

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

MARKEITH DEMANGZLO LOYD,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

ANSWER BRIEF /CROSS INITIAL BRIEF

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

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

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

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

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

In its Notice of Intent to Seek Death Penalty, filed on April 3, 2017, the State announced that it intended to prove the following eight³ aggravating factors as set forth in Florida Statute 921.141(6)(a): the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation; (b) the defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to a person; (c) the defendant knowingly created a great risk of death to many persons; (e) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (g) the

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

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

capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or enforcement of laws; (h) the capital felony was especially heinous, atrocious or cruel; (i) the capital felony was a homicide and was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification; (j) the victim of the capital felony was a law enforcement officer engaged in the performance of her official duties.⁴ (R 319-320)

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

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

PRETRIAL LITIGATION

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

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

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

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

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

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

and Final Instructions⁵ needed to be updated to conform with the Court's decision in *Poole* and the current, clear language of Florida Statute section 921.141. Specifically, the State sought an order eliminating any need for the jury to unanimously agree that the proven aggravating factors are sufficient to warrant death, or to unanimously agree that the aggravation outweighs the mitigation. (R 1631-33) The defense filed a written response. (R 1710-1717)

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

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

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

GUILT PHASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5020. 5020.

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

Hey, hun, give me a clear channel at Walmart. Give me a couple units for a signal 17⁸, if possible, signal 5⁹ suspect.

(Inaudible.)

(Inaudible) 33 traffic on emergency north¹⁰ for Bravo 20 out at the Walmart, 3101 West Princeton Street, reference attempted contact, possible signal 5 suspect. 10-33¹¹ on emergency north.

(Inaudible) we're here.

(Inaudible) officer.

(Inaudible.)

Serg, where are you exactly?

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

Do you have eyes on him or a vehicle?

(Inaudible.)

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

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

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

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

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

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

(Inaudible) 43, might have been shots.

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

(Inaudible.)

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

Silver Star and Princeton, vehicle description?

Purple vehicle.

(Inaudible) right now.

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

(Inaudible) onto Princeton.

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

(Inaudible.)

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

(Inaudible) chase off.

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

10-39¹⁴ (inaudible).

(Inaudible.)

(Audio stopped.)

(TT 3997-98)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PENALTY PHASE

On November 29, 2021¹⁶, the trial's penalty phase began as to Count 1 of the Indictment. (TT 5742) In its penalty phase the State called Todd Herb, previously employed as an officer with the Orlando Police Department. He testified to being on patrol on January 3rd of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The trial court held a *Spencer*¹⁷ hearing on January 14, 2022, with additional testimony taken on February 7, 2022.¹⁸ (R 6939-7171) On February 7, when court reconvened for the second portion of the *Spencer* hearing, the judge agreed to take Dr. Amador's testimony regarding both competency and mitigation and appointed Drs. Jeffrey Danziger and Katherine Oses to evaluate Loyd's competency. (R 7085,7087-88, 7175)

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

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

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

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

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

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

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

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

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

THE COURT: Would he understand I'm the judge?

THE WITNESS: Factually, yes, he would.

THE COURT: Would he understand if I sentenced him to life?

THE WITNESS: He factually would, yes.

THE COURT: Would he understand if I sentenced him to death?

THE WITNESS: Yes.

THE COURT: Would he understand if I explained his appeal rights to him for either of those sentences?

THE WITNESS: He likely would, yes.

THE COURT: Okay. So what is it he would not be competent to do at that sentencing?

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

(R 7218-19)

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

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

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

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

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

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

This appeal followed.

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

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

SUMMARY OF ARGUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

POINT ONE

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

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

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

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

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

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

pretrial publicity²², attitudes toward the death penalty, and attitudes toward the insanity defense. (R 7360) During the examination of Juror 809 by Mr. Williams, the following exchange took place:

Q Mr. 809, I'll call you, you told us a few minutes ago -- you told me that you saw the injuries that Mr. Loyd suffered after his arrest?

A Yes.

Q What do you think about the fact that he was injured during his arrest?

A What do I think about it?

Q Yes, sir.

A I mean...

Q And there's no wrong answer.

A Yeah.

Q Because I understand the sensitive nature of this topic.

A Yeah, it's -- I mean, just being honest --

Q Yes.

A -- what I seen, I was, you know, like -- because I seen the helicopter footage.

Q Yes, sir.

A I just remember seeing him, like, laid out, you know, and the first thing I seen was the cop, you know, kind of, like, kick him.

Q Yes, sir.

A I thought it was messed up, like, honestly, but at the same time, it was like, Well, you know, you killed a cop, so it's kind of like -- I'm not saying that it's the right thing to do, but it's like, you know -- I think it was wrong.

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

Q You think what the police are alleged to have done was wrong?

A Yeah.

(TT 1105-06)

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

MR. WILLIAMS: I understand the juror said he could set it aside, but I think -- State's belief is that his knowledge of information that is not going to be admissible -- in fact, my recollection of your last order noted that it was inflammatory, and this juror said he saw Mr. Loyd's face post-injury, is that he needs to be excused for cause.²³

THE COURT: Reply?

MR. LENAMON: Yes, Judge. Based on their belief system, I can excuse the entire jury because you instructed the jury not to consider in the first part of the case the murder and the attempted murders of the people on the Dixon case, and they agreed to do so. How this is any different than that is beyond me. This person said he could set it aside, just like he can set aside the pretrial publicity, and this is no different than that, Judge.

THE COURT: Number one, this is completely different. The fact of Ms. Dixon and the unborn child, the conviction in

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

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

(TT 1112-15)

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

Q You said that you saw some media coverage about Mr. Loyd's eye?

A Yes.

Q Did you -- was it a verbal description or did you see a photograph?

A I saw it on the news.

Q A photograph?

A No, it was -- it was video on the news.

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

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

(E.g., TT 305-06)

Q Video. Was it Mr. Loyd with police around him coming out?

A Yes.

Q Did you hear or see anything about how that happened?

A Yes, I do remember. I was -- there was a fight or something -- something to that, that he got into an altercation, or there was --

Q Do you know a fight with whom?

A Of the police.

Q The police?

A I don't know if it was police, Orange County, I don't know. It was -- it was law enforcement.

Q Okay. So, is it your understanding from the information that you have that law enforcement inflicted the injuries on Mr. Loyd?

A I don't know. I just saw it on there. Again, that's something, just because you see something, you can't judge that's what occurred. I don't know.

(TT 1557-58)

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

Q Did you hear anything about when he was caught?

A Oh, I think he was -- he got beat up.

Q Okay. Anything else you remember about that?

A No, ma'am.

Q Did you hear anything about who beat him up?

A The police officers that caught him.

(TT 2975)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As such, this claim should be denied.

POINT TWO

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

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

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

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

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

Section 775.027(2), Florida Statutes.

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

Clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such weight *that it is sufficient to persuade you that the Defendant's claim is highly probable. It is a higher standard of proof than a preponderance of the evidence, but less exacting than proof beyond a reasonable doubt.*

A "preponderance of the evidence" is enough evidence to persuade you that the Defendant's claim is more likely true than not true.

(R 3782)

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

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

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

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

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

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

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

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

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

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

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

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

Now, in a moment, I will sit down, and the defense will have an opportunity to speak to you, and I suspect that they will discuss self-defense and insanity. And as we discussed during jury selection, and as you've already been instructed here today, it is their burden to *prove by clear and convincing evidence* that Mr. Loyd was insane at the time of this offense.

So, I would ask you as the argument is made to you that you listen carefully to defense counsel's argument but ask, is there evidence that is clear and convincing that Mr. Loyd was insane? *Is it -- to use the language of the instruction -- precise, explicit, and lacking in confusion?*²⁷ Is that what you heard from Dr. Toomer?

(TT 5425-26)

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

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

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

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

POINT THREE

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

This Court reviews trial court rulings regarding the propriety of comments made during closing argument for an abuse of discretion. *See Salazar v. State*, 991 So. 2d 364, 377 (Fla. 2008). When no objection to a comment challenged on appeal was made below, or no motion for mistrial was made following a sustained objection, this Court reviews the issue for fundamental error. *Evans v. State*, 177 So.3d 1219, 1234 (Fla. 2015). As no objection was made, Appellant's position is that the State's closing argument as to premeditation amounted to fundamental error as to both Counts I²⁸ and II.

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

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

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

So that brings us to the second element. Markeith Loyd acted with a premeditated design to kill Joseph Carter. Now, what evidence do we have of that and what exactly does premeditated design mean?

You've all been read to this morning, I'm not going to read to you again, but ***you can see it on the screen***. What it means is a conscious intent to kill. And that conscious intent has to be present in the person's mind during the act.

So, the example I would give you is all being Floridians familiar with mosquitoes. You are sitting on your front porch, a mosquito lands on your arm. You look down and you see it and you have a decision to make. Do you brush it off? Do you smack it? There is a conscious choice in your mind to do one or the other, and it may take a matter of seconds to make that decision; but if you smack it down, that is an intent to kill that was formed in your mind at the time and during the actual act. And that is all that is necessary to prove premeditation in the state of Florida.

(TT 5408-09)

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

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

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

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

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

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

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

And there is no doubt that Markeith Loyd had a premeditated design to kill Captain Carter. How do we know that? We know that because of the way Captain Carter described what he saw when he pulled up behind who we now know has Markeith Loyd. What did Captain Carter say the man in the dark clothing was doing when he pulled his car to a stop? He was already standing looking right at him.

Remember, the firearm wasn't up at that point, but he was standing waiting for Captain Carter.

If Markeith Loyd's intention was to flee, if his intention was to scare Captain Carter, he could have jumped out of the Mercury and taken off running, but he didn't. He stood and he waited for Captain Carter, yet another law enforcement officer, to start to get out of his car, and that's when Markeith Loyd fired at Captain Carter.

We also know, unfortunately, that Markeith Loyd intended to kill Captain Carter because he had just killed another law enforcement officer minutes before for trying to do the same thing that Captain Carter was doing, which was to take his freedom away from him.

(TT 5408-10) (Emphasis added.)

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

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

Appellant is not entitled to relief on this claim.

POINT FOUR

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

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

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

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

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

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

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

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

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

(T 7436-37)

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

MR. LENAMON: Objection. Misstatement of the law.

THE COURT: Overruled.

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

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

(T 7439-40)

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

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

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

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

MR. LENAMON: So, you can actually, without question, find that the aggravating factors outweigh the mitigating factors, and when it gets to question -- the last question on this, about we, the jury, unanimously find that the defendant, Markeith Loyd, should be sentenced to death, if one juror, even if they believe the aggravators outweigh the mitigators, they don't have to vote for death. And so, for the things that we have talked about over the last two hours, you never have to vote for death. For a death sentence to occur, it has to be all 12 jurors unanimously believing that the death penalty is the appropriate sentence.

If you go through all the weights and you get to that point and you don't feel the death penalty is appropriate, it's not a death sentence. It's got to be unanimous. All 12. One juror is a life verdict. End of story.

And so when you go back there and make a decision, if your decision is life, you just say life.

(TT 7552-53)

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

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

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

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

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

MR. WILLIAMS: So the next mitigating circumstance I want to talk about is the allegation that Mr. Loyd's capacity to appreciate the criminality of his conduct or conform to requirements of law was substantially impaired. And my recollection is that the only testimony of this came from Dr. Colino, and it came at the end of his testimony. And he was asked the specific question with the specific language and he clarified that in his view Mr. Loyd understood or appreciated the criminality of his conduct. And here again, you-all have already made this determination by rejecting his insanity defense. You determined that he knew the difference between right or wrong or that it was unlawful.

(TT 7463-64)

The prosecutor then argued that *in addition* to the testimony from Dr. Colino, the jury could also consider the fact that they rejected the insanity defense. While a finding of sanity does not preclude consideration of the statutory mitigating factors concerning a defendant's mental condition, no rule of law states that those findings must be ignored in weighing the mitigating factors. *Globe v. State*, 877 So. 2d 663, 676 (Fla. 2004) The prosecutor then went on

to argue why there was no evidence that Loyd couldn't conform his conduct to requirements of law:

MR. WILLIAMS: So what you're left with is Dr. Colino in his testimony that Mr. Loyd couldn't conform his conduct. Well, Dr. Colino didn't explain why he believes that. Didn't say a word about it.

What evidence is there that Mr. Loyd was unable to conform his conduct to the requirements of law? In fact, as Dr. Maher had to acknowledge, the records from the Orange County Jail where Mr. Loyd was staying after he murdered Lieutenant Clayton indicated that he was able to. In fact, they changed his confinement level based upon his willingness to do so to do that very thing, to follow the laws and rules and regulations.

There's no evidence that he couldn't conform his conduct to requirements of law. And that leaves aside that Dr. Negen completely blew up Dr. Colino's testimony by saying that yes, he, in his expert opinion, evaluated the scans, that the scarring was normal, that all of the scans were normal.

(TT 7464)

This comment was not improper because the prosecutor was attempting to rebut mitigating evidence argued by the defense. In this case, the comments directly before and after the one indicated by Appellant dispels the message Appellant perceives was being conveyed. The prosecutor in this case urged the members of the jury to use their recollection of the evidence introduced at trial and to the

witness testimony they heard to decide whether the mitigator had been proven.

Even if this Court finds that the comment was improper, any error is harmless under these facts. There is no reasonable probability that they contributed to the death sentence. The facts themselves support the jury's rejection of this mitigator as well as their verdict in favor of death. As stated in the sentencing order:

At his trial, the defendant testified that he knew that he was wanted for the murder of Sade Dixon. The defendant was hiding in the woods near the Princeton Walmart prior to the murder of Debra Clayton. Before killing Debra Clayton, the defendant obtained a bulletproof jacket, clearly anticipating a confrontation with law enforcement. To avoid being arrested for the murder of Sade Dixon, the defendant murdered Debra Clayton and fled from Walmart. When confronted by law enforcement again, the defendant attempted to kill Captain Carter of the Orange County Sheriff's Office. Ultimately the defendant was found by law enforcement hiding in a house. The actions of the defendant both before and after the murder of Debra Clayton speak of a person making decisions to avoid the consequences of his crimes. The evidence established that the defendant appreciated the criminality of his conduct. The testimony of the experts to the contrary was not credible.

(R 4819)

Lastly, Appellant argues that the State, by so arguing the following, had in effect improperly relied on a non-statutory aggravating factor:

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

(IB 70).

The trial court relied on *Spivey v. Head*, 207 F. 3rd 1263 (11th Cir. 2000) to deny relief. In *Spivey*, explaining why a life sentence verdict would be just “a slap on the wrist,” the prosecutor in his closing during the sentencing phase stated:

State's Exhibit Number 22 ... is an Indictment, a verdict of guilty, and a sentence to life imprisonment for the defendant in Bibb County, Georgia. You know when he committed that murder in Bibb County, Georgia? Two hours before he committed the one, or three hours before he committed the one in Muscogee County. So your verdict of life imprisonment will not add one day of punishment to this man.... If he is sentenced to life imprisonment on the first murder and you give him life on the second, is that appropriate punishment?

The court held that assuming *arguendo*³¹ that the prosecutor did misstate the law and his argument was therefore improper, there was not a reasonable probability that the misstatement changed the outcome of the case. At the sentencing stage, the jury faced the central question of whether to sentence Spivey to death or to life imprisonment. *Spivey v. Head*, 207 F.3d 1263, 1277–78 (11th Cir. 2000) The court explained that, even assuming the statements were improper and misstated the law, the comments unlikely affected, even minimally, the jury’s verdict; therefore, the sentence was not fundamentally unfair.

Similarly, the State’s comments in closing argument neither misrepresented the law or the facts in any way and were not improper. In the present case, the comments at issue represented a very brief portion of the State's entire closing and much like the “slap on the wrist” hyperbole in *Spivey*, there is not a reasonable probability that the figurative language used here changed the outcome of the case. Moreover, the State clarified that it was

³¹ It is important to note that the 11th Circuit in *Spivey*, never determined that the prosecutor’s comments were improper or misstated the law.

intentionally argued as to the weight of the prior violent felony aggravators. (TT 7493, 7495; see TT 7484)

Prior to closing argument, the jurors were aware that Loyd was convicted of murder, that he was serving a life sentence, and that he would never get out of prison. The defense in this case made a strategic decision to tell the jurors from the very beginning from the statement of facts that were first read to the jurors, that the defendant had already been convicted of a murder after a trial, gave the jurors the dates of that trial, and was serving a life sentence such that he would never get out of prison. This information was brought to the attention of every single juror that was substantially questioned during individual voir dire in hopes of getting a more life-oriented jury. By telling the jury that Loyd was already serving a life sentence and was never getting out of prison, they could then question the jurors about that specific aggravator and the fact that he was never getting out in order to find those jurors who think that that was so weighty, such that it would become an automatic life sentence based on that aggravator.

This Court has held that it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any

prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction. *Rhodes v. State*, 547 So. 2d 1201, 1204 (Fla. 1989). As this Court has explained, “[t]estimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence.” *Id.* Such testimony would also be relevant in determining what weight to give to the prior violent felony aggravator. *Cruz v. State*, 320 So.3d 695, 721 (Fla. 2021); citing *Seibert v. State*, 64 So.3d 67, 79 (Fla. 2010). The prosecutor did not rely on a nonstatutory aggravating factor but used strong language only to describe the weight ascribed to a statutory aggravating factor. *Oyola v. State*, 158 So.3d 504, 511 (Fla. 2015).

Should this Court find that the trial court erred, any error is harmless under these facts. It is unlikely that a different sentence would have been imposed but for the comment. The jury was instructed to follow the law as instructed by the court and further instructed on which aggravating factors they could consider,

provided those aggravators were established by the evidence.³² The law presumes that juries follow the instructions given them by the court. *Crain v. State*, 894 So. 2d 59, 70 (Fla. 2004).

In the context of the entire closing argument and considering the evidence presented in the penalty phase, namely, the strength of the evidence against Loyd and the gravity of the aggravators, it cannot be said that the objected-to comments deprived Loyd of a fair penalty phase or were “so inflammatory” that a sentence of death could not have been obtained without it. *Lowe v. State*, 259 So.3d 23, 48 (Fla. 2018).

Accordingly, this claim should be denied.

POINT FIVE

THE TRIAL COURT PROPERLY DENIED APPELLANT’S PROPOSED MODIFICATION TO THE PENALTY PHASE JURY INSTRUCTIONS.

Standard of review. Appellant argues that the court should have removed from the penalty-phase jury instructions any language that places on the defense the burden of proving mitigating circumstances. The trial court has wide discretion in instructing the

³² Defense counsel conceded the aggravators were proven. (TT 7552)

jury, and the decision to give or refuse to give a special jury instruction is reviewed under the abuse of discretion standard. See *Hudson v. State*, 992 So. 2d 96, 112 (Fla. 2008).

Appellant's claims that Florida's capital sentencing statute and jury instructions are unconstitutional because they shift the burden of proof as to the weighing of aggravation and mitigation have consistently been rejected by this Court. See *Bush v. State*, 295 So.3d 179, 210 (Fla. 2020) (standard penalty phase jury instructions do not 'impermissibly shift the burden to the defense to prove that death is not the appropriate sentence.' (quoting *Rogers v. State*, 957 So. 2d 538, 555 (Fla. 2007); *Lebron v. State*, 982 So. 2d 649, 666 (Fla. 2008) (penalty-phase instructions do not improperly shift burden of proof to the defendant); *Barnhill v. State*, 971 So. 2d 106, 117 (Fla. 2007) (Florida's death penalty statute and jury instructions do not unconstitutionally shift the burden of proof); *Reynolds v. State*, 934 So. 2d 1128, 1151 (Fla. 2006) (rejecting claim that capital sentencing statute and instruction unconstitutionally place a higher burden on the defendant to establish that life is the appropriate penalty than is placed on the State to establish that death is appropriate).

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

POINT SIX

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE VICTIM IMPACT EVIDENCE

Standard of review: Appellant suggests that this Court create a bright-line rule directing the trial courts to exclude music from victim-impact evidence, except in cases where a victim's musical gifts were part of that individual's unique contribution to the community. IB 81. A trial court's decision to admit victim impact testimony is reviewed for an abuse of discretion. *Kalisz v. State*, 124 So.3d 185, 211 (Fla. 2013).

Sentencing judges have broad discretion to admit a victim impact statement, which limits to identifying the victims and the crime's impact on them and their family but imposes no restriction on the manner of presentation. Traditionally, during the sentencing phase of a capital trial, a member of the victim's family would go before the court and read aloud into the record a written statement of victim-impact evidence "to inform the judge or jury of the financial, physical, and psychological impact of the crime on the victim and the victim's family."³³ But with technological advances in the courtroom,

³³ BLACK'S LAW DICTIONARY (9th ed. 2009)

victim impact is no longer limited to just the words of the family members. The presentation has evolved to include photographs, videos, and now background music.

The possibility that evidence may in some cases be unduly inflammatory does not justify a prophylactic rule that this evidence may never be admitted. *Payne v. Tennessee*, 501 U.S. 808, 831 (1991). The current standard governing the admissibility of victim-impact evidence already restricts any evidence that would unduly prejudice the jury and lead to an unfair trial.³⁴

With regard to the admissibility of music during victim impact statements, different jurisdictions have drawn the line of admissibility differently. A common thread, however, is the necessity that the trial court review any video evidence before it is presented at the sentencing hearing so that the court can exclude irrelevant, cumulative, or overly prejudicial material. The sentencing judge has the duty to ensure that the defendant's due process rights are not violated by the court's consideration of evidence “so unduly prejudicial that it renders the trial fundamentally unfair.” *State v.*

³⁴ *Payne v. Tennessee*, 501 U.S. 808 (1991).

Graham, 513 P.3d 1046, 1069 (Alaska 2022). Thus, when determining whether to permit the use of music in victim-impact evidence, courts must determine whether the music is so emotionally evocative it reaches a prejudicial level of emotion that would render the trial unfair.

The first widely cited case applying *Payne*'s guidelines to the admission of music during VIS was *Salazar*, decided in 2002. There, the Texas Court of Criminal Appeals rejected a picture montage set to music. The defendant, a sixteen-year-old special-education student, was convicted of murder and sentenced to death. During sentencing, the state showed a video tribute of the victim consisting of 140 photographs set to the music of "Storms in Africa" and "River" by Enya and Celine Dion's "My Heart Will Go On." shop's life. *Salazar v. State*, 90 S.W.3d 330, 333 (Tex. Crim. App. 2002). The court held that admitting the video was reversible error. Describing the video as "lengthy, highly emotional, and barely probative of the victim's life at the time of his death," with background music that "greatly amplifie[d] the prejudicial effect of the original error," the Texas appellate court held that the probative value of the video was "substantially outweighed" by its risk of unfair prejudice. *Id.* at 337–

39. Furthermore, it was an abuse of discretion to admit the videos over objection without reviewing them beforehand to ensure that their contents comported with the constitutional limits and the twin purposes of victim impact evidence laid out in *Payne*. The case was remanded back for the sentencing judge review the video tribute evidence for relevance, prejudice, and cumulativeness.

A district court in Massachusetts refused to allow a similar video tribute in *Sampson*, excluding a memorial video of the victim that featured “evocative” and “poignant” music that “would have inflamed the passion and sympathy of the jury”. *United States v. Sampson*, F. Supp 2d 166, 191-93 (D. Mass. 2004). There the government sought to introduce a memorial video of the college victim during the sentencing. The video was made in preparation of a memorial service, lasted twenty-seven minutes, included over 200 photographs, in roughly chronological order, from the time he was born until the time just before his death and was set to background music of The Beatles and James Taylor. *Id.* at 191.

A professionally produced seventeen-minute video entitled “A Tribute to Officer James Hess” was played at sentencing in *State v. Hess*, 207 N.J. 123, 158–59, 23 A.3d 373, 393–94 (2011). The video

displayed approximately sixty still photographs and four home-video clips of the victim in various activities and phases of his life. The video included photographs of the victim's childhood and his tombstone and a television segment covering his funeral. Three poems scrolled over the photographs and video clips. The video was scored to popular, holiday, country, religious, and military music. *Id.* The court held that the music and the photographs of the victim's childhood and of his tombstone, and the television segment about his funeral should have been redacted from the video because they contained *little to no probative value, but instead have the great capacity to unduly arouse or inflame emotions. Id.* (emphasis added).

In comparison, the video shown to the jury in Loyd's case lasted 1 minute and 32 seconds, set to music containing no lyrics. *See State v. Leon*, 142 Idaho 705, 710, (Ct. App. 2006) (the musical accompaniment was not found to be unduly inflammatory or manifestly unjust, noting that the entire DVD presentation was only four-and-one-half minutes in length, and therefore offered only a "quick glimpse of the life petitioner chose to extinguish."). Although it is conceivable that a video or photographic presentation could be so prejudicial or inflammatory in its design or content that its

consideration by the sentencing court would result in “manifest injustice,” that is not the case here. Moreover, even if there was an error, such error was harmless. The addition of music to the photographic montage did not inflame the passions of the jury any more than the facts of the crime. *See Payne*, 501 U.S. at 832.

Appellant has not established, and cannot establish, an abuse of discretion in the trial court's admission of music during the State's presentation of victim impact evidence.

POINT SEVEN

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE DEFENDANT COMPETENT TO BE SENTENCED.

Standard of review. Next, Loyd claims the court abused its discretion in finding Loyd competent to proceed. A trial court's decision regarding a determination of competency is subject to review for abuse of discretion, and the trial court's resolution of factual disputes will be upheld if supported by competent, substantial evidence. *Larkin v. State*, 147 So.3d 452, 464 (Fla. 2014). The test for determining a defendant's mental competence is whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he

has a rational as well as factual understanding of the proceedings against him.” *Id.*

When expert testimony regarding a defendant's competency is in conflict, this Court has traditionally afforded great deference to the trial court's resolution of that factual dispute. “It is the duty of the trial court to determine what weight should be given to conflicting testimony.” *Mason v. State*, 597 So. 2d 776, 779 (Fla. 1992). Appellant claims since there were no conflicts in the evidence, the record does not reflect a reasonable resolution of conflicting expert opinion which is supported by competent, substantial evidence. (IB 86) The record is clear that the opinions of the mental health specialists who testified on Loyd’s behalf all had inconsistent, and often contradictory opinions. Even if this Court found that there were no conflicts, the reports of experts are ‘merely advisory to the [trial court], which itself retains the responsibility of the decision. *Hunter v. State*, 660 So. 2d 244, 247 (Fla. 1995)(quoting *Muhammad v. State*, 494 So. 2d 969, 973 (Fla. 1986)).

Loyd further alleges that the testimony that Drs. Amador and Danziger gave regarding competency was disregarded by the trial judge amounting to an abuse of discretion. (IB 86) Contrary to Loyd’s

allegations, in finding Loyd competent to proceed, the trial judge considered all the testimony and evidence presented. In an eleven-page order filed on February 27, 2022, the trial court found that based on the court's observations, experience, and Dr. Oses' opinion, Loyd was competent to proceed to trial. *McCray v. State*, 71 So.3d 848, 861–62 (Fla. 2011) (R 4779-89):

1. Whether the Defendant has a Factual Understanding of the proceedings.

Dr. Amador's testimony focused exclusively on the Defendant's ability to discuss his case rationally with his lawyers and his ability to conform his conduct in the courtroom. Dr. Amador presented no additional evidence as to any other factor, indicating he focused on those 2 factors alone. Nothing prevented him from evaluating the other factors.

Drs. Danziger and Oses both opined that the Defendant has a factual understanding of the proceedings against him, the charges against him, the range and nature of the penalties, including the fact he might be sentenced to death. The Defendant understands the prosecutors are against him. The Defendant understands that his lawyers are supposed to be working for him, although he informed the doctors that he feels they are acting against his interests. Both doctors believe the Defendant can manifest appropriate courtroom behavior if he chooses.

The testimony of these two doctors who evaluated those factors as required by Fla. R. Crim.P. 3.211 establish that the defendant has a factual understanding of the proceedings in this case.

2. Whether the Defendant has a Rational Understanding of the Proceedings:

Drs. Danziger and Amador opined that the Defendant does not have a rational understanding of the case and cannot communicate effectively with his lawyers. Both doctors are of the opinion that the voices the Defendant says he hears are a sign of psychosis and that he is mentally ill. Dr. Amador believes the Defendant is Schizophrenic and psychotic. Dr. Danziger believes he suffers from Other Schizophrenia Spectrum and Psychotic Disorders, and antisocial personality disorder. Both doctors believe his mental illness prevents him from rationally discussing his case with his lawyers.

During interviews with Drs. Amador and Danziger, the Defendant discussed his beliefs about the historical treatment of blacks and his assertion that the judge and the prosecutors were slave masters seeking to kill him. Additionally, the two experts report that the Defendant has fixated on factual issues related to his convictions for the murder of Ms. Sade Dixon, her unborn child, and the attempted murder of Ms. Dixon's brother Ron Stewart in Orange County case 2016-CF- 15738. The doctors report that the Defendant continues to insist that the bodies of Ms. Dixon and Ron Stewart were moved and that testing the blood found at the scene will prove this and prove his innocence. He claims that the judge, the lawyers, and the police are all conspiring to assure his conviction. In his interviews with the doctors, the Defendant would constantly and repeatedly speak about this issue. Dr. Danziger testified that the Defendant's counsel had informed him that they could not communicate with the Defendant effectively due to this behavior. Because of the Defendant's continuing aggressive pursuit of the prior case, the doctors opine that Defendant does not have a rational understanding of the present case and cannot communicate effectively with his counsel. Both doctors have opined that the Defendant is incompetent to proceed for the preceding reasons.

Dr. Oses, having heard the same information as Drs. Amador and Danziger throughout her interview with the Defendant, diagnosed him with antisocial personality disorder. Unlike Drs. Danziger and Amador, Dr. Oses testified that when the Defendant would begin speaking about these matters in response to questions, she would redirect him to the question, which he would then answer. She testified that happened "most of the time," leaving the Court the impression there were some times he refused to be redirected. Dr. Oses also noted that the Defendant informed her he was planning on acting out in Court. She noted that this statement confirmed the volitional nature of his outbursts. Dr. Oses opined that the Defendant is competent to proceed.

The expert opinions about the Defendant's competency are to be considered, but the decision as to the Defendant's competency is solely the Court's responsibility. *See Peede v State*, 955 So. 2d 480, 488-489 (Fla. 2007) (citations omitted). The experts testimony is conflicting, and the Court must now turn to its experience and observations of the Defendant in numerous court proceedings. *Id.*

The Court has had the opportunity to observe and interact with the Defendant since 2019. These observations have included numerous motion hearings and his two capital trials, which included penalty phases and involved daily contact with the Defendant for weeks on end. In the present case, where Defendant is facing sentencing after a December 8, 2021 recommendation of death by the jury, this Court has had the opportunity to observe and interact with the Defendant on numerous occasions. The Court has also reviewed the numerous pro se motions filed by the Defendant.

The Court's observations have been consistent throughout all the above but will discuss the trial in the present case as it is closest in time to the assertion of incompetence by the defendant.

During this trial, the Defendant actively participated in his defense throughout the trial. He would object to

lawyers ending their examination of a witness and confer with them as to further questions. At times the lawyers did not ask the questions. On other occasions, they read the Defendant's written question or just asked the question. At no time did the Defendant appear to have trouble following testimony, nor did the lawyers indicate an issue with his competence to this Court. He constantly communicated with his attorneys at counsel table.

The Defendant spent several hours on the stand testifying at length during the trial. He answered questions that were asked of him about this case without difficulty. He reviewed a video of the shooting frame by frame with his attorney. He explained in detail his version of what happened and why he shot Lt. Clayton. He maintained his innocence. He claimed Lieutenant Clayton was trying to murder him and was first to fire her weapon and that "he stopped shooting when she stopped shooting. During his testimony, he remained alert, focused, and attentive.

Of particular note is that during testimony the Defendant stopped several times to inquire directly of the Court about matters that the Court had ruled inadmissible. His inquiry would recognize the previous ruling, and he would ask if he could speak about the issue. When the Court ruled that he could not, he would move on. It was clear that he had been instructed on what he could discuss on the stand; he understood those instructions, the Court's rulings, and what those rulings meant in terms of testifying. This Court notes there was absolutely nothing about his testimony that would cause anyone, let alone the Court, to think he did not have a rational understanding of the proceedings and an ability to communicate with his lawyers about them.

During the trial(s) (and motion hearings) the Defendant would repeatedly exhibit a pattern of commentary loud enough to be heard. This was particularly true during the State's case-in-chief. When the Court would admonish him, the Defendant would lapse into silence.

During the State's closing arguments the Defendant became increasingly loud and disruptive.

After admonishing him several times, the Court ordered him removed. The Defendant argued for a brief period and then indicated he would behave and asked the Court, "Can I stay?" Given permission to remain in the courtroom, he behaved for the remainder of the closing argument.

This Court notes that throughout his trial the Defendant demonstrated an ability to control himself when he wished to. Dr. Amador's findings of incompetence based on Defendant's actions or words during the trial are not supported by the record nor by the Court's observations.

The Court further notes that none of the doctors observed the trial or read the entire transcript.

In addition to the expert testimony as to competency, at least five or more doctors examined the Defendant during the trial and penalty phase, including defense experts. None indicated any concerns with his competence. Also, during the last five years of the Defendant's incarceration pending trial, no evidence has been presented of the Defendant being treated for or having any need of psychiatric care at the county jail. He was examined immediately after the jury's death recommendation and no issues were noted.

Based on the testimony of Dr. Oses who evaluated the competency factors as required by Fla. R. Crim.P. 3.211 and the Court's observations of the Defendant this Court finds that the Defendant has a reasonably rational understanding of the proceedings against him.

As a special note, during the hearing on February 21, 2022, defense counsel gave vague hints, but offered no evidence, about their concerns about the Defendant's competence during the preceding trial. Although what the lawyers say is not evidence, the Court feels compelled to make certain observations, so that the record is clear.

The Defendant's counsels are neither timid nor diffident in defending their client. During the trial and in

the preceding case, the defense team has been active with both objections and motions.

[FN1] In fact, in one memorable moment in the present case, the defense moved for a mistrial (later withdrawn) on the basis of what a group of people watching on the Internet thought had happened in the courtroom and had posted on the internet.

An example of this attentiveness regarding the Defendant's mental health is the action of lead counsel, Terrance Lenamon, who filed a Motion to Determine Competence in August of 2019 prior to the Defendant's first trial (2016-CF-15738-A-0). Mr. Lenamon expressed concerns about Defendant's paranoia and ramblings.

[FN2] After examination, the Defendant was found competent to proceed. August 13, 2019.

Based on the record before the Court at this time and the Court's observations, the Court does not find the implication that the defense team failed to notice or bring to the Court's attention that the defendant was incompetent during this trial credible.

A discussion of Drs. Amador and Danziger's opinions about the defendant's continuing to discuss bodies being moved and blood testing is warranted.

This Defendant has been discussing this issue for years. His lawyers have filed motions at his request regarding this issue, and he testified to it in the previous trial. That jury rejected the idea. The Defendant presents this claim to the Court at every opportunity. This Court notes that this has not prevented the Defendant from testifying to his version of events in this case nor answering questions, even when the Court has indicated to him that the blood/bodies issue is not going to be discussed at that time. As Dr. Oses noted, while the

Defendant does talk about this issue, he can be redirected, and this Court sees that as a choice.

Additionally, the Defendant, in this case, has filed numerous pro se motions. He asked to represent himself and was granted that right in August 2021. After struggling to do so because of the restrictions placed upon inmates, he stated in Court that the restrictions made it impossible to represent himself and asked to have his lawyers reappointed. These are not the actions of an incompetent defendant.

This Court finds that Dr. Oses observations and opinions are supported by the Court's extensive observations of the Defendant over three years. The Court has observed no significant change in the Defendant's behavior in that time. He has previously been examined and found competent to proceed during this time. The Court recognizes that the issue is whether he is competent to proceed at this time. Dr. Amador's opinion was based on an incomplete assessment. The Court notes that nothing prevented him from conducting a full assessment he just chose not to address many factors. The Court is left to consider Dr. Danziger's opinion.

The Court accepts that the Defendant suffers from some mental illness, however, that does not necessarily equate with incompetence to proceed to sentencing. See *Thompson v State*, 88 So. 3d 312, 319 (Fla. 4th DCA 2012) (quoting *Card v. Singletary*, 981 F.2d 481, 487-88 (11th Cir. 1992)). Dr. Danziger is very well known to the Court, and his opinion has been accepted many times. However, this Court finds the opinion of Dr. Oses to be more reliable and therefore more credible than that of Dr. Danziger in this case based on the factual bases of Oses opinion coupled with this Court's interactions with and observations of the Defendant now and over the course of these cases. To accept Dr. Danziger's opinion, the Court would have to find that a

Defendant who knows:

a. what the judge, prosecutor, and defense's role are,

- b. knows he is being sentenced for the murder of Debra Clayton,
- c. knows the sentence can be life or death,
- d. knows he can appeal that sentence, and
- e. has repeatedly demonstrated the ability to talk about his version of why he shot Debra Clayton.

is not competent because he simply refuses to accept his guilt and espouses a defense theory that has been rejected by two separate juries. Dr. Oses was able to redirect him from this topic, indicating he has the present ability to communicate with his lawyers. The Court understands that Dr. Danziger believes this is a product of his mental illness, making him incompetent.

However, this Court notes that nothing has occurred since the jury recommended death that is different from before the jury recommended death. Based on the Court's observations, experience, and Dr. Oses' opinion, the Court finds:

The defendant has a factual understanding of the proceedings in this case. None of the experts has testified otherwise. The Court further finds the defendant has a rational understanding of the proceedings in this case. The defendant understands the role of the Court, the prosecutors, and defense counsel. The defendant understands and appreciates the charges and allegations against the defendant and the nature of possible penalties in this case. He understands the adversary nature of the legal process. He can, if he wishes, manifest appropriate courtroom behavior and testify relevantly.

Therefore, the Court finds the Defendant, in this case, Markeith Loyd, is competent to proceed.

(R 4779-89)

Although two experts testified that they believed Loyd was not competent to stand trial, the trial court relied on one expert who

testified that defendant was competent to stand trial, and the trial court personally observed defendant's behavior in the courtroom and expressly relied on this observation as one basis for its determination. Loyd argues that because the trial court relied extensively on the expert opinion of Dr. Oses, it is clear the trial court disregarded the conflicting expert testimony offered by Drs. Amador and Dr. Danziger. However, the order reflects that the trial court considered all the testimony introduced during the hearing in making its final determination. Although the experts disagreed with the ultimate conclusion regarding Loyd's competency, the trial court resolved that disagreement in favor of finding Loyd competent based on all the evidence before her.

In *Barnes*, this Court noted that the defendant filed and argued motions, lodged objections and comported himself well in court. Barnes also appeared alert and knowledgeable and made clear that he understood the consequences of self-representation and of entering a guilty plea. *Id.* at 913. In fact, the trial judge in *Barnes* made comments similar to the trial judge here, specifically remarking on Barnes's demeanor and competence in his presentation. *Id.* Equally applicable here is the reasoning from *Card v. Singletary*, 981

F.2d 481, 487-88 (11th Cir. 1992), upon which this Court relied in *Barnes*, noting, “[n]ot every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges.” *Barnes*, 124 S. 3d at 913.

Accordingly, there is competent, substantial evidence to support the trial court's resolution of the conflicting testimony and that the trial court did not abuse its discretion in finding Loyd competent.

POINT EIGHT

FELONS WERE PROPERLY EXCLUDED FROM THE JURY POOL; APPELLANT LACKS STANDING TO ARGUE VIOLATION OF THE VENIREMENS’ EQUAL PROTECTION RIGHTS.

Appellant next argues that felon exclusion violates the equal protection rights of felons. And while Appellant relies on *Powers*³⁵ to establish standing, the right being violated is that of the juror, not of the Appellant.

³⁵ *Powers v. Ohio*, 499 U.S. 400 (1991), was a United States Supreme Court case that re-examined the *Batson* Challenge. Established by *Batson v. Kentucky*, 476 U.S. 79 (1986), the *Batson* Challenge prohibits jury selectors from using peremptory challenges on the basis of race, ethnicity, gender, and sex. *Powers* expanded the

Nevertheless, the argument that felon exclusion violates the equal protection rights of felons has consistently failed. Not everyone has the *right to serve* as a juror. What one does have, as recognized by the United States Supreme Court and our own supreme court, is the constitutional *right not to be excluded* from jury service *on the basis of racial, gender, or ethnic discrimination*. *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Alen*, 616 So. 2d 452 (Fla. 1993). It is clear, however, that there can be no violation of equal protection where there is no protected class, and merely showing the existence of a distinct group, is not sufficient. *Bryant v. State*, 386 So. 2d 237, 240 (Fla. 1980).

No court has ever held that, as a matter of federal constitutional law, jury service is a fundamental right entitled to strict or even heightened scrutiny. Moreover, felons are not entitled to strict scrutiny as a suspect class. Any such case would rely heavily on *Hunter v. Underwood*, 471 U.S. 222 (1985) in which the Supreme Court struck down a felon disenfranchisement provision on grounds

jurisdictions of this principle, allowing all parties within a case, defendants especially, to question preemptory challenges during a jury selection, regardless of race.

that it was a thinly veiled Jim Crow law. However, the fatal flaw with the provision in *Hunter* was that disenfranchising crimes were chosen (and enforced) so that black people would be affected vastly more than white people. Most states have changed their felon exclusion laws since 1900, and Florida excludes all felons rather than some.

Accordingly, this claim should be denied.

POINT NINE

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING APPELLANT'S PROPOSED JURY INSTRUCTIONS ON MERCY.

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

In addition to the standard jury instructions being offered by the court, Loyd proposed a special instruction with two alternative options:

The Defendant requests the following instruction:

Even when death is a possible sentence, each juror must decide based on his or her own moral assessment, whether life imprisonment without the possibility of parole, or death, should be imposed. Regardless of your findings, the law never requires nor compels any juror to return a sentence of death. You may always consider mercy in making this determination of the appropriate sentence. Every juror has the right to vote for a sentence of life imprisonment without the possibility of parole.

In the alternative, the Defense requests the following:

Regardless of your findings, the law never compels nor requires any juror to return a sentence of death. You may always consider mercy in making this determination. Mercy itself is sufficient to justify a sentence of life without the possibility of parole.

In the alternative, the Defense requests the following:

Regardless of your findings, the law never compels nor requires any juror to return a sentence of death. You may always consider mercy in making this determination.

(R 2576). The request was denied.

Appellant asserts that precluding consideration of mercy, in the absence of a mercy instruction amounted to structural error. The instructions proposed by Loyd were not required to ensure the consideration of mitigating factors. The “failure to give special jury instructions does not constitute error where the instructions given adequately address the applicable legal standards.” *Coday v. State*, 946 So. 2d 988, 994 (Fla. 2006) (quoting *Stephens v. State*, 787 So.

2d 747, 755 (Fla. 2001)); *Flowers v. State*, 158 So.3d 1009, 1066 (Miss. 2014), *cert. granted, judgment vacated on other grounds*, 136 S. Ct. 2157 (2016) (although the court stated that the life without parole option was stated more clearly in D-39 than in the omnibus instruction, it cannot be said that the jury was not given the instruction. The trial court did not err in refusing instruction D-39).

As here, the standard penalty phase jury instructions sufficiently obviated the need for a specific instruction regarding mercy or sympathy. The standard jury instructions specifically instructed the jurors regarding the concepts contained in Loyd's proposed jury instruction regarding mercy. See Fla. Std. Jury Instr. 7.11 (Crim.) ("Regardless of the results of each juror's individual weighing process—even if you find that sufficient aggravators outweigh the mitigators—the law neither compels nor requires you to determine that the defendant should be sentenced to death."). Additionally, Appellant was able to argue mercy in closing argument, to wit:

MR. LENAMON: Mercy is not about just emotion. Mercy comes from the heart..... Each of you have your own definition of mercy. I can't tell you what one juror's definition from the other. It's an individual process. And with mercy alone, you can find life in this case.

(TT 7503)

This Court has rejected similar claims regarding jury instructions on the role of sympathy. *Bush v. State*, 295 So.3d 179, 210 (Fla. 2020); *Downs v. Moore*, 801 So. 2d 906, 913 (Fla. 2001); *Moore v. State*, 820 So. 2d 199, 210 (Fla. 2002); *Zack v. State*, 753 So. 2d 9, 23–24 (Fla. 2000); *Hunter v. State*, 660 So. 2d 244, 253 (Fla. 1995).

Appellant’s claim for relief on this issue should also denied.

POINT TEN

THE CONSTITUTION DOES NOT PROHIBIT THE STATES FROM ‘DEATH QUALIFYING’ JURIES IN CAPITAL CASES.

Standard of review: Appellant argues that the Supreme Court should revisit its views on death-qualification. Once again, no relief is warranted on this claim, which has been repeatedly rejected by this Court as well as the United States Supreme Court.

The United States Supreme Court has explicitly rejected the argument that death qualification deprives a defendant of a jury comprised of a fair cross section of the community. *Lockhart v.*

McCree, 476 U.S. 162, 176–77 (1986). This Court has similarly recognized that there is no constitutional infirmity in the “death qualification” of a jury in a capital case. *See San Martin v. State*, 705 So. 2d 1337, 1343 (Fla.1997) “Indeed, any group ‘defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case may be excluded from jury service without contravening any of the basic objectives of the fair-cross-section requirement.” *San Martin v. State*, 705 So.2d 1337, 1343 (Fla. 1997), *citing Lockhart*, 476 U.S. at 176-77.

The United States Supreme Court also noted in *Lockhart* that not all prospective jurors who oppose the death penalty are subject to removal for cause in capital cases; “only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case.” *San Martin*, 705 So. 2d at 1343, *citing Lockhart*, 476 U.S. at 176. The standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) 31 (*quoting Adams v. Texas*, 448 U.S. 38, 45 (1980)).

This claim is meritless and foreclosed by binding precedent.

POINT ELEVEN

CAPITAL PUNISHMENT DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT OF THE FEDERAL CONSTITUTION.

Standard of review: Appellant's next challenges the validity of the death penalty as a sentencing option. This Court reviews constitutional challenges to statutes de novo. *Braddy v. State*, 219 So.3d 803, 819 (Fla. 2017). Once again, no relief is warranted on this claim, which has been repeatedly rejected by this Court as well as the United States Supreme Court.

The only authority cited by the appellant to support his argument is Justice Breyer's dissenting opinion in *Glossip v. Gross*, 576 U.S. 863 , 908-947 (2015). The actual holding of *Glossip* upheld the practice of judicial execution and fully refutes the appellant's claim. See also *Baze v. Rees*, 553 U.S. 35, 47 (2008); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976); *Correll v. State*, 184 So.3d 478 (Fla. 2015); *Mann v. State*, 112 So.3d 1158, 1162 (2013).

The High Court has repeatedly held capital punishment constitutional.³⁶ Historically, the Eighth Amendment was understood to bar only those punishments that added “ ‘terror, pain, or disgrace’ ” to an otherwise permissible capital sentence.³⁷ Appellants attempt to redefine “cruel” to mean “unreliable,” “arbitrary,” or causing “excessive delays,” and “unusual” to include a “decline in use,” offers up a white paper devoid of any meaningful legal argument.³⁸

While Appellant draws a connection between unreliability and the number of exonerations to date, the reality is that it is the

³⁶ *Baze v. Rees*, 553 U.S. 35, 47 (2008) (“We begin with the principle, settled by *Gregg*, that capital punishment is constitutional” and observing it “necessarily follows that there must be a means of carrying it out.”) (emphasis added but citation omitted); *McCleskey v. Kemp*, 481 U.S. 279, 299-319 (1987) (rejecting an Eighth Amendment as-applied challenge to the death penalty based on a study and observing the “Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment” and that “the Constitution does not place totally unrealistic conditions” on the use of capital punishment); *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding the punishment of death for the crime of murder did not violate the Eighth Amendment).

³⁷ *Glossip v. Gross*, 576 U.S. 863, 894–95 (2015) (J. Scalia, concurring) (citing *Baze v. Rees*, 553 U.S. 35, 96 (2008)).

³⁸ *Id.* (J. Scalia, concurring).

convictions, not punishments, that are unreliable.³⁹ Nor are Appellant's claims regarding the arbitrary application of the death penalty compelling. The argument that death sentences do not necessarily correspond to the "egregiousness" of the crimes, but instead appear to be correlated to "arbitrary" factors, such as the locality in which the crime was committed, fails to respect the values implicit in the Constitution's allocation of decision-making in this context.⁴⁰ We rely on juries to make judgments about the people and crimes before them. The fact that these judgments may vary across cases is an inevitable consequence of the jury trial. But when a punishment is authorized by law—if you kill you are subject to death—the fact that some defendants receive mercy from their jury no more renders the underlying punishment "cruel" than does the fact that some guilty individuals are never apprehended, are never tried, are acquitted, or are pardoned.⁴¹ As for the argument that delay undermines the penological rationales for the death penalty by

³⁹ *Id.* (J. Scalia, concurring).

⁴⁰ *Id.*, at 901 (J. Thomas, concurring).

⁴¹ *Id.*, at 896 (J. Scalia, concurring).

subjecting inmates to long periods on death row, life without parole is an even lengthier period than the wait on death row; and if the objection is that death row is a more confining environment, the solution should be modifying the environment rather than abolishing the death penalty.⁴²

Appellant also claims capital punishment violates the Eighth Amendment because it is contrary to the “evolving standards of decency. The evolving standards of decency standard certainly does not require that States in the majority adopt the view of States in the minority. Moreover, basing the evolving standards of decency on mere trends undermines the States’ independent sovereignty, which is at its highest when the issue concerns a state’s police powers and the criminal law. *United States v. Morrison*, 529 U.S. 598, 618 (2000) (noting police power was denied to the National Government and reposed in the States by the Founders); *United States v. Lopez*, 514 U.S. 549, 561, n.3 (1995) (“Under our federal system, the States possess primary authority for defining and enforcing the criminal

⁴² *Id.*, at 896 (J. Scalia concurring).

law” citing cases). Florida should not be required to do what other states have done based merely on trends in those other states.

As this claim is defeated as a matter of law, this Court must deny relief.

POINT TWELVE

APPELLANT’S MENTAL ILLNESS DOES NOT CATEGORICALLY BAR EXECUTION OR VIOLATE THE EIGHTH AMENDMENT’S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Standard of review: Appellant asserts that his death sentence violates the Eighth Amendment’s prohibition against cruel and unusual punishment due to his mental health. This Court reviews constitutional challenges to statutes de novo. *Braddy v. State*, 219 So.3d 803, 819 (Fla. 2017). Once again, no relief is warranted on this claim, which has been repeatedly rejected by this Court as well as the United States Supreme Court.

Appellant’s alternative argument, that the death penalty is unconstitutional as applied to him due to his mental and intellectual deficits, cites no supporting authority whatsoever. The Eighth Amendment broadly protects two classes from execution: people who are intellectually disabled and minors. *Atkins v. Virginia*, 536 U.S.

304 (2002) (intellectual disabilities); *Roper v. Simmons*, 543 U.S. 551 (2005) (minors). This Court has repeatedly declined to extend *Atkins*, to defendants that are mentally ill but do not suffer intellectual disability. It cannot be disputed that *Atkins* and *Hall* do not apply to Loyd's case because he was/is not intellectually disabled, and his intellect was *never* in dispute or made an issue.

This Court has previously held that the Eighth Amendment's prohibition of cruel and unusual punishment does not require a categorical bar against the execution of persons who suffer from any form of mental illness or brain damage. *McKenzie v. State*, 153 So.3d 867, 884-85 (Fla. 2014) (noting "neither this Court nor the United States Supreme Court has recognized mental illness as a per se bar to execution," citing *Power v. State*, 992 So. 2d 218, 222 (Fla. 2008); *McCoy v. State*, 132 So.3d 756, 775 (Fla. 2013) (rejecting the argument that capital defendant was "so severely mentally ill" that he is in "the class of persons similar to those" under the age of eighteen and with "mental retardation, who are categorically excluded from being eligible for the death penalty"); *Muhammad v. State*, 132 So.3d 176, 207 (Fla. 2013) (holding execution of a capital defendant who suffers from schizophrenia and paranoia does not

constitute cruel and unusual punishment); *Carroll v. State*, 114 So.3d 883, 886–87 (Fla. 2013) (holding that similar claims that mental illness bars the death penalty have been rejected on the merits); *Simmons v. State*, 105 So.3d 475, 511 (Fla. 2012) (holding claim that persons with mental illness must be treated similarly to those with intellectual disability due to reduced culpability to be without merit); *Schoenwetter v. State*, 46 So.3d 535, 562-63 (Fla. 2010) (holding “mental illness does not serve as a bar to execution under *Atkins*” and mental and psychological disorders or conditions may be considered as mitigation circumstances); *Johnston v. State*, 27 So.3d 11, 26 (Fla. 2010) (finding no merit in the claim that mentally ill persons are similar to and should be treated the same as juvenile murderers who are exempt from execution); *Lawrence v. State*, 969 So. 2d 294, 300 n. 9 (Fla. 2007) (rejecting assertion that the Equal Protection Clause requires extension of *Atkins* to the mentally ill due to their reduced culpability).

Likewise, other courts have rejected the argument that the Equal Protection Clause of the United States Constitution requires that the decision in *Atkins* be extended to the mentally ill. *Lewis v. State*, 620 S.E. 2d 778, 786 (Ga. 2005) (declining to extend *Atkins* to

the mentally ill); *State v. Hancock*, 840 N.E. 2d 1032, 1059-1060 (Ohio 2006) (declining to extend *Atkins* to the mentally ill because mental illnesses come in many forms and different illnesses may affect a defendant in different ways and to different degrees, thus creating an ill-defined category of exemption from the death penalty without regard to the individualized balance between aggravation and mitigation in a specific case); *Dunlap v. Kentucky*, 435 S.W. 3d 537, 616 (Ky. 2013), as modified (Feb. 20, 2014) (“We are not prepared to hold that mentally ill persons are categorically ineligible for the death penalty.”); *Commonwealth v. Baumhammers*, 960 A. 2d 59, 96 (Pa. 2008) (rejecting a substantially similar argument); *State v. Dunlap*, 313 P. 3d 1, 36 (Idaho 2013) (“It appears that every court that has considered this issue have refused to extend *Atkins* and hold that the Eighth Amendment categorically prohibits execution of the mentally ill.”); *People v. Castaneda*, 254 P. 3d 249, 290 (Ca. 2011) (holding that antisocial personality disorder is not analogous to mental retardation or juvenile status for purposes of imposition of the death penalty); *Mays v. State*, 318 S.W. 3d 368, 379 (Tex. Crim. App. 2010) (noting absence of authority to support claim that mental illness renders one exempt from execution under the Eighth Amendment);

State v. Johnson, 207 S.W. 3d 24, 51 (Mo. 2006) (noting that “federal and state courts have refused to extend *Atkins* to mental illness situations”); *Malone v. State*, 293 P. 3d 198, 216 (Okla. Crim. App. 2013) (“Appellant cites no cases from any American jurisdiction that hold that the *Atkins* rule or rationale applies to the mentally ill We expressly reject that the *Atkins* rule or rationale applies to the mentally ill.”). Loyd’s assertion that the evolving standards of decency prohibit the execution of the mentally ill is refuted by the decisions of numerous courts that have considered and rejected similar claims.

Additionally, mental illnesses, in their various forms, are not treated the same as intellectual disability because they are, in fact, different. *Tigner v. Texas*, 310 U.S. 141, 147 (1940) (holding equal protection “does not require things which are different in fact or opinion to be treated in law as though they were the same”). There is no basis in law or fact for the proposition that the death penalty’s justifications of deterrence and retribution are not applicable to those with mental illnesses. Mental illness can be considered by the judge in sentencing as a mitigating factor, “thus providing the individualized determination that the Eighth Amendment requires in capital cases.” *Hancock* 840 N.E. 2d at 1059-1060.

This claim is meritless and foreclosed by binding precedent.

POINT THIRTEEN

FLORIDA’S CAPITAL SENTENCING SCHEME DOES NOT VIOLATE THE UNITED STATES OR FLORIDA STATE CONSTITUTIONS.

Standard of review: The appellant’s final challenge disputes the validity Florida’s capital sentencing scheme. This Court reviews constitutional challenges to statutes de novo. *Braddy v. State*, 219 So.3d 803, 819 (Fla. 2017). Once again, no relief is warranted on this claim, which has been repeatedly rejected by this Court as well as the United States Supreme Court.

Appellant asserts that Florida’s capital sentencing scheme does not limit the class of persons eligible for the death penalty and violates the Eighth Amendment due to 1) elimination of proportionality review;⁴³ 2) elimination of the special standard for reviewing circumstantial evidence;⁴⁴ and 3) an overprovision of aggravating factors. (IB 115). Loyd’s arguments are ones that this Court has consistently rejected or recently declined to reconsider.

⁴³ *Lawrence v. State*, 308 So.3d 544 (Fla. 2020).

⁴⁴ *Bush v. State*, 295 So.3d 179 (Fla. 2020).

Bush v. State, 295 So.3d 179, 214 (Fla. 2020); *Colley v. State*, 310 So.3d 2 (Fla. 2020); *Davidson v. State*, 323 So.3d 1241 (Fla. 2021); *Bell v. State*, 336 So.3d 211 (Fla. 2022); *Joseph v. State*, 336 So.3d 218 (Fla. 2022); *State v. Garcia*, 338 So.3d 847, 848 (Fla. 2022); *Rodriguez v. State*, 335 So.3d 168, 172 (Fla. Dist. Ct. App. 2021); *Bradwell v. State*, 300 So.3d 325, 327-28 (Fla. 1st DCA 2020), *review denied*, SC20- 1337, 2021 WL 276149 (Fla. Jan. 27, 2021). Because Loyd offers no new or persuasive argument or specific claim of error in his sentencing, this facial challenge to Florida’s capital sentencing scheme is meritless and should be rejected.

The constitutional protections Florida capital defendants are afforded ensure “a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” *See State v. Poole*, 297 So.3d 487, 495-96 (Fla. 2020). The existence of a statutory aggravating factor is but the first step in the sentencing process to narrow that class of persons eligible for the death penalty. It begins “with an evidentiary hearing before a jury and/or judge to hear evidence relevant to the nature of the crime and the character of the defendant, including

statutory aggravating and mitigating circumstances.” *Poole*, 297 So.3d at 495. Whether the sentencing fact finder is a jury or judge, at least one aggravating factor must be proven beyond a reasonable doubt. *Id.* at 491; *McKinney v. Arizona*, 140 S.Ct. 702, 707 (2020). Only then is the sentencer able to proceed to the sufficiency and weighing stage. § 921.141(2)(b), Fla. Stat. (2019). In the event of unanimous jury aggravation findings and death sentence recommendation, the trial court may still nonetheless impose a life sentence. § 921.141(3), Fla. Stat. (2019).

The *Colley* Court succinctly rejected the claim that Florida’s “legislative enactments have expanded the number of aggravating factors to the point where every first-degree murder conviction is eligible for a death sentence, in violation of the Supreme Court’s mandate” in *Furman*. *Colley v. State*, 310 So.3d 2, 15-16 (Fla. 2020), citing *Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006). The argument that Florida’s capital sentencing scheme was unconstitutional and failed to limit the class of persons eligible for the death penalty was also made in *Cruz v. State*, 320 So.3d 695, 730 (Fla. 2021). This Court rejected Cruz’s claim, relying in part on *Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003) (the argument that Florida’s capital sentencing

scheme “fails to limit the class of persons eligible for the death penalty” is meritless). ⁴⁵

Loyd ignores the undisputed fact that he became constitutionally eligible for the death penalty when the trial court found three aggravating factors were proven beyond a reasonable doubt. *See, e.g., Craft v. State*, 312 So.3d 45, 56 (Fla. 2020) and *Knight v. State*, 225 So. 3d 661, 683 (Fla. 2017). Only after this process was Loyd placed within a narrow class of persons *eligible* for the death penalty. The *number* of aggravating factors enumerated in Florida Statutes had no impact on the individualized eligibility findings.

Because this issue is well-settled at law, no relief is warranted. The issue should be rejected, and Appellant’s sentence affirmed.

The record establishes sufficient evidence of Appellant’s guilt, and this Court should affirm.

POINT FOURTEEN

THE TRIAL COURT ERRED IN DENYING THE STATE’S PROPOSED STANDARD JURY INSTRUCTIONS 7.10

⁴⁵ *Cruz* was reversed and remanded “for the limited purpose of resentencing by the trial court and a new sentencing order” where the defendant was improperly sentenced to death based on facts not admitted during the penalty phase. *Id.* at 723-24.

AND 7.11 AND VERDICT FORM 3.12(E) WHICH ARE IN CONFLICT WITH THIS COURT’S DECISION IN POOLE AND FLORIDA STATUTE 921.141.

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

Argument. In the wake of its opinion in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), this Court adopted Florida Standard Jury Instructions 7.10 and 7.11—“Preliminary Instructions in Penalty Proceedings—Capital Cases” (“*Preliminary Instructions*”) and “Final Instructions in Penalty Proceedings—Capital Cases,” (“*Final Instructions*”) respectively—in its opinion in *In re Std. Crim. Jury Instrs. in Capital Cases*, 244 So.3d 172, 174 (Mem.) (Fla. 2018). This Court explicitly adopted the current version of the *Preliminary Instructions* and the *Final Instructions* by citing to its opinion in *Hurst*. This Court’s opinion also made the following observation: “The changes to the standard criminal jury instructions were also warranted in light of chapter 2017-1, Laws of Florida, amending section 921.141, Florida Statutes (2016), which requires a jury to

unanimously determine that a defendant should be sentenced to death.” *Id.* at 173.⁴⁶ 921.141 reads in pertinent part, as follows:

(2) Findings and recommended sentence by the jury. -

- This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.

(a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).

(b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous. If the jury:

1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.

2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:

⁴⁶ This Court also stated that “in authorizing the publication and use of these instructions, we express no opinion on their correctness and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of these instructions”. *Id.* at 174.

- a. Whether sufficient aggravating factors exist.
- b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
- c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

(c) If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

Fla. Stat. § 921.141(2) (2019). Significantly, the statute only requires the jury unanimously find aggravating factors and unanimously recommend a sentence of death. The other components of the statute (found in (b)2, set out above) are a part of the weighing process, but unanimity is not required.

On January 23, 2020, this Court released its decision in *State v. Poole*, 297 So.3d 487 (Fla. 2020) and reached the following, clear conclusion: “Having thoroughly considered the State’s and Poole’s arguments in light of the applicable law, we recede from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a

reasonable doubt.” *Id.* at 508. The core principle in *Poole* is its explanation of the difference between “eligibility” for a death sentence and “selection” for such a sentence. As this Court has clarified, Florida’s capital sentencing process begins with a finding that the defendant is eligible for the death penalty, *i.e.*, a unanimous finding that a statutory aggravating factor has been proved beyond a reasonable doubt. *State v. Poole*, 297 So.3rd 487, 501 (Fla. 2020), *citing Tuilaepa v. California*, 512 U.S. 967 (1994). If that “eligibility phase” results in a finding favorable to the State, the case enters the “selection phase,” where the jury is tasked with determining the appropriate penalty. *Id.* That selection finding is not a “fact.” The ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy. The *Poole* Court made it clear that the jury is *not* required to unanimously agree that the aggravating factor or factors are sufficient to impose a sentence of death.⁴⁷ Thus, the decision upon which significant

⁴⁷ This is the § 921.141(2)(b)(2)(b) factor in the current statute. The *Poole* decision refers to the statute in effect at the time of that case. For purposes of this case, § 921.141(2)(b)(2)(b) is the pertinent provision.

portions of the current *Preliminary* and *Final Instructions* were based is no longer good law.

Prior to trial, the State filed a motion moving the trial court to modify Florida Standard Penalty Phase Jury Instructions 7.10 and 7.11, as well as Verdict Form 3.12(E) to mirror the state of the law as announced by this Court in its January 23, 2020 decision in *State v. Poole*, 297 So.3d 487 (Fla. 2020). (R 1628-1654) The State argued that the Preliminary and Final Instructions⁴⁸ needed to be updated to conform with the Court’s decision in *Poole* and the current, clear language of Florida Statute section 921.141. Specifically, the State sought an order eliminating any need for the jury to unanimously agree that the proven aggravating factors are sufficient to warrant death, or to unanimously agree that the aggravation outweighs the mitigation. (R 1631-33)

⁴⁸ State’s “Exhibit A,” “Exhibit B,” and “Exhibit C” were provided to the court with the conforming language. (R 1366-1654)

The State sought to delete the italicized portion⁴⁹ of the *Preliminary Instructions* to conform with the holding in *Poole* as follows:

You are instructed that this evidence [, along with the evidence that you heard during the guilt phase of this trial,] is presented in order for you to determine, as you will be instructed, (1) whether each aggravating factor is proven beyond a reasonable doubt; (2) *whether the aggravating factors found to exist beyond a reasonable doubt are sufficient to justify the imposition of the death penalty*; (3) *whether mitigating circumstances are proven by the greater weight of the evidence*; (4) *whether the aggravating factors outweigh the mitigating circumstances*; and (5) (2) whether the defendant should be sentenced to life imprisonment without the possibility of parole or death.

The State also argued that under *Poole*, the following portion of the *Preliminary Instructions* was incorrect⁵⁰, and should not be given:

Before moving on to the mitigating circumstances, you must determine that the aggravating factor[s] [is] [are] sufficient to impose a sentence of death. If you do not unanimously agree that the aggravating factor[s] [is] [are] sufficient to impose death, do not move on to consider the mitigating circumstances.

⁴⁹ This is the paragraph of the section of the *Preliminary Instructions* under the heading “Give this instruction in all cases.”

⁵⁰ This is the final paragraph of the section of the *Preliminary Instructions* under the heading “Aggravating Factors.”

Likewise, the *Final Instructions* contained the following, inaccurate, language⁵¹ which is indicated by italics:

Once each juror has weighed the proven factors, he or she must determine the appropriate punishment for the defendant. The jury's decision regarding the appropriate sentence must be unanimous if death is to be imposed. To repeat what I have said, *if your verdict is that the defendant should be sentenced to death, your finding that each aggravating factor exists must be unanimous, your finding that the aggravating factors are sufficient to impose death must be unanimous, your finding that the aggravating factor[s] found to exist outweigh the established mitigating circumstances must be unanimous, and your decision to impose a sentence of death must be unanimous.*

The State further sought to modify the verdict form to reflect that a unanimous finding is only required to (1) find the existence of an aggravating factor, and (2) recommend a sentence of death. (R 1633) The defense filed a written response. (R 1710-1717)

The trial court initially granted the State's motion finding "that the *Poole* decision does, in fact, say that the last two factors do not have to be found by a jury beyond a reasonable doubt. I also find that the case law in Florida is clear, including from the Supreme Court, and I don't remember the name of the case, but the trial court is to

⁵¹ This is the third paragraph following the listing of mitigating circumstances.

make sure that the jury instructions, regardless of what the standard jury instructions say, conform to the evidence in the case and conform to the existing law at the time the instructions are read”. (TT 274, 292, 5635, 5639, 5647) However, the court ultimately instructed the jury with the standard jury instructions. (TT 7421-22,7428-29; R4485;4488)

It is undisputed that the trial judge has “the responsibility of correctly charging the jury.” *State v. Floyd*, 186 So.3d 1013, 1022 (Fla. 2016). “That responsibility includes giving instructions that are not ‘confusing, contradictory, or misleading.’ ” *Routenberg v. State*, 301 So.3d 325, 328 (Fla. 2d DCA 2020) (*quoting Dooley v. State*, 268 So.3d 880, 885 (Fla. 2d DCA 2019)). The State argues that the language identified in both the *Preliminary Instructions* and the *Final Instructions* as well as the Verdict Form, is contrary to the explicit holding in *Poole*, is not a correct statement of the law, and should not have been given. In short, the burden is on the trial court to provide clear, correct, and complete instructions to the jury on what the law is and how it is to be applied. *Nichols v. State*, 312 So.3d 530, 533 (Fla. 2d DCA 2021).

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

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court to affirm the trial court's Judgments of Conviction and Sentence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPELLE'S ANSWER BRIEF/CROSS-INITIAL BRIEF has been furnished via e-portal to: **Nancy Ryan**, Assistant Public Defender, Email: ryan.nancy@pd7.org, coppello.renee@pd7.org, appellate.efile@pd7.org; **Robert Jackson Pearce, III**, Assistant Public Defender Email: pearce.robert@pd7.org, 444 Seabreeze Blvd., Suite 210, Daytona Beach, FL 32118 on this 15th day of November, 2022.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 14-point Bookman Old Style, and word count is 27,909 in compliance with Fla. R. App. P. 9.210 and 9.045.

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