**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

MARKEITH LOYD,

Appellant/Cross-Appellee,

vs. Supreme Court Case No. SC22-378

STATE OF FLORIDA,

Appellee/Cross-Appellant.
_____/

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

# REPLY BRIEF/CROSS-APPELLEE'S INITIAL BRIEF

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/CROSS-APPELLEE

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## SUMMARY OF ARGUMENTS

**Point one.** Per the United States Supreme Court, Appellant need not show prejudice from the exclusion of the three jurors in question. After the court ruled it would strike any venire member who admitted knowing that Appellant was severely beaten on being arrested, the State obtained extra challenges by prodding selected venire members into acknowledging that well-known fact. When a state's jury selection system is undermined, however subtly, the Supreme Court does not require a showing of prejudice to challenge the offending procedure.

**Point two.** Appellant maintains his position that the trial court erred by denying his request for the jury to hear what relationship exists among the preponderance, clear and convincing, and beyond a reasonable doubt standards of proof. The trial court further erred by denying his request for the jury to hear that clear and convincing evidence is proof that makes the existence of a fact highly probable.

**Point three.** This Court recently reaffirmed a commitment to redress fundamental error when necessary to protect the interests of justice. This Court should hold that the prosecutor's misleading comments on what

suffices to prove premeditation amounted to fundamental error, and should reverse the convictions on Counts I and II based on that holding.

**Point four.** The State argues that no error took place when the prosecutor exhorted the jurors to agree amongst themselves, and suggested they need not consider mental health-related mitigation. The courts hold that jurors must base their decisions on the facts elicited during trial and the law *instructed on by the trial court.* Extraneous instructions on the law by counsel for the State have no place in that system. The defense's objections to those comments should have been sustained. The State has failed to show beyond a reasonable doubt that the objected-to comments, and the court's responsive rulings, did not contribute to the penalty phase verdict.

**Point five.** Appellant seeks, on this point, an opinion receding from Campbell v. State, 571 So. 2d 571 (Fla. 1990), to the extent Campbell holds that the defense bears any burden at all to prove mitigation in a capital case. The State has responded to a distinct argument that the defense bar historically made in Florida capital cases. Appellant maintains his position that his challenge to Campbell has merit, and that this Court should act on it and order a resentencing hearing on that ground.

**Point six.** As to this point, Appellant will rely on his initial brief.

**Point seven.** The parties disagree whether the trial judge properly considered all of the expert testimony adduced on the question whether Appellant was competent to be sentenced. Appellant urges this Court to hold that the trial court abused its discretion by failing to do so.

**Point eight.** As to this point, Appellant will rely on his initial brief.

**Point nine.** The State argues that the standard jury instructions, although they omit any express mention of mercy, adequately address the subject. As was argued in the initial brief, the Appellant disagrees, and asks this Court to recede from Woodbury v. State, 320 So. 3rd 631 (Fla. 2021), to reverse his sentence, and to remand for a new penalty phase.

The State further argues that any error on this point was cured by defense counsel's mercy-based argument to the jury. The caselaw holds that allowing counsel to argue a pertinent point to the jury in closing is not an adequate substitute for an instruction from the court.

**Points ten through thirteen.** As to these points, Appellant will rely on his initial brief.

**Cross-Appellant's Answer Brief.** The State objects to rulings made during the penalty-phase charge conference, but seeks no remedy other

than general affirmance. If this Court does not order a new penalty phase, per the governing caselaw the State is entitled to no relief.

On the merits of the cross-appeal, the State asserts that the court ultimately instructed the jury in accordance with outdated standard instructions, disregarding changes the State had sought pursuant to State v. Poole, 297 So. 3rd 487 (Fla. 2020). The record shows that the court did, in fact, make the requested changes. The State is thus entitled to no relief, regardless of the outcome of the direct appeal.

## ARGUMENT

## POINT ONE

IN REPLY: 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.

The State relies, in supplemental authority, on Jones v. Dretke, 375 F. 3rd 352 (5th Cir. 2004). In Jones, a death-penalty case, the State challenged a juror for cause because her instinct was to disfavor the testimony of an accomplice. 375 F. 3rd at 354. She was later rehabilitated, but was removed for cause – erroneously, under Texas law. Id. at 355. Both the Texas and federal courts reasoned that since the jury that served in Jones's case was impartial, there was no remedy for the erroneous cause removal. Id. at 355-57. No mention was made whether the venire member in question was qualified to serve pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968).

The State argues that in this case, there is no legal remedy for the exclusion of jurors no. 809, 717, and 21. This is so, in their view, because there has been no showing that the jury that served was biased, and because the three excluded jurors were not struck based on their views on capital punishment, thus leaving this case outside the structural-error rule

set out in Gray v. Mississippi, 481 U.S. 648 (1987). (Answer brief at 55-59) Appellant acknowledges that the Supreme Court has "decline[d] to extend the rule of Gray beyond its context: the erroneous "Witherspoon exclusion" of a qualified juror in a capital case." Ross v. Oklahoma, 487 U.S. 81, 87 (1988). Ross involved the erroneous *inclusion* of a juror who should have been excluded under Witherspoon, which caused the defense to use a peremptory strike. Ross sought relief based on losing the peremptory strike; the Court held that it would not intervene because there is no constitutional aspect to peremptory challenges, in the absence of invidious discrimination. The quotation from Ross set out above is not fatal to Appellant's claim, however, in light of a principle announced by the Court in Thiel v. Southern Pacific Co., 327 U.S. 217 (1946).

In Thiel, a personal injury suit brought against a railway under the federal courts' diversity jurisdiction, the clerk of the court deliberately excluded day laborers from the jury pool because the judge had a practice of excluding such workers for economic hardship. The Court reversed the ensuing judgment for the railway pursuant to its supervisory powers, holding that the plaintiff's motion to strike the venire should have been granted. Per the Court it was "unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion…. The evil

lies in the admitted wholesale exclusion of a large class of wage earners in disregard of the high standards of jury selection. To reassert those standards, to guard against the subtle undermining of the jury system, requires a new trial." Id. at 225.

Thiel reflects the Supreme Court's view that a showing of prejudice is not necessary to challenge a practice which effectively undermines the jury system, no matter how subtly. Here, as shown to some extent in the answer brief at 50-53, the prosecutor prodded excluded jurors 809 and 717 to disclose just what they knew about the injuries imposed during Appellant's arrest. Earlier questioning of Juror 809 appears in the trial transcript as follows:

> STATE: You talked about the different places that you received information about the case.
>
> 809: Right.
>
> STATE: But I didn't hear you say exactly what information you had.
>
> 809: Uh-huh.
>
> …STATE: What did you hear about the second case…the one we're here about now?
>
> 809: Yeah. That one, basically, everything that's on the news. Like he's at Walmart.
>
> STATE: Okay. He was at Walmart. What else?
>
> 809: Pretty much the officer approached him or something, and he shot her.

STATE: All right. Anything else about that situation that you're aware of?

809: Huh-uh. Well besides him going on the run.

STATE: Okay. He went on the run. Did you hear, or did you see, any media coverage of when he was arrested?

809: Yeah, yeah.

STATE: Okay. What do you know about his arrest?

809: I seen when he was getting arrested, I seen the footage of it. It was like a helicopter.

STATE: Okay. The helicopter footage, yes, sir.

809: Yeah. I seen him like just laid out on the ground, police came, arrested him. Looked like he was hit.

STATE: Okay. It looked like law enforcement struck him?

809: Yeah.

STATE: Okay. Do you know anything about what happened as a result of his arrest? His injuries or anything like that?

809: Like, what injuries happened to him?

STATE: Yes, sir.

809: Eye.

STATE: Okay. What do you know about his eye?

809: I guess from when he got hit, maybe, from the police officers.

STATE: Okay. That's what you heard?

809: That's – I mean, I seen that on the footage, the kicking from the officer.

STATE: All right. And did you see footage of Mr. Loyd with the injury to his eye after his arrest?

809: Yes.

STATE: Okay. So you actually saw the injuries?

809: Like, I mean, he had something on his eye.

STATE: The big bandage over his eye?

809: Yeah, I seen that.

(T 1093-96) As to juror 717, the prosecutor again was following up, asking about that venire member's earlier statement to the court that he knew something about the case. (T 1540) The questioning of venire member 21 – conducted by the court - is set out in full in the answer brief at 53. (T 2975) The State successfully challenged No. 21 for cause based on the quoted colloquy. (T 2981-85)

Excluded venire members 809 and 717 had each weathered a Witherspoon-based colloquy without incident before the State sought further information about just what they had seen on the news. (T 1097-1101, 1542-45) It was also established that Juror 21 satisfied the Witherspoon test. (T 2977-80)

In contrast, of the jurors that served, numbers 215, 927, and 759 told the court they had heard about the case on the news, but during the State's follow-up questioning not one of the three was asked just what they remembered. (T 603-04, 607-20, 1161-62, 1166-73, 1412-14, 1417-25; see

SR 540) That Appellant Loyd lost an eye during his arrest was an open secret: as the defense noted in its motion for new penalty phase, Appellant "was seated in court throughout the entirety of voir dire, very noticeably missing his left eye." (R 4605) The record thus quite clearly suggests that the State, when it disfavored a venire member who had already been Witherspoon-approved, prodded until a cause challenge could be raised regarding knowledge of the arrest scenario, but when it wished to retain a juror, refrained from asking identical questions. This practice exploited the court's determination, expressed early on in voir dire, that any venire member who acknowledged the defendant's well-known treatment at the hands of the police would be removed. (See T 1112-15) The practice added to the State's total number of challenges, thus tending to undermine the jury system set out in Florida's statutes and rules. For that reason, the defense need not show prejudice from the exclusion of the three jurors in question. Thiel, *supra*. Reversal of Appellant's sentence should follow.

## POINT TWO

IN REPLY: 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.

The State argues that when a standard jury instruction is given over a motion to substitute non-standard language, the courts review the ruling for abuse of discretion. (Answer Brief at 60) Appellant has argued for a *de novo* review standard on this point, citing State v. Floyd, 186 So. 3rd 1013 (Fla. 2016). In its cross-appeal in this case, objecting to the trial court's alleged refusal to alter a standard penalty phase instruction, the State relies on State v. Floyd to seek *de novo* review. (State's Brief at 124) The anomaly is nowhere explained. Appellant maintains his view that *de novo* review is appropriate on this point. *See* Schminky v. State, 305 So. 3rd 640, 644 (Fla. 3rd DCA 2020) (accuracy of a jury instruction is a question of law); Robinson v. State, 290 So. 3rd 1007, 1011 (Fla. 2d DCA 2020) (en banc) (legal adequacy of an instruction is a question of law); Rodriguez v. State, 174 So. 3rd 502, 505 (Fla. 4th DCA 2016) (propriety of giving standard instruction calls for *de novo* review).

On the merits, the State disputes Appellant's assertion that instructions on the parties' burdens of proof are always relevant to what the

jury must consider in order to convict. It distinguishes Yohn v. State, 476 So. 2d 123 (Fla. 1985), noting that in Yohn the standard instruction disapproved by this Court did not establish where the burden lay. (Answer Brief at 62) Here the drawback in the standard instruction is that it does not adequately help a layman understand what the law means by "clear and convincing." This Court holds that an instruction which fails to correctly and completely state the law relating to a criminal defense denies the "trial by due course of law" guaranteed by Section 12 of Florida's Declaration of Rights. Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (Fla. 1945).

As the State correctly notes, the defense asked the court to define "clear and convincing evidence" as evidence "sufficient to persuade you the Defendant's claim is highly probable." The State characterizes the requested language as "a clear misstatement of law." (Answer brief at 62) In fact, the First and Second DCA's use the term "highly probable" in explaining the clear and convincing standard. Edwards v. State, 2022 WL 17087690 *6 (Fla. 1st DCA 2022), citing Cummings v. State, 310 So. 3rd 155, 158-59 (Fla. 2d DCA 2021). The State's view is that the language used in the standard insanity instruction to define "clear and convincing," *i.e.*, "of such weight that it produces a firm belief, without hesitation, about the matter in issue," is the *only* correct language to use in explaining the

intermediate standard. It notes, in support, that the "firm belief" formulation dates back "decades." (Answer Brief at 63) The language in question was added to the insanity instruction in 2006. *See* In re Standard Jury Instructions in Criminal Cases (no. 2005-5), 939 So. 2d 1052 (Fla. 2006).

In arguing that any error on this point is harmless, the State asserts that the trial court "instructed the jury that clear and convincing was a lower standard than…beyond a reasonable doubt during jury selection." In support, it cites the trial transcript at 3337 and 3344-45. (Answer Brief at 65) At those pages, during individual voir dire, the court mentioned to potential jurors 912 and 534 that "clear and convincing" is a lower burden than "beyond a reasonable doubt." (See T 3333, 3342) Neither of those venire members was chosen to serve. (SR 540)

Appellant further maintains his position that the trial court should have granted his request for the jury to hear what relationship exists among the preponderance, clear and convincing, and beyond a reasonable doubt standards. The First and Second DCA's, like this Court in the JQC cases cited in the initial brief, have found an explanation of that relationship useful when educating the public about how it reaches decisions. *See* Edwards v. State, *supra*, 2022 WL 17087690 *6 (Fla. 1st DCA 2022) and In re Petition for Judicial Waiver of Parental Notice, 333 So. 3rd 265, 272 (Fla. 2d DCA

2022). A jury's understanding of the law it must apply in a capital case is no less critical a matter.

Finally, the State urges this Court to conclude that the jury "rightfully rejected the insanity defense," alleging there was inconsistent testimony by mental-health experts called by the defense. (Answer Brief at 66) In the first phase of trial the defense called only one expert, Dr. Toomer. (T 4983-5070) In any event, the State's argument on this point would inappropriately substitute this Court's judgment for that of the jury in a case where an uninformative instruction on the burden of proof had the effect of vitiating the jury's findings. *See* Murray v. State, 937 So. 2d 277, 281-82 (Fla. 4th DCA 2006). Reversal should follow.

## POINT THREE

IN REPLY: 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.

The State cites Kaczmar v. State, 228 So. 3rd 1, 12 (Fla. 2017) for a rule that review of closing argument for fundamental error "includes two factors," *i.e.*, whether an improper statement was repeated, and whether the jury was provided with an accurate statement of law afterward. (Answer brief at 67-68) Kaczmar cites Poole v. State, 151 So. 3rd 402, 415 (Fla. 2014) for that rule. It is clear from Poole that those two factors are not intended to be the *only* factors considered. 151 So. 3rd at 415. Read fairly, Poole and Kaczmar do not overrule long-standing decisions reversing judgments based on comments which were not repeated, but were of the type that invokes comparison to a skunk in the jury box. *E.g.,* F.J.W. Enterprises, Inc. v. Johnson, 746 So. 2d 1145, 1147 (Fla. 5th DCA 1999). Nor do Poole and Kaczmar overrule decisions where a particular set of instructions, on a particular record, was held inadequate to erase the taint of improper argument. *See generally* Paul v. State, 980 So. 2d 1282 (Fla. 4th DCA 2008). As noted in the initial brief, this Court has recently

reaffirmed a commitment to acknowledge and redress fundamental error when necessary to protect the interests of justice. Ritchie v. State, 344 So. 3rd 369, 386 (Fla. 2022).

The State suggests that if a reversal results on this point it should only apply to Count II, since the objectionable discussion did not clearly refer to Count I. (Answer brief at 67 n. 28) While the prosecutor's musing on premeditation was conveyed during his discussion of the proof underlying Count II, his comments were not limited to that subject matter. Reversal as to both Counts I and II should follow.

## POINT FOUR

IN REPLY: 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.

The State cites Lowe v. State, 259 So. 3rd 23, 47 (Fla. 2018) for a rule that improper comments, to warrant reversal, must have been so inflammatory that a sentence of death could not have been obtained without them. (Answer Brief at 86) Each of the penalty-phase comments now questioned was the subject of an objection which was overruled. (T 7439-40, 7464, 7485, 7491-7500) Since the objections should have been sustained, the correct standard of review is whether the State can show beyond a reasonable doubt that there is no reasonable possibility any of the comments contributed to the death sentence. *E.g.,* Cardona v. State, 185 So. 3rd 514, 520 (Fla. 2016).

As the State correctly notes, what the prosecutor said about unanimity was this: "I would suggest to you that as the instructions point out, you have an obligation to give meaningful consideration to everything. And not only that, but that you try your best to reach a unanimous verdict." The State's view is that in those sentences, "you have an obligation"

patently relates *only* to the goal of considering all the proof. (Answer Brief at 73-76) Of course, the jury had no transcript of closing argument to parse. The jurors, or one or more of them, may indeed have taken in just "try your best to reach a unanimous verdict" rather than "you have an obligation to try your best to reach a unanimous verdict." The former is just as objectionable as the latter, in light of the fact that *no such aspirational goal is remotely appropriate in penalty phase deliberations*,

The State argues that any error in exhorting the jurors to agree amongst themselves was harmless, because defense counsel and the jury instructions both told the jury that the law does not require unanimity as to the ultimate sentencing decision. The fact that unanimity on that question *is not required by law* in no way precludes the possibility that unanimity on that question *is preferred by the prosecuting authority.* As noted in the initial brief, argument by the government's advocate has "a heightened impact on the jury." Drake v. Kemp, 762 F. 2d 1449, 1459 (11th Cir. 1985). As this Court has further noted, "a bedrock principle of our criminal justice system is that every effort must be made in any trial…to ensure that the jurors base their decision…solely on the facts elicited during trial and the law *instructed by the trial court.*" Cardona v. State, *supra*, 185 So. 3rd 514, 519 (Fla. 2016)

(emphasis added). Extraneous advice on the law from counsel for the State appears nowhere in that calculus.

As to the comment "you have already made th[e] determination [what weight to give to mental health-related mitigation] by rejecting [the] insanity defense," the State argues that what the jury probably heard was "you may take your guilt-phase verdict into account as you weigh the evidence" rather than "you don't need to consider this aspect of the mitigation." Appellant perceives a significant risk that one or more jurors arrived at the latter interpretation. A reliable penalty-phase verdict exists when the reviewing court can be confident that the decision-maker gave independent weight to the mitigation. Beck v. Alabama, 447 U.S. 625, 638 n.13 (1980). The comments challenged on this point tend firmly to undermine such confidence.

Relying on the judge's sentencing order, the State asserts that the comment "you have already made this determination" should be considered harmless, if error at all. It points to the trial judge's view that the more credible testimony indicates that Appellant could easily conform his conduct to the requirements of law. (Answer Brief at 81) As on Point Two, the State is suggesting that this Court may rely on the judgment of another entity –

here, the trial judge – as to a decision which the Legislature entrusts to the jury.

In his initial brief, Appellant characterized a third comment by the prosecutor - to the effect that another life sentence would amount to no punishment at all – as reliance on a non-statutory aggravating factor. (Initial brief at 71) This Court in Globe v. State, 877 So. 2d 663 (Fla. 2004) held that a similar conclusion in a sentencing order did not, in fact, amount to reliance on a non-statutory aggravator.[1] In Globe, a case involving a prison murder, this Court held that the judge had instead validly summed up the strength of a statutory aggravator present in that case, *i.e.*, that the murder was committed while under a sentence of imprisonment. 877 So. 2d at 676. The trial court, and this Court, noted that Globe's life sentences – which were in effect at the time he killed his cellmate - had the effect of eliminating deterrence from further violent crime, which made that aggravator weigh heavily in favor of a death sentence. No analogous reasoning has connected the objected-to argument to a statutory aggravating factor in this case. The trial judge should have read the curative instruction proposed by the defense, to the effect that any effort to

[1] The undersigned has belatedly discovered Globe, and had no intention of misleading this Court in the initial brief.

denigrate the choice of a life sentence should be disregarded. The defense's objections to the other comments discussed on this point should have been sustained. The State has failed to show beyond a reasonable doubt that the prosecutor's comments, and the court's responsive rulings, did not contribute to the penalty phase verdict. Reversal of the sentence should follow.

## POINT FIVE

IN REPLY: 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.

As on Point Two above, the State argues for an abuse-of-discretion standard of review, although in its cross-appeal it seeks *de novo* review of a ruling which allegedly denied a departure from the standard jury instructions. (Answer brief at 86-87, 124, 60) *De novo* review is appropriate. State v. Floyd, *supra*, 186 So. 3rd 1013, 1019 (Fla. 2016); Schminky v. State, *supra*, 305 So. 3rd 640, 644 (Fla. 3rd DCA 2020); Robinson v. State, *supra*, 290 So. 3rd 1007, 1011 (Fla. 2d DCA 2020) (en banc); Rodriguez v. State, *supra*, 174 So. 3rd 502, 505 (Fla. 4th DCA 2016).

Appellant seeks, on this point, an opinion receding from Campbell v. State, 571 So. 2d 571 (Fla. 1990), to the extent Campbell holds that the defense bears any burden at all to show mitigation in a capital case. Appellant's point is that this aspect of Campbell does not reflect any view ever expressed by the Florida Legislature, and that the single case cited in the Campbell opinion on the point does not support the disputed principle.

*See* Initial Brief at 73-76. As this Court teaches, the proper question is whether there is a valid reason is *why not* to recede from Campbell. *E.g.*, Lawrence v. State, 308 So. 3rd 544, 551 (Fla. 2020), *citing* State v. Poole, 297 So. 3rd 487, 507 (Fla. 2020).

The State has responded to a distinct argument that the defense bar historically made in Florida capital cases. That argument challenged the constitutionality of language in Section 921.141 of the Statutes which arguably required a showing that the mitigation outweighed the aggravation, rather than vice versa. The Legislature, in 2016, corrected that often-challenged provision. *Cf*. Section 921.141(2)(b)(2)b, Florida Statutes (2016) with Section 921.141(2)(b), Florida Statutes (2015); *see* Chapter 2016-13, §3, Laws of Florida.

Appellant maintains his position that his challenge to Campbell has merit, and that this Court should act on it and order a resentencing hearing on that ground.

## POINT SIX

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

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

## POINT SEVEN

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

The Appellant's position is that the expert testimony the defense introduced below, read fairly, is not internally consistent. The State makes much of the fact that the defense experts' ultimate diagnoses differed; however, those witnesses' testimony regarding the symptoms they perceived was consistent, as was their testimony that such symptoms wax and wane. They further agreed that the taxonomy used by mental-health professionals often varies.

It is also Appellant's position that the testimony given by Dr. Oses, that the defendant was sufficiently able to communicate with her on the day she saw him, is in fact consistent with testimony from multiple defense experts to the effect that symptoms such as those Appellant endures vary widely from day to day.

The State maintains that the trial judge properly considered all of the experts' contributions. On this record, Appellant disagrees. The judge rejected Dr. Amador's testimony because he did not consider all the factors laid out in Florida's rule governing competency evaluations. Dr. Amador,

who appeared by Zoom from Utah, was never appointed to conduct such an evaluation; he was hired by the defense team to testify at the Spencer hearing, then reported to them his concerns about Appellant's mental state at the time of their interaction in 2022. The judge also dismissed any opinion that did not reflect her experience with the defendant in court between 2018 and 2021, although three months elapsed between the end of the penalty phase and Dr. Amador's testimony.

In its competency order, the court dismissed the defendant's continual return to the topic of the handling of the crime scene in the Dixon case, which he perceived as significant to the jury's consideration of the Clayton case. The court's view was that "he simply refuses to accept his guilt." (Answer brief at 102) This view is at odds with the defense experts' explanation that "perseveration," or returning continually to a fixed idea, is a symptom of mental-health difficulties. (T 4987, 6944)

Appellant urges this Court to hold that the trial court abused its discretion when it found him competent to be sentenced.

## POINT EIGHT

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

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

## POINT NINE

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

As on Points Two and Five above, the State argues for an abuse-of-discretion standard of review, although in its cross-appeal it seeks *de novo* review where the court allegedly denied a departure from the standard jury instructions. (Answer brief at 106, 60, 86-87, 124) *De novo* review is appropriate. State v. Floyd, *supra*, 186 So. 3rd 1013, 1019 (Fla. 2016); Schminky v. State, *supra*, 305 So. 3rd 640, 644 (Fla. 3rd DCA 2020); Robinson v. State, *supra*, 290 So. 3rd 1007, 1011 (Fla. 2d DCA 2020) (en banc); Rodriguez v. State, *supra,* 174 So. 3rd 502, 505 (Fla. 4th DCA 2016).

On this point, the State takes the position that the standard jury instructions, although they omit any express mention of mercy, adequately address the subject. In the cross-appeal portion of its brief, the State concedes that "[t]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy," citing State v. Poole, 297 So. 3rd 487 (Fla. 2020). If mercy is indeed "the whole megillah" in a penalty phase, an express mention of that fact could only assist the laypeople who are tasked with deciding the defendant's fate. *See*

*generally* Pickel v. State, 32 So. 3rd 638 (Fla. 4th DCA 2010) (DNA evidence amounts to "the whole megillah" in a sexual battery trial).

The State further argues that any error in the jury instructions was cured by defense counsel's mercy-based argument to the jury. The Third DCA has rejected a similar argument: "[w]e are not persuaded that permitting defense counsel to argue [a pertinent point] to the jury in closing was an adequate substitute for an instruction from the court…. The comparative value of arguments by counsel and instructions by the court, through the eyes of the jury, cannot be underestimated given the fact that 'particularly in a criminal trial, the judge's last word is apt to the be the decisive word.'" Cliff Berry, Inc. v. State, 116 So. 3rd 394, 411-12 (Fla. 3rd DCA 2012), *citing* Boyde v. California, 494 U.S. 370, 384 (1990) and Bollenbach v. United States, 326 U.S. 607, 612 (1946).

Appellant asks this Court to recede from Woodbury v. State, 320 So. 3rd 631 (Fla. 2021), to reverse his sentence, and to remand for a new penalty phase.

**POINT TEN**

IN REPLY: THE JURY WAS DEATH-QUALIFIED OVER OBJECTION.

**POINT ELEVEN**

IN REPLY: THE DEATH PENALTY IS UNCONSCIONABLE.

**POINT TWELVE**

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

**POINT THIRTEEN**

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

The Appellant will rely on his initial brief as to Points Ten through Thirteen.

## CROSS-APPELLEE'S ANSWER BRIEF

THE STATE SEEKS NO RELIEF, AND IS ENTITLED TO NONE, BASED ON THE JURY INSTRUCTIONS READ DURING THE PENALTY PHASE.

The State, in its Cross-Appeal (which it has styled as "Point Fourteen" of its brief), objects to rulings made during the penalty-phase charge conference, but seeks no remedy other than general affirmance. If this Court does not order a new penalty phase in this matter, the State is entitled to no relief. *See* Pitone v. Pitone, 585 So. 2d 449, 451 (Fla. 4th DCA 1991) (cross-appellant sought no remedy other than general affirmance; per the court "we see no need to go any further…in light of our decisions [denying the appellant relief.]"). *See also* Gamble v. State, 659 So. 2d 242, 244 (Fla. 1995) (state's cross-appeal moot in light of affirmance of death sentence). The State, in effect, seeks an advisory opinion to which it is not entitled. *See* Walker v. State, 459 So. 2d 333, 335 (Fla. 3rd DCA 1984).

The matter disputed at the charge conferences below was whether the court would read standard instructions which required the jury to *unanimously* decide both (a) whether the case in aggravation was sufficient, in isolation, to warrant a death penalty, and (b) whether the aggravation outweighed the mitigation. (T 5740-46, 7343, 7393) The parties and court also discussed whether to adapt the penalty-phase

verdict form so as to make it parallel to the instructions on those topics. (T 7404-06) The State asserts that the court ultimately instructed the jury in accordance with the standard instructions. (State's Brief at 131) This is not quite accurate.

As to the **preliminary** penalty-phase instructions, the standard instruction called for the following language:

> Before moving on to the mitigating circumstances, you must determine that the aggravating factors are sufficient to impose a sentence of death. If you do not **unanimously** agree that the aggravating factors are sufficient to impose death. Do not move on to consider the mitigating circumstances.

Fla. Std. Jury Instr. (Crim.) 7.10. The court read that language with one change, *i.e.*, "unanimously" was removed. (R 4453; T 5744) Neither the standard preliminary instruction, nor the preliminary instruction given below, addresses whether the "outweighing" determination must be found unanimously. Fla. Std. Jury Instr. (Crim.) 7.10. (R 4453; T 5744-45) The jury received a copy of the preliminary penalty-phase instructions. (T 5740)

As to the **final** penalty-phase instructions, the standard instruction called for the following language:

> The next step in the process [after finding which aggravating factors and mitigating circumstances were proved] **is for each of you to determine whether the aggravating factors…outweigh the mitigating circumstances….** Once each juror has weighed the proven factors, he or she must determine the appropriate punishment…. To repeat what I have said, if your verdict is that the

> defendant should be sentenced to death, your finding that each aggravating factor exists must be **unanimous**, your finding that the aggravating factors are sufficient to impose death must be **unanimous**, your finding that the aggravating factors…outweigh the…mitigating circumstances must be **unanimous**, and your decision to impose a sentence of death must be **unanimous**.

Fla. Std. Jury Instr. (Crim.) 7.11. The court substituted, for that last standard sentence, the following:

> To repeat what I have said, if your verdict is that the defendant should be sentenced to death, you must have **unanimously** found that at least one aggravating factor was proven beyond a reasonable doubt and you must find that the aggravating factors are sufficient to impose death and outweigh the mitigating circumstances.

(R 4489; T 7429-30)

As to the **verdict form,** the standard form authorized by this Court contains the following language:

> B. Sufficiency of the Aggravating Factors
>
> …we the jury **unanimously** find the aggravating factors are sufficient to warrant a possible sentence of death.
>
> YES ___
>
> NO ___
>
> D. Eligibility for the Death Penalty
>
> …We the jury **unanimously** find that the aggravating factors… outweigh the mitigating circumstances….
>
> YES ____
>
> NO ____

In re Standard Criminal Jury instructions in Capital Cases, 244 So. 3rd 172, 178-79 (Fla. 2018). The verdict form used below omitted the term "unanimously" in both interrogatories B and D. (R 4494)

Judge Marques made the changes she did after making the following comments during the charge conference:

> [T]he fact of the matter is, the Poole decision changes what we were doing. I can't get around that. I wish I could, because it would be so much easier for me to say "we're just going to use the existing instructions."

(T 5647)

> [T]he trial judges are charged with telling the jury what the current law is regardless of whether the jury instructions have caught up or not…trust me, I would prefer not to be in this position. I would prefer to say "just us[e] the existing instructions," but I don't believe that I can simply ignore the Florida Supreme Court telling us this is the law in the State of Florida, and it does not require unanimity on sufficiency.

(T 5648) Since the record shows the State was not in face prejudiced by the jury instructions or the verdict form used in the penalty phase, regardless of the outcome of the direct appeal, this Court should decline to address the cross-appeal.

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/
CROSS-APPELLEE

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing brief has been filed electronically through the Florida Courts E-Filing Portal in the Florida Supreme Court, at www.myflcourtaccess.com, and has been served on the Office of the Attorney General, Assistant Attorney General Doris Meacham, at capapp@myfloridalegal.com;. I further certify that a true and correct copy of this brief has been delivered by mail to Mr. Markeith Loyd, #380384, Union Correctional Institution, P.O. Box 1000, Raiford, Florida, 32083, on this 24th day of January, 2023.

## 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.

*Isl Nancy Ryan*
Nancy Ryan
Assistant Public Defender