Filing # 198590426 E-Filed 05/17/2024 03:57:32 PM

IN THE SUPREME COURT OF FLORIDA

MICHAEL JACKSON, :
Appellant,
:
v. CASE NO. **2023-1298**
:
STATE OF FLORIDA,
Appellee. :

_____/

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

INITIAL BRIEF OF APPELLANT

Cassandra Stubbs
Brian W. Stull
American Civil Liberties Union
Capital Punishment Project
201 W. Main Street, Suite 402
Durham, NC 27701
(919) 682-5659
cstubbs@aclu.org
(PRO HAC No. 1050528)
bstull@aclu.org
(PRO HAC No. 0118537)

Megan D. Byrne
Alexandra C. Valdez
American Civil Liberties Union
Capital Punishment Project
125 Broad Street, Floor 18
New York, NY 10004
(332) 204-2830
mdbyrne@aclu.org
(PRO HAC No. 1050527)
avaldez@aclu.org
(PRO HAC No. 1053019)

Daniel Tilley
Florida Bar No. 102882
ACLU Foundation of Florida
4343 West Flagler St., Suite 400
Miami, FL 33134
(786) 363-2714
dtilley@aclufl.org
(LOCAL COUNSEL)

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 12

ARGUMENT 15

1. The trial court's improvised and inaccurate jury instructions misled the jury about its role in violation of section 921.141 and *Caldwell v. Mississippi* 15

   A. The court misled the jury as to its sentencing power under the applicable statute and thus committed instructional error. 16

   B. The incorrect improvised charge misled the jury by omitting its statutory authority to issue a binding life sentence and thus violated *Caldwell*. 21

2. The new statute allowing non-unanimity in capital sentencing violates the Sixth, Eighth, and Fourteenth Amendments. 30

   A. The racial discrimination intrinsic to non-unanimous verdicts violates the Eighth and Fourteenth Amendments. ... 31

   B. Non-unanimous jury recommendations violate evolving standards of decency and the Eighth Amendment. 37

   C. The statute violates the Sixth Amendment by not requiring unanimity on essential fact findings for death. 40

   D. In the alternative, the Sixth Amendment jury right the framers understood included a right to unanimity for life and death decisions. 44

3. Section 775.022(3), Florida Statutes, bars retrospective application of the 2023 amendment to Florida's capital sentencing statute. 46

4. By permitting a non-unanimous death sentence, the trial court violated res judicata. 49

5. The trial court violated the Eighth Amendment by barring the jury's consideration of the codefendant's life sentence. 51

6. The trial court violated the Sixth and Eighth Amendments, and Florida law, by precluding impeachment of Bruce Nixon's prior-recorded testimony by his subsequent recantation.. 56

7. The trial court erred under both Florida law and the Eighth Amendment by assigning no weight to five of Mr. Jackson's proven mitigating circumstances. 61

8. The prosecution deprived Mr. Jackson of a fair trial by denigrating mitigation and committing misconduct throughout trial. 63

   A. The prosecution denigrated Mr. Jackson's mitigation evidence and directed the jury to disregard it in its entirety. 64

   B. The prosecutor improperly injected fear and emotion into the sentencing determination through jury argument. 67

9. The cumulative prejudice of the many errors throughout Mr. Jackson's resentencing deprived him a of fair trial. 73

10. The trial court abused its discretion by denying Mr. Jackson's motion to continue. 75

   A. Instead of granting the motion to continue to wait for model instructions, the trial judge "shot from the hip" and erred in its charge. 76

   B. By denying the continuance, the court deprived defense counsel a full opportunity to challenge the new law pretrial.. 78

11. Goaded by prosecutors, the Legislature acted on time for Mr. Jackson's sentencing trial to strip him of the right to a unanimous jury, issuing an unconstitutional bill of attainder. . 81

A. Prompted by prosecutors, the Legislature targeted Michael Jackson. 83

B. Stripping Mr. Jackson of the protection of unanimity amounted to punishment, and indeed resulted in his death sentence..... 90

12. Florida's lack of Eighth Amendment safeguards have resulted in an arbitrary, capricious, and unconstitutional sentence..... 92

A. Florida has abandoned safeguards and engaged in capricious and arbitrary sentencing practices (facial challenge)..... 92

B. Michael Jackson's resulting death sentence is arbitrary, capricious, and violates the Eighth Amendment (applied)..... 99

13. Michael Jackson's trial and death sentence under non-unanimity violates the Equal Protection Clause..... 101

14. The trial court constitutionally erred in permitting racially-discriminatory cause exclusions of jurors opposed to the death penalty..... 102

A. The court's reasoning proves faulty. 103

B. Death disqualification removed Black jurors from Mr. Jackson's trial at nearly ten times the rate of white jurors and diluted the power of Black jurors in the pool. 108

C. Relief is required. 111

CONCLUSION 113

APPENDIX 1 114

CERTIFICATE OF SERVICE..... 121

CERTIFICATE OF COMPLIANCE 121

TABLE OF AUTHORITIES

Page(s)

Cases

Ake v. Oklahoma, 470 U.S. 68 (1985) 66

Albrecht v. State, 444 So. 2d 8 (Fla. 1984) 49

Allen v. State, 322 So. 3d 589 (Fla. 2021) 25

Allred v. State, 55 So. 3d 1267 (Fla. 2010) 97

Apprendi v. New Jersey, 530 U.S. 466 (2000) 24, 40, 44

Arbelaez v. State, 898 So. 2d 25 (Fla. 2005) 62

Armstrong v. State, 642 So. 2d 730 (Fla. 1994) 52

Ault v. State, 53 So. 3d 175 (Fla. 2010) 61

Bargo v. State, 331 So. 3d 653 (Fla. 2021) 61

Berger v. United States, 295 U.S. 78 (1935) 67, 89

Bertolotti v. State, 476 So. 2d 130 (Fla. 1985) 69, 71

Bevel v. State, 221 So. 3d 1168 (Fla. 2017) 30

Blackwell v. State, 76 Fla. 124, 79 So. 731 (Fla. 1918) 21

Braddy v. State, 111 So. 3d 810 (Fla. 2012) 71

Brooks v. State, 762 So. 2d 879 (Fla. 2000) 64, 67, 69, 71

Buck v. Davis, 580 U.S. 100 (2017) 36

Bush v. State, 295 So. 3d 179 (Fla. 2020) 26

Butler v. State, 493 So. 2d 451 (Fla. 1986) 15, 20

Johnson v. State, 252 So. 3d 1114 (Fla. 2018) 73

Lugo v. State, 845 So. 2d 74 (Fla. 2003) 69

Caldwell v. Mississippi, 472 U.S. 320 (1985)..... *passim*

Cardona v. State, 826 So. 2d 968 (Fla. 2002)..... 30

Carr v. State, 156 So. 3d 1052 (Fla. 2015) 75

Carroll v. State, 20 So. 3d 913 (Fla. 3d DCA 2009)..... 51

Chapman v. California, 386 U.S. 18 (1967) 29, 54, 59

City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985)..... 102

Clark v. Commonwealth, 833 S.W.2d 793 (Ky. 1991) 27

Clark v. State, 363 So. 2d 331 (Fla. 1978)..... 81

Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961)..... 83

Cook v. Smith, 288 Ga. 409 (2010)..... 91

Cruz v. State, 320 So. 3d 695 (Fla. 2021)..... 35, 67, 68

Cruz v. State, 372 So. 3d 1237 (Fla. 2023)..... 75, 94

Cummings v. Missouri, 71 U.S. 277 (1866)..... 90, 92

Cutter v. Wilkinson, 544 U.S. 709 (2005) 66

Darden v. Wainwright, 477 U.S. 168 (1986)..... 21

Davis v. State, 121 So. 3d 462 (Fla. 2013) 22

Davis v. State, 859 So. 2d 465 (2003) 52

Dawson v. Delaware, 503 U.S. 159 (1992)..... 66

Delhall v. State, 95 So. 3d 134 (Fla. 2012) ..... *passim*

Dugger v. Adams, 489 U.S. 401 (1989) 23, 47

Dugger v. Williams, 593 So. 2d 180 (Fla. 1991)..... 91

Duren v. Missouri, 439 U.S. 357 (1979)..... 111

Eddings v. Oklahoma, 455 U.S. 104 (1982) ..... *passim*

Epps v. State, 941 So. 2d 1206 (Fla. 4th DCA 2006) 80

Evans v. State, 177 So. 3d 1219 (Fla. 2015) 73, 74

Ferrell v. State, 29 So. 3d 959 (Fla. 2010) 30, 71

Fletcher v. Peck, 10 U.S. 87 (1810) 90

Florida Power Corp. v. Garcia, 780 So. 2d 34 (Fla. 2001) 49

Flowers v. Mississippi, 588 U.S. 284 (2019) 112

Fox v. Timepayment Corp., 316 So. 3d 818 (Fla. 5th DCA 2021) 50

Franqui v. State, 59 So. 3d 82 (Fla. 2011) 64

Franqui v. State, 804 So. 2d 1185 (Fla. 2001) 52

Frye v. Commonwealth, 231 Va. 370 (1986) 25

Furman v. Georgia, 408 U.S. 238 (1972) 36, 92, 96, 99

Garcia v. State, 644 So. 2d 59 (Fla. 1994) 52

Gardner v. Florida, 430 U.S. 349 (1977) 58

Garron v. State, 528 So. 2d 353 (Fla. 1988) 67

Gaulden v. State, 195 So. 3d 1123 (Fla. 2016) 47

Getzen v. Sumter Cty., 103 So. 104 (Fla. 1925) 47

Gonzalez v. State, 136 So. 3d 1125 (Fla. 2014) 72

Gregg v. Georgia, 428 U.S. 153 (1976) 37, 42, 93, 94

Hall v. Florida, 572 U.S. 701 (2014) 38

Harich v. State, 437 So. 2d 1082 (Fla. 1983) 30

Harmelin v. Michigan, 501 U.S. 957 (1991) 78

Harris v. State, 843 So. 2d 856 (Fla. 2003) 29

Harvey v. State, 529 So. 2d 1083 (Fla. 1988) 62

Hertz v. Jones,218 So. 3d 428 (Fla. 2017) 52

Hurst v. Florida, 577 U.S. 92 (2016) ..... *passim*

Hurst v. State, 202 So. 3d 40 (2016) ..... *passim*

Ice v. Comm., 667 S.W.2d 671 (Ky. 1984) 28

Jackson v. State, 18 So. 3d 1016 (Fla. 2009) 56, 85, 100

Jennings v. State, 123 So. 3d 1101 (Fla. 2013) 52

Kansas v. Carr, 577 U.S. 108 (2016) 42

Khorrami v. Arizona, 143 S. Ct. 22 (2022) 32

King v. State, 623 So. 2d 486 (Fla. 1993) 68, 70

Lara v. State, 699 So. 2d 616 (Fla.1997) 29

Lawrence v. State, 308 So. 3d 544 (Fla. 2020) 62, 71, 93

Lindsay v. State, 326 So. 3d 1 (Ala. Crim. App. 2019) 24

Lockett v. Ohio, 438 U.S. 586 (1978) 52

Lockhart v. McCree, 476 U.S. 162 (1986) ..... *passim*

Loyd v. State, 379 So. 3d 1080 (2023) 95

Luis v. United States, 578 U.S. 5 (2016) 112

Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987) 26

McCleskey v. Kemp, 481 U.S. 279 (1987) 36, 95, 112

McGautha v. California, 402 U.S. 183 (1971) 45

McKinney v. Arizona, 589 U.S. 139 (2020) 42

Merck v. State, 975 So. 2d 1054 (Fla. 2007) 63

Middleton v. State, 220 So. 3d 1152 (Fla. 2017) 75, 78

Miller v. State, 379 So. 3d 1109 (Fla. 2024)..... 97

Morgan v. State, 515 So. 2d 975 (Fla. 1987)..... 30

Mosley v. State, 209 So. 3d 1248 (Fla. 2016) 99

Neelley v. Walker, 67 F. Supp. 3d 1319 (M.D. Ala. 2014) 90

Nelson v. Quarterman, 472 F. 3d 287 (5th Cir. 2006)..... 53, 54

Offord v. State, 959 So. 2d 187 (Fla. 2007) 94

Pait v. State, 112 So. 2d 380 (Fla. 1959) 70

People v. Perez, 483 N.E.2d 250 (Ill. 1985)..... 27

Petrysian v. Metro. Gen. Ins. Co., 672 So. 2d 562 (Fla. 5th DCA 1996) 50

Phillips v. State, 608 So. 2d 778 (Fla. 1992)..... 30

Powers v. Ohio, 499 U.S. 400 (1991)..... 35

Proffitt v. Fla., 428 U.S. 242 (1976)..... 92, 93, 94

Puccio v. State, 701 So. 2d 858 (Fla. 1997) 52

Ramos v. Louisiana, 140 S. Ct. 1390 (2020)..... *passim*

Rauf v. State, 145 A.3d 430 (Del. 2016) 41, 44, 45

Ray v. State, 755 So. 2d 604 (Fla. 2000)..... 52

Reaves v. State, 826 So. 2d 932 (Fla. 2002)..... 36

Rigterink v. State, 193 So. 3d 846 (Fla. 2016) 68

Ring v. Arizona, 536 U.S. 584 (2002) ..... *passim*

Rodriguez v. State, 753 So. 2d 29 (Fla. 2000)..... 56

Roper v. Simmons, 543 U.S. 551 (2005) 38

Rose v. Mitchell, 443 U.S. 545 (1979) 107

Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841 (1984) 82, 91

Simmons v. South Carolina, 512 U.S. 154 (1994) 58

Smith v. Fairman, 862 F.2d 630 (7th Cir. 1988) 57

Smith v. Ill., 390 U.S. 129 (1968) 57

Smith v. State, 204 So. 3d 18 (Fla. 2016) 47

Smith v. State, 866 So. 2d 51 (Fla. 2004) 34

Spaziano v. Florida, 468 U.S. 447 (1984) 38, 39, 40

In re Standard Criminal Jury Instructions in Capital Cases, 244 So. 3d 172 (2018)..... 17, 25

Stapleton v. State, 286 So. 3d 837 (Fla. 5th DCA 2019) 48

State v. Adams, No. 23-CF-001904 (Fla. 13th Cir. Ct. April 12, 2024) 46

State v. Beasley, 580 So. 2d 139 (Fla. 1991)..... 80

State v. Billy Bennett Adams, III, No. 2D2024-1089 (2d DCA May 8, 2024) 47

State v. Daniels, 542 A.2d 306 (Conn. 1988)..... 37, 95

State v. Dixon, 283 So. 2d 1 (Fla. 1973) ..... *passim*

State v. Jackson, 306 So. 3d 936 (Fla. 2020) 3, 4, 49, 50

State v. Larzelere, 979 So. 2d 195 (Fla. 2008) 30

State v. Poole, 297 So. 3d 487 (2020)..... *passim*

State v. Rhoden, 448 So. 2d 1013 (Fla. 1984) 81

Stephens v. State, 787 So. 2d 747 (Fla. 2001), Or 24, 25, 76

Strickland v. Washington, 466 U.S. 668 (1984) 79

Tennessee v. Lane, 541 U.S. 509 (2004) 80

Theisen v. Old Republic Ins. Co., 468 So. 2d 434 (Fla. 5th DCA 1985) 50

Trease v. State, 768 So. 2d 1050 (Fla. 2000)..... 61, 62

Trocola v. State, 867 So. 2d 1229 (Fla. 5th DCA 2004)..... 75

Trop v. Dulles, 356 U.S. 86 (1958) 31

United States v. Aquart, 912 F.3d 1 (2d Cir. 2018) 95

United States v. Brown, 381 U.S. 437 (1965) 90, 91

United States v. Lovett, 328 U.S. 303 (1946) 82, 91

United States v. Orange, 447 F.3d 792 (10th Cir. 2006) 111

United States v. Tanner, 544 F. 3d 793 (7th Cir. 2008) 76

Urbin v. State, 714 So. 2d 411 (Fla. 1998)..... 71, 72

Vasquez v. Jones, 496 F.3d 564 (6th Cir. 2007)..... 58

Village of Willowbrook v. Olech, 528 U.S. 562 (2000)..... 102

Wade v. State, 41 So. 3d 857 (Fla. 2010) ..... *passim*

Wainwright v. Witt, 469 U.S. 412 (1985) 104, 108

Walker & La Berge, Inc. v. Halligan, 344 So. 2d 239 (Fla. 1977) 48

Warren v. State, 307 So. 3d 871 (Fla. 3d DCA 2020)..... 76

Way v. Dugger, 568 So. 2d 1263 (Fla. 1990) 30

Westerheide v. State, 831 So. 2d 93 (Fla. 2002) 31, 93

Wiggins v. Smith, 539 U.S. 510 (2003) 79

Witherspoon v. Illinois, 391 U.S. 510 (1968)..... 106

Woldt v. People, 64 P.3d 256 (Colo. 2003) 90

Woodel v. State, 804 So. 2d 316 (2001)..... 63

Woodson v. North Carolina, 428 U.S. 280 (1976)..... 58

Woodward v. Alabama, 134 S. Ct. 405 (2013)..... 96

Yacob v. State, 136 So. 3d 539 (Fla. 2014)..... 62

U.S. Constitution

U.S. Const. art. I, § 10..... 82, 90

U.S. Const. amend. I 66

U.S. Const. amend. V 56

U.S. Const. amend. VI ..... *passim*

U.S. Const. amend. VIII..... *passim*

U.S. Const. amend. XIV..... *passim*

State Constitution

Art. III, § 7, Fla. Const..... 86

Art. III, § 8, Fla. Const..... 86

Statutes

§ 40.01, Fla. Stat..... 104

§ 40.011, Fla. Stat..... 109

§ 90.806, Fla. Stat. (1995) 56, 57

§ 105.031, Fla. Stat. (2023) 96

§ 406.135, Fla. Stat. (2024) 48

§ 704.05, Fla. Stat. (1999) 48

§ 775.022, Fla. Stat. (2019) ..... *passim*

§ 775.082, Fla. Stat. (2019) ..... *passim*

§ 775.087, Fla. Stat. (2019) 48

§ 921.141, Fla. Stat. (2023) ..... *passim*

Other Authorities

ABA, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 925 (2003)..... 78, 79

Carol S. Steiker & Jordan R. Steiker, *The American Death Penalty and the (In)visibility of Race*, 82 U. Chi. L. Rev. 243, 261 (2015)..... 107

Chelsea Creo Sharon, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 Harv. C.R.-C.L.L. Rev. 223 (Winter 2011) 96

Death Penalty Information Center, *States with and without the death penalty*, https://deathpenaltyinfo.org/states-landing..... 38

Gilbert King, *Devil in the grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America* (2012)..... 105

James Unnever, Francis Cullen & Cheryl Lero Johnson, *Race, Racism, and Support for Capital Punishment*, 37 Crime & Just. 45, 83 (2008)..... 107

Jennifer Eisenberg, *Ramos, Race, and Jury Unanimity in Capital Sentencing*, 55 Loy. L.A. L. Rev. 1085, 1104 (2022)..... 95

Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 Mich. St. L. Rev. 793, 809 (2011)..... 96

Michael L. Radelet & G. Ben Cohen, *The Decline of the Judicial Override*, 15 Ann. Rev. L. & Soc. Sci. 539, 548-49 (2019) 39

STATEMENT OF CASE AND FACTS[1]

Case History

In 2005, 23-year-old Michael Jackson and three co-defendants—Tiffany Cole, Alan Wade, and Bruce Nixon—kidnapped and killed Reggie and Carol Sumner. Mr. Jackson had an idea to rob the Sumners with the agreement of Tiffany Cole, the Sumners' family friend, and Alan Wade, who recruited the fourth co-defendant, Bruce Nixon. T.641, T.1154.[2]

According to Mr. Nixon, on July 8, 2005, he and Mr. Wade entered the Sumners' home by asking to use the phone. T.1130. They incapacitated the Sumners with rope and tape. *Id.* Mr. Jackson then entered the house and, along with Mr. Wade, searched the home for credit cards and financial documents. T.1130-35. Mr. Nixon and Mr. Wade put the Sumners in the trunk of their car and drove them to the woods, where, days earlier, the

---

[1] Mr. Jackson presents additional facts relevant to his claims in the argument section.

[2] Citations to "T." refer to the trial transcript, dated May 15, 2023 to May 24, 2023. Citations to "T1." refer to the voir dire in Mr. Jackson's attempted trial dated June 6, 2022, through June 8, 2022. Citations to "R." refer to the Record on Appeal submitted in three volumes.

three male co-defendants had dug a hole with shovels stolen by Mr. Nixon. T.1117, 1136-42. While Ms. Cole stood at a separate location, the three male co-defendants placed the still-living Sumners in the hole and buried them. T.1144-45. The next day, Ms. Cole and Mr. Wade returned to the Sumners' home and stole additional items. T.1149. Over the next several days, Mr. Jackson repeatedly used the Sumners' ATM card to withdraw cash and lied to law enforcement when the ATM card stopped working. T.681, 889. Mr. Wade, meanwhile, was arrested in possession of a check from the Sumners' account made payable to him for $8,000. *Wade v. State*, 41 So. 3d 857, 878-79 (Fla. 2010).

After being questioned by police, Bruce Nixon eventually took the police to the location where the Sumners were buried. T.1156. Mr. Nixon pled guilty to second-degree murder in exchange for an expected sentence of 52 years to life. T.1157. Mr. Jackson waived his right to put on any mitigation evidence at the penalty phase of his 2007 trial. T.1613. Even still, four of the 12 jurors voted against his death sentence. R.2902. The other two co-defendants were also convicted and received non-unanimous death sentences. R.789.

Although Mr. Jackson had disputed his guilt in 2007, he took full responsibility for his actions a few years later, and even returned to court so that he could do so publicly in 2011. T.1792. He also waived all guilt-related issues against the advice of his attorney. *Id.*

Hurst Relief

In 2017, Mr. Jackson submitted a motion to vacate his death sentence under *Hurst v. State*, 202 So. 3d 40 (2016), seeking resentencing under the newly-acknowledged requirement of juror unanimity. R.44-69, 112-120. He was granted such relief, as were Tiffany Cole and Alan Wade. R.121-126, 789.

In September of 2019, Hurricane Dorian derailed Mr. Jackson's scheduled sentencing trial. R.1031-32. At the time, another vote of eight to four for death would have resulted in a life sentence. *See* Ch. 2017-1, § 1, Laws of Fla.

In February of 2020, citing *State v. Poole*, 297 So. 3d 487 (2020), the prosecutor filed a motion to "dismiss the [scheduled] resentencing proceeding and maintain [Mr. Jackson's] sentence[s] of death[.]'" *State v. Jackson*, 306 So. 3d 936, 939 (Fla. 2020). The trial court quickly denied this frivolous motion, along with the State's

motion to delay the scheduled resentencing. R.1124-25. Later, this Court similarly denied the motion, because it "'lack[ed] jurisdiction to reconsider' the final order that vacated Jackson's death sentences." *Jackson*, 306 So. 3d at 939 (quoting circuit court order). But by that time, November of 2020, the global Coronavirus pandemic had shuttered jury trials across the state. R.2905. The State thus shut Mr. Jackson's 2020 unanimous-sentencing window, and the window remained shut through 2021.

When capital trials resumed in 2022, Mr. Jackson was again ready for trial. R.2905. The trial court had silently denied his 2019 motion for severance from Mr. Wade, R.789-96, but he renewed it orally before the 2022 trial, unsuccessfully. R.2905. Not until the trial court's ineffectual attempt to seat two different sentencing juries from one panel imploded, on June 8, 2022 (because Mr. Wade had an outburst in the courtroom and the judge had not called enough jurors (T1.904-15)), did the court finally grant Mr. Jackson's severance motion. R.2447-48. Mr. Wade's trial went forward, while Mr. Jackson's was reset due to the insufficiency of jurors. T1.905-13; R.2905. At the time, a vote of eight to four for death for Mr. Jackson still would have resulted in a life sentence.

Indeed, on resentencing, under the law of unanimity, Mr. Wade received a life sentence (although the jury was deprived of this evidence at Mr. Jackson's eventual resentencing, *see* Point 5). R.2920-23.

One assistant district attorney prosecuted all of the co-defendants, including Mr. Wade in his 2022 life sentence. In 2023, this same prosecutor raced to persuade the Legislature to pass the new non-unanimity law before Mr. Jackson's new trial date, and then rushed to try Mr. Jackson before pattern jury instructions were available. R.2870-80; T.628; Point 11, *infra* (describing State rushing the Legislature to enact the new law). Although defense counsel immediately asked for a continuance to properly defend against this new law, *see* Point 10, the trial court denied the motion without explanation. R.2879. Less than a month after the ink on the new law dried, Ch. 2023-23, § 1, Laws of Fla. effective April 20, 2023, and before new standard instructions were available, Mr. Jackson's trial began.

Resentencing

The State's case largely reiterated Mr. Jackson's guilt phase trial, with two of the State's six witnesses appearing only by

"perpetuated" testimony from that trial. This included Carol Sumner's daughter, Rhonda Alford, who had declined to testify, R.4445, and co-defendant Bruce Nixon, who had recently recanted his prior testimony, a fact Alan Wade's jury heard but the trial court suppressed at Mr. Jackson's trial (*see* Point 6). T.1229.

Mr. Jackson presented three core theories of mitigation: 1) his mental and physiological differences brought on by parental abandonment, prenatal drug and alcohol exposure, and other adverse childhood experiences, 2) the responsibility he took for his actions years before he knew that he would receive a resentencing, and 3) the dramatic change he had made in his life due largely to a spiritually awakening over a decade before resentencing.

As to his childhood, the defense offered evidence that Mr. Jackson's biological mother had used drugs and alcohol throughout her pregnancy. T.1261. According to neuropsychologist Dr. Robert Ouaou, Mr. Jackson as a result developed a neurodevelopmental disorder. T.1437. His biological mother's alcohol abuse also aligned with abnormalities in Mr. Jackson's cerebellum, the brain part affecting emotional and cognitive processing. T.1513.

In the couple years after his birth, his biological mother neglected him, leaving him home alone and even once trying to sell him. T.1262. She eventually abandoned him altogether and moved across the country. T.1263. Although his mother never came back to visit him, she repeatedly promised to do so; thus, even though his grandmother had taken over raising him, Mr. Jackson developed separation anxiety disorder and behavioral issues. T.1265, 1384-86, 1597. Although professionals recommended a psychoeducational evaluation, he never received it. T.1597-98.

A renowned psychologist and professor, Dr. James Gabarino, testified that Mr. Jackson had experienced several "adverse childhood experiences" ("ACE"), which predict a wide-range of health and mental health problems, including depression, suicidal behavior, drug abuse, and even some forms of cancer and reduced life expectancy. T. 1371-73. Dr. Gabarino found that Mr. Jackson had endured seven or eight ACE's, a statistic disproportionately shared by people who face murder charges. T.1374.

Nevertheless, a shift began to happen in Mr. Jackson's life in 2009 when he found religion as a Messianic Jew—a subset of Jewish faithful who believe in Jesus. T.1319. The next year, Mr.

Jackson reached out to family friend Stephanie Stewart and told her that he wanted to fully acknowledge his guilt so that the Sumners' family would have closure. T.1321. After much effort, in 2011, Mr. Jackson returned to court so he could apologize to the Sumners' family publicly. T.1323-24.

Throughout the years, Mr. Jackson continued to be involved in religious studies, earning several certificates and accomplishments. T.1324-25. Mr. Jackson, who one witness referred to as "the most ardent and zealous follower of Jesus" he had ministered to, regularly communed with other religious visitors and provided support to other incarcerated people. T.1339, 1342, 1478, 1480. This dedication led Chaplain Michael Zoosman to give his "unequivocal[]" opinion that Mr. Jackson was both "sincere and passionate" about his religious commitments. T.1478.

After presenting the above evidence, the defense proposed 26 mitigating factors encapsulating it. T.1806-08. The State submitted eight aggravating factors,[3] and delivered a summation that largely

[3] The aggravating factors, all of which the jury found, included Mr. Jackson's: 1) prior conviction for a felony and sentence of probation, 2) conviction of another capital felony (given the

discounted, and even discredited, Mr. Jackson's sincerely-held religious beliefs, while calling him evil and invalidating his other mitigation (*see* Point 8).

After deliberating for just over two hours, the jury voted for death by the minimum-now-allowed vote of eight to four. T.1827, 1833-35. But as shown in Point 1, the court's charge led the jury to believe that its vote—whether for life or death—would mean no more than a recommendation that the court could alter if it chose. Due in part to the court's denial of Mr. Jackson's continuance motion until model instructions under the new law were available, the jury never heard that a vote of just one less person for death would have *assured* Mr. Jackson a sentence of life (as the model instructions expressly state, the new law requires, and counsel argued below). *See* Points 1, 10, *infra*.

After the death vote, Mr. Jackson seized an opportunity to speak with some of the Sumners' family members. Although kept

---

concurrent murders), 3) commission of murder during kidnapping, 4) commission to avoid arrest, 5) commission especially heinous, atrocious, or cruel, 6) commission cold, calculated, and premeditated manner, 7) commission for financial gain, and 8) commission against an elderly or vulnerable victim. T.1799-1802.

from the jury, Mr. Jackson had long since made contact with some of the family members and had already earned forgiveness from some close family members, such as Carol Sumner's daughter who declined to testify at the resentencing. T.1846-48.

Multiple family members of the Sumners chose to speak at the post-verdict *Spencer* hearing. For instance, Reginald Sumner's brother told Mr. Jackson "all is forgiven on my part," and that he "had no harm against [Mr. Jackson] whatsoever." T.1846. His sister-in-law told Mr. Jackson she believed he had changed and knew he was going to be "a mighty witness in prison." T.1847. Reginald Sumner's sister told Mr. Jackson that she forgave him and would be praying for him, and his niece echoed that forgiveness. T.1847-48.

Timeline of statutory changes and relevant decisions

For ease of reference, Table 1 summarizes the changes in Florida capital sentencing law relevant to this appeal—both decisional and statutory. At the time this brief is being filed, Mr. Jackson is the only known person with a *Hurst* resentencing condemned to death under the 2023 amendment permitting non-unanimity.

Table 1

Relevant Date	Development	Legal implications
1996	Ch. 1996-302, § 1, Laws of Fla.	Requires jury recommendation of life or death by majority vote (including finding of aggravator) which judge may override.
2005	Mr. Jackson's Crime	
Jan. 2016	*Hurst v. Florida*, 577 U.S. 92 (2016)	Invalidates extant statute; holds a jury must decide all facts needed for a death sentence.
March 2016	Ch. 2016-13, § 3, Laws of Fla. (hereafter 2016 amendment)	Requires unanimous jury to find aggravator needed for death sentence, ten votes for an *advisory* death recommendation, and three or more for *binding* life recommendation
Oct. 2016	*Hurst v. State*, 202 So. 3d 40 (Fla. 2016)	Requires unanimous recommendation of death, and on all findings needed for recommendation.
March 2017	Ch. 2017-1, § 1, Laws of Fla. (hereafter 2017 amendment)	Requires unanimous recommendation of death, and on all findings needed for recommendation. Life recommendation *binds*; death remains *advisory*.
2020	*State v. Poole*, 297 So. 3d 487 (2020)	Receded from *Hurst v. State* to the extent that it requires unanimous jury finding for anything but a single aggravator.
April 20, 2023	Ch. 2023-23, § 1, Laws of Fla. (hereafter 2023 amendment)	Requires unanimous jury to find aggravator needed for death, eight votes for an *advisory* death recommendation, and five or more for *binding* life recommendation.
May 15, 2023	Mr. Jackson's trial starts.	

SUMMARY OF ARGUMENT

It is hard to overstate the unique and arbitrary circumstances surrounding Michael Jackson's eight-to-four death sentence in May of 2023. If his resentencing had taken place just one month earlier, before the capital sentencing law changed in April 2023, *see* Table 1, eight votes for death would have meant that he lived. If the trial judge had correctly applied the amended law to apply only prospectively, as the Legislature unambiguously commands, § 775.022(3)(a), Fla. Stat. (2019), only a unanimous jury vote could have resulted in death. Point 3. In either case, the very same eight-to-four jury vote would have saved Mr. Jackson's life.

And even this on-the-cusp vote might have tilted in favor of life if the trial court had not failed to instruct the jury that, under Florida law, a life recommendation would be binding. The court's error followed from not only its failure to read the clear terms of the law, which had included this protective provision since 2016, *see* Table 1, but also from its refusal to believe counsel was describing the law accurately, and finally from its decision to deny the defense's motion to continue. A continuance would have allowed the court to confirm—with model jury instructions that came out

shortly after Mr. Jackson was sentenced—the arguments Mr. Jackson's attorneys were making all along: that the jury could not be lawfully instructed that its life vote would be a mere recommendation subject to the court's approval rather than a binding determination that the court could not modify. *See* Points 1 (*Caldwell* error), 10 (continuance erroneously denied).

Instead, the court improvised with instructions that mischaracterized the law and repeatedly misled the jury as to their authority to issue a binding life vote, violating *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In doing so, the court at once deprived Mr. Jackson of his statutory, common-law and constitutional rights, by saddling him with the more onerous demands of the amended law (Points 2 (constitutional error), 3 (section 775.022(3)(a) error), & 4 (res judicata)), while withholding from the jury its "substantial discretion" to compel a life sentence and thereby implement the law's safeguard against life override. Point 1.

As not only one of the first death sentences to reach this Court under the 2023 amendments, but also an outlying *Hurst* resentencing conducted under non-unanimity, this case presents

several constitutional issues of first impression. *See* Points 2, 11-13. But this Court need not reach these broader issues, because the trial court committed narrower errors also violating Mr. Jackson's constitutional and statutory rights, such as suppressing one co-defendant's life verdict (Point 5) and another co-defendant's recantation (Point 6). The trial court also failed to consider mitigation (Point 7) and allowed death disqualification despite its disproportionate exclusion of prospective jurors of color (Point 14). Similarly, the prosecutor made several improper and prejudicial comments constituting misconduct. *See* Point 8. All of these errors require reversal each on their own and certainly in the aggregate. *See* Point 9. This is particularly true when one considers that the jury returned only the minimum number of votes that would allow a death recommendation, a fact which, as this Court has repeatedly found in other cases, highlights the prejudice caused by each of the errors at Mr. Jackson's trial. *See* n.11 *infra.*

A jury erroneously deprived of lawful instructions and of constitutionally relevant evidence cannot issue the reliable sentencing decision the Eighth Amendment and this Court's

precedents demand. For all of these reasons, Michael Jackson's death sentence cannot stand.

ARGUMENT

1. The trial court's improvised and inaccurate jury instructions misled the jury about its role in violation of section 921.141 and *Caldwell v. Mississippi*.

The four jurors who voted to sentence Michael Jackson to life after just two hours of deliberation did not know that, under Florida law, they could compel a mandatory life sentence by persuading just one more juror to vote for life. None of the jurors knew they had this power because the trial judge, over repeated defense objections, did not tell them. The court falsely equated binding life recommendations (required under Florida law since the 2016 amendment, *see* Table 1, *supra*) and non-binding death recommendations,[4] and described both verdicts as mere recommendations to the court. In doing so, the court incorrectly instructed the jurors, *Butler v. State*, 493 So. 2d 451, 452 (Fla. 1986), and unconstitutionally misled them as to their sentencing

[4] *Compare* § 921.141(3)(a)(1), Fla. Stat. (2023) (life recommendation must be followed), *with* § 921.141(3)(a)(2) (trial court may reject death recommendation).

power. *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (hereafter *Caldwell*). *See* U.S. Const. Amends. VIII; XIV. Both the statutory and the constitutional errors demand reversal.

A. The court misled the jury as to its sentencing power under the applicable statute and thus committed instructional error.

Michael Jackson was tried for his life in May of 2023, only weeks after passage of Senate Bill 450, which allowed once more for non-unanimous death recommendations—but with the proviso that the sentencing judge remains *bound* to a jury's *life* verdict.[5] Although counsel had asked the court to continue trial for model jury instructions under the new law, the court denied the motion: "[Y]ou asked me to continue this because there is not jury instructions yet. So I am shooting from the hip . . . that's what I am going to do." T.628.

The model jury instructions correctly inform the jury of their sentencing role:

> If fewer than 8 jurors vote for the death penalty, the Court *must* sentence the defendant to life in

[5] Because the statute permits the judge to override death recommendations but requires the judge to adhere to life recommendations, for the purpose of clarity in this brief, life "recommendations" are referred to as life verdicts.

> prison without the possibility of parole. If 8 or more jurors vote for the death penalty, your recommendation must be for the death penalty. This recommendation is not binding on the Court.

Fla. Std. Jury Instr. (Crim.) 7.11 (emphasis added). Under Florida law, and prior jury instructions, life recommendations had for years been binding. *See In re Standard Criminal Jury Instructions in Capital Cases*, 244 So. 3d 172, 192 (2018) (in the event of non-unanimity, "the defendant will be sentenced to life in prison without the possibility of parole").

By contrast, the trial court repeatedly and inaccurately told the jurors that they would be merely providing a sentencing "recommendation" to the trial court, which would make the final decision. Not once did the court explain that under the new statute five life votes would compel a life sentence or that Florida law treats life and death recommendations differently. Instead, in its final charge, the court conveyed that they were the same:

> Now if eight or more jurors determine the defendant should be sentenced to death then the jury's recommendation to the Court would be a sentence of death. If less than eight of you determine the defendant should be sentenced to death then the jury's recommendation to the Court is for a life sentence without the

> possibility of parole and I will give you the verdict form to record that as well. . . . [P]lease understand that this is a recommendation that you are making to the court.

T.1810, 1817. These statements punctuated a litany of misleading references, beginning during jury selection, to a "recommendation" that the jury would be making to the court, without differentiating between the binding life verdict and non-binding death recommendation. *See* T.34, 80, 88, 95, 280, 429, 604, 606, 607, 608, 654, 658, 659, 660, 668, 941, 1069, 1216, 1217, 1657, 1804, 1806, 1810, 1811, 1817, 1818, 1823.

The court's repeated unqualified references to a "recommendation" did not go unchallenged. Defense counsel objected that the court's proposed charge "suggested to the jury that their verdict is advisory when if they return a verdict of life, it is not advisory. It is life." T.1711. Counsel made such objections as early as during voir dire and consistently throughout trial. *See* T.88-89, 299-300, 1465, 1708-1710, 1824-1826. Counsel objected, including under the Eighth Amendment and *Caldwell*, that the charge would "eliminate[] the jury's sense of responsibility." T.1668-69. So numerous were defense counsel's objections that the court

granted a "standing objection" to the recommendation language and the prosecutor said, "I think the objections have been preserved. The state waives any contemporaneous objections to the jury instructions pursuant to your prior objections." T.1826; *see also* T.300.

Despite counsel's repeated objections and the statute's plain language, the court persisted in characterizing the jury verdict as a recommendation on which the court would have final say. The court explained that its reasoning for doing so was that it did not "want the jury to think that they are responsible for it" because, in the court's view, "the buck stops at [the court's] desk." T.1664, 1710; *see also* T.1669 ("[I]t's not a conclusive finding by the jury. It's a recommendation."); T.1711 ("I am not comfortable with the leaving the suggestion to the jury that they are responsible for the sentencing because they are not.")

At one point, the court acknowledged "that if their [the jury's] recommendation is life that's it. It's over." T.1711-12. But contrary to this acknowledgment and the plain language of the statute, the court never told the jury that it was mandated to impose life upon a

jury vote for life. T.1711-1712, 1798-1822. After the charge, the defense renewed their objections. T.1826.

When the jury returned a verdict after just two hours of deliberating, it recommended death by a vote of eight to four and read the following statement from the verdict sheet that mirrored the court's instruction:

> We, the jury, understand that if there are eight or more votes for death then the jury's recommendation is for a sentence of death and if there are ... less than eight votes for death then the jury's recommendation [is] for a sentence of life without the possibility of parole[.]

T.1827, 1833-1837; R.3333.

In sum, the trial court committed instructional error. This Court has long held that a trial court "should not give instructions which are confusing, contradictory, or misleading." *Butler v. State*, 493 So. 2d 451, 452 (Fla. 1986). Because the trial court's improvised jury instructions inaccurately described the plain terms of section 921.141(3)(a)(1), as later confirmed by the model jury instructions, this alone requires reversal. *See, e.g.*, *Butler*, 493 So. 2d at 453 (finding "misleading" instruction regarding a legal defense

required reversal where "there exists a reasonable possibility that it contributed to the conviction").

B. The incorrect improvised charge misled the jury by omitting its statutory authority to issue a binding life sentence and thus violated *Caldwell*.

The trial court's instruction also violated this Court's guidance, given for over a century, that a trial court may not allow communications that would "cause the jury to lessen their estimate of the weight of their responsibility." *Blackwell v. State*, 76 Fla. 124, 79 So. 731 (Fla. 1918). The Supreme Court applied this reasoning to capital sentencing in *Caldwell*, when it condemned remarks undermining a sentencing jury's "awareness of its 'truly awesome responsibility.'" 472 U.S. at 341 (internal citation omitted). Such an awareness is "indispensable to the Eighth Amendment's need for reliability in the determination that death is appropriate punishment in a specific case." *Id.*

Thus, in *Caldwell* and the decisions since, the Court has found error in prosecutorial argument "mislead[ing] the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright*, 477 U.S. 168, 184, n.15 (1986). Logically,

the authoritative statements in a trial court's charge, when similarly misleading, raise far graver constitutional concerns than the mere argument of counsel. *See*, *e.g.*, *Davis v. State*, 121 So. 3d 462, 492 (Fla. 2013) (presuming "that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow" them) (citing *United States v. Olano*, 507 U.S. 725, 740–41 (1993)).

In sum, a *Caldwell* error is committed when a jury hears argument or a jury charge that 1) misleads the jury as to its role, and 2) lessens the jury's sentencing responsibility. *See* 472 U.S. at 336 ("The argument was inaccurate, both because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform."). The communications and charge to Mr. Jackson's jury, over repeated defense objection, met both of these criteria.

i. The Court's instruction misled the jury

Under the first criterion, "a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams,* 489 U.S. 401, 407 (1989). Here, the trial judge repeatedly misled the jury with its unadorned and unqualified use of the term "recommendation," with respect to a life vote.

Since 2016, Florida has outlawed life-to-death judicial override by empowering the jury to issue a *binding* recommendation of a sentence of life imprisonment. "If the jury has recommended a sentence of . . . [l]ife imprisonment without the possibility of parole, the court *shall* impose the recommended sentence of life." § 921.141(3)(a) (1) (emphasis added); *compare with* § 921.141(3)(a) (2) (upon a death recommendation, "the court, after considering each aggravating factor found by the jury and all mitigating circumstances, *may* impose a sentence of life imprisonment without the possibility of parole or a sentence of death") (emphasis added).

This is a power that, according to the model jury instructions, should be communicated to the jury: "If fewer than 8 jurors vote for the death penalty, the Court *must* sentence the defendant to life in

prison without the possibility of parole." Fla Std. Jury Instr. (Crim.) 7.11 (2023) (emphasis added).

But the trial judge's charge, made after the 2023 change in the new law but before the model jury instructions, omitted this critical feature of the law. Instead, it aligned with the court's belief, communicated to the parties, that the jury was not issuing any "conclusive finding . . . [i]t's a recommendation." T.1669. The trial judge thereafter misled the jury to believe that he could lawfully modify any sentencing recommendation—when he could do so only for death.

This Court should not condone this misleading description of the Legislature's clear commands. The statute is plain, even if the model charge was not yet ready.[6] The parties explicitly discussed the asymmetry in the law. T.1711-12. If the court did not trust the attorneys' argument without a new model charge, it should have granted a brief continuance to wait for it. *See Stephens v. State*, 787

[6] Alabama decisions, concerning the binding "recommendations" its capital juries now issue, confirm the plain meaning of "shall" in the capital sentencing context. *See Lindsay v. State*, 326 So. 3d 1, 12 n.1 (Ala. Crim. App. 2019) ("The jury's sentencing verdict is *no longer a recommendation*.") (emphasis added) (citing Ala. Code §§ 13A-5-46 (f) (using "recommend"), 13A-5-47 (using "shall")).

So. 2d 747, 755 (Fla. 2001) (extolling "standard jury instructions").[7] Instead, the court falsely repeated its charge that a "life" or "death" vote would have the same outcome: it would only be a recommendation that the court could disregard. T.88, 1810, 1817, 1823, SSR. 5297.

The trial court's insistence on "shooting from the hip" by issuing its instructions in the short stretch of time between passage of the 2023 law and before the adoption of model instructions contributed to its erroneous charge. *Compare Frye v. Commonwealth*, 231 Va. 370, 398 (1986) (vacating death sentence where jury was told that a court could set aside its verdict, but was not told about the limit to the court's ability to do so) *with Allen v. State*, 322 So. 3d 589, 597, 600 (Fla. 2021) (finding no *Caldwell* violation where "the jury was properly informed as to its role in [the defendant's] sentencing").[8]

---

[7] Or, as the authors of the standard instructions later did, the court could have modified the 2018 standard instructions to adjust for the switch to non-unanimity. *In re Standard Instructions*, 244 So. 3d at 192 ("the defendant will be sentenced to life in prison").

[8] *See also Allen* Br. of State, No. SC19-1313, 2020 WL 4043843 at *67 (Fla. May 7, 2020) (pointing to correct jury charge given that, if

Significantly, the court did not ever "withdraw or correct its misleading statements or accurately describe the jury's role." *Compare Mann v. Dugger*, 817 F.2d 1471, 1482–83 (11th Cir. 1987), *aff'd on reh'g*, 844 F.2d 1446, 1588 (11th Cir. 1988) (emphasizing misleading statements never corrected) *with Bush v. State,* 295 So. 3d 179, 208-09 (Fla. 2020) (rejecting *Caldwell* claim under 2016 statute due to stray references to "recommendation" where trial court ultimately used correct standard instructions on effect of life recommendation) (citing *In re Standard Instructions*, 214 So. 3d 1236, 1263 (2017) (in the event of non-unanimity, "the defendant will be sentenced to life")).

ii. The Court's incorrect charge lessened the jury's sense of responsibility.

Despite the Legislature's clear contrary intent, the trial judge explicitly aimed to reduce the jury's sense of sentencing responsibility. In his own words, he "d[id] not want the jury thinking that they are solely responsible for the sentence" when "the buck stops at [the court's] desk." T.1710. Despite the black-

---

the death vote is less than unanimous, "'the trial court *shall* impose a sentence of life without the possibility of parole[]'").

and-white law binding him to follow a life recommendation, he was just "not comfortable with leaving the suggestion to the jury that they are responsible for the sentencing decision because they are not." T. 1711. The court's misguided concern cuts to the very heart of *Caldwell* error, which concerns not only incorrect instructions to juries, but particularly ones that incorrectly mislead a capital jury as to its power and responsibility in capital sentencing.

For instance, in *Commonwealth v. Montalvo*, the Supreme Court of Pennsylvania found "textbook . . . *Caldwell* error" when the prosecutor's repeated misleading use of the word "recommendation," endorsed in part by the judge, "specifically directed the jurors that the trial court, and not the jury, would determine whether Appellant would receive a sentence of life imprisonment or death." 651 Pa. 359, 398, 401 (Pa. 2019) (finding trial counsel ineffective for failing to object to the error). *See also Clark v. Commonwealth*, 833 S.W.2d 793, 795-96 (Ky. 1991) (finding *Caldwell* error when prosecutor "us[ed] the term 'recommend' 25 times in opening and closing during the sentencing phase to reinforce the notion that the final decision rests with the trial judge"); *compare with People v. Perez*, 483 N.E.2d 250, 260 (Ill.

1985) (no *Caldwell* error where, although the prosecutor used the word "recommend," the court instructed on circumstances when "the court *must* sentence the defendant to death") (emphasis in original).

Although not required for reversal, the record suggests that Mr. Jackson's jury may have felt a diminished sense of responsibility for its life and death decision. After hearing five days of evidence and argument, the jury deliberated only just over two hours. T.1827, 1833. *See Ice v. Comm.*, 667 S.W.2d 671, 674, 676 (Ky. 1984) (anticipating *Caldwell* and reversing in part due to prosecutor's misleading comments about appeal, and noting a death deliberation period of little more than an hour). Mr. Jackson's co-defendants, sentenced for the same crime, all received sentences less than death. *See* Facts, *supra*. And his own jury split eight to four, garnering the bare minimum number of death votes needed.

The erroneous instructions hamstrung the defense in this regard. Although not always a model of clarity,[9] counsel attempted

[9] *See e.g.*, T.1767 ("If five jurors vote for life that is considered a life recommendation.").

to save Mr. Jackson's life by arguing that "it takes five jurors to get a life sentence" and "that your decision is the final decision." T. 1767. But their plea lacked backing by the judge, who left the jurors with repeated instructions that they could only issue a life "recommendation." T.1804, 1810, 1817, 1823, SSR. 5297.

Given all of this, the Court "cannot say that" the erroneous charge information "had no effect on the sentencing decision[,]" *Caldwell*, 472 U.S. at 341, or speculate that four life jurors empowered with the knowledge that they could compel a sentence of life with one more vote would not have fought longer than two hours and succeeded.[10] This is particularly true here where the jury's recommendation reflected by a death vote "by the narrowest of margins. . . and only one more vote [] needed" for [] life." *Harris v. State*, 843 So. 2d 856, 869 (Fla. 2003).[11]

---

[10] *Caldwell* thus incorporates its own internal prejudice test, requiring the State to prove the misleading information had "no effect," which the State cannot do here. But to the extent the Court would utilize an external harmless error test for this constitutional error, the State cannot prove it harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

[11] *See also Lara v. State*, 699 So. 2d 616, 619 (Fla.1997) (finding prejudice in instructional error given "the seven-to-five vote by the

These statutory and constitutional errors require reversal.

2. The new statute allowing non-unanimity in capital sentencing violates the Sixth, Eighth, and Fourteenth Amendments.

Under the new statute, just eight members of a jury of nine white jurors, two Black jurors, and one Hispanic juror, R.4644, non-unanimously recommended death for Michael Jackson. This death sentence violates the Constitution in ways not briefed or considered by this Court in *State v. Poole*, 297 So. 3d 487 (2020), which the Court decided before the U.S. Supreme Court highlighted the intolerable racism baked into non-unanimous verdicts in *Ramos v. Louisiana,* 140 S. Ct. 1390 (2020).

---

jury"); *Way v. Dugger*, 568 So. 2d 1263, 1267 (Fla. 1990) ("[W]e cannot be certain that had the jury been properly instructed, one additional juror would not have voted for life."); *Cardona v. State*, 826 So. 2d 968, 981 (Fla. 2002) (finding prejudice in light of eight-to-four vote); *Ferrell v. State*, 29 So. 3d 959, 986 (Fla. 2010) (same with seven-to-five vote); *Phillips v. State*, 608 So. 2d 778, 783 (Fla. 1992) (same and noting the "swaying of the vote of only one juror would have made a critical difference"); *State v. Larzelere*, 979 So. 2d 195, 203 (Fla. 2008) (same in light of seven-to-five vote); *Bevel v. State*, 221 So. 3d 1168, 1182 (Fla. 2017) (similar); *Morgan v. State*, 515 So. 2d 975, 976 (Fla. 1987) (finding error harmful in seven-to-five case because of the difference one vote would make); *Harich v. State*, 437 So. 2d 1082, 1086 (Fla. 1983) (finding no prejudice because jury voted nine to three for death).

As shown further below, and preserved in the trial court,[12] *see* R.2924-57, 3070-75, the new statute discriminates by race and thus violates the Eighth and Fourteenth Amendments. An extreme outlier, it also violates "evolving standards of decency that mark the progress of a maturing society" in violation of the Eighth Amendment. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). And, based on a new statutory provision not addressed in *Poole* or *Hurst*, it permits essential fact findings needed for death to be decided non-unanimously and removes the ultimate decision from the jury, both in violation of the Sixth Amendment.

A. The racial discrimination intrinsic to non-unanimous verdicts violates the Eighth and Fourteenth Amendments.

By definition, non-unanimous verdicts allow a jury to make a decision without the agreement of members in the minority. This creates a breeding ground for racial discrimination in conflict with the Fourteenth Amendment's guarantee of equal protection and the Eighth Amendment's guarantee of capital verdicts uninfected by

[12] Even when not preserved at the trial level, "a facial challenge to a statute's constitutional validity" such as here "may be raised for the first time on appeal." *Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002).

racial discrimination. This is particularly true in cases like Mr. Jackson's, where the number of dissenting life votes tolerated (four) is greater than the number of jurors of color on a panel (in this case, three).

In fact, as noted in *Ramos*, states enacted non-unanimity laws precisely because they silenced the voice of racial minorities. 140 S. Ct. at 1393, 1405 (acknowledging the purpose of non-unanimity law to "establish the supremacy of the white race" and criticizing prior precedent for failing to "grappl[e] with the historical meaning of the Sixth Amendment's jury trial right, this Court's long-repeated statements that it demands unanimity, or the racist origins of Louisiana's and Oregon's laws"); *see also Khorrami v. Arizona*, 143 S. Ct. 22, 27 (2022) (Gorsuch, J., dissenting from denial of certiorari) (arguing to review Arizona's use of eight-person jury in part because "[d]uring the Jim Crow era, some States restricted the size of juries and abandoned the demand for a unanimous verdict as part of a deliberate and systematic effort to suppress minority voices in public affairs"). And regardless of history or intent, the *current* practical effect of non-unanimity laws allows decisions to be made without the input of jurors of color. "Then and *now*, non-

unanimous juries can silence the voices and negate the votes of black jurors." *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J. concurring) (emphasis added).

Knowing the damage that non-unanimity would do to Florida's Black citizens, the Florida Legislature still plowed forward with this change. Indeed, the witnesses before the Legislature and the legislators themselves repeatedly acknowledged the problems *Ramos* poses. R.3776, 3805, 3808, 3809, 3858, 3904, 3926, 3957, 3972, 3982, 3983, 3994. Other legislators specifically called out the negative effect of this law on the Black community. R.3839, 3968-69 (proposing amendment to the bill to disallow death qualification because it already disproportionately excludes Black jurors); 3990-91. Undeterred, however, a majority of the Legislature voted to make the law of this state what the Supreme Court had only recently condemned as racially discriminatory.

And, regrettable undercurrents crisscrossed the legislative history of this bill. One witness argued that the "current law allowed a single activist juror" to cause the life sentence of Nikolas Cruz. R.3743. The bill sponsor and other legislators followed suit. They repeatedly invoked the image of "rogue" or "activist" jurors

who wouldn't vote for death, R.3952-54, 3960-61, R3812, 3830, 3920, 4012, even though lawmakers are presumed to understand the clear rulings of this Court that Florida law *never* "require[s] the imposition of the death penalty." *Smith v. State*, 866 So. 2d 51, 67 (Fla. 2004). Tellingly, it was a Black woman, Dr. Melody Vanoy, who followed Florida law, voted for life, disclosed her decision publicly, and then was referred to by legislators as a rogue and activist. R.3072.[13]

The rights conferred by the Fourteenth Amendment—the vehicle through which Black Americans and other people of color were finally given the right to serve on a jury—are at stake. The silencing of Black jurors and other jurors of color through non-unanimous verdicts violates these rights. In *Batson v. Kentucky*, the Court held that "denying a person participation in jury service on account of his race" (there, through discriminatory peremptory

[13] R.3072 (citing Joe Gorchow, *Another Parkland sentencing trial juror shares her experience, reasoning*, CBS News, (Oct. 14, 2022), https://www.cbsnews.com/miami/news/another-parkland-sentencing-trial-juror-shares-her-experience-reasoning/). *See also* Youtube, *Parkland jury voted 11-1 for death, family member says – 1 holdout juror saved Nikolas Cruz's life* (Oct. 13, 2022), https://www.youtube.com/watch?v=pEEg67HoRHQ.

strikes) denies equal protection. 476 U.S. 79, 87 (1986). So, too, does denying a person participation in jury service through a non-unanimous jury, which, when negating the presence of jurors of color, essentially "operates much the same as the unfettered peremptory challenge" as a "backdoor and unreviewable peremptory strike[]." *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J. concurring).

The fear of a "backdoor" peremptory challenge is real in Mr. Jackson's case, where there were only three non-white jurors, two of whom were Black.[14] While we do not know the voting breakdown of the jurors by race, we do know that Mr. Jackson's jury voted for death by a vote of only eight to four. Thus, we know that the statute permitted a death sentence here without the necessary agreement of a single non-white juror.[15]

---

[14] Because this right concerns the right of citizens to have their voices heard on juries, Mr. Jackson's own race is irrelevant. *See Powers v. Ohio*, 499 U.S. 400, 415 (1991) ("To bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service.").

[15] Nevertheless, despite these facts, and although Dr. Vanoy is similarly an identifiable Black juror whose voice would have been silenced by the new law had it applied in the *Cruz* case, the challenge here is facial, not as applied. The ultimate racial

This not only violates the Fourteenth Amendment by allowing for racial discrimination in the ability to substantively participate in jury service, but also the Eighth Amendment guarantee that racial discrimination not infect capital sentencing. *See Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) (finding death penalty "imposed under a procedure that gives room for the play of [racial] prejudices" to violate Eighth Amendment); *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987) (condemning practices that pose a "constitutionally significant risk of bias affecting the . . . capital sentencing process"); *Buck v. Davis*, 580 U.S. 100, 124 (2017) (calling reliance on race when imposing a criminal sanction "poison[ous]" to the judicial process).

Regardless of what distinctions this Court may make concerning what "fact" finding is "essential" for a death sentence under the Sixth Amendment, Point 2 (C), *infra*, for Eighth and Fourteenth Amendment purposes, the jury indisputably plays a

---

breakdown of Mr. Jackson's eight-four vote would be very challenging, if not impossible, to learn under extant Florida law. *See*, *e.g.*, *Reaves v. State*, 826 So. 2d 932, 943 (Fla. 2002) (explaining limited bases to interview jurors post verdict). In any case, *Ramos's* condemnation of non-unanimity did not turn on the availability of such demanding proof.

significant role in the "selection decision." *Poole*, 297 So. 3d at 501. The Court has held that this decision turns on mercy and morals. *Id.* at 503. Just as we should condemn a system that "can silence the voices and negate the votes of black jurors" in the context of the Sixth Amendment, *Ramos*, 140 S. Ct. at 1408 (Kavanaugh, J., concurring), this Court should condemn such racial silencing and negation around questions of morality under the Eighth and Fourteenth.

B. Non-unanimous jury recommendations violate evolving standards of decency and the Eighth Amendment.

The Eighth Amendment problems with the statute span beyond impermissible racial discrimination. As a required procedural constitutional safeguard against unreliability, *Gregg v. Georgia*, 428 U.S. 153 (1976), the "Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." *Ring v. Arizona*, 536 U.S. 584, 619 (2002) (Breyer, J., concurring) (citing *Harris v. Alabama*, 513 U.S. 504, 515-26 (1995) (Stevens, J., dissenting)); *See State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988) (finding Eighth Amendment requires sentencing unanimity). Mr. Jackson presents the failure of

Florida's capital sentencing, as a whole, to maintain required safeguards below. *See* Point 12, *infra*.

Additionally, the Eighth Amendment bars capital sentencing outside the "evolving standards of decency that mark the progress of a maturing society." *Hall v. Florida*, 572 U.S. 701, 708 (2014) (internal citation omitted). Courts measure evolving standards against "objective indicia" such as "legislative enactments and state practice[,]" *Roper v. Simmons*, 543 U.S. 551, 563 (2005), which, here, demonstrate a nearly universal abandonment of non-unanimous death sentences.

Four decades ago, in *Spaziano v. Florida*, 468 U.S. 447, 464 (1984), the U.S. Supreme Court noted that "30 out of 37 jurisdictions with a capital sentencing statute gave the life-or-death decision to the jury[.]" Today, among only twenty seven death-penalty states,[16] an even more stark disparity exists: all capital

[16] "On the other side of the ledger stand the 18 States that have abolished the death penalty, either in full or for new offenses, and Oregon, which has suspended the death penalty and executed only two individuals in the past 40 years." *Hall*, 572 U.S. at 716. Since *Hall*, five more states have abolished executions, and six others have gubernatorial holds on further executions. *See* Death Penalty

punishment states but two—Florida and Alabama—require unanimous death sentences as a general rule.[17] *Poole*, 297 So. 3d at 513 (Labarga, J., dissenting). And in this very short and aberrant list, Florida is the most severe because it allows execution with the vote of only eight jurors, while Alabama requires ten.

In *Poole*, this Court erred in relying on *Spaziano* to deny the Eighth Amendment challenge. "Time and subsequent cases have washed away the logic of *Spaziano*[.]" *Hurst v. Florida*, 577 U.S. 92, 102 (2016). While *Hurst* made this observation in the context of the Sixth Amendment, the legislative developments discussed above, as well as *Ramos*, have washed away any remaining Eighth Amendment vitality in *Spaziano*. Most tellingly, *Spaziano*'s evolving

---

Information Center, *States with and without the death penalty*, https://deathpenaltyinfo.org/states-landing.

[17] In just two states, Indiana and Missouri, a judge is allowed to impose a death sentence when a jury is not able to reach a sentencing decision, while in two other nearly dormant death-penalty states, Nebraska and Montana, a judge makes the decision. Michael L. Radelet & G. Ben Cohen, *The Decline of the Judicial Override*, 15 Ann. Rev. L. & Soc. Sci. 539, 548-49 (2019) (describing these four and the scarcity of recent death sentences and/or executions in the states).

standards analysis, even then close,[18] has aged four decades and become completely outdated.

C. The statute violates the Sixth Amendment by not requiring unanimity on essential fact findings for death.

In *Hurst v. Florida*, the Supreme Court analyzed Florida's capital sentencing scheme through the lens of *Ring v. Arizona* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), holding "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 577 U.S. 92, 94 (2016). In other words, a sentencing statute is unconstitutional if a jury does not make all factual determinations necessary for the imposition of a death sentence. This inquiry is "one not of form, but of effect[:] does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494.

Under Florida's new statute, a jury must base a capital sentencing recommendation on a) finding aggravating factor(s) and

---

[18] *See Spaziano*, 468 U.S. at 472-74 (Stevens, Brennan, and Marshall, JJ., concurring in part) (reading the same numbers as the majority to establish a consensus against judicial sentencing).

b) a finding that those aggravating factors outweigh "the mitigating circumstances found to exist." § 921.141(2)(a)-(b). Among these findings, it requires unanimity only for the finding of aggravating factors. This violates *Hurst* because *both* findings involve factual determinations. *See* T.1746-59 (prosecutor summation arguing factual unreliability of mitigation witnesses); T.1811-15 (classic jury charge on weighing reliability of witnesses and evidence).

In fact, the weighing determination involves factual determination two times over: the finding of mitigating factors and the fact-based weighing of those factors against any found aggravating factors. *See, e.g.*, *Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (finding capital-sentencing statute violated Sixth Amendment because it did not require a jury to find that "the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist").

Although mercy and morals play a role at the selection stage,[19] *Poole*, 297 So. 3d at 503, this does not negate the fact-finding

[19] Section 921.141(2)(c) requires that a jury, after making findings under subsections (a) and (b), determine "whether the defendant

nature of the steps that come before. After all, the Supreme Court has acknowledged that weighing includes both "a factual and judgment component." *Kansas v. Carr*, 577 U.S. 108, 119 (2016) (describing weighing).[20] Moreover, the law requires these determinations to be based in fact so that death sentences are tethered to a uniform standard that protects against unconstitutional arbitrariness. *See State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973) (post-*Furman* approval of Florida's new statute because "it must consider from the facts" including "whether there were mitigating circumstances which require a lesser penalty"); *Gregg*, 428 U.S. at 161 (approving Georgia's post-*Furman* sentencing scheme because it requires consideration of "any special facts about this defendant that mitigate against imposing capital punishment").

---

should be sentenced to life imprisonment without the possibility of parole or death."

[20] While *Poole* relied in isolation on *Carr*'s focus on the question of "mercy," 297 So. 3d at 503, it seems to have overlooked the acknowledgment that weighing retains a "factual component." *Carr*, 577 U.S. at 119. In any case, *Carr*, a decision under the Eighth Amendment, *id.* at 118, could not have silently overruled the specific Sixth-Amendment commands of *Ring* and *Hurst*. Nor could *McKinney v. Arizona*, 589 U.S. 139, 143 (2020) (deciding sui generis appellate reweighing question under the Eighth Amendment).

A weighing finding in the State's favor under section (b) is "necessary to impose a sentence of death." *Hurst*, 577 U.S. at 94. Under the new statute, a judge may not proceed to decide between life and death unless a jury greenlights that decision. That requires *both* the jury finding an aggravating factor and that any factors in aggravation outweigh those in mitigation.[21] *See* § 921.141(3)(a)(1)-(2). As shown above, Point 1, *supra*, the jury's red light is a life recommendation.

Thus, the new law differs from the statute analyzed in *Poole*, and which the Supreme Court analyzed in *Hurst*, in which the jury's findings were "advisory only," and did not restrict the judge's sentencing ability. *Hurst*, 577 U.S. at 100 (quoting *Spaziano*, 422 So. 2d at 512). Because the new law requires juries to make these fact-based determinations before the judge may issue a sentence of

[21] Although the statute states that a defendant is "eligible" for a sentence of death after only the finding of an aggravating factor, the statute also makes clear that additional eligibility questions remain. Under the statute, a jury finding an aggravating factor could also find that it does not outweigh mitigation and thus return a binding life verdict. *See Poole*, 297 So. 3d at 504 ("[T]he legislature's use of a particular label" or omission of such a label "is not what drives the Sixth Amendment inquiry." (citing *Apprendi*, 530 U.S. at 494)).

death, they become equally required by the Sixth Amendment under *Apprendi*, *Ring*, and *Hurst*. And the Sixth Amendment jury right now encompasses unanimity under *Ramos*.

D. In the alternative, the Sixth Amendment jury right the framers understood included a right to unanimity for life and death decisions.

Additionally, the Sixth Amendment criminal jury right, as universally understood in 1791 when adopted in the Bill of Rights, went further than acknowledged in *Poole*. It encompassed the right, at the selection phase, to a unanimous jury agreeing to a defendant's execution before that punishment could be carried out.[22] This history drove the decision in *Rauf* striking down Delaware's non-unanimous capital sentencing statute:

> *Hurst* is best read as restoring something basic that had been lost. At no time before *Furman* was it the general practice in the United States for someone to be put to death without a unanimous jury verdict calling for that final punishment. Overlooking the role juries played in capital sentencing before *Furman* and its progeny altered the status quo would be

[22] The parties in *Poole* did not brief this argument, denying the Court the opportunity to consider it. *See* Answer Br. of Appellee and Initial Br. of the Cross-Appellant, *State v. Poole* (No. SC18-245), 2018 WL 6161258.

> ignoring nearly 200 years of our nation's customs and traditions.

Rauf, 145 A.3d at 477 (Strine, C.J., concurring).[23] It should drive this Court too – to uphold the Sixth Amendment and strike down this statute. *See also McGautha v. California*, 402 U.S. 183, 197-99 (1971) (tracing common-law history to 13th-century England and through the middle of nineteenth century in which the jury, always unanimous, decided who lives and dies through "discretion which they had been exercising in fact" to determine levels of offenses and/or when the benefit of clergy would be awarded), *overruled on other grounds by Furman v. Georgia*, 408 U.S. 238 (1972).

This Court should uphold *Ramos*, follow the reasoned decisions of sister courts on the Eighth Amendment (*Daniels supra*) and Sixth Amendment (*Rauf*), and recede from contrary precedent.

---

[23] For concision in this word-limited brief, Mr. Jackson further incorporates the extensive briefing on this history set out more fully in the record below. R.2949-2957. *See also* Brief of the American Civil Liberties Union, the ACLU of Florida, and the Constitutional Accountability Center as Amicus Curiae Supporting Petitioner, *Hurst v. Florida,* 577 U.S. 92 (2016) (No. 14-7505), 2015 WL 3608900 at *5-24 (detailing the history of the Sixth Amendment and right to unanimous capital jury determinations at common law).

3. Section 775.022(3), Florida Statutes, bars retrospective application of the 2023 amendment to Florida's capital sentencing statute.

In 2019, the Legislature enacted section 775.022 (3), Florida Statutes, requiring, absent specified exceptions not present here, that "the amendment of a criminal statute operate *prospectively* and does not affect or abate . . . (a) [t]he prior operation of the statute or a prosecution or enforcement thereunder." § 775.022(3)(a), Fla. Stat. (2019) (emphasis added). As argued below, R. 2970-71, the 2023 amendments to the capital sentencing statute are governed by section 775.022(3)(a),[24] and therefore applied "prospectively" only. *Id.* The court below erred by denying this claim. R. 3057-59.

One of the exceptions to this requirement of prospectivity is when "expressly provided for in an act of the Legislature[.]" § 775.022 (3). The amendment to section 921.141 does not expressly

[24] The term "'criminal statute' means a statute, whether substantive or procedural, dealing in any way with a crime or its punishment, defining a crime or a defense to a crime, or providing for the punishment of a crime." § 775.022(2). The State of Florida has conceded that section 921.141 is a criminal statute. *See* Order Granting Defendant's Motion to Preclude Application of the Most Recent Amendments to F.S. 921.141, as Such Application Would Violate F.S. 775.022 at 2, *State v. Adams*, No. 23-CF-001904 (Fla. 13th Cir. Ct. April 12, 2024) (hereafter *Adams* Order).

so provide. *See* Ch. 2023-23, § 1, Laws of Fla. *See also Adams* Order, at 6. The other two exceptions involve a change of punishment, § 775.022 (4), or limitations on a defense to an offense, § 775.022 (5), which have nothing to do with the procedural changes in section 921.141. *See also Adams* Order at 6. In writ litigation in the District Court of Appeal also concerning *Adams*, the State has both abandoned its trial-court argument that the Legislature expressly provided that the 2023 amendment would operate retroactively, and conceded that subsections (4) and (5) do not apply.[25]

To effectuate the Legislature's intent, as is required, *Getzen v. Sumter Cty.*, 103 So. 104, 107 (Fla. 1925), Florida courts look to the plain and obvious meaning of the statute. *Smith v. State*, 204 So. 3d 18, 21 (Fla. 2016). If the statute is "clear and unambiguous," then the Court does not look beyond the plain language or employ the rules of construction to determine legislative intent: it simply applies the law. *Gaulden v. State*, 195 So. 3d 1123, 1125 (Fla. 2016).

[25] State's Petition in *State v. Billy Bennett Adams*, III, No. 2D2024-1089 (2d DCA May 8, 2024), at 14-22 & n.2.

The language of section 775.022(3) is as clear and unambiguous as its application here. It permits *only* a prospective application of the 2023 non-unanimity amendment to section 921.141, because the Legislature, on notice of this law it enacted only four years earlier, omitted any mention of retroactivity, express or otherwise (notwithstanding general knowledge about the many *Hurst* resentencings). Ch. 2023-23, § 1, Florida Laws.[26] The Legislature knows how to require retroactivity.[27] It did not do so here.

---

[26] *See Walker & La Berge, Inc. v. Halligan*, 344 So. 2d 239, 241 (Fla. 1977) (looking "to the wording of the act itself" and finding "nothing in the language of the statute which manifested an intention by the Legislature to do otherwise than prospectively apply the new" law); *Stapleton v. State*, 286 So. 3d 837, 839 (Fla. 5th DCA 2019) (same conclusion about section 775.087, Florida Statutes (2019), based on same analysis); *Feris v. Club Fort Walton Beach*, Inc., 138 So. 3d 531, 536 (Fla. 1st DCA 2014) (same analysis).

[27] *See*, *e.g.*, § 406.135, Fla. Stat. (2024) ("The exemptions in this section shall be given retroactive application."); Ch. 2014-182, § 18, Laws of Fla. ("The amendments made by this act . . . shall be applied retroactively to the full extent permitted by law."); Ch. 2011-215, § 2, Laws of Fla. ("The Legislature intends that this act be applied retroactively[.]"); § 704.05, Fla. Stat. (1999) ("This section is intended, and shall be deemed, to operate both prospectively and retrospectively."); Ch. 2002-211, § 3, Laws of Fla. ("Except as otherwise specifically provided in this act, the provisions reenacted by this act shall be applied retroactively to July 1, 1999[.]").

The court below thus erred by applying this 2023 law retroactively to a resentencing this Court reaffirmed Mr. Jackson was entitled to in 2020, *Jackson*, 306 So. 3d at 945, for a crime that occurred in 2005. *See also* Adams Order at 6 (finding the 2023 amendments apply to crimes occurring on or after April 20, 2023).

4. By permitting a non-unanimous death sentence, the trial court violated res judicata.

Res judicata rests on the premise that "a final judgment by a court of competent jurisdiction is absolute and puts to rest every justiciable, as well as every actually litigated, issue." *Albrecht v. State*, 444 So. 2d 8, 11–12 (Fla. 1984) (superseded by statute on other grounds). Also termed a "doctrine of decisional finality," res judicata allows parties to "rely on a decision as being final and dispositive of the rights and issues involved therein." *Florida Power Corp. v. Garcia*, 780 So. 2d 34, 44 (Fla. 2001) (internal quotation omitted). The doctrine protects "final judgment" against a "change in the applicable rule of law resulting from a later appellate decision

in an unrelated case[.]" *Theisen v. Old Republic Ins. Co.*, 468 So. 2d 434, 435 (Fla. 5th DCA 1985).[28]

Here, the trial court issued an order of final judgment after Mr. Jackson moved for relief under *Hurst v. State*. *See* R.44-69; 121-126. Mr. Jackson's request for resentencing was not general—he specifically asked the court to vacate his sentence and "either impose a life sentence or conduct a new penalty phase that complies with the *Hurst* decisions." R.68. Accordingly, when the court granted Mr. Jackson's motion, it "f[ound] *Hurst v. Florida* and *Hurst* appl[ied] to [Mr. Jackson's] case and [that] he is entitled to relief" where his "death sentences stem from 8-4 votes." R.125.

The State did not appeal. *Jackson*, 306 So. 3d at 938. And this Court, in the context of rejecting the State's attempt to evade this judgment, specifically held the judgment to be final despite the commencement of a new sentencing proceeding. *Id.* at 942.

---

[28] *See also Petrysian v. Metro. Gen. Ins. Co.*, 672 So. 2d 562, 563 (Fla. 5th DCA 1996) (same and noting a court may "regret that [a party] was frustrated by the timing of the supreme court's decisions, but [it] cannot grant relief from the application of the law as it existed at the time" a judgment became final); *Fox v. Timepayment Corp.*, 316 So. 3d 818, 818 (Fla. 5th DCA 2021) (citing *Petrysian*, 672 So. 2d at 563 (citing *Theisen*, 468 So. 2d at 435-36)).

This final decision imposed a duty on the trial court to hold a resentencing that applied *Hurst v. State*, which, of course, required, for a death sentence, unanimity on the finding of sufficient aggravating circumstances, that they outweighed the mitigating circumstances, and that death is the appropriate sentence. 202 So. 3d 40, 44, 53-54 (Fla. 2016). Disregarding this mandate, the trial court resentenced Mr. Jackson under the law of non-unanimity.

Thus, as argued below, R. 2909-2012, the trial court violated res judicata. Therefore, this Court should order a resentencing applying *Hurst* as originally ordered. *See, e.g.*, *Carroll v. State*, 20 So. 3d 913, 914 (Fla. 3d DCA 2009) (disallowing a plenary sentencing under new guidelines because it was beyond the limited sentencing ordered by the court which had "called for correction of a portion of the defendant's sentence, and did not call for, or allow, a plenary resentencing hearing").

5. The trial court violated the Eighth Amendment by barring the jury's consideration of the codefendant's life sentence.

Under the Eighth and Fourteenth Amendments, a 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." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). *See also Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (reaffirming the rule).

Florida courts have long acknowledged the life sentence of a codefendant for the same crime as mitigation. *Hertz v. Jones*, 218 So. 3d 428, 431 (Fla. 2017) (noting codefendant's life sentence "given significant weight" in mitigation); *Jennings v. State*, 123 So. 3d 1101, 1122 (Fla. 2013) (similar); *Armstrong v. State*, 642 So. 2d 730, 734, 739-40 (Fla. 1994) (similar); *Davis v. State*, 859 So. 2d 465, 477 (2003) (noting trial court permitted defendant "to urge the jury to consider the treatment of the other codefendants"); *Franqui v. State*, 804 So. 2d 1185, 1196 (Fla. 2001) (same); *cf. Garcia v. State*, 644 So. 2d 59, 63 (Fla. 1994) (holding defendant made tactical decision *not* to present codefendant's life sentence in mitigation). Similarly, under this Court's prior proportionality review, it provided sentencing relief due to the life sentence awarded at trial to an equally culpable codefendant. *Ray v. State*, 755 So. 2d 604, 612 (Fla. 2000); *Puccio v. State*, 701 So. 2d 858, 863 (Fla. 1997).

Against this clear precedent, the trial court, without explanation, barred the defense effort to introduce codefendant Wade's life sentence as mitigation. T.1227-28. It did so despite its order granting the State's *in limine* motion to preclude introduction of sentencing from other cases to the extent only that they were *unrelated*. R.2443 (emphasis added). In a May 2022 hearing on that motion, the State's argument concerned such unrelated examples as the Oklahoma City bombing case and Hitler. R.4849. *See also* R.3448 (defense renewing this objection in motion for new trial); R.3719 (denial).[29]

This Eighth Amendment error prejudiced Mr. Jackson and requires reversal of his sentence. If this Court were to deny his Sixth Amendment challenge to non-unanimity because the weighing and mitigation questions concern only mercy and morals, *but see* Point 2 (c), then this Court could not, in considering this mitigation in the first instance, "substitute its own moral judgment for a moral

[29] In a hearing in April of 2022, the prosecutor conceded (before Mr. Wade and Mr. Jackson's planned joint trial) that he had no research on whether one co-defendant's life sentence (if returned before the outcome for the other) could be introduced as mitigation. R.4194.

judgment [of] the jury." *Nelson v. Quarterman*, 472 F. 3d 287, 314-316 (5th Cir. 2006). Reversal should be automatic. *Id.* (rejecting harmless-error due to failure to consider mitigation). Regardless, given the close case for life, the Court cannot conclude beyond a reasonable doubt that one additional juror would not have voted life if provided with this additional mitigation. *Chapman*, 386. U.S. at 24; n.11, *supra* (collecting close-vote cases finding prejudice).

After all, based on the same body of evidence, even though the State argued in *this trial* that Mr. Jackson was more culpable, T.676, it previously took a more artful position about Alan Wade's relative culpability. R.2915 (quoting *State v. Wade*, No. 2005-CF-10263, Tr. 1320 (Fla. 4th Cir. Ct. June 9, 2022) ("Wade Tr.") (prosecutor arguing for Alan Wade's execution because he "along with Michael Jackson were the two human beings" committing the murder)).

Indeed, accepting the State's prior arguments, this Court affirmed the trial court and made its own findings that Alan Wade shared his own particular and significant responsibility at multiple parts of the crime:

- "'Wade alone was responsible' for bringing Nixon into the criminal scheme. . . . [N]o direct evidence established that Wade's 'personality was subdued by' Jackson[.]" *Wade v. State*, 41 So. 3d 857, 866 (Fla. 2010) (quoting trial court).

- "'[Wade] knew exactly what he was doing' and was not under the influence of drugs or suffering a 'mental aberration' at the time of the murders." *Id.*

- "Wade—with Jackson and Cole—planned to commit a robbery, and then Wade invited Nixon to join them . . . Together, the group planned . . . and Wade participated in obtaining the materials needed to implement the plan." *Id.* at 878-79.

- "Wade and Nixon entered the Sumners' home, and then . . . put the Sumners in the trunk of their own car and drove them to the gravesite in Georgia. There, Wade and Jackson placed the couple in the hole and buried them[.]" *Id.*

- On their arrest, the police "found evidence linking all three to the crimes, including a check for $8,000 on the Sumners' account made out to Wade . . . ." *Id.*

The point is not that Mr. Jackson is less responsible. He has repeatedly admitted his own significant role. T.1049-53. Rather,

given the same crime, and that both shared responsibility at various points and for various actions, Mr. Jackson had a constitutional right to present evidence of Mr. Wade's life sentence to the jury. The trial court denied it. This Court should reverse.

6. The trial court violated the Sixth and Eighth Amendments, and Florida law, by precluding impeachment of Bruce Nixon's prior-recorded testimony by his subsequent recantation.

In 2007, Bruce Nixon was a key witness against Michael Jackson. As the only co-defendant to testify, he narrated the entire crime in greater detail than the circumstantial evidence collected afterwards would reveal. *Jackson v. State,* 18 So. 3d 1016, 1021-22 (Fla. 2009) (acknowledging this source of extensive factual narrative); T.1112-98 (testimony in this trial). But at Alan Wade's 2022 retrial on sentence, Mr. Nixon recanted his prior testimony as a lie he had told at the direction of his lawyer. T.1229. Then, at Mr. Jackson's retrial, Mr. Nixon invoked his Fifth Amendment right to silence and refused to testify. T.933-35.

The trial court thereafter erred by admitting Mr. Nixon's perpetuated 2007 testimony while denying the defense motion to present his 2022 recantation of it. T.1229; *See* U.S. Const. amends.

VI (Confrontation Clause); VIII; XIV; § 90.806, Fla. Stat. (1995); § 921.141(1); *Rodriguez v. State*, 753 So. 2d 29, 43 (Fla. 2000) (stating "uncontroverted proposition that the Sixth Amendment right of confrontation applies to all three phases of the capital trial").

Florida law could not be clearer. It expressly permits attack on the credibility of a hearsay declarant "by any evidence that would be admissible for those purposes if the declarant had testified as a witness." § 90.806, Fla. Stat. (1995). The rule thus makes admissible "[e]vidence of a statement or conduct by the declarant at any time inconsistent with the declarant's hearsay statement . . . regardless of whether or not the declarant has been afforded an opportunity to deny or explain it." *Id.*

Similarly, the capital sentencing-statute mandates that defendants be "accorded a fair opportunity to rebut any hearsay statements" the State may offer against them. § 921.141(1).

Multiple provisions of the Constitution also protect this right. The denial of cross examination on even a single critical question violates the Confrontation Clause of the Sixth Amendment. *Smith v. Ill.*, 390 U.S. 129, 131 (1968) (finding violation when trial court

sustained objection to request for declarant's real identity). This protection equally applies to confrontations of recorded claims set out in a transcript, rather than a live witness. *Smith v. Fairman*, 862 F.2d 630, 637–38 (7th Cir. 1988) (finding Confrontation-Clause violation because accused prevented from impeaching hearsay declarant with prior inconsistent statement); *Vasquez v. Jones*, 496 F.3d 564, 578 (6th Cir. 2007) (same where court precluded impeachment of hearsay declarant with his criminal record).

The Eighth and Fourteenth Amendments' requirements of heightened reliability and due process in capital sentencing afford this same right of rebuttal and confrontation. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 362 (1977) (finding due-process violation because defendant sentenced to death based on confidential sentencing report without opportunity to confront it); *Simmons v. South Carolina*, 512 U.S. 154, 165 (1994) (finding due process violation because "petitioner was prevented from rebutting information that the sentencing authority considered"); *id.* at 172 (Souter, J., concurring) (finding additionally a violation of the "heightened standard 'for reliability'" required by the Eighth

Amendment and citing, *inter alia*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)).

When it denied Mr. Jackson the opportunity to impeach Mr. Nixon's perpetuated testimony with his own admission, under oath, that he had lied, the court violated both the Florida Statutes and the Constitution.[30] The result was a death verdict from a jury oblivious to the fact that a key state witness had recanted.

Particularly in light of the close jury vote, n.11, *supra*, the State cannot prove this constitutional error harmless beyond a reasonable doubt. *Chapman*, 386. U.S. at 24. Before awarding Alan Wade a life sentence, his jury heard Bruce Nixon's recantation – that his prior testimony "was what [defense counsel] wanted me to say. So *now* I am going to be honest about the whole situation." *Wade* Tr., supra, at 1320) (emphasis added). Mr. Jackson's jury too should have been permitted to hear the recantation.

[30] The trial judge's puzzling statement that he had only allowed Bruce Nixon to recant for thirty seconds before removing him from Alan Wade's trial does not excuse his departure from the statutory and constitutional rules set out above. T.1229. If anything, the court artificially minimized Mr. Nixon's recantation by cutting off this testimony, prejudicing Mr. Jackson's ability to use it more fully.

In its own words, the State relied on Mr. Nixon "to show the current jury the basic facts of the case. [We're] going to do that through Nixon . . . [we] think those particular facts need to be presented to the jury." T.4090; *see also* T.4562 (State listing Bruce Nixon as the first of its four witnesses).

To obtain Mr. Nixon's testimony, the State spared no expense or effort. Prosecutor time, court time, appointed counsel, and significant corrections resources were all required. R.4393 (prosecutor: "I have spoke[n] to Bruce Nixon today."); 4445 (prosecutor describing efforts to have Nixon's court-appointed attorney, Donald Mairs, speak with Nixon); 4637 (noting prison transported him to Duval County "two and a half weeks earlier"); 4828 ("We have ordered him to be back. My last conversation with Mr. Nixon is he was refusing to answer questions on the matter."); 4913 (prosecutor asking that transport order require separation of all codefendants); R.1027 (order to transport Mr. Nixon); 2687 (same); 3042-43 (same); 1080 (order requiring codefendant separation); 1209 (same).

In this exceedingly close case, the State cannot now prove that its years-long efforts to secure this testimony did not possibly help

it to obtain a death sentence. Nor can it prove that the result would have been the same had the trial court not suppressed Mr. Nixon's recantation.

7. The trial court erred under both Florida law and the Eighth Amendment by assigning no weight to five of Mr. Jackson's proven mitigating circumstances.

As shown above, *see* Point 5, *supra*, the Eighth Amendment forbids the sentencer from giving mitigation "no weight by excluding such evidence from their consideration." *Eddings*, 455 U.S. at 115. But under Florida caselaw, which clashes with *Eddings*, trial judges must at least give written justification for refusing to give any weight to mitigation. *Ault v. State*, 53 So. 3d 175, 186 (Fla. 2010). While a trial court generally need not explain its specific rationale for assigning some degree of weight to an established mitigating circumstance, s*ee Bargo v. State*, 331 So. 3d 653, 664 (Fla. 2021), a court only may assign *no weight* if the court determines that "additional reasons or circumstances unique to that case" exist. *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000).

The trial judge here found that the defense had established each of Mr. Jackson's proposed mitigating circumstances, R.3434-37, but

he assigned five no weight,[31] including his desire to share his faith with others. *But see Yacob v. State*, 136 So. 3d 539, 551 (Fla. 2014) (citing religiosity and family relationships among mitigating factors in review of cases with disproportionate death sentences), *receded from on other grounds, Lawrence v. State*, 308 So. 3d 544 (Fla. 2020). In his written sentencing order, the judge provided no "additional reasons or circumstances unique to [Jackson's] case" to justify [his] decision to entirely reject five aspects of Mr. Jackson's mitigation. *Trease*, 768 So. 2d at 1055. Under Florida law and this Court's application of the Eighth Amendment, this was reversible error. *Id.*

Under *Eddings*, the trial court violated the Eighth Amendment by refusing to consider these inherently-mitigating and concededly-established circumstances. *See, e.g., Yacob,* 136 So. 3d at 551; *Arbelaez v. State*, 898 So. 2d 25, 35 (Fla. 2005) (finding failure to

[31] The Court assigned no weight to the following mitigation: 1) Mr. Jackson's mother repeatedly promised to visit when he was a child, but never followed through, R. 3434 (mitigating circumstance number 5); 2) he has impaired social skills, R. 3435 (number eight); 3) he never underwent a psychoeducational evaluation, despite one being recommended, R.3436 (number 18); 4) he recently formed a relationship with his separated sister Melissa Russell, R.3437 (number 22); 5) Mr. Jackson has expressed a desire to teach others about God, *Id.* (number 24).

receive prescribed mental health treatment among "strongest evidence of mental health mitigation"); *Harvey v. State*, 529 So. 2d 1083, 1088 n.5 (Fla. 1988) ("The judge found as a mitigating circumstance that Harvey had . . . poor educational and social skills.").

The remedy for these errors is to vacate the death sentence and remand for a new sentencing order. *See Woodel v. State*, 804 So. 2d 316, 327 (2001). Harmless error analysis for a sentencer's failure to consider mitigation is inapplicable under *Woodell*, and for the reasons described above. *See* Point 6 (citing *Nelson*, 472 F. 3d at 314-316).

8. The prosecution deprived Mr. Jackson of a fair trial by denigrating mitigation and committing misconduct throughout trial.

Departing from his "duty to seek justice," *Merck v. State*, 975 So. 2d 1054, 1068 (Fla. 2007) (Pariente, J. dissenting), the prosecutor engaged in misconduct throughout his renewed attempt to sentence Mr. Jackson to death. He invalidated Mr. Jackson's mitigation. He littered his case with appeals to the jurors' emotions and fears. The cumulative harm of his repeated misconduct

deprived Mr. Jackson of his constitutional rights to a fair sentencing trial. *See* U.S. Const. amends. VI, VIII, XIV.

A. The prosecution denigrated Mr. Jackson's mitigation evidence and directed the jury to disregard it in its entirety.

Because a person facing death has a constitutional right to have the sentencer consider evidence in mitigation, *Eddings,* 455 U.S. at 113-114, the State may not employ arguments that "invalidate the mitigation" in its "entire[ty]." *Delhall v. State*, 95 So. 3d 134, 168 (Fla. 2012).

For instance, prosecutors cannot deride mitigation with characterizations like "flimsy" or "phantom." *Brooks v. State*, 762 So. 2d 879, 904 (Fla. 2000); *Franqui v. State,* 59 So. 3d 82, 98 (Fla. 2011) (condemning argument that mitigation is "makebelieve"). This Court has also repeatedly forbidden arguments that mitigation serves as an "excuse." *Delhall*, 95 So. 3d at 168 (forbidding such argument) (citing *Brooks* (same) and *Urbin v. State*, 714 So. 2d 411, 422 n.14 (Fla. 1998) (same)).

The prosecutor denigrated mitigation in its entirety when, over repeated defense objections, he told the jury, "Do not judge him by the clergy who visit him or by the lectures from paid advocates[,]

but by his behavior when he was free. . . *Judge him not by what you heard in this courtroom*. Judge him by when he was free." T.1733-34 (emphasis added). There is no innocent explanation for these words. What the jury "heard in this courtroom" was Mr. Jackson's penalty phase trial, including several days' worth of mitigation evidence. Overriding the constitutional imperative that the sentencer consider mitigation, *Eddings*, 455 U.S. at 113-114, the prosecutor commanded the jury to disregard it and exclusively sentence Mr. Jackson based on the crime he committed.

In addition to wholly denigrating Mr. Jackson's mitigation, the prosecutor mocked several of its components. He belittled Mr. Jackson's remorse. He twice called it "another con job." T.691, 1750. It was "just another escape route." T.1750. It was not something that Jackson was "supposed to get credit" for. *Id.* (over defense objection). He reduced it to a game of chess. *Id.*

The prosecutor mocked Mr. Jackson's Messianic Jewish faith. He posed the veracity of Mr. Jackson's faith as a question the jury could decide and belittled him for being "a "South Carolina kid that somehow celebrat[es] Passover like he is a religious Jew." T.1751. He derided his subsect of Judaism as "Jews for Jesus, a small

fringe religion," *id.*, and asked the jury to ignore the members of that faith who testified on Mr. Jackson's behalf. T.1733. These jabs at his religion improperly belittled Mr. Jackson's right, as an incarcerated person, to freely express and practice his faith. *See Cutter v. Wilkinson*, 544 U.S. 709, 719-20 (2005) (grounding protection of rights to practice religion in prison "within the corridor" between the First Amendment's Religion Clauses); U.S. Const. amends. I, VIII; *cf. Dawson v. Delaware*, 503 U.S. 159, 168 (1992) (reversing death sentence predicated in part on State's use of defendant's mere membership in Aryan Brotherhood and citing First Amendment association rights).

The State also invalidated Mr. Jackson's right, as an indigent person facing execution, to present state-funded experts. *See Ake v. Oklahoma*, 470 U.S. 68, 86-87 (1985); U.S. Const. amends. VI, VIII; XIV. He told the jury that "[m]itigation is a biased, paid for industry" over defense objection. T.1733. He said, "let's analyze what the $40,000 gets you, analyze whether or not it's garbage in and garbage out." T.1746; 1733 (similar reference to this figure); 1758 (referring to appointed experts as "paid advocates"). He went so far as to roleplay a defense expert while proclaiming, "I am God[,]" as if

the doctor himself had sworn it. T.1751 (Dr. Gabarino). He asked another defense expert, over the defense's objection and motion for a mistrial, whether neuropsychological testing results "excused" Mr. Jackson's crime. T.1446 (Dr. Ouaou).

The State's language only served to denigrate mitigation in violation of Mr. Jackson's constitutional rights. *Brooks*, 762 So. 2d at 904. As a prosecutor, his "improper suggestions [and] insinuations. . . [were] apt to carry much weight against the accused when they should properly carry none." *Berger v. United States*, 295 U.S. 78, 88 (1935). The damage was done the moment the prosecutor uttered each word.

B. The prosecutor improperly injected fear and emotion into the sentencing determination through jury argument.

This Court has consistently condemned argument that "impermissibly inflame[s] the passions and prejudices of the jury with elements of emotion and fear." *Cruz v. State*, 320 So. 3d 695, 720 (Fla. 2021) (quoting *Brooks*, 762 So. 3d at 900). Prosecutors "venture far outside the scope of proper argument" where their comments "inject elements of emotion and fear into the jury's deliberations." *Garron v. State,* 528 So. 2d 353, 359 (Fla. 1988).

i. The prosecutor presented a "dissertation on evil."

The State may not present the jury with a "dissertation on evil" by suggesting it would be cooperating with evil or immorality by recommending a life sentence. *Cruz*, 320 So. 3d at 720; *King v. State*, 623 So. 2d 486, 488 (Fla. 1993). *See also Rigterink v. State*, 193 So. 3d 846, 876 (Fla. 2016) (similar condemnation of State's use of "evil" in context of HAC allegation). For instance, on appeal of codefendant Alan Wade's first trial for this crime, this Court found this same prosecutor "'blatant[ly] appeal[ed] to jurors' emotions'" by "suggest[ing] that an acquittal would constitute walking 'into the darkness of greed' rather than 'into the light of justice.'" *Wade v. State*, 41 So. 3d 857, 872 (Fla. 2010) (internal citations omitted).

Undeterred, in the very first words of his opening, the prosecutor framed this case as a battle of good—the State—versus evil—now Mr. Jackson. Over defense objection, T.669-70, he told the jury:

> Standing before 14 citizens it is my solemn and awful duty to share the shocking and evil and really inconceivable acts that occurred in July of 2005. Time and it[s] passage has done nothing to dull the sting of this defendant's especially vile and cruel acts.
>
> Nothing has brightened the soulless darkness where these crimes were conceived, and make no mistake about

> it, every crime, every harm that befell the victims in this case was grown inside that brain seated before you.
>
> The state is presenting this case because some evil is just too great to tolerate. Time does not heal all wounds. Some evil can only sufficiently be punished by imposing a just sentence of the ultimate punishment.

T.669. The prosecutor continued to invoke this imagery of evil throughout his summation, T.1732-33, 1734, 1762, and in his final plea for death:

> Time has not dulled the evil that was germinating in this defendant's brain. . . Time has done nothing to dull the sting of these vile acts and nothing will brighten the soulless darkness where those crimes were committed in his heart and in his soul. Some evil is just too great to tolerate. Thank you.

T.1761-62.

The prosecutor sought "obvious[ly] [to] appeal to the emotions and fears of the jurors," violating longstanding precedent. *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985). He described a "soulless darkness" within Mr. Jackson. T.669, 1761. He imagined evil "germinating in his mind." T.1734; *see also* T.1762, 669. The statements were not isolated. *C.f. Lugo v. State*, 845 So. 2d 74, 107 (Fla. 2003). They formed the base of the prosecutor's case for death.

Similarly forbidden is the "prosecutorial overkill" of calling a person inherently dangerous. *See Delhall*, 94 So. 3d at 168 (quoting

Teffeteller v. State, 439 So. 2d 840, 845 (Fla. 1983)); *Brooks,* 762 So. 2d at 903-04. In *Delhall*, this Court reversed a death sentence due to argument that the defendant was "violent, dangerous, [and] 'cannot be fixed'. . . all of which suggest a pattern of dangerousness extending into the future." 94 So. 3d at 168. Here, too, the prosecutor placed the evil of this case deep in Jackson's identity, not just the facts of this case. He told the jury that time had not changed a thing—that in effect, Mr. Jackson was, is, and will always be evil. *See* T.669, 1761-62. This violated at least two of this Court's rulings: it claimed Mr. Jackson was inherently dangerous, and informed the jury that it would be "cooperating with evil" by recommending any sentence less than death. *See King*, 623 So. 2d at 488.

The prosecutor couched yet another impropriety in his sermon against evil: he used his opening to bolster the State's decision to pursue death. With his initial words, he claimed that "the State is presenting this case because some evil is just too great to tolerate . . . some evil can only sufficiently be punished by imposing a just sentence of the ultimate punishment." T.699. The law forbids such argument. *See Pait v. State*, 112 So. 2d 380, 384-85 (Fla. 1959)

(condemning arguments suggesting "the composite judgment of the State Attorney's staff" is to seek death). Any assurance that a prosecutor correctly seeks death "tends to cloak the State's case with legitimacy as a bona-fide death penalty prosecution." *Brooks,* 762 So. 2d at 901; *see Ferrell v. State*, 29 So. 3d 959, 987 (Fla. 2010) (same, where the prosecutor said, where the facts "demand the death penalty, the state has an obligation to come forward and seek the death penalty"). The prosecutor justified a charging decision by claiming evil festered at Mr. Jackson's core. The resulting death sentence cannot stand.

ii. The prosecutor violated the "golden rule" of summations by inviting the jury to imagine the victims' fictionalized final thoughts.

All prosecutors must follow the "golden rule" of summations: do not "invite the jurors to place themselves in the victim's position" and imagine their suffering, pain, or fear. *Braddy v. State*, 111 So. 3d 810, 849 (Fla. 2012); *see Bertolotti*, 476 So. 2d at 133. This Court has long condemned even "subtle 'golden rule' argument[s]" as improper appeals to jurors' emotions. *See, e.g., Urbin v. State*, 714 So. 2d 411, 422 (Fla. 1998), *receded from on other grounds as noted in Lawrence v. State*, 308 So. 3d 544 (Fla. 2020).

In *Urbin*, this Court found that a prosecutor subtly violated the "golden rule" by "creating an imaginary script" of the victim begging for his life as he died. *Id.* at 421. While the prosecutor did not explicitly direct the jury to imagine the victim's final suffering, the script carried the same effect. *Id.*; *see also Gonzalez v. State*, 136 So. 3d 1125, 1153 (Fla. 2014) (finding error where the prosecutor opined that the victim feared for her children in her final moment).

The prosecutor here fabricated an "imaginary script" of the victims' dying thoughts. He told the jury that upon realizing "that they were not getting out of that hole, they may have thought about that gun [that they saw earlier in their home] putting two bullets in the back of their heads." T.1742. The court overruled Defense's immediate objection to this statement. *Id.* This was error. *Gonzalez*, 136 So. 3d at 1153.

"By literally putting his own imaginary [thoughts] in the victim's [head]. . . the prosecutor was apparently trying to 'unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused.'" *See Urbin,* 714 So. 2d at 421 (quoting *Barnes v. State*, 58 So. 2d 157, 159 (Fla. 1951)). The prosecutor wanted the jury to imagine a suffering so great that the

victims wished for an execution-style death. This "blatant appeal" to the jury's emotion was improper, even if this Court does not find a golden rule violation. *See Wade*, 41 So. 3d at 872 (finding impropriety even where the prosecutor did not technically break the golden rule).

* * *

The cumulative harm of the prosecutor's improper comments, including those without objection, fundamentally tainted the proceedings against Mr. Jackson and deprived him of a fair trial. *See Delhall*, 95 So. 3d at 168; *see also* n.11, *supra* (demonstrating danger of prejudice in close death cases).

9. The cumulative prejudice of the many errors throughout Mr. Jackson's resentencing deprived him of a fair trial.

Where multiple errors mar a proceeding, this Court must reverse conviction if there is a reasonable possibility that the cumulative harm caused by the errors affected the jury's decision. *Evans v. State*, 177 So. 3d 1219, 1238-39 (Fla. 2015) (finding cumulative prejudice sufficient to reverse from evidentiary error, improper questioning, and prosecutor's improper

summation), *receded from on other grounds by Johnson v. State*, 252 So. 3d 1114, 1117-18 (Fla. 2018).

Prejudicial error plagued Mr. Jackson's resentencing, from the court and the prosecutor alike. The judge incorrectly instructed the jurors that they could not issue a binding life vote. Point 1. He refused to grant a necessary continuance after passage of the new law. *Infra*, Point 10. The court forbade Mr. Jackson from introducing evidence of Nixon's recantation, Point 6, or using Mr. Wade's life sentence as mitigation. Point 5. The court declined to consider several proven mitigating circumstances. Point 7. And finally, the prosecutor appealed to the jurors' emotions and denigrated Mr. Jackson's mitigation throughout his opening and closing statements. Point 8.

Mr. Jackson's case for life was strong enough that despite court error, and despite the State's desperate use of every foul tactic to block a mercy vote, four jurors wanted him to live. This Court "cannot conclude" the cumulative prejudice of these errors "did not influence the jury to a reach a more severe penalty recommendation than it would have otherwise." *Delhall*, 95 So. 3d at 170 (citing eight to four death recommendation and noting recommendation "far from

unanimous"). This Court must reverse. *Evans*, 177 So. 3d at 1238-39.

10. The trial court abused its discretion by denying Mr. Jackson's motion to continue.

Just twenty-five days before Mr. Jackson's *Hurst* resentencing trial began, a change in law (potentially) stripped him of his right to a unanimous jury. *But see* Point 3. But when defense counsel quickly requested a continuance, R.2870-71 (filing just four days after the law changed), 2872-78 (supplementing that argument two days later), the court summarily denied their request and forced an immediate trial. R.2880. The trial judge abused his discretion.

This Court must reverse a trial court's denial of a motion to continue if the record reveals a "palpable abuse of . . . judicial discretion," *Middleton v. State*, 220 So. 3d 1152, 1175 (Fla. 2017), that unduly prejudiced the accused. *Carr v. State*, 156 So. 3d 1052, 1064 (Fla. 2015) (citing *Doorbal v. State*, 983 So. 2d 464, 486 (Fla. 2008)) *abrogated on other grounds by Cruz v. State*, 372 So. 3d 1237 (Fla. 2023). "The 'common thread' connecting cases finding a 'palpable' abuse of discretion . . . seems to be that defense counsel

must be afforded a reasonable opportunity" to prepare for trial. *Trocola v. State*, 867 So. 2d 1229, 1231 (Fla. 5th DCA 2004).

A. Instead of granting the motion to continue to wait for model instructions, the trial judge "shot from the hip" and erred in its charge.

A sentencing court may properly grant a continuance to await clarification on a new law. *See United States v. Tanner*, 544 F. 3d 793, 795 (7th Cir. 2008) (noting that sentencing judges may await clarification of a law, but may not wait for a new law to take effect). When a new law requires new jury instructions, this Court's Committee on Standard Jury Instructions (the "Committee") will convene, interpret the law, and provide guiding pattern instructions. *See* In re Amends. to Fla. Rules of Jud. Admin., Fla. Rules of Civ. Proc., & Fla. Rules of Crim. Proc.-Standard Jury Instructions, No. SC20-145, 2020 WL 1593030 (Fla. Mar. 5, 2020). "[W]hile a trial judge is tasked with explaining to jurors the law they are to apply, the trial judge should rely upon, and seldom stray from, Florida's Standard Jury Instructions." *Warren v. State*, 307 So. 3d 871, 872 (Fla. 3d DCA 2020); *see also Stephens v. State*, 787 So. 2d 747, 755 (Fla. 2001) (holding that standard instructions are

presumptively correct and preferable to any individualized interpretation of the law).

Senate Bill 450 altered the way that capital juries deliberate and, in turn, the instructions they must receive. As discussed *supra,* Points 1 and 2, the non-unanimity amendment was complex in both its novelty and as an outlier in the nation. But while much of the law was new, the amendment retained a significant provision extant since 2016: a jury's vote for life is binding. Thus, no court could correctly instruct a capital jury under the April 2023 non-unanimity law without also instructing them of their seven-year-old power to bind the court with a life vote.

Defense counsel correctly objected when the trial judge failed to do just that, for the simple reason that he still, after seven years, believed that he could override a life vote. *See* Point 1. The defense sought a continuance to await the Committee's guiding interpretation (which the court may have received with less skepticism than counsel's word). R.2871. Ultimately, the Committee did amend the instructions—only four months after Jackson's trial was set to begin. Fla. Std. Jury Instr. (Crim.) § 7.11 (amend. Sept. 8, 2023).

But the trial court refused to wait, choosing to improvise new instructions rather than continue the case. Jackson incorporates all arguments raised *supra*, Point 1, about the harm this decision caused him. Had the judge waited just four months, he could have ensured that he understood the new law and accurately communicated it to the jury: basic protections that Jackson deserved as a person facing punishment of death. *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (commanding courts to provide those who face death with special accommodations, considerations, and "protections that the Constitution nowhere else provides" at all stages of a capital trial, including the punishment phase). Instead, the judge failed the follow the plain terms of the law despite defense counsel's insistence that he was wrong, and when given the opportunity to await the model instructions' guidance, he chose to "shoot[] from the hip" instead. T.628. This choice was a "palpable abuse of discretion." *Middleton,* 220 So. 3d at 1175.

B. By denying the continuance, the court deprived defense counsel of a full opportunity to challenge the new law pretrial.

The American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

(Feb. 2003) (hereinafter "ABA Guidelines"), reprinted in 31 Hofstra L. Rev. 913, 925 (2003), outline the duties and obligations of capital trial counsel. They serve as "guides to determining what is reasonable," *Wiggins v. Smith*, 539 U.S. 510, 522 (2003), and "embody the current consensus about what is required to provide effective defense representation in capital cases." *ABA Guidelines* at 2. Among other duties, Capital counsel must investigate, raise and preserve all worthy legal claims. ABA Guidelines 10.8. *See Strickland v. Washington*, 466 U.S. 668, 680 (1984) (holding that counsel bears the duty to reasonably investigate the laws and facts of a case). Florida law requires that counsel raise and resolve such claims "at the first opportunity" to preserve them for appellate review. § 924.051(8).

Defense requested a continuance to ensure they had enough time to challenge the new law. R.2875-77. At oral arguments for the legal challenges they did raise, counsel admitted to the court, "obviously, we've had very little time and have been scrambling to try to get arguments and motions together for presentation today." *Id.* "The law just changed[,] so we've had very little time to sort of gather everything we need to gather." *Id.* Counsel clarified that

while they filed "a couple of motions," they "think there are other arguments that could be made and perhaps even arguments in furtherance of the ones" they were about to present. *Id.*

By denying Mr. Jackson's continuance, the court deprived his lawyers of a meaningful opportunity to research and raise all viable challenges to the new law. *Id.* This both made it impossible for counsel to ensure Mr. Jackson effective capital representation, *see* ABA Guidelines at 2, and deprived him of due process of law. *See Tennessee v. Lane*, 541 U.S. 509, 532 (2004) ("a State must afford to all individuals a meaningful opportunity to be heard in its courts" to satisfy due process) (internal citations omitted); *State v. Beasley*, 580 So. 2d 139, 141 (Fla. 1991); *see also Epps v. State*, 941 So. 2d 1206, 1207 (Fla. 4th DCA 2006) (finding due process violation where the court did not afford the accused a "meaningful opportunity" to challenge its decision to deprive him of the right to proceed pro se).

Given that the trial court's ruling denied Mr. Jackson of the opportunity his counsel requested to fully prepare, to the extent the State claims any part or subpart of any argument concerning the new statute or its operation is unpreserved, this Court should not

hold Mr. Jackson to the strictures of Florida's preservation rule.[32] The court's haste deprived Mr. Jackson of the "first opportunity," § 924.051(8), to challenge the new law. The contemporaneous-objection rule exists to prohibit counsel from "from *deliberately allowing known errors to go uncorrected* as a defense tactic[.]" *State v. Rhoden*, 448 So. 2d 1013, 1016 (Fla. 1984) (emphasis added); *Clark v. State*, 363 So. 2d 331, 335 (Fla. 1978). But here, the court deprived counsel of the opportunity to fully object, or even to study and understand what they needed to object to.

11. Goaded by prosecutors, the Legislature acted on time for Mr. Jackson's sentencing trial to strip him of the right to a unanimous jury, issuing an unconstitutional bill of attainder.[33]

In March of 2023, amidst outrage by many legislators over the life sentences of Nikolas Cruz and Alan Wade under the 2017 amendment requiring death-sentencing unanimity (Table 1, *supra*),

[32] This is not to suggest any lack of preservation, but rather is based in the recognition that the State frequently relies on preservation arguments and in an abundance of caution to preserve Jackson's rights.

[33] Mr. Jackson raises this point in the alternative to Point 3. If the Court rules that the Legislature could not, under section 775.022, apply the 2023 law retroactively, then this constitutional point becomes moot.

the Legislature began considering bills to rescind this right. R.3735. Or, as one witness put it, as regards the final execution decisions, the Legislature considered removing "a right to a jury trial [that] necessarily includes a unanimous verdict." R.3859. Working in concert with Mr. Jackson's prosecutor, the legislators targeted the recission to apply at Mr. Jackson's May 2023 resentencing. Because the legislature stripped this right from Mr. Jackson without a trial, and the removal amounts to "punishment" under Supreme Court precedent set out below, this targeted punishment without trial violates the Constitution's command that "[n]o State shall . . . pass any Bill of Attainder." U.S. Const. art. I, § 10, cl. 1.

Bills of attainder are "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial[.]" *United States v. Lovett*, 328 U.S. 303, 315 (1946). They contain three elements: "specification of the affected persons, punishment, and lack of a judicial trial." *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 847 (1984). Because the Legislature indisputably afforded Mr. Jackson no trial before stripping him of

his right to be free from execution absent a jury unanimously calling for that punishment, this brief will focus next on specification, or targeting, and then on punishment.

A. Prompted by prosecutors, the Legislature targeted Michael Jackson.

"The singling out of an individual for legislatively prescribed conduct constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 86 (1961). Here, legislators singled out Michael Jackson, and targeted his pending trial, on the official record and behind the scenes with Mr. Jackson's lead prosecutor. They did so with the help of legislators whose former work in law enforcement connected them to this case.

In debate, legislators highlighted one and only one *pending* capital case—this one (with Mr. Jackson and Ms. Cole's sentencing pending). Several argued that this case, in which codefendant Wade had recently been sentenced to life, showed the need for stripping unanimity from Florida law:

- "I reached out to my State Attorney in Duval County . . . . She told me there were six cases" in last 12 months where "the State sought the death penalty. None" were successful. "One victim [stet] was buried alive." R.3810-11.

- "The jury up in northeast Florida where a murderer did a home invasion abducted an elderly couple, buried them alive. That jury also got it wrong. 100 percent wrong. Ten/two [vote]." R.3842.

- "An elderly couple . . . were taken off site and buried alive. . . . Even in that case. Ten/two." R.3914 (quoted portion significantly reduced for concision).

- "From South Florida with the Parkland families to Northeast Florida where an elderly couple were the victims of one of the most heinous things I've heard. . . . Buried them alive. . . . [E]ven in that case, the jury was not unanimous." R.4013 (reduced for concision).

House Justice Appropriations Subcommittee Chairman Chuck Brannan used his own work on this case, as a former law enforcement officer,[34] to argue colorfully for unanimity stripping:

> Three thugs went to someone's home. It was just like my grandma and your grandpa. The grandaddy was crippled, in a wheelchair. . . . And they took them . . . dug a hole and buried them alive. Now, I found that car about a week before we found their bodies. That morning we found one of the suspects. . . . This is a Jacksonville case, but they

[34] His official biography lists his occupation as "[r]etired Chief Investigator, Baker County Sheriff's Office[.]" *Robert Charles "Chuck" Brannan III, Biographical Information*, https://www.myfloridahouse.gov/Sections/Representatives/details.aspx?MemberId=4708&LegislativeTermId=90 [https://perma.cc/TRY9-7LFM].

> were buried out in my area. We had an interview and we had a come to Jesus meeting. And he decided to show us where they were. . . . If there was ever a case where the death penalty needed to be applied, this was it.

R.3934-35; *see also* R.4013 (another legislator describing Brannan's work on the case). *But see* R.4759 (prosecutor claiming that Brannan "not in any way, shape or form directly involved with the case"). The Bill's sponsor continued to link it to the buried-alive case for months after it passed.[35]

Behind the scenes of the legislative debate, the targeting was urgent. Mr. Jackson's trial was scheduled to begin on May 15, 2023. T.4. Whether he would be sentenced to death or life on another non-unanimous vote, *Jackson*, 18 So. 3d at 1024 (8-4 vote from first trial), depended not only on the bill's passage but also how quickly it could be passed, presented to the Governor, and signed. The Legislature was set to adjourn sine die on May 5,

---

[35] In August, Senator Berny Jacques referred to Mr. Jackson's co-defendant in a post: "Because of the bill I did with Senator Blaise Ingoglia, this heinous woman will now be resentenced and face the death penalty that she deserves. It's sad that she was able to escape true justice under the previous law." Berny Jacques, @BernyJacques, Twitter (Aug. 14, 2023, 9:19 AM), https://twitter.com/BernyJacques/status/1691077112822665216. [**https://perma.cc/T3GF-JDYJ**]

2023.[36] Under the Florida Constitution, passed bills must "be signed by the presiding officers of the respective houses and by the secretary of the senate and the clerk of the house of representatives during the session or as soon as practicable after its adjournment sine die." Art. III, § 7, Fla. Const. The Governor's time to sign a bill into law increases from seven days to 15 when, as here, the legislature adjourns sine die before the ordinary seven-day period passes. Art. III, § 8, Fla. Const.

In other words, it was by no means certain that Senate Bill 450 would make it across the finish line for Jackson's trial. Indeed, the Governor signed 27 bills originating in this same session as late as May 25, 2023.[37] And many of these originated before or at the same time as Senate Bill 450.[38]

---

[36] *See*, *e.g.*, Fla. S. Jour. 877 (Reg. Sess. 2023), https://www.flsenate.gov/Session/Journals/2023/5-5-2023 [https://perma.cc/AKE7-FGC2].

[37] *See* Governor's Transmittal Letters (May 25, 2023), https://www.flgov.com/wp-content/uploads/2023/05/5.25.23-Transmittals.pdf [https://perma.cc/JW8K-PZJK]. Many lingered for weeks after their passage, awaiting officer signatures and then, days later, the Governor's signature.

[38] *See*, *e.g.*, Fla. HB 537 (2023), https://www.flsenate.gov/Session/Bill/2023/537/ByCategory

Prosecutor Alan Mizrahi had been the lead prosecutor on all three capital cases since 2007. Less than one year after a non-unanimous jury awarded life to Mr. Wade, Mr. Mizrahi worked inside connections to ensure S.B. 450 would be the law by the time of Mr. Jackson's trial. On April 13, he began texting with Representative Sam Garrison, a former assistant state attorney in Mr. Mizrahi's office at the time of Jackson's first trial and death sentence.[39] During house debates that same date, Representative Garrison invoked by name Dan Skinner – his old mentor and a senior leader in the same office – and predicted that Mr. Skinner and "his buddies" were watching the proceedings online. R.4007. And indeed, Mr. Mizrahi's text message that same day informed the representative he was "watching" and asked, "So DP 8/4 will be law *when I try Buried alive 5/15*?" T.2987, 2998 (emphasis added).

(passed and enrolled on May 1, signed by presiding officers on May 22, approved by Governor on May 25) [https://perma.cc/6QWD-ZK9F].

[39] *See* Sam Garrison, Other Public Service, https://www.myfloridahouse.gov/Sections/Representatives/details.aspx?MemberId=4767&LegislativeTermId=90 (listing employment in same prosecutor's office from 2001 to 2011) [https://perma.cc/7NS4-ZBSG].

A later text chain occurred between Messers. Garrison and Mizrahi, Mark Caliel (R.2994, 3026), and "DS" or "S" (in context, possibly Mr. Skinner) (R.2994, 3028-32, 4007)—all part of the State Attorney's Office leadership team, https://sao4th.com/about/meet-mrs-nelson-and-her-team/ https://[perma.cc/2GMN-MSMU]). On this chain, Mr. Mizrahi asked "when do we think the governor will sign? And will it be effective immediately upon signing" R.3018. Representative Garrison responded: "Unclear when it will be signed[.]" R.3019.

On April 19, Mr. Mizrahi persisted: "Are we safe to assume it will be signed before 5/15?" R.3020. Alluding to the complex constitutional procedure outlined above, Representative Garrison responded: "Not necessarily. It depends when the bill is physically sent to him for signature. It's a weird process." R. 3021. He then added: "My recommendation is the elected SA's need to reach out and communicate that time is of the essence." R.3022.

The effect of Representative Garrison's collaboration with the State Attorney's Office became clear one day later: unlike other bills that had languished for needed signatures until late May, Senate Bill 450 rocketed through both chambers and received prompt

signatures by the presiding officers *and* the Governor one day after the last known text exchange,[40] on April 20, 2023. *See* Florida Senate Tracker, S.B. 450, https://www.flsenate.gov/Session/Bill/2023/450 [https://perma.cc/R59R-NP7Q].

In its debates, Michael Jackson's was the only pending case the Legislature discussed where "time [was] of the essence." R.3022. Encouraged by prosecutors, the Legislature thus targeted him with their legislative timeline. *See*, *e.g.*, *Neelley v. Walker*, 67 F. Supp. 3d 1319, 1329-30 (M.D. Ala. 2014) (finding targeting based on debates and statutory language referring to one prisoner's parole status, without naming her explicitly); *Woldt v. People*, 64 P.3d 256, 271 (Colo. 2003) (finding in context of Ex Post Facto Clause, three capital defendants were "identifiable targets of the legislation" where

[40] Despite Mr. Jackson's best efforts, he was unable in the short time between the Bill's passage and his trial to obtain most of the communications that have occurred about this bill behind the scenes. R.2973-3041. Suffice to say that, given the Attorney General's duty to ensure "justice shall be done," *Berger v. United States*, 295 U.S. 78, 88 (1935), Mr. Jackson continues to request that additional information be disclosed to him and this Court for use in this and any future litigation.

the section applied only to three persons who had received the death penalty from a three-judge panel).

B. **Stripping Mr. Jackson of the protection of unanimity amounted to punishment, and indeed resulted in his death sentence.**

Distinct from ex post facto laws, *see*, *e.g.*, U.S. Const. art. I, § 10, bills of attainder do not necessarily impose criminal "punishment." *United States v. Brown*, 381 U.S. 437, 445-48 (1965) (collecting examples of bills of attainder involving rights and property legislatively stripped). Nearly back to our Nation's founding, the Supreme Court has found bills of attainder for deprivation of rights and property. *See*, *e.g.*, *Fletcher v. Peck*, 10 U.S. 87, 138 (1810) (Marshall, J.) ("A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."); *Cummings v. Missouri*, 71 U.S. 277, 320 (1866) ("The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact."); *Lovett*, 328 U.S. at 315-18 (finding law barring future payment to named federal employees bill of attainder).

The law has thus operated for 150 years. *See Brown*, 381 U.S. at 448. *See, e.g.*, *Cook v. Smith*, 288 Ga. 409, 414 (2010) (violation of bill of attainder where law shortened political term "previously … established by statute and local Board policy"); *cf. Dugger v. Williams*, 593 So. 2d 180, 181-83 (Fla. 1991) (noting "some procedural matters have a substantive effect" and that challenged procedural provision constituted ex post facto law because it caused "a substantial substantive disadvantage . . . retrospectively applied").

While at common law bills of attainder often imposed the death penalty, *Selective Serv. Sys.*, 468 U.S. at 851-52, the evidence here establishes something no less unlawful—stripping Jackson of his right, afforded by the Legislature in 2017, to live absent the unanimous vote of a jury saying he should die. The record shows the Legislature's intent that Mr. Jackson, unlike his codefendant Alan Wade, should not escape death through the benefit of this right. Because the Legislature, without a trial, intentionally stripped Mr. Jackson of this right, "previously enjoyed," *Cummings*, 71 U.S. at 320, Senate Bill 450 was an unconstitutional bill of attainder, as applied to him.

As argued below, R.2906-08, 2916-17, R.2973-3041, the death sentence based upon that unconstitutional law cannot stand.

12. Florida's lack of Eighth Amendment safeguards have resulted in an arbitrary, capricious, and unconstitutional sentence.

A. Florida has abandoned safeguards and engaged in capricious and arbitrary sentencing practices (facial challenge).

After the Supreme Court struck down all extant capital-sentencing schemes under the Eighth Amendment because they produced outcomes as arbitrary as a lightning strike, *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring), Florida enacted a statute this Court approved in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973). The Court found the new statute would channel sentencing discretion and render executions "reasonable and controlled, rather than capricious and discriminatory[.]" *Id.* at 7. *See also Proffitt v. Fla.*, 428 U.S. 242, 250-259 (1976) (approving new scheme under *Furman* and citing this Court's review of "each death sentence to ensure that similar results are reached in similar cases").

But Florida has moved far away from the previously-approved statute. It has discarded its safeguards. And through a series of

whiplashing changes unheard of in American capital jurisprudence, it has created instability and arbitrariness in sentencing, rather than reason and control. As argued more fully in pleadings below, R.2913-16; 2937-44, incorporated by reference for concision here, and preserved as a matter of law as a facial constitutional challenge, *Westerheide*, 831 So. 2d at 105, the system is riddled with caprice and discrimination. In brief:

1. Florida has abandoned the proportionality review it promised when the U.S. Supreme Court approved its sentencing scheme. *Compare Lawrence v. State*, 308 So. 3d 544, 552 (Fla. 2020) *with Proffitt*, 428 U.S. at 252-53 (approving Florida's capital sentencing scheme with assumption Florida death sentences would be reviewed for comparative proportionality, as in the Georgia scheme simultaneously approved in *Gregg v. Georgia*, 428 U.S. 153 (1976)). It has thus abandoned a process this Court previously proclaimed would ensure no one would live or die on the basis of race or sex. *Offord v. State*, 959 So. 2d 187, 188 (Fla. 2007).

2. It has also abandoned *comparative* proportionality review of codefendant sentences, *Cruz v. State*, 372 So. 3d 1237, 1245 (Fla. 2023), despite Florida's assurance to the Supreme Court that this

Court would review "each death sentence to ensure that similar results are reached in similar cases." *Proffitt*, 428 U.S. at 250-259.

3. This Court no longer actively polices capital cases for error. *Compare Proffitt*, 428 U.S. at 253 (finding this court "has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed," having vacated 8 of the 21 death sentences it had reviewed to date) *with* R.2936-37 & n.7 (reviewing death-penalty cases reviewed by this Court from 2019 through May of 2023, and documenting 27 of 29 affirmed). This sea of change also evinces the impact of this Court's abandonment of proportionality review.

4. In 2023, Florida abandoned the unanimity requirement that had previously led to many life sentences and served as a safeguard against arbitrary sentences. *See* Point 2, *supra*; *Gregg*, 428 U.S. at 211 (White, J., concurring) (approving of Georgia's scheme in part because "[u]nless the jury unanimously determines that the death penalty should be imposed, the defendant will be sentenced to life imprisonment"); *McCleskey*, 481 U.S. at 309-311 (similarly extolling value of Georgia's capital sentencing jury as representative of community with "diffused impartiality" and authority to exercise

unreviewable leniency); *United States v. Aquart*, 912 F.3d 1, 51-53 (2d Cir. 2018) (approving federal death penalty's lack of proportionality review due to other safeguards, including requiring unanimity on the weighing question for death); *Daniels,* 542 A.2d at 315) (identifying unanimity as Eighth Amendment safeguard); *Loyd v. State*, 379 So. 3d 1080, 1096 (2023) (extolling value of jury of peers and their collective moral judgment, unanimously reached under prior law); Jennifer Eisenberg, *Ramos, Race, and Jury Unanimity in Capital Sentencing*, 55 Loy. L.A. L. Rev. 1085, 1104 (2022) (citing *Ramos*'s emphasis on unanimity as enhancement of quality of jury deliberations, and arguing it thus serves as a requisite Eighth-Amendment safeguard).

Meanwhile, Florida's continued reliance on judicial sentencing provides no backstop against juries' non-unanimous death recommendations.[41] It is highly unusual for a Florida judge to reject

[41] *Woodward v. Alabama*, 134 S. Ct. 405, 408 (2013) (Sotomayor, dissenting from denial of cert.) (reviewing evidence that "Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressure" to support death sentences). Florida Circuit Court judges too are elected. *See* § 105.031, Fla. Stat. (2023).

a jury's death recommendation. Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 Mich. St. L. Rev. 793, 809 (2011).[42]

5. In 1972, Florida relied on a narrow set of eight statutory aggravating factors. *Dixon*, 283 So. 2d at 5-6. Since then, the number has doubled to sixteen. § 921.141(6)(a-p), Fla. Stat. This results in what has been described as "aggravator creep," undermining the safeguards required by *Furman* against arbitrary imposition of the death.[43] One experienced Florida Circuit judge has lamented that it is difficult to imagine any Florida first-degree murder case without at least one aggravator. R.2932.[44] The most

---

[42] With respect to unanimity, this point complements the arguments in Point 2, *supra*, providing an additional reason the new statute violates the Eighth Amendment. But this point also makes a broader argument under this guarantee—about Florida's system as a whole.

[43] *See* Chelsea Creo Sharon, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 Harv. C.R.-C.L.L. Rev. 223 (Winter 2011).

[44] That is because first-degree murder under section 782.04 (1)(a), Florida Statutes, already requires either proof of premeditation or

unusual type of first-degree murder would thus be one without one of 16 available aggravating circumstances. Florida's aggravating circumstances therefore do little to nothing to narrow death eligibility.

6. The questions presented in this appeal raise additional questions with the operation of Florida's capital scheme:

- Is it one in which a jury is permitted to return a death recommendation without being informed of its power to return a binding life sentence with the vote of five jurors? Point 1.
- Is it one in which disparate sentences of codefendants may neither be considered by the jury, Point 5, *infra*, nor by this Court on appellate review?

---

any one of several accompanying felonies. Thus, as here, nearly every such crime will have an accompanying felony that qualifies as an aggravator under section 921.141 (6) (d); or if not, the defendant will have a qualifying prior felony (a & b); or, will meet the relatively easy standard for "especially heinous atrocious or cruel" (h), *Allred v. State*, 55 So. 3d 1267, 1280 (Fla. 2010) (holding a victim's perception of pending death "need only last seconds"); or, the murder will qualify as cold, calculated, and premeditated (i), requiring a level of reflection beyond (mere) premeditated murder for which there is no "bright line rule[.]" *Miller v. State*, 379 So. 3d 1109, 1125 (Fla. 2024).

- Is it one in which, despite Eighth-Amendment precedent, proven mitigation may be excluded or given no weight? Points 5, 7.

7. Without the above safeguards, contrary to its original goals, Florida does not reserve death for "the most aggravated and unmitigated of most serious crimes." *Dixon*, 283 So. 2d at 7.

But this is also so because, in the last two decades, accidents of time have determined who lives and who dies. In *Hurst*, 202 So. 3d at 57, this Court required unanimity on every finding set out in the capital statute, including the ultimate sentencing decision. The Legislature then changed the law to require unanimity in compliance with *Hurst*. *See* Table 1, *supra*. Four years after *Hurst*, however, this Court reversed course, "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance[.]" *Poole*, 297 So. 3d at 508.

After *Hurst*, approximately 145 death-row prisoners received sentencing relief,[45] and less than 60 remained to be resentenced

[45] Relief was limited temporally to those whose death sentences became final after *Ring*, and substantively to cases where the State could not prove the error harmless. *See Mosley v. State*, 209 So. 3d

when the Legislature reverted to non-unanimity.[46] Of the more than 80 resentenced before the 2023 change, roughly 70 were resentenced to life under unanimity, *see* n.46, *supra*, including Mr. Jackson's co-defendant Alan Wade (while his codefendant Tiffany Cole was resentenced to life under the renewed non-unanimity regime).

B. Michael Jackson's resulting death sentence is arbitrary, capricious, and violates the Eighth Amendment (applied).

As argued below, R.2902-09, 2913-16, within this scheme, Mr. Jackson's death sentence resembles a bolt of lightning. *Furman*, 408 U.S. at 310 (Stewart, J., concurring). Although twice juries have refused to unanimously sentence him to death, each time with only eight votes for death, *Jackson*, 18 So. 3d at 1024 (jury vote

---

1248, 1284 (Fla. 2016) (granting relief because the jury was *not* unanimous and citing *Mullens v. State*, 197 So. 3d 16, 39-40 (Fla. 2016) (holding *Hurst* relief unavailable for defendants who waived jury)).

[46] R.2917-18 (citing Death Penalty Information Center, https://deathpenaltyinfo.org/stories/florida-prisoners-sentenced-to-death-after-non-unanimous-jury-recommendations-whose-convictions-became-final-after-ring) [https://perma.cc/JW2X-2XNU]. The website has since been updated, but the updated numbers on resentencing now combine both those sentenced under unanimity and renewed non-unanimity.

from first trial), among three other codefendants, only Mr. Jackson is sentenced to death. Bruce Nixon is serving 45 years, *id.* at 1021 n.2; Mr. Wade and Ms. Cole are serving life imprisonment. R.2920-23 (Wade); R.4018 (Cole). As reviewed above, however, Florida's scheme includes no means—by jury or appellate review—to account for this differential sentencing treatment between codefendants. The defense presented this disparity to the sentencing judge as well, but he too ignored it. *Compare* R.3378, 4018 (asking judge to consider this disparity for Mr. Wade and Ms. Cole respectively) *with* R.3417-38; 4020 (ignoring it).[47]

Rather than questions of aggravation and mitigation, *Dixon*, 283 So. 2d at 7, timing and geography overwhelmingly predicted Mr. Jackson's eight-vote death sentence. Within a state that is a national outlier for allowing non-unanimous death sentences, *see* Point 2, *supra*, Mr. Jackson is one of a small minority of *Hurst* defendants forced to be resentenced under non-unanimity. *See* n.46, *supra*. And the timing that dictated this was never in his

[47] The State has argued to Mr. Wade's sentencers and to this Court that Mr. Jackson and Mr. Wade shared responsibility for the killing. *See* Point 5, *supra* (incorporated by reference).

control, but subject to Florida's extreme weather (akin to lightning), acts of God (a global pandemic), prosecutor delay (the frivolous prosecutor writ), and judicial incompetence (failure to call enough jurors in 2022). *See* Facts, *supra*.

Two different juries have failed to reach unanimity in recommending death for Mr. Jackson, each maxing out at eight jurors, the minimum vote required for death now, and insufficient in other states. The Eighth Amendment does not condone death sentences such as here based on fluke and caprice.

13. Michael Jackson's trial and death sentence under non-unanimity violates the Equal Protection Clause.

As he argued below, R.2917-18, Mr. Jackson's sentence of death by a non-unanimous jury violates the Equal Protection Clause of the Fourteenth Amendment in light of the scores of other *Hurst*-resentencing defendants who received the benefit of unanimity (and resulting life sentences) discussed above and incorporated by reference here. *See* Point 12 (A), *supra*.

The State engaged in this disparate treatment, creating (so far) a "class of one," *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), and burdening Mr. Jackson's right to death sentencing by

only a unanimous jury, without any rational basis for doing so. *See City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 446-47 (1985) (requiring a rational basis). As reviewed above, the only bases for his trial under the new statute were factors outside of his control like natural disasters, frivolous State litigation, and judicial incompetence. Moreover, the State cannot now claim a rational interest in applying its new law retroactively in light of this Court's decision in *Poole*, because the 2023 amendment made no "express[] provi[sion]" for retroactive application. § 775.022 (3). *See* Point 3, *supra*. Without the Legislature having followed its own clear law for expressing such interest, the State's belated claim to it now would ring hollow. This constitutional error too requires reversal.

14. The trial court constitutionally erred in permitting racially-discriminatory cause exclusions of jurors opposed to the death penalty.

The silencing of jurors of color accomplished by non-unanimity, *see* Point 2, *supra*, began much earlier, in jury selection. Based on a new study showing that the removal of Florida jurors unable to fairly consider a death sentence excludes Black jurors and people of color at rates doubling the exclusion of white jurors, R.2549-2640, Mr. Jackson moved below to bar such removals at his

trial, and for a consolidated evidentiary hearing with other defendants seeking similar relief. R.2682-87. In a brief order, the trial judge assumed the disproportionate exclusions alleged, but summarily denied the motion. He cited *Lockhart v. McCree*, 476 U.S. 162 (1986) (rejecting Sixth Amendment challenge to death qualification) for the proposition that Mr. Jackson is entitled to a fair-cross section in his venire—but not on his petit jury. R.2841-43. As shown below, the court erred and thus allowed a racially-discriminatory jury selection process to infect Jackson's trial, in violation of the Sixth, Eighth, and Fourteenth Amendments.

A. The court's reasoning proves faulty.

The court correctly found that the Sixth Amendment affords no right to a particular composition on a petit jury. R.2841-42. But that was not Mr. Jackson's claim. He argued that death qualification would (as ultimately shown here) fundamentally "strip Jackson's jury venire from the very peers, the representative community members, who ought to be interposed between Mr. Jackson and the State as it attempts to condemn him to death." R.2554. Thus, it was the venire—rather than the petit—jury that was tainted through the process of death qualification. Potential

jurors who appeared in court, excludable because of their death-penalty views under *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), were no more eligible to serve than an underage juror erroneously summoned. § 40.01, Fla. Stat. (requiring age of at least 18); 913.03 (1) (permitting cause challenge of juror who does not meet qualifications "required by law"). As Mr. Jackson's jury selection illustrates, Florida's process removes jurors under *Witt* before a clean slate of eligible veniremembers are presented to the parties for their strike and selection decisions. *See* T.580.

Moreover, because *McCree*'s basic assumptions do not apply to Mr. Jackson's claims or evidence four decades later, it is distinguishable. The *McCree* court assumed that death qualification affected a relatively small number of people "on the basis[,]" unlike race, "of an attribute that is within the individual's control." 476 U.S. at 176. Dissenting, but more experienced with the death penalty,[48] Justice Thurgood Marshall knew better: "Because opposition to capital punishment is significantly more prevalent

[48] *See* Gilbert King, *Devil in the grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America* (2012) (recounting then attorney Marshall's efforts to exonerate Black men facing execution, focusing on Florida).

among blacks than among whites," he wrote, "the evidence suggests that death qualification will disproportionately affect the representation of blacks on capital juries." *Id.* at 201 (Marshall, J., dissenting).

Ignored by the court below, the evidence supporting Mr. Jackson's claims proved that Justice Marshall was exactly right. University of Central Florida Professor Dr. Jacinta Gua's study examined twelve Duval County capital trials from 2010 to 2021. By every method, she found jurors of color excluded at higher rates:

- White people comprised 65% of jurors summoned, but only 45.5% of those excluded by death disqualification. Black jurors comprised 26% percent of the venire, but 39% of those death disqualified. Together, Black, Hispanic, Asian, and jurors of "other" race comprised 35% summoned and 54% of those death disqualified. R.2633.
- 27.1% of all Black potential jurors were removed through death qualification, as were 32.4% of all other jurors of color, but only 12.8% of white potential jurors were removed through death qualification. R.2636 (Table 3).

- Of potential jurors not excludable for any other cause or hardship, 38.6% of Black willing and eligible jurors were death disqualified, as were 43.4% of other jurors of color, but only 17.1% of white potential jurors. *Id.* at Table 4.

By ignoring critical and undisputed evidence unavailable in *McCree*,[49] and by ignoring Mr. Jackson's other claims under the Sixth, Eighth and Fourteenth Amendments, including that this process deprived Mr. Jackson of a "conscience of the community," *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968), the trial court erred. *See* R. 2576-99.

What's more, Mr. Jackson's Eighth and Fourteenth Amendment claims showed that state racial discrimination in the administration of the death penalty and criminal punishment system, historically and into the present, R.2563-75, has caused greater opposition to the death penalty in communities of color and thus led in turn to the disproportionate disqualification Dr. Gau and other researchers have unanimously observed. R. 2561-62

[49] Duval County prosecutors, who tried these cases, would have been well positioned to dispute this study or evidence if that were possible. They did not.

(collecting studies). *See*, *e.g.*, Carol S. Steiker & Jordan R. Steiker, *The American Death Penalty and the (In)visibility of Race*, 82 U. Chi. L. Rev. 243, 261 (2015) (observing "troubling dynamic" in which Black jurors who view the death penalty as discriminatory are excluded, which in turn "contribute[s] to discriminatory results"); James Unnever, Francis Cullen & Cheryl Lero Johnson, *Race, Racism, and Support for Capital Punishment*, 37 Crime & Just. 45, 83 (2008) (finding consistently increased opposition to the death penalty explained by historically rooted fear of state power).

As shown above, Point 2 (A), and incorporated here by reference, the Constitution does not permit such entanglement of race in life and death decisions. *See also Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.").

B. Death disqualification removed Black jurors from Mr. Jackson's trial at nearly ten times the rate of white jurors and diluted the power of Black jurors in the pool.

As Dr. Gau's study predicted, and as has occurred in cases since,[50] death disqualification, in fact, did disproportionately remove jurors of color from Michael Jackson's trial.

The clerk summoned 84 jurors in the first and only panel. R.5278-83 (numbered list); T. 29-35, 163, 426 (confirming use of only first 84). Of these, 70 either answered questions about the death penalty or offered their views before being questioned. (14 were excused for hardship or early-identified cause reasons without speaking of the death penalty. T.104-113 (removing jurors 8, 13, 14, 15, 17, 32, 35, 56, 60, 64, 65, 67, 76, 83)).

The table attached to this brief as Appendix 1 lists the races and selection outcomes of the 70 remaining jurors. In the table, "DDQ" refers to jurors death disqualified under *Witt*. "Other" refers to other types of cause removals, including the three in this venire

---

[50] *Thread of Maurice Chammah about trial of Jame Belcher in Duval County*, https://threadreaderapp.com/thread/1631709605276287023.html ("I counted 10 Black people cut from the jury pool — more than half — because they couldn't give the death penalty.") [https://perma.cc/RK2F-JEE6]

who would automatically impose death without considering mitigation "ADP." Strike refers to peremptory strikes exercised by the Defense "D" or the State "S." "DNR for perempt" refers to those potential jurors whom the parties, in their exercise of peremptories, did not reach.

Race information is derived from "'the individual profiles originally obtained from the" Florida Highway Safety and Motor Vehicles "each year that constitutes [the] jury pool.'" R.4644 (quoting email from clerk providing race of selected jurors in same manner).[51] *See also* § 40.011(1), Fla. Stat. (describing this process). As did the trial court in placing the race of the seated jurors in the record, R.4644, this Court may take judicial notice of these same profiles under section 90.202 (6) and (12), Florida. In the table, Black jurors are highlighted in green and Hispanic jurors (the term used in the clerk's lists) are highlighted in blue.

[51] While this list is available directly from the Clerk, counsel have also placed a courtesy copy, and everything needed to verify its contents, in a sharepoint file available on request by the Court or the State. Those interested would navigate to Term23_Names for the database provided by the Clerk, and to the other documents for verification it came from the Clerk's Office.

In the pool of 70 who spoke on their death-penalty views, 47 were white (67.1%), 19 were Black (27.5%) and 4 were Hispanic (5.8%).

Based on a conservative count, *see* n.54 at Appendix 1, *infra*, the court removed at least seven, or 37%, of the Black jurors for their death opposition, and two of the Hispanic, 50%. But it removed only two white jurors on this basis (4.3%). Stated otherwise, it removed Black jurors at nearly ten times the rate of white.[52]

In the corresponding reduced pool of 58 jurors, white representation jumps—from 66.7% to 77.6% (45/58). And the Black population representation drops, from 27.5% to 19% (11/58).[53] "According to the 2020 Census, Duval County is approximately 60% white and only 30% Black." R.2571.

---

[52] For the admittedly small sample of Hispanic jurors, this ratio is even higher (50/4.3 = 11.6).

[53] The State removed two additional Black jurors with peremptory strikes, T.583, 594, including Aaron Stringer, for being opposed to the death penalty (rating his execution support at 0.5 on a scale from 0 to ten). T.584. *See McCree*, 476 U.S. at 191 (Marshall, J., dissenting) (noting "true impact of death qualification" spans beyond cause removals).

C. Relief is required.

Under fair-cross section precedent, *Duren v. Missouri*, 439 U.S. 357 (1979), Black jurors are a distinctive group, their representation in the adjusted venire is not fair and reasonable in in relation to their percentage in the community. And, as the underlying motion and study show, this underrepresentation is due to systemic exclusion. *Id.* at 364. The absolute disparity of at least 11% (30%-19%) raises a prima facie case the State has not answered. *See United States v. Orange*, 447 F.3d 792, 798 (10th Cir. 2006) (explaining "absolute disparity measures the difference between the percentage of a group in the general population and its percentage in the qualified wheel" and providing examples of Sixth Amendment violations (citing *Jones v. Georgia*, 389 U.S. 24, 25 n.* (1976) (relying on 14.7% absolute disparity—Black persons made up 19.7% of tax digest but only 5% on venire list and finding State failed to explain disparity))).

Florida can propose no legitimate reason for these costly exclusions. Floridians opposed to the death penalty can render lawful sentencing verdicts. *See* § 775.082 (1)(a), Fla. Stat. (providing life imprisonment option). Indeed, over 27,000 first-degree murder

cases result in life imprisonment. R.2587-88. Where the Constitution is concerned, the State's preference among lawful punishment must yield. *Luis v. United States*, 578 U.S. 5, 17-19 (2016) (holding State's desire for restitution must yield to constitutional right to counsel).

The Supreme Court "has emphasized time and again the 'imperative to purge racial prejudice from the administration of justice' generally and from the jury system in particular." *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J. concurring) (quoting *Peña Rodriguez v. Colorado*, 580 U.S. 206, 221 (2017)). "[I]t is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *McCleskey*, 481 U.S. at 310 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880)). "Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 588 U.S. 284, 293 (2019).

Its effects unmasked, death disqualification represents a racial attack on our democracy in violation of the Sixth, Eight, and Fourteenth Amendments. For concision in this word-limited brief, Mr. Jackson further relies on and incorporates his briefing set out

above, Point 2, and in the court below. R. 2549-2640. Reversal is required.

CONCLUSION

WHEREFORE, Michael Jackson's death sentence should be vacated, and/or such further relief as requested above should be granted.

Respectfully submitted,

/s/Cassandra Stubbs
/s/Brian W. Stull
American Civil Liberties Union
Capital Punishment Project
201 W. Main Street, Suite 402
Durham, NC 27701
(919) 682-5659
cstubbs@aclu.org
(PRO HAC No. 1050528)
bstull@aclu.org
(PRO HAC No. 0118537)

/s/Megan D. Byrne
/s/Alexandra C. Valdez
American Civil Liberties Union
Capital Punishment Project
125 Broad Street, Floor 18
New York, NY 10004
(332) 204-2830
mdbyrne@aclu.org
(PRO HAC No. 1050527)
avaldez@aclu.org
(PRO HAC No. 1053019)

/s/Daniel Tilley
Florida Bar No. 102882
ACLU Foundation of Florida
4343 West Flagler St., Suite 400
Miami, FL 33134
(786) 363-2714
dtilley@aclufl.org
(LOCAL COUNSEL)

APPENDIX 1

Key

DDQ = juror disqualified for death-penalty opposition

ADP = juror disqualified for being automatically for the death penalty and thus unable to consider mitigation

DNR for Perempt = juror was death qualified and non-cause excused, but neither served nor was removed by peremptory because jury selected before peremptory was possible

Green shading = Black juror

Blue shading = Hispanic juror

No shading = White juror

No.	Name	Race	DDQ	Other Cause	Strike	Juror or Alt.?	Page
1	Stansel, Jonathan Dudas	W	N	N	S	N	581
2	Ford, Beth Anne	W	N	N		Juror	R.4644
3	Johnson, Maxfield R	W	N	N		Juror	R.4644
4	Blanton, Shelby Cheyenne	W	N	N		Juror	R.4644
5	Abram, Floyd Vern	W	N	N	D	N	582
6	Reed, Pamela Lynette	B	DDQ	N		N	562

No.	Name	Race	DDQ	Other Cause	Strike	Juror or Alt.?	Page
7	Sloan, Michael Emanuel	B	N	Y		N	579-80
9	Bonham, Vicki Latrise	B	DDQ	N		N	562-63
10	Archer, Michael James	W	N	Y		N	54-60, 105, 113
11	Monts, Megale Latane	B	DDQ	Y		N	563
12	Applewhite, Tierra Alexus	B	N	N		Juror	R.4644
16	Tosh, Brianna Elyse	W	N	N		Juror	R.4644
18	Dalessandro, Meil Lynn	W	N	N	D	N	582
19	Gaglioti, Chad Anthony	W	N	N	D	N	583
20	Pilling, Amanda Lynn	W	N	N		Juror	R.4644
21	Rivera, Magdalena	H	DDQ	N		N	564
22	Greene, Teresa Diana	W	N	ADP & other		N	482, 564
23	Bessent, Steven Harold	W	N	ADP		N	68-69, 106, 113

No.	Name	Race	DDQ	Other Cause	Strike	Juror or Alt.?	Page
24	Sanchez, Rodney Arthur	W	N	N	D	N	583
25	Halvorsen, Lisa Adelle	W	N	N	S	N	582
26	Wery, Emily Grayce	W	N	N	S	N	586
27	Suhrer, Victoria Bandosz	W	N	N	D	N	583
28	Malan, Louise	W	N	N		Juror	R.4644
29	Schill, Maggie May	W	N	N	S	N	582
30	Alfaro, Jonathan Nickolas	W	N	N	D	N	584
31	Simigran, Patricia Ann	W	N	N	D	N	585
33	Broughman, Makayla Ann	W	N	N	S	N	583
34	Hyska, Dejvi	W	DDQ	N		N	565
36	Stringer, Aaron Eugene	B	N	N	S	N	583-84
37	Morgan, Beth	W	N	N	D	N	590
38	Fagan, Carol Royal	W	N	N		Juror	R.4644
39	Acker, Mitchell Brad	W	N	N	D	N	585

No.	Name	Race	DDQ	Other Cause	Strike	Juror or Alt.?	Page
40	Carter, Jason Dennis	W	N	Y		N	572
41	Hunt, Melissa Marie	W	N	N	S	N	585
42	Ferrell, Nakobe Ashanti	B	N	Y[54]		N	218, 370-72, 565-67
43	Holley, Timothy Brian	W	N	N	D	N	585-56
44	Collins, Jai Nica Danielle	B	N	Y		N	567
45	Bell, Brenda Sue	W	N	N	D	N	586
46	Moffitt, Victoria Dianne	W	N	N	D	N	587
47	Lee, Malenie Jefferson	B	N	Y		N	567
48	Stokes, Tracy Denise	B	N	N		Juror	R.4644
49	McCafferty, Robert Francis	W	N	N	D	N	591

[54] Although coded, in an abundance of caution, as "other cause," this juror called the death penalty "revenge," T.218, rated herself a one or two on the prosecutor's scale of one (minimum) to ten (maximum) support for the death penalty, T.372, and said she "couldn't do this whole process." *Id.* If she were counted as being death disqualified, the percentage of Black jurors removed on this basis would further increase.

No.	Name	Race	DDQ	Other Cause	Strike	Juror or Alt.?	Page
50	Rae, Stella Marie	W	N	N	S	N	587
51	Henley, Leah Machelle	W	N	N	S	N	590-91
52	Harris, Angel Yolanda	B	DDQ	N		N	567
53	Ndubuisi, Elvis Karmachi	B	N	N	S	N	593-94
54	McKinnon, Turner Anthony	B	DDQ	N		N	265-66, 567
55	Albrecht, Jordan Ryan	W	N	N	S	N	595
57	Tracy, Erin Nicole	W	N	N	S	N	595
58	Jean Brice, Dotine Lamour	B	N	Y		N	568
59	Wyatt, Sharon	W	N	Y		N	235, 568
61	Pisano, Andrew James	H	N	N		Juror	R.4644
62	Peterson, Nicholas	W	N	N	S	N	595
63	Farmer, Robert Lee	W	N	N		Juror	R.4644
66	Upchurch, Drew Stuart	W	N	N		Juror	R.4644
68	Drew, Cheri Elois	W	DDQ	N		N	568

No.	Name	Race	DDQ	Other Cause	Strike	Juror or Alt.?	Page
69	Johnson, Donald Mark	W	N	N	D	N	597
70	Viss, Margaret Mary	W	N	N		Alt	R.4644
71	Sampson, Jacquelyn Michele	B	N	N		Alt	R.4644
72	Hurst, Brandi Cheree	W	N	N		DNR for perempt	
73	Barrow, Cecil Warren	B	DDQ	N		N	569
74	Bowlus, Jordan Matthew	W	N	N		DNR for perempt	
75	Herrera, Julio Enrique	H	N	N		DNR for perempt	
77	Leslie, Angela Denise	B	N	N		DNR for perempt	
78	Robinson, Jose Alberto	H	DDQ	N		N	570
79	Moore, Mark	B	DDQ	N		N	570
80	Azzarello, Michael	W	N	ADP		N	580
81	Collins, Mieko Michelle	W	N	Y		N	

No.	Name	Race	DDQ	Other Cause	Strike	Juror or Alt.?	Page
82	Adams, Crayton Joel	W	N	Y		N	573-74
84	Dixon, Tiffany Lavon	B	N	N		DNR for perempt	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this Brief was served upon: Michael W. Mervine, Assistant Attorney General, through the Florida Electronic Portal, this 17th day of May, 2024.

CERTIFICATE OF COMPLIANCE

I FURTHER CERTITY that this brief is printed in Bookman Old Style 14 point font, is 23,308 words and 121 pages in length. This brief otherwise complies with the requirements of Florida Rules of Appellate Procedure 9.045 and 9.210.

/s/ Megan D. Byrne
Senior Staff Attorney
American Civil Liberties Union
Capital Punishment Project
125 Broad Street, Floor 18
New York, NY 10004
332-204-2830
mdbyrne@aclu.org
(PRO HAC No. 1050527)