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SC23-1298

In the Supreme Court of Florida

MICHAEL JACKSON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM A FINAL JUDGMENT OF THE
CIRCUIT COURT FOR THE FOURTH JUDICIAL CIRCUIT
L.T. NO. 16-2005-CF-10263-C

ANSWER BRIEF ON THE MERITS

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INTRODUCTION & SUMMARY OF ARGUMENT

Appellant Michael Jackson faces the death penalty for his murders of Reggie and Carol Sumner. In 2005, Jackson hatched a plot to rob and murder the Sumners—whom he targeted because they were old and sick—enlisting teenaged accomplices to aid him. But he did not merely kill the Sumners. Jackson and the others duct taped them, threw them in the trunk of a car, and drove them to a makeshift grave. Jackson then buried the Sumners alive. After attempting to mislead the police and pin the murders on his accomplices, he eventually confessed to his lead role in the crimes. Jackson was convicted in 2007, received *Hurst* relief a decade later, and had a new penalty phase in 2023. By a supermajority vote of 8-4, the jury recommended sentences of death, which the trial court imposed. This Court should now affirm.

I. Jackson concocts every conceivable legal challenge to Senate Bill 450, the Legislature's recent amendment to Florida's death-penalty statute that permits a death sentence based on an 8-4 jury recommendation. None has merit.

A. First, applying SB 450 to Jackson's case did not violate the Equal Protection Clause. Jackson cannot meet either prong of an

Arlington Heights disparate-impact claim: SB 450 does not discriminate against black jurors, and there is zero evidence that the Legislature intended such a result.

Likewise, equal protection did not require that Jackson be sentenced under the 12-0 rule, in effect between 2016 and 2023, that had previously been applied at the new penalty phases of earlier *Hurst* defendants. "Florida obviously had to draw the line at some point" between those defendants subject to the old and new regimes. *Dobbert v. Florida*, 432 U.S. 282, 301 (1977).

B. Next, this Court has already repeatedly rejected Jackson's claim that evolving standards of decency require the jury to unanimously recommend death. *E.g.*, *State v. Poole*, 297 So. 3d 487, 504 (Fla. 2020).

C. It has similarly rejected Jackson's theory that Florida's death-penalty rules, taken as a whole, violate the Eighth Amendment. The Constitution does not require a unanimous jury recommendation of death, appellate proportionality review, or a narrower set of aggravators. It instead requires that state law channel sentencing discretion and reduce arbitrariness, as Florida's does.

D. Also barred by precedent is Jackson's contention that the

Sixth Amendment jury-trial right encompasses a right to unanimous jury weighing of aggravators and mitigators. *Id.* at 503–04.

E. The same is true for the jury's ultimate recommendation of death. *Id.* at 504; *McKinney v. Arizona*, 589 U.S. 139, 144 (2020).

F. State law did not prevent SB 450's application either. Because juror unanimity is a matter of procedure, *Edwards v. Vannoy*, 593 U.S. 255, 276 (2021), SB 450 applies in pending cases to upcoming penalty phases. As this Court made clear in *Love v. State*, such an application is not "retroactive" at all—it is "prospective" to a judicial proceeding to be held after the statute's effective date. 286 So. 3d 177, 188 (Fla. 2019).

G. Jackson's res judicata claim fares no better. Due to *Hurst* error, the postconviction court in 2017 ordered that Jackson be resentenced. This Court, in extraordinary-writ proceedings in *State v. Jackson*, refused to reinstate Jackson's death sentences after *Poole*, which held that a unanimous jury recommendation is not required by the Constitution; but in doing so, the Court observed that Jackson's new penalty phase would be "subject to" any "intervening" change in law. 306 So. 3d 936, 943 (Fla. 2020). SB 450 is just such an intervening change and properly applied here.

H. Without question, SB 450 is not a "bill of attainder." It does not impose punishment, is not a legislative determination of Jackson's guilt, and does not dispense with a trial.

II. Nor is Jackson entitled to a new sentencing hearing because of alleged defects in the trial judge's rulings.

A. There was no *Caldwell* error. *Caldwell* and its progeny hold that a jury must not be told inaccurate information about its role that reduces the jury's sense of responsibility for a death sentence. Jackson complains that the trial court referred to the jury's sentencing recommendation as a "recommendation," when a life recommendation would in fact bind the judge. But in using the term "recommendation," the trial court tracked the wording of Section 921.141. And jurors need not be told "any bit of information that might possibly influence an individual juror's voting behavior." *Jones v. United States*, 527 U.S. 373, 382 (1999). Furthermore, the trial court implored the jury to apply its "best judgment," to "realiz[e] that a human life is at stake," and to show "due regard to the gravity of these proceedings"—instructions that this Court has previously relied on when concluding that the jury properly understood its role and the enormity of its task.

Any error was harmless. Jackson's theory of prejudice is that, had the four jurors who voted for life known that a life recommendation was binding, they would have "fought longer" to convince a fifth juror to see things their way. This Court has rejected similar speculation. It should do so again here, particularly given the truly heinous nature of Jackson's crimes, the minimal mitigation, and the presence of several of the most serious aggravators in Florida's statutory scheme.

B. Next, Jackson had no right to tell the jury that a *different* defendant—co-defendant Wade—received a life sentence. As this Court has often stressed, capital sentencing is highly individualized, turning on countless details about both offense and offender. A co-defendant's sentence is thus not probative of the sentence the defendant himself should receive. The Court recognized that point when it held that relative-culpability review is inappropriate. *See Cruz v. State*, 372 So. 3d 1237, 1243 (Fla. 2023).

C. In arguing that the trial court abused its discretion by excluding proof of co-defendant Nixon's alleged "recantation," Jackson ignores that he failed to proffer the evidence he wished to introduce. The Court can therefore only guess that the recantation evidence was

proper impeachment. For that reason alone, he cannot prevail in his Confrontation Clause claim.

But as a logical matter, any error was harmless. Jackson argues that if the jury heard that Nixon had previously lied about *something* (the record says not what), it might have disbelieved Nixon's perpetuated testimony from the 2007 trial, which prosecutors below used to establish the basic facts of the crimes. The jury did not need to rely on Nixon's testimony, however. It instead heard Jackson's own recorded admissions to both law enforcement and documentary filmmakers. Those statements revealed that the plot to murder the Sumners originated with Jackson, that Jackson picked them because they were sick and elderly, that he wished to kill them himself, and that he buried them alive. From that evidence alone, the jury would have recommended death. Nixon's perpetuated testimony was at most duplicative, and any error in precluding impeachment of that testimony could not have been prejudicial.

D. Jackson's claim that the trial court improperly assigned no weight to five mitigating circumstances misstates the law. This Court recently held that a trial court need not explain its assignment of a particular weight to a mitigator; it is enough that the trial court

expressly find the mitigators, give them a weight, and weigh them against the aggravators. *Rogers v. State*, 285 So. 3d 872, 889–90 (Fla. 2019). All of that was done here.

E. Though Jackson now alleges that prosecutors used "every foul tactic" in opening and closing statements, trial counsel apparently did not think so, objecting to only three of the statements that Jackson insists were unethical. The only objected-to comments were not improper; marshalling the evidentiary record, those comments responded to Jackson's theories of mitigation. It was fair to exhort the jury to consider, for example, that Jackson's experts were "paid" tens of thousands of dollars for their testimony. It was likewise fair for the prosecution to point out that despite Jackson's current claims of remorse, he had previously tried to pin the murders on his co-defendants and to impersonate the dead victims to throw law enforcement off his trail.

The remaining comments were not fundamental error. All references to "evil" were to Jackson's crimes, not to Jackson himself, and therefore properly related to the HAC aggravator, which turns on the "shockingly evil" nature of the murders. And there was no impermissible "golden rule" comment: The prosecutor merely explained to the

jury that the victims' anticipation of death made the murders torturous, again relevant to HAC. On top of that, Jackson suffered no prejudice from the comments.

F. Because Jackson has not shown error, there is no prejudice to aggregate. And any error would not have changed the outcome one way or the other, given the highly aggravated nature of these murders.

G. Jackson says he must be retried because he did not have enough time in the 25 days between SB 450's becoming law and the start of his penalty phase. But that was ample time to litigate the constitutionality of the new law, as evidenced by the many legal challenges Jackson raised below. On appeal, he identifies only a single additional (and meritless) claim that was not raised below. It thus was not an abuse of discretion for the trial court to refuse to further delay a retrial that had been pending for nearly six years.

H. Finally, Jackson swims upstream in his claim that the process of "death disqualification" is illegal. The U.S. Supreme Court long ago held that a juror is properly stricken if she holds an unyielding opposition to the death penalty, such that she could not follow the law and fairly consider a death sentence. *Lockhart v. McCree*, 476

U.S. 162, 165 (1986). The State, no less than a defendant, is entitled to an impartial jury.

STATEMENT OF THE CASE AND FACTS

A. Jackson is convicted and sentenced to death for burying an elderly couple alive.

1. In July 2005, 60-year-old Carol Sumner and her 62-year-old husband, James "Reggie" Sumner, were living in Jacksonville. Tr. 696, 702. Carol was undergoing chemotherapy for liver cancer. Tr. 698. Reggie was an insulin-dependent diabetic who had gone into kidney failure several times. Tr. 699.

The Sumners hosted Appellant Michael Jackson and his girlfriend, co-defendant Tiffany Cole, as guests in their home. Tr. 717, 1051. Cole knew the Sumners because they used to live in her parents' neighborhood. Tr. 799. Jackson overheard Mrs. Sumner tell Cole that they had recently sold their house for $90,000. Tr. 1051. Upon learning this, Jackson suggested to Cole that they rob the Sumners. Tr. 1049. He told Cole that he would have to murder the couple because it would take time to withdraw all the money from their bank accounts. Tr. 1049, 1052.

Putting his plan into action, 23-year-old Jackson recruited 18-

year-old Alan Wade, who in turn involved 18-year-old Bruce Nixon. Tr. 717–18, 1049, 1114, 1117, 1119. Jackson, Wade, and Nixon found a secluded location in Georgia where they dug a hole six feet deep. Tr. 1119–20, 1170.

After dark on July 8, the four defendants drove to the victims' house in a Mazda. Tr. 1128–29. Nixon and Wade knocked on the door and asked the Sumners if they could use their phone. Tr. 1129. Once inside, Wade pulled the phone cord from the wall and restrained Mr. Sumner while Nixon, armed with a BB gun, forced Mrs. Sumner onto a couch. Tr. 1125, 1130. After duct taping the victims' legs, mouths, and eyes, the men ordered them into a bedroom. Tr. 1130, 1133–34.

Jackson then entered the house. Tr. 1132. He had waited to enter because he feared that the Sumners would recognize him. Tr. 1132–33. Upon locating a wallet, jewelry, coins, and bank documents, Jackson opened the trunk of the victims' car and directed Wade and Nixon to put them inside. Tr. 1135, 1137, 1139–40. Nixon and Wade then drove their car to the site of the hole while Jackson and Cole followed in the Mazda. Tr. 1137–38.

When they arrived, Jackson opened the trunk of the Sumners' car. Tr. 1139. The Sumners were hugging each other. Tr. 1141.

Jackson grew upset that the duct tape had fallen off and ordered that the Sumners be duct taped again. Tr. 1141. Nixon closed the trunk and backed up to the gravesite. Tr. 1141–42. Jackson then forced the victims to give him the PIN codes for their bank cards. Tr. 1050, 1145.

Although Jackson had originally wanted to kill the victims by injecting them with medicine, he became fearful of this method and decided to bury them alive instead. Tr. 1049. Jackson and Wade put the victims into the makeshift grave and began shoveling dirt on top of them. Tr. 1050. Jackson could hear the victims "moaning," as though they were "trying to get up." Tr. 853. When the Sumners were mostly covered, Nixon went to help while Cole held a flashlight so that Jackson could finish the job. Tr. 1050.

Once the burial was complete, Wade and Nixon abandoned the victims' car. Tr. 1050. Jackson and Cole picked them up and the four traveled to an ATM where Jackson withdrew money. Tr. 1050. Over the next several days, he used the victims' ATM card over 20 times. Tr. 728, 1050, 1188.

Nixon led law enforcement to the Sumners' grave a week later. Tr. 731. The couple's heads were four feet below ground. Tr. 1101.

Both were in a kneeling position with their heads bowed and torsos upright. Tr. 722, 1100. According to the medical examiner, the position of their bodies indicated that they had been alive and conscious when their heads were engulfed with dirt. Tr. 1105. They would have died within seconds to minutes of that point. Tr. 1106.

Each had dirt in the mouth, trachea, and esophagus. Tr. 1093, 1098. Mrs. Sumner had vomited. Tr. 1108. Their cause of death was a combination of smothering and mechanical asphyxiation. Tr. 1099. The latter was caused by the press of the dirt on their bodies; they could not move their diaphragms. Tr. 1099–1100. They were also smothered by dirt on their faces. *Id.*

2. Florida law at the time required that a capital jury issue an "advisory sentence" of life or death. *See* § 921.141(2), Fla. Stat. (2005). Under that scheme, a majority of jurors recommended either life imprisonment or death. *Id.* The jury was told to base that recommendation on its finding of an aggravating factor; its views on the sufficiency of the aggravating factors to warrant death; its views on the relative weight of the aggravating factors and any mitigating circumstances; and whether death was the appropriate penalty. *Id.* But the ultimate decision of which sentence to impose lay with the trial

court: "Notwithstanding the recommendation of a majority of the jury," the trial court could impose a sentence either of life or death. *Id.* § 921.141(3).

3. A jury convicted Jackson in 2007 for the murders. *Jackson v. State*, 18 So. 3d 1016, 1023 (Fla. 2009). It then recommended death for both by votes of eight to four. *Id.* at 1024. Finding that the aggravators "far outweighed" the mitigators, the court followed the jury's recommendations. *Id.* This Court affirmed the convictions and death sentences. *Id.* at 1036.

B. Jackson receives resentencing based on *Hurst.*

In 2017, the postconviction court ordered resentencing based on *Hurst v. Florida*, 577 U.S. 92 (2016) (*Hurst I*), which held that the Sixth and Fourteenth Amendments require that, before the death penalty may be imposed, a jury must find the fact of an aggravating factor beyond a reasonable doubt, not simply issue an advisory recommendation. *State v. Jackson*, 306 So. 3d 936, 937–38 (Fla. 2020).

In the wake of *Hurst I* and this Court's decision construing it in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (*Hurst II*) (expanding *Hurst I*'s holding by requiring that the jury unanimously find not only an aggravator but also that the aggravators outweigh any mitigators and

that death is the appropriate sentence), the Legislature amended Florida's death-penalty statute, Section 921.141. In conformity with *Hurst II*, the Legislature required that, before the trial court may impose the death penalty, a jury must unanimously find: (1) the existence of an aggravating factor, (2) that the aggravating factors are sufficient to warrant death and that they outweigh any mitigating factors, and (3) that death is the appropriate sentence. *See* Ch. 2016-13, § 3, Laws of Fla. (effective Mar. 7, 2016); Ch. 2017-1, § 1, Laws of Fla. (effective Mar. 13, 2017); *see also* § 921.141(2)–(3), Fla. Stat. (2017). If any of those findings were not made, the defendant was to be sentenced to life in prison.

This Court later overruled *Hurst II*. *See State v. Poole*, 297 So. 3d 487 (Fla. 2020). It explained in *Poole* that the jury's weighing and recommendations functions do not involve "facts" that the Sixth Amendment requires be found by a jury beyond a reasonable doubt; those inquiries instead involve "mostly a question of mercy," and do not lend themselves "to being objectively verifiable." *Id.* at 503–05. And under binding Supreme Court precedent, the Eighth Amendment likewise does not require a unanimous jury recommendation. *Id.* at 505.

Citing *Poole*, the State sought an extraordinary writ from this Court, asking to reinstate Jackson's death sentences because, on the proper view of the law, those sentences were lawful all along. *Jackson*, 306 So. 3d at 937–39. The Court rejected that request, finding that the 2017 postconviction order was "final" and could not be revisited. *Id.* at 943. But it observed that Jackson's new penalty phase would be "subject" to any "intervening [changes in law]." *Id.*

C. Before the new penalty phase, the Legislature enacts SB 450, authorizing death based on a supermajority jury recommendation of death.

On April 20, 2023, prior to Jackson's new penalty phase, which was scheduled to begin in May, the Governor signed into law Senate Bill 450, which again amended Florida's death-penalty statutes. Ch. 2023-23, § 1, Laws of Fla. (effective Apr. 20, 2023); *see also* § 921.141, Fla. Stat. (2023).

Under SB 450, the jury must still unanimously find the fact of an aggravating factor, as required by *Hurst I*, before the defendant is eligible for the death penalty. § 921.141(2)(a)–(b), Fla. Stat. (2023). But the jury's recommendation of death now need not be unanimous; it is enough that at least eight jurors vote to recommend death. *Id.* § 921.141(2)(b)2., (c). The statute provides for the recommendation

to be based on the jury's weighing of whether sufficient aggravating factors exist, whether those aggravators outweigh any mitigating circumstances, and whether the defendant should be sentenced to life imprisonment or death. *Id.* § 921.141(2)(b)2.a–c. A jury recommendation of life binds the trial court. *Id.* § 921.141(3)(a)1. But if the jury recommends death, the trial court may impose either that sentence or a sentence of life. *Id.* § 921.141(3)(a)2.

D. Jackson is sentenced to death under the new statute.

The new penalty phase began on May 15, 2023. The State's exhibits included Jackson's post-trial letters admitting guilt, a recording of a true crime documentary during which Jackson was interviewed, and his statements admitting guilt to police. Tr. 636, 1046; R. 3340. From Jackson's mouth, the jury heard that the plan to rob and murder the Sumners "stemmed from me" and was "my idea." Tr. 1052. He at first wanted merely to take their money but soon "realize[d]" that it "would take a while" to withdraw it through an ATM. Tr. 1049. "[T]hat's when the idea entered my mind to kill them." *Id.* "I told [Wade and Nixon] that I would be the one to kill" the Sumners, Jackson said. *Id.* When it came time to kill them, however, he got "scared" to do it by injection; he instead had "the idea of burying

them.” *Id.* It did not occur to Jackson at the time “how unmerciful and cruel” such a death would be. Tr. 1049–50. Jackson said that he and Wade put the couple in the hole and covered them with dirt. Tr. 1050.

Jackson targeted the Sumners because they were “elderly, vulnerable people.” Tr. 1051–52. He said that he knew the Sumners had a lot of money from the recent sale of their home, and Jackson wished to fund his party lifestyle. *Id.*

Despite those confessions, the jury also heard a lengthy recorded phone call that Jackson made to the Sheriff’s Office shortly after the murders, in which he tried to throw the authorities off the scent by impersonating Reggie Sumner and pretending to be alive in Delaware. Tr. 737–58. And in Jackson’s initial statements to detectives after his arrest, he had attempted to pin the murders on Cole, Wade, and Nixon. Tr. 779, 786, 790–98, 812–17. He claimed in those statements that he had informed Wade and Nixon that the Sumners had a lot of expensive stuff in their home and would be a “good score,” but that Wade and Nixon killed the Sumners without his knowledge and told him about it only later. Tr. 779, 794–97, 800, 812–17. He said that he used the Sumners’ ATM card thinking it was Wade’s

mother's. Tr. 805–06. Only later did he confess to his role in the murders.

After co-defendant Nixon invoked his right to remain silent at the penalty phase, Tr. 934, the State offered his transcribed testimony from Jackson's first trial. Tr. 1112–97. That testimony backed up Jackson's admissions to being the ringleader and various details of the murders. *See, e.g.*, Tr. 1119, 1123–24, 1143.

In a brief exchange with the trial court, defense counsel sought to introduce "prior testimony where [Nixon] references that his lawyer basically told him to lie and he lied on behalf of his lawyer and all the testimony that came before the Court before he actually was taken off the stand and invoked." Tr. 1229. It is unclear, however, what "prior testimony" counsel was referring to, as counsel did not proffer the contents of the testimony or enter into the record a transcript. The trial court denied the request, and defense counsel responded "[u]nderstood." *Id.* The court noted that "there was about 30 seconds of that before I had him removed from the courtroom," *id.*—an apparent reference to the prior testimony.

In addition, the prosecution and defense stipulated that Jackson had been convicted of a felony and was on probation when he

committed the offenses. Tr. 925; R. 3086. Finally, the jury learned that Jackson had gone to trial in 2007 and was convicted of two counts of first-degree murder, two counts of kidnapping, and two counts of armed robbery. Tr. 1044. The jury heard that Jackson testified at the 2007 trial and denied or minimized his participation. Tr. 1044–45.

Mr. Sumner's brother and sister spoke on the couple's behalf. Tr. 1205–15. Though the Sumners first met in high school, they reunited by chance after Reggie called the cable company where Carol was working and the two hit it off. Tr. 1207, 1212. They had only been married a few years before their lives were taken. Tr. 1207, 1213. Carol kept Reggie "well fed" and made "delicious desserts." Tr. 1212. One of a dozen children, Reggie served as a father figure to his siblings. Tr. 1206, 1209–10. He was a source of "encouragement" to neighbors in "difficult times." Tr. 1214. Even after "many years," the couple is remembered for their "love for people, their humility, their generosity." Tr. 1215.

In mitigation, Jackson's sister, a mother of his childhood friend, two clergymen, a licensed psychologist specializing in neuropsychology, a developmental psychologist, a clinical and forensic

psychologist, and a psychiatrist specializing in neurocognitive imaging testified. Tr. 1304–05, 1338, 1359, 1427, 1473, 1487, 1573, 1644. The defense also presented the perpetuated testimony of Jackson's grandmother. Tr. 1252. The gist of much of this testimony was that Jackson had found God and was a new man.

By votes of 8-4, the jury recommended death for each first-degree murder. Tr. 1835, 1837; R. 3333, 3336. It unanimously found eight aggravating factors beyond a reasonable doubt: (1) Jackson was on felony probation at the time of the murders; (2) he was convicted of another capital felony prior to this proceeding; (3) the murder was committed while Jackson was engaged in a kidnapping; (4) the murder was committed to avoid arrest; (5) the murder was committed for financial gain; (6) the murder was especially heinous, atrocious or cruel; (7) the murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification; and (8) the victim was particularly vulnerable due to advanced age or disability. Tr. 1833–37; R. 3331–35.

The trial court agreed that death was appropriate. It found all eight aggravators, assigning each either very great or great weight. R. 3423–32. It also found that all 25 proposed mitigating

circumstances were established. R. 3433–37 It assigned no weight to five mitigating circumstances, little weight to 17, and some weight to three. *Id.* In conclusion, the court remarked that the aggravators "heavily outweigh" the mitigators and that death was "the only proper penalty." SR3. 22.

STANDARD OF REVIEW

I. Jackson raises a series of legal challenges to the application of SB 450 at his new penalty phase. Those purely legal claims are reviewed de novo. *See Correll v. State*, 184 So. 3d 478, 487 (Fla. 2015) (constitutional claims); *Love v. State*, 286 So. 3d 177, 183 (Fla. 2019) (retroactivity of state statute); *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 427 n.6 (Fla. 2013) (res judicata). His constitutional challenges to SB 450 itself can succeed only if he proves the statute's invalidity "beyond reasonable doubt." *Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67, 87 (Fla. 2024).

II. A. *Caldwell* claims are reviewed de novo. *Reynolds v. State*, 251 So. 3d 811, 814 (Fla. 2018) (plurality opinion).

B. The admissibility of evidence pertaining to mitigation is reviewed for abuse of discretion. *Troy v. State*, 948 So. 2d 635, 650 (Fla. 2006). A court abuses its discretion when it "adopts a view that no

other reasonable person would take." *Loyd v. State*, 379 So. 3d 1080, 1088 (Fla. 2023). To the extent an evidentiary issue presents a pure question of law, review is de novo. *See Linn v. Fossum*, 946 So. 2d 1032, 1036 (Fla. 2006).

C. This Court reviews "trial court decisions as to the scope of cross-examination on an abuse of discretion standard." *Boyd v. State*, 910 So. 2d 167, 185 (Fla. 2005).

D. A trial court's decision as to the weight of mitigating circumstances is reviewed for an abuse of discretion. *Bright v. State*, 299 So. 3d 985, 1007 (Fla. 2020). "This includes the discretion to assign an established mitigating circumstance no weight." *Id.* (citing *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000)).

E. To preserve a challenge to a comment in closing argument for appellate review, counsel must first contemporaneously object and give a legal ground for the objection. *Calloway v. State*, 210 So. 3d 1160, 1191 (Fla. 2017). Preserved claims of improper prosecutorial comments are reviewed for abuse of discretion. *Braddy v. State*, 111 So. 3d 810, 837 (Fla. 2012). Conversely, an unpreserved challenge is reviewed only for fundamental error. *Id.* Fundamental error "reaches down into the validity of the trial itself to the extent that the

jury's recommendation of death could not have been obtained without the assistance of the alleged error." *Cruz v. State*, 320 So. 3d 695, 715 (Fla. 2021).

F. This Court has said that "[w]hen reviewing closing arguments," it will consider the "cumulative effect of all improper arguments, including the objected-to and unobjected-to closing arguments." *Evans v. State*, 177 So. 3d 1219, 1235 (Fla. 2015).

G. A trial court's denial of a motion for continuance will be affirmed on appeal "unless there has been a palpable abuse of [] judicial discretion which clearly and affirmatively appears in the record." *Middleton v. State*, 220 So. 3d 1152, 1175 (Fla. 2017). This requires an appellant to show that the denial of the continuance "result[ed] in undue prejudice." *Hernandez-Alberto v. State*, 889 So. 2d 721, 730 (Fla. 2004).

H. In deciding whether to strike a juror for cause, a trial court has "broad discretion," *Lamarca v. State*, 931 So. 2d 838, 857 (Fla. 2006), and its "determination of juror competency will not be overturned absent manifest error." *Fernandez v. State*, 730 So. 2d 277, 281 (Fla. 1999).

ARGUMENT

I. SB 450 properly applied to Jackson's penalty phase.

In 2023, the Legislature enacted Senate Bill 450. That law provides that before the death penalty may be imposed in a capital murder case, the jury must unanimously find the existence of an aggravating circumstance beyond a reasonable doubt and then recommend death by a supermajority vote of at least 8-4. SB 450 amends an earlier statute that went well beyond what the Constitution demands by requiring that death be imposed only upon a 12-0 jury recommendation.

Jackson was sentenced to death after a jury voted 8-4 to recommend death, and a judge imposed that penalty for his murder of an elderly couple whom he buried alive. Jackson now raises a slew of challenges to SB 450.[1] Each lacks merit.

A. Applying SB 450 did not deprive Jackson of equal protection.

In his opening salvo against SB 450, Jackson outlines two equal

[1] Jackson scatters these claims throughout his initial brief, in no particular order and interspersed amongst claims that do not pertain to SB 450. We address those claims together under Section I of this brief.

protection theories. Neither need detain the Court long.

1. Jackson's disparate-impact claim fails because he offers no proof that the Legislature enacted SB 450 out of racial animus (Claim 2.A.).

Jackson first contends that SB 450 is "[]infected by racial discrimination" because laws that do not require a unanimous jury "silence[] the voice of racial minorities." Init. Br. 31–32, 35; *see also id.* at 33 (alleging that the Legislature enacted SB 450 "[k]nowing the damage" it would do to black jurors). Such laws act, he says, as a "backdoor and unreviewable peremptory strike" against minority jurors who might otherwise recommend life if the decision lay solely in their hands. *Id.* at 35. In making that charge, he relies on *Ramos v. Louisiana*, 590 U.S. 83 (2020), where the Supreme Court noted that non-unanimous-jury laws adopted in the late 18th and early 19th centuries in Louisiana and Oregon were motivated by a desire to disenfranchise black jurors. Init. Br. 32–33, 37. Jackson thus appears to raise a Fourteenth Amendment disparate-impact claim. *See id.* at 31–37; *see Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977).[2]

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[2] Jackson additionally argues that his race-discrimination claim

A. That argument is unpreserved. Because SB 450 is not racially discriminatory on its face, Jackson can show that SB 450 violates equal protection only if the law has both a "racially disproportionate impact" and a "discriminatory intent or purpose." *Arlington Heights*, 429 U.S. at 265. The challenger bears the burden to adduce "evidence" proving both factors. *See id.* at 266, 270; *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 683–84, 687 (2021). Yet Jackson tacitly acknowledges that he did not present this claim to the trial court, Init. Br. 31 n.12,[3] which therefore had no chance to evaluate

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sounds under the Eighth Amendment. Init. Br. 31–32, 36 (citing *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987); *Buck v. Davis*, 580 U.S. 100, 124 (2017)). None of the cases he cites stands for that proposition. *McCleskey*, for instance, analyzed (and rejected) an Eighth Amendment claim of racial disparities against black *defendants*, not jurors. The Supreme Court has instead evaluated claims of discrimination against black jurors under the equal protection rubric. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) ("Purposeful racial discrimination in selection of the venire violated a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."). Jackson cannot sidestep the strictures of an equal protection disparate-impact claim by grounding his claim instead in amorphous Eighth Amendment standards.

[3] In the trial court, and after the penalty phase had already commenced, Jackson relied exclusively on dicta in *Ramos* and did not argue that SB 450's legislative record evinced racial discrimination. *See* R. 3070–75. And even then Jackson apparently did not ask the

the facts on which Jackson's new argument turns. While facial challenges may generally be brought for the first time on appeal, *id.*, that is not true where the facial challenge turns on facts not established below. *See State v. Johnson*, 616 So. 2d 1, 4 (Fla. 1993) (reviewing an unpreserved claim of facial unconstitutionality only because the claim "does not involve any factual application"). This Court need go no further. *See Snelgrove v. State*, 107 So. 3d 242, 252 n.7 (Fla. 2012) (declining to address an unpreserved equal protection claim in a capital case).

B. In any event, Jackson establishes neither prong of the *Arlington Heights* test. In predicting that SB 450 will have a disparate impact, Jackson reasons that "non-unanimity laws allow[] decisions to be made without the input of jurors of color," who will often constitute a minority on capital juries. Init. Br. 32, 35. By that logic, this Court's own practice of deciding cases by majority vote impermissibly discriminates based on race, since "[justices] of color" will see their votes "negat[ed]" whenever they are in the dissent. *Id.* at 35. Yet no

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trial court to bar SB 450's use in his case, instead asking for a "special verdict form" that would reveal the race of each juror for use in post-verdict challenges. *See* R. 3075.

one thinks that. And even if every decision society makes somehow must be unanimous, Florida's death-penalty statute, unlike the Louisiana and Oregon laws discussed in *Ramos*, *does* require unanimity: All 12 jurors must find beyond a reasonable doubt both that the defendant committed first-degree murder and that an aggravator exists. Jurors simply need not be unanimous in recommending death.

Jackson also fails to allege, let alone prove, racial animus. To demonstrate animus, he must show "that an 'invidious discriminatory purpose was a motivating factor' in the [Legislature's] decision." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (plurality opinion) (quoting *Arlington Heights*, 429 U.S. at 266); *see also Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (for a showing of animus, the Legislature must have adopted the challenged law "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"). That means ascertaining the underlying motivation for "the legislature as a whole," *Brnovich*, 594 U.S. at 689, a demanding task because "determining the intent of the legislature is a problematic and near-impossible challenge." *Greater Birmingham Ministries v. Sec'y of State*, 992 F.3d 1299, 1324 (11th Cir. 2021). Jackson must also overcome "the presumption of legislative good

faith," *id.* at 1325 (citing *Abbott v. Perez*, 585 U.S. 579, 603 (2018)), for which "only the clearest proof will suffice." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (internal quotation marks omitted).

Jackson never actually alleges that the Legislature was motivated by racial animus when enacting SB 450. *See* Init. Br. 31–37. He accuses the Legislature, at most, of enacting the law "[*k*]*nowing*" that it would harm black jurors. Init. Br. 33 (emphasis added); *cf. id.* ("[A] majority of the Legislature voted to make the law of this state what the Supreme Court had only recently condemned as racially discriminatory."). But it is not enough that a legislature passed a law "in spite of" its potential effects on a racial group; the challenger must instead show that the legislature did so "because of" racial animus. *Feeney*, 442 U.S. at 279. It is therefore irrelevant—even if true—that a handful of individual legislators "acknowledged" the potential racial impact of SB 450. Init. Br. 33.

But it is *not* true. Jackson cites not a single comment from a supporter of SB 450 acknowledging any purported outsized effect on

black jurors.[4] The remarks he identifies show only that the law's supporters wished to prevent "rogue" jurors—of any race—from impeding justice, making a jury's recommendation more representative of the views of the community. *See* Init. Br. 33–34; *see also Ramos*, 590 U.S. at 128 (Kavanaugh, J., concurring) ("[O]ne could advocate for and justify a non-unanimous jury rule by resort to neutral and legitimate principles.").[5]

Jackson's comparison between SB 450 and laws enacted by Louisiana in 1898 and Oregon in the 1930s, which *Ramos* found were adopted to disenfranchise black jurors, also cannot reflect animus. Init. Br. 32 ("In fact, as noted in *Ramos*, states enacted non-

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[4] Even then, the statements of individual legislators do not "demonstrate discriminatory intent by the state legislature." *League of Women Voters of Fla. v. Fla. Sec'y of State*, 32 F.4th 1363, 1373 (11th Cir. 2022) (per curiam). That is because "legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents," *Brnovich*, 594 U.S. at 689, so the allegations would be insufficient to support an inference of discriminatory purpose on the part of the legislature as a whole. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it[.]" *United States v. O'Brien*, 391 U.S. 367, 384 (1968).

[5] *See, e.g.*, R. 3907, 3951–53, 4012 (Remarks of Rep. Berny Jacques, the House sponsor of SB 450, explaining that the bill was intended to make a capital jury's recommendation more representative of the views of the community).

unanimity laws precisely because they silenced the voice of racial minorities.”); *see Ramos*, 590 U.S. at 87–88 (discussing the Louisiana and Oregon laws). The fact that *other* States many years ago passed certain laws out of animus hardly shows that Florida’s Legislature in 2023 was motivated by the same impermissible considerations. And even if Florida had a history resembling those of Louisiana and Oregon—which Jackson has not deigned to show—that would not carry the day. “[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.” *Abbott*, 585 U.S. at 603. Instead, the “ultimate question” is “whether a discriminatory intent has been proved in a given case.” *Id.*

Because Jackson has shown neither disparate impact nor animus, his equal protection claim is unavailing.

2. Applying SB 450 did not impermissibly distinguish between *Hurst* defendants (Claim 13).

Jackson’s second equal protection argument is barred by precedent. He contends that because “scores of other” *Hurst* defendants “received the benefit of unanimity (and resulting life sentences),” he himself was entitled to the protections of the 12-0 law. Init. Br. 101. In his estimation, no “rational basis” supported treating him

differently than earlier *Hurst* defendants. *Id.* at 101–02.

That theory fails. Jackson properly admits that, because *Hurst* defendants are not a protected class, rational basis review applies. *Cf. United States v. Ayala-Bello*, 995 F.3d 710, 714 (9th Cir. 2021). Florida has a rational basis for treating pre- and post-2023 *Hurst* defendants differently. As courts have explained in similar contexts, "Florida obviously had to draw the line at some point." *Lambrix v. Sec'y, DOC*, 872 F.3d 1170, 1183 (11th Cir. 2017) (quoting *Dobbert v. Florida*, 432 U.S. 282, 301 (1977)). And the Legislature has concluded that SB 450 reflects better policy than the 2017 version of Section 921.141, which was adopted only because *Hurst II* at the time erroneously required it.

The Supreme Court's decision in *Dobbert* controls. In *Furman v. Georgia*, the Supreme Court paused application of the death penalty nationwide because it concluded that the States' death-penalty schemes were flawed. 408 U.S. 238 (1972). To rectify the problem, Florida enacted a new, more detailed death-penalty statute, which, coupled with a decision of this Court, divided those who had committed murders before *Furman* into two categories. *Dobbert*, 432 U.S. at 288. One category consisted of those who had already been convicted

and sentenced to death by the time of *Furman*. *Id.* at 301. This Court commuted their sentences to life. *Id.* (citing *Anderson v. State*, 267 So. 2d 8 (Fla. 1972)). The second category were those who had not yet been tried at the time of *Furman* and the new statute. *Id.* That category, this Court held, remained subject to the death penalty. *Id.* A defendant in the second category then argued in the Supreme Court that this dichotomy violated his right to equal protection.

The Supreme Court rebuffed that challenge in *Dobbert*. The second category of offenders, it wrote, "is simply not similarly situated to those whose sentences were commuted." *Id.* "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"—in our case, *Hurst* defendants resentenced before April 2023—"and those whose cases involved acts which could properly subject them to punishment under the new statute"—here, offenders like Jackson resentenced after April 2023. *Id.* As such, there was "nothing irrational about Florida's decision to relegate petitioner to the latter class, since the new statute was in effect at the time of his trial and sentence." *Id.*; *see also Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017) (rejecting a defendant's equal protection

challenge to distinctions between capital defendants based on timing for purposes of *Hurst* retroactivity).

Jackson cannot evade that holding.

B. SB 450 does not inflict cruel and unusual punishment in violation of the Eighth Amendment (Claim 2.B.).

Next, citing solo opinions of members of the Supreme Court that have never garnered a majority, Jackson proclaims that the Eighth Amendment "requires jurors to make. . . a decision to sentence a person to death," Init. Br. 37 (citing *Ring v. Arizona*, 536 U.S. 584, 619 (2002) (Breyer, J., concurring); *Harris v. Alabama*, 513 U.S. 504, 512–26 (1995) (Stevens, J., concurring)), and, moreover, that the decision must be unanimous. *Id.* That is so, he claims, because only two States—Florida and Alabama—currently allow death based on a non-unanimous recommendation, purported proof of society's "evolving standards of decency." *Id.* at 38–40.

Precedent rejects that notion. In *Poole*, this Court held just four years ago that it had "erred in *Hurst* [*I*] when [it] held that the Eighth Amendment requires a unanimous jury recommendation of death." 297 So. 3d at 504.

Its revised conclusion was dictated by the Supreme Court's

decision in *Spaziano*. *Id.*; *see also id.* at 509 (Lawson, J., concurring). There, the Supreme Court reviewed a death-penalty statute that made Florida one of just three death-penalty jurisdictions—contrasted with 34 others—that allowed a judge to override a jury's recommendation of life. *Spaziano v. Florida*, 468 U.S. 447, 464 (1984), *overruled on other grounds by Hurst I*, 577 U.S. 92. "The fact that a majority of jurisdictions have adopted a different practice," the Supreme Court wrote, "does not establish that contemporary standards of decency are offended by the jury override." *Id.* Rather, "[t]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." *Id.* Indeed, the Eighth Amendment does not require a jury recommendation of death at all, never mind one that was binding on the trial court. *Id.* at 465 ("[T]here is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed[.]"); *see also McKinney v. Arizona*, 589 U.S. 139, 144 (2020) (holding that a jury is "not constitutionally required . . . to make the ultimate sentencing decision within the relevant sentencing range").

That part of *Spaziano* has never been overruled. The Supreme

Court's evaluation of "national consensus" in that case means that this Court is "bound" to reach the same result "on this same legal issue." *Poole*, 297 So. 3d at 509 (Lawson, J., concurring).

C. Florida's capital-sentencing regime does not violate the Eighth Amendment more generally (Claim 12).

Jackson also brings an Eighth Amendment challenge to Florida's overall approach to the death penalty. Init. Br. 92–101. In his view, Florida in recent years has impermissibly "discarded its safeguards" against the imposition of "arbitrary" death sentences. *Id.* at 92. Among the developments that he condemns are the "abandonment of proportionality" and "comparative proportionality review," *id.* at 92–93 (emphasis omitted), so-called "aggravator creep," *id.* at 96, and the Legislature's rejection of the "unanimity requirement" for a jury's death recommendation. *Id.* Collectively, he says, these features leave Florida's system "riddled with caprice and discrimination." *Id.* at 93. Not so.

1. For decades, the Supreme Court has said that it is not "cruel and unusual punishment[]," U.S. Const. amend. VIII, for a State to impose the death penalty, so long as the State "administer[s] that penalty in a way that can rationally distinguish between those

individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano*, 468 U.S. at 460, *overruled on other grounds*, *Hurst I*, 577 U.S. 92. Along those lines, the State's scheme must "genuinely narrow the class of persons eligible for the death penalty" by requiring the showing of an aggravating factor, *Zant v. Stephens*, 462 U.S. 862, 877 (1983), and "must also allow the sentencer to consider the individual circumstances of the defendant, his background, and his crime." *Spaziano*, 468 U.S. at 460. But there is no "one right way for a State to set up its capital sentencing scheme." *Spaziano*, 468 U.S. at 464. The point, the Court has stressed, is merely to "minimize[] the risk of wholly arbitrary, capricious, or freakish sentences." *Pulley v. Harris*, 465 U.S. 37, 45 (1984).

SB 450 and amended Section 921.141 meet those requirements. Before death may be imposed under that regime, the jury, after a full-length penalty phase trial, must unanimously find beyond a reasonable doubt the existence of an aggravating circumstance. § 921.141(2)(a), Fla. Stat.; *see generally* Fla. R. Crim. P. 3.780. Next, the jury must consider whether the aggravators are sufficient to justify the death penalty, and whether the aggravators outweigh any mitigators. § 921.141(2)(b)2., Fla. Stat. In making that decision, the

jury is aided by the defense's presentation of evidence of mitigating circumstances, *id.* § 921.141(7), often including voluminous biographical information and the testimony of expert witnesses. *See* Fla. R. Crim. P. 3.202. The jury must then recommend to the judge whether to impose life imprisonment or death. § 921.141(2)(b)2.c., (2)(c)., Fla. Stat. If the jury opts for leniency, the judge is bound by that recommendation and must sentence the defendant to life. *Id.* § 921.141(3)(a)1. It is only where a two-thirds supermajority recommends death that the judge may impose that penalty. *Id.* § 921.141(3)(a)2. Even then, the judge has the discretion to extend mercy, *id.* § 921.141(3)(a)2., and must conduct its own assessment of the aggravators and mitigators and explain its order in writing. § 921.141(3)(a)2., (4). This Court reviews various portions of that assessment for an abuse of discretion. *See, e.g.*, *Bell v. State*, 336 So. 3d 211, 216–17 (Fla. 2022).

All in all, these numerous safeguards minimize the risk of arbitrary death sentences.

2. This scheme is not cruel and unusual simply because appellate review no longer entails a comparative assessment of the defendant's culpability, or because the jury need not be unanimous in

recommending death. Init. Br. 93–95. As this Court explained when discontinuing proportionality review, the Supreme Court itself has rejected the notion that the Eighth Amendment requires the practice. *Lawrence v. State*, 308 So. 3d 544, 548 (Fla. 2020) (citing *Pulley*, 465 U.S. at 50–51); *see also McCleskey*, 481 U.S. at 306 ("[W]here the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not constitutionally required."). And in the same opinion, this Court observed that Florida's 12-0 death-penalty statute "exceed[ed] what the federal and state constitutions require by mandating . . . that the jury's recommendation for death be unanimous." *Lawrence*, 308 So. 3d at 552. As *Spaziano* shows, a State need not require a jury to recommend death at all. 468 U.S. at 457–65.

As for Jackson's facial challenge (Init. Br. 96–97) that the Legislature has so expanded Section 921.141's list of statutory aggravating circumstances that the finding of an aggravator no longer "genuinely narrow[s] the class of persons eligible for the death penalty," *Zant*, 462 U.S. at 877, the aggravators alleged in his case undoubtedly fulfilled this narrowing function. That is dispositive because a law is facially unconstitutional only if "no set of circumstances exists

under which the [law] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) ("[T]o prevail" in a facial challenge, "the Government need only demonstrate that [a law] is constitutional in some of its applications; "[a]nd here the provision is constitutional as applied to the facts of [the defendant's] own case."). The aggravators here included (1) HAC (Jackson buried the victims alive); (2) CCP; (3) Jackson had been previously convicted of a felony and was on probation at the time of the murders; and (4) the victims were particularly vulnerable due to advanced age or disability (they were elderly and ill, which is why Jackson targeted them). Even as to others, Section 921.141's aggravators appropriately narrow the death penalty, particularly when considered together with Florida's other safeguards. *Colley v. State*, 310 So. 3d 2, 15–16 (Fla. 2020); *see also Cox v. State*, No. SC2022-1553, 2024 WL 3364911, at *8 (Fla. July 11, 2024) (calling arguments similar to Jackson's "well-worn" and "repeatedly rejected"); *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (an aggravator is "infirm" if "the sentencer fairly could conclude that [it] applies to *every* defendant eligible for the death penalty").

Nor is it accurate, as Jackson alleges, that "[t]his Court no

longer actively polices capital cases for error." Init. Br. 94. That extraordinary charge requires extraordinary evidence. Yet Jackson offers none. He instead relies on his belief that "27 of 29" death sentences reviewed between 2019 and May 2023 were affirmed. *Id.* As an initial matter, that statistic is flawed. During that span, this Court reversed four death sentences, twice as many as Jackson credits.[6]

Either way, there is no Eighth Amendment requirement that an appellate court reverse in an arbitrary percentage of cases deemed satisfactory by the defense bar. Appellate courts reverse when they find prejudicial error. § 924.33, Fla. Stat. And Jackson does not identify anything in those affirmances suggesting an abdication of the Court's constitutional duty to review capital cases. *See* Art. V, § 3(b)(1), Fla. Const. Those decisions may reflect no more than that capital trials are litigated by experienced, serious, and capable lawyers and judges, and that this Court calls balls and strikes without

[6] *See Simpson v. State*, 344 So. 3d 1274 (Fla. 2022); *Avsenew v. State*, 334 So. 3d 590 (Fla. 2022); *Mosley v. State*, 349 So. 3d 861 (Fla. 2022); *Cruz v. State*, 320 So. 3d 695 (Fla. 2021). In his papers below, Jackson discounted *Avsenew* and *Cruz* because one was reversed due to a guilt-phase error, R. 3936 n.6, while the other was a postconviction case. *See id.* (limiting statistical analysis to "direct appeal[s]").

favoring particular outcomes.

D. The Sixth Amendment does not require a unanimous finding that the aggravators outweigh any mitigators (Claim 2.C.).

Invoking the Sixth Amendment, Jackson asserts that SB 450 is unconstitutional because it does not require "unanimity" in the jury's finding that the aggravators outweigh the mitigating circumstances, and thus does not require the jury to unanimously "make all factual determinations necessary to the imposition of the death penalty." Init. Br. 40–41 (citing *Hurst v. Florida*, 577 U.S. 92, 94 (2016)). He thinks the weighing function entails two sets of facts: first, the "finding of mitigating factors," and second, the "weighing of those factors against any found aggravating factors." *Id.* at 41. Precedent again bars the path.

In *Ramos*, the Supreme Court held that the constitutional right to a jury requires that "the verdict should be unanimous" as to "all the essential elements" of a crime. 590 U.S. at 92. And in *Hurst I*, the Supreme Court held that the existence of an aggravating circumstance is an element that must be found by the jury. 577 U.S. at 94. But a capital jury's weighing of aggravators and mitigators is not an element. That was this Court's express holding just four years ago in

Poole. There, the Court receded from the part of *Hurst II* that required a unanimous weighing determination. 297 So. 3d at 504, 508. As it explained, the Supreme Court's *Apprendi* and *Hurst I* decisions interpreting the Sixth Amendment have held that any fact that "increase[s] the prescribed range of penalties to which a criminal defendant is exposed" is considered an "element" that must be found by the jury. *Id.* at 503 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). That includes the finding of an aggravator necessary to make a first-degree murder eligible for the death penalty. *Id.* at 501–03 (explaining *Hurst I*, 577 U.S. 92).

Weighing, however, is not a "purely factual determination"—it "is mostly a question of mercy." *Id.* at 503 (quoting *Kansas v. Carr*, 577 U.S. 108, 119 (2016)); *cf. Spaziano*, 468 U.S. at 465 (holding that the ultimate question of whether to impose death is not one the Constitution requires be decided by a jury). Such a "discretionary judgment" "cannot be analogized to an element of a crime." *Poole*, 297 So. 3d at 503; *see also Herard v. State*, No. SC15-391, 2024 WL 3281897, at *8 (Fla. July 3, 2024) (reaffirming *Poole*).

The Supreme Court confirmed *Poole*'s holding soon after in *McKinney v. Arizona*. Interpreting *Hurst I*, the Court explained that

all the Sixth Amendment requires in a capital penalty phase is that the jury "find the aggravating circumstance that makes the defendant death eligible." *McKinney*, 589 U.S. at 144. By contrast, a jury is "not constitutionally required . . . to make the ultimate sentencing decision within the relevant sentencing range." *Id.*

E. The Sixth Amendment does not require a unanimous death recommendation (Claim 2.D.).

Jackson's alternative Sixth Amendment theory is similarly barred by precedent. Taking aim at the jury's recommendation of death, Jackson asserts that the "framers understood" the right to a jury to "include[] a right to unanimity for life and death decisions." Init. Br. 44. In support, he offers just two paragraphs of argument and a cross-reference to the ACLU's amicus brief in *Hurst I*. *See id.* at 44–45 & n.23.

Whatever the merits of those cursory arguments, *Poole* forecloses them. There, the Court held that the Sixth Amendment "does not require any jury recommendation of death, much less a unanimous one." *Poole*, 297 So. 3d at 504. To the contrary, "[s]entencing recommendations are neither elements nor facts," the sole concern of the Sixth Amendment jury right. *Id.*

The Supreme Court has agreed. In *Spaziano*, the Court held that the ultimate question of whether to impose death is not one the Constitution requires be decided by a jury, meaning it is not an element of capital murder. 468 U.S. at 465. It doubled down on that holding in *McKinney*, writing that a jury is "not constitutionally required . . . to make the ultimate sentencing decision within the relevant sentencing range." 589 U.S. at 144. Neither of those binding opinions has been overruled.

Jackson has no answer to those precedents. He does not ask the Court to recede from *Poole*, suggesting instead that it is not binding as to his theory of the Sixth Amendment's original meaning because "[t]he parties in *Poole* did not brief this argument, denying the Court the opportunity to consider it." Init. Br. 44 n.22. But the Court's holding was clear: "the Sixth Amendment . . . does not require any jury recommendation of death, much less a unanimous one." *Poole*, 297 So. 3d at 503–04.

At any rate, the "common-law history" that Jackson gestures at only further extinguishes his claim. Init. Br. 45 (referencing the Supreme Court's historical discussion in *McGautha v. California*, 402 U.S. 183, 197–99 (1971)). History shows that, at the Framing, the

death penalty was mandatory if the jury found the defendant guilty of murder. *McGautha*, 402 U.S. at 197–98. Back then, the jury did not even need to find the fact of an aggravating circumstance (all it needed to find was that the defendant committed murder), and certainly did not need to find that death was appropriate. *See id.* As a practical matter, though, a jury that wished to extend mercy could nullify, acquitting the defendant of murder. *Id.* at 199.

Beginning in the late 1830s, some States grew frustrated with the jury's "occasion[al]" acts of "nullification." *Id.* at 199–200. To address the problem, several legislatures gave jurors the "discretion" to decide not only the elements of murder but also the ultimate punishment. *Id.* at 199. But the first of those reforms came in Tennessee in 1838, well after the Framing. *Id.* at 200. Alabama and Louisiana followed suit in 1841 and 1846. *Woodson v. North Carolina*, 428 US. 280, 291 (1976) (plurality opinion). And it was only "[b]y the turn of the century" that half of all States had adopted the practice, with another "two decades" elapsing before an additional 14 States got on board. *Id.*

Federal juries likewise came by their formal sentencing powers very late. As Justice Frankfurter explained in *Andres v. United States*,

"[f]or the first hundred years of the establishment of this Government one guilty of murder in the first degree, under federal law, was sentenced to death." 333 U.S. 740, 753 (1948) (Frankfurter, J., concurring). It was not until 1897 that Congress afforded federal jurors the ability to "qualify their verdict by adding thereto 'without capital punishment.'" *Id.* That led Frankfurter to remark that a legislature need not require "unanimous agreement on remission of the death sentence" and may instead "make such remission effective by a majority vote of the jury." *Id.* at 754.[7]

SB 450 provides capital defendants significantly more protections than their counterparts enjoyed at the Framing.

F. As a procedural law, SB 450 applied prospectively to Jackson's then-upcoming penalty phase (Claim 3).

Turning from his constitutional claims, Jackson contends that the 8-4 rule could not be applied to him because, under Section

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[7] Jackson's theory also falters because modern capital juries willing to "disregard[] their oaths," *Woodson*, 428 U.S. at 293, possess the same power of nullification as a capital jury in 1791: Even a single juror set on blocking the death penalty can nullify by refusing to vote for, say, the element of premeditation, or for an aggravator. Because Florida law requires unanimity as to both of those findings, a lone holdout effectively prevents death—the same de facto sentencing role that jurors had at the Framing.

775.022(3)(a), the "amendment of a criminal statute operate[s] *prospectively*." Init. Br. 46. As he sees it, applying SB 450 to his new penalty phase was impermissibly retroactive because the law was enacted in 2023 and Jackson's crimes "occurred in 2005." *Id.* at 49. Precedent, however, dictates that SB 450 was applied prospectively here: It is a procedural law applicable to penalty phases occurring, like Jackson's, after its effective date.

This Court's most recent guidance on the applicability of statutory amendments to pending litigation, *Love v. State*, instructs that the inquiry is twofold. 286 So. 3d 177, 186–89 (Fla. 2019). A court first asks whether the new law is substantive or procedural. *See id.* at 186–87. If substantive, the law presumptively does not apply to a pending case. *Id.* But if procedural, whether the law applies "will generally turn on the posture of the case, not the date of the events giving rise to the case." *Id.* at 187. A procedural law receives an "essentially . . . prospective application," the Court clarified, as applied "to those [] hearings, including in pending cases, that take place on or after the statute's effective date." *Id.* at 188. In that circumstance, the law is not retroactive because it does not "attach[] new legal consequences to events completed before its enactment." *Id.* at 187 (quoting

Landgraf v. USI Film Products, 511 U.S. 244, 269–70 (1994)). In the case of a procedural law, the "event" is the hearing at which the new procedure applies.

In *Love*, for example, this Court held that a law altering the burden of proof at a Stand Your Ground immunity hearing was procedural and properly applied to immunity hearings conducted after the law's effective date, regardless when the defendant's alleged offense occurred. Because the change to the burden of proof affected only the "means and methods" used "to apply and enforce" the substantive right to self-defense immunity, it applied at the upcoming hearing in a "commonsense" and "ordinar[y]" way. *Id.* at 183, 188. That application was "prospective." *Id.* at 188.

In the criminal context, a law is substantive if it "declares what acts are crimes and prescribes the punishment therefor." *Id.* at 185 (quoting *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969)). Thus, a law is substantive if it authorizes the death penalty for an offense. A procedural law, by contrast, "provides or regulates the steps by which one who violates a criminal statute is punished." *Id.* (same).

As a matter of settled precedent, SB 450 is procedural. The law changes the number of jurors required to recommend death from 12

to eight. That does not alter the "prescribe[d] punishment" for first-degree murder, which remains either life imprisonment or death. SB 450 instead alters only the "steps by which" a sentencing court decides between those two sentencing options. Just three terms ago, the Supreme Court reiterated that a rule adjusting the requisite number of jurors is procedural. *See Edwards v. Vannoy*, 593 U.S. 255 (2021). In *Edwards*, the Court addressed whether its earlier decision holding that the Sixth Amendment requires unanimous verdicts as to the "elements" of an offense was substantive or procedural for retroactivity purposes. *Id.* at 258, 263 (explaining that, under federal retroactivity law, a new substantive rule applies retroactively whereas a new rule of criminal procedure does not). Juror unanimity, the Court held in *Edwards*, affected "only the manner of determining the defendant's culpability," a prototypical question of procedure. *Id.* at 276. Other Supreme Court cases are in accord. *See, e.g.*, *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (holding that the requirement that a jury, not a judge, find the aggravating factor required for death was procedural); *McKinney*, 589 U.S. at 146; *Dobbert*, 432 U.S. at 293 (holding that a Florida statute altering the role of judge and jury in capital cases was "clearly procedural").

This Court has taken the same approach. In *Asay*, the Court had to decide whether *Hurst I*, which held that the jury must find the fact of an aggravator beyond a reasonable doubt, applied to cases that were final before *Hurst I* was decided. *Asay v. State*, 210 So. 3d 1, 15–17 (Fla. 2016). The Court reasoned that *Hurst I*'s new rule did not "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties," and thus was not substantive. *Id.* at 17. It therefore applied its test for determining whether new rules of criminal procedure are retroactive under state law. *Id.* at 17–22 (deeming *Hurst I* not retroactive); *see also State v. Lobato*, No. 6D23-3201, 2024 WL 2789409, at *3 (Fla. 6th DCA May 31, 2024) (calling SB 450 "'quintessentially procedural' in nature"); *Arbelaez v. State*, 369 So. 3d 1141, 1142 (Fla. 2023) (noting that the Court has "consistently" held that jury unanimity is not a "substantive right").[8]

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[8] The fact that SB 450 is procedural does not mean it violates Florida's separation of powers. Under the Florida Constitution, the Legislature determines matters of substance while this Court dictates the rules of court procedure. *Compare* Art. III, § 1, Fla. Const., *with id.* Art. V, § 2(a). But a statute will violate the separation of powers only if it is "*purely* procedural." *State v. Raymond*, 906 So. 2d 1045,

Each of these cases recognize that a mere change to the role of the jury is procedural.

Under *Love*, then, SB 450's procedural provision was applied *prospectively* to Jackson's upcoming penalty phase. As a consequence, he is incorrect that Section 775.022 forbade its application. That law provides that "the . . . amendment of a criminal statute operates prospectively" and does not "affect or abate . . . [a] violation of the statute based on any act or omission occurring before the effective date of the act." § 775.022(3)(b), Fla. Stat. SB 450 does not "affect or abate" the consequences of Jackson's "2005" conduct, Init. Br. 49; it altered only the procedures at a penalty phase held after the law's effective date. Jackson cites not a single case labeling a similar law substantive.

1049 (Fla. 2005) (emphasis added). Thus, this Court has "consistently rejected constitutional challenges where the procedural provisions were intertwined with substantive rights." *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 54 (Fla. 2000). SB 450's procedural provisions are "intimately related to the definition of [] substantive rights" conferred by Section 921.141, and thus are constitutional. *Id.* at 54.

G. Jackson’s res judicata argument fails because preclusion principles do not apply when there has been an intervening change in the law (Claim 4).

Jackson further contends that the “res judicata” doctrine compelled application of the 12-0 statute to his case. Init. Br. 49–51. To that end, he insists that the postconviction court’s 2017 vacatur of his death sentences was “final” and “required . . . unanimity” before the jury could recommend death. Init. Br. 51.

Jackson misapprehends the preclusion principles he invokes. The doctrine of res judicata states that “[a] judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.” *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 425 (Fla. 2013) (emphasis omitted). By definition, res judicata does not bar the applicability of intervening legislative enactments, which could not have been litigated in the earlier suit. Instead, “[t]he cases are legion” holding that res judicata is silent when “there has been an intervening . . . change in the law between the first and second

judgment." *Wagner v. Baron*, 64 So. 2d 267, 267–68 (Fla. 1953). The same is true of the law-of-the-case doctrine,[9] which is subject to an exception for "an intervening change of controlling law." *Thompson v. State*, 341 So. 3d 303, 306 (Fla. 2022); *see also Nixon v. State*, 327 So. 3d 780, 783 (Fla. 2021) ("One 'generally accepted occasion for disturbing settled decisions in a case [is] when there has been an intervening change in the law underlying the decision.'").

There is no preclusion here because there is no prior ruling on the procedures at the new penalty phase. The final judgment on which Jackson relies—the 2017 postconviction order granting him resentencing—is res judicata for only one proposition: that Jackson's original penalty phase violated the *Hurst* cases, entitling him to a new one. *State v. Jackson*, 306 So. 3d 936, 938 (Fla. 2020).[10] By its terms, that order does not specify which procedures should apply at the new penalty phase. It says only: "Defendant's 'Motion for Post-Conviction

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[9] Though Jackson purports to invoke res judicata, his arguments more aptly sound under the law-of-the-case doctrine, because they rely on a prior judgment in the *same* case, not in an earlier suit.

[10] The Fifth District cases Jackson relies on similarly stand only for that limited proposition: that Jackson was entitled to be resentenced. Init. Br. 49–50 (citing, for example, *Theisen v. Old Republic Ins. Co.*, 468 So. 2d 434, 435 (Fla. 5th DCA 1985)).

Relief in Light of *Hurst v. Florida* and *Hurst v. State*' is hereby GRANTED to the extent Defendant is entitled to a new penalty phase[.]" R. 125. Jackson received that new penalty phase in the proceedings below. The 2017 order did not resolve what law would apply at the new penalty phase, since the parties could not have litigated that issue. In all events, res judicata is inapplicable because SB 450 is an intervening change in law.

This Court has already said as much. *See Jackson*, 306 So. 3d at 943. After *Poole*, the State petitioned this Court for a writ ordering the "retroactive[] reinstate[ment]" of Jackson's vacated death sentences. *Id.* at 937–39, 943. In support, the State argued that, under *Poole*'s intervening change in the law, Jackson was not properly entitled to vacatur of his sentences in 2017. *Id.* at 938–39. "[U]nwilling to go that far," the Court declined to reinstate Jackson's death sentences. *Id.* at 943 (quoting *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997)). Rather, the 2017 postconviction order was "final at the time *Poole* was decided" and thus could not be reopened. *Id.* Jackson would get his new penalty phase. *Id.*

Critically, however, the Court clarified that the new penalty phase would be "subject to" any "intervening" changes in law. *Id.*

(quoting *Owen*, 696 So. 2d at 720). It wrote: "Jackson analogously stands in the same position as any other defendant who has been convicted of first-degree murder but who has not yet been sentenced." *Id.* at 943. Thus, in the part of *Jackson* that Jackson ignores, this Court forecast these very developments. *See also Owen*, 696 So. 2d at 719–20 (holding that defendant's confession was admissible at his retrial after an intervening change in law).

In short, res judicata did not bar application of SB 450.

H. SB 450 is not a bill of attainder (Claim 11).

Last, Jackson challenges SB 450 as a "bill of attainder." Init. Br. 81. He predicates that unusual claim on his belief that legislators "targeted" SB 450 at Jackson himself, whose penalty phase was pending when the law was enacted. *Id.* at 81–83. Thus, he says, SB 450 violates Article I of the United States Constitution, which provides that "[n]o State shall . . . pass any Bill of Attainder." *Id.* at 82 (quoting U.S. Const., art. I, § 10, cl. 1).

Jackson properly recites the legal standards defining "bills of attainder," *id.*, yet mangles their application. 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). As one early legal commentator put it, attainders are "a legislative declaration of the guilt of the party."[11] An oft-cited historical example is the 17th-century bill against the Earl of Clarendon that "forever banished" the earl without a trial. *Cummings v. Missouri*, 71 U.S. 277, 324 (1866). Condemnation of the practice "reflect[s] the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *United States v. Brown*, 381 U.S. 437, 445 (1965).

Bills of attainder, in sum, contain three elements: "specification of the affected persons, punishment, and lack of a judicial trial." *Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp.*, 468 U.S. 841, 847 (1984). SB 450 bears none of those hallmarks.

First, SB 450 does not single out any person or group.

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[11] 1 St. George Tucker, Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia 292–93 (1803).

"Historically, bills of attainder generally named the persons to be punished." *Id.* at 847. When a person or group is not identified in a bill by name, the law constitutes an attainder only where "past activity serves as 'a point of reference for the ascertainment of particular persons *ineluctably designated* by the legislature' for punishment." *Id.* (quoting *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 87 (1961)) (emphasis added). So, in *Communist Party*, a law was not an attainder because "[i]t attache[d] not to specified organizations but to described activities in which an organization may or may not engage." 367 U.S. at 86.

SB 450 does not "ineluctably designate" any individual or group. It instead applies to *all* defendants who commit certain conduct: first-degree murder. That includes, of course, offenders like Jackson whose cases were pending when the law was passed. But it also includes future first-degree murderers whose identity currently cannot be known. In other words, SB 450 is a "rule[] of general applicability," not an attainder. *Brown*, 381 U.S. at 461; *see also Communist Party*, 367 U.S. at 88 ("Legislatures may act to curb behavior which they regard as harmful to the public welfare, whether that conduct is found to be engaged in by many persons or by one.").

Second, SB 450 does not impose punishment. Classical forms of punishment include death, imprisonment, banishment, and confiscation. *Minn. Pub. Int. Rsch. Grp.*, 468 U.S. at 852. But Sections 782.04(1) and 775.082(1)(a), not SB 450, have long authorized the death penalty in Jackson's case. Those statutes provide that a person convicted of first-degree murder may be sentenced either to life imprisonment or death following a penalty-phase trial.

Jackson does not contend that SB 450 inflicts the death penalty, or any other criminal punishment. *See* Init. Br. 90. Departing from ordinary conceptions of "punishment," he alleges that SB 450 punishes him by "stripping [him] of his right" to a "unanimous vote of a jury" before death is imposed. *Id.* at 90–91. That is untenable. "Deprivation" of a procedure is not itself a punishment; procedures, after all, are mere courtroom devices for deciding whether a person qualifies for a particular punishment.

Third, SB 450 does not deprive anyone of a trial. No attainder arises if the Legislature "leave[s] to courts and juries the job of deciding what persons have committed the specified acts." *Brown*, 381 U.S. at 450. Here, the whole point of SB 450 is to govern the procedures by which Jackson's substantive liability for first-degree murder

will be decided—*at a trial*. Far from lacking judicial process, Jackson has received a guilt-phase trial to ascertain whether he committed first-degree murder; and after SB 450's passage, he received a penalty-phase trial to decide the appropriate penalty. *See Communist Party*, 367 U.S. at 86–87 (challenged law was not an attainder because it imposed a penalty only "after full administrative hearing, subject to judicial review").

SB 450 is not a bill of attainder.

II. The trial court committed no reversible error in Jackson's penalty phase.

Jackson is also not entitled to resentencing due to what he alleges are a series of errors in his penalty phase.

A. There was no *Caldwell* error because the jury was told nothing to lessen its sense of responsibility (Claim 1).

The jury recommended by a vote of 8-4 that Jackson be sentenced to death. In doing so, each juror presumptively voiced their reasoned and honest judgment about the appropriate punishment. Citing the Supreme Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), Jackson now argues that the court "misled the jury about its role" by characterizing the jury's task as a mere "recommendation[]," when in fact a *life* recommendation (though not a death

recommendation) would bind the trial court. Init. Br. 15–16. Jackson deems that prejudicial because the four dissenting jurors "did not know" that they could "compel a mandatory life sentence by persuading just one more juror to vote for life." *Id.* at 15. Had they known, the argument goes, the dissenting jurors might have "fought longer" and changed the outcome. *Id.* at 29. That claim draws no support from either *Caldwell* or state law.

In *Caldwell*, the Supreme Court found Eighth Amendment error when prosecutors told the jury that the ultimate sentencing decision lay not with the jury but with the appellate court. 472 U.S. at 323. That comment, the Court reasoned, mistakenly led the jury to believe that "the responsibility for determining the appropriateness of the defendant's death rests elsewhere," frustrating the "need for reliability" in capital sentencing. *Id.* at 328–29, 340. Indeed, the prosecutor's statement in *Caldwell* was an incorrect statement of local law because though the Mississippi Supreme Court would automatically review the death sentence, that court "applied a presumption of correctness to the jury verdict and could only overturn it under limited circumstances." *Reynolds v. State*, 251 So. 3d 811, 820 (Fla. 2018) (plurality opinion). The prosecutor's statement thus risked

undermining the jury's "recogni[tion]" of its "truly awesome responsibility" in selecting between life and death. *Caldwell*, 472 U.S. at 341.

The Supreme Court has since clarified that *Caldwell* is "relevant only to certain types of comment—those that mislead 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." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). For error to arise, the jury must have been "*affirmatively misled* regarding its role in the sentencing process." *Id.* (emphasis added). The gravamen of a *Caldwell* error, in other words, is an incorrect instruction inviting the jury to pass the buck—to cavalierly recommend death on the belief that a higher authority will correct any mistake by the jury.[12]

The instructions in Jackson's case did not have that effect. The trial court told the jury that "if eight or more jurors determine the defendant should be sentenced to death then the jury's

[12] As compared to appellate courts, a reference to the trial judge's role as the ultimate sentencer is "less problematic" because "trial courts are positioned to make factual findings, which they do every day." *Reynolds*, 251 So. 3d at 825 (plurality opinion).

recommendation to the Court would be a sentence of death," while "[i]f 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." Tr. 1810. In the same breath, the trial court also implored jurors to apply their "best judgment," to "realiz[e] that a human life is at stake," not to "act hastily," and to show "due regard to the gravity of these proceedings." Tr. 1811. The jury was thus asked to decide whether life or death was the appropriate punishment, and it was admonished that Florida's justice system treated that decision as a grave one.

Jackson does not seriously contend that his jury was "*affirmatively* misled." Nor was it. In telling the jury that it was making a sentencing recommendation, the trial court tracked Florida's death-penalty statute, which repeatedly refers—nine times in all—to the jury's decision as a "recommendation" or "recommended" sentence. § 921.141(2), (2)(b)2., (2)(c), (3)(a)1.-2., (4), Fla. Stat. Because the judge borrowed the term from the statute itself, Jackson is left to argue that the trial court "omitted" information potentially relevant to the jury's deliberations: the legal consequence that a life recommendation binds the judge. Init. Br. 24.

His theory runs headlong into *Jones v. United States*, where the Supreme Court held that a jury need not be told "any bit of information that might possibly influence an individual juror's voting behavior." 527 U.S. 373, 382 (1999). The federal death-penalty statute in *Jones* provided that if the jury did not unanimously recommend death, a life sentence would be imposed. *Id.* at 371–89. But the defendant's jury was not told that its "failure to agree" would result in life. *Id.* at 381. As a practical matter, that could have affected how jurors thought about their deliberations: Had they been told that juror-deadlock would compel a life sentence, each juror would have had a clearer appreciation of his or her ability to unilaterally block the death penalty. But though the Supreme Court recognized that under *Caldwell* "a jury cannot be 'affirmatively misled regarding its role in the sentencing process,'" the defendant's jury was "in no way . . . affirmatively misled" by the trial court's decision not to tell it this one effect of its vote. *Id.* at 382 (quoting *Romano*, 512 U.S. at 9). "[T]he Eighth Amendment," the Court held, "does not require that the jurors be instructed as to the consequences of their failure to agree." *Id.* at 381.

That makes sense. *Caldwell* highlights the importance of jurors

"view[ing] their task as the serious one of determining whether a specific human being should die at the hands of the State." 472 U.S. at 329. Yet Jackson has identified no reason to fear that the instructions here watered down jurors' appreciation for their role. Even setting aside that the disputed instruction was not affirmatively misleading, this Court "assume[s] that jurors will follow the instructions given to them," *Reynolds*, 251 So. 3d at 827 (plurality opinion), and examines disputed instructions in "context." *Combs v. State*, 525 So. 2d 853, 857 (Fla. 1988). Jackson focuses exclusively on the trial court's use of the term "recommendation," overlooking important context: that jurors were instructed to apply their "best judgment" as to the appropriate sentence, "realizing that a human life is at stake." Tr. 1811. Assessing those same instructions, this Court in *Reynolds* refused to "guess" that the jury "vot[ed] for the death of another person haphazardly." 251 So. 3d at 828 (plurality opinion); *see also Combs*, 525 So. 2d at 857–58 (similarly relying on these clarifying instructions to find no *Caldwell* error).

Jackson also fails to show prejudice. His alleged injury turns on the notion that the four dissenting jurors would have "fought longer" to convince a fifth if only they were told that a life recommendation

was binding. Init. Br. 29. He thus assumes both that those four jurors had strong preferences for a life sentence and that one of the eight jurors in the majority was open to persuasion. Both theories are "unsubstantiated." *Reynolds*, 251 So. 3d at 827 (plurality opinion); *see also Romano*, 512 U.S. at 14 (rejecting a theory of *Caldwell* prejudice that required "an exercise in speculation" and "rest[ed] upon one's intuition"). For one thing, capital sentencing schemes take as their premise "that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision." *Caldwell*, 472 U.S. at 329–30. That is the starting place. It would take a serious instructional error indeed to convince jurors that their actions in a capital case do not matter.

What is more, Jackson's jurors almost certainly did not vote for death out of any diminished sense of responsibility. Jackson buried an elderly and infirm couple alive, without even the humanity of a quick and painless death. The jury would have suffered no disillusion about the terror and resignation those victims must have felt. That led it to unanimously find the HAC aggravator, applicable "only in torturous murders." *Guzman v. State*, 721 So. 2d 1155, 1159 (Fla.

1998), and one of the “two most serious aggravators” in the statutory scheme. *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006). And though Jackson touts the brief length (“just two hours”) of the jury’s deliberations, Init. Br. 15, that speaks only to jurors’ lack of hesitation that death was appropriate.

Even the four dissenting votes do not suggest that a fifth vote for life was likely. Init. Br. 28. If anything, “a converse argument could be made.” *Reynolds*, 251 So. 3d at 827 (plurality opinion). Contrary to Jackson’s supposition, this Court has explained that life votes do not necessarily signal that the case presented a close call for jurors. *See id.* at 827–28. In a scheme where jurors are not required to unanimously recommend death, even those jurors who might prefer death when the rubber hit the road nonetheless “could vote for a life sentence without feeling any responsibility for leniency,” since the recommendation would remain death. *Id.* at 827. In this way, a nonunanimity scheme tends to induce stray juror votes for life. *See id.* This Court therefore predicted in *Reynolds* that “cases that previously received nonunanimous death recommendations” before *Hurst* “may become unanimous death verdicts” in the post-*Hurst* unanimity

scheme in effect between 2016 and 2023. *Id.* So the presence of dissenting votes does not say much at all.

Those same considerations defeat Jackson's state-law claim as well. Init. Br. 16–21. The trial court did not read an instruction that was "confusing, contradictory, or misleading," *id.* at 20 (quoting *Butler v. State*, 493 So. 2d 451, 452 (Fla. 1986)), and Jackson identifies no prejudice.

In summation, though perhaps the trial court could have been more precise about the effect of a life recommendation, *see* Fla. Std. Jury Instr. (Crim.) 7.11 (2023) ("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."), its instructions did not "affirmatively misle[a]d" jurors in a way that diminished their sense of responsibility.

B. Jackson's co-defendant's life sentence was not appropriate mitigation (Claim 5).

The trial court likewise did not "violate[] the Eighth Amendment" by barring discussion of Jackson's "codefendant's life sentence." Init. Br. 51. Capital sentencing is highly individualized, and a co-defendant's sentence sheds no light on the proper outcome for a defendant

with different aggravation and mitigation. *Cruz v. State*, 372 So. 3d 1237, 1243 (Fla. 2023). But even if a co-defendant's sentence were sometimes relevant, the trial court did not abuse its discretion in excluding Wade's sentence under the unique facts of this case.

1. A co-defendant's life sentence is not an aspect of a defendant's character or record or the circumstances of the offense.

The U.S. Supreme Court has held that the Eighth Amendment guarantees a capital defendant the right to introduce mitigation evidence going to "any aspect of a defendant's character or record and any of the circumstances of the offense." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). That enables a sentencer to account for the "uniqueness of the individual," *id.*, when "arriv[ing] at a just and appropriate sentence." *Woodson*, 428 U.S. at 304 (plurality opinion). Stated another way, the sentencer gets to hear whether there are "any special facts about this defendant that mitigate against imposing capital punishment." *Eddings*, 455 U.S. at 111 n.6.

Jackson advocates for a starkly different rule: that the jury be told details about a *different* defendant—namely, the sentence a co-defendant received. But mitigation involves facts about "*this* defendant," *Eddings*, 455 U.S. at 110 n.6 (emphasis added), and the fact of

a co-defendant's sentence does not "tend[] to prove," § 90.401, Fla. Stat. (defining relevant evidence), that this defendant deserves the identical sentence. The co-defendant's judge or jury might have opted for leniency for countless reasons inapplicable to the defendant. The co-defendant might have demonstrated genuine remorse, been an upstanding citizen, or touched the lives of many people. The co-defendant might have been immature, mentally ill, or impoverished. He may have pled guilty, sparing the victim's family a prolonged trial. Or the co-defendant might have played a lesser role in the murder, or thereafter regretted the offense and sought emergency assistance for the victim. And even when the aggravation and mitigation for two offenders appear similar on their face, a different jury is entitled to credit witness testimony differently, or merely to form its own "subjective determination" that death is the just sentence. *Poole*, 297 So. 3d at 503.

For those reasons, "an alleged accomplice's sentence has no bearing on the defendant's character or record and it is not a circumstance of the offense." *Coulter v. State*, 438 So. 2d 336, 345 (Ala. Ct. Crim. App. 1982).

On the other side of the ledger, telling the jury about the co-

defendant's sentence would have real costs. Doing so would improperly invite the jury to defer to another decisionmaker. We would never tell a jury that the trial judge intended to impose a life sentence (or worse, a death sentence) before the jury reached its recommendation, for fear that this knowledge would sway the jury's own thinking. Our system likewise does not permit jurors to consult family or friends for help in reaching their verdict. Enlisting the views of a prior jury is no different.

For another thing, instructing the jury about a co-defendant's sentence presents serious practical problems. Because capital sentencing is individualized, for a co-defendant's sentence to have even minimal relevance the jury would need to learn all the aggravation and mitigation that informed the prior jury's opinion. *See People v. Dyer*, 753 P.2d 1, 27 (Cal. 1988) ("We find it difficult to see how the ultimate conclusions of the juries in Ario's and Jackson's cases could possibly be relevant without reviewing the entire guilt and penalty phases of their trials."). But penalty phases are lengthy enough as it is; conducting a trial-within-a-trial to compare a co-defendant's life sentence with the defendant's facts "would unnecessarily complicate an already difficult task." *People v. Page*, 620 N.E.2d 339, 380 (Ill.

1993).

Jackson's rule is also hopelessly asymmetrical. It operates (at least presumably) in only one direction: Defendants can offer proof of a co-defendant's *life* sentence, yet prosecutors cannot do the same with a co-defendant's *death* sentence. That speaks volumes about the propriety of his rule. This Court would not tolerate a rule that permitted prosecutors to inform the jury of a co-defendant's death sentence and urge a death recommendation on that basis. *See Coulter*, 438 So. 2d at 345 ("[T]he fact that an alleged accomplice did not receive the death penalty is no more relevant as a mitigating factor for the defendant than the fact that an alleged accomplice did receive the death penalty would be as an aggravating circumstance against him."). Yet Jackson offers no principled reason for adopting a one-sided rule allowing one but not the other.

Finally, Jackson's proposal would make Florida an extreme outlier. Of the jurisdictions that have considered the question, at least 20 hold that a co-defendant's life sentence is irrelevant and

inadmissible.[13] By contrast, only three allow introduction of the co-defendant's sentence.[14]

Messer v. State does not compel a different result. 330 So. 2d 137 (Fla. 1976). In that case, the Court reversed a death sentence

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[13] *Meyer v. Branker*, 506 F.3d 358, 375–76 (4th Cir. 2007); *Brogdon v. Blackburn*, 790 F.2d 1164, 1169 (5th Cir. 1986); *Schneider v. Delo*, 85 F.3d 335, 342 (8th Cir. 1996); *Beardslee v. Woodford*, 358 F.3d 560, 579–804 (9th Cir. 2004); *Postelle v. Carpenter*, 901 F.3d 1202, 1223 (10th Cir. 2018) (applying AEDPA deference); *Coulter v. State*, 438 So. 2d 336, 345 (Ala. Ct. Crim. App. 1982); *People v. Dyer*, 753 P.2d 1, 26–27 (Cal. 1988); *Crowder v. State*, 491 S.E.2d 323, 325 (Ga. 1997); *People v. Page*, 620 N.E.2d 339, 379–80 339 (Ill. 1993); *Johnson v. State*, 477 So. 2d 196, 218 (Miss. 1985); *Edwards v. State*, 200 S.W.3d 500, 509–11 (Mo. 2006); *Rodriguez v. State*, No. 63423, 2015 WL 5383890, *2 (Nev. Sept. 11, 2015); *State v. Williams*, 292 S.E.2d 243, 261–62 (N.C. 1982); *State v. Gerald*, 549 A.2d 792, 824–25 (N.J. 1988), *abrogated on other grounds by constitutional amendment*; *State v. Berry*, 650 N.E.2d 433, 443 (Ohio 1995); *Brogie v. State*, 695 P.2d 538, 546–47 (Okla. Ct. Crim. App. 1985); *Commonwealth v. Williams*, 896 A.2d 523, 593–94 (Pa. 2006); *State v. Charping*, 508 S.E.2d 851, 855 (S.C. 1998); *Saldano v. State*, 232 S.W.3d 77, 100 (Tex. Ct. Crim. App. 2007); *State v. Lord*, 822 P.2d 177, 225 (Wash. 1991).

[14] *Garden v. State*, 844 A.2d 311, 317 & n.24 (Del. 2004); *Howell v. State*, 860 So. 2d 704, 762 (Miss. 2003); *State v. Agee*, 364 P.3d 971, 999 & n.30 (Or. 2015) (but turning on the unique facts of the case). A handful of other courts consider a co-defendant's lesser sentence under circumstances not relevant here. *State v. Marlow*, 786 P.2d 395, 401–02 (Ariz. 1989) (consideration of co-defendant's sentence by trial judge, not jury); *State v. McIlvoy*, 629 S.W.2d 333, 341–42 (Mo. 1982) (appellate court considering co-defendant's sentence as part of comparative proportionality review); *State v. Getsy*, 702 N.E.2d 866, 892 (Ohio 1998) (same).

after the defendant was forbidden from telling the jury that his accomplice had pled guilty and received a 30-year sentence. *Id.* at 141–42. With little analysis, the Court found that "the jury should have had the benefit of the consequences suffered by the accomplice in arriving at its recommendation of the sentence to be visited upon the appellant." *Id.* at 142. It explained only that "[d]efendants should not be treated differently upon the same or similar facts." *Id.*

That decision does not survive *Cruz*, which swore off relative-culpability review. As the Court explained there in receding from precedent, "[u]nderlying" that form of review was "the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment," *Cruz*, 372 So. 3d at 1241—the same rationale *Messer* used. But *Cruz* rejected the principle. "[I]t would be a farce," the Court emphasized, to treat co-defendants as "equally culpable" simply because they were involved in the same crime, without accounting for aggravation and mitigation. *Id.* at 1244; *see also id.* at 1245 (rejecting due process argument because "this argument makes no sense if disparate sentences are imposed based on incongruent mitigation or aggravation or both"). Yet the Court's relative-culpability review had "never required consideration

of the aggravating factors or mitigating circumstances applicable to each codefendant," and thus overstated the similarities between co-defendants. *Id.* at 1244. That warranted dispensing with the practice altogether. *Id.* at 1245. And so, the Court held, the co-defendant's "life sentence [wa]s irrelevant to and ha[d] no bearing on Cruz's death sentence." *Id.* at 1243.

That same reasoning eviscerates *Messer* and dooms Jackson's claim that the jury should have been told the inert fact of Wade's life sentence.[15]

But even if *Cruz* left *Messer* with some vitality, *Messer* was clearly erroneous for all the reasons listed above. It should therefore be overruled unless "there is a valid reason [] *not* to recede from that precedent." *Poole*, 297 So. 3d at 507. "The critical consideration ordinarily will be reliance." *Id.* But "reliance interests are 'at their acme in cases involving property and contract rights,'" and are "lowest in cases—like this one—'involving procedural and evidentiary rules.'" *Id.* That is because procedural rules "do not 'serve as a guide to lawful

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[15] That is also true for Jackson's reliance on various other Florida decisions noting that the co-defendant's lesser sentence was offered in mitigation. *See* Init. Br. 52.

behavior.'" *State v. Maisonet-Maldonado*, 308 So. 3d 63, 69 (Fla. 2020). Jackson did not have *Messer* in mind when murdering his victims.

2. Even if a co-defendant's life sentence were sometimes admissible, it was not here because co-defendant Wade had previously received a death sentence.

Even if *Messer* remains good law, the Court should affirm. Co-defendant Wade's unique sentencing history shows that Jackson and Wade were not similarly situated to the defendant and co-defendant in *Messer*. Unlike the *Messer* co-defendant, Wade previously received a sentence of death by an 11–1 jury recommendation that would have sufficed to impose death under SB 450. *Wade v. State*, 41 So. 3d 857, 865 (Fla. 2010). That death sentence—reversed only because of *Hurst* error—was just as probative as Wade's more recent life sentence.[16] Informing the jury solely of Wade's life sentence, as Jackson proposed to do, would therefore have provided an incomplete picture: Jackson's jury would have believed that a judge or jury deemed death

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[16] On resentencing, Wade's second jury unanimously found the fact of an aggravator, and additionally concluded that the aggravators were sufficient to impose death.

unwarranted for Wade, unaware that Wade's first judge and jury had found death appropriate.

Thus, to the extent Wade's life sentence was relevant at all, "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, [or] misleading the jury." § 90.403, Fla. Stat. At the very least, Jackson has not shown that "reasonable people could [not] differ as to the propriety of the action taken by the trial court," meaning that action was not an abuse of discretion. *Alahad v. State*, 362 So. 3d 190, 198 n.4 (Fla. 2022).

C. The trial court correctly precluded impeachment of Bruce Nixon's prior-recorded testimony (Claim 6).

Citing his Sixth Amendment right to confront the witnesses against him, Jackson next critiques the trial court's order excluding evidence of Nixon's "2022 recantation of" his "perpetuated 2007 testimony." Init. Br. 56. But the claim is unpreserved because Jackson did not proffer the contents of the purported "recantation." And any error was harmless. Though Jackson claims that Nixon was a "key witness" back "[i]n 2007," *id.*, his testimony at the 2023 penalty phase was merely duplicative of Jackson's own recorded admissions that Jackson was the ringleader, hatched the plan to murder the

Sumners, and personally buried them.

1. "In order to preserve a claim based on the court's refusal to admit evidence, the party seeking to admit the evidence must proffer the contents of the excluded evidence to the trial court." *Blackwood v. State*, 777 So. 2d 399, 410 (Fla. 2000). The "purpose" of this requirement is to ensure a record from which the "appellate court can consider the admissibility of the excluded testimony." *Jacobs v. Wainwright*, 450 So. 2d 200, 201 (Fla. 1984). "Reversible error cannot be predicated on conjecture." *Id.*

Jackson did not proffer the contents of Nixon's recantation. At Jackson's penalty phase, Nixon invoked his Fifth Amendment right to remain silent, Tr. 934, and the trial court declared him unavailable to testify. Tr. 935. The State then introduced Nixon's recorded guilt-phase testimony from 2007. *See* Tr. 1112–97. Presumably to impeach unspecified portions of that testimony, defense counsel sought to introduce Nixon's "prior testimony where he references that his lawyer basically told him to lie and he lied on behalf of his lawyer and all the testimony that came before the Court before he actually was taken off the stand and invoked." Tr. 1229. The trial court denied the request, noting that "there was about 30 seconds of that before I had

him removed from the courtroom." *Id.* Defense counsel did not proffer the relevant testimony; he simply responded, "[u]nderstood." *Id.*

As a result, no transcript of that alleged recantation was placed in the record. *See* R. ii–xlviii (index to record), 3359–63 (exhibit list).[17] And it is unclear what "prior testimony" defense counsel was referring to. That is fatal to Jackson's claim. Without a proffer or a transcript, 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. The Court therefore cannot assess the propriety of the trial court's ruling.

Moreover, Jackson failed to preserve a Confrontation Clause issue because he did not cite the Sixth Amendment below; in fact, he offered no legal argument at all to support his request to introduce the prior testimony. *Compare* Tr. 1229 (seeking admission of Nixon's

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[17] Jackson quotes a transcript of co-defendant Wade's resentencing without citing where in the record it can be found or identifying in which, if any, Florida court it has been filed. Init. Br. 59; *see also id.* at 54 (quoting another part of the transcript). That material is not properly before the Court. *See Sutherland v. State*, 305 So. 3d 776, 781 (Fla. 1st DCA 2020).

prior statement without specifying a legal basis, or even an intended use for that evidence), *with Delhall v. State*, 95 So. 3d 134, 159 (Fla. 2012) (requiring a specific objection to preserve a *Crawford* claim). Jackson does not argue fundamental error on appeal, and thus the Court need not consider his unpreserved claim. *See, e.g.*, *Williams v. State*, 845 So. 2d 987, 989 (Fla. 1st DCA 2003).

2. If the Court does consider it, any error was harmless. *See Gosciminski v. State*, 132 So. 3d 678, 706 (Fla. 2013) ("Errors in limiting or restricting the scope of cross-examination are subject to harmless error analysis."). In evaluating prejudice, the Court considers five factors: (1) "the importance of the witness' testimony in the prosecution's case," (2) "whether the testimony was cumulative," (3) "the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points," (4) "the extent of cross-examination otherwise permitted," and (5) "the overall strength of the prosecution's case." *Livingston v. State*, 565 So. 2d 1288, 1291 (Fla. 1988).

Each factor counsels affirmance here, though one is especially probative: Nixon's perpetuated testimony—which Jackson apparently hoped to impeach with the recantation—offered nothing of value

that Jackson himself had not confessed to in his recorded statements. Jackson argues on appeal that the prosecution "relied on" Nixon's perpetuated testimony "to 'show the current jury the basic facts of the case.'" Init. Br. 60 (quoting Tr. 4090). But Jackson's admissions more than met that task. In recorded confessions to documentary filmmakers and to detectives, he conceded:

- "[Cole] knew Mr. and Mrs. Sumner and we ended up spending the night with them and actually noticed the credit card on their table and I overheard Mrs. Sumner and [Cole] speaking and talking they were saying they just sold their house for like $90,000 . . . ." Tr. 1051.

- "[The plan] stemmed from me. This was my idea to say let's get these." Tr. 1052.

- "[F]irst it was just to rob and we started thinking about we have the ATM card. That's just a few thousand dollars so the idea came to kill them." Tr. 1053.

- "I realize[d] all that money was in the bank and in order to get it out through ATM usage it would take a while and sadly, that's when the idea entered my mind to kill them." Tr. 1049.

- "I told [Wade and Nixon] I would be the one to kill Mr. and Mrs. Sumner." *Id.*

- "Honestly, I was scared to [kill the victims by injection] and that's where the idea of burying them came from . . . ." *Id.*

- "[M]e and [Wade] then placed them both in the hole and began to cover them with dirt." Tr. 1050.

Even if Nixon's "recantation" might have led jurors to view his perpetuated testimony as untrustworthy, it would not have mattered: The jury heard the horrific details of the crimes—and Jackson's starring role in committing them—straight from the horse's mouth. Even without more, that compels affirmance.

The other factors only reinforce that outcome. Nixon's perpetuated testimony featured extensive cross-examination, during which Nixon acknowledged that he was testifying in the hopes of receiving a life sentence, initially lied to the police, and previously discussed possible stories he could tell to minimize his culpability. Tr. 1159, 1163–64, 1185–86. The jury also learned from a detective that Nixon "got a deal"—a life sentence following his testimony at Jackson's initial trial. Tr. 1064.

And whatever it was that Nixon had allegedly "lied" about, the State's other evidence corroborated his testimony. Jackson's cellphone pinged off a tower near the victim's home as well as one by the burial site. Tr. 776. ATM cameras captured the Mazda and Jackson using the victims' ATM card two-and-a-half hours later. Tr. 727. ATM usage records, hotel receipts, and video documented Jackson's travel between Jacksonville and South Carolina. Tr. 776. After the victims'

car was recovered, Jackson called the sheriff impersonating Reggie Sumner. Tr. 730, 736–37. Information learned from that call led law enforcement to South Carolina, Tr. 730, where a rented Mazda was found with a bag of the victims' mail on the front passenger seat, Tr. 766, along with Jackson's fingerprints. Tr. 1044. Jackson was holed up in a hotel room with the victims' credit cards, identification, and checkbooks. Tr. 769. Their ATM and Social Security numbers were written on a yellow pad. Tr. 772.

Finally, the jury learned the sickening manner of death from independent witness accounts. Law enforcement found the couple interred in the ground, on their knees and with their heads four feet beneath the surface. Tr. 722, 1100–01. Each had dirt in the mouth, trachea, and esophagus. Tr. 1093, 1098. Mrs. Sumner had vomited. Tr. 1108. The couple died of a combination of dirt blocking their airways and the sheer weight of the earth on their diaphragms. Tr. 1099–1100. And the jury knew that the Sumners were infirm, with the wife receiving cancer treatment and the husband an insulin-dependent diabetic who had gone into kidney failure several times. Tr. 698–99.

It was precisely for those reasons that Jackson picked them: As

he admitted, they were "elderly, vulnerable people" who would make easy prey. Tr. 1051–52.

"[I]n light of the entire record," any error in limiting impeachment was harmless. *Kramer v. State,* 619 So. 2d 274, 276 (Fla. 1993).

D. The trial court did not abuse its discretion by assigning no weight to five mitigating circumstances (Claim 7).

Misreading both state and federal law, Jackson asserts that the trial court "erred" in "refusing to give any weight" to five mitigating circumstances. Init. Br. 61. It is true that the court assigned no weight to several mitigators, including that Jackson's mother promised to visit him as a child and never did and that Jackson had recently rekindled a relationship with his sister. *See* R. 3434–37. It is not true that error occurred.

1. Jackson's state-law claim maintains that a trial court "only may assign *no weight*" to a proven mitigator if the court offers "additional reasons or circumstances unique to that case." Init. Br. 61. This Court's decision in *Rogers v. State* says otherwise. 285 So. 3d 872, 889 (Fla. 2019). Receding from precedent, *Rogers* held that a trial judge need not "expressly and specifically articulate why the evidence presented warranted only the allocation of a certain weight to

a mitigating circumstance." *Id.* at 890 (overruling *Oyola v. State*, 99 So. 3d 431 (Fla. 2012)). Thus, while a sentencer should of course have some reason for assigning a mitigator no weight, *see Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000), it need not announce that reason. *Rogers*, 285 So. 3d at 890.

A capital sentencing order must instead do four things with respect to mitigation:

> (1) expressly evaluate [ ] each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature; (2) assign a weight to each aggravating factor and mitigating factor properly established; (3) weigh the established aggravating circumstances against the established mitigating circumstances; and (4) provide a detailed explanation of the result of the weighing process.

Id. at 889 (quoting *Orme v. State*, 25 So. 3d 536, 547–48 (Fla. 2009)). The order here meets those requirements.

In it, the trial court wrote that "[i]n imposing this sentence, the Court has taken into account the jury verdict, all the evidence presented during trial, including the guilt and penalty phases, the *Spencer* hearing, and all sentencing memoranda submitted by the parties." R. 3423. It then individually addressed all 25 proposed mitigating circumstances and found that each had been established.

R. 3434–37. Having done so, the court assigned a weight to each, *id.*, before concluding: “This Court finds the aggravating factors heavily outweigh the mitigating circumstances and that death is the only proper penalty for the murders of James and Carol Sumner as charged in the Indictment.” SR3. 22. There was no abuse of discretion under state law.

2. The trial court also did not violate federal law. Jackson tells us that Florida law “clashes” with *Eddings*, 455 U.S. 104, which he describes as “forbid[ding] the sentencer from giving mitigation ‘no weight by excluding such evidence from their consideration.’” Init. Br. 61. To be sure, *Eddings* bars the State from keeping the sentencer in the dark about “any aspect of a defendant’s character or record and any of the circumstances of the offense” potentially relevant to mitigation. 455 U.S. at 104, 110. But *Eddings* does not require the sentencer to *credit* insubstantial mitigation; it expressly says the opposite: “The sentencer . . . may determine the weight to be given relevant mitigating evidence.” *Id.* at 114–15.

Florida’s death-penalty statute comports with *Eddings* by commanding the sentencer to consider “all mitigating circumstances,” § 921.141(3)(a)2., Fla. Stat., and the trial court did so here. *See*

R. 3434–37. It simply found several of those mitigators to be insignificant.

3. Assuming an error, it was harmless. Jackson calls (Init. Br. 63) harmless-error review inapplicable under *Woodell v. State*, 804 So. 2d 316, 327 (Fla. 2001). But *Woodell* does not hold that a trial court's error in attributing weight to a mitigator is structural, as proven by the many cases deeming mitigation errors harmless. *See, e.g.*, *Ault v. State*, 53 So. 3d 175, 195 (Fla. 2010) (plurality opinion) (holding trial court's failure to consider defendant's brain damage, low IQ, acceptance of responsibility, and remorse to be harmless in light of substantial aggravation); *Wuornos v. State*, 644 So. 2d 1000, 1011 (Fla. 1994) (same for failure to consider defendant's alcoholism, difficult childhood, impaired capacity, and mental disturbances); *Mullens v. State*, 197 So. 3d 16, 32, 34–35 (Fla. 2016) (same for failure to consider defendant's relationship to his late sister and alleged sexual abuse as a child).

There is "no reasonable possibility that a lesser sentence would have resulted without" the alleged error here. *Mullens*, 197 So. 3d at 30. These murders were highly aggravated, with the jury and trial court finding three of the "qualitatively weightiest aggravators in

Florida's capital sentencing scheme"—HAC, CCP, and prior-violent-felony. *Allen v. State*, 322 So. 3d 589, 602 (Fla. 2021); R. 3424–25, 3428–31. And Jackson admitted to being the ringleader and to personally burying the Sumners alive, targeting them because they were old and frail. Tr. 1049–52. In the trial court's words, the aggravators "heavily outweigh[ed]" the mitigators. SR3. 22.

E. Prosecutors did not cross ethical boundaries in opening and closing arguments, and Jackson suffered no prejudice anyways (Claim 8).

Jackson next trains his fire on the prosecutor's opening and closing statements to the jury, arguing that the prosecutor illegally "denigrat[ed]" Jackson's "mitigation" efforts and "commit[ed] misconduct throughout the trial." Init. Br. 63. Those comments do not warrant reversal. Nearly all went unobjected to, all were proper when read in context, and none caused prejudice.

1. To preserve a claim of improper prosecutorial argument, the defendant "must make a timely, contemporaneous objection" and "state a legal ground for that objection." *Calloway v. State*, 210 So. 3d 1160, 1191 (Fla. 2017). Despite complaining on appeal of nearly 20 prosecutorial comments, Init. Br. 63–73; *see also id.* at 74 (panning the prosecutor's "desperate use of every foul tactic"), Jackson

preserved objections to only three of them.

He identifies four prosecutorial references to the "evil" nature of Jackson's deeds, Init. Br. 68–69; none were objected to:

Comment	**Cite**	**Preservation**
"[S]hocking and evil and really inconceivable acts"; "The state is presenting this case because some evil is just too great to tolerate."	Tr. 669–70	None.
"There were two evil murders . . . [t]hese evil crimes."	Tr. 1732–33	None.
Responding to defense counsel's extensive use of Jackson's childhood photos: "Every murderer who commits a vile and evil act has a baby picture."	Tr. 1734	None.
"Time has not dulled the evil that was germinating in this defendant's brain"; "Some evil is just too great to tolerate."	Tr. 1761–62	None.[18]

Jackson also protests that the prosecutor committed a "golden rule" violation by arguing that the Sumners "were not getting out of that hole, they may have thought about that gun putting two bullets in the back of their heads," which Jackson says was met with an

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[18] The decision not to object was apparently tactical, as defense counsel led off his closing argument by comparing the prosecutor to a "soldier[]" "trained to kill by [his] superiors by dehumanizing the person." Tr. 1762. "Evil, evil, evil, that's what this prosecutor's theme was[.]" Tr. 1762–63.

"immediate objection." Init. Br. 72 (quoting Tr. 1742). Not the case. Defense counsel's objection consisted only of the words "improper argument," Tr. 1742, and "a nonspecific objection on the grounds of '[i]mproper argument'" does "not preserve[]" a "golden rule" claim. *Braddy*, 111 So. 3d at 850.

What remains are the "denigration of mitigation" comments, where again Jackson largely stood mute. Of 11 comments raised on appeal, Init. Br. 64–67 (quoting Tr. 691, 1446, 1733, 1746, 1750, 1751), three garnered a contemporaneous objection. Those include: "[A]nd he is supposed to get credit because he – year after year after year of denying it," Tr. 1750; "[m]itigation is a biased, paid for industry," Tr. 1733; and asking an expert witness, "[n]othing involved in the testing . . . is an excuse for his actions, correct?" Tr. 1446.

Ordinarily, "[u]npreserved errors made in closing statements are reviewed for fundamental error," with the question being whether the remarks "reach[ed] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Calloway*, 210 So. 3d at 1191. Here, however, Jackson does not ask the Court to apply fundamental-error review. *See* Init. Br. 63–73. That claim is therefore not before

it. *See, e.g.*, *Williams*, 845 So. 2d at 989. The only comments for consideration are the three alleged denigration remarks.

2. Even considering all the comments, Jackson has shown no reversible error.

Denigration of mitigation. Beginning with those that were preserved, the prosecutor's comments were well within the "wide latitude" enjoyed by lawyers in closing argument. *Smith v. State*, 7 So. 3d 473, 509 (Fla. 2009). A comment is not improper if it is a "fair rebuttal" of the opposing party's theory of the case. *Pagan v. State*, 830 So. 2d 792, 809 (Fla. 2002). Here, one of Jackson's proposed mitigating circumstances was that he "accept[ed] responsibility for his actions and has voluntarily waived appeals relating to his guilt." R. 3437. In support, Jackson presented his expressions of remorse, admissions of guilt, and waiver of appellate review of a postconviction order. Tr. 1658–61, 1078, 1345.

It was therefore fair for the prosecutor to respond by asking the jury whether Jackson "is supposed to get credit" when "year after year after year [he] den[ied] it." Tr. 1750. Jackson displayed no genuine remorse, the prosecutor argued, because previously he offered to "take [detectives] to the bodies" in a bid to shift responsibility for

the murders to Wade and Nixon and had "call[ed]" the sheriff "pretending to be Reggie Sumner" to create the impression that the Sumners were still alive. Tr, 1749–50; *see* Tr. 779, 786, 790–801, 730, 737–58 (evidentiary support for those arguments). Prosecutors are permitted to "rebut nonstatutory mitigating evidence of remorse presented by a defendant." *Walton v. State*, 547 So. 2d 622, 625 (Fla. 1989).

It was similarly fair game for the prosecution to point out that Jackson's defense experts were "biased" because they were paid large sums of money. Tr. 1733; *cf.* Fla. Std. Jury Instr. 3.9 (Crim.) (instructing the jury to consider whether "the witness been offered or received any money, preferred treatment, or other benefit in order to get the witness to testify"). And the prosecutor did not rely solely on the fact that the experts were paid. Rather, he engaged with their testimony, disagreeing, for instance, with the experts' suggestion that Jackson was "[s]everely brain damaged," as the testimony showed that Jackson had an IQ of "well over a hundred." Tr. 1733; *see* Tr. 1435–37 (testimony that Jackson's verbal IQ is 112 and overall IQ is 103).

Most of the other allegedly denigrating comments were in the

same vein. *See* Tr. 1446, 1733, 1746, 1751–52.

If any comment approached a line, it was the prosecutor's unobjected-to reference to a "South Carolina kid . . . celebrating Passover" and characterization of Jackson's faith as a "small fringe religion." Tr. 1751. But that comes nowhere close to reversible error, especially when the remarks are considered in context. Another of Jackson's proposed mitigating circumstances was that he "ha[d] found God and devoted his life to religious study, earning many certificates for discipleship." R. 3436. Jackson's faith was therefore at issue. The State's argument neither questioned Jackson's First Amendment rights nor asserted that his religious beliefs supported the imposition of the death penalty. It simply called into doubt the sincerity of his professed beliefs. *See Fletcher v. State*, 168 So. 3d 186, 214 (Fla. 2015) ("[T]he prosecutor may comment on the validity of the mitigation evidence and assert that it should be afforded less weight."). The jury was positioned to assess the veracity of those competing claims.

"Dissertation on evil." Jackson also likens certain of the prosecutor's comments to the impermissible suggestion that a jury would be "cooperating with evil" if it "recommend[ed] a life sentence." Init.

Br. 68 (citing *Cruz v. State*, 320 So. 3d 695, 720 (Fla. 2021)). There was no such implication here. In describing Jackson's *actions* as "evil," the prosecutor linked the evidence of the crimes to the legal standard applicable to the HAC aggravator. *See* Tr. 669 (discussing Jackson's "evil and really inconceivable acts"), 1732 ("evil murders"), 1734 ("evil act"), 1761 ("evil" was "carried out by his hands," resulting in the victims' "heinous, atrocious and cruel . . . deaths"). "Heinous" as it relates to HAC is defined as "extremely wicked or shockingly evil." *Gosciminski*, 132 So. 3d at 714; *see* Fla. Std. Jury Instr. (Crim.) 7.11. Unlike in the main case on which Jackson relies, Init. Br. 68, these comments were directed at the nature of the crimes Jackson committed, not at Jackson himself. *See Rigterink v. State*, 193 So. 3d 846, 876 (Fla. 2016) ("evil" comments directed at defendant were problematic—though not reversible error—because "HAC is evaluated from the perspective of the victim").

Golden rule. Last, a "golden rule" argument is one that "invite[s] the jurors to place themselves in the victim's position during the crime and imagine the victim's suffering." *Braddy*, 111 So. 3d at 842. The prosecutor did not do that here. Because HAC was charged as an aggravator, the prosecution had to describe for the jury the

egregious nature of the murders. In doing so, the prosecutor reminded the jury that the Sumners "saw a gun in that house" and that "when they are in that hole and they realize that they are not getting out of that hole they may have thought about that gun putting two bullets in the back of their heads." Tr. 1741–42. The prosecutor tied that point to the "heinous, atrocious and cruel" aggravator. *Id.* Addressing similar comments made in the trial of Jackson's co-defendant, this Court found no golden rule violation. *Wade v. State*, 41 So. 3d 857, 870 (Fla. 2010). "[T]he State's recitation of the facts of the case was accurate," it reasoned, "and 'focuse[d] on . . . the victim['s] [] torturous anxiety and fear of impending death.'" *Id.*

Any error was not fundamental even when taking the objected-to and unobjected-to comments together. Were there improper comments, they were "isolated statements in an otherwise proper closing argument" spanning more than 30 pages. *Ritchie v. State*, 344 So. 3d 369, 386 (Fla. 2022); *see* Tr. 1730–62. Under similar circumstances, this Court has repeatedly affirmed. *See Braddy*, 111 So. 3d at 843–44 (affirming despite "three aspects of the State's guilt phase closing argument that raise concern"); *Cruz*, 320 So. 3d at 708, 715–17 (same for numerous references to "unspeakable acts" and "two

unbelievably brutal strangers”); *Lugo v. State*, 845 So. 2d 74, 100 n.51, 106–08 (Fla. 2003) (same for “evil,” “horrible,” “gruesome,” worse than ‘any war crime,’” “human barbecue,” and “hell on wheels”); *Merck v. State*, 975 So. 2d 1054, 1061–64 (Fla. 2007) (same for improper golden rule and mercy-for-the-victim arguments).

Jackson formulated and carried out a plan to kidnap and murder two infirm, elderly victims in the most horrific way. *Supra* at 9–12, 16–17. Those facts—not anything the prosecutor said—convinced the jury to recommend death.

F. Having shown no error of any kind, Jackson cannot show that cumulative prejudice requires a new trial (Claim 9).

Jackson argues that he is entitled to a new trial because of the cumulative effect of various alleged errors. Init. Br. 73–75. But where there is no error, there is no prejudice to aggregate. *Muehleman v. State*, 3 So. 3d 1149, 1165 (Fla. 2009). That is true here. And for all the reasons described above, any errors did not contribute to the outcome anyways. *Supra* at 65–68, 80–84, 87–88.

G. Jackson was not entitled to a continuance to litigate the effect of SB 450 on his case, since he suffered no prejudice (Claim 10).

SB 450 became law 25 days before Jackson's penalty phase. He now claims that this was insufficient time for defense counsel to "research and raise all viable challenges to the new law," Init. Br. 75, 78–81, and therefore that the trial court committed a "palpable abuse of . . . judicial discretion" by denying his request for a continuance. *Id.* at 75 (quoting *Middleton v. State*, 220 So. 3d 1152, 1175 (Fla. 2017)). He also asserts that the trial court's failure to await the promulgation of updated standard jury instructions caused the alleged *Caldwell* error. *Id.* at 76–78. Neither theory establishes an abuse of discretion.

As for counsel's purported inability to effectively represent Jackson, counsel had more than three weeks from the date the Governor signed SB 405 into law—and more than a month from when the Legislature passed the bill—to prepare legal challenges. That is ample time. And counsel raised numerous such claims in the trial court, *see* R. 2902–19, 2924–58, 2970–71 (bill-of-attainder, preclusion, retroactivity, equal protection, Sixth Amendment, and Eighth Amendment arguments), which were denied pretrial. R. 3057–58. In the

ensuing year between the penalty phase and Jackson's initial appellate brief, Jackson has identified only one other basis for attacking SB 450: a meritless *Arlington Heights* challenge. Init. Br. 31–37; *supra* at 25–31. By all appearances, counsel had a "reasonable opportunity to investigate and prepare any applicable defenses." *Trocola v. State*, 867 So. 2d 1229, 1231 (Fla. 5th DCA 2004). Jackson therefore cannot show the "undue prejudice" required to establish an error in denying a motion for continuance. *Hernandez-Alberto v. State*, 889 So. 2d 721, 730 (Fla. 2004).

As for Jackson's jury-instructions theory, the claim is indistinguishable from his *Caldwell* claim, addressed earlier in this brief. *Supra* at 60–68. It is not a separate ground for holding that a continuance was necessary.

In May 2023, Jackson's *Hurst* resentencing had been pending for nearly six years. It was not an abuse of discretion to forego further delay. *See* R. 4424–28 (order denying continuance).

H. Several prospective jurors who could not be fair to the State because they were predisposed against the death penalty were rightly struck (Claim 14).

Jackson's final claim—that the process of "death disqualification" violates his "Sixth, Eighth, and Fourteenth Amendment[]"

rights—seeks to relitigate decades-old Supreme Court precedent. Init. Br. 102–13. In *Lockhart v. McCree*, the Court held that jurors "whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase" may be removed for cause. 476 U.S. 162, 165 (1986). That is known as "death disqualification." This commonsense rule recognizes that the State, no less than the defendant, is entitled to a fair trial, and that jurors who hold an unyielding opposition to the death penalty cannot be fair. *See Wainwright v. Witt*, 469 U.S. 412, 423 (1985).

Jackson simply disagrees with that precedent. As he admits, his assertion that death disqualification disproportionately affects black jurors because bias against capital punishment "is significantly more prevalent among blacks" was raised by the dissent in *McCree* and rejected by the majority. Init. Br. 104–05 (quoting *McCree*, 476 U.S. at 201 (Marshall, J., dissenting)). The fact remains: When a juror "can[not] conscientiously and properly carry out their sworn duty to apply the law," the juror has no business on the jury, no matter their race. *McCree*, 476 U.S. at 184; *see, e.g.*, Tr. 465–66 (two jurors answering "no" or "I don't think I would" when asked if they "could

follow the law" and "consider both" life and death options).

CONCLUSION

The Court should affirm Jackson's death sentences.

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I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains 20,908 words.

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