IN THE SUPREME COURT OF FLORIDA

CASE NO. SC2024-1512

L.T. NO. 16-2010-CF-008424

DAVID KELSEY SPARRE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument.

STATEMENT OF THE CASE AND FACTS

In 2011, a Duval County jury convicted Appellant David Sparre of first-degree murder and unanimously recommended the death penalty. (R. 592-93, 628).[1] In 2012, the trial court sentenced him to death. (R. 694-713, 988-1008). This Court affirmed on direct appeal, *Sparre v. State*, 164 So. 3d 1183 (Fla. 2015), and upheld the denial of Appellant's initial postconviction motion pursuant to Fla. R. Crim. P. 3.851, *Sparre v. State*, 289 So. 3d 839 (Fla. 2019). The Court later affirmed the denial of Appellant's first successive Rule 3.851 motion. *Sparre v. State*, 391 So. 3d 404 (Fla. 2024).

On February 16, 2023, Appellant filed a second successive Rule 3.851 motion in the circuit court. The motion was based on new evidence showing that systemic practices in Duval County capital jury selection violated his rights under the United States Constitution and, separately, the Florida Constitution. (PCR-3. 17-80). Appellant proffered a recent study by Dr. Jacinta M. Gau, who

[1] References to trial record are designated "R. [page]." References to the Rule 3.851 proceedings below are designated "PCR-3. [page]."

analyzed comprehensive data from Duval County capital trials over an eight-year period, including data from Appellant's trial. (PCR-3. 18-22, 39-50). Dr. Gau found that the operation of death qualification in Duval County disproportionately excluded nonwhite jurors, resulting in their removal at double the rate of white jurors. When combined with prosecutorial peremptory strikes, the effect was the systematical removal of a majority of qualified, willing, and available nonwhite jurors. (PCR-3. 20, 43-50). Appellant also proffered a report by Dr. Michael Radelet, who reviewed Dr. Gau's work and concluded that the broader statistical trends she found in Duval County were present in Appellant's specific trial. (PCR-3. 21, 52-54).

Appellant claimed that further evidentiary development consistent with Dr. Gau's findings would show that the systemic exclusion of nonwhite jurors from his trial violated: (1) his Sixth Amendment rights (PCR-3. 23-27); (2) his Eighth Amendment rights (PCR-3. 27-31); and (3) his rights under Article I of the Florida Constitution (PCR-3. 31-35). Appellant proffered arguments that all three of his claims were timely and procedurally proper as newly discovered evidence claims under state law. (PCR-3. 22-23). He

requested an evidentiary hearing to develop the factual record further. (PCR-3. 22).

At the same time that he filed his second successive Rule 3.851 motion, Appellant moved to stay further proceedings under *Tompkins v. State*, 894 So. 2d 857 (Fla. 2005), noting that his appeal from the denial of his first successive Rule 3.851 motion was still pending in this Court, and that this Court had not yet ruled on his motion in that appeal to relinquish jurisdiction. (PCR-3. 14-16).

On March 10, 2023, the State filed an answer to the second successive Rule 3.851 motion, arguing that it was procedurally barred and meritless. (PCR-3. 105-28). The State also filed a response opposing the stay motion. (PCR-3. 129-33).

On March 28, 2023, the circuit court summarily denied relief without holding a case management conference. (PCR-3. 134-36). The court addressed the merits of Appellant's claims without applying any procedural bars, ruling that: (1) "the Constitution does not prohibit the State from death-qualifying a jury," even if certain racial or ethnic groups are disproportionately screened out through death qualification; and (2) Appellant failed to show that his jury's verdict resulted from actual bias. (PCR-3. 134-35). In a footnote, the

Court stated that *Tompkins* did not require a stay because the claims raised in the second successive Rule 3.851 motion were not similar to the claims raised in the appeal. (PCR-3. 135 n.2).

Appellant moved for rehearing, arguing that the circuit court lacked jurisdiction because of the pending appeal and that it should have, at a minimum, held a case management conference to allow him to be heard on (1) the need for further factual development, and (2) any purely legal issues of concern to the court. (PCR-3. 137-46).

On April 11, 2023, the circuit court granted rehearing, vacated its March 28th order, and stayed further proceedings pending this Court's ruling in the first-successive appeal. (PCR-3. 167). This Court subsequently denied the motion to relinquish and affirmed the denial of the first successive Rule 3.851 motion. *Sparre*, 391 So. 3d 404. The State moved in the circuit court to lift the stay on the second successive motion and suggested that the court simply reimpose its prior order denying relief. (PCR-3. 170-80, 182-88).

On August 12, 2024, Appellant filed a motion for a case management conference, stressing the importance of allowing him the opportunity to be heard as to the legal reasoning in the court's premature order denying relief and the need for further evidentiary

development. (PCR-3. 192-95). The same day, the court summarily denied the Rule 3.851 motion and reimposed the rulings from its earlier order, without addressing Appellant's requests for a case management conference. (PCR-3. 189-90). The circuit court denied rehearing on September 17, 2024. (PCR-3. 220).

SUMMARY OF ARGUMENT

Issue I: The circuit court's failure to hold a case management conference before summarily denying relief violated the rules of criminal procedure and Appellant's due process rights. Appellant was prejudiced because his Rule 3.851 pleadings and evidentiary proffer were neither legally insufficient nor meritless.

Issues II and III: The circuit court's order denying relief failed to address Appellant's state constitutional claim (3) under Article I of the Florida Constitution. The court also failed to address Appellant's claim (2) under the Eighth Amendment.

Issue IV: Although the circuit court correctly imposed no procedural bars and reached the merits of Appellant's Sixth Amendment claim (1), it misapplied federal law in denying relief.

This Court should reverse and remand with instructions that the circuit court hold a case management conference, allow factual

development, and address the merits of all of the state and federal claims consistent with the Florida and United States Constitutions.

ARGUMENT

I. The circuit court's refusal to hold a case management conference violated the rules of criminal procedure and Appellant's due process rights.

Despite the clear text of the Florida Rules of Criminal Procedure, and Appellant's repeated requests to be heard on (1) the need for further factual development and (2) the pure issues of law, the circuit court refused to hold a case management conference before summarily denying Appellant's claims on the merits. Under the circumstances, the circuit court's failure to allow Appellant the opportunity to be heard violated not only the rules of criminal procedure, but also Appellant's state and federal due process rights.

The relevant text of the Florida Rules of Criminal Procedure is unambiguous:

> Successive Postconviction Motion. Within 30 days after the state files its answer to a successive motion for postconviction relief, the trial court ***shall hold*** a case management conference. At the case management conference, the trial court also shall determine whether an evidentiary hearing should be held and hear argument on any purely legal claims not based on disputed facts. If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion

> may be denied without an evidentiary hearing. If the trial court determines that an evidentiary hearing should be held, the court shall schedule the hearing to be held within 90 days. If a death warrant has been signed, the trial court shall expedite these time periods in accordance with subdivision (h) of this rule.

Fla. R. Crim. P. 3.851(f)(5)(B) (emphasis added).

Rule 3.851(f)(5)(B) provides that, after receiving the State's response to a successive postconviction motion, the circuit court "shall hold" a case management conference to (1) determine whether to hold an evidentiary hearing to develop the factual record; and (2) hear argument on purely legal issues. *Id*. "The word 'shall' is mandatory in nature." *Sanders v. City of Orlando*, 997 So. 2d 1089, 1095 (Fla. 2008); *see also Lexecon Inc. v. Millberg*, 523 U.S. 26, 35 (1998) ("The Panel's instruction comes in terms of the mandatory 'shall,' which normally creates an obligation impervious to judicial discretion."). Thus, under the rules, only *after* the case management conference is the circuit court permitted to deny an evidentiary hearing or deny Rule 3.851 relief on the merits.

Here, the State filed an answer to the successive Rule 3.851 motion on March 10, 2023. (PCR-3. 105-28). Instead of holding a conference within 30 days, the circuit court summarily denied relief

on March 28, 2023, without allowing Appellant an opportunity to be heard. (PCR-3. 134-36). After the court acknowledged its premature ruling and vacated its order, Appellant specifically moved for a case management conference so that he could address particular issues that were clearly of concern to the court. (PCR-3. 192-95). The circuit court did not acknowledge Appellant's request and simply reimposed the original ruling that was previously vacated. (PCR-3. 189-90).[2] This Court should not tolerate such clear and repeated violations of the rules.

The circuit court's behavior is particularly concerning because it had previously recognized, at an earlier stage of Appellant's postconviction proceedings, that a case management conference was required under the rules. During the litigation of Appellant's first successive Rule 3.851 motion, both the circuit court and the State discussed the need for a case management conference under the rules and held one accordingly. (PCR-3. 83-84). In the proceedings below, however, the circuit court arbitrarily denied

[2] Appellant's case was reassigned (PCR-3. 181) to a new judge after his motion for rehearing was granted on April 11, 2023 (PCR-3. 134-36, 167-68). A different circuit court judge lifted the stay and also denied the Rule 3.851 motion in an almost identical manner as the original order. (PCR-3. 189-91).

Appellant the same opportunity to be heard with no explanation and despite Appellant's repeated requests.

Reflecting the clarity of the rule, other circuit judges routinely hold case management conferences on successive motions in conformance with Rule 3.851(f)(5)(B). *See, e.g.*, *State v. Davis*, No. 16-1992-CF-13193 (Duval Cty. June 10, 2024) (order following case management conference held on successive 3.851 motion); *State v. Hartley*, No. 16-1991-CF-08144 (Duval Cty. Jan. 11, 2024) (order setting case management conference on fourth successive 3.851 motion); *State v. Sanchez-Torres*, No. 2009-CF-671 (Clay Cty. Feb. 26, 2021) (order granting rehearing and vacating order dismissing successive 3.851 motion for failure to hold a case management hearing); *State v. Peterka*, No. 89-CF 966 (Okaloosa Cty. Jan. 25, 2017) (order setting case management conference on successive 3.851 motion). Appellant was entitled to the same treatment under Rule 3.851(f)(5)(B), but the circuit court refused to allow it.

Appellant recognizes that the circuit court's failure to hold a case management conference "is not reversible error in itself" and can be subjected to harmless-error review. *See Boyd v. State*, 324 So. 3d 908, 913 (Fla. 2021). Here, though, Appellant's Rule 3.851

motion was neither legally insufficient nor meritless on the face of his pleading and evidentiary proffers. *Id.*; *see also Taylor v. State*, 260 So. 3d 151, 157-58 (Fla. 2018) (failure to hold a case management hearing harmless when the Rule 3.851 motion is either legally insufficient or meritless). Moreover, Appellant told the circuit court that he had specific arguments to make in response to the reasoning in the circuit court's premature order denying relief that he should be heard on. The circuit court should have afforded Appellant the opportunity to present those arguments.

For instance, Appellant noted that the circuit court's reliance on *Lockhart v. McCree*, 476 U.S. 162 (1986), could not resolve either his Eighth Amendment claim or his state-law claim under the Florida Constitution. (PCR-3 at 195). Appellant also pointed out that the circuit court's original order had misconstrued his claims as only relating to death qualification, rather than the entire capital jury selection process in Duval County and his case specifically, including the gross disparity in peremptory challenges used against nonwhite jurors by the prosecution in his case. *Id.* The circuit court was on notice about these arguments, but refused to hold a case management conference to allow Appellant to be heard on them.

Beyond being a clear violation of the text of the rules of criminal procedure, the circuit court's decision to bypass a case management conference violated Appellant's state and federal due process rights. As this Court has said, "[t]he essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered." *Huff v. State*, 622 So. 2d 982, 983-84 (Fla. 1993). And under federal law, once a state establishes a mechanism for postconviction review of a death sentence, the procedures it applies to conduct that review must comport with due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982) ("[T]he Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be the equivalent of denying them an opportunity to be heard upon their claimed rights.") (internal quotes omitted); *Evitts v. Lucey*, 469 U.S. 387, 393 (1985).

Appellant recognizes that this Court only automatically applies *Huff*'s due-process requirement to initial state postconviction motions. But the Court has also not foreclosed the possibility that

the failure to hold a case management conference in a specific successive Rule 3.851 proceeding could violate due process under certain circumstances. That is why this Court has often reminded that hearings are preferred in successive proceedings, *see, e.g.*, *Taylor*, 260 So. 3d at 157, and why Rule 3.851(f)(5)(B) provides that the circuit court "shall hold" a case management conference in successive cases. *Boyd v. State*, 324 So. 3d 908, 913 (Fla. 2021) ("the better practice is to hold such a hearing [case management conference] on any postconviction motion in a case involving the death penalty"). When those prophylactic measures are ignored, due process violations are risked, even in a successive proceeding.

Here, a due process violation occurred given Appellant's repeated, unanswered requests to be heard at a case management conference, the circuit court's knowledge that a conference was required under the rules, and the court's reimposition of its premature rulings despite being on notice that Appellant requested to be heard on those specific issues. The violation was not harmless and prejudiced Appellant because, as described in the sections below, Appellant's second successive claims were neither legally insufficient nor meritless. *See Taylor*, 260 So. 3d at 157-58. This

Court should reverse the order below and remand with instructions that the circuit court conduct a case management conference before addressing the merits of the state and federal claims.

II. The circuit court failed to address Appellant's state-law claim under Article I of the Florida Constitution.

The circuit court failed to address Appellant's state-law claim that Duval County's racially skewed capital jury selection process violated his right to an impartial jury under Article I of the Florida Constitution. The circuit court's order relied only on *Lockhart*, a Sixth Amendment decision, and this Court's decisions in *Carratelli v. State*, 961 So. 2d 312 (Fla. 2007), and *Martin v. State*, 322 So. 3d 25 (Fla. 2021), which address claims of individual juror bias. (PCR-3. 134-35). The circuit court failed to reference Article I or analyze any of the specific state-law arguments Appellant presented. This Court should address the issue and reverse. Dr. Gau's study reveals, and further factual development would establish, that the State violated Appellant's "inviolate" right to an impartial jury under Article I §§ 9, 16, 17, and 22 of the Florida Constitution.

Under Florida law, the jury right is "an indispensable component of our system of justice" enshrined in the "state

constitution's Declaration of Rights[.]" *Blair v. State*, 698 So. 2d 1210, 1213 (Fla. 1997); *State v. Webb*, 335 So. 2d 826, 828 (Fla. 1976) (noting the right of trial by jury remains inviolate and has been "carefully protected and enforced" by the Court). The framers of Florida's original Constitution stated: "That the right of trial by jury shall remain forever inviolate." Fla. Const. art I, § 6 (1838).[3] Mirroring the Sixth Amendment, section 10 of the Florida Constitution provided additional jury protections for those facing criminal prosecutions, specifically, the right to "an impartial jury of the County or District, where the offense was committed[.]" Fla. Const. art I, § 10 (1838). The framers restated these protections, in the same precise terms, in every subsequent version of the Constitution, including in 1865, 1868, 1885, and 1968. These provisions now reside, respectively, in sections 22 (inviolate) and 16 (rights of accused) of Article I, the Declaration of Rights.

In selecting the word "inviolate," and reaffirming the requirement time and again, the Florida framers meant that no

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[3] Constitution of the State of Florida, 1838, FLORIDA MEMORY: THE STATE LIBRARY AND ARCHIVES OF FLORIDA, www.floridamemory.com/items/show/189087 (last visited Dec. 12, 2024).

subsequent legislative or judicial action could change the right as it was understood at Florida's founding and set out in its founding charter. *See Flint River Steamboat Co. v. Roberts*, 2 Fla. 102, 114 (Fla. 1848). As this Court explained, only a decade after the Florida Constitution was written and three years after Florida became a state, "inviolate" means that "the right shall (in all cases in which it was enjoyed when the Constitution became binding and obligatory) continue unchanged." *Id.* Furthermore, inviolate "does not merely imply that the right of jury trial shall not be abolished or wholly denied, but that it shall not be impaired." *Id.* As lexicographers of this founding era had taught, the word means "unhurt, uninjured, unpolluted, unbroken. Inviolate says Webster is derived from the Latin word 'inviolatus' which is defined by Ainsworth to mean, not corrupted, immaculate, unhurt, 'untouched.'" *Id.* Given these facts, this Court "conclude[d] that the General Assembly has no power to impair, abridge, or in any degree restrict the right of trial by jury as it existed when the Constitution went into operation." *Id.*

The systemic racial bias in Duval County's jury selection restricts the jury right "as it existed when the Constitution went into operation." *Flint River Steamboat Co.*, 2 Fla. at 114. It would

have been unheard of in the founding era to exclude jurors because they would not meaningfully consider imposing a death sentence. "Neither at common law, nor in Blackstone's England, did the death qualification of jurors exist." G. Ben Cohen & Robert J. Smith, *The Death of Death Qualification*, 59 Case W. Res. L. Rev. 87, 92 (2008).

At the founding, the jury in a capital case was required to convict or acquit, and could, if it so chose, recommend mercy. Absent a recommendation of mercy, the punishment was death. *See generally Keech v. State*, 15 Fla. 591, 607 (1876) (holding trial court could lawfully instruct a jury to consider and pass upon the question of mercy with its verdict but was not required to do so unless the defense requested it). In the founding era, as now, service on a jury was an essential duty and a right of citizenship. Jury service was a "valued civil and political right" that held "parallel importance to the other democratic rights of voting and serving as an elected official." Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. Davis L. Rev. 1105, 1116-19 (2014). "Indeed, jury duty constitutes the most direct way citizens participate in the application of [Florida] laws." *State v. Slappy*, 522 So. 2d 18, 20 (Fla. 1988), *abrogated on other grounds by Melbourne*

v. State, 679 So. 2d 759, 763 (Fla. 1996). Florida's founders would not have conceived of the exclusion from jury service of all those who would not meaningfully consider a death sentence.

As this Court has recognized, when a modern practice with no basis in the original Florida Constitution infringes upon a defendant's right to an impartial jury, the modern practice must yield to the extent it has been shown to be tainted by racial discrimination. *See State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984), *receded from in part on other grounds by State v. Johans*, 613 So. 2d 1319, 1321 (Fla. 1993), (forbidding the use of peremptory strikes based on race after noting that the "right to peremptory challenges is not of constitutional dimension"). In *Neil*, this Court held that, although the "primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury," in light of the widespread use of preemptory challenges "solely as a scalpel to excise a distinct racial group from a representative cross-section of society," the racially discriminatory use of peremptory challenges "impedes, rather than furthers, article I, section 16's guarantee" of an impartial jury. *Id.* at 486. The Court thus banned peremptory challenges based on race.

In light of the revelations in Dr. Gau's study, it is clear that the modern practice of capital jury selection in Duval County is fraught with racial bias. Dr. Radelet confirmed that this systemic racial exclusion occurred at Appellant's trial at numbers "consistent with" the larger study, and "in some ways even stronger" than the study as a whole. (PCR-3. 53-54). Although the purpose of instituting rules regarding the capital qualification of jurors may have likewise been "to aid and assist in the selection of an impartial jury," in light of the systemic discrimination that has been revealed, the result is that, at least in Duval County, capital qualification appears to only be used "solely as a scalpel to excise a distinct racial group from a representative cross-section of society." *Neil*, 457 So. 2d at 486.

On these bases, Duval County's current jury selection practices systemically frustrate the inviolate jury right, Fla. Const. art. I, § 22, "as it existed when the Constitution went into operation." *Flint River Steamboat Co.*, 2 Fla. at 114. Because the importance of jury service, the right of every eligible juror to serve, and of every litigant to have such eligible jurors available for their jury, the post-founding eligibility requirement that death

qualification foists on jurors and defendants gravely harms the jury right as it existed at the time the Constitution went into operation. This modern practice has resulted in systemic racial discrimination in the selection of capital juries in Duval County. Therefore, as this Court has consistently done since *Neil*, this Court should "reaffirm this state's continuing commitment to a vigorously impartial system of selecting jurors based on the Florida Constitution's explicit guarantee of an impartial trial." *Slappy*, 522 So. 2d at 20-21.

The circuit court was presented with these Article I arguments but chose not to address them. Instead, the court narrowly focused on Appellant's separate Sixth Amendment argument. The circuit court's references to this Court's decisions in *Carratelli* and *Martin* are not responsive to the state-law issue because those cases involved the prejudice standard applicable to claims of individual juror bias, or claims that trial counsel was ineffective during jury selection. *Carratelli*, 961 So. 2d at 317 (addressing "which standard to apply for determining prejudice when a defendant claims that defense counsel was constitutionally ineffective for failing to preserve a juror challenge"); *Martin*, 322 So. 3d at 29 ("[W]e address the standard for evaluating postconviction claims of juror

misconduct based on the juror's nondisclosure of information during voir dire"). This Court has not yet confronted a systematic-bias claim in the context of Article I of the Florida Constitution.

Although this Court is the ultimate arbiter of Article I's meaning, it should not decide these issues in the first instance or on the current record. The circuit court failed to conduct even rudimentary steps to determine the need for further factfinding, and the order below entirely ignored the legal issues. This Court should find that Appellant's state constitutional arguments are of sufficient merit to warrant further proceedings in the circuit court, reverse the order below, and remand with instructions for the circuit court to hold a hearing and address the legal issues in the first instance.

III. The circuit court failed to address Appellant's Eighth Amendment claim.

The circuit court's order also ignored Appellant's claim based on the Eighth Amendment. (PCR-3. 134-35). The circuit court failed to reference the Eighth Amendment or analyze any of the specific Eighth Amendment arguments Appellant raised. As with the state-law claim, this Court should remand to the circuit court for further proceedings because Appellant's pleadings and factual proffer show

that, as a result of the skewing effect of death qualification in Duval County, the judgment resulting from Appellant's jury trial violates the Eighth Amendment's Cruel and Unusual Punishment Clause.

As Appellant's pleadings and proffer below indicate, death qualification in Duval County skewed the jury in favor of the State's preferred outcome—a death sentence. It did so by ridding from juries, including Appellant's, those most willing to consider mitigation, eschewing them in favor of jurors more likely to find aggravation and want a death sentence. In doing so, through Duval County's systematic capital jury selection practices, whole voices from the Duval County community were erased. In light of Duval County's discriminatory practices, a judgment to execute Appellant based on the decision making of a death-qualified jury constitutes an arbitrary outcome forbidden by the Eighth Amendment. It does not accurately reflect "contemporary community values," which the Supreme Court has said is required for the punishment to conform with the Eighth Amendment. *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.15 (1968) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1968)).

The United States Supreme Court has observed that "one of the most important functions any jury can perform in making [the

penalty] selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* And later, in *Woodson v. North Carolina*, 428 U.S. 280 (1976), the plurality emphasized the importance of jurors' individual perspectives as a reason for why a mandatory death penalty scheme violated "contemporary values." *Id.* at 295 (plur. op. of Stewart, J.). Similarly, in *Coker v. Georgia*, Justice White observed that "[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved." 433 U.S. 584, 596 (1977) (plur. op. of White, J.) (quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976)); *see also Enmund v. Florida*, 458 U.S. 782, 788 (1982) (explaining Court must examine Eighth Amendment decency standards using, among other factors, juries' sentencing decisions).

The Supreme Court's Eighth Amendment jurisprudence therefore shows that a jury that is demographically skewed due to death qualifications fails to adequately capture the standards of decency. As one scholar has explained, the "use of death-qualified jury verdicts as 'objective indicia' of contemporary values produces

an obviously warped data set from which to gauge 'evolving standards of decency.'" Aliza Cover, *The Eighth Amendment's Lost Jurors*, 92 Ind. L.J. 113, 128 (2016). Stated differently, the Supreme Court's view that "juries serve as a link between punishments and the conscience of the community" has failed "to account for the impact of death qualification upon the representativeness of the capital jury." *Id.* at 124, 126. Given the skewed jury selection process, Appellant's jury failed to properly judge whether a death sentence is constitutionally appropriate in his case.

A capital jury also "must consider all relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982); *United States v. Tsarnaev*, 595 U.S. 302, 317-18 (2022) (observing that binding Supreme Court precedent "requir[es] the sentencer to consider mitigating circumstances when deciding whether to impose the death penalty") (alteration modified) (quoting *Jones v. Mississippi*, 593 U.S. 98, 115-16 (2021)). Because such a jury assessment is largely dependent on an individual person's moral judgment, *Williams v. Taylor*, 529 U.S. 362, 398 (2000), a juror's determination of mitigation functions as a "question of mercy." *Kansas v. Carr*, 577 U.S. 108, 119 (2016) ("[J]urors will accord

mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.").

Death qualified jurors are more likely to overvalue aggravation and even misperceive mitigation as aggravating. Studies show that death-qualified jurors do not consider constitutionally required mitigation and are more likely to both devalue mitigation and overvalue aggravation compared to non-death-qualified jurors. *See* M. Lynch & C. Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 L. & Hum. Behav. 481, 486 (2009) (finding that between 14 and 30% of death-qualified panels "actually weighed mitigating evidence as favoring a death sentence," misinterpreting this evidence as aggravation instead); Brooke M. Butler & Gary Moran, *The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 L. & Hum. Behav. 175, 183 (2002) ("[D]efendants in capital trials are subjected to juries that are oriented toward accepting aggravating circumstances and rejecting mitigating circumstances."). These studies show that because death-qualified jurors are by definition more supportive of death, they are more inclined to favor aggravation over mitigation.

Finally, as to the ultimate determination whether to impose death, because death-qualified juries have fewer moral reservations about imposing the death penalty and have been selected precisely on that basis, they are more likely to sentence defendants to death at rates disproportionate to the community at large. *See, e.g.*, Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 Ariz. State L.J. 769, 784-85 (2006) ("After carefully controlling for each of the McCree Court's concerns, the [Capital Jury Project] data nevertheless invariably confirms what Professor Zeisel's study showed back in the 1950s: The death-qualification process today still seats juries uncommonly willing to find guilt, and uncommonly willing to mete out death."); William J. Bowers & Wanda J. Foglia, *Still Singularly Agonizing*, 39 Crim. Law Bull. 51, 57 (2003) (finding that 30.3% of jurors decided to vote for death before the start of the penalty phase); David Niven et al., *A "Feeble Effort to Fabricate National Consensus": The Supreme Court's Measurement of Current Social Attitudes Regarding the Death Penalty*, 33 N. Ky. L. Rev. 83, 108 (2006) (noting that "[t]he pre-trial voir dire process of focusing on the willingness of potential jurors to impose a death sentence encourages a belief

among jurors that the defendant is guilty . . . and that opposition to the death penalty is disfavored by legal authorities").

In packing juries with those most favorable to the State, the capital jury selection process erased voices from the Duval County community. *See Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring) (explaining that juries represent a "community's moral sensibility" because they "reflect more accurately the composition and experiences of the community as a whole"). Dr. Gau's study, confirmed by Dr. Radelet, reveals that Appellant did not have a jury who reflected "contemporary community values" due to the systemic exclusion of potential nonwhite jurors in Duval County. *Witherspoon*, 391 U.S. at 520 n.l; *cf. Ballew*, 435 U.S. at 230-37 (finding five-member jury unconstitutional because, among other constitutional concerns, it fails to "provide a representative cross-section of the community" because "meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service"); *Smith v. Texas*, 311 U.S. 128, 130 (1940) ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.").

The circuit court was presented with these Eighth Amendment arguments but chose not to address them. This Court should find the arguments of sufficient merit to warrant further consideration by the circuit court in the first instance along with Appellant's separate claim under Article I of the Florida Constitution. The Court should reverse the order below and remand for the circuit court to hold a hearing, consider further factual development, and address the Eighth Amendment arguments Appellant raised.

IV. The circuit court correctly imposed no procedural bars and reached the merits of Appellant's Sixth Amendment claim, but misapplied federal law in denying relief.

The circuit court correctly imposed no procedural bars and addressed the merits of Appellant's Sixth Amendment claim, but misapplied federal law in denying relief. Appellant's Rule 3.851 motion proffered valid arguments that all three of his claims were timely and procedurally proper as newly discovered evidence claims. (PCR-3. 22-23). Although the State raised procedural defenses to the claims in its answer, the circuit court declined to adopt them. This Court should follow suit and reach the merits of Appellant's

claims, rejecting any suggestion by the State to apply procedural bars.[4]

Unlike with the state-law and Eighth Amendment claims, the circuit court's order did (briefly) analyze Appellant's Sixth Amendment claim, focusing on the Supreme Court's reasoning in *Lockhart* to hold that "the Constitution does not prohibit the State from death-qualifying a jury," even if certain racial or ethnic groups are disproportionately screened out through death qualification. (PCR-3. 134). However, the circuit court misconstrued Appellant's claim and incorrectly applied federal law to deny relief. Appellant's claim was not confined only to death qualification—the Rule 3.851 motion's factual allegations relate to the entire capital jury selection process in Duval County and Appellant's case specifically, including the disparity in peremptory challenges used against nonwhite jurors by the prosecution. (PCR-3. 21-22) ("These factual allegations demonstrate that capital jury selection in Duval County is

[4] To the extent the State re-raises any such procedural arguments in this appeal, despite the circuit court reaching only the merits, Appellant will address them with more specificity in his reply brief.

conducted unconstitutionally to skew the cross-section of the jury pool."). The circuit court also wrongly found *Lockhart* preclusive.

As revealed by Dr. Gau's study, the State violated Appellant's Sixth Amendment right to be tried by a "petit jury selected from a fair cross section of the community." *Duren v. Missouri*, 439 U.S. 357, 358-59 (1979). In *Duncan v. Louisiana*, the Supreme Court recognized that the purpose of a jury trial is to "prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury of his peers [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." 391 U.S. 145, 155-56 (1968). But death qualification, as currently practiced in Duval County, accomplishes the opposite. It biases the composition of the jury and allows the State to manipulate the jury to produce a verdict in its favor. "Because of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decision making, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance." *Ballew v. Georgia*, 435 U.S. 223, 239 (1978).

Although *Lockhart* rejected a facial challenge to all death-qualifications, the factual underpinnings of *Lockhart* make it inapplicable to Appellant's claim because it rejected a fair-cross-section challenge solely because it was based on an assertion that death qualifications disproportionately render a jury more prone to conviction at the guilt phase. 476 U.S. at 172. Appellant does not raise a constitutional objection to his jury having been more prone to conviction based on any skewed opinions or values. His challenge is instead based on the characteristics the Court expressly affirmed as cognizable: racial skewing. Challenges to exclusion of "such groups as blacks, women, and Mexican-Americans" remain cognizable because "the exclusion from jury service of large groups of individuals . . . on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably . . . deprive[s] members of these often historically disadvantaged groups of their right as citizens to serve on juries in criminal cases." *Id.*

Relatedly, when *Lockhart* was decided, nearly four out of every five Americans supported the death penalty and a comparatively small number opposed. *See* Haney et al., *The Continuing Unfairness of Death Qualification: Changing Death Penalty Attitudes and Capital*

Jury Selection, Psychology, Public Policy, and Law 12 (2022) (reviewing survey data). Execution support was then climbing to an all-time high, while those in opposition had dwindled considerably. *Id.* During this time, the impact of death qualification on the cross-section of the jury pool was therefore at its lowest. This is particularly salient because even beyond Duval County, racial minorities' support for the death penalty has elsewhere been the cause for disproportionate removal. *See, e.g.*, Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 NE. L.J. 299, 333-34 (2017) (finding in study of transcripts in South Carolina capital trials that 32% of Black potential jurors removed for cause based upon death penalty opposition, but only eight percent of white potential jurors). As public opinion generally shifts away from the death penalty, the racial disparities have become even more stark to the point of being constitutionally intolerable. That is the case with Duval County.

Doctrinally, to establish a prima facie violation of the fair cross section requirement, a defendant must show: (1) that the group alleged to have been excluded is a 'distinctive group' in the community; (2) that the representation of this group in venires from

which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Duren*, 439 U.S. at 364. The test for distinctiveness is whether (1) the group is defined and limited by some factor; (2) a common thread or basic similarity in attitude, ideas, or experience runs through the group; and (3) there is a community of interest among members of the group such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process. *Willis v. Zant*, 720 F.2d 1212, 1216 (11th Cir. 1983). Once the defendant has established a prima facie case, the burden shifts to the State to demonstrate that the State's interest outweighs the defendant's constitutional right to a jury drawn from a fair cross section of the community. *Id.* at 368.

As evidenced by the study of capital trials in Duval County, potential Black and nonwhite jurors are disproportionately excluded during capital jury selection. Death qualification in Duval County cases excluded Black jurors at a rate nearly twice the rate of white jurors. Fully, 39% of Black Duval County citizens and 43% of other nonwhite citizens, who answered the jury summons, posed no

hardship basis for excusal, and were not subject to cause challenge based for any other reason, were excluded for opposing the death penalty. While only 17% of white (but otherwise identically situated) jurors were disqualified. When peremptory challenges are factored in, 62% of Black jurors are excluded, while only 34% of white jurors were. This demonstrates that the representation of potential Black and other nonwhite jurors is not fair and reasonable in relation to the number of Black and nonwhite citizens of Duval County, meeting the second *Duren* criterion. *Duren*, 439 U.S. at 364.

As to *Duren*'s third criterion of showing systemic exclusion, the data in Dr. Gau's report unmistakably "demonstrate[s] that a large discrepancy occurred not just occasionally but over a period of years manifestly [indicating] that the cause of the underrepresentation was systematic—that is, inherent in the particular jury selection process utilized." *Duren*, 439 U.S. at 366 (finding such systemic exclusion based on a year's worth of data week to week). Moreover, as Dr. Radelet has confirmed, the systemic exclusion present during Appellant's case was "consistent with, and in some ways even stronger, than those observed in the data from twelve cases analyzed by Dr. Gau." (PCR-3. 52-54).

Finally, under the final step of *Duren* analysis, once the defendant has established a prima facie case, the burden shifts to the State to demonstrate that the State's interest outweighs the defendant's constitutional right to a jury drawn from a fair cross section of the community. *Duren*, 439 U.S. at 368. The State cannot do so here. Florida law anticipates sentences of life imprisonment. Fla. Stat. § 921.141 (3)(a) ("If the jury has recommended a sentence of: (1) Life imprisonment without the possibility of parole, the court shall impose the recommended sentence."). Indeed, at the time of these proceedings, more than 27,000 people were sentenced to life in prison without release in Florida, including 1,833 from Duval County. *See* Florida Department of Corrections, Public Records Requests for the OBIS Database.[5] Many of these defendants were convicted, as was Appellant, of first-degree murder. Those sentenced to death make up the exception (317 total in the state, and 46 from this county). *Id.*; *see also Furman v. Georgia*, 408 U.S. 238, 311 (1972) (White, J., concurring) ("[L]egislative will is not frustrated if the [death] penalty is never imposed[.]").

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[5] Public Records Requests for the OBIS Database, FLORIDA DEPARTMENT OF CORRECTIONS, www.dc.state.fl.us/pub/obis_request.html (last visited Dec. 12, 2024).

In comparison to the legitimate views of Black persons and other persons of color eliminated from capital juries through death qualification, the State's desired punishment of death is simply a preference among lawful options. It "lie[s] somewhat further from the heart of a fair, effective criminal justice system." *Luis v. United States*, 578 U.S. 5, 6 (2016). It cannot trump the constitutional concerns of systematically excluding cognizable groups. *Cf id.* (prosecutor's legitimate interest in imposing victim restitution does not trump defendant's Sixth Amendment rights).

As with Appellant's other claims, the Sixth Amendment claim warranted, at a minimum, a hearing to determine whether further factual development was warranted in light of the data from Dr. Gau. The circuit court's reliance on *Lockhart* and broad focus on death qualification was not responsive to Appellant's claim of systematic racial skewing in Duval County jury selection. Because the circuit court failed to take even basic steps to determine the need for further factfinding, this Court should reverse and remand for a hearing on whether factual development is necessary and for the circuit court to address the full scope of Appellant's claim.

CONCLUSION

This Court should reverse and remand with instructions that the circuit court hold a case management conference, allow factual development, and address the merits of both the state and federal claims consistent with the Florida and United States Constitutions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this brief was served by electronic service to all counsel of record on December 30, 2024.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count requirement in Fla. R. App. P. 9.210(a)(2)(D) because it does not exceed 20,000 words or 75 pages, and the font requirement in Fla. R. App. P. 9.045(b) because it was computer-generated in Bookman Old Style 14-point.

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