her mom sent her dad (T5668-69). Upon her return, Theresa began staying in the housing projects with a couple of teenage mothers, in exchange for babysitting their kids (T5669,5674). Theresa's education ended in the eighth grade (T5672).

Looking back, Theresa wishes that when she left home she could have taken her brother with her (T5666). It is hard for her to discuss her childhood experiences; "when I talk about it I get a picture in my head" (T5691-92). She has had a lot of therapy and been in programs to develop coping skills, and "I don't think I have to ever rehash those memories again. I just forgave and give it to God. . . ." (T5691-92).

The state presented no expert witnesses in its rebuttal case. The prosecutor initially indicated that she would call two lay witnesses - - Michael Gordon, Sr. and his wife Mary Gordon - - but later stated that she would wait until the father testified before deciding whether or not to call the mother (T5754,5809). Before Gordon, Sr. took the stand, Judge Harb brought up the matter of his potential criminal liability if he were to make any admissions or inculpatory statements regarding his daughter Theresa's allegations that he sexually assaulted her when she was under age twelve, and "[k]eep in mind statutes of limitations" (T5802; see 5802-17). The prosecutor stated that she expected Gordon, Sr. to deny Theresa's accusation (T5803-04). Judge Harb directed the state to inform the witness of his protection against self-incrimination, and he indicated that it would be up to the state whether to offer him immunity (beyond the derivative use immunity conferred by the subpoena) (T5806-09). Accordingly, the prosecutor - - during a brief recess, in the presence of defense counsel and in the absence of the judge and jury - - advised both of his potential witnesses that their in-court testimony could not be used against them (T5815-16).

Michael Gordon, Sr. was born in Jamaica and came to the United

States at age 24 (T5819). He has two children - - Theresa and Michael, Jr. - - with his wife Mary, and three other children (born during his marriage to Mary) with another woman (T5820,5823-25,5846-49). The latter three children were not raised by Michael, Sr., and they never got in any trouble (T5846-47). Michael, Sr. worked and provided for his family, though sometimes he would get laid off and draw unemployment (T5821-22,5830-31). Asked whether he drank alcohol, he said he would drink two or three beers after work, or sometimes wine or brandy (T5854-55).

When his son Michael, Jr. was growing up in his home, Michael, Sr. testified, he never hit him with a closed fist, never hit him with a belt, never slapped him, and never spanked him, even when the boy would do so many "stupid things that make me mad" (T5841-42,5852). Asked what he did for discipline, he replied "I talk to him. I talk to him rough" (T5852). He denied that he ever had sex with his daughter Theresa, or touched her inappropriately (T5845, 5853-54). He denied that he ever hit his wife Mary in front of the kids, though he admitted "scuffling" with her (T5852). He acknowledged that on one occasion he told Theresa and Michael, Jr. that he didn't even think they were his children, but he only said that because "they were so bad" (T5852-53).

The state then rested its penalty phase rebuttal case without calling Mary Gordon (T5856).

SUMMARY OF ARGUMENT

The prosecutor's proffered reasons for her peremptory strike of African-American juror Kimberly James were pretexts for racial discrimination. This can plainly be seen even without reference to the voir dire responses of other jurors whom the prosecutor did not strike [Issue I]; and it becomes even more apparent when the constitutionally required comparative analysis is performed [Issue II].

This Court's recent abandonment of proportionality review has rendered Florida's capital sentencing system arbitrary, capricious, and unconstitutional [Issue III]. The compelling mitigating evidence of Gordon's longstanding mental illness, his severe brain damage, his low intelligence and learning disabilities, his drug and alcohol abuse, and his savagely abused childhood shows that this case is not among the least mitigated first degree murders, and the death penalty is therefore proportionally unwarranted [Issue IV]. The trial court's superficial and dismissive analysis (or lack of analysis) of mitigating factors fails to comply with Florida law and renders Gordon's death sentence unconstitutionally unreliable [Issue V]. Execution of people with severe mental illness violates the Eighth Amendment [Issue VI]. The state's evidence is legally insufficient to prove attempted first degree murder (with a vehicle) of two police officers on Counts 11 and 12 [Issue VII].

ISSUE I

THE PROSECUTOR'S SUCCESSFUL SECOND PEREMPTORY STRIKE AGAINST AFRICAN-AMERICAN JUROR KIMBERLY JAMES - - AFTER HER FIRST ATTEMPT TO STRIKE THAT JUROR WAS DENIED BECAUSE THE TRIAL JUDGE WAS NOT SATISFIED THAT THE ARTICULATED REASON WAS GENUINE - - WAS BASED ON A PRETEXTUAL AFTERTHOUGHT, AND AMOUNTED TO RACIAL DISCRIMINATION IN JURY SELECTION IN VIOLATION OF UNITED STATES AND FLORIDA CONSTITUTIONAL PROTECTIONS AFFORDED LITIGANTS, JURORS, AND THE COMMUNITY AT LARGE.

A. PREFATORY STATEMENT

As a consequence of this Court's denial of Gordon's motion to reconstruct the record to show that jurors Kelly, Stanley, and Mamula - - all of whom served on the jury which convicted Gordon and returned a verdict for the death penalty - - are white, this Court will be unable to consider (or be limited in its ability to fully consider) a comparative analysis of those jurors' voir dire responses and the responses given by prospective juror James, in light of the prosecutor's asserted reasons for striking Ms. James. See Miller-El v. Dretke, 545 U.S. 231 (2005). Therefore, for purposes of clarity, Gordon is raising two separate Points on Appeal regarding this peremptory strike.

In Issue I, he contends that - - even without any comparison of Ms. James' responses with those of the other jurors - - the circumstances of the prosecutor's two attempts to strike her (the second of which was successful), the questions to and answers from Ms. James, and the "afterthought" nature of the prosecutor's substitute rationale, show that her asserted reasons were pretextual. Therefore, reversal of Gordon's convictions and death sentences

for a new trial is necessary based solely on the facts and legal arguments presented in Issue I.

In Issue II, Gordon will present the voir dire responses of jurors Kelly, Stanley, and Mamula on the same subjects which formed the basis of the prosecutor's reasons for striking Ms. James. Gordon will ask this Court to reconsider its denial of his motion to reconstruct the record on the grounds that (1) comparative analysis is constitutionally required under Miller-El; (2) comparative analysis in this case will further demonstrate that the prosecutor's reasons for striking Ms. James were pretextual; and (3) comparative analysis is a method to ensure meaningful appellate review of whether the prosecutor engaged in racial discrimination in the selection of jurors, and it is not "waived" by trial counsel not arguing it below. See Miller-El; United States v. Atkins, 843 F.3d 625,636 (6th Cir. 2016).

In the event that this Court declines to reconsider its denial of Gordon's motion to reconstruct the record to show that none of the three comparison jurors are black [and note defense counsel's unchallenged comment early in the jury selection proceeding that there were very few African-American jurors in the venire (T452)], Gordon will contend that even without absolute proof of their respective races, jurors Kelly, Stanley, and Mamula gave responses which bely the genuineness of the prosecutor's original and substitute rationales for striking Ms. James.

Finally, Gordon will contend in Issue II, to preserve his constitutional arguments for federal postconviction review, that in the event that this Court declines to reconsider its ruling on

the motion to reconstruct the record, if it rejects Gordon's Batson⁶ claim as presented in Issue I, and if it affirms his convictions and death sentences without comparative analysis of the prosecutor's treatment of jurors James, Kelly, Stanley, and Mamula, then Michael Gordon's convictions and death sentences are and will remain constitutionally infirm.

B. RACIAL DISCRIMINATION IN THE EXERCISE OF PEREMPTORY
CHALLENGES IS CONSTITUTIONALLY IMPERMISSIBLE

"The Constitution forbids striking even a single prospective juror for a discriminatory purpose." Flowers v. Mississippi, 139 S.Ct. 2228,2244 (2019); Foster v. Chatman, 136 S.Ct. 1737,1747 (2016); Snyder v. Louisiana, 552 U.S. 472,478 (2008). This Court has recognized that "the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other." State v. Slappy, 522 So.2d 18,21 (Fla. 1988) (emphasis in opinion). [Slappy was receded from in part in Melbourne v. State, 679 So.2d 759,765-66 (Fla. 1996), on the question of whether the Florida Constitution requires a "reasonable" [Slappy] or a "genuine" [Melbourne] basis for a peremptory strike, but Melbourne continued to recognize that this state's constitution can and does "guarantee that each [strike] will be nonracial"]. In Joiner v. State, 618 So.2d 174,176 (Fla. 1993), this Court rejected the state's invitation to rule that as long as an improperly challenged juror is replaced by a member of the same minority the constitutional infirmity is cured. The Court said "Ju-

⁶ Batson v. Kentucky, 476 U.S. 79 (1986)

rors are not fungible. Each juror has a constitutional right to serve free of discrimination. . . .Were we to endorse the State's view we would retain no practical device for redressing each person's right to serve on a jury free of being stricken for racially discriminatory reasons."

Exercise of peremptory challenges based on race, ethnicity, or gender violates a defendant's rights to equal protection and to be tried by an impartial jury under the federal and state constitutions. See, e.g., Batson v. Kentucky, Miller-El v. Dretke; State v. Neil; 457 So.2d 481 (Fla. 1984); State v. Alen, 616 So.2d 452 (Fla. 1993); Abshire v. State, 642 So.2d 542 (Fla. 1994). In a criminal trial, a prosecutor's discriminatory use of peremptory challenges harms not only the accused, but also the excluded juror or jurors and the community at large. Georgia v. McCollum, 505 U.S. 42,48 (1992); Powers v. Ohio, 499 U.S. 400,406 (1991). As the United States Supreme Court stated in Miller-El, 545 U.S. at 237-38 (citations omitted):

"It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish "state sponsored group stereotypes rooted in, and reflective of, historical prejudice."

Nor is the harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that "overt wrong. . .casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial. . ." That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination "invites cynicism respecting the jury's neutrality," and undermines public confidence in adjudi-

cation. So, "[f]or more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause."

See also Murray v. State, 3 So.3d 1108,1119 (Fla. 2009) ("In Florida, both jurors and litigants have a right to jury selection procedures that are free from discrimination."

C. THE PROSECUTOR'S TWO PEREMPTORY STRIKES OF MS. JAMES

When the prosecutor struck Ms. James, the defense asked for a race neutral reason, and the prosecutor, Ms. Ducharme, asserted the following:

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 [the other prosecutor] 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.

(T1792).

Defense counsel disagreed that that was a sufficient race neutral reason, whereupon Judge Harb said:

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. Now 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 of 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 [sic] chal-

lenge.

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.

(T1792-94) (emphasis supplied).

The prosecutor did not at that time indicate that she had another reason to strike Ms. James, and the defense accepted her as a juror (T1794).

After seven more jurors were accepted, one peremptorily excused by the defense, and one peremptorily excused by the state (T1794-95), the prosecutor said "Judge, we would move to backstrike Kimberly James" (T1795-96).

[Gordon would point out here that there is no rule or recognized procedure that allows a party to exercise two peremptory challenges against the same juror. The term "backstriking" refers to a party's right to retract his prior acceptance of a juror. McCray v. State, 220 So.3d 1119,1123-24 (Fla. 2017); Hayes v. State, 94 So.3d 452,456 n.1 (Fla. 2012); Dobek v. Ans, 475 So.2d 1266,1267-68 (Fla. 4th DCA 1985). Here, the state never accepted Ms. James as a juror; instead, she was seated as a juror (after the defense accepted her) because that is the preferred remedy - - short of discharging the entire venire - - when a trial judge finds that a party's asserted reason for striking the juror is not genuine. See Jefferson v. State, 595 So.3d 38,40 n.2 (Fla. 1992), quot-

ing Batson, 476 U.S. at 99; see also United States v. Analetto, 807 F.3d 423,427 (1st Cir. 2015); United States v. Tomlinson, 764 F.3d 535,537-38 (6th Cir. 2014). So what the prosecutor did here to remove Ms. James from the jury cannot be seen as a true backstrike, just an unwarranted and unauthorized second bite at the same apple].

Asked if she had any additional grounds for striking Ms. James, the prosecutor now offered this:

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.

(T1796)

Ms. Ducharme then reasserted her original rejected rationale:

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"

(T1796)

Defense counsel said "Your Honor, we still object", and contended that the prosecutor's substitute rationale was not a sufficient race neutral reason (T1796). "In fact, she [juror James] 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" (T1796-97).

Judge Harb did not immediately rule on the prosecutor's second peremptory strike of Ms. James; saying "I'm just going through my

notes to see what notes I have in addition to what's been presented by the State and the defense in support or opposition of the peremptory challenge" (T1797). After eight more jurors were accepted or struck (T1797-99), the judge announced, "Having considered the totality of the circumstances, going back to Number 10, and particularly the second reason for the peremptory strike of Ms. James, I'm going to grant the State's request over the defense's objection to strike Ms. James" (T1800). Ms. James was then excused from the jury (T1802-03).

Subsequently, after the jury which would hear the trial and penalty phases was selected, defense counsel's acceptance of the jury was conditioned on his renewal of his previous objections based on race and gender⁷ which the court had already ruled on (T2107). [Counsel's conditional acceptance of the jury subject to his earlier Batson objections apprised Judge Harb that Gordon still believed that reversible error had occurred, thereby complying with the renewal requirement of Joiner v. State, supra, 618 So.2d at 176. See also Mitchell v. State, 620 So.2d 1008,1009 and n.1 (Fla. 1993); State v. Ivey, 285 So.3d 281,286-87 (Fla. 2019); Ellis v. State, 152 So.3d 683,687 n.4 (Fla. 3d DCA 2014)]. Moments later, when the judge asked Gordon personally if he accepted the panel as selected, defense counsel interjected that he would prefer the question to be phrased as to whether Gordon had any additional

⁷ While defense counsel objected below to the excusal of several jurors on Batson grounds, Gordon is raising on appeal only the race-based strike of Ms. James.

objections to the panel (T2108). Accordingly, Judge Harb asked him “. . . [O]ther than. . . the objections that were overruled and were renewed on your behalf, any other objections you would like to make to the panel as selected?” (T2109) (emphasis supplied). Gordon replied, “No, sir” (T2109). [See Ellis v. State, supra, 152 So.2d at 687 n.4 (“Upon our review of the record, including the trial court’s assurances to the defense that the issue was preserved for appeal, and the trial court’s colloquy of the defendant at the conclusion of the jury selection process, we find the objections [to the state’s peremptory strikes of African-American jurors] were not waived and were properly preserved for review”)]].

D. THE SUBSTITUTE RATIONALE

As in Miller-El v. Dretke, supra, 545 U.S. at 246 - - and using the Supreme Court’s apt description - - the prosecutor’s asserted justification for her second, ultimately successful, effort to strike Ms. James (after the asserted justification for her original peremptory strike of that juror was rejected by the trial court as not genuine) “reeks of afterthought.” Moreover, the prosecutor’s own explanation to the prospective jurors as to why she was asking the question in the first place, and what information she was seeking to gather, belies her later substitute justification for striking Ms. James:

Row three - - and I’m going to ask everybody this, so just be thinking about it. Have any of you had somebody close to you who has been charged with a crime? And I’m talking about any crime, but I want to keep it to somebody very close to you where it impacted your life. You thought about it, you were involved in it, things of that - - I don’t want to know about your coworker, your, you know, acquaintance or somebody you ran into in the

grocery store. A son, daughter, mother, things of that nature. So starting with row three, do any of you have anybody that you know that's close to you that has been charged with any crime?

(T1399) (emphasis supplied)

When the prosecutor got to the second row and saw that juror James had her hand up, the first thing the juror said was:

But it didn't affect me. It was a first cousin.

MS. DUCHARME [prosecutor]: Okay.

PROSPECTIVE JUROR JAMES: So he got in prison because he - - I guess it was a sex sting where he went to a house and he was trying to meet up with a young child which was a boy, but it didn't affect me no way. I didn't have to go to the prosecutor or nothing like that. This happened like last year, and this happened in Georgia.

Q: In Georgia?

A: Uh-huh.

Q: So you weren't involved in the court process?

A: No. No.

Q: Didn't provide a statement?

A: No.

Q: Do you know - - and I'm not asking you to tell me, but do you know the details of the case?

A: Well, he - - I mean, he was with boy pictures on the computer, and he would go to those houses and they did stings. I think he got like 25 years.

Q: Okay.

A: I believe.

Q: Do you feel that he was rightfully charged?

A: Yes.

Q: And the sentence - -

A: It was in his possession.

Q: Okay. The sentence that was imposed, do you feel

that that was a fair sentence?

A: Yes.

Q: Okay. Is there anything about that incident that would impact your ability to be fair and impartial as it relates to this case?

A: Definitely not.

MS. DUCHARME: Okay. Thank you.

(T1402-03) (emphasis supplied)

Especially in light of the prosecutor's explanation to the jurors that she was only concerned about "somebody very close to you where it impacted your life", her belated expression of worry about Ms. James' "ability to give the State a fair shot" strains all credulity. With absolutely no equivocation, Ms. James made it clear that it didn't affect her in any way; she was not involved in her cousin's case; she felt he was rightfully charged and fairly sentenced; and it would not impact her ability to be fair and impartial as a juror in Michael Gordon's case. If the prosecutor had any reason to believe otherwise she would have brought it up when she was originally asked for a race neutral reason for striking Ms. James.

It is also worth noting that there is no meaningful nexus between the cousin's charge (a traveling to meet a minor sex sting) and the charges involved in Michael Gordon's trial (arising from a pawn shop robbery and culminating in the homicide of two adult women). See Batson, 476 U.S. at 98 n.20 ("The prosecutor must therefore articulate a neutral explanation related to the particular case to be tried"); Spencer v. State, 238 So.3d 708,712 (Fla. 2018); Wright v. State, 586 So.2d 1024,1028 (Fla. 1991) (each quot-

ing Batson for this proposition); State v. Slappy, 522 So.2d at 22; Ellis v. State, 152 So.3d 683, 689 n.7 (Fla. 3d DCA 2014); Landis v. State, 143 So.3d 974, 977 (Fla. 4th DCA 2014); Glinton v. State, 956 So.2d 497, 501 (Fla. 4th DCA 2007) (among the factors tending to show pretext is when "the prosecutor's reason is unrelated to the facts of the case).

In Miller-El v. Dretke, 545 U.S. at 246, similarly to what took place here, the prosecutor "suddenly came up with [prospective juror] Fields' brother's prior conviction as another reason for the strike." The Supreme Court saw through this obvious ploy:

It would be difficult to credit the State's new explanation, which reeks of afterthought. While the Court of Appeals tried to bolster it with the observation that no seated juror was in Fields' position with respect to his brother. . . the court's readiness to accept the State's substitute reason ignores not only its pretextual timing but the reasons rendering it implausible. Fields's testimony indicated he was not close to his brother. App. 190 ("I don't really know too much about it"), and the prosecution asked nothing further about the influence his brother's history might have had on Fields, as it probably would have done if the family history had actually mattered. See, e.g., Ex parte Travis, 776 So.2d 874, 881 (Ala.2000) ("[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting the explanation is a sham and a pretext for discrimination"). There is no good reason to doubt that the State's afterthought about Fields's brother was anything but makeweight.

(emphasis supplied)

In the instant case, the pretextual nature of the prosecutor's substitute rationale (or rationalization) is even more apparent, since her proffered reason for her second attempt to strike Ms. James is glaringly inconsistent with her own stated purpose in asking the question in the first place; i.e., that she was only concerned about "somebody very close to you where it impacted your

life." This was a cousin (not a brother as in Miller-El); there is no indication that it meant anything whatsoever to Ms. James; and the cousin's offense was in no way similar to the charges for which Michael Gordon was on trial. The prosecutor's belated "concern" about "her ability to give the State a fair shot" is nothing but pretextual makeweight⁸. Judge Harb erred in giving the prosecutor a second bite at the apple, and he committed reversible error of constitutional dimension when he excused Ms. James from Michael Gordon's jury.

E. THE ORIGINAL RATIONALE

At the outset, why even talk about the prosecutor's original rationale, since the trial judge rejected it? There are two reasons. First, Judge Harb denied the prosecutor's first peremptory challenge of Ms. James because he was not satisfied that the articulated reason was genuine (T1793-94). When he later allowed the prosecutor to strike Ms. James on her second try the judge said he had "considered the totality of the circumstances" and "particularly" the second rationale (T1800). This suggests that the original proffered justification, even though he wasn't satisfied that it was genuine, may have contributed to some extent to Judge Harb's decision to allow the strike (and this, in itself, amounts to constitutional error). Secondly, because a "prosecutor's proffer of

⁸ While Gordon relies entirely on Ms. James' Q. and A. with respect to Issue I, the pretextual nature of the prosecutor's afterthought justification will be even more starkly revealed if this Court - - as requested on constitutional grounds in Issue II - - compares Ms. James' statements regarding a relative's criminal history with those of jurors Kelly and Stanley.

[a] pretextual explanation naturally gives rise to an inference of discriminatory intent" [Snyder v. Louisiana, 552 U.S. at 485], the very timing of the prosecutor's substitute reason tends to show that both reasons were pretextual. See Miller-El, supra, at 246.

The prosecutor's original rationale was that Ms. James' "initial comment that she was not God" gave 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" (T1792). Judge Harb stated that he had considered "all of the answers and responses given by Ms. James to the questions by both the State and the defense" (T1793). He recognized that unless the trial court is satisfied that the articulated reason is genuine the court should deny the peremptory challenge, "[s]o the challenge is denied as to Ms. James" (T1793-94).

[The prosecutor did not immediately respond to Judge Harb's comment about "if there's any other reasons that somebody wants the Court to consider", and the defense accepted her as a juror (T1793-94)].

The questions to and answers by Ms. James - - which were considered by the trial court in finding that the prosecutor's asserted justification was not genuine - - show that the prosecutor took her "I'm not God" remark entirely out of context. The comment had nothing to do with any religious views regarding the death penalty. Instead, it was made in the context of the difference between watching news coverage of death penalty cases, as contrasted with the role of a juror in an actual death penalty trial:

MS. DUCHARME [prosecutor]: Ms. James.

PROSPEPCTIVE JUROR JAMES: Yes

Q. Have you ever had any casual conversations with anybody about the death penalty?

A. No, ma'am.

Q. Okay. Is this week the first time that you have ever really thought about it?

A. Well, no. I mean, thinking to myself, yeah, but not like in conversations no.

Q. Okay. Do you remember the last time that you thought about the death penalty?

A. Well, you know, maybe like watching news or something, being on a crime or something like that. Other than that, no. It's not like an everyday thought.

Q. What was your thoughts when you saw it on the news?

A. 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.

Q. Okay. Do you think that you would have any difficulties voting to impose the death penalty?

A. No, I wouldn't say that, but I would want to see the evidence. Yeah.

Q. I'm just asking because you used the term "I'm not God," and I understand some people have religious beliefs. And they're entitled to that.

A. It has nothing to do with religion. It's just how I am as a person. I want to see the evidence. If it warrants death, so be it. If it warrants life, life.

Q. Would you be - - would you be more inclined to impose life in prison versus the death penalty?

A. Like I say, I have to look at the evidence.

Q. Okay.

A. Yes, all right, it's a must.

Q. Have you ever been in a disagreement with anybody about the death penalty?

A. No.

Q. Do you belong to any organizations that strongly oppose the death penalty?

A. No.

Q. Do you feel that the death penalty is sought against African-Americans more than any other race?

A. No. And I don't know the statistics. So I can't say that, no.

Q. Okay. Do you think that you would have any outside pressure to vote a certain way?

A. No. I have my own mind. No.

Q. If tomorrow were election day and you were being asked to determine whether the death penalty should remain an option for punishment, what would your vote be?

A. Yes.

Q. Would you consider both the aggravating circumstances and mitigating circumstances with an open mind?

A. Yes.

Q. If the State proves beyond a reasonable doubt that the aggravating circumstances exist and they outweigh the mitigating circumstances, could you still consider life in prison as an option - -

A. Yes.

Q. - - or would you automatically impose death?

A. No.

Q. Okay.

A. Either/or.

Q. Okay. Thank you.

A: Thank you.

(T1497-1500) (emphasis supplied).

Every one of Ms. James' responses show that the prosecutor had no genuine reason for concern as to whether she could be fair and impartial regarding the death penalty. Ms. James' clear distinc-

tion between sitting as a juror in a capital trial (where considering all the evidence “[is] a must”) and watching a newscast (where “I’m not there to look like at evidence to see whether the person should die”) is a very fair and rational distinction which gave the prosecutor no genuine cause for concern about her impartiality. While the state may peremptorily strike a juror who expressed some opposition to [San Martin v. State, 705 So.2d 1337,1343 (Fla. 1998)], discomfort with [Morrison v. State, 818 So.2d 432,444 (Fla. 2002)], or “blatant ambivalence” about [Poole v. State, 151 So.3d 402,413 (Fla. 2014)] the death penalty, Ms. James’ responses showed none of those things. Instead, she consistently and unequivocally stated that she would look to the evidence to decide between death or life imprisonment. Importantly, when asked whether she thought the death penalty was sought more against African-Americans than people of other races, she said no, she couldn’t say that because she doesn’t know the statistics. And when asked how she would vote in a hypothetical election to determine whether or not to retain the death penalty as a punishment option, she answered that she would vote yes. [Contrast Poole v. State, supra, at 413, where the challenged jurors were the only two who said “not sure”].

In Nowell v. State, 998 So.2d 587,605-06 (Fla. 2008), this Court determined that the trial court had erroneously allowed the prosecutor to peremptorily strike an Hispanic juror, where:

the record confirms that Mr. Ortega would fairly consider the imposition of the death penalty depending on the evidence he heard in the courtroom, could impose a death sentence in a murder case depending on the circumstances presented, only had “mixed feelings” about capital punishment, and never expressed uncertainty about his ability to vote for it in a proper case according to the appropriate legal standards. In fact he stated he would

follow the law. [footnote omitted].

In the instant case, juror James never even came close to expressing "mixed feelings."

That the original proffered reason was pretextual is further illustrated by the prosecutor's flagrant twisting of Ms. James' words and meaning when she [the prosecutor] repeated her original reason at the time of her second attempt to strike Ms. James. "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 part of a process that the death would be imposed? That's God's job, not anybody else's.'" (T1796). However, during voir dire examination, the prosecutor asked Ms. James to clarify what she meant by saying "I'm not God" because "I understand some people have religious beliefs. . . [a]nd they're entitled to that." Ms. James answered "It has nothing to do with religion. It's just how I am as a person. I want to see the evidence. If it warrants death, so be it. If it warrants life, life'" (T1498) (emphasis supplied). [While it's true that there exist religious denominations which have teachings against the death penalty (or against sitting in judgment in general), there is nothing to suggest that Ms. James belonged to such a church, or that she personally held any such religious views. See Foster v. Chatman, supra 136 S.Ct. at 1751-53. In fact, her voir dire examination shows that she had no such religious predisposition].

In considering a trial court's ruling on the genuineness - - or lack thereof - - of a prosecutor's purportedly race-neutral explanation this Court accords deference (although not unlimited def-

erence) to the trial court's superior vantage point in weighing credibility and demeanor. Dorsey v. State, 868 So.2d 1192,1200 (Fla. 2003); Melbourne v. State, supra, 679 So.2d at 746; cf. Craven v. State, __ So.3d __ (Fla. 2020) [2020 WL 6166336] (trial court did not abuse discretion in finding that defense counsel's proffered reason for striking African-American juror was pretextual). See also Young v. State, 744 So.2d 1077,1082 (Fla. 4th DCA 1999) (In determining whether a proffered explanation for a challenge is a pretext for racial discrimination, "identifying the true nature of an attorney's motive behind a peremptory strike turns primarily on an assessment of the attorney's credibility").

Here, there is more than ample record support for Judge Harb's denial of the state's peremptory strike of Ms. James based on the prosecutor's twisting of her "I'm not God" remark. And the very fact that her initial asserted justification was not genuine is a strong indication that her substitute justification - - when improperly given a second bite at the apple - - was not genuine either. When the latter rationale - - the cousin who was convicted of traveling to meet a minor - - is viewed in light of the prosecutor's expressed reason for asking the question ("I want to keep it to somebody very close to you where it impacted your life"), the prosecutor's claimed concern about Ms. James' "ability to give the state a fair shot" is merely a backup pretext she came up with after her initial peremptory strike was properly denied. See Miller-El v. Dretke, supra.

Since Batson error is per se reversible, Gordon's convictions, death sentences, and other sentences must be reversed for a new

trial. See Weaver v. Massachusetts, 137 S.Ct. 1899,1911-12 (2017); Rivera v. Illinois, 556 U.S. 148,161 (2009); Nowell v. State, supra, 998 So.2d at 601-07; Winston v. Boatwright, 649 F.3d 618,627-29 (7th Cir. 2011); State v. Kirk, 145 N.E.3d 1092,1103 (Ohio App.8th Dist. 2019); Conner v. State, 327 P.3d 503,511 (Nev.2014).

ISSUE II

THE PRETEXTUAL NATURE OF THE PROSECUTOR'S PEREMPTORY STRIKE OF JUROR JAMES IS EVEN MORE BLATANT WHEN VIEWED IN LIGHT OF THE VOIR DIRE RESPONSES OF MR. KELLY, MS. STANLEY, AND MR. MAMULA, EACH OF WHOM SERVED ON THE JURY WHICH CONVICTED GORDON AND RETURNED DEATH PENALTY VERDICTS.

A. PROFFERED REASONS FOR STRIKE EQUALLY APPLICABLE - - OR MORE APPLICABLE - - TO UNCHALLENGED JURORS

An important factor to consider in determining whether a peremptory strike was exercised against a juror for racially discriminatory reasons is whether the proffered justification for the strike is equally applicable to an unchallenged juror. Miller-El v. Dretke, supra; Nowell, 998 So.2d at 602; Melbourne v. State, 679 So.2d at 764 n.8; Slappy, 522 So.2d at 22; Ellis, 152 So.3d at 687 and 689 n.7; Landis, 143 So.3d at 977-78.

Here, the prosecutor's original proffered justification for striking Ms. James (unsuccessful) and her afterthought justification when inappropriately given a second chance to exercise a peremptory strike against the same juror (successful) were pretextual even when viewed without any comparison with unchallenged jurors who served on Gordon's jury. Issue I, supra. When - - in addition - - one considers the voir dire responses of Mr. Mamula on the subject which supposedly aroused the state's concern on the first

challenge (whether the juror could be fair and impartial regarding the death penalty); the voir dire responses of Ms. Stanley on the subject which supposedly aroused the state's concern on the second challenge (whether the juror could "give the State a fair shot" because she might be swayed by a relative's unrelated criminal case); and especially the voir dire responses of Mr. Kelly regarding a relative's criminal history, it becomes even more apparent that the state's asserted motives for striking Ms. James were not genuine, but pretextual. See Miller-El v. Dretke, 545 U.S. at 241-51; Snyder v. Louisiana, 552 U.S. at 478-84.

B. JUROR KELLY

Moments after telling the jurors she was only interested in somebody very close to you where it impacted your life, and after discussing with Ms. James her cousin who was convicted of traveling to meet a minor, the prosecutor had a very similar discussion with Mr. Kelly. Mr. Kelly told her his nephew spent twelve years in prison for vehicular homicide (T1405). The prosecutor asked Mr. Kelly if he was close with his nephew, and the juror replied "Yes, still am" (T1405). [In contrast, Ms. James was not asked by the prosecutor whether she was close with her cousin, but she did volunteer - - in response to the prosecutor's explanation to the group of what kind of things she was looking for - - that her cousin's situation didn't affect her in any way (T1402)]. Other than that, the prosecutor's questions to Ms. James, and to Mr. Kelly moments later, were nearly identical (T1402-03,1405-06). Just like Ms. James, Mr. Kelly was not involved in the court process; he did not

provide a statement; he felt that his relative was rightfully charged and appropriately sentenced; and there was nothing about the incident that would impact his ability to be fair and impartial in this case (T1405-06; compare T1402-03).

Almost immediately after the prosecutor's initial peremptory strike of Ms. James (ostensibly based on her "I'm not God" remark, with no suggestion at that time that she [Ms. Ducharme] was concerned about the cousin) was denied, the prosecutor accepted Mr. Kelly on the jury (T1794, see 1791-94). Then, in very short order, the prosecutor moved to "backstrike" Ms. James, and now she claimed as her reason that because of the cousin's case "we're concerned about her ability to give the State a fair shot or not let that come into play. . . if she were selected on this jury" (T1796).

If that were her genuine reason, she would have struck Mr. Kelly (two pages earlier in the transcript). Miller-El; Snyder.

C. JUROR STANLEY

Juror Stanley was in the second group of jurors to be questioned, and was not part of the group (which included James and Kelly) which was asked by the prosecutor about close relatives with criminal charges that impacted the juror's life. Instead, Ms. Stanley's group was asked (by the other prosecutor) about any communication or correspondence they may have had with any person who was an inmate in a prison or jail (T1992). Ms. Stanley answered that it was her brother; "It's been a few years back but it's in Georgia. And it's all to do with drugs that he was put in jail" (T1992-93). Ms. Stanley had a couple of face-to-face visits with her brother

while he was incarcerated; "He was in and out years, so it's been a long process" (T1993). Ms. Stanley was not asked whether she felt that her brother was treated fairly, or whether his incarceration was rightful, or whether his evidently long criminal history would impact her ability to be fair and impartial if she were selected as a juror in Gordon's trial (T1992-93).

Once again, if the state had been truly concerned that African-American juror Kimberly James' ability to give the state a fair shot would be impaired by her cousin's unrelated criminal case (despite her statements that it didn't affect her in any way, and it would "definitely not" impact her ability to be fair and impartial), then the state would not have accepted Ms. Stanley on the same jury (T2092) without asking her whether her brother's criminal history might impact her ability to be fair and impartial. See Miller-El; Snyder. A brother, in most families, is a much closer relationship than a cousin; and prosecutor Ducharme had earlier made it clear that what the state was interested in was somebody very close to you where it impacted your life. [Ms. Stanley had visited her brother in jail, while there is no indication that Ms. James ever visited her cousin]. Moreover, Ms. Stanley's brother's drug-related criminal history could give rise to concern that in the penalty phase she might be sympathetic to Gordon because of his long-standing drug abuse.

D. JUROR MAMULA

Mr. Mamula's voir dire responses bear on the prosecutor's initial justification for striking juror James, and provide additional

record support for Judge Harb's finding that he was not satisfied that the proffered reason was genuine. The prosecutor claimed that Ms. James' "I'm not God" remark (made in the context that she's "not there to look at like evidence to see whether the person should die" when she's watching news coverage of a capital case) caused the state concern about "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" (T1792). This despite Ms. James' clear and unequivocal statements that if selected as a juror she would have to look to the evidence to decide between death and life imprisonment; that she would consider both the aggravating and mitigating circumstances; that she has no information that would lead her to think that the death penalty is disproportionately sought against African-Americans; and that in a hypothetical election on whether to retain the death penalty as a punishment option she would vote yes (T1497-1500).

Contrast that with Mr. Mamula's voir dire responses. Like Ms. James, he would vote to retain the death penalty as a punishment option; and he would consider both aggravating and mitigating factors in deciding between death and life imprisonment (T1825-27). When jurors were asked by the prosecutor whether they would want to serve on the jury, Mr. Mamula said "I would prefer not to be" (T1533). Asked if there was a particular reason, Mr. Mamula said, "Yeah. Because I don't think it's going to be that easy having a man's fate in your hands at the end of this whole process" (T1533-34). Later, during defense counsel's portion of voir dire examination, the subject of Mr. Mamula's feelings about the death penalty

was revisited:

MR. BRUNVAND: Mr. Mamula, how do you feel about that, that sentence [life imprisonment] as compared to the death penalty?

PROSPECTIVE JUROR MAMULA: It would be nice if all of them could be life in prison instead of death row. You know, it's hard to put someone to death.

Q. Okay.

A. I mean, in my opinion.

Q. So that being said, do you agree with the proposition that the death penalty should be reserved for the most aggravated and least mitigated of murders?

A. Yes.

Q. One of the questions that was asked by the prosecutor on Friday was - - and I believe everyone agreed - - was if the death penalty came up for a vote tomorrow, would you - - you know, how would your vote? And I think everyone said we would vote to keep it, including yourself.

Why - - why did you indicate that you would want to keep it?

A. The only way I could really even think about the death penalty would be if my family was involved.

Q. Okay.

A. That's - - you know, that's what I told you guys in closed session before. That's what we have in Florida. I stick to that. I mean, I have a hard time answering that question outside of the view of my family.

Q. Okay. So I want to explore that a little bit further, because obviously as a society, you know, we have rules and we try to sort of temper things, because when it's family it gets even more emotional than what it is as is, right?

A. Right.

Q. And in fairness to the State, when you say, you know, unless it's family, I have a hard time envisioning voting for death, in fairness to the State, can you consider the death penalty under the circumstances where it does not involve a family member of yours?

A. Yes. Yes, I can.

Q. But it's difficult.

A. Yes.

Q. Okay.

A. But they would really have to do their job.

Q. Okay. All right. So going back to the question about voting and voting for the death penalty, you indicated that you would have voted to keep it. Why do you - - why would you vote to keep it?

A. Again, if I was sitting - - if I was sitting over there and one of my family member's life was taken from someone that brutally had slaughtered them - -

Q: Okay.

A: - - I mean, that's what I would want for justice.

Q: You want that as an option.

A: Yes.

(T1669-71) (emphasis supplied)

If the prosecutor's expressed worry - - based on a single remark taken out of context - - about Ms. James' impartiality in the penalty phase were genuine, she would have had ample reason to be much more worried about Mr. Mamula, who made several comments to the effect that it would be hard to return a death verdict. He also said "[i]t would be nice if all of them could be life in prison instead of death row"; and "[t]he only way I could really even think about the death penalty would be if my family was involved." While he did state that he could weigh the aggravating and mitigating factors and consider both the death penalty and life imprisonment as options, so did Ms. James. Ms. James made one isolated comment, and the context in which she made that comment was thoroughly explained, while Mr. Mamula made repeated comments which revealed - - at the very least - - serious ambivalence about the death penalty.

Yet the prosecutor - - seven transcript pages after her first, unsuccessful, peremptory strike of Ms. James (T1792), and three transcript pages after repeating the same reason (along with her afterthought reason) at the time of her second peremptory strike of Ms. James (T1796) - - had no problem accepting Mr. Mamula (T1799).

E. POTENTIAL ROADBLOCKS TO FULL APPELLATE REVIEW

All of the circumstances surrounding the state's two strikes of Ms. James, coupled with its acceptance of Mr. Kelly, Ms. Stanley, and Mr. Mamula, strongly show that the prosecutor's proffered explanations were not genuine, and that they served as a pretext for racial discrimination. Kelly, Stanley, and Mamula were all selected for the jury and participated in the guilt phase and penalty phase deliberations and verdict (see T2107;4874-75;6010-12).⁹

There are two potential roadblocks, however, to this Court's ability to compare these four jurors' voir dire responses. First, as a consequence of this Court's denial of Gordon's September 11, 2020 motion to reconstruct the record, Gordon is unable to conclusively show on appeal that Kelly, Stanley, and Mamula are nonblack jurors. Secondly, the state will undoubtedly contend, as it did in opposing Gordon's motion to reconstruct the record, that comparative analysis is waived.

Gordon asserts (1) that even without comparative analysis the circumstances of the prosecutor's two peremptory strikes of Ms. James - - including her twisting of Ms. James' voir dire responses

⁹ Mr. Kelly's name is inaccurately transcribed as Keller at T4875, and is correctly transcribed at T2107 and 6011.

and taking them out of context, and the afterthought nature of her substitute justification, are more than enough to show that the asserted reasons were pretextual. (2) Based on the constitutional arguments to follow, as illustrated by Miller-El v. Dretke, Gordon asks this court to reconsider its denial of his motion to reconstruct the record. (3) Comparative analysis is necessary for this Court to consider all of the circumstances in the jury selection proceeding bearing on the question of whether Juror James' exclusion was based on genuine reasons or whether it amounted to impermissible racial discrimination, and is constitutionally required. See Miller-El. Hence, (4) in the event that this Court affirms Michael Gordon's convictions and death sentences without consideration of the prosecutor's disparate treatment of Ms. James, those convictions and death sentences are and will remain constitutionally infirm.

F. GORDON SHOULD NOT BE PRECLUDED FROM AN OPPORTUNITY TO ESTABLISH A CRITICAL FACT - - ONE WHICH WAS READILY OBSERVABLE TO THE COURT BELOW - - THAT JURORS KELLY, STANLEY, AND MAMULA ARE WHITE

The apparent race of jurors Kelly, Stanley, and Mamula, like that of juror James, was plainly visible to the to the trial judge, the two prosecutors, the two defense attorneys, the mitigation specialist, Mr. Gordon, and anyone else in the courtroom; and to place this fact in the appellate record would not constitute new evidence of which the trial court was unaware. See Jamerson v. Runnels, 713 F.3d 1218,1226 (9th Cir.2013); Higgins v. Cain, 720 F.3d 255,262-63 (5th Cir. 2013); see also Ramey v. Davis, 942 F.3d 241,254 (5th Cir. 2019) (quoting an unpublished Fifth Circuit opin-

ion in Hayes v. Thaler, 361 F.App'x 563,574n.8 (5th Cir. 2018), that it is acceptable to supplement the record to include "juror cards from the trial. . . to assist in the comparative [juror] analysis").

In Jamerson, 713 F.3d at 1224, the appellate court in a federal habeas corpus proceeding said:

As part of its evaluation of the prosecutor's reasoning, the court must conduct a comparative juror analysis - - that is, it must "compar[e] African American panelists who were struck with those non-African American panelist who were allowed to serve." Briggs v. Grounds, 682 F.3d 1165,1170 (9th Cir.2012). Where the prosecutor's reason for striking a black juror applies "just as well" to a non-black juror who is selected for the panel, "that is evidence tending to prove purposeful discrimination" that should be considered in assessing the genuineness of the prosecutor's proffered explanation. Miller-El v. Dretke (Miller-El II), 545 U.S. 231, 241, 125 S.Ct 2317, 162 L.Ed.2d 196 (2005).

The Jamerson court had to decide as a threshold matter whether Cullen v. Pinholster, 563 U.S. 170 (2011) precluded consideration of:

the enlarged driver's license photographs that Jamerson submitted to show the race of each venire member, as the State contends. The state vigorously opposes consideration of these photographs. It reasons that Pinholster must bar our examination of them because the California Court of Appeal "was limited to analyzing the transcripts of voir dire, which did not reveal the racial makeup of the entire jury venire." Because one of the state courts did not know the race of each jury venire member and because that state court was the one to issue the last reasoned opinion, the State argues that we, too, should operate under the same handicap.

We are not persuaded that Pinholster bars consideration of evidence designed to reconstruct the racial composition of the jury venire. Where a habeas petitioner alleges a Batson violation, courts are required to conduct "side-by-side comparisons of [the] black venire panelists who were struck and white panelists allowed to serve" to evaluate the merits of the claim. Miller-El II, 545 U.S. at 241,125 S.Ct 2317. If the state court has not performed the comparative juror

analysis, we must do so in the first instance. Green[v. LaMarque, 532 F.3d 1028,1031 (9th Cir.2008)]. Without knowing the race of each venire member - - a fact visible to the state trial court but obscured by the cold record on review - - it would be impossible to discharge this duty. Reconciling these two lines of precedent, therefore, we conclude that Pinholster does not bar our consideration of evidence reconstructing the racial composition of a petitioner's jury venire.

713 F.3d at 1226.

[In this regard, Gordon would also point out that when it is gender discrimination which is the basis of a Batson / Miller-El violation, the voir dire transcript does show the gender composition of the jury venire, by use of the prefixes Mr. and Ms. There is no logical reason why an appellate court should handicap itself just because the violation involves racial discrimination instead].

G. WHEN NECESSARY FOR A REVIEWING COURT TO CONSIDER ALL OF THE CIRCUMSTANCES IN A JURY SELECTION PROCEEDING BEARING ON THE QUESTION OF WHETHER A PEREMPTORY STRIKE WAS MADE FOR A RACIALLY DISCRIMINATORY PURPOSE, COMPARATIVE ANALYSIS IS CONSTITUTIONALLY REQUIRED

As the United States Supreme Court said in Miller-El v. Dretke, 545 U.S. at 251-52, "As for law, the rule in Batson provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all the evidence with a bearing on it." (emphasis supplied). In Miller-El's case, "[t]he whole of the voir dire testimony subject to consideration casts the prosecutor's reasons for striking [juror] Warren in an implausible light. Comparing his strike with the treatment of panel members who expressed similar views supports a conclusion that race was signifi-

cant in determining who was challenged and who was not.” 545 U.S. at 252. The Miller-El majority expressly rejected the dissenters’ position that comparisons of black and nonblack venire panelists should not be undertaken because those comparisons were not specifically argued in the trial court. 545 U.S. at 241 n.2; see 545 U.S. at 280.

The federal Fourth Circuit Court of Appeals in United States v. Barnette, 644 F.3d 192,204-05, (4th Cir. 2011) recognized that Miller-El is one of the most important Supreme Court decisions applying Batson, and that it had “one profound effect on this circuit’s Batson jurisprudence”. Prior to Miller-El “we adhered to the rule that comparative juror analysis was not a critical element of a Batson claim.” “However, in Miller-El, the Supreme Court explicitly rejected this rule, holding that proper analysis of a Batson claim requires that a court engage in comparative juror analysis”. 644 F.3d at 205 (emphasis supplied).

While Gordon acknowledges that there exists Florida case law supporting the state’s waiver argument, none of that case law discusses or even mentions Miller-El¹⁰, and none addresses the

¹⁰ Although Miller-El has been described as one of the most important cases to apply Batson [United States v. Barnette, *supra*], it has never been cited in a prevailing opinion in Florida. In the year after it was decided, it was cited in Justice Pariente’s dissenting opinion in Jones v. State, 923 So.2d 486,493 (Fla. 2006) and in Judge Casanueva’s concurring opinion in Wicks v. Publix Supermarkets, Inc., 908 So.2d 1190,1194 (Fla. 2d DCA 2005), and it has been completely ghosted during the last fourteen years. [Miller-El’s earlier case, Miller-El v. Cockrell, 537 U.S. 322 (2003) has been cited four times in Florida, each time for the proposition that deference to the trial court’s findings does not preclude review or relief. Dorsey v. State, 868 So.2d 1192,1200 (Fla. 2003); Nowell v. State, 998 So.2d 597,602 (Fla. 2008); Hayes v. State, 94 So.3d 452,463 (Fla. 2012); and [continued]

constitutional argument which Gordon asserts in this appeal; that comparative analysis is required to properly resolve a Batson Equal Protection claim of racial discrimination in jury selection, whether or not those comparisons were made at the trial level. [This Court's waiver case law - - for example Hoskins v. State, 965 So.2d 1, 10-11 (Fla. 2007), King v. State, 89 So.3d 209, 230-31 (Fla. 2012), and Poole v. State, 151 So.3d 402,413-14 (Fla. 2014) - - is descended from a pre-Miller-El non-capital decision of the Third District Court of Appeal, Davis v. State, 691 So.2d 1180 (Fla. 3d DCA 1997)].

The highest appellate courts of two very dissimilar states - - California and Texas - - which have considered the waiver issue in light of Miller-El have concluded that comparative analysis is required even if raised for the first time on appeal. See People v. Lenix, 187 P.3d 946,960-61 (Cal. 2008); People v. Gutierrez, 395 P.3d 186,202 (Cal. 2017); Watkins v. State, 245 S.W.3d 444,448 and n.13 (Tex. Crim. App. 2008); Jones v. State, 431 S.W. 3d 149, 156-57 n.4 (Tex. App.-Houston [14th Dist.] 2013) (citing Watkins).

As explained in Lenix, "[t]he inherent limitations of comparative juror analysis can be tempered by creating an inclusive record", and Miller-El and Snyder v. Louisiana, 552 U.S. 472 (2008) "demonstrate that an adequate record is critical for meaningful review." 187 P.3d at 962. Therefore, "our former practice of declining to engage in comparative juror analysis for the first time on appeal

[continued] Wicks v. Publix Supermarkets, Inc., supra, 908 So.2d at 1194 (Casanueva, J., concurring)].

unduly restricts review based on the entire record." 187 P.3d at 960-61.

As the high court noted in *Snyder*, "In *Miller-El v. Dretke*, the Court made it clear that in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted." . . . Thus evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by a defendant and the record is adequate to permit the urged comparisons.

People v. Lenix, 187 P.3d at 961 (emphasis in Lenix opinion).

[In the instant case, the record is more than adequate to permit comparison between Ms. James' voir dire responses and those of jurors Kelly, Stanley, and Mamula. To the extent that the current record falls short of establishing that the latter three jurors are white, that can be easily remedied if this Court reconsiders its denial of Gordon's motion to reconstruct the record. See Jamerson v. Runnels, *supra*].

The Lenix court did note that when comparative analysis is conducted for the first time on appeal considerable deference must be accorded the trial court's ruling. 187 P.3d at 962. However, as recognized in Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) and Dorsey v. State, 868 So.2d at 1200, "deference does not imply abandonment or abdication of judicial review."

In United State v. Atkins, 843 F.3d 625 (6th Cir. 2016), a direct appeal from a federal conviction, the Sixth Circuit Court of Appeals - - citing Miller-El and contrasting the majority and dissenting views expressed in that case - - rejected the government's contention that Atkins waived comparative juror analysis on appeal by failing to request it below. 843 F.3d at 633-34. The At-

kins court referenced four factors, each of which applies in the instant case:

The lesson we draw from Snyder[v. Louisiana] and [Miller-El] is that it is appropriate to conduct a comparative juror analysis for the first time on appeal when: (i) the government purportedly strikes a venireperson because of an answer to a question posed during voir dire, (ii) venirepersons relevant to the comparison were asked same question during voir dire, (iii) the relevant venirepersons actually answered that question in similar depth; and (iv) the purpose of the analysis is to show that the government treated jurors with similar answers differently.

843 F.3d at 636.

While the Supreme Court of California, the Court of Criminal Appeals of Texas, and the federal Sixth Circuit have all relied on Miller-El to reject state or government assertions of waiver, the Fifth and Ninth federal circuits (in determining postconviction claims under the AEDPA)¹¹ have concluded that whether Miller-El establishes a constitutional requirement that state appellate courts must conduct comparative analysis of a Batson claim remains an open question. See Chamberlin v. Fisher, 855 F.3d 832, 836-39 (5th Cir. 2018); Rhoads v. Davis, 914 F.3d 357, 377 n.85 (5th Cir. 2019); McDaniels v. Kirkland, 813 F.3d 770, 775-77 (9th Cir. 2015). The same federal circuits have also made it clear, however, that when a state court has declined to conduct a comparative juror analysis, the federal habeas corpus court should perform the comparative analysis itself. Reed v. Quarterman, 555 F.3d 364, 374 (5th Cir. 2009); Rhoads v. Davis, supra, 914 F.3d at 377 n.85; Ramey v. Davis, supra, 942 F.3d at 254; Jamerson v. Runnels, su-

¹¹ Antiterrorism and Effective Death Penalty Act

pra, 713 F.3d at 1225; McDaniels v. Kirkland, supra, 813 F.3d at 778-81 (reaffirming the ruling in Jamerson). It is noteworthy that these courts have not used a waiver or "independent state ground" rationale as a basis to forgo comparative analysis.

Side-by-side comparison of the voir dire responses of juror James with the responses on the same subjects given by jurors Mamula (re the prosecutor's original justification for striking Ms. James) and jurors Kelly and Stanley (re her substitute justification) makes even clearer what is already apparent even when looking at Ms. James' voir dire examination alone. The prosecutor's reasons were not genuine, but were pretexts for racial discrimination. The exclusion of Ms. James from Michael Gordon's jury violated his constitutional rights (especially in light of the fact that this was a black defendant / white victims homicide), and violated Ms. James' right to equal protection of the law. For the reasons shown in Issue I, with or without the comparative analysis which Gordon asserts is required under Miller-El [Issue II], Gordon's convictions and death sentences must be reversed for a new trial.

ISSUE III

BY ABANDONING PROPORTIONALITY REVIEW IN LAWRENCE V. STATE (OCTOBER 29, 2020) (2020 WL 6325895) THIS COURT HAS MISCONSTRUED THE UNITED STATES SUPREME COURT'S DECISION IN PULLEY V. HARRIS, 465 U.S. 37(1984) AND RENDERED FLORIDA'S CAPITAL SENTENCING SYSTEM ARBITRARY, CAPRICIOUS, AND UNCONSTITUTIONAL.

A. RISE AND FALL OF PROPORTIONALITY REVIEW - FURMAN TO LAWRENCE

It has been recognized since 1972 that the death penalty cannot be imposed under sentencing procedures which create a substantial risk that it will be inflicted in an arbitrary and capricious manner. Furman v. Georgia, 408 U.S. 238(1972). There must be a meaningful basis for distinguishing the few cases in which capital punishment is imposed from the many in which it is not. Gregg v. Georgia, 428 U.S. 153,188 (1976), citing Justice White's concurring opinion in Furman. Accordingly, when this Court first upheld the constitutional validity of Florida's post-Furman capital sentencing statute it recognized that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation"; therefore the Florida legislature properly chose to reserve its application to only the most aggravated and least mitigated of first degree murders. State v. Dixon, 283 So.2d 1,7 (Fla. 1973).

For nearly five decades, this Court has considered proportionality review to be "a unique and highly serious function of [the] Court, the purpose of which is to foster uniformity in death-penalty law." Crook v. State, 908 So.2d 350,356 (Fla. 2005); Urbin v. State, 714 So.2d 411,417 (Fla. 1998). "The inquiry is

two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. . . so as to justify the imposition of death as the penalty." Crook, 908 So.2d at 357 (emphasis in opinion). Thus, even when the aggravation prong is satisfied, imposition of the death penalty is unwarranted when there is compelling mitigating evidence, and especially when there is substantial mental health mitigation. Crook, at 357-58; see also Cooper v. State, 739 So.2d 82,83-86 (Fla. 1999); Davis v. State, 121 So.3d 462,499-502 (Fla. 2013).

In Urbain, 714 So.2d at 416, this Court recognized that "[t]he requirement that death be administered proportionately has a variety of sources in Florida law", one of which was the state constitution's prohibition against unusual punishments. Another source, however, is legislative intent to comply with Furman's prohibition of the arbitrary imposition of death:

In performing a proportionality review, a reviewing court must never lose sight of the fact that the death penalty has long been reserved for only the most aggravated and least mitigated of first-degree murders. State v. Dixon, 283 So.2d 1,7 (Fla. 1973). See also Jones v. State, 705 So.2d 1364,1366 (Fla. 1998) (reasoning that "[t]he people of Florida have designated the death penalty as an appropriate sanction for certain crimes, and in order to ensure its continued viability under our state and federal constitutions 'the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious crimes'" (footnote omitted)).

Urbain, at 416.

When the United States Supreme Court upheld the constitutionality of Florida's post-Furman death penalty law in 1976, it emphasized that any risk of arbitrary or capricious imposition is

minimized by Florida's system of appellate review, to determine whether the ultimate penalty is or is not warranted. Proffitt v. Florida, 428 U.S. 242,252-53 (1976). Trial judges' decisions to impose death "are reviewed to ensure that that they are consistent with other sentences imposed in similar circumstances", and thus in Florida it is no longer true that there is "no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not." Proffitt, 428 U.S. at 253. The Court found it noteworthy that the Florida Supreme Court "has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed", having vacated 8 of the 21 death sentences it had reviewed to date. Proffitt, 428 U.S. at 253 [See Olsen v. State, 67 P.3d 536,610 (Wyo.2003) ("As seen in Pulley v. Harris, 465 U.S. 37 (1984)], the Court continues to consider a state supreme court's willingness to set aside death sentences when warranted as an important indication that the constitutional safeguards are in place and effective").

In 1983, the U.S. Supreme Court granted certiorari on the question of whether California's 1977 capital punishment statute was constitutionally invalid because it failed to require that state's supreme court to conduct comparative proportionality review. Pulley v. Harris, 460 U.S. 1036 (1983); Pulley v. Harris, 465 U.S. 37,38-41 (1984). The Florida Supreme Court - - well aware of the pending issue regarding the California death penalty scheme - - stated in Booker v. State, 441 So.2d 148,153 (Fla. 1983) that Pulley v. Harris "is of no significance to the instant case. The

United States Supreme Court has stated that the issue will not apply to states which are already conducting proportionality review. The United States Supreme Court has already approved of this Court's method of review in a specific statement in Proffitt and this Court has repeatedly stated that we conduct proportionality review in all cases" (emphasis supplied).

The U.S. Supreme Court subsequently decided in Pulley v. Harris that comparative proportionality review was not required in California, because that state's 1977 statutory scheme provided adequate safeguards to prevent arbitrary and capricious imposition of the death penalty. 465 U.S. at 51-54. Pulley v. Harris does not categorically hold that proportionality review is never constitutionally required; it depends on the presence or absence of sufficient other "checks on arbitrariness." See also State v. Welcome, 458 So.2d 1235, 1249 (La. 1984) (emphasis supplied) (in Pulley v. Harris the Supreme Court held that the Eighth Amendment does not necessarily require proportionality review; "[t]he principal constitutional consideration is that the overall system contain sufficient checks and safeguards against the arbitrary imposition of capital punishment"); Walker v. Georgia, 555 U.S. 979 (2008) (statement of Justice Stevens respecting the denial of the petition for writ of certiorari) (Pulley v. Harris' statement that the Eighth Amendment does not require proportionality review of every capital sentence "was intended to convey our recognition of differences among the States' capital schemes and the fact that we consider statutes as we find them").

In 2002, the Florida Constitution was amended to provide that the state's prohibition against cruel and unusual punishment shall be construed in conformity with decisions of the U.S. Supreme Court which interpret the Eighth Amendment's prohibition against cruel and unusual punishment. Art. 1, §17, Fla. Const.; see Lightbourne v. McCollum, 969 So.2d 326,334-35 (2007). Florida has a similar conformity clause regarding search and seizure law. Art. 1, §12, Fla. Const. The question of whether a U.S. Supreme Court decision automatically modifies Florida law depends on whether the Supreme Court decision "is both factually and legally on point" and "whether it is controlling." Smallwood v. State, 113 So.3d 724,730 (Fla. 2013); see also State v. Michel, 257 So.3d 3, 12 (Fla. 2018) (Pariente, J., dissenting).

Since Pulley v. Harris expressly decides only the question of whether California's 1977 capital sentencing scheme - - a very different system than Florida's - - provides sufficient safeguards against arbitrary imposition of the death penalty even without mandatory proportionality review, it is neither controlling in Florida nor is it factually and legally on point.

For years after the adoption of the conformity clause, this Court continued to conduct proportionality review - - whether or not raised by the capital defendant on appeal¹² - - in order to limit imposition of the death penalty to the most aggravated and least mitigated first degree murders, as the legislature intended. Then, in 2014, Justices Canady and Polston announced their conclu-

¹² See, e.g., Kaczmar v. State, 104 So.3d 990,1007 (Fla. 2012)

sion that proportionality review is prohibited in this state by the (then twelve years old) conformity clause, coupled with the (then thirty years old) Pulley v. Harris decision. Yacob v. State, 136 So.3d 539,557-63 (Fla. 2014) (Canady J., joined by Polston, C.J., concurring in part and dissenting in part). Based on that legal analysis, Justices Canady and Polston would have refused to set aside Yacob's death sentence even though they agreed with the plurality and concurring Justices that death was a disproportionate punishment "under this Court's comparative proportionality jurisprudence" in Yacob's case [136 So.3d at 557 and 562].

The plurality opinion in Yacob and the concurring opinion of Justice Labarga each emphasized that proportionality review arises from a variety of sources in Florida and federal law - - not solely from the prohibition against cruel and unusual punishment - - and (with the plurality citing Furman, Proffitt, Gregg, and Dixon) it is essential to guard against the arbitrary imposition of the death penalty. 136 So.3d at 546-550,552-57. The plurality opinion specifically points out another fatal flaw in the dissent's conformity clause analysis, i.e., its implicit assumption that what the U.S. Supreme Court said about California's 1977 capital sentencing scheme necessarily applies to Florida's very different scheme. 136 So.3d at 549 n.2.

Six days after the Yacob opinions were issued, another capital defendant who was challenging the proportionality of his death sentence, Humberto Delgado, filed motions to disqualify Justices Canady and Polston on the ground that they would decline to engage in the Court's mandatory proportionality review. The two Justices

denied the motions for disqualification. In 2015, Delgado's death sentence was reduced to life imprisonment on proportionality grounds, largely based on compelling mental health mitigation. Delgado v. State, 162 So.3d 971,982-83 (Fla. 2015). Once again, Justices Canady and Polston agreed with the majority's conclusion that Delgado's death sentence "cannot withstand scrutiny under this Court's comparative proportionality jurisprudence." Justice Canady wrote:

[In Yacob] I expressed the view that the exercise of proportionality review by this Court is inconsistent with the conformity clause of article 1, section 17, of the Florida Constitution. My view on the subject was however, expressly rejected by the Court majority. Until the State presents an argument justifying receding from our precedent on the subject that was clearly established in Yacob, I will follow that precedent. Accordingly, I agree with the decision to overturn the sentence of death imposed in this case.

Delgado, 162 So.3d at 983 (Canady, J. concurring).

Thus, by dint of fortunate timing, Michael Yacob (whose crime was a single aggravator "robbery gone bad", with a spur-of-the-moment shooting precipitated by the store clerk's sudden movement) and Humberto Delgado (who suffered from a serious, longstanding, and well-documented mental illness, and where the shooting of the police officer also occurred on the spur of the moment after Delgado was tasered) were spared the death penalty because it was proportionally unwarranted. [If their cases were before the Florida Supreme Court now their death sentences would presumably be upheld, on the flawed theory that the Court's hands are tied by the conformity clause, since Yacob and five decades of sound precedent have recently been overturned by Lawrence, infra].

In January 2019, Justices Lewis, Quince, and Pariente, having reached the mandatory retirement age of seventy (since amended to seventy-five) retired from the Court.

On October 29, 2020, in Lawrence v. State, __So.3d__ (Fla. 2020) [2020 WL 6325895] (motion for rehearing pending), this Court receded from Yacob and adopted the position advocated by Justices Canady and Polston in their dissent in that case.

Justice Labarga, who had written a strong concurring opinion in Yacob, now found himself the lone dissenter in Lawrence. Characterizing the majority decision as its “most consequential step yet in dismantling the reasonable safeguards” in Florida’s capital sentencing system, Justice Labarga sought to place the majority’s recent (i.e., since the changes in membership beginning in January 2019) decisions in context:

I cannot overstate how quickly and consequentially the majority’s decisions have impacted death penalty law in Florida. On January 23, 2020, this Court decided State v. Poole, 297 So.3d 487 (Fla. 2020). As I noted in my dissent in Poole, despite the clearly defined historical basis for requiring unanimous jury verdicts in Florida, this Court receded from the requirement that juries must unanimously recommend that a defendant be sentenced to death. Poole, 297 So.3d at 513 (Labarga, J. dissenting). After 2016, only the state of Alabama permitted a non-unanimous (10-2) jury recommendation. [Footnote omitted]. Poole paved the way for Florida to return to an absolute outlier status of being one of the only two states that does not require unanimity.

On May 14, 2020, this Court decided Bush v. State, 295 So.3d 179 (Fla. 2020). In that case, this Court uprooted the long applied heightened standard of review in cases that are wholly based on circumstantial evidence. Under the heightened standard “[e]vidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain [a] conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof of sufficient to convict.” Davis v.

State, 90 So.2d 629, 631-32 (Fla. 1956). This standard, applied for more than one hundred years, served as an important check on circumstantial evidence cases. As I noted in my dissent in *Bush*, while circumstantial evidence is a vital evidentiary tool in meeting the State's burden of proof, "circumstantial evidence is inherently different from direct evidence in a manner that warrants heightened consideration on appellate review." *Bush*, 295 So.3d at 216 (Fla. 2020) (Labarga, J., concurring in part and dissenting in part). "The solemn duty imposed upon this Court in reviewing death cases more than justifies the stringent review that has historically been applied in cases based solely on circumstantial evidence." *Id.* at 217.

On May 21, 2020, this Court decided *Phillips v. State*, 299 So.3d 1013 (Fla. 2020). In *Phillips*, this Court receded from *Walls v. State*, 213 So.3d 340 (Fla. 2016) (holding that *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), is to be retroactively applied). The United States Supreme Court's decision in *Hall* held that Florida law, which barred individuals with an IQ score above 70 from demonstrating that they were intellectually disabled, "creates an unacceptable risk that persons with intellectual disability will be executed, and this is unconstitutional." *Id.* at 704, 134 S.Ct. 1986. The Supreme Court concluded: "This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723, 134 S.Ct. 1986. In *Walls*, this Court held that *Hall* is to be retroactively applied. The majority's recent decision in *Phillips* subsequently receded from *Walls*.

As expressed in my dissent in *Phillips*, in light of the majority's decision to recede from *Walls*, "an individual with significant deficits in adaptive functioning, and who under a holistic consideration of the three criteria for intellectual disability could be found intellectually disabled, is completely barred from proving such because of the timing of his legal process. This arbitrary result undermines the prohibition of executing the intellectually disabled." *Phillips*, 299 So.3d at 1025 (Labarga, J. dissenting).

In each of these cases, I dissented, and I lamented the erosion of our death penalty jurisprudence. Now today, the majority jettisons a nearly fifty-year-old pillar of our mandatory review in direct appeal cases. As a result, no longer is this Court required to review death sentences for proportionality. I could not dissent more strongly to this decision, one that severely undermines

the reliability of this Court's decisions on direct appeal, and more broadly, Florida's death penalty jurisprudence.

Lawrence v. State, 2020 WL 6325895, p.7-8 (Labarga, J. dissenting) (emphasis supplied).

In addition to the 180-degree turnabouts discussed above by Justice Labarga, yet another recent example of the dismantling of Florida's death penalty safeguards - - one which is especially relevant to Gordon's case in light of the trial court's superficial and dismissive treatment of his extensive mental health, low intelligence, and life history mitigating evidence [Issue V, infra] - - concerns the findings regarding mitigating circumstances in the trial court's sentencing order. In Oyola v. State, 99 So.3d 431,437 (Fla. 2012), where the trial court merely gave a brief summary of its findings, and did not expressly and specifically articulate why the evidence failed to support the proposed statutory and nonstatutory mitigating factors, this Court found that that sentencing order failed to reflect "a well reasoned evaluation and determination", as required by Campbell v. State, 571 So.2d 415,419-20 (Fla. 1990). Oyola's death sentence was therefore reversed for the purpose of evaluating all aggravating and mitigating evidence, and (if the death penalty was reimposed) a revised sentencing order.

Oyola was consistent with post-Campbell Florida law on this subject. See, e.g., Crump v. State, 654 So.2d 545,547 (Fla. 1995) (requiring express evaluation of proposed mitigation; findings should be of unmistakable clarity); Woodel v. State, 804 So.2d 316,326-27 (Fla. 2001) (sentencing order which "comprehensively addresses all mitigation" is absolutely essential in capi-

tal cases; and an order which "summarily dispose[s] of mitigation" is inadequate); and especially Walker v. State, 707 So.2d 300,318-19 (Fla. 1997) ("bedrock requirement" to expressly evaluate all mitigating evidence "cannot be met by treating [mitigation] as an academic exercise which may be summarily addressed and disposed of"; the outcome of the weighing process can only satisfy Campbell "if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty").

Walker, quoting Crump and State v. Dixon, supra, cites as support for the importance of a thoughtful and comprehensive analysis the "death is different" principle which underlies the Eighth Amendment's requirement of heightened reliability in capital sentencing. See Allen v. Butterworth, 756 So.2d 52,59 (Fla. 2000).

However, on September 5, 2019 this Court receded from Oyola (and may or may not have receded sub silentio from Crump, Woodel, and Walker) "to the extent that it employed a requirement that a trial court expressly articulate why the evidence presented warranted the allocation of a certain weight to a mitigating circumstance". Rogers v. State, 285 So.3d 872,889-90 (Fla. 2019).

B. BECAUSE FLORIDA'S CAPITAL SENTENCING SCHEME (ESPECIALLY AS CONSTRUED BY THIS COURT SINCE 2019) - - IN CONTRAST TO THE 1977 CALIFORNIA SCHEME WHICH WAS AT ISSUE IN PULLEY V. HARRIS - - DOES NOT PROVIDE ADEQUATE SAFEGUARDS AGAINST ARBITRARY INFLICTION OF THE DEATH PENALTY, THIS COURT'S ABANDONMENT OF PROPORTIONALITY REVIEW RENDERS FLORIDA'S SYSTEM UNCONSTITUTIONAL

In Pulley v. Harris, 465 U.S. at 879-80, the Supreme Court did not address Florida's system, and did not hold that proportionality review is never required by the Eighth Amendment. [And that, in and of itself, is a fatal flaw in the Lawrence majority's conformity clause analysis]. The Supreme Court simply said, "Assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without proportionality review, the 1977 California statute is not of that sort" (emphasis supplied).

First of all, we do know that there could be capital sentencing systems lacking sufficient safeguards against arbitrariness, because all of the various states' pre-Furman systems were of that sort. So the question is whether Florida's system - - especially as construed by this Court since 2019, and now in the absence of appellate review designed to ensure that the death penalty is narrowed to only the most aggravated and least mitigated of first-degree murders - - is of that sort.

Under the 1977 California scheme, a conviction of first-degree murder resulted in a sentence of life imprisonment, unless the state alleged one or more "special circumstances" in the charging document. There were, at the time, only seven of these special circumstances, and they were tried, along with the issues

of guilt or innocence, at the initial phase of the trial. Only if the jury found the defendant guilty of first degree murder and found beyond a reasonable doubt the existence of one or more special circumstances would the trial then proceed to a second phase to determine whether death or life imprisonment was the appropriate penalty. In the second phase, additional evidence could be presented, and the jury was given a list of additional factors it could consider. Pulley v. Harris, 465 U.S. at 880. California's 1977 system, the Supreme Court concluded, was sufficient to limit the death sentence "to a small sub-class of capital-eligible cases." 465 U.S. at 831. (emphasis supplied).

In Florida, in contrast, this Court has repeatedly rejected the argument that one or more aggravating circumstances must be alleged in the indictment [see, e.g., Lott v. State, __So.3d__ (Fla. 2020)[2020 WL 5553384], Pham v. State, 70 So.3d 485,496 (Fla. 2011)], nor are any findings required in the first phase of the trial to narrow the class of death-eligible defendants. Moreover, while under Florida's earlier (i.e., pre-Hurst) incarnation of its capital sentencing system a defendant became death-eligible only upon (inter alia) findings by the co-sentencers of sufficient aggravating circumstances [Hurst v. Florida, 577 U.S. 92, 99-100 (2016)], the post-Hurst 2019 statute explicitly provides that if the jury unanimously "finds at least one aggravating factor, the defendant is eligible for a sentence of death." Fla. Stat. §921.141(2)(b)2 (emphasis supplied).

Is such a system sufficient, without at least some form of

proportionality review, to limit imposition of the death penalty to a small sub-class of first degree murder defendants? In 1972, when Florida's post-Furman death penalty law was enacted, there were eight statutory aggravating factors. State v. Dixon, 283 So.2d at 5-6. That number has since doubled to sixteen. §921.141 (6) (a through p). This results in what has been described as "aggravator creep"¹³, and it undermines the safeguards required by Furman against arbitrary imposition of the death penalty. As discussed in Sharon, The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes, 46 Harv.C.R.-C.L. L.Rev. 223 (Winter, 2011):

Aggravating factors frequently fail to perform this constitutionally required function designated for them by Furman and its progeny. Rather than confining death eligibility to the worst offenders, most state death penalty statutes list a litany of aggravating factors that apply to nearly every first-degree murder and are motivated more by political exigency than careful efforts to identify those who are most culpable.

.

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

¹³ See, e.g., Shatz, The American Death Penalty: Past, Present, and Future, 53 Tulsa L.Rev. 349,355-56 (2018). Retired Circuit Judge O.H. Eaton, Jr. one of Florida's most experienced trial judges in death penalty cases, speaking before a Senate Criminal Justice Committee workshop on January 27, 2016, referred to "aggravator creep" and said it would be hard to imagine a Florida first degree murder case without at least one aggravator. Judge Eaton was engaging in slight hyperbole; you can imagine such a case and if you look hard enough you can find some. But they are few and far between.

mas tree ornaments", rendering more and more offenders eligible for the death penalty.

46 Harv. C.R-C.L. L.Rev. at 232-33 (footnotes omitted).

Professors Carol and Jordan Steiker, in Courting Death: The Supreme Court and Capital Punishment, 160-62 (2016), noted (in the context of Arizona's system) that the enumeration of numerous and broad aggravating factors in combination with that state's Supreme Court's minimalist policing, subverted Furman's requirement of adequate safeguards against arbitrary imposition of the death penalty.

Florida's current system of sixteen aggravators is very different from the 1977 California system which was upheld in Pulley v. Harris. Until the Lawrence decision two months ago jettisoned five decades of sound precedent, and dispensed with meaningful review of whether the death penalty was appropriate under the totality of circumstances of the particular case, it is possible that this Court's proportionality review may have saved the continued viability of Florida's system. See Jones v. State, 705 So.2d 1364, 1366 (Fla. 1998). But now that this Court has abandoned proportionality review in favor of minimalist policing (or no policing) based on a flawed conformity clause analysis and on a 36 year old U.S. Supreme Court decision which addressed a very dissimilar state capital sentencing scheme, whatever meaningful safeguards Florida may once have had to comply with Furman have been eviscerated.

There are two more points which should be made here, and which may become even clearer by the time the issue of whether Florida may constitutionally dispense with proportionality review

is ultimately resolved. First, with regard to minimalist policing, and the Wyoming Supreme Court's recognition in Olsen v. State, 67 P.3d at 610, that "the [U.S. Supreme] Court continues to consider a state supreme court's willingness to set aside death sentences when warranted as an important indication that the constitutional safeguards are in place and effective", this Court since the retirement of Justices Lewis, Quince, and Pariente has reviewed eleven direct appeals where the death penalty was imposed and affirmed all eleven.¹⁴ [Contrast Proffitt v. Florida, 428 U.S. at 253, finding it significant that this Court in the mid-1970s had not hesitated to vacate death sentences (8 of 21) when it determined that that sentence should not have been imposed]. While eleven cases may be a relatively small sample size, the sample may grow by the time this issue is resolved by the U.S. Supreme Court in this or another case.

Another potential complication down the road is the question of jury unanimity. At the time Justices Canady and Polston first proposed in Yacob the theory that the conformity clause precluded this Court from reviewing whether death sentences are proportionally warranted there was yet another significant difference be-

¹⁴ Hojan v. State, ___ So.3d ___ (Fla. 2020) [2020 WL 7062475]; Colley v. State, ___ So.3d ___ (Fla. 2020) [2020 WL 6948844]; Craft v. State, ___ So.3d ___ (Fla. 2020) [2020 WL 6788794]; Craven v. State, ___ So.3d ___ (Fla. 2020) [2020 WL 6166336]; Santiago-Gonzalez v. State, 301 So.3d 157 (Fla. 2020); Bush v. State, 295 So.3d 179 (Fla. 2020); Smiley v. State, 295 So.3d 156 (Fla. 2020); Bright v. State, 299 So.3d 985 (Fla. 2020); Doty v. State, ___ So.3d ___ (Fla. 2020) [2020 WL 717815]; Newberry v. State, 288 So.3d 1040 (Fla. 2019); Rogers v. State, 285 So.3d 872 (Fla. 2019).

tween the safeguards provided by the California system and those available in Florida, in that Florida was an outlier jurisdiction which did not require a unanimous jury verdict to find an aggravating circumstance or to return a verdict (or recommendation) for the death penalty. See State v. Steele, 921 So.2d 538,550 (Fla. 2005). However, to comply with Hurst v. Florida, 517 U.S. 92 (2016) and Hurst v. State, 202 So.2d 40 (Fla. 2016) the Florida Legislature reluctantly amended the statute to require jury unanimity. Then in 2020, after the shift in membership, this Court in State v. Poole receded from Hurst v. State (except to the extent that it requires a unanimous verdict of one aggravating factor). The Poole majority “acknowledge[d] that the Legislature has changed our state’s capital sentencing law in response to Hurst v. State. Our decision today is not a comment on the merits of those changes or whether they should be retained. We have simply restored discretion that Hurst v. State wrongly took from the political branches.” 297 So.3d at 507 (emphasis supplied).

As a consequence of the overturning of Hurst v. State in Poole, there is a substantial risk during every legislative session that the political branches will choose to return Florida to its outlier status by removing the current statutory requirements that each aggravating factor be found by an unanimous jury, and that a jury verdict for the death penalty must be unanimous. In fact, under the Poole majority’s view of Sixth and Eighth Amendment requirements, while a jury must determine death eligibility by unanimously finding a single aggravator, there need not be any jury participation at all on the issue of death selection. If a

spur-of-the-moment fatal shooting occurred during a "robbery gone bad" [as in Yacob], the jury's guilt-phase verdicts of murder and robbery would suffice, and there would be no constitutional impediment to a judge-only penalty phase. Similarly, in cases involving two or more victims - - for example a murder and an attempted murder - - guilt phase convictions of the contemporaneous crimes would suffice. In addition, many of Florida's proliferation of aggravating factors would require only a pro forma jury finding. If the defendant had a ten year old conviction of strong arm robbery, or if he was on felony probation, or if the victim was a law enforcement officer or a child under twelve, death-eligibility would be virtually automatic, and there would be no constitutional requirement that the jury even hear mitigating evidence, much less weigh the aggravating and mitigating factors or reach a verdict (unanimous or otherwise) on whether the death penalty or life imprisonment is the appropriate punishment.

Having said all this, Gordon recognizes that since he was tried under the current statute the constitutional question of whether it was Poole or Hurst v. State which correctly applied Hurst v. Florida is not at issue in this appeal. However, what is at issue is whether this Court's jettisoning of proportionality review renders Florida's capital sentencing scheme arbitrary, capricious, and unconstitutional. Gordon submits that without proportionality review Florida's system, especially as administered by this Court since 2019, lacks the safeguards against arbitrariness that were present in California's 1977 statute and are required by Furman, and therefore neither the non-controlling thir-

ty-six year old decision in Pulley v. Harris nor the conformity clause can save it.¹⁵

ISSUE IV

GORDON'S DEATH SENTENCE SHOULD BE REDUCED TO LIFE IMPRISONMENT BECAUSE THIS IS NOT AMONG THE LEAST MITIGATED FIRST DEGREE MURDERS

[Due to page limits, Gordon will rely on the evidence summarized at p.9-30 of the Statement of Facts - Penalty Phase for Issues IV, V, and VI].

The compelling mitigating evidence, presented by five expert witnesses as well as Gordon's sister, establishing Gordon's longstanding mental illness, his severe traumatic brain damage, his low intelligence (IQ 70) and learning disabilities, his long history of drug and alcohol abuse, the adverse side effects of prescribed antipsychotic and antidepressant medications, his use of K2 on the day of the homicides, and his savagely abused and neglected childhood, shows that this is not among the least mitigated first degree murders.

Under this Court's proportionality review - - which is necessary to safeguard against arbitrary imposition of the death penalty and to preserve the constitutionality of Florida's capital sentencing system [Issue III, supra] - - this Court conducts a two-pronged inquiry to "determine whether the crime falls within the

¹⁵ And in the event that the Florida legislature sees fit to dismantle safeguards even further by dispensing with jury unanimity requirements, the absence of proportionality review will become (if there is such a concept) even more unconstitutional.

category of both (1) the most aggravated, and (2) the least mitigated of murders.” Davis v. State, 121 So.3d 462,499 (Fla. 2018); Crook v. State, 908 So.2d 350,357 (Fla. 2005); Cooper v. State, 739 So.2d 82, 85 (Fla. 1999); Almeida v. State, 748 So.3d 922,933 (Fla. 1999) (emphasis in opinions); see also Delgado v. State, 162 So.3d 971,982 (Fla. 2015). Thus, even in cases where the “most aggravated” prong is satisfied, “we are next required to determine whether [the] case also falls within the category of the least mitigated of murders for which the death penalty is reserved.” Crook, 908 So.2d at 357 (emphasis in opinion); see also Cooper, 739 So.2d at 85-86.

Florida case law has consistently held that “substantial mental deficiencies merit great consideration in evaluating a defendant’s culpability in a proportionality assessment.” Crook, 908 So.2d at 358. See Miller v. State, 373 So.2d 882,886 (Fla. 1979) (recognizing legislative intent “to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse”); Davis v. State, supra, 121 So.3d at 501 (“We have held sentences of death to be disproportionate in a large number of other cases involving substantial mental health mitigation”).

Gordon’s extensive mitigation was presented by five expert witnesses, whose medical, psychiatric, and pharmacological findings dovetailed with and corroborated one another. While the state, as to be expected, cross-examined each expert witness, the state presented no expert testimony of its own to contradict their

findings. See Coday v State, 946 So.2d 988,1004 (Fla. 2006); Davis v. State, 121 So.3d at 500; Nibert v. State, 574 So.2d 1059,1061 (Fla. 1990). [Contrast Colley v. State, __So.3d__ (Fla. 2020) (2020 WL 6948844 p.9); Bright v. State, __So.3d__ (Fla. 2020) [2020 WL 1592942, p.14-15]; and Smith v. State, 170 So.3d 745,762-64 (Fla. 2015) (each of which involves conflicting expert testimony regarding mental health mitigation)]. Here, Gordon's mental illness - - including psychosis with hallucinations, bipolar disorder, and PTSD - - began in his childhood and were of longstanding duration [see Delgado]. He was treated with strong psychiatric medications - - which would not have been prescribed for an inmate who was not mentally ill - - during his prior incarceration. These psychotropic meds were renewed after his release, at which time he experienced "a reemergence of psychiatric symptoms" including auditory hallucinations and paranoia. However, such medications cause severe adverse side effects, and Gordon (a brain damaged person of borderline retarded intelligence) began self-medicating with alcohol and illegal drugs instead. See Crook, 908 So.3d at 359 ("We . . . find it compelling that the unrefuted expert testimony indicated that Crook would be especially uninhibited when his already damaged brain was exposed to the negative affects of alcohol and drugs"). Crook was discussed in Coday, 946 So.2d at 1002, noting that Crook's "brain damage was substantiated by objective testing done by the experts", and was "exacerbated by his use of alcohol and drugs at the time of the murder".

Expert testimony, as well as common sense, supports the conclusion that Gordon was not malingering. [To do so he would have

had to be malingering his whole life, and somehow photoshopped the brain imaging apparatus]. Nor did the trial judge, in his short, superficial, and dismissive findings regarding mitigating circumstances [see Issue V, supra], indicate that he found any - - much less all - - of the mental health experts not to be credible (see R6787-88).

As summarized by Dr. Toomer, the combination of Michael Gordon's mental illness, his brain damage, his low intellectual functioning, and the toxic stress syndrome (a subset of PTSD, which is a very serious condition that affects all components of behavior) which he developed as a result of his traumatic childhood and adolescence, impaired Michael's judgment and adversely influenced his actions during the criminal episode which culminated in the murders (T5700-04, 5720-23, 5736-38, 5745). "Michael Gordon has all the strikes against him basically", and the combination of these factors resulted in impulsiveness, poor decision-making, and inability to weigh alternatives or project consequences (T5721-23, 5736-37). Asked by the prosecutor on cross whether "[i]f it was determined that the reason that he killed [the two women] was because they were beginning to scream and shout to alert the officers that were beginning to come in the area, would that show some type of a purposeful goal-directed thinking and action?", Dr. Toomer answered that it showed his impulsivity and easily-triggered vulnerability to stressors; and was consistent with toxic stress syndrome, as well as Michael's other diagnoses (T5743-44, see 5721).

Contrary to the conclusion in Lawrence v. State, proportionality review is not prohibited by the Florida Constitution's conform-

ity clause. And as a result of the absence (and the more recent systematic dismantling) of other adequate safeguards in Florida against arbitrary imposition of the death penalty, proportionality review is necessary under the Eighth and Fourteenth Amendments of the United States Constitution to perform the required narrowing function. Gordon's case is not among the least mitigated of first degree murders and his death sentence should be reduced to life imprisonment.

ISSUE V

THE TRIAL COURT'S SUPERFICIAL AND DISMISSIVE TREATMENT OF THE MITIGATING EVIDENCE IS INADEQUATE UNDER FLORIDA LAW, AND FAILS TO COMPLY WITH THE EIGHTH AMENDMENT'S REQUIREMENT OF HEIGHTENED RELIABILITY IN CAPITAL SENTENCING

"The United States Supreme Court has . . . repeatedly emphasized that the Eighth Amendment requires a heightened degree of reliability in capital cases":

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

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion), quoted in Allen v. Butterworth, 756 So.2d 52, 59 (Fla. 2000); see also Sumner v. Shuman, 483 U.S. 66, 72 (1987).

"[S]tate courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." Eddings v. Oklahoma, 455 U.S. 104, 116 (1982). Accordingly, this Court "has repeatedly held that all mitigating evi-

dence, found anywhere in the record, must be considered and weighed by the trial court in its determination of whether to impose a sentence of death.” Walker v. State, 707 So.2d 300,318 (Fla. 1997) (emphasis in opinion). This Court further emphasized that “[t]his bedrock requirement cannot be met by treating mitigating evidence as an academic exercise which may be summarily addressed and disposed of.” Walker at 319 (emphasis supplied).

Referring to its earlier decision in Campbell v. State, 571 So.2d 415 (Fla. 1990), the Court in Walker said:

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

707 So.2d at 319 (emphasis supplied).

See also Jackson v. State, 704 So.2d 500,507 (Fla. 1997) (to ensure meaningful review, trial courts must provide a thoughtful and comprehensive analysis of the mitigating evidence); Woodel v. State, 804 So.2d 316,326-27 (Fla. 2001) (sentencing order which “comprehensively addresses all mitigation” is absolutely essential in capital cases; and an order which “summarily disposes[s] of mitigation” is inadequate); Griffin v. State, 820 So.2d 906,914 n.10 (Fla. 2002) (reiterating the importance of a thorough written evaluation of the proposed mitigating circumstances; and “where the order is made up of conclusory statements or otherwise reflects a perfunctory evaluation on the part of the trial court, harmless error analysis will not save that order”).

The rationale behind these requirements is "very simple yet powerful":

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

Walker v. State, 707 So.2d at 318-19, quoting Crump v. State, 654 So.2d 545, 547 (Fla. 1995) (emphasis in Walker opinion).

Here, in his order sentencing Michael Gordon to death, the trial court found three aggravating factors¹⁶. He summarized in outline form the testimony of the five defense mental health experts, as well as Gordon's sister, the retired DOC employee, and the rebuttal testimony of Gordon's father (R6774-82). Then he provided the following analysis:

This Court concludes that the offered mitigating circumstances were for the most part, established by the greater weight of the evidence. The Court further concludes, that the State's rebuttal evidence weakened, in a limited fashion, certain aspects of the mitigation. The Court's assessment of the mitigations is set forth below:

The Defendant Was Under The Influence of Extreme Mental Or Emotional Disturbance

The Court finds that the Defendant voluntarily used illegal substances and voluntarily stopped taking his medications as prescribed to him. The court assigns little weight to this circumstance.

The Defendant's Capacity to Appreciate The Criminality Of His Conduct Or To Conform His Conduct To The Requirements Of Law Was Substantially Impaired

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

¹⁶ As to each homicide he found HAC (great weight), contemporaneous and previous violent felonies (substantial aggravation), and capital felony committed during burglary and to avoid arrest (combined) (moderate weight) (R6786-87, see 6768-73).

arrest lead the Court to conclude that this circumstance was not established. Therefore, this circumstance deserves no weight.

Brian Damage

The mitigation evidence showed that the Defendant suffers from mental illnesses. Such illness(s) were complicated by his voluntary use of illegal drugs and decisions not to adhere to instructions of his mental health providers. Accordingly, the Court assigns this circumstance little weight.

Any Other Factors In The Defendant's Character, Background, Or Life Or The Circumstances Of The Offense

The circumstances of this case established that the Defendant was capable of making decisions or choices other than those he made on January 15, 2015. The Court does not find that this circumstance was proven. Therefore, the Court assigns no weight to this circumstance.

The Defendant Was An Accomplice In The Murders And His Participation Was Relatively Minor

The evidence at trial established that the Defendant played a major role in the commission of the robbery and that he was the only perpetrator of the murders. The Court concludes that this circumstance was not established. Therefore, the Court assigns no weight to this circumstance.

The Defendant Suffered From Toxic Stress Syndrome

The evidence presented established the presence of this syndrome due to certain environmental factors in the Defendant's life. The Court assigns moderate weight to this circumstance.

The Defendant Was Not Receiving Proper Treatment

As indicated above, this circumstance was proven but its existence was exacerbated by decisions made by the Defendant. The Court assigns little weight to this circumstance.

The Defendant Was Abused And Abandoned By His Family

The State's rebuttal minimized the evidence presented by the Defendant in support of this circumstance. The Court assigns little weight to this circumstance.

The Defendant Was Smoking K2 or Spice On January 15, 2015

The testimony of Dr. Buffington in particular established this circumstance. But the use of K2 was done at the Defendant's own volition. This Court assigns little weight to his mitigator.

(R6787-88).

That is a far cry from the thorough and comprehensive analysis of the mitigating evidence which Florida law and the Eighth Amendment require. Despite the voluminous and unrebutted testimony of five mental health experts - - none of whom the trial court found not to be credible - - establishing that Gordon has long suffered from mental illnesses including schizophrenia (with auditory hallucinations), bipolar disorder, and PTSD; that he has organic brain damage which severely impairs his ability to regulate impulses; that he had very low intelligence and learning disabilities even in childhood (and the brain damage and drug and alcohol abuse has caused his intelligence to deteriorate to the extent that he now has an IQ of 70; a single point above the threshold of mental retardation); and he was not malingering either his brain damage (which would have been impossible) or his IQ, the trial court entirely rejected the "impaired capacity" mitigator without regard to any aspect of Gordon's preexisting mental condition.

Similarly, the trial court accorded little weight to the "extreme mental or emotional disturbance" mitigator, without any reference whatsoever to the effects of Gordon's mental illness or his brain damage, solely on the basis that he "voluntarily used illegal substances" and that he "voluntarily stopped taking" his prescribed medications. In this regard, it is important to look at why those medications were prescribed in the first place. For years during

his prior imprisonment Gordon was receiving a variety of psychiatric medications including Risperdal ("a very potent antipsychotic agent"); Prozac (a common antidepressant), and Remeron (a much stronger antidepressant used for bipolar disorder and - - often in combination with Prozac - - for very severe depression (T5570-71,5579-80,5583-85,5610,5624,5642-43). These psychotropic medications often have severe (and overlapping) side effects (T5571-72;5582-83;5633-41), and they would not have been prescribed to an inmate who was not mentally ill (T5657, see 5590). Within a month of Gordon's release from prison, the Peace River Center (a psychiatric and substance abuse facility) was already documenting that Gordon was experiencing a reemergence of psychiatric symptoms, including auditory hallucinations and paranoia (T5568,5573,5613).

The mere fact that Gordon stopped taking his prescribed psychiatric meds and began self-medicating with alcohol and illegal drugs "voluntarily" in no way negates the extensive mental health mitigation which encompasses Gordon's life from childhood through adolescence and continuing to (at least in a chronological sense) adulthood. As the pharmacologist Dr. Buffington explained, well over half of all psychiatric patients try to reduce their prescribed medications because of the adverse and extremely uncomfortable side effects, and they frequently self-medicate with alcohol and other substances (T5575-76,5582). In their interview, Gordon told Dr. Buffington that he'd been experiencing confusion, memory problems, anxiety, depression, insomnia, and blackouts (T5571-72,5633-41). In view of Gordon's preexisting mental illness and brain damage, and his very low intelligence, it is highly question-

able whether his actions in substituting illegal for prescribed drugs can truly be considered voluntary, but in any event that does not provide a rational basis for summarily denigrating all of the other mental mitigation presented in this penalty phase.

While the weight to be accorded a mitigating factor is subject to an abuse of discretion standard [see, e.g., Woodel v. State, supra, 804 So.2d at 327; Lowe v. State, 259 So.3d 23,61 (Fla. 2018); Schoenwetter v. State, 931 So.2d 857,875 (Fla. 2006)], unrebutted mitigating evidence cannot be summarily disposed of without a rational basis. See Woodel, at 327; Williams v. State, 37 So.3d 187,204 (Fla. 2010). Here, there was no conflict among the experts; indeed they corroborated each other's conclusions about Gordon's mental state. In his summary of the five experts' testimony (R6774-81) and in his findings regarding mitigation (R6787-88) the trial judge never stated or suggested that any of them lacked credibility.¹⁷

The trial court's findings regarding nonstatutory mitigating factors are equally superficial. These findings also tend to fixate on voluntary drug use to the near-exclusion of all else. The judge gave Gordon's brain damage little weight because the evidence "showed that the Defendant suffers from mental illnesses. Such illness(es) were complicated by his voluntary use of illegal drugs and decisions not to adhere to instructions of his mental health pro-

¹⁷ The judge did note Dr. Wu's statement on cross that he did not see any medical records or police reports describing the head injuries reported as part of Gordon's clinical history (R6777). Both Dr. Wu and Dr. Rubino testified that efforts were made to obtain hospital records but they were nonexistent because too many years had passed (T5349,5414-15).

viders" (R6787-88). Regarding Gordon's lack of proper mental health treatment, "this circumstance was proven but its existence was exacerbated by decisions made by the Defendant" (R6788). The judge found that Gordon's use of K2 (or Spice) - - a synthetic cannabinoid described by Dr Buffington as a "Molotov cocktail" which can trigger an extremely aberrant reaction and violent behavior (T5659-60; see 5577-79) - - was established by the evidence, but he gave it little weight because "the use of K2 was done at the Defendant's own volition" (R6788).

An extensive history of substance abuse is a strong nonstatutory mitigating circumstance [Mahn v. State, 714 So.2d 391,401 (Fla. 1998); Clark v. State, 609 So.2d 513,516 (Fla. 1992)], and longstanding substance abuse is almost always voluntary (though it may eventually result in addiction). [Following the trial court's logic, substance abuse or intoxication would only be a significant mitigator for someone like Cary Grant in North by Northwest, having whisky forcibly poured down his throat by James Mason's henchmen].

Similarly, the nonstatutory mitigation relating to "any other factors in the defendant's character, background, or life or the circumstances of the offense" was rejected as unproven based solely on the trial court's finding that Gordon "was capable of making decisions or choices other than those he made on January 15, 2015" (R6788). First of all, while it is true that Gordon may have been capable of making better decisions on that day, the evidence also showed that his ability to do so was substantially impaired by his mental illness, brain damage, low intelligence, and drugs. Moreover, even though the pawnshop robbery was planned, the evidence

strongly indicates that the murders were not; they occurred after a high-adrenaline police chase and during a desperate attempt to escape. The testimony of the five mental health experts supports the conclusion that at the time of the murders Gordon was acting on frenzied impulse, not rational thought processes. Finally, even if the "circumstances of the offense" prong could be rejected, how does Gordon's supposed ability to make better choices on January 15, 2015 rebut the "character, background, or life" prong?

The trial court's rationale for giving little weight to the abuse and neglect Gordon suffered in his childhood was that the defense evidence was "minimized" by the state's rebuttal (i.e, the testimony of Gordon's father) (R6788). However, there was nothing minimal about the abuse and neglect. If it occurred - - as presented by Gordon's sister Theresa and by the various family members interviewed by the defense experts - - it was extreme. On the other hand, if the self-serving testimony of the accused abuser - - Gordon's father - - is to be believed, it didn't occur at all. The trial court did not purport to resolve the credibility question; he did not indicate that he disbelieved Theresa or that he believed Gordon, Sr. Splitting the difference between two polar opposite witnesses - - especially when one was corroborated by other family members whose hearsay statements formed a part of the mental health experts' assessment of Gordon's mental state, while the other had an obvious motive to deny - - is not a valid basis to minimize an otherwise compelling mitigator.

Finally, the trial court's findings on mitigation entirely fail to address Gordon's low intelligence (R6787-88). In the de-

fense's sentencing memorandum, this was raised under the heading of the "impaired capacity" statutory mitigator, emphasizing Dr. Quiroga's testing which established that Gordon has an IQ of 70 (R6719). Although low intelligence is a relevant and potentially significant mitigating factor [see, e.g., Tennard v. Dretke, 542 U.S. 274, 287-88 (2004); Phillips v. State, 207 So.3d 212, 221-22 (Fla. 2016)], the trial court ignored it in his findings regarding statutory and nonstatutory mitigation. See Clark v. State, 609 So.2d at 516 (evidence which may fall short of establishing a statutory mitigating factor can still "constitute strong nonstatutory mitigation").

The trial court's treatment of the extensive mitigating evidence in this case - - and especially the compelling and un rebutted testimony of five experts establishing Gordon's longstanding mental illness, his brain damage, his low intelligence and learning disabilities, his use of drugs and alcohol from late childhood or early adolescence and his use of K2 on the day of the crimes, and the interaction of all of these factors to impede his impulse control - - is certainly not the thoughtful and comprehensive analysis required by Florida law, and by the Eighth Amendment to ensure reliability in capital sentencing. Therefore, the state law question is this: in expressly receding from Oyola in Rogers, did this Court also intend to recede sub silentio from the entire body of sound case law developed in Walker, Jackson, Woodel, and Griffin, and to say, in effect, that a thoughtful and comprehensive analysis is no longer required, and a sentencing order which summarily disposes of mitigating evidence is okay. Gordon submits that this was not the Court's intention in Rogers. If Gordon is mistaken and it was the

Court's intention in Rogers to overrule the prior case law requiring a thoughtful and comprehensive analysis of mitigating evidence, then that - - especially in combination with the Court's recent abandonment of proportionality review [Issue III, supra] - - would render Florida's entire capital sentencing scheme arbitrary, capricious, and violative of the Eighth Amendment standards of Furman, Proffitt, and Gregg. In either event, the trial court's superficial and dismissive treatment of Gordon's mitigating evidence renders the death sentences in this case constitutionally unreliable. This Court should remand for imposition of a sentence of life imprisonment or (in the event the trial court decides to reimpose death sentences) for preparation of an order which properly addresses the mitigating evidence.

ISSUE VI

THE EIGHTH AMENDMENT BARS THE EXECUTION OF INDIVIDUALS
LIKE GORDON WHO SUFFER FROM SEVERE MENTAL ILLNESS AND
BRAIN DAMAGE

At the outset Gordon recognizes that this Court and appellate courts in other jurisdictions have rejected this claim.¹⁸ However, claims that the Eighth Amendment bars the execution of mentally retarded people and adolescents under age eighteen were also consistently rejected until - - eventually - - they were accepted, so Gordon is raising the issue for constitutional preservation purposes, and to afford this Court another opportunity to change its

¹⁸ See, e.g., McCoy v. State, 132 So.3d 756, 775 (Fla. 2013).

mind.

As with mentally retarded people and adolescents under age eighteen, execution of individuals who suffer from severe mental illness (in Gordon's case compounded by brain damage and very low intelligence) serves neither of the asserted justifications for capital punishment; retribution or deterrence. As the Supreme Court stated in Atkins v. Virginia, 536 U.S. 304, 318-20 (2002) (mental retardation):

With respect to retribution-the interest in seeing that the offender gets his "just deserts"- the severity of the appropriate punishment necessarily depends on the culpability of the offender. Since Gregg, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. For example, in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct 1759, 64 L.Ed.2d 398 (1980), we set aside a death sentence because the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." Id, at 433, 100 S.Ct 1759. If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

With respect to deterrence-the interest in preventing capital crimes by prospective offenders- "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,'" Enmund, 458 U.S., at 799, 102 S.Ct 3368. Exempting the mentally retarded from that punishment will not affect the "cold calculus that precedes the decision" of other potential murderers. Gregg, 428 U.S., at 186, 96 S.Ct 2909. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable - - for example, the diminished ability to understand and process information, to learn from experience, to engage in log-

ical reasoning, or to control impulses- - that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.

(emphasis supplied).

See also Roper v. Simmons, 543 U.S. 551, 571-73 (2005) (applying similar reasoning to hold that the Eighth and Fourteenth Amendments prohibit execution of individuals who were under eighteen years of age at the time of their capital crimes); Justice Johnson's dissenting opinion in State v. Kahler, 410 P.3d 105,138 (Kan.2018) (in which, after quoting the above passage from Atkins, he said "I fail to grasp how a severely mentally ill person possessing those same characteristics is not in the same less-morally-culpable category as the mentally retarded offender"); and Justice Alcala's dissenting statement in Ex parte Panetti, 2014 WL 6734357 (Tex.Crim.App.2014) (unpublished) (describing Panetti's claim that the Atkins rationale prohibits execution of severely mentally ill individuals as "a compelling argument").

Granted Justice Johnson's and Justice Alcala's views were expressed in dissent. But time - - and sometimes not that much time - - has a way of turning dissenting opinions into law [see, e.g., Yacob and Lawrence; Hurst v. State and Poole]. As the U.S. Supreme Court again recognized in Atkins, imposition of the death penalty must be confined to a narrow category of murders. This Court in Lawrence, Poole, and Rogers, combined with the legislature's ex-

pansion of aggravating factors to sixteen (at least one of which applies to nearly every first-degree murder case, and a single one of which makes a defendant death-eligible) has dismantled most of Florida's protections against arbitrary infliction of the death penalty. Absent proportionality review, it is even more imperative for this Court now, or the U.S. Supreme Court later, to hold that the execution of severely mentally ill individuals like Michael Gordon is constitutionally prohibited.

ISSUE VII

AS TO COUNTS ELEVEN AND TWELVE, CHARGING GORDON WITH ATTEMPTED FIRST DEGREE MURDER OF DEPUTY QUINTANA-RIVERA AND OFFICER NICKELS, THE STATE FAILED TO PRESENT COMPETENT, SUBSTANTIAL EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD FIND PREMEDITATION, OR ANY INTENT TO KILL

Counts 11, 12, and 13 of the indictment charged Gordon with attempted first degree murder, from a premeditated design to effect the deaths of deputy sheriff Quintana-Rivera and police officers Nickels and Gill (R78-79). [The state did not charge Gordon with attempted felony murder of these officers, nor was the jury instructed on attempted first-degree murder on any basis other than premeditation (T4675-78). See Weatherspoon v. State, 214 So.3d 578 (Fla. 2017)]. Officer Gill was deceased, from unrelated causes, by the time of trial (T2363,4371). Quintana-Rivera and Nickels testified (T3470-3524). The trial court granted the defense's motion for judgment of acquittal on Count 13 (Gill), but denied the motion as to Counts 11 and 12 (T4348-49,4370-71).

Under Florida law, "[p]remeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill." Glover v. State, 226 So.3d 795,805-06 (Fla. 2017); Oliver v. State, 214 So.3d 606,618 (Fla. 2017); Bradley v. State, 787 So.2d 732,738 (Fla. 2001). While premeditation may be formed a moment before the act, "it must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act." Oliver, at 618; Bradley, at 738. Premeditation may be proven by circumstantial evidence, and the standard since Bush v. State, 295 So.3d 179 (Fla. 2020) is whether the state presented competent, substantial evidence from which a rational trier of fact could find each of the elements of the offense beyond a reasonable doubt. See J.A.R. v. State, __So.3d__ (Fla. 2d DCA 2020)[2020 WL 6106031]; Bradwell v. State, 300 So.3d 325,327-28 (Fla. 1st DCA 2020); Jones v. State, 297 So.3d 685,687 (Fla. 1st DCA 2020); see also Wright v. State, 221 So.3d 512, 525-26 (Fla. 2017) (Canady, J., joined by Labarga, C.J., Polston, and Lawson, J.J., concurring) (even absent the special circumstantial evidence standard - - later abrogated in Bush - - evidence was insufficient to sustain Wright's convictions).

The evidence presented at Gordon's trial relating to counts eleven and twelve was as follows:

Law enforcement officers had converged around the house at 618 Astor Drive where one or more suspects were believed to be. Officer Eric Nickels, holding his 12-gauge shotgun, was positioned near the curb, about 35 feet from the garage door, when he heard a loud bang (T3477,3479-80,3482-83,3485). The bottom panel of the

garage door bowed outward, and within seconds Nickels heard another, much louder, bang (T3483-84). The entire garage door collapsed and a blue sedan came through, dragging part of the garage door with it (T3484). Nickels shouted something like "He's coming through the garage" (T3484). The car's engine was revving, and it rapidly accelerated from maybe 10 miles per hour to 35 or 40 (T3484-85). Trying to get out of the way, Nickels moved toward the grass area and "ended up falling down partially in the roadway" (T3485). He was on the ground, not yet on his feet, when the car made a hard left and was coming directly at him (T3485). In fear that he was going to be hit by the car, Nickels fired his shotgun once or twice at the driver's front windshield, and fired four more shots as the car went past him (T3485-86). His intention was to hit the driver, who he couldn't see because it was starting to get dark out and the windows were tinted (T3486). The car missed Nickels' legs by 5-10 feet (T3485-87). It continued down Astor Drive, made a hard right-hand turn, went through a field, and then crashed (T3488).

Deputy Jonathan Quintana-Rivera was also among the officers maintaining the perimeter in front of the house (T3512). It was extremely dark out (T3523). He was on the front lawn, holding his rifle, and then he moved onto the "actual driveway" (T3511-12, 3522). He heard an engine start, acceleration coming from inside the garage, and squealing of tires (T3513). Then the front of the garage bowed out after being impacted by something (T3513). Quintana-Rivera got on his radio and yelled, "He's coming out of the garage" (T3514). There was more squealing of tires, and then the

door came off the track (T3514). A car came out with the garage door on top of it (T3514). Quintana-Rivera was walking back toward the grass area, and the car was coming in his direction (T3515). The garage door stayed with the car for some time, and it was blocking Quintana-Rivera's view of the driver (T3516). Asked by the prosecutor what thoughts he had and what action he took, Quintana-Rivera said, "Well, I was afraid that he was coming to strike me and the other. . . officer who was next to me" (T3515-16). Quintana-Rivera ran out of the way and the other officer jumped out of the way (T3515). Quintana-Rivera fired his rifle twice at close range at the driver's side of the vehicle, but then stopped firing because Officer Nickels had popped up into his line of sight, and he was afraid he might accidentally hit him or another officer (T3517-18). It was so hectic, and Quintana-Rivera's adrenaline was so high, that he could not hear any of the shots being fired, not even his own (T3519,3523-24). He did see muzzle flashes from the locations where Officer Nickels and Deputy Nunez were (T3519-20).

Several other officers gave testimony relating to the car which came through the garage door. Deputy Hermelbracht opined that the vehicle tried to run over several deputies (T2544). Hermelbracht initially said "As soon as I jumped the fence is when I heard the crash from when he was backing the vehicle out", but subsequently clarified that he couldn't see from his vantage point whether the car came out headlights or taillights first (T2544, 2557). "The only thing I saw was when it was going down the road towards the officers" (T2557). Deputy Russo said there were offic-

ers and deputies standing in the roadway or perimeter, and the vehicle came right out of the garage directly at them (T3440). Russo said the car ran through the garage door "front first" (T3438, 3464). Officer Harrison said it was dark out and the scene was chaotic when the car came busting out of the garage door (T3555, 3575-76). When the shooting began he was concerned about the potential for getting caught in the crossfire (T3555). Deputy Frese stated repeatedly that the car came through the garage door tail-lights first and backed out of the driveway (T4125-26, 4139). Then it turned around and went in the opposite direction (T4125). Deputy Turner, who was standing with Deputy Frese, thought the car must have "been originally backed into the garage" because it pulled out in drive (T4173). He could see that the driver appeared to be a black male (T4157). Only when it turned was he able to see the taillights (T4173).

What the evidence shows is a chaotic, high-adrenaline scene where suddenly a stolen car - - driven by a person desperately trying to escape - - barrels through a closed garage door. It is extremely dark out (or, according to one witness, starting to get dark). The garage door collapses and lands on top of the car, likely obscuring the driver's vision, as the vehicle rapidly accelerates down the driveway and out to the road. Officers scramble to get out of the way, and begin firing their weapons. Nickels falls, and as he's trying to get up the car misses his legs by 5-10 feet and speeds away (to where it soon crashes at the edge of a nearby pond).

Two unpublished¹⁹ opinions from California and Michigan, by way of contrast, illustrate how premeditation and/or intent might properly be inferred from a driver's actions. In People v. Corona, 2009 WL 783024, p.6 (Cal.App.5th Dist.2005), the appellate court found:

ample circumstantial evidence of planning activity present in this record. After Garcia disengaged from the fight and left the scene, Corona got into his car and turned it around rapidly to go after him. Next, he accelerated towards Garcia. Then he drove onto the curb and rammed into Garcia, hitting him with such force that he smashed into the windshield and was thrown 45 feet. This evidence supports the jury's findings that Garcia made several deliberate and thought out moves in an attempt to kill Garcia by running him over with the car. As for the element of motive, Corona was angry tht Garcia had been talking about him and he was in a murderous mood that day, as shown by his earlier threat to kill Calderon and run him over with his car. Finally, a reasonable juror also could have found the manner of the attempted murder, i.e. following Garcia in his car, accelerating and then going onto the curb to hit Garcia, indicated Corona acted willfully and with deliberation and premeditation.

In People v. Presswood, 2018 WL 5276305, p.1-2 (Mich.App 2018), the defendant was convicted of first degree premeditated murder on the following facts:

James Brewer, who was in the car with the defendant, testified that, after Mayers punched defendant, defendant put his car in the drive gear, chased Mayers down the sidewalk, drove through a fence, and hit Mayers. De-

¹⁹ Unpublished opinions, while not binding or precedential, may have persuasive value [see State v. Martinez, 71 So.3d 945, 948 n.1 (Fla. 3d DCA 2011)], and are frequently cited by this Court for that purpose. See Visiting Nurse Ass'n of Florida, Inc. v. Jupiter Medical Center, Inc., 154 So.3d 1115,1131 (Fla. 2014); Foster v. State, 132 So.3d 40,73 (Fla. 2013); Smallwood v. State, 113 So.3d 724, 733 n.5 (Fla. 2013); Baptiste v. State, 995 So.2d 285,297 (Fla. 2008); Siegle v. Progressive Consumers Ins. Co., 819 So.2d 732,738 n.4 (Fla. 2002); Ventura v. State, 794 So.2d 553, 563-64 (Fla. 2001); State v. Perkins, 760 So.2d 85,88 (Fla. 2000); Florida Dept. of State v. Mangat, 43 So.3d 642,653-54 (Fla. 2010) (Canady, C.J. dissenting)].

fendant did not stop at that point, but turned around, drove back through the fence, and "ran [Mayers] over again" before fleeing the scene. A club employee similarly testified that Mayers was running toward the club when defendant took off after him, hit Mayers once, "turned around in the . . . church parking lot, and hit [Mayers] again." Considering all the evidence that was presented at trial, no rational juror could conclude that defendant's conduct of running over Mayers two times, after chasing him and driving through a fence to catch up to him, could be characterized as only an act of gross negligence, committed without malice.

In the instant case, Officer Nickels' and Deputy Quintana-Rivera's fear that the escaping car might hit them was understandable and rational but it proves nothing about the driver's intent. [And the fact that the car did not hit any of the officers tends to show that Gordon was not trying to hit them but simply trying to get away]. In the prosecutor's closing argument on these counts, she said to the jury:

. . . [W]e heard testimony from several officers that when Michael Gordon came out of 618 Astor in that Ford Focus he came out face first and the vehicle fled from the garage face first. We also heard from a couple of officers that when the vehicle came out of the garage, it came out rear end first and then backed up and then proceeded to where the law enforcement officers were. Some of you may believe that it came out face first. Some of you may believe that it backed out first. But that fact is not an element of any charge in which Michael Gordon has been charged with.

(T4485-86) .

True, whether the car was in drive or reverse when it barreled through the garage door is not an element of attempted premeditated murder. But if the state is proposing to prove premeditation solely by the manner in which the car was driven it needs to present some competent, substantial evidence showing that the driver had a fully formed conscious purpose to kill. Instead, what the evidence showed was chaos. The jurors, as the prosecutor said,

were free to believe that the car came out headfirst or rear end first - - or that it didn't matter which way it came out - - but either way there was no evidence from which a rational trier of fact could find that the driver had a premeditated intent, or any intent, to kill the two officers.

Gordon's convictions on counts eleven and twelve for attempted first-degree murder should be reversed.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant GORDON respectfully requests that this Court reverse his convictions [Issues I, II, and VII] and death sentences [Issues III, IV, V, and VI].

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Assistant Attorney General Rick Buchwalter at CrimappTPA@myfloridalegal.com, on this 21st day of December, 2020.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

HOWARD L. "REX" DIMMIG, II
Public Defender
Tenth Judicial Circuit
(863) 534-4200

SLB/kas

/s/Steven L. Bolotin
STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number 0236365
P. O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.state.fl.us
sbolotin@pd10.state.fl.us
kstockman@pd10.state.fl.us