IN THE SUPREME COURT OF FLORIDA
CASE NO. SC18-2014

JAMES TERRY COLLEY, JR.

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

ASHLEY MOODY
ATTORNEY GENERAL

PATRICK BOBEK
ASSISTANT ATTORNEY GENERAL
Florida Bar no. 112839
444 Seabreeze Blvd., 5th Floor
Daytona Beach, Florida 32114
(386) 238-4990
Fax-(386) 226-0457
patrick.bobek@myfloridalegal.com
cappapp@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Colley." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

STATEMENT OF THE CASE

On September 4, 2015, Colley was indicted for the August 27, 2015 murders of Amanda Colley and Lindy Dobbins. Colley's trial began on July 9, 2018. On July 18, 2018, the jury returned a verdict of guilty on seven counts: Count I) First-degree premeditated and felony murder of Amanda Colley; Count II) First-degree premeditated and felony murder of Lindy Dobbins; Count III) Attempted first-degree murder of Lamar Douberly; Count IV) Attempted first-degree felony murder of Rachel Hendricks; Count V) Burglary of a Dwelling with an Assault or Battery while Armed with a Firearm; Count VI) Burglary of a Dwelling; Count VII) Aggravated Stalking after Injunction. On July 25, 2018, the jury unanimously voted that Colley be sentenced to death. The trial court imposed that sentence on November 30, 2018. Notice of appeal was filed on December 4, 2018. Colley filed his *Initial Brief* on June 21, 2019.

STATEMENT OF THE FACTS

Sometime during the summer of 2015, Amanda Colley[1] and the Appellant separated. They had been married eight years and had two children. Appellant moved out of the marital home and moved in with his sister Rhonda Colley in a neighborhood called Southampton. (TT, 38-9).[2] Although Appellant had started a new relationship, Appellant could not let go of Amanda and kept trying to figure out if she had moved on as well. She had. (TT, 39-40). Eventually, Amanda was forced to get a domestic-violence injunction against Appellant, which was served on him on August 10, 2015. (TT, 38-9).

Appellant used one of his friends, Mike Dickens, who lived a few houses down from Amanda, to spy on his estranged wife. (TT, 40). Appellant also texted Dickens often about his problems with Amanda, calling her names like "bitch", "whore", and "evil", and saying she would pay for what she did. (TT, 985). He had even changed the contact name for Amanda in his phone to "Bitch" after he was served the injunction. (TT, 414-5).

---

[1] For clarity, Amanda Colley and Appellant's family members with the same surname will be referred to by their first names.

[2] Cites to the trial transcripts will be "TT" followed by the appropriate page number. Cites to the pleadings, penalty phase, and *Spencer* hearing will be "R" followed by the appropriate page number.

The weekend before the homicides, Dickens spotted a shirtless man, who later proved to be Amanda's new boyfriend Lamar Douberly, mowing Amanda's lawn. (TT, 40). Dickens took a photo and sent it to Rhonda, who in turn sent it to Appellant. (TT, 40). This was the confirmation Appellant had been looking for, and within seconds of receiving the photo he immediately began harassing Amanda about it by texting and calling her repeatedly. (TT, 41).

A couple days later, the night before the murders, was Appellant's son's birthday party. (TT, 81). Appellant had their kids for the evening and they stayed with him at Rhonda's house. (TT, 42) After his children went to bed, Appellant had several alcoholic drinks at home before going out to a couple bars with a friend. (R, 4129). While out, he drank more alcohol and ingested cocaine. (R, 100-2). Later, a little before 4:00 a.m. on August 27, cell tower data put Appellant in the area of Amanda's home. (TT, 41-2). Appellant entered the home Amanda's injunction prohibited him from being within 500 feet of. When he did not find Amanda home, he started snooping around. (TT, 42). While going through the house he found adult sex toys that were unfamiliar to him, and this threw him into a rage. He proceeded to ransack the house, throwing clothes everywhere, emptying trash cans, and destroying television sets. (TT, 42).

After leaving the home at around 4:45 a.m., he went down the street and woke up his friend, Dickens. While there, he spent five minutes or so complaining about

what he found, still angry, and repeatedly insisting Dickens see the proof he found. (TT, 43). He also admitted to ransacking the house, which is how he found the toys. (TT, 542). Dickens gave Appellant a beer and told him to go home. (TT, 43). Appellant did so, but he did not go to sleep. Instead, he started calling and texting Amanda constantly. In addition to the numerous texts he sent, he called her almost nonstop, twenty-two times, from 5:00 a.m. to 10:30 a.m., shortly before the murders. (TT, 44). She only picked up twice, once when Appellant was on his way to a court appearance that morning, and once again after he left the courthouse. (TT, 45). He also left harassing voicemails when she did not answer, including one in which he called her, "Fucking disgusting". (TT, 986).

The morning of the murders, Appellant had a 9:30 a.m. court hearing related to a separate violation of the injunction Amanda had obtained. He dressed for work in business clothes, and could be seen on the courthouse cameras wearing his work badge. (TT, 987). Kyle Bedran, Appellant's attorney that morning, testified that Appellant appeared nervous and jittery, but also seemed coherent and in his right mind. (TT, 844-7). Appellant seemed to understand what was said and was happy with the outcome of the case. (TT, 845-6). During the penalty phase of the trial, Judge Charles Tinlin, who presided over Appellant's case on August 27, 2015, testified. Tinlin has been a county court judge for twenty-eight years and presided over countless pleas. (R, 4544). He stated Appellant did not appear impaired to him

in any way, and if he had, Tinlin would not have accepted the plea. (R, 4546-8). The video recording of Appellant's plea colloquy, was played for the jury. In it, Appellant stated he was not under the influence of any alcohol or drugs. He asked several questions relevant to the proceedings. For example, he asked if his bail could be used to cover his court costs and fines and inquired about early termination of probation, suggesting he was cognizant of his surroundings and what was going on. (R, 4551-8).

The second time Amanda talked to Appellant that morning was after he left court, at 9:41 a.m. The phone call lasted about fourteen minutes. (TT, 987). At the penalty phase it was revealed that this phone call likely was the impetus for what came after. Appellant had called to take responsibility for the damage to the house, and said he would come over with a check. In response, Amanda told Appellant, "He called the cops." Appellant repeated it back to her as a question, and realizing that his wife's new boyfriend was in their marital home, then said, "I have to fix this." (R, 4208-10).

Even though they had just talked for fourteen minutes, Appellant immediately called Amanda back, but she did not answer her phone. (TT, 988). Although Appellant had dressed for work, he instead went back to Rhonda's house. Cell tracking data and a receipt for a Gatorade at 10:00 a.m. from a gas station outside Rhonda's neighborhood showed him going toward her house instead of to work.

(TT, 988). He texted Amanda, “Please” at 10:03 a.m., and left an unintentional voicemail at 10:07 a.m., where you can hear shuffling and a man call Appellant a moron. (TT, 989). It was at this time he was retrieving weapons and ammo from his room at Rhonda’s house. Crime scene technician Kristine Keegan processed his room and found it in disarray: a gun holster on the floor, a gun case and several boxes of ammo scattered about, and an empty case for a 9mm Ruger handgun. (TT, 362-8). Some bullets were described as “Zombie rounds”, with green tips; the same type of rounds were later recovered from Amanda’s body. (TT, 990).

Appellant then returned to the gas station at 10:11 a.m., bought less than three gallons of gasoline, a 24-ounce Corona, and some cigarettes. (TT, 527-8, 582). From there, the cell tracking data has him driving from Rhonda’s house to Amanda’s. This is because he kept trying to call her, and she kept ignoring his calls. (TT, 992). At 10:23 a.m., just a few minutes before the murders, he sent what could be interpreted as a goodbye text to his new girlfriend, Amy Mason, saying only, “I love I”, which he then corrected to “you” with no further context. (TT, 992). At 10:28 a.m. and 10:31 a.m. he has two short phone calls with his father, which were overheard by a dog-walker. (TT, 992-3). The dog-walker, Brittany Mano, saw a frantic elderly gentleman on the phone in Rhonda’s neighborhood around 10:30 a.m. that morning. (TT, 993). She later learned that the man was Appellant’s father, and she heard him

say, “Son, don’t do it,” and she heard a male’s voice respond, “I can’t take it anymore.” (TT 993-4).

When Appellant got near Amanda’s house, he did not park his car out front or nearby. Instead, he parked in an adjacent neighborhood in the driveway of a foreclosed home that had been long-abandoned. (TT, 995). Deputy Melanie Merritt and her K-9, Inverness, did a track from the back of Amanda’s house. Inverness led her through the backyard, into another neighborhood, and did circles in a driveway, which indicated to Deputy Merritt that someone had left in a car and the trail disappeared. (TT, 995).

Amanda had arrived at the house earlier in the morning to find it ransacked. She called Douberly to show him the damage, and Douberly called a police nonemergency number to report a domestic disturbance. (TT, 158-9). Douberly called Amanda’s friends Lindy Dobbins and Rachel Hendricks and asked them for help cleaning up. The two women went over to Amanda’s to help out. (TT, 100, 159). A Public Service Assistant with the St. John’s County Sheriff’s Office arrived at 9:56 a.m. to make a report. (TT, 568). When Young learned that this was domestic-violence related, he encouraged Amanda to have a deputy come out and take a police report, but she wasn’t ready to bring the police in yet. (TT, 572-3). Video from a surveillance camera located down the street from Amanda’s house shows that Lindy arrived at 10:11 a.m., a couple minutes after Young left, and

Hendricks arrived at 10:27 a.m. (TT, 524-5). Just seven minutes later, at 10:34 a.m., Douberly can be seen fleeing from the front of the house, followed shortly by Hendricks. (TT, 525). It was during this seven-minute period that Appellant arrived.

Appellant, armed with two handguns, snuck through the backyard. Amanda and Dobbins were in the master bedroom, while Hendricks and Douberly were in the living room. Douberly heard a pop that he initially thought was a firework. (TT, 161-4). He then noticed damage to the blinds of the rear sliding glass door, and then noticed a bullet hole. Suddenly a second one appeared. (TT, 165). Next, Douberly heard a man's voice yelling, "Where is he? Where is he?" He quickly realized that the person outside was Appellant, and correctly believed Appellant was there to kill him, so he fled the home. (TT, 166).

When the shooting started, Hendricks looked outside and saw Appellant, who she had previously met, holding a gun. (TT, 103). Everyone started yelling to run, and Hendricks ran into the master bedroom with the other two women. Amanda retreated into the master bathroom while Hendricks and Dobbins hid in the closet and barricaded the door. (TT, 108-9). Appellant followed the women, and Hendricks could hear him yelling repeatedly at Amanda, "Where is he?" (TT, 111). Appellant started trying to get into the closet, and Hendricks heard Amanda tell him that Douberly was not in there, that it was Hendricks and Dobbins. Dobbins also called out, "It's Lindy in here." (TT, 111). Hendricks heard a gunshot and did not hear

Amanda yelling anymore. (TT, 111). Appellant then shot and barged his way into the closet where Dobbins and Hendricks were hiding. When the door opened, it blocked Hendricks from Appellant's view. Appellant did not see Hendricks and rushed straight to Lindy. Hendricks took this opportunity to run out of the closet and flee from the house, but as she was leaving she heard Dobbins say, "Oh my God, no," followed by a gunshot. (TT, 112-3). At that point, Appellant had shot Dobbins twice, execution-style, while she kneeled in the back of a closet presenting no threat to him.

Dobbins murder was not a random act of violence against anyone who may be present. Text messages Appellant sent to Dickins partly blamed Dobbins for his marital problems. On July 4, 2015, Appellant texted Dickens, "Lindy came by today. Thirty minutes later, Amanda tells me she doesn't feel anything for me anymore." (TT, 555). On July 16, 2015, Appellant texted, "I'm pretty sure she's going to take Lindy with her to court to talk bad about me." (TT, 555). On July 19, 2015, Appellant texted, "It's total bullshit. She has those two bitches in her ear. They have been through shit," and later that same day he texted, "Lindy feeds her full of shit." (TT, 555-6). Although Dickens testified at trial he did not recall Appellant ever blaming anyone in particular for his marital problems, his testimony was impeached with his deposition wherein Dickens stated, "I always knew he was upset with Lindy. He didn't want her around because every time Lindy came around, Amanda would just

be a different person. I think he was just worried about Lindy ruining his marriage by telling her she didn't have to deal with that kind of stuff." (TT, 557).

The gunshot that Hendricks heard while she was hiding in the closet had not killed Amanda. Amanda's 911 call was played for the jury and showed that Amanda died after Lindy. In the call, Amanda can be heard begging Appellant to put the gun down, then he shoots her. One gun shot, which got Hendricks to back off the closet door and hit Dobbins in the foot, can be heard, followed by the two that killed Dobbins. After, Amanda can be heard begging for her life as Appellant approaches. Amanda, fully aware of what is about to happen, says, "No, no, no. Please, don't." (TT, 996-7). In response, Appellant called her a "fucking whore," and shot her multiple times with his 9mm handgun. When that ran out of bullets, Appellant dropped it on the floor and continued shooting Amanda with his .45 caliber handgun. (TT, 997-1000). Amanda was shot a total of nine times. (TT, 1000).

At trial, Dr. Predrag Bulic, the Chief Medical Examiner in the area, testified Dobbins received three gunshot wounds: one on her foot, one on her shoulder, and one to the temple. (TT, 485). The shoulder wound had a very steep angle as it traveled through her body, indicating she would have been on the floor and the shooter would have been above her. (TT, 487-8). That shot traveled through her aorta and was "rapidly lethal," in that it would cause loss of consciousness and death within a couple minutes. (TT, 490). Dr. Bulic described the temple wound as having

an extremely steep angle as well, and it would have been immediately lethal. (TT, 490). Because the temple wound would have immediately killed her and made her collapse, he believes that shot came after the shoulder wound. (TT, 493).

On Amanda, Dr. Bulic found evidence of nine separate gunshots, some of which caused multiple injuries. (TT, 447). While he could not specify an order, the characteristics of the injuries imply a certain order. (TT, 448). Dr. Bulic testified that if someone has wounds that have defensive characteristics, and one that would, for example, render them paralyzed, one can infer that the defensive wounds came before the person was incapacitated. (TT, 449). All of Amanda's wounds were caused by shots that were further than two feet away. (TT, 452-3). Dr. Bulic found a couple wound tracks that were mostly horizontal, indicating Amanda received them when she was standing. (TT, 456-7; 466). However, the majority of her wounds had steep trajectory angles, which suggest she was on the ground when she received them. Amanda was found by police lying on the bathroom floor. One of the gunshots traveled through her neck, severing her carotid artery and spinal cord. In addition to being almost immediately lethal, this shot would have rendered Amanda a quadriplegic, making her unable to lift her arms and legs defensively. Since Amanda had defensive wounds on her forearm, her hand, on her legs, and her wrist; Dr. Bulic opined that this wound must have occurred after the other eight gunshots. (TT, 460-

78). He also stated these defensive wounds show she would have been aware of what was happening to her, and in pain the whole time. (TT, 481).

After committing the murders, Appellant fled the scene and cell phone data shows him driving back toward Rhonda's house while making and receiving several phone calls with family members. (TT, 55-6). When he got to the neighborhood, he dumped his cell phone in the road and started making his way to Virginia. (TT, 56). Several hours later, near 10 p.m., police in Norton, Virginia, responded to calls about one car harassing another on the highway. (TT, 660-1). When they pulled the cars over, Appellant was one of the two drivers. (TT, 666). The Norton police spotted two guns on the front seat of Appellant's car and quickly learned that he was wanted by Florida authorities. (TT, 667-9). His car was impounded pending a warrant. (TT, 672).

Detective Samantha English became the lead detective on the case the day of the murders. (TT, 498). By 1:30 p.m. the St. John's County Sheriff's Office had obtained an arrest warrant for Appellant and search warrants for Rhonda and Amanda's homes. (TT, 504). While searching in and around Amanda's house crime scene technician Shawn Vollmar found several relevant pieces of evidence. The gate to the back fence of the house was open, and he found an unspent 9mm bullet in the pathway behind the home. (TT, 247-9). In the home, in addition to finding a large combination of spent 9mm and .45 caliber shell casings next to Amanda's body,

Vollmar found a 9mm handgun which he processed for DNA. (263-9). DNA found on this gun was later tested and confirmed to be a match for Appellant. (TT, 714-6). At Rhonda's house in Appellant's room, crime scene technician Kristine Keegan found an empty 9mm gun case, assorted ammunition, including some which matched that used in the murders, and the sex toys Appellant had discovered earlier in the day. (TT, 363-9).

When English was notified that Appellant had been arrested in Norton that evening, she and other officers immediately drove to Virginia, arriving around 9:00 a.m. on August 28, 2015. (TT, 506-7). There, they assisted local police with searching Appellant's car, where they found the .45 caliber handgun used in the murders, receipts from the gas station near Rhonda's house, and some broken glass. (TT, 507-9).

The jury convicted Appellant on seven counts, including the two first-degree murders, on July 18, 2018. (TT, 1113-5).

In the penalty phase, the State only put on four more witnesses, all to give victim impact statements: Tammy Malone, Amanda's sister; Beth Kennedy, a good friend of Amanda's; William Mosler, Lindy's father; and Chris Dobbins, Lindy's husband. (R, 4085-4110). Appellant then called several witnesses of his own.

The first mitigation witness was Dr. Mark Mills, a forensic psychologist. (R, 4114). Mills testified that Appellant was prescribed several different medications

around the time of the murders, including the antidepressants Wellbutrin and Cymbalta, Ambien, hydrocodone, and bupropion. (R, 4123-4). Mills took special note of the Ambien, saying that it is associated with a negative side-effect called "parasomnia", wherein someone can be ambulatory and doing activities, essentially blacked out and will have little to no memory of it. (R, 4125-6). Mills performed a two and one-half day evaluation with Appellant at the jail. (R, 4119-22). Appellant described drinking several alcoholic drinks until about 3:00 a.m. and doing a line of cocaine around 1:00 a.m. (R, 4129-31). Appellant told Mills that when he arrived home at 5:00 a.m., he took "two half-tablets" of Ambien, which would have been 10mg of the drug, even though he had court in a few hours. (R, 4133). Appellant said he then went to sleep for a few hours and was woken by his father around 8:00 a.m., but Mills reviewed many text messages sent by Appellant during that time frame. (R, 4135).

Mills describes the memories Appellant conveyed from this point on the day of the murders as "stroboscopic", meaning that Appellant only had flashes of memory with a lot of blank space in between them, as opposed to a normal smooth progression of events. (R, 4136). Mills also testified that he believes Appellant has merged a lot of information he later learned with these flashes of memories, and that Mills does not believe Appellant truly remembers it. (R, 4136-8). Appellant told Mills he remembered driving to Amanda's house and parking out back in case the

cops had arrived. Appellant claimed to be there only to hand over a check, and did not realize that Douberly was there until he walked up to the house. (R, 4164-6). It was then that Appellant retrieved the guns from the trunk of his car, which he says he didn't know were there, and that it just dumb luck they were present. (R, 4166-8). Next, he remembered being outside of the house with a gun, jumping the fence, and then blacked out. (R, 4169). His next reported memories are shooting the glass, then yelling at his wife while she reached for a gun, then seeing someone in a closet with a gun and blood, and then leaving to go to Rhonda's. (R, 4169-71). Mills gives his opinion that Appellant was "substantially impaired" at the time of the murders and experiencing a parasomnia event that started around 7:00 a.m. and continued through the early afternoon. (R, 4141).

Next the defense called Dr. Michele Quiroga, a clinical and forensic neuropsychologist. (R, 1480). She met with Appellant at the jail on six different occasions. (R, 4186). She said at the time of the murders Appellant met the criteria for an alcohol-abuse disorder, and that he was a heavy drinker who drank on a daily basis. (R, 4910). She also stated that he was currently suffering from depression due to his situation, his father's poor health, and being unable to see his kids. (R, 4193-4). She spoke about how Appellant appeared to be adjusting well to prison life, receiving a paralegal certificate and assisting other inmates with legal work. (R, 4195). Going back to the time of the murders, Quiroga opined that from her

discussions with Appellant, she believed he was suffering from panic attacks and an anxiety disorder, both of which he only treated with self-medication through alcohol. (R, 4196). She said panic attacks cause you to get nervous, make your heart beat faster, but inconsistently, and that a feeling that the world is ending falls over you. (R, 4197). Because of this, the attacks can have an impact on your thinking called "derealization", and that you perceive stress where there shouldn't be any, and you distort reality and have trouble telling what is real. (R, 4197-8).

Quiroga also performed fourteen different neuropsychological tests on Appellant, testing for deficits in a variety of different areas. (R, 4198). The only tests where Appellant exhibited any deficits were in ADD and ADHD. (R, 4198-9). She testified for memory problems and malingering, and found no issues with either. (R, 4199). She found no deficits in his problem-solving and found that he had an average IQ, with a result of 99. (R, 4199-200, 4219). He gave her a fairly similar account of the night and morning leading up to the murders to the one he gave Mills, but also said he had a panic attack, and that's when he started shooting. (R, 4200-12).

The defense called a third doctor, Dr. Daniel Buffington, a clinical pharmacologist. (R, 4348). Part of Buffington's practice includes studying potential drug interactions and drug metabolism concerns, and he was brought on the case to determine what role Appellant's prescriptions, illicit drugs, and over-the-counter drugs may have had on events. (R, 4349-53). He found Appellant had been

prescribed Wellbutrin followed by Cymbalta (both antidepressants), Ambien, Norco (an opiate for back pain), meloxicam (also used for back pain), and Naprosyn (used treat back pain and inflammation). (R, 4356-66). Appellant was also taking a few over-the-counter supplements used as metabolism stimulants and glucose stabilizers. (R, 4358-9). Buffington testified that Ambien can cause increased sedation the day after use, which can result in drowsiness, diarrhea, amnesia, hallucinations, and confusion. (R, 4360-1). In addition, it can cause parasomnia, or sleepwalking, where someone can typically complete a task that they've done before and is common to them; these parasomnia events are magnified by alcohol and exhaustion, and can occasionally result in violent and aggressive behavior. (R, 4361-3). However, Appellant had been previously prescribed Ambien in 2014, and there is no evidence he ever experienced any of these side effects. (R, 4419-20).

Buffington went through the other medications and supplements Appellant was using, and described all of them as having possible side effects that include insomnia, abnormal sensations to pain and anxiety, changes in blood pressure and heart rate, and sweating, nausea, and vomiting. (R, 4366-72). Additionally, Appellant was switched from Wellbutrin to Cymbalta in August 2015, an abrupt switch which Buffington testified was inadvisable, because it is better to taper off one antidepressant into another. This is because they affect different neurotransmitters in the brain, and Cymbalta was a more potent medication than

Wellbutrin. (R, 4366-7). Buffington described Appellant's recounting of the morning of the murders as "snapshots", disconnected pictures instead of a consistent flow of information. (R, 4380-2). In Buffington's opinion, Appellant was experiencing a parasomnia event. (R, 4388-9).

The defense also called several witnesses to attest to Appellant's good character. Gail Dickens, the wife of Mike Dickens, testified that Appellant and his children were very loving and happy, that he was an affectionate father, and that he was a coach for his son's sports teams. (R, 4224, 4229). She also appreciated that Appellant was one of the few people she knew who went out of their way to make sure her son, who has Down's Syndrome, was happy and having a good day. (R, 4227). Maria Obert-Isaac, Appellant's cousin, said Appellant was a great father and had a strong work ethic. (R, 42141-4). He also had a racecar that he raced with his dad. (R, 4249-50). April Ayala, another cousin, said Appellant was always a hands-on dad, that he loved animals, and the Appellant and his sisters and parents had a very close familial relationship, which she always wished she had. (R, 4257-63). Freddie Cartwright, a friend of Appellant's for over twenty years, said Appellant was like a brother to him, and described a time Appellant protected Cartwright from some bullies in middle school. (R, 4266-9). Cartwright also testified that when they were in high school, Cartwright's father was diagnosed with cancer, and Appellant helped Cartwright's father mow lawns all while having multiple other jobs and being

on the honor roll. (R, 4271-2). He also described Appellant as a good father. (R, 4275).

Defense then called John Schwinghammer, one of Appellant's coworkers at Citibank. (R, 4279). The two became friends in 2014 and started doing things together outside work like fishing and hunting. (R, 4280-1). Appellant coached a flag football team both their kids were on, and Schwinghammer described Appellant as a "great dad". (R, 4285). Appellant participated in at least one charity through Citibank and taught little league; Schwinghammer said Appellant was "just a normal sort of typical good guy". (R, 4288-91). The next witness was Jason Deloach, a friend and coworker of Appellant's who has known him since 2002. (R, 4294). They both worked in the mortgage industry together for twelve years, and he said Appellant was a reliable and trustworthy coworker who would take the time to train new mortgage processors and be a mentor when most coworkers would not. (R, 4296, 4302). Appellant always had high customer service ratings and was one of the biggest income earners in a job that paid on commission. (R, 4298-300). Deloach also believe Appellant was a loving father. (R, 4300). Another witness was John Wright, who had been married to Appellant's sister, Crystal, for nineteen years. (R, 4306). Wright has known Appellant's family since before Appellant was born, and viewed Appellant as a brother. (4306-8). In 2010, Wright lost his business when the market crashed, and he and Crystal separated for a time. (R, 4311). Appellant let

Wright live in his house for about a year and a half, and helped Wright get a job at a bank. (R, 4311-2). Appellant loved animals and was a good father and uncle. (R, 4314-8).

The final character witness was Crystal Colley Wright, Appellant's other sister. She talked about how hard a worker he was, that in high school he had several jobs, including Sbarro's Pizza, Home Depot, he would clean several banks in the area, worked at a restaurant called Barnacle Bill's, and helped a friend's landscaping business on the weekends. (R, 4429-30). Since graduating high school he has worked in the mortgage industry for over sixteen years, and has made a lot of money doing it. (R, 4433-4). She said Appellant would often train new employees, consistently received high performance ratings, and did some charity work for Habitat for Humanity. (R, 4436-9). She called Appellant a wonderful father, a good uncle, and added that he loved animals and had always had pets. (R, 4439-44). As for their childhood, Crystal recounted a time they both saw their mother get violent toward their dad. When they were kids, their mother learned their father was having an affair, and she attacked him with a bat when he came home. Appellant would have been around nine years old. (R, 4460-1). Later that week was Thanksgiving, and this time their mother pulled a knife on their dad when he tried to come inside for dinner. (R, 4461-2). However, on cross-examination, Crystal was impeached with her deposition where she testified that she never saw any physical fights between their

parents and never saw their mom hit their dad. The first time she brought these up was at trial. Their parents eventually reconciled. After which Appellant and his father were like best friends, and had a racecar hobby together for twenty years. (R, 4463-4). While various witnesses testified that Appellant was a great father, brother, son, uncle, coworker, or coach, no one testified that Appellant was a good husband.

The State called two witnesses: Dr. Jeffrey Danziger and Judge Charles Tinlin. Tinlin's testimony has been described above. Dr. Danziger is a psychiatrist with an active office treating patients in Maitland, Florida. (R, 4481). Dr. Danziger also serves as a forensic psychiatrist to offer opinions about a person's mental state. (R, 4482). He performed an in-person, three-hour evaluation of Appellant at the jail, and reviewed a multitude of documents before issuing a report. (R, 4488). In his opinion, Appellant was not impaired by any substances, including Ambien, at the time of the murders, and was not experiencing any parasomnia event. (R, 4489). The evidence shows that in the days and weeks leading up to the crimes there is no indication his behavior was altered, peculiar, or that he was acting oddly. He was still going to work regularly, coaching tee-ball, and taking care of his kids. (R, 4489-90). Dr. Danziger pointed out that all the side effects mentioned are rare, with the less severe happening about five to ten percent of the time, and the severe ones, like parasomnia, happening less than one percent of the time. (R, 4490-2). He agrees that someone in a parasomnia event can perform tasks like driving a car, but that they

will be very poorly coordinated and will appear confused to someone else. They would appear dazed, befuddled, and out of sorts. He also said a parasomnia event is associated with taking higher doses rather than the prescribed dosage, or that one would expect to see it occur in the first few days of use. (R, 4493-4). Dr. Danziger said that appearing in court and testifying relevantly and coherently is inconsistent with someone experiencing a parasomnia event. His review of Appellant's court appearance shows just that: Appellant answered questions appropriately, coherently, and logically, and that Appellant's answers and responses showed he had a solid understanding of where he was and what he was doing. (R, 4496-7). If Appellant was experiencing a parasomnia event at 10:30, during the murders, this should have been reflected in his behavior at 9:30, which was closer in time to when he supposedly took Ambien. (R, 4497).

Dr. Danziger also reviewed an evaluation of Appellant by another doctor, Dr. Krop, which occurred in November 2015, much closer in time to the murders than when any of the doctors who testified were able to evaluate Appellant. In that evaluation, Appellant gave a much different account of events than he gave to any other doctors. He told Dr. Krop that on August 27, 2015, he was hung over and just snapped; he never mentioned anything about memory loss, "snapshots", or blank periods. (R, 4500-1). Dr. Krop wrote in his report that Appellant understood the nature, quality, and wrongfulness of his actions. (R, 4501). Dr. Danziger pointed out

this shows Appellant's story changed over time to a more favorable description of events. (R, 4501). Appellant gave Dr. Danziger a description of the morning of the murders similar to what the other doctors received, that it was choppy and disjointed, but Dr. Danziger believes this self-report is different from what Appellant actually remembers. The Ambien, Appellant claims to have taken is an immediate release drug. It is meant to put people to sleep quickly, but does not have much effect after three hours. Since Appellant said he took it at 6:00 a.m. and his court date was three and a half hours later, there would have been signs of parasomnia in court if it were actually occurring. (R, 4510-21). Finally, Dr. Danziger disagrees with Buffington that Cymbalta is a more powerful drug than Wellbutrin. Dr. Danzinger was a principal investigator for both drugs before they hit the market, and regularly prescribes both. (R, 4532).

On July, 25, 2018, the jury unanimously voted that Appellant should receive the death penalty for each murder. (R, 4784-88).

A *Spencer*[3] hearing was held on October 2, 2018 where the State presented additional victim impact statements and the defense provided additional mitigation. (R, 4804-4832).

Deputy Samuel Williams, who is in charge of running the St. John's County Jail, testified for the defense. (R, 4814). At the time of the *Spencer* hearing,

[3] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

Appellant had been in the jail for a little over three years. Williams could not personally speak to how Appellant was adjusting since they have a lot of inmates, but he had not heard Appellant's name a lot. (R, 4815). Appellant had been transported from the jail several times for medical treatments and they never had any security problems. (R, 4815-6). Appellant did have a few minor disciplinary issues. Once he allowed another inmate to use his PIN code to call the inmate's mother; another time he was disciplined for not making his bed in the morning; and finally he was disciplined for suspicion of being involved with smuggling prescription drugs, but denied the accusation. (R, 4816-9). Williams agrees Appellant had done well in jail. (R, 4820).

Appellant did not testify at the hearing, but did give the statement, "This was a horrible, terrible accident and I wish it was different, but it's not. And I'm sorry for all the parties involved." (R, 4822). The State entered additional victim impact statements. (R, 4807).

On November 30, 2018, the trial judge followed the jury's unanimous verdict and sentenced Appellant to death for the murders of Amanda Colley and Lindy Dobbins. (R, 4843). For the murder of Amanda Colley, the court found the following aggravating circumstances: 1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person – great weight; 2) the capital felony was committed while the defendant was engaged

in the commission of a burglary – great weight; 3) the capital felony was especially heinous, atrocious, or cruel – great weight; 4) the capital felony was committed in a cold, calculated, and premeditated manner – moderate weight; 5) the capital felony was committed by a person subject to an injunction issued pursuant to § 741.30 and was committed against the petitioner who obtained the injunction or protection order – great weight. (R, 3518-3529). For the murder of Lindy Dobbins, the court found the following aggravating circumstances: 1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person – great weight; 2) the capital felony was committed while the defendant was engaged in the commission of a burglary – great weight; 3) the capital felony was especially heinous, atrocious, or cruel – great weight; 4) the capital felony was committed in a cold, calculated, and premeditated manner – moderate weight. (R, 3552-59).

For both murders, Appellant relied on two statutory mitigators: 1) that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired – not established, no weight; 2) the existence of any other factors in his character, background, or life, or the circumstances of the offense that would mitigate against the death penalty – slight weight. (R, 3546-9). For both murders, the court considered the following non-statutory mitigating circumstances: 1) good father to his children – very slight

weight; 2) good worker – slight weight; 3) good son – slight weight; 4) good brother – slight weight; 5) gainfully employed at the time of arrest – slight weight; 6) maintained stable employment – slight weight; 7) mentor to fellow employees – slight weight; 8) did various charitable works through employment – slight weight; 9) great uncle – slight weight; 10) witnessed domestic violence by his mother on his father as a child – slight weight; 11) history of drug and chronic alcohol abuse – moderate weight; 12) impulsive – slight weight; 13) loves animals – very slight weight; 14) positive influence on other children in the neighborhood – very slight weight; 15) volunteered as a baseball coach – slight weight; 16) volunteered as a football coach – slight weight; 17) previously active in racecar driving – slight weight; 18) tried to go through marriage counseling with his wife – slight weight; 19) was taking pain, anti-depressant, and sleep disorder medications at the time of the homicides – slight weight; 20) previously diagnosed with depression – moderate weight; 21) impaired at the time of the homicides – not established, no weight; 22) adjusted well to incarceration – slight weight; 23) no prior felony convictions prior to the date of the incidents in this case – moderate weight. (R, 3531-49).

The trial court agreed with the jury's unanimous verdict and found Appellant should be sentenced to death for both murders. (R, 3551, 3557). This appeal follows.

SUMMARY OF THE ARGUMENTS

POINT I: Competent substantial evidence was presented to support the finding of the Cold, Calculated, and Premeditated (CCP) aggravator for both murders. The evidence shows that Appellant had about an hour between his phone call with his wife, which prompted him to drive to his sister's house instead of work, and the murders. In that time, he drove about fifteen minutes to his sister's house where he retrieved multiple firearms and substantial ammunition; drove to a gas station to top off his gas tank and buy a beer to calm his nerves; parked in an adjacent neighborhood at a foreclosed home so he wouldn't be seen parking near his wife's house; and then snuck up to his wife's house from behind before firing into the house and hunting down his victims. This is more than enough evidence to sustain a finding of CCP.

POINT II: Competent substantial evidence was presented to support the finding that both murders were especially Heinous, Atrocious, or Cruel (HAC). The evidence shows that both victims had a substantial amount of time to realize that their deaths were imminent, and both were able to make phone calls to 911 before being murdered. Lindy Dobbins heard gunshots outside the closet that likely led her to believe Amanda had been killed before Appellant forced his way into the closet and approached her, gun drawn, and had time to say, "Oh, my God, no," before being killed. Amanda was shot, heard her friend get murdered, and was then shot several

more times before dying. Most of her wounds were defensive, showing she was aware of what was happening and trying to protect herself. Both deaths were conscienceless and pitiless, and needlessly tortuous to the victims.

POINT III: Florida's death penalty scheme is constitutional. Appellant argues that Florida's proliferation of aggravating factors does not properly narrow the class of defendants who will receive the death penalty. This analysis ignores that the existence of an aggravating factor is only the first step in sentencing a defendant to death. After unanimously finding at least one aggravating factor, the jury must go through more steps: they must unanimously find that aggravating factor justifies death; they must then individually determine which, if any, mitigating factors have been proven; they then must again unanimously agree that the aggravating factor or factors outweigh the mitigation; and finally, they must unanimously vote that death is the appropriate sentence. Even after all this, a judge can override a jury vote for death, but not one for life. This process constitutionally narrows the class of defendants who will receive the death penalty in Florida.

POINT IV: Appellant's death sentence for each murder was proportionate. The jury found five aggravating factors for one murder and four for the second, including some of the weightiest aggravators recognized by Florida. In contrast, the defense provided little meaningful mitigation, consisting mostly of evidence that Appellant had been a "typical, good guy" before this crime, and included nothing

significant, such as brain trauma or severe mental health problems. This case was one of the most aggravated and least mitigated cases, and thus his sentences of death were proportionate.

POINT V: The trial court did not abuse its discretion and properly rejected mitigation not established by Appellant. It is within the trial court's discretion to determine what, if any mitigators exist, and mitigators must be established by competent, substantial evidence. If the defense does not provide such evidence, a trial court can reject a mitigator. Appellant argues that the trial court abused its discretion in rejecting the mitigators that Appellant was impaired at the time of the murders and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Both mitigators were discussed at length by the trial court, and although Appellant did present experts who testified to this mitigation, the State presented a rebuttal expert, and the trial court gave the rebuttal expert more credence. As it was within the trial court's discretion to determine which experts, if any, he found credible, his discretion was not abused by rejecting Appellant's experts' opinions.

POINT VI: The jury was properly instructed on the CCP and HAC aggravators, which were unanimously found by the jury and were supported by the evidence. This is a repackaging of Points I and II, and here Appellant argues that since CCP and HAC do not apply, it was error to instruct the jury on them. As both

aggravators were supported by ample competent, substantial evidence, there was no error when the jury was instructed on—and unanimously found—both factors.

POINT VII: The trial judge properly admitted victim impact evidence and the jury's verdict was not tainted. Victim impact evidence has consistently been upheld by state and federal courts, and none of the victim impact presented went outside the bounds of Fl. St. 921.141(7). All but one of Appellant's objections to the statements were sustained by the judge, and the statements were altered to remove the offending language.

POINT VIII: The prosecutor's penalty phase arguments were neither improper nor inflammatory. Prosecutorial arguments only warrant reversal if they are so outrageous as to taint the finding of guilt or recommendation of death. Here, Appellant only points to two minor comments the prosecutor made, and when they are put in their proper context instead of looked at in a vacuum, it is clear that the prosecutor was not making the improper arguments alleged by Appellant. Even if they were improper or objectional, two short comments made in an entire closing argument are not so egregious as to taint the recommendation of death.

POINT I

COMPETENT SUBSTANTIAL EVIDENCE WAS PRESENTED TO SUPPORT THE FINDING OF THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATOR (CCP) FOR BOTH MURDERS

The standard of review in determining whether an aggravating factor was properly found is if it is supported by "competent, substantial evidence." *Conde v. State*, 860 So. 2d 930, 953 (Fla. 2003). In determining whether a jury could have been properly instructed on a particular aggravating factor, this Court determines whether the "evidence adduced at trial is legally sufficient to support a finding of that aggravating circumstance." *Davis v. State*, 2 So.3d 952, 962 n.4 (Fla. 2008). If evidence is presented from which CCP can be inferred, trial counsel "should be permitted wide latitude to advance all legitimate arguments and draw logical inferences from the evidence." *Id*.

To establish CCP, the State has to prove beyond a reasonable doubt four factors: (1) the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant exhibited heightened premeditation (premeditated); and (4) the murder was committed with no pretext of legal or moral justification. § 921.141(5)(i), Fla. Stat. (2003); *Pearce v. State*, 880 So. 2d 561, 575–7 (Fla. 2004). For the cold factor, this Court has held that the murder must be the product of cool

and calm reflection and not an act of emotional frenzy or panic or fit of rage. *Hall v. State*, 107 So.3d 262, 277 (Fla. 2012). Examples of the calculated prong are when the defendant arms himself in advance, kills execution-style, and had time to coldly and calmly decide to kill. Heightened premeditation can sometimes overlap with evidence proving a prearranged plan, and can be shown by evidence that the defendant had the opportunity to leave the crime scene and not commit the murder, but instead committed it. *Campbell v. State*, 159 So.3d 814, 831 (Fla. 2015). A legal or moral justification is any colorable claim based on at least partly or uncontroverted and believable factual evidence or testimony that…would constitute an excuse, justification, or defense as to the homicide. *Id*. (quoting *Nelson v. State*, 748 So. 2d 237 (Fla. 1999).

Here, there is competent, substantial evidence to support the finding of this aggravator by both the jury and the judge. It is also important to note that the facts of this case are largely undisputed. In finding this aggravator for both murders, the judge summarized the facts as follows:

> Here, after the Defendant left the courthouse, he returned to the Garrison Drive residence where he retrieved ammunition for the two pistols that he either retrieved at that time or were already in the car. He is seen on surveillance video at a nearby gas station, shortly after leaving the Garrison Drive residence, buying a beer. Of significance, the Defendant also purchased a little over $2.00 worth of gasoline. A reasonable inference from the gasoline purchase was that he was topping off the gas tank in order to leave the area after the murders he was about to commit. The Defendant then left the gas station and headed towards the Bellagio Drive residence. While driving to the

Bellagio Drive residence, Brittney Manno overheard a conversation between the Defendant and his father, in which the Defendant's father is pleading to the Defendant to come back. The Defendant is overheard replying "I can't take it anymore." The Defendant drove approximately 15 miles from the Garrison Drive residence to the area of the Bellagio Drive residence, all that time having significant opportunity to reflect on what he was about to do and plan his attack. When the Defendant arrived at the Murabella neighborhood, rather than parking his car in front of the Bellagio Drive residence, as he had done hours earlier when he entered the residence and ransacked it, he strategically parked his car in the driveway of an unoccupied residence on Porta Rosa Drive, a street that backed up to Bellagio Drive. [n. 6] It is reasonable to conclude that the Defendant knew this residence was unoccupied and a place where he could park his car unnoticed from Amanda, and others present at the Bellagio Drive residence, as part of his well-thought-out plan. The Defendant then armed himself with the two loaded semi-automatic handguns. The Defendant walked behind the unoccupied residence, crossed a berm on foot, and went to the rear of the Bellagio Drive residence. Once at the rear of the Bellagio Drive residence, the Defendant was able to see in the residence through the sliding glass doors. The Defendant then proceeded to fire gunshots through the sliding glass doors, causing them to break. The Defendant then entered the Bellagio Drive residence through the broken sliding glass doors. The Defendant then proceeded into the master bedroom bathroom where he confronted Amanda. The Defendant then proceeded to murder Amanda and Lindy.

> [n. 6] Jennifer Meadows, who lives on the street behind Bellagio Drive, identified on a map the house on Porta Rosa Drive that was unoccupied, which she indicated was due to foreclosure. St. Johns County Deputy Melanie Merritt, a police canine handler, testified that her police blood hound tracked a scent shortly after the murders from the back of the Bellagio Drive residence to the driveway of the aforementioned unoccupied home on Porta Rosa Drive. Deputy Merritt testified that the dog's behavior in the driveway indicated that the person he was tracking had gotten into a car in the driveway, where the dog stopped tracking the scent.

> At any point from the time the Defendant returned to the Garrison Drive residence after attending court, to the time he went and obtained the firearms and ammunition, to the time he went to the gas station and topped off the car's gas tank, to the time he drove approximately 15 miles to the Murabella neighborhood while being urged by his father to return, to the time he surreptitiously parked his car on an adjacent street at an unoccupied home, to the time he armed himself with the two firearms, to the time he walked behind the unoccupied home and crossed the berm to the back of the Bellagio Drive residence, to the time he shot through the sliding glass doors, to the time he entered the Bellagio Drive residence, to the time he entered the master bedroom bathroom and first confronted Amanda, the Defendant could have abandoned his plan and left the victims unharmed. However, he chose to follow through on his plan, after having had a substantial and significant amount of time to reflect on his plan before killing the victims. The elements set forth in *Baker, supra*., for the existence of the CCP aggravating factor are present in this case. *See e.g. Raleigh v. State*, 705 So.2d 1324, 1328-29 (Fla. 1997).
>
> The jury unanimously determined that the State established this aggravating factor beyond a reasonable doubt. (Question A.4 in the Jury's Verdict As To Sentence On Count I) This Court agrees with the jury's finding regarding this aggravating factor. There are varying degrees of reflection, planning and the heightened premeditation supporting the CCP aggravating factor, from murders planned weeks or months in advance, such as a contract killing, to murders planned earlier the same morning, as was the case here.

(R, 3524-8).

These facts are more than sufficient for a finding of CCP. Appellant had the entire drive to the Garrison Drive house, where he armed himself with ammunition and at least two guns, to reflect on what he was about to do. He had the entire drive to the Murabella neighborhood, where he topped off his gas tank for his later getaway and parked in a surreptitious location, to reflect on what he was about to do. He had the entire walk from where he parked, sneaking up behind the house so

as not to be seen by any potential police officers, to reflect on what he was about to do. After he shot into the house and followed Amanda, Dobbins, and Hendricks into the master bathroom, while Douberly managed to get away, he still had time to reflect on what he was about to do. Still, after shooting Amanda the first time and not killing her, and discovering that Douberly was not the person in the closet, he had the opportunity to leave the house and not kill anyone. Instead, he shot into the closet, striking Dobbins, and then forced his way in. He walked up to Dobbins who was cowering in the corner on the phone with 911, saying her final words, "Oh, my God, no," and he shot her execution-style twice in the head. Dobbins had long, brown hair and was female. Appellant had seen a photo of Douberly, who he wanted to kill, which showed Douberly had very short brown hair and was a large male. And still, after that first murder, he had one last opportunity to leave his wife alive. Instead, he turned around, called her a "fucking whore," unloaded one gun into her, and when that gun ran out, dropped it and started shooting her with a second gun until she stopped moving.

Even taking the facts in the light most favorable to the defense, this case is similar to *Marquardt v. State*, 156 So.3d 464 (Fla. 2015), where this Court upheld the CCP aggravator. There, the facts showed Marquardt procured two weapons before arriving at the victims' house, and started shooting from the outside, supporting "the conclusion that Marquardt approached the house with the

prearranged design to shoot and kill *any* occupants." *Id*. at 487 (emphasis added). The heightened premeditation was supported by the evidence that Marquardt started shooting from the outside and, as Appellant did, pursued the victim through the house and ensured she died by shooting her multiple times. *Id*. This Court found that there was no evidence that Marquardt intended to do anything other than murder the occupants of the house. *Id*. Similarly, in particular the murder of Dobbins, who was neither of the two people who were the focus of Appellant's ire, the evidence shows Appellant was prepared to kill anyone he found in the home.

Of course, we also have more evidence of heightened premeditation than in *Marquardt*. Appellant told Dr. Krop before trial that he learned his wife's lover, Douberly, had called the police due to his criminal conduct earlier in the morning. It was at that point he learned Douberly was in his house with his wife. He learned this during a phone call nearly an hour before the murders. The evidence shows from that point forward he had the singular goal of getting back inside his marital home and killing Douberly, Amanda, and anyone else who might be around or get in the way. The amount of time it took him to drive to Garrison, load up on weapons, drive to Murabella, top off his gas tank, surreptitiously park at a foreclosed home where his car would not be spotted, sneak up to the house from the backyard, and methodically hunt down Amanda and Dobbins, is *completely* inconsistent with

Appellant's contention that these murders occurred during the heat of passion. (Appellant IB at 28).

In arguing that the cold factor is missing, Appellant cites to outdated cases from this Court that were previously interpreted by some to create a domestic dispute exception to the CCP aggravator. *See*, *e.g.*, *Santos v. State*, 591 So. 2d 160 (Fla. 1991). This Court has made it clear that there is no "domestic dispute exception in connection with death penalty analysis," and thus such a finding does not automatically negate that a murder could be cold, calculated, or premeditated. *Lynch v. State*, 841 So. 2d 362, 377 (Fla. 2003). This Court rejected a similar claim in *Allred v. State*, 55 So.3d 1267 (Fla. 2010), where Allred attempted to invoke the domestic dispute nature of his murders to negate CCP. There, this Court found that the record supported the trial court's determinations that Allred was suffering an emotional disturbance, but it was neither severe nor extreme, and Allred had been able to conform his actions to the requirements of law. *Id*. at 1279. Appellant's arguments are equally deficient. While he tried to put on an Ambien-fueled parasomnia defense, this evidence was rebutted by the State's expert and rejected by the trial court as a mitigating factor. In addition, Appellant by all accounts grew up in a normal household and was an all-around, regular "good guy" who had no pronounced mental issues that would go to negate CCP. This Court should reject this argument.

Cases where this Court has found that murder was committed in the "heat of passion" are under wholly different facts, or involved defendants who were severely impaired by substances and/or mental issues. *See, e.g*, *Almeida v. State*, 748 So. 2d 922 (Fla. 1999) (No CCP where the trial court found both mental health mitigators, defendant had severe impulse control issues due to a brutal childhood in Brazil, and defendant had been drinking the night of the murder and told police it was an impulsive act he committed shortly after getting drunk by himself); *Mahn v. State*, 714 So. 2d 391 (Fla. 1998) (No CCP when 19-year-old defendant retrieved a knife from the kitchen and started stabbing one victim, only stabbing a second when the second victim ran into the room after hearing the noise, and an expert testified defendant was impulsive and doesn't think about consequences); *Richardson v. State*, 604 So. 2d 1107 (Fla. 1992) (No CCP where defendant shot his wife in the middle of an active, heated argument); *Davis v. State*, 121 So.3d 462 (Fla. 2013) (No CCP where defendant's erratic behavior and expert testimony showed he committed his murders while having a psychotic break, and he made no attempt to hide himself from his eventual victims); *McWatters v. State*, 36 So.3d 613 (Fla. 2010) (No CCP where the only evidence related to heightened premeditation was defendant's confession that he only attacked and strangled the victim after she threatened him with a knife).

Comparing the ample evidence of CCP in this case with those cited *supra*, it's clear this Court should uphold the finding of CCP in both murders.

POINT II

THE TRIAL COURT PROPERLY FOUND THAT BOTH MURDERS WERE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL (HAC)

For the HAC aggravator to apply, "the crime must be conscienceless or pitiless and unnecessarily torturous to the victim." *Boyd v. State*, 910 So. 2d 167, 191 (Fla. 2005) (quoting *Davis v. State*, 859 So. 2d 465, 478 (Fla. 2003). Whether this aggravator can apply in the context of a shooting death is best summarized by *Gonzalez v. State*, 136 So. 2d 1125 (Fla. 2014):

> "Generally, shooting deaths do not qualify as HAC because they are instantaneous, or nearly so…unless the shooting is accompanied by additional acts resulting in mental or physical torture to the victim." *Allred v. State*, 55 So.3d 1267, 1280 (Fla.2010). However, the HAC aggravating circumstance will apply in cases where the victim is terrorized before being shot or endures fear and emotional strain or the infliction of mental anguish. *Lynch*, 841 So.2d at 369. The focus should be on "the victim's perceptions of the circumstances as opposed to those of the perpetrator." *Id*. Further, the victim's mental state may be evaluated in accordance with common sense inferences from the circumstances. *Swafford*, 533 So.2d at 277. To support HAC, the evidence must show that the victim was conscious and aware of impending death. *Douglas*, 878 So.2d at 1261. However, *the victim's perception of imminent death need only last seconds for this aggravator to apply*. *Buzia*, 926 So.2d at 1214. Moreover, the actual length of the victim's consciousness is not the only factor relevant to this aggravator. *Beasley v. State*, 774 So.2d 649, 669 (Fla.2000). "[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." *James*, 695 So.2d at 1235. "[A] victim's suffering

> and awareness of his or her impending death certainly supports the finding of the heinous, atrocious, or cruel aggravating circumstance where there is a merciless attack....” *Cox*, 819 So.2d at 720.

Id. at 1162 (emphasis added).

In the sentencing order, the trial court relied on the following facts in finding that HAC applied to both victims:

> In the instant case, the Defendant shot through the glass windows at the rear of the Bellagio Drive home and shouted, “Where is he?” In immediate fear for their lives, the female victims, including Amanda Colley, ran into the master bedroom to hide from the Defendant. Amanda proceeded to hide in the master bedroom bathroom, while Lindy Dobbins and Rachel Hendricks hid in the master bedroom closet. The Defendant came into the bathroom and confronted Amanda screaming, “Where is he?” Amanda can be heard on her frantic 911 call pleading for the Defendant to put his gun down. The Defendant proceeded to shoot Amanda. Rachel Hendricks testified she heard one gunshot from the bathroom and then didn’t hear Amanda scream again. Rachel Hendricks testified she then felt a gunshot graze her through the closet door. Rachel testified the Defendant then forced his way into the closet and executed Lindy Dobbins while she was crouched down.
>
> According to the medical examiner, Amanda Colley was not killed immediately and she suffered several defensive gunshot wounds where she attempted to defend herself from the Defendant. The medical examiner testified three or four of the gunshot wounds were inflicted while Amanda was still standing or slightly bent over, and the remaining shots were inflicted as the Defendant stood over her in an elevated position. According to the medical examiner, Amanda would have been in great pain but conscious after those first shots.
>
> Amanda laid on the bathroom floor after the first shot or shots, conscious and in great pain, when she was made to listen to the Defendant execute her friend Lindy, assuredly suffering great anxiety while awaiting her ultimate fate. After shooting Lindy, the Defendant exited the closet, returned to the bathroom where Amanda was suffering from the earlier gunshots, and proceeded to shoot Amanda again. One

of the Defendant's final shots was immediately fatal to Amanda by severing her spinal cord.

Amanda experienced torturous anxiety and fear of impending death. This is evident from her taking cover in the bathroom, pleading for her life, and being shot but remaining alive and conscious during the first shot or series of shots though suffering great pain, as described by the medical examiner, and as evidenced by the presence of defensive wounds. *See Campbell v. State*, 159 So.3d 814 (Fla. 2015)("As noted, an important factor in determining if the victim was conscious and aware of impending death has been the presence of defensive wounds."); *King v. State*, 130 So.3d 676, 684 (Fla. 2013)("this court has affirmed findings of HAC where defensive wounds revealed awareness of impending death"). In addition, while suffering from the initial gunshots, Amanda witnessed and overheard the Defendant force his way into the nearby closet and fire additional shots where he killed her friend Lindy Dobbins. *See e.g. Hutchinson v. State*, 882 So.2d 943, 558-59 (Fla. 2004)(HAC upheld where decedent witnessed Defendant murder family members before being shot); *Heyne v. State*, 88 So.3d 113, 122-23 (Fla. 2012).

While death by gunshot is often instantaneous such that a finding of HAC would not usually follow, where "the shooting is accompanied by additional acts resulting in mental or physical torture to the victim," the HAC aggravating factor may be found to exist. *Heyne*, 88 So. 3d at 123; *Gonzalez v. State*, 136 So.3d 1125, 162 (Fla. 2014). This is particularly the case where a shooting victim doesn't die instantaneously, suffers extreme pain, and is aware others are in the home at the time of the attack. *See Marquardt v. State*, 156 So.3d 464, 488 (Fla. 2015); *Martin v. State*, 151 So.3d 1184, 1194-95 (Fla. 2014). Such is the case here, as it pertains to the murder of Amanda, as described above, thus, supporting a determination that the HAC aggravating factor exists.

Moreover, the fact that the attack on Amanda occurred within the supposed safety of her own home adds to the atrocity of this murder. *See Zommer v. State*, 31 So.3d 733, 746 (Fla. 2010); citing *Williams v. State*, 967 So.2d 735, 763 (Fla. 2007).

. . .

> Thus, the analysis for this aggravating factor focuses on Lindy Dobbins' perceptions prior to her murder. Lindy Dobbins arrived at the Bellagio Drive residence on the morning of the murders to help her friend Amanda Colley clean up the damage the Defendant left behind from his earlier intrusion into the home. Lindy Dobbins' fear and terror began when the Defendant shot through the glass windows at the rear of the Bellagio Drive home and shouted, "Where is he?" In immediate fear for their lives, the female victims, including Lindy Dobbins, ran into the master bedroom in fear to hide from the Defendant. Amanda Colley hid in the master bedroom bathroom, while Lindy Dobbins and Rachel Hendricks hid in the master bedroom closet. The Defendant came into the bathroom and first confronted Amanda. Amanda could be heard on her 911 call pleading for the Defendant to put the gun down. The Defendant then shot Amanda at least once. While the Defendant confronted and shot Amanda, Lindy was hiding in the nearby closet, listening to the violent exchange, assuredly fearing she would be next. The Defendant then left Amanda suffering in the bathroom and went to the nearby master bedroom closet where Lindy Dobbins and Rachel Hendricks were hiding. The Defendant fired a gunshot through the closet door grazing Rachel Hendricks. The Defendant then forced his way into the closet. After hearing the Defendant shoot Amanda Colley, fire through the door to the closet and forcing his way in, Lindy Dobbins was assuredly suffering unimaginable torturous anxiety of her impending death. Once in the closet, the Defendant walked up to Lindy Dobbins, raised his gun and executed her. Lindy Dobbins was shot three times—in the foot, head and neck. Lindy Dobbins' unimaginable fear and anxiety is demonstrated by the fact she was crouched on the floor of the closet and at some point called 911 before she was executed by the Defendant. *See e.g. Parker v. State*, 476 So.2d 134, 139-40 (Fla. 1985)(victim's fear of death is imminent prior to being shot execution style while kneeling on the ground is sufficient to establish HAC aggravating factor).

(R, 3521-4; 3554-6).

Even taking the extremely defense-friendly recitation of facts Appellant advances in his brief (Appellant IB at 40-1) that Appellant was yelling at Amanda, fired no shots, executed Dobbins, and then shot Amanda, there is enough evidence

of HAC for both victims. As explained *supra*, this aggravating factor can apply even when the victim has mere seconds of realization of their impending death. *Buzia v. State*, 926 So. 2d 1203, 1214 (Fla. 2006). It is the victim's awareness of their impending death that makes the HAC aggravator apply, not the quickness with which their wounds were administered. And of course, we have evidence that the victims were aware of their imminent death for longer than the few seconds Appellant suggests.

A review of Dobbins and Amanda's 911 calls, coupled with Douberly and Hendricks's testimony gives a more accurate accounting of what occurred the morning of the murders, and are facts the trial court properly relied on. Hendricks and Douberly both testified they heard gunshots and then a man's voice yelling, "Where is he?" While Hendricks and Dobbins were hiding in the closet, they heard Appellant and Amanda yelling, and Amanda telling him that Douberly was not in the closet, that it was Hendricks and Dobbins. Amanda's 911 call catches part of this exchange, as she is begging him to put his gun down. Hendricks testified that she then heard a gunshot and Amanda stopped yelling. At this point, it's reasonable for both Hendricks and Dobbins to assume their friend had been killed. Then, instead of hearing Appellant leave, they hear him trying to break into the closet, and then shoot into it. Any rational person at that point would assume they were going to be killed next, which is evidenced by Hendricks testifying that Dobbins said, "Oh my god,

no," as Appellant walked up to her, pointing a gun, presumably after just murdering someone else. The only reasonable interpretation of these facts is that Dobbins was acutely aware that she was about to die, and that she was utterly helpless to stop it. The sheer terror she was clearly feeling is captured in her helpless screams recorded on her 911 call.

The fear and unnecessary torture Amanda would have felt is even worse. She had already been shot at least once when she watched Appellant go into a closet where her friends were hiding, and heard him fire multiple shots, silencing Dobbins's screams. She knew Appellant was angry with her, but after hearing him kill someone else a few feet away, she absolutely knew her death was next. Like with Dobbins, her 911 call captures the fear and terror she was feeling. At the beginning of the call she is yelling and telling him to put the gun down. There is a pause where not much sound was captured by the phone, and then a succession of two quick shots—the shots that executed Dobbins. We know Amanda was still alive at this point because *after* those shots she can be heard begging for her life as Appellant exited the closet. It was only then that Appellant said the last words Amanda would ever hear: "Fucking whore," and unloaded his gun into her, callously dropping it and switching to a second when it ran out of bullets. Additionally, the medical examiner testified that she was shot nine separate times, several of which evidenced defensive wounds, and that it was quite likely only the last shot killed her,

as it would have made her a quadriplegic and unable to defend herself. Viewing all this evidence, it is hard to conceive that Amanda and Dobbins were not fully aware of their imminent, violent deaths.

Appellant correctly anticipated Appellee's reliance on *Allred v. State*, 55 So.3d 1267 (Fla. 2010) to support the HAC aggravator in this case. (Appellant IB at 46). Despite Appellant's attempts to distinguish *Allred* from our case, it is directly on point with eerily similar facts. In *Allred* the defendant went to a house where his ex-girlfriend and her new boyfriend were. *Id*. at 1273 He gained entry to the house by shooting out the back sliding glass door. *Id*. Like Appellant, Allred's targets were his former significant other, Tiffany Barwick, and her new partner, Michael Ruschak. *Id*. at 1271. Unfortunately for Ruschak, he was unable to get away like Douberly did, and was gunned down by Allred shortly after Allred entered the home. *Id*. at 1274. Barwick, like the victims in this case, had taken refuge in a bathroom and dialed 911. *Id*. Allred was briefly detained by another occupant of the house before breaking free, finding Barwick in the bathroom, and gunning her down while she was still on the phone with 911. *Id*. In finding that the HAC aggravator was appropriate for Barwick's murder, this Court held:

> When Allred fired his pistol through the glass door to gain entry, Barwick immediately hid in a bathroom. Although she did not see Allred pump four shots into Ruschak, killing him, she undoubtedly heard the screams of her helpless friends and Allred's repeated gunshots. After all, Cochran testified that she heard all of this from the other bathroom where she hid in the small house. More importantly, in

> Barwick's one-minute, seventeen-second 911 call, her voice moves quickly from panic and fright as she hears the gunshots outside the bathroom to desperate, indescribable screams of terror as Allred enters the bathroom and begins firing six shots into her body. Regardless of whether the fatal shot was the first of the six shots, the helpless victim clearly knew Allred was coming for her and fully recognized her impending death.

Id. at 1280.

Our case has very similar facts. Both victims' screams of terror are immortalized in their 911 calls, and although they were likely only aware of what was about to happen for less than a minute, that awareness is evident. This Court has repeatedly stated to use a common-sense inference when evaluating the circumstances around a killing to determine a victim's mental state; such an inference here leads to the inescapable conclusion that Dobbins and Amanda were aware of their impending deaths. *See e..g*, *Aguirre-Jarquin v. State*, 9 So.3d 593, 609 (Fla. 2009) (Common sense would indicate that an elderly woman confined to a wheelchair, who is one room away from a brutal murder, and who witnesses her attacker walk into the room, face her and stab her through the heart with a ten-inch chef's knife would be acutely aware of her impending death) (internal quotations omitted).

POINT III

FLORIDA'S DEATH PENALTY SCHEME IS CONSTITUTIONAL AND DOES NOT VIOLATE THE U.S. OR FLORIDA CONSTITUTIONS.

In 1972, the United States Supreme Court imposed a temporary, nation-wide moratorium on the death penalty. *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman* the Court held that the death penalty was being indiscriminately and capriciously imposed, and implicitly tasked the states with formulating a fairer system of administering it. *Id*. at 309-10. Four years later, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court reinstated the death penalty under Georgia's new statutory scheme. Georgia had instituted a scheme similar to that used by most states today: capital punishment was reserved for a few select crimes, and the trial was bifurcated into guilt and penalty phases; during the penalty phase the judge or jury would hear arguments in aggravation and mitigation, and while the state was limited to certain aggravation, the defendant was given wide latitude in what could be presented in mitigation. *Id*. 162-3. After trial, capital defendants, like in Florida, were afforded an expedited direct review of their case by the Supreme Court of Georgia, who would independently determine the appropriateness of the sentence. *Id*. at 166-7. The Court found that these procedures properly narrowed the application of the death penalty to only the worst-of-the-worst, and provided objective criteria to avoid its freakish or wanton use. *Id*. at 206-7. This narrowing of

cases is a "constitutionally necessary function" of state death penalty statutory schemes. *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

Appellant argues that Florida's death penalty statute and related laws have broadened the number of cases to such a degree as to betray those requirements of *Furman* and *Gregg*. (Appellant IB at 51-6). He goes so far as to say, "Every conceivable fact situation that could support a charge of first degree murder includes at least one of Florida's aggravating factors." *Id*. at 55. Even if we assume this assertion is correct for the sake of argument (which it is not), it completely ignores how the death penalty is implemented in the State of Florida. The existence of an aggravating factor is only the first step in the process Florida uses to narrow the large number of first-degree murder cases that result in the death penalty to only the worst of the worst. *See Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003) ("We have previously rejected the claim that the death penalty system is unconstitutional as being arbitrary and capricious because it fails to limit the class of persons eligible for the death penalty.") (citing *Shere v. State,* 579 So. 2d 86, 95 (Fla. 1991)).

A jury must go through several steps before returning a verdict for the death penalty. First, they must unanimously determine that at least one aggravating factor has been proven beyond a reasonable doubt; they can only choose from those presented by the prosecution, and the prosecution is limited by a statutory list of specific aggravators. Fla. Stat. § 921.141 (2)(a);(6) (2019). Before they even start

the weighing process, they then must unanimously find that any aggravators they found are sufficient on their own to warrant the death penalty. *See* Fl. Standard Jury Inst. 7.11 ("If you do unanimously find the existence of at least one aggravating factor *and* that the aggravating factor[s] [is][are] sufficient to impose a sentence of death, the next step…") (emphasis added). After making this unanimous determination, the jurors make individual determinations about which, if any mitigating factors were proven by a preponderance of the evidence. *Id*. Unlike the state and aggravating factors, in addition to a list of statutory mitigating circumstances, the defense is permitted to present, "the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty," and so the defense is not limited in any way as to what they can present in mitigation. Fla. Stat. § 921.141 (7) (2019). The jury must then make another unanimous finding, this time that whatever aggravators they had to unanimously find outweigh any mitigators they each individually found to exist. Fla. Stat. § 921.141 (2)(b)(2) (2019). After all this, their job is still not done; they must then unanimously find, after unanimously agreeing that the aggravators outweigh the mitigators, that the appropriate punishment is death. Fla. Stat. § 921.141 (2)(c) (2019). Even after all of these findings were made by a unanimous jury, the judge still has the authority to impose a life sentence instead of death; the judge, however, cannot override a life verdict. Fla. Stat. § 921.141 (3)(a) (2019). This lengthy narrowing process is a far

cry from Appellant's suggestion that the only inquiry that matters is the existence of one aggravating factor.

Appellant concedes that each enumerated aggravating factor satisfies the mandates of *Furman* and *Gregg*. *See* Appellant IB at 52 ("Each of the aggravating factors listed, taken separately, narrows the class of cases eligible for the death penalty.") He argues, instead, that the sheer number of aggravators abrogates the mandate of narrowing the class of defendants who will receive the death penalty. This argument is belied by the fact that of the sixteen aggravators Appellant cites, eight have been added in the nearly fifty years since *Furman* and *Gregg* were decided, one as recently as 2010. If every conceivable first-degree murder were already covered by the aggravators in Florida's death penalty scheme, as Appellant contests, it is curious that the legislature feels the need to add aggravators covering more factual scenarios.

Florida's capital punishment statutory scheme only begins, and ends well after, the finding of a single aggravating factor in a first-degree murder case. Appellant also urges this Court ("in the alternative") to tell the State legislature how to address the capital punishment scheme in the future. *See* (Appellant IB at 56). Appellee instead reminds this Court that it is not in the business of issuing advisory opinions. *See, e.g., Charles v. Southern Baptist Hospital of Fla. Inc.*, 209 So.3d 1199, 1217 (Fla. 2017) (J. Canady, dissenting) ("The decision of the majority here,

which can have no impact on this settled case, is a purely advisory opinion. Our job is to decide live controversies presented by the parties to a case that is before us.")

This claim should be denied.

POINT IV

APPELLANT'S DEATH SENTENCE FOR EACH MURDER WAS PROPORTIONATE

The death penalty is reserved for those cases which are the most aggravated and the least mitigated. *Silvia v. State*, 60 So.3d 959, 973 (Fla. 2011). Therefore, this Court always performs an independent proportionality review, which entails "a *qualitative* review…of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." *Offord v. State*, 959 So. 2d 187, 191 (Fla. 2007) (quoting *Urbin v. State*, 714 So. 2d 4116, 416 (Fla. 1988)). In making this review, this Court always accepts the jury's recommendation and the weight assigned by the trial judge to each aggravator and each mitigator. *Silvia*, 60 So.3d at 973.

Appellant's case easily falls into this category of the most aggravated and least mitigated. Despite Appellant's attempts to hand-wave away several aggravators in the proportionately review, there were five aggravators found for Amanda's murder and four for Dobbins's, and the judge assigned all "great weight" except for CCP, which he gave "moderate weight." Three of those aggravators, HAC, CCP, and prior violent felony convictions, are some of the most serious aggravators in Florida's

capital sentencing scheme. *See Puiatti v. Sec'y Fla. Dept. of Corr.*, 732 F.3d 1255 (11th Cir. 2013); and *Hodges v. State*, 55 So.3d 515 (Fla. 2010).

Additionally, despite Appellant's arguments to the contrary, he provided little to no meaningful mitigation. He had no history of significant mental health issues or brain injuries, he grew up in a normal home with two loving parents and a family everyone described as tight-knit, and before August 27, 2015, as his coworker and friend put it, Appellant was "just a normal sort of typical good guy". (R, 4288-91). This is a stark contrast to the substantial, weighty mitigation this Court has previously cited to find that the death penalty was disproportionate. A review of each case relied on by Appellant reveals that either much less aggravation, or much more mitigation is required than what this case provides. *See Kramer v. State*, 619 So. 2d 274 (Fla. 1993) (Defendant's alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison made the death penalty disproportionate when the evidence suggested nothing more than a spontaneous fight between an alcoholic and a man who was legally drunk); *Smalley v. State*, 546 So. 2d 720 (Fla. 1989), abrogated on other grounds by *Beltran-Lopez v. State*, 626 So. 2d 163 (Fla. 1993) (sole aggravator, HAC, sufficiently mitigated by defendant's severe depression, lack of criminal history, genuine remorse, and inability to appreciate the criminality of his conduct); *Ross v. State*, 474 So. 2d 1170 (Fla. 1985) (sole aggravator, HAC, sufficiently mitigated by

defendant's lack of criminal history, that he had been drinking the night of, and that the murder happened while the defendant and victim were in the middle of heated domestic dispute); *Sager v. State*, 699 So. 2d 619 (Fla. 1997) and *Voorhees v. State* 699 So. 2d 602 (Fla. 1997) (death disproportionate for both co-defendants when the murder occurred after a drunken episode with the victim, Sager had mental health issues, and Voorhees was an alcoholic with an abnormal reaction to alcohol); *Almeida v. State*, 748 So. 2d 922 (Fla. 1999) (Aggravator was defendant's *two* prior first-degree murders, but the mitigation presented showed he had severe mental health issues and had an abusive childhood).

These cases are easily distinguishable from Appellant's. Cases where this Court finds the death penalty disproportionate typically involved only one or two aggravators and usually involve defendants who presented actual mental health mitigation. Appellant's murders involve five aggravators for one victim, four for another, and he was unable to provide the judge or jury with any significant mental health mitigation or evidence of a troubled childhood to mitigate his actions. Much like the facts of this case are very similar to *Allred v. State*, so is the proportionality analysis. Just as Allred did, Appellant argues that only two aggravators are valid and that the murders stemmed from an ongoing heated domestic dispute. In *Allred*, this Court found:

> In this double homicide case, the court found three of the most serious aggravating factors—CCP, prior capital felony conviction, and HAC—

applicable to Barwick's murder and that the first two applied to Ruschak's murder as well. *See Jackson v. State*, 18 So.3d 1016, 1035 (Fla.2009) (stating HAC and CCP are "two of the most serious aggravators"), *cert. denied*, —— U.S. ——, 130 S.Ct. 1144, 175 L.Ed.2d 979 (2010); *Chamberlain v. State*, 881 So.2d 1087, 1109 (Fla.2004) ("CCP and prior violent felony conviction are considered among the more serious aggravating circumstances."). As explained previously, we reject Allred's challenges to two of the aggravators. With regard to mitigation, the sentencing court gave moderate to little weight to the nonstatutory mitigating circumstances established and found the aggravators "far outweigh[ed]" the mitigation.

We reject appellant's argument that the sentences are disproportionate because they resulted from a domestic dispute. "This Court does not recognize a domestic dispute exception in connection with death penalty analysis." *Lynch*, 841 So.2d at 377. Under the totality of the circumstances and after comparison of this case with similar cases, we conclude that the death sentences in this double homicide case are proportionate. *See Frances v. State*, 970 So.2d 806, 820–21 (Fla.2007) (affirming death sentences where two aggravators—prior capital felony conviction and committed in the course of a robbery—applied to both murders, HAC also applied to one victim, and one statutory mitigator and several nonstatutory mitigators were found); *Lynch*, 841 So.2d at 368 (affirming death sentences for murders of girlfriend and her daughter where two aggravators—prior violent felony conviction and commission during a felony—applied to both murders; a third aggravator—HAC in one and CCP in the other—applied in each; and one statutory and eight nonstatutory mitigators were found); *Francis v. State*, 808 So.2d 110, 141 & n. 12 (Fla.2002) (affirming death sentences where four aggravators—prior capital felony conviction, committed while engaged in a robbery, HAC, and victim vulnerability due to advanced age—were found as to each; two statutory mitigators—defendant's age and under extreme mental or emotional disturbance—were established; and nonstatutory mitigators including mental illness or emotional disturbance, no significant prior violent criminal activity, and ability to conform to the law may have been impaired were found).

Allred, 55 So.3d at 1284 (Fla. 2010).

Like Appellant, Allred came from a normal upbringing, and had little to no mental health mitigation to present. The most compelling mitigation Appellant and Allred were able to present was their lack of prior criminal history, which does little to mitigate against a cold, calculated, and premeditated double homicide. Allred even had two fewer aggravators per murder than Appellant does. This Court should find that both death sentences were proportional.

POINT V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND PROPERLY REJECTED MITIGATION NOT ESTABLISHED BY APPELLANT

It is within the discretion of the trial court to determine what, if any, mitigators have been established by the evidence, and this Court must uphold a court's determination of the applicability of a mitigator when it is supported by competent, substantial evidence. *See Philmore v. State*, 820 So. 2d 919, 936 (Fla. 2002). If "a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved," however, a "trial court may reject a defendant's claim that a mitigating circumstance has been proved if the record contains substantial evidence to support the trial court's rejection of the mitigating circumstance." *Nelson v. State*, 850 So. 2d 514, 529 (Fla. 2003) (quoting *Spencer v. State*, 645 So. 2d 377, 385 (Fla. 1994)). Just because a defendant presents expert testimony, a trial court is not required to

find extreme mental or emotional disturbance—even if that testimony is unopposed by another expert—especially when it is hard to reconcile with the other evidence presented in the case. *Hoskins v. State*, 965 So. 2d 1 (Fla. 2007).

Appellant argues the trial court erred in finding that he was not impaired at the time of the homicides and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired. (Appellant IB at 65). He argues that evidence of these mitigators was unrebutted and that the trial court cited no reasons for rejecting these mitigators. Both assertions are simply not supported by the evidence in the record or by the judge's sentencing order, where he discussed at length his valid reasons for rejecting both mitigators as unfounded:

> *xxi. Defendant was impaired at the time of the homicides.*
>
> A significant portion of the penalty phase addressed this alleged mitigating circumstance, which must be considered together with the following alleged mitigating circumstance: the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> As discussed above, the Defendant consumed alcohol and cocaine the night before and the early morning before the murders. The Defendant consumed the alcohol and cocaine while out with a friend until approximately 3 a.m. The Defendant consumed another beer at about 4 a.m. while speaking with Mike Dickens, after he ransacked Amanda's residence. According to the Defendant's experts, the alcohol and cocaine were no longer impairing or affecting the Defendant at the time of the murders several hours later that morning.
>
> Much of the focus during the penalty phase, as it pertained to this and the next alleged mitigating circumstance, was on the Defendant's

consumption of the prescribed sleep aid Ambien at approximately 5 a.m. the morning of the murders.

During the penalty phase, Dr. Mark Mills, a forensic psychiatrist, testified about the effect of the Ambien on the Defendant. Dr. Mills testified that Ambien has a known side effect of parasomnia, a sleep disorder which involves doing something while asleep, such as sleep walking, sleep talking, etc., but not being aware of what you are doing. Dr. Mills opined that based on his discussions with the Defendant, and other evidence, the Defendant was substantially impaired at the time of the murders from the Ambien, together with the other medications he was taking, and was suffering from parasomnia during the murders, such that he could not appreciate the criminality of his acts or conform to the requirements of law.

The defense also called Dr. Daniel Buffington, a clinical pharmacologist, to testify during the penalty phase on this issue. Dr. Buffington's testimony mirrored that of Dr. Mills, discussing the side effects of Ambien, including parasomnia. Dr. Buffington likewise opined that the Defendant was substantially impaired at the time of the murders, suffering parasomnia such that he could not appreciate the criminality of his acts or conform to the requirements of law.

During the cross-examination of Drs. Mills and Buffington, the State pointed out that the Defendant seemed to have a memory of waking up that morning, going to court that morning, engaging in a phone call with Amanda, going to Amanda's residence, parking on another street, arming himself with two guns, going to Amanda's house, but doesn't recall committing the murders in the house. Drs. Mills and Buffington characterized this as snapshot memory of some of the events, which they indicated could happen during a parasomnia event.

During the penalty phase, in rebuttal the State introduced a video and audio recording of the Defendant's court appearance at 9 a.m. the morning of the murders—approximately 90 minutes before the murders and a few hours after the Defendant took the Ambien. During his court appearance, the Defendant appeared alert and oriented when he entered a no contest plea to the misdemeanor violation of injunction charge. The Defendant even inquired of the presiding judge whether he could use the money he used to post his bond to pay his court costs, inquired

about early termination of his probation, and advised the judge that he had already signed up for a batterers intervention course. The Defendant did not appear to be impaired.

The State also called St. Johns County Court Judge Charles Tinlin as a rebuttal witness during the penalty phase. Judge Tinlin was the presiding judge over the aforementioned proceeding. Judge Tinlin testified that the Defendant did not appear to be under the influence or impaired, and if the Defendant did seem that way he would not have accepted the no contest plea. Moreover, during the guilt phase of the trial, Kyle Bedran, the Defendant's attorney during that court appearance, testified the Defendant was coherent and seemed to be in his right senses at that time.

At the penalty phase, the State also called Dr. Jeffrey Danzinger, a psychiatrist, to testify. Dr. Danzinger opined that the Defendant was not substantially impaired or suffering from parasomnia at the time of the murders. Dr. Danzinger testified the Defendant would not have been able to engage in the plea colloquy or the exchange he had with Judge Tinlin in court that morning if he was suffering from parasomnia or substantial impairment. Moreover, Dr. Danzinger related that while the Defendant is now telling his penalty phase experts that he has no recollection of the murders, approximately 90 days after the murders when being interviewed by psychologist Harry Krop, the Defendant never mentioned a blackout, memory loss or snapshot memory of the events surrounding the murder, but only said he was hungover at the time and snapped. Moreover, Dr. Danzinger found significant the Defendant's immediate flight from the jurisdiction following the murders as indicative of someone who knew what he did and was fully aware of the wrongfulness of his conduct. Dr. Danzinger disagreed with the opinions of Drs. Mills and Buffington that the Defendant was suffering from parasomnia or was substantially impaired at the time of the murders.

This Court, after carefully considering the evidence before it, concludes the Defendant has not established by the greater weight of the evidence that he was impaired at the time of the murders. This Court finds persuasive the recording of the Defendant's court appearance, where he went through a plea colloquy conducted by Judge Tinlin, in which he appeared alert and oriented and asked questions demonstrating higher-level thinking, such as use of bail funds to pay

> court costs and getting off probation early. The Court also finds persuasive the testimony of the presiding judge and the Defendant's own attorney at that court appearance, indicating the Defendant did not seem to be impaired. It defies logic that the Defendant would have taken Ambien approximately four hours before his court appearance, appeared alert and oriented at his court appearance, and then approximately 90 minutes later when he committed the murders he was impaired and suffering from parasomnia not realizing what he was doing. The Court finds Dr. Danzinger's opinions more credible than those of Drs. Mills and Buffington. Accordingly, the Court gives this mitigating circumstance NO WEIGHT.
>
> > *xxii. The capacity of Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.*
> >
> > Fla. Stat. §921.141 (7)(f)(2017), enumerates the mitigating circumstance of "[t]he capacity of the Defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired." The analysis for this alleged mitigating circumstance is the same as the preceding alleged mitigating circumstance, wherein the Defendant asserts he was impaired at the time of the murders. As discussed in detail above, the Court has carefully considered the evidence and finds that this mitigating circumstance has not been established by the greater weight of the evidence, and accordingly, the Court gives this mitigating circumstance NO WEIGHT.

(R, 3542-7).

The trial court considered the evidence presented by Appellant and the State, and when compared to other evidence in the case found that the opinions of his experts that he was experiencing a parasomnia event at the time of the murders didn't make any sense. While Appellee does not contest that Appellant was going through an emotionally stressful time in his life, the evidence also does not support his theory

that he was impaired by this emotional strain to the point he could not conform his conduct to the law or that he was otherwise mentally impaired at the time of the murders. As opposed to a spontaneous outburst in the middle of an active argument, the evidence shows that Appellant had at least thirty minutes after his phone call with Amanda to plan, decide, and enact his plot to go to his marital home and attempt to kill her boyfriend and anyone else he found there. Someone who is impaired does not top off their gas tank right before the murders so he can drive farther before having to stop. He also does not park in an adjacent neighborhood where his car won't be seen, and then sneak up behind the house. The evidence does not support a finding that Appellant was impaired, but instead knew exactly what he was doing and that it was wrong. *See, e.g.*, *Allen v. State*, 137 So.3d 946, 966 (Fla. 2013) (Defendant's contention that she was unable to appreciate the criminality of her actions rebutted by the fact that the events surrounding the victim's death lasted for an extensive period of time rather than an instantaneous loss of impulse control, and that defendant was intelligent enough to destroy evidence in an attempt to exculpate herself from the murder).

Even if this Court finds that the trial court should have found these mitigators, any error is harmless. *See Ault v. State*, 53 So.3d 175, 186-7 (Fla. 2010) (Holding that this Court will not overturn a capital appellant's sentence if a trial court's findings on mitigation are harmless beyond a reasonable doubt). There is competent,

substantial evidence Appellant was not experiencing a parasomnia event, so any error would have been from not finding that his emotional turmoil caused him some impairment. Such a finding would have done little more to mitigate this double homicide, given the current dearth of other mitigation and the weighty and prolific aggravation. *See Miller v. State*, 770 So. 2d 1144, 1150 (Fla. 2000) (Finding that although the trial court abused its discretion in not finding that defendant suffered from long-term alcohol and substance abuse, the error was harmless given the weighty aggravating factors present.)

This claim should be denied.

POINT VI

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE CCP AND HAC AGGRAVATORS WHICH WERE UNANIMOUSLY FOUND BY THE JURY AND THE JUDGE AND WERE SUPPORTED BY THE EVIDENCE

In this point Appellant argues that since, according to him, CCP and HAC don't apply in his case, the jury was improperly instructed on those aggravators and he should receive a new penalty phase. (Appellant Brief IB 71-2). He also argues that the changes to Florida's death penalty scheme after the *Hurst* decisions make finding any instruction on inapplicable aggravators harmless more difficult, and that the error here was not harmless. (Appellant IB at 72-6). The first part of this argument is merely a rebranding of Appellant's first two points on appeal, rebutted

supra in Points I and II of this brief, and thus there was no error in instructing the jury on well-established aggravators.

This Court has already found that even under Florida's new death penalty statute requiring unanimity in a jury's death verdict, consideration of an invalid aggravator is subject to harmless error review. *See*, *e.g.*, *Lowe v. State*, 259 So.3d 23, 60 (Fla. 2018) ("Even if we were to conclude that the circumstantial evidence in this case was insufficient to prove the avoid arrest aggravator and that the aggravator should be stricken, any error by the trial court would be harmless."); *Cozzie v. State*, 225 So.3d 717, 729 (Fla. 2017) (Holding that even if an avoid arrest aggravator were stricken, the error would be harmless due the unanimous jury verdict and because the remaining aggravators still outweighed the mitigators).

With that in mind, even if this Court were to strike one or both of the CCP and HAC mitigators, which Appellee maintains are amply supported by the record for both murders, any error would be harmless because the remaining aggravators—the murders were committed in the course of a burglary, prior violent felony conviction due to the contemporaneous murders, and that the victim held a domestic violence injunction against Appellant for the murder of Amanda—still outweigh, on their own, the minimal mitigation Appellant put forth. *See Campbell v. State*, 159 So.3d 814, 834 (Fla. 2015) (No reasonable possibility appellant would have received life sentence after striking HAC aggravator when remaining aggravators of CCP, prior

violent felony, and pecuniary gain, still outweighed mitigation); *Cozzie* and *Lowe*, *supra*. This claim should be denied.

POINT VII

THE TRIAL JUDGE PROPERLY ALLOWED ADMISSIBLE VICTIM IMPACT EVIDENCE AND THE JURY'S VERDICT WAS NOT TAINTED

In this point, Appellant urges this Court to recede from its holding in *Windom v. State*, 656 So. 2d 432 (Fla. 1995) and overturn decades of precedent finding that victim impact evidence is properly admissible.

A trial court's decision to admit victim impact testimony is reviewed for an abuse of discretion. *Kalisz v. State*, 124 So.3d 185, 211 (Fla. 2013), *cert. denied*, 134 S. Ct. 1547 (2014); *Deparvine v. State*, 995 So. 2d 351, 378 (Fla. 2008). As stated in *Jackson v. State*, 127 So.3d 447, 473 (Fla. 2013), permissible victim impact statements do "not fall within one of the proscribed categories of victim impact evidence delineated in section 921.141(7). These proscribed categories are characterizations and opinions concerning (1) the crime, (2) the defendant, or (3) the appropriate sentence." Appellant has not established, and cannot establish, an abuse of discretion in the trial court's admission of the victim impact evidence.

"Evidence of a family member's grief and suffering due to the loss of the victim is evidence of 'the resultant loss to the community's members by the victim's

death' permitted by section 921.141(7),[4] and the admission of such evidence is consistent with the Supreme Court's decision in *Payne v. Tennessee*, 501 U.S. 808 (1991)." Victim impact evidence "relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family" is entirely proper. *Id. Payne* does not preclude the State from depicting to the jury the "life" of the human being murdered by the defendant. *Id.* at 822.

In the instant case, the trial court acted within its discretion in allowing four witnesses to give victim impact statements. *See Huggins v. State*, 889 So. 2d 743, 765 (Fla. 2004) (Upholding the trial court's admission of victim impact evidence presented during the penalty phase from three witnesses—the victim's husband, mother, and best friend—regarding their relationship with the victim and the loss they suffered due to her murder). The evidence presented in this case was limited to the type of evidence specified in section 921.141(7), Florida Statutes. Here, the proper balance was struck between the victims' family members' right to be heard and to assist the jury in understanding the loss of Amanda and Dobbins, and

[4] Section 921.141(7), Florida Statutes (2006), provides that in a capital case, once the prosecution has provided evidence of one or more aggravating factors, the prosecution may present victim impact evidence and that: Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

Appellant's right to a fair trial. In fact, all but one of Appellant's objections to the statements were sustained, so Appellant was given a lot of input in limiting these statements to what is allowed by statute.

This Court spells out the purpose of victim impact statements in *Deparvine v. State*, 995 So. 2d 351, 378 (Fla. 2008), stating, "[v]ictim impact evidence is designed to show 'each victim's uniqueness as an individual human being, whatever the jury might think the loss to the community resulting from his death might be,'" quoting *Payne v. Tennessee*, 501 U.S. 808 (1991). The victim impact evidence presented in this case was not unnecessarily emotional or inflammatory. None of the four statements made any mention of Appellant. None asked for a specific sentence or punishment. None was overly emotional, and none made mention of revenge or retribution. None of the statements discussed the crime. Each statement merely sought to express the specific loss that individual felt.

Appellant also argues that the one objected-to comment, "Please think about Amanda and the lives she has blessed," inserted a religious obligation to the jury and a religious dimension to the life of the victim. (Appellant IB at 78-9). This comment, taken on its own and in the full context of the victim impact statements, does neither. The word "blessing" has a colloquial definition outside its specific religious context, and there is nothing in the record to support the contention the witness or the

prosecution was trying to use religion to pressure the jury into an impermissible verdict.

Even if this Court were to find any error in the admission of the victim impact evidence, given the strong case in aggravation and the relatively weak case for mitigation, the error is harmless beyond a reasonable doubt. *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998). There is no reasonable possibility that the jurors advised imposition of the death penalty based on the complained-of comments. Neither did the judge impose the death penalty because of the complained-of victim impact testimony. Rather, he imposed it because Colley met the statutory criteria. This Court should affirm the trial court's ruling.

POINT VIII

THE PROSECUTOR'S PENALTY PHASE ARGUMENTS WERE NEITHER INFLAMMATORY NOR IMPROPER

To determine whether a prosecutor has engaged in improper argument, it is necessary to evaluate the actions of the prosecutor in context rather than focus on the challenged statement in isolation. *State v. Jones*, 867 So. 2d 398,400 (Fla. 2004). "the rule against inflammatory and abusive argument by a state's attorney is clear, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made." *Bush v. State*, 461 So. 2d 936, 941 (Fla. 1984), holding modified on other grounds by *State v. Evans*, 770 So. 2d 1174 (Fla. 2000). Such comments or arguments by a prosecutor only warrant

reversal if they were so outrageous that they taint the finding of guilt or recommendation of death. *Crump v. State,* 622 So. 2d 963, 972 (Fla. 1993). Any error in prosecutorial comments is harmless, if there is no reasonable possibility that those comments affected the verdict. *King v. State*, 623 So. 2d 486, 488 (Fla. 1993).

In *Crump*, the prosecutor made comments in closing argument comparing the defense to an octopus who was clouding the waters in an attempt to slither away, and asked twice for the jury to give a recommendation for death to send a message to the community. 622 So. 2d at 972. This Court found that these comments did not justify reversal. In *Darden v. State,* 329 So. 2d 287, 289 (Fla. 1976), after defense counsel said whoever committed the acts in that case was an animal, the prosecutor repeatedly referred to the defendant as an animal. The prosecutor also implied the defendant was a liar, saying, "Let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out," and "What does he have to lose to lie? Nothing. Nothing." *Id*. This Court found that in the context of the heinous nature of the crimes committed, and that defense counsel was the first to use the animal characterization, these comments, including the ones calling the defendant a liar, were not improper. *Id*. at 290. In another case, the prosecutor argued to the jury that the defendant was a "dangerous, vicious, cold-blooded murderer," and warned them that neither the police or the judicial system could protect the public from people like him. *Esty v.*

State, 642 So. 2d 1074, 1079 (Fla. 1994). Even these comments were not seen as so overly prejudicial as to vitiate the entire trial. *Id*.

Cases where this Court did find error involved much more egregious or numerous remarks. *See Knight v. State*, 316 So. 2d 576 (Fla. 1st DCA 1975) (Defendant unduly prejudiced when prosecutor made comments throughout the trial and closing argument concerning the defendant's lack of support for his family, direct assaults on his morals, appeals of sympathy for the plight of the widow and the children of the deceased, and attempts to play on the jurors' geographic prejudice); *King v. State*, 623 So. 2d 486, 488 (Fla. 1993) (Prosecutor went too far when he gave a dissertation on evil which amounted to admonishing the jurors, "they would be cooperating with evil and would themselves be involved in evil just like" the defendant if they recommended life instead of death); *Taylor v. State*, 640 So. 2d 1127, 1134-35 (Fla. 1st DCA 1994) (Prosecutor committed harmful error by trying to evoke an emotional response from the jury during closing arguments when he struck the table with the murder weapon and conjectured about the child victim's dying words).

What overly prejudicial remarks have in common is that they were so numerous as to take over the trial, or were individually completely over the line. For example, in *Taylor*, *supra*, while it was only one comment that was made, the prosecutor was striking a table with the murder weapon while talking about what a

dying child may have said. 640 So. 2d at 1134-35. That remark was not just irrelevant, it was a clear and blatant attempt to play to the jury's emotions, not an argument on the facts. None of the comments singled out by Appellant rise to the level of tainting the jury's verdict.

The first comment Appellant finds issue with is the following:

> Now, your job is a – nobody is going to put it lightly. It's going to be a difficult job. Nobody envies the job that you're being asked to do in this particular case.
>
> It is a solemn one, but it is an important one. It is a job that requires great courage.

(R, 4625)[5].

Appellant argues that the prosecutor was telling the jurors that voting for death and rejecting a vote for life was the courageous choice, which could be construed as impermissible argument. *See Urbin v. State*, 714 So. 2d 411, 421 (Fla. 1998) (Finding the prosecutor's argument that voting for life would be taking "the easy way out" was improper). However, when reading the comment with the argument before and after the one isolated by Appellant, it's clear he is misconstruing what the prosecutor said:

> You heard during the course of this trial some information about Amanda Colley. She had a dream to one day possibly be a [sic] advocate for domestic violence. You heard about Lindy Dobbins, her children, her stepson, who she inspired to get his driver's license. That's

[5] Appellant's Initial Brief cites this quotation at page 4225 instead of 4625, Appellee respectfully submits that is a small typo and that the correct page is 4625.

who these people were: a daughter, a sister, a friend, a wife, and a mother. Amanda Colley and Lindy Dobbins were human beings.

And now they're dead. And they're dead because of one man, the choices that one man made, the selfish choices that he made on August the 27th of 2015. The choices that he made for his own selfish desires because he couldn't let things go, because he was losing control, and this was the only way that he could regain control. Now, your job is a – nobody is going to put it lightly. It's going to be a difficult job. Nobody envies the job that you're being asked to do in this particular case. It is a solemn one, but it is an important one. It is a job that requires great courage. So what is your role here today in this phase of the trial?

It all starts with the law. Now, it is true, and I'm sure the defense will tell you when they get up here, that there will be no requirement at any point in time, legally, that you return a verdict for the death penalty. However, it is the law. And we talked about this during jury selection, and each of you agreed and took an oath that you would do that. You would consider, you would consider in this case, the death penalty. You also said you would consider life without the possibility of parole.

And so I'd like to spend some time with you, talk to you first about your role in this particular case, and then talk to you about the law that applies in this particular case and sort of how you go about looking at the evidence that the State has presented to you in this case and how to weigh the different pieces of evidence.

So what you're going to learn in a few minutes during the jury instructions the judge will give you is that it's now your duty to make a decision as to the appropriate punishment that the defendant should be – should be imposed on the defendant for the crime he committed, the first-degree murder of Amanda Colley and the first-degree murder of Lindy Dobbins. And there are two possible punishments, as you know. And it's life without the possibility of parole or death. And it is important. It is important you follow the laws that are spelled out in the instructions.

(R, 4624-6) (Paragraph breaks in original altered to ease reading).

The prosecutor begins by explaining why the jury was there, which was because Appellant murdered Amanda Colley and Lindy Dobbins. Then, after telling them that their job is a difficult and courageous one, he then expounds on what that job is: not to vote for death because it's the hard choice, but that their job is weighing those aggravators and mitigators and reaching a verdict for life or death, and it's *that* job which is difficult and courageous. It is permissible for a prosecutor to tell the jury what their role is and help them understand how to deliberate.

Appellant only challenges one other argument by the prosecutor, saying it improperly appealed to the sympathy or prejudices of the jurors:

> He may have had a right to be upset, but not like this, not like this. The defendant was on a mission. Whatever he thought about Amanda Colley, he was not the judge, jury, and executioner of her character. That was not his job. What she did was – did not deserve a death sentence. What he did, in shooting her down the way he did and shooting Lindy Dobbins and killing her, that does deserve a death sentence.

(R, 4688).

Appellant does not explain how this improperly appealed to the sympathy or prejudices of the jurors, and again when it is put it in its proper context it is even more clear that the argument Appellant believes was being made does not exist:

> Many years ahead of them, but their lives were cut short, and they were cut short in the most vile and heinous way. For what? For what? Why? Because he couldn't let go. He may have had a right to be upset, but not like this, not like this. The defendant was on a mission. Whatever he thought about Amanda Colley, he was not the judge, jury, and executioner of her character. That was not his job. What she did was –

> did not deserve a death sentence. What he did, in shooting her down the way he did and shooting Lindy Dobbins and killing her, that does deserve a death sentence.
>
> In a few minutes, you're going to go back to the jury room, and you're going to contemplate that verdict in this particular case. And I ask you to deliberate about that. There's 12 of you that will decide that. And it's only going to take one of you to say no.
>
> I'm asking each and every one of you, consider the evidence. Consider the aggravating circumstances in this case. Consider the mitigating circumstances. *If you do, I'm confident you will find that the aggravating circumstances in this particular case, how the defendant carried out these crimes, will far outweigh whatever mitigating circumstances that you find*.
>
> And when you find that, I ask you, not eight of you, nine of you, ten of you, or 11 of you, all 12 of you, I ask that you find that in this particular case, this is not a run-of-the-mill first-degree-murder case. This is a case where the aggravating circumstances in the case have great weight. What the defendant did in this particular case was horrific. It was not justified. It was unnecessary. And it far outweighs any mitigating circumstances in this particular case.

(R, 4687-9). (Emphasis added, paragraph breaks in original altered to ease reading).

The entirety of the prosecutor's argument is that this was a heinous crime where the aggravators far outweigh the mitigators, one of the mitigators being the effects of his tumultuous relationship with his wife ("what she did") and thus death is the proper verdict in this case. As that argument is the entire reason there is a penalty phase and is a conclusion the jury must reach to return a verdict of death, this is permissible argument.

Even if this Court finds one or both of the complained-of comments to be improper, they are two relatively benign, isolated comments in an otherwise lengthy, legally permissible closing argument. This claim should be denied.

CONCLUSION

Appellant's convictions and sentences of death should be upheld in all respects.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

s/PATRICK A. BOBEK
PATRICK A. BOBEK
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 112839
444 Seabreeze Blvd., 5th Floor
Daytona Beach, Florida 32118
Phone: (386) 238-4990
Fax: (386) 226-0457
patrick.bobek@myfloridalegal.com
cappapp@myfloridalegal.com

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: George E. Burden**,** Assistant Public Defender, burden.george@pd7.org, and Steven N. Gosney, Assistant Public Defender,

gosney.steve@pd7.org, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118 on this 30th day of August, 2019.

s/PATRICK BOBEK
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

s/PATRICK BOBEK
ASSISTANT ATTORNEY GENERAL