Filing # 206849887 E-Filed 09/13/2024 02:24:35 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

REPLY 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 AUTHORITIES

Page(s)

Cases

U.S. Constitution

Statutes

Other Authorities

INTRODUCTION

The State's response fails to engage with the particular and uncommon circumstances of Michael Jackson's case. It fails to address the unique record revealing a trial judge who rushed to trial less than a month after a change in capital sentencing law, and without updated jury instructions to reflect the change. It fails to address that judge's outdated view of his own sentencing authority, which he erroneously transmitted to the jury. *See* Point 1, Init. Br. And it fails to rectify that judge's choice to blow past a Florida statute commanding him, in the first instance, *not* to apply the new law to a capital sentencing proceeding the State has conceded (in a different case) would have been triggered upon Mr. Jackson's 2007 first-degree murder convictions. Point 3.

The State similarly fails to refute significant twin errors in the trial court's refusal to permit the jury to hear that Mr. Jackson's co-defendant, Alan Wade, received a sentence of life imprisonment for the same crime, Point 5, and that another co-defendant, whose prior-recorded testimony the jury heard in the form of a non-

confronted transcript, had recanted his testimony before Mr. Jackson's trial. Point 6.

The State further fails to adequately address the legislative record of the new law wherein some legislators fruitlessly raised concerns that it would discriminate against Black jurors while others made statements suggesting it was passed to improperly target Mr. Jackson. Points 2 & 11. This is to say nothing of the injustice and unconstitutionality of applying the new law to Mr. Jackson given the circumstances (including the State's own frivolous litigation) that delayed that resentencing. Point 12.

The State's failures to address the above issues, others described previously,[1] the applicable law, or similar cases are repeated and significant. In the wake of these failures, this Court should not be swayed by the State's claims that there can be no prejudice due to the gravity of Mr. Jackson's crimes, as this argument itself ignores not only the magnitude of error in this case, but the multiple sources of mitigation for Mr. Jackson as reflected

[1] The State's failures extend to its response to all of the issues Mr. Jackson raised in his initial brief. But this reply, for economy, focuses on the most significant issues.

in the bare-minimum 8- 4 death vote. As shown further below, given these errors and circumstances, this Court should vacate Mr. Jackson's sentence.

ARGUMENT IN REPLY

1. As intended, the trial court's instructions diminished the jury's sentencing responsibility, warranting reversal (Point 1 of Initial Brief).

The error in this case is straightforward: The trial court repeatedly and inaccurately told the jury that, whether it returned a verdict for life or death, its decision would be merely a "recommendation to the court."[2] In responding, the State fails to address either the factually-similar *Caldwell* errors discussed in Mr. Jackson's initial brief, or the damning record evincing the court's wish to lessen the jury's sense of responsibility. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The State then attempts to turn

[2] Thus, the trial court violated "*Caldwell*'s mandate against '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.'" *Allen v. State*, 322 So. 3d 589, 600 (Fla. 2021) (quoting *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)).

on their head both the significance of a close 8-4 vote and the State's own burden to show harmlessness. Both strategies falter.

A. Instead of addressing the precedent requiring reversal, the State cites inapt precedent.

The State acknowledges that the trial court "could have been more precise about the effect of a life recommendation." Resp. Br. 68. This understatement fails to grapple with the court's marked deviation from the text of the sentencing statute, its undermining of the jury's authority, or the overwhelming evidence that lessening the jury's sense of responsibility and authority was precisely the trial judge's intent.

The State does not spare even a word addressing, much less distinguishing, the cases resembling this one.[3] For instance, in *Commonwealth v. Montalvo,* both the prosecutor and the trial court used phrasing *nearly identical* to that repeatedly used by the court

[3] Instead, the State discusses cases in which a jury is *accurately* charged—under the former statute—that any recommendation returned, whether for life or death, would only be advisory. Resp. Br. 75 (citing *Reynolds v. State*, 251 So. 3d 811, 825 (Fla. 2018) (noting no error in referring to recommendations as advisory when that was the law, in rejection of so-called *Hurst*-induced *Caldwell* claim); *Combs v. State*, 525 So. 2d 853, 857 (Fla. 1988) (similar, but pre-*Hurst*)).

in Mr. Jackson's case when it told the jury that its verdict would be a mere "recommendation to the court[,]" T.1804, even though the jury, in fact, had the authority to return a final verdict. 205 A.3d 274, 299 (Pa. 2019). Even though the trial court later corrected this misstatement, the Supreme Court of Pennsylvania found *Caldwell* error. *Id.*

In *Clark v. Commonwealth*, a similarly-misleading (and repeated) characterization of the jury's verdict as a "recommendation" unconstitutionally "minimize[d] the jury's sense of responsibility." 833 S.W.2d 793, 795-96 (Ky. 1991). And contrary to the State's claim, Resp. Br. 63, the use of "recommendation" in the Florida statute, before the clarification that a life recommendation is binding, § 921.141(3)(a)(1), Fla. Stat. (2023), did not relieve the trial court from its duty of *Caldwell* compliance. *See Tamme v. Comm.*, 759 S.W.2d 51, 53 (Ky. 1988) (disallowing the word "recommendation" in jury instructions despite its presence in statute because of the incorrect "inference . . . that the jury's

recommendation holds little or no weight and may be rejected by the trial court").[4]

The State's reliance on *Jones v. United States*, 527 U.S. 373, 381-82 (1999), by contrast, compares apples to oranges. Resp. Br. 4, 64. *Jones* did not address *Caldwell* or even the consequences of a rendered verdict, but instead whether the Eighth Amendment requires the trial court to tell the jury, preemptively, the consequences should it find itself unable to render a unanimous verdict (unanimity required in federal capital sentencing and every state scheme but Alabama). *Jones*, 527 U.S. at 381-82.[5] This poses a very different question than whether a court may give a Florida

---

[4] Nor does using the statutory term "recommendation" in isolation remedy the court's instructional error because, regardless of this term, the trial court did not convey the sentencing statute's mandate that a court "*shall*" impose a life sentence; instead it improperly turned this "shall" into an operative "may" when instructing the jury. *Cf. Silva v. State*, 259 So. 3d 278, 282 (Fla. 3d DCA 2018) ("If the trial court deviates from, or modifies, the standard jury instruction, it is required to state on the record or in a separate order the reasons for doing so.").

[5] At the time, only four states required the type of anticipatory deadlock instruction *Jones* was seeking under the Eighth Amendment. *See People v. Cahill*, 809 N.E.2d 561, 598 & n.4 (2003) (Smith, J. concurring) (collecting statutes). *Caldwell*'s commands are universal and apply to require accuracy in the instructions already being given.

jury incorrect or misleading instructions regarding the finality of a rendered verdict.

And even on the very different question at issue in *Jones*, the Court considered the charge as a whole in determining that any confusion as to the consequence of the jury's failure to reach a verdict was unlikely. *Jones,* 527 U.S. at 391 ("[W]hen these passages are viewed in the context of the entire instructions, they lack ambiguity and cannot be given the reading that petitioner advances."). The State pays lip service to this precept, by pointing to instances in which the trial court issued the standard instruction on the "gravity" of the jury's task in not "hast[ily]" issuing its sentencing recommendation because "a human life is at stake[.]" Resp. Br. 63.[6] But those vague standard charges failed to correct

[6] Every phrase on which the State relies may be found in the standard jury instructions. *See, e.g.*, Fla. Std. Jury Instr. (Crim.) § 7.11 ("Before you vote, you should carefully consider and weigh the evidence, realizing that a human life is at stake, and bring your best judgment to bear in reaching your decisions."). That the judge used part of the standard charge, but overruled the defense motions to wait for other new (accurate) parts reflecting the new law, does not persuade. Moreover, the court's use of the standard charge for part of its charge—as occurs in virtually every capital case—does not distinguish this case from cases in which a reversible error has been found.

the unadorned instruction the jurors heard at least 27 times (before and after selection) that the sentencing decision, whether for death or life, would be a mere "recommendation to the court[.]" T.1810. *See* Init. Br. 18 (collecting record cites).

Indeed, the Supreme Court has rejected similar reasoning. *Caldwell*, 472 U.S. at 340 n.7 (rejecting argument that the error was "'corrected' by later prosecutorial comments" that "the jury played an important role in the sentencing process" because such "did not retract, or even undermine, [prosecutor's] previous insistence that the jury's determination of the appropriateness of death would be reviewed by the appellate court to assure its correctness[]").

As alluded to above, the State also ignores appellate rejection of far more pointed corrections than that issued here as insufficient. *Montalvo*, 205 A.3d at 209 (rejecting "contention that the trial court's final jury charge cured any error that arose" from "recommendation" even though "the final charge correctly stated that the jury's 'verdict is not merely a recommendation' and that it 'actually fixes the punishment'" including because the trial court did not acknowledge its prior inconsistent directive (citing *Comm. v.*

Jasper, 737 A.2d 196, 197-98 (Pa. 1999) (similar)); *cf. Francis v. Franklin*, 471 U.S. 307, 322 (1985) (holding that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity[]").

The State further ignores that every statement made by the trial court on the issue reveals that the court's very intent was to convey its own exclusive sentencing power:

- "I intend to use some of the *old jury instructions* about recommendations[.]" T.299 (emphasis added).

- "I am concerned that there is no reference to the fact that this is a recommendation from the jury which it clearly is under the statute as much as I – I am not sure about the logistics of how all this came to pass but I am concerned that *I don't want the jury to think that they are responsible for it when the law is clear that I am*[.] T.1664 (emphasis added).

- "I do not want – you know my concern is *I do not want the jury thinking they are solely responsible for the sentence.*" T.1710 (emphasis added).

- "The buck stops at my desk." T.1710.

- "All I am saying is that I don't -- I am not comfortable with leaving the suggestion to the jury *that they are responsible for the sentencing because they are not.* That's why the statute calls it recommendation." T.1711 (emphasis added).

- "My concern is that the common law in Florida *if you go back two years* is that it's the responsibility of the court[.]" T.1711 (emphasis added).

Then, when issuing its final instruction to the jury, the court repeatedly acted on its intent to claim exclusive final sentencing authority:

- "If you unanimously find that at least one aggravating factor exists then the defendant is eligible for a sentence of death and the jury at that point would make a *recommendation to the Court* as to whether the defendant should be sentenced to *life imprisonment without parole or death.*" T.1804 (emphases added).

- "I would suggest that you should use your own common sense in deciding what's the best evidence and which evidence should not be relied upon in making your *recommendation as to what sentence should be imposed.*" T.1811 (emphasis added).

- "And just as an aside, in addition to not relying on anything other than the evidence that you have heard during the course of this trial, please understand that *this is a recommendation that you are making to the Court.*" T.1817 (emphasis added).

By design and definition, thus, the trial court "'misle[]d the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should for the sentencing decision.'" Resp. Br. 62 (quoting *Romano*, 512 U.S. at 9). This not

only violated *Caldwell* but contravened the Court's duty to convey (rather than contradict, as it did here) that, in the event of a life verdict, "the court *shall* impose the recommended sentence." Section 921.141(3)(a)(1) (emphasis added).

B. The State erroneously attempts to shift the burden of proving prejudice to Mr. Jackson.

The State's arguments that Mr. "Jackson fails to show prejudice" ignore the controlling law. Resp. Br. 65. The *Caldwell* prejudice inquiry under the Eighth Amendment is whether the error "had no effect on the sentencing decision." 472 U.S. at 341. This test aligns with the State's burden, as the "beneficiary of [constitutional] error" to prove it harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). This standard applies equally to the instructional error here, even were it not deemed constitutional. *See Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999). Of course, the State is unable to show, beyond a reasonable doubt or otherwise, that the error made no difference.

Instead, the State claims that Mr. Jackson has not proven prejudice because the jury's 8-4 vote "does not say much at all."

Resp. Br. 68. But this supposition defies both precedent and common sense. As noted in Mr. Jackson's initial brief, numerous cases hold that a close death vote makes prejudice more likely. *See* Init. Br. n.11. And no doubt if Mr. Jackson's jury had voted 11-1 in favor of death, the State would surely have proclaimed the significance of such a close vote, as it regularly does. *See, e.g.*, Resp. Br. *10, *Okafor v. State*, No. SC15-2136, 2016 WL 11508735 (Fla. Nov. 17, 2016) (arguing that error under *Hurst v. State* was not prejudicial because "the eleven to one (11-1) recommendation for death was as close to unanimity as possible[]").[7]

Simply put, the State has not proven that, had each and every juror known they had the power to save Mr. Jackson's life, not one of them would have changed their vote. It similarly cannot and has

---

[7] *See also* State Br. *72-73, *Floyd v. State*, No. SC95824, 2001 WL 34114568 (Jan. 2001)("There is no reasonable possibility, much less probability, that the eleven to one recommendation for a death sentence … would have been a recommendation for a life sentence absent the prosecutor's comment."); State Br. *51, *Peede v. State*, No. 90,002, 1998 WL 34087343 (Fla. June 29, 1998) ("[T]he jury actually returned a verdict recommending death by an 11 to 1 margin. … Thus, any error was certainly harmless because there is no indication anyone changed their vote to make a majority.").

not proven that none of the four life-voting jurors would have taken the time needed to sway one more juror to a binding life recommendation. By design, the court deprived the jurors of the information needed for that to happen.

Mr. Jackson's divided jury landed as close to life as Florida law allows for a vote of death. As the Court has previously held, the State thus faces the highest of hurdles in proving the error here harmless beyond a reasonable doubt. *See Delhall v. State*, 95 So. 3d 134, 170 (Fla. 2012) (finding possibility of prejudice "especially significant in view of the fact that the jury recommended death by a vote of eight to four—a recommendation that was far from unanimous[]"); *compare with Poole v. State*, 151 So. 3d 402, 417 (Fla. 2014) (finding no fundamental error in prosecutor's argument concerning aggravators "where the jury recommended imposition of the death penalty by an 11–1 vote" and distinguishing case in which similar improper argument led to such relief due to "close seven-to-five" death recommendation). *See also* Init. Br. 29-30 n.11.

Increasing this burden are the facts of this deliberation. The jury's 8-4 sentencing recommendation, issued after only a couple hours' deliberation after a full, fifteen-witness sentencing trial

makes it impossible for the State to prove, beyond a reasonable doubt, that the trial court's misinstruction bore not at all on the jury's sense of responsibility and authority when issuing a life recommendation. The State has failed to meet its burden.

2. The racial discrimination embedded in S.B. 450's removal of the unanimity requirement violates the Constitution (Point 2 of Initial Brief).

As Justice Douglas wrote in *Furman v. Georgia*, "[i]t would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." 408 U.S. 238, 242 (1972) (Douglas, J., concurring). On this firm basis Mr. Jackson raises an Eighth Amendment claim, but the State declines to substantively engage with what it characterizes as "amorphous Eighth Amendment standards." Resp. Br. 25-26 n.2. Nor does it dispute the basis of Mr. Jackson's Eighth Amendment claim: S.B. 450 allows for imposition "under a procedure that gives room for . . . [racial] prejudices." *Furman*, 408 U.S. at 242. A death penalty system that allows jurors of color to be silenced on the question of whether a person is allowed to live or sentenced to die is

a cruel and unusual system. On this basis alone, S.B. 450 violates the Constitution.[8]

S.B. 450 also violates the Fourteenth Amendment. Although the State characterizes Mr. Jacksons' equal protection position as one suggesting that "every decision society makes" must be unanimous, Resp. Br. at 28, this is incorrect. Rather, courts must take particular care when addressing civic rights, responsibilities and privileges previously denied to underrepresented populations.

---

[8] Contrary to the State's arguments, Resp. Br. 26 & n.2, Mr. Jackson's discrimination claims were both presented and pressed as a continuing basis for barring non-unanimity after the trial judge denied initial objections. *See* R.2924 (objecting to non-unanimous sentencing, *inter alia*, under the Eighth and Fourteenth Amendments to the U.S. Constitution); R.2943 (relying on "Eighth and Fourteenth Amendment protections against arbitrary, capricious, unreliable, and/or discriminatory infliction of the death penalty"); R.3069 ("Mr. Jackson continues to object on constitutional and other grounds to the application of [S.B. 450] to his capital sentencing. . . . History and research show that non-unanimity in capital sentencing, like non-unanimity sufficing to convict, is rooted in discriminatory practices. Minority voices can be sidelined to irrelevance . . ."). Regardless, as the State does not seem to dispute, Mr. Jackson may attack the facial constitutionality of S.B. 450 for the first time on appeal if either the factual evidence is in the record or the claim does not involve factual application. Resp. Br. 27. The only relevant facts behind this claim, beyond the pure logic and history in *Ramos* itself, is S.B. 450's legislative record. It spans roughly 200 pages of the appellate record, R.3801-4015, and belies the State's preservation contention. Resp. Br. 26-27.

This frame of reference centers the appropriate equal-protection analysis. *Cf. Flowers v. Mississippi*, 588 U.S. 284, 293 (2019) ("Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."); *Ramos v. Louisiana*, 590 U.S. 83, 128 (2020) (Kavanaugh, J., concurring) (quoting *Johnson v. Louisiana*, 406 U.S. 356, 402 (1972) (Marshall, J., dissenting) (to "fence out a dissenting juror fences out a voice from the community, and undermines the principle on which our whole notion of the jury now rests[]")).

Justice Kavanaugh thus employed this lens in his *Ramos* concurrence. His opinion discussed the origin of nonunanimity laws in Louisiana and Oregon, but also referenced generally "the racist origins of the non-unanimous jury[.]" *Ramos,* 590 U.S. at 126 (Kavanaugh, J., concurring). Justice Kavanaugh reviewed this history not to prove intent but rather to highlight that the current practice "tolerates and reinforces a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects[.]" *Id.* at 129. Surely such a history remains relevant here, where the Legislature has decided not just to "retain" nonunanimous sentencing juries but to actively change the law in favor of them.

Also relevant, legislators, in vain, cited specifically to *Ramos* and the racial equity concerns highlighted therein when discussing S.B. 450. *See* NAACP Amicus Br. at 17 (legislators had "full awareness of *Ramos v. Louisiana*" and "did not hide their intent to drown out the voices of minority jurors"). Leader Driskell, for instance, noted that passage would "make the votes of minorities on juries meaningless." *Id.* at 18. This is significant because *Arlington Heights* holds that a racially discriminatory intent undergirding a Fourteenth Amendment violation may be shown through "impact of the official action" that "bears more heavily on one race than another," "[t]he historical background of the decision," and "the legislative or administrative history" of the action, "especially where there are contemporary statements by the members of the decisionmaking body." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

The *Arlington Heights* factors further illustrate why S.B. 450 does not pass constitutional muster: the impact of S.B. 450 "bears more heavily" on Black jurors who are silenced. The "historical background" of non-unanimity is one including the often-express intent of silencing Black jurors, and "contemporaneous statements"

made by the decision-making body detail a concern that passage of the bill would silence minorities,[9] rendering their presence on a jury meaningless.

3. By responding to common-law and statutory claims not at issue, and concealing a concession in another pending appeal, the State effectively concedes that section 775.022 (3) (a) barred Mr. Jackson's non-unanimous death sentence (Point 3 of Initial Brief).

This claim does not depend on retroactivity under Florida common law. *Compare with Love v. State*, 286 So. 3d 177 (Fla. 2019) (cited at Resp. Br. 3, 21, 48-49). It does not hinge on whether S.B. 450 made "substantive or procedural" changes to section 921.141, Florida Statutes, a concededly "'criminal statute.'" Fla. Stat. § 775.022 (2). *But see* Resp. Br. 47, 52 (insisting this distinction decides the case). It does not even hinge on section 775.022 (3)(b). *But see* Resp. Br. 52 (arguing otherwise). It hinges

[9] Similarly relevant is the problematic referral of legislators to a Black woman juror in the Nicolas Cruz case (who followed Florida law and her conscience in voting for life) as a "rogue" or "activist" juror. R.3952-54, 3960-61, 3812, 3830, 3920, 4012. Merriam Webster defines rogue as a "dishonest or worthless person: scoundrel." https://www.merriam-webster.com/dictionary/rogue. The State's newfound defense of this remark as one signaling a desire to prevent jurors from "impeding" a view of "justice" that requires a death sentence is unsupported. Resp. Br. 30.

solely on section 775.022 (3)(a), Florida Statutes. By omitting analysis of this provision, the State conceals the concession it has made in another pending appellate matter that this provision would apply to bar application of S.B. 450 in a case where the defendant has already been convicted of first-degree murder and thus the prior version of section 921.141 has been triggered.

As shown in Mr. Jackson's opening brief, section 775.022 (3)(a) barred the non-unanimity amendments of S.B. 450 from affecting Mr. Jackson's ongoing prosecution under the 2017 version of section 921.141, Florida Statutes. The 2017 law required, among other things, jury unanimity for a sentence of death. *See* Chapter Ch. 2017-1, § 1, Laws of Florida (March 13, 2017). By avoiding Mr. Jackson's true claim with irrelevant arguments, and hiding its inconsistent position in another pending appellate case, the State effectively concedes the error here.

A. The trial court statutorily erred by permitting the 2023 amendments to affect an ongoing death prosecution under the prior-operating 2017 law.

In June of 2017, the trial court vacated Mr. Jackson's original death sentence, granting him resentencing under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *See* R.121-126. As it did with dozens of

other *Hurst*-resentencing defendants, *see* Init. Br. 98-99, the State of Florida then began prosecuting Mr. Jackson for his life under Chapter Ch. 2017-1, section 1, Laws of Florida. The 2017 law was a *Hurst v. State*-compliant version of section 921.141, requiring, among other things, a unanimous jury vote for a sentence of death.

While Mr. Jackson's resentencing prosecution remained pending, in 2019, the Legislature enacted 775.022 (3), Florida Statutes, requiring, "[e]xcept as expressly provided for in an act of the Legislature" (and other exceptions inapt 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).[10]

In 2023, less than a month before Mr. Jackson's resentencing under the 2017 law was to begin, the Legislature amended section 921.141 yet again, repealing the unanimity requirement among

[10] A year later, this Court affirmed that Mr. Jackson's resentencing would go forward over the State's objection and argument that his death sentence could instead be "reinstated." *State v. Jackson*, 306 So. 3d 936, 945 (Fla. 2020).

other changes. *See* Ch. 2023-23, § 1, Laws of Fla. In doing so, however, the Legislature (only four years after enacting section 775.022) nowhere "expressly provide[d]" that this amendment would operate prospectively or that it would "not affect or abate" its prior operation or "a prosecution or enforcement thereunder." § 775.022(3)(a). Despite the many *Hurst* resentencings then pending, the 2023 law made no provision for non-prospective or retroactive application whatsoever.

Thereafter, despite the clear and unambiguous command of section 775.022(3)(a), and over Mr. Jackson's objection thereunder, the trial court ruled that the non-unanimity amendments to section 921.141 contained in Chapter 2023-23, § 1, *would* affect the statute's prior operation in this case and his ongoing prosecution under the 2017 amendments to the law. CR.2970-71 (objection); 3057-59 (ruling). Under this erroneous ruling, the 2023 amendment, allowing non-unanimity, would instead apply.

B. The State avoids analysis or even mention of section 775.022 (3)(a) and thereby hides its concession in another case.

The State disputes none of this history. It relies instead on a dozen inapt decisions – not a single one of which interpret, apply or

even reference section 775.022. Resp. Br. 47-52. All instead address either state and federal common-law jurisprudence on retroactivity and prospectivity, such as *Love v. State*, 286 So. 3d 177 (Fla. 2019) and *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), or the State's puzzling fixation on the distinction, irrelevant here, between substantive and procedural changes of law. *See, e.g.*, *State v. Garcia*, 229 So. 2d 236 (Fla. 1969). *See also* Resp. Br. 47-52 (collecting inapt cases).

The State indeed begins and ends its argument with the claim that S.B. 450 is a procedural law. *See* Resp. Br. 47 ("As a procedural law, S.B. 450 applied prospectively to Jackson's then-upcoming penalty phase."); 52 ("Jackson cites not a single case labeling a similar law substantive."). But that makes no difference whatsoever. Section 775.022, subdivision (3)'s limitations apply to "'criminal statute[s]' . . . whether *substantive or procedural*[.]" § 775.022 (2) (emphasis added).

Relatedly, the State appears to argue that since it believes the common-law holding of *Love v. State* would permit the application of the 2023 amendments to a *Hurst* resentencing not yet begun, the trial court did not err under section 775.022 (3)(a). But even were

the State's premise correct, the conclusion would not follow. It is elementary that the statute controls. *See*, *e.g.*, *Ballenger v. Mark*, 155 So. 106, 107 (Fla. 1934) ("If a statute is inconsistent with the common law, the statute controls, and the common law is abrogated or modified to the extent of the inconsistency.").

And the statute, unlike *Love*, 286 So. 3d at 188, requires that an amended criminal statute "whether substantive or procedural" apply not only "prospectively" but also that it does not "amend or abate" a "prior operation of the statute or prosecution . . . thereunder." § 775.022 (2),(3)(a). Not one word of the State's brief analyzes section 775.022(3)*(a)*.

The brief instead mistakenly refutes a non-sensical claim Mr. Jackson has never made, under section 775.022 (3)(b). Resp. Br. 52. But subdivision (3)(b) – permitting continuing prosecution under a prior criminal statute when criminal conduct precedes amendment to that statute – has nothing to do with this case. R.2970-71 (trial motion raising claim under subdivision (3)(a)); Init. Br. 46 (same argument).

By avoiding Mr. Jackson's true claim, under section 775.022 (3)(a), the State also avoids mention of the concession it has

submitted in a different, still pending, appellate proceeding. In that proceeding, the State concedes that "prior operation" or prosecution under the 2017 version of section 921.141, and thus under subdivision (3)(a) of section 775.022, would be triggered "upon conviction or adjudication of guilt of a defendant of a capital felony[.]"*See State v. Billy Bennett Adams, III*, No. 2D2024-1089 (2d DCA) (hereafter *Adams*), State's Reply to Response to Petition for Writs, at 11 (July 19, 2024) (hereafter State's *Adams* Reply).

The context in *Adams* is the State's argument against a trial court's ruling under section 775.022 (3)(a) barring the use of the unanimity provisions of S.B. 450 in a *pretrial* capital case where the alleged crime occurred before the bill's April 2023 passage. In a pleading filed less than two months ago, by the same Assistant Attorney General who serves as lead counsel for the State here, the State states that there was no "prior operation" or "prosecution" under the 2017 amendments to section 921.141 there because the defendant has not yet been convicted of a capital crime, and that section 921.141 is only "triggered upon a conviction[.]" *Id.* In full, the State acknowledges that, at a minimum,

> Section 921.141 is only triggered upon a conviction or adjudication of guilt of a capital felony. The first sentence provides: "Separate proceedings on issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082."
>
> Its provisions play no role following an acquittal or a conviction or adjudication of guilt for a non-capital crime, thus *there has been no "prior operation" of the statute in this case where a penalty phase is still theoretical*.

State's *Adams* Reply 11 (emphasis added).

At a minimum, and as the State has admitted in *Adams* but avoided acknowledging here, prior operation of Chapter 2017-1, section 1, has occurred here because Mr. Jackson's penalty phase is *not* theoretical. He was convicted years ago, in 2007. *Jackson v. State*, 18 So. 3d 1016, 1023 (Fla. 2009). And the trial court ordered his resentencing in June of 2017, after the 2017 amendments were in place. Once the 2017 version of section 921.141 was triggered, section 775.022 (3)(a)'s enactment in 2019 forbade any later amendment from affecting its operation or prosecution thereunder.

Because the trial court violated section 775.022 (3)(a), Mr. Jackson objected, and the State has not refuted the claim (but rather has supported it in *Adams*), this Court should reverse the death sentence and issue an order requiring Mr. Jackson to be resentenced under the 2017 law.

4. The trial court violated Mr. Jackson's Eighth Amendment rights by precluding admission of his codefendant's life sentence. The State's attempts to upend decades of Florida precedent demonstrating this preserved error fail (Point 5 of Initial Brief).

The State does not contend that this error is unpreserved. Nor does it dispute one word of Mr. Jackson's extensive showing that Mr. Wade bore significant responsibility for the murders of Carol and Reggie Sumner. *Compare* Init. Br. 54-56 *with* Resp. Br. 69-77. But it does bury in a footnote a nod to three decades of Florida decisions acknowledging the admission of a co-defendant's life sentence as mitigation evidence (even if only to incorrectly claim they stand for the mere proposition that the sentence was "*offered* in mitigation." *Compare* Resp. Br. 75 n.15 (emphasis added) *with* Init. Br. 52 (collecting cases stretching back to 1994 in which evidence was *admitted*)). After incorrectly characterizing this history, the State ultimately asks this Court to reverse its own

precedent, including *Messer v. State*, 330 So. 2d 137 (Fla. 1976). It relies on select decisions of other state courts (but not the U.S. Supreme Court) and on inapt precedent. Resp. Br. 72-75. Both arguments fail.

This Court has repeatedly decided and addressed the issue in the context of Florida's unique capital-sentencing scheme. It need not look to other death-penalty states (as the State urges here, but not with respect to other issues, Resp. Br. 35), which are far fewer than the State contends in its botched accounting.[11] Moreover,

---

[11] The State claims to identify "at least 20 jurisdictions [that] hold that a co-defendant's life sentence is irrelevant and inadmissible." Resp. Br. 72-73 & n.13. Not so. *First*, the State counts Mississippi as a jurisdiction banning such evidence, Resp. Br. 73 n.13, but then also among the jurisdictions *permitting* it. *Id.* at n.14.

Second, the State double counts North Carolina, Missouri, California, and Oklahoma, by including (among its supposed 20) both state-court decisions from these jurisdictions and federal-habeas decisions declining to provide habeas relief from death sentences in these same four states. Resp. Br. 73 n.13 (collecting four federal decisions reviewing death sentences from these states). The federal statute, by contrast, permits such evidence. 28 U.S.C.A. § 3592 (a)(4).

Third, three of the "jurisdictions" used to inflate this figure—Illinois, New Jersey, and Washington—no longer have the death penalty. *Cf. Roper v. Simmons,* 543 U.S. 551, 574 (2005) ("[T]he … Court should have considered those States that had abandoned the

unlike in Florida, all of the states cited by the State that both retain the death penalty and proportionality review, and have precedent barring the jury from learning of a codefendant's life sentence, route consideration of this important evidence to appellate comparative proportionality review.[12] While the State acknowledges that two of

---

death penalty altogether as part of the consensus *against* the juvenile death penalty[.]" (emphasis added)).

Fourth, the State's citations to *State v. Williams*, 292 S.E.2d 243, 262 (N.C. 1982) and *Rodriguez v. State*, No. 63423, 2015 WL 5383890 (Nev. Sept.11, 2015) (unpublished) are incomplete and misleading. In *Williams*, the accomplice's sentences were in fact before the jury and thus "could have [been] considered under the catch-all" provision of North Carolina's statutory mitigation list. 292 S.E.2d at 262. And *Rodriguez* is unpublished, applicable only to its unique facts, and of no precedential value. Nev. R. App. P. 36 (c)(2). *See also Flanagan v. State*, 810 P.2d 759, 762 (Nev. 1991) ("We believe that it was proper and helpful for the jury to consider the [life-sentence] punishments imposed on the co-defendants."), *vacated on other grounds by Moore v. Nevada*, 503 U.S. 930 (1992). The State's "20 jurisdictions" are thus reduced to 10 or 11 at best.

[12] *See McWhorter v. State*, 781 So. 2d 257, 329 (Ala. Crim. App. 1999) (considering a codefendant's sentence during proportionality review), *aff'd sub nom. Ex parte McWhorter*, 781 So. 2d 330 (Ala. 2000); *Allen v. State*, 321 S.E.2d 710, 715 (Ga. 1984) ("[O]ur statutorily mandated proportionality review of death sentences includes special consideration of the sentences received by co-defendants in the same crime."); *State v. Brogdon*, 457 So. 2d 616, 626 (La. 1984) (holding that jury may not hear "relevant evidence" of codefendant's life sentence because "the duty of performing a

the state high courts that have barred admission of a codefendant's life sentence do just that, and that a trial judge considers the evidence in a third state, *see* Resp. Br. n.14 (citing Missouri, Ohio, and Arizona), it has failed to acknowledge seven other state high courts that consider the evidence. *See* note 12, *supra* (collecting cases). Most prominent among these is Alabama, whose jurisprudence the State repeatedly asks this Court to adopt. Resp. Br. 70, 72, 73.

Related, contrary to the State's argument, Resp. Br. 74-75, this Court's recent decision in *Cruz v. State*, 372 So. 3d 1237 (Fla. 2023) (confirming relative culpability review violates the Florida

---

detailed comparative proportionality review as a safeguard is imposed on this court by the constitution and court rule[]"); *Branch v. State*, 882 So. 2d 36, 67 (Miss. 2004) (holding that a death sentence was not excessive or disproportionate to a codefendant's life sentence); *State v. Stokes*, 352 S.E.2d 653, 667 (N.C. 1987) (considering a codefendant's life sentence during proportionality review); *Com. v. Zook*, 615 A.2d 1, 18 (Pa. 1992) (noting that "data concerning any" codefendants is to be considered for proportionality review); *Com. v. Frey*, 475 A.2d 700, 708 (Pa. 1984) (reviewing co-defendants' life sentences but concluding death proportionate); *State v. Charping*, 508 S.E.2d 851, 855 (S.C. 1998) (similar to *Brogdon*, *supra*, and citing *Brogdon v. Blackburn*, 790 F.2d 1164 (5th Cir. 1986), the federal habeas review of the same case). Neither California, Oklahoma nor Texas conduct proportionality review.

Constitution) helps, not hurts Mr. Jackson's claim. This Court's constitutional inability to consider a codefendant's life sentence in proportionality review heightens the need for some sentencing entity to review this important evidence, including as a critical Eighth Amendment safeguard. *See* Init. Br. Point 12 (A). As the Louisiana Supreme Court explained when confining such review to itself, rather than the sentencing jury, "there can be little doubt that a comparison of defendant's case to similar first degree murder cases would provide a meaningful basis for determining whether the case is one of the relatively few in which the death penalty is to be imposed or one of the many in which it is not." *Brogdon*, 457 So. 2d at 626.

Particularly in light of this Court's constitutional constraints, Florida juries should continue to be entrusted with this evidence.

And despite the State's claims, Resp. Br. at 74-75, *Cruz* is not based on contrary reasoning, but rather this Court's simple determination that its "relative culpability review was a corollary of its comparative proportionality review, which [it] determined in *Lawrence* [*v. State*, 308 So. 3d 544 (Fla. 2020)] to [] violat[e] . . .the Florida Constitution. As an integrated part of comparative

proportionality review, relative culpability review was rendered obsolete by the *Lawrence* decision[.]" *Cruz*, 372 So. 3d at 1245.[13]

The State has waived any harmless-error argument by not making it, rendering this Court's harmless-error review optional. *Heuss v. State*, 687 So. 2d 823, 824 (Fla. 1996). This waiver and failure are not surprising, as the State cannot prove the error harmless beyond a reasonable doubt for at least three reasons. *Id.*

First, the execution option garnered the statutory bare minimum number of votes. *See* Init. Br. 29-30 n.11 (collecting cases weighing close vote in favor of finding error harmful). Second, the question before the jury was one of mercy, not one of empirical evidence. *See* Resp. Br. 43. Third, jurors find this type of evidence

[13] Without the support of any cases, the State makes the puzzling additional claim that Florida's longstanding practice would somehow differ when the codefendant was originally sentenced to death, under a different sentencing procedure. Resp. Br. 76-77. This merits little attention. The question is not which sentencing procedure produced which outcome, or which prior proceeding might compare best to Mr. Jackson's proceeding. Rather it is whether Mr. Jackson's "jury should have had the benefit of the *consequences* suffered by" the codefendant. *Messer*, 330 So. 2d at 142. The consequences for Mr. Wade (like every other codefendant in this case) are irrevocably a sentence of less than death. Under Florida law and the Eighth Amendment, Mr. Jackson's jury was entitled to this evidence.

highly mitigating. *See* Meredith Rountree and Mary Rose, *The Complexities of Conscience: Reconciling Death Penalty Law with Capital Jurors' Concerns*, 69 Buff. L. Rev. 1237 (Dec. 2021) (examining federal verdict sheets, finding 138 cases in which jurors wrote in a co-participant's lesser sentence as mitigation, and finding unanimous life sentences more than twice as frequently returned in such cases). This constitutional error therefore requires reversal.

5. Mr. Jackson preserved the prejudicial and reversible error in the trial court's refusal to permit impeachment of Bruce Nixon's prior-recorded testimony by his subsequent recantation (Point 6 of Initial Brief).

Before the State introduced Mr. Nixon's 2007 trial testimony in this 2023 sentencing retrial, Mr. Nixon recanted that testimony. He did so at co-defendant Alan Wade's 2022 trial, stating repeatedly that he testified not from memory but to what his attorney told him to say. T.1229 (referring to R.5240-47). Yet the trial court blocked admission of this crucial impeachment. T.1229.

The State does not defend the error on the merits. It does not contend that Mr. Nixon's recantation was inadmissible under sections 90.806 and 921.141(1) of the Florida Statutes, or under

the Sixth and Eighth Amendments. *Compare* Init. Br. 57-59 *with* Resp. Br. 77-84. It merely claims that this error is not preserved because the record does not contain the testimony of Mr. Nixon's recantation. Resp. Br. 78-79.[14]

The State is wrong. On January 3, 2024, alert to the trial court's error and on notice to the State, Mr. Jackson moved this Court to make Mr. Nixon's recantation testimony part of the record on appeal. *See* Appellant's Motion for an Order Directing the Lower Tribunal to Complete the Record and to Stay Proceedings in this Court, at 6. The next day, this Court granted the motion. And in turn, the lower court filed the Nixon recantation transcript with this Court. *See, e.g.*, R.5240-47. (The citation in Mr. Jackson's opening brief followed the convention used in his trial-court pleadings,

[14] While it appears that Mr. Jackson's counsel did not object under the Sixth or Eighth Amendments, this Court should reverse under the preserved general objections or under fundamental error. § 924.051 (3), Fla. Stats. Additionally, while an ineffectiveness claim would be appropriate on direct appeal because "the ineffectiveness is apparent on the face of the record" when a lawyer fails to cite all constitutional provisions supporting an objection, *Gore v. State*, 784 So. 2d 418, 437–38 (Fla. 2001), this Court has more recently ruled that such claims must await post-conviction review. *Steiger v. State*, 328 So. 3d 926, 932-33 (Fla. 2021). Still, Mr. Jackson preserves the claim here to ensure against default arguments in any subsequent proceedings.

R.2915, which cited the internal page numbers within the *Wade* transcript).

The State is thus also wrong to contend that the content of the recantation is unknown, or that the particular portion of his testimony that he disavowed is unknown. Resp. Br. 79. At Mr. Wade's trial, Mr. Nixon clearly testified that he dug a hole, but never learned "what was going to happen at that hole[.]" R.5240. "What [he] said" in his prior testimony about the murder thereafter was "what [defense counsel] wanted [him] to say." R.5241. Mr. Wade's jury heard this brief testimony, but was then excused. R.5242.

Outside of the jury's presence, Mr. Nixon explained that he was on drugs during the event and that his attorney "advised me what to say before I came in." R.5243. He continued:

> I was on Xanax and methadone at the time so in and out of consciousness . . . So he filled in the blanks for me and told me what to say. I was guided into my testimony. . . I'm just trying to tell the truth of what happened.

Id. See also R.5247 ("I am telling you at this time . . . before I did what I did my attorney told me what to say and told me what was

going to happen."). Thus, Mr. Nixon did not testify based on truthful memories, but instead what his lawyer told him to say.

Even after the prosecutor advised Mr. Nixon that he could face the death penalty and life imprisonment "times two," Mr. Nixon held fast: "I just want to tell the truth of what happened. I don't care about all that." R.5250. Beyond Mr. Nixon's relatively brief testimony, the remaining colloquy consists of extensive discussion by the attorneys and trial judge, irrelevant here, about how to handle Mr. Wade's trial in light of this recantation and the charges Mr. Nixon would face by changing his testimony. R.5235-5277. The State thus errs to claim that this "Court cannot know the contents and context of Nixon's purported recantation, including what portions of his earlier testimony he may have disavowed and whether it pertained to Jackson's case." Resp. Br. 79.

Because this Court ordered the lower tribunal to include this testimony in the record, it did so. This Court thus has everything it needs in the record to review the error.

The State next attempts to escape the consequences of the trial court's error by arguing no prejudice ensued. Resp. Br. 80-84.

But these contentions rely on inapt guilt-phase precedent,[15] rather than addressing the questions of mercy and discretion. As to these questions, a recantation looms large and, certainly, the State has not proven it irrelevant beyond a reasonable doubt. *Goodwin*, 751 So. 2d at 546. Further, the State's prejudice arguments make no sense in light of the State's exhaustive, years-long efforts in the court below to obtain the testimony and present it to the sentencer. *See* Init. Br. 59-61. If Mr. Nixon's testimony had no impact on Mr. Jackson's death sentence, the State would not have used extensive law-enforcement and judicial resources to introduce it.

Moreover, the State completely fails to address the abundant capital case law favoring a finding of prejudice where, as here, a

---

[15] While claiming elsewhere that death sentencing involves a question of mercy and discretion, not facts, Resp. Br. 43, the State cites here only to inapt precedent involving how to evaluate fact-intensive prejudice questions when a trial court has precluded cross examination in the guilt phase of a criminal trial. Resp. Br. 80-84 (citing and relying extensively on *Gosciminski v. State*, 132 So. 3d 678, 706 (Fla. 2013) (analyzing guilt-phase error); *Livingston v. State*, 565 So. 2d 1288, 1291 (Fla. 1988) (same and noting overwhelming evidence of guilt); *Kramer v. State*, 619 So. 2d 274, 276 (Fla. 1993) similar). If this Court agrees that these fact-intensive guilt-phase analyses apply here, it should apply that same reasoning to find the Sixth Amendment applies to the jury's weighing and sentencing decisions. *See* Init. Br. Point 2.

divided penalty-phase jury is only one or two votes from a life sentence. *Compare* Init. Br. 29-30 n.11 (collecting cases) *with* Resp. Br. 80-84 (ignoring cases).

In light of the close vote for death, and the discretionary question of mercy, Resp. Br. 43, the State cannot now prove it harmless beyond a reasonable doubt that the sentencing jury was misleadingly presented with the damning prior testimony of a codefendant while deprived of the knowledge that he had since recanted. *Goodwin*, 751 So. 2d at 546. Even more so, when combined with the prejudice flowing from depriving Mr. Jackson's jury of his co-defendant's life sentence. *See* Point 4, *supra* (Point 5, Init. Br.); Point 7, *infra* (Point 9 Init. Br., cumulative error).

In sum, this preserved error requires reversal.

6. Contrary to the State's position, Mr. Jackson's claims of prosecutorial summation misconduct are preserved as a matter of law (Point 8 of Initial Brief).

The State directs this Court to disregard Mr. Jackson's prosecutorial misconduct claim, either due to lack of preservation or failure to request fundamental error review. Resp. Br. 90-91. This argument fails on both points.

While the State cites district court-of-appeals precedent to bar this Court from its statutory fundamental error review where not explicitly requested in the alternative on appeal, Resp. Br. 90-91, Mr. Jackson *did* raise a claim of fundamental error in his opening brief. Init. Br. 73. Citing *Delhall v. State*, 95 So. 3d 134 (Fla. 2012), he argued that "the prosecutor's improper comments, including those without objection, fundamentally tainted the proceedings against Mr. Jackson and deprived him of a fair trial." *Id.* This requested fundamental error review. *See also Delhall*, 95 So. 3d at 170 ("We find that these cumulative errors so fundamentally tainted the guilt phase that we cannot conclude they did not influence the jury to reach a more severe penalty recommendation than it would have otherwise.").

The State is right in one respect: not all challenges to the prosecutor's summation misconduct were subject to objection. Resp. Br. 88-90. But Mr. Jackson does not contend that they were. Nor was objection required for this Court to review whether they cumulatively amount to reversible fundamental error. *Braddy v. State*, 111 So. 3d 810, 855-56 (Fla. 2012) (explaining that the Court engages in a "cumulative error analysis" to determine whether the

combined effect of all error—objected to and otherwise—amounts to "cumulative fundamental error").

7. The cumulative harm caused by errors in Mr. Jackson's trial warrants reversal (Point 9 of Initial Brief).

Rather than grapple with a cumulative error analysis, the State claims none is necessary because "no error of any kind" marred Mr. Jackson's resentencing trial. Resp. Br. 96. As shown in Mr. Jackson's opening brief and elsewhere in this brief, this is incorrect. Mr. Jackson specifically cites Points 1, 5, 6 and 8 of his initial brief, as both indisputable errors and errors infecting the jury's decision at trial that are subject to cumulative-error analysis.

As for the State's argument against prejudice (cumulative or otherwise), it is simple: the facts of this case were so horrific that no amount of error could change how the jury voted. Resp. Br. 66, 83-84, 87-88, 96. But this ignores the fact that four of the twelve people who heard these facts—one third of the jury—voted for Mr. Jackson to live. In his opening brief, Mr. Jackson presented a litany of this Court's decisions that warn of the heightened risk of prejudice in close penalty-phase capital trials. Init. Br. 29-30 n.11.

The State failed to address any of these cases. *See* Resp. Br. For the reasons discussed above and throughout Mr. Jackson's initial brief, the State has failed to prove that these errors, with their individual prejudice assessed cumulatively, were harmless beyond a reasonable doubt. *Goodwin*, 751 So. 2d at 546.

8. To deny that S.B. 450 was a Bill of Attainder, the State invents an overly narrow definition of punishment and ignores the State's damning text-message campaign and legislative record (Point 11 of Initial Brief).

The State creates its own definition of punishment barred as a Bill of Attainder: punishment must be criminal. Resp. Br. 59. It selectively paraphrases *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 847 (1984) to claim that "[c]lassical forms of punishment include death, imprisonment, banishment, and confiscation." *Id.* From this artificially narrow premise, it argues that S.B. 450 did not criminally punish Mr. Jackson, and a deprivation of a right or procedure cannot be punishment under those "ordinary conceptions of 'punishment'" listed above.

A correct reading of *Selective Serv. Sys.* and its multiple allusions to non-criminal punishment undercuts the State's entire argument. "Confiscation," Resp. Br. 59, refers not to a criminal

punishment, but "the punitive confiscation of property." *Selective Serv. Sys.*, 468 U.S. at 852 (internal citations omitted). And the State's list of "classical forms" of punishment is one that the *Selective Serv. Sys.* Court explains was once used historically *in England*. *Id*. The Court distinguished that from the law in our country in the very next sentence: "[i]n our own country, the list of punishments forbidden by the Bill of Attainder Clause has expanded to include legislative bars to participation by individuals or groups in specific employments or professions." *Id*. This, again, is a non-criminal form of punishment.

The State could provide no legal support for its argument because, for centuries, our nation has protected against Bills of Attainder that inflict more than mere criminal punishment. The State, for example, may not deprive its citizens of their 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."); *Selective Serv. Sys.*, 468 U.S. at 852. Nor may it deprive its citizens of civil or political rights. *See, e.g.*, *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."); *United States v. Lovett*, 328 U.S. 303, 315-18 (1946) (finding law barring future payment to named federal employees bill of attainder); *Selective Serv. Sys.*, 468 U.S. at 852 (including legislative bars to employment or profession in the definition of punishment forbidden by the Bill of Attainder Clause).

"[T]he Bill of Attainder Clause [is] not to be given a narrow historical reading. . . but [is] instead to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965). S.B. 450 posed the precise evil that the Framers sought to protect its citizens against.

S.B. 450 legislatively punished Mr. Jackson by depriving him of the right to have a jury unanimously decide whether the State can kill him. Evidence of this intent, unaddressed by the State, includes the State Attorney's inappropriate text message campaign with Lawmakers to pass S.B. 450 in time to deprive Mr. Jackson of his rights at retrial. R.3018-3022. The State similarly omits mention of the repeated, targeted, and explicit session arguments that S.B. 450 is necessary to make sure that Michael Jackson—and no other

currently pending capital defendant—is sentenced to die. R.3934-35. This is a bill of attainder.

9. Mr. Jackson's *Hurst* resentencing was unacceptably arbitrary, violated the Equal Protection Clause, and resulted from a scheme with insufficient Eighth Amendment safeguards (Points 12 and 13 of Initial Brief).

A. Deciding capital-sentencing jury rights on a game of chance violates the Constitution.

In arguing the line drawn for those awaiting *Hurst* resentencings is rational, the State largely focuses on one case, *Dobbert v. Florida*, 432 U.S. 282 (1977). Resp. Br. 32-33. In *Dobbert*, after Florida's death penalty statute was found unconstitutional and it made a new one, Florida decided to draw a line between those who had been sentenced to death under the previous, unconstitutional statute and those who had not yet been tried. 432 U.S. at 301. The former category of defendants had their sentences commuted and the latter category remained subject to the death penalty under a new, proper death penalty statute. *Id.*

The current "*Hurst* line" and the former "*Dobbert* line" do not compare. The rationale for the *Dobbert* line was that "Florida obviously had to draw the line at some point *between those whose cases had progressed sufficiently far in the legal process as to be*

governed solely by the old statute" and those who had committed capital acts but who had not yet been tried. *Id.* at 301. (emphasis added). In other words, there were defendants who had been given a decision (in this case, a sentence) under the old law on one side and defendants who had not yet gone to trial on the other.

The current *Hurst* relief line is not a line at all, zigging and zagging between unanimous and non-unanimous sentencing trials on the whims of chaotic weather, overburdened lawyer schedules, and unpredictable court docketing issues. *See generally* FACDL Amicus Br. This could not be more different than *Dobbert*'s straight line. Under *Dobbert*'s reasoning, the only rational line would be for those defendants ordered *Hurst* relief to receive it. Meanwhile, those without relief (due to failure to file a claim, retroactivity problems, or having already received a unanimous death recommendation) would remain without, along with of course (at least for Equal Protection and Eighth Amendment purposes) those not yet tried.

This would conform not only with *Dobbert*, but also with principles of *res judicata*, equity, and the Eighth Amendment requirement of non-arbitrariness. After all, the unlucky 42 remaining *Hurst* defendants ran the same *Hurst* gauntlet as the 80-

plus already sentenced before S.B. 450 became the law. All timely preserved the issue, showed prejudice in that their original jury vote was non-unanimous, and had death sentences that became final after *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016) (retroactivity standard); *Davis v. State*, 207 So. 3d 142, 173-74 (Fla. 2016) (harmless error standard). It is only right that they receive that promised relief as did the majority 80-plus others fortuitously sentenced before them.

To put it differently, Florida courts, in duly entered orders, promised Mr. Jackson and dozens of defendants *Hurst* relief. But due to whatever caused delay of that remedy—in Mr. Jackson's case, the weather, a global pandemic, and the State's own frivolous motions and accompanying delay— the State now seeks to take back that remedy. Mr. Jackson and the remaining 41 have lost "the quintessential game of chance" that none of the *Hurst* defendants even knew they would be playing. FACDL Amicus Br. at 5. In addition to forming an arbitrary line, this violates Mr. Jackson's right to equal protection under the U.S. and Florida Constitutions.

B. The State fails to address the compounded weight of Florida's abandonment of Eighth Amendment safeguards.

While the State asks the Court to pretend that these claims have already been decided, Resp. Br. 39, the truth is that the Court has never decided the constitutional adequacy of its current system under the commands of *Furman*. This current system – never reviewed by this Court or the U.S. Supreme Court – includes a number of aggravating circumstances so large that virtually every person accused of murder is death eligible,[16] death sentencing permitted without unanimous juries and with as few as eight juror votes for death, a lack of proportionality review, a lack of comparative proportionality review in co-defendant cases and, in the State's current view, the inability of any sentencing entity to consider a codefendant's sentence of life. *See* Init. Br. 92-99; Point

[16] Puzzlingly, the State acknowledges that aggravator creep is part of Mr. Jackson's facial claim in one breath but in the very next switches to an as-applied analysis by discussing the aggravators proven at Mr. Jackson's own trial. Resp. Br. 39-40. Of course, the particular facts of Mr. Jackson's own trial are irrelevant to his facial challenge that Florida's capital-sentencing scheme, like in *Furman*, violates the Eighth Amendment under any circumstance.

4, *supra* (Point 5, Init. Br.). This Court should hold that the system, as a whole, fails to comply with *Furman*.

CONCLUSION

WHEREFORE, for the reasons stated in this Reply and Michael Jackson's Initial Brief, his 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)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this Brief was served upon: Michael W. Mervine, Assistant Attorney General, through the Florida Electronic Portal, this 13th day of September, 2024.

CERTIFICATE OF COMPLIANCE

I FURTHER CERTIFY that this brief is printed in Bookman Old Style 14 point font, is 9,845 words and 47 pages in length. This brief otherwise complies with the requirements of Florida Rule of Appellate Procedure 9.210 (b)(2).

/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)