

IN THE SUPREME COURT OF STATE OF FLORIDA

MARKEITH LOYD,

Appellant,

vs.

Supreme Court Case No. SC22-378

STATE OF FLORIDA,

Appellee.

_____ /

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

INITIAL BRIEF OF APPELLANT

MATTHEW J. METZ
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0765910
444 Seabreeze Boulevard, Ste. 210
Daytona Beach, Florida 32118
Phone: (386) 254-3758
ryan.nancy@pd7.org

ROBERT J. PEARCE, III
ASSISTANT PUBLIC DEFENDER
Florida Bar number 092955
444 Seabreeze Boulevard, Suite 210
Daytona Beach, Florida 32118
Phone(386)254-3758
pearce.robert@pd7.org
COUNSEL FOR APPELLANT

RECEIVED, 09/06/2022 03:46:24 PM, Clerk, Supreme Court

TABLE OF CONTENTS

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iv
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENTS	46
ARGUMENTS	
POINT ONE	
THE TRIAL COURT DISMISSED FOR CAUSE, OVER DEFENSE OBJECTIONS, VENIRE MEMBERS WHO WERE COMPETENT TO SERVE. SUCH AN ERROR IS NOT SUBJECT TO HARMLESS-ERROR REVIEW.	51
POINT TWO	
THE DEFENSE SOUGHT TO MODIFY THE STANDARD JURY INSTRUCTION ON INSANITY. THE TRIAL COURT ERRED IN DENYING THE PROPOSED CHANGE, WHICH WOULD HAVE CLARIFIED THE DEFENSE’S BURDEN OF PROOF.	56
POINT THREE	
THE STATE ARGUED THAT PREMEDITATION IS PROVED UNDER FLORIDA LAW IF THE DEFENDANT HARBORED THE REQUISITE INTENTION “DURING THE ACTUAL ACT.” THAT MISSTATEMENT OF LAW AMOUNTED TO FUNDAMENTAL ERROR ON THIS RECORD.	62

POINT FOUR

THE COURT OVERRULED OBJECTIONS TO IMPROPER ARGUMENT IN CLOSING ARGUMENT IN THE PENALTY PHASE. THE STATE MUST SHOW THERE IS NO REASONABLE POSSIBILITY THAT THE RULINGS CONTRIBUTED TO THE VERDICT. 66

POINT FIVE

THE DEFENSE SOUGHT TO MODIFY THE STANDARD JURY INSTRUCTION WHICH PLACES THE BURDEN ON THE DEFENSE TO PROVE THAT MITIGATING CIRCUMSTANCES EXIST. THE REQUEST SHOULD HAVE BEEN GRANTED, AS THE LEGISLATURE HAS ALLOCATED NO SUCH BURDEN. 73

POINT SIX

THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO VICTIM IMPACT EVIDENCE. 79

POINT SEVEN

THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THE DEFENDANT COMPETENT TO BE SENTENCED. 82

POINT EIGHT

FELONS WERE EXCLUDED FROM THE JURY POOL, VIOLATING THE VENIREMENS' EQUAL PROTECTION RIGHTS AS WELL AS APPELLANT'S RIGHTS. 87

POINT NINE

THE DEFENSE REQUEST FOR AN EXPRESS JURY
INSTRUCTION ON MERCY SHOULD HAVE BEEN
GRANTED. 93

POINT TEN

THE JURY WAS DEATH-QUALIFIED OVER OBJECTION. 96

POINT ELEVEN

THE DEATH PENALTY IS UNCONSCIONABLE. 101

POINT TWELVE

ATKINS SHOULD BE EXTENDED TO PROHIBIT THE
EXECUTION OF THE SEVERELY MENTALLY ILL. 108

POINT THIRTEEN

FLORIDA'S SCHEME RISKS THE ARBITRARY AND
CAPRICIOUS APPLICATION OF THE DEATH PENALTY AND,
THEREFORE, VIOLATES THE EIGHTH AND FOURTEENTH
AMENDMENTS. 112

CONCLUSION 119

CERTIFICATE OF SERVICE 121

CERTIFICATE OF FONT COMPLIANCE 121

TABLE OF CITATIONS

<u>CASES CITED:</u>	<u>PAGE NO.</u>
<i>Allen v. United States</i> , 164 U.S. 492 (1896)	67
<i>Almeida v. State</i> , 748 So.2d 922 (Fla. 1999)	70
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	76
<i>Atkins v. Virginia</i> , 536 U.S. 304, 122 S.Ct. 2242 (2015)	Passim
<i>Ault v. State</i> , 866 So. 2d 674 (Fla. 2003)	51, 53, 54, 55
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	88
<i>Beck v. Alabama</i> , 447 U.S. 625	60, 77, 94
<i>Berghuis v. Smith</i> , 559 U.S. 314 (2010)	96, 97
<i>Bolin v. State</i> , 736 So. 2d 1160 (Fla. 1999)	52, 54
<i>Bright v. State</i> , 299 So. 3rd 985 (Fla. 2020)	76
<i>Brooks v. State</i> , 762 So. 2d 879 (Fla. 2000)	69, 71
<i>Brown v. Wainwright</i> , 392 So. 2d at 1331	76
<i>Bush v. State</i> , 295 So. 3d 179 (Fla. 2020)	115
<i>Campbell v. State</i> , 159 So. 3rd 814 (Fla. 2015)	118
<i>Campbell v. State</i> , 571 So. 2d 415 (Fla. 1990)	69, 73, 75, 76
<i>Cardona v. State</i> , 185 So. 3rd 514 (Fla. 2016)	66, 68
<i>Coday v. State</i> , 946 So. 2d 988 (Fla. 2006)	75

<i>Coker v. Georgia</i> , 433 U.S. 584 (1977).....	109, 111
<i>Conage v. United States</i> , 2022 WL 3651398 (Fla. 2022).....	65
<i>Court cited Brown v. Wainwright</i> , 392 So. 2d 1317 (Fla. 1981).....	76
<i>Deparvine v. State</i> , 995 So. 2d 351 (Fla. 2008).....	79
<i>DePew v. Anderson</i> , 311 F. 3rd 742 (6th Cir. 2002)	69, 72
<i>Drake v. Kemp</i> , 762 F. 2d 1449 (11th Cir. 1985)	65
<i>Enmund v. Florida</i> , 458 U.S. 782, 102 S.Ct. 3368 (1982)	109
<i>Flowers v. State</i> , 158 So. 3rd 1009 (Miss. 2014)	94
<i>Floyd v. State</i> , 497 So. 2d 1211 (Fla. 1986).....	118
<i>Furman v. Georgia</i> , 408 U.S. 238, 92 S. Ct. 2726 (1972)	106, 108, 113
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977).....	81, 112
<i>Garron v. State</i> , 528 So. 2d 353 (Fla. 1988).....	118
<i>Glossip v. Gross</i> , 576 U.S. 863 (2015).....	Passim
<i>Gosciminski v. State</i> , 132 So.2d 678 (Fla. 2013).....	118
<i>Graham v. Florida</i> , 560 U.S. 48 (2010).....	103
<i>Gray v. Mississippi</i> , 481 U.S. 648 (1987).....	54, 55, 99
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976).....	108, 112, 109, 113
<i>Hidalgo v. Arizona</i> , 138 S. Ct. 1054 (2018).....	115
<i>Hunter v. State</i> , 660 So. 2d 244 (Fla. 1995).....	84
<i>Hunter v. Underwood</i> , 471 U.S. 222 (1985).....	90

<i>In re Davey</i>	
645 So. 2d 398, 404 (Fla. 1994).....	58
<i>In re Hawkins,</i>	
151 So. 3rd 1200 (Fla. 2014).....	58
<i>In re LaMotte,</i>	
341 So. 2d 513 (Fla. 1977).....	58
<i>In re Medley,</i>	
134 U.S. 160 (1890).....	106
<i>In re Standard Criminal Jury Instructions in Capital Cases,</i>	
214 So. 3rd 1236 (Fla. 2017).....	75
<i>In re Standard Criminal Jury Instructions in Capital Cases,</i>	
244 So. 3rd 172 (Fla. 2018).....	75
<i>In re Standard Jury Instructions in Criminal Cases,</i>	
22 So. 3rd 17 (Fla. 2009).....	Passim
<i>Jackson v. State,</i>	
191 So. 2d 423 (Fla. 2016).....	87, 108
<i>Jackson v. State,</i>	
191 So. 3d 423 (Fla. 2016).....	101, 112
<i>Johnson v. Governor of the State of Florida,</i>	
405 F.3d 1214 (11th Cir. 2005)	88
<i>Johnson v. State,</i>	
44 So. 3rd 51 (Fla. 2010).....	78
<i>Johnson v. State,</i>	
53 So. 3rd 1003 (Fla. 2010).....	55, 60, 78, 95
<i>Kansas v. Carr,</i>	
577 U.S. 108 (2016).....	74, 75, 94
<i>Lawrence v. State,</i>	
308 So. 3d 544 (Fla. 2020).....	114, 115
<i>Lockhart v. McCree,</i>	
476 U.S. 162 (1986).....	97
<i>Lowenfield v. Phelps,</i>	
484 U.S. 231 (1988).....	116
<i>Loyd v. State,</i>	
311 So. 3rd 858 (Fla. 5th DCA 2021)	2
<i>McCray v. State,</i>	
71 So. 3rd 848 (Fla. 2011).....	82, 85
<i>Mines v. State,</i>	
390 So. 2d 332 (Fla. 1980).....	69
<i>Morgan v. Illinois,</i>	
504 U.S. 719 (1992).....	98

<i>Mt. Healthy City School Dist. Bd. of Educ. V. Doyle</i> , 429 U.S. 274, 97 S.Ct. 568 (1977)	90
<i>Murray v. State</i> , 937 So. 2d 277 (Fla. 4th DCA 2006)	59
<i>Nowitzke v. State</i> , 572 So. 2d (Fla. 1990).....	84
<i>Patten v. State</i> , 467 So. 2d 975 (Fla. 1985).....	67
<i>People v. Prince</i> , 156 P. 3rd 1015 (Cal. 2007)	80, 81
<i>Perriman v. State</i> , 731 So. 2d 1243 (Fla. 1999).....	59
<i>Poole v. State</i> , 997 S. 2d 382 (Fla. 2008).....	71, 76
<i>Powers v. Ohio</i> , 499 U.S. 400 (1991).....	88
<i>Proffit v. Florida</i> , 428 U.S. 242 (1976).....	113, 114, 115, 116
<i>Pulley v. Harris</i> , 465 U.S. 37 (1984).....	114, 116
<i>Reed v. State</i> , 837 So. 2d 366 (Fla. 2002).....	65
<i>Reilly v. State</i> , 557 So. 2d 1365 (Fla. 1990).....	52, 54
<i>Reynolds v. State</i> , 251 So. 3rd 811 (Fla. 2018).....	68
<i>Ritchie v. State</i> , 2022 WL 2071090 (Fla. 2022).....	62, 65
<i>Robertson v. State</i> , 829 So. 2d 901 (Fla. 2002).....	78
<i>Rockmore v. State</i> , 140 So. 3d 979 (Fla. 2014).....	117
<i>Rodriguez v. State</i> , 210 So. 3rd 750 (Fla. 5th DCA 2017)	72
<i>Romano v. Oklahoma</i> , 512 U.S. 1 (1994).....	68
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S. Ct. 1183 (2005)	101, 102, 111
<i>Rose v. State</i> , 425 So. 2d 521 (Fla. 1985).....	67

<i>Salazar v. State</i> , 90 S.W. 3rd 330 (Tex. Crim. App. 2002).....	80, 81
<i>San Martin v. State</i> , 717 So. 2d 462 (Fla. 1998).....	96
<i>Skipper v. South Carolina</i> , 476 U.S. 1 (1986).....	69, 77
<i>Smiley v. State</i> , 966 So. 2d 330 (Fla. 2007).....	96
<i>Smith v. State</i> , 320 So. 3rd 20 (Fla. 2021).....	65
<i>Sparre v. State</i> , 164 So. 3d 1183 (Fla. 2015).....	117
<i>Spivey v. Head</i> , 207 F. 3rd 1263 (11th Cir. 2000)	70, 71
<i>Stanford v. Kentucky</i> , 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).....	102
<i>State v. Cherry</i> , 298 N.C. 86, 257 S.E. 2d 551 (N.C. 1979)	117
<i>State v. Dene</i> , 533 So. 2d 265 (Fla. 1988).....	117
<i>State v. Dixon</i> , 283 So. 2d 1 (Fla. 1973).....	94, 114
<i>State v. Floyd</i> , 186 So. 3rd 1013 (Fla. 2016).....	56, 73, 93
<i>State v. Graham</i> , 513 P. 3rd 1046 (Alaska 2022).....	79
<i>State v. Hess</i> , 23 A. 3rd 373 (N.J. 2011)	79, 81
<i>State v. Middlebrooks</i> , 840 S.W. 2d 317 (Tenn. 1992)	117
<i>State v. Poole</i> , 297 So. 3rd 487 (Fla. 2020).....	31, 74, 76, 94
<i>Stephens v. State</i> , 787 So. 2d 747 (Fla. 2001).....	57, 117
<i>Strauder v. West Virginia</i> , 100 U.S. 303 (1879).....	88
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993).....	60, 78
<i>Taylor v. Louisiana</i> , 419 U.S. 522 (1975).....	88, 96

<i>Thomas v. State</i> , 748 So. 2d 970 (Fla. 1999).....	67
<i>Trease v. State</i> , 768 So. 2d 1050 (Fla. 2000).....	73
<i>Trop v. Dulles</i> , 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958)	108
<i>Tuilaepa v. California</i> , 512 U.S. 967 (1994).....	74
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140 (2006).....	95
<i>Village of Arlington Heights v. Metropolitan Housing Development Corp.</i> , 429 U.S. 252 (1977).....	89, 90
<i>Wainwright v. Witt</i> , 469 U.S. 412 (1985).....	97
<i>Washington v. Davis</i> , 426 U.S. 229 (1976).....	89
<i>Wheeler v. State</i> , 4 So. 3rd 599 (Fla. 2009).....	81
<i>Williams v. State</i> , 488 So. 2d 62 (Fla. 1986).....	67
<i>Witherspoon v. Illinois</i> , 391 U.S. 510 (1968).....	97, 99
<i>Woodbury v. State</i> , 320 So. 3rd 631 (Fla. 2021).....	93
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976).....	112
<i>Yohn v. State</i> , 476 So. 2d 123 (Fla. 1985).....	57
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983).....	113, 116

OTHER AUTHORITIES CITED:

Amendment 6, United States Constitution	92, 96
Amendment 14, United States Constitution.....	81, 87
Amendment 8, United States Constitution.....	Passim
Article I, Section 2, of the Florida Constitution.....	88
Article I, Section 9 of the Florida Constitution.....	81

Section 40.013(a), Florida Statutes.....	5, 90
Section 775.027(2), Florida Statutes.....	56
Section 775.0823, Florida Statutes (2017).....	1
Section 775.087, Florida Statutes (2017).....	1
Sections 782.04, Florida Statutes (2017).....	1
Sections 784.021, Florida Statutes (2017).....	1
Section 790.23, Florida Statutes (2017).....	1
Section 812.133, Florida Statutes (2017).....	1
Sections 913.13, Florida Statutes (2021).....	1
Section 921.141, Florida Statutes	31, 73
Section 921.141(1), Florida Statutes (2021).....	99
Section 921.141(2), Florida Statutes (2022).....	73
Section 921.141(2)(b), Florida Statutes	75
Section 921.141(2)(c), Florida Statutes (2022)	74
Section 921.141(7)(f), Florida Statutes	28, 68
Section 921.141(8), Florida Statutes.....	22
 Ch. 72-72, Section 1, Laws of Florida.....	 64, 74
Ch. 79-353, Section 1, Laws of Florida.....	74
Ch. 87-368 Section 1, Laws of Florida.....	116
Ch. 88- 381 Section 10, Laws of Florida.....	116
Ch. 91-270 Section 1, Laws of Florida.....	116
Ch. 95-159, Section 1, Laws of Florida.....	74, 116
Ch. 96-290 Section 5, Laws of Florida.....	116
Ch. 2005-28 Section 7, Laws of Florida.....	116
Ch. 2010-120 Section 1, Laws of Florida.....	116
 Rule 3.210(a), Florida Rules of Criminal Procedure.....	 83
Rule 3.214, Florida Rules of Criminal Procedure	38
 Florida Standard Jury Instructions (Crim.) 3.7. Per instruction no. 3.6(a).....	 Passim
Florida Standard Jury Instructions (Civ.) 411.3.....	59
 <u>The Principled Executioner: Capital Juries’ Bias and the Benefits of True Bifurcation</u> , 38 Ariz. S. L. J. 769 (2006).....	 98, 99, 100
 <u>Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process</u> , 2005 B.Y.U. L. Rev. 519, 530-32....	 98

<u>The Eighth Amendment’s Lost Jurors: Death Qualification and the Evolving Standard of Decency</u> , 92 Ind. L. J. 113, 121 (2016).....	98
<u>Capital Jurors in an Era of Death Penalty Decline</u> , 126 Yale L. J. Forum 417 (2017).....	99
Death Penalty Information Center (DPIC), Innocence Database (September 2, 2022).....	104
Smith, <u>The Geography of the Death Penalty and its Ramifications</u> , 92 B. U. L. Rev. 227, 231–232 (2012).....	104
Donohue, <u>An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?</u> 11 J. Empirical Legal Studies 637, 673 (2014).....	104
DPIC, <u>The 2% Death Penalty: How A Minority of Counties Produce Most Death Cases At Enormous Costs to All</u> 9 (Oct. 2013).....	105
American Civil Liberties Union (ACLU), <u>A Death Before Dying: Solitary Confinement on Death Row</u> 5 (July 2013).....	107
Entzeroth, <u>The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty</u> , 44 Akron L. Rev. 529, 559 (2011).....	110
<u>Recommendation and Report on the Death Penalty and Persons with Mental Disabilities</u> , 30 Mental & Physical Disability L. Rep. 668 (2006)...	111

STATEMENT OF THE CASE AND FACTS

In this capital case the Appellant, Markeith Loyd, was charged by indictment with five felonies that all occurred on or about January 9, 2017. (R 173-76) Count I charged the premeditated murder of Debra Clayton, a law enforcement officer, while she was engaged in the lawful performance of a legal duty.¹ (R 173) Count II charged the attempted premeditated murder of a second law enforcement officer, Joe Carter, who was also engaged in the lawful performance of a legal duty.² (R 174) Counts III and IV charged assault with a firearm and armed carjacking, both committed against one Antwyne Thomas.³ (R 174-75) Count V charged possession of a firearm while a convicted felon.⁴ (R 176) The parties proceeded in 2021 to a jury trial before Circuit Judge Leticia Marques, where Appellant was convicted of all five charges. (R 4075-77) A penalty phase and Spencer hearing ensued, and Judge Marques ultimately sentenced Appellant to death on Count I with consecutive prison sentences on the other counts. (R 4793-98)

¹ Pursuant to Sections 782.04 and 775.0823, Florida Statutes (2017).

² Pursuant to Sections 782.04, 777.04, and 775.0823, Florida Statutes (2017).

³ Pursuant to Sections 784.021, 812.133, and 775.087, Florida Statutes (2017).

⁴ Pursuant to Section 790.23, Florida Statutes (2017).

As Judge Marques noted in her sentencing order, “intertwined” charges were filed in a 2016 case. (R 4806) In that other case (“the Dixon matter”), Mr. Loyd was convicted, after a jury trial, of fatally shooting his girlfriend Sade Dixon, of causing the death of her unborn child, and of attempting to kill three of her family members with a firearm.⁵ (R 4807-08) The State sought the death penalty as to Ms. Dixon; the jury returned a verdict of life imprisonment. (R 4808) Appellant was sentenced to five consecutive life sentences by Judge Marques in the Dixon matter in 2019, and the Fifth District Court of Appeal affirmed the convictions and sentences. Loyd v. State, 311 So. 3rd 858 (Fla. 5th DCA 2021). (R 4808) In the Dixon trial Appellant admitted firing the fatal and near-fatal shots and argued he had fired in self-defense. (R 4808) The proof in the earlier case showed that Sade Dixon brought a gun to a verbal argument which preceded those shootings. (R 4807-08)

In its Notice of Intent to Seek Death Penalty in the Clayton case, the State announced that it intended to prove eight aggravating factors. (R 319-20) The allegations were that the victim was a law enforcement officer engaged in a legal duty, that the murder was committed to disrupt or hinder

⁵ Ronald Stewart, Stephanie Dixon-Daniels, and Dominique Daniels.

the lawful exercise of a governmental function, and that the murder was committed for the purpose of avoiding arrest. (R 319) The jury eventually found that those three aggravating factors were proved beyond a reasonable doubt; their instructions specified that the three were to be treated as a single aggravator due to their overlapping content. (R 4860-61, 4493) The State's Notice also alleged that the defendant had committed a prior violent felony, and that he was on felony probation at the time Lt. Clayton was shot. (R 319) The jury found that those two aggravators were also proved beyond a reasonable doubt. (R 4860) The Notice alleged three additional aggravators, *i.e.*, that the defendant knowingly created a great risk of death to many persons; that the murder was especially heinous, atrocious, and cruel; and that the murder was committed in a cold, calculated, and premeditated manner. (R 319) The court found that the "great risk of death" and "especially heinous" aggravators were not proven beyond a reasonable doubt, and the State conceded before the jury was instructed in the penalty phase that it had not proved the "cold, calculated" aggravator beyond a reasonable doubt. (T 5945, 6024, 6036, 6402)

PRETRIAL LITIGATION

Before trial, the defense filed motions challenging the death penalty generally. (R 2220-29, 2248-61, 2663-2744) The motions argued that the death penalty no longer accords with evolving standards of decency, and that lengthy delays in its imposition constitute cruel and unusual punishment. The State filed written responses (R 2875-77, 2883-86) and the court denied the motions. (R 5409-10, 5799, 5802, 5860, 6490)

Also before trial, the defense moved the court to declare unconstitutional each of the aggravating factors which were eventually found proven in this case. (R 2212-15, 2233-38, 2277-79, 2309-12, 2411-14). The motions each argued that the respective aggravating factor was overbroad in its application and failed to narrow the class of persons eligible for the death penalty. Those motions were also responded to and denied. (R 2872-73, 2241-42, 5797-98, 6597, 2300-02, 6455, 2343-47, 5803, 2419-20, 5816).

The defense also filed motions objecting to death-qualifying the jury. (R 2268-74, 2275-76) Those motions argued that the United States Supreme Court should recede from its cases approving that practice, in light of that Court's recent history-based approach to construing the Sixth Amendment to the United States Constitution. (R 3579-81) The motions

also argued that contemporary research shows the practice has the effect of skewing juries towards guilt. (R 3582-83) Those motions were responded to and denied. (R 3577-85, 3594-95, 5409, 6711-12)

Other pretrial motions sought a ruling declaring unconstitutional Section 40.013(a) of the Florida Statutes. (R 2314-32, 2854-60) That statute disallows convicted felons from serving on juries. The defense position was that the statute both has racially disparate impact and was enacted with racially discriminatory intent, and that its enforcement violates the Sixth Amendment to the federal Constitution. (R 2332, 2855) The State opposed the motions, and the trial court agreed with the State. (R 2388-91, 2905, 5804-05, 5875)

JURY SELECTION

Between October 8 and October 25, 2021, the parties selected a jury to hear both phases of trial. (T 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 venire was split into ten panels; before individual questioning began, in order to jog the potential jurors' memories, each of those panels was read a statement of facts that had been agreed on by the parties, 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 Lt. 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 27, 2019, and concluded on October 23, 2019. Mr. Loyd was convicted and sentenced to life without the possibility of parole.

(E.g., T 305-06) Venire members were then asked, in isolation, whether they could set aside knowledge of the Dixon shooting throughout the first phase of the Clayton trial. (E.g., T 503-04, 528, 549)

Three venire members were dismissed by the court for cause solely because they knew the defendant had been severely beaten by police at the time of his arrest. (T 1095-96, 1105-07, 1112-15, 1540-41, 1557-61, 1577-78, 1647-48, 2975, 2981-85) The State had moved, before jury selection, to exclude in both phases of trial any evidence of the officers' use of excessive force; the defense agreed as to first phase, but sought a ruling allowing it to prove up the beating during penalty phase. (R 3166-78, 6490-92, 6499, 6504-05) At the time the jury was selected, the judge had ruled the beating inadmissible in first phase, and had ruled it inadmissible in penalty phase except to the extent it was relevant to any forthcoming

expert testimony regarding when brain damage may have been inflicted.⁶ (R 3691-92) Two of the venire members who were removed for cause for that reason stated they could set aside their knowledge of the events surrounding the arrest, and defense counsel sought unsuccessfully to ascertain from the third whether he could set the subject matter aside. (T 1106-07, 1558-59, 2984-85) At the close of jury selection, the defense preserved for appeal the question whether the court had erroneously granted the State's cause challenges over defense objection. (T 3814-15)

PROOF IN THE FIRST PHASE OF TRIAL

The shooting that gave rise to the capital charge in this case was captured on surveillance video, which was entered into evidence and played for the jury. (R 4809; T 3884-86, 3926-35, 4020-32; State's Exhibit 4) The case was defended on alternative bases of self-defense and insanity. (R T 3850-51, 5430) The State conceded in opening statement that it would not become clear, beyond a reasonable doubt, whether the defendant or Lt. Clayton fired first. (T 3844) The lead detective testified at

⁶ The court later expanded that admissibility ruling, generally allowing proof during the penalty phase of the defendant's injuries and how they were caused.

trial that the shooting portion of the incident lasted six seconds. (T 4009, 4032, 4049)

Three eyewitnesses testified for the State about parts of the shooting. Takeshia Bryant testified that the defendant, on being confronted by Lt. Clayton, initially ducked behind a pillar, then re-emerged with his gun drawn. Ms. Bryant could not say at what juncture the officer drew her gun, and could not say who fired first, as she (Ms. Bryant) had taken shelter behind a car. (T 3899-3902, 3922-23) Ms. Bryant testified that after the shots she was hearing ceased, she saw the defendant fire a final shot while standing over the officer. (T 3903) At the time he was wearing a black T-shirt with "SECURITY" printed on it. (T 3889)

Julia Johnson testified that she heard the officer say "get on the ground;" that the officer had her gun out at that time; that she then saw the defendant bolt away from the officer; and that she saw the officer pursue him. (T 3945-47, 3953) Ms. Johnson's view was obstructed from that point; she heard multiple shots, but did not see who fired first. (T 3947) She testified that she believed, from what she could hear, that it was the officer who fired first. (T 3948)

Monica Pridgeon testified that she also saw the start of the confrontation; what she recalled was that the officer had her hand on her holstered gun when she ordered the defendant to get down. (T 3966-67) Ms. Pridgeon also testified that she saw the defendant fire the first shot, and that “he just kept shooting her when she was on the ground.” (T 3967-70) She admitted on cross-examination that it was important to her to help the prosecutors. (T 3973)

Medical examiner Dr. Joshua Stephany testified that Lt. Clayton died from one of four bullet wounds; the projectile that caused that wound entered her neck. (T 4225, 4246) One of the other bullets entered her leg, one caused a superficial wound to her abdomen, and the other caused a serious but non-fatal wound to her abdomen. (T 4231-39) The doctor’s opinion was that Lt. Clayton could still have fired her gun after the three non-fatal wounds were inflicted. (T 4245) He could not establish how she and her assailant were positioned at the time the shots were fired, and could not testify in what order the shots were fired. (T 4237, 4225-26) There was no stippling associated with any of the wounds, indicating the shooter was at least three feet away when he fired each shot. (T 4228-29, 4231, 4235-36, 4238)

The State established that Lt. Clayton's gun was a 9-mm Sig Sauer 226 semiautomatic pistol, and that the gun the defendant had at Walmart was a .40-caliber Smith & Wesson semiautomatic pistol. (T 4262-63, 4332, 4339, 4342-44, 4459, 4471-73, 4478-79) Eight projectiles from each of those firearms were found in the Walmart parking lot. (T 4052-53, 4449-50, 4471-73, 4478-79)

Captain Joseph Carter of the Orange County Sheriff's Office testified that he joined the pursuit of the suspect after the news of Lt. Clayton's shooting was radioed. (T 4076, 4079-84) He spotted a car that matched the description of the suspect's vehicle and followed it, with lights and siren activated, until it parked in the Royal Oaks apartment complex. (T 4084-87) He parked behind it at an angle so as to give himself cover, and started to emerge from his vehicle when he saw the driver's hand come up, and heard two shots fired. (T 4089-90) He maneuvered his car so as to block the suspect's car in, whereupon the suspect fled the apartment complex on foot. (T 4090, 4094-95) A bullet hole was later discovered in a hubcap of Captain Carter's vehicle. (T 4097) A crime scene technician testified that she found one spent casing in the Royal Oaks parking lot. (T 4454-55) That casing, per an FDLE analyst, was expelled from a gun that was in the defendant's possession on the day he was arrested. (T 4474-75; see 4332-

45) The court, in its sentencing order, found that one round was fired toward Captain Carter. (R 4809)

Antwyne Thomas testified that he lived at Royal Oaks in 2017, and that on the morning of January 9 he arrived home about 7:15 a.m. (T 4102-03) As he mounted the stairs a black man in a black shirt that read "SECURITY" pointed a gun in his face and demanded his keys. (T 4111-14) Frightened, he complied by throwing his keys toward the man. (T 4114-15) Mr. Thomas identified the defendant in court as the man who confronted him. (T 4121)

Orange County Deputy Charles Ashworth testified that in January of 2017 he was assigned to a task force which apprehended fugitives wanted for violent crimes. (T 4188-90) He responded to 1157 Lescot Lane in Orlando on the night of January 17, 2017 to assist in apprehending the defendant. (T 4189-90) Agents surrounded the house; Ashworth estimated that more than a hundred officers responded to the scene. (T 4194, 4204) A person later identified as the defendant opened the front door and tossed two firearms out, then emerged and crawled toward the waiting officers with his hands raised. (T 4194, 4196-4201) The guns were recovered and came into evidence. (T 4332, 4339-46) An analyst from the Florida Department of Law Enforcement established that one of the guns thrown from the house

was the .40-caliber weapon used in both the Dixon and Clayton shootings. (T 4477-80; see T 4329-31) As noted, the other was used at the Royal Oaks complex. (T 4332-45, 4474-75) At the time of his arrest the defendant was wearing a bulletproof vest. (T 4211-12) The parties stipulated that the defendant is a convicted felon who has not had his civil rights restored. (T 4492)

The State introduced into evidence fourteen posts the defendant made on Facebook between 2014 and 2016. (R 3787-3804; T 4444) The Facebook posts appear in the record. (R 3792-3804) A 2014 post states “let’s die fighting back...as long as they can continue to kill us and get away they will.” (R 3793) Another 2014 post reads “tell on the police when they doing wrong...what do you owe them...death if anything crackers.” (R 3793) A third 2014 post reads “F protesting...IT’S A TIME TO KILL and our killings will be in defense.” (R 3793) In 2016, he posted “I HAVE NO SYMPATHY FOR THESE CRACKERS...They been killing us for hundreds of years and now supposedly some blacks kill four crackers ...ALL THEM CRACKERS SHOULD HAVE DIED...Only good cop is a dead cop.” (R 3798) Another 2016 post reads “Look how quickly they take a black life...I say eye for an eye life for a life...If we go die let’s die on the battle field fighting for our kids to have a better place to live where they don’t get shot

because they black.” (R 3798) Later in 2016 he posted “I rather us die striking a blow than die on our knees...We need to kill back anything short of that we ain’t nothing.” (R 3799) More posts emphasized his views that “I rather die than live my life in [a] cell,” (R 3802), and “Goals! To be on America’s most wanted.” (R 3804)

At the close of the State’s case, the defense moved for judgment of acquittal, arguing “we believe that they have not proved premeditation.” (T 4496) The motion was denied “as to all counts.” (T 4497)

Appellant testified in his own defense. (T 4797-4981) He explained that police in the past participated in lynch mobs and that in his view, some of that is still happening. (T 4802) He explained that his intention in the Facebook posts was to encourage self-defense. (T 4818-27) He further explained that when someone looking for a buyer for a bulletproof vest came to a homeless camp where he was staying after the Dixon shooting, he took it as a sign from God. (T 4850-53) He gave his own version of the exchange of fire at Walmart, to wit: he was leaving the store with his head down when he was confronted by a gun in his face. (T 4861-62) He ducked behind his shopping cart and started to run in the direction of some woods; when he heard a shot he drew his gun, turned around, and returned fire. (T 4862-63, 4866-68, 4956, 4958) He described the incident as “a gun battle,”

and testified that the officer was still firing after she hit the ground, and that “when she stopped shooting I stopped shooting.” (T 4868, 4871-72, 4960) He specified that he fired toward the officer’s bulletproof vest. (T 4867-68, 4871, 4960) Mr. Loyd emphasized that his focus was on the officer’s gun. (T 4968) Asked by counsel why he didn’t just run from the scene, he answered “I just turned my back, and she just tried to shoot me. If I turn my back again, I’m gonna get shot in the back.” (T 4969, 4959-60) In response to further questioning, he clarified that he believed his life was in danger and that he had to return fire to defend his life. (T 4870, 4959)

As to the confrontation with Captain Carter at the Royal Oaks apartments, the defendant’s testimony was that he fired a warning shot before he turned and ran from the scene. (T 4873)

Asked on cross-examination if he had ever been prescribed drugs for any mental-health condition, the defendant responded “no, I don’t believe in medication.” (T 4912, 4922) Asked about the insanity defense, he responded “[t]his is the defense that my lawyer [and] the psych, that’s what they came up with.” (T 4945) Also during cross-examination, the following took place:

STATE: So [you acquired] guns to protect yourself, right?

DEFENDANT: Yes.

STATE: Now at this time you were a convicted felon, correct?

DEFENDANT: Yes.

STATE: And you knew that it was against the law for you to possess firearms?

DEFENDANT: Yes, but God's law, I can carry it.

STATE: Okay, so you disregarded the laws of the State of Florida for that decision, right?

DEFENDANT: God's law, I have a right to protect myself like anyone else.... You-all made a law saying my people wasn't humans. What that supposed to mean? Does that it make it right? Does that make the law right, when the law says I'm not human?

STATE: So you obey the laws that you think are appropriate, is that fair?

DEFENDANT: I follow God's law.

STATE: ...so you knew it was unlawful to do what you were doing, right?

DEFENDANT: It was against the law.

STATE: ...Did you tell your probation officer that you were carrying firearms?

DEFENDANT: Of course not.

STATE: Right, because you knew that was illegal? ...So it's not as if you didn't know right from wrong. You knew right from wrong, right?

DEFENDANT: Who doesn't know right from wrong?

(T 4925-27)

Psychologist Dr. Jethro Toomer testified for the defense. (T 4983-5070) Dr. Toomer interviewed the defendant for six hours, and concluded

that while Mr. Loyd does not believe he is mentally ill, his presentation and his Facebook posts reveal an ongoing disconnection with reality which amounts to delusional thinking. (T 4993, 4998-99) He described the defendant's mood, during their interview, as "uneven," noting that when he spoke about the Dixon prosecution his mood would become elevated. (T 5005) He perceived a fixed belief on the defendant's part that black people have been, by design, the subject of degradation, harassment, and punishment by white people; that fixed belief is a filter through which Mr. Loyd views the world. (T 4999-5000)

Dr. Toomer testified that psychosis, which he described as a global term indicating a relatively rare break with reality, is present. (T 5019, 5043-44) He also diagnosed post-traumatic stress disorder, bipolar disorder, and schizophrenia, explaining that the symptoms of those disorders overlap to a significant extent. (T 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 because of the mental illnesses Toomer diagnosed. (T 5020-21)

The State called neuropsychologist Dr. Michael Gamache and psychiatrist Dr. Tonia Werner to rebut Dr. Toomer's testimony. (T 5170-5262, 5283-5317) The State also called psychiatrist Dr. Michael Maher in

its rebuttal case for a limited purpose. (T 5262-71) Dr. Gamache testified, on direct examination, that after a records review and a face-to-face interview he disagreed with Dr. Toomer's conclusion as to sanity. (T 5180-82, 5199-5200) That disagreement was based in part on his conclusion, based on Mr. Loyd's self-report, that he could not have suffered from any serious mental illness between 2014 and 2017 because during that time he functioned well socially and in work environments. (T 5192-96) On cross-examination, Dr. Gamache explained that he did not believe that a disorder on the delusional/schizophrenia spectrum is present, in that beliefs shared by one's subset of the population are not diagnosable as delusions. (T 5208-09, 5216-18) He elaborated that a Scientologist belief - that humans are immortal aliens encased in mortal shells – is not treated as delusional because Scientologists, worldwide, number in the hundreds of thousands.⁷ (T 5261-62)

Dr. Gamache acknowledged that Mr. Loyd has a long-held belief that the criminal justice system is racist and corrupt, but noted that relating present-day racism to the history of slavery is “not uncommon at all. In fact,

⁷ A doctor retained by the defense later in the case was asked by the State whether he shared Dr. Gamache's view that an irrational belief is not a delusion if enough people share it. That doctor, psychologist Xavier Amador, responded “you're wrong about that.” (R 7140-41)

it's particularly prominent these days as there's been more, sort of, tribalism...about those kinds of things.” (T 5215-17) He further noted that between the time of the Dixon shooting and the Clayton shooting, any perception that Mr. Loyd was at risk of death at the hands of police was “a rational perception on his part.” (T 5215-16)

Dr. Werner, after a records review and an interview with the defendant, also disagreed with Dr. Toomer's conclusion as to insanity. (T 5289-95) Her disagreement was based on her own diagnoses, which included only anti-social personality disorder (“ASPD”) and cannabis use disorder; she explained that an ASPD diagnosis precludes an insanity conclusion, and further explained that the fact Mr. Loyd evaded police after the Clayton shooting clearly indicates that he knew what he did was wrong. (T 5290-95)

As noted, psychiatrist Michael Maher was called in rebuttal for a limited purpose, in that he had formed no opinion whether Mr. Loyd was sane at the time of the Clayton shooting. (T 5263, 5269-71) The State was allowed to establish that Dr. Maher had concluded that Mr. Loyd was sane at the time of the Dixon shooting. (T 5265) On cross, the defense elicited Dr. Maher's views that Mr. Loyd suffers from a chronic psychotic condition in that he harbors delusions, and that he also suffers from post-traumatic

stress disorder. (T 5273) Dr. Maher also testified that he had reviewed the results of an MMPI-2 test administered in this case; the results indicated to him that Mr. Loyd under-reports, rather than exaggerates, his symptoms. (T 5275-77)

JURY INSTRUCTIONS AND CLOSING: PREMEDITATION

In its first-phase closing, the State argued as follows:

...What exactly does “premeditated design” mean? ...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.

(T 5408-09) There was no objection to that argument. The jury had been instructed, pursuant to the standard instruction as to premeditation, 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.

(T 5360-61; R 4020-21) (emphasis added)

JURY INSTRUCTIONS: INSANITY

The defense sought, by motion, to modify the standard criminal jury instruction on insanity, no. 3.6(a). (R 3782-85) The standard paragraph addressed by the motion provides that “[a]ll persons are presumed to be sane. The defendant has the burden of proving the defense of insanity by clear and convincing evidence. 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.*” The motion sought to delete the italicized clause, and replace it with “of such weight that it is sufficient to persuade you the Defendant’s claim is highly probable.” (R 3782) The motion also sought clarifying language to follow, to the effect that the “clear and convincing” standard occupies a middle ground between the “proof beyond a reasonable doubt” standard and a “greater weight of the evidence” standard. (R 3782) The State opposed the motion; it was denied, and the standard language was read to the jury. (T 3584-85, 5391)

The insanity instruction read by the court also included the following standard paragraphs:

A defendant who believed that what he was doing was morally right is not insane if the defendant knew that what he was doing violated societal standards or was against the law.

Unrestrained passion or ungovernable temper is not insanity, even though the normal judgment of the person is overcome by passion or temper.

Although insanity is a defense, mental or psychiatric conditions not constituting insanity are not defenses to any crime in this case. Unless there is clear and convincing evidence that Markeith Loyd was insane at the time of the crimes alleged, any evidence of mental illness, a[n] abnormal mental condition, or diminished mental capacity may not be taken into consideration to show that he lacked the specific intent or did not have the state of mind essential to proving he committed the crimes charged or any lesser crime.

(T 5392; R 4057-58) The jury in first phase was otherwise instructed in accordance with the standard criminal instructions. (T 5356-5400; R 4016-4071)

DELIBERATIONS AND VERDICT IN FIRST PHASE

After the jury retired, the court stated the following on the record:

THE COURT: After the defense closing, a juror wrote a question, and the question is "Is the DSM-5 in evidence?" I've answered the question and my answer is "it is not," and I've signed my name...I'm going to send [the note] back to them since they asked.

(T 5512)

After two hours of deliberations (see T 5510, 5540), the jury asked for a readback of testimony that would establish just what the eyewitnesses at Walmart had seen, and just what the medical examiner had said about Lt. Clayton's continued ability to fire after being shot. (T 5555-56) The jury sought a further readback of testimony that would establish the "exact interaction" between the defendant and Captain Carter. (T 5555) The requested testimony was read to the jurors. (T 5562-5621) After three more hours of deliberations, the jury reached a verdict of guilty as charged as to all counts. (T 5621-24; R 4078-86)

PENALTY PHASE: EVIDENCE

In its limited penalty-phase case, the State proved that on January 9, 2017, the defendant was on federal probation for a drug-related crime. (T 5973-79) As to the aggravating factor of commission of a prior violent felony, the State relied on its previous showing regarding the Dixon matter. (T 5855-79)

In penalty phase the State, in addition, called four victim-impact witnesses and played a slideshow of photos of the victim in life, set to music. Pretrial motions had challenged generally the use of victim impact evidence at all. (R 2283-86, 2449-2500) Specifically, the motions sought to exclude all victim-impact evidence and declare Section 921.141(8) of the

Florida Statutes unconstitutional. The State responded (R 2305-08, 2501-03), and the motions were denied. (R 5825). During penalty phase, the defense objected to the State's intention to use a musical soundtrack to accompany their presentation of a two-minute montage of photographs to the jury during the penalty phase. (T 5724-28). The Court denied the objection, and the State was permitted to present the montage with music. (T 5834).

The defense, in its case, called witnesses to testify to the defendant's generosity and devotion to family. (T 6151-6222, 6301-20, 6367-6401, 6433-46, 6668-90, 6743-64, 6841-6900, 7070-7112) The defense also called more mental health-related expert witnesses, and was permitted to put on proof regarding what it argued was disproportionate force used at the time of Mr. Loyd's arrest. Specifically, the court allowed videotaped footage from a helicopter camera of the beating the defendant took. (T 6085-88) A still photo of the defendant at the police station, depicting his injuries, came into evidence. (T 6295) A detective from the Sheriff's Office testified that the defendant sought medical attention before his interrogation, but that Orlando Police officers delayed a trip to the hospital until afterward. (T 6717-19) A medical doctor who reviewed the defendant's hospital records from January 17, 2017 testified that he had

suffered a “burst” fracture of one or more orbital bones, and that his eyeball had burst in the process. (T 6425-26)

As to mental health, the defense in penalty phase recalled Dr. Michael Maher, one of the psychiatrists who had testified in the first phase; called another M.D., neurologist Dr. Geoffrey Colina; and called two psychologists, Drs. James Campbell and Marvin Dunn.

Dr. Maher testified that a finding of sanity by no means precludes a finding that mental illness is present. (T 6909) After spending five hours interviewing Mr. Loyd, he diagnosed psychosis NOS (not otherwise specified) with delusional features, as well as traumatic brain injury. (T 6915, 6926) He explained that a diagnosis of psychosis means the individual is out of touch with reality, in that he experiences delusions, hallucinations, or disordered thought. (T 6926-27; see T 6915-16) Dr. Maher acknowledged that at times Mr. Loyd has the ability to act rationally. (T 6994, 6997-98) He explained that psychotic symptoms typically ebb and flow, sometimes dramatically, and that while some psychotic patients are disabled in the professional and social spheres, others can maintain a normal outward appearance. (T 6931-32)

Dr. Maher noted that Mr. Loyd does not believe he is mentally ill. (T 6929) The doctor disagreed, pointing to Mr. Loyd’s belief that he has a

special role to play in the Messiah's mission to save souls, and his related belief that he is being attacked and maligned by unseen powerful forces in the struggle to save those souls. (T 6938-39) Dr. Maher rejected the conclusion that Mr. Loyd suffers from ASPD, despite the criminal behavior the State had proved, because he can and does maintain good relationships. (T 6946-47)

On cross and redirect, Dr. Maher explained that the diagnoses given by the various defense experts in this case are not in fact inconsistent, in that "critically" they all feature a finding of a psychotic component. (T 6989-93, 7000-01) He also explained that the defendant's courtroom outbursts reflect poor impulse control, which he believes is consistent with his untreated mental problems. (T 7004)

Dr. Colino, the defense's neurologist, diagnosed the defendant with organic psychosis NOS, explaining that "organic" in this context means originating in the brain, rather than drug-induced. (T 6450, 6511-12) The defense displayed images of the defendant's brain while Dr. Colino pointed areas where he perceived scarring and other abnormalities. (T 6482-6510) He agreed with Dr. Maher that the defendant presents as "incredibly" tangential and obsessed, displaying hyper-religiosity, a grandiose self-image, and "persecutory" thought. (T 6459) Dr. Colino explained that those

symptoms, across cultures, can be found in patients with organic psychoses. (T 6511) He compared the defendant's multiple distorted perceptions to the view in a fun-house mirror, and testified that Mr. Loyd's inability to check those distorted perceptions leads him to be unable to conform his behavior to the requirements of law. (T 6512-13)

Psychologist Dr. James Campbell diagnosed the defendant with post-traumatic stress disorder, citing various violent events the defendant had experienced and witnessed. (T 6591-96) He described the symptoms of that disorder as intense emotional reactivity and a heightened "fight or flight" response to events. (T 6613) Like Dr. Maher, he rejected an ASPD diagnosis, because in his view Mr. Loyd does not lack empathy. (T 6619)

The other defense psychologist at the penalty phase, Dr. Marvin Dunn, is a retired psychology professor from FIU who currently specializes in "community psychology." (T 6768-69, 6779-80) He described that field as focusing on external actors – both institutions and individuals – that influence emotional development. (T 6779-80) He gave his opinion that Mr. Loyd experiences an extreme degree of "cultural paranoia" focused on police abuses, to a degree Dr. Dunn has never come in contact with. (T 6803) He described Mr. Loyd's perceptions as "so distorted, so dysfunctional, so beyond the pale... [he harbors] an extraordinary amount

of bias” regarding race relations. (T 6803) Dr. Dunn concluded that the defendant’s beliefs are not a product of rational thought, but instead constitute a delusional belief system. (T 6827)

In rebuttal, the State called neuro-radiologist Dr. Geoffrey Negin, who disagreed with most of the observations Dr. Colina had made regarding the brain scans they had both analyzed. (T 7226-65)

PENALTY PHASE: ARGUMENT OF COUNSEL

The defense filed a motion seeking to limit argument by the State in its penalty-phase closing. (R 2927-31) The motion objected, *inter alia*, to any argument that would misstate the law, ask the jury to send a message to the community, inflame the passions of the jury, or rely on a non-statutory aggravating circumstance. (R 2928-31) When the motion was called, the court announced “State, both sides need to follow the rules in closing arguments. Everybody clear on that?” The State responded “we are.” (R 5876-77)

Early in its penalty phase closing, the State told the jurors “you have an obligation to...try your best to reach a unanimous verdict.” (T 7439) The defense immediately responded “objection. Misstatement of the law.” (T 7439) The trial court overruled that objection in the jury’s presence. (T 7440) In defense counsel’s closing, he argued that the prosecutor “was

trying to shift the law into his favor, about going back there and... acting as one.... That's all incorrect. If you read the jury instructions, I'm right, he's wrong." (T 7503) A State objection was sustained, again in the jury's presence. (T 7504)

In his penalty-phase opening, defense counsel stated "I don't want you to discount Dr. Toomer because you voted against the insanity. I respect your decision.... What I want you to focus on with Dr. Toomer is that "delusional thinking" definition that he gave." (T 5785-86) At the penalty phase charge conference, counsel for the State acknowledged that the proof supported an instruction on the statutory mitigating factor 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. See Section 921.141(7)(f), Florida Statutes. (T 7347-48) However the State, in its penalty-phase closing, argued as to the "conform his conduct" statutory mitigator, "you-all have already made this determination by rejecting his insanity defense. You determined that he knew the difference between right or wrong." (T 7464) Defense counsel responded "objection, misstatement;" the court overruled the objection. (T 7464).

Near the end of the penalty-phase closing, the following took place:

STATE: [T]he defense has on several occasions, in fact, I believe every single witness that they called, they brought up the fact that Mr.

Loyd was serving two life sentences in prison. And they believe, I suppose, that that is mitigating.

DEFENSE: Objection.

THE COURT: Sustained, rephrase.

STATE: What I would submit to you is that the fact that Markeith Loyd is already serving a life sentence in this case –

DEFENSE: Objection, may we approach?

THE COURT: Overruled. Go ahead.

STATE: - is no punishment at all.

DEFENSE: Objection.

THE COURT: Overruled.

STATE: That is the evidence and reality before you.... Mr. Loyd got life sentences not just for the murders of Sade Dixon and her unborn child, he was given life for the attempted murder of Ronald Stewart, the attempted murder of Stephanie Dixon Daniels, and the attempted murder of Dominique Daniels. Is another sentence of life appropriate in this case?

DEFENSE: Objection, improper argument.

THE COURT: Overruled.

STATE: The reality is, it would be another piece of paper in Mr. Loyd's file.

DEFENSE: Objection, improper argument.

THE COURT: Sustained, rephrase.

STATE: The question is, is the murder of Lieutenant Clayton the same, or is it so much more? [Video played]

(T 7484-87)

Moments later, at the end of the State's argument, the defense sought a mistrial with regard to the "no punishment at all" line of argument. (T 7491) The judge responded "I sustained that objection," and defense counsel replied "so I'm moving for a mistrial." (T 7491-92) The prosecutor argued "it is no error at all. The defense counsel has told these jurors on multiple occasions, there are documents in evidence, that Mr. Loyd has multiple life sentences.... It is...factual that if they give him a life sentence it has no meaning as to Mr. Loyd's future as an individual. I'm unaware of any case law that prohibits me from making that argument now that they have made the decision to bring it out." (T 7492) Defense counsel responded that the objected-to argument amounted to reliance on a non-statutory aggravating factor. (T 7494-95) Addressing the prosecutor, the judge stated "I would prefer you not have said it, but I don't believe it rises to the level of a mistrial." (T 7498) Defense counsel asked the court to tell the jury "any attempt [by] the State of Florida to downplay the significance of a life sentence should be disregarded." (T 7500) The judge, who had

already noted that in her view any curative instruction would “make the whole problem worse,” responded “I’m not giving that instruction.” (T 7500)

PENALTY PHASE: JURY INSTRUCTIONS

The State argued before trial that the standard penalty phase jury instructions and verdict form should be adapted to comply with State v. Poole, 297 So. 3rd 487 (Fla. 2020). (R 1628-34) 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 responded that Section 921.141 of the Statutes controls, and precludes the proposed change. (R 1710-12, 3769-71) The defense further argued that the federal constitutional rule that capital proceedings must provide for “heightened reliability” militates against the proposed change. (R 1713-16, 3771)

At a charge conference, the court noted that under Poole and Section 921.141, there is no need for a jury to rule *beyond a reasonable doubt* either that the aggravation is sufficient to warrant execution, or that the aggravation qualitatively outweighs the mitigation. (T 5635) The State objected to any language being read that would require *either* unanimity *or* a beyond-a-reasonable-doubt finding by the jury as to either the sufficiency

question or the “outweighs” question. (T 5638, 5643) The court twice noted that during deliberations, twelve jurors might agree that an aggravator had been proved beyond a reasonable doubt, but only ten might agree that the aggravation was sufficient to warrant death. (T 5644-45, 5648) The court ultimately instructed the jury without making the State’s requested changes to the standard instructions. (T 7421-22, 7428-29; R 4485, 4488)

During closing argument, defense counsel argued “sufficiency of the aggravating factors...is an individual decision. And it only takes one to then end this deliberation and come back with life...[if] all the jury believe [the aggravating factors] are sufficient, then you move on to the next section.” (T 7550-51) The State objected to “misstatement of the law.” (T 7551) The court sustained the objection, advising the jury to follow its instructions. (T 7551)

By a pretrial motion, the defense sought an express penalty phase jury instruction stating that each juror may consider mercy in determining the appropriate sentence. (R 2575-77) The motion acknowledged that the standard instructions state that “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.” See Fla. Std.

Jury Instr. 7.11 (Crim.). The requested additional language would have added “[y]ou may always consider mercy in making this determination.” (R 2576) The State opposed the motion (R 2578-80, 3327, 6455-58), and the court read the standard language without the requested addition. (T 7429)

Over an objection made at the penalty phase charge conference, the court instructed the jury, pursuant to the standard instructions, that the defense bears the burden of proving mitigation by the greater weight of the evidence. (T 7422) The defense had sought, instead, instructions which would omit any indication that the defense carries any burden of proof as to mitigation. (T 7344-45)

PENALTY PHASE: DELIBERATIONS AND VERDICT

The jurors deliberated for three and a half hours on December 7, and for an hour and a half on December 8. (T 7559, 7565, 7567, 7575) During that time they sent out the question “[s]ince Markeith’s arrest, has there been any treatment (psychiatric meds) of any sort been administered to him? Since was diagnosed of various mental illnesses – was anything done to aid in that?” (T 7560-61; Sealed Record at 724) With the agreement of both parties, the court responded that they must rely on the evidence. (T 7560) The jury also sought, and received, a readback of the cross-examination testimony of the defendant’s daughter. (T 7567-73) That

cross-examination included her testimony that her father had once alarmed her by conveying paranoid thoughts; asked by the prosecutor, she answered that she did not seek medical help for him at that time. (T 7572; see T 7087-88)

The verdict form indicates the jury found that all five aggravating factors presented to them were proved beyond a reasonable doubt. (R 4860-61) The jurors also checked “yes” as to

- “we the jury find that the aggravating factors are sufficient to warrant a possible sentence of death,”
- “one or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence,”
- “we the jury find that the aggravating factors... outweigh the mitigating circumstances,” and
- “we the jury unanimously find that the Defendant...should be sentenced to death.” (R 4861-62)

POST-PENALTY PHASE LITIGATION

The parties reconvened before the court on January 7, 2022. (R 7287-7314) At that hearing they again addressed the “life would be no punishment at all” argument made in penalty phase. (R 7288-7301) The

State again asserted “it can’t be said that that comment was misleading or inaccurate or factually wrong in any way.” (R 7291) The defense responded “[t]here are a lot of things that are true about these cases that cannot be argued before a jury,” and added “Mr. Loyd is entitled to individualized sentencing on each case, which the State eliminated.” (R 7297)

A Spencer hearing was held on January 14 and February 7. (R 6938-7170) During that hearing the State called more witnesses to give victim-impact statements. (R 7060-76)

At the Spencer hearing, the defense also called neuropsychologist Dr. Joseph Sesta, who had evaluated Mr. Loyd for the defense but who was not called as a witness in first phase or penalty phase. (R 6992-7023) Like Dr. Negin, he concluded that brain injuries and abnormalities had played no role in the shooting. (R 6996-97) Per his testimony, however, that view does not preclude the presence of major mental illness; his diagnosis is delusional disorder with paranoid and grandiose delusions. (R 6997-98) Dr. Sesta explained that delusional disorder is a psychotic disorder, and that “psychosis” is an overarching term which also takes in schizophrenia and schizoaffective disorder. (R 6998) He rejected a schizophrenia diagnosis because those patients – as distinct from those who suffer from delusional disorder - usually cannot interact with others

normally. (R 6998-99) He distinguished Mr. Loyd from other black men who share his beliefs about American policing by pointing to his MMPI-2 score on the “paranoid scale,” which was elevated “to clinical levels.” (R 7002-03)

Between the Spencer hearings, on February 6, the defense moved the court to appoint an expert or experts to evaluate the defendant’s competence to proceed. (R 4748-51) The motion was based on concerns expressed by another psychologist retained by the defense during January, Dr. Xavier Amador. (R 4749-50) On February 7, when court reconvened for the second portion of the Spencer hearing, the judge agreed to take Dr. Amador’s testimony at that time regarding both competency and mitigation. (R 7085) Also on February 7, the court appointed Drs. Jeffrey Danziger and Katherine Oses to evaluate Mr. Loyd’s competency. (R 7087-88, 7175)

Dr. Amador testified on February 7 that he met with Mr. Loyd twice on Zoom, on January 21 and February 3, and concluded that he lacked the ability to consult with counsel with an appropriate degree of rational understanding, lacked the ability to disclose pertinent facts to counsel, and lacked the ability to manifest appropriate courtroom behavior. (R 7107-10) He acknowledged that per his reading of the trial transcript, clearly Mr. Loyd has moments of clarity, in that his testimony was “responsive in a structured manner.” (R 7117-18) However, Dr. Amador testified that during

their 2022 interactions he was completely unable to re-direct Mr. Loyd's attention from the deficiencies he saw in the court system's handling of the Sade Dixon matter. (R 7121-22) Amador acknowledged that he only works with defense counsel, but noted that in "the overwhelming majority" of cases he has found their clients to be competent. (R 7126, 7165)

A competency hearing was held February 21. (R 7172-7282) At that hearing, the court noted that the Spencer hearing had concluded, and that there was no further opportunity under the Criminal Procedure Rules for either party to introduce testimony, or for the defendant to speak on his own behalf. (R 7175-76) The defense argued that under the Rules the court could not proceed until a competency finding was made. (R 7176, 7263-64) The judge questioned one of the doctors she had appointed, Dr. Jeffrey Danziger; he responded that the defendant would understand a death or life sentence if either were to be announced, and would understand his appeal rights. (R 7218-19) When she asked Danziger "what is it he would not be competent to do at...sentencing?" he responded "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...that, through the prism of his delusional mind, he would not grasp." (R 7219) The court eventually ruled that "[t]he Defendant must be

competent in order to proceed with sentencing,” citing Rule 3.214, Fla. R. Crim. P. (R 4779)

At the competency hearing the defense called as its witness Dr. Danziger, who is a psychiatrist with 34 years’ experience in forensic practice, and who has evaluated between 18,000 and 20,000 inmates for competency, sanity, or mitigation. (R 7178) He noted that he tested for malingering in this case, since he had assumed “this is all a last-minute scheme he’s pulling to derail the process. But somewhat to my surprise, the malingering test came out clean.” (R 7180, 7187) Danziger diagnosed a psychotic disorder “not quite entirely fitting the criteria for schizophrenia.” (R 7180, 7206-08) He explained that delusional disorders are part of a spectrum of psychotic disorders that includes schizophrenia, and testified that he “wouldn’t quibble too much” in this case over the defense experts’ differences as to which of those psychotic disorders is present. (R 7206-07)

Dr. Danziger disagreed with Dr. Amador’s conclusion that Mr. Loyd is incapable of manifesting appropriate courtroom behavior; he concluded that “[m]y opinion is he can behave himself in court if he wants to.” (R 7223) However, Danziger concluded that as of February, 2022, Mr. Loyd had a factual understanding of the proceedings against him, but lacked a *rational* understanding of the proceedings. (R 7186) While the defendant

understood in 2022 what the various actors in the system were assigned to accomplish, “he expressed a belief that...the defense team are aware of his innocence, [and] that [this view has something] to do with blood not being tested or bodies being moved.⁸ That [the defense team] are all aware of this and [are] deliberately working against him as part of a plot to have him killed... He believes [the proceedings are] essentially a sham.” (R 7186-88)

As part of his inquiry into whether Mr. Loyd could consult with counsel with a reasonable degree of rational understanding, Dr. Danziger asked one of the lawyers on the defense team, Teodoro Marrero, “can you work with your client?” (R 7188) Per Danziger Marrero responded “no, we cannot, because he continually perseverates on this issue of...you-all are working against me, tell me about the body being moved, tell me about the blood that wasn’t tested.” Dr. Danziger expressed his understanding that this “is not a rational defense. So in that sense, his ability to consult with

⁸ Mr. Loyd addressed the court on several occasions, over the course of the Clayton case, about his beliefs that just after the Dixon shooting, the Dixon family moved the bodies of Sade and her brother Ronald; that blood testing would reveal their interference; that the fact of their interference would tend to show his innocence in the Dixon matter; that a press release issued by police just after the Dixon shooting was inaccurate and was deliberately intended to inflame the public; and that proof of these facts would make a crucial difference to the Clayton jury. (R 6501, 6530, 6535, 6554, 6475, 6997, 7052-59, 7329, 7336)

counsel, directly because of mental illness, is in my opinion unacceptably impaired.” (R 7189)

The State called the third expert appointed by the court, psychologist Dr. Katherine Oses. (R 7227-63) She reported that that Mr. Loyd, during their conversation on February 10, did consistently return to his views that the legal system was biased against him, that he “didn’t trust anyone,” and that he “did focus somewhat on the blood evidence and the body being moved.” However, in her view, he was cooperative and “oriented to date, person, place, time,” and she was able “for the most part” to get him to stay on her choice of topics. (R 7233-38, 7242) Dr. Oses perceived no psychosis, concluding instead that the defendant’s preoccupations are typical of antisocial personality disorder. (R 7239-40) She agreed with Dr. Danziger that no malingering was present. (R 7242)

Dr. Oses concluded that the defendant’s appreciation of the charges and appreciation of the range of possible penalties are both “acceptable.” (R 7243) In contrast, she characterized as “likely acceptable” his understanding of the adversarial nature of the system, his ability to disclose pertinent facts to counsel, his ability to testify relevantly, and his ability to manifest appropriate courtroom behavior. (R 7244-48) As to that last criterion, she reported that Mr. Loyd “told me that...he did not plan to

present with appropriate courtroom behavior.” (R 7242) Her overall conclusion was that the defendant was competent to proceed. (R 7248)

The defense argued that characterizing a person’s abilities as “likely acceptable” “is another way of saying...‘I don’t know.’ ” (R 7269) The State, in its argument, noted that Mr. Loyd has not previously been found incompetent. (R 7273) The defense rejoined that “[a]s the Court is well aware, competency waxes and wanes.” (R 7278)⁹ Defense counsel further noted that at that moment, during the competency hearing, the defendant was urging her to proffer a police report which examined the trajectory of the bullets that were fired at Sade Dixon’s house. (R 7280)

The court on February 24 filed an order finding the defendant competent to proceed. (R 4779-89) In the order, the court noted that the defendant had been ruled competent before the Dixon trial when the defense first brought such concerns to the court’s attention, had sensibly realized before trial that he was too limited by his inmate status to successfully represent himself, and had testified at trial in a relevant fashion. (R 4784, 4786, 4787) The court concluded that Mr. Loyd “has a

⁹ Dr. Danziger so testified, as to both competency and the symptoms of psychosis, at the competency hearing. (R 7198) Drs. Sesta and Amador testified similarly at the Spencer hearing. (R 7011-12, 7168) Dr. Maher testified in the penalty phase that the intensity of such symptoms ebbs and flows, “sometimes very dramatically.” (T 6932)

reasonably rational understanding of the proceedings against him.” (R 4785) The court in its order did not acknowledge that four doctors had emphasized in this case that psychotic symptoms are not static, but ebb and flow.

In its order the court also concluded that “throughout this trial the Defendant demonstrated an ability to control himself when he wished to.” (R 4785) The record shows that at a motion hearing in 2019, the defendant was removed from the courtroom after telling the judge “watch your m*****-f***** tone. F*** you, ho.” (R 7408-09) During the penalty phase, in the jury’s presence, the defendant interjected audibly during various witnesses’ testimony and during the State’s closing. (T 6696-97, 7165-66, 7191-92, 7439, 7485-86) He was again removed from the courtroom after the penalty phase verdict was returned (T 7585) and during the Spencer hearing. (T 7090-99)

Also in the competency order, the court acknowledged the concerns Drs. Danziger and Amador expressed about the defendant’s overwhelming persistence in objecting to how the Dixon crime scene was handled. (R 4781-82) The court characterized that preoccupation as an indication that “he simply refuses to accept his guilt and espouses a defense theory that has been rejected by two separate juries.” (R 4788)

SENTENCING

The parties and court reconvened on March 3, when the court pronounced a sentence of death on Count I with consecutive maximum prison terms on each of Counts II to V. (R 7384-85) That pronouncement was accompanied by issuance of a formal sentencing order on all five counts (R 4793-98) and a written order setting out the trial court's findings underlying the death sentence. (R 4806-31) In its sentencing order, the court gave slight weight to the aggravating factor that the capital felony was committed while the defendant was on felony probation. (R 4811) The court gave the "prior violent felony" aggravator great weight. (R 4812) The court also gave the remaining aggravators – that the victim of the capital offense was a police officer, that the capital offense was committed to avoid arrest, and that the capital offense was intended to hinder a lawful government function – great weight, after treating them as one aggravator due to the overlap in their subject matter. (R 4813)

Also in the sentencing order, the judge noted that in her view the first-phase testimony of the State's experts as to sanity had been more credible than Dr. Toomer's first-phase testimony for the defense. (R 4817) As to penalty-phase testimony, the judge concluded that the proof was "consistent with the diagnosis of anti-social personality disorder." (R 4821)

While assigning that circumstance moderate weight as a mitigator, the court wrote that “[t]here is no credible evidence that this mental health factor profoundly contributed to the defendant’s motives or behavior when he murdered Debra Clayton.” (R 4821) The judge also found that no brain injury or abnormality had been proven, in that she found the testimony of Drs. Negrin and Sesta on the subject to be more credible than that of Dr. Colino. (R 4822)

As to the statutory mitigating circumstances that deal with mental health-related issues, the court ruled that neither was proved by the greater weight of the evidence. (R 4814-19) Generally, the court found the defense experts’ testimony was both “inconsistent” and “contradictory,” concluding that “[t]he multitude of...opinions was not especially helpful.” (R 4815, 4818) In particular, the court singled out the varying diagnoses the defense experts had reached. (R 4815) The court did not acknowledge testimony by Drs. Sesta, Danziger, Maher, and Amador which explained that apparent inconsistencies in the defense experts’ diagnoses were insignificant.

As to non-statutory mitigation not relevant to mental health, the court found that childhood trauma, trauma in the defendant’s adult life, and trauma due to racism were all proven, and respectively assigned those circumstances moderate weight, some weight, and minimal weight. (R

4822-26) The court also found that excessive force was used at the time of the defendant's arrest, and gave that circumstance minimal weight. (R 4826-27)

The sentencing order also briefly addressed the comparative proportionality of a death sentence here, concluding that past cases involving similar facts establish that the death sentence is proportional. (R 4827) Timely notice of appeal from the orders of judgment and sentence was filed March 19. (R 4949-50)

SUMMARY OF ARGUMENTS

Point one. Over objection, the court granted three of the State's challenges for cause because the potential jurors knew of information that had been excluded from the first phase of trial. Two of those potential jurors assured the court they could put that knowledge aside; the court did not permit the defense to ask the third if he could do the same. The record shows the three jurors were otherwise able to follow the court's instructions. Dismissing them amounted to manifest error.

Per the governing caselaw, such an error is not subject to harmless-error analysis. This is so because a reviewing court cannot meaningfully consider how a differently composed jury might have decided a case.

The perceived problem with the jurors' service would not have arisen until the penalty phase. Again per the governing caselaw, reversal of only the sentence is for that reason the appropriate remedy.

Point two. The defense unsuccessfully sought, in writing, an amendment to the first-phase jury instruction on insanity. The requested language would have clarified the burden of proof relevant to that defense; the proposed change correctly stated the law and would have affirmatively alleviated potential confusion.

Point three. Whether the proof satisfied the necessary element of premeditation, as to the charges on Counts I and II, was vigorously disputed in argument to the jury. The State, in its first-phase closing, substantially misstated the law that defines premeditation. The misstatement amounted to fundamental error on this record, where during deliberations the jury sought and received a readback of testimony from the eyewitnesses to both shootings. The error should be deemed structural.

Point four. During closing argument in the penalty phase, objections were overruled to two State arguments that patently misstated this Court's caselaw. A third objection was overruled to an argument that relied on a non-statutory aggravating factor. Where a ruling denying an objection to closing is deemed erroneous, the reviewing court places the burden on the beneficiary of the error to show beyond a reasonable doubt that there is no reasonable possibility the ruling contributed to the conviction or death sentence. The State cannot make that showing on this record.

Point five. The defense asked the court to remove from the penalty-phase jury instructions any language that places on the defense the burden of proving mitigating circumstances. Appellant acknowledges that this Court has held that the defense bears such a burden. Appellant's position is that the caselaw adverse to him does not clearly reflect the intent of the

Legislature, has doubtful antecedents, and, in this case, ran afoul of federal caselaw applying the federal Eighth Amendment. The error should be deemed structural.

Point six. Appellant's objection to the use of music to enhance victim-impact evidence was overruled. Appellant suggests that current case-law, read together, suggest a bright-line rule precluding musical accompaniment to any exhibit offered to show the uniqueness of a victim. Appellant requests this Court create such 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.

Point seven. Even when a criminal defendant has previously been found to be competent, the trial court must remain receptive to revisiting the issue if circumstances change. Here the court treated the evaluating doctors' testimony as conflicting, and defaulted to her own experience with the defendant to find him competent to proceed. The fact that the doctors had disparate ability to communicate with Appellant reflects only the fact, testified to by four doctors below, that symptoms such as those Appellant contends with ebb and flow. The decision to disregard altogether the

serious concerns two of the three doctors had amounted to an abuse of discretion.

Point eight. Appellant's motion challenging the jury panel presented a colorable, prima-facie claim of equal protection. Since the State's response did not contest the underlying allegations, and since the motion was denied without comment, Appellant seeks remand for a hearing on this issue and, if successful at said hearing, a new trial.

Point nine. Appellant seeks to exhaust for federal review the claim that the error in denying an express mercy instruction should be deemed structural, since the impact of its absence on the jury cannot be ascertained from the record.

Point ten. Appellant seeks to exhaust for federal review the claim that the United States Supreme Court should recede from its own cases, to the extent they preclude recourse to the Sixth Amendment where a capital offense is charged and the jury is death-qualified before the first phase of trial.

Point eleven. Appellant seeks to exhaust the claim for federal review that the death penalty now violates the Eighth Amendment in light of evolving standards of decency.

Point twelve. Appellant seeks to exhaust the claim for federal review that the United States' Supreme Court decision in Atkins should be extended to prohibit the execution of the severely mentally ill.

Point thirteen. Appellant seeks to exhaust the claim for federal review that Florida's capital sentencing scheme is inadequate to protect against the arbitrary and capricious application of the death penalty.

ARGUMENT

POINT ONE

THE TRIAL COURT DISMISSED FOR CAUSE, OVER DEFENSE OBJECTIONS, VENIRE MEMBERS WHO WERE COMPETENT TO SERVE. SUCH AN ERROR IS NOT SUBJECT TO HARMLESS-ERROR REVIEW.

Standard of review. A trial court's determination of juror competency will not be overturned absent manifest error. Ault v. State, 866 So. 2d 674, 684 (Fla. 2003).

Argument. Here, as in Ault, the record supports a finding of manifest error in the court's exclusion, for cause, of competent venire members. In this case 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. (T 1096, 1105, 1540, 1558, 2975) Each of those jurors, on the State's motion and over a defense objection, was excused for cause because evidence of that incident had been excluded by the court as to the first phase and limited as to the penalty phase.¹⁰ (T 1112-15, 1558-60, 1577, 1647, 2982-84)

¹⁰ As noted, the court later expanded that admissibility ruling.

The State, in defending the cause challenges made below, relied on Bolin v. State, 736 So. 2d 1160 (Fla. 1999) and Reilly v. State, 557 So. 2d 1365 (Fla. 1990). In Reilly, a murder case where the defendant's confession had been suppressed, the trial court declined to exclude for cause a venire member who knew about the confession. This Court reversed Reilly's conviction because what the juror knew was "far more damaging ...than anything which was actually introduced into evidence." 557 So. 2d at 1367. This Court further concluded it was unrealistic to believe a juror could entirely disregard such a piece of knowledge. Id.

In Bolin, the court trying the case denied individual voir dire, despite news reports which revealed there had been not only a confession but a prior conviction in the case, and despite a ruling excluding from trial all evidence of either the confession or the previous verdict. 736 So. 2d at 1165. Five jurors who admitted they had read about the case served, although counsel had not been permitted, in the group setting, to probe the extent of their knowledge. Id. at 1163-64. This Court reversed the ensuing conviction, based in part on Reilly.

In this case, Juror 809 established that he could presume the defendant innocent, that he could vote for either a death or life sentence, and that he could return a verdict of not guilty by reason of insanity. (T

1088-93, 1101, 1104) Voir dire of Juror #717 established that he could presume the defendant innocent; that he had no religious, personal, or moral objection to the death penalty; that he could think of no category of case that should always result in a death sentence; that he could vote for either death or life; and that he could set aside, in the guilt phase, any knowledge of the Dixon shooting. (T 1542-46) Juror 21 responded that he could presume the defendant innocent, that he believes the death penalty should never be automatic regardless of whether the victim is a law enforcement officer, that he had no doubt that he could vote for either verdict, and that he could set aside knowledge of the Dixon matter during the first phase of trial. (T 2976-81)

Defense counsel further established that jurors 809 and 717 could, during deliberations, set aside their knowledge of how the defendant came to be injured. (T 1106-07, 1558-59) Counsel unsuccessfully asked the court to inquire of juror 21 whether he could also set aside that knowledge. (T 2984-85) Defense counsel preserved, at the time the jury was selected, the question whether the State's cause challenges had been granted in error. (T 3814-15)

In Ault, *supra*, this Court noted that the test for determining a juror's competency to serve is whether he can lay aside any bias or prejudice, and

render a verdict solely on the evidence presented and the court's instructions on the law. 806 So. 2d 674, 683. A venire member must be excused for cause where there is a reasonable doubt that he is impartial. Id. In Ault, a potential juror was excluded for cause because she opposed the death penalty. Id. at 684-87. This Court held that voir dire had failed to establish that her personal views would substantially impair her ability to follow the court's instructions on the law. This Court accordingly reversed Ault's death sentence, applying Gray v. Mississippi, 481 U.S. 648 (1987), where the same disposition was reached on facts indistinguishable from those in Ault.

Here, as in Ault and in Gray, jurors were lost to the defense although there was no question as to their ability to follow the court's instructions. The error in Ault and Gray was based on the faulty perception that the jurors in question could not set aside their personal opinions on substantive law; the error here is based on the faulty perception that the jurors could not set aside a presumed visceral reaction to a circumstance which was ruled to be admissible in the penalty phase, albeit for a limited purpose. Bolin and Reilly are distinguishable here: the juries in those cases were tainted by knowledge of facts that were patently more prejudicial to the defense than anything the jury would ultimately hear. The excluded jurors

in this case, in contrast, knew something which the jury would ultimately learn, even pursuant to the court's pretrial order. What the excluded jurors knew here, further, was in no way likely to eviscerate the impact of the State's case, in light of the videotaped evidence of the charged shooting. Dismissing the three jurors thus amounted to manifest error.

According to both the United States Supreme Court and this Court, the error identified in Gray and Ault is not subject to harmless-error analysis. This is so as a practical matter, because a reviewing court cannot meaningfully consider how a differently composed jury might have decided a case. Gray, 481 U.S. at 660-66; Ault, 866 So. 2d at 686. See *generally Johnson v. State*, 53 So. 3rd 1003, 1007 (Fla. 2010).

Here as in Gray and Ault, the jurors' presumed disability would not have arisen until the penalty phase. Reversal of the sentence of death is for that reason the appropriate remedy.

POINT TWO

THE DEFENSE SOUGHT TO MODIFY THE STANDARD JURY INSTRUCTION ON INSANITY. THE TRIAL COURT ERRED IN DENYING THE PROPOSED CHANGE, WHICH WOULD HAVE CLARIFIED THE DEFENSE'S BURDEN OF PROOF.

Standard of review. The question 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. 3rd 1013, 1019 (Fla. 2016).

Argument. The defense at trial unsuccessfully moved to modify the standard criminal jury instruction on insanity, no. 3.6(a). The standard paragraph addressed by the motion correctly states that “[t]he defendant has the burden of proving the defense of insanity by clear and convincing evidence.” See Section 775.027(2), Florida Statutes. Instruction 3.6(a) goes on to state that “[c]lear 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.*” The defense sought to delete the italicized clause, and to replace it with “of such weight that it is sufficient to persuade you the Defendant’s claim is *highly probable.*” (Emphasis added.) The motion also sought clarifying language

to follow, i.e., “[clear and convincing proof] 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.” (Emphasis added.) The request was denied, and the jury was read the standard instruction on the burden of proving insanity.

In a criminal case, in order to be entitled to a special instruction, the defendant must show (1) that the proposed instruction was supported by the evidence, (2) that the standard instructions do not adequately cover the affected subject matter, and (3) that the proposed instruction is a correct statement of the law, and is in itself neither misleading or confusing.

Stephens v. State, 787 So. 2d 747, 756 (Fla. 2001). All three conditions are met in this case.

As to (1), an instruction on the burden of proof is always relevant to what the jury must consider in order to convict. See Yohn v. State, 476 So. 2d 123 (Fla. 1985), where this Court held that the standard instruction on the then-existing insanity defense did not completely and accurately state the law governing the defense, in that it did not establish where the burden of proof lay.

As to criterion (2), the standard language in instruction no. 3.6(a) does not *adequately* cover the affected subject matter from a layman's perspective. The standard instruction that explains how to weigh an insanity defense is not clearly different from the standard instruction that explains how to apply the "beyond a reasonable doubt" standard. All criminal juries are instructed that their doubts as to the State's case are reasonable, if their view that the defendant has been proved guilty "*is not stable but...wavers and vacillates.*" Fla. Std. Jury Instr. (Crim.) 3.7. Per instruction no. 3.6(a), a defendant has not met his burden of showing insanity by clear and convincing evidence unless that evidence "*produces a firm belief, without hesitation.*" Without more, the difference between the two analyses is less than clear.

As to criterion (3), the language proposed by the defense is a correct statement of law which is not in itself confusing. This Court, in cases regarding violations of the Code of Judicial Conduct, regularly explains that the "clear and convincing" quantum of proof "is an intermediate standard, more than 'a preponderance of the evidence,' but less than "beyond and to the exclusion of a reasonable doubt." In re Hawkins, 151 So. 3rd 1200, 1212 (Fla. 2014); In re Davey, 645 So. 2d 398, 404 (Fla. 1994); In re LaMotte,

341 So. 2d 513, 516 (Fla. 1977). The language sought here is indistinguishable; it is clearly correct, and positively alleviates confusion.

As Appellant argued below, in those civil theft cases where more than one burden of proof applies, a standard instruction provides the jury with an intuitively understandable comparison similar to that requested here. (R 3783) Civil instruction no. 411.3 includes this optional sentence: “[c]lear and convincing evidence’ differs from the ‘greater weight of the evidence’ in that it is more compelling and persuasive.” The Notes for Use provided with that instruction advise the courts to “[u]se the [optional] sentence if there are other claims in the case that invoke the greater weight of the evidence standard.” See Fla. Std. Jury Instr. (Civ.) 411.3. A similar statement could only have assisted the laymen entrusted with deciding this capital case. As this Court has said, the yardstick by which jury instructions are measured is clarity, since jurors must understand fully the law that they are expected to apply fairly. Perriman v. State, 731 So. 2d 1243, 1246 (Fla. 1999).

Here as in Murray v. State, 937 So. 2d 277, 281-82 (Fla. 4th DCA 2006), the error should be deemed structural, *i.e.*, not subject to harmless-error analysis. A juror who believed that the defense’s burden of proof was as great as the State’s general “beyond a reasonable doubt” burden may have been discouraged for that reason from pursuing an insanity-related

issue. See *generally* Sullivan v. Louisiana, 508 U.S. 275, 280-81 (1993) (misdescription of the burden of proof vitiates the jury's findings); see also Johnson v. State, 53 So. 3rd 1003, 1007 (Fla. 2010) (harmless-error analysis inappropriate where the reviewing court cannot meaningfully consider how an error affected the jury).

In the event this Court deems harmless-error analysis appropriate, where a jury instruction enhances the risk of an unwarranted conviction, constitutional law prohibits giving that instruction in a capital case. See Beck v. Alabama, 447 U.S. 625, 638 and n.13 (1980), *citing* United States Constitution Amend. 8. Here, after the jurors heard the case for and against insanity, just as they were sent back to deliberate in the guilt phase, one of them asked the court whether a copy of the DSM-5 was in evidence. (T 5512) One or more jurors in this case thus may well have given serious consideration to the insanity defense. The record therefore reflects an unacceptable risk of an unwarranted conviction. See Beck, *supra*.

The questioned instruction, by its terms, applied to all counts: it directed the jury to find Appellant not guilty by reason of insanity *if* it found that Appellant committed *one or more of the alleged crimes* but also found that the defense had met its burden of proof. (T 5392) Appellant's

convictions on all five offenses should be reversed, and the case remanded for a new trial.

POINT THREE

THE STATE ARGUED THAT PREMEDITATION IS PROVED UNDER FLORIDA LAW IF THE DEFENDANT HARBORED THE REQUISITE INTENTION “DURING THE ACTUAL ACT.” THAT MISSTATEMENT OF LAW AMOUNTED TO FUNDAMENTAL ERROR ON THIS RECORD.

Standard of review. The Florida courts find fundamental error

- where a jury is precluded by improper argument from making a reasoned assessment based on the evidence, AND ensuing prejudice to the defendant is such as to deny due process, OR
- where doing so is necessary to protect the interests of justice itself.

Ritchie v. State, 2022 WL 2071090 *12-13 (Fla. 2022).

In its first-phase closing, the State argued as follows:

...What exactly does “premeditated design” mean? ...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.

(T 5408-09) (Emphasis added.) There was no objection to that argument. Appellant's position is that the argument amounted to fundamental error on this record.

In closing, the defense emphasized to the jury its view that premeditation was not shown as to either Count I or Count II. (T 5429-30, 5455-56) The argument has support in the record: as to Count I, a detective conceded that the surveillance video in evidence shows a six-second-long exchange of gunfire. Also as to Count I, counsel for the State conceded that the proof would not establish, beyond a reasonable doubt, who had fired first. On Count II, the proof showed that a single shot was fired and entered Captain Carter's hubcap. Hours into first-phase deliberations, the jury sought and received a readback of testimony from the eyewitnesses to both shootings. (T 5537-46, 5562-5602) On this record, the prosecutor's misstatement of the law amounted to fundamental error as to both Counts I and II.

The jury was instructed, pursuant to the standard instruction on first-degree murder, 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.

(T 5360-61; R 4020-21) (Emphasis added.) See Std. Jury Instr. (Crim.) 7.2.

The State's assertion was that intent to kill is premeditated under Florida law if it is shown to exist "during the act." While the second sentence set out above does read that the decision to kill "must be present in the mind at the time of the killing," the first sentence states that a premeditated killing is one committed *after* consciously deciding to do so; the third sentence assumes that some period of time must pass between the decision and the act; the fourth requires that period of time to be "long enough to allow reflection by the defendant;" and the fifth sentence, although phrased in reverse order, restates the first. Even if it were ever proper to analyze a single sentence out of context, it would clearly be improper here, where the other four sentences in the same paragraph *convey a completely different meaning* from that announced by the State. In any event, as Justice Scalia and Professor Bryan Garner pointed out in Reading Law: The Interpretation of Legal Texts,¹¹ "[p]erhaps no interpretative fault is more common than the failure to follow the whole-text canon, which calls on the...interpreter to consider the entire text.... Context is a primary determinant of meaning." *Id.*

¹¹ (West, 2012).

at 167. *Accord* Conage v. United States, 2022 WL 3651398 *2 (Fla. 2022) (urging consideration of “statutory context.”)

As noted, Florida’s appellate courts may correct an error on fundamental-error grounds, despite a party’s failure to follow procedural rules regarding preservation, in order “to protect the interests of justice itself.” Ritchie, *supra*, 2022 WL 2071090 at 12; *accord* Smith v. State, 320 So. 3rd 20, 27 (Fla. 2021). For that principle, Smith cites Reed v. State, 837 So. 2d 366 (Fla. 2002). In Reed, the trial court read a standard instruction which had been effectively superseded by this Court’s caselaw, and which incorrectly defined a statutory term. As this Court wrote in Reed, the incorrect definition had the effect of reducing the State’s burden of proof on a disputed element of a charged offense. 837 So. 2d at 369. While this case involves the argument of counsel rather than an instruction read by the court, the State’s “mosquito” analogy, like the faulty instruction in Reed, may have had the effect of reducing the State’s burden of proof. For all it lacks as legal analysis, the analogy is memorable, and may well have featured in deliberations. “Arguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury.” Drake v. Kemp, 762 F. 2d 1449, 1459 (11th Cir. 1985). Reversal is warranted on Counts I and II, pursuant to Reed.

POINT FOUR

THE COURT OVERRULED OBJECTIONS TO IMPROPER ARGUMENT IN CLOSING ARGUMENT IN THE PENALTY PHASE. THE STATE MUST SHOW THERE IS NO REASONABLE POSSIBILITY THAT THE RULINGS CONTRIBUTED TO THE VERDICT.

Standard of review. Where a trial court overrules objections to closing argument, the reviewing court considers whether the rulings represented an abuse of the court's discretion. Cardona v. State, 185 So. 3rd 514, 520 (Fla. 2016). If the rulings are deemed erroneous, the reviewing court applies the harmless error standard, placing the burden on the beneficiary of the errors to show beyond a reasonable doubt that there is no reasonable possibility that they contributed to the conviction or death sentence. Id.

Argument. Near the beginning of penalty phase closing, the State told the jurors "you have an obligation to...try your best to reach a unanimous verdict." An objection to "misstatement of the law" followed, and was overruled. In defense counsel's subsequent closing, he argued that the prosecutor "was trying to shift the law into his favor, about going back there and... acting as one.... That's all incorrect. If you read the jury instructions, I'm right, he's wrong." A State objection was sustained at that juncture.

The defense objection to the initial misstatement of law should have been sustained. The position that the jurors in a capital sentencing proceeding “have an obligation to...try [their] best to reach [unanimity]” is nowhere echoed in Section 921.141(2) of the Statutes, or in Florida’s standard jury instructions for use in capital cases. Counsel may possibly have had in mind Allen v. United States, 164 U.S. 492, 501 (1896), where the nineteenth-century Court noted “[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors.” However, a jury charge based on Allen may not be given in the penalty phase of a capital case; this Court holds that to do so amounts to reversible error. Patten v. State, 467 So. 2d 975, 979-80 (Fla. 1985); Rose v. State, 425 So. 2d 521, 525 (Fla. 1985), *disapproved on other grounds in Williams v. State*, 488 So. 2d 62, 64 (Fla. 1986). In any event, the courts have moderated Allen, concluding that “a trial court should not couch an instruction to a jury or otherwise act in any way that would appear to coerce any juror to...abandon a conscientious belief in order to achieve a unanimous position.” Thomas v. State, 748 So. 2d 970, 976 (Fla. 1999). Even if an Allen charge were appropriate in the penalty phase, that fact would not authorize the State to improvise a prophylactic instruction declaring a non-existent “obligation” to achieve unanimity.

Here the court's rulings placed its imprimatur on the "obligation" referenced by the State. See Cardona v. State, *supra*, 185 So. 3rd at 516. The objected-to argument was misleading to the jurors, minimizing the role they properly play as individuals in Florida's capital sentencing process. The Eighth Amendment precludes comments that mislead the jury as a *whole* as to its role in the process in a way that leads them as a *group* to feel less responsible than they should for the sentencing decision. Reynolds v. State, 251 So. 3rd 811, 822 (Fla. 2018), *citing* Romano v. Oklahoma, 512 U.S. 1, 9 (1994). Where, as here, the prosecution misleads individual jurors in a way that allows them to feel less responsible as *individuals* than they should for the sentencing decision, a similar diminution of reliability in the decision necessarily results.

Also early in penalty-phase closing, the State argued that the jury had 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."¹² Its position was that the jury had already decided the question when it rejected the insanity defense. The argument was, again, completely

¹² See Section 921.141(7)(f), Fla. Stat.

incorrect: this Court expressly holds that a finding of sanity does not eliminate consideration of the statutory mitigating factors that involve the defendant's mental condition. Campbell v. State, 571 So. 2d 415 (Fla. 1990); Mines v. State, 390 So. 2d 332, 337 (Fla. 1980). The incorrect argument was made in the jury's presence although, at the charge conference, the State had acknowledged that the proof supported an instruction on the statutory mitigating factor in question. The court overruled the defense objection to the misstatement of law, again giving its stamp of approval to a legally insupportable position.

Juries in capital cases may not be precluded from considering, and giving effect to, relevant mitigating circumstances. Skipper v. South Carolina, 476 U.S. 1, 4 (1986). A misstatement by the prosecution which is designed to undermine the jury's ability to consider relevant mitigation may violate Eighth Amendment requirements. DePew v. Anderson, 311 F. 3rd 742, 749-50 (6th Cir. 2002). Both of the misstatements of law discussed here were launched early in the State's presentation, indicating that they "were not provoked by irritations or proddings by the defense counsel." See Brooks v. State, 762 So. 2d 879, 905 (Fla. 2000). Nor were they made "during an impassioned appeal;" instead "the record... suggests that the objectionable arguments were tendered calmly and in a fashion calculated

to forestall a mercy recommendation.” Id. Cf. also Almeida v. State, 748 So.2d 922, 927 (Fla. 1999), where this Court deemed a misstatement of law “innocent” in that “the prosecutor was struggling with a subtle rule of law that is difficult to articulate.”

Near the end of penalty phase closing in this case, the defense made a further objection which was sustained in part and overruled in part. Counsel preserved the point by following up with a motion for mistrial and motion for curative instruction, both of which were denied. That third objection was engendered by the following argument:

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.

Defense counsel argued that the State, by so arguing, had in effect improperly relied on a non-statutory aggravating factor; the State responded that its argument was factually correct. The court relied on Spivey v. Head, 207 F. 3rd 1263 (11th Cir. 2000) to deny relief, noting “I would prefer you not to have said it, but I don’t believe it rises to the level of a mistrial.” This Court should decline to apply Spivey here. Judge Rosemary Barkett’s dissent in that case is well-reasoned; her view was that the argument made to Spivey’s jury, which was similar to the argument

addressed on this point, presented the jury with a “false choice between imposing death and imposing no punishment.” 207 F. 3rd at 1287.

In Brooks v. State, 762 So. 2d 879 (Fla. 2000), an objection was overruled when the State announced in closing that it carefully selects the cases where it seeks the death penalty. On appeal, this Court found that overruling the objection amounted to an abuse of discretion, in that while the State’s remark was “undoubtedly correct...it is also irrelevant and tends to cloak the State’s case with legitimacy...much like an improper ‘vouching’ argument.” 762 So. 2d at 902. Here, similarly, the “no punishment at all” rumination - while based in the undeniable fact that life sentences cannot as a practical matter actually be served consecutively - is both irrelevant and toxic, in that the State in capital cases may not rely on non-statutory aggravation. *E.g.*, Poole v. State, 997 S. 2d 382, 393 (Fla. 2008).

Since each objection discussed here was overruled, the State must show beyond a reasonable doubt that there is no reasonable possibility those rulings contributed to the jury’s death verdict. As to the phantom duty to strive for unanimity in the penalty phase, the court compounded its initial error in overruling the objection when it sustained the State’s objection to defense counsel’s later attempt to right the ship. One or more jurors, as a

result, may have curtailed active participation in deliberations based on a perceived “obligation” to go along with a clear majority.

The federal courts look not only to whether misstatements of law are deliberate, but also to whether they go to the heart of the proffered mitigation. DePew v. Anderson, *supra*, 311 F. 3rd at 749-50 (6th Cir. 2002). Here, the incorrect statement that the jury need not consider the mental health-related statutory mitigators went to the heart of the defense: no fewer than eight mental health-related expert witnesses testified for the parties over the course of both phases of trial.

Finally, the “another piece of paper” argument made in the penalty phase was quotable, like the mosquito-swatting analogy floated by the State in the first phase. Both likely made their way into the jury room; both were patently designed to induce a verdict for a reason other than the evidence and the law. See *generally* Rodriguez v. State, 210 So. 3rd 750, 754 (Fla. 5th DCA 2017). Reversal of the sentence is the correct outcome on this record, since the State cannot show beyond a reasonable doubt that there is no reasonable possibility that the rulings addressed on this point contributed to the penalty phase verdict.

POINT FIVE

THE DEFENSE SOUGHT TO MODIFY THE STANDARD JURY INSTRUCTION WHICH PLACES THE BURDEN ON THE DEFENSE TO PROVE THAT MITIGATING CIRCUMSTANCES EXIST. THE REQUEST SHOULD HAVE BEEN GRANTED, AS THE LEGISLATURE HAS ALLOCATED NO SUCH BURDEN.

Standard of review. Whether a standard jury instruction is accurate comprises a pure question of law subject to *de novo* review. State v. Floyd, 186 So. 3rd 1013, 1019 (Fla. 2016).

Argument. The defense in this case asked the court to remove from the penalty-phase jury instructions any language that places on the defense the burden of proving mitigating circumstances. Appellant acknowledges that this Court has held that the defense bears such a burden. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), *receded from on other grounds in* Trease v. State, 768 So. 2d 1050 (Fla. 2000). Appellant's position is that Campbell does not clearly reflect the intent of the Legislature, has doubtful antecedents, and in this case runs afoul of caselaw applying the federal Eighth Amendment.

Section 921.141 of the Florida Statutes is, and always has been, silent as to a burden of proof relevant to mitigation. *Cf.* Section 921.141(2),

Fla. Stat. (2022) with Ch. 95-159, §1, Laws of Florida, Ch. 79-353, §1, Laws of Florida, and Ch. 72-72, §1, Laws of Florida. 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. Only if the selection phase ends with a unanimous death verdict does the process continue. §921.141(2)(c), Fla. Stat. (2022). The Supreme Court has expressed doubt

whether it is even possible to apply a standard of proof to the...selection phase of a capital-sentencing proceeding. It is possible to do so for the...eligibility phase, because that is a purely factual determination. The facts justifying death...either did or did not exist – and one can require the finding that they did exist to be made beyond a reasonable doubt. Whether mitigation exists, however, is largely a judgment call (or perhaps a value call).

Kansas v. Carr, 577 U.S. 108, 119 (2016) (punctuation omitted). This Court has echoed that doubt. See Poole at 503, quoting Carr for the further thought that “the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy.”

Florida's Legislature characterizes the jury's duties during the selection phase as "a weighing." §921.141(2)(b), Fla. Stat. That focus on weighing, rather than findings, suggests that the Legislature agrees with the view set out in Kansas v. Carr, and has at all times intentionally *not* prescribed a burden of proof for the selection phase.

In Florida's Standard Jury Instructions, no express allocation of a burden of proof on mitigation was present until 2009. See In re Standard Jury Instructions in Criminal Cases, 22 So. 3rd 17, 21 (Fla. 2009). When it approved new language which allocated the burden to the defense, this Court relied on cases which rely on Campbell v. State, *supra*. See *id.*, citing e.g. Coday v. State, 946 So. 2d 988, 1003 (Fla. 2006). Similar language, to the same effect, was later approved by this Court. See In re Standard Criminal Jury Instructions in Capital Cases, 214 So. 3rd 1236, 1262 (Fla. 2017) and In re Standard Criminal Jury Instructions in Capital Cases, 244 So. 3rd 172, 189 (Fla. 2018). The current instructions provide that

it is the defendant's burden to prove that one or more mitigating circumstances exist. Mitigating circumstances do not need to be proven beyond a reasonable doubt. Instead, the defendant need only establish a mitigating circumstance by the greater weight of the evidence.

Fla. Std. Jury Instr. (Crim.) 7.11.

In Campbell v. State, this Court for the first time specified that mitigating circumstances must “ha[ve] been reasonably established by the greater weight of the evidence.” 571 So. 2d 415, 419 (Fla. 1990). For that principle this Court cited Brown v. Wainwright, 392 So. 2d 1317, 1331 (Fla. 1981). Campbell at n.5. What this Court said in Brown on the subject is that as the reviewing court in capital cases, “[o]ur only concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances.” 392 So. 2d at 1331. Brown, of course, predates Apprendi v. New Jersey, 530 U.S. 466 (2000), which has led to the understanding that the federal Sixth Amendment by and large governs aggravating factors, while the federal Eighth Amendment controls the treatment of mitigation. See Poole, *supra*, 297 So. 3rd at 500.

Mitigating circumstances can arise from the defendant’s history, but also from the circumstances of the offense. *E.g.*, Bright v. State, 299 So. 3rd 985, 996 (Fla. 2020); Fla. Std. Jury Instr. (Crim.) 7.11. Historical information is naturally within the knowledge of the defense, but the circumstances of the offense are proved up largely by the State. This practical consideration, as well as the perception that weighing of mitigation is in general a bad fit

with burdens and standards of proof, may have motivated the Florida Legislature to deliberately forego the opportunity to allocate to the defense any burden regarding mitigation.

Constitutional constraints apply here as well. Juries in capital cases may not be precluded from considering, and giving effect to, relevant mitigating circumstances. Skipper v. South Carolina, 476 U.S. 1, 4 (1986). As noted, Florida's current burden of proof regarding mitigation begins with "it is the defendant's burden to prove that one or more mitigating circumstances exist." Particularly in an emotional case, jurors may well be disinclined to find *any* proof brought by the defense mitigating; a juror so disinclined may conclude from the quoted admonition that the defense has *ipso facto* failed to meet its burden and that a vote for death necessarily follows. In any case, if mitigation relied on in closing was introduced by the State as part of the circumstances of the charged offenses, the same result may ensue. Where a jury instruction enhances the risk of an outcome adverse to the defendant in a capital case, the Eighth Amendment prohibits giving that instruction. Beck v. Alabama, 447 U.S. 625, 638 and n.13 (1980).

Appellant's view, for the foregoing reasons, is that it is error to read the instruction at issue over an objection. The error should be deemed

structural, *i.e.*, not subject to harmless-error analysis. See *generally* Sullivan v. Louisiana, 508 U.S. 275, 280-81 (1993) (misdescription of the burden of proof vitiates the jury's findings). See *also* Johnson v. State, 53 So. 3rd 1003, 1007 (Fla. 2010) (harmless-error analysis inappropriate where the reviewing court cannot meaningfully consider how an error affected the jury). If this Court deems harmless-error analysis appropriate, the State's argument in its penalty-phase closing is pertinent: "The mitigating circumstances they are alleging [are] just like the State's allegations, they have to be proven...the idea that Markeith Loyd has a mental illness has not been proven whatsoever." (T 7450, 7453) See Johnson v. State, 44 So. 3rd 51, 70-72 (Fla. 2010) (State emphasized erroneously admitted matter; this Court was unable to conclude error was harmless beyond a reasonable doubt); Robertson v. State, 829 So. 2d 901, 913-14 (Fla. 2002) (same). Reversal of the death sentence appealed from is therefore warranted.

POINT SIX

THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO VICTIM IMPACT EVIDENCE.

Standard of review. Rulings on admissibility of victim-impact evidence in the penalty phase of a capital trial are reviewed for abuse of discretion. Deparvine v. State, 995 So. 2d 351, 378 (Fla. 2008).

Argument. Defense counsel in this case objected solely to the musical soundtrack included in a two-minute montage of photographs displayed for the jury during the penalty phase. Appellant acknowledges that the montage was not maudlin, and was not exploited by the State in argument. Appellant's position is that this Court should 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.

Several courts have addressed memorial montage videos displayed as part of victim-impact showings. In State v. Graham, 513 P. 3rd 1046 (Alaska 2022) and State v. Hess, 23 A. 3rd 373 (N.J. 2011), both cases that did not involve a jury, a memorial montage set to music was played at sentencing; the supreme courts of both states criticized the use of such evidence as likely to appeal solely to emotion. Hess at 393-94; Graham at

1069. The California Supreme Court, in a death-penalty case, affirmed the sentence appealed from, noting that a video played for the jury had *not* been accompanied by "stirring music," which leads to a situation where "the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience from other types of evidence." People v. Prince, 156 P. 3rd 1015, 1091-93 (Cal. 2007).

A Texas intermediate court has reversed a 30-year jury sentence where music, including the theme from "Titanic," "swell[ed] to a crescendo" as an accompaniment to a memorial-style montage of photos of the victim in life. In Salazar v. State, 90 S.W. 3rd 330 (Tex. Crim. App. 2002), the court wrote that the punishment phase of a criminal trial is not a memorial for the victim, and that courts must carefully consider the potential of memorial exhibits "to impress the jury in some irrational, but nevertheless indelible, way." 90 S.W. 3rd at 333-34. The court remanded the case for the trial court to make a harmless-error determination about the montage.

This Court should hold that the trial court abused its discretion by overruling the defense objection to the audio component of the memorial video played for the jury. As noted, such presentations appeal to emotion rather than reasoned discourse. While the State did not emphasize its victim

impact exhibits, a theme of the showing in aggravation was law enforcement officers' great worth to the community.

The cited cases frequently note that bright-line rules are difficult to craft in the victim-impact arena. Hess at 394; Price at 1092; Salazar at 336. Appellant submits that these cases, read together, suggest a bright-line rule precluding musical accompaniment to any exhibit offered to show the uniqueness of a victim, unless that victim's musical gifts are part of the loss to the community. Such a rule would protect the right to due process of law, which is violated when victim impact presentations become an "undue focus" of a penalty phase. Wheeler v. State, 4 So. 3rd 599, 604 (Fla. 2009). It would protect the justice system's interest in verdicts which are based on the evidence and the law, rather than emotion. See Gardner v. Florida, 430 U.S. 349, 358 (1977) ("[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.") For these reasons, this Court should apply the requested bright-line rule pursuant to Article I, Section 9 of the Florida Constitution and pursuant to the federal right to due process of law. U.S. Const., Amend. 14.

POINT SEVEN

THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THE DEFENDANT COMPETENT TO BE SENTENCED.

Standard of review. The constitutional test of competency 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.” McCray v. State, 71 So. 3rd 848, 862 (Fla. 2011). Where expert testimony on competency is in conflict, it is the trial court’s responsibility to consider all relevant evidence and resolve all factual disputes. Id. Its resolution of the conflict(s) will not be disturbed as long as that resolution is supported by competent, substantial evidence. Id.

Argument. As noted above, the question of competency was raised February 6, 2021, when the Spencer hearing was in recess. When the Spencer hearing reconvened on February 7, the court chose to hear defense expert Dr. Xavier Amador’s testimony both as to competency and as to mitigation. Dr. Amador testified that he spoke with the defendant by Zoom on January 21 and February 3, and concluded that the defendant lacked the ability to consult with counsel with an appropriate degree of rational understanding, lacked the ability to disclose pertinent facts to

counsel, and lacked the ability to manifest appropriate courtroom behavior. He acknowledged that patently Mr. Loyd has moments of clarity, in that his trial testimony was “responsive” and “structured.” However, during their 2022 interactions Dr. Amador was completely unable to re-direct Mr. Loyd’s attention from the deficiencies he saw in the court system’s handling of the Sade Dixon matter. The court appointed Drs. Jeffrey Danziger and Katherine Oses to evaluate the defendant, and set a competency hearing for February 22.

On February 22, the court noted that since the Spencer hearing was complete, the defendant no longer had an active role to play, and all that remained was for the parties to hear sentence pronounced. In response to the court’s questions, Dr. Danziger responded that Mr. Loyd “would factually understand what you were doing, but rationally, the idea that you are lawfully sentencing him in your role as an impartial judge... that, through the prism of his delusional mind, he would not grasp.” Defense counsel argued that Rule 3.210(a), Florida Rules of Criminal Procedure, required a hearing. Per that rule, a person who is mentally incompetent at any material stage of a criminal proceeding shall not be proceeded against; the Rule defines “material stage” to include “sentencing.” The court correctly concluded that the competency hearing had to go forward.

Dr. Danziger, who spoke with Appellant sometime between February 7 and February 21, concluded – like Dr. Amador -- that at that time he lacked a *rational* understanding of the proceedings against him, in that he believed the defense team were aware of his innocence, and were deliberately working against him as part of a plot to have him killed. Dr. Danziger's opinion was that Mr. Loyd's ability to consult with counsel, directly because of mental illness, was unacceptably impaired.

Dr. Oses, who spoke with Appellant on February 10, reported that he could be redirected from his fixations at some times but not others. The judge deemed the experts' testimony to conflict as to whether Appellant was in 2022 able to focus on pertinent matters, and defaulted to her own experience with him throughout the Dixon and Clayton trials. (R 4782-83) The court noted that Appellant was ruled competent before the Dixon trial, and noted that between that 2019 evaluation and 2022 he had on many occasions conducted himself well in the courtroom. (R 4783-86)

Even when a criminal defendant has previously been found to be competent, the trial court must remain receptive to revisiting the issue if circumstances change. Hunter v. State, 660 So. 2d 244, 248 (Fla. 1995). The prior determination does not control, when new evidence suggests that the defendant is at the current time incompetent. Nowitzke v. State, 572

So. 2d 134, 1349 (Fla. 1990). The red flags raised without equivocation by Drs. Amador and Danziger were dismissed because they were not replicated by the court's own experience with the defendant, which the court found was confirmed by the experience Dr. Oses had with him.

When expert testimony conflicts as to competency to proceed, the court's resolution of the factual disputes must be supported by competent, substantial evidence. McCray v. State, *supra*, 71 So.3rd 848, 862 (Fla. 2011). In McCray, none of the appointed experts could rule out malingering, and the court's own observations tended to support the view of the State's expert that malingering was the sole cause of the defendant's courtroom outbursts. *Id.* at 863. On that record, this Court had no difficulty affirming the trial court's finding that McCray was competent to proceed.

On this record, four experts testified without opposition that psychotic symptoms wax and wane, sometimes "dramatically." In light of that undisputed testimony, it was unreasonable for the court to conclude that Dr. Amador's and Dr. Danziger's testimony conflicted factually with Dr. Oses's testimony. The latter established that Appellant was having a relatively good day when Dr. Oses spoke to him, but the former – again, unequivocally – established that Appellant's symptoms were in flux and that he could not sustain, for long, a rational understanding of his situation.

Since there was no factual conflict, the record does not reflect a reasonable resolution of conflicting expert opinion which is supported by competent, substantial evidence. The decision to disregard altogether the testimony that Drs. Amador and Danziger gave regarding competency amounted to an abuse of discretion. This Court should vacate the sentence imposed below, and remand for a determination whether at the time of that remand Appellant can rationally understand the proceedings against him.

POINT EIGHT

FELONS WERE EXCLUDED FROM THE JURY POOL, VIOLATING THE VENIREMENS' EQUAL PROTECTION RIGHTS AS WELL AS APPELLANT'S RIGHTS.

Preservation. This argument was made below in Appellant's pretrial motion challenging the jury panel, and denied.¹³

Standard of Review. "Constitutional challenges to statutes are pure questions of law, subject to de novo review."¹⁴

Argument. Section 1 of the Fourteenth Amendment to the U.S. Constitution provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹⁵ This Amendment was enacted as part of a post-Civil War effort by the federal government to ensure the fair

¹³ (R 2314-2332, 2854-2960).

¹⁴ Jackson v. State, 191 So. 2d 423, 426 (Fla. 2016).

¹⁵ U.S. Const. Amend. XIV.

treatment of Blacks in the southern states.¹⁶ Florida's constitution contains a similar provision.¹⁷

The venires for petit juries are subject to an equal protection requirement with respect to the method of their selection¹⁸, and “a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race.”¹⁹ Indeed, “[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.”²⁰ Even “a facially-neutral law violates the Equal Protection Clause if adopted with the intent to discriminate against a racial group.”²¹

¹⁶ Strauder v. West Virginia, 100 U.S. 303, 310 (1879) *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975) (Fourteenth Amendment's “aim was against discrimination because of race or color.”).

¹⁷ Art. I, § 2, Fla. Const.

¹⁸ Batson v. Kentucky, 476 U.S. 79, 85–86 (1986).

¹⁹ Powers v. Ohio, 499 U.S. 400, 415 (1991).

²⁰ Batson v. Kentucky, 476 U.S. 79, 85 (1986) *holding modified by* Powers v. Ohio, 499 U.S. 400 (1991).

²¹ Johnson v. Governor of the State of Florida, 405 F.3d 1214, 1222 (11th Cir. 2005).

The analysis of a claim that a facially race-neutral law violates the Fourteenth Amendment's equal protection guarantee proceeds in three stages. First, the plaintiff must prove by a preponderance of the evidence that the challenged law has a racially disparate impact.²²

Second, the plaintiff must then show by a preponderance of the evidence that the law's enactment was either motivated by a racially discriminatory purpose, or that race discrimination played a substantial part in the decision to enact the law.²³ The plaintiff is not required to show that "the challenged action rested solely on racially discriminatory purposes," but must bring "proof that a discriminatory purpose has been a motivating factor in the decision" to pass the legislation.²⁴ To this end, "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes."²⁵

²² Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-65 (1977); Washington v. Davis, 426 U.S. 229, 240-42 (1976).

²³ Arlington Heights, 429 U.S. at 265.

²⁴ Id., at 265-66.

²⁵ Arlington Heights, 429 U.S. at 267.

Third, “[o]nce racial discrimination is shown to have been a “substantial” or “motivating” factor behind enactment of the law, the burden shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor.”²⁶

In Hunter v. Underwood, 471 U.S. 222 (1985), the Supreme Court addressed a similar issue to that presented here; specifically, whether a provision in Alabama’s constitution that disenfranchised persons convicted of crimes “involving moral turpitude” violated equal protection. There, the Supreme Court held that “[w]ithout deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under Arlington Heights.”

Here, Appellant’s motion challenged the jury panel on two grounds, including the equal protection challenge discussed above. As required by Arlington Heights and Hunter, the motion alleged (1) that the provision at issue – Section 40.013 – has a racially disparate impact, and (2) that racial discrimination was a substantial and/or motivating factor in its enactment:

²⁶ See Mt. Healthy City School Dist. Bd. of Educ. V. Doyle, 429 U.S. 274, 287 (1977), 97 S.Ct. 568, 576 (1977).

Historically, Florida's statutory disqualification of jurors on the basis of criminal convictions has worked to keep Blacks off of juries entirely: in response to a 1910 survey, Florida counties where Blacks made up over 50% of the population reported that Blacks were uniformly excluded from juries. Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 Texas L. Rev. 1401, 1407 (1983) (citing G. STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 253-72 (1910)). In 1946, a journalist described the situation in Florida: "The Negroes who have served on juries since reconstruction probably could be counted on the fingers of one hand." Stanmore Cawthon, *Lakeland Lawyer Charges Negroes Barred As Jurors*, ST. PETERSBURG TIMES 7 (Dec. 19, 1946). This law continues to keep Blacks off juries at a disturbingly high rate. It is estimated that 21.35% of Blacks in Florida are disqualified from jury service because of a conviction, compared to 10.43% of the state's adult population as a whole.² Uggen et al., at 15-16.

(R 2321).

Florida's juror disqualification law was enacted as part of an effort to keep Blacks oppressed in the wake of emancipation. See Sarah C. Grady, *Civil Death is Different: An Examination of a Post-Graham Challenge to Felon Disenfranchisement Under the Eighth Amendment*, 102 J. CRIM. L. & CRIMINOLOGY 441, 447 (2013) (explaining that after the Civil War, "southern states used criminal disenfranchisement provisions to prohibit black men from access to the ballot"); Part C (ii) (c), *supra*; JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 41-68, 236-44 (2008) (explaining racial threat theories; finding that percent of non-white prison population is a statistically significant predictor of a state's enactment of a felon disenfranchisement law). Florida's disqualification of jurors on the basis of criminal history continues to disproportionately exclude Blacks. See THE

SENTENCING PROJECT, ESTIMATES OF AFRICAN
AMERICAN DISENFRANCHISEMENT, *supra*.

(R 2331).

The State's only response to Appellant's motion did not contest either of these allegations, nor did it attempt to demonstrate that the law would have been enacted without this factor.²⁷ Instead, the response focused entirely on the motion's *other* argument – not advanced here – that the exclusion of felons from the venire violated the “fair cross-section” requirement of the Sixth Amendment. Despite this, the lower court orally denied Appellant's motion without further comment.

Because Appellant's motion alleged a colorable, prima-facie claim that the provision at issue violates equal protection, because the State's response did not address the argument nor contest the facts underlying these allegations, the court erred in denying the claim, and the matter should be remanded for further hearing.

²⁷ (R 2388-2391).

POINT NINE

THE DEFENSE REQUEST FOR AN EXPRESS JURY INSTRUCTION ON MERCY SHOULD HAVE BEEN GRANTED.

Standard of review. Whether a standard jury instruction is accurate comprises a pure question of law subject to *de novo* review. State v. Floyd, 186 So. 3rd 1013, 1019 (Fla. 2016).

Argument. Appellant acknowledges that the argument raised on this point is precluded by Woodbury v. State, 320 So. 3rd 631 (Fla. 2021). Appellant seeks to exhaust the claim made here for federal review.

In Woodbury, as here, the defense at trial unsuccessfully sought to modify Florida's standard criminal jury instruction for use in the penalty phase, no. 7.11. There, as here, the defense sought an instruction that would have expressly told the jurors that mercy could guide their decision-making; the request was denied, and the jury was read standard instruction no. 7.11. The gravamen of Woodbury is that standard language in 7.11 adequately conveys the idea that jurors may be guided by mercy; that standard language reads "even if you find that the sufficient aggravators outweigh the mitigators, the law neither compels nor requires you to determine that the defendant should be sentenced to death." 320 So. 3rd at 656. The Mississippi Supreme Court, considering indistinguishable

language, has held that it “seems simply to instruct the jury on its ability to impose a sentence of life in prison, rather than the death penalty.” Flowers v. State, 158 So. 3rd 1009, 1066 (Miss. 2014), *cert. granted, judgment vacated on other grounds*, 136 S. Ct. 2157 (2016). Appellant submits that the Mississippi court correctly intuits the layperson’s likely reaction to the language in question.

If a jury instruction enhances the risk of an outcome adverse to the defendant, the right to heightened reliability in capital proceedings prohibits giving that instruction in a death-penalty case. Beck v. Alabama, 447 U.S. 625, 638 and n.13 (1980), *citing* U.S. Const., Amend. 8. That risk is enhanced here, because mercy is central to the death-penalty selection process, as viewed by the United States Supreme Court. That Court has observed that “what our case law is designed to achieve” in the selection process is a conscious jury decision to accord or withhold mercy. Kansas v. Carr, 577 U.S. 108, 119 (2016). This Court agrees. See State v. Poole, 297 So. 3rd 487, 503 (Fla. 2020) (citing Carr); see also State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) (defending a client’s interests in a penalty phase consists of “seeking the mercy of society.”)

The error in denying an express mercy instruction should be deemed structural, since the impact of its absence on the jury cannot be ascertained

from the record. See *generally* Johnson v. State, 53 So. 3rd 1003, 1007 (Fla. 2010) and United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006).

POINT TEN

THE JURY WAS DEATH-QUALIFIED OVER
OBJECTION.

Standard of review. This point raises a question of law; accordingly *de novo* review is appropriate. *E.g.*, Smiley v. State, 966 So. 2d 330, 333 (Fla. 2007).

Argument. The Appellant acknowledges that the argument raised on this point is precluded under this Court's caselaw. *E.g.*, San Martin v. State, 717 So. 2d 462, 467 (Fla. 1998). Appellant seeks to exhaust for federal review the claim that the United States Supreme Court should recede from its own cases, to the extent they preclude recourse to the Sixth Amendment where a capital offense is charged and the jury is death-qualified before the first phase of trial.

The Sixth Amendment to the federal constitution protects the right to trial by an impartial jury. U.S. Const., Amend. 6. As elaborated by the courts, that guarantee entails both a right to disinterested jurors and a right to a jury drawn from a fair cross-section of society. Taylor v. Louisiana, 419 U.S. 522, 529-31 (1975). "Fair cross section" jurisprudence allows challenges only where a group recognized as "distinctive" is under-represented in jury venires due to systematic government action. Berghuis

v. Smith, 559 U.S. 314, 327 (2010). In Lockhart v. McCree, 476 U.S. 162 (1986), in this context, the Court rejected the idea that a sector of society bound together only by like-mindedness could form the requisite “distinctive” group.

Were it not for his inability to show a constitutionally-protected distinctive group is involved, Appellant could easily argue he is entitled to relief under the fair-cross-section cases. The other element he would need to show is under-representation of the group in question by systematic government action. The record of jury selection, in this case, shows that element on its face. *See generally Berghuis v. Smith*, 559 U.S. at 328 (process of jury selection can itself establish those factors).

While the “fair cross section” cases were evolving, the Supreme Court decided Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985). Witherspoon involved the wholesale exclusion of *all* venire members who harbored *any* reservation about the death penalty; the Court reversed the death sentence imposed in that case. In Witt, the Court clarified Witherspoon, holding that jurors who would be substantially impaired in following the court’s instructions by their beliefs against capital punishment could not serve where a unitary jury is in use. The process of excluding those venire members became known as death-

qualification, and the affected would-be jurors became known as “Witherspoon-excludables.” See Morgan v. Illinois, 504 U.S. 719, 733 (1992).

Justice Breyer, dissenting in Glossip v. Gross, 576 U.S. 863 (2015), has acknowledged that research has shown for decades that death qualification skews juries toward guilt. 576 U.S. at 913 (Breyer, J., dissenting, *citing* Susan D. Rozelle, The Principled Executioner: Capital Juries’ Bias and the Benefits of True Bifurcation, 38 Ariz. S. L. J. 769 (2006).) There is no shortage of scholarship attesting to that causal relationship. Studies show that death-qualified juries are as much as 44% more likely to find guilt, and are more hostile to the insanity defense, more mistrustful of defense lawyers, and less concerned about the risk of erroneous convictions. Note, Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process, 2005 B.Y.U. L. Rev. 519, 530-32. Other studies show that death-qualified jurors are more inclined to believe a prosecutor’s version of events. Aliza Plener Cover, The Eighth Amendment’s Lost Jurors: Death Qualification and the Evolving Standard of Decency, 92 Ind. L. J. 113, 121 (2016). From a statistical standpoint, the data set of death-qualified juries represents a biased sample. Id at 115-16.

Further, the practice of death-qualification provides prosecutors with a firewall against changing public opinion. Brandon Garrett *et al.*, Capital Jurors in an Era of Death Penalty Decline, 126 Yale L. J. Forum 417 (2017). Notably, twenty-first century support for the death penalty in Black communities has been measured at a mere 36%. See [pewresearch.org/fact-tank/2018/06/11](https://www.pewresearch.org/fact-tank/2018/06/11).

Professor Susan Rozelle, the author of The Principled Executioner, *supra*, makes a persuasive case for requiring bifurcation of juries in capital cases. She distinguishes between “excludables” and “nullifiers”: the latter would never find a defendant charged with a capital crime guilty, given the knowledge that their judgment might eventually result in an execution, while the former could fully participate in a guilt-or-innocence phase, although not a penalty phase. 38 Ariz. S. L. J. at 776. Florida has both an anti-nullifier statute and a general unitary capital jury statute. Sections 913.13, 921.141(1), Florida Statutes (2021). However, where an interest recognized by statute comes into conflict with a constitutional right, the latter prevails. *E.g.*, Gray v. Mississippi, 481 U.S. 648, 663 (1987). Professor Rozelle’s conclusion is that nullifiers may reasonably be excluded at the outset of capital trials, but that the current practice of removing Witherspoon-excludables at the guilt-or-innocence stage cannot

be allowed to continue. The Principled Executioner at 793, 796-97. For the foregoing reasons, the Supreme Court should revisit its view on death-qualification.

POINT ELEVEN

THE DEATH PENALTY IS UNCONSCIONABLE.

Standard of review. “Constitutional challenges to statutes are pure questions of law, subject to de novo review.” Jackson v. State, 191 So. 3d 423, 426 (Fla. 2016).

Argument.

A. Capital punishment is no longer compatible with the evolving standards of decency.

“Often when deciding whether a punishment practice is, constitutionally speaking, ‘unusual,’ this Court has looked to the number of States engaging in that practice.”²⁸ In this respect, the number of active death penalty States has fallen dramatically.”²⁹ “In 1972, when the Court decided Furman, the death penalty was lawful in 41 States. Nine States had abolished it.”³⁰ Since then, the number of active death penalty states has fallen to 24. At present, 23 states do not have an active death penalty. If Governor-imposed moratoriums are included – currently active in California,

²⁸ Atkins v. Virginia, 536 U.S. 304, 313–316, 122 S.Ct. 2242 (2015); Roper v. Simmons, 543 U.S. 551, 564-66, 125 S. Ct. 1183 (2005).

²⁹ Glossip v. Gross, 576 U.S. 863, 940 (2015) (J. Breyer, dissenting).

³⁰ Id. (citations omitted).

Oregon, and Pennsylvania – this number rises to 26. As of last year, the majority of states now prohibit the death penalty.

Further, it “ ‘is not so much the number of these States that is significant, but the consistency of the direction of change.’ ”³¹ Here, the consistency and direction of change away from the death penalty is unambiguous. Writing in 2015, Justice Breyer concluded that “capital punishment has indeed become unusual,” noting that “[s]even States have abolished the death penalty in the last decade”³²

Since that time, 5 more states have joined the chorus. In 2016, Delaware’s Supreme Court declared their death penalty scheme unconstitutional, as did Washington’s in 2018. New Hampshire’s legislature abolished their death penalty in 2019, Colorado repealed its death penalty statute for future offenses in 2020, and Virginia repealed its death penalty statute in its entirety in 2021.

³¹ Roper, 543 U.S., at 566, 125 S.Ct. 1183 (quoting Atkins, supra, at 315, 122 S.Ct. 2242) (finding significant that five States had abandoned the death penalty for juveniles, four legislatively and one judicially, since the Court’s decision in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)).

³² Glossip, at 942 (J. Breyer, dissenting) (citing Death Penalty Information Center, States With and Without the Death Penalty).

It is therefore evident – from the declining number of death sentences imposed each year, the growing number of jurisdictions that have abolished capital punishment, and the palpable reluctance to carry out executions in the states that still permit the death penalty – that the “objective indicia of society's standards,” as expressed through legislation and state practice, is no longer compatible with “evolving standards of decency” and therefore violates the Eighth Amendment.³³

B. Additional constitutional infirmities

Further, “[t]oday's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose.”³⁴

i. Unreliability. As of 2002, “there was evidence of approximately 60 exonerations in capital cases.”³⁵ By 2015, “the number of exonerations in

³³ Graham v. Florida, 560 U.S. 48, 61, 58 (2010).

³⁴ Glossip, 576 U.S. at 909 (J. Breyer, dissenting).

³⁵ Id., at 911 (J. Breyer, dissenting) (citing Atkins, 536 U.S., at 320, n. 25, 122 S.Ct. 2242)).

capital cases ha[d] risen to 115.”³⁶ As of 2022, that number stands at 190.³⁷ Florida leads the nation in this regard, and has exonerated 30 *people* sentenced to death.³⁸ These statistics demonstrate not only that there is a risk that the death penalty will be imposed arbitrarily, but that such arbitrary imposition actually does occur all too frequently.

ii. Arbitrary application. Otherwise irrelevant factors, such as geography, play far too dominant a role in determining who is sentenced to death. See Glossip, at 918 (J. Breyer, dissenting). This is not simply because some States permit the death penalty while others do not,” but rather because even “within a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried.”³⁹

³⁶ Id. (J. Breyer, dissenting).

³⁷ Death Penalty Information Center (DPIC), Innocence Database (September 2, 2022), <https://deathpenaltyinfo.org/policy-issues/innocence-database?sort=exonerationYear/desc&sort=id/asc>.

³⁸ Death Penalty Information Center (DPIC), Innocence Database (September 2, 2022), <https://deathpenaltyinfo.org/policy-issues/innocence-database?state=Florida&sort=exonerationYear/desc>.

³⁹ Id., at 918-19 (J. Breyer, dissenting) (citing Smith, The Geography of the Death Penalty and its Ramifications, 92 B. U. L. Rev. 227, 231–232 (2012); Donohue, An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities? 11 J. Empirical Legal Studies 637, 673 (2014)) (“[T]he single most important influence from 1973–2007 explaining whether a death-

“Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide [. . .] And in 2012, just 59 counties (fewer than 2% of counties in the country) accounted for all death sentences imposed nationwide.”⁴⁰

Yet “whether one looks at research indicating that irrelevant or improper factors—such as race, gender, local geography, and resources—do significantly determine who receives the death penalty, or whether one looks at research indicating that proper factors—such as “egregiousness”—do not determine who receives the death penalty, the legal conclusion must be the same: The research strongly suggests that the death penalty is imposed arbitrarily.”⁴¹

iii. Lengthy delays. Lastly, lengthy delays undermine the penological justification for the death penalty, and constitutes cruel and unusual punishment in its own right. A lengthy delay is especially cruel because it

eligible defendant [in Connecticut] would be sentenced to death was whether the crime occurred in Waterbury [County]”).

⁴⁰ *Id.*, at 919 (J. Breyer, dissenting) (citing DPIC, The 2% Death Penalty: How A Minority of Counties Produce Most Death Cases At Enormous Costs to All 9 (Oct. 2013)).

⁴¹ *Id.*, at 920 (J. Breyer, dissenting).

“subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement.”⁴²

In 1890, the Supreme Court recognized that “when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist *for the period of four weeks*, as to the precise time when his execution shall take place.”⁴³ The “long wait between the imposition of sentence and the actual infliction of death” is “inevitable” and often “exact[s] a frightful toll.”⁴⁴

“In the past century and a quarter, little has changed in this respect—except for duration. Today we must describe delays measured, not in weeks, but in *decades*.”⁴⁵ Perhaps worse still, most prisoners must suffer this

⁴² Id., at 928-29 (J. Breyer, dissenting) (internal citations omitted).

⁴³ In re Medley, 134 U.S. 160, 172 (1890).

⁴⁴ Furman v. Georgia, 408 U.S. 238, at 288, 92 S. Ct. 2726 (1972) (Brennan, J., concurring).

⁴⁵ Glossip, at 927 (J. Breyer, dissenting) (emphasis added).

“frightful toll” in solitary confinement, as nearly all death penalty States keep death row inmates in isolation for 22 or more hours per day.⁴⁶

In sum, Appellant respectfully submits that the death penalty – now active in only a minority of states – constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, as it no longer comports with “evolving standards of decency,” exacts a decades-long, torturous and “frightful toll” on defendants, is unreliable in its imposition, and is arbitrary in its application.

⁴⁶ American Civil Liberties Union (ACLU), A Death Before Dying: Solitary Confinement on Death Row 5 (July 2013) (ACLU Report).

POINT TWELVE

ATKINS v. VIRGINIA SHOULD BE EXTENDED TO PROHIBIT THE EXECUTION OF THE SEVERELY MENTALLY ILL.

Standard of Review. “Constitutional challenges to statutes are pure questions of law, subject to de novo review.” Jackson v. State, 191 So. 2d 423, 426 (Fla. 2016).

Argument. In Atkins v. Virginia, 536 U.S. 304 (2002), the United States Supreme Court held that the execution of an individual who is intellectually disabled is prohibited by the Eighth Amendment, and applicable to the States through the Fourteenth. The Court found that the penological purposes served by the death penalty - specifically, “retribution and deterrence of capital crimes by prospective offenders,” as identified some 30 years prior in Gregg v. Georgia, 428 U.S. 153 (1976) - were not measurably furthered by the execution of these individuals.⁴⁷

In Gregg, “the Court firmly embraced the holdings and dicta” from prior cases⁴⁸ “to the effect that the Eighth Amendment bars not only those

⁴⁷ Id., 317-321.

⁴⁸ Including Furman v. Georgia, 408 U.S. 238 (1972); and Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958).

punishments that are ‘barbaric’ but also those that are ‘excessive’ in relation to the crime committed.”⁴⁹ “Under Gregg, a punishment is ‘excessive’ and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.”⁵⁰

Accordingly, regarding the former: Unless the death penalty, when applied to those in the defendant’s position, “measurably contributes to one or both of these goals, it ‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.”⁵¹ The question, therefore, is whether the execution of the severely mentally ill “measurably contributes” to the goals of either retribution or deterrence.

“The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and

⁴⁹ Coker v. Georgia, 433 U.S. 584, 591-92 (1977).

⁵⁰ Coker v. Georgia, 433 U.S. 584, 591-92 (1977).

⁵¹ Enmund v. Florida, 458 U.S. 782, 798, 102 S.Ct. 3368 (1982) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.”⁵²

“With respect to retribution – the interest in seeing that the offender gets his ‘just deserts’ – the severity of the appropriate punishment necessarily depends on the culpability of the offender.”⁵³ “Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, [the intellectually disabled] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”⁵⁴ “Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”⁵⁵

These same rationales apply to the severely mentally ill. See, e.g., Lyn Entzeroth, The Challenge and Dilemma of Charting a Course to

⁵² Atkins v. Virginia, 536 U.S. 304, 320 (2015).

⁵³ Id., at 319.

⁵⁴ Id., at 306.

⁵⁵ Id., at 318.

Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty, 44 Akron L. Rev. 529, 559 (2011) (noting that “the parallels between the severely mentally ill and the individuals protected by Atkins and Roper are remarkable”). In light of Atkins and Roper, the American Psychiatric Association, the American Psychological Association, and the American Bar Association have all recommended defendants with severe mental illness be excluded from capital punishment.⁵⁶

As in the instant case, severe mental illness often affects a person's ability to engage in logical thought and his capacity to understand and process information.⁵⁷ And, just as with the intellectually disabled in Atkins, the imposition of the death penalty on the severely mentally ill makes “no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering.”⁵⁸ Accordingly, sentencing a defendant who is severely mentally ill to death violates the Eighth Amendment's prohibition of cruel and unusual punishment.

⁵⁶ Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, 30 Mental & Physical Disability L. Rep. 668 (2006).

⁵⁷ Id.

⁵⁸ Coker v. Georgia, 433 U.S. 584, 591-92 (1977).

POINT THIRTEEN

FLORIDA'S CAPITAL SENTENCING SCHEME
RISKS THE ARBITRARY AND CAPRICIOUS
APPLICATION OF THE DEATH PENALTY AND,
THEREFORE, VIOLATES THE EIGHTH AND
FOURTEENTH AMENDMENTS.

Standard of review. “Constitutional challenges to statutes are pure questions of law, subject to de novo review.”⁵⁹

Argument. Where discretion is afforded a sentencing body on 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 arbitrary and capricious action.⁶⁰ Since reinstating the death penalty in Gregg v. Georgia, the U.S. Supreme Court has barred “sentencing procedures that create [] a substantial risk that [a death sentence] would be inflicted in an arbitrary and capricious manner.”⁶¹

⁵⁹ Jackson v. State, 191 So. 3d 423, 426 (Fla. 2016).

⁶⁰ Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion).

⁶¹ 428 U.S.153, 188 (1976) (plurality opinion); see also Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion) (“It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (recognizing the heightened “need for reliability in the determination that death is the appropriate punishment in a specific case”).

In Gregg, “[t]he approval of Georgia's capital sentencing procedure rested primarily on two features of the scheme: that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, *and that the state supreme court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate*. These elements, the opinion concluded, adequately protected against the wanton and freakish imposition of the death penalty.”⁶²

The same two factors were cited in Proffitt v. Florida, 428 U.S. 242 (1976), where the Supreme Court rejected an ‘arbitrary and capricious’ challenge to Florida's post-Furman statute.⁶³ In upholding the statute, the Court after noting that “the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed,”⁶⁴ the court added:

Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. *The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.*

⁶² Zant v. Stephens, 462 U.S. 862, 876 (1983) (emphasis added).

⁶³ See id., at 254.

⁶⁴ Id., at 258.

Id., at 258 (citing State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) (emphasis added)).

In Pulley v. Harris, 465 U.S. 37 (1984), the Supreme Court held that the Eighth Amendment does not require “comparative proportionality review by an appellate court [. . .] in every case in which the death penalty is imposed.”⁶⁵ The Court explained that while “[p]roportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, [] “each distinct system must be examined on an individual basis.”⁶⁶ Relying on Pulley, this Court recently announced that it would no longer perform comparative proportionality review in death cases.⁶⁷

Florida’s scheme now fails to sufficiently reduce the risk of arbitrary infliction of death sentences. The Pulley Court acknowledged that “there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review.”⁶⁸ Appellant respectfully submits that Florida’s system has become such a system, as multiple vital safeguards for

⁶⁵ Pulley, at 50.

⁶⁶ Pulley, at 45 (quoting Gregg, 428 U.S., at 195).

⁶⁷ Lawrence v. State, 308 So. 3d 544 (Fla. 2020).

⁶⁸ Pulley, at 879-80.

the system have either been eliminated or eroded since it was last examined in Proffitt v. Florida, 428 U.S. 242 95 (1976).

First, as noted above, this court has eliminated the safeguard of comparative proportionality review. As Justice Labarga opined in his dissent in Lawrence, “the fact that this Court has reversed death sentences due to a lack of proportionality underscores the need for proportionality review,” and its elimination marks “the most consequential step yet in dismantling the reasonable safeguards contained within Florida's death penalty jurisprudence.”⁶⁹

Second, this Court has also recently eliminated the safeguard of the “reasonable hypothesis of innocence” motion for judgment of acquittal. See Bush v. State, 295 So. 3d 179, 216 (Fla. 2020) (J. Labarga, dissenting) (“today, this Court eliminates another reasonable safeguard in our death penalty jurisprudence and in Florida's criminal law across the board.”).

Third, Florida's capital scheme has fallen victim to the “aggravator creep”⁷⁰ problem.⁷¹ A capital sentencing scheme, either through legislatively

⁶⁹ Lawrence, 308 So. 3d at 552 (J. Labarga, dissenting).

⁷⁰ The undersigned is indebted to O.H. Eaton, Circuit Judge emeritus, for the expression.

⁷¹ In Hidalgo v. Arizona, 138 S. Ct. 1054 (2018), four Justices commented on the Court's denial of certiorari. The state court had held that Arizona's

enumerated aggravating factors or through legislatively mandated guilt-phase findings, must genuinely narrow the class of persons eligible for the death penalty.⁷² Each aggravating factor, taken singly, must also narrow the eligible class.⁷³ Florida's scheme, however, fails to do so.

The California capital scheme approved in Pulley contained eight aggravating factors⁷⁴, as did this State's then-existing scheme approved in Proffitt v. Florida, 428 U.S. at 251. Since then, however, the number of aggravating factors in Florida has doubled.⁷⁵ Several of the categories are not tightly drawn and, as of 2021, virtually all conceivable murders fit at least one of the sixteen categories of eligibility.

capital scheme is sufficiently narrowly drawn even if it assumed that 98% of Arizona's first-degree murder cases are automatically eligible for death-penalty proceedings. The four Justices recognized "a possible constitutional problem" which "warrants careful attention and evaluation." 138 S. Ct. at 1057. In Florida, the reported cases and the relevant statutes on their face establish that an "aggravator creep" problem exists.

⁷² Lowenfield v. Phelps, 484 U.S. 231, 244 (1988), (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

⁷³ Zant, at 877.

⁷⁴ Pulley, at 46.

⁷⁵ Chapters 2010-120 '1, 2005-28 '7, 96-290 '5, 95-159 '1, 91-270 '1, 88-381 '10, 87-368 '1, Laws of Florida.

For instance, Florida's scheme treats as an aggravator the fact that a defendant was found guilty of felony-murder, rather than premeditated murder. As Tennessee and North Carolina have held, doing so of necessity fails to narrow the death-eligible class.⁷⁶ Notably, the conduct underlying common predicate felonies has broadened over the years⁷⁷, and the statute has been expanded to cover significantly more participants.⁷⁸

Another of Florida's aggravators, that the defendant has been convicted of a prior violent felony, in practice has also failed to narrow the eligible class. This court has construed "prior" broadly, to include violent crimes on other victims committed in connection with the murder.⁷⁹

The cold, calculating and premeditated ("CCP") aggravator has also evolved. In its early years that factor was applied in cases involving contract

⁷⁶ State v. Middlebrooks, 840 S.W. 2d 317, 346-47 (Tenn. 1992); State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (N.C. 1979).

⁷⁷ See Sparre v. State, 164 So. 3d 1183, 1200-01 (Fla. 2015) (burglary can occur after invitation is effectively rescinded); Rockmore v. State, 140 So. 3d 979, 982 (Fla. 2014) (robbery includes force used after taking).

⁷⁸ See State v. Dene, 533 So. 2d 265, 266-69 (Fla. 1988).

⁷⁹ See, e.g., Stephens v. State, 787 So. 2d 747, 761 (Fla. 2001).

killings and execution-style killings.⁸⁰ In recent years, however, a CCP finding has been upheld so long as the murder was not committed impulsively or on the spur of the moment, and was not committed in a state of rage or loss of control⁸¹, "even where there is evidence that the final decision to kill was not made until shortly before the murder itself."⁸²

In sum, Florida's capital scheme, as administered in 2021, fails to adequately reduce the risk of arbitrary infliction of death sentences⁸³, as it has eliminated the safeguards of comparative proportionality review and the "reasonable hypothesis of innocence" judgment of acquittal, and fails to narrow the class of first-degree murderers eligible for death.

⁸⁰ See Floyd v. State, 497 So. 2d 1211, 1214 (Fla. 1986) and Garron v. State, 528 So. 2d 353, 360-61 (Fla. 1988).

⁸¹ Campbell v. State, 159 So. 3rd 814, 830-31 (Fla. 2015).

⁸² Gosciminski v. State, 132 So.2d 678, 712 (Fla. 2013).

⁸³ Notably, the decision to pursue the death penalty in the instant case varied from prosecutor to prosecutor.

CONCLUSION

The Appellant requests this Court to reverse the conviction and sentence appealed from, and remand for a new trial on all counts, as to the issues raised on Points 2, and 10.

The Appellant requests this Court to reverse the conviction and sentence appealed from, and remand for a new trial on Counts I and II, as to the issues raised on Point 3.

Appellant requests this Court to reverse the sentence appealed from, and remand for a new penalty-phase hearing, as to the issues raised on Points 1, 4, 5, 6, and 9.

As to the issue raised on Point 7, Appellant asks this Court to vacate his sentence and remand for a new competency evaluation and hearing.

As to the issue raised on Point 8, Appellant asks this Court to remand for an evidentiary hearing.

As to the issues raised on Points 11-13, Appellant asks this Court to vacate his death sentence and remand with directions to impose a sentence of life in prison.

Respectfully submitted,

MATTHEW J. METZ
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

/s/ Nancy Ryan

NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0765910
444 Seabreeze Boulevard, Suite 210
Daytona Beach, Florida 32118
Phone: (386) 254-3758
ryan.nancy@pd7.org

/s/Robert Jackson Pearce III

ROBERT J. PEARCE, III
ASSISTANT PUBLIC DEFENDER
Florida Bar number 092955
444 Seabreeze Boulevard, Suite 210
Daytona Beach, Florida 32118
Phone(386)254-3758
pearce.robert@pd7.org

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically through the Florida Courts E-Filing Portal in the Florida Supreme Court, at www.myflcourtagency.com; the Office of the Attorney General, Assistant Attorney General Doris Meacham, at capapp@myfloridalegal.com; and a true and correct copy thereof delivered by mail to Mr. Markeith Loyd, #380384, Union Correctional Institution, P.O. Box 1000, Raiford, Florida, 32083, on this 6th day of September, 2022.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing initial brief complies with the Florida Rules of Appellate Procedure in that it is set in Arial 14, and in that it does not exceed the word count set out in the Rules.

/s/ Nancy Ryan
Nancy Ryan
Assistant Public Defender