IN THE SUPREME COURT OF FLORIDA

JAMES T. COLLEY, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. SC18-2014

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The record on appeal is comprised of two digital files with consecutively numbered pages. The record on appeal has 5,830 pages, and counsel will refer to the record on appeal using the letter "R." The trial transcript has 1,137 pages, and counsel will refer to the trial transcript using the letter "T."

STATEMENT OF THE CASE

James T. Colley, Jr., hereinafter referred to as appellant, was indicted by a Grand Jury with two counts of Murder in the First Degree, two counts of Attempted First Degree Murder, and one count of Burglary with an Assault or Battery; Burglary of a Dwelling while Armed with a Firearm; and Aggravated Stalking after Injunction for the August 27, 2015 shooting death of his estranged

wife Amanda Colley and Amanda Colley's girlfriend Lindy Dobbins. (R 55) The state filed a Notice of Intent to Seek the Death Penalty, and renoticed the intent to seek the death penalty after the new death penalty statute went into effect. (R 121, 232) The appellant filed a Motion to Preclude the Death Penalty on the grounds that there was no death penalty in the State of Florida due to the United States Supreme Court decision of Hurst v. Florida, 577 US ___ 2016, that invalidated the Florida death penalty. (R 149) The Motion to Preclude the Death Penalty was denied.[1] (R 165)

The state provided notice of five aggravating factors that it believed applied to this case, and the state renoticed the same aggravating factors after the Florida Legislature passed a new death penalty statute in 2017.[2] (R 159, 230) The appellant filed six pretrial motions challenging the constitutionality of the

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[1] The appellant amended the Motion to Preclude the Death Penalty based upon the Florida Supreme Court Hurst and Perry decisions finding that the newly enacted Florida death penalty was unconstitutional. (R 191) After hearing, Judge Maltz denied the Renewed Motion to Preclude the Death Penalty. (R 199)

[2] The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; The capital felony was committed while the Defendant was engaged in the commission of a burglary; The capital felony was especially heinous, atrocious, or cruel; The capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; and The capital felony was committed by a person subject to an injunction and was committed against the petitioner who obtained the injunction.

Florida death penalty scheme.[3] The trial court denied these motions. (R 648, 650, 652, 660, 746) The appellant filed a pre-trial motion to exclude victim impact evidence which was denied. (R 350) The appellant filed a motion for change of venue on the grounds of pretrial publicity. (R 3769) The trial court denied the Motion for Change of Venue, but would revisit the issue during jury selection if necessary. (R 3787)

The case proceeded to trial. (T 5) During the testimony of St. Johns Deputy Douglas Kowieski the state sought to introduce hearsay evidence over appellant's objection. (T 232) The state sought to introduce part of a conversation the appellant's father had with the appellant after the shooting. (T 232) The state sought to introduce the statement as an excited utterance. (T 233) The trial judge allowed the statement in over defense objection. (T 235)

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[3] Felony Murder Aggravating Factor should be struck because the least culpable form of first degree murder is being used as the sole basis to impose capital punishment; (R 373) CCP Aggravating Factor is vague and overly broad; (R 444) Prior Violent Felony Aggravating Factor as applied fails to limit the class of death eligible defendants; (R 516) HAC aggravating factor is vague and overbroad; (R 484) Injunction Violation Aggravating factor because the factor is vague and over broad, it is not capable of a constitutionally adequate narrowing construction, and as such it will be applied in an arbitrary and inconsistent manner; (R 723) Florida Statute 921.141 fails to narrow class of death-eligible murderers. (R 823)

Likewise, the state sought to introduce the testimony of Brittany Manno, a person that was walking a dog in the vicinity of James Colley, Sr. at 10:15 am the morning of the shooting. (T 313) Manno overheard James Colley, Sr. talking on his cell phone "speaker phone" sounding panicked and distressed. (T 313) James Colley, Sr. was pleading with someone to come back and get their truck and not to do it. (T 314) He further stated: "Son, please don't do this. Come back. We all know what you've been through. Um, we'll take you to see your kids." (T 314) She heard the caller on the other end of the call state: "I just can't fucking take this anymore." (T 314) The state argued that these hearsay statements should be introduced into evidence. (T 323) The trial judge permitted the statement into evidence over appellant's objection. (T 326)

The state rests. (T 735) The appellant made a Motion for Judgment of Acquittal on the ground that the state failed to prove identity. (T 737) The trial judge denied the Motion for Judgment of Acquittal. (T 740) The appellant renewed his Motion for Judgment of Acquittal which was denied. (R 901) The jury returned a verdict of guilty as charged on all counts. (T 1,113)

Penalty Phase

After a full colloquy, Mr. Colley did not take the stand during the penalty phase. (R4321-4323) In the penalty phase, the jury unanimously found the

aggravators in its interrogatory verdict and recommended a sentence of death for counts one and two. (R 3313-3318, 4781-4790)

On July 27, 2018, the defense submitted a motion for new trial and the trial court denied same by written order. (R 3347, 3351) The Spencer[4] hearing on October 2, 2018 included the submission of 20 letters in support of Mr. Colley, the detention facility director's testimony about his adjustment as an inmate, and Mr. Colley's short statement. (R 3436, R 4812, 4822) The defense submitted its sentencing memorandum on October 11, 2018. (R 3461-3485) The state submitted a sentencing memorandum on October 12, 2018. (R 3461-3486) The trial judge's written Sentencing Order was submitted at the sentencing date on November 30, 2018, concurrent with its sentence and oral pronouncement of death on Counts I and II. (R 3491-3508, 3511-3583, 4834-4848) An amended notice of appeal was filed on December 2, 2018. (R 3583)

[4] Spencer v. State, 615 So. 2d 688, 691 (Fla. 1993)

STATEMENT OF THE FACTS

James Colley and his wife Amanda were married eight years with two children, and they began having marital problems in the summer of 2015. (T 385-89) Amanda Colley sought and obtained a domestic violence injunction against her husband on August 10, 2015 requiring James Colley to leaving the marital home at 260 South Bellagio. (R 283-2846) James Colley thereafter resided with his sister at 1189 Garrison Drive. (T 501, 540) During the separation Amanda Colley was in a intimate relationship with Lamar Douberly and James Colley was in an intimate relationship with Amy Mason. (T 155-156; 641-649)

Both Colley spouses were discreet in their new relationships. Days before the shootings, a neighbor provided the appellant a picture of Douberly at the Colley house. (T 153) The picture along with the fact that Douberly would park his vehicle away from the Colley home gave suspicion to the appellant that his wife was having an intimate relationship with Douberly. (T 153) Amanda Colley was confronted by her husband with suspicions of infidelity, and she denied it explaining that Lamar Douberly was the yard man. (T 834) After receiving his wife's repeated denials, the appellant expressed his love for his wife and hopes that they had a future together. (T 838)

In the early morning hours of August 27, 2015 the appellant visited his

friend Mike Dickens after visiting the marital home. (T 540) The appellant was agitated, upset and antsy. (T 541) The appellant began to cry. (T 541) The appellant showed Dickens sex toys that he found in the marital home. (T 542) The appellant observed that this was the proof that the appellant's wife was cheating. (T 543) Meanwhile at this time, Amanda Colley was staying with Lamar Douberly at his camper. (T 155) Amanda Colley began receiving text messages and telephone calls from the appellant. (T 156) The appellant called his wife 22 times and she answered one call at 4:53 am. (T 408) Amanda Colley's telephone conversation with the appellant was heated, and the main topic was whether Amanda Colley was in a romantic relationship with another man, which Amanda Colley denied. (T 156, 409) Amanda Colley decided that she would return to her house while the appellant was at a scheduled Court hearing that morning. (T 157)

Between 5:26 a.m. and 5:53 a.m. the appellant sent the following text messages to Amanda Colley: "You should have just told me the truth, that this is what you wanted. (T 422) "I would have left you alone. And I would have -- and I have you a chance to walk away right now. Whips and gag balls, really? I'm glad that this was -- what's gets you off." (T 422) "You should have told me. I could have moved on. "I guess all the crying yourself to sleep" -- or whatever that word is -- "shit was a liar." (T 422) "Take our photos down of your face -- your

Facebook and our whole house, please. "Give me the furniture and let me move on. I'll buy a TV tomorrow and you can pick it up, and we will never speak again." (T 423) "And I won't tell anyone about this. This is just as bad for you as me. At this point he is welcome in my house. Is there any -- there any way? Eight years and two kids." (T 423)

At 8:51 a.m. the appellant sent a text message to his wife stating: ""Call me or I'm going to come find you." (T 426) Amanda Colley called the appellant back at 8:58 a.m. and they were connected for six minutes. (T 426) After that phone call the appellant came before St. Johns County Judge Tinlin and entered a plea to a violation of the restraining order. (T 605-610) At 9:10 a.m. Amanda Colley returned home, and she made a "Face Time" cell phone call to Douberly. (T 158, 523) Douberly saw that the Colley home was ransacked. (T 158) Douberly called the St. Johns County non-emergency telephone line to report a domestic incident, and called Lindy Dobbins to discuss the matter. (T 159) The appellant's wife answered a call from the appellant at 9:41 a.m. and they stayed connected for 14 minutes. (T 427) During that call, the appellant's vehicle was tracked in the vicinity of his residence. (T 633, 634) Prior to this telephone call the appellant had planned to go to work, and after work met with Amy Mason to buy a tie to wear at a wedding celebration that weekend. (T 649)

At 9:42 a.m. Lamar Douberly arrived at the Colley residence and found Amanda Colley cleaning up some of the shattered glass. (T 159) At 9:55 a.m. a Public Service Assistance (PSA) Officer arrived at the residence, and the PSA Officer surveyed the damage. (T 160) Amanda Colley did not want any legal action taken until she spoke with her mother and attorney, so the PSA Officer left without taking any further action. (T 573)

Rachel Hendricks testified that she received a telephone call from Lindy Dobbins and was informed that there was an incident at the Colley home. (T 100) Hendricks drove to the Colley home to check on Amanda Colley and arrived just afer Lindy Dobbins. (T 102) Hendricks testified that when she arrived a Public Service Assistance (PSA) Officer was leaving.[5] (T 100-102) Amanda Colley was crying and the Colley home was ransacked. (T 101) There were clothes, broken TVs and garbage cans dumped all over the house. (T 101)

At 10:14 a.m. the appellant purchased beer and 2.76 gallons of gas. (T 527) At 10:28 a.m. the appellant's father was on his cell phone pleading with his son: "Please, please, son, come back and get your truck. Um, don't do this. Everybody knows what you've been through." (T 334, 428) The caller responded: ""I can' t

[5] A neighbor had a video surveillance system. The video from the system showed that the PSA officer departed the Colley residence at 10:09 am, and Rachel Hendricks arrived at the Colley residence at 10:27 am. (T 525)

F'ing take this anymore." (T 336)

Minutes later Douberly was in the kitchen area cooking when he heard a pop. (T 165) Douberly noticed that there was some plastic missing from the vertical blinds, and went to investigate. (T 165) Douberly observed a bullet hole, and then suddenly a second bullet hole appeared closer to where Douberly was standing. (T 165) James Colley was standing in the backyard with a handgun, shooting into the living room.[6] (T 103) Lamar Douberly yelled "that is gunfire– Run!" (T 108) Lamar Douberly, thinking he was the target of the attack, ran from the kitchen, and out through the garage. (T 108, 166) At 10:36 am, Douberly slammed open the garage door, rolled underneath the garage door, and then ran through the cul-de-sac between two homes. (T 166)

Amanda Colley, Lindy Dobbins, and Rachel Hendricks ran into the master bedroom. (T 108) Amanda Colley ran into the bathroom to hide. (T 109) Lindy Dobbins and Rachel Hendricks ran into the master bathroom closet and slammed the door and barricaded themselves in. (T 109) Lindy Dobbins knelt down next to a chest that was up against the right wall of the master closet and hid behind the chest and called 911. (T 110)

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[6] A live 9 millimeter round and a 9 millimeter shell casing was located in the backyard. (T 250, 251)

Rachel Hendricks testified that James Colley entered the home and confronted Amanda Colley in the bathroom area, shouting "Where is he? Where is he? Where the fuck is he?" (T 111) Amanda Colley responded: "He's not in here. **I don't know**." (T 111) James Colley came over and tried to get into the closet door, and Amanda Colley said, "He's not in there; **that's Rachel and Lindy in there. That's Rachel and Lindy.**" (T 111) Lindy Dobbins shouted from the closet: **"It's Lindy in here, It's Lindy."** (T 111) The words in bold were not heard over the 911 calls found in State Exhibit 5.

Amanda Colley and James Colley were arguing and then there was a gunshot, and the argument ended. (T 111)[7] James Colley then tried to get into the closet, saying, **"Open the door. Open the door. I'm going to shoot."** (T 112) James Colley then shot through the closet door and the bullet grazed Rachel Hendricks' arm. (T 112) Hendricks backed off from the closet door, and the closet door came in on her as James Colley walked past the closet door and approached Lindy Dobbins with a handgun in hand. (T 112) Lindy Dobbins said, **"Oh, my God, no."** (T 113) Rachel Hendricks testified that she ran out of the closet and heard a shot. (T 113) At 10:37 a.m. Rachel Hendricks ran out of the front door of

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[7] Lindy Dobbins was likely shot first in the closet, and her shots were immediately fatal. The 911 calls establish that when Amanda Colley was shot she exclaimed "I have been shot, I have been shot." See State Exhibit 5.

the house and ran into the Dickens residence nearby. (T 115, 526) At 10:39 a.m. the appellant called his father and spoke with him for two minutes. (T 429) (Bold lettered words above were not heard on the 911 calls)

St. Johns County deputies responded to the Colley home after receiving 911 calls. (T 200) The deputies secured the house and discovered the body of Lindy Dobbins in the master bathroom closet and the body of Amanda Colley in the master bathroom. (T 206) A K-9 deputy arrived on the scene and tracked from the last known position of the appellant (not the appellant's scent) exiting the scene through the backyard to a neighborhood where a car was likely parked. (T 225)

After the shootings, St. Johns Deputy Douglas Kowieski drove to the last known address of the appellant. (T 230) Deputy Kowieski came upon the appellant's father leaving the residence and made a felony stop. (T 231) The appellant's father seemed "a little bit excited, panic and seemed a little bit flustered." (T 232) The appellant's father received a telephone call from his son, and he stated that "you should never have gone to Amanda's house." (T 236) The residence was searched, and in appellant's bedroom there was a gun case and ammunition on the floor. (T 237) Also sex toys were located in a nightstand, and a prescription bottle of Zolpidem, ten-milligram (sleep medication). (T 369, 380) A cell phone was recovered by a bicyclist in the neighborhood and turned over to

law enforcement. (T 348, 350)

Crime scene technicians responded to the Colley residence. (T 244) A nine millimeter Ruger pistol was found on the floor close to the bathtub. (T 263) The Ruger pistol had a 10 bullet magazine with one bullet in the chamber. (T 725) The decedent Lindy Dobbins was found crouched in the corner behind a dresser in a closet with a cell phone in her left hand. (T 263) There were two 9 millimeter shell casings found on the floor of the closet. (T 278) The decedent Amanda Colley was located in a corner of the master bathroom. (T 268) A total of 11 shell casings were recovered for analysis: 5 shell casings were .45 caliber and 6 shell casings were 9 millimeter. (T 727) There were a total of 12 projectiles recovered for analysis: 5 were .45 caliber and 7 were 9 millimeter. (T 728)

The appellant fled the state and was arrested hours after the shooting in Lorton, Virginia in his sister's car. (T 507) The passenger side of the vehicle had two firearms: an AR-15 style rifle and a handgun. (T 667) The handgun was a Smith & Wesson .45 caliber automatic that had a 8 shot magazine and one bullet in the chamber. (T 688) The AR-15 had a magazine that held 29 bullets. (T 691)

Medical Examiner

Dr. Predrag Bulic conducted the autopsy on the victims Amanda Colley and Lindy Dobbins. (T 440) Colley had nine gunshot wounds. (T 447) Dr. Bulic

opined that he was not able to determine the gunshot wound order. (T 448) Bulic opined that it is impossible to scientifically determine that. (T 448) However, Dr. Bulic added that there are some certain instances where certain trajectories and paths of the projectile through the body can imply a certain order. (T 448) None of the gunshots were fired from close range. (T 453) The gunshot wounds on the autopsy photos are labeled from the letter A through I, with the letter order being arbitrary.[8] (T 464) Dr. Bulic opined that Amanda Colley was aware of what was happening to her throughout the shooting process, and that most of the defensive wounds were painful. (T 482) Amanda Colley's cause of death was multiple gunshot wounds. (T 482)

Dr. Bulic performed an autopsy on Lindy Dobbins. (T 483) Dobbins had

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[8] **Gunshot A:** Shot in the right breast, and not lethal. (T 467) **Gunshot B:** Shot in the arm and classified as a defensive injury. (T 460) **Gunshot C:** An elongated mortal wound to the abdomen which meant the projectile entered on a steep angle. (T 474) The victim was down and almost horizontal. (T 475) **Gunshot D:** Non-lethal shot in the abdomen. (T 458) **Gunshot E:** Defensive gunshot wound to the right hand that reentered into the neck and it severed the spinal cord. (T 479) **Gunshot F:** Dr. Bulic opined that this is one of three parallel defensive gunshot wounds to the right leg where the victim raised her right knee to cover her vital parts. (T 471) **Gunshot G:** Dr. Bulic opined that this is one of three parallel defensive gunshot wounds to the right leg where the victim raised her right knee to cover her vital parts. (T 471) **Gunshot H:** Dr. Bulic opined that this is one of three parallel defensive gunshot wounds to the right leg where the victim raised her right knee to cover her vital parts. (T 471) **Gunshot I:** Shot in the left thumb and likely another defensive wound. (T 468)

three gunshot wounds: one was on the right temple; the second one was on the right shoulder; and the third one was on the left foot. (T 485) The gunshot wound to the right temple was an immediately lethal injury. (T 490) The projectile passed through the brain, causing immediate loss of consciousness. (T 490)

Defense Case

The appellant introduced the text messages between the appellant and his wife days before the murders. (T 838-842) In the messages the appellant let his wife know that he still loved her, and that he hoped they had a future together. (T 838)

The appellant had a court appearance immediately before the murders. (T 843) The appellant's attorney testified that the appellant was nervous and jittery. (T 844) The appellant was still jittery after his court hearing was concluded. (T 844) The appellant appeared happy when he left the courthouse. (T 845)

The appellant's sister Rhonda Boatwright confirmed that her brother was having marital problems in July/August 2015. (T 849) Boatwright had a close relationship with Amanda Colley, and Boatwright acted as a "go between" to try to have the couple reconcile. (T 850) The appellant moved in with his sister after an injunction was issued, but Boatwright confirmed that Amanda Colley made dinner for the appellant at their home during a family birthday party 2 days before the

murders. (T 851) Boatwright also confirmed that she locked a 9 millimeter and 45 caliber handgun in the trunk of her car days before the murders. (T 853)

Penalty Phase

State Case

On July 23, 2018, the penalty phase commenced before the Honorable Howard M. Maltz. (R 4029-4801) The State pursued five aggravators in relation to the first degree murder of Amanda Colley: 1) The defendant was previously convicted of another capital felony (in Florida means contemporaneous or at the same time); 2) The murders were committed while defendant was committing burglary; 3) murder was especially heinous, atrocious, and cruel (EHAC); 4) The murders were committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification (CCP); and 5) The domestic violence injunction aggravator. The State sought the same initial four aggravators as applied to the first degree murder of Lindy Dobbins, but did not seek the domestic injunction aggravator.

Defense Case

The defense presented substantial mitigation during the penalty phase, and established 18 separate mitigation points which tend to show that Mr. Colley was

a fine family man before his marital breakup.[9] (R 3453, 4113)

Mr. Colley also developed evidence that he was taking pain, anti-depressant, and sleep disorder medication at the time of the homicides and was diagnosed with depression. Mr Colley also adjusted well to incarceration, earning a paralegal certificate, assisting other inmates and reading avidly. (R 4195) Further, Mr. Colley had no felony convictions prior to the date of the incidents in this case. (R 4195, 4821)

Mr. Colley was being treated for depression from 2015, first with the prescription drugs Wellbutrin then Cymbalta. (R 4188-4195, 4447, 4355) Mr. Colley was also presecribed Ambien (Zolipen) and hydrocodone. (R4123, 4127,

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[9] 1. Was a good father to his children. (R 4223-4229, R 4238, passim) 2. Was a good worker (R 4243-4245, 4317, passim) 3. He was a good son. (R 4248, 4257-4263, passim) He was a good brother. (R 4248, 4257- 4263, passim) 5. Was gainfully employed at the time of his arrest. (R 4243-4245, 4297-4302) 6. Has maintained stable employment. (R 4243-4245, 4297-4302) 7. Was a mentor to other fellow employees. (R 4243-4245) 8. Did various charitable works through his employment. (R 4435-4440) 9. Was a great uncle. (R 4248, 4257-4263, passim) 10. Witnessed domestic violence by his mother on his father as a child. (R 4460-4462) 11. He has a history of drug and chronic alcohol abuse. (R 4179-4219, 4189-4191) 12. He is impulsive. (R 4444-4446) 13. He loves animals. (R 4262-4264, 4444) 14. He was a positive influence on other children in the neighborhood. (R 4223-4229) 15. He volunteered as a baseball coach. (R 4229-4231, 4262-4264, passim) 16. He volunteered as a football coach. (R 4229-4231, 4262-4264, passim) 17. He was previously active in race car driving. (R 3401, 3408, 3416, passim) 18. He tried to go through marriage counseling with his wife. (R 1302-1304, 1336, 1750, 3430, 4447)

4356) In addition, Mr. Colley was taking numerous pain and anti-inflammatory medications for long term pain issues. (R4447, 4357) Further, Mr. Colley suffered from periodic panic attacks and a significant anxiety disorder. (R 4196-4198)

The order of events leading up to the murders was generally agreed to by the state and defense experts (differences were noted). (R 4374-4390, 4511-4521) After 10 p.m. the night before the murders, Mr. Colly consumed several Crown Royal drinks of alcohol and 1 or 2 lines of (possibly) cocaine around midnight. (R4128-4130, 4195) After leaving the bar and parting from his friend at approximately 3 a.m., Mr. Colley traveled to 260 South Bellagio, entering using a garage door opener, whereupon he found sex toys in his former home. (R 4130) In response he damaged three televisions and generally trashed the home interior. (R 4130) Mr. Colley then traveled to a friend's house (Mr. Dickens) consuming more alcohol.

When he finally arrived at his sister Rhonda's house (approximately 5 a.m.), he consumed Ambien (either two one halves - State expert, or two halves or two and one half - defense experts). (R 4133, 4152, 4159) After taking the Ambien, Mr. Colley fell asleep "for a couple of hours"[10], and was awakened by his father at around 8 a.m. to go to Court. (R 4135, 4153) Mr. Colley ran over a mailbox while

[10] See Footnote 11, *Supra*, regarding sleep.

exiting the driveway on his way to Court. (R 4135-4136, 4160) Mr. Colley appeared in Court at approximately 9 a.m. the morning of the murders.

Mr. Colley was awakened with very little or no sleep and began texting. (R 4134, 4155) The cell phone records reflect that Mr. Colley was communicating via text message with Amanda continuously on the morning of the murders.[11] After Court, Mr. Colley called Amanda Colley, and during this call, he diverted from his work to his sister's home where he appears to have gathered up

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[11] While the witnesses testified that Mr. Colley "went to sleep" for a short period before the murders, the evidence shows that Mr. Colley did not sleep, or was in a state of parasomnia, in the period before the murders:

> "A: According to Mr. Colley, he then slept for a couple of hours. Uh, and he told me he had been awakened by his father around eight in the morning." (R 4135)
> "Q And he slept from five o'clock to 7:30, correct?"
> "A Yes. (R 4206)"

The testimony of the experts was that Mr. Colley ingested two one-half tablets of Ambien (for a total of 10 mg of Ambien) in the early morning of the murders. (R 4135, 4206) The cell phone records show almost continuous phone use during that period: 3:47 a.m., 4:41 a.m. and 4:46 a.m., 4:52 a.m., 4:53 a.m., 4:59 a.m., 5:02 a.m., 5:26 a.m.-5:53 a.m., 5:56 a.m., 5:57 a.m., 5:58 a.m., 5:59 a.m., 6:00 a.m., 6:01 a.m., 6:02 a.m., 6;45 a.m., 6:55 a.m., 6:57 a.m., 7 a.m., 7:12 a.m., 7:25 a.m.-8:30 a.m., 8:34 a.m., 8:38 a.m., 8:51 a.m. ("call me or I am going to come and find you."), 8:54 a.m., 8:58 a.m., 9:04 a.m., 9:31 am. - 10:02 am., 10:03 a.m., 10:05 a.m., 10:22 a.m., 10:23 a.m. (To Mason: I love U), 10:26 a.m., 10:28 a.m. (From "Dad" 55 sec.), 10:31 a.m. (From "Dad" 19 sec.), 10:37 a.m., 10:39 a.m. (To "Dad" 2:01 min.). (R 2859-2872, 2881-2894).

ammunition and traveled to the 260 South Bellagio address. Upon arrival, Mr. Colley witnessed a man in the interior of the house. (R 4138) According to the defense experts but contested by the State experts, Mr. Colley's memory was affected at this point. The defense experts reported that Mr. Colley reported snapshot memory during the shooting episode and much of the time thereafter, which is indicative of parasomnias and intoxication.

Intake of Ambien and its contested effects on Mr. Colley.

The effect of Ambien on Mr. Colley was the subject of a battle of the experts between the Defense and State. On the defense side, Dr. Mark Mills testified that Ambien can cause adverse side effects, including parasomnia. (R4125) From the point of the ingestion of the Ambien, Dr. Mills testified that Mr. Colley exhibited stroboscopic memory during the day of the murders. (R4135-4138) Mr. Colley reported he parked behind the estranged wife's house, and was enraged by the presence of a man. (R4138-4139) Mr. Colley recounted flashes of the murders. (R4139-4140) Mr. Colley left the scene in his car, and was later arrested in Virginia after experiencing excessive motility. (R4139-4141) Based on these observations, Dr. Mills testified that Mr. Colley was substantially impaired at the time of the murders. (R 4110) Specifically, he testified that the appellant experienced a parasomnic event as a side effect of ingesting Ambien, exacerbated

by the presence of other drugs. (R 4140-4142)

Ambien's side effects include extended sedation, drowsiness, dizziness, diarrhea, amnesia, hallucinations, confusion and parasomnia. (R 4139, 4359-4362) Parasomnia can be enhanced by alcohol and exhaustion. (R 4362) Ambien has been associated with violent and aggressive behavior. (R 4363) Dr. Buffington also described the adverse side effects of chemicals used to treat Mr. Colley's depression and the in-advisable rapid fluctuations between therapies. (R 4366-4371) Dr. Buffington opined that parasomnia may have resulted in the mixture of the prescriptions, including Ambien. Specifically, Dr. Buffington concluded, "Based on what he was prescribed, taking the sequence of events that night, that morning, the appearance and the presentation, the lack of memory, the abnormality of the actions, yes, it would be consistent with these adverse side effects." (R 4391)

In rebuttal, state witness Dr. Jeffrey Danzinger opined that Mr. Colley was not impaired by substances at approximately 10:30 in the morning on August 25 [sic], and he was not suffering from any parasomnia or disorder of sleep. (R 4489) Dr. Danzinger testified that he frequently and regularly prescribed Ambien in his practice, and that the side effects are "rare and uncommon." (R4490) Dr. Danzinger based that opinion on his understanding of an Ambien induced

parasonomia event being confused and incoherent, contrasted with Mr. Colley's behavior in Court just before the murders, as well as differing self-reported recollections at different times by Mr. Colley. (R 4493-4499, 4521)

In further rebuttal, County Judge Charles Tinlin testified that at 9 a.m. August 27, 2015 (the morning of the murder), he took a plea from Mr. Colley, including a full plea colloquy regarding competency, demeanor and intoxicants. (R 4544-4550) Over defense objection, the State introduced the recording of the Court appearance and plea colloquy on the morning of the murders. (R 4550-4558)

SUMMARY OF ARGUMENT

Point I: The trial court claimed in the sentencing order that the Cold, Calculated and Premeditated (CCP) aggravating circumstance was proven and should be given great weight. The trial court found Mr. Colley had a careful plan and sufficient time to reflect on his actions before coming to the Colley home and shooting to death his wife and her girlfriend Lindy Dobbins. The evidence at trial was that on the morning of the murder Mr. Colley discovered evidence that his wife was having an extra-marital affair. Mr. Colley became emotionally distraught, but nonetheless got dressed for work and made a Court appearance. After Court, Mr. Colley had a lengthy telephone conversation with his wife. After this telephone call, Mr. Colley obtained firearms and headed for the marital home looking for his wife's boyfriend with disastrous results. The finding of CCP under these circumstances is not supported by the evidence.

Point II: The trial court claimed in the sentencing order that the Heinous, Atrocious or Cruel aggravating circumstance was proven in the shooting deaths of both Amanda Colley and Lindy Dobbins and should be given great weight. 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. The evidence in the case simply does not

support the imposition of EHAC. Reconstructing the video surveillance footage and the cell phone calls made by Mr. Colley to his father immediately before and after the shootings show that Mr. Colley was in the house for three minutes at the longest. Because the gunfire by Mr. Colley took place in a time frame less than 58 seconds, there was insufficient time for EHAC to develop and it simply cannot apply. This finding is not supported by the evidence.

Point III: A capital sentencing scheme, either through legislatively enumerated aggravating factors or through legislatively mandated guilt-phase findings, must genuinely narrow the class of persons eligible for the death penalty. The scope of Florida's capital-sentencing scheme has broadened over the years, and the scheme as a whole now fails to suitably narrow the class of eligible persons.

Point IV: The trial court found five aggravating factors in the murder of Amanda Colley and four aggravating factors in the murder of Lindy Dobbins. Two of the aggravating factors on each murder was not supported by the evidence. Florida reserves the death penalty for the most aggravated and least mitigated of first-degree murderers. The totality of the circumstances of this case, compared with other capital cases, render the death sentence a disproportionate penalty.

Point V: The trial judge erred in sentencing the appellant to death without

considering valid mitigation. Judge Maltz did not point to any evidence contradicting the impairment mitigator, focusing on the disputed effect of Ambien and assigning the mitigator no weight. Moreover, Judge Maltz summarily dismissed mitigation evidence supporting the assertion that Mr. Colley's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired based on the same finding related to the claim that Mr. Colley was impaired at the time of the murders. This was error.

Point VI: The trial judge instructed the jury on statutory aggravation that was not supported by competent substantial evidence. Specifically, the aggravating factors EHAC and CCP should not have been before the jury and were improperly found. The new death penalty statute in Florida after Hurst has created a vastly different paradigm because one lone juror can vote for a verdict of life imprisonment regardless of the balance of the aggravating factors and mitigating factors. In fact, a lone juror can vote for a verdict for life imprisonment where the state has proven several weighty aggravating factors beyond a reasonable doubt, and little or no mitigation evidence has been presented. In this context, it is a violation of the Sixth and Eighth Amendment of the United States Constitution to improperly instruct a penalty phase jury of statutory aggravating factors that are

not supported by the evidence. This Court has held that constitutional errors are subject to the harmless error rule. The appellant submits that under the heavy burden placed on the state, one can not say beyond a reasonable doubt that giving improper instruction of weighty aggravating factors of CCP and HAC did not contribute to at least one juror's individual verdict of death in this case. Mr. Colley should be given a new penalty phase trial without the jury being instructed on the CCP and HAC.

Point VII: The appellant objected to the state introducing victim impact evidence on the grounds that the penalty phase is to determine whether aggravating and mitigating factors exist and victim impact evidence is not relevant to this phase of the trial. The trial court followed the law of this Court and ruled the evidence admissible. This is error.

Point VIII: During the penalty phase trial closing argument, the prosecutor made improper argument and inflammatory remarks which tainted the jury's verdict and rendered the sentencing proceeding fundamentally unfair.

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT COMMITTED THE MURDERS IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Standard of Review. "The standard of review applicable to whether a trial court properly found an aggravating factor is "whether competent, substantial evidence supports the trial court's finding." Conde v. State, 860 So.2d 930, 953 (Fla. 2003) The standard of review applicable to whether the trial court properly instructed the jury to consider an aggravating factor is 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) (quoting Ford v. State, 802 So.2d 1121, 1133 (Fla. 2001)), cert. denied, --- U.S. ----, 129 S.Ct. 2872, 174 L.Ed.2d 585 (2009)." Cole v. State, 36 So. 3d 597, 608 (Fla. 2010)

"A trial court's ruling on an aggravating circumstance will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent substantial evidence in the record. See Willacy v. State, 696 So.2d 693 (Fla. 1997). Competent substantial evidence is tantamount to legally sufficient evidence, and we assess the record evidence for its sufficiency only, not its weight." Almeida v. State, 748 So. 2d 922, 932 (Fla. 1999)

Argument. The Sentencing Order erroneously applied the CCP aggravator. The "cold, calculated, and premeditated" aggravating factor found in this case was not based on competent substantial evidence. The trial judge principally relied upon the fact that from the time that the appellant diverted from going to work, and appearing at the marital home time (approximately thirty minutes), "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." (R 3527) Something unknown occurred during the 14 minute telephone conversation between the appellant and his wife after the appellant left court that put the appellant into an emotional frenzy. All of the testimony and evidence in the case points to anything but "cold" but rather an act committed during the heat of passion. This Court should strike the CCP aggravating factor for that reason.

The Sentencing Order cites to Baker v. State, 71 So. 3d 802 (Fla. 2011) for the CCP factor:

> "Whether the CCP aggravator applies in a given case is subject to a four-part test: (1) The killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and (3) the defendant must have

> exhibited heightened premeditation (premeditated); and (4) there must have been no pretense of moral or legal justification."

As stated in the jury instructions, in order to establish CCP,

> 9. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. "Cold" means the murder was the product of calm and cool reflection. "Calculated" means having a careful plan or prearranged design to commit murder. A killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing. However, in order for this aggravating factor to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required. A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditated nature of the murder." (R 3170-3171)

Based upon the jury instruction, the CCP aggravator pertains specifically to the state of mind, intent, and motivation of the defendant. Wright v. State, 19 So. 3d 277, 298 (Fla. 2009) In the present case, two of the required elements were missing in this case in order for CCP to apply:

#1 Missing Element: "Cold"

"Cold" means the murder was the product of calm and cool reflection prior to the killing. Richardson v. State, 604 So.2d 1107 (Fla. 1992) The facts developed at trial show anything but calm and cold deliberation by Mr. Colley. Instead, the evidence shows that Mr. Colley was acting under the influence of a perfect storm of agitating domestic emotional factors resulting in his criminal actions. This list includes: sleep deprivation, alcohol consumption, emotional upset at losing his home, wife and family, the recent recovery of sex toys from the marital home, the 14 minute telephone call between Mr. Colley and his wife, the immediate trigger of witnessing a man in the marital home, along with the ingestion of parasomnia inducing Ambien prior to the murders. Only the last of these factors was contested by the State, and only as to the extent of the effect of the Ambien intake. The killings in the present case were not the product of cool and calm reflection, but rather an act promoted by emotional frenzy, panic or fit of rage.

In order for CCP to apply, "the murder must have been "cold." This element has been found wanting "only for 'heated' murders of passion, in which the loss of emotional control is evident from the facts." Gosciminski v. State, 132 So. 3d 678, 712 (Fla. 2013) It is evident from the facts of the present case that the single motivator for these murders was Mr. Colley's loss of emotional control. Similar to

Santos v. State, 591 So.2d 160 (Fla. 1991), Mr. Colley's actions resulted from an emotional domestic dispute and therefore were not "cold" and "calculated." In that case, the Court found that the fact a murder arose from a domestic dispute tended to negate the CCP aggravator. Id. at 162. Then, upon finding, based on a mental health expert's testimony, that the "ongoing, highly emotional domestic dispute" had "severely deranged" Santos and that he was under extreme emotional distress and unable to appreciate the criminality of his conduct, the Court struck the aggravator. Id. at 163. See also Almeida v. State, 748 So. 2d 922 (Fla. 1999) (No CCP found where the court concluded the killing was impulsive and not planned or prearranged.) This follows the general rule that the "cold" element of CCP will not be present in "heated murders of passion in which the loss of emotional control is evident from the facts." Looney v. State, 803 So. 2d 656 (Fla. 2001); See also Mahn v. State, 714 So.2d 391, 398 (Fla. 1998) (No CCP found because no cool and calm reflection (or plan) where defendant acted emotionally out of unresolved hate for his father. This rash and spontaneous killing evidenced no analytical thinking, no conscious and well developed plan to kill).

Similarly, the Court in Richardson v. State, 604 So. 2d 1107 (Fla. 1992) found that the "cold" aggravating factor does not apply to a situation where the killing was an act prompted by emotional frenzy, panic, or fit of rage. Rather, the

killing must be the product of cool and calm reflection prior to the killing. In Richardson, the facts showed that after a police call, Mr. Richardson fled into the woods behind the trailer but overheard his paramour, Ms. Newton, talking to police. He returned to the trailer when the police left and stated he was going to kill her. The next day, Mr. Richardson returned to the trailer and forced his way in. An argument began and continued outside where Mr. Richardson recovered a shotgun he had placed earlier from under the trailer tongue, shooting Ms. Newton in the chest, killing her. Mr. Richardson then turned the shotgun on himself but was unsuccessful.

The Richardson Court found that these facts did not support the imposition of CCP because the murder was not "cold" but rather an act promoted by emotional frenzy, panic or fit of rage. "Richardson's actions were spawned by an ongoing dispute with his girlfriend, one that involved an obvious intensity of emotion. The eyewitnesses even testified that Richardson appeared angry and crazy when he shot Newton. Accordingly, the element of coldness, i.e., calm and cool reflection, is not present here. The factor of cold, calculated premeditation thus is not permissible." Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992), opinion corrected on denial of reconsideration (Oct. 8, 1992) Similarly in the present case, all of the evidence indicated that Mr. Colley was enraged and

emotional, and that this state existed through the time of the murders. The murders were not in any sense "cold" but rather an act promoted by emotion and rage. Similar to Richardson also, Mr. Colley's actions were spawned by an ongoing dispute with his wife, one that involved an obvious intensity of emotion. Because the element of coldness, i.e., calm and cool reflection, is not present here, the aggravating factor of cold, calculated premeditation is not permissible.

Further, a defendant under the influence of excessive drug or alcohol use may be deemed incapable of forming the degree of premeditation required for the CCP factor. White v. State, 616 So.2d 21 (Fla. 1993) The "coldness" or the "calm and cool reflection" element is not present in these cases where the defendant cannot form the requisite intent. Richardson v. State, 604 So.2d. 1107 (Fla. 1992). In the present case, not only was there binge drinking, and possible cocaine use, as well as the intake of prescription drugs, there was also the impairment of sleep deprivation and emotional disturbance.

Domestic disputes that lead to murder do not per-se negate the "cold" element of the CCP aggravating factor. For example, in Allred v. State, 55 So. 3d 1267, 1278 (Fla. 2010), this Court upheld the CCP factor in a domestic dispute. However, the facts of Allred are substantially different from the present case. In Allred, "On the day of the murders - a month after the breakup with Barwick -

appellant told his friend Michael Siler in an instant message exchange that he intended to kill both Barwick and Ruschak. In similar messages to his victims that day, appellant said that he would kill Ruschak the next time he saw him and that he could not forgive Barwick for having sex with Ruschak. This anger, however, was not evident when he had dinner with Siler that evening. Instead, Allred was quiet and passive." Further, "appellant purchased the gun soon after the breakup and practiced with it by using a picture of Barwick for a target."

Thus under Allred, the mere fact of a domestic relationship does not preclude a finding of CCP. However, there must be calm and cool reflection, such as when Allred exhibited a calmness for a period before the murders, and practiced shooting with his handgun using targets of his intended victims. The length of time for quiet contemplation – approximately 48 hours in Allred – is simply not present here. Nor is there evidence in the present case of a cold demeanor prior to the killings, in comparison to the Allred case where at dinner before the murders, Allred seemed not to care about anything and often shrugged in response to questions. See also Kopsho v. State, 84 So.3rd 204 (Fla. 2012) (Kopsho planned the murder for a period of at least three days after learning that his wife was unfaithful. During this time, he confessed that he acted "cool" and "calm" so Lynne would not be aware of his plan until he could secure a weapon.)

#2 Missing Element: "Heightened Premeditation."

Heightened premeditation must be demonstrated by a plan and substantial time to reflect. The term "calculation" requires a careful plan or prearranged design to commit murder. Nelson v. State, 850 So.2d 514 (Fla. 2003); Jackson v. State, 648 So. 2d 85 (Fla. 1994); Rogers v. State, 511 So.2d 526, 533 (Fla. 1988). The plan must be before the killing. Nelson v. State, 850 So.2d 514 (Fla. 2003); Jackson v. State, 648 So. 2d 85 (Fla. 1994). "[P]roving a premeditated murder for purposes of guilt is not enough to support CCP; greater deliberation and reflection is required." Gosciminski v. State, 132 So. 3d 678, 712 (Fla. 2013) citing Walls v. State, 641 So.2d 381, 388 (Fla. 1994). Similarly, in Douglas v. State, 575 So. 2d 165, 166–67 (Fla. 1991), the Court stated:

> "[t]he level of premeditation needed to convict in the [guilt] phase of a first-degree murder trial does not necessarily rise to the level of premeditation [required under CCP] [That subsection] limits the use of premeditation to those cases where the state proves beyond a reasonable doubt that the premeditation was "cold, calculated ... and without any pretense of moral or legal justification." Jent; Combs.

This aggravating factor normally, although not exclusively, applies to execution-style or contract murders. McCray v. State, 416 So.2d 804 (Fla.1982). The passion evidenced by Mr. Colley in this case – the relationship between the parties, and the circumstances leading up to the murder – negate the trial court's

finding that this murder was committed in a "cold, calculated, and premeditated manner without any pretense of moral or legal justification." Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981), Preston v. State, 444 So.2d 939 (Fla. 1984).

The amount of "heightened premeditation" required to support the CCP aggravator is not present in the present case. While some premeditation is present, in the light most favorable to the State that premeditation began less than an hour before the murders when Mr. Colley talked to his wife for approximately 14 minutes on his cell phone, causing him to divert from his path to work to the Garrison Drive home and then to the crime scene. This short period of time has been held insufficient to overcome the "heightened premeditation" standard. For example, in Almeida, an underage (20 year old) drinker was ejected from Higgy's bar, causing Almeida acute embarrassment. Several hours later, he obtained a .44 caliber handgun, returned to Higgy's, and sometime after 4:30 a.m. shot and killed the manager. The Court found that the killing was impulsive and not planned or prearranged (and thus no heightened premeditation was present for CCP) even though Almeida had calmed down in the hours following the incident at Higgy's, and several hours had passed between the bar ejection and the murder. Almeida v. State, 748 So. 2d 922, 932–33 (Fla. 1999) In comparison, the present case shows Mr. Colley at best had minutes of lead time between the formulation of intent and

the murders. Thus, the minutes Mr. Colley had to plan does amount to a "substantial period of reflection" as required for the CCP aggravator to apply. Further, there is no evidence in the record that Mr. Colley had calmed down. In fact, all of the evidence was that Mr. Colley was enraged and "hot headed" during the entire time that led up to the murders. Thus, under Santos, Almeida and Richardson, the lower Court erred as a matter of law to find the CCP aggravator.

Finally, if CCP can be found in a heat of passion murder such as the case here, then the aggravator fails to narrow the class of eligible cases, and is unconstitutional. See point III.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT'S MURDERS WERE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Standard of Review. "The standard of review applicable to whether a trial court properly found an aggravating factor is "whether competent, substantial evidence supports the trial court's finding." Conde v. State, 860 So.2d 930, 953 (Fla. 2003). The standard of review applicable to whether the trial court properly instructed the jury to consider an aggravating factor is 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) (quoting Ford v. State, 802 So.2d 1121, 1133 (Fla. 2001); Cole v. State, 36 So. 3d 597, 608 (Fla. 2010)

Argument. As stated in the instructions, in order to establish EHAC:

> "3. The First Degree Murder was especially heinous, atrocious or cruel.
> "Heinous" means extremely wicked or shockingly evil.
> "Atrocious" means outrageously wicked and vile.
> "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as especially heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless." (R3170)

As further stated in the Sentencing Order,

> The Florida Supreme Court has held the especially heinous, atrocious, or cruel (EHAC) aggravating circumstance would apply "only in torturous murders - those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Chesire v. State, 568 So.2d 908, 912 (Fla. 1990); Robertson v. State, 611 So.2d 1228, 1232 (Fla. 1993); Rogers v. State, 783 So.2d 980, 994 (Fla. 2001). For this aggravating factor to apply, the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim. Nelson v. State, 748 So.2d 237, 245 (Fla. 1999). The Florida Supreme Court has stated this aggravating factor "focuses on the means and manner in which the death was inflicted and the immediate circumstances surrounding the death, where a victim experiences the torturous anxiety and fear of impending death; thus, the trial court [and jury] considers the victim's perceptions of the circumstances as opposed to those of the perpetrator." Allred v. State, 55 So.3d 1267 (Fla. 2010). Together with a prior violent felony conviction, the Florida Supreme Court has expressed the heinous, atrocious, or cruel aggravating factor as "the most weighty in Florida's sentencing calculus. Sireci, 825 So.2d at 887." (R3520-3521)

I. EHAC as to Amanda Colley.

In relation to the finding of EHAC by the trial judge, the written Sentencing Order contains the following unsupportable factual findings:

> 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. (R 3522-3623)

Amanda Colley's death from Mr. Colley's rapid gunshots was nearly instantaneous and thus the victim's fear of impending death could only have lasted a matter of seconds. "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." Gonzalez v. State, 136 So. 3d 1125, 1162 (Fla. 2014) citing Allred v. State, 55 So.3d 1267, 1280 (Fla. 2010).

The evidence in the case simply does not support the imposition of EHAC. Reconstructing the video surveillance footage and the cell phone calls made by Mr. Colley to his father immediately before and after the shootings show that Mr. Colley was in the house for three minutes at the longest. (Lamar Douberly fled the house at 10:36:11, a long 911 call at was made at 10:36:34, a short 911 call was made at 10:36:48, and Rachel Hendricks fled the house at 10:37:09. (T 518-527) Because the gunfire by Mr. Colley took place in a time frame less than 58 seconds, there was insufficient time for EHAC to develop and it simply cannot apply.

The record does not establish that Mr. Colley shot Amanda Colley, then shot three killing shots at Lindy Dobbins, then returned to shoot additional killing

shots at Amanda. The evidence instead supports a different chronology of events: that Mr. Colley shot four times in the closet area, with one shot to the closet door and three shots into a prone Lindy Dobbins, killing her immediately, followed by nine shots to Amanda. (T 111-133) Rachel Hendricks, the only eyewitness who was in the closet with Lindy Dobbins at the time she was shot testified to the last words of Lindy Dobbins, none of which are present on either 911 cell phone call, and the 911 cell phone calls do not support the trial judge's account in the Sentencing Order. (T 111-114) The other person at the residence, Lamar Douberly, was fleeing and does not provide any testimony to support the account of the Sentencing Order. (T 166-169) Instead, all the evidence is that Mr. Colley went into the master bathroom closet looking for Mr. Douberly, and shot Lindy Dobbins in a string of three shots and resulted in two killing shots: one to the lung, windpipe, and aorta and one to the right temple. (T 489-490) Then Amanda Colley was killed in seconds with two volleys of fire – four 9 mm shots and the second volley of five .45 caliber shots, albeit with the final five shots being fired at the end of the volley. The finding by the trial judge that Lindy Dobbins was alive and able to overhear her friend being shot is not supported by the evidence in the case.

The trial judge appears to rely on the State's Sentencing Memorandum

which in turn relies on the testimony of the medical examiner, Dr. Predrag Bulic, M.D. and the audio of the 911 calls. Dr. Bulic testified that the autopsy of Amanda Colley revealed nine gunshot wounds, including a killing shot to the spinal cord. (T 447-483) Dr. Bulic identified the killing shot to the neck artery and spinal cord as "immediately lethal." (T 479) During the testimony (and contrary to the factual findings in the Sentencing Order), Dr. Bulic specifically stated, "forensic pathology is not, at this point, is not able to determine the -- the order in what -- in which the wounds are received. And, um, so this is -- is basically impossible scientifically to determine that." (T 448) The State's sentencing memorandum also points to the 911 audio for support for the idea that Mr. Colley made a return trip to the bathroom to fire the killing shots. Petitioner asserts that neither the 911 audio nor the testimony of Dr. Bulic supports the above cited version of events recounted in the Sentencing Order.

The unsupported recitation of events contained within the sentencing order make the finding of EHAC unreliable. As such, the jury should never have been instructed as to the EHAC aggravator. The Sentencing Court afforded this factor "great weight." Striking the EHAC aggravator tips the balance away from death to a sentence of life.

II. EHAC as to Lindy Dobbins.

As to Lindy Dobbins, there can be no EHAC. If EHAC applies in this case, it would apply in every case. Ms. Dobbins died instantly from a gunshot wound to the head while she was hiding in the closet behind a dresser. Her death was so instantaneous that she still had her cell phone next to her head when her body was found.

In support of the finding of EHAC as to Lindy Dobbins, the Sentencing Order recites:

> 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.[12] 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,

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[12] Note that there is no entry to the master bedroom walk-in closet except through the master bathroom.

> 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 3555-3556)

The trial judge relied on Parker v. State, 476 So.2d 134, 139-40 (Fla. 1985) for the idea that HAC can be appropriate when a victim's fear of death is imminent prior to being shot execution style while kneeling on the ground. (R3555-3556) The facts of Parker are very different from the facts of the present case. In Parker, two robbers went into a convenience store where the victim was working, took the money and the woman clerk, placing her in the back seat of the car. The victim pleaded, "You aren't going to hurt me," and one of the robbers responded, "Man, I'm going to kill this bitch. I done been to prison for six years and I ain't going back, 'cause this whore going to identify us." At an isolated location the victim was dragged out of the car by her hair. During the course of the 20-minute trip, the victim had pleaded that she not be hurt. After the victim was removed from the car, one of the robbers stabbed her and Parker shot her. The victim apparently

sank to the ground in a kneeling posture after being stabbed and was shot in the back of the head, execution-style, from a distance of approximately two feet. Contrast that with the present case. Lindy Dobbins was aware that Mr. Colley was firing into the house, but the whole time he was shouting, "Where is *he*?" – clearly referring to Amanda's lover, not herself. Even when Mr. Colley was at the door of the closet, Amanda was pleading with Mr. Colley, "He's not in there. That's Rachel and Lindy in there. That's Rachel and Lindy." Lindy then said, "It's Lindy in here." and "It's Lindy." Lindy was clearly communicating her perspective that Mr. Colley was not looking to murder her, but Mr. Douberly, who was not in the closet. The only evidence of Lindy's awareness that Mr. Colley was going to kill her came at the very last instant when just before being shot, Lindy stated, "Oh my God, no." (Rachel Hendricks testimony) This awareness was so quick that Ms. Dobbins died with her cell phone next to her left ear.

A more appropriate case regarding the application of HAC as to Lindy Dobbins is the case Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992), *opinion corrected on denial of reconsideration* (Oct. 8, 1992). Richardson addressed a killing where the victim was shot suddenly in the heart, lost consciousness, and died within moments. The Richardson Court found the factor of heinous, atrocious, or cruel impermissible on those facts, because there was no

pitiless or conscienceless infliction of torture. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992), opinion corrected on denial of reconsideration (Oct. 8, 1992) *See also* Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983) (EHAC absent in a killing involving a single sudden shot, even though the victim lingered in undoubted pain for several hours).

Assuming the trial judge's version of the events to be correct, the amount of awareness of Amanda Colley was seconds. Assuming the statement "I've been shot" was Lindy Dobbins' voice, the time between that statement and the final five shots was mere seconds. In addition to the arguments made above, the facts as recited in the sentencing order are not grounded in competent substantial evidence. The fact that Lindy Dobbins was found with her cell phone pressed to her face in the closet supports the idea that Ms. Dobbins called 911 just as Mr. Colley was forcing his way into the closet and was killed just before 911 started recording. The actual facts do not even support a finding that Lindy heard the gunshots against Amanda, since Amanda had not yet been shot when Lindy was killed in the closet.

Anticipating the State's argument, the instant case is somewhat similar to the facts of Allred v. State, 55 So. 3d 1267 (Fla. 2010), a domestic violence double homicide where EHAC was established. However, a close reading of that case

indicates that the facts as related to the EHAC aggravator distinguish that circumstance from the present case. In Allred, the Trial Court found,

> However, this 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 v. State, 841 So.2d 362, 369 (Fla. 2003) All of these exceptional factors are present in this case and are forever memorialized in the 911 tape in evidence, during which the listener can hear the helpless victim anticipate her own death after hearing the other victim being shot, her pleas for assistance to the 911 operator, and her screams as she is repeatedly shot time and time again. This piece of evidence is the most horrific piece of evidence this court has heard in a homicide case in nearly twenty-three years as a trial judge. The fright and terror suffered by the victim during that 1:17 minute telephone call is difficult to imagine—yet it is plainly evident on the recording.

Allred at 1280.

The Allred Court upheld the trial judge's finding, stating,

> The facts are undisputed that Barwick was panic-stricken upon learning that Allred was coming to the house that night and that he had threatened to kill Ruschak in an instant message exchange with Barwick earlier that day. 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.

Allred at 1280.

The present case involves a similar fact pattern, but, unlike Allred, does not include the victim learning that a murderous person was approaching the house. Further, the 911 phone calls indicate Amanda Colley's voice pleading "He's not in there ... please stop ... Put that down ... put it down ..." (R 3515) Thus, even up to seconds before her death, Amanda is unaware of her impending death. The Trial Court does not specifically find, but it is clear from the context, sequence, and voice that Amanda yells, "Oh my God! Oh my God! I just got shot!" Then seconds pass and two additional shots are fired, and there are no more audible yells from Amanda. Additional seconds pass (presumably as Mr. Colley switches guns to the .45) and fires five more shots into Amanda. The content of the 911 audio (as horrific as they are) when analyzed objectively does not support EHAC. For this aggravating factor to apply, the crime must be *both* conscienceless or pitiless *and* unnecessarily torturous to the victim. The facts instead support the view that Mr. Colley killed Amanda Colley as quickly as he possibly could, pausing only to

switch guns when his first gun ran out of ammunition. He did not leave her to bleed out or inflict additional pain. When compared to other killings, the circumstances were not *unnecessarily* torturous to Amanda Colley as legally defined. This, combined with the fact that all of the killing was accomplished in under a minute, must compel against the finding of EHAC.

If the killings in the present case support EHAC, it would be hard to envision any first degree murder case that would not. This Court is under an obligation to provide guidance to the trial level courts when EHAC is appropriate and when it is not. The facts of the present case would widen the door to the EHAC aggravator to such an extent so as to make the aggravator applicable in every case.

Finally, if EHAC can be found in a near instantaneous killing such as the case here, then the aggravator fails to narrow the class of eligible cases, and is unconstitutional. (See Point III)

POINT III

FLORIDA STATUTE 921.141 IS UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION.

The appellant contends that the current Florida death penalty is unconstitutional because it fails to adequately narrow the class of cases eligible for the death penalty. "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460 (1984) Narrowing is a "constitutionally necessary function at the stage of legislative definition." Zant v. Stephens, 462 U.S. 862, 878 (1983). That is, the statute itself must limit the scope of those eligible for the death penalty beyond those who are convicted of murder. See Lowenfield v. Phelps, 484 U.S. 231, 246 (1988) (noting it is "the legislature" that must provide the means for "narrow[ing] the class of death-eligible murderers"). This requirement enforces the Eighth Amendment's demand that the death penalty be free from "arbitrary or irrational imposition." See Parker v. Dugger, 498 U.S. 308, 321 (1991) And put another way, a capital sentencing scheme violates the Eighth Amendment if it fails to

provide objective criteria that would limit the application of the death penalty to the worst-of-the-worst. Furman v. Georgia, 408 U.S. 238, 239 (1972)

Florida's post-Furman death penalty statute listed eight aggravating factors. Since its enactment, the aggravating factors listed in the statute have expanded to a total of sixteen. The expansion has occurred over the years as follows:

A. Victim a law enforcement officer was added in 1987.
B. Victim an elected official was added in 1988.
C. Victim Impact was added in 1990. (Not called an aggravating circumstance)
D. Defendant on probation or community control was added in 1991.
E. Victim under 12 years of age was added 1995
F. Victim elderly or vulnerable was added in 1996.
G. Defendant a member of a street gang was added in 1996.
H. Sexual predator was added in 2005.
I. Violation of an injunction for protection was added in 2010.

In addition, (1) the legislature has added aggravated child abuse to the list of felonies that trigger the felony murder rule; (2) the legislature has significantly expanded the common law definitions of robbery and burglary to include relatively minor criminal activity which would formerly have been petit theft or trespass; and (3) the distinction between principals in the first and second degree has been abolished. The effect of this legislation has been to widen the net, thereby ensnaring more defendants into the crime of first degree murder. The conduct of these defendants generally involves a lower level of culpability than

previously required for a capital crime.

The 16 aggravating circumstances and the other legislative changes are so all encompassing as to include every conceivable fact situation that would support a conviction for first degree murder. Each of the aggravating factors listed, taken separately, narrows the class of cases eligible for the death penalty. However, when the legislature added additional aggravating circumstances to the list over the years, it expanded the number of cases eligible for the death penalty. Only a severely mathematically challenged individual would conclude that these additions and expansions truly narrow the class of cases eligible for the death penalty.

One of the aggravating factors the Florida Supreme Court has held to narrow the class of cases eligible for the death penalty is the felony murder aggravating circumstance. The Court justified this "automatic aggravator" by comparing the list of felonies in the felony murder statute to the list of felonies that can be used for the felony murder aggravator and noting the felony murder statute has a longer list. Blanco v. State, 706 So.2d 7, 17-18 (Fla. 1998). The Court reasoned that since the felony murder statute has a longer list of felonies, the shorter list in the felony murder aggravating circumstance narrows the class of cases eligible for the death penalty in felony murder cases. That analysis is correct

as far as it goes. However, each of the felonies contained in the felony murder statute, and missing from the list of felonies in the felony murder aggravating circumstance always provides one or more separate aggravating circumstances. For example, carjacking always includes the pecuniary gain aggravator for the auto theft. And every felony included within the list of felonies that qualify as an aggravating circumstance in the felony murder aggravating circumstance includes at least one aggravating circumstance that "doubles" with the felony murder aggravating circumstance. For example, burglary always includes the pecuniary gain if the motive is theft, and cold, calculated, and premeditated or heinous, atrocious, and cruel if the motive is sexual battery or harm to another. Thus, every felony murder conviction in Florida contains at least one, if not more, aggravating circumstances. Since a high percentage of first degree murders in Florida are felony murders, the felony murder aggravating circumstance actually increases, rather than decreases, the number of murders eligible for the death penalty.

The Heinous Atrocious and Cruel (HAC) aggravating factor is also supposed to narrow the class of people eligible for the death penalty. The appellant argues that HAC is overbroad. The U.S. Supreme Court first deliberated the HAC aggravating factor post-Furman in Gregg v. Georgia, 428 U.S. 153 (1976). The Supreme Court reviewed the constitutionality of Georgia's capital

sentencing procedures after a hitchhiker who shot and killed two men was sentenced to death by a Georgian jury. Gregg's attorneys argued that the HAC aggravating factor violated Furman because it was so broad "that capital punishment could be imposed in any murder case." Gregg at 201. The Court disagreed, and upheld the use of the Georgia HAC aggravator as constitutional, because cases could be reviewed by state appellate courts to assess "whether the sentence is disproportionate compared to those sentences imposed in similar cases." Gregg at 198. Maynard v. Cartwright, 486 U.S. 356 (1988) further supports the proposition that vague aggravators must be sufficiently narrowed to avoid arbitrary imposition of the death penalty. These cases demonstrate that the failure to instruct the sentencing jury properly with respect to an aggravator does not automatically render a defendant's sentence unconstitutional. The Court has repeatedly indicated that a sentencing jury's consideration of a vague aggravator can be cured by appellate review. Lambrix v. Singletary, 520 U.S. 518 (1997)

In this case based upon the neighborhood surveillance camera and the two 911 calls, we know that from the time that the murder victims where aware that the appellant had entered the house armed, and the shooting stopped was 55 seconds. Based upon the medical examiner's testimony each victim suffered a gunshot wound that was immediately fatal. Therefore, each victim suffered for seconds

before they died. Where this Court to approve the HAC aggravator in this case, this Court would fail its mandate by the United States Supreme Court to cure the overbroad language of the HAC aggravator by striking it down when miss applied by trial courts.

A capital punishment scheme must genuinely narrow the category of cases subject to the death penalty. Furman v. Georgia, 408 U.S 236 (1972); Zant v. Stephens, 462 U.S. 862 (1983). The Florida death penalty scheme fails to comply with this constitutional requirement. Every conceivable fact situation that could support a charge of first degree murder includes at least one of Florida's aggravating factors. The legislature could have simply combined the sixteen aggravating factors listed above into one aggravating factor, which could be stated as follows: "Any person convicted of first degree murder in Florida is eligible for the death penalty unless the jury finds there is sufficient mitigation to justify the imposition of a life sentence." The sixteen aggravating circumstances listed in the current statute must be construed together and, when combined, fail to narrow the class of cases of first degree murder that are eligible for the death penalty.

The appellant urges this Court to declare Florida Statute 921.141 unconstitutional because it violates the Eighth and Fourteenth Amendments to the United States Constitution by failing to sufficiently narrow the class of cases that

are eligible for the death penalty. In the alternative, the appellant urges this Court to provide guidance for the Legislature on this issue. Specifically, that creating more aggravating factors in the future could jeopardize the constitutionality of the Florida death penalty statute.

POINT IV

THE APPELLANT'S DEATH SENTENCE WAS DISPROPORTIONATE AND THIS COURT SHOULD VACATE THE DEATH SENTENCE AMD REMAND FOR A LIFE SENTENCE.

Standard of review. This court undertakes a qualitative proportionality review in every capital case, in which it compares the totality of the circumstances in the case before it with those in other capital cases. Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998); see also Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). The number of aggravating and mitigating factors is not dispositive of the proportionality question. Urbin, 714 So. 2d at 416. This court deems death to be a disproportional remedy where the case is not *both* one of the most aggravated, *and* least mitigated, cases to come before it for review. Crook v. State, 908 So. 2d 350, 357 (Fla. 2005).

These were unplanned, domestic, emotionally charged murders, in response to a 14 minute telephone call between the appellant and his estranged wife. The appellant had no prior criminal record, and until his martial difficulties was living the American dream in an affluent community in St. Johns County, Florida. The two weighty aggravators of EHAC and CCP do not apply in this case, so the proven aggravating circumstances are two aggravators: felony-murder during a

burglary (of the appellant's home) which is not especially weighty; and prior violent felony for the double homicide; and in the case of Amanda Colley a murder with an injunction in place. When compared to similar cases, it is clear that equally culpable defendants have received sentences of life imprisonment. Accordingly, Mr. Colley's death sentence is not proportionately warranted.

The purpose of this Court's proportionality review "is to foster uniformity in death-penalty law" and to prevent the imposition of "unusual" punishments. The requirement that death be administered proportionately rests in part on the prohibition against unusual punishments in Article 1, Section 17, of the Florida Constitution. As this Court explained in Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991), "[i]t clearly is 'unusual' to impose death based on facts similar to those in cases in which the death penalty previously was deemed improper." Thus, in deciding whether the death penalty is unusual in this sense, "'[w]e compare the case under review with all past capital cases.'" Williams v. State, 437 So. 2d 133, 137 (Fla. 1983); Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998). In making this comparison, the Court considers several factors: Our proportionality review requires us "to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)

In reaching this decision, we are also mindful that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation." State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973) Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist. Id.; Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993).

This court has reversed the death penalty on proportionality grounds on facts similar to those presented here. In Kramer v. State, 619 So. 2d 274 (Fla. 1993), this court concluded the death penalty was disproportional although this court affirmed the two aggravating factors the trial court had found, i.e., that the murder was especially heinous, atrocious and cruel and that the defendant had a prior violent felony on his record. After reviewing the overall circumstances of Kramer's case, this court concluded that substantial competent evidence "supports a jury finding of premeditation [but] the case goes little beyond that. The evidence in its worst light suggests nothing more than a spontaneous fight." 619 So. 2d at 278. This case is similar to Kramer: the same two aggravating factors are present, but the crime at issue here appears to have involved little reflection. Further, here as in Kramer, the defense showing of non-statutory mitigation is significant.

Even if this Court holds that this case is one of the most aggravated it has seen, it is not independently true that this case is one of the least mitigated. The

case in mitigation clearly showed a confluence of events that had dire effects, and clearly showed an individual who - when not beset by loss of impulse control - is generous, loving, and productive. The present case is a terrible example of a perfect storm of factors reducing the defendant's mental state during the murders. This case is similar to Smalley v. State, 546 So. 2d 720 (Fla. 1989), abrogated on other grounds, see Beltran-Lopez v. State, 626 So. 2d 163 (Fla. 1993). The killings, both here and in Smalley, appear to have been violent overreactions in the family or personal setting; Smalley and this case both also appear to involve an isolated instance in a usually law-abiding worker's life. In Smalley, this Court held that the death sentence was disproportionate in spite of the fact the EHAC aggravating factor was present, noting that the non-specific first-degree murder verdict had likely been predicated on a felony-murder theory, in the absence of any proof of planning. Smalley at 721, 723.

The unrebutted evidence was that Mr. Colley was a hard worker who sustained his family with his work as a mortgage broker at Citibank, who had no prior criminal record and who was well liked by many friends and colleagues. The evidence was unrebutted that Mr. Colley has a potential for productive functioning in the structured environment of prison. More immediate to the crime, the unrebutted evidence established that Mr. Colley, a binge drinker, was under

extreme mental distress, was experiencing the breakup of his marriage due to infidelity, was faced with the prospect of prison for the earlier damage to the marital home upon finding sex toys, was experiencing a lack of any sleep prior to the murders, was dealing with the contested effects of Ambien on his memory and actions; and finally the 14 minute telephone conversation between Mr. Colley and his wife that led him to come to the marital home. All of these factors resulted in a severe loss of emotional control. In similar circumstances this Court has found the imposition of the death penalty not proportional. See Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993)

In Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985), the Court found the death penalty disproportionate when combined with mitigation related to drinking and that the killing was a result of an angry domestic dispute and the fact that the appellant had no prior history of violence. This Court has found death a disproportional penalty in other cases where two aggravating factors were present. In Sager v. State, 699 So. 2d 619 (Fla. 1997) and Voorhees v. State, 699 So. 2d 602 (Fla. 1997), this court held that neither of those co-defendants had received a proportional death sentence although their crime was found in both cases to be especially heinous, atrocious and cruel and to have been committed in the course of a robbery. This court viewed the totality of the circumstances, and concluded

the murder arose swiftly out of a "drunken episode." Voorhees, 699 So. 2d at 615. Non-statutory mental-health mitigation was present in both cases. 699 So. 2d at 615, 623.

In Almeida v. State, 748 So. 2d 922, 933–34 (Fla. 1999), a 20 year old bar patron was ejected, and returned several hours later with a .44, killing the bar owner. The trial court found three statutory and many nonstatutory mitigators, including a brutal childhood and vast mental health mitigation. In finding Almeida's death sentence disproportionate, the Almeida Court stated "this Court has reversed the death penalty in cases where the extent of mitigation was comparable or less, even in the face of significant aggravation. [...] the prior capital felonies all arose from a single brief period of marital crisis that spanned six weeks. [...] On this record, we cannot conclude that the present crime is one of the least mitigated murders."

This case, like the cited cases, is neither among the most aggravated or least mitigated cases this court has reviewed. A lifetime of good work should not be negated by a nightmare set of circumstances collapsing onto one morning. Viewed in totality, this is substantial mitigation that should be weighed in favor of life. Given the prior history of Mr. Colley, the substantial mitigation established in the present case should tip the scales of justice towards life. As it did in Kramer, and

the other cited cases, this Court should conclude that the death penalty is not proportional here.

POINT V

THE TRIAL JUDGE ERRED IN SENTENCING THE APPELLANT TO DEATH WITHOUT CONSIDERING VALID MITIGATION.

Mitigation evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. Robinson v. State, 684 So. 2d 175, 177 (Fla. 1996) "Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established." See Campbell v. State, 571 So.2d 415 (Fla. 1990) Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances." Kight v. State, 512 So.2d 922, 933 (Fla. 1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); Cook v. State, 542 So.2d 964, 971 (Fla. 1989) (trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of the mitigating circumstance); see also Pardo v. State, 563 So.2d 77, 80 (Fla. 1990) (this Court is

not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law)." Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990)

Argument. Given the facts of the case (and the main contested issue was the amount and effect of Ambien), Petitioner suggests that the Sentencing Court abused its discretion in not finding and applying the impairment mitigator. The Sentencing Order contains the following non-findings:

> 21. Defendant was impaired at the time of the homicides: Court finds that the defense had not established this mitigator and weights as *no weight*; (R3546)
>
> 22. The capacity of Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired: Court finds that the defense had not established this mitigator and weights as *no weight*;" (R3542-3547) Echoed at xxi. And xxii. (R3569-3573)

Despite the Trial Court's Sentencing Order, the underlying facts were generally agreed to by the parties, with disagreement only as to the amount and effect of Ambien on Mr. Colley during the murders. Other impairment facts were generally uncontested and agreed to by the State and defense experts (differences where noted). (R 4374-4390, 4511-4521)

After 10 p.m. the night before the murders, Mr. Colly, a binge drinker,

consumed several Crown Royal drinks of alcohol and one or two lines of (possibly) cocaine around midnight. (R 4128-4130, 4195) After leaving the bar and parting from his friend at approximately 3 a.m., Mr. Colley traveled to 260 South Bellagio, entering using a garage door opener wherein he witnessed sex toys in his former home and in an angry response damaged three televisions and generally trashed the home interior. (R 4130-4131) The Colleys were separated and both parties were engaged in infidelity, but up to that point Mr. Colley was unsure of her infidelity. (Passim) Mr. Colley then traveled to a friend's house (Mr. Dickens), cried in despair, and consumed more alcohol while discussing his discovery of evidence of infidelity with his friend. When he finally arrived at his residence at his sister Rhonda's house (approximately 4 - 5 a.m.), Mr. Colley ingested two one-half pills of Ambien and possibly fell asleep.[13] (R 4133)

Mr. Colley left his sister's residence at approximately 7:30 a.m. to go to Court, running over a mailbox while exiting the driveway. (R 4135) Mr. Colley appeared in Court at approximately 9 a.m. the morning of the murders and began texting his father. (R 4134) After Court, Mr. Colley called Amanda Colley and a conversation took place that resulted in Mr. Colley diverting from his travels to work instead traveling to his residence and then to the 260 South Bellagio address.

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[13] See Footnote *Supra* 11 regarding sleep.

Upon arrival, Mr. Colley witnessed a man in the interior of the house.

According to the defense experts but contested by the State experts, Mr. Colley's memory was affected at this point by the Ambien. The defense experts reported that Mr. Colley reported snapshot memory during the shooting episode and much of the time thereafter, which is indicative of parasomnias and intoxication.

In the present case, the extreme mental and emotional turmoil impacting Mr. Colley at the time of the murders, along with the life stresses he was experiencing and the extreme sleep deprivation, were factually uncontested. The only factor that was contested was the effect of Ambien intake on Mr. Colley. Thus, while the mitigation portion of the Sentencing Order focuses in most part on the Ambien dispute, the mitigation point is much broader, and mostly unaddressed. (R 3542-3546) In Mahn the Court discussed mitigation as follows:

> We have repeatedly stated that "[w]henever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved. Spencer v. State, 645 So.2d 377, 385 (Fla. 1994) (cite omitted) A trial court may only reject the proffered mitigation if the record provides competent, substantial evidence to the contrary. Spencer; Kight v. State, 512 So.2d 922, 933 (Fla. 1987).
>
> Based on those standards, we also agree with Mahn that the trial court erred in giving no weight to his uncontroverted

> history of drug and alcohol abuse as a nonstatutory mitigating circumstance. See Clark v. State, 609 So.2d 513, 516 (Fla.1992) (finding defendant's extensive history of substance abuse constituted strong nonstatutory mitigation). This is especially true considering that the trial court acknowledged the uncontroverted evidence in its sentencing orders that Mahn "began drinking alcohol at a very young age and would get drunk and fight and cause trouble most of his life ... [and] has used all sorts of illegal drugs in the past."

Mahn v. State, 714 So. 2d 391, 400–01 (Fla. 1998).

Similarly, in Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985), the Court found error when a trial court failed to find as a significant mitigating factor mitigation related to drinking or that the killing was a result of an angry domestic dispute, when such evidence was undisputedly presented at the penalty phase.

Here, there was general agreement as to the substantial mitigation in the case. Mr. Colley was in the midst of a divorce with two children after eight years of marriage. The night before the murders, Mr. Colley engaged in binge drinking and possibly cocaine. Mr. Colley had just uncovered proof of his wife's infidelity, and was confronted with sex toys in the marital home. Mr. Colley was faced with the prospect of prison when he damaged the marital home - a fact that was reported to the police by the man who was sleeping with his wife. Mr. Colley had practically no sleep, and was engaged in frenetic, emotional text exchanges with

his estranged wife. Upon arrival at the marital residence, Mr. Colley witnessed a man in the interior of the house. All of these emotional and mental blows resulting in the storm of anger while under the influence of alcohol and prescription drugs were uncontested, and therefore should have been found as mitigation and afforded some degree of weight. Instead, the Court found that the mitigation evidence that Mr. Colley was impaired at the time of the murders was not established. Moreover, the Court found that "[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" was not found by the greater weight of the evidence.

Judge Maltz did not point to any evidence contradicting the impairment mitigator, focusing on the disputed effect of Ambien and assigning the mitigator no weight. Moreover, Judge Maltz summarily dismissed mitigation evidence supporting the assertion that Mr. Colley's capacity to appreciate the criminality of his conduct of conform his conduct to the requirements of law was substantially impaired based on same finding related to claim that Mr. Colley was impaired at the time of the murders. This was error. This Court in Ault v. State, 53 So. 3d 175, 191–92 (Fla. 2010) held that:

> Because the trial court failed to cite any evidence

> contradicting the finding of the only expert who testified on the issue, we find that its rejection of this mitigating circumstance was error. See Coday, 946 So.2d at 1005 (explaining that expert testimony in support of mitigation "could be rejected only if it did not square with other evidence in the case").

Ault at 191. Applying Ault, the failure to find the two impairment mitigators was error.

Harmfulness. "A trial court's findings on mitigation are also subject to review for harmless error, and this Court will not overturn a capital appellant's sentence if it determines that an error was harmless beyond a reasonable doubt." Ault v. State, 53 So. 3d 175, 186–87 (Fla. 2010). Throughout the trial, the main thrust of the defense was a reliance on the mental and emotional impairment causing Mr. Colley to act out in a murderous rage. This storm of circumstances clearly hindered Mr. Colley's capacity to conform his conduct to the requirements of law. The harmlessness of the failure of the trial court to find the impairment mitigator must also be read in context of the previous merit points where both the CCP and EHAC aggravators are at issue, as well as the proportionality analysis comparing the present case to all death cases in Florida. With all of these aggravators subject to question, the absence of the main defense argument from the sentencing order cannot be harmless.

POINT VI

APPELLANT'S DEATH SENTENCE MUST BE REVERSED AND A NEW PENALTY PHASE TRIAL ORDERED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY ON IMPROPER STATUTORY AGGRAVATION THEREBY TAINTING THE JURY VERDICT.

Judge Maltz at the conclusion of the penalty phase trial, instructed the jury on five aggravating circumstances as to the murder of Amanda Colley and four aggravating circumstances as to the murder of Lindy Dobbins. The aggravating factors EHAC and CCP should not have been before the jury and were improperly found.[14]

The jury was improperly instructed on two weighty aggravating factors in this case. The Florida Legislature revised Florida Statute 921.141 in March 2017 in response to the Perry[15] decision. The relevant revisions to the statute were as follows:

> c) If a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of

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[14] See Point I and II.

[15] Perry v. State, 210 So.3rd 630 (Fla. 2016)

> parole.
> (3) Imposition of sentence of life imprisonment or death.--
> (a) If the jury has recommended a sentence of:
> 1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.
> 2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury.

The new death penalty statute has created a vastly different paradigm because one lone juror can vote for a verdict of life imprisonment regardless of the balance of the aggravating factors and mitigating factors. In fact, a lone juror can vote for a verdict for life imprisonment where the state has proven several weighty aggravating factors beyond a reasonable doubt, and little or no mitigation evidence has been presented.

The Harmless Error Rule Should be Revisited

When the sentencer in a capital case weighs one or more aggravating factors which are later ruled to have been unsupported factually, the Eighth Amendment is not satisfied. Sochor v. Florida, 504 U.S. 527 (1992); Parker v. Dugger, 498 U.S. 308 (1991). In a "weighing state" like Florida, the presence of an invalid aggravating factor in the weighing calculus renders a death sentence unconstitutional under the Eighth Amendment, and the sentence may not be

automatically affirmed merely because "other valid aggravating factors exist." Sochor v. Florida, 504 U.S. 527, 532 (1992). A weighing state is one in which the Eighth Amendment legislative narrowing of death-eligible defendants and the Sixth Amendment individualized sentencing determination are collapsed into a single step and based on an evaluation of the same sentencing factors. See Brown v. Sanders, 546 U.S. 212 (2006).

Florida being a weighing state, the cases of Clemons v. Mississippi, 494 U.S. 738 (1990), and Brown v. Sanders, 546 U.S. 212 (2006) are instructive. In Clemons, the Supreme Court held that a state appellate court may uphold the constitutionality of a death sentence, even where it is based on an invalid or improperly defined aggravator, if the Court undertakes either a reweighing of the aggravating and mitigating evidence or harmless error review. Clemons at 741. To find an error harmless, the state court must employ the "beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18, 24, (1967). Clemons, at 753. In the case before it (which also involved the "especially heinous, atrocious, and cruel" aggravating circumstance), the Supreme Court in Clemons identified two different permissible approaches to conducting harmless error review. First, the state court could have determined that the "sentence would have been the same even if there had been no 'especially heinous' instruction at all," balancing the

remaining aggravators against the mitigating circumstances. Id. Second, the state court could "ask whether beyond reasonable doubt the result would have been the same had the especially heinous aggravating circumstance been properly defined in the jury instructions." Id. at 754.

In a weighing State, therefore, the sentencer's consideration of an invalid eligibility factor necessarily skews the balancing of aggravators with mitigators, and requires reversal of the sentence unless a state appellate court determines the error is harmless or reweighs the mitigating evidence against the valid aggravating factors. In response to the complexity of the weighing and non-weighing state schemes the Court in Brown adopted the following Rule: "An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." Brown at 220.

Since Brown, the United States Supreme Court issued the Hurst v. Florida, 136 S.Ct. 616 (2016) decision that held that the Florida death penalty statute violated the Sixth Amendment of the Constitution because a trial judge rather than a jury was finding facts necessary to impose a sentence of death. Hurst at 619. The

Hurst Court did not provide guidance on whether a Hurst error was harmless stating: "Finally, we do not reach the State's assertion that any error was harmless. (citation omitted) This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. See Ring v. Arizona, 536 U.S., at 609, n. 7 (2002)"

The Eighth Amendment and Sixth Amendment Harmless Error

In response to the United States Supreme Court Hurst decision this Court addressed both the Eighth Amendment ramifications and the harmless error analysis. Concerning the Eighth Amendment, this Court in Hurst v. State, 202 So.3rd 40 (2016) went beyond the United States Supreme Court Hurst decision and held that the Eight Amendment also requires jury unanimity because it assists in the narrowing of offenders eligible for the death penalty:

> As we hold in this case, the unanimous finding of the aggravating factors and the fact they are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help narrow the class of murderers subject to capital punishment. However, the further requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment even more significantly, and expresses the values of the community as they currently relate to imposition of death as a penalty.

Hurst at 60. Concerning the Sixth Amendment, this Court held that Sixth

Amendment Hurst errors are subject to the harmless error rule. This Court defined the harmless error analysis for Hurst violations pursuant to Florida law as follows:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So.2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," DiGuilio v. State, 491 So.2d 1129 at 1137 (Fla. 1986), and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case.

Hurst at 68. Based upon the this Court's Hurst decision, clearly giving an improper aggravating factor jury instruction to a penalty phase jury is a constitutional error. As such, the error is subject to Florida harmless error analysis. The appellant submits that under the heavy burden placed on the state, one can not say beyond a reasonable doubt that giving improper instruction of weighty aggravating factors of CCP and HAC did not contribute to at least one juror's individual verdict of death in this case. Mr. Colley should be given a new penalty phase trial without the jury being instructed on the CCP and HAC aggravating factors.

POINT VII

THE JURY'S PENALTY PHASE VERDICT WAS TAINTED BY HIGHLY INFLAMMATORY AND IMPROPER VICTIM IMPACT EVIDENCE, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §17 OF THE FLORIDA CONSTITUTION.

Standard of review. Generally, rulings on evidentiary admissibility are reviewed for abuse of discretion. Patrick v. State, 104 So. 3rd 1046, 1056 (Fla. 2012). A court abuses its discretion if its ruling is based on an erroneous view of the law. Id. This court further holds that mixed questions of law and fact which determine constitutional rights should be reviewed using a two-step approach, deferring to the trial court on questions of historical fact but conducting de novo review of the constitutional issue. City of Fort Lauderdale v. Dhar, 185 So. 3rd 1232, 1234 (Fla. 2016), citing Connor v. State, 803 So. 2d 598, 605 (Fla. 2001).

Argument. Section 921.141(8) of the Florida Statutes provides that the State may introduce proof designed to demonstrate the victim's uniqueness as an individual and the resultant loss to the community, provided that evidence does not characterize the defendant or convey an opinion as to the appropriate sentence. The statute codifies the law as set out in Payne v. Tennessee, 501 U.S. 808, 831

(1991). This court in Windom v. State, 656 So. 2d 432 (Fla. 1995), approved the statute, holding that it does not impermissibly affect weighing of aggravation and mitigation, or otherwise interfere with defendants' rights. 656 So. 2d at 438.The appellant filed a motion objecting to the state introducing victim impact evidence on the grounds that the penalty phase is to determine whether aggravating and mitigating factors exist and victim impact evidence creates sympathy for the victim and as such is not relevant to this phase of the trial. (R 351) The appellant also argued that the jury would consider victim impact evidence as aggravating even though they are instructed not to do so. (R 3804) The trial court followed the law of this Court and ruled the evidence admissible.

The state submitted four Victim Impact statements. (R 3270) The trial judge sustained all the appellant's objections to the Victim Impact statement made by Tammy Malone. (R 4035) The appellant objected to a portion of Beth Kennedy's Victim Impact statement that stated: "Please think about Amanda and all the lives she has blessed." (R 4037) Judge Maltz overuled the appellant's objection and permitted this statement to go to the jury. The trial judge sustained all the appellant's objections to the Victim Impact statement made by William Mosler. (R 4040) The trial judge sustained all the appellant's objections to Chris Dobbins Victim Impact statement. (R 4044)

The state requesting that the jury consider all the blessings the victim bestowed to other lives through a victim impact statement improperly inserts a religious obligation to the jury and religious dimension to the life of the victim. The introduction of this evidence, over defense objection, unconstitutionally tainted the jury's verdict at the penalty phase.

This is exactly the type of evidence that prosecutors are presenting to juries throughout this state after this Court's holding in Windom v. State, 656 So.2d 432 (Fla. 1995) and the enactment of §921.141, Fla. Stat. Prior to Payne v. Tennessee, 501 U.S. 808 (1991), the Eighth Amendment to the United States Constitution prohibited the introduction of victim impact evidence at the sentencing phase of a capital murder trial. Booth v. Maryland, 482 U.S. 496 (1987) Booth correctly pointed out that the admission of such evidence creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. The focus is not on the defendant, but on the character and reputation of the victim and the effect on his family, factors which may be wholly unrelated to the blame-worthiness of a particular defendant. Booth pointed out that the presentation of this type of information can serve no other purpose then to inflame the jury and to divert it from deciding the case on relevant evidence concerning the crime and the defendant. Of course, Payne overruled Booth. This

Court settled the question in this state by its holding in Windom. Appellant submits that this Court's holding was erroneous and urges this Court to recede from Windom. Additionally, the evidence in this case exceeded the proper bounds of victim impact evidence. The state placed a thumb on the scales of justice with this evidence, canting them toward injustice. A new penalty phase is required, without victim impact evidence.

POINT VIII

THE PROSECUTOR'S PENALTY-PHASE ARGUMENT HAD IMPROPER AND INFLAMMATORY REMARKS, WHICH TAINTED THE JURY'S VERDICT AND RENDERED THE SENTENCING PROCEEDING FUNDAMENTALLY UNFAIR.

Prosecutorial misconduct has "long been recognized" as grounds for reversal. Berger v. United States, 295 U.S. 78 (1934) ("it is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertion of personal knowledge, are apt to carry weight against the accused when they should proper carry none.") In Greer v. Miller, 483 U.S. 756, 765 (1987) the Supreme Court stated:

> This Court has recognized that prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process. To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial.

In fact, between Proffitt v. Florida, 428 U.S. 242 (Fla. 1976) and Hurst v. Florida, 136 S. Ct. 616 (2016), this court held that improper argument in the penalty phase must be "outrageous," or "egregious indeed," to so deeply taint the jury's advisory

verdict that vacating the sentence, and remanding for a new penalty phase, was needed. See Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985). After Hurst, penalty-phase deliberations must receive the same protections accorded to deliberations in all criminal matters. As the Supreme Court has written, the right to trial by an impartial jury is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." Hurst v. State, 202 So. 2d 40, 50 (2016), quoting Blakely v. Washington, 542 U.S. 296, 305-06 (2004).

The prosecutor made an argument that voting for death is the hard courageous choice.

> 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 4225)

As noted in Urbin v. State, 714 So. 2d 411, 421(Fla. 1998), argument that directly states the converse - by characterizing a vote for a life sentence as "tak[ing] the easy way out" - improperly suggests that voting for life would irresponsibly violate that juror's oath. The change in phrasing does not significantly change the message, and this court should hold the "courageous choice" approach impermissible.

The prosecutor also 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)

The statement above has no relevance in determining the appropriate penalty. The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law. Cardona v. State, 185 So.3rd. 514 (Fla. 2016)

The argument in penalty phase closing argument by the prosecutor was improper. The right to due process is threatened where the State encourages a jury to take into account matters that are not legitimate sentencing considerations, and where there is a reasonable probability the outcome was affected. Johnson v. Wainwright, 778 F. 2d 623, 629-31 (11th Cir. 1985) The federal courts look to whether improper considerations were deliberately placed before the jury. DePew

v. Anderson, 311 F. 3rd 742, 749 (6th Cir. 2002). The Florida courts agree: "if jurors are to remain fair decision-makers, the trial court must guard against a deliberate act of counsel that serves to put the jury center stage in the drama that should be the trial." Bocher v. Glass, 874 So. 2d 701, 703 (Fla. 1st DCA 2004). The ultimate question is whether the jury could fairly judge the evidence. Wilson v. Sirmons, 536 F. 3rd 1064, 1117 (10th Cir. 2008). Here, the State's calculated appeal to a nonevidentiary basis for a verdict put at risk the jury's willingness and ability to fairly judge the evidence. Appellant's right to due process, guaranteed by the Florida and federal constitutions, was not adequately protected below.

The need for heightened reliability in capital proceedings, protected by the federal Eighth Amendment, also was not met. A "reliable" verdict, in this context, exists when the courts can be confident that the decision-maker gave independent weight to the showing in mitigation. See Beck v. Alabama, 447 U.S. 625, 638 n.13 (1980). Here, since the State affirmatively sought a verdict on a non-evidentiary ground, the conditions that ensure the requisite reliability are absent. This court should reverse the death sentence appealed from.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to reverse the sentences of death and order an new penalty phase trial with a new jury, or in the alternative reverse the sentences of death with directions that the appellant be sentenced to life in prison.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed electronically by email to the Honorable Pamela Jo Bondi, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, at capapp@myfloridalegal.com, and mailed to Appellant on this 21st day of June, 2019.

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

s/ George D.E. Burden
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