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IN THE SUPREME COURT OF FLORIDA

MARK H. WILSON,

Appellant,

vs. Case No. SC2023-0320
L.T. No. 2020-CF-1021

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR PUTNAM COUNTY, FLORIDA

INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In this capital case the Appellant, Mark Wilson, was convicted of two murders and sentenced to death for each by the Honorable Howard O. McGillin, Jr., Circuit Judge. He was further convicted and sentenced to serve life in prison for a contemporaneous burglary. (R 1740-44) He appeals those convictions and sentences to this Court.

THE CHARGES

Mr. Wilson was charged by indictment with committing four felonies which were alleged to have occurred on or about August 26, 2020. (R 119-20) Count I charged that the Appellant killed Robert Baker, either from a premeditated design or else while engaged in a burglary or in a second murder. (R 119)[1] Count II set out identical charges, on identical alternative theories, as to victim Tayten Baker. (R 119) As to the felony-murder theory, pursuant to the State's concession the jury was eventually instructed only that the State charged that the killings took place during the course of a

[1] The indictment identified the victims on Counts I and II by their initials. (R 119) While the indictment in the record redacts those initials, it is clear from the verdict forms and the court's sentencing order that the victim referred to on count I was Robert Baker and the victim referred to on Count II was Tayten Baker. (R 1122, 1135, 1688)

burglary, rather than in the course of a second murder. (R 1123, 1136; T 759, 773; see T 724-25)

Count III charged burglary of the Baker home, with an assault or battery committed in the course of the burglary. (R 119) That count was eventually nolle prossed. (R 1740, 2142, 2169) Count IV charged burglary of the Baker home while armed, either by entering the dwelling with intent to commit a felony or by remaining in the dwelling with such intent after permission to do so had been withdrawn. (R 120) The jury was eventually instructed solely on the "remaining in" theory. (T 791; R 1151)

In its Second Amended Notice of Intent to Seek the Death Penalty, the State announced it would seek to prove four statutory aggravating factors as to each murder victim. (R 145-146) As to each victim, the State alleged a prior conviction for another capital felony; that the murders were committed while engaged in a burglary (the "felony-murder" aggravator); that the murders were especially heinous, atrocious, or cruel ("EHAC"); and that the murders were cold, calculated, and premeditated ("CCP"). (R 145-146) Regarding the first of those aggravating factors, as to each victim the State relied on the contemporaneous death of the other victim. (R 2078, 3410) The State ultimately pursued the EHAC aggravator only as to Tayten. (R 2100)

PRETRIAL LITIGATION

The defense filed pretrial motions challenging the death penalty generally. Those motions argued that Florida's death penalty scheme is unconstitutional because it fails to narrow the class of persons eligible for that penalty, and because capital sentencing is unconscionable. (R 287-91, 292-99) Defense counsel also moved the court to declare section §921.141(6)(d) of the Florida Statutes, and its corresponding standard jury Instruction, unconstitutional because the felony-murder aggravating factor exacerbates the problem of a broad death-eligible class. (R 280-84) The court denied the motions. (R 645-46)

The defense also sought before trial to preclude death-qualification of the jury, arguing that the process skews juries toward finding guilt. (R 297-299) Judge McGillin denied that motion as well. (R 598)

Counsel further filed pretrial motions seeking variations on the standard jury instructions. The defense moved for a special instruction which would have advised that in Florida, "life without the possibility of parole" in fact means that no release is possible except in extraordinary circumstances. (R 191-93) The motion was based on a 2016 study which showed that 40.2% of Floridians believe that a sentence of "life without the possibility of parole" in fact allows release. (R 192) Specifically, the

requested instruction would have read "[d]espite anything you may have heard or read elsewhere, there is no legal mechanism for anyone convicted of first-degree murder in Florida to receive parole, or to be released from imprisonment absent a personal pardon or order of clemency from the Governor." (R 191) The defense asked that the instruction be read before voir dire, so that the parties could question venire members about their ability to put aside any pre-existing misapprehensions on the subject. (R 192)

At a hearing the State opposed the motion, relying on the fact that the standard instructions for use in death-penalty cases repeatedly state that the alternative to a death sentence is a sentence of "life without the possibility of parole." (R 1859-60) The judge agreed; he granted the motion only to the extent of agreeing to read, before voir dire, a standard jury instruction that refers to "life without the possibility of parole." (R 1860-64, R 640) The jury was eventually read instructions which refer multiple times to "life without the possibility of parole." (R 2236, 2237,2238, 2239, 3377, 3384,3385, 3393, 3394, 3396, 3397,3398, 3400) Defense counsel announced during voir dire that in Florida, regardless of parole eligibility, a life sentence does not contemplate release. (R 4424, 4425, 4782) Defense counsel again so advised the jury in penalty-phase opening and closing. (R

2302, 3477) Counsel for the State, while addressing the venire on the second day of jury selection, made the same announcement to those potential jury members who were present. (R 4377)

In another motion, the defense addressed the definition of mitigating circumstances that appears in the standard instructions. The standard language defines “mitigating circumstances” as those aspects of the defendant’s life, or of the offense, which *reasonably* may indicate that the death penalty is not appropriate. The defense argued in a motion that the ”reasonably” qualifier has no place in jury deliberations, since it could operate to preclude consideration of valid mitigation. (R 266-68) The court denied that motion. (R 604)

The court also denied a special instruction that would have expressly told the jury that mercy can be considered in the penalty phase. (R 198-99, 603) The court ruled that nothing precluded defense counsel from so arguing to the jurors, but declined to so instruct them. (R 1868, 603)

The court further denied Appellant’s motion to exclude from the penalty phase jury instructions a statement included in the standard instructions, to the effect that sympathy should not form any part in deliberations. (R 244-45, 606)

PROOF IN THE FIRST PHASE

The first phase of trial took place from October 11-13, 2022. (T 1-899) The victims' mother, Sarah Baker, established that Robert and Tayten were respectively twelve and fourteen years old when they were killed. (T 41) She found the boys with their throats cut in her home on the morning of August 26, 2020. (T 43, 56, 62-66) On August 27 the defendant confessed to the murders in a taped conversation with two detectives that was played for the jury. (T 357-58, 366-528, 532-78) The defendant and his girlfriend, Sarah's sister Cindy, had moved into an outbuilding on the Baker property a few days before the murders. (T 46, 50-51, 55, 1690) They had their one-year-old child Kaitlyn living with them. (T 50-54) They had permission to enter the main house as needed to use the kitchen, bathrooms, and laundry. (T 51) They moved to the Bakers' property in Melrose after Sarah discovered they were living in a flea-ridden apartment with no power and were smoking pot there while caring for the baby. (T 52-53) Sarah invited them to move to her property, and told them she would get the Department of Children and Families involved if their living conditions did not improve. (T 53-55, 1690)

On August 25, Cindy took a pregnancy test which indicated a positive result; she arranged to go to a doctor the following day. (T 58-59) That

night, sometime before 2:00 A.M., Sarah went outdoors to smoke a joint; she encountered the defendant outside, sharpening his knife. She testified that he was not noticeably impaired at the time. (T 61-62) It was the morning of the 26th when she found the boys' bodies. (T 63-65, 1691) An officer described the scene in the room where the bodies were found as disorganized, with items strewn all over. (T 90-91) Police spoke with the whole family on August 26, including the defendant. (T 219-26, 1693) Two of those conversations with the defendant were recorded and played for the jury. (Exhibit 28; T 226-35) The detective who participated in them was called as a witness at trial; he testified that the defendant did not appear impaired at that time. (T 222) The first such transcribed conversation consists of the defendant answering straightforward questions appropriately; the second consists of him returning to clarify a point he had not made, much to the officer's confusion. (T 226-35; Exhibit 28)

On August 27th the defendant's mother, after speaking with him, approached police and agreed to wear a wire while speaking with him again. (R 1694, T 325-29, 337-43) That operation was carried out on the afternoon of the 27th, and the taped result was played for the jury. (T 358-67) On the tape the defendant can be heard admitting that he and Cindy agreed to kill Tayten and Robert, as well as their mother and a much

younger brother. (T 364; R 1694) On the tape the defendant also states that he killed the boys to prevent any disclosures to DCF. (T 361; R 1694) The conversation ended when officers moved in to make an arrest. (T 364-66)

As noted, detectives talked at length to the defendant after his arrest on the 27th. (R 1694) On the confession tape, after receiving the usual warnings from police, the defendant responded "I guess" when asked if this was about the family turning him in to DCF. (T 496; R 1694) Pressed for a fuller explanation, the defendant explained he had been high on methamphetamine throughout the previous three days, and that he believed the boys were physically abusing his daughter, who had suffered a busted lip since they moved onto the property. (T 510-13, 519-20) When he further commented "there was obviously sexual s**t going on," an officer asked "so you believe that Robert and Tayten were sexually abusing your daughter or that they were having sex with Cindy?" (T 513) The defendant's response was "probably both;" he added that he committed the murders "pretty much" to protect Cindy and Kaitlyn. (T 513-14) In the course of the confession, the defendant said "Cindy f**ks with my head…all the time." (T 508-09) He elaborated "it's almost…like she was trying to get me to do something." (T 517) Asked if Cindy told him to kill the boys, he answered

“In a way, yeah. That’s how I feel.” (T 518) Asked if Cindy directly told him to kill the boys, he answered “I don’t know if it was her f**king with my head or what. I mean, well, she’s so, like, mischievous. It’s never direct.” (T 519-20)

After a three-hour break from about 3:00 P.M. to 6:00 P.M. when they let the defendant sleep, the detectives returned to questioning him. (T 541-43) He told them he had an imperfect memory of the murders. (T 545-48, 553, 561-63, 566, 568-69) Asked about Cindy’s role again, he responded “she orchestrated it a little bit. I don’t know what her angle is.” (T 553) He repeated that Cindy had influenced him to act without speaking directly, and agreed with a detective’s summation that she was “just giving off those vibes.” (T 566-67) The defendant ultimately identified the hammer and knife he had used, and agreed with one of the detectives that he had used the hammer first. (T 554-55, 559) He further agreed that he hit each of the boys with the hammer multiple times then cut their throats, and added that he felt numb and cold at the time. (T 572, 578)

A medical examiner testified that Robert’s throat had been cut five or six times, and that the deepest cut reached the vertebrae. (T 258-61; R 1692) Robert also experienced multiple incidents of blunt force trauma to his skull. (T 264-69) The doctor identified a knife and hammer in evidence

as consistent with the injuries. (T 268) The knife and hammer had been found on the Bakers' property bearing traces of blood. (T 194-96) The doctor concluded that either the hammer blows or the knife wounds would have been sufficient to cause Robert's death. (T 268) He could not establish whether Robert was conscious for any of the attack. (T 269-70; R 1692)

As to Tayten, the witness identified some twenty stab wounds in addition to three significant knife wounds to his neck. (T 278-82; R 1692) A defensive wound and a trail of blood indicated Tayten was conscious for the attack. (T 278-79, 294; R 1693) The doctor who testified estimated that Tayten experienced 20 to 30 seconds of consciousness after the attack began. (R 1693) Tayten, like Robert, also experienced blunt force trauma to his skull, and the doctor again concluded that either the hammer blows or the knife wounds he saw would have been sufficient on their own to cause death. (T 288-95)

The court denied the defense's motions for judgment of acquittal, ruling as to the murder charges that premeditation could be inferred from the facts the defendant used two weapons and attacked two victims. (T 695) The judge further ruled as to the burglary charge that the jury could

conclude that any consent to the defendant's presence in their home was revoked when he armed himself. (T 695-96)

DELIBERATIONS AND VERDICT IN FIRST PHASE

As noted, the indictment charged the murders based on both theories available to the State, *i.e.,* felony-murder and premeditation. (R 119) During the charge conference in the first phase of trial, the parties accepted a proposed verdict form without discussion. (T 738) The form originally sent to the jury is not in the record, but it is clear from the existing record that it provided three options for a guilty-as-charged verdict on each of the murder counts: (1) "guilty as charged of **both** first-degree premeditated murder and first-degree felony-murder," (2) "guilty as charged of **only** first-degree premeditated murder," and (3) "guilty as charged of **only** first-degree felony-murder." (R 1118, 1300; see T 877-89) In closing, the State argued that it had proved the murder counts under both theories. (T 809-20, 830) Pursuant to the standard jury instructions, the court told the jury that to return a verdict of guilty as charged, it did not need to reach unanimity as to either theory. (T 868).

The jurors retired at 4:30 p.m. on the third day of the guilt phase. (T 871) During deliberations, they sent out the question:

Verdict form lists 3 choices of 1st degree –

1) Premeditated and felony murder
2) Only premeditated
3) Only felony

But, instructions state if 1st – not necessary for all to agree on premeditation. So – if we are not unanimous as to premeditation – which line on the form do we use?

(R 1118; T 878) Judge McGillin found that the verdict form contradicted the instructions; he proposed a new form that would remove the option requiring unanimity as to both theories, and would substitute "guilty as charged of first-degree murder." (T 877-89) The State agreed; the defense objected and sought an interrogatory asking the jurors whether they were unanimous as to either theory. (T 880-82) The State objected, and the court agreed that the law does not require such an interrogatory. (T 881-83) The court re-instructed the jury that it did not need to reach unanimity as to either theory, and provided it with the new verdict form it had proposed. (T 883-84; R 1165-66) The jury again retired at 6:31 and knocked with its verdict at 6:36. (T 884) On the murder counts, the jury checked the box for the general verdict of "guilty of first-degree murder." (R 1165-66)

Before the penalty phase began, the defense filed a motion to preclude an instruction, or argument, on the "cold, calculated, and premeditated" ("CCP") aggravating factor. (R 1300-03) The motion relied on the due process clause of the federal constitution, the Florida Constitution,

and the court's inherent authority. (R 1300) The defense acknowledged that in the usual case, a general guilty-as-charged verdict on a first-degree murder charge allows the State to go forward with the CCP factor. (R 1301-02) Defense counsel distinguished this case, where the jury indicated, very close to the end of its deliberations, that it had not reached unanimity on the premeditation theory. (R 1302) It argued that absent a good-faith assertion by the State that it had additional admissible proof to support the CCP aggravator, the court should preclude argument, and decline to instruct, on that factor. (R 1302)

At a hearing held on the defense motion on October 21, the State conceded it had no new proof to support the CCP factor. (R 2082) It also conceded that it would have been precluded from going forward with CCP if the jurors had checked the box indicating they were unanimous only as to the felony-murder theory. (R 2081) However, it opposed the motion on two grounds. First, it contended that the jury might have changed its mind about premeditation after the court dismissed it to recommence deliberations; second, it argued that it was not clear whether the jury's question had arisen as to both murder victims. (R 2080-81) The State reassured the court that if the jurors were still not unanimous as to premeditation, they would reject the CCP aggravator. (R 2081-82) Specifically, it argued

"because [the jury's intent is] not clear, we feel like it should be put forth and the arguments can be made, and then the jury can reject it or not." (R 2081) The judge denied the defense motion, noting that "the State will have to maintain the higher level of premeditation in order to prove CCP, or at least make the argument to that regard, and if the jury is not unanimous, then they won't find on the aggravator." (R 2083-84) The State later argued at length to the jury that the CCP factor is present. (R 3412-21)

The court, in its sentencing order, addressed the matter again, noting that the jury's question during first-phase deliberations suggested that some of its members believed premeditation had been proved while others believed felony-murder had been proved. (R 1701-02) The judge wrote:

> [t]he Court finds that in penalty phase, the jury reflected on the evidence and concluded that the Defendant did, indeed, premeditate and plan this murder.

(R 1702)

VICTIM IMPACT

Before trial, the defense moved to exclude or limit victim-impact evidence, seeking in the alternative an order requiring advance disclosure of all such evidence the State proposed to introduce. (R 222-29) The order was granted only as to the requested advance disclosure. (R 330-331)

Before the penalty phase began, the court and counsel convened to consider defense objections to three of five written victim-impact

statements the State had provided. (R 2201-12) The court sustained some of counsel's objections (R 2204-08) but overruled an objection to testimony about "completely unrelated tragedies within the family." (R 2208-11) The disputed statement was ultimately read to the jury by the victims' step-grandmother Deborah Benson. (R 2275-89) The disputed portion was as follows:

> In 2017, **my youngest stepdaughter was in a very bad car crash**. She spent nine days in a coma, with doctors telling us that she may never wake up, she may never talk or walk. Everyone dropped everything, and [the victims and their parents] stayed up here for weeks while we hoped and prayed and waited for her to improve. **She eventually did wake up** and she did learn to talk and walk again…**I thought for sure that was going to be the most traumatic experience our family would endure**.
>
> **Then, just seven months later, my other stepdaughter got very sick**, very unexpectedly and very rapidly. An infection took over her body and we found ourselves right back in the ICU, all of us around her, fighting for her life. Very sadly, **we lost her a week later** to septic shock. Her death shook our family hard. It was so unexpected, and it showed us how fragile life really is and how important it is to spend time with your loved ones. We were so devastated to have lost someone so beautiful and full of life, and at that time **I thought losing her was going to be the most tragic thing that happened to our family**.
>
> We vowed to spend as much time as we could with each other from now on for Andrea, and that was when we began to try to convince [the victims' parents] to move up here with the boys…we convinced her…that family really is everything…they finally agreed to sell their house and move up here. "Excitement" doesn't even begin to describe what our family felt…We were ecstatic…Two weeks is all we got with them.

(R 2283-87)

At the hearing before the penalty phase began, the State argued that the foregoing statement "explains one of the reasons why the Bakers came here. I mean, it's not speaking anything to Mr. Wilson." (R 2208-09) Defense counsel responded "not to say that these aren't factual, and these aren't experienced by the family, but that's not the purpose of victim impact." (R 2209) The court ruled as follows:

> I'm going to deny the defense's request. I think that this directly goes to, specifically goes to, the issue of the victim's uniqueness as a part of this family, a family that lost, and almost lost, another family member. I don't think that you can understand the context of the impact on this family without understanding that history.

(R 2211) Five victim-impact statements were ultimately read to the jury, all of them concerning the emotional impact to the family and to a teenaged friend of one of the victims. (R 2254-59, 2260-62, 2264-67, 2268-74, 2276-89) The emotions recounted were raw; as an example, the victims' mother invoked her moments alone with their ashes. (R 2258)

PROOF IN THE PENALTY PHASE

The defense conceded, in its opening statement in penalty phase, that legal sanity was not an issue in the case, but relied on the "bizarre reasoning" and "disconnected thinking" reflected in the defendant's taped confession. (R 2292) In support, the defense called Dr. Susan Skolly-

Danziger, a pharmacist and toxicologist. She testified that methamphetamine is more potent than cocaine; that its effects include paranoia, and can include delusions and hallucinations; and that its effects last some 10 to 15 hours, whereupon the drug converts to amphetamine, which has its own effects. (R 2348, 2403) She also testified that memory loss can be caused by long-term methamphetamine use, and that Appellant reported to her that he had been using the drug since 2016. (R 2440, 2384)

The defense also called pediatric neurologist Dr. Stephen Nelson; he testified to the effects of childhood trauma on the brain. (R 2740, 2754-56, 2766-70) The defendant's stepsister testified to the circumstances of their upbringing, which included drug-abusing parents and frequent hunger. (R 2592, 2596-99) In his testimony Dr. Nelson also explained that someone coming down off a drug high can still be under the influence of those drugs, and that memory loss frequently follows traumatic incidents. (R 2808-11) Dr. Nelson's view was that due to sleep deprivation and voluntary drug abuse, the defendant was under the influence of extreme mental or emotional disturbance at the time of the murders. (R 2771-72) He further testified that due to the same factors, the defendant was at that time unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. (R 2772-73)

Dr. Michael Quinones, a psychologist who specializes in the effects of trauma, also testified for the defense. He established that the defendant had experienced eight out of ten recognized types of "adverse childhood events" or "ACE's," which he characterized as "inordinate, excessive form[s] of stress." (R 2827, 2848) The defendant described to Dr. Quinones a childhood dominated by a father who engaged in frequent drug and alcohol abuse, emotional outbursts, and displays of violence. (R 2836-37)

Drs. Nelson and Quinones testified that they were aware of no prior violent acts the defendant had committed, and the State proved up none. (R 2803, 2871, 2886-87) The defendant's mother testified during the penalty phase that she had never known him to be violent. (R 2932, 2940-41)

Experts for the defense and State disputed whether evidence of brain damage is visible on scans that were published and explained for the jury. (R 2531-70, 2575-77, 3020-52) Dr. Travis Snyder, called for the defense on this point, testified that the scanned results probably reflected brain injuries, or could reflect long-term drug abuse or a stroke caused by such abuse. (R 2537-45, 2572) Dr. Snyder also testified that the abnormalities he saw could have meaningful effects on behavior, or no such effect at all. (R 2560, 2575-77)

The State called forensic psychologist Dr. William Meadows and psychiatrist Dr. Tonia Werner in rebuttal. Dr. Meadows testified that when he met with Appellant during the week before the penalty phase, he perceived no memory problems, no delusional thought or other psychotic symptoms, and no mania. (R 3149-53) He contrasted his past experiences with jail inmates who were actively high on methamphetamine, referencing their sweatiness, accelerated motor behavior, and rapid and illogical speech. (R 3165-66, 3168) Dr. Meadows diagnosed the defendant with antisocial traits, and testified that he suspects antisocial personality disorder is present. (R 3180)

Dr. Meadows does not believe that Appellant does not remember the details of the killings; he views Appellant's reported memory loss as "selective." (R 3166-74) Dr. Meadows also testified that he does not believe that Appellant was under the influence of extreme mental or emotional distress at the time of the killings, since he was able to accompany Cindy to her doctor's appointment that morning without incident, and to purchase convenience-store items on the way there, characterizing those as "higher functioning activities." (R 3171-73) He believes that common sense precludes a conclusion that Appellant was impaired in appreciating the criminality of his actions, or in conforming his conduct to the requirements

of law, because he tried to mislead police at the outset of the August 27 interview. (R 3183-86)

Dr. Werner agreed with Dr. Meadows, noting that the defendant's activities the morning after the boys' deaths, which included a stop to feed a dog on the way back from the doctor's office, were "very organized" and inconsistent with psychosis. She specified that paranoia and agitation continue unabated for several days when methamphetamine intoxication is present. (R 3276-78) Dr. Werner also testified that the defendant reported to her that he had experienced hallucinations before while three days into a methamphetamine binge, but that the only voice he heard had told him to get on with his household tasks. (R 3279-80)

INSTRUCTIONS, ARGUMENT AND VERDICT IN PENALTY PHASE

The jurors were instructed for the most part in accordance with the standard jury instructions for use in capital cases. (R 1399-1412, 3377-3404) They heard that the CCP aggravator may apply as to each victim. (R 1401-02, 3379, 3381) They also heard the standard instructions as to mercy and sympathy, and heard that evidence is not mitigating unless it *reasonably* indicates that a death sentence is not appropriate. (R 1404, 1408, 1410, 3385, 3392, 3403) The State emphasized the. "reasonably indicates" requirement in closing. (R 3407, 3408)

Also in closing, the State briefly relied on two of the charged aggravating factors, i.e., that two contemporaneous murders are more culpable than one (prior capital felony), and that the boys were killed in a place they thought was safe (felony-murder in the course of a burglary). (R 3410-12) It also argued that Tayten's death, per the medical examiner's evidence, involved significant suffering (EHAC). (R 3422-25) The prosecutor argued at length that both crimes were cold, calculated, and premeditated, noting that in her view any ameliorating proof of methamphetamine intoxication had been unconvincing. (R 3412-22) In its closing, the defense emphasized its doubts that the State proved a calculated plan to kill the boys, in light of the defendant's nonsensical ramblings on the confession tape. (R 3466-68)

The jurors deliberated for less than an hour, then recommended two death sentences. (R 3483, 3486-87, 1413-18) They unanimously found that all of the charged aggravating factors were present as to both victims. As to each victim, one or more individual jurors found that one or more mitigating factors had been proved. (R 1413-17, 1697) The jury further unanimously found that the aggravation, as to each victim, was sufficient to warrant a death sentence, and outweighed the mitigation found. (R 1414-18, 1697)

Judge McGillin convened a Spencer[2] hearing in December, 2022. (R 2105-32) At that hearing the defendant's stepmother testified that to her knowledge he had never behaved violently. (R 2111) Also at that hearing, the defendant apologized to the victims' family and expressed his desire to take back what he had done. (R 2118) The judge, in his sentencing order, wrote that he found the apology sincere. (R 1733)

A mitigation specialist, in an attachment to the defense's sentencing memo, reported that at the age of 10 the defendant was introduced to illicit drug use by a caretaker putting a crack pipe into his mouth. (R 1559) The court, in its sentencing memo, treated the report as true. (R 1720)

A presentencing report was prepared and transmitted to the court. (SR 5255-63) It shows that the defendant was 30 years old at the time of the murders (SR 5256), and that his prior criminal career consisted of one instance of burglary of a dwelling, and other incidents involving drug possession and dealing in stolen property. (R 5259)

THE SENTENCING ORDER

The trial court issued its written sentencing order on January 27, 2023. (R 1688-1735) The court gave each of the aggravating factors great weight. (R 1698-05) As to CCP, as noted, the court found that "in the

[2] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

penalty phase, the jury reflected on the evidence .and concluded that the Defendant did indeed premeditate and plan this murder." (R 1702) The court also found that the primary defense to that aggravator, that the defendant was under the influence of a powerful drug, was unsupported almost solely by the defendant's claims. (R 1702, 1710) Agreeing that CCP was shown, the court relied on the fact the defendant had been seen sharpening his knife on the night in question, and on the fact he used two weapons. (R 1702)

In the sentencing order, the court described the defendant's taped confession. (R 1694-95) Specifically, the court recounted that the defendant

> claimed that he believed the two boys were abusing his daughter sexually. He also suggested that perhaps they were having sexual relations with Cindy (their aunt). He also claimed the boys were responsible for Kaitlyn [his daughter] having a busted lip. In the end he asserted that since they were abusing his family, he had to kill them.
>
> The Defendant, for the first time in this confession, then began to claim that he was "f…ed up on meth." He claimed that he and Cindy had been doing meth(amphetamine) for three days straight leading up to the homicides. He asserted that there was a plan that he would kill the boys and Cindy would kill Landon and Sarah. He claimed this was to protect his family from them and from the DCF.
>
> In response to questions, he admitted that both boys were asleep when he began the attack. He admitted he killed Tayten first and then Robert. He claimed, however, that he "blacked out" and did not

> remember any of the other details. He also claimed that the drugs he was on prevented him from remembering any of the details.
>
> …Law enforcement investigated the allegation about abuse to Kaitlyn. There was no evidence of either sexual or physical abuse to the young child. There was, likewise, no evidence of an incestuous relationship between Cindy and the boys.

(R 1694-95)

The defense argued in its sentencing memorandum that the statutory mitigating factor set out in Section 921.141(7)(b) was present, *i.e.,* "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." (R 1441) The State disagreed that the proof supported that factor. (R 1467-68) The court, in its order, concluded that substance abuse disorder was proved, that adverse childhood experiences were proved, and that contested evidence supported the presence of resulting brain damage. (R 1707-08) The court went on to find:

> however…there is no contemporaneous proof that any of those diagnoses, conditions, or disorders were affecting him the night of August 25-26 when he committed these crimes. The Defendant argues that he was under the influence of methamphetamine. There is scant proof of this. All contemporaneous observations indicate he was not under the influence. The defendant argues his memory was impaired by the methamphetamine use. There is also scant proof of this.
>
> Instead, there is proof of a claim [of] selective memory. …The Court listened to the audio recording of the three short interviews on the day of the attack. There is no indication of the influence of drugs or

> altered thinking. Indeed, he wanted to make sure he "had his story straight" when he spoke to the detective.
>
> The allegations about the threats to Kaitlyn and the sexual relationship between the boys and Cindy are simply unbelievable. The Court finds them without any foundation in fact. To the extent the Defendant may have even considered them as true, the Court cannot afford these absurdities any evidentiary value.
>
> The Court finds the mental health and childhood conditions, in the abstract, were all proven, but there is insufficient proof to conclude that at the time of the attack the Defendant was under the influence of *extreme* mental or emotional disturbance. The Court finds this not proven and affords it no weight.

(R 1707-08)

The defense also argued for the presence of a second statutory mitigating factor, *i.e.*, that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R 1442) Again, the State disagreed. (R 1469-71) The court found the factor was not proven, then stated it would receive no weight. (R 1710) Specifically, the judge again noted that the long-term effects of childhood abuse and various disorders were proved, but went on to find as follows:

> The missing piece that the Court has searched for…is proof of any connection from the significant history to his actions on the night of August 25-26. The events of that night are truly incomprehensible under any rational analysis. The Defendant's experts all posited that the long-term effect of the adverse childhood experience, long term substance abuse, and his other diagnoses *could* cause situations

> such as hyper-arousal, impaired decision-making, and an overreaction to stimuli.
>
> The Court finds, however, that there is no proof of a correlation from those conditions to an *actual* impairment on the night of August 25-26. …First, there is little contemporaneous proof, other than the Defendant's self-serving claims, that he was actually under the influence of methamphetamine. …Indeed, the Court finds the greater quantum of evidence suggests that even if he had used methamphetamine, it was not having the deleterious effect his arguments suggest. Nor is there evidence of any of the other psychiatric diagnoses coming to the fore.

(R 1709-10)

The court then turned its attention to non-statutory mitigating factors argued by the defense. Regarding adverse childhood experiences, the court found the facts were proven and indeed undisputed. (R 1712) The Court went on to write:

> The more pressing question is the significance of these facts. The Defendant argues the Court should afford them great weight. The problem the Court perceives is that there is no evidence tying these deeply troubling circumstances to the Defendant's conduct in this murder. If the Defendant asserts this childhood *caused* him to murder the two boys, the Court cannot accept that proposition; it is without evidentiary support whatsoever. To the extent that these circumstances paint the Defendant in a sympathetic light, they have some value. However, the Court is not convinced that it should independently afford this circumstance any more than slight weight.

(R 1712) The court returned to adverse childhood experiences later in the order, observing they may well have caused cognitive deficits, but

concluding “there is no proof those were controlling at the time of the murder. To the contrary, the evidence is that the Defendant formed a detailed plan, took steps to prepare for the homicide, and took steps to cover it up when complete. As such, while this circumstance is proven, and significant, the Court can only afford it little weight.” (R 1723)

Regarding the defendant’s resilience in overcoming childhood adversity, the court wrote:

> this has nothing to do with the events of August 25 and 26. However, it is broadly and properly to be considered under Fla. Stat. §921.141(7)(h). …The Court finds the circumstance proven but declines to afford it any more than slight weight.

(R 1713) Regarding a sexual assault against the Defendant in elementary school, a childhood diagnosis of attention deficit disorder, and exposure in childhood to mental illness within the family, the court made similar findings. (R 1713-14, 1718, 1719-20)

Regarding the abuse the defendant suffered in childhood, the court acknowledged defense experts’ views that

> certain traumas *can, may, or could* contribute to conditions such as impulse control [deficits]. …However, there is also a common theme to all the Defendant’ evidence: that the clinicians never asked the Defenant what he was actually thinking or experiencing as he committed the homicides. This combined with the State’s damaging

> evidence suggesting that his claimed amnesia was fraudulent, leaves the Court with little to weigh in mitigation. The Court finds the existence of abuse proven. The Court accepts, willingly, the evidence that such abuse *may* affect cognitive processing. The Court finds, however, that given the inability to demonstrate any real link from that abuse to the events of August 25-26, 2020, that it should afford this only slight weight.

(R 1719) The court assigned no weight to the contested proof of brain damage, citing Dr. Snyder's concession that the damage he saw might have had no behavioral effects. (R 1728-29)

Regarding a lack of parental guidance in the Defendant's childhood, the court wrote:

> this is proven…. However, as there is no link from that poor modeling to the events in the murder, the Court finds it can only consider this circumstance in the broadest applicability as a general mitigating factor from the Defendant's life. The Court affords this slight weight.

(R 1719) The court gave moderate weight to one circumstance, i.e., the defendant's willingness, throughout the course of the proceedings, to plead guilty in order to "spare the family the trauma of a contested trial." (R 1714) Ultimately, as noted, the court sentenced Appellant to two death sentences for the murders and to a life sentence for burglary. (R 1743-44)

SUMMARY OF ARGUMENTS

Point one. The "cold, calculated, and premeditated" aggravating factor should not have gone to the jury, because minutes before the guilt-or-innocence verdict was announced, the jury foreman spontaneously indicated the jurors had not achieved unanimity as to premeditation. The error is not harmless, per the Supreme Court, unless another aggravating factor required the jury to weigh the same "facts and circumstances." That test is not met on the record of this case. A new penalty phase should be convened.

Point two. This Court holds that the Circuit Courts, in capital cases, must consider and weigh all mitigating evidence found anywhere in the record. The court declined in this case to give any evidentiary significance to the defendant's startling allegations against the victims, and against his baby's mother, included in the long confession tape transcribed in the record. The court's point was that the allegations were patently untrue; their very senselessness should have been considered as persuasive evidence corroborating the defendant's claim of methamphetamine intoxication. That claim provides a defense to the "cold, calculated, and premeditated" aggravating circumstance emphasized in closing, and is relevant to the overarching issue of Appellant's culpability. This Court should direct the trial

court to reconsider the evidence as a whole in light of the evidence it declined to consider.

Point three. Over defense objection, as part of a victim-impact statement read during the penalty phase, a witness was permitted to recount tragic events that took place in the victims' family before the victims moved to the area. That testimony was offered, and admitted, to show how difficult it has been for the extended family to recover from the boys' violent deaths. The ruling allowing that testimony amounted to an abuse of discretion and to a violation of the right to due process of law.

Point four. The trial court abused its discretion by denying the defense's request for a special jury instruction that would have clarified what parole ineligibility means as a practical matter in Florida. Appellant asks this Court to adopt a concurring opinion from the Supreme Court, and to hold that the order denying the instruction resulted in denial of the right to heightened reliability in penalty phase proceedings guaranteed by the federal Eighth Amendment.

Point five. The standard jury instructions state that a "mitigating circumstance" may be embodied in evidence which *reasonably* shows that a sentence less than death may be appropriate. The "reasonably" qualifier applies to review of sentencing orders, but should have no place in the jury

room, as it may encourage a majority to dismiss a holdout's concerns as "unreasonable" if they are arguably based in emotion.

Point six. The standard jury instructions indirectly convey that jurors may vote for a life sentence based on mercy, rather than solely based on weighing the charged statutory aggravating factors against the defense case. Appellant sought a jury instruction that would have expressly made that ability clear. The standard instruction creates a risk of misunderstanding, and thus fails to provide the heightened reliability guaranteed in capital cases by the federal Eighth Amendment. A new penalty phase should be convened in this case for that reason.

Point seven. The standard jury instructions state that the case should not be decided because a juror feels sorry for anyone. The defense objected to that portion of the instructions being read, based on a dissenting view expressed by three Justices of the Supreme Court. Appellant urges this Court to adopt that dissenting view, and to reverse the death sentence in this case so that a new penalty phase, with instructions that comply with the federal Eighth Amendment, can be held.

Point eight. Appellant asks this Court to recede from its recent decision to discontinue comparative proportionality review of capital appeals. Such an analysis would show that this case is not one of the least

mitigated to come before this Court. Appellant's death sentence should be reversed for that reason.

Point nine: Each state's capital sentencing scheme must narrow the class of persons eligible for the penalty, in order to satisfy the federal Eighth Amendment. Each individual aggravating factor must accomplish the same goal. Florida's scheme generally, and the felony-murder and "cold, calculated and premeditated" aggravating factors specifically, fail to meet those goals, as the eligible class has gradually broadened. The death sentence imposed here should be reversed, and the case remanded for imposition of a life sentence.

Point ten: In bifurcated capital trials such as those held in Florida, the Supreme Court permits the states to seat a unitary jury and strike those venire members who would not vote for a death penalty, but who could fully participate in a guilt-or-innocence determination. Research shows that the practice skews the guilt-or-innocence determination in favor of guilt. The United States Supreme Court should revisit its precedent permitting the practice in jurisdictions where a unitary jury must be seated in capital cases.

Point eleven: The death penalty in America has become unusual, in that it is enforced only sporadically, and cruel in that the delays entailed are

measured in decades. Its enforcement is further geographically arbitrary. The penalty fails to meet legitimate penological goals for those reasons. The death sentence imposed in this case should accordingly be reversed, and the case remanded for imposition of a life sentence.

ARGUMENT

POINT ONE

THE TRIAL COURT ERRED AS A MATTER OF LAW BY ALLOWING THE JURY TO CONSIDER THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING FACTOR.

Standard of Review. Where an aggravating factor improperly goes to the jury, this Court holds that whether the error warrants reversal depends on whether there is a reasonable probability that it contributed to the death sentence. Perez v. State, 919 So.2d 347, 381 (Fla. 2005). The Supreme Court specifically holds that where an aggravator was improperly presented, the error "will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." Brown v. Sanders, 546 U.S. 212, 220 (2006).

Argument. As noted, in this case the written verdict on the murder counts was a general verdict of guilty; that verdict was received minutes after the jury advised the court it had not reached unanimous agreement on the premeditation theory. In the usual capital case, a verdict of guilty of first-degree murder is valid whether or not it reflects unanimity as to the underlying theory of guilt. Mansfield v. State, 911 So.2d 1160, 1178-79 (Fla.

1991), *citing* Schad v. Arizona, 501 U.S. 624, 645 (1991). The State conceded below that if the jurors had checked a box indicating they were unanimous only as to the felony-murder theory, then the State would have been precluded from seeking a finding that the CCP factor is present. The disagreement in the trial court was over the effect of the jury's revelation that it did not, in fact, unanimously find that the defendant premeditated the killings. That disclosure, even though it was made in a question to the court rather than in a notation on a verdict form, on this record should have prevented the State from pursuing a "second bite at the apple."

In ruling that the State could argue that CCP is present, the judge announced that he agreed with the State that the jurors' question might not have reflected their ultimate verdict, in that they could have changed their minds after they received the answer to their question along with the amended verdict form. The record shows that only five minutes elapsed between the pause in deliberations and the time the jury knocked with a verdict; they had previously been out for two hours. It seems vanishingly unlikely, on this record, that a substantive realignment took place during that interim and that the verdict after all was based on a unanimous finding that premeditation was shown.

The judge also announced his agreement with a second argument made by the State, *i.e.*, that at the time they asked their question, the jurors could have already reached a unanimous verdict as to one of the two victims. At that time, the defense sought an interrogatory verdict to clarify any uncertainty introduced by the jury's note. The State successfully opposed any interrogatories, then posited that it should be able to argue for CCP *because the jury's intentions were unclear.* Having forestalled clarification, the State should not have been heard to argue that the presence of uncertainty favored its choice of outcomes.

As noted, the court revisited the matter in its sentencing order, finding that the jury reflected on the matter during its penalty-phase deliberations and concluded that premeditation had been proved beyond a reasonable doubt. With great respect for the thoughtful trial judge, what was in the jurors' minds cannot be divined on this record.

Generally, courts disfavor rulings that allow a party a second chance to prove an element of its case. *E.g.*, Allen v. Allen, 346 So.3rd 667, 670 (Fla. 1st DCA 2022); Robinson v. Nationstar Mtg. LLC, 301 So.3rd 1059, 1063 (Fla. 2d DCA 2019). Such rulings greatly prejudice the opposing party without serving the best interests of justice. Allen at 670. In the criminal context, this Court declines to give the State a "second bite at the apple"

when it fails to timely request an available remedy. *See* Richards v. State, 288 So.3rd 574, 576 (Fla. 2020) (citing cases). In the capital realm, where a resentencing is ordered and a second jury convenes in the case, this Court holds that the judiciary's constitutionally mandated role is to ensure that the new sentence is not erroneously predicated on facts or findings that would contravene the original guilt determination. Lebron v. State, 894 So.2d 849, 852 (Fla. 2005). Lebron was charged with the felony-murder of a robbery victim; his first-phase jury expressly found that someone else fired the fatal shot. Id. At 851. The State at resentencing impermissibly introduced proof intended to show that Lebron had in fact fired the fatal shot. Id. At 853. This Court reversed the ensuing death sentence for that reason, and remanded for a second resentencing hearing. Lebron at 854.

This Court has distinguished Lebron in a capital case where the appellant argued the jury's findings were ambiguous. In Smiley v. State, 295 So.3rd 156 (Fla. 2020), the jury found the defendant "guilty as charged" in a case where the indictment charged that he shot and killed a particular burglary victim. 295 So. 3rd at 171. Smiley's jury was expressly instructed, as to felony-murder, that to reach the verdict it ultimately reached it must find that Smiley was the shooter. Id. The State accordingly argued in the penalty phase – which was held before a separate jury – that Smiley, rather

than a co-defendant, had shot the victim in question. Id, at 171, 162-63. Smiley's appellate counsel sought a new penalty phase, citing Lebron, based on the fact that the first-phase jury did not check any boxes regarding firearm possession *on other counts which charged underlying felonies* in the same indictment. Id. at 171. This Court held that it need not speculate about why the jury had not checked any of the boxes on the underlying counts, since on the felony-murder count itself, in light of the instructions as a whole, the jury clearly found that Smiley was the shooter when it chose "guilty as charged." Smiley at 171-72.

This case is more like Lebron than Smiley, in that the record shows a genuine risk of inconsistent verdicts which was timely brought to the trial court's attention. Since the court in this case was on notice that the penalty phase verdict might reflect unanimity as to the CCP factor, it was not free to ignore the jurors' disclosure and treat the written verdict as it would any other verdict. This Court should hold that it was error to instruct on the CCP factor, and that the error amounted to a violation of Appellant's federally protected right to due process of law. Where a jury instruction enhances the risk of an unwarranted conviction or death sentence, the State is constitutionally prohibited from giving that instruction. Beck v. Alabama, 447 U.S. 625, 638 (1980).

Where an aggravating factor found by a jury is invalidated on appeal from a death sentence, the ruling allowing the State to proceed with that aggravator is subject to harmless-error analysis. Clemons v. Mississippi, 494 U.S. 739 (1990). In Brown v. Sanders, 546 U.S. 212 (2006), the Supreme Court limited the parameters of the appropriate harmless-error analysis. Justice Scalia wrote for the Court that an error such as the one in this case "will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." 546 U.S. at 220. Here, the remaining aggravating factors concerned the circumstances that more than one death resulted, that the safety of the victims' home was violated, and that one victim suffered before dying. None of those factors invites consideration of whether a high degree of preparation was proved; per the rule of Brown v. Sanders, the error identified on this point may not be deemed harmless on this record.

Simmons v. Epps, 654 F. 3rd 526 (5th Cir. 2011), is instructive. In that case two aggravators – that the murder was committed for pecuniary gain, and that it created a great risk of harm to many – were presented. After the "great risk of harm" aggravator was invalidated, the appellate court

considered the overall effect of the State's presentation to the jury, and concluded that the pecuniary gain aggravator had in fact so dominated the State's argument that any error having to do with the "great risk of harm" aggravator was patently harmless. Here in contrast, nine pages of the State's closing argument were devoted to the CCP factor (T 3412-21), and eight pages were devoted to all of the other charged aggravators. (T 3409-12, 3421-26)

This Court, like the court in Simmons v. Epps, has looked to the emphasis the State placed in closing on a later-invalidated aggravator, in order to determine the degree of harm done. It does so because a reviewing court cannot be certain whether the trial court would have imposed death if a differently influenced jury had voted for life. Preston v. State, 564 So. 2d 120, 123 (Fla. 1990). *Accord* Beck v. Alabama, *supra*, 447 U.S. at 645 ("it is manifest that the jury's verdict must have a tendency to motivate the judge to impose the [same] sentence.") In Preston and in Perez v. State, 919 So. 2d 347 (Fla. 2005), this Court reversed where one aggravator historically deemed weighty was invalidated, although two other aggravators also deemed weighty remained. 919 So.2d at 382; 564 So.2d at 123. In both cases, this Court noted the State had emphasized the invalidated aggravator at trial.

Other factors this Court has considered in harmless-error analysis include the strength of the improperly considered aggravator, the strength of the remaining aggravators, and the strength of the mitigation. Hill v. State, 643 So.2d 1071 (Fla. 1994); Vining v. State, 637 So. 2d 921 (Fla. 1994); Shere v. State, 579 So. 2d 86 (Fla. 1991). Here, the CCP factor was assigned great weight by the trial judge, and is generally deemed to be among the strongest in Florida's scheme. *E.g.*, Phillips v. State, 207 So. 3rd 212, 222 (Fla. 2016). The remaining aggravators in this case are likewise deemed strong. However, here the State not only relied at length in closing on the CCP factor, but it did so to offset a strongly argued mitigator that, if found, had potential to raise a substantial question about Appellant's culpability – *i.e.*, that he had over-consumed a powerful stimulant throughout the days leading up to the murders. In Hill, Vining, and Shere, in contrast, the presence of weak or even virtually non-existent mitigation resulted in affirmance. Hill at 1074; Vining at 928; Shere at 96. This Court should reverse the sentence appealed from, and remand for a new sentencing proceeding. Brown v. Sanders; Perez; Preston.

POINT TWO

THE TRIAL COURT ERRED IN EXCLUDING MITIGATING EVIDENCE FROM ITS WEIGHING PROCESS.

Standard of Review. Whether a circumstance is mitigating in nature is a question of law subject to de novo review. Ford v. State, 802 So. 2d 1121, 1135 (Fla. 2001). Whether a mitigating circumstance has been established by the evidence is a question of fact subject to the competent substantial evidence standard. Id.

Argument. Appellant argued in the penalty phase below that the proof showed he was intoxicated by methamphetamine at the time of the offenses; the State and the court disagreed. (R 1441-42, 3416-18, 3466-67, 1708-11, 1725-26) In reaching its conclusion on that disputed point, the court expressly declined to "afford…any evidentiary value" to bizarre statements the defendant made during his confession on the afternoon and evening of the day following the murders. (R 1708) It did so "[t]o the extent the Defendant may have even considered them as true," because they were "without any foundation in fact" and "simply un-believable." (R 1708) The court erred in declining to consider relevant mitigating evidence.

The judge concluded in his sentencing order that "the greater quantum of evidence suggests that even if [Appellant] had used

methamphetamine, it was not having the deleterious effect his arguments suggest." (R 1710) For that conclusion the judge cited "[a]ll contemporaneous observations." (R 1708) At trial the boys' mother had testified that she saw no evidence of impairment when she shared a joint with the defendant the night of August 25-26. (T 61-62) There was also testimony from a police officer that he briefly interviewed the defendant August 26 and did not believe he was impaired. (T 222-26) The judge also noted in the order that he listened to a recording of that short conversation and perceived "no indication of the influence of drugs or altered thinking." (R 1708)

The court found that the defense proved that Appellant is a user of methamphetamine, and that he was sleep-deprived at the time of the murders. (R 1725-26) As to the defendant's statement on the August 27 confession tape that he and Cindy had been consuming methamphetamine for three days, the court noted that the self-report was corroborated by evidence that Cindy after the murders tested positive for methamphetamine use. (R 1710) The court characterized that showing as "only the barest of proof" that Appellant was affected by using the drug. (R 1725-26, 1708, 1710) The court should also have considered the fact that on several occasions during his long confession, the defendant leaves reality behind;

as noted, he told the officers on one such occasion that Cindy was "so mischievous" she might well have silently conveyed to him her view that multiple members of her family ought to be murdered in their sleep.

Where evidence is mitigating, the penalty-phase trier of fact can neither be prevented from considering it nor refuse as a matter of law to consider it. Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982). Whether a circumstance is mitigating in nature is a question of law. Ford v. State, *supra*, 802 So. 2d at 1135. Mitigating circumstances are those which relate to the offense (or to the defendant's character or record), and which reasonably may serve as a basis for imposing a sentence less than death. Ford at 1136. This Court holds that voluntary intoxication, while no longer a defense to a charged crime, "remains a circumstance that reasonably may serve as a basis for imposing a sentence less than death." Douglas v. State, 878 So. 2d 1246, 1259 (Fla. 2004).

Depending on the case, evidence offered to show voluntary intoxication may not in fact mitigate a crime. Douglas at 1259-60. In Douglas's case, there was testimony that he had been drinking, but none that he was impaired; thus it was not error for the court to reject a proposed mitigating circumstance on an incorrect legal ground. Here, in contrast, while there was testimony that the defendant did not appear impaired at

various times on August 26, the proof the court declined to consider tended to show that he had, in fact, been affected by a whopping amount of a powerful mind-altering substance. This is so in that on the afternoon of August 27 his thinking was still taking bizarre flights from reality, notwithstanding the absence of speeded-up speech or mannerisms.

Overall, the court's view, as expressed in its sentencing order, was that the events of August 26 are "truly incomprehensible under any rational analysis." (R 1710) That drug-induced psychosis overtook the defendant is in fact a plausible explanation of events. Defense expert Dr. Skolly-Danziger testified, without contradiction, that paranoia and delusions can accompany intoxication by the drug in question. Dr. Meadows's and Dr. Werner's rebuttal testimony was based on their experience with inmates who were actively intoxicated by methamphetamine, not with individuals who had consumed the drug for three days ending the previous day.

All mitigating evidence, found anywhere in the record, must be considered and weighed by the trial court in its determination whether to impose the death penalty. Walker v. State, 707 So. 2d 300, 318 (Fla. 1997). *Accord* Eddings v. Oklahoma, *supra*. Declining to consider Appellant's irrational accusations, even if they amounted to proof of contemporaneous delusional thought, led to the court's finding that there was scant proof of

drug use, and to its further finding that the defendant formed a detailed plan to commit the murders. Those findings ultimately led to the conclusion that the murders were proved beyond a reasonable doubt to have been cold, calculated, and the result of heightened premeditation. Appellant asks this Court to reverse the sentence appealed from and to remand for "careful and proper reconsideration where the mitigating testimony is accorded appropriate consideration and weight." Walker at 319.

POINT THREE

VICTIM IMPACT TESTIMONY SHOULD NOT HAVE INCLUDED REFERENCES TO PAST TRAUMA TO THE VICTIMS' FAMILY.

Standard of Review. Rulings on the admissibility of victim impact evidence in the penalty phase of a capital trial are reviewed for abuse of discretion. Deparvine v. State, 995 So.2d 351, 378 (Fla. 2008); *see* Loyd v. State, 223 WL 7815783 *7 (Fla. 2023).

Argument. Section 921.141(8), Florida Statutes (2022), sets out when victim-impact testimony is admissible in capital cases in Florida. The statute requires that such evidence must show "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." *See* Loyd, *supra*, 2023 WL 7815783 at *7. This Court construes "loss to the community's members" as including the emotional impact of a murder on family members. *E.g.,* Bonifay v. State, 680 So.2d 413, 419-20 (Fla. 1996).

Where evidence proffered under the statute "ha[s] no association with [the victim]'s uniqueness as a human," it is irrelevant and must be excluded. Loyd at *7. In Loyd, this Court held it amounted to an abuse of discretion to overrule a defense objection to instrumental music which was played over a slide show that memorialized the victim's contributions to her

community. This Court held that the music had no relevance to the community's loss, and should have been excluded on the defendant's motion. Id.

The statement objected to in this case recounted tragic events that took place in the victims' family before the victims moved to the area. That testimony was offered, and admitted, to show how difficult it has been for the extended family to recover from the boys' violent deaths. The court expressly noted "I don't think that you can understand the context of the impact on this family without understanding that history." However profoundly felt other relatives' death and near-death may have been, those events were only indirectly related to the offenses charged in this case, or to the victims of those offenses. Where proffered evidence is a "fertile source of prejudice" and has only tenuous probative value, the calculus is not in favor of admissibility under Section 90.403 of the Statutes. *See* Estrich v. State, 995 So.2d 613, 617 (Fla. 4th DCA 2008). The trial court abused its discretion by overruling the defense objection. Loyd; Estrich.

"Undue focus" on victim-impact evidence can constitute a due process violation. Wheeler v. State, 4 So.3rd 599, 606 (Fla. 2009). Admitting the objected-to statement amounted to reversible error on the record of this case, not only based on Loyd and the terms of the statute, but also based

on the due process clause of the federal constitution. This case was necessarily an emotional one for the jurors, given the nature of the proof they heard in the first phase. In its opening statement in the penalty phase, counsel for the State led with:

> Robert and Tayten will never get to go to high school. They'll never go on a first date. They'll never get to drive a car. They're never going to get to graduate college. They'll never celebrate another Thanksgiving with their family, never have another birthday, never open up presents on Christmas again. They'll never get to get married and never have their own family…they are dead because this man sitting right here brutally and viciously killed them.

(R 2244) It was in the overheated atmosphere created by this appeal to emotion that the victim-impact statements were read to the jury. (R 2244-89)

In Loyd, *supra*, this Court held that the error in overruling the defense objection to music was harmless. In that case, the defense conceded that the State had not invited the jury to make its decision on emotional grounds. Loyd at *7. The same cannot be said here, in light of the penalty-phase opening statement quoted above. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). This Court should reverse Mr. Wilson's sentence and remand for a new sentencing hearing

where the verdict can be “based on reason rather than…emotion.”

Gardner, *supra.*

POINT FOUR

THE TRIAL COURT ERRED IN DENYING A SPECIAL JURY INSTRUCTION WHICH WOULD HAVE CLARIFIED THAT A SENTENCE OF "LIFE WITHOUT THE POSSIBILITY OF PAROLE" IMPOSED IN FLORIDA IN FACT VIRTUALLY PRECLUDES RELEASE.

Standard of review. Denial of a special jury instruction is reviewed for abuse of discretion. Snelgrove v. State, 107 So.3d 242, 257 (Fla. 2012).

Argument. To be entitled to a special jury instruction, a criminal defendant must show that the requested instruction is supported by the evidence, that the standard instructions do not cover the same subject matter, and that the special instruction is a correct statement of law and is neither misleading nor confusing. Stephens v. State, 787 So.2d 747, 756 (Fla. 2001).

As to the first factor identified in Stephens, whether the proposed Instruction was supported, the State did not dispute the accuracy of the salient statistic relied on by the defense. The study the defense relied on, as noted, yielded a finding that 40% of Florida residents believe that prisoners who receive a sentence of "life without the possibility of parole" are nevertheless subject to being released during their lifetimes. The statistic reflects the Supreme Court's recognition that confusion among the general public has resulted from this country's long history with parole-

eligible "life" sentences. *See* Simmons v. South Carolina, 512 U.S. 154, 169-70 (1994). Florida's legislature eliminated parole for non-capital offenses in the 1980's, then for capital felonies in the 1990's. *See* Bowen v. State, 196 So. 3rd 567, 568 (Fla. 4th DCA 2016). Many of Florida's prisoners are, however, eligible for release based on gain time by way of control release. *See* Sections 944.70 and 944.275(2)(a), Florida Statutes (2024). While those mechanisms have no applicability to life sentences, *see* Jackson v. State, 96 So. 3rd 980 (Fla. 4th DCA 2012), few potential jurors are likely to fully understand the interplay among the cited authorities.

The State, and ultimately the court, relied solely on the argument that the second Stephens factor is not met in this case. As that argument goes, the standard instructions already cover the subject matter of the requested instruction, in that they state repeatedly that "life without the possibility of parole" is the jury's only alternative to a death sentence. That position begs the question whether in Florida, jurors know that ineligibility for *parole* means ineligibility for *release* where a life sentence is concerned. As noted, the supposition that they do know just what the law requires in this regard does not warrant a high degree of confidence.

The State did not argue that the third Stephens factor is not met in

this case. The proposed special instruction consisted of a true statement which is neither confusing nor misleading. This Court holds that parole ineligibility may serve as a basis to select a life sentence. Ford v. State, 802 So. 2d 1121, 1136 (Fla. 2001). As noted, the defense in this case relied on parole ineligibility in its presentation to the jury. Accordingly, the jurors' instructions had to allow them to give meaningful consideration and effect to that mitigating factor. *E.g.,* Abdul-Kabir v. Quarterman, 550 U.S. 233, 246 (2007). As all three Stephens factors are met, this Court should hold that the trial court abused its discretion by denying the requested instruction.

The Supreme Court has addressed the constitutional ramifications of failing to instruct a jury on parole eligibility in capital proceedings, in Simmons v. South Carolina, 512 U.S. 154 (1994). In Simmons the Supreme Court held that the right to due process requires an instruction on parole eligibility where the State has relied on the defendant's future dangerousness. 512 U.S. at 162. In this case, the State did not argue that it would endanger the public to release the Appellant. In Simmons, future dangerousness was argued to the jury, but an instruction on parole eligibility was sought and denied; the Court reversed on due-process grounds, noting that it had not reached the question whether the Eighth Amendment also required reversal. Simmons, 512 U.S. at 162 and n.4.

Two Justices who concurred in reversal in Simmons would have held that even in cases where future dangerousness is not relied on, under the Eighth Amendment "whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following a refusal of such a request should be vacated." 512 U.S. 154, 172-73 (Souter, J., concurring) (cites and internal punctuation omitted). This Court should adopt the reasoning of those Justices who would have reached the Eighth Amendment question in Simmons, and should hold that the proceedings here did not guarantee the heightened reliability which the Eighth Amendment requires in capital cases. *See generally* Beck v. Alabama, 447 U.S. 625, 638 (1980) (condemning procedures that tend to "diminish the reliability of the sentencing determination.")

Defense counsel was not prevented in this case from arguing to the jury that "life means life," and did so argue. Further, counsel for the State acknowledged during voir dire, in the presence of one panel of potential jurors, that in Florida "life means life." However, the courts hold that permitting counsel to argue a legal point to a jury is not an adequate substitute for an instruction from the court. Cliff Berry, Inc. v. State, 116 So.3rd 394, 411 (Fla. 3rd DCA 2012), *citing* Boyde v. California, 494 U.S.

370, 384 (1990). The error identified on this point should accordingly not be deemed harmless.

As this Court holds, parole ineligibility is mitigating in nature and reasonably may serve as a basis to select a life sentence. Ford v. State, 802 So.2d 1121, 1136 (Fla. 2001). There is a reasonable likelihood that one or more jurors in this case failed to understand the practical defining aspects of parole ineligibility in the Florida system, a problem that could have been alleviated by reading the requested instruction. Appellant asks this Court to reverse the sentence appealed from on the Eighth Amendment ground asserted, as well as on the abuse-of-discretion ground argued above, and to remand for a new sentencing proceeding.

POINT FIVE

THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST TO AMEND THE STANDARD JURY INSTRUCTIONS TO REMOVE THE "REASONABLE" QUALIFIER FROM THE DEFINITION OF "MITIGATING CIRCUMSTANCES."

Standard of review. Denial of a special jury instruction is reviewed for abuse of discretion. Snelgrove v. State, 107 So.3d 242, 257 (Fla. 2012).

Argument. As noted on Point Four, to be entitled to a special jury instruction, a criminal defendant must show that the special instruction is supported by the evidence, that the standard instructions do not adequately cover the defendant's theory of the case, that the proposed instruction accurately states the law, and that the proposed instruction would not confuse or mislead the jury. Stephens v. State, 787 So. 2d 747, 755-56 (Fla. 2001).

Florida's preliminary and final standard jury instructions for use in the penalty phase both include the following sentence:

> [a] mitigating circumstance may include any aspect of the defendant's character, background, or life or any circumstance of the offense that *reasonably* may indicate that the death penalty is not an appropriate sentence in this case.

Fla. Std. Jury Instr. (Crim.) 7.10, 7.11 (emphasis added). *See* West's Florida Criminal Laws and Rules 2022, Vol. 1 at p. J- 75 and J-78.

Requiring proof of mitigation to meet a "reasonableness" test in the jury

room presents a risk that deliberations regarding relevant mitigating evidence will be curtailed. Creation of that risk is both improper and unnecessary, and appears to have been unintentional.

The "reasonably" qualifier appears to have been incorporated in the standard instructions because the term appears in §921.141(4) of the Florida Statutes. Subsection (4) of the statute prescribes rules for any written order that imposes the death penalty; it requires the court to address "the aggravating factors ... found to exist" and "the mitigating circumstances ... reasonably established by the evidence." It does not follow that a "reasonableness" requirement should limit jury deliberations.

The United States Supreme Court requires in capital cases that "each juror must be allowed to consider all mitigating evidence." McKov v. North Carolina, 494 U.S. 433,442-43 (1990), *citing* Mills v. Maryland, 486 U.S. 367 (1988). In Mills the Court wrote

> it is beyond dispute that in a capital case the sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. The corollary thathe sentencer may not refuse to consider *or be precluded from considering* any relevant mitigating evidence is equally well-established.

486 U.S. 367, 374-75 (cites and punctuation omitted; emphasis in original.) The "reasonably" qualifier may suggest to jurors that they must reject any

proffered mitigation which appeals to emotion rather than reason. It is not difficult to imagine a majority of jurors arguing that a holdout's concerns are not *reasonable,* and that for the group to consider them would violate the Court's instructions.

Rule 3.985, Florida Rules of Criminal Procedure, provides that the standard instructions for use in criminal cases may be used "unless the trial court shall determine that an instruction is erroneous or inadequate." As this Court held in Yohn v. State*,* 476 So. 2d 123, 127 (Fla. 1985), "no approval of [standard instructions] could relieve the trial judge of his responsibility under the law to charge the jury properly and correctly in each case." The requested change to the standard instructions would have effectuated the defendant's right, protected by the federal and Florida due process clauses, to have his jury correctly and intelligently instructed. *See* Gerds v. State*,* 64 So. 2d 915, 916 (Fla. 1953). It would further have effectuated his right to heightened reliability in capital proceedings, guaranteed by the federal Eighth Amendment. *See generally* Johnson v. Gibson*,* 254 F. 3rd 1155, 1166-67 (10th Cir. 2001) (right to heightened reliability applies to jury instructions) and United States v. Taveras*,* 584 F. Supp. 2d 535, 543 (E.D.N.Y. 2008) (same).

The non-standard instruction proposed here is neither confusing nor misleading, *see Stephens,* and states the law accurately. *See Mills* and *McKov.* It amounted to an abuse of discretion under Stephens, and adversely affected Appellant's constitutional rights as set out above, to fail to give the requested instruction. Appellant asks this Court to reverse the sentence appealed from and to remand for a new penalty phase where the jury can be correctly instructed.

POINT SIX

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

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

Argument. Before trial the defense requested, in writing, the instruction "You may always consider mercy in making your determination whether the defendant should be sentenced to death or to life in prison without the possibility of parole." As noted, the court ruled that nothing precluded defense counsel from arguing that the jurors should exercise mercy, but it declined to instruct them that they had discretion to do so.

Appellant acknowledges that the relief sought on this point is precluded in the courts of this State by Woodbury v. State, 320 So.3d 631 (F.la. 2021). Appellant submits that Woodbury is incompatible with federal constitutional principles. In that case this Court held that Florida's standard jury instructions for use in capital cases adequately convey the idea that jurors may be guided by mercy, in that they state "even if you conclude that sufficient aggravators outweigh the mitigators, the law neither compels nor requires you to recommend that the defendant should be sentenced to

death." *See* Woodbury at 656; *see also* Fla. Std. Jury Instr. (Crim.) at 7.11, West's Florida Criminal Laws and Rules 2024 at J-82. The Mississippi Supreme Court, considering indistinguishable language, has held that it "seems simply to instruct the jury on its ability to impose a sentence of life in prison, rather that the death penalty." Flowers v. State, 158 So.3rd 1009, 1066 (Miss. 2014), *cert*. *granted*, *judgment vacated on other grounds*, 136 S. Ct. 2157 (2016). Appellant submits that the Mississippi court correctly intuits the layperson's likely reaction to the disputed language.

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

The error in denying an express mercy instruction should be deemed structural, since the impact of its absence on the jury cannot be ascertained from the record. *See generally* Johnson v. State, 53 So.3rd 1003, 1007 (Fla. 2010) and United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006). This Court should accordingly reverse the sentence appealed from and remand for a new penalty phase where instructions that guarantee heightened reliability can be given.

POINT SEVEN

THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR JURY INSTRUCTIONS THAT DO NOT PRECLUDE SYMPATHY AS A FACTOR IN THE SENTENCING DECISION.

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

Argument. The defense sought jury instructions which omit any statement to the effect that sympathy may not be considered in the jury's life-or-death decision-making. The court denied its motion, and the jury was instructed, in accordance with the standard jury instructions for use in the penalty phase, that "[y]our decision must not be based upon the fact that you feel sorry for anyone or are angry at anyone." (R 1410, 3403)

In its motion, the defense acknowledged California v. Brown, 479 U.S. 538 (1987), where the Court held that a jury instruction which generally precludes the jury from considering sympathy, along with conjecture, prejudice, and public feeling, does not violate the federal Eighth Amendment. (R 244) The defense did, and does, take the position that the dissenting view expressed by three Justices in Brown should prevail in the Florida courts. (R 245) Their view was that in a capital matter, an instruction that leaves the jurors unclear as to the scope of their proper

decision-making power fails to satisfy the Eighth Amendment. 479 U.S. at 548-49 (Brennan, J., dissenting). Appellant asks this Court to adopt that view, to reverse the sentence appealed from, and to remand for a new penalty phase where the jury can be instructed in accordance with the Eighth Amendment.

POINT EIGHT

PROPORTIONALITY ANALYSIS SHOULD BE CONDUCTED; THIS COURT'S DECISION IN LAWRENCE v. STATE WAS INCORRECTLY DECIDED.

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

Argument. Appellant asks this Court to recede from its decisions in Lawrence v. State, 308 So. 3d 544 (Fla. 2020) and Cruz v. State, 372 So.3d 1237 (Fla. 2023), where it abandoned proportionality analysis in direct appeals in capital cases. Before Lawrence this Court, when reviewing such appeals, considered the totality of the circumstances, and compared the case with other cases. *E.g.*, Crook v. State, 908 So. 2d 350, 357 (Fla. 2005). Death was deemed to be a disproportionate remedy where the case was not *both* one of the most aggravated, and the least mitigated, to come before the Court for review. Id.

In Lawrence, this Court concluded that Pulley v. Harris, 465 U.S. 37 (1984), read in combination with Article I, Section 17 of the Florida Constitution, precludes proportionality review in this State. In Pulley v. Harris the Supreme Court, in reviewing California's capital sentencing scheme, held that the Eighth Amendment does not require "comparative

proportionality review by an appellate court…in every case in which the death penalty is imposed." Id. at 50. The Court explained that "each distinct system must be examined on an individual basis," and acknowledged that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." Pulley, at 879-80. Appellant respectfully submits that Florida's scheme has become such a system. As argued on Point Nine *infra*, many checks on arbitrariness have either been eliminated or eroded since that scheme was approved by the Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976).

Proportionality analysis recognized that death is a uniquely irrevocable penalty which requires an intensive level of judicial scrutiny. Its purpose was to foster uniformity in death penalty law and to prevent the imposition of unusual punishments. As this Court explained in Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991), "[i]t clearly is 'unusual' to impose death based on facts similar to those in cases in which the death penalty previously was deemed improper." Here, as noted, the defense presented substantial mitigation which casts significant doubt on his culpability: the record strongly suggests that drug-induced psychosis resulted in the boys' deaths. On similar facts, this Court has deemed a resulting death sentence

disproportionate. Crook, *supra;* Robertson v. State, 699 So. 2d 1343, 1347 (Fla. 1997), *receded from on other grounds* in Delgado v. State, 776 So. 2d 233, 241 (Fla. 2000); Nibert v. State, 574 So. 2d 1059 (Fla. 1990). Appellant asks this Court to recede from Lawrence and Cruz, to conduct proportionality analysis, and to determine that this case is not one of the least mitigated to come before this Court. Crook; Robertson; Nibert.

POINT NINE

FLORIDA'S DEATH PENALTY SCHEME FAILS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THAT PENALTY.

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

Argument. Appellant acknowledges that this Court rejects the arguments made on this point. *See, e.g.*, Loyd v. State, 2023 WL 7815783 at **10-11 (Fla. 2023). His position is that Loyd and the cases it relies on are inconsistent with the governing Eighth Amendment-based caselaw.

A capital sentencing scheme, either through legislatively enumerated aggravating factors or through legislatively mandated guilt-phase findings, must genuinely narrow the class of persons eligible for the death penalty. Zant v. Stephens, 462 U.S. 862, 877 (1983). Each aggravating factor, taken singly, must also narrow the eligible class. Zant at 877. Florida's current capital sentencing scheme fails to attain those goals.

Since the Supreme Court approved Florida's system in Proffitt v. Florida, 428 U.S. 242 (1976), the scope of Florida's statutory aggravating factors has broadened significantly; indeed, the number of aggravators in Florida has doubled from eight to sixteen. Many of those aggravators have

themselves significantly broadened in scope. In particular, the cold, calculating and premeditated ("CCP") aggravator has outgrown its tendency to narrow the eligible class. In its early years, CCP was applied in cases involving contract killings and execution-style killings. *See* Garron v. State, 528 So. 2d 353, 360-61 (Fla. 1988) and Floyd v. State, 497 So. 2d 1211, 1214 (Fla. 1986). In recent years, however, a CCP finding has been upheld so long as the murder was not committed impulsively or on the spur of the moment, and was not committed in a state of rage or loss of control, even where there is evidence that the final decision to kill was not made until shortly before the murder itself. *See* Gosciminski v. State 132 So. 3rd 678, 712 (Fla. 2013).

Another aggravating factor, that the defendant at the time of sentencing has a prior conviction for a violent felony, has had a similarly expansive history. "Prior conviction" in this context has come to include adjudications imposed for crimes committed contemporaneously with the offense for which the defendant is facing the death penalty. Even crimes committed years after the capital offense meet this aggravating factor, provided the conviction predates imposition of the death sentence. *See* Brown v. State, 473 So. 2d 1260, 1266 (Fla. 1985).

A third aggravating factor, that the murder was committed during the course of a felony, has also expanded as a practical matter. Offenses which commonly underlie felony-murder prosecutions, robbery and burglary, have themselves expanded in this State far beyond their common-law definitions. *See* Royal v. State, 490 So. 2d 44 (Fla. 1986) (violence occurring after a taking can complete a robbery); Section 810.015, Florida Statutes (openly remaining in a dwelling after forming criminal intent can complete a burglary, on the assumption that the residents would have withdrawn their consent to enter based on the defendant's subsequent change of mind). *See* State v. Ruiz, 863 So. 2d 1205, 1207-08 (Fla. 2003). In this case, the State relied solely on the "remaining in" theory of burglary.

The Eighth Amendment contemplates that capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." Roper v. Simmons, 543 U.S. 551, 568-69 (2005), *citing* Atkins v. Virginia, 536 U.S. 304, 319 (2002). Appellant respectfully submits that Florida's death penalty scheme no longer serves the goal of limiting the class of eligible persons. For that reason, it violates the Eighth Amendment to enforce the death penalty in Florida.

POINT TEN

THE JURY WAS DEATH-QUALIFIED OVER THE DEFENSE'S OBJECTION.

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

Argument. The Appellant acknowledges that this Court has rejected the argument raised on this point. *E.g.*, Loyd v. State, *supra*, 2023 WL 7815783 at *9 (Fla. 2023). Appellant's position is that the United States Supreme Court should recede from its own decisions, to the extent that they preclude recourse to the Sixth Amendment in capital cases where the jury is death-qualified before the first phase of trial.

The Sixth Amendment to the federal constitution protects the right to trial by an impartial jury. U.S. Const., Amend 6. As elaborated by the courts, this guarantee entails both a right to disinterested jurors and a right to a jury drawn from a fair cross-section of society. Taylor v. Lousiana, 419 U.S. 522, 529-31 (1975). "Fair cross-section" jurisprudence allows challenges only where a group recognized as "distinctive" is under-represented in jury venires due to systemic government action. Berghuis v. Smith, 559 U.S. 314, 327 (2010). In Lockhart v. McCree, 476 U.S. 162 (1986), the Court rejected the idea that a sector of society bound together only by like-

mindedness could form the requisite "distinctive" group.

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

While the "fair cross-section" cases were evolving, the Supreme Court decided Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985). Witherspoon involved the wholesale exclusion of *all* venire members who harbored *any* reservation about the death penalty; in Witt the Court clarified Witherspoon, holding that jurors who would be substantially impaired in following the court's instructions by their beliefs against capital punishment could not serve where a unitary jury is used. The process of excluding those venire members became known as death-qualification, and the affected would-be jurors became known as "Witherspoon-excludables." *See* Morgan v. Illinois, 504 U.S. 719, 733 (1992).

Justice Breyer, dissenting in Glossip v. Gross, 576 U.S. 863 (2015), has acknowledged that research has shown for decades that death-qualification skews juries toward guilt. 576 U.S. at 913. (Breyer, J., dissenting, *citing* Susan D. Rozelle, The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation, 38 Ariz. S. L. J. 769 (2006)). Considerable scholarship attests to that causal relationship. Studies show that death-qualified juries are as much as 44% more likely to find guilt, and are more hostile to the insanity defense, more mistrustful of defense lawyers, and less concerned about the risk of erroneous convictions. Note, Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process, 2005 B.Y.U.L. Rev. 519, 530-32. Other studies show that death-qualified jurors are more inclined to believe a prosecutor's version of events. Aliza Plener Cover, The Eighth Amendment's Lost Jurors: Death Qualification Process, 2005 B. Y. U. L. Rev. 519, 530-32. From a statistical standpoint, the data set of death-qualified juries represents a biased sample. Id at 115-16.

Further, the practice of death-qualification provides prosecutors with a firewall against changing public opinion. Brandon Garrett *et al.*, Capital Jurors in an Era of Death Penalty Decline, 126 Yale L. J. Forum 417 (2017). Notably, twenty-first century support for the death penalty in Black

communities has been measured at only 36%. *See* pewresearch.org/fact-tank/2018/06/11.

Professor Susan Rozelle, author of The Principled Executioner, *supra*, makes a persuasive case for requiring bifurcation of juries in capital cases. She distinguishes between "excludables" and "nullifiers": the latter would never find a defendant charged with a capital crime guilty, given the knowledge that their judgment might eventually result in an execution, while the former could fully participate in a guilt-or-innocence phase, although not a penalty phase. 38 Ariz. S. L. J. at 776. Florida has both an anti-nulifier statute and a general unitary capital jury statute. Sections 913.13, 921.141(1), Florida Statutes (2022). However, where an interest recognized by statute comes into conflict with a constitutional right, the latter prevails. *E.g.,* Gray v. Mississippi, 481 U.S. 648, 663 (1987). Professor Rozelle concluded that nullifiers may reasonably be excluded at the outset of capital trials, but that the current practice of removing Witherspoon-excludables at the guilt-or-innocence stage cannot be allowed to continue. The Principled Executioner at 793, 796-97. For the foregoing reasons, the Supreme Court should revisit its view on death-qualification.

POINT ELEVEN

THE DEATH PENALTY IS UNCONSCIONABLE.

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

Argument. Appellant acknowledges that this Court rejects the arguments made on this point. *E.g.*, Loyd v. State, *supra*, 2023 WL 7815783 at **10-11 (Fla. 2023). His position is that Loyd and the cases it relies on are inconsistent with the governing Eighth Amendment-based caselaw.

"Often when deciding whether a punishment practice is, constitutionally speaking, 'unusual,' this Court has looked to the number of States engaging in that practice." Atkins v. Virginia, 536 U.S. 304, 313-16, 122 S.Ct. 2242 (2015); Roper v. Simmons, 543 U.S. 551, 564-66, 125 S.Ct. 1183 (2005). "In this respect, the number of active death penalty States has fallen dramatically." Glossip v. Gross, 576 U.S. 863, 940 (2015) (J. Breyer, dissenting). In his dissent in Glossip, Justice Breyer noted that in 1972 the death penalty was lawful in 41 states and that nine states had abolished it. Id. Since then, the number of active death penalty states has fallen to 23. If Governor-imposed moratoriums are included, such as

those currently active in California, Oregon, and Pennsylvania, this number rises to 26. Thus the majority of states now do not enforce a death penalty.

Further, it "'is not so much the number of these States that is significant, but the consistency of the direction of change.'" Id. Here, the consistency and direction of change away from the death penalty is unambiguous. Writing in 2015, Justice Breyer concluded that capital punishment has indeed become unusual, noting the trend toward abolition and non-enforcement. Objective indicia of society's standards, as expressed through legislation and state practice, establish that the death penalty is no longer compatible with evolving standards of decency and therefore violates the Eighth Amendment. *See* Roper v. Simmons, 543 U.S. 551 (2005).

In addition, "[t]oday's administration of the death penalty involves three fundamental constitutional defects: serious unreliability, arbitrariness in application, and unconscionably long delays that undermine the death penalty's penological purpose." Glossip, 576 U.S. at 909 (J. Breyer, dissenting). The death penalty is unreliable in that as of 2002, "there was evidence of approximately 60 exonerations in capital cases." Glossip, at

911 (J. Breyer, dissenting) (citing Atkins, 536 U.S., at 320, n. 25, 122 S.Ct. 2242)). By 2015, the number of exonerations in capital cases had risen to 115. Id. (J. Breyer, dissenting).

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

Lastly, long delays undermine the penological justification for the death penalty, and constitute cruel and unusual punishment in their own right. Such delays, in the twenty-first century, are measured in decades. In sum, Appellant respectfully submits that the death penalty – now active in only a minority of states – constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, as it no longer comports with "evolving standards of decency," exacts a decades-long toll on defendants, is unreliable in its imposition, and is arbitrary in its application.

CONCLUSION

The appellant asks this Court to reverse his death sentence and remand for a new penalty phase, based on the arguments set out above in Points One, Three, Four, Five, Six, Seven, and Ten.

He asks this Court to reverse his sentence and remand for reconsideration of the sentencing order based on the argument made on Point Two.

As to Points Eight, Nine, and Eleven, he asks this Court to reverse his death sentence and remand for imposition of a sentence of life in prison.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically through the Florida Courts E-Filing Portal in the Fifth District Court of Appeal, at www.myflcourtaccess.com; and served on the Office of the Attorney General, at capappdab@myfloridalegal.com, Assistant Attorney General, Patrick Bobek at patrick.bobek@myfloridalegal.com. I further certify that a copy of this brief has been mailed to Mr. Mark Howard Wilson, DOC# G19924, Union Correctional Institution, PO Box 1000, Raiford, FL 32083, on this 11th day of March, 2024.

/s/ Nancy Ryan
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CERTIFICATE OF RULE COMPLIANCE

I HEREBY CERTIFY that this brief complies with the Florida Rules of Appellate Procedure, in that the font used herein is 14 point Arial and in that the brief complies with the word-count limitation set out in the Rules.

/s/ Nancy Ryan
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