IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-458

STATE OF FLORIDA,
Petitioner,

v.

ZACHARY JOSEPH PENNA,
Respondent.

RESPONDENT'S ANSWER BRIEF

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

CAREY HAUGHWOUT
Public Defender
421 Third Street
West Palm Beach, FL 33401
(561) 355-7600

Paul Edward Petillo
Assistant Public Defender
Florida Bar No. 508438
ppetillo@pd15.state.fl.us
appeals@pd15.state.fl.us

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

SUMMARY OF THE ARGUMENT

I. This Fourth District's decision is supported by United States Supreme Court precedent; it's supported by the cases the State cites; and it's supported by originalism. This Court should approve it

II. The Fourth District erred in rejecting two of Penna's additional arguments.

1. The trial court erred in letting the State use Dr. Myers as a conduit for inadmissible hearsay. The error was not harmless because the State used the inadmissible evidence in closing argument.

2. Defense counsel requested that the jury be more fully instructed on what happens if they find appellant not guilty by reason of insanity. The trial court abused its discretion in denying that request.

ARGUMENT

I. THE FOURTH DISTRICT'S DECISION IS CORRECT AND SHOULD BE APPROVED

A. *Factual Background*

Penna's offenses were committed on November 19, 2015, and he was arrested the next day in Titusville. T 709-10, 1427. His arrest was unusual: when officers told Penna to come out of the woods, he said he would do so for water. T 1437, 1731, 1734. When officers released a dog, Penna, wearing only boxer shorts, stormed out of the woods. T 1437-38, 1736. Police opened fire and shot him four times. T 1438. One of the arresting officers said that after Penna was shot he was "laying on the ground reasonably incoherent, and he was manipulating his genitalia." T 1735. When Penna refused to show his hands or do what he was told, another officer tasered him. T 1735-36.

Penna was hospitalized, and he was guarded around the clock by jail deputies. R 584-85. He was handcuffed to the hospital bed. R 598.

On November 21, officers from the Greenacres Police Department were notified that Penna was awake and able to speak,

so they went to the hospital to interrogate him. R 534. A detective and sergeant went in the room and *Mirandized* him, but after two questions (whether he recognized the victims' house or their photos, and he said he couldn't), Penna requested a lawyer, and they left the room. R 538-39. Undeterred by this, another detective went in and tried to interrogate Penna.[1] R 540. Penna again invoked his rights, and the officers left the hospital without a statement. R 540.

Almost a month later, on December 17, one of the jail deputies guarding Penna called the Titusville Police Department to ask whether they wanted statements from Penna. R 628. They said they didn't need any but Greenacres might. R 628, 631.

The deputy called the Greenacres police. R 630. The detectives told him that Penna had refused to speak to them and that he had requested counsel. R 633, 636.

The deputy guarded Penna on December 17, 19, 20, 25, and January 7, and on each of those days he (unlike, apparently, the other jail deputies) questioned Penna in response to something

[1] When a suspect invokes the right to remain silent or to counsel questioning must cease. *Miranda v. Arizona*, 384 U.S. 436, 474 (1966). Officers are required to "scrupulously honor[]" these rights. *Id.* at 479; *Michigan v. Mosley*, 423 U.S. 96, 103 (1975).

Penna said. The Fourth District said that many of these questions crossed the line into interrogation. *Penna v. State*, 344 So. 3d 420, 436-38 (Fla. 4th DCA 2021). The deputy did not *Mirandize* Penna or make sure he understood—and was waiving—his rights; nor did he ask him about his request for counsel, and whether he was now forgoing that.

The Fourth District ruled that most of the statements Penna made in response to the deputy's questions were inadmissible because the deputy did not *Mirandize* Penna before questioning him. *Penna*, 344 So. 3d at 436-38.

B. *Standard of Review*

Appellate courts accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the court's determination of historical facts, but they independently review mixed questions of law and fact that determine constitutional issues arising in the context of the Fifth Amendment. *Miller v. State*, 42 So. 3d 204, 220 (Fla. 2010).

C. *Argument*

1. *United States Supreme Court precedent supports this Court's decision in* Shelly.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *see also* Art. I, § 9, Fla. Const. It applies to the States through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964).

"[T]he privilege is one of the principles of a free government," *Malloy*, 378 U.S. at 9 (cleaned up), and "registers an important advance in the development of our liberty—one of the great landmarks in man's struggle to make himself civilized." *Ullmann v. United States*, 350 U.S. 422, 426 (1956) (cleaned up). It is the "essential mainstay" of our "accusatorial, not inquisitorial," system of criminal justice. *Malloy*, 378 U.S. at 7; *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) (stating that involuntary confessions are excluded "not because such confessions are unlikely to be true" but because "ours is an accusatorial and not an inquisitorial system").

The privilege acknowledges the "historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes." *Chambers v. Florida*, 309 U.S. 227, 237 (1940). "[A] system of criminal law enforcement which comes to depend on the confession will, in the long run, be

less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court adopted a set of measures to protect a suspect's Fifth Amendment privilege from the "inherently compelling pressures" of custodial interrogation. *Id.* at 467. The Court said that "incommunicado interrogation" in an "unfamiliar," "police-dominated atmosphere," *id.* at 456-57, involves psychological pressures "which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467. And "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Id.* at 458.

To counteract these pressures and preserve the adversarial nature of our system, officers must warn a suspect prior to questioning that he has the right to remain silent, that what he says will be used against him, and that he has the right to the presence and assistance of an attorney. *Id.* at 444. If the suspect

indicates that he wishes to remain silent, the interrogation must cease. *Id.* at 473–74. If the suspect requests an attorney, the interrogation must cease until an attorney is present. *Id.* at 474.

A suspect can waive these rights, *id.* at 475, but to establish a valid waiver, the State must show that the waiver was knowing, intelligent, and voluntary under the "high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson v. Zerbst*, 304 U.S. 458 (1938)." *Id.* at 475.

When a suspect requests the assistance of counsel there are "additional safeguards," *Edwards v. Arizona*, 451 U.S. 477, 484 (1981), and a "second layer of prophylaxis." *Maryland v. Shatzer*, 559 U.S. 98, 104 (2010) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991)). This is because the "right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege." *Miranda*, 384 U.S. at 469.

For example, when a suspect requests counsel, the interview must not only cease but the suspect is not subject to further interrogation until counsel is present. *Miranda*, 384 U.S. at 474; *Edwards*, 451 U.S. at 484-85. On the other hand, if a suspect invokes the right to silence, the police must scrupulously honor

that right, but they may, after a significant passage of time, and a fresh set of *Miranda* warnings, question the suspect again. *Michigan v. Mosley*, 423 U.S. 96 (1975).[2] The police may not do so, even about a separate offense, if the suspect requests counsel. *Arizona v. Roberson*, 486 U.S. 675 (1988).

If a suspect invokes the right to counsel or right to silence, and subsequently engages in further conversation with police, the police may question the suspect as long as the police re-administer the *Miranda* warnings and obtain the suspect's waiver of rights. *Shelly v. State*, 262 So. 3d 1, 11-13 (Fla. 2018); *see also Welch v. State*, 992 So. 2d 206 (Fla. 2008).

This "standard … is derived from" *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). *Shelly*, 262 So. 3d at 11. Bradshaw invoked his right to counsel. *Bradshaw*, 462 U.S. at 1041-42. Shortly thereafter, Bradshaw asked, "[W]hat is going to happen to me now?"

---

[2] On the issue of whether *Mosley* requires a fresh set of *Miranda* warnings, see: *State v. Hartley*, 511 A. 2d 80, 82 (N.J. 1986) (fresh warnings required); *United States v. DeMarce*, 564 F. 3d 989, 994 (8th Cir. 2009) (fresh warnings given); *United States v. Lugo Guerrero*, 524 F. 3d 5, 12 (1st Cir. 2008) (same); *People v. Bonilla-Barraza*, 209 P. 3d 1090, 1099 (Colo. 2009) (*Mosley* violation for failure to provide fresh *Miranda* warnings).

Id. at 1042. The officer reminded Bradshaw that he had requested counsel and that he did not want to talk to him unless he wanted to. *Id.* They continued to talk and the officer suggested he take a polygraph test. *Id.* He agreed, and the officer re-*Mirandized* him and he waived those rights. *Id.* The Oregon courts ruled that the suspect's initiation had to be, not just an initiation, but also the waiver of the previously asserted right to counsel. *Id.* at 1044.

The Supreme Court held that this was wrong: whether a suspect, 1) initiated contact with police, and, 2) waived his rights "are separate [inquiries], and clarity of application is not gained by melding them together." *Id.* at 1045. This is the key paragraph on the first inquiry, whether Bradshaw initiated a "generalized discussion about the investigation":

> Although *ambiguous*, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation. That the police officer so understood it is apparent from the fact that he immediately reminded the accused that "you do not have to talk to me," *and only after the accused told him that he "understood" did they have a generalized conversation.* Pet. 11. *On these facts* we believe that there was not a violation of the *Edwards* rule.

Id. at 1045-46 (emphasis added)

Because Bradshaw initiated the conversation, there was no *Edwards* violation, and the Court moved on to the second inquiry: whether, under the totality of circumstances, Bradshaw knowingly and intelligently waived the *Miranda* rights that had just been given to him—for the second time.

Shelly is consistent with *Mosley* (fresh Miranda warnings required if police seek to question a suspect after an invocation of the right to silence) and *Bradshaw*, which applied the totality-of-the-circumstances test to Bradshaw's waiver of the rights after fresh *Miranda* warnings. It is consistent with *Miranda*, which requires that warnings be given at the time of interrogation: "[W]hatever the background of the person interrogated a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege *at that point in time*." *Miranda*, 384 U.S. at 469 (emphasis added).

Shelly is consistent with the rule that when a suspect requests the assistance of counsel there are "additional safeguards," *Edwards*, 451 U.S. at 484, and a "second layer of prophylaxis."

Shatzer, 559 U.S. at 104. A suspect's request for counsel raises a presumption that he "considers himself unable to deal with the pressures of custodial interrogation without legal assistance...." *Roberson*, 486 U.S. at 683; *Mosley*, 423 U.S. at 110 n.2 (White, J., concurring) (by requesting counsel the suspect "expresse[s] his own view" that he is "not competent to deal with the authorities without legal advice"). As one scholar put it:

> A suspect who claims the counsel promised by *Miranda* [is] effectively saying, 'I need protection against the pressure to speak. I am too weak, too vulnerable to face questioning alone. I would like the reinforcement of counsel.' A counsel assertion is particularly significant because it provides some concrete evidence that the risks of susceptibility to compulsion, which otherwise are simply presumed to exist in custodial interrogations, are present and real. The suspect's specific request for shelter against official pressure should render questionable the voluntariness of any subsequent uncounseled responses to interrogation.

James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 Iowa L. Rev. 975, 1027 (1986).

Thus, "where a suspect has explicitly and unambiguously asserted his right to counsel, the absence of an equally explicit and unambiguous renouncement of that right will make it substantially more difficult for the government to show a valid waiver...." *Dorsey*

v. United States, 60 A. 3d 1171, 1200 (D.C. 2013). In fact, when a suspect invokes the right to counsel and then re-initiates contact with the police, the State cannot rely solely on a fresh set of *Miranda* warnings, but "must show the suspect affirmatively acknowledges that he or she is revoking a previously invoked right to counsel." *State v. Staats*, 658 N.W. 2d 207, 214 (Minn. 2003).

Shelly is consistent with the rule of *Miranda* that "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, 384 U.S. at 475. The Court has consistently reaffirmed its commitment to the government's "heavy burden" of proving that a waiver has been "made voluntarily, knowingly, and intelligently." *E.g.*, *Roberson*, 486 U.S. at 680; *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *Tague v. Louisiana*, 444 U.S. 469, 470 (1980); *Fare v. Michael C.*, 442 U.S. 707, 724 (1979); *North Carolina v. Butler*, 441 U.S. 369, 372 (1979); *Brewer v. Williams*, 430 U.S. 387, 403 (1977).

"The courts must presume that a defendant did not waive his rights; the prosecution's burden is great...." *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). *Bradshaw* states that "even if a conversation ... is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." *Bradshaw*, 462 U.S. at 1044.

2. *The State's cited cases address a different issue: "seriatim interrogation."*

Shelly is supported by United States Supreme Court precedent and is correct. But not so, the State says, and it cites a blizzard of cases. *Initial Brief at 16-18*. But almost all the cases it cites address a different issue. These are cases in which the suspect is *Mirandized*, *waives* his or her rights, and is questioned by police in a stop-and-start fashion. These could be called "serial interrogation" cases or "seriatim interrogation" cases (Penna will use the latter term). For example, the suspect waives his rights, is interrogated, and then is interrogated again hours, days, or a week (or more) later. The cases say that even when the suspect waives his or her

Miranda rights, the lapse of time may make the *Miranda* warnings stale and require the officers to re-*Mirandize* the suspect and obtain a new waiver before resuming questioning. The courts apply a list of factors that Penna will call the *McZorn* factors, after a frequently cited (and vividly named) case (though other cases have similar factors): *State v. McZorn*, 219 S.E. 2d 201, 212 (N.C. 1975). These are the *McZorn* factors:

> Courts have included the following factors, among others, in the totality of circumstances which determine whether the initial warnings have become so stale and remote that there is a substantial possibility the individual was unaware of his constitutional rights at the time of the subsequent interrogation: (1) the length of time between the giving of the first warnings and the subsequent interrogation…; (2) whether the warnings and the subsequent interrogation were given in the same or different places…; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers…; (4) the extent to which the subsequent statement differed from any previous statements…; (5) the apparent intellectual and emotional state of the suspect.

McZorn, 219 S.E. 2d at 212 (citations omitted). For cases with similar factors, see: *DeJesus v. State*, 655 A. 2d 1180, 1195 (Del. 1995); *State v. Rogers*, 188 S.W. 3d 593, 606 (Tenn. 2006); *People v. Mickle*, 54 Cal. 3d 140, 170, 814 P. 2d 290, 305 (1991); *State v. Prue*, 153 A. 3d 551, 565 (Vt. 2016); *United States v. Pruden*, 398 F.

3d 241, 246-47 (3d Cir. 2005); *Koger v. State*, 17 P. 3d 428, 431 (Nev. 2001); *State v. Beaulieu*, 359 A. 2d 689, 693 (R.I. 1976); *Commonwealth v. Ferguson*, 282 A. 2d 378, 379 (Pa. 1971).

Emblematic of these "seriatim interrogation" cases (and the State's misconception) is the State's cited case of *State v. Hale*, 453 N.W. 2d 704 (Minn. 1990). Hale was *Mirandized*, waived his rights, and was interrogated in the morning. *Id.* 706. That afternoon he was interrogated again, but only after the police showed him a copy of the waiver he had signed earlier and after he said that he was still willing to talk. *Id.* at 707-08. The Minnesota Supreme Court stated that "[a]lthough prudent police officers will perhaps choose to give a defendant another *Miranda* warning before resuming custodial interrogation of a suspect, it is not necessary as a matter of law to do so unless circumstances have changed in some significant way." *Id.* at 708 n.1 (citing *Wyrick v. Fields*, 459 U.S. 42, 47 (1982)).

This is the rule Minnesota applies when the suspect waives his or her rights and is questioned seriatim. But if the suspect invokes his or her right to counsel, initiates contact with the police, and is questioned, the rule in Minnesota is even stricter than the re-

Mirandize rule of *Shelly*. The police must not only re-*Mirandize* the suspect but the suspect must "affirmatively acknowledge[] that he or she is revoking a previously invoked right to counsel." *Staats*, 658 N.W. 2d at 214.

Like *Hale*, the following cases cited by the State are "seriatim interrogation" cases, i.e., no invocation of rights and seriatim questioning: *Treesh v. Bagley*, 612 F. 3d 424, 431–32 (6th Cir. 2010); *States v. Andaverde*, 64 F. 3d 1305, 1312 (9th Cir. 1995); *Ex parte Landrum*, 57 So. 3d 77, 81 (Ala. 2010) (this is a "seriatim interrogation" case but one initiated by the juvenile defendant; the court helds that a lapse of two days did not make the *Miranda* warnings stale); *Williams v. State*, 214 S.W. 3d 829, 837 (Ark. 2005) (*Mirandized* and questioned on Dec. 17; *Mirandized* on Jan. 7, and questioned on Jan. 8); *In re Kevin K.*, 7 A. 3d 898, 907 & n.7 (Conn. 2010); *Bivins v. State*, 642 N.E. 2d 928, 939 (Ind. 1994); *In re Miah S.*, 861 N.W. 2d 406, 412 (Neb. 2015); *Koger*, 17 P. 3d at 432; *Rogers*, 188 S.W. 3d at 606; *State v. DeWeese*, 582 S.E.2d 786, 797-98 (W. Va. 2003).

There is a subset of "seriatim interrogation" cases (cited in the State's brief) involving polygraph examinations. It must come as a

surprise to defendants or their lawyers (or both) that after a polygraph test, the examiner will question the suspect about perceived deceptive responses. Defendants argue that this second round of questioning requires a fresh set of *Miranda* warnings. These arguments generally fail.

Wyrick v. Fields, 459 U.S. 42 (1982), is one of those cases. Fields was arrested for rape and released (it doesn't appear there was any attempt to question him); he saw a lawyer, and he requested a polygraph examination. Before the examination, he was *Mirandized* and he waived his rights. After the examination, he was questioned about perceived deceptive responses and this led him to make inculpatory statements. The Supreme Court held that the *Miranda* warnings given some two hours earlier were not stale: "Fields validly waived his right to have counsel present at 'post-test' questioning, unless the circumstances changed so seriously that his answers no longer were voluntary, or unless he no longer was making a 'knowing and intelligent relinquishment or abandonment' of his rights." *Id.* at 47.

In addition to *Fields*, the State cites these polygraph cases, which, again, are a type of "seriatim interrogation" case: *Wise v.*

Commonwealth, 422 S.W.3d 262 (Ky. 2013); *State v. Morgan*, 559 N.W.2d 603, 607 (Iowa 1997); *State v. Green*, 443 So. 2d 531, 536 (La. 1983); *State v. Clark*, 483 A. 2d 1221, 1226 (Me. 1984); *State v. Tolbert*, 850 A. 2d 1192, 1200 (Md. 2004); *People v. Ray*, 430 N.W. 2d 626, 633 (Mich. 1988); *State v. Monroe*, 711 A. 2d 878, 886 (N.H. 1998).

This Court's decision in *Davis v. State*, 698 So. 2d 1182 (Fla. 1997), is also a "seriatim interrogation" case. Davis was *Mirandized* (following an invocation of counsel and reinitiation) and made a statement on March 18. Before he was questioned again on May 26, he was reminded that he had the right to counsel, but he was not re-*Mirandized*. It was in this context that this Court said, "[N]umerous state and federal courts have rejected the talismanic notion that a complete readvisement of *Miranda* warnings is necessary every time an accused undergoes additional custodial interrogation." *Id.* at 1189 (citing *Brown v. State*, 661 P. 2d 1024 (Wyo. 1983), a "seriatim interrogation" case).

By contrast, the Fourth District held that a gap of two years and four months between a statement (with *Miranda* warnings) and the subsequent statement (with incomplete *Miranda* warnings) was

too long. *Loureiro v. State*, 133 So. 3d 948, 955 (Fla. 4th DCA 2013) ("Although the supreme court did not agree to a mechanical application of *Miranda* in *Davis* where the delay between interrogations was a little more than two months, we doubt the supreme court would use a less mechanical application where the delay is at least two years and four months.").

On the other end of the spectrum, in *State v. DuPont*, 659 So. 2d 405, 407 (Fla. 2d DCA 1995), the Second District ruled that twelve hours between the warnings and interrogation was too long. In that case, Dupont was *Mirandized* and questioned for two hours. He then invoked his right to remain silent by saying he wanted to leave, and the police told him he could do so. He did not leave, however, and the police resumed questioning. The Second District said that the "police erroneously failed to stop the interview for a significant period of time" in violation of *Mosley*. *DuPont*, 659 So. 2d at 405. The next day Dupont returned for a polygraph examination. He was reminded of his *Miranda* rights but he was not re-*Mirandized*. The Second District held that Dupont should have been re-*Mirandized* given the twelve-hour gap and the *Mosely* violation. *Id*. at 407-08.

In addition to the beside-the-point "seriatim interrogation" cases, the State cites cases where the defendants did not argue that they needed to be re-*Mirandized*, and so there was no decision on that issue.[3] *Lamp v. Farrier*, 763 F. 2d 994, 997 (8th Cir. 1985); *Pickens v. Gibson*, 206 F. 3d 988, 995 (10th Cir. 2000); *State v. Culbertson*, 666 P. 2d 1139, 1141 (Idaho 1983); *Bradshaw v. Commonwealth*, 323 S.E. 2d 567, 570 (Va. 1984).

The State cites cases that don't appear to have any bearing on the issue at all. *United States v. Robinson*, 586 F. 3d 540 (7th Cir. 2009); *United States v. Medunjanin*, 752 F. 3d 576 (2d Cir. 2014); 461 A. 2d 1025 (D.C. 1983); *Hawkins v. State*, 461 A. 2d 1025 (D.C. 1983); *State v. Newton*, 682 P. 2d 295, 296 (Utah 1984) (Newton invoked the right to counsel, and police later questioned him about a separate offense—this was pre-*Roberson* case—and they *Mirandized* him before doing so); *United States v. Straker*, 800 F. 3d 570, 620-25 (D.C. Cir. 2015) (Straker reinitiated and was re-*Mirandized*); *State v. Grady*, 766 N.W. 2d 729 (Wis. 2009) (holding

[3] A holding requires, among other things, that an issue actually be decided. *Pedroza v. State*, 291 So. 3d 541, 547 (Fla. 2020).

that that non-custodial *Miranda* warnings carried over to the custodial interrogation conducted two and a half hours later); *Judd v. Vose*, 813 F. 2d 494 (1st Cir. 1987) (decision does not say when the *Miranda* rights were given, or when the re-initiation occurred, or whether Judd argued new *Miranda* warnings were required).

The State cites cases that hold that a suspect need not be re-*Mirandized* when the re-initiation follows immediately on the heels of the invocation of rights. *Poyner v. Murray*, 964 F. 2d 1404 (4th Cir. 1992); *United States v. Velasquez*, 885 F. 2d 1076 (3d Cir. 1989) (in addition, it does not appears that Velasquez argued that she needed to be re-*Mirandized*); *United States v. Muhammad*, 196 F. Appx. 882, 887 (11th Cir. 2006) (Muhammad waived his rights, spoke to police, then asserted his right to remain silent, but kept talking and so he reinitiated).

Finally, the State's cited case of *Biddy v. Diamond*, 516 F. 2d 118 (5th Cir. 1975), lacks precedential force because not only was it pre-*Bradshaw*, it was pre-*Mosley* and pre-*Edwards* as well.

3. *Suppression would be required even if Penna did not invoke the right to counsel.*

Even if Penna had not invoked his right to counsel and this were a garden variety "seriatim interrogation" case, suppression would be required. Nearly all of the *McZorn* factors favor Penna. Again, these are the *McZorn* factors:

> (1) The length of time between the giving of the first warnings and the subsequent interrogation.
>
> (2) Whether the warnings and the subsequent interrogation were given in the same or different places.
>
> (3) Whether the warnings were given and the subsequent interrogation conducted by the same or different officers.
>
> (4) The extent to which the subsequent statement differed from any previous statements.
>
> (5) The apparent intellectual and emotional state of the suspect.

The "most relevant factor" is the time between the *Miranda* warnings and the subsequent questioning. *Koger*, 117 Nev. at 142, 17 P. 3d at 431 ("Certainly, the most relevant factor in analyzing whether a former *Miranda* admonition has diminished is the amount of time elapsed between the first reading and the subsequent interview"). "*Miranda* warnings, once given, are not to be accorded unlimited efficacy or perpetuity." *DeWeese*, 582 S.E. 2d at 797 (*quoting United States v. Hopkins*, 433 F.2d 1041, 1045 (5th Cir. 1970)).

"Most courts addressing the time factor have considered instances involving only a few hours." *Id.* (citing cases). "The outer limit extends to one week as discussed in *Martin v. Wainwright*, 770 F.2d 918 (11th Cir.1985), and—under certain circumstances—two weeks as discussed in *Biddy v. Diamond*, 516 F. 2d 118 (5th Cir.1975)." *Id.* (citation omitted).

As noted above, the Second District in *DuPont* ruled that a lapse of twelve hours required a fresh set of *Miranda* warnings. The West Virginia Supreme Court of Appeals ruled that "[a]s a matter of public policy in West Virginia, a lapse of seven days between an initial waiver of the rights enunciated in the *Miranda* warnings and a subsequent interrogation requires renewed warnings before the subsequent interrogation may occur." *DeWeese*, 582 S.E. 2d at 799. The court cited *DuPont* as well as these cases (582 S.E. 2d at 797): *Ex parte J.D.H.*, 797 So. 2d 1130 (Ala. 2001) (lapse of 16 days required renewal of *Miranda* warnings); *Commonwealth v. Doe*, 636 N.E. 2d 308 (Mass. App. Ct. 1994) (lapse of 2 days required renewal of *Miranda* warnings); *Commonwealth v. Coplin*, 612 N.E. 2d 1188 (Mass. App. Ct. 1993) (lapse of thirty to forty-five minutes required renewal of *Miranda* warnings); *Commonwealth v. Wideman*, 334 A.

2d 594 (Pa. 1975) (lapse of twelve hours required renewal of *Miranda* warnings); *State v. Walker*, 729 S.W. 2d 272 (Tenn. Crim. App. 1986) (lapse of four months required renewal of *Miranda* warnings). *See also United States v. McClain*, 2006 WL 2403926, at *11 (D.N.J. Aug. 18, 2006) (two-week gap made *Miranda* warnings stale).

Here, the lapse was twenty-nine days between the Miranda warnings and the December 20 statements that the Fourth District ruled were inadmissible. This is far beyond even the "outer limit" of one to two weeks.

Penna was questioned by a different officer than the one who *Mirandized* him, so that *McZorn* factor favors suppression. *See Commonwealth v. Wideman*, 334 A. 2d 594, 599 (Pa. 1975) (twelve-hour gap, change in location, and change in officers made Miranda warnings stale); *Commonwealth v. Riggins*, 304 A. 2d 473, 478 (Pa. 1973) (seventeen-hour gap, change in location, change in officers made Miranda warnings stale).

And perhaps most important was Penna's fragile "intellectual and emotional state." He was grievously wounded and mentally ill;

and between the *Miranda* warnings and the statements he underwent surgery.

Given all that, suppression would be required even if *Penna* had not invoked his right to counsel.

4. *The issue at bar isn't knowledge of the rights*.

The State repeatedly tries to frame the issue in terms of Penna's knowledge of the rights, i.e., because he was *Mirandized* in November (and invoked his rights) he must have remembered his rights in December. But the *Miranda* warnings are not just about educating the uninformed suspect. The Supreme Court was explicit about this: "For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise." *Miranda*, 384 U.S. at 468. "More important," the Court said, "such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a

jury." *Id*. And to repeat what was said about the timing of the warnings: "[W]hatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." *Id*. at 469.

The Court said it would not excuse the failure to give the required warnings on the ground that the suspect already knew them: "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Id*. at 468. "No amount of circumstantial evidence that the person may have been aware" of his rights can substitute for the warnings. *Id*. at 472.

5. *Originalism support's Penna's argument*.

The State argues that *Miranda* is contrary to an originalist interpretation of the constitution. Besides the obvious point that "it is a *constitution* we are expounding," *McCulloch v. State*, 17 U.S. 316, 407 (1819) (emphasis added), and not a statute book, recent

scholarship shows that the founders would have been familiar with the warnings required by *Miranda*.

Contrary to the State's assumptions, "there is an historical case to be made for *Miranda*." Wesley MacNeil Oliver, *Magistrates' Examinations, Police Interrogations, and Miranda-Like Warnings in the Nineteenth Century*, 81 Tul. L. Rev. 777, 782 (2007) (footnote omitted). "Beginning in the late-eighteenth and early-nineteenth centuries, magistrates began to caution suspects they examined that their statements could be used against them. Courts began to allow statements to be admitted, notwithstanding otherwise improper inducement, if the suspect was cautioned he was not required to answer the magistrate's questions and made aware of the consequences of confessing." *Id*. at 789 (footnote omitted). "[T]he practice of alerting a suspect to the right to remain silent—and the consequences of speaking—was established well before the drafting of the American Bill of Rights." Brief of Amici Curiae Historians of Criminal Procedure in Support of Respondent, *Vega v. Tekoh*, No. 21-499, 2022 WL 1056937, at *7 (U.S. April 6, 2022). "[T]he warnings developed in the mid-1700s, given by law enforcement

officers, were provided to demonstrate that confessions were not the product of an improper influence and thus admissible." *Id.* at *16.

"The Supreme Court in 1966 did no more than require modern police to follow the practices adopted by law enforcement at the turn of the nineteenth century to satisfy courts that statements were not obtained in violation of a rule of evidence known to the Framers." Oliver, 81 Tul. L. Rev. at 783.

> 6. *The State introduced the statement's in its case-in-chief so it's impossible to determine whether they would have been admissible as rebuttal in a case where the trial court suppressed them.*

The State argues that Penna's statements were admissible impeachment or rebuttal evidence. But the State admitted the statements in its case-in-chief, and it is impossible now to unscramble the eggs. Had the trial court granted the motion to suppress, Penna's presentation of evidence (or even his defense) might have been different so as not to open the door to this

evidence.[4] But once the statements were admitted in the State's case-in-chief, Penna did not need to be careful about his presentation of evidence; in fact, he had to neutralize the statements the best he could with other evidence—evidence that he might not have introduced if the motion to suppress had been granted. As this Court has said, when evidence is improperly admitted over defense objection, the defense has "every right, and indeed … no choice, but to comment upon the evidence." *Sheffield v. Superior Ins. Co.*, 800 So. 2d 197, 202 (Fla. 2001).

Finally, the State does not say how these statements would be admissible as impeachment evidence given that Penna did not testify. Perhaps the State has in mind section 90.806(1), Florida Statutes, which allows a party to impeach the statements of a hearsay declarant. *See Nock v. State*, 256 So. 3d 828, 836 (Fla. 2018). But section 90.806(1) only applies when the out-court-

[4] This assumes the evidence would be admissible rebuttal evidence. There is a split of authority on this issue. *Compare United States v. Hinkley*, 672 F .2d 115, 132-34 (D.C. Cir. 1982), *overruled in part on other grounds by Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984); *People v. Ricco*, 437 N.E. 2d 1097, 1101 (N.Y. App. 1982), with *Wilkes v. United States*, 631 A. 2d 880, 889-91 (D.C. App. 1993).

statements are admitted for their truth. A defendant's statements in support of an insanity defense are rarely admitted for that purpose and so impeachment under section 90.806(1), Florida Statutes, is improper. *Gudmestad v. State*, 209 So. 3d 602, 605 (Fla. 2d DCA 2016) (defendant's out-of-court statements that supported supported insanity defense were not admitted for their truth and so were inadmissible under section 90.806(1)).

~ ~ ~

The rule in *Shelly* is correct and it was correctly applied here. This Court should approve the Fourth District's decision.

II. THE FOURTH DISTRICT ERRED IN REJECTING TWO OF PENNA'S ADDITIONAL ARGUMENTS

1. *The trial court abused its discretion in overruling Penna's hearsay objection to Dr. Myers's testimony about what Penna's mother said.*

A. *Background*

Penna's defense at trial was insanity. Two highly qualified defense experts testified that Penna suffered from a major mental illness that prevented him from rationally understanding his actions; in short, that he was legally insane when he committed these offenses. T 2037-38, 2147-48.

In rebuttal, the State's expert, Dr. Myers, testified that Penna suffered from a personality disorder, not a major mental illness, and that he was legally sane when he committed the crimes. T 2266, 2254. He testified that Penna, his mother, and stepfather had family therapy at "Therapeutic Oasis." T 2269. Dr. Myers was allowed to testify that the therapist's records showed that Penna manipulated his mother and that he was more capable than he let on. T 2273. According to the therapist, Penna's mother said that Penna said that if she made him get a job, he would start drinking again. T 2273. Defense counsel objected to this testimony on

hearsay grounds. T 2271-72. The trial court overruled the objection. T 2272-73.

B. *Standard of Review*

A trial court's ruling on the admissibility of evidence is subject to an abuse of discretion standard of review. *Kopsho v. State*, 84 So. 3d 204, 217 (Fla. 2012). But the court's discretion is limited by the rules of evidence. *Patrick v. State*, 104 So. 3d 1046, 1056 (Fla. 2012).

C. *Argument*

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. Here, the therapist put in her notes that Penna's mother stated during therapy that Penna had made a manipulative statement. Defense counsel was right: this was hearsay within hearsay (therapist's statement about Penna's mother's statement—Penna's statement was either not hearsay or was within the party-opponent exception), "requiring two hearsay exceptions to apply." *Roesch v. U.S. Bank Nat'l Ass'n, as trustee for Citigroup Mortgage Loan Tr., Inc., Mortgage Pass-Through Certificates, Series 2006-AR9*,

294 So. 3d 429, 433 (Fla. 2d DCA 2020); § 90.805, Fla. Stat. ("Hearsay within hearsay is not excluded under s. 90.802, provided each part of the combined statements conforms with an exception to the hearsay rule as provided in s. 90.803 or s. 90.804.").

In the case at bar, the State did not assert that any hearsay exception applied. Moreover, "[a]lthough an expert may rely on hearsay in reaching the experts opinion, 'an expert's testimony may not merely be used as a conduit for the introduction of the otherwise inadmissible evidence.'" *Tolbert v. State*, 114 So. 3d 291, 294 (Fla. 4th DCA 2013) (quoting *Linn v. Fossum*, 946 So. 2d 1032, 1037-38 (Fla. 2006)). And "[w]hen an expert's testimony acts as a conduit for inadmissible hearsay, the evidence is presented to the jury without affording the opposing party an opportunity to cross-examine and impeach the source of the hearsay." *Linn v. Fossum*, 946 So. 2d 1032, 1038 (Fla. 2006) (citing *Gerber v. Iyengar*, 725 So. 2d 1181, 1185 (Fla. 3d DCA 1998)). Here, defense counsel could not cross-examine either the therapist or Penna's mother on this matter. And as explained below, the State argued the truth of these statements in closing. *See Conley v. State*, 620 So. 2d 180, 183-84 (Fla. 1993) ("Regardless of the purpose for which the State claims it

offered the evidence, the State used the evidence to prove the truth of the matter asserted [during closing arguments].").

Accordingly, defense counsel's hearsay objection was well taken and it should have been sustained. Having introduced error into the trial, the State must show that it was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). "Courts are . . . less likely to find an error harmless where the State relies on the erroneously admitted evidence during its closing argument." *Tripoli v. State*, 50 So. 3d 776, 781 n.3 (Fla. 4th DCA 2010) (collecting cases). In closing argument, the State capitalized on the trial court's erroneous ruling. The State argued (T 2601): "[There is] [e]vidence that he manipulated his mother, saying, if you make me go back to work manipulating his parents -- if you make me go back to work, I'll start drinking again." And in rebuttal the State argued, "He's the one who manipulates; whether it's family, whether it's doctors." T 2684.

This was a closely fought case on insanity. Any inadmissible evidence prejudicing that defense could have tipped the balance, and so the error was not harmless. The Fourth District erred in rejecting Penna's argument on this point.

2. *The trial court abused its discretion in denying Penna's requested instruction on insanity.*

A. *Background*

In voir dire, defense counsel discussed, naturally enough, the insanity defense and how it excuses what would otherwise be criminal behavior. When she began to question jurors about the consequences of an NGI verdict—that it would be hospitalization or release as determined by the judge—the prosecutor objected and the trial court sustained the objection, stating that the discussion was "inappropriate." T 427-29. When jurors voiced their concern about what happens to a defendant found not guilty by reason of insanity (T 446-47, 458-59), the judge relented and read a portion of Standard Jury Instruction 3.6(a). T 460-62.

Because of the jurors concerns, defense counsel requested a special jury instruction that added to the standard jury instruction (underlined portion below) by stating in more detail what will happen if the jurors find Penna not guilty by reason of insanity:

> If your verdict is that the defendant is not guilty by reason of insanity, that does not necessarily mean [he] [she] will … be released from custody. I must conduct further proceedings to determine if the defendant should be committed to a mental hospital, or given other outpatient treatment or released. <u>Such proceedings</u>

> would require the court to determine whether the defendant has a mental illness and, whether, because of the illness, he is manifestly dangerous to himself or others. That determination would only be made after hearing from the state, the defense, and from mental health experts who have examined and interacted with the defendant. If the court determined that the defendant is manifestly dangerous to himself or others, the court can order the involuntary commitment and treatment of the defendant until the defendant is no longer deemed to be dangerous. Then, and only then, would the defendant be eligible to be released either outright or subject to continuing supervision and monitoring by the Court and mental health professionals.

SR 5 (strikethrough omitted; ellipsis added). This expanded instruction is based on the procedures outlined in Florida Rule of Criminal Procedure 3.217 and 3.218.

The State opposed the instruction and the trial court denied it. T 1924-35.

B. *Standard of Review*

A trial court's decision to give a requested jury instruction is generally reviewed for an abuse of discretion. *Garrido v. State*, 97 So. 3d 291, 297 (Fla. 4th DCA 2012).

C. *Argument*

When jurors are "[f]reed from confusion and wonderment as to the possible practical effect of a verdict of not guilty by reason of

insanity," they "will be able to weigh the evidence relating to the factual existence of legal insanity in an atmosphere untroubled by the distracting thought that such a verdict would allow a dangerous psychopath to roam at large." *Roberts v. State*, 335 So. 2d 285, 289 (Fla. 1976). The standard jury instruction fails in this regard. It isn't enough to know that the judge will "determine if the defendant should be committed to a mental hospital, or given other outpatient treatment or released." The jury needs to know *how* that what will be determined; and the jury needs to know most importantly that if the defendant is dangerous, *he will not be released*. Keeping this is a secret from jurors is unfair to them and prejudices Penna.

Jurors are sworn to base their verdict on the facts and on the law as given to them by the judge. They are instructed in the "Rules for Deliberation" that they "must follow the law as it is set out" in the judge's instructions and that if they fail to follow the law their verdict "will be a miscarriage of justice." Fla. Std. Jury Instr. (Crim.) 3.10. Hence, accurate instructions are a vital part of the trial and are required by Florida Rule of Criminal Procedure 3.390 and the Due Process and Jury Clauses of the state and federal constitutions.

"[S]tandard jury instructions are presumed to be correct. However, … the trial judge still retains the responsibility of correctly charging the jury." *State v. Floyd*, 186 So. 3d 1013, 1022 (Fla. 2016) (citation omitted). The Florida Rules of Criminal Procedure provide a party with the opportunity to request modifications, additions, and deletions to the standard instructions. Fla. R. Crim. P. 3.390(c).

The failure to give a requested special jury instruction is error if: (1) the special instruction was supported by the evidence; (2) the standard instruction did not adequately cover the theory of defense; and (3) the special instruction was a correct statement of the law and not misleading or confusing. *Bush v. State*, 295 So. 3d 179, 206 (Fla. 2020). All three elements were satisfied by Penna's proposed instruction. Therefore, the trial court abused its discretion in denying it, and the Fourth District erred in rejecting Penna's argument on this point.

CONCLUSION

This Court should approve the Fourth District's decision.

CERTIFICATE OF SERVICE

I certify that this brief was served to Allen L. Huang, Deputy Solicitor General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399 by e-service through the portal at service at allen.huang@MyFloridaLegal.com this 14th day of April, 2023.

/s/ PAUL EDWARD PETILLO
PAUL EDWARD PETILLO

CERTIFICATE OF FONT AND WORD COUNT

I certify this brief is submitted in Bookman Old Style 14-point font in compliance with rule 9.210(a)(2)(a) and that the word count is 13,000 or less exclusive of the caption, cover page, table of contents, table of citations, certificate of compliance, certificate of service, or signature block.

/s/ PAUL EDWARD PETILLO
PAUL EDWARD PETILLO