IN THE SUPREME COURT OF FLORIDA
CASE NO. SC22-745

EVERETT G. MILLER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR OSCEOLA COUNTY
STATE OF FLORIDA

ANSWER BRIEF

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

PATRICK BOBEK
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 112839
444 Seabreeze Blvd., 5th Floor
Daytona Beach, Florida 32118
(386) 238-4990
Fax: (386) 227-0457
patrick.bobek@myfloridalegal.com
capapp@myfloridalegal.com

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Miller". Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. Citations to the trial transcript will be noted by (TT, __) followed the page number; citations to the direct record on appeal will be noted by (R, __) followed by the page number.

STATEMENT OF THE CASE

On August 17, 2017, Appellant murdered two Kissimmee Police Department officers, Officer Matthew Baxter and Sergeant Richard "Sam" Howard. He was indicted for their murders, resisting an officer without violence, and carrying a concealed weapon in a liquor establishment the next day. (R, 184). His guilt phase trial began on August 30, 2019, and on September 11, 2019, the jury unanimously convicted him on all four counts of the indictment. Following penalty phase proceedings, on November 13, 2019, the jury unanimously recommended he be sentenced to death for both murders. On September 13, 2021, the trial court held a Spencer hearing and on May 13, 2022, the court imposed the sentence of death for both murders. This appeal follows.

STATEMENT OF THE FACTS

Guilt Phase Proceedings

On August 17, 2017, around 9:30 p.m., Maribel Gonzalez King and two friends were hanging out on a street corner when an officer she recognized, Matthew Baxter, approached. (TT, 2284-91). She had an open container of beer on the ground in front of her, and Officer Baxter kicked it over, which she said had happened before. (TT, 2311-2). While Baxter was talking to her, a car came to an abrupt stop and the Appellant jumped out of the car. (TT, 2292-3). Appellant was being obnoxious and rude, and got in Baxter's face yelling at him to stop harassing people, and asked Baxter call his supervisor. (TT, 2295). He said he wanted to talk to the sergeant and that he was tired of police harassing people. (TT, 2297). After Sergeant Sam Howard arrived, Appellant told him he was a veteran, feared for his life, and was eligible to carry a concealed weapon. (TT, 2297-9). At that point Howard asked King and her friends to leave, and as she was walking away and only partly down the street, she heard two gunshots. (TT, 2302). She never looked back to see what led to the gunshots, but then she heard another two shots. (TT, 2302-3). She then heard a car door slam and heard a car drive past her. (TT, 2303). She never saw

the police act aggressively, draw their weapon, or give Appellant commands or yell at him. (TT, 2306-7). During her testimony a ten-second video clip recorded by one of her friends was played, showing Appellant yelling at the officers. (TT, 2309-10).

Nichole Palmer, who lived across the street from shooting, was eating dinner around 9:30 p.m. that night when she heard three "noises" with a pause between the first two and the third. (TT, 2363-4). When she looked outside, she saw two police SUVs and a dark car, and she saw a shadowy figure get in the third car and drive away. 2365-7.

At 9:27 p.m. Lt. Christopher Succi heard a call on the radio from Baxter saying he was with three black males and one of them wanted to speak to Howard. (TT, 2389). A short time later he heard an emergency tone and a report of shots fired. (TT, 2389-90). When he arrived on scene, he found the layout of the bodies unusual for a gunshot case, as they were on their backs with their feet straight and arms at their sides, which is not how someone typically falls. (TT, 2401-2). A hat was found at the scene that matched the one Appellant was wearing in the video. (TT, 2415).

Officer Edward Martinez was Howard's second in command that night. (TT, 2426). When he arrived he helped get Howard on a gurney and removed his gun belt because it kept getting in the way. (TT, 2429). Howard's gun had not been drawn, and in fact the top leather hood strapping it into the holster had not even been disengaged. (TT, 2429).

Tanya Blew was a bartender at Roscoe's bar the night of the murders. (TT, 2470-1). At some point in the night after she noticed an increased police presence, Appellant walked into the bar. (TT, 2481). He said there was crazy stuff going on and he was going to stay for a drink; he was calm, not agitated, and he did not seem intoxicated. (TT, 2482). Eventually another customer engaged Appellant in conversation, asking if he had shot the cops, and this sparked an argument. (TT, 2485-6). The bar owner reported this to the police who then arrived and detained Appellant. (TT, 2488-9).

Deputy Christopher Hart was booking an arrestee when the call about the shooting went out, so he did not arrive until well after the first responders. (TT, 2556-7). Later he and other officers heard a suspect was at Roscoe's, and they went to the bar to detain him. (TT, 2558). While detaining Appellant, one gun fell from the back of his

pants and Hart found a second one after searching him. (TT, 2561-3). The second gun was a revolver that had only one live round and four spent rounds that had been fired. (TT, 2564-5).

Officer Charles Hess was the lead investigator in the case. (TT, 2445). He learned during the investigation that Appellant had a 2015 blue Kia registered in his name, which was similar in size and design as the car a witness described at the scene. (TT, 2594). He also discovered Appellant had a YouTube channel where he did firearms instructions and reviews, and the two guns retrieved from Appellant that night resemble guns in the video. (TT, 2607). The videos were played for the jury and one shows him using the eventual murder weapon to practice headshots on a silhouette target. (TT, 2625-7) (State's Exhibit 22). Hess described the .22 caliber handgun as "single action", meaning you have to manually pull hammer back every time you want to fire a bullet. (TT, 2630).

Deputy Ryan Tattoli was not on shift the night of the murders but went on duty when he heard about the shooting. (TT, 2635-7). He transported Appellant to the police station from the bar and since he retrieved Appellant's keys, help with the search for his car. He eventually made contact with a woman who said there was a car she

did recognize in her yard, and after checking the plates, confirmed it was Appellant's and secured it for retrieval. (TT, 2638-43).

Courtney Laverdiere was forensic tech at the time and collected and secured multiple pieces of evidence. (TT 2675). She took photos and a 3D rendering of the crime scene. (TT, 2678-87). She collected the Steelers hat and beaded necklace from the scene and swabbed the brim of the hat for DNA. (TT, 2689-91). She responded to Appellant's car, which had been backed into a dirt driveway, and secured the doors and windows with evidence tape. (TT, 2694-6). She collected Appellant's clothes, got a sample of his DNA, took fingernail scrapings and clippings, and took DNA swabs from his hands. (TT, 2703). The next day she collected the projectiles and bullet fragments that the medical examiner had retrieved from the bodies. (TT, 2709). During the forensic processing of Appellant's car, she found a bloodstain on the left rear tire and swabbed it. (TT, 2713-5). She processed the outside of car for latent fingerprints and retrieved two notebooks from the car. (TT, 2719-22). No shell casings were found at the scene, but the .22 caliber revolver had four spent shell casings and is not designed to eject shell casings from the cylinder. (TT, 2738-

9). Finally, she discovered blood on Appellant's shoes and took swabs of those areas. (TT, 2744-5).

Ashley Church was the forensic unit supervisor for Osceola County Sheriff's Office and responded to the hospital the night of the shooting to collect the victims' clothing, personal effects, and to observe them for injuries. Baxter's pistol was secured in its holster and fully loaded, and his taser had also not been used. (TT 2761-2). Howard's gun was gone as it had been removed at the scene, but his taser was also unused. (TT, 2763).

Erin West is a latent print examiner for OCSO. A latent palm print had been lifted from the trunk of Appellant's car. (TT 2788). West was able to compare the palm and two fingers to known prints and matched it to Sergeant Howard. (TT, 2788-9).

Doctor Sara Zydowicz performed the autopsy of Howard. (TT, 2798). She discovered no defensive wounds, but he did have two gunshot wounds to his head. (TT, 2798). One shot was to his left temple and the second was above his upper lip. (TT, 2798). The shot to his temple had gun powder stippling, indicating the end of the gun was close to the surface of the skin. (TT, 2799-801). The second shot

also had stippling with a close grouping, indicating it was likely no more than a few inches away. (TT, 2802-4).

Doctor Joshua Stephany performed Baxter's autopsy. Baxter had a had a few abrasions on the back of right hand and right elbow, and several on his left hand and left knee. (TT, 3051-3). He had two gunshot wounds, one with an entry below the lower lip, the second to the back left of his head. (TT, 3054). Both shots had abrasions that indicated they were contact wounds. (TT, 3058-9).

Lewis Peterson, who admittedly has twenty-eight prior felony convictions, testified that he met Appellant in the jail infirmary while Appellant's case was pending. Peterson recognized him from the news of the shooting and the two bonded when they realized they knew a lot of the same people. (TT, 3013-6). Appellant began talking about the crime, saying he stopped to ask the cops why they "were harassing the dudes." (TT, 3017-8). He told Peterson he knew the officers from previous encounters and that he hated them, and that he hated cops in general because the Kissimmee cops were always harassing people. (TT, 3019-20). Appellant also mentioned that if he'd had his AR15 he could have hidden in the bushes and picked

off the officers instead of just walking up and shooting them. (TT, 3023).

Timothy Petree worked in the biology and DNA lab of FDLE and testified to DNA results. (TT, 3088). On the Steelers hat he found a DNA mixture that included Appellant as a possible contributor, and the mixture was 700 billion times more likely to have come from Appellant and another person than two people that weren't Appellant. (TT, 3103-5). He was a possible contributor on a mixture found on the necklace with that same 700 billion likelihood. (TT, 3105). A DNA mixture from his shoes included Appellant and Baxter. (TT, 3108-9). Two DNA swabs taken from Appellant's car were a complete DNA profile that matched Howard. (TT, 3110). A DNA mixture found on Appellant's fingernail clippings included Appellant and Baxter but excluded Howard. (TT, 3116-7). A swab of his left hand and from his shirt both found mixtures with multiple individuals that included Appellant and Baxter. (TT, 3118-20). DNA mixtures from end of the barrel of the murder weapon and from the trigger, grip, and hammer, were mixtures that included Appellant and Baxter. (TT, 3121-22).

Richard Ruth works in the firearms section and test-fired the guns found on Appellant. (TT, 3127-31). The bullets recovered from the victims all matched as being fired from the single action revolver and not the semiautomatic pistol. (TT, 3146-7). The State then rested its case. (TT, 3177). Defense made a motion for judgment of acquittal arguing the State had failed to prove premeditation and after hearing argument from both sides, the judge denied the motion. (TT, 3182-6).

The defense presents the testimony of one witness, Shavon Sutton, Appellant's sister. (TT, 3246). She testified Appellant is about ten years older than her and although they have the same mother, they have different fathers. (TT, 3246-7). Appellant lived with his father for a while but moved into Sutton's house his senior year of high school. (TT, 3247). She remembered being loving and fun to be around, and later when he was in the military, he would send her gifts and money. (TT, 3247-8). She testified when Appellant returned from the military, he was different, and she'd have to announce herself before entering room so as not to startle him. (TT, 3249). As they got older, she noticed more changes in him, for example one time they were in the car and he said the government was watching

him. (TT, 3251). Appellant had been financially stable his whole life, but when he left the military, and his girlfriend broke up with him he started running into trouble and asked her for money. (TT, 3252). In the months leading up to the murders she noticed him showering less and wearing clothes several days in a row. (TT, 3252). She also recounted his Baker Act and said he broke down crying and kept chanting his military number. (TT, 3255-6). The defense then rested. (TT, 3282).

Following closing arguments and deliberations, on September 11, 2019, the jury convicted Appellant on all four counts in the indictment. (TT, 3439-41).

Penalty Phase Proceedings

Two months later, on November 5, 2019, penalty phase proceedings began. Prior to opening statements, the State told the judge that they were still in the process of making requested edits to victim impact videos, but due to the late objection by defense they would not have the videos ready before the trial started. Therefore, they requested they be able to play the videos during rebuttal. (TT, 3471). The defense objected, however the judge overruled since the delay to the video edits was caused by the defense's late objection

when they'd had the opportunity to review the videos for months. (TT, 3474).

The State first called Julian Albright, who served in the Air Force from 1982 to 2003. (TT, 3514-5). His job was to use imaging data and GPS to figure out where best to drop bombs on targets. (TT, 3518-9). Albright first met Appellant right after September 11, 2001, when Appellant was transferred to the facility Albright worked at. (TT, 3521). They had a good relationship during their time in the military and later when both were military contractors in the private sector. (TT, 3522-3). Appellant left the contracting job in 2016, but they continued to speak weekly. (TT, 3522-3). A month or two before the murders, Appellant called Albright saying he wanted to talk. (TT, 3525). When Albright arrived, he saw weed in Appellant's car and asked him about it. Appellant started discussing what was going on in his life and saying things like, "I'm not going to be another statistic, I'm not gonna be caught driving while black." (TT, 3527-8). Appellant then showed Albright his AR-15 saying he was prepared and said, "All these cops going out and killing brothers while driving black, I'm ready for them." (TT, 3550).

J.J. MacNab then testified for the State. She is a research fellow at George Washington University on extremism. (TT, 3561). She tracks extremist groups, usually through their violent rhetoric online, and keeps a list she publishes once a year. (TT, 3562). Although she is not a professor, she teaches about these groups to law enforcement agencies and at counterterrorism conferences. (TT, 3563). Her process for learning about these extremists and their beliefs is to immerse herself in their culture and get to the know the members. (TT, 3567-9). A handful of other people are involved in the same work as her, and she talks with them often. (TT, 3570-1). She has worked with multiple federal agencies and teaches law enforcement how to look for markers of these groups, be it bumper stickers or key phrases that they use to indicate to each other. (TT, 3571-2). She has also done work with both print and television media writing articles and doing interviews. (TT, 3572). She described the Moorish movement as a primarily Muslim organization, though not mainstream Islam, that is about 100 years old. (TT, 3577). Over the years it has splintered into multiple subgroups. (TT, 3577). While many followers of the Moors are nonviolent, there are violent pockets of people. (TT, 3578). She said while they described themselves as a

Muslim group, standard Muslims don't recognize them. (TT, 3578-9). They have an alternative account of history, believing that black people were in the U.S. before Columbus and Native Americans, and one group even believes the entire Louisiana Purchase belongs to them. (TT, 3579). She says at its core it's harmless, just people who "wear fezzes and outfits and have patches" and promote entrepreneurialism and self-reliance. (TT, 3579). However, there are some that have adopted sovereign citizen beliefs. (TT, 3579). A sovereign citizen is someone who believes he has individual sovereignty. (TT, 3580). They believe they don't have to follow rules they don't like, and laws don't apply to him if he chooses. (TT, 3580). And they believe if a judge, or a law enforcement officer, or some other person tries to infringe on his rights and enforce those laws, he has the right to harm them. (TT, 3580).

MacNab testified the most common way for someone to become exposed to these beliefs is through the internet. (TT, 3581). YouTube has thousands of videos, Facebook has groups with up to 20,000 members, and it has a large presence in the prison system. (TT, 3581). She said that these groups appeal to people who are desperate, who are struggling financially or personally, so they grab

onto anything they think will help them. (TT, 3581). She said Moorish sovereigns are almost universally black. (TT, 3582). Both Moors and sovereigns are highly distrustful of government and believe in an alternative history. (TT, 3582). They believe they have special knowledge that gives them power and that they were born with certain rights. (TT, 3582-3). This distrust of government includes a dislike of law enforcement since they are the arm of the government you are most likely to encounter trying to enforce laws upon you. (TT, 3583). A certain subset also develops black supremacist and anti-white views. (TT, 3583). She testified to instances where adherents to these Moorish sovereign beliefs ultimately had violent clashes with law enforcement in the last few years. (TT, 3586-7.)

The State then presented victim impact testimony from Deputy Christopher Breuer, Deputy Michael Bixler, Brandon Nicolson, Elizabeth Salyers, Jeffrey Suran, and Sadia Baxter. (TT, 3608-3659). The State rested afterward. (TT, 3663).

Defense opened their mitigation presentation by also calling Julian Albright. He testified that after Appellant arrived in 2001, they both were involved in arranging air strikes in several middle eastern countries. (TT, 3677). He said the job was stressful because if you

were wrong you could end up bombing a mosque or killing a bunch of kids. (TT, 3677-8). An inherent part of the job was killing people, and they saw the bombs hit live, with bodies and body parts flying. (TT, 3678-84). Appellant was a good coworker. (TT, 3686). Appellant retired from the military in 2010, but began a job in a related position, a targeteer, for a contractor with Albright. (TT, 3689-94). It was a more involved job with more responsibility about making decisions and finding coordinates to drop bombs. (TT, 3697). Appellant never expressed any moral or ethical concerns about their work but would commiserate along with everyone else if they learned civilians were killed. (TT, 3725-6). Appellant eventually left the job but told Albright it was for financial reasons as he was spending too much money driving back and forth from Kissimmee to Tampa. (TT, 3734-5). Albright never saw Appellant acting weird or displaying paranoia or delusions. (TT, 3740-1).

Devona Barnes, a cousin of Appellant about his age, then testified. (TT, 3759). They spent most weekends together growing up. (TT, 3760). When they were kids, Appellant's younger brother Maurice developed leukemia. (TT, 3764). After Appellant came back from the military, in time he opened up about his work helping to

drop bombs, and Barnes said it weighed on him and was becoming increasingly depressed. (TT, 3766). In the weeks leading up to the murders he seemed to be in a downward spiral of depression, and it was during this time he was Baker Acted. (TT, 3768-75). She said before he was put into custody, he ran around her house closing the blinds, taking out sharp objects, and said people were coming to get him. (TT, 3775). Barnes conceded Appellant had a good childhood where all his needs were met. (TT, 3780-3).

Defense then called Dr. Steven Gold, a psychologist who primarily serves people dealing with trauma. (TT, 3793). In his opinion, Appellant met all the criteria for PTSD and that he met the standard for two statutory mitigators: he suffered from an extreme mental or emotional disturbance, and his ability to conform his conduct to the requirements of the law was substantially impaired. (TT, 3829-30). Appellant reported not remembering the shooting and Gold says this kind of disassociation is common with PTSD. (TT, 3833-4). Gold also stated that there were concerns Appellant was having flashback or nightmares the day he was Baker Acted, and that in the hospital he exhibited poor impulse control and emotional control. (TT, 3863-4). Gold pointed to several stressors that led up to

the murders: difficulty adjusting to civilian life; losing his job; his girlfriend broke up with him; and he was reevaluating his work in the military in a different light. (TT, 3871-2). Gold discovered Appellant did tours overseas and was in bases that were shelled by enemies and dealt with IEDs as he traveled from one location to another. (TT, 3873). Appellant also had a number of adverse childhood experiences, ACEs: physical abuse (spanking); witnessing domestic violence; claims physical neglect, but only support was his mom didn't always buy him newer clothes; verbal abuse from his mother; and his mother having a nervous breakdown. (TT, 3877-3915). Gold testified some symptoms of PTSD Appellant exhibited were an exaggerated startle response, which went back years; nightmares; hesitancy to talk about his service, and mood changes. (TT, 3893). Gold described Appellant's breaking point for his PTSD as a hospital bombing that Appellant reported, but Gold could not corroborate that Appellant was involved, witnessed it, or even that it happened. (TT, 3956-58). While Gold believes something provoked or triggered Appellant to do the shootings, he has no information that such a thing occurred. (TT, 3959-60).

John Hampton is another military veteran who served with Appellant, meeting him in 2007. (TT, 3987-8). He considers Appellant a friend and has spent time with him outside work. (TT, 3990). They did a deployment to Afghanistan together in 2013, and they were fired upon during that time. (TT, 3993-4). They also suffered attacks from two suicide bombers at the based, one of which killed several soldiers. (TT, 3995-6). He recalled Appellant having trouble sleeping. (TT, 3997). Appellant lived with Hampton for a year, and during that time Hampton would hear him having nightmares, screaming, and Hampton would announce himself before entering the room so as not to startle Appellant. (TT, 4000).

Thomas Leech was in the military and met Appellant in 2007 when he became Appellant's commanding officer. (TT, 4013-4). He added Appellant to his administrative staff in 2008 and they worked closely together. (TT, 4016-7). Leech said Appellant was one of the finest marines he had ever served with and there was no one he trusted more. (TT, 4019). He said Appellant's job duties, not just day-to-day but with larger projects like organizing deployments, would have overwhelmed anyone else. (TT, 4029-30). At some point another commanding officer enlisted Appellant's help so he was essentially

doing two jobs that's overlooked about 750 people. (TT, 4032-3). Leech always gave Appellant top marks on his fitness reports and when Appellant retired, he nominated him for a Defense Meritorious Service Medal. (TT, 4036-42).

Aubrey Land is a former law enforcement officer and corrections officer who now does consulting work as a prison adjustment expert. (TT, 4061-2). He believes Appellant could adjust well to prison life as his experience in the military has made him very organized, and he'd benefit from being assigned a job from DOC. (TT, 4065-7). Land spoke to staff at the Orange County Jail who told him Appellant is a model inmate who is already doing well in general population. (TT, 4069-70). Admits Appellant did have one disciplinary report where he threatened to choke one of the women providing mental health services. (TT, 4074-5). Land also was not aware of a report from the Osceola County Jail where Appellant had been involved in a plan to threaten or harm officers. (TT, 4075).

Martin Hamann met Appellant in 2003 and worked with him at MacDill Air Force Base where they worked similar jobs in targeting for bombs. (TT, 4078-80). Hamann's job was providing GPS coordinates and elevation data from strikes while Appellant's was

analyzing images to avoid collateral targets and damage. (TT, 4079-80). They both ended up stationed in Kabul and were roommates for four months. During that time Hamann saw Appellant wake up from nightmares and sometimes threaten him, not realizing who Hamann was. (TT, 4089-91). They were in a war zone, so there were times they were fired upon or warned about strikes, and he remembers at least one suicide bomber that struck while Appellant was sleeping, and the explosion woke him up. (TT, 4094-6). They eventually stopped working together but Hamann kept up with Appellant on Facebook. (TT, 4097). In the summer of 2017, he began to grow concerned with some of Appellant's posts that did not sound like the person Hamann knew, so eventually he deleted him. (TT, 4097).

Defense next called Arthur Cody, a military veteran who now works for the Veteran's Advocacy Project helping both prosecutors and defense attorneys navigate military records. (TT, 4149-50). Cody said Appellant's fitness reports indicate he was outranking his peers and showing leadership potential. (TT, 4168-9). Appellant spent four to six months in Iraq in 2003 during which insurgents would attack the base a few times a week with mortar rounds and spread IEDs on the roads around it. (TT, 4179-81). He had the same experience on a

tour in 2005. (TT, 4186-7). When a soldier comes back from deployment, they fill out a health questionnaire, and on it Appellant said he hadn't experienced combat and wasn't bothered by the experience. Cody said these forms are filled out right before leaving a combat zone, and answering yes on them can delay your departure or put you in a mental health program that soldiers did not want to be in. (TT, 4190-1). Appellant was court martialed early in his career and charged with assaulting someone with a pistol and disorderly conduct. (TT, 4123-4).

Defense called another Orange County corrections officer, Larry Thompson. (TT, 4221). Thompson testified Appellant had been at the jail for eight months, that he followed all rules and directions, and they'd had complaints about his behavior. (TT, 4222). Appellant was outgoing and helpful to other inmates and had his security designation dropped one level since arriving. (TT, 4223).

Rufus Miller[1], Appellant's father, then testified. (TT, 4226). Rufus's brother served in the military from 1958 to 1962 and came back with "shell shock" and was never the same; his brother had also

[1] To avoid confusion, Rufus and any other witnesses sharing Appellant's last name will be referred to by their first name.

had mental issues growing up as well. (TT, 4228-9). Rufus married Appellant's mother while they were still in high school, and Appellant was born shortly after. (TT, 4229-30). The marriage ended after a few years when Rufus discovered her infidelity. (TT, 4231). They divorced in 1975 and moved out; Appellant's mother got custody and Rufus paid child support. (TT, 4234). When Appellant was almost seven his mother called Rufus asking if he wanted custody, so they went to court and transferred Appellant to Rufus. (TT, 4234-5). Rufus remarried and had two children with another woman, and the whole family were devout Jehovah's Witnesses. (TT, 4235-8). One of his children, Maurice, developed leukemia when he was a baby and Appellant was about eight, and Appellant helped take care of him. (TT, 4238-9). Once Appellant's mother attacked Rufus and Appellant witnessed it. (TT, 4239-40). Appellant was a happy kid and they played sports together and went door-to-door to spread the word, but as Jehovah's Witnesses they didn't celebrate holidays. (TT, 4242-3). When Appellant got to high school he complained about the religious restrictions, like not playing organized sports, and decided to spend senior year living with his mother. (TT, 4245-6). Appellant met his wife when he was twenty years old, and they married young. (TT,

4251-2). They eventually divorced. (TT, 4253-4). After Appellant left the military, Rufus helped him get a job at Sunoco driving a forklift where Rufus had worked for decades. (TT, 4255-61). Rufus was proud of Appellant, not for his military service, but because he had grown up to be a good man and a good father. (TT, 4257-8). Appellant was laid off May 1, 2017, and soon after broke up with his girlfriend. (TT, 4263). Then, Appellant seemed to be bouncing from one home to another and Rufus worried about him. (TT, 4263-4). Once, Appellant was hospitalized and Rufus saw him curled in a ball, crying. (TT, 4266-7).

Rynequa Miller, Appellant's daughter, testified. (TT, 4330). She has a half-brother from her mother who was born about a year before her, but Appellant is the only father either of them ever knew. (TT, 4331-2). Because Appellant was in the military, they moved a lot each time he was redeployed. (TT, 4332-3). She said Appellant was a good and present father, always doing things with the family. (TT, 4336). He was hands-on in teaching them house and lawn maintenance and to be self-sufficient. (TT, 4339-40). Appellant was in a mason organization where he helped with charitable activities and liked reading about different religions. (TT 4341-9). After Appellant lost his

Sunoco job, he started working odd jobs, which she found strange because he'd previously been singularly focused. (TT, 4350). He also appeared more paranoid and cautious, insisting on sitting where he could see anyone approaching. (TT, 4351).

The State called several witnesses out of order before the defense's last witness, as he was unavailable at the time. The State's first round of rebuttal witnesses were to give more context to the events surrounding the Baker Act and the night Appellant was arrested. The day of the Baker Act, Appellant had gotten in an argument with his uncle, and he stripped down to his underwear to prove he was unarmed. (TT, 4392-3). Appellant then retrieved his AR-15 when someone else flashed a gun at him, but when he learned the police were on the way, he stashed his rifle in the woods. (TT, 4394-5). The day after the incident, Shavon Sutton found his gun in the trunk of her car. (TT, 4406-7). Sutton turned it over to the police, who discovered it was still fully loaded. (TT, 4412-3). Charles Hess and Courtney Laverdiere, who both interacted with Appellant the night of his arrest, testified they saw either no injuries, or only minor abrasions and a scrape. (TT, 4414-9). The State then played two

videos totaling eight minutes, with no sound, consisting of photos and short video clips of the two victims. (TT, 4457).

Finally, the defense called Dr. Robert Cohen, a neuropsychologist who performs concussion evaluations and traumatic brain injury exams for several sports teams. (TT, 4459). Cohen testified it was a greater possibility than not that Appellant was experiencing PTSD for some time before the murders, but especially at the time of the murders. (TT, 4480). However, Cohen gave Appellant a test called the PCL which is to look for PTSD, and he only scored a 24, well below the threshold of 33 required for a PTSD diagnosis. (TT, 4480). Cohen explains this by saying it was artificially low because Appellant had been in the jail for years and had been getting treatment; at Veterans Affairs before the murders, he scored a 65. (TT, 4880-1). Appellant again reported not remembering the shooting and Cohen says he met the criteria for being under the influence of an extreme mental or emotional disturbance. (TT, 4481-97). The defense then rested their case. (TT, 4578).

The State's next rebuttal witness was Wendell Glover, who served in the military from 1986 to 1991. (TT, 4580-1). In 1991 he

lived in Georgia. (TT, 4581). One day he and some friends drove a cookout and before he got out of the car he was already greeting people he had not seen in a while. (TT, 4583). Then, suddenly a man came up to him pointing a gun at him and asking what they were doing there. (TT, 4583-4). He and his friends drove off and called the police, and although the man was arrest, Glover was never called to testify. (TT, 4584-6).

The State's final rebuttal witness was Dr. Michael Gamache, a licensed psychologist. (TT, 4590). About half of his work is for the defense and half is for the State. (TT, 4595). He disagrees with the PTSD diagnosis, saying all eight criteria have to be met in some form to reach it, and Appellant doesn't. (TT, 4600-1). Gamache believes Appellant is being disingenuous when he describes the hospital bombing as his PTSD-triggering event, because he has variously described being part of the attack, but later said he only saw it on the news. (TT, 4605). Gamache cannot pinpoint the onset of PTSD, which is typically a requirement, and that there were never sufficient symptoms to diagnose it. (TT, 4608). He said Appellant failed three out of five scales on the malingering test and that the data and tests show Appellant is capable of feigning or exaggerating symptoms if he

wants to. (TT, 4614-5). Gamache argues the way the defense experts tested Appellant basically gave him the road map and opportunity to essentially say yes to each symptom, instead of doing an open-ended questioning that could have led to him describing the symptoms without first hearing what they were looking for. (TT, 4616-7). One PTSD criterion is avoidance after the traumatic event, and Appellant seeking employment in the same job does not fit that. (TT, 4622). Appellant also described his work as rewarding and important, that exact opposite of traumatizing. (TT, 4623). Another factor is impairment in social, occupational, or other areas of function, and instead Appellant excelled in the marines and in his contracting job. (TT, 4626-7). Gamache disagrees that Appellant was suffering PTSD at the time of the crimes and disagrees he was under the influence of an extreme mental or emotional disturbance or was unable to conform his conduct to the requirements of the law. (TT, 4625-30). Gamache points to four other explanations for Appellant's behavior that summer: alcohol abuse; cannabis abuse; an adjustment disorder from several concurrent stressors; and his ego and inability to adjust to nonmilitary life. He was angry and gravitated toward

extremist, and sometimes racist, anti-law enforcement views. (TT, 4642-6). The State then rested. (TT, 4698).

Following closing arguments and deliberations, the jury came back with a unanimous verdict for death and a finding of four aggravating factors for each murder: 1) the victim was a law enforcement officer engaged in the performance of his official duties; 2) previous conviction for a violent or capital felony; 3) CCP; 4) committed to disrupt or hinder the lawful exercise of any governmental function or enforcement of the laws. (TT, 4844-48).

Spencer Hearing[2]

A *Spencer* Hearing was held on September 13, 2021.

The State first called Sadia Baxter to give a statement as the next of kin of one of the victims and she spoke about Officer Baxter's life and how his death has affected his family and others. (R, 3637-46). The State also called Mia Brown, who wanted to give her own statement as next of kin. (R, 3649-53).

Their first witness was Darren Hightower, who served with Appellant in the Marines from 1991 to 1993. (R, 3662). They served

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

on a navy ship in Georgia. (R, 3662). They would sometimes do cookouts together outside work, Appellant was slightly older and had a family already, Hightower would have been nineteen or twenty. (R, 3663). There was an incident at a cookout in 1991 where they both were arrested for disorderly conduct. (R, 3664). It began when a car drove by, and they believed gunfire was coming from it. (R, 3665). Hightower dropped to the ground and before they knew it police arrived; at no time did he see Appellant with a gun. (R, 3666).

Their next witness was Thomas Leech, who also testified during the penalty phase. (R, 3674). Leech gave general testimony about how different court martials work and the processes involved. (R, 3674-81). Appellant was given a summary court martial, which is something akin to traffic court for civilians as far as possible punishments and the processes involved. (R, 3682). Appellant was found not guilty of assault, but guilty of an article 134, which is a catchall on bringing discredit upon the armed forces and which he says you could find against just about anyone on any given day. (R, 3686-7). This is a conviction for a less-than-criminal offense. (R, 3689).

Next the defense called Adam Thomas, who did two tours in Iraq with Appellant. (R, 3700). Previous to that they were both in the same intelligence unit in North Carolina. (R, 3700). In Iraq, Appellant was involved in imagery analysis, which included battle assessments and body counts after bombings. (R, 3701-2). While they were there, they'd come under fire from enemies shooting large rockets from far off, and you never really knew where they were going to hit, so danger was always present. (R, 3704). Thomas said he can't hear a boom without it taking him back to Iraq, he gets extremely startled when he hears loud noises or bangs, and he's been going to therapy for years to deal with it. (R, 3704-5). When they were being bombed, the enemy was calibrating based on each shot, so the booms would get closer and closer and they huddled on the ground waiting for it to end. (R, 3706). Much of their job most days was post-strike analysis, trying to assess enemy strength, effectiveness of the bombing, and often there'd be bodies that were "pretty seriously brutalized." (R, 3708). After Iraq, Thomas kept up with Appellant on Facebook, and in the months leading up to the murders noticed him posting a lot of "out-there" things that were extreme, especially for the level-headed

person Thomas knew. (R, 3710). He also found it odd that Appellant went from a highly-trained job to driving a forklift. (R, 3711).

The defense also called Dr. Elizabeth McAlister, a professor at Wesleyan University. (R, 3713). She teaches several courses related to race, religion, and how they intersect, especially for Africans and African-Americans. (R, 3713). She reviewed an interview with Laverne Smith, Appellant's VA records, his entire Facebook record which was over 6600 pages, a notebook purportedly from Appellant, his jail calls, a list of books he read while incarcerated, and also interviewed some of his family members. (R, 3715-7). McAlister learned Appellant joined Prince Hall Freemasons in 2004, a fraternal order for black men that started due to their exclusion from the white Freemasons. (R, 3722). The Freemasons looked to Islamic philosophy earlier in their history, so you can see Islamic symbology in their lodges and works. (R, 3723-4). Appellant started becoming interested in tracing his ancestry, and this led him to the Moorish Science Temple. (R, 3724-5). She gives a thorough rundown of the origin and history of the Moors. (R, 3726-35). Based on what she reviewed about Appellant, she does not believe he is sovereign Moor. (R, 3744). Other than a time he reported a sovereign citizen meme, she found nothing

in Facebook to indicate sovereign citizens. (R, 3747). Appellant requested books that discussed various religions, not just Moors. (R, 3749). She does acknowledge that he made a lot of posts showing he was getting into Moor ideology. (R, 3755). She testifies he had adopted Moorish Science beliefs at the time he committed these murders. (R, 3764). McAlister agreed that since law and citizenship is important to Moorish Science, its followers would respect and revere law enforcement officers. (R, 3768). They are also more concerned about nationalities than race, like black and white, and don't use hate speech. (R, 3769). One of Appellant's posts close to the murders talked about killing white people, which McAlister agreed would be very out of character for a normative Moor. (R, 3778).

Finally, the defense called Donald Witmyer, a lawyer who served as a JAG officer from 1997 to 2008. (R, 3782). The defense called him to discuss court-martials and military justice. (R, 3782). There are three types: summary, which is used the least often and is a noncriminal forum; special, which is for misdemeanor offenses; and general, where you can receive a dishonorable discharge and be tried for offenses up to capital offenses. (R, 3785). Since Appellant received

the summary court-martial, it was the least amount of punishment that could happen. (R, 3786).

Sentencing and Sentencing Order

On May 13, 2022, the trial court held a sentencing hearing and issued its sentencing order. It found the existence of four aggravating factors for each murder, two of which merged into one: 1) previously convicted of capital felony for the contemporaneous murders (very great weight); 2) committed to disrupt or hinder the lawful exercise of a governmental function or enforcement of laws; 3) the victim of the capital felony was a law enforcement officer engaged in performance of official duties (merged with factor 2, collectively given very great weight); 4) CCP (very great weight). (R, 2132-46). The court considered three statutory mitigating factors: 1) no significant criminal history (moderate weight); 2) under the influence of extreme mental or emotional disturbance (not proven); and 3) ability to appreciate his criminality or conform his conduct to the requirements of the law (not proven). (R, 2149-61). The court found the existence of seven other mitigators assigning the following weights: considerable to one; some to one; little to three; very little to one; and no weight to one. (R, 2161-66).

The court followed the jury's recommendation and sentenced Everett Miller to death for the murders of Officer Matthew Baxter and Sergeant Richard "Sam" Howard. (R, 2168).

SUMMARY OF THE ARGUMENT

ISSUE 1: The trial court properly admitted the testimony of Genet "J.J." MacNab. MacNab is an expert in extremist groups and extremist beliefs, which include the Moorish Nation and sovereign citizens. The crime Appellant committed makes no sense and is seemingly without motive until certain comments and a multitude of Facebook posts he made are reviewed. Appellant had fallen down a rabbit hole of anti-government and anti-law enforcement content online as his life was falling into shambles around him. More than showing just that he was angry and directing that anger at law enforcement, MacNab's testimony was key to showing Appellant had begun adhering to a belief system and wasn't just expressing generalized complaints. This helps explain why he would do something as drastic and public as gun down to police officers in the middle of a busy street. The trial court did not abuse its discretion in admitting her testimony.

ISSUE 2: The trial court also did not err in finding MacNab qualified as an expert, and could give her expert opinion on the Moors, sovereign citizens, and how their beliefs may be relevant to this case. Although not a credentialed professor, MacNab has spent decades immersed in the culture and beliefs of various extremist groups across the nation to better understand them and track them. She works as a Research Fellow with the Program on Extremism at George Washington University, consults with a multitude of local, state, and federal agencies, educates law enforcement agencies on these extremist groups, and regularly consults with a group of other researchers in her field who study these extremists. As addressed in Issue 1, her testimony was necessary to give proper context to Appellant's Facebook posts and comments as more than angry ramblings, or as the defense tried to portray them, evidence of mental illness. The trial court properly acted within his discretion in finding her to be an expert witness.

ISSUE 3: The finding of CCP for both murders was supported by competent, substantial evidence. Both officers were shot execution-style in the back of their heads before ever getting a chance to even unholster their weapons, and there is no evidence they did anything

to provoke Appellant. The most logical conclusion that can be drawn from Appellant's actions that night was that he saw a police officer harassing a civilian, and given his ever-growing hatred of law enforcement, decided to take matters into his own hands. He used a gun that he could palm in his hand so that it could both be concealed and more easily and quickly accessible than a holstered gun. He requested a second officer to the scene that he had injected himself into even though he kept telling people how supposedly worried he was of interacting with law enforcement. And he must have been waiting for, and exploited, an opportunity to shoot both officers when they were otherwise distracted, as both were shot in the back of the head and offered no resistance. He then posed the bodies and shot each again in the face. All the while, he was using a single-action revolver, which required the user to both manually pull back the hammer and then pull the trigger before a bullet would be expelled. While not the classic meticulous murder planned out months in advance, Appellant may picture when thinking of CCP, the facts show he acted in a cold, calculated manner with a clear plan of action exhibiting heightened premeditation.

ISSUE 4: The trial court properly excluded evidence of diminished capacity during the guilt phase, a defense that is not cognizable in Florida. While Appellant asserts evidence of his PTSD was crucial to an affirmative defense to show he acted in the heat of passion as opposed to with premeditation, he is simply stating the textbook example of what a diminished capacity defense is. First-degree murder is a specific intent crime, and he was seeking to introduce evidence of his mental illness to show he was unable to form that specific intent. The cases he cites in support actually do deal with introduction of such evidence for an affirmative defense: self-defense. Rather than trying to negate a specific intent element of a crime, those defendants were trying to show that they were not liable legally at all because they were acting in self-defense, and their mental illness is what affected their subjective perception of a threat to themselves. That is not what Appellant was offering his PTSD evidence for, he was instead trying to negate the premeditation mens rea, and thus was trying to present diminished capacity. The trial court did not abuse its discretion in excluding inadmissible evidence.

ISSUE 5: Florida's capital sentencing scheme is designed to properly narrow the class of cases eligible for the death penalty. Even if this

Court were to accept Appellant's argument that there are so many aggravators as to cover every possible murder—which the State does not concede—that would not be enough to find a lack of narrowing. Florida's death penalty does not begin and end at the finding of a single aggravator. Instead, a jury must find those aggravators alone justify the death penalty; that they outweigh any mitigators that are found; and ultimately, decide unanimously (at the time of Appellant's trial) that death was the proper sentence. And they are instructed that at no time must they vote for death even if they find the aggravators outweigh the mitigators. And after all that, a judge still has the opportunity to override their recommendation and impose a life sentence but cannot override a life verdict.

ISSUE 6: The trial court did not abuse its discretion in declining to give a special jury instruction on mercy drafted by defense. Standard jury instructions are preferred, and Appellant even concedes that this claim is precluded by this Court's opinion in *Woodbury v. State*, which pointed out the standard jury instructions already contain a mercy instruction, even if that exact word is not used.

ISSUE 7: The trial court did not abuse its discretion in admitting victim impact in this case and in allowing the State to provide some

additional victim impact after its case-in-chief had ended. Victim impact evidence has long-survived constitutional challenges both in this Court and in federal courts and Appellant advances no novel argument to exclude it. Additionally, the only reason the State requested to present victim impact evidence during its rebuttal case is because defense counsel objected to some videos shortly before the penalty phase began, despite having the evidence to review for months. Given this, redactions could not be accomplished before the State presented its case. Rather than continue the case, which had already been delayed months, while the jury was sitting outside waiting to hear evidence, the Court permitted the State to present the evidence after they had time to properly redact it. This was not an abuse of discretion.

ARGUMENTS

ISSUE 1: THE TRIAL JUDGE PROPERLY ACTED WITHIN HIS DISCRETION IN ADMITTING RELEVANT EVIDENCE

Here, Appellant argues that the trial court erred in permitting the State to present the testimony of Genet MacNab related to Moors and sovereign citizens. The State called MacNab to explain the significance of several Facebook posts Appellant made in the months

and weeks leading up to the murders, and how those posts signified Miller may have started identifying with a group that was anti-law enforcement and often anti-white. This was relevant to his motive not just for committing the crime in general, but for who he targeted and why.

The standard of review for a judge's decision to admit evidence is abuse of discretion. *Hudson v. State*, 992 So.2d 96 (Fla. 2008). Abuse of discretion occurs when the judicial action is arbitrary, fanciful, or unreasonable, and discretion is only abused where no reasonable person would take the view adopted by the trial judge; if reasonable people could differ, there is no error. *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980). Appellant argues the State used MacNab's testimony to prejudicially paint him as a violent extremist and racist, and doing so was not relevant to any matter before the jury.

First, Appellant misrepresents MacNab's description of Moorish beliefs to the jury. She testified that it's an umbrella term that applies to many groups that share some beliefs and not others, and specifically stated, "I would say most people who belong in the Moorish subgroup—Moorish movement are not violent." (TT, 3578).

She also told the jury, "[A]t its core, it's harmless. These are people that gather, and they wear fezzes and outfits and have patches, and they generally promote entrepreneurialism and self-reliance and things like that. And that's not a problem." (TT, 3579). She also pointed out both Moors and sovereign citizens, which can sometimes overlap depending on the person, both have a distrust of government, and that this distrust is often focused on law enforcement since that is the agent of the government, you're most likely to run into who will try to enforce laws you believe don't apply to you. (TT, 3582-3). MacNab's testimony was provided to put into context many posts Appellant made on Facebook and comments he had been making to friends and family. Her testimony gave the jury insight into the kind of belief structure he had started to subscribe to and gave some kind of logic to this senseless crime.

Without some exploration of Appellant's social media posts and concerning comments to people, and more importantly, how they related to his mindset and motive, this crime in a vacuum makes no sense. A decorated marine corps veteran with essentially no criminal history gunned down two police officers in the middle of the street with no provocation. Having an expert come in and show the Moorish

and potentially sovereign citizen rabbit hole Miller had fallen in during the months before the murders does a lot to put the murders into context not just for motive, but for the aggravating factors, which must be proven beyond a reasonable doubt for Appellant to be eligible for a death recommendation.

The judge referred to things referenced in MacNab's testimony in finding three of the four (two of three, after merging) aggravating factors in Appellant's case. The two aggravators that merged were that the murders were committed to disrupt or hinder the lawful exercise of governmental function or enforcement of laws, and that the victims were law enforcement officers engaged in the performance of their official duties. The third aggravator was CCP. Miller confronted Officer Baxter because he perceived him to be "harassing" citizens. (R, 2134). While arguing with Baxter and apparently armed with a hidden pistol, Appellant then requested that Baxter call in his sergeant, and Baxter did. (R, 2134-5). After Sergeant Howard arrived, he and Baxter were shot at point blank range in the back of the head, then their bodies were posed, and each were shot once again in the face. (R, 2135).

The judge made reference to Miller's behavior before the murders in finding that the aggravating factors applied. His posts showed an animosity toward law enforcement, and he made multiple posts about how he would have handled police officers who were involved in police brutality encounters. (R, 2136). He told a friend shortly before the murders that, "I'm not gonna be another statistic," and showed him a small pistol—the eventual murder weapon—which he said he'd be armed with if he encountered police. (R, 2136). Importantly, he also told another inmate after the murders that he knew Baxter and Howard and that he hated them because they were always harassing people. (R, 2136).

Even with all that, Appellant's actions are still hard to fathom for someone who simply harbors animosity or ill will toward law enforcement. Given the rise of the Black Lives Matter movement and an increased focus on police brutality in this country over the last several years, especially around the time of these murders, it's likely such opinions have become increasingly common. MacNab's testimony gives an insight into where he was mentally and emotionally that simply reading his comments or posts could not provide. It showed he didn't just have some general opinions or

passing thoughts, but that he appeared to be subscribing to a *belief structure*, something that had a bigger impact on the core of who he was and how he saw himself and his place in the world. He changed his name on Facebook to a Muslim name; he flooded his timeline with anti-law enforcement and sometimes racist comments that were out of character for him previously and were in line with the Moorish system of beliefs. Without MacNab's testimony he either appeared simply as someone angry at some things he saw on the news, or as the defense would characterize it, someone devolving into severe mental illness, when in fact he was something else, and something more—he was a convert. He was, of course, angry, but he channeled that anger into this new belief system and externalized it toward law enforcement and the government. This is not the kind of connection the State could draw without someone testifying to it.

Appellant points to *McDuffie v. State*, 970 So.2d 312 (Fla. 2007) to illustrate how MacNab's testimony caused him unfair prejudice. In *McDuffie* the defendant had been charged with the murder of two Dollar General employees. *Id.* at 316. The State focused a substantial portion of its presentation on establishing McDuffie's motive was related to the dire financial situation he had found himself in. *Id.* at

319. One of the pieces of evidence they were permitted to present was testimony related to a voicemail McDuffie had left attorney David Pederson, whose father had recently filed an eviction suit against McDuffie. *Id.* at 326. Pederson testified:

> He said that he hoped myself and my father would go to Baltimore, Maryland, and get our asses shot off. At that time the sniper was there. Also, he said you can go suck your father's dick, fuck your mother, things along that nature. It's just—it was a nasty, hardcore message.

Id. This Court found that admission of the testimony was error because any probative value it showed as to his state of mind and desperation was outweighed by the unfair prejudice of the "the highly inflammatory contents of a voice mail depicting McDuffie as a person with a vicious temper who wishes on another individual a fate similar to that of the victims of the Washington, D.C./Baltimore area snipers." *Id.* at 328.

Appellant's case is distinguishable. McDuffie's statements were wholly unrelated to the crime he later committed, involved excessively vulgar attacks toward someone who was not one of the victims or related to the victims, and specifically wished for them to be killed by a notorious serial killer. Miller's Facebook posts, on the other hand, were generalized attacks at the law enforcement at large

and exhibited that he had fallen into a belief system that wanted to elevate the black race at a time when tensions between the black community and law enforcement at large were becoming increasingly strained. They also involved instances where he said he would have taken the police out when commenting on incidents, and he did, in fact, later kill two police officers. While some of his posts were of course inflammatory, they were much more probative of his state of mind and motive specifically toward his later murders in a way McDuffie's voicemail was not.

Appellant's case is more similar to *Gregory v. State*, 118 So.3d 770 (Fla. 2013). In *Gregory* the defendant was accused of murdering his ex-girlfriend and her new boyfriend. *Id.* at 774-5. One of the pieces of evidence the State introduced was a statement Gregory made to a former co-worker eight months before the murders, which is that if he ever caught his girlfriend cheating on him, he would kill them both. *Id.* at 780. This Court found that the trial court did not abuse its discretion because, even though the comment was eight months prior, it showed evidence of Gregory's motive and intent in murdering his girlfriend and her new boyfriend, something he ultimately did. *Id.* at 781. Appellant's comments have the same nexus

and were admitted for the same purpose as Gregory's. He kept saying on Facebook and to friends that if he encountered the police he wouldn't be another statistic, that he had something ready for them, and commented on other incidents how he would have handled them differently. And just like Gregory, he ultimately carried out his threats. His statements and posts were relevant to his motive, state of mind, and the aggravating factors because they show he targeted his victims specifically because they were police officers and had been planning on doing something like this for a while (CCP).

This claim should be denied.

ISSUE 2: THE TRIAL COURT PROPERLY ADMITTED STATE WITNESS MACNAB'S EXPERT TESTIMONY

Here, Appellant argues that the trial court erred in finding J.J. MacNab's testimony qualified as an expert opinion under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The admission of expert testimony is reviewed under an abuse of discretion standard. *Kumho*, at 138-9.

For expert testimony to be admissible under *Daubert* it must meet three criteria: 1) the testimony is based upon sufficient facts or data; 2) the testimony is the product of reliable principles and

methods; and 3) the witness has applied the principles and method reliably to the facts of the case. Fla. Stat. § 90.702.

Appellant's main argument attacks MacNab's credentials, and he begins by describing her as "a lay person that has made a hobby of watching news reports of violence towards police officers." IB at 50. He takes issue with the fact she is not a professor, there are no conferences for her type of work, and the field of research she is in is small. He argues she has no academic credentials in the area of extremism. He also seems to argue the incidents of Moorish sovereign violence are too infrequent to describe them as an extremist group, and believes she unreasonably concluded Appellant may be a member of the Moorish belief based on what she reviewed. She also had not previously been deemed an expert on extremism or extremist violence by a court, but there's no evidence she has even been prevented from doing so. (TT, 2881). Finally, he argues that since the court limited her to providing expository information about Moors and sovereign citizens, and to not give an opinion on whether they applied to Appellant, her testimony was irrelevant to any issue and was "pure opinion" testimony.

While it is true MacNab does not have elite credentials of a Ph.D from an Ivy League university in the field of extremists and extremist beliefs, *Daubert* does not require some kind of arbitrary credentialing for a witness to be recognized as an expert. *Daubert* permits an expert to be qualified by knowledge, skill, experience, training, *or* education. *See, United Auto. Ins. Co. v. Progressive Rehab. & Orthopedic Servs.*, LLC, 324 So.3d 1006 (Fla. 3rd DCA 2021); *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 147-51 (1999). In their response to the Daubert motion, the State laid out MacNab's thorough qualifications in this area and how her testimony would be helpful to the trier-of-fact:

a. Ms. MacNab's status as one of the nation's leading experts on sovereign citizens, tax protesters, U.S. paramilitary militia groups, and related anti-government extremist organizations, including members of the Moorish movement.

b. Ms. MacNab having received her Bachelor of Arts in International Relations from the University of California at Berkeley, and now working as a Research Fellow with the Program on Extremism at George Washington University, exploring current trends in and public policy responses to homegrown anti-government extremism.

c. Ms. MacNab detailing more than 20 years of her professional experience in the field of anti-government extremism, including working as a consultant for

various federal, state, and local regulatory and law enforcement agencies, testifying before the U.S. Senate and other governmental agencies on subjects ranging from the growth of extremist groups to the financial scams used to recruit new members to these groups. Ms. MacNab will also describe her writing regular columns on the subject of anti-government extremism at Forbes, and appearing as an expert on CBS 60 Minutes, CNN, NBC Nightly News, ABC World News, NPR, as well as numerous other television news and radio shows. Finally, Ms. MacNab will testify she is the author of the forthcoming book, The Seditionists: Inside the Explosive World of Anti-Government Extremism in America.

d. Ms. MacNab explaining that much of her knowledge of anti-government Extremism-and the groups that promote the beliefs within it-derives from her review and study, for more than a decade, of interviews of extremists, their writings, their practices, and the history behind certain viewpoints or belief systems. Ms. MacNab will further testify that there are very few experts who study the topic of extremism within the United States.

e. Ms. MacNab detailing her review in this case of hand-written notes found in Defendant's vehicle within hours of committing the murder, videos hosted by Defendant's YouTube account with the user name "top_scout_0241," screenshots of postings made by Defendant on his Facebook page, account name "Malik Mohammad Ali, user name "Everette.milelr," a list of books and other reading materials requested by Defendant while incarcerated, and police reports and witnesses statements generated or obtain by police during the investigation of the homicide.

f. Ms. MacNab explaining her use of "content analysis" as her methodology used to review documents and

communication artifacts, including photographs, audio, and video, to infer the motivations and belief systems of individuals by comparing them to recognized and commonly occurring communications of adherents to specific belief systems, in this case members of the Moorish nation. Ms. MacNab will testify that content analysis is commonly used by researchers in her field and is generally accepted amongst scholars within her field.

g. Ms. MacNab educating the jury on the origin and belief system of Moorish subgroups, with said beliefs including the idea that African Americans are descendants of peoples from North Africa who arrived in North America before European colonists, and are therefore not subject to a United States government formed after their arrival. She will further inform the jury of the Moorish nation's belief in racial superiority over the white race, resulting in anti-white views and sentiments, as well as disdain or hatred for government figures, most particularly law enforcement officers.

h. Ms. MacNab opining that Defendant's name change, hand-written notes and explanations of his beliefs in recorded calls from the jail, and self-identification as a "Moor" in social media posts, among other markers she will describe, are consistent with Defendant's adoption of aspects of Moorish identity.

i. Finally, the State seeks testimony from Ms. MacNab that the attack on the victim officers in this case is consistent with other attacks on law enforcement officers, since 2014, carried out by individuals identifying themselves as members of Moorish subgroups, and that law enforcement nationwide received a bulletin warning of such attacks from the FBI on August 3, 2017-two weeks before the Defendant committed the murders in this case.

(R, 1168-70).

It is clear from the record that MacNab was qualified to give an expert opinion in her field and that her "content analysis" approach was reliable and sound. While evaluating the admissibility of expert testimony, "the trial court must determine if (1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case." *Hawthorne v. State*, 248 So.3d 1261, 1261 (Fla. 1st DCA 2018). The Daubert Court further outlined a *non-exhaustive* list of factors that courts should consider in determining the reliability of expert testimony: (1) whether the theory or technique used by the expert can be or has been tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) general acceptance in the scientific community. 509 U.S. at 593-94. Importantly, however, the United States Supreme Court subsequently provided "that a trial court may consider one or more of the specific factors that *Daubert* mentioned ... [but] the test of reliability is flexible and *Daubert*'s list of specific factors neither

necessarily nor exclusively applies to all experts or in every case." *Kumho*, 526 U.S. at 141. The Court in *Kuhmo* stated the following:

> Experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called general truths derived from ... specialized experience. And whether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert's testimony often will rest upon an experience confessedly foreign in kind to the [the jury's] own. The trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate that foreign experience, whether the testimony reflects scientific, technical, or other specialized knowledge.

Id. at 148-9 (internal citations omitted). This language from the U.S. Supreme is echoed by the Advisory Committee's notes to Federal Rule of Evidence 702, which is essentially identical to Fla. St. 90.702, which states the following:

> A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F .3d 107 4, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an

> automatic challenge to the testimony of every expert. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct.1167, 1176 (1999) (noting that the trial judge has the discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.").

Fed. R. Evid. 702, Advisory Committee's Note (2000). *See also United States v. Hammoud*, 381 F.3d 316, 337 (4th Cir. 2004), vacated on other grounds, 543 U.S. 1097 (2005) ("'The court, however, should be conscious of two guiding, and sometimes competing, principles': (1) 'that Rule 702 was intended to liberalize the introduction of relevant expert evidence;' and (2) 'that due to the difficulty of evaluating their testimony, expert witnesses have the potential to be both powerful and quite misleading.'") (quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999)). A review of two federal court decisions addressing the admissibility of testimony regarding the identification, categorization, and radicalization of terrorists is instructive for the Court.

In *United States v. Batiste*, No. 06-20373-CR, 2007 WL 5303052 (S.D. Fla. Oct. 26, 2007), the Southern District Court of Florida addressed a defendant's motion to exclude the expert testimony of

the Government's witness Dr. Tanter, who was prepared to testify regarding: (1) different categories of terrorists, including "radical converts;" (2) the radicalization process of terrorists; (3) how the defendants in the case fit the profile of "radical converts"; (4) how the defendants followed a process of radicalization similar to that of other extremists and radical converts; and (5) that the defendants shared the goals of terrorists, among other things. *Id.* at 3. The court in *Batiste* denied the defense motion to exclude the expert testimony, concluding not only that the expert was qualified to testify, but also that the testimony was admissible and would be helpful to the trier of fact. *Id.*

In conducting its Daubert analysis the Batiste court first assessed the expert witness's qualifications to testify. In finding Dr. Tanter qualified to testify as to domestic terrorism and the radicalization process, the court relied on both his education and professional experience. *Id.* at 4. The court noted that Dr. Tanter "ha[d] spent the last 40 years in the field of international and domestic terrorism," was at the time "a consultant on the intersection of domestic and foreign terrorism to various government agencies," and was a professor at Georgetown University who taught courses on

domestic and international terrorism. *Id.* The court also thought it significant that Dr. Tanter had been regularly interviewed about occurrences of terrorism both domestically and internationally, and ha[d] published at least three books and many articles regarding the area of domestic and foreign terrorism ... ,"all which had been peer reviewed. *Id.*

The *Batiste* court next reviewed the reliability of the methodology and reasoning Dr. Tanter employed in reaching his conclusions regarding terrorism and the radicalization process. *Id.* Dr. Tanter testified that he "often employs a method called 'content analysis,' which involves taking an individual's statements and inferring what the motivations of the individual might have been in the absence of being able to interview them directly. *Id.* Dr. Tanter further stated that after reviewing both the evidence in the case and the defendants' statements, he could conclude that the defendants were "radical converts" who converted from one religion to violent Islam. *Id.* Dr. Tanter also noted that although he did not have an error rate for the radicalization process, nor a control group, his expertise, research, analysis, and the existing data in the field provided for the validity of the process. *Id.* at 5.

The Southern District ultimately concluded that the data and reasoning relied upon by Dr. Tanter was the product of reliable principles and methods. *Id.* The court found that "the radicalization process described by Dr. Tanter [was] a valid social scientific method that offer[ed] a theoretical explanation for Defendants' alleged actions in [the] case." *Id.* The court also noted that "the radicalization process [could] be challenged on cross-examination at trial, and [could] be assessed and criticized in the trial testimony of the Defendant's experts." *Id.* (citing *Daubert*, 509 U.S. at 596 (explaining that a party should use vigorous cross-examination and the presentation of contrary evidence to attack even "shaky but admissible" evidence)). Lastly, the court found Dr. Tanter's testimony would be helpful to the jury, holding that "Dr. Tanter's testimony [would] both 'logically [advance] a material aspect of the proposing party's case' and [assist] the jury in understanding the principles underlying the charges in [the] case, as well as the defense theories." *Id.* at 6.

The Fourth District Court of Appeals reached a similar conclusion in its decision in *United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014). In *Hassan*, the Eastern District Court of North Carolina had issued an order denying the defendant's motion to

exclude expert testimony regarding several aspects of decentralized and homegrown terrorism. *Hassan*, 742 F.3d at 131. The Fourth Circuit Court of Appeal affirmed the admission of the evidence, holding the trial court had not abused its discretion in admitting the expert's testimony after holding a hearing and determining the expert "possessed the requisite knowledge, skill, experience, training, and education to testify on various aspects of the trend of decentralized terrorism and homegrown terrorism." *Id.* The Fourth Circuit took particular note of the expert testimony's assistance to the trier of fact, pointing out the "case involved terminology and concepts that were likely to be unfamiliar to jurors." *Id.* (citing *United States v. Benkahla*, 530 F.3d 300, 309 (4th Cir. 2008) ("There, the trial evidence was also 'complicated, touching by necessity on a wide variety of ideas, terms, people, and organizations connected to radical Islam.' We thus ruled that the trial court had not abused its discretion in deeming 'lengthy testimony about various aspects of radical Islam ... appropriate, and indeed necessary, for the jury to understand the evidence and determine the facts.'"). The analysis of the courts in and provide a framework for the clearly admissible testimony of State expert J.J. MacNab.

MacNab possessed the specialized knowledge required for the Court to permit her to provide her opinion to the jury about Moorish sovereign beliefs and how Appellant may have been exhibiting them. MacNab has spent more than 20 years researching and studying various anti-government extremist groups. Her research and knowledge on the topic led the Program on Extremism at George Washington University to bring MacNab onto their multidisciplinary team that not only studies extremism but works to develop pragmatic policy solutions to the challenges extremism represent. MacNab has testified before the United States Senate on the topic of extremism, and she has consulted on the topic with the Department of Homeland Security, the FBI, the Joint Terrorism Taskforce, the United States Marshall's Services, the Department of Justice, the Internal Revenue Service, and the Canadian Provincial Police. MacNab is regularly interviewed on the topic of anti-government extremism, has appeared as an expert on several radio and television shows, including "60 Minutes", and writes a regular column on the topic for Forbes. MacNab is also the author of a book on anti-government extremism, "The Seditionists". MacNab writing is not subject to peer review, but this fact is not determinative in the Court's analysis. *See Kannankeril*

v. Terminix Intern, Inc., 128 F.3d 802, 809 (3rd Cir. 1997) (noting that peer review and publication "may not, however, in every case be necessary conditions of reliability") (citing *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1042 (2d Cir.1995) (holding that peer review and publication or general acceptance of an expert's theory goes to the weight of the testimony rather than its admissibility)). Instead, she often consults with other experts in her field and regularly attends conferences and meetings where such experts congregate. Her education, research, and experience qualify her to opine on the topic of antigovernment extremism. *See Kannankeril*, 128 F.3d at 806 ("The Rules of Evidence embody a strong and undeniable preference for admitting any evidence which has the potential for assisting the trier of fact. Rule 702, which governs the admissibility of expert testimony, has a liberal policy of admissibility.").

MacNab's testimony was also based upon sufficient facts or data. MacNab reviewed the hand-written notes recovered from Appellant's vehicle pursuant to a search warrant, his YouTube account and videos posted there, as well as Appellant's Facebook account and posts throughout the six-month period leading up to Appellant's murder of the officers in this case. *See Giamo v. Florida*

Autosport, Inc., 154 So.3d 385, 388 (Fla. 1st DCA 2004) (concluding the medical expert at issue relied upon sufficient facts or data by reviewing the medical records and diagnostic studies of the plaintiff in the case).

MacNab's use of "content analysis" as a research methodology in this case, wherein she reviewed Appellant's hand-written notes, his statements found in YouTube videos and in his social media posts, as well as police reports documenting the evidence and Appellant's behavior, was approved as an "accepted practice in the social science community" in *United States v. Baptiste,* 2007 WL 5303052 at 4 (S.D. Fla. Oct. 26, 2007). *See also United States v. Frazier*, 387 F.3d 1244, 1262 n.14 (11th Cir. 2004) ("Scientific evidence encompasses so-called hard sciences (such as physics, chemistry, mathematics and biology) as well as soft sciences (such as economics, psychology, and sociology), and it may be offered by persons with scientific, technical, or other specialized knowledge whose skill, experience, training, or education may assist the trier of fact in understanding the evidence or determining a fact in issue.") (internal citations omitted).

Finally, MacNab's testimony applied the principles and methods of content analysis and experts in her field reliably to this case. MacNab methodically compared her observations of Appellant's statements, writings, his name change, his use of and citation to beliefs of Moorish sovereigns, and his self-identification as a "Moor" to the statements, writings and belief systems of other, previously identified adherents to the Moorish movement, as well as to the documented teachings and writings of readily identifiable adherents to Moorish beliefs such as the Moorish Science Temple, the Nuwaubian Nation, and the "Five-Percent Nation." In addition, MacNab did not attempt to utilize every potential Moorish indicator found in the materials she reviewed, acknowledging that some of the markers she observed in Appellant's writings "are not unique to [Moorish] teachings." This acknowledgment should boost the reliability of her application of content analysis in this case as it shows she was simply finding what she was looking for like Appellant suggests.

Considering all this, Appellant cannot show how admitting her testimony rises to the level of the very lenient abuse of discretion standard. This claim should be denied.

ISSUE 3: THE JUDGE PROPERLY FOUND THAT THE COLD, CALCULATED, AND PREMEDITATED (CCP) AGGRAVATING FACTOR APPLIED TO BOTH MURDERS

Appellant argues that the judge erred in finding that the CCP aggravator applied to the murders in this case. Specifically, he argues that the "heightened premeditation" aspect of CCP is missing, and this was an unplanned double homicide.

The standard of review for a judge's finding of an aggravator is whether it is supported by competent, substantial evidence. *Conde v. State*, 860 So.2d 930, 953 (Fla. 2003). There are four elements that must be met to support a finding of CCP: the murder must have been "cold"; the murder must have been "calculated"; the murder must exhibit some heightened premeditation above that needed for a first-degree murder conviction alone; and the murder must be done without any pretense of legal or moral justification. *Walls v. State*, 641 So.2d 381, 388 (Fla. 1994).

The judge did a lengthy and thorough analysis of the facts of this case in finding CCP applied to the murders. For the first element the court pointed out that execution-style killing are by their very nature "cold". *Lynch v. State*, 841 So.2d 362, 372 (Fla. 2003). The court found that the evidence established that Miller executed both

officers, as both had contact or near-contact wounds to the back of their heads and to their faces. (R, 2139-40). The evidence also showed Miller had caught them off guard and executed them before they could call for help or defense themselves. (R, 2140). Sergeant Howard had no defensive wounds at all, and Baxter had only minor abrasions. (R, 2140). There was no evidence either officer had had a chance to deploy their tasers, pepper spray, or even reach their guns—in fact, Howard's gun was still securely holstered to his body and there was no record of either officer radioing for assistance. (R, 2140). There was also no evidence of provocation as, again, none of their weapons were drawn and the only other witness, Maribel Gonzalez, testified both officers stayed calm while she was present. (R, 2140-41). The court also found there was no evidence Appellant was prompted by emotional frenzy, panic, or rage. (R, 2141). Although he was clearly agitated, he was upset because he thought Officer Baxter was harassing people (not Appellant himself), and he calmly requested Baxter's supervisor. The judge also cited that "[h]is Facebook posts in the month immediately prior to the murders of Officer Baxter and Sergeant Howard contained numerous comments and posts expressing his anti-law enforcement sentiments" and he

had told a friend, J.W. Albright, shortly before the murders, "I'm not going to be another statistic," and "if you're going to take me out, you know, I got this," while displaying the eventual murder weapon. (R, 2141). Finally, he told another inmate that he hated the officers and that he always saw them harassing people, and if he'd had his AR-15 that night he could laid out and picked off the officers one by one. (R, 2142).

The court also found the "calculated" element established, finding "Defendant expressed his prearranged design to commit violence upon law enforcement officers before and after murders in several different ways." (R, 2142). He had Facebook posts reflecting anti-law enforcement sentiment, such as, "I'm a killer by trade," "That cop is a punk. I would whoop his azz and all his friends," and "Here is another human murder by cops. *It won't happen to me*." (R, 2142) (emphasis added). The judge also referenced again the conversations Appellant had with Albright and a fellow inmate cited for the "cold" element. (R, 2142-3). He also armed himself in advance with a small .22 caliber firearm that could be concealed in his palm. (R, 2143). He expressed an intent beforehand to use that gun against police if he felt harassed; he inserted himself into an encounter that

didn't involve him when he could have just driven by; he stayed and confronted Baxter and even asked him to summon another officer; he killed both officers execution-style by shooting them in the back of the head at point blank range, showing he clearly waited for his moment to strike. (R, 2143). He had a YouTube video where he displayed his proficiency with that firearm and was practicing headshots—the eventual method of the killing—at ten yards, hitting the target in the head 5 times in less than 6 seconds. (R, 2143). Finally, the gun he used was a single action, rather than the typical semiautomatic hand guns more commonly used today. (R, 2143-44). That means it required two movements to fire: first, the shooter has to manually pull back the hammer, and then after, separately pull the trigger to fire one bullet. (R, 2143-44). Typical handguns today can fire one bullet by simply pulling trigger, which both pulls back the hammer on the gun itself and then expels the projectile. That means Appellant had to make two separate decisions before firing each bullet, all of which, like the target in his video, ended up in the heads of his victims. (R, 2144). "Instead of leaving the scene that night with the officers still alive, Defendant made eight separate decisions to cock the hammer back and/or pull the trigger when he

murdered both officers by shooting each of them in the head twice." (R, 2144).

Third, the trial court found there to be "heightened premeditation." (R, 2144). The court again pointed out that he had armed himself in advance and expressed an intent to use a firearm against police if he felt he was being harassed. (R, 2144). He told a fellow inmate he recognized the officers, hated them for harassing people, and shot both execution-style in the head. (R, 2144). It's clear he caught them off guard as they weren't given an opportunity to use any of their weapons, including their guns, and one officer had only minor defensive wounds and the other had none. (R, 2144). There's no evidence he was provoked and in fact the scene did not initially even involve him; he inserted himself into the situation and convinced Baxter to summon another officer, presumably to increase his body count. (R, 2144). And he made eight separate decisions after all that in firing the four bullets from a single-action revolver. (R, 2144). Additionally, the evidence suggests that both officers were shot first in the back of the head and that Appellant then posed by the bodies before shooting each point blank in the face, as the court noted, "[t]his is the most reasonable explanation because the officers

were caught off guard and an attack initiated from behind is more likely to go undetected. It is also unreasonable to believe the officers would have allowed Defendant to stand in front of them and place the barrel of his firearm to their lips to take the first two shots." (R, 2144-5). The evidence suggests after incapacitating each officer with a shot to the back of the head, he placed them on their backs with their arms to the side, as that is not how a body would normally fall to the ground, much less two, and then shot each in the face. (R, 2145). The court found this also exhibited heightened premeditation. (R, 2145).

Finally, the court found the Miller lacked any pretense of legal or moral justification, something he did not contest. (R, 2146). Citing a string of cases the court found, "Defendant's belief that law enforcement officers, like the officers murdered in the case, harass people is not a moral or legal justification for his actions." (R, 2146).

Appellant disagrees with several of the court's findings related to the heightened premeditation element of CCP, although he does concede this aggravator typically applies to execution-style murders under *McCray v. State*, 416 So.2d 804 (Fla. 1982). He argues his comments that he was a killer by trade and that he wasn't going to

be another statistic are not relevant because they were not specifically directed toward the victims in this case. He also argues that his comments that he hated the victims is irrelevant—while also questioning the credibility of the source of the statement, a fellow inmate with 28 felony convictions—because he wasn't driving around town looking for them the night of the murders. He also claims there is no evidence he "armed himself in advance" because he was always armed. He disagrees with the judge's finding that the officers didn't provoke him that he was free to leave, instead saying once the officers asked the other people present to leave, "At this critical point we do not know how Officer Baxter and Officer Howard responded to an agitated non-compliant African American male that refused to produce his driver's license and was armed." He says that because Baxter asked for his license (after he initiated the encounter and was berating Baxter for some time), he was in fact not free to leave. IB 68-72. He seems to urge this Court to find that this must have been a provoked attack from a real or perceived threat from the officers.

Appellant's arguments require this Court to pretend nothing happened before or after this event in his life that led to or informs how he ended up murdering to police officers. It's important to look

at the entire context of his life, and especially the months leading up to the murders, to see that this was not something he decided to do within a few seconds.

Appellant had a decades-long career in the Marines where, by all accounts, he was a model recruit. He received top marks, was promoted almost as high as he possibly could be by the end of his career, and was widely respected by subordinates, peers, and his superiors. Then, not long after ending his contracting job, which was essentially an extension of his military career and where he was also highly regarded, he's back in the civilian world, and his life begins to unravel. He broke up with his girlfriend, he lost a seemingly low-skill warehouse job, and he was largely living out of his car. As a Marine, he was extraordinary. As a civilian, he was ordinary. It's clear that this shatters his view of himself, as his lifelong friends said he started changing rapidly, espousing views and extreme beliefs they'd never heard from him before, leading many to simply stop talking to him. All his life, Appellant had been essentially at the top of his field in a highly competitive, regimented environment. Then when he left, he found himself just another person struggling to make ends meet and fill his days. It's clear from his posts and the things he said to people

that he was angry, and it's equally clear he needed to externalize that anger somewhere else than at himself, as he quickly latched onto the anti-law enforcement sentiment increasing around the country and apparently also the Moorish belief system, going as far as to change his Facebook name to a more Muslim/Moorish epithet.

He continually talked about how he would act if police confronted him, that he wouldn't be just another statistic, and he procured a single-action pistol small enough to fit in the palm of his hand. This is especially important because it shows a level of planning for his supposed eventual "self-defense". Appellant argues the judge erred in finding he procured a gun in advance because he was always armed, but it's not that he secured a gun, but it's the particular gun he chose to arm himself that shows planning. If he simply has a gun in a holster, he runs into two problems if he's ever in a situation to fight the police. One is that it is much more likely to be visible and thus tip the police off to be wary. The second is that he would have to reach to pull it out, a very obvious movement that a police officer would immediately perceive as a threat and have more time to react to. This small pistol allowed him to be instantly and secretly armed when he approached Baxter and to more quickly shift

to a firing position as all he had to do was adjust his grip around the gun and raise it. It's no accident that this small pistol, which packs far less fire power than Appellant's other more visible, harder to immediately use, guns was chosen as the murder weapon: it's because he had planned out this scenario in advance, and was willing to trade stopping power for the opportunity to strike first.

And so, we reach the night of the murders. Appellant, who has stated he recognized Baxter from around the neighborhood and always saw him harassing people, again sees Baxter and believes he's harassing people. He can keep going, he can avoid the police encounter he keeps saying he is so worried about dealing with, but instead he initiates. He pulls over, he inserts himself into a situation that has nothing to do with him and never would have, he asks Baxter to get another officer on scene, and within a few minutes two law enforcement officers are dead in the middle of the street. Just like the selection of the palm-able .22 caliber pistol, this result is also not the accident Appellant would have you believe. His Facebook posts exhibited a desire to hit back at law enforcement; instead of letting them continue killing unarmed black men, Miller kept saying how he would deal with unruly, harassing police officers. And the

night he saw Baxter apparently harassing someone on the street, he saw his opportunity to do just that. His actions that night and the result of two murdered police officers make no logical sense unless that was his plan when he pulled over.

First, Miller, who professes he doesn't want to be another statistic due to police brutality, *initiates an encounter with law enforcement*. As Appellant must have been aware, the easiest way for him not to end up killed by the police would be to not interact with them at all. Then, instead of showing the officer his gun or setting it aside to show he's not up to anything, he simply claims he has one in his car while actively concealing one in his palm. Next, he actually requests that Baxter call another police officer to the scene. Having no interaction with police would have been the simplest path to not having a violent interaction with them, but now he's actively requesting the presence of an additional officer, which does not make any sense if he is trying to avoid a situation where he could be at risk. It only makes sense if he is hoping to kill more than one law enforcement officer, a member of a group he clearly saw as the enemy. Finally, and crucially, after Sergeant Howard arrives, the only conclusion that can be reached is that Appellant waited for his

moment. Both officers were shot in the back of the head without ever having the opportunity to fight back or even unholster their guns. According to Officer Edward Martinez, not only had Howard's gun not been drawn, he had not even disengaged the top leather hood that holds the gun in the holster. (TT, 2429). Baxter's gun was still secured and holstered as well. TT, 2761-2. If Appellant had been provoked by some actions of the officers, or some struggle ensued, it makes little sense that both of them ended up shot in the back of the head without ever having the chance to retrieve any of their weapons. At least one of them would have had an opportunity to react if either officer had set Appellant off and they were looking at him; instead, as evidenced by the shots to the back of the head, he caught them in a moment where both happened to be looking away. The murder weapon was a gun that required two actions to fire each shot, and its unlikely Appellant would have had that opportunity against two trained police officers unless they were caught unaware; i.e. by a prepared attack from Miller.

An analogous case is *Brown v. State*, 126 So.3d 211 (Fla. 2013). In that case the defendant and victim, Juanese Miller[3], were both employees at a Wendy's restaurant with an ongoing feud. *Id.* at 213. Various incidents between the two led to both their hours being cut. *Id.* The day of the murder both were working the same shift, but other employees did not notice any active issues between the two. *Id.* However, the supervisor, Mike Emami, noticed that Brown was working slowly and seemed upset. *Id.* Emami attempted to engage Brown in conversation, but Brown complained about his hours being cut, two began arguing, and Emami forced him to leave the restaurant. *Id.* Brown eventually returned to the restaurant still upset, asking for Emami. Emami had left, but Juanese was at the counter ordering lunch with her back to Brown; the two did not interact. *Id.* Brown then left and appeared to be leaving as he put in his car in reverse. However, instead he got out of the car, walked directly back into the restaurant, pulled a .40 caliber gun from his waistband and shot Juanese in the back while still yelling for Emami. *Id.*

[3] To avoid confusion with Appellant, Juanese will be referred to by her first name.

Like Appellant, defendant Brown had a lot of animosity directed toward other people. He may argue that Brown had previously directed his anger toward his eventual victim specifically, but Appellant did later admit he had a hatred specifically toward Baxter and Howard as he'd seen them around the neighborhood before. Like Appellant, Brown armed himself in advance, although it seems his intended victim was Emami and not Juanese. Critically, the evidence shows Brown had abandoned his plan and was leaving, as he'd put his car in reverse; but instead, in that moment he made the decision to kill Juanese. Heightened premeditation can be shown when a defendant has an opportunity to leave the scene but chooses to kill the victims instead. *Looney v. State*, 803 So.2d 656, 679 (Fla. 2001). Additionally, "[a] plan to kill may be demonstrated by the defendant's actions and the circumstances surrounding the murder even when there is evidence that the final decision to kill was not made *until shortly before the murder itself*." *Brown*, 126 So.3d at 219, quoting *Baker v. State*, 71 So.3d 802, 819 (Fla. 2011). It appears the decision to kill Juanese in particular was made in an even shorter amount of time than Appellant had in this case, and this Court still upheld the finding of CCP against Brown. *Id.*

Like Brown, Appellant had a prearranged plan to kill. He procured a gun in advance uniquely designed to give him the opportunity to get the drop on trained, armed police officers. He inserted himself into a situation with Baxter and made sure to palm his selected weapon beforehand. Despite his protestations that he was worried about being a victim to police brutality, he insisted that Baxter summon another police officer to the scene, which would only put Appellant more at risk. Given his statement to a fellow inmate later that if he'd had his AR-15 he could have picked off officers one by one, the only explanation of doing this is so he could kill two officers instead of one, and he had an active desire to have killed more if he had the firepower. Then, after the officers arrived, all accounts are they were acting calmly while he was continuing to be belligerent. And most importantly, both officers are ultimately shot in the back of the head without having a chance to defend themselves or fight back. The only logical explanation for this is that the Appellant had been waiting for a moment where they were distracted or looking away, and at that moment, struck. As he had a gun, he could palm in his hand he didn't have to waste time unstrapping a holster or reaching for his waist, but instead would have been able to adjust his

grip and shoot immediately when he saw the opportunity, which all evidence shows he did.

Appellant exhibited the heightened premeditation required to find CCP, and these murders were carried out in a cold, calculated, and premeditated manner. This claim should be denied.

ISSUE 4: THE TRIAL COURT CORRECTLY EXCLUDED EVIDENCE DURING THE GUILT PHASE THAT AMOUNTED TO A DEFENSE OF DIMINISHED CAPACITY

Appellant argues that he was prevented from presenting evidence of an affirmative defense that his PTSD resulted in this crime happening "in the heat of passion" as opposed to premeditation. IB 74. Appellant seems to be misconstruing the difference between a diminished capacity defense, which is permitted, and an affirmative defense like self-defense. The court's decision to exclude evidence is reviewed on abuse of discretion standard.

This Court has long held "that evidence of an abnormal mental condition not constituting legal insanity is inadmissible to negate specific intent." *Hodges v. State*, 885 So.2d 338, 352 n. 8 (Fla. 2004). While trial counsel and Appellant in his initial brief keep trying to

portray his defense that he acted in the heat of passion due to PTSD as an affirmative defense, it is in fact a diminished capacity defense, which is not permitted. *Evans v. State*, 946 So.2d 1, 11 (Fla. 2006). Premeditated murder is a specific intent crime, and diminished capacity is not a viable defense to negate the premeditation element of the crime. *Chestnut v. State*, 538 So.2d 820, 820 (Fla. 1989). At trial and even now Appellant does not argue he was trying to introduce the evidence for any other purpose than to negate the premeditation element and reduce the crime to a lesser degree of murder. While he is allowed to introduce evidence and make argument that his actions did not amount to first-degree murder, using "an abnormal mental condition that does not amount to insanity" is the definition of a diminished capacity defense.

The cases Appellant cites in support involve introducing mental health evidence to establish the affirmative defense of self-defense and are thus distinguishable. Instead of trying to negate the specific element of a crime to reduce it to lesser degree, self-defense asserts that a defendant is not criminally liable at all, even though they committed the acts described. In *State v. Mizell*, 773 So.2d 618 (1st DCA 2000) the district court considered the introduction of the

defendant's PTSD for the charge of attempted second degree murder. That court specifically found that the PTSD evidence was not being offered as diminished capacity evidence but was instead being offered and was relevant to the question of self-defense. *Id.* at 620-1. Similarly, in *Filomeno v. State*, 930 So.2d 821 (5th DCA 2006), the evidence of the defendant's altered or heightened fight or flight response was being offered for self-defense, not to negate a specific intent element. The district court went out of its way to distinguish Filomeno's proffered use of the evidence as for self-defense instead of diminished capacity:

> Filomeno's theory of self-defense *was not that of diminished capacity*. Filomeno never contented [sic] that his acts were involuntary, or that *he could not form the requisite intent to commit the crime charged*. Rather, he contended that the proffered evidence was relevant to help the jury understand his state-of-mind, a relevant inquiry on the question of self-defense.

Id. at 823.

"Heat of passion" is not an affirmative defense that the defendant is not criminally liable but is instead an argument that he could not form the specific intent necessary to commit the crime of first-degree premeditated murder, but may instead be guilty of the crime of second-degree murder or manslaughter. Supporting this

defense with an abnormal mental condition like PTSD that does not reach the level of insanity is textbook diminished capacity evidence and is a defense that is not cognizable in Florida. This claim should be denied.

ISSUE 5: FLORIDA'S CAPITAL SENTENCING SCHEME DOES NOT ARBITRARILY OR CAPRICIOUSLY APPLY THE DEATH PENALTY AND IS CONSTITUTIONAL

In 1972, the United States Supreme Court imposed a temporary, nation-wide moratorium on the death penalty. *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman* the Court held that the death penalty was being indiscriminately and capriciously imposed, and implicitly tasked the states with formulating a fairer system of administering it. *Id.* at 309-10. Four years later, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court reinstated the death penalty under Georgia's new statutory scheme. Georgia had instituted a scheme similar to that used by most states today: capital punishment was reserved for a few select crimes, and the trial was bifurcated into guilt and penalty phases; during the penalty phase the judge or jury would hear arguments in aggravation and mitigation, and while the state was limited to certain aggravation, the defendant was given wide latitude in what could be presented in mitigation. *Id.* 162-3. After

trial, capital defendants, like in Florida, were afforded an expedited direct review of their case by the Supreme Court of Georgia, who would independently determine the appropriateness of the sentence. *Id.* at 166-7. The Court found that these procedures properly narrowed the application of the death penalty to only the worst-of-the-worst and provided objective criteria to avoid its freakish or wanton use. *Id.* at 206-7. This narrowing of cases is a "constitutionally necessary function" of state death penalty statutory schemes. *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

Appellant argues that Florida's death penalty statute and related laws have broadened the number of cases to such a degree as to betray those requirements of *Furman* and *Gregg*. He goes so far as to say, "virtually all conceivable murders fit at least one of the sixteen categories of eligibility." IB at 84. Even if we assume this assertion is correct for the sake of argument (which it is not), it completely ignores how the death penalty is implemented in the State of Florida. The existence of an aggravating factor is only the first step in the process Florida uses to narrow the large number of first-degree murder cases that result in the death penalty to only the worst of the worst.

A jury must go through several steps before returning a verdict for the death penalty. First, they must unanimously determine that at least one aggravating factor has been proven beyond a reasonable doubt; they can only choose from those presented by the prosecution, and the prosecution is limited by a statutory list of specific aggravators. Fla. Stat. § 921.141 (2)(a)(6) (2019). Before they even start the weighing process, they then must unanimously find that any aggravators they found are sufficient on their own to warrant the death penalty. *See* Fla. Standard Jury Inst. 7.11 ("If you do unanimously find the existence of at least one aggravating factor and that the aggravating factor[s] [is][are] sufficient to impose a sentence of death, the next step…") (emphasis added). After making this unanimous determination, the jurors make individual determinations about which, if any mitigating factors were proven by a preponderance of the evidence. *Id.* Unlike the state and aggravating factors, in addition to a list of statutory mitigating circumstances, the defense is permitted to present, "the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty," and so the defense is not limited in any way as to what they can present in mitigation. Fla. Stat. § 921.141 (7) (2019).

The jury must then make another unanimous finding, this time that whatever aggravators they had to unanimously find outweigh any mitigators they each individually found to exist. Fla. Stat. § 921.141 (2)(b)(2) (2019). After all this, their job is still not done; they must then unanimously find, after unanimously agreeing that the aggravators outweigh the mitigators, that the appropriate punishment is death. Fla. Stat. § 921.141 (2)(c) (2019). Even after all these findings were made by a unanimous jury, the judge still has the authority to impose a life sentence instead of death; the judge, however, cannot override a life verdict. Fla. Stat. § 921.141 (3)(a) (2019). This lengthy narrowing process is a far cry from Appellant's suggestion that the only inquiry that matters is the existence of one aggravating factor.

Appellant argues that the sheer number of aggravators abrogates the mandate of narrowing the class of defendants who will receive the death penalty. This argument is belied by the fact that of the sixteen aggravators Appellant cites, eight have been added in the nearly fifty years since *Furman* and *Gregg* were decided, one as recently as 2010. If every conceivable first-degree murder were already covered by the aggravators in Florida's death penalty scheme,

as Appellant contests, it is curious that the legislature feels the need to add aggravators covering more factual scenarios.

Florida's capital punishment statutory scheme only begins, and ends well after, the finding of a single aggravating factor in a first-degree murder case. As noted previously,

> This Court has rejected similar arguments. Specifically, "[t]his Court has rejected the argument that Florida's capital sentencing scheme is unconstitutional because it provides for an automatic aggravating circumstance and neither 'narrow[s] the class of persons eligible for the death penalty' nor 'reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Miller v. State*, 926 So. 2d 1243, 1260 (Fla. 2006) (quoting *Parker v. State*, 873 So. 2d 270, 286 n.12 (Fla. 2004) (alterations in original)); see *Blanco v. State*, 706 So. 2d 7, 11 (Fla. 1997) (rejecting Blanco's argument that the murder-in-the-course-of-a-felony aggravator does not sufficiently narrow the class of death penalty-eligible individuals). Bush is not entitled to relief.

Bush v. State, 295 So.3d 179, 214 (Fla. 2020).

This claim should be denied.

ISSUE 6: THE TRIAL COURT PROPERLY REJECTED THE DEFENSE PROPOSED SPECIAL JURY INSTRUCTION ON MERCY

Appellant argues that the trial court erred in not granting their request to give the jury a special, proposed jury instruction related to mercy.

First, Appellant, misrepresents the standard of review on this issue. Trial counsel was requesting a nonstandard, special jury instruction on the issue of mercy, specifically:

DEATH PENALTY IS NOT REQUIRED

> You are never required to impose a death sentence. You have complete control and discretion in determining whether or not the circumstances of this case justify a sentence of death. You must consider whether the aggravating factor you have found to be established in this case sufficiently outweighs the mitigating factor or factors you have found to have been established before you may consider imposing a sentence of death. However, regardless of your findings as to aggravating and mitigating circumstances, you are neither compelled nor required to recommend a sentence of death. You may always consider mercy in making this determination.

(R, 1024).

Standard jury instructions are presumed correct, are preferred over special instructions, and the decision to give the standard instruction and deny the special instruction is reviewed on an abuse of discretion standard, not *de novo*. *Stephens v. State*, 787 So.2d 747, 755-6 (Fla. 2001).

Additionally, Appellant acknowledges that this argument is already precluded and rejected by this Court in *Woodbury v. State*, 320 So.3rd 631 (Fla. 2021), and he simply trying to exhaust a claim

in state court for later litigation in federal court. But it bears repeating, as this Court acknowledged in *Woodbury*, our standard jury instructions do include a mercy instruction:

> We affirm the trial court's ruling because the instruction that was read to the jury adequately informed the jurors of the applicable legal standard. *See Coday v. State*, 946 So. 2d 988, 994 (Fla. 2006) ("[F]ailure to give special instructions does not constitute error where the instructions given adequately address the applicable legal standards." (quoting *Stephens v. State*, 787 So. 2d 747, 755 (Fla. 2001)). When a juror votes for a life sentence despite finding that the aggravators outweighed the mitigators and were sufficient to impose death, this decision is often referred to as a mercy vote. In fact, we have referred to the relevant provision of Standard Instruction 7.11 as the "mercy instruction." *Reynolds v. State*, 251 So. 3d 811, 816 n.5 (Fla. 2018). Thus, the court did read an instruction on mercy, and although Woodbury might have preferred the wording of his proposed instruction, Standard Jury Instruction 7.11 is not ambiguous when it comes to addressing the jurors' options.

Id. at 656.

The trial court did not abuse its discretion in giving the standard jury instructions, and this Court has already found that a special mercy instruction is just not required but is in fact already a part of the standard instructions regardless. This claim should be denied.

ISSUE 7: VICTIM IMPACT EVIDENCE WAS PROPERLY ADMITTED IN APPELLANT'S TRIAL

Miller argues both that the victim impact evidence in his case was overly prejudicial, and that the judge permitting some (but not all) victim impact evidence to be presented during the State's rebuttal case was an error. Both issues are reviewed on an abuse of discretion standard. *Kalisz v. State*, 124 So.3d 185, 211 (Fla. 2013).

As stated in *Jackson v. State*, 127 So.3d 447, 473 (Fla. 2013), permissible victim impact statements do "not fall within one of the proscribed categories of victim impact evidence delineated in section 921.141(7). These proscribed categories are characterizations and opinions concerning (1) the crime, (2) the defendant, or (3) the appropriate sentence." Appellant has not established, and cannot establish, an abuse of discretion in the trial court's admission of the victim impact evidence.

"Evidence of a family member's grief and suffering due to the loss of the victim is evidence of 'the resultant loss to the community's members by the victim's death' permitted by section 921.141(7), and the admission of such evidence is consistent with the Supreme Court's decision in *Payne v. Tennessee*, 501 U.S. 808 (1991)." Victim

impact evidence "relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family" is entirely proper. *Id. Payne* does not preclude the State from depicting to the jury the "life" of the human being murdered by the defendant. *Id.* at 822. Also worthy of note, while Appellant argues that the victim impact evidence in this case was overly prejudicial, he points to no actual testimony that was an issue, and points to no testimony that was admitted over the objection of counsel to support this claim.

As to the second point, presentation of additional victim impact testimony after the State's penalty case-in-chief is not without precedent. *See*, *Morris v. State*, 219 So.3d 33, 39 (Fla. 2017) ("Then the State presented rebuttal mental health expert testimony and additional victim impact testimony."). Also, while defense counsel initially objected to the introduction of more victim impact evidence, they offered an alternative, that the State present the evidence before the defense expert witness testified, to provide a larger gap between the presentation of the evidence and the beginning of deliberations. (TT, 4430). The State and the court agreed to this alternative, so as an initial matter the Appellee argues the objection was essentially withdrawn and this issue is not preserved. That would require the

additional evidence amounts to fundamental error, and Appellant offers no argument how this limited victim impact evidence could reach that high standard.

If this Court finds the issue is preserved, the Court did not err in admitting the evidence. The delay in presenting the two videos was caused by defense counsel. The evidence had been provided to the defense months prior to the trial, but they did not make any objections until just a couple days before the penalty phase began. (TT, 3471). The State and defense ultimately agreed on edits to the videos but given the short time frame caused by defense counsel, they were unable to complete the edits before the presentation of the State's penalty phase case-in-chief. (TT, 3471). This is the sole reason the State requested presenting the videos during rebuttal, because the alternatives were either to continue the trial while the jury and witnesses were ready to go, or exclude the evidence due to *defense counsel's* failures, not the State's. (TT, 3471-4). As the delay in presenting the evidence was caused by the defense, and the judge still granted their request to have the State play the evidence early, it was not an error for the judge to allow this presentation of additional victim impact evidence.

Finally, even if it were an error, any error is harmless or does not rise to the level of fundamental error. The additional videos were mostly photos, were played on mute, and amounted to only an additional eight minutes of victim impact evidence. (TT, 4454). The judge pointed out that the total amount of victim impact testimony was one hour and twenty-three minutes of what had been, up to that point, a five-day penalty phase. The additional victim impact evidence was clearly a small part of the State's rebuttal, and the total victim impact was a small part of the all the penalty phase evidence the jury heard.

This claim should be denied.

CONCLUSION

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

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

s/PATRICK A. BOBEK
PATRICK A. BOBEK
ASSISTANT ATTORNEY GENERAL
Fla. Bar #112839
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118

(386) 238-4990
Fax # (386) 226-0457
patrick.bobek@myfloridalegal.com
CapApp@myfloridalegal.com

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished on May 4th, 2023, by e-portal to: George D.E. Burden and Kathryn R. Radtke, 444 Seabreeze Blvd., Daytona Beach, Florida 32118, Suite 210, burden.george@pd7.org; Radtke.kathryn@pd7.org.

s/PATRICK A. BOBEK
PATRICK A. BOBEK
ASSISTANT ATTORNEY GENERAL
Fla. Bar #112839

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this Answer Brief is 14-point Bookman Old Style, and word count is less than 25,000 words in compliance with Fla. R. App. P. 9.210(a)(2)(C) and 9.045.

s/PATRICK A. BOBEK
PATRICK A. BOBEK
ASSISTANT ATTORNEY GENERAL
Fla. Bar #112839