

IN THE SUPREME COURT OF FLORIDA

EVERETT GLEN MILLER,

Appellant,
vs.

CASE NO. SC22-745

STATE OF FLORIDA,

Lower Tribunal No.:
49-2017-CF-2906-05

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR OSECOLA COUNTY, FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

MATTHEW S. METZ
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D.E. BURDEN
Florida Bar No. 0786438
KATHRYN R. RADTKE
Florida Bar No. 656331
ASSISTANT PUBLIC DEFENDERS
444 Seabreeze Blvd. Suite 210
Daytona Beach, Florida 32118
(386) 254-3758
burden.george@pd7.org
radtke.kathryn@pd7.org

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

Mr. Everett G. Miller (hereinafter Appellant) was indicted on August 18, 2017 for the first degree murders of Kissimmee Police Officers Matthew Baxter and Richard "Sam" Howard.¹ (R 184). The State filed a notice of intent to seek the death penalty. (R 204) Appellant filed a Motion for Psychiatric Evaluation to Determine Competency to Stand Trial. (R 163) After a competency hearing the Appellant was adjudicated competent to proceed. (R 224)

PRETRIAL MOTIONS

There were pre-trial motions filed challenging the constitutionality of Florida's death penalty.² The trial judge denied these motions with a

¹ Miller was also charged with Resisting an Officer without Violence and Carrying a Concealed Weapon in a Liquor Establishment.

² Motion to Declare Section 921.141 and/or Section 921.141(5)(e), Florida Statutes and/or its Standard Instruction Unconstitutional Facially and as Applied and to Preclude its Use at Trial. (R 447) Motion to Declare Section 921.141 and/or Section 921.141(5)(g), Florida Statutes and/or its Standard Jury Instruction Unconstitutional Facially and as Applied. (R 455) Motion to Declare Section 921.141 and/or Section 921.141(5)(h), Florida Statutes and/or its Standard Jury Instruction Unconstitutional Facially and as Applied. (R 461) Motion to Declare Section 921.141, Florida Statutes Unconstitutional Because it Precludes Consideration of Mitigation by Imposing Improper Burdens of Proof or Persuasion. (R 475) Motion to Declare Section 921.141(5)(l), Florida Statutes Unconstitutional and to Preclude its Application at Trial. (R 481)

written order after hearing. (R 613-617) The Appellant filed a Motion to Prohibit the State From Mentioning Any and All Evidence Concerning the Defendant's Race, Religion, Political Beliefs, Personal Writings, Booklists, and/or Social Media Activity in Voir Dire and Opening Argument Unless and Until the State Establishes the Admissibility of the Foregoing Evidence and Witness J.J. MacNab's Testimony. (R 1041) To establish the admissibility of Ms. MacNab's testimony as an expert, the state proffered her testimony. (T 2815) Ms. MacNab is a research fellow at George Washington University's program on extremism. (T 2815) Ms. MacNab reviewed the Appellant's diary, social media posts and Youtube videos. In her opinion the Appellant is a member of the Moorish Sovereign group.³ (T 2864) After the hearing, the trial judge entered an Order finding Ms. MacNab to be an expert. (T 1191) However, MacNab will be limited to expository testimony only, and MacNab would not be permitted to offer any opinions related to Appellant's purported beliefs or statements based upon her review of the

³ The Moorish sovereign citizen movement is a collection of independent organizations and lone individuals who emerged in the early 1990s as an offshoot of the anti-government sovereign citizens movement, adherents of which believe that individual citizens hold sovereignty over, and are independent of, the authority of federal and state governments. Southern Poverty Law Center at <https://www.splcenter.org/fighting-hate/extremist-files/group/moorish-sovereign-citizens>.

facts of this case. (R 1191) The state made a Motion to Exclude Evidence of Abnormal Mental Condition Other Than Insanity. (R 1156) The trial court ruled that any fact that would support that the Appellant had an abnormal mental condition at the time of the crime is inadmissible. (R 1197)

The state rests. (T 3180) The Appellant made a Motion for Judgement of Acquittal on Counts 1 and 2 on the grounds that the state failed to prove that the shootings of Officer Howard and Officer Baxter were done with a premeditated design. (T 3182) The trial judge denied the Motion for Judgement of Acquittal. (T 3186) The Appellant sought to enter his picture in his Marine Corps uniform to contrast with his appearance in the days before the murders. (T 3229) The trial court sustained the state's objection based upon relevance. (T 3229) The Appellant also proffered the Appellant's Baker Act mental health records that would negate the state's theory that the Appellant planned an ambush on police officers. (T 3230)

The Appellant rests. (T 3282) The Appellant renewed his Motion for Judgement of Acquittal which was denied. (T 3283) The Appellant made a Motion for Mistrial on the grounds that the jury was tainted by threats made to jurors outside the courtroom. (T 3418) The Motion for Mistrial was denied. (T 3419) The jury unanimously found the Appellant guilty as

charged, and the case was set for a penalty phase trial. (T 3443)

During the penalty phase trial the Appellant sought the expert testimony of Dr. Elizabeth Atkins to give the history of the Moorish Science Temple. (T 4300) After MacNab's testimony, Dr. Atkins changed direction in her testimony to rebut what was in the FBI report. (T 4309) The Appellant decided not to call Dr. McAlister because the Court would allow the State to cross-examine on her prior opinion brings in all of the information that would confuse and mislead the jury to possibly seek to recommend a death sentence on Mr. Miller based on his race and religion. (T 4322)

Upon completion of penalty phase rebuttal, the Appellant objected to the state submitting additional victim impact evidence. (T 4427) The trial court permitted the state to introduce additional victim impact evidence over Appellant's objection. (T 4431) The victim impact evidence video was shown to the jury over Appellant's objection. (T 4457) The Appellant objected to rebuttal witness Wendell Glover on the grounds of relevancy because of the 28 years between the two offenses. (T 4572) The trial court overruled the objection. (T 4572)

The Appellant rests. (T 4578) The state rests. (T 4700) The jury

found that the aggravating factors were proven beyond a reasonable doubt for each murder. (T 4844-4848) The jury found that mitigating circumstances were not established by the greater weight of the evidence in either murder. (T 4846) The jury recommended that the Appellant be sentenced to death for each murder. (T 4849)

The Appellant filed a Motion for New Trial; Motion to Set Aside the Death Recommendation; Motion for Arrest of Judgement; and Motion to Interview Jurors. (R 1513) These Motions were denied. (R 1605) The trial court sentenced the Appellant to time served on his two misdemeanor charges, and found that the aggravating factors far outweighed the mitigating factors and sentenced the Appellant to death on each count of first degree murder. (R 2167, 3818) The trial court appointed the Public Defender for purposes of appeal. (R 3818) The Appellant filed a Notice of Appeal. (R 2211) This appeal follows.

STATEMENT OF THE FACTS

GUILT PHASE

The present case arises from the murders of Officer Matthew Baxter and Officer Richard “Sam” Howard of the Kissimmee Police Department. During the Appellant’s opening statement, counsel conceded that the Appellant murdered both police officers. (T 2283) The Appellant argued that at the time of the murders the Appellant was suffering from an unspecified mental illness, and this mental condition should permit the jury to find a verdict of second degree murder. (T 2283)

On August 18, 2017, Kissimmee Police Officers Richard Howard and Matthew Baxter started their evening work shift the customary way by receiving a pre-shift briefing at police headquarters. (T 2384) During the shift briefing it was revealed that a Kissimmee resident, Nichole Palmer, had expressed unspecified concerns in her neighborhood, and the shift briefer directed additional patrols in Palmer’s neighborhood. (T 2385) Pursuant to that directive, Officer Baxter patrolled Palmer’s neighborhood, and found Maribel King, Damion Kinloch (“Dash”) and Justin Hazley (“Blaze”) loitering at the corner of Cypress and Palmway in front of Nichole Palmer’s house. (T 2288) King was a convicted felon and knew Officer

Baxter. (T 2285)

Upon arrival, Officer Baxter exited his patrol vehicle and engaged in a routine encounter with the group. (T 2292) During this encounter, the Appellant approached in his vehicle in a reckless manner and made a sudden stop. (T 2293) The Appellant exited his vehicle and approached Officer Baxter and displayed an obnoxious, loud and belligerent attitude. (T 2295) The Appellant got into Officer Baxter's face and asked why he was always harassing people. (T 2295) The Appellant demanded that Officer Baxter stop harassing people and demanded to speak to his supervisor. (T 2295) Officer Baxter called his supervisor Officer Howard, and Officer Howard arrived moments later. (T 2298)

Officer Howard approached Officer Baxter and then engaged the Appellant. (T 2298) The Appellant told Officer Baxter that he was a veteran, feared for his life and was eligible to carry a concealed weapon. (T 2299) Alerted to a weapon, Officer Howard approached Maribel King and the others and told them to move on. (T 2299) Seconds later there was the sound of two gunshots; a short pause and then two more gunshots. (T 2302) Officer Baxter and Howard each fell to the ground after being shot by the Appellant. (T 2303) The Appellant fled the scene in his vehicle. (T

2303) Nichole Palmer heard the gunshots, observed the Appellant fleeing the scene, and observed the two officers on the ground with gunshot wounds to the head. (T 2371) Palmer immediately called 911. (T 2371)

The watch commander, Lt. Christopher Succi, heard a radio call of shots fired and officers down. (T 2391) Lt. Succi got in his vehicle and rushed to the scene. (T 2397) Lt. Succi and Officer Toro arrived on the scene at the same time. (T 2398) Lt. Succi approached Officer Baxter and provided aid, and Officer Toro gave aid to Officer Howard. (T 2401) It was unusual that both Officers were lying on their backs, feet straight and arms by their side. (T 2402) Officer Charles Hess became the lead investigator of the double homicide. (T 2455) At the crime scene there was a black and gold ball cap and a beaded necklace. (T 2449) Officer Hess began the search for other witnesses. (T 2453) Officer Hess was able to identify witnesses Maribel King, Damion Kinloch and Justin Hazley within 30 minutes of the shooting. (T 2455)

The Appellant's cousin Christine Mills was at nearby Brack Street doing someone's hair. (T 2323) There was a bunch of commotion in the neighborhood, and Mills went outside to see what was happening. (T 2324) The Appellant then approached Mills on foot and he appeared agitated and

“ready to go” like he was scared and in a panic. (T 2324, 2336) The Appellant asked Mills to help him get back home to St. Cloud. (T 2325) Mills made some phone calls but was not able to get Appellant a ride to St. Cloud. (T 2327) The Appellant told Mills that he was going to go to his Aunt Pookie’s house. (T 2327)

Prior to this shooting Mills observed one of the Appellant’s “episodes.” (T 2335) Mills described an episode as the Appellant waking-up in the morning full of sweat and he “was not here” meaning the Appellant was terrified, and didn’t know what he was doing or what was going on. (T 2336)

After leaving Christine Mills, the Appellant came in contact with Sheriff Deputies. (T 2467) The Appellant had his hands up shouting things. (T 2467) The Appellant stated to the Deputies that he was trying to get out of the area and go to Roscoe’s Bar. (T 2468) The Appellant was permitted to pass and he entered Roscoe’s Bar. (T 2481) The Appellant said to the liquor store clerk that there was some crazy stuff going on outside and he was going to stay and have a drink. (T 2481) The Appellant was calm and did not appear agitated or upset in any way. (T 2482) The Appellant ordered a drink and then made conversation with the bartender. (T 2500)

While sitting at the bar, the Appellant was approached by one of the regular bar patrons who asked the Appellant whether he had shot the two cops. (T 2486) The Appellant became agitated and claimed that he had not shot anybody and had been in the bar. (T 2486) Hearing this exchange, the Roscoe's bar owner left the bar and flagged down a police officer. (T 2487) Soon four Sheriff Deputies entered Roscoe's bar and asked the Appellant to step outside. (T 2535) The Appellant was not compliant and began shouting obscenities and displeasure with law enforcement. (T 2535) The Appellant did not comply with the Deputies' commands. (T 2537) The Deputies pinned the Appellant to the wall and grabbed his arms when they saw a handgun in his waistband. (T 2537) The Appellant was handcuffed and taken out of the bar. (T 2539) The Appellant was searched and a small .22 caliber revolver was found in his pocket. (T 2539)

After arrest it was discovered that the Appellant had a Facebook page. (T 3156) The posts on the Appellant's Facebook page were obtained from Facebook. (T 3157) The Appellant used the name Malik Mohammed Ali on his Facebook page. (T 3162) The Appellant had a photo with him displaying the .22 revolver. (T 3163) Another page had a

reference to Top Scout 0241 which is used on the Appellant's Youtube videos. (T 3165)

At the Osceola County Jail, the Appellant was incarcerated with a career felon named Lewis Peterson. (T 3011) Mr. Peterson met the Appellant in the jail infirmary, and learned that they knew the same people in Kissimmee. (T 3016) The Appellant told Peterson about the murders of the two Kissimmee police officers. (T 3019) The Appellant explained that he was heading home when he observed Officer Baxter "harassing some dudes." (T 3018) The Appellant knew Officer Baxter and hated him because he was always harassing people. (T 3020) The Appellant had the same feelings for Officer Howard. (T 3020) The night of the shooting if Appellant had the opportunity he would have concealed himself and picked off police officers one by one with an AR-15. (T 3024)

Forensic Evidence

A DNA sample was taken from the Appellant and sent to the FDLE. (T 2707) Also, fingernail clippings were taken from the Appellant and a swab of the Appellant's right hand. (T 2708) Bloodstains were found on the Appellant's 2015 Kia. (T 2713) Swabs of the bloodstains were forwarded to FDLE for DNA testing. (T 2716) Latent fingerprints were taken from the

Appellant's Kia. (T 2718) A swab for DNA was taken from a Steelers ball cap found at the scene. (T 2742)

Amanda Stephens was an intelligence analyst with Florida Department of Law Enforcement, assigned to the electronics surveillance task force. (T 3067) Stephens reviews telephone cell records to determine the location of a cell phone at the time of its usage. (T 3067) Stephens was able to determine the location of the Appellant's cell phone at the time of the shooting. (T 2603, 3069)

Timothy Petree is a FDLE senior crime laboratory analyst in the biology and DNA section of the crime laboratory. (T 3088) Petree performed DNA testing on samples submitted by law enforcement. (T 3096) Petree developed DNA profiles for Officer Baxter; Officer Howard and the Appellant. (T 3097)

The Steelers ball cap and beaded necklace found at the crime scene had a DNA mixture which included the Appellant. (T 3103) The swab taken from the Appellant's sneakers had a DNA mixture of the Appellant and Officer Howard. (T 3108) The swabs taken from the Appellant's vehicle had the DNA profile of Officer Howard. (T 3110) The fingernail clippings from the Appellant had a DNA mixture of the Appellant and Officer Baxter.

(T 3117) The swabs of the Appellant's hands had a DNA mixture of the Appellant and Officer Howard and Officer Baxter. (T 3118) The Appellant's tank top had a DNA mixture of the Appellant and Officer Baxter. (T 3119) Swabs of the Appellant's .22 revolver had a DNA mixture of the Appellant and Officer Baxter. (T 3121)

Rich Ruth is a FDLE crime laboratory analyst working in the firearms section. (T 3127) Ruth performed firearm analysis on items submitted from this case. (T 3142) The bullets recovered from Officer Howard and Officer Baxter were fired from the Appellant's revolver. (T 3147)

Medical Examiner

Dr. Sara Zydowicz performed the autopsy on Officer Howard. (T 2795) An external examination of Officer Howard showed no defensive wounds. (T 2798) Officer Howard had a gunshot wound to the left side of his head and a gunshot wound on his face just above his lip. (T 2799; 2802) Both gunshot wounds were near contact wounds based upon the stripling pattern found at each wound site. (T 2804; 2806) Dr. Zydowicz was able to remove two projectiles from Officer Howard's head. (T 2809) The cause of death was two gunshots to the head and the death was a homicide. (T 2810)

Dr. Joshua Stephany, Chief Medical Examiner for Orange and Osceola Counties performed the autopsy on Officer Matthew Baxter. (T 3048) Officer Baxter had two gunshot wounds to the head. (T 3054) One wound entered the front of the head, the lower lip, striking the tongue, the mouth, and then going into the base of the skull. The second wound entered the back of the left head and entered the cranial cavity. (T 3054) Both wounds were “contact” wounds meaning the barrel of the gun was in near contact with the victim’s body. (T 3058, 3059) Officer Baxter’s cause of death was gunshot wounds to the head, and the manner of death was homicide. (T 3060) The gunshot projectiles were recovered from Officer Baxter’s skull during the autopsy. (T 3061)

Defense Case

Shavon Sutton is the Appellant’s younger half-sister and would spend time with Appellant on weekends. (T 3266) The Appellant was loving, caring and cuddly. (T 3267) The Appellant would take Sutton places and do things with her. (T 3267) Sutton kept in touch with the Appellant during his military career, and spent holidays together when the Appellant returned home after his military service. (T 3269) Once a civilian again, the Appellant liked to dance and dressed very nicely. (T 3269)

A couple months before the murders, the Appellant broke-up with his girlfriend and moved in with his sister and mother. (T 3270) The Appellant kept his things in his car, didn't shower often and wore the same clothes twice a week. (T 3271) The Appellant had a change in his mood and behavior. (T 3271) The Appellant was "jumpy" meaning that if asleep and a noise awakened the Appellant, he would jump up like he was startled. (T 3271) Riding in the car the Appellant was acting weird saying that somebody was watching him. (T 3271) On July 11, 2017, Sutton drove the Appellant to the police department because the Appellant was chanting his military ID number and crying. (T 3273)

Penalty Phase

State Case

Julian Albright served with the Appellant in the military and as civilian contractors for several years. (T 3521) In 2016 the Appellant left his work as a contractor and remained in contact with Albright. (T 3523) A month before the murders, the Appellant contacted Albright and asked to meet at a 7-Eleven. (T 3525) During their talk, the Appellant displayed his .22 caliber firearm and exclaimed that he was not going to become a statistic. (T 3527) With the firearm the Appellant was prepared if stopped for

“driving while black.” (T 3529) The Appellant detailed concern for African Americans being killed by police officers. (T 3531) Albright didn't call the police because he didn't take the Appellant's statements to mean that he was going to kill police officers. Albright believed that Appellant was in fear that he could be killed by a police officer, and he was going to defend himself. (T 3533) It appeared that the Appellant was living in his car, so Albright gave the Appellant some money, which caused the Appellant to breakdown and cry. (T 3536)

Genet MacNab, a/k/a JJ MacNab is a research fellow at the George Washington University program on extremism. (T 3561) MacNab tracks known extremist groups, and works to educate the public on various extremist groups. (T 3563) MacNab explained the Moors movement. (T 3577) The Moors movement is about a hundred years old, and over the decades, it splintered. (T 3577) It is primarily a Muslim organization, although not what most people consider mainstream Muslim. And over the decades, as charismatic leaders died, it splintered into multiple subgroups. (T 3577) One subgroup is known as a sovereign citizen. A sovereign citizen is someone who believes he has individual sovereignty as a birthright. (T 3580) Laws don't apply to him, and anyone, whether it's a

judge or a police officer or a child protective services person, who tries to infringe on his rights, he thinks he has the ability and the right to harm them. (T 3580)

The state presented six victim impact witnesses. (T 3607) Two witnesses were police officers, one witness was a boyhood friend of Officer Howard; one witness was the sister of Officer Baxter; one was the stepfather of Officer Howard and the last witness was the widow of Officer Baxter. (T 3608-3659) The state rests. (T 3663)

Defense Case

Julian Albright served in the military with the Appellant at Central Command Headquarters, in Tampa in 2001. (T 3669) Albright was a target intelligence analyst and the Appellant was an imaging analyst. (T 3671) On a day-to-day basis, Albright and the Appellant were involved in the killing of insurgents and terrorists. (T 3678) It was very stressful work because of the need to limit innocent civilian casualties which were not always successful. (T 3684) The office was multi-racial, and the Appellant showed no signs of being a racist, and the Appellant's closest friends were white and hispanic. (T 3687) The Appellant retired in 2010 after receiving accolades and awards from colonels and generals he worked for at the

Special Operations Command. (T 3690)

After retirement, the Appellant sought to be a civilian contractor and work as a target intelligence analyst. (T 3694) Albright provided the Appellant on the job training for this new job. (T 3695) The Appellant provided faithful service for the next six years in the pressured filled job as a target intelligence analyst. (T 3696) The Appellant expressed regret when there were civilian casualties. (T 3726) Innocent civilians were killed as collateral damage in targeting terrorists. (T 3745) Albright never observed the Appellant engage in racist behavior. (T 3735) Albright never observed the Appellant engage in paranoid or delusional behavior. (T 3740)

Devona Barnes is Appellant's first cousin and grew-up with Appellant. (T 3759) Barnes lived near the Appellant, and would generally see the Appellant on weekends. (T 3760) Barnes and Appellant were both active in the Jehovah Witness Church. (T 3761) As a child the Appellant played with a racially diverse group of children including white and Latin children. (T 3762) The Appellant had a happy childhood and enlisted in the Marine Corps after graduating from High School. (T 3764)

After leaving government service the Appellant's demeanor started to

change. He became more depressed and remorseful about what he had done, and it was beginning to take a toll on him. (T 3766) Barnes then received a call asking Barnes to come and pick up the Appellant because he was running around town in his underwear. (T 3774) Barnes stopped and picked-up the Appellant and they returned to her house. When Appellant entered the house, he started closing all the blinds, running around in the house, and getting out the knives and the pitchforks and the scissors and all these things, and saying that the people were trying to get him and get down, you know, we need to get down on the floor, that the people are coming to get us. (T 3775) Ultimately, the Appellant had a breakdown and was hospitalized pursuant to the Baker Act. (T 3774) These actions were out of character for the Appellant, and occurred a month before the shootings. (T 3778)

Dr. Steven Gold is a professor in psychology and is training doctoral students to engage in specialized trauma services. (T 3795) Dr. Gold's practice includes working on forensic criminal cases and post-traumatic stress disorder "PTSD." PTSD is a psychological disorder that results from exposure too at least one traumatic event. PTSD is the only diagnosis where the cause is part of the diagnosis. You can diagnose, for example,

depression without having to know what caused it. But you can only diagnose PTSD if you've identified that the person has been through a traumatic event.

The Appellant met the criterion for suffering from PTSD. (T 3829) In Dr. Gold's opinion the Appellant suffered from an extreme mental or emotional disturbance at the time of the crime, and by virtue of that disturbance, his ability to conform his conduct to the requirement of the law was substantially impaired. (T 3830) Dr. Gold explained that the Appellant could not recall the shooting, which is very common for people suffering with PTSD. (T 3834) This dissociation or "spacey" state of mind occurs during a fight/flight/freeze reaction to an emergency situation which is at the core of PTSD. (T 4890) The Appellant had an exaggerated startle response, meaning he was having nightmares and would awaken startled, and he would be screaming in his sleep. (T 3893) If the Appellant was awakened, he would awake startled and be ready to attack. (T 3893) Like many military personnel who have PTSD, he was very hesitant to talk about any of this with anybody else, which would be the avoidance factor in PTSD. (T 3893) The Appellant suffered a major change in his mood and/or way of thinking about things, a major symptom of PTSD. (T 3893)

When suffering a PTSD episode the person is acting on automatic pilot. (T 3834) The individual is acting on perceived danger, not necessarily real danger. (T 3835) According to Dr. Gold, something triggered a PTSD episode the night of the shooting. (T 3835) The Appellant had trouble adjusting to civilian life. (T 3892) A month before the shooting, the Appellant was Baker Acted and taken to psychiatric facility for evaluation. (T 3862) The Appellant was suffering from a serious mental disorder. (T 3862) The Appellant was paranoid and somewhat disorientated. (T 3863) Upon discharge, the Appellant was diagnosed with bipolar disorder, manic, meaning that he was in an elevated or agitated state as opposed to a depressed state at the time of discharge, and that he had PTSD. (T 3865) The Appellant sought psychiatric assistance from the Veterans Administration. (T 3886)

Prior to the shooting, the Appellant was making posts in Facebook that were hateful and at times bizarre. (T 3889) Most of the posts expressed anger directed to white people. (T 3889) The Appellant was involved for most of his adult life in defending his country under stressful circumstances. (T 3891) Watching people “who look like him” being shot and killed, apparently unarmed, contributed to his confusion of trying to

make sense of his identity. (T 3892)

John Hampton was a Marine that served with the Appellant at Special Forces Command. (T 3988) Hampton and the Appellant were friends. Hampton would come to Appellant for advice about certain situations, and attended several social events at the Appellant's home. (T 3990) Hampton described the Appellant's personality as a man very serious about his job, a good Marine, and a man that was always there for Hampton. (T 3991)

Hampton and the Appellant deployed together to Kabul, Afghanistan as civilian contractors. (T 3994) The Appellant's roommate in Kabul was Martin Hamann. (T 4090) The Appellant would suffer from nightmares. (T 4091) In Kabul, the Appellant experienced mortar fire and other fire of all kinds. (T 3994) There were also frequent deadly missile attacks. (T 4095) There was an incident 100 meters from the Appellant's office where an ally Afghan pilot shot and killed 5 or 6 NATO allies. (T 4096)

When Hampton and Appellant returned to work in Tampa, the Appellant was having issues with his wife. (T 4000) Ultimately, the Appellant moved in with Hampton. (T 4000) The Appellant had trouble sleeping, and had nightmares including screaming out while in bed. (T 4000) The Appellant sought help from the Veterans Administration, and

encouraged Hampton to do the same. (T 4002) The Appellant never expressed racist views to Hampton or Hamann. (T 4005, 4095) The Appellant visited with Hampton days before the murders, and Hampton did not observe anything unusual about the Appellant's behavior. (T 4006)

Thomas Leech was the Navy Captain and senior officer in charge of an intelligence unit at Special Operations Command. (T 4014) Leech selected the Appellant to be his Senior Enlisted Advisor in 2008. (T 4016) Leech relied on Appellant to help him understand what was going on with the troops. (T 4017) The Appellant was probably one of the finest Marines Leech had ever served with, and it is not an exaggeration to say the Appellant is one of the finest military members Leech ever worked with during Leech's 25-year career. (T 4019) The Appellant wore the uniform impeccably, was on time to everything, respected everyone and treated everyone fairly. (T 4019) There was no other senior enlisted personnel that Captain Leech trusted more than the Appellant. (T 4019)

Clarence France was a Marine Major that worked with the Appellant at Special Operations Command. (T 4050) France was Captain Leech's Deputy, and viewed the Appellant as the epitome of a Marine Corps staff NCO. (T 4052) After retirement, France kept in touch with Appellant

through Facebook. (T 4054) France noticed that some of Appellant's Facebook posts were racist, and France was in disbelief; these posts were totally out of character. (T 4054) France messaged the Appellant stating: Hey, brother, what -- what's wrong? Let me know if anything I can do to help. This isn't you. (T 4054)

Aubrey Land is a retired law enforcement and corrections professional. (T 4061) Land was engaged to look at the Appellant's adjustment to incarceration, and opined on how the Appellant would fare if he was doing life in prison or if he was on death row. (T 4064) In Land's opinion, the Appellant would be an asset in the prison system. The Appellant's is very well organized. If Land was a Warden, he would want Appellant on his compound. The Appellant could benefit the Florida Department of Corrections because his organization skills improve food service, laundry service or the library. (T 4066)

Arthur Cody is a career military officer that has been used by the Courts to explain an individual's military records. (T 4150) Cody detailed the Appellant's various military assignments and evaluations. (T 4159) After Appellant completed Staff Non-Commissioned Officer (NCO) school he changed his career to become an imagery intelligence analyst. (T 4164)

In this new role the Appellant excelled, and was earmarked for further promotion and leadership responsibility. (T 4168) Due to his superior performance, the Appellant was assigned to a very selective “joint duty” at Central Command (“CENTCOM”) to work on Operation Enduring Freedom in Tampa. (T 4173)

In 2003 the Appellant was deployed to Iraq and was running the National Intelligence Center for CENTCOM in Iraq. (T 4178) The Appellant was in a war zone and subjected to mortar attack, IEDs, and rocket attacks. (T 4179) The Appellant was awarded the Defense Meritorious Medal for his service in Iraq, a rare accomplishment for a Marine Gunnery Sergeant. (T 4185)

After a short assignment in the United States, the Appellant was assigned again to a war zone in Iraq as an intel collections chief. (T 4185) During a subsequent Iraq deployment the Appellant was rated as being in the top five percent of senior NCOs. (T 4194) The Appellant had a third deployment to Iraq and served as the deputy G-2 operations chief. (T 4195) This position put the Appellant in charge of all enlisted personnel in intelligence operations. (T 4195) For this service, the Appellant’s command submitted the Appellant for a Marine Corps-wide award for being the best

fleet force staff NCO of the year for the Marine Corps. (T 4195) The state revealed that when the Appellant was a Lance Corporal he received a court martial for an improper assault with a handgun. (T 4213)

Orange County Corrections Officer Larry Thompson commanded the section of the Orange County Jail that has housed the Appellant. (T 4222) While in jail the Appellant followed all the rules, did every task and duty that was asked of him in the dorms. (T 4222) Thompson received no complaints about the Appellant, and he did everything efficiently and in a timely manner. (T 4222) The Appellant is a model prisoner. (T 4223)

Rufus Miller is the father of the Appellant and married the Appellant's mother Joann while they were in High School. (T 4230) The Appellant was born four months later. (T 4230) In less than two years the Appellant's parents separated and ultimately divorced. (T 4234) When the Appellant was seven years old his father assumed custody, and the Appellant lived with his father and stepmother. (T 4235) The Appellant's father and stepmother were both Jehovah Witnesses. (T 4235) The Appellant's father went to the Kingdom Hall three days a week and the Appellant joined him. (T 4243) The Appellant had a racially diverse group of friends from the Kingdom Hall and from public school. (T 4245) After the Appellant left his

defense consulting job, he came home to work with his father in Orlando. (T 4256) On the Appellant's year anniversary with the company he was laid-off. (T 4263)

When Rufus Miller learned that the Appellant was Baker Acted, he went to visit him in the hospital. (T 4265) The Appellant was not himself. (T 4265) The Appellant was balled up in a fetal position and crying. (T 4265) The Appellant's Uncle suffered from PTSD, and the Appellant appeared to be suffering in the same way. (T 4267)

Rynequa Miller is the Appellant's daughter and was a military "brat" that lived with the Appellant wherever he was deployed. (T 4333) The Appellant was a great dad that instilled in his children great values and great morals. (T 4336) The Appellant became a freemason and was involved in the Toys for Tots charity. (T 4341) The Appellant recently became a grandfather. (T 4345) Prior to the murders, the Appellant's daughter noticed that the Appellant was more paranoid. (T 4351)

Deputy Jecarra Miles responded to the Key West Market from a report of the Appellant in his underwear with a rifle. (T 4372) When Deputy Miles arrived on the scene, the Appellant was gone. Deputy Miles saw the Appellant later at the mental hospital. (T 4381) There seemed to be

something wrong with the Appellant because he was sitting on the bed chanting. (T 4382) Deputy Miles thought that the Appellant was suffering from a mental problem that made him a threat to others. (T 4385)

Dr. Robert Cohen was asked to evaluate the Appellant's psychological status, and whether he met the criteria for PTSD. (T 4466) Before meeting with the Appellant, Dr. Cohen read police reports, military records, VA records, testimony or notes from a close friend. (T 4469) Dr. Cohen also reviewed the medical records of an Uncle that has a history of schizophrenia on the father's side, and of Shavon Sutton on the Appellant's mother's side. (T 4469, 4470) This is relevant because when a family member has mental illness, there's an increased risk that other family members can have a predisposition for mental illness as well, because there are instances where mental illness is genetically based. (T 4469)

Dr. Cohen gave the Appellant a test to determine whether he was malingering symptoms of PTSD. (T 4478) The Appellant scored a 14 on the test which would suggest that the Appellant was not malingering. (T 4479) In Dr. Cohen's opinion the Appellant was suffering from PTSD for quite awhile at the time of the murders. (T 4480) Moreover, in Dr. Cohen's expert opinion the Appellant was under the influence of an extreme mental

or emotional disorder at the time of the crimes. (T 4481) The factual basis for Dr. Cohen's opinion aside from his personal evaluation, are the reports from family members, reports from friends, his military MOS, his job which included his three tours in Iraq and two tours in Afghanistan, where he experienced repeated and persistent trauma. (T 4481)

State Rebuttal

Everade Hill is a longtime acquaintance of the Appellant and he discussed the incident with the rifle that led to Appellant being Baker Acted. (T 4392) The incident began when the Appellant's Uncle took twenty dollars from the Appellant's car. (T 4392) An altercation ensued, and the Uncle refused to fight Appellant because the Appellant always had a gun. (T 4393) In response, Miller stripped down to his underwear and stated: "I haven't got a gun, let's fight." (T 4393, 4399) Later, when the Appellant was on his way back to his car to put his clothes back on, there was a young man looking at him and said something to him about being in his underwear. The young man lifted up his shirt and showed him a gun. (T 4394) The Appellant's response was to retrieve his assault rifle from his car. (T 4394) The Appellant could not find the young man that brandished a gun, and heard the police were coming, so the Appellant hid the assault

rifle in the bushes, and hid in a nearby house. (T 4395)

Wendell Glover was a lifelong resident of Kingsland, Georgia and went into the military. (T 4580) In the early 1990's Glover came home from military service and visited the Palmetto Pines Mobile Park where a friend was having a cookout. (T 4583) While approaching in a vehicle as a passenger, for some unknown reason a person greeted Glover with a gun. (T 4583) The person asked Glover what he was doing out here. (T 4584) The person then went back to where he came from, and Glover left and immediately called the police. (T 4585) Glover denied that he was there to crash a party. (T 4587)

Dr. Michael Gamache is a forensic psychologist hired by the state to evaluate the testimony of defense experts and advise the state whether the opinions being offered by the defense experts were supported to a reasonable degree of psychological certainty. (T 4597) In Dr. Gamache's opinion the Appellant was not suffering from post-traumatic stress disorder at the time of the offense. (T 4600, 4625)

There are eight criteria that must be met in some form for the PTSD diagnosis to be given. (T 4601) One criteria is exposure to actual or threatened death or serious injury. (T 4601) Dr. Gamache was skeptical

that the Appellant's report of a triggering traumatic event actually occurred. (T 4605) Dr. Gamache claimed that a July 4, 2017 Facebook post by the Appellant arguably endorsed feigning symptoms of PTSD. (T 4618) Dr. Gamache found no evidence of "avoidance" of repeat trauma in the Appellant's life. (T 4622) The Appellant was experiencing problems but was not suffering from an extreme mental disorder at the time of the murders. (T 4628) The Appellant suffers from substance dependence, alcohol and cannabis; and adjustment disorder. (T 4681, 4682)

Spencer Hearing

Darren Hightower served with the Appellant in the Marine Corps in Georgia in 1991. (R 3663) Hightower was having a cookout with the Appellant at his home when they heard the sound of gunfire. (R 3664) Hightower was arrested for Disorderly Conduct. (R 3663) Hightower never saw the Appellant in the possession of a gun at anytime during this incident. (R 3665)

The Appellant received a summary court martial for bringing discredit to the Marine Corps for the incident in 1991. (R 3686) This was a non-criminal administrative proceeding. (R 3685) The Appellant's punishment of 15 days restricted duty meant that the Navy believed that the Appellant

was a valued member of the Marine Corps detachment. (T 3687)

Adam Thomas served with the Appellant in Iraq. (R 3701) Thomas confirmed that both Thomas and the Appellant were under frequent indirect fire attacks and one never knew when or if they would be harmed. (R 3703)

Thomas now suffers from the experience and has been in individual therapy for 7 of the past 12 years. (R 3704) Thomas explained that due to the nature of their job in Iraq, they would witness enemy combatant bodies that were “pretty seriously brutalized” on a recurring basis. (R 3707) The effect of these experiences on Thomas was a major factor in him leaving the Marine Corps. (R 3707)

Dr. Elizabeth McAlister was asked to review some documents in this case related to Appellant's religious views. (R 3714) Throughout his military career the Appellant was spiritual but not religious. (R 3719) The Appellant was a “spiritual seeker” and became a Prince Hall Freemason in 2004. (R 3723) In the summer of 2017, the Appellant became interested in Moorish Science and Moorish Science Temple teachings. (R 3723) The Moorish Science Temple does not believe in sovereign citizen thought. (R 3743) Dr. McAlister reviewed the Appellant's 6,000 plus pages of Facebook posts, and reviewed his notebook and in her opinion she would

describe Appellant as spiritual but not religious and someone who considers himself as Moorish American, or a Moor. (R 3744)

SUMMARY OF THE ARGUMENTS

Point One. In this case the evidence was overwhelming that the Appellant held great animus against law enforcement officers; Appellant believed that African Americans were a target of law enforcement; and the Appellant was determined that he would not be victimized by law enforcement. It was proper for the state to introduce the Appellant's social media posts that supported the foregoing. Over objection, the state went further and introduced social media posts that contained crude language, racial epithets and political statements. Moreover, over objection, the state introduced a "faux expert" on extremist groups that gave the jury the inference that the Appellant was a follower of the racist Moor sovereign citizen group. There was no competent evidence to support this narrative and the prejudice of this evidence denied the Appellant a fair trial.

Point Two. The trial court abused his discretion in determining that J.J. MacNab was qualified to provide expert testimony in this trial. On May 23, 2019, this Court rendered the opinion *In re Amendments to the Florida Evidence Code*, 278 So.3d 551 (Fla. 2019), adopting the amendments made to this section by Laws 2013, c.2013-107 § 1, as procedural rules of evidence. This amendment prohibited "pure opinion testimony." Judge

Tynan's ruling finding that J.J. MacNab was an expert was erroneous because first, MacNab's testimony was not relevant; and second MacNab provided pure opinion testimony that is no longer admissible.

Point Three. The trial judge erred to find the weighty cold, calculated and premeditated aggravating factor. There is no competent evidence to support Judge Tynan's finding that the murders were committed with heightened premeditation.

Point Four. The trial judge erred in excluding heat of passion evidence through the use of mental health experts. The Appellant is entitled to present state-of-mind evidence as an affirmative defense. The trial judge erroneously believed that the Appellant was attempting to present a diminished mental capacity defense, and improperly denied the Appellant his theory of defense.

Point Five. The Appellant seeks to exhaust the claim for federal review that Florida's capital sentencing scheme is inadequate to protect against the arbitrary and capricious application of the death penalty.

Point Six. The Appellant seeks to exhaust for federal review the claim that the error in denying an express mercy instruction should be deemed structural, since the impact of its absence on the jury cannot be

ascertained from the record.

Point Seven. The trial court erred in permitting the state to present emotionally charged victim impact evidence in penalty phase rebuttal.

Victim impact evidence is not rebuttal evidence. Presenting victim impact evidence moments before the jury begins their deliberations to decide the Appellant's fate creates the danger that the jury will render their verdict based upon emotion and not the facts of the case.

POINT ONE

THE TRIAL JUDGE ERRED IN ALLOWING THE STATE TO INJECT RACE, RELIGION AND POLITICAL BELIEFS INTO THE TRIAL DENYING THE APPELLANT A FAIR TRIAL IN VIOLATION OF FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Standard of Review

A trial court decision to admit evidence is reviewed under an abuse of discretion standard. Hudson v. State, 992 So.2d 96 (Fla. 2008)

On August 9, 2014, 18-year-old Michael Brown was shot and killed by police officer Darren Wilson in Ferguson, Missouri, a suburb of St. Louis. The unrest in Ferguson that followed sparked a vigorous debate in the United States about the relationship between law enforcement officers and African Americans, the militarization of police, and the use-of-force law nationwide. The black experience in America has changed since Ferguson with strained relationships between the African American community and law enforcement. In this case the evidence was overwhelming that the Appellant held great animus against law enforcement officers; Appellant believed that African Americans were a target of law enforcement; and

Appellant was determined not to be victimized by law enforcement.⁴ The state through their introduction of evidence of Appellant's spiritual and political beliefs, improperly confused and prejudiced the jury against him.

The Appellant concedes that the state was within their right to bring to the juries' attention the Appellant's attitude related to law enforcement. It was certainly relevant to prove motive. However, in this case the state went over the line to ensure not only a guilty verdict, but to ensure the needed unanimous death penalty verdict from the jury. To obtain their goal, the state's strategy in this case was to paint the Appellant as an anti-government black nationalist Islamic extremist. The state's reason for pursuing this strategy was to establish motive and to support their argument that the Appellant acted with heightened premeditation when he murdered Officer Howard and Officer Baxter. Judge Tynan erred in permitting this highly prejudicial evidence before this jury.

In the guilt phase the state introduced Facebook posts by the Appellant. In the Facebook posts there was evidence that the Appellant

⁴ According to a study published by National Public Radio since 2015, police officers have fatally shot at least 135 unarmed Black men and women nationwide. <https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns>

used the Muslim name Malik Mohammad Ali; evidence that the Appellant renounced his allegiance to the United States; evidence that the Appellant used racial epithets; and evidence that the Appellant used foul language. See State Trial Exhibit 67 In the penalty phase trial, the state introduced Facebook posts where the Appellant claimed that the people of the United States are racists; referring to white men as “cavemen crackers that raped and are still raping my people”; racial epithets; crude language; disparaging remarks about former President Barack Obama; and support for the Moor movement. See Penalty Phase State Exhibit 1

Worse yet, in the penalty phase the state was permitted to present testimony from State Witness Genet MacNab, a Research Fellow at George Washington University's program on Extremism. MacNab is purportedly an expert on violent political extremism with a special emphasis on sovereign citizens, private paramilitary groups, and related anti-government organizations. To Judge Tynan's credit he greatly limited Genet MacNab's testimony. Nonetheless, Judge Tynan committed error by finding MacNab as an expert (See Point Two); and Judge Tynan committed error by permitting MacNab to testify on items that prejudiced the Appellant and did not assist the trier of fact in understanding the evidence or any fact

in issue pursuant to Florida Statute §90.702.

MacNab explained to the jury what she does for a living as follows:

I track known extremist groups, the members who are usually talking violence online. I keep a list of groups and people that I track that I publish once a year, and I do a lot of work with the press to educate them on various extremist groups.

(T 3562) The immediate inference to the jury is that the Appellant must be a violent extremist or why would MacNab be called as a witness. Over Appellant's objection MacNab was asked to explain the Moorish movement. MacNab explained that the Moorish movement as follows:

It's primarily a Muslim group. The prayers are to Allah. The -- it's not -- normal Muslim, standard Muslims, don't actually recognize this as being an Islamic group, but they consider themselves that. They have an alternative history. For example, they believe that black people were in the United States before Columbus came; that they were here before the Native Americans; and that gives them ancestral rights. One group, for example, thinks that all of the Louisiana Purchase, which is a large chunk of the United States, belongs to a Native American tribe that they formed.

(T 3579) The state introduced evidence over Appellant's objection that the Appellant claimed that he was a Moor. Now the logical inference to the jury is that the Appellant is a Moor Islamic Extremist. Then MacNab explained to the jury that there exists a sub-group of Moors that have also adopted

sovereign citizen beliefs. The state then requested that MacNab explain some beliefs of Moorish sovereign citizens:

STATE: So you talked about distrust of a government. Does that in any way translate to a specific view of law enforcement?

MACNAB: If you think you have -- yes. If you think you have inalienable rights and you are allowed to, for example, drive without a license or beat your kids or take over a home that's vacant or whatever, and it's most likely the person that's gonna tell you "no" is a police officer.

STATE: Do or does this group that fuses these two beliefs have a view on Caucasians or whites?

MACNAB: It's not universal, but there are a large number of these pockets that are inside the overall movement are considered to be black supremacists, black separatists, and are anti-white.

(T 3583) The logical inference that the jury will take from this testimony is the Appellant could be a child abusing, anti-government black supremacist who is racist and anti-white. And finally, MacNab was permitted to provide examples of Moor sovereign citizen attacks on police officers in 2016 and 2017 over appellant's objection. (T 3586)

Judge Tynan abused his discretion in permitting Genet MacNab to testify. During the pre-trial proffer of MacNab's testimony it was revealed that she viewed only 23 pages of the Appellant's Facebook pages out of the thousands of pages gathered by the state. Based upon MacNab's

limited review of Appellant's record, MacNab claimed that there were indications that Appellant was part of the Moorish sovereign citizen movement. When pressed to explain this finding MacNab stated that the Appellant once made a reference to constitutional law in one of his social medial posts, and on July 27, 2016, the Appellant shared an "ankh" meme on social media. Despite MacNab's dismal performance during her proffered testimony, Judge Tynan permitted her to testify in the penalty phase finding she was an expert and had relevant testimony that was not unduly prejudicial.

Section 90.402, Florida Statutes (2018), provides that all relevant evidence is admissible except as provided by law. Relevant evidence is "evidence tending to prove or disprove a material fact" § 90.401, Fla. Stat. (2018). However, "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (2018). "Unfair prejudice" is "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." McDuffie v. State, 970 So.2d 312, 327 (Fla. 2007) (quoting Brown v. State, 719 So.2d 882, 885 (Fla. 1998)). Of

concern is evidence “which inflames the jury or appeals improperly to the jury's emotions.” McDuffie at 327 (quoting Steverson v. State, 695 So.2d 687, 688-89 (Fla. 1997)). If a trial court determines that evidence is relevant, the court must then determine if the unfair prejudice outweighs the probative value. The trial court must exclude evidence in which the unfair prejudice outweighs the probative value to avoid the risk that a jury will convict a defendant based upon reasons other than his guilt. McDuffie at 327. Where trial courts fail to do so, and the error is not harmless, reversal is required. See, eg., McDuffie 970 So.2d 312.

For example, in McDuffie, in the defendant's trial for first degree murder, robbery, and false imprisonment of two co-workers, the trial court allowed testimony regarding a “threatening and vulgar message” the defendant left on the voice mail of an attorney who had filed an eviction suit against the defendant. The Supreme Court found that the testimony regarding the inappropriate comments was unnecessary to prove the defendant's desperate state of mind and was not probative of whether the defendant committed the crimes. McDuffie at 328. Regarding the prejudicial nature of the comments, the Supreme Court stated:

On the other hand, those details tended to prove quite effectively several irrelevant, highly prejudicial facts - that McDuffie was vicious, nasty, and of

questionable moral character. McDuffie at 328.

In this case Judge Tynan considered the prejudicial impact of Genet MacNab's testimony. In his order permitting MacNab's testimony Judge Tynan found that:

Despite qualifying MacNab as an expert to testify about the Moorish Sovereign Citizen Movement, the Court acknowledges the danger of allowing her to testify to everything proffered during the hearing or in her written reports provided to the State of Florida.....

To establish an anti-government or anti-police motive or intent from the Facebook posts, writings in the notebooks, or other statements made by the Defendant, the jury simply needs to understand the Moorish Sovereign Citizen Movement, including its ideology and underlying customs, symbols and beliefs. Once educated about the movement, the jurors are more than capable of applying that education, should they find it credible, to the Facebook posts, writings in the notebooks and other statements of the Defendant to decide for themselves whether the Defendant's motive or intent for the crimes charged was related to his adoption of said beliefs.

(R 1194, 95) Any fair reading of the Appellant's cross-examination of MacNab during the initial proffer clearly exposed that MacNab was not an expert on Moorish beliefs and its relationship with the sovereign citizen movement. One post about the U.S. Constitution where the Appellant shared an "ankh" meme on social media over a year before the shooting out of over six thousand social medial posts is not a sufficient evidentiary foundation to conclude that the Appellant was a follower of the Moorish sovereign citizen movement.

Judge Tynan should have recognized that there was not a proper evidentiary foundation to support MacNab's "expert" opinions. The Appellant had a driver's license, had a license plate on his automobile, likely paid his income tax, and at no time during the several years that this case was being litigated did the Appellant express that the state had no jurisdiction in his case. In fact, the Appellant by all accounts was a model prisoner while awaiting trial. It is obvious that Genet MacNab has created a cottage industry for herself in identifying extremist groups and extremists. At the conclusion of the proffer of MacNab's expert opinions the Appellant's cross-examination clearly revealed that MacNab was a paid shill for the state that suffered from "confirmation bias."⁵

The state's strategy to inject race, politics and religion into this case denied the Appellant a fair trial. The social media posts that painted the Appellant as a crude Islamic racist compounded by the erroneous testimony of Genet MacNab inflamed the passions of the jury to the extent that their deliberations were guided by emotion rather than the facts of the

⁵ Confirmation bias, a phrase coined by English psychologist Peter Wason, is the tendency of people to favor information that confirms or strengthens their beliefs or values and is difficult to dislodge once affirmed. See Plous, Scott (1993), *The Psychology of Judgment and Decision Making*, page 233.

case. Judge Tynan in his gate keeping function should have excluded the prejudicial social media posts and Genet MacNab's testimony in the penalty phase trial. The Appellant should be granted a new trial.

POINT TWO

THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING STATE WITNESS MACNAB AN EXPERT CONTRARY TO THE DICTATES OF THE DAUBERT AMENDMENT TO FLORIDA STATUTES 90.702 and 90.704 DENYING THE APPELLANT A FAIR TRIAL IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Standard of Review

All scientific, technical, or otherwise specialized knowledge must be shown to be reliable for it to be relevant. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993); and In Re: Amendments To the Florida Evidence Code, 278 So.3d 551, 554 (Fla. 2019). An appellate court must apply an abuse-of-discretion standard when it reviews a trial court's decision to admit or exclude expert testimony. Kumho, at 138-139. That standard applies as much to the trial court's decisions about how to determine reliability as to its conclusion. Id.

Daubert's "gatekeeping" obligation requires an inquiry into both relevance and reliability, and applies not only to scientific testimony, but to all expert testimony. Kumho Tire Company, LTD. v. Carmichael, 526 U.S. 137-138 (1999). Daubert discussed four factors – testing, peer review, error rates, and acceptability in the relevant scientific community – which

might prove helpful in determining the reliability of a particular scientific theory or technique. Daubert, at 593-594. In Kumho, the Supreme Court held that the Daubert factors apply to the testimony of engineers and other experts who are not scientists. Id., at 137. The decision in Kumho relies on Federal Rule 702's use of the word "knowledge" (that might become the subject of expert testimony) which establishes a standard of evidentiary reliability. Id., at 138. Federal Rule 702 formed the basis for Florida Evidence Rule 90.702, amended by Laws 2013, c.2013-107, § 1, and adopted by the Supreme Court of Florida. See *In re Amendments to the Florida Evidence Code*, 278 So.3d 551 (Fla. 2019).

While a trial judge determining the admissibility of testimony from a witness proffered as an expert may consider one or more of the specific Daubert factors, those factors do not constitute a definitive checklist, and the gatekeeping inquiry must be tied to the particular facts. Kumho, at 138. In determining whether a particular expert's testimony is reliable, the trial court should consider the specific Daubert factors where they are reasonable measures of reliability. Kumho, at 138.

On May 23, 2019, this Court rendered the opinion *In re Amendments to the Florida Evidence Code*, 278 So.3d 551 (Fla. 2019), adopting the

amendments made to this section by Laws 2013, c.2013-107 § 1, as procedural rules of evidence, and receding from In re Amendments to the Florida Evidence Code, 210 So.3d 1231 (2017). The order entered by the circuit court was entered on September 9, 2019, and is therefore governed by this Court's decision entered on May 23, 2019, which adopted the Daubert amendment.

The legislative intent behind the Daubert amendment was expressed in Chapter 2013-107, "An act relating to expert testimony; amending s. 90.702, F.S." with the intent to pattern it after Rule 702 of the Federal Rules of Evidence, the Florida Legislature intends to adopt the standards for expert testimony in the courts of this state as provided in Daubert, General Electric Co. v. Joiner, 522 U.S. 136 (1997), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and to no longer apply the standard in Frye v. United States, 293 F.2d 1013 (D.C. Cir 1923) in the courts of this state, and by amending s. 90.702, Florida Statutes, the legislature intended to prohibit pure opinion testimony, as provided in Marsh v. Valyou, 977 So.2d 543 (Fla. 2007).

Argument

The State's theory of the case was as follows: the Appellant was a

radicalized anti-government black supremacist sovereign citizen that carried out a planned assassination of Officer Howard and Officer Baxter. The State's "expert", J.J. MacNab, is a lay person that has made a hobby of watching news reports of violence towards police officers, and has never been qualified by a Florida Court as an expert on extremism. Nonetheless, the state wished to use MacNab as an "expert" to testify that the Appellant was a radicalized anti-government black supremacist sovereign citizen. The trial court abused its discretion in finding state witness J.J. MacNab an expert and allowing her to give expository testimony, even though the court ordered that she would not be permitted to express any opinions related to Appellant's purported beliefs or statements based on her review of the facts of this case. See R 1192-1197 Judge Tynan's ruling was erroneous because first, MacNab's testimony was not relevant because her testimony was not directly related to Appellant's action or beliefs; and second MacNab's pure opinion testimony is no longer admissible, as the Legislature made a point of expressing in Chapter 2013-107: "Whereas, by amending s. 90.702, Florida Statutes, the Florida Legislature intends to prohibit in the courts of this state pure opinion testimony" as previously allowed by the opinion in Marsh v. Valyou, 977 So.2d 543 (Fla. 2007).

The court's order permitting MacNab's testimony was prompted by Appellant's motion to prohibit the State from mentioning any evidence concerning Mr. Miller's race, religion, political beliefs, personal writing, booklists, and/or social media activity unless and until the State establishes the admissibility of that evidence and witness J.J. MacNab's testimony. (R 1042-1148) Appellant's motion to exclude's MacNab's testimony specifically sought to protect his rights pursuant to the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Florida Rules of Evidence, including (but not limited to) 90.702 and 90.704. (R 1042)

Prior to entering the order in this case on September 9, 2019, Judge Tynan heard the State's proffer of Ms. MacNab's proposed testimony and the defense's cross-examination of the witness during a Daubert hearing, on September 6, 2019. (T 2815-2960). Ms. MacNab described herself as a research fellow for George Washington University, since about 2015. (T 2817) She described her job duties and title as 'an external researcher.' (T 2818) She is not housed at the University but works out of her own offices. (T 2818) She said she is "in charge of everything that is non-Islamic domestic terrorism and extremism." (T 2818) By saying she is in charge,

she meant that she monitors extremist groups and looks for trends. (T 2818) She prepares periodic reports and educates the press about what's happening in the world of ideological crimes. (T 2818) She described an "ideological crime" as one committed by a person wanting to act violently on an extremist belief. (T 2818) Her normal workday consists of reading news reports about violence and noting whether an ideology had anything to do with it. (T 2819) She is not paid by the university. (T 2879-2880)

By her own admission, MacNab does not teach classes, attends no peer conferences, and is not an academic. (T 2819) She lectures law enforcement personnel and keeps busy traveling to talk at terrorism meetings. (T 2819) She has a bachelor's degree in independent studies, international relations from the University of California at Berkeley. (T 2920)

She also spends a lot of time on-line, going to sites frequented by the groups she monitors, watching their videos. (T 2821) Her independent study thesis was in international relations, and the Bosnian conflict. (T 2878)

MacNab began her interest in extremist groups when she learned that two police officers were killed in West Memphis, Arkansas in 2010, and she saw that as a sign of increasing violence towards police. (T 2824) Now

she attends press interviews on the subject. (T 2824) There is another person who does what she does: J.M. Berger. (T 2825) There are "like ten people doing Islamic terrorism and one doing non." (T 2825-2826)

There are no conferences for the type of work she does and there are only six or seven such persons as herself. (T 2826) She sometimes calls police departments and asks if she can ask questions about a case and to offer her help. (T 2828) A local analyst with the FBI sometimes asks for her advice on dealing with sovereign citizens. (T 2828) Otherwise, it's local police departments. (T 2828) That's typically when a violent incident or threat of violence occurs in their jurisdiction. (T 2828-2829)

She has recently written a book about seditionists, which is aimed at a readership consisting of the general public. (T 2832) She keeps a database of how many cases she has reviewed and kept notes on over the last 20 years. (T 2832) There are about 350 such cases. (T 2833) There are subsets in the database: tax protesters, militia, sovereign citizens, Moorish sovereigns. (T 2833) Ms. MacNab testified these are not hate groups; rather, she tracks who has actually been violent. (T 2833) Since she began noticing violence against police officers, she has been "keeping an eye on every murder of a police officer in the country." (T 2833)

She became aware of this case by watching media. (T 2834) Then she was contacted by the Office of the State Attorney. (T 2834) She was asked to review some of Mr. Miller's writings and statements to see whether he fell within any of the group categories she monitors. (T 2835) She believes he has a belief system like the "Moorish nation" or the "Moorish sovereign movement." (T 2836) She said the six other persons who do the type of work she does also arrive at their opinions by "content analysis." (T 2836-2837) She described the idea of a Moorish identity as belief that Moors are a racially superior group and they try to preserve their rights by relying on a view of history that the Moors were in this country before Columbus arrived and therefore, they own the continent. (T 2837-2838) She opined that there are persons who believe they are protected nationals, and that U.S. laws don't necessarily apply to them. (T 2837) The people in government they are most likely to meet are police officers, so there is animosity toward the officers. (T 2837)

According to Ms. MacNab, sovereign citizens believe that the government we now have is illegitimate. (T 2838) She testified that the Southern Poverty Law Center tracks "about 1000" hate groups around the nation, almost a quarter of whom were Moorish, black separatists, or black

supremacist groups. (T 2839) The Anti-Defamation League tracks groups who hold anti-Semitic beliefs. (T 2839) Both are sources of information, and both recognize Moorish sovereign citizens as a subset of anti-government extremism. (T 2840)

Ms. MacNab had a list of 25 incidents of violence toward police that were alleged to have been committed by "Moorish sovereigns" in the U.S. from 2013 to the time of her testimony in 2019. (T 2843) Her national statistic, if accurate, equates to an average of only 4.16 such incidents per year. She identified Moorish sovereign "markers" for each of the 25 persons she referred to, after reviewing police reports and social media postings. (T 2844-2845) Then she would contact the police agencies and have a phone conversation. (T 2845) She received a Snapchat video of 10 seconds in length, a photo of Mr. Miller, handwritten notes from his vehicle, and transcripts of some witness testimony. (T 2846-2847) She said she found Moorish sovereign markers on the note, where he cited the Moorish Science Temple of International law. (T 2849) In her opinion, that and other references are signs that he is an adherent of Moorish beliefs. (T 2849-2859) She conceded that nothing in that document would indicate he is a sovereign citizen. (T 2867)

On cross-examination during the proffer, Ms. MacNab stated she didn't know who wrote the notebooks she'd been handed. (T 2869-2870) She admitted she didn't authenticate them, even though she was partially basing her opinion on them. (T 2870) She has never published a peer-reviewed document. (T 2878) She earns her living from speaking engagements. (T 2880) She has spoken as an expert in the fields of insurance and securities law. (T 2880) **She has not been deemed an expert by a court in any other topic.** (T 2881) She has not responded to defense attorneys who have contacted her. (T 2881) She acknowledged that she is a crusader. (T 2881) The purpose of her Twitter account is so she can provide information on violent extremists - and cats. (T 2894) Ms. MacNab's list of 'violent extremists' includes some people whose cases were dismissed. (T 2920) People who were indicted make her list. (T 2922) Eight persons on her list had their cases dismissed, while two were acquitted. (T 2923)

Appellant's counsel argued that MacNab claims to be an expert in her field, but in reality she's an "echo chamber." (T 2968) She listens to herself, her colleagues at the Southern Poverty Law Center who she works for, her colleagues at the Anti-Defamation League, and people at the New

Jersey Dept. of Homeland Security. (T 2968) They keep telling each other the same things and when a report by the NAACP is published, Ms. MacNab ignores that and ignores Congressional testimony attacking the FBI's methodology as well. (T 2969) She was not aware of the report by the National Association of Black Law Enforcement Officers. (T 2969)

Appellant argued that the only evidence here that Mr. Miller has any interest in sovereign citizenship was in 2016, where he shared a meme of someone else repeating the themes and theories of sovereign citizens. (T 2969-2970) Everything else, this witness admitted, can be under the heading of the Moorish Scientific Temple. (T 2970) Counsel asked the court to focus on the fact that the only hard evidence before the court is one document – a Facebook page - from 2016. (T 2970-2972)

Appellant distinguished the two cases cited by the State in support of the court admitting this into evidence: Mr. Miller conceded in opening argument that he killed the two police officers, while the cases cited by the prosecution – U.S. v. Hassan, 742 F.3d 104 (U.S.C.A., 4th Cir. 2014) and U.S. v. Baptiste, 607 Fed. Appx. 950 (U.S.C.A., 4th Cir. 2014) – were cases in which elements had to be proved. (T 2971) There is no element of the crime charged in this case that had to be proven. (T 2971)

Following the entry of the circuit court's order allowing Ms. MacNab's testimony, provided it was only expository and contained no opinions on Mr. Miller, she was permitted to testify during the penalty phase. (T 3561-3605) MacNab's limited testimony was not relevant to any fact at issue. She said she is a research fellow at George Washington University's program on extremism. (T3561) Her daily routine as a research fellow includes tracking known extremist groups, the members who are talking violence online. (T 3562) She keeps a list of groups and people she tracks and publishes the list once a year. (T 3562) She also works with the press to educate them on various extremist groups. (T 3562-3563) She teaches law enforcement agencies around the country, and goes to terrorism, and counter-terrorism conferences. (T 3563).

She described anti-government extremism as a large, loose knit group of people who share a common belief that government is bad, and that it's their job to fix it by whatever means necessary. (T 3563) The prosecutor asked her to give some examples of groups that might fit this definition. Appellant's trial counsel objected, based on a previous objection to this witness' testimony. (T 3563) At the bench, Ms. Eckert claimed that the witness is not qualified to give this kind of testimony, and it had not

been established that she's qualified to give such testimony. (T 3563)

Defense counsel cited the previous objection that Ms. MacNab is not an expert in this field and shouldn't be allowed to testify. (T 3564) The court stated he'd already ruled on that objection, and what weight and credibility the jury wanted to give was another story. (T 3564) It was overruled. (T 3564)

Defense counsel had another objection: the State hadn't qualified the witness to give that testimony before the jury, because there's not a sufficient predicate. (T 3564-3565) The court overruled the objection, on the grounds that he'd previously found that she is qualified and entered an order to that effect, but the defense could cross-examine her on her qualifications. (T 3565)

Ms. MacNab testified that some examples of groups that fit the definition of anti-government extremists are militias, doomsday preppers, sovereign citizens, and tax protesters. (T 3566) She has a bachelor's degree in international relations, and acquires her knowledge from interviews with extremists, monitoring their social media accounts, and attending their criminal trials. (T 3566) She also reads books they read, watches their movies, listens to their music, and podcasts. (T 3569)

MacNab was asked about a belief system known as the Moorish Movement. The Appellant objected to MacNab testifying any further stating:

For the record, I renew the objection based on her testimony related to the Moorish belief system or any Moorish sovereign based on Daubert, failure to comply with Daubert, also the constitutional First Amendment chilling effect . The First Amendment cases that we cited only have to do with when the religion or belief system is central to carrying out the act. And I also renew the objection based on the Sixth and Eighth Amendment.

(T 3574) The objection was overruled. The state then received a detailed history of the Moorish movement and then a description of Moor sovereign citizens. (T 3577-3582) And worse MacNab was permitted to provide examples of Moor sovereign citizen attacks on police officers in 2016 and 2017 over appellant's objection. (T 3586)

Under Daubert, a trial judge has a gate keeping role to “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” Id. at 589. The trial judge is “charged with this gatekeeping function ‘to ensure that speculative, unreliable expert testimony does not reach the jury’ under the mantle of reliability that accompanies the appellation ‘expert testimony.’ ” Rink v. Cheminova, Inc., 400 F.3d 1286,

1291 (11th Cir. 2005) (citation omitted). More importantly, a trial judge must make “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” Id. at 592–93. This basic gatekeeping obligation applies not only to scientific testimony, but “to all expert testimony.” Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147 (1999).

The error of the judge can best be understood by example. The example goes as follows: Judge Slow has the worst docket movement in the circuit. Every six weeks the Chief Judge sends Judge Fast to do a docket pre-trial hearing. On one occasion senior managers from the State Attorney Office and the Public Defender Office are there to observe. Both managers are experts in their office. After the pre-trial hearing with Judge Fast forty percent of Judge Slow’s docket is cleared by plea agreement. When each senior manager is later asked to testify why Judge Fast was so successful in clearing Judge Slow’s docket, the state attorney stated the Judge made no difference; the problem is that the public defender had limited contact with their clients and is usually not prepared. The public defender stated the Judge made no difference; the state attorney office

usually makes lousy plea offers. The managers from each office have an inherent bias and have rendered unreliable “pure opinion testimony” and under Florida law despite their positions as a senior managers would not qualify them to testify as experts.

Likewise, Ms. MacNab is not an expert on Moor beliefs or sovereign citizen extremists. Ms. MacNab has no academic credentials in this area. MacNab has no academic study in this area because in her own words she is “not an academic.” MacNab, like our state attorney and public defender senior managers in the example above simply observes news events throughout the years and exchanges her ideas with like minded individuals that confirms her bias. Moreover, throughout the proffer it was obvious that MacNab is a pro-state zealot on a mission. She labeled the appellant as a Moor Sovereign citizen member based upon one “marker”, that being the Appellant shared a meme on a single social media post the year before the shooting. This absurd “pure opinion” should have been a red flag to Judge Tynan. Judge Tynan should have recognized that MacNab was providing “pure opinion” testimony. As such, Judge Tynan failed in exercising his gatekeeping role because Ms. MacNab is no expert on extremist movements.

MacNab's testimony was especially prejudicial because she testified to some Moor beliefs that fits her narrative, and detailed Moor sovereign citizen attacks on police officers in 2016 and 2017. This suggested to the jury that Appellant could have been motivated by these events and acted in the same manner. The wrongful admission of MacNab's testimony denied the Appellant a fair trial in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The Appellant should be granted a new trial.

In the event that the state argues that the Daubert challenge was untimely, the Appellant's trial counsel addressed the untimely filing of the motion. The Appellant explained that there was a delay because the State failed to timely inform the defense that the State's expert witness had been using a different name and that the FBI had retracted their report on so-called Black identity extremists. (T 2967) The Appellant, citing Scipio v. Florida, 928 So.2d 1138 (Fla. 2006), stated that the case applies when a prosecutor learns that the State's expert is changing testimony for trial after a proffer, and when the prosecutor fails to timely tell the defense about the change. (T 2966-2967) There was an ex-parte hearing where the defense raised this issue within three days of learning about the retraction of the FBI

report, when they asked for the appointment of a consulting witness. (T 2967) As soon as the defense was able, they filed this Daubert motion. (T 2967) Additionally, the Appellant argued the State was obligated to tell the defense that the witness's name was not the same as she reported, and that the basis of her opinions were was no longer reliable. (T 2967)

F.S.A. RCrP Rule 3.220(j) is titled: "Continuing Duty to Disclose", and provides: "If, subsequent to compliance with the rules, a party discovers additional witnesses or material that the party would have been under a duty to disclose or produce at the time of the previous compliance, the party shall promptly disclose or produce the witness or material in the same manner as required under these rules for initial discovery. This duty includes any additional recorded or unrecorded statements of any person disclosed under subdivisions . . . of this rule that materially alter a written or recorded statement previously provided under these rules."

POINT THREE

THE TRIAL JUDGE ERRONEOUSLY FOUND THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Standard of Review

“The standard of review applicable to whether a trial court properly found an aggravating factor is “whether competent, substantial evidence supports the trial court's finding.” Conde v. State, 860 So.2d 930, 953 (Fla. 2003). The standard of review applicable to whether the trial court properly instructed the jury to consider an aggravating factor is whether the “evidence adduced at trial is legally sufficient to support a finding of that aggravating circumstance.” Davis v. State, 2 So.3d 952, 962 n. 4 (Fla. 2008); Cole v. State, 36 So. 3d 597, 608 (Fla. 2010) Competent substantial evidence is tantamount to legally sufficient evidence, and we assess the record evidence for its sufficiency only, not its weight.” Almeida v. State, 748 So. 2d 922, 932 (Fla. 1999)

The Sentencing Order erroneously applied the CCP aggravator. The “cold, calculated, and premeditated” aggravating factor found in this case was not based on competent substantial evidence. All of the testimony and

evidence in the case do not support a finding of heightened premeditation. The trial court finding this aggravating factor violated the Eight and Fourteenth Amendment to the United States Constitution. This Court should strike the CCP aggravating factor for that reason.

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

Whether the CCP aggravator applies in a given case is subject to a four-part test: (1) The killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) there must have been no pretense of moral or legal justification.

As stated in the instructions, in order to establish CCP, the first-degree murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. "Cold" means the murder was the product of calm and cool reflection. "Calculated" means having a careful plan or prearranged design to commit murder. A killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation

of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing. However, in order for this aggravating factor to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required. (T 4728)

“The CCP aggravator pertains specifically to the state of mind, intent, and motivation of the defendant.” Wright v. State, 19 So. 3d 277, 298 (Fla. 2009) In the present case, one of the required elements was missing in this case in order for CCP to apply:

Missing Element: “Heightened Premeditation.”

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

641 So.2d 381, 388 (Fla. 1994). Similarly, in Douglas v. State, 575 So. 2d 165, 166–67 (Fla. 1991), the Court stated:

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

This aggravating factor normally, although not exclusively, applies to execution-style or contract murders. McCray v. State, 416 So.2d 804 (Fla. 1982).

In the sentencing order Judge Tynan pieced together the sequence of events that led to the shootings of Officer Howard and Officer Baxter. Judge Tynan described the Appellant’s prior display of hostility against law enforcement. Specifically, Judge Tynan noted the Appellant’s claim in social media that he was a “killer by trade.” The Appellant was a career Marine. This killer claim was not directed specifically to law enforcement. Also, Judge Tynan made note of the testimony of J.W. Albright, a friend and fellow serviceman of the Appellant. Albright testified that he had a conversation with Appellant where the Appellant displayed his .22 pistol and told Albright that he was not going to be hurt by law enforcement.

These facts were not directed to Officer Howard nor Officer Baxter.

More relevant is Judge Tynan's finding that the Appellant hated Officer Howard and Officer Baxter. This finding is based upon the jailhouse testimony of career criminal Lewis Peterson. Peterson testified that he had 28 felony convictions (21 convictions involving dishonesty). While in the jail infirmary, Peterson had a discussion with Appellant about the shooting. According to Peterson, the Appellant "hated" Officer Baxter and Officer Howard because they harassed people. The Appellant claimed that he stopped when he observed Officer Baxter on the side of the road harassing local citizens. Peterson stated that the Appellant was heading home when he came upon Officer Baxter by chance. The Appellant was not driving around town looking for Officer Baxter and Officer Howard to kill them.

Also, on the issue of heightened premeditation, Judge Tynan made the following finding of fact: "Defendant procured and armed himself in advance and expressed an intent to use a firearm against law enforcement if he believed he was being harassed." (R 2143) **There is no competent evidence to support this claim.** First, the Appellant had a concealed carry permit and told Officer Baxter and Officer Howard that he was armed. Second, testimony related to when the Appellant was "Baker Acted"

revealed that the Appellant was always armed. Therefore, the fact that the Appellant was armed is a non-sequitur and does not logically support the finding of heightened premeditation. Third, the Appellant told Mr. Albright that he was not going to be a statistic (a black male shot by law enforcement). Mr. Albright explained this claim by Appellant. The Appellant was concerned that African Americans were being killed by police officers. (T 3531) Albright was not alarmed by Appellant's anti-law enforcement comments because the Appellant was not going to kill police officers, but rather that Appellant was in fear that he could be killed by a police officer, and he prepared to defend himself.

Judge Tynan made another factual finding that is not supported by competent evidence: The officers did not provoke the Appellant and the Appellant could have left the scene. We do know from the Snapchat video that the Appellant was highly agitated when he initially engaged Officer Baxter. Officer Baxter asked for the Appellant to come to him and give him his driver's license. The Appellant was non-compliant by walking away from Officer Baxter and telling him that he had to come to him if he wanted his license. We also know that the Appellant told Officer Baxter that he was a veteran, feared for his life and was eligible to carry a concealed

weapon. We also know that Officer Howard ordered the bystanders to disperse for their safety. 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.

The Appellant claims to have no memory of the shooting, and there were no eyewitnesses to the shooting. Therefore, we probably will never know if the Appellant was provoked in any way by Officer Howard or Officer Baxter. We do know that Officer Howard ordered the bystander that was recording the encounter on Snapchat to leave the area. A citizen recording the encounter on Snapchat certainly gave the Appellant a feeling of safety from being harmed by Officer Baxter or Officer Howard. Creating a situation where the Appellant was now alone with the two officers without witnesses with the Appellant's fearful paranoid state of mind was in itself provocative.

Finally, Judge Tynan made the factual finding that the Appellant remained on the scene and called for Officer Howard as part of a plan to murder two officers that he hated. The Appellant had the opportunity to leave and chose not. These factual findings are not supported by the evidence. The Snapchat video confirms that Officer Baxter asked the

Appellant for his driver's license (presumably because of the reckless manner upon which the Appellant approached the scene in his vehicle), and therefore the Appellant was not free to leave. The Appellant then demanded that Officer Baxter call his supervisor. The Appellant did not call for Officer Howard by name, and it was mere chance that Officer Howard was Officer Baxter's supervisor on that shift.

The amount of "heightened premeditation" required to support the CCP aggravator is not present in the present case. While premeditation is present, that premeditation began after the Appellant was alone with Officer Baxter and Officer Howard. Had bystanders been permitted to continue to record this encounter, this tragic crime would not have happened. Judge Tynan erred by finding "heightened premeditation" and thus the CCP aggravator. Based on a review of the relevant case law, competent substantial evidence does not support the finding of CCP.

Finally, if CCP can be found in an unplanned premeditated murder such as the case here, then the aggravator fails to narrow the class of eligible cases, and is unconstitutional in violation of the Eighth and Fourteenth Amendment to the United States Constitution.

POINT FOUR

THE APPELLANT WAS WRONGFULLY DENIED AN AFFIRMATIVE DEFENSE WHEN THE TRIAL JUDGE WITHHELD EVIDENCE OF APPELLANT'S MENTAL-HEALTH ISSUES DENYING THE APPELLANT A FAIR TRIAL IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Standard of Review

This Court reviews evidentiary rulings for abuse of discretion. A judge's discretion is limited by the rules of evidence and the principles of stare decisis. *Johnson v. State*, 969 So. 2d 938, 949 (Fla. 2007)

At the conclusion of jury selection, the state made a Motion to Exclude Evidence of Abnormal Mental Condition Other Than Insanity. (R 1156) The state argued that even though the Appellant may have had nightmares, jumpiness, anxiety, depression or Post Traumatic Stress Disorder ("PTSD"), these facts are factually irrelevant to any cognizable defense in this case. The state conceded that these facts may form the basis of some type of general, abnormal mental condition defense which does not rise to the level of insanity, but such a defense is not permitted in Florida, and therefore the evidence is legally irrelevant.

The trial judge held a hearing on the Motion and the Appellant argued

that the Appellant deserves a full defense and stated that they wish to give notice of a mental health defense listing their experts Dr. Cohen and Dr. Gold. (T 2349) The Appellant wished to present an affirmative defense that the Appellant acted in the heat of passion related to his PTSD and fear of law enforcement. The trial judge denied the Appellant's request to present at heat of passion defense because it is akin to a claim of diminished mental capacity. (T 2358) This was error in violation the of Fifth and Fourteenth Amendment to the United States Constitution.

In Chestnut v. State, 538 So. 2d 820 (Fla. 1989), the defendant sought to introduce evidence of low intelligence and brain damage from being kicked by a bull that left him with a seizure disorder. The circuit court excluded the evidence, this Court affirmed, and the Supreme Court approved this Court's decision. The Supreme Court concluded that persons with mental deficiencies that do not amount to insanity "should be held accountable for their crimes just as everyone else." Id., at 825. The dissenting view, which garnered three votes, would have allowed evidence of involuntary organic brain damage bearing on the defendant's intent. Id. at 826 (Overton, J., dissenting).

In Evans v. State, 946 So. 2d 1 (Fla. 2006), this Court ruled that trial

counsel was not ineffective in failing to present evidence that the defendant suffered a head injury that rendered him unable to control his rage and violent behavior. This Court reaffirmed that diminished capacity is not a viable defense in Florida. *Id.*, at 11. See also Lukehart v. State, 70 So. 3d 503, 515 (Fla. 2011) (noting that court “repeatedly rejected” claims of ineffectiveness for failure to present evidence of diminished capacity). In Evans, the court acknowledged that in Bunney v. State, 603 So. 2d 1270 (Fla. 1992), the court made exceptions to the rule of inadmissibility “for conditions which are ‘commonly understood’ and may be explained without the assistance of a mental health expert, such as medication, epilepsy, infancy, and senility.” 946 So. 2d at 11. In Bunney, the circuit court erred in excluding evidence that the crime occurred during the course of a minor epileptic seizure. 603 So. 2d at 1273.

Similarly, in Wise v. State, 580 So. 2d 329 (Fla. 1st DCA 1991), the circuit court erred in excluding expert testimony that the defendant may have blacked out from a blow to the temple, then stabbed the victim involuntarily while suffering from a “running fit.” The expert witness described the running fit as a “psychomotor, partial complex epilepsy in which people will continue to engage in what appears to be purposeful

behavior but they don't know what it is that they are doing.” *Id.*, at 330. The

First DCA reversed stating:

The instant case, unlike *Chestnut*, involves a physical defect or condition which has as a potential result, loss of consciousness. This is a situation wholly distinguishable from one involving a diminished capacity defense. A diminished capacity defense concerns the defendant's ability to understand the wrongfulness of his acts. The instant case presents a question of the defendant's consciousness of his acts themselves, not of his understanding of their wrongful nature. *Wise* did not seek to prove the existence of any mental illness or psychiatric condition, but instead that a physical condition may have caused him to blackout at the time of the assault in question...

Id., at 330. Here *Wise's* proffered defense does not involve mental illness, but a purely physical condition which affects his consciousness, not his mental state. As such it is comparable to a defendant in a vehicular homicide case asserting as a defense that a stroke, seizure or heart attack rendered him unconscious prior to the fatal accident.

In *Mizell v. State*, 773 So. 2d 618 (Fla. 1st DCA 2000), this Court denied the state's petition for a writ of certiorari challenging the trial court's pretrial ruling that evidence of the defendant's post-traumatic stress disorder (PTSD) would be admissible on the question of self-defense in a prosecution for attempted second-degree murder. The Second DCA

“view[ed] the PTSD evidence offered in this case as state-of-mind evidence, quite analogous to battered spouse syndrome (BSS) testimony that has in fact been approved many times. BSS testimony has been admitted to support a claim of self-defense.” *Id.* at 620.

Finally in Filomeno v. State, 930 So.2d 821 (Fla. 5th DCA 2006) the Court held that a psychologist's testimony regarding characteristics of “fight or flight” response did not constitute inadmissible evidence of defendant's diminished mental capacity, which was not a recognized defense in Florida, but rather was state-of-mind evidence that was relevant to defendant's claim of self-defense in trial for second-degree murder with a firearm.

In Filomeno, the defense had a psychologist examine the defendant prior to trial. According to defense counsel, the psychologist was prepared to testify that in some highly stressful situations, an individual's perception of danger may impel them to “fight,” when they perceive that they are being prevented from “flight.” Additionally, the psychologist was prepared to testify that given Filomeno's situation, his perceptions of danger were both logical and reasonable. The trial judge agreed with the State and excluded the psychologists testimony. The trial judge concluded that the psychologist's testimony attempted to put forth the defense of diminished

mental capacity, a defense not recognized in Florida under Chestnut v.

State, 538 So.2d 820, 825 (Fla.1989) On appeal, the Fifth DCA held that:

While the State correctly argues that Florida rejects the defense of diminished mental capacity, we think that the State and the trial court mischaracterized at least some of the proffered evidence as diminished capacity evidence. We view the psychologist's explanation as to the "fight or flight" response as state-of-mind evidence, analogous to battered spouse syndrome testimony that has been approved many times.

Filimeno at 822.

The Appellant's theory of defense was that his life was spiraling out of control due to untreated PTSD and depression. One manifestation of the Appellant's condition was being obsessed with law enforcement's treatment of African-Americans. He confided to a friend leading up to these murders that he was not "going to become a statistic." This meaning he was not going to be killed by the police for being black. Analogous to PTSD or Battered Wife Syndrome, the Appellant wished to present mental health expert testimony on a condition that the Appellant's counsel described as "heat of passion." Psychologist's testimony regarding characteristics of a "heat of passion" response did not constitute inadmissible evidence of defendant's diminished mental capacity, but rather

was state-of-mind evidence that was relevant as an affirmative defense.

The erroneous exclusion of evidence of the Appellant's mental condition denied the Appellant a fair trial in violation of the Fifth and Fourteenth Amendment to the United States Constitution. In the guilt phase trial opening statement the Appellant argued that at the time of the murders the Appellant was suffering from an unspecified mental illness, and this mental condition should permit the jury to find a verdict of second degree murder. (T 2283) Thereafter, on the request of the state, the trial judge excluded all evidence of the Appellant's mental condition in the guilt phase trial. As a result, the Appellant was thereafter prejudiced throughout the course of his proceedings because the Appellant's counsel failed to fulfill his opening pledge to the jury. This Court should reverse the Appellant's convictions and remand for a new trial.

POINT FIVE

FLORIDA'S CAPITAL SENTENCING SCHEME
RISKS THE ARBITRARY AND CAPRICIOUS
APPLICATION OF THE DEATH PENALTY AND,
THEREFORE, VIOLATES THE EIGHTH AND
FOURTEENTH AMENDMENTS.

Standard of Review

Constitutional challenges to statutes are pure questions of law, subject to de novo review. Jackson v. State, 191 So. 3d 423 (Fla. 2016)

Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of arbitrary and capricious action. Gregg v. Georgia, 428 U.S. 153, 189 (1976) Since reinstating the death penalty in Gregg, the U.S. Supreme Court has barred “sentencing procedures that create a substantial risk that [a death sentence] would be inflicted in an arbitrary and capricious manner.”⁶

In Gregg, “[t]he approval of Georgia's capital sentencing procedure

⁶ See Also Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion) (“It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (recognizing the heightened “need for reliability in the

rested primarily on two features of the scheme: that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the state supreme court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. These elements, the opinion concluded, adequately protected against the wanton and freakish imposition of the death penalty.”⁷

The same two factors were cited in Proffitt v. Florida, 428 U.S. 242 (1976), where the Supreme Court rejected an ‘arbitrary and capricious’ challenge to Florida’s post-Furman statute.⁶³ In upholding the statute, the Court after noting that “the trial court’s sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed,”⁸ the court added:

Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.

Id., at 258 (citing State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) (emphasis

determination that death is the appropriate punishment in a specific case”).

⁷ Zant v. Stephens, 462 U.S. 862, 876 (1983) (emphasis added).

⁸ Id., at 258.

added)).

In Pulley v. Harris, 465 U.S. 37 (1984), the Supreme Court held that the Eighth Amendment does not require “comparative proportionality review by an appellate court [...] in every case in which the death penalty is imposed.” The Court explained that while “[p]roportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, [] “each distinct system must be examined on an individual basis.” *Id.*, at 45. Relying on Pulley, this Court recently announced that it would no longer perform comparative proportionality review in death cases.⁹ Florida’s scheme now fails to sufficiently reduce the risk of arbitrary infliction of death sentences. The Pulley Court acknowledged that “there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review.” Appellant respectfully submits that Florida’s system has become such a system, as multiple vital safeguards for the system have either been eliminated or eroded since it was last examined in Proffitt v. Florida, 428 U.S. 242 95 (1976).

First, as noted above, this court has eliminated the safeguard of

⁹ Lawrence v. State, 308 So. 3d 544 (Fla. 2020).

comparative proportionality review. As Justice Labarga opined in his dissent in Lawrence, “the fact that this Court has reversed death sentences due to a lack of proportionality underscores the need for proportionality review,” and its elimination marks “the most consequential step yet in dismantling the reasonable safeguards contained within Florida's death penalty jurisprudence.” Lawrence at 552.

Second, this Court has also recently eliminated the safeguard of the “reasonable hypothesis of innocence” motion for judgment of acquittal. See Bush v. State, 295 So. 3d 179, 216 (Fla. 2020) (J. Labarga, dissenting) (“today, this Court eliminates another reasonable safeguard in our death penalty jurisprudence and in Florida's criminal law across the board.”).

Third, Florida's capital scheme has fallen victim to the "aggravator creep" problem.¹⁰ A capital sentencing scheme, either through legislatively enumerated aggravating factors or through legislatively mandated guilt-phase findings, must genuinely narrow the class of persons eligible for

¹⁰ In Hidalgo v. Arizona, 138 S. Ct. 1054 (2018), four Justices commented on the Court's denial of certiorari. The state court had held that Arizona's capital scheme is sufficiently narrowly drawn even if it assumed that 98% of Arizona's first-degree murder cases are automatically eligible for death-penalty proceedings. The four Justices recognized "a possible constitutional problem" which "warrants careful attention and evaluation." 138 S. Ct. at 1057. In Florida, the reported cases and the relevant statutes on their face establish that an "aggravator creep" problem exists.

the death penalty.¹¹ Each aggravating factor, taken singly, must also narrow the eligible class.¹² Florida's scheme, however, fails to do so. The California capital scheme approved in Pulley contained eight aggravating factors, as did this State's then-existing scheme approved in Proffitt v. Florida, 428 U.S. at 251. Since then, however, the number of aggravating factors in Florida has doubled.¹³ Several of the categories are not tightly drawn and, as of 2021, virtually all conceivable murders fit at least one of the sixteen categories of eligibility. For instance, Florida's scheme treats as an aggravator the fact that a defendant was found guilty of felony-murder, rather than premeditated murder. As Tennessee and North Carolina have held, doing so of necessity fails to narrow the death-eligible class.¹⁴ Notably, the conduct underlying common predicate felonies has broadened over the years,¹⁵ and the statute has been

¹¹ Lowenfield v. Phelps, 484 U.S. 231, 244 (1988), (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

¹² Zant, at 877.

¹³ Chapters 2010-120 '1, 2005-28 '7, 96-290 '5, 95-159 '1, 91-270 '1, 88- 381 '10, 87-368 '1, Laws of Florida.

¹⁴ State v. Middlebrooks, 840 S.W. 2d 317, 346-47 (Tenn. 1992); State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (N.C. 1979).

¹⁵ See Sparre v. State, 164 So. 3d 1183, 1200-01 (Fla. 2015) (burglary can occur after invitation is effectively rescinded); Rockmore v. State, 140 So. 3d 979, 982 (Fla. 2014) (robbery includes force used after taking).

expanded to cover significantly more participants.¹⁶

Another of Florida's aggravators, that the defendant has been convicted of a prior violent felony, in practice has also failed to narrow the eligible class. This court has construed "prior" broadly, to include violent crimes on other victims committed in connection with the murder.¹⁷ The cold, calculating and premeditated ("CCP") aggravator has also evolved. In its early years that factor was applied in cases involving contract killings and execution-style killings.¹⁸ In recent years, however, a CCP finding has been upheld so long as the murder was not committed impulsively or on the spur of the moment, and was not committed in a state of rage or loss of control, "even where there is evidence that the final decision to kill was not made until shortly before the murder itself." In sum, Florida's capital scheme, as administered in 2021, fails to adequately reduce the risk of arbitrary infliction of death sentences, as it has eliminated the safeguards of comparative proportionality review and the "reasonable hypothesis of innocence" judgment of acquittal, and fails to narrow the class of first-degree murderers eligible for death.

¹⁶ See State v. Dene, 533 So. 2d 265, 266-69 (Fla. 1988).

¹⁷ See, e.g., Stephens v. State, 787 So. 2d 747, 761 (Fla. 2001).

¹⁸ See Floyd v. State, 497 So. 2d 1211, 1214 (Fla. 1986) and Garron v. State, 528 So. 2d 353, 360-61 (Fla. 1988).

POINT SIX

THE DEFENSE REQUEST FOR AN EXPRESS JURY INSTRUCTION ON MERCY SHOULD HAVE BEEN GRANTED.

Standard of Review

Whether a standard jury instruction is accurate comprises a pure question of law subject to de novo review. State v. Floyd, 186 So. 3rd 1013, 1019 (Fla. 2016).

The Appellant filed a proposed jury instruction on mercy. (R 1024) After hearing the trial judge denied the Appellant's request for an express instruction on mercy stating:

Finally, although it is, and should be, the Court's responsibility to instruct jurors that they do not have to vote for a sentence of death, the Court declines to give the Defendant's proposed instruction that essentially instructs jurors that mercy is a sufficient reason for them to exercise their discretion. (R 1319)

Appellant acknowledges that the argument raised on this point is precluded by Woodbury v. State, 320 So. 3rd 631 (Fla. 2021). Appellant seeks to exhaust the claim made here for federal review. In Woodbury, as here, the defense at trial unsuccessfully sought to modify Florida's standard criminal jury instruction for use in the penalty phase, no. 7.11. There, as here, the defense sought an instruction that would have expressly told the

jurors that mercy could guide their decision making; the request was denied, and the jury was read standard instruction no. 7.11. The gravamen of Woodbury is that standard language in 7.11 adequately conveys the idea that jurors may be guided by mercy; that standard language reads “even if you find that the sufficient aggravators outweigh the mitigators, the law neither compels nor requires you to determine that the defendant should be sentenced to death.” Woodbury at 656. The Mississippi Supreme Court, considering indistinguishable language, has held that it “seems simply to instruct the jury on its ability to impose a sentence of life in prison, rather than the death penalty.” Flowers v. State, 158 So. 3rd 1009, 1066 (Miss. 2014), cert. granted, judgment vacated on other grounds, 136 S. Ct. 2157 (2016). Appellant submits that the Mississippi court correctly intuits the layperson’s likely reaction to the language in question.

If a jury instruction enhances the risk of an outcome adverse to the defendant, the right to heightened reliability in capital proceedings prohibits giving that instruction in a death-penalty case. Beck v. Alabama, 447 U.S. 625, 638 and n.13 (1980), citing U.S. Const., Amend. 8. That risk is enhanced here, because mercy is central to the death-penalty selection process, as viewed by the United States Supreme Court. That Court has

observed that “what our case law is designed to achieve” in the selection process is a conscious jury decision to accord or withhold mercy. Kansas v. Carr, 577 U.S. 108, 119 (2016). This Court agrees. See State v. Poole, 297 So. 3rd 487, 503 (Fla. 2020) (citing Carr); see also State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) (defending a client’s interests in a penalty phase consists of “seeking the mercy of society.”)

The error in denying an express mercy instruction should be deemed structural, since the impact of its absence on the jury cannot be ascertained from the record. See generally Johnson v. State, 53 So. 3rd 1003, 1007 (Fla. 2010) and United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006).

POINT SEVEN

THE ADMISSION AND PRESENTATION OF VICTIM IMPACT EVIDENCE RENDERED APPELLANT'S TRIAL FUNDAMENTALLY UNFAIR, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Standard of Review

A trial court's decision to admit victim impact testimony is reviewed for an abuse of discretion. Kalisz v. State, 124 So.3d 185, 211 (Fla.2013)

This Court has consistently held that victim impact testimony is admissible as long as it falls within the parameters set by the United States Supreme Court in Payne v. Tennessee, 501 U.S. 808 (1991). Windom v. State, 656 So.2d 432, 438 (Fla.1995). Victim impact evidence is permitted to inform the jury about the specific harm caused by the crime in question. The Florida statutes provide that once the prosecution has provided evidence of the existence of one or more aggravating factors, the prosecution may introduce, and subsequently argue, victim impact evidence. See §§ 921.141(8), 921.142(9), Fla. Stat.

Such evidence must be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Id. The State may seek to

introduce victim impact evidence if it concludes that such evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. Kalisz v. State, 124 So. 3d 185 (Fla. 2013)

In the instant case, the state sought to introduce victim impact evidence in their rebuttal case. (T 3472) The Appellant objected to any victim impact evidence be permitted on Constitutional grounds, and also objected to victim impact evidence being introduced during the state's rebuttal case. (T 3472) The Appellant argued that the victim impact evidence will become a feature of the rebuttal case. Moreover, the timing of presenting victim impact evidence in rebuttal just before the jury deliberates is prejudicial. Judge Tynan asked whether the Appellant knew of any case that says that victim impact evidence can only be presented in the State's case-in-chief, and the Appellant responded that victim impact evidence is not rebuttal to anything. The trial judge overruled Appellant's objection. This was error.

Rebuttal evidence is usually offered after the defense has rested its case and is directed to refuting the evidence introduced by the defendant, unless the court exercises its discretion under section 90.612(1) to permit

broader proof. For example, evidence that refutes the defense theory or impeaches a defense witness is normally a proper subject for rebuttal.

The Appellant concedes that the decision as to whether to permit rebuttal testimony falls within the broad discretion of the trial court. Rimmer v. State, 825 So. 2d 304, 321–22 (Fla. 2002) However, as defense counsel pointed out to Judge Tynan, victim impact evidence is not rebuttal evidence.

Appellant recognizes that Judge Tynan has wide discretion to control the mode and order of the interrogation of witnesses and the presentation of evidence. See § 90.612, Fla. Stat. (2019) However, in a capital case this Court should find that it is an abuse of discretion for a trial judge to allow victim impact evidence be presented moments before a jury is going to deliberate on sentence.

Victim impact evidence is the most compelling evidence available to the state— highly emotional, tearful testimony coming directly from the hearts and mouths of the survivors left behind by killings. It is prejudicial and violates Due Process to permit victim impact evidence in penalty phase rebuttal because the evidence arrives at the precise time when the balance is at its most delicate and the stakes are highest—when jurors are poised to make the visceral decision of whether the offender lives or dies—after the

defendant has been convicted of the most horrendous crime possible.

Victim impact testimony presented in rebuttal is also prejudicial because it diverts the jury's attention away from the facts that should be scrutinized (i.e., the circumstances of the crime and the background and character of the defendant) and focuses on facts that should not be considered, i.e., victim character and experienced harm just before they commence deliberations.

In sum, the victim impact evidence in this case was so emotion-laden in its content that presenting this evidence in penalty phase rebuttal just before jury deliberations has the danger that jurors may be persuaded more by the emotion of the moment rather than by the facts of the case. There is a heightened duty in capital cases to avoid death sentences based on emotion: "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion" See Gardner v. Florida, 430 U.S. 349, 358 (1977). The State thus cannot show beyond a reasonable doubt that the emotional victim-impact evidence in penalty phase rebuttal did not affect the verdict in this case.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to vacate both death sentences and order the Appellant a new trial; or in the alternative remand for imposition of sentences of life without the possibility of parole.

Respectfully submitted,

MATTHEW S. METZ
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

/s/ George D.E. Burden
GEORGE D.E. BURDEN
Florida Bar No. 0786438

and KATHRYN R. RADTKE
Florida Bar No. 656331
ASSISTANT PUBLIC DEFENDERS
444 Seabreeze Blvd. Suite 210
Daytona Beach, Florida 32118
(386) 254-3758
burden.george@pd7.org
radtke.kathryn@pd7.org

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically through the Florida Courts E-Filing Portal in the Florida Supreme Court, at www.myflcourtagency.com; the Office of the Attorney General, Assistant Attorney General Doris Meacham, at capapp@myfloridalegal.com; and a true and correct copy thereof delivered by mail to Mr. Everett Miller, #W91529, Union Correctional Institution, P.O. Box 1000, Raiford, Florida, 32083, on this 2nd day of February, 2023.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing initial brief complies with the Florida Rules of Appellate Procedure in that it is set in Arial 14, and in that it does not exceed the word count set out in the Rules.

/s/ George D.E. Burden
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER