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ARGUMENT

ISSUE I

THE TRIAL COURT VIOLATED MR. SEXTON'S
CONSTITUTIONAL RIGHTS BY DENYING HIS
LAWYERS THE FUNDS NEEDED FOR TRAVEL
AND NEUROLOGICAL TESTING TO
INVESTIGATE MITIGATION

The State does not acknowledge any of the U.S. Supreme Court decisions that underpin the defense teams' obligation to investigate mitigation, e.g., Wiggins v. Smith, 539 U.S. 510 (2003), Rompilla v. Beard, 545 U.S. 372 (2005), Porter v. McCollum, 558 U.S. 30 (2009), and Sears v. Upton, 561 U.S. 945 (2010).

The State relies on decisions that predate the last twenty years of U.S. Supreme Court's decisions that have addressed the professional standards the Court uses to assess counsel's duty to conduct a reasonable and thorough investigation into a capital client's potential mitigation. It cites Rogers v. State, 783 So. 2d 980 (Fla. 2001) and San Martin v. State, 705 So. 2d 1337 (Fla. 1997), for its abuse of discretion argument that requires the defendant to show "particularized need." To the extent that a trial court's decision to

deny funding to investigate mitigation can be subject to the court's discretion, it must be discretion that is informed by the Supreme Court's Sixth Amendment decisions that apply standards for counsel's mitigation investigation in a capital case. To evaluate the adequacy of counsel's investigation, the Supreme Court has repeatedly referred to the ABA Guidelines for capital defense counsel.

In Wiggins, the Court found that counsel's investigation was constitutionally deficient, and in doing so, it referred to the ABA Guidelines to make that determination.

Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which we long have referred as "guides to determining what is reasonable." Strickland, supra, at 688, 104 S.Ct. 2052; Williams v. Taylor, supra, at 396, 120 S.Ct. 1495. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. id., 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural

influences (emphasis added)); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1982) (“The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing Investigation is essential to fulfillment of these functions”).

Wiggins, 539 U.S. at 524–25 (emphasis added).

Regarding the denial of travel funds, this Court recognized in Mosley v. State, 349 So. 3d 861, 864, n. 5 (Fla. 2022), that mitigation specialists have unique training to investigate capital cases. The ABA Guidelines dictate face-to-face interviews with witnesses.

[T]he standard for investigation requires in-person, face-to-face, one-on-one, culturally competent interviews of witnesses in criminal cases. Those standards are published as the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (“Supplementary Guidelines ”), and they are relied upon by defense teams across the country to guide investigations into the delicate issues that must be explored in criminal cases. The Supplementary Guidelines do not describe a Cadillac defense; they articulate the appropriate standard of practice for defending a client in high-stakes criminal cases in which life and/or liberty are at issue. The objective of these professional standards is to achieve counsel's constitutional mandate to conduct a reasonable, thorough investigation into their client's defense.

Sean D. O'Brien et. al., Put Down the Phone! The Standard for

Witness Interviews Is in-Person, Face-to-Face, One-on-One, 50

Hofstra L. Rev. 339, 341–42 (2022) (footnotes omitted).

The State avoids addressing the ABA standards in its Answer Brief. Instead, it argues generally about the defense lawyer's burden to show "particularized need," in a test that essentially requires a defense attorney to show the results of an investigation before funding for an investigation is granted. This was the trial judge's impossible standard. The judge's remarks show that concern for safeguarding due process funds overrode any concern for protecting Sexton's constitutional rights. Consequently, the trial court's order forced Sexton's lawyers to limit the investigation of Sexton's mitigation after having acquired only rudimentary knowledge of his history from a narrow set of sources. The court decided this was all that was required.

The State attempts to downplay the extraordinary efforts that Sexton's lawyers made to show Judge Rondolino that the travel and brain scans were necessary. Although the judge claimed the defense showing of need was inadequate, the judge denied the lawyers' request for an evidentiary hearing, thwarting the defense counsel's attempt to make the record that the judge insisted was necessary.

The defense filed the two original motions for travel at R209 and

R214 to Oregon and Arkansas, which resulted in extensive discussion at a hearing, R1351, 1374-1391. The trial judge questioned the relevance of the investigation and considered travel to be just a fishing expedition. This characterization, obviously meant to be derogatory, actually shows the judge's standard was unreasonable. A competent investigation is by definition a fishing expedition to uncover facts.

Then, the defense filed a detailed motion asking the judge to reconsider the denial of travel expenses, which included a memorandum of law. R274-277 In an "Order Denying Defendant, John Sexton's Motions for Travel," R285-288, the court indicated that counsel's belief that that Mr. Sexton had been abused earlier in life was a mere fishing expedition and was an inadequate support for the request to engage family members or others in face-to-face questioning. R287 The order also documents the further submission by counsel:

After taking the matter under advisement, allowing further submission by counsel, the court received an ex parte Motion for Reconsideration of Travel Costs. This motion essentially raised the argument already presented by counsel that a trip to Pangburn, Arkansas is critically important because the

mitigation specialist "needs to meet with Mr. Sexton's family members to discuss various topics regarding his upbringing, including allegations of abuse." The motion indicates in paragraph number 6, "By some accounts, Mr. Sexton's parents were abusive alcoholics." It also asserts the topics (such as Mr. Sexton's own addiction issues and its effect on the family) are not topics that can meaning fully be discussed by telephone.

R287 The order is conclusory, providing no explanation for why counsel's submission provides no basis for the funds.

In regard to the three Motions for Travel, there is simply no adequate basis for the requested funds. There is no evidence to support a finding of reasonableness and necessity. Therefore these motions must be and are DENIED.

R288

Next, the defense filed a "Motion For Evidentiary Hearing With Chief Judge And For Appointment Of Expert To Testify At Hearing For Funding Of Mitigation Specialist And Rehearing For Travel Costs," with exhibits A & B. R308-377, which was heard by the court and denied summarily with no explanation. R567, 572 That motion addresses that fact that face-to-face interviews are the prevailing norm:

In death cases, one on one, face to face interviews with witnesses are the prevailing norm and nationally recognized as such. See Affidavit of Russell Stetler filed in *Phan v. State*, a

Georgia case, attached hereto as Exhibit "A"; *See also*, Memorandum Regarding Adequate Time to Ensure that These Capital Procedures Meet the Standard of Heightened Reliability Required When the State Seeks the Death Penalty, attached hereto as Exhibit "B".

R312 (footnote omitted).

At that hearing, the defense attorney explained that due to the standards the court was imposing the defense wanted to bring in an expert to address the importance of the travel for live in-person interviews as opposed to over the phone or through the computer.

R570-571 The defense attempted to show it was pursuing a reasonable investigation, but the attempt was blocked by the trial judge when he denied the motion for the evidentiary hearing. The judge imposed an impossible standard on the defense and put up a barrier to allowing the defense to meet that standard.

The State's argument that Sexton never established need for the travel is an attempt to legitimize the court's arbitrary standard. Any investigator, whether police officer or mitigation specialist, cannot be expected to know what their investigation will reveal before it can be justified. It is impossible for a defense attorney to prove the relevance of testimony that has yet to be discovered, but that is what the State

seems to be suggesting should be the standard, when it writes that Sexton failed to establish a particularized need for travel. AB at 2. “Counsel offered no other details regarding ‘hidden secrets’ and what information was expected to be gained by the sit-down meetings.” AB at 25 The State also suggests that the defense of a capital case can be adequately investigated by long distance phone calls alone but provides no authority for this. AB at 26

In discussing the request for the brain scans, the State is incorrect in its assertion that there was no proffer that an expert required a scan to reach an opinion. This was addressed in the defense motion at R514, at the hearing at R616-617, and at the trial at T223.

Although JAC was not objecting to the funding request, the trial court rejected the request based on its reading of this Court’s opinion in Sexton’s prior appeal, which indicated that mental mitigation had been found by the court. R578 The judge said that the question of organic brain damage was of no relevance. The discussion that occurred between the defense lawyer and judge shows that the judge was disregarding the professional standards that govern the

adequacy of a capital investigation.

THE COURT: . . . So we've already had a sentencing hearing at which two expert witnesses provided testimony on the subject matter that we're delving into here on this expedition to find whether something actually exists. So I just don't understand why this is a necessity for the State to spend money for a brain scan.

MR. LENAMON: Because the standard practice is if there's any kind of indication of a brain impairment that it should be done.

THE COURT: Okay. Well, it's denied if it's just based on the standard practice that if there is any kind of brain impairment that it should be done. That is not really the standard that the Court considers here. The Court is considering what is reasonable and necessary for the Defense to present the matters that the Defense needs to present. And it's clear that this was successfully presented previously by witnesses that have already been involved in the case, two expert witnesses, not just one. In addition to that, the Court has appointed and granted you funds for additional mental health experts. I believe at least two, if not more, mental health experts.

MR. LENAMON: That's correct, you have appointed two experts, Judge. But the fact that those doctors with -- with the record is missing, although they testified to a statutory mitigating factor, there was no testimony about him having a brain scan done and showing a brain injury, which would impact the jury in making its decision to vote for life.

And so although there are statutory mitigators that were established, regional counsel did not spend the money to do the brain scans as they should have back then, but they didn't do that. So we're correcting their mistake, Judge, by doing the brain scan that needs to be done in this case and is required based on the testimony of Dr. Maher.

THE COURT: And the brain scan is going to cost how much?

MR. LENAMON: It runs around \$1,500, Judge.

THE COURT: And Dr. Wu -- because this is essentially two motions -- is the one that had the scan done?

MR. LENAMON: Dr. Wu is \$300 an hour. He is going to review the scan and review some records, testify via video. Probably \$7,500, Judge.

And Dr. Maher, I'm just asking for his time to write the script because Dr. --

THE COURT: And so I'm failing, really, to see what the possible relevance would be of the expert testimony that he does have particular mental health issues, whether they're organically caused, genetically caused, trauma caused, you know, the actual mechanism that results in the aberrant behaviors does not seem to be something that has to be explored and so I'm not

--

MR. LENAMON: It absolutely has to be explored, and let me tell you why, Judge. The record is that at some point during the night he goes to the front door of this 95-year-old woman who he was the lawn person for. He has a history of severe alcoholism. Something happens. He then stabs her, chokes her, kills her. It's brutal, Judge.

THE COURT: I understand that.

MR. LENAMON: So here we go. Brain damage, frontal lobe damage. A doctor will come in and say that if somebody has a brain injury and brain damage and they have frontal lobe, there is impairment and that they can snap. And that's what exactly happened here. He snapped. I don't know if he was thinking

that she's his mother, ex-girlfriend, she said something to him. I don't know what he was thinking, but whatever happened caused him to be brutal. And this killing is horrendous, almost indefensible, Judge. So that's why this brain scan is so important.

THE COURT: Well, it need not be defensible because he's been found guilty. So what we're really talking about is whether it's – whether there are mitigating circumstances, not defenses. But be that as it may, the Court understands and appreciates the arguments that you make. You're doing your job and I'm really trying to do mine, and the motion is denied.

R582

Brain damage has long been recognized as a mitigating circumstance and the failure to consider it as mitigation is error. Ault v. State, 53 So. 3d 175, 190 (Fla. 2010); Eddings v. Oklahoma, 455 U.S. 104 (1992). The statements by the Court show a complete disregard for the question of whether Sexton has organic brain damage. The court ignored the professional standards that the Supreme Court requires of capital counsel to perform adequately under the Sixth Amendment. Therefore, the court's denial of the funding was a clear abuse of discretion because it was premised on a disregard for Sexton's Sixth Amendment right to effective assistance of counsel.

In Jones v. Ryan, 52 F.4th 1104, 1122 (9th Cir. 2022), cert. granted sub nom. Thornell v. Jones, 22-982, 2023 WL 8605741 (U.S. Dec. 13, 2023), the Ninth Circuit addressed a claim involving the denial of funding to develop an ineffective assistance of counsel claim, which was based on trial counsel's failure to adequately investigate a capital defendant's potential brain damage.

The PCR court's decision not to fund a defense mental health expert fatally undermined the fact-finding process, in part because that decision resulted in the court ruling on an unconstitutionally incomplete record. Without funding for a mental health expert, it was impossible for Jones to demonstrate that he had been prejudiced by counsel's failure to obtain one during the course of Jones's criminal proceedings. Jones could not demonstrate the inadequacy of counsel's mitigation case without providing the mitigation evidence that could have been presented by a defense neuropsychological expert. Moreover, without funding, Jones could not show that a defense neuropsychological expert would have presented materially different evidence than that already provided by Dr. Potts. By failing to provide additional funding to develop Jones's mental health mitigation evidence, the state court, as Jones phrases it, created "its own self-fulfilling prophecy," by preventing the development of the claim before it was even presented.

The same situation was created here with the denial of funding for the brain scans. By not authorizing funding for the brain scans, the trial judge prevented the development of the mitigation and fatally

undermined the factfinding process.

The State relies entirely on speculation with regard to prejudice for the denial of funding, arguing that there was no potential mitigation to be discovered. It also speculates that any undiscovered mitigation was inconsequential because Mr. Sexton would have chosen to exclude that evidence at trial. This Court should reject these speculations, which are refuted by the record.

Ms. O'Shea's testimony refutes the assertion that the funding limitation had not impacted her ability to discover consequential mitigation.

[THE PROSECUTOR]: And also, in terms of your mitigation, the things that you brought up for the Court, were there any other witnesses that were unlisted or unable to be pursued that had additional information, or is what you testified to encompass all of the information you were able to come up with?

MS. O'SHEA: Well, there were a number of witnesses that I was unable to interview because I was never granted funding to go to Arkansas or to Portland, where there were witnesses that I might have been able to interview in person, who I was unable to interview over the phone.

* * * *

THE COURT: Does the Defense have anything that they want her to go over that -- something that we didn't discuss?

[DEFENSE COUNSEL]: Yes. The only thing is, Ms. O'Shea, did Dr. Maher and Dr. Ouaou both recommend brain scans in this case?

MS. O'SHEA: Yes, they did.

[DEFENSE COUNSEL]: Were we not able to do that because we were not granted funding?

MS. O'SHEA: That's correct.

[DEFENSE COUNSEL]: And what was the reason that those brain scans were being recommended?

MS. O'SHEA: Dr. Ouaou said that there could be additional cognitive impairments that were not detectable through neuropsychological testing alone, and he wanted to have us get a neurologist and take a look at what might show up on brain scans.

[DEFENSE COUNSEL]: And was that due to the – being able to find out things from the brain scan because of the, for example, lead poisoning or toxicity and alcohol abuse?

MS. O'SHEA: Correct.

T221, 223 Ms. O'Shea's testimony refutes any suggestion that the funding denials and limitations had no impact on her investigation.

Further, the argument that Mr. Sexton would have opted to forego mitigation evidence that was not discovered as a result of the funding denials cannot justify the rulings. The funding requests were

denied in early 2019. R567 Mr. Sexton notified the court of his intent to present selective mitigation in November 2022. R271 This case went to trial in early 2023. Mr. Sexton never waived the right to have counsel investigate the mitigation of his case. This is not a case where Mr. Sexton waived all mitigation. He put on a substantial case. It requires rank speculation to conclude that if the funding had been authorized in 2019 whatever mitigation his lawyers discovered through forensic interviews and neurological testing would have been disregarded by Mr. Sexton at his trial in 2023.

Further, the State's argument ignores what actually occurred at trial. The judge called the mitigation specialist as a court witness to adduce all the mitigation that the specialist was able to discover. Whatever mitigation she had found would have come to light at trial through the trial court's questioning of O'Shea. The State justifies this procedure in Issue II, saying that the trial court had the discretion to call the mitigation specialist "so that it could explore additional un-presented mitigation to have a complete picture of the available mitigation when determining Sexton's sentence." AB at 38 Sexton strongly disputes that this procedure was legally authorized.

Nevertheless, under the procedure that was employed at this trial, if the sought after forensic interviews and the brain scans had occurred in 2019, any potential mitigation that was discovered by the mitigation specialist would have been brought to the court's attention and considered by the judge at trial despite Mr. Sexton's wishes to the contrary. In fact, just before the mitigation specialist testified, the defense lawyer renewed the objection to the court going forward because the brain scans were denied. "MS. ALAVI: Judge, I just want to maintain for the record that based on the brain scan issue that we discussed yesterday, the Defense is not ready to proceed." T207

Given the court's efforts to get all the potential mitigation into the record through Ms. O'Shea's testimony, it is incorrect for the State to say that potential mitigation would not have been presented. Because the State justifies the procedure of calling the mitigation specialist as a court witness in Issue II, it undermines its argument that "[t]he fact that Sexton waived much of his mitigation also dispels any notion of prejudice." AB at 28

The State's prejudice argument is contrary to the Supreme Court's analysis of prejudice where an investigation is inadequate or

not undertaken. The Supreme Court has said that the defense can decide to forgo the presentation of mitigating evidence only when a reasonable investigation has occurred. “As we established in Strickland, ‘strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.’ ” Wiggins v. Smith, 539 U.S. 510, 528 (2003) (quoting Strickland v. Washington, 466 U.S. 668, 690-691 (1984)). Here, reasonable professional judgments did not support the limitations.

Regarding the equal protection violation aspect of the denial of funds, the State is incorrect in its assertion that this was not preserved. Sexton repeatedly raised a violation of the right to equal protection with respect to his motions for the travel and brain scans, arguing that the failure to grant the motions will:

not only violate the Defendant's statutory right to effective assistance of counsel but also his rights to due process, to equal protection, to present mitigating evidence, and to the effective assistance of counsel under State and Federal Constitutions. U.S. CONST. amend. VI, VIII, & XIV; FLA. CONST. art. 2, 9, 16, & 17.

See R204, 209, 214, 295, 515

Finally, the State’s assertion that all counsel representing indigent defendants are on equal footing with regard to obtaining investigative funds is simply incorrect. The State’s quotation attributed to Andrews v. State, 243 So. 3d 899 (Fla. 2018), is taken out of context. That case concerns an indigent defendant’s entitlement to an ex parte hearing when his pro bono private counsel requests funds for experts. That case confirms the distinction drawn in the Initial Brief between the funding rules for indigent defendants represented by private counsel who are appearing either by court-appointment or, as in Andrews, pro bono and those represented by the public defender or regional counsel offices, with state-funded office budgets:

Andrews argues that “comparable defendants represented by private counsel would not be required to divulge details to the prosecution regarding the hiring of experts, nor would similarly-situated defendants who are represented by the Office of the Public Defender or the Office of Criminal Conflict and Civil Regional Counsel.” We agree with Andrews.

243 So. 3d at 901 (emphasis added). In short, this issue arises only because Mr. Sexton was indigent and his lawyers were court-appointed private counsel as opposed to a Public Defender or

Regional Counsel.

The defense attorney correctly asserted that the State should not be its funding adversary:

For purposes of funding of defense costs, the State is not Defendant's adversary. In fact, for all intents, the State is the financial guarantor of Defendant's right to a constitutionally effective defense.

R309 The trial court's statements at the hearings and in its orders show that it elevated what it saw as its role as a guardian of funds over its role as a guarantor of Sexton's right to an effective defense. By putting a financial roadblock up against appointed counsel's efforts to adequately investigate the case, the court abused its discretion and violated Sexton's constitutional rights.

ISSUE II

THE TRIAL COURT VIOLATED MR. SEXTON'S
SIXTH AMENDMENT RIGHT TO COUNSEL
AND RIGHT TO CONTROL HIS DEFENSE BY
CALLING MS. O'SHEA, THE DEFENSE'S
MITIGATION SPECIALIST, AS A COURT
WITNESS

The State repeatedly characterizes Sexton's presentation of his case as being very minimal mitigation, but this characterization

should be rejected. The State’s contention that Sexton waived “nearly all his mitigating evidence” is simply incorrect. Sexton put on four witnesses; whereas, the State put on three for its case. The characterization of Mr. Sexton’s case for a life sentence as minimal is an attempt to justify the trial court’s decision to take over the evidence for his case. Sexton’s mitigation was intentionally focused on his many positive accomplishments, relationships, talents, and adjustments. The favorable and emotional testimony of Belinda Lister, Madison Setzer, Lorena Smith, and Ronald McAndrew, and the exhibits showing examples of Mr. Sexton’s paintings, was not a small case for a life sentence. However, all of that positive testimony was completely overshadowed by the negative facts that the trial judge elicited from Ms. O’Shea.

The State defines the Sixth Amendment right to counsel too narrowly when it argues that Sexton’s right was not violated because he was represented. Judicial interference with the attorney-client relationship and forced disclosure of protected work product violate the Sixth Amendment right to effective assistance of counsel. See In re Search Warrant Issued June 13, 2019, 942 F.3d 159, 174–75 (4th

Cir. 2019):

Notably, the attorney-client privilege and the work-product doctrine jointly support the Sixth Amendment's guarantee of effective assistance of counsel. See U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.”); Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (analyzing Sixth Amendment right to effective assistance of counsel). For example, in assessing the interplay between the attorney-client privilege and the Sixth Amendment, we have emphasized that “[t]he essence of the Sixth Amendment right to effective assistance of counsel is, indeed, privacy of communication with counsel.” See United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981); cf. DeMassa v. Nunez, 770 F.2d 1505, 1507 (9th Cir. 1985) (describing Sixth Amendment as a “source” for the expectation of privacy in attorney-client communications); 1 Geoffrey C. Hazard, Jr. et al., The Law of Lawyering § 10.14, 10-91 (4th ed. Supp. 2019) (explaining that “[t]he attorney-client privilege has ties to the Sixth Amendment”). Absent privacy of communications and the “full and frank” discussions that flow therefrom, a lawyer could be deprived of the information necessary to prepare and present his client's defense. See Upjohn Co. [v. United States], 449 U.S. [383] at 389, 101 S.Ct. 677 [(1981)].

Similarly, the work-product doctrine fulfills an essential and important role in ensuring the Sixth Amendment right to effective assistance of counsel. The Supreme Court has recognized that the work-product doctrine is vital to “assur[e] the proper functioning of the criminal justice system,” in that it “provid[es] a privileged area within which [a lawyer] can analyze and prepare his client's case.” See [United States v.]Nobles, 422 U.S. [225] at 238, 95 S.Ct. 2160 (1975); see also In re Grand Jury Subpoenas, 454 F.3d [511] at 520 [6th Cir. 2006] (explaining that “people should be free to make requests of their attorneys without fear, and that their attorneys should be free

to conduct research and prepare litigation strategies without fear that these preparations will be subject to review by outside parties”). Without that “privileged area,” a lawyer's ability to plan and present his client's defense will be impaired. See Nobles, 422 U.S. at 238, 95 S.Ct. 2160; see also Hickman [v. Taylor], 329 U.S. [495] at 511, 67 S.Ct. 385 [1947].

The State’s additional characterization of the court’s actions as intending to benefit Mr. Sexton is contradicted by the record. See Answer Brief at 37-38, where the State characterizes the trial court’s intention as protective of Mr. Sexton’s interests. When the trial court called the mitigation specialist as a court witness, the court’s intent was not to supplement the mitigation in order to protect Mr. Sexton’s interests or to justify a life sentence. The court made its intent known when it said that the result of the defense attorney’s investigation would be listed in a sealed document solely for purposes of defeating a later claim of ineffective assistance of counsel, which meant that the court was intent on insulating a death sentence from a post-conviction challenge. Where there were only two possible outcomes in this re-sentencing proceeding, death or life, a life sentence would be a win for Sexton that would not occasion a post-conviction challenge. So there was only one reason why the court would be

contemplating insulating the decision from a post-conviction challenge.

But the next day, the court detoured from the plan to have defense counsel's list be put in the record as a sealed document that would not be reviewed. Instead, the court called the mitigation specialist as a court witness so that the information would be included in the calculus of the ruling. The trial judge incorrectly believed that this Court required a trial judge to have considered all potential mitigation before imposing a death sentence, even if that testimony was not presented by the defendant in mitigation. The trial judge said, "the Supreme Court has said that I should look at all mitigation in the record." T201 The trial judge acknowledged this process was not to benefit Mr. Sexton but only to meet her obligations. "And I know this is against Mr. Sexton's wishes, but I have my own obligations that don't include him." T201 The judge discussed the list she had ordered counsel to prepare.

I think yesterday we had some discussions on whether that I would review it or I would just put it into the record. I think I have an obligation under the case law to review it.

So instead of ordering a Presentence Investigation, I don't think

it's necessary since we already had the person testify for mitigation on DOC records, his DRs, all that kind of stuff. We already had that part, so the only other part of that would be any other mitigation.

State, do you have any position on this matter?

MR. SARABIA: We do not, Judge.

THE COURT: Okay. So what I could have is it's Ms. O'Shea, correct?

MS. O'SHEA: Yes.

MR. LENAMON: Correct.

THE COURT: I could have Ms. O'Shea -- I could swear her in and put her on the stand, and then she can outline for me all of the mitigation that was found, read the names, what the mitigation would be in a small summary, and then present that list to me that I can put it into the record.

This is a witness that I would call. This is not a witness that the Defense has called. I understand Mr. Sexton's position. He does not wish to have any of this presented. However, I'm going to do it one of two ways, I'm either going to call -- order the PSI, and I'm going to get it that way, or I'll just have Ms. O'Shea, I'll call her as the Court's witness, and have her present whatever other mitigation applies.

T202-204 The Court knew that Mr. Sexton was objecting to this, but disregarded his objection.

THE COURT: So if Ms. O'Shea feels that she has the information with her today, I can call her as a Court witness, and then I could have her testify to all of the other mitigation

that may be out there.

Mr. Sexton, I'm sure you want to object to this on the record.

THE DEFENDANT: Absolutely, I want to object to this part of the proceeding. I still contend that mitigation is concessionary by nature.

THE COURT: Okay.

THE DEFENDANT: And anything they present that I did not approve goes towards conceding the guilt of the crime that I did not commit.

THE COURT: Okay. I completely understand your position.

THE DEFENDANT: To have them make that concession, I, again, contend that it's a violation of my Sixth Amendment rights and very similar to as the Supreme Court cited in McCoy vs. Louisiana. And the decision states clearly that the Sixth Amendment guaranteed a criminal defendant the right to choose the objective of his defense and who insists that his counsel refrain from admitting guilt.

THE COURT: Okay. I'll have that on the record. The Court, at this time, is going to call Ms. O'Shea. She's ready to go. I will have you sworn in, then I will have you testify of everything you've got. Come on up.

T205-206; see also R219 where Sexton objected again, specifically pointing out, “[t]his is still part of the penalty phase. Ms. O'Shea is part of the Defense.”

The court was intent on calling the mitigation specialist and

reciting in the sentencing order that it had reviewed the entire prior record to fulfill what the court considered to be its obligation before imposing a death sentence. This procedure was not implemented as a benefit to Mr. Sexton. It was not done to provide a basis for a life sentence. The State's assertion that "the lower court took extra precautions by electing to call the mitigation specialist as a court witness," (AB at 37) is accurate only in so much as the extra precaution was intended to insulate the death sentence from appellate scrutiny.

The State contends that this Court has not prohibited the calling of the mitigation specialist and the trial court was properly exercising its discretion. AB at 38. The State contends that the trial court had the discretion to call its own witnesses. AB 37 This is incorrect, and again, based a misreading of this Court's cases. The judge did not have the discretion to call as a court witness a member of the defense team to testify to information gathered on behalf of the defendant, which the defendant specifically chose to omit, all over the defendant's objection. See United States v. Nobles, 422 U.S. 225, 238–39 (1975) (discussing the vital role of the work-product doctrine

in assuring the proper functioning of the criminal justice system); Boyd v. State, 910 So. 2d 167 (Fla. 2005) (defendant controls the objectives of mitigation); Fla. R. Crim. P. 3.220 (work product nondisclosure). Discussing section 90.615, Florida Statutes, which gives a court discretion to call a witness when required by the interests of justice, the Third District said that “a court's use of this latitude to independently inquire as a means to supply or develop evidence for an essential element in a party's claim or defense signals bias and is reversible error.” Marwan v. Sahmoud, 306 So. 3d 248, 253 (Fla. 3d DCA 2020). That is what occurred here where the calling of the mitigation specialist was not intended to benefit the defendant.

A trial court may have the discretion to appoint independent counsel when all mitigation has been waived. But this court has approved of that procedure only when the defendant did not put on any mitigation, as was the case in Barnes v. State, 29 So. 3d 1010 (2010), which simply follows Muhammad v. State, 782 So. 2d 343 (Fla. 2001), in allowing the court to appoint counsel to present mitigation where a defendant waives presentation of all mitigation.

This Court’s opinion in Barnes recognizes the distinction

between a defendant waiving all mitigation, as was the situation with Barnes, and one who presents selected evidence mitigation as a strategy which is then followed by court-appointed independent counsel presenting additional mitigation that directly conflicts with a pro se defendant's approach. 29 So. 3d at 1023-1024. The Barnes Court distinguished U.S. v. Davis, 285 F.3d 378 (5th Cir. 2002), where the appointment of an independent counsel violated Davis's Sixth Amendment right to self-representation.

Davis is instructive. Both Barnes and Davis are cases where the defendant was pro se, which is not the case here, but that distinction is irrelevant. In Barnes the defendant waived all mitigation; whereas, in Davis the defendant chose to put on selective mitigation. But special counsel put on evidence that conflicted with Davis' strategy and undermined his ability to control the case he intended to present, which violated his Sixth Amendment rights. "This is so regardless of whether society would benefit from having a different presentation of the evidence." Davis, 285 F.3d at 385. The Sixth Amendment right that was violated in Davis, and acknowledged in Barnes, is the defendant's ability to select the mitigation presented.

The process used by the trial judge clearly violated Mr. Sexton's constitutional rights under the Sixth, Eighth and Fourteenth Amendments. This issue is preserved. The trial court was well-aware of Mr. Sexton's objections to the court putting the excluded mitigation in the record and calling his mitigation investigator as a court witness. Defense objections were made by both Mr. Lenamon and Mr. Sexton as the court's rulings evolved, and they were repeatedly entertained and overruled by the court. T34, 39, 41, 188-91, 197-98, 205-06, 219-20; R781. The fact that Mr. Sexton made some of the objections personally does not lessen their effectiveness at preserving the error, especially where his counsel had already voiced Mr. Sexton's opposition. This is not a situation where Mr. Sexton was at odds with his counsel.

There is no basis for the State to assert that Mr. Sexton's objections were not adequate to preserve the issue when those objections were acknowledged and denied by the judge. The defense counsel was not required to make extra objections when the judge acknowledged Mr. Sexton's objections. A trial court has discretion to allow hybrid representation. McCray v. State, 71 So. 3d 848, 865

(Fla. 2011). Over the course of the case, the judge had allowed Mr. Sexton to make legal objections and even invited him to challenge his lawyer's actions. See, e.g., R177:

THE COURT: [Addressing Mr. Sexton] Are you are you agreeing to this motion [filed by counsel]? If you do not agree to this motion, I'm just going to deny it right now.

THE DEFENDANT: Yes. I agree to the motion.

See also T24-25, R178, 184-87, 1041-42, 1139-40, 1169, 1194-97.

There is no basis for the State's "invited error" argument. At the start of the trial, the defense attorney voiced discomfort with a represented client having autonomy to choose what is presented in mitigation. T26-27 The State attempts to conflate that discussion with the judge's decision to call the mitigation investigator as a court witness at the end of the trial in an attempt to suggest a procedural bar. The defense attorney was not at odds with his client at the end of the case. The defense attorney adhered to the law and tailored the defense case to the positive testimony that Mr. Sexton wanted to present. A legal discussion at the start of the case regarding a capital defendant's autonomy has nothing to do with this issue. This court should reject any attempt by the State to conflate that early

discussion with what transpired at the end of the defense's case as these were entirely separate issues. This Court should reverse and remand for resentencing before a different judge.

ISSUE III

THE TRIAL JUDGE VIOLATED FLORIDA LAW AND MR. SEXTON'S CONSTITUTIONAL RIGHTS BY (1) FAILING TO CONDUCT A DE NOVO PENALTY PHASE, (2) TAKING JUDICIAL NOTICE OF THE PRIOR PROCEEDINGS, (3) REOPENING THE CASE TO ASSIST THE STATE, AND (4) RELYING ON FACTS NOT IN EVIDENCE

The issues raised here are pure questions of law as to a trial court's authority, subject to de novo review. This Court should reject the State's attempt to frame this issue as involving the trial court's discretion.

(1) Failing to Conduct a De Novo Penalty Phase and (2) Taking Judicial Notice of Prior Testimony and Exhibits

The State claims that Sexton received "an entirely new resentencing proceeding." It references the trial court's statement at the beginning of the case saying that it was "going to basically do this from scratch." T20. The problem is the court's statement conflicts

with what actually occurred. The court changed its position as the trial progressed. And the court's other statements show an erroneous understanding of the meaning of a de novo resentencing, which requires a clean-slate evaluation of the sentence.

We have repeatedly stated, in the same context of a resentencing proceeding stemming from a previously vacated death sentence, that this Court applies the "clean slate" rule. See, e.g., Way v. State, 760 So. 2d 903, 917 (Fla. 2000) ("[T]he resentencing judge is not obligated to find the same aggravating and mitigating circumstances that were established in the original sentencing proceeding."); Preston v. State, 607 So. 2d 404, 409 (Fla. 1992) (noting that a resentencing must be allowed "to proceed in every respect as an entirely new proceeding"); Teffeteller, 495 So. 2d [744] at 745 [(Fla. 1986)] ("The resentencing should proceed de novo on all issues bearing on the proper sentence").

Lowe v. State, 259 So. 3d 23, 61 (Fla. 2018).

In response to the defense objections to judicial notice, the court indicated that it was not going to be considering the case de novo. Its ruling on judicial notice conflicts with considering the case as an entirely new proceeding.

THE COURT So I will deny the objection, and I will allow the Court to take judicial notice -- I will take judicial notice of all of the previous witnesses and evidence admitted in the previous trial under oath subject to cross-examination.

* * * *

So any other objections from the Defense?

[DEFENSE ATTORNEY]: Yes, Judge. I have a question as to that? The Court has ruled that these transcripts are not hearsay and that it will take judicial notice; however, what about as to the proceeding being a de novo proceeding? I raised that objection also.

THE COURT: I understand. It is a de novo review. I'm going to have to pull the transcript, and I'm going to have to review them personally as part -- when the State makes their argument, whether you make your argument, once we've gone forward. I assume the State is going to move in whether it's the MEO's report, whether it's the MEO's testimony, the pictures from the medical examiner, the witnesses' testimony, they're going to have to note during their proceeding what -- what witness I'm supposed to look at and what evidence I'm supposed to look at.

You have a copy of the transcript. If there's anything else that -- any witnesses that you wanted to call to dispute that, any new Medical Examiner's Office testimony that you wanted to dispute, you could do so.

So it's not hearsay because it was in court subject to cross-examination. And it would be foolish for the Court to spend all of this time rehearing evidence that I already can review in transcript form from a trial subject to cross-examination.

So I'm not saying I'm not going to read it. I am going to read it. I'm going to -- I'm going to read the transcripts, and I assume that the State is going to refer to which transcript and which witness and which evidence that I've previously heard that we already have a copy of, they're going to have to provide that to the Court, then I'm going to read that as part of the sentencing.

[DEFENSE ATTORNEY]: Yeah. I just wanted to make sure it was

the Court's position that de novo review was satisfied by the Court rereading prior transcripts. I just wasn't clear on that. I was clear on the hearsay issue that the Court discussed.

THE COURT: I believe it is satisfied, as long as the State refers to which witness during the original trial they are asking me to read that transcript.

And, again, that transcript has already been, you know, subject to cross-examination. Those witnesses were here live, and the Defense is able to provide me with other witnesses or other evidence, if they wish to. I have no idea what you're going to do or what your presentation is going to be, but this provides you with an idea that the State is not going to put on any new witnesses. They're going to rely on whatever they have. They're going to tell me what it is, and I'm going to read the transcript, and then we'll move on.

* * * *

I was there. I made the previous rulings, so it's not even that there's a new judge and a new ruling that has to be made. I was there. I made the rulings. The transcript was under oath, subject to cross-examination, and in front of a jury, and it's already been upheld on appeal.

So at this point I'm going to go ahead and allow the -- the previous testimony to -- if that's what the State wants. I'm not -- they're going to have to tell me to rely on the MEO's report or rely on these pictures, and then I can pull them from the record to supplement as we go along. And you'll know what they want because they're going to tell me what they're looking at.'

So if that answers your question, that's the best you're going to get from me.

T12-16

The State has offered no response to the error of violating the clean slate rule and the case law explaining that judicial notice cannot be used to dispense with proof of essential facts that are not judicially cognizable. There is no legal basis for the State to justify the court's ruling.

(3) Reopening the Case to Assist the State

Again, the State cites no authority for its contention that "the court's actions were appropriate." The State offers no authority for the proposition that a judge may appropriately solicit evidence to assist the State after the parties have rested. Saying that Sexton was "not blindsided" is not a legal justification for a judge to initiate the introduction of evidence on behalf of the State.

Further, as the above-quotation indicates, Sexton was blindsided because the judge started the trial by saying that "I assume the State is going to move in whether it's the MEO's report, whether it's the MEO's testimony, the pictures from the medical examiner, the witnesses' testimony, they're going to have to note during their proceeding what -- what witness I'm supposed to look at and what evidence I'm supposed to look at." T13-14 The judge said

clearly the State was required to move into evidence what portion of the prior trial it was relying on. "I'm not -- they're going to have to tell me to rely on the MEO's report or rely on these pictures, and then I can pull them from the record to supplement as we go along. And you'll know what they want because they're going to tell me what they're looking at." T16

Based on this ruling at the start of the trial, the defense had a right to expect that the State would move into evidence that portion of the prior trial that it was relying on. This did not happen, so the defense was "blindsided" when at the end of trial when, after the evidentiary portion had concluded, the judge solicited the State to name portions of the prior transcripts it wanted reviewed.

(4) Relying on Facts Not in Evidence

"A prior sentence, vacated on appeal, is a nullity." Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986). The facts that the court relied on to make the findings required for death are not fully revealed in this record, such as the judge's extensive notes from the prior penalty phase. Many facts in the sentencing order are derived from the reversed trial. R774 The State does not acknowledge the problem.

The State raises a harmless error argument. In the sentencing context, the State must show the error to be harmless beyond a reasonable doubt, meaning there is no reasonable possibility that the error contributed to the sentence. Zack v. State, 753 So. 2d 9, 20 (Fla. 2000). In considering the mitigation, the trial court's reliance on the evidence from the prior penalty phase is especially prejudicial. See R784 The court's recitation of "mitigation" from the prior trial is all negative, e.g., antisocial personality traits, bipolar disorder, alcohol dependency. The Court's discussion of whether Sexton was under the influence of extreme mental or emotional disturbance is a very negative analysis, which is not based on the mitigation presented in this current proceeding. E.g., "The Defendant continues to deny committing the offense, so there is no evidence that the Defendant was suffering from a "manic" episode at the time of the murder." R784 Likewise, the analysis of the mitigating factor of whether the capacity to appreciate the criminality of his conduct was substantially impaired, which is entirely based on testimony from the prior reversed penalty phase, was completely negative. See, e.g., R785 (discussing his well-documented 20-year history of severe

alcoholism and history of mental illness and treatment for mental illness).

All the negative “mitigation” that the court gleaned from the prior sentencing hearing was assigned little weight as mitigation, so it did not help Mr. Sexton’s cause. But it was prejudicial. The prejudice comes from the judge using that testimony in place of any consideration or even a mention of the positive traits that were brought to light by the witnesses who testified in this trial. All the positives in Mr. Sexton’s life were not mentioned at all in the sentencing order. No mention is made of him raising his children as a devoted father, running a business, supporting his sister through the death of her husband, or cultivating his artistic talents while in prison. All the positives were overshadowed by the negative evidence that the trial judge took from the reversed prior hearing. This cannot be considered harmless.

“Application of the [harmless error] test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the

jury verdict.” State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). It is clear that the court’s error of relying on the reversed penalty phase evidence did contribute to the verdict; therefore, the State did not meet its burden of showing harmless error.

ISSUE IV

JUDGE HANDSEL ERRED IN DENYING MR. SEXTON’S MOTION TO DISQUALIFY HER

When Judge Handsel denied the motion for disqualification, no death sentence had been imposed. Death was only a possibility. Now that a death sentence has been imposed, this Court cannot avoid its mandatory and exclusive jurisdiction to review the trial court’s rulings that resulted in the death sentence. Art. V, § 3 (b)(1), Fla. Const. (“Shall hear appeals from final judgments of trial courts imposing the death penalty”). By asking this Court to avoid reaching the merits of this claim, the State is asking this Court to delegate its mandatory jurisdiction to an inferior court. This Court cannot defer to the Second District’s denial of a prior extraordinary writ petition to avoid its mandatory jurisdiction.

Aside from the jurisdictional mandate, this Court must review the trial court's order on the merits because it has no way of knowing whether the Second District ever reached the merits. That court issued an unelaborated order that is not evidence of a ruling on the merits. See Topps v. State, 865 So. 2d 1253 (Fla. 2004). The holding in Topps is well-established law. See Warren v. DeSantis, 365 So. 3d 1137, 1142 (Fla. 2023) (“[g]iven the nature of an extraordinary writ, there may be circumstances in which a court denies relief for ‘reasons other than the actual merits of the claim.’”) (citing Topps)).

On the merits, the State correctly notes that the standard of review is de novo. But the State downplays the basis for the motion and mischaracterizes the record. The motion was not based on an adverse prior ruling. In fact, there was no adverse ruling made at the hearing when Judge Handsel denigrated Mr. Lenamon. Judge Handsel's statements to Attorney Lenamon must be understood in the context of what the judge did not say to the prosecutor who had just disparaged the defense attorney, the defense experts, and the appellate courts whose decisions had necessitated a new sentencing trial for Mr. Sexton. The State does not acknowledge the prosecutor's

remarks that prompted Mr. Lenamon's response. The State fails to acknowledge the entire context of what occurred at the hearing to prompt the motion for disqualification.

When the record is reviewed in conjunction with the properly filed motion, it is clear that the Mr. Sexton had a legitimate basis to fear that the court was prejudiced against his attorney and partial to the prosecutor. Further, the judge's verbal responses to Mr. Lenamon's voiced intent to file a motion to disqualify as well as the written denial order itself went beyond merely determining sufficiency and improperly took issue with the motion, which created an independent ground for disqualification. See Fla. R. Gen. Prac. & Jud. Admin. 2.330(h) ("No other reason for denial shall be stated, and an order of denial shall not take issue with the motion."); Jada v. Harrison, 369 So. 3d 341, 342 (Fla. 5th DCA 2023) (judge commented on the allegations of bias contained within motion to disqualify).

The motion was legally sufficient under Florida Rule of General Practice and Judicial Administration 2.330. After reciting the facts in paragraphs 1 through 9, and the applicable law in paragraphs 10

through 16, the motion concluded with a statement of Mr. Sexton's fears, including that the Court's prejudice, bias, or antipathy against defense counsel will adversely affect him, that he will not receive a fair trial, or that he will otherwise suffer prejudice or bias from the Court. It was personally sworn to by Mr. Sexton. R107 The State has offered no legal basis to justify the trial court's denial of the verified motion. This Court should reverse.

ISSUE V

THE TRIAL COURT VIOLATED MR. SEXTON'S RIGHTS UNDER THE SELF-INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT BY COMMENTING NEGATIVELY ON HIS SILENCE IN THE SENTENCING ORDER

The State's preservation argument is incorrect. Sexton was not required to assert a sentencing error in the lower court where a death sentence has been imposed. Lynch v. State, 841 So. 2d 362 (Fla. 2003); Fla. R. Crim. P. 3.800 ("This subdivision shall not be applicable to those cases in which the death sentence has been imposed and direct appeal jurisdiction is in the supreme court").

The State attempts to excuse the judge's blatant violation of the self-incrimination clause of the Fifth Amendment on the grounds that Sexton waived a jury. "Because Sexton had no jury, there was no possibility of improper influence." Ans. Br. at 61 The fact that he waived the jury is a non-sequitur. The judge was acting in place of the jury, and the sentencing order shows that the judge used Sexton's exercise of his Fifth Amendment rights against him to excuse the absence of evidence that the victim was conscious when the sexual battery occurred. The State has no logical answer to this. The error cannot be harmless because the trial court assigned great weight to the aggravator in part because of facts presumed as to the victim's consciousness. This error requires reversal of the sentence.

ISSUE VI

THE TRIAL COURT FAILED TO
MEANINGFULLY CONSIDER THE POSITIVE
NONSTATUTORY MITIGATING TESTIMONY
AND EVIDENCE INTRODUCED BY MR.
SEXTON

The trial court utilized its prior sentencing order to discuss mitigation in the new sentencing order entered in this case. Sexton's

prior reversed sentencing order is in SC14-0062 at R3185.

Regarding nonstatutory mitigation, the trial court's mention of the "only other factor listed for this subsection" in the current sentencing order is a reference to the prior defense attorney's 2013 sentencing memo filed on October 11, 2013. Comparing the sentencing orders that Judge Handsel entered in 2013 and present shows that the trial court did not give any effect to the mitigation that was presented in this trial. The State attempts to justify it by blaming the defense for not spelling out the mitigation. Given that this case involved a bench trial with a combined Spencer hearing and waived closing arguments, there was no reason to suppose that the trial judge would overlook all the positive mitigating testimony without having it spelled out by the defense lawyer. But that is what happened.

In Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990), a case the State relies on, this Court reversed a death sentence for reconsideration and rewriting of the findings. "Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion." Id. at 23. This Court said that a trial court's findings must be of

“unmistakable clarity.” Id. (quoting Mann v. State, 420 So.2d 578, 581 (Fla.1982)).

The instant sentencing order falls short of this standard where there is no mention of the testimony by Sexton’s mitigation witnesses. The findings do not meet this Court’s requirements or the requirements of the Eighth and Fourteenth Amendments.

ISSUE VII

THE TRIAL COURT’S DECISION TO IMPOSE
THE DEATH SENTENCE IS FUNDAMENTALLY
FLAWED AND VIOLATES THE EIGHTH
AMENDMENT BECAUSE IT IS BASED ON A
MISUNDERSTANDING OF THE SENTENCER’S
DISCRETION TO IMPOSE A LIFE SENTENCE

“Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision.” Tuilaepa v. California, 512 U.S. 967, 971 (1994); see also State v. Poole, 297 So. 3d 487, 501 (Fla. 2020), as clarified on denial of reh'g (Apr. 2, 2023). The instant claim involves the selection decision, “where the sentencer determines whether a defendant eligible for the death

penalty should in fact receive that sentence.” Id. at 972 The Eighth Amendment requires an individualized determination. “That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.” Id.

The trial court’s statement in the sentencing order indicating it was compelled by law to impose death shows a fatal flaw in the selection process. The State argues that the trial court understood the discretion available to impose a life sentence. But this argument flies in the face of the judge’s statement. This Court should not assume that the judge meant something different from what was written. Because the judge’s statement that the court was compelled by law is unambiguous and puts the decision to impose death on an outside source, the sentence must be reversed

ISSUE VIII

FLORIDA’S CAPITAL SENTENCING SCHEME
FAILS TO SUFFICIENTLY REDUCE THE RISK
OF AN ARBITRARY AND CAPRICIOUS DEATH
SENTENCE IN VIOLATION OF THE EIGHTH
AND FOURTEENTH AMENDMENTS

Appellant relies on the argument in the Initial Brief.

CONCLUSION

This Court should reverse the death sentence and remand for resentencing to life, or if this is not granted, then for a new penalty phase with a different judge.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via the e-filing portal to Assistant Attorney General Christina Z. Pacheco at Christina.Pacheco@myfloridalegal.com, capapp@myfloridalegal.com, Stephanie.Tesoro@myfloridalegal.com, Heather.Davidson@myfloridalegal.com, Paula.Montlary@myfloridalegal.com, on this 21st day of December, 2023.

CERTIFICATE OF COMPLIANCE

I certify, as required by Fla. R. App. P. 9.210 and 9.045, this document complies with the word count requirement for a Reply Brief for a judgment of conviction imposing a sentence of death and was prepared with Bookman Old Style 14-point font.

Respectfully submitted,

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