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STATEMENT OF THE CASE

TYRONE T. JOHNSON was charged by superseding indictment in Hillsborough County with (1) first-degree murder of Ricky Willis; (2) second-degree murder of Stephanie Willis; and (3) aggravated child abuse (R87-88). The state filed a notice of intent to seek the death penalty on Count One (R91-92).

The trial took place in November 2021 before Circuit Judge Christopher Sabella and a jury, and resulted in guilty verdicts on each count as charged (R109-12). After the penalty phase the jury unanimously recommended the death penalty for the Ricky Willis homicide (R113-15;T3423-24); and on December 12, 2022 the trial judge imposed a death sentence (R530-50,561;T3814).

Judge Sabella found and gave great weight to three aggravating factors: (1) the contemporaneous conviction for second-degree murder of Stephanie Willis; (2) especially heinous, atrocious, or cruel; and (3) victim under age 12 (R533-35). The judge found four statutory mitigating factors: (1) impaired capacity (slight weight); (2) extreme mental or emotional disturbance (moderate weight); (3) no significant history of prior criminal activity (moderate weight); and (4) age (no weight), along with numerous nonstatutory

mitigators, one of which – - the effect on Johnson of his eldest son’s suicide which occurred ten months before the crimes - - was given great weight. Fifteen of the other nonstatutory mitigators were accorded moderate weight (R533-48).

STATEMENT OF FACTS

A. THEORIES OF THE CASE

At the outset of the trial, Johnson’s counsel put on the record that the defense was going to concede that Johnson was the person who shot the two decedents, and that the defense intended to argue for a lesser included offense. Judge Sabella conducted a colloquy with Johnson, who confirmed that he was in agreement and had not been coerced (T1718-19). Accordingly, defense counsel argued to the jury that Johnson had acted in the heat of passion; the shooting of Ricky was neither premeditated nor felony murder; the two shootings were not done from ill will, hatred, spite, or evil intent; and Johnson was guilty only of manslaughter (T1761-63,2593, 2670,2678-79,2682).

The state relied primarily on physical evidence from the crime scene as proof of premeditation, and argued that it showed - - contrary to Johnson's statement to Detectives Florio and Tabor - - that Ricky had tried to hide in his bedroom and Johnson went there and shot him. The defense argued that there were inconsistencies in the physical evidence, the police investigation was shoddy, and the crime scene was compromised; therefore insufficiently reliable to prove premeditation beyond a reasonable doubt.

B. STATE'S EVIDENCE – ARREST, CRIME SCENE, AUTOPSY

According to the state in its sentencing recommendation (R489-91), the state's evidence established the following:¹ On October 21, 2018 the defendant, Tyrone Johnson called the Hillsborough County Sheriff's Office via 911 advising the 911 operator that he had shot two people because he was being attacked. The defendant advised one victim was his girlfriend and the other was her ten-year-old son (T1766,1898-1906). Deputies from the Sheriff's Office arrived to find the defendant seated on the

¹ As to Part B. Bracketed portions and transcript cites have been added by Johnson's appellate counsel.

front porch holding a phone (T1770-72,1784-88,1822,1832,1843-44,1858,1864-65,1919). [He was crying, screaming, and repeatedly saying “I’m sorry, I’m sorry, I’m so sorry” (T1771-72,1784-85,1822,1832,1844,1858,1864-65,1919)]. The defendant was detained while deputies went into the house to search for the victims. Upon entering the apartment the deputies noticed a gun and a knife on the floor in the main living room area (T1773-74,1807,1869-70,2170). The victims were found lying together on the floor in the master bedroom in front of the bathroom (T1775-77,1808,1859-60,1984). They were clearly deceased and deputies noticed numerous injuries that appeared to be bullet wounds. The scene was immediately secured and the defendant was placed in a patrol vehicle. He was eventually transported to the Criminal Investigations Division where he was interviewed by Detective Joe Florio (T2384-91; State Exhibit 56).

While the interview was taking place the scene was being processed for evidence. A total of 9 shell casings were discovered in various areas of the house. Six casings were found in the master bedroom where the bodies were discovered, one casing was found on the front porch, and two casings were found in the child’s

bedroom, 30 feet away from where the bodies were found (T1966-68,1975,1986,1990-96,1999-2000,2005,2008,2092,2177-78, 2182-84,2192-93). . . . [B]esides the two shell casings found in the child's bedroom, there was also a pool of vomit as well as numerous areas of what appeared to be blood in the room (T1810,1999,2002-08, 2011,2183,2187,2239,2466, 2522). The bed was moved and under the bed in the child's room, which was later determined to be Ricky Willis' room, a large pool of blood was found under the bed as well as two bullet holes in the wall. The blood under the bed was tested and DNA confirmed it was Ricky Willis' blood (T2016-18, 2046, 2101-02,2187-90,2239,2241,2466,2522). One projectile was recovered from the wall and the other projectile was recovered in the neighboring apartment (T2020-23,2102-03,2149-53, 2190, 2241-47). These projectiles, as well as the casings recovered in Ricky Willis' bedroom, were determined to have been fired from the firearm that was recovered at the scene. They also matched the casings found in the master bedroom and on the porch. All of the shell casings recovered were fired from the same firearm recovered at the scene (T2326-34,2352-54).

The bodies of both victims Stephanie Willis and Ricky Willis were transported to the medical examiner's office for autopsy. Stephanie Willis had been shot three times, once in the chest, one in the mouth and once in the center of her forehead (T2525-36). [Toxicology came back at .06 (T2562)]. Ricky Willis had been shot six times including once in the leg, once in the chest, twice in the arm, once in the jaw and once in the side of his head which turned out to be the fatal wound (T2536-59)]. Ricky Willis also had what the medical examiner testified was a defensive wound with the gunshot wound to the wrist where stippling was present on his hand indicating a close-range shot (T2553,2557-58,2564).

C. INTERROGATION - FIRST PORTION

While the scene was being processed, Johnson was being interviewed by detectives at the criminal investigations division office. The defense argued and renewed its pretrial motion in limine seeking to redact, inter alia, the portions of the interview where Detectives Florio and Tabor are expressing their opinions that Johnson's statements regarding the shooting are not credible (R254-61;T2121-43,2381,2391). State Exhibit 56 - - the videotaped

interview - - was introduced and played to the jury over the defense's objection (T2139,2391). [See Issue I, infra].

The video opens with Johnson hobbling from a foot injury, shaking, sobbing, hyperventilating, and barely able to speak. It takes a full four minutes before Detective Florio is even able to ask him any background questions, and eleven minutes until Miranda warnings are given. Johnson's emotional condition remains evident throughout both segments of the interview. [The state in its sentencing memorandum says "The defendant acted hysterical when describing the events that had happened. . ." (R490-91). This Court can view the video and decide for itself whether Johnson's emotional state was real or contrived].

Early in the interview, Detective Florio introduces himself as Joe and his partner as David (T2396). He says "All we want to do is make sure you are okay right now, okay. Are you hurt?" Johnson says "Just - - just - - I tried to leave" (T2396). Florio says "Well, we are going to get to that", and he asks Johnson about his time in the Marines and in Iraq (T2395-97). Asked if he has any medical issues, Johnson replies "PTSD"; he takes medications but hasn't taken any today (T2398-99). While in the military, he suffered a

crushing injury to his leg, and he had surgery three weeks ago (T2401-02). Johnson had moved back to Florida from Beaufort, South Carolina after his son's suicide to be with his girlfriend Stephanie (who was also from there, and whom he'd known since childhood) (T2400-01,2411,2427). At this point Detective Florio reads Johnson his Miranda rights (T2402-05).

Johnson told the detectives that that evening after dinner he changed the TV to football, which started an argument that quickly escalated. Johnson said "[W]hat do you want to do? I can leave. This can be over." Stephanie said "I never dated a bitch"; Johnson replied "[Y]ou a bitch, your last boyfriend a bitch"; and Stephanie said "I can see why your son killed his self like a bitch, because you're a bitch." Johnson said "This relationship is over" (T2405-06,2414-15,2444).

Johnson telephoned his father in South Carolina and asked him to come get him in the morning (T2406,2408,2415-16,2444). In the master bedroom Johnson began packing his stuff and Stephanie was hitting him on the back of his head (T2406,2416, 2438). He was on his knee roller (a device to help him walk) and he was trying to get his crutches (T2406-08). He fell or was pushed off

the knee roller, either by Stephanie or Ricky². Stephanie was holding a PlayStation above her head as if she was about to throw it at him. Johnson was begging her stop (T2407-09, 2412, 2416-18, 2420-21,2432-35,2443). Ricky, who had left the room earlier, came back in, got on Johnson's shoulder, and said something like "What are you doing to my mom?" Johnson said "I'm not doing anything to your mom" and pushed him off (T2407-09,2414,2418-20,2430, 2432-33,2436). Johnson, who was on the floor on his butt, picked up the gun (a Glock 22) which he kept on the floor by the bed and just started firing (T2407-09,2417-18,2418,2421,2423-26,2434-35, 2437 -38,2443,2447).

Afterwards, he called 911 from the house phone (T2421-22,2438). He told the detectives he didn't mean to do it, and "I don't know how this happened, man. I really don't" (T2429,2446).

² During the interview Ricky is often referred to by the nickname Ry (see T2411, 2455).

D. INTERROGATION - SECOND PORTION

The interrogation paused for a period of time, and then resumed (T2447-50). Because it is critical to Issue I, the second portion of the interview is set forth in its near-entirety.

DETECTIVE FLORIO: Okay, I just talked to one of my partners over at the scene over there. I got to clarify something, okay. Why is there blood in Ry's room?

JOHNSON: I don't know sir.

Q. So Tyrone - -

A. I don't know sir.

Q. Then why is there blood and shell casings in his room?

A. I don't know, sir. I didn't - - I didn't - - (inaudible)

Q. Okay. But understand, there is also evidence to show that the young man was more than likely trying to get away from you. There is blood on the bottom of his socks, okay. There is blood in his bedroom.. What it appears is the body was moved. Did you move that body?

A. No, sir.

Q. Okay. Did you move that body?

A. No, sir.

Q. Did you move anybody?

A. No, sir.

Q. Tyrone, look, I'm here just to tell your story, okay. It's all going to be on the video.

A. Yes, sir.

Q. Okay. But Tyrone, I got to know, I got to know man. Someone's gonna want to know what happened here right now.

A. Yes, sir.

Q. Okay. You seem like a - - you seem like a guy who just fell on bad times and just something happened. And if that's what happened, it's a tragedy, it sucks.

A. (Inaudible).

Q. Tyrone, you know, it appears that what you are telling me doesn't make sense with the scene, okay. So again, Tyrone, I want to just make sure because I don't have the luxury of just going on, you know what, Tyrone seems like a nice guy. I don't have that luxury. I just tell the facts of what happened, okay.

A. Yes, sir.

Q. And I can only go on what you tell me.

A. Yes, sir.

Q. If what you tell me doesn't make sense with that scene, 'cuz the thing is this, man, and I been doing this job a long time, I know that evidence will never lie to me, okay - -

A. Yes, sir.

- - but people will try to minimize and try to make themselves out to be something that it's not, okay. I get it, you and your girl were having an argument with you. She said something nasty to you that she should have never said to you before. I would be pissed too, okay. I -
- I have never lost a child like you have lost a child, okay, okay, dealing with loss, okay. But I can tell you this, I don't know how you feel about that, but if someone were to tell me about an experience I had gone through and said something nasty about it, I would be upset. Okay - -

A. Yes, sir.

Q. - - and sometimes.

A. And I called my dad to come and get me.

Q. I know. But you also picked up a gun and started firing at people.

A. (Inaudible).

Q. Then why is there blood in his room? Explain that to me.

A. I don't know sir. I didn't - -

Q. What?

A. Ry was standing there - -

Q. Where was he standing? Where was he standing?

A. - - when I was - - Stephanie - - Stephanie, when I looked up he was standing there - -

Q. How far away was he?

A. - - kept firing.

Q. And you fired at him while he was on the ground?

A. I just kept firing at him, sir.

Q. Did you fire at him while he was on the ground?

A. I just kept firing, sir.

Q. Okay.

A. I just kept firing.

Q. You can't explain how there is blood in his bedroom?

A. I didn't go in his bedroom, sir - -

Q. - - how did his body - -

A. - - I looked up and he was there and I kept firing, sir.

Q. Okay. But you weren't in fear of him?

A. I don't know what was happening, sir.

Q. He is a 10-year-old boy.

A. I know, sir (Inaudible).

Q. Tyrone, again, I'm not there, I didn't see it, okay. But when I do go there and I see it, I hope, I hope that it matches your story. What I'm being told right now it doesn't.

A. Yes, sir.

Q. Okay, it doesn't match. Which again, remember, over here and over here, where do you want to be?

A. (Inaudible).

Q. Where do you want to be?

A. I don't know, sir.

Q. Do you want a tragic situation where shit went bad or do you want Tyrone is manipulating anything and he murdered his girlfriend and he chases her 10-year-old son throughout the house, killed him and dumped his body next to the mother?

A. I can't chase anyone.

Q. Okay. I'm not in your shoes. I don't know how you feel right now, I don't. But just, I got to know man, okay. Well, there are two people dead tonight - -

A. (Inaudible.)

(T2450-55; State Exhibit 56)³

Here, Detective Florio shows Johnson a picture of Stephanie and asks him about Ricky's nickname. Then Detective Tabor begins to participate:

DETECTIVE TABOR: [S]omething happened in Ry's room. We need you to tell us what happened in Ry's room. We know something happened in there. The only one in this whole conversation or the people that are involved that were at the apartment at the time of the incident that went down were you, Ry, and Stephanie, correct.

A. Yes, sir.

³ All emphasis is supplied here, and throughout this brief, unless the contrary is indicated.

Q. Then only person that I know of that had a gun was you.

A. Yes, sir.

Q. I got shell casings in Ry's room.

A. I don't know, sir. I didn't - -

Q. The only person that had a gun is you. There is shell casings in Ry's room. How'd they get there?

A. (Inaudible.)

Q. We know you did it because you told us that you shot him.

A. (Inaudible) - - not in his room - -

Q. Where did you shoot him?

A. (Inaudible.)

Q. Where is your knee roller at?

A. Sitting at the house.

Q. Okay. Where at the house?

A. In the master bedroom.

Q. Okay. How did you get to Ry's room?

A. I did not go in Ry's room, sir.

Q. Then how did the shell casings get in there?

A. I don't know.

Q. How did the bullet holes get in the wall?

A. (Inaudible.)

Q. How did blood get in there?

A. (Inaudible.)

DETECTIVE FLORIO: When Ry came back into the room, was he bleeding?

A. I don't know, sir. I just kept firing. I just kept - - I just kept firing, sir.

DETECTIVE TABOR: Where did you fire at?

A. In the room.

Q. Which room?

A. In the master bedroom, sir. I just kept firing.

Q. Does Ry have any guns?

A. I don't think so, sir.

Q. Has he ever shot up his wall?

A. I don't think so, sir.

Q. Have you ever seen any other bullet holes in his wall?

A. No, sir. I barely go in Ry's room.

Q. So there would be no reason for there to be any bullet holes in the wall? Is that a no?

A. (Inaudible.)

Q. People make mistakes.

A. I didn't mean to, sir.

Q. We know you didn't mean to.

DETECTIVE FLORIO: What happened in Ry's room, man? What happened in there.

A. I don't - - (Inaudible.).

Q. You don't remember anything in Ry's room?

A. No, sir.

Q. Could you have gone into Ry's room?

A. (Inaudible)

DETECTIVE TABOR: Tyrone, I'm gonna - - I'm gonna have to disagree with you there. I'm going to tell you why I'm going to disagree with you. Because I know you can't move great, but I know you can move around because you told me you moved from the bedroom to the outside before the cops came, so I know you can move around.

A. Yes, sir.

Q. Okay. So it's very possible that you could have moved from the master bedroom to Ry's room because Ry was scared and he was trying to get away from you.

A. (Inaudible.)

Q. I didn't say you murdered anybody. It's an accident, could have been an accident.

A. (Inaudible.)

Q. Well, you are the only one with a gun, right?

A. Yes, sir.

Q. So there is only one explanation for the shell casings and bullet holes in his room.

A. (Inaudible.)

Q. I'm not - -

A. (Inaudible.)

Q. Why is your life over? Tell me why.

A. (Inaudible) - - I was just trying to - - (inaudible)

Q. Why is your life over?

A. (Inaudible.)

Q. You made a terrible, terrible mistake.

A. Yes.

Q. And what was that mistake?

A. You said they died. I tried to call (Inaudible) - - I said I need help.

Q. Why didn't you call 9-1-1 instead of your dad?

A. My phone was off, sir, and I - - I called him and said I need help, and then I remembered the house phone and I called 9-1-1. I already had my dad on the phone because I was trying to get my stuff and a ride.

DETECTIVE FLORIO: Tyrone, how much time passed between the time you went outside and called for help and - -

A. Not even a minute, not even a minute.

Q. Not even what?

A. Not even a minute.

Q. Not even a minute?

A. No, sir.

Q. It's pretty fast.

A. I was just outside the doorway - -

Q. When you went out to the doorway to the gate?

A. To the gate right there and I hopped back in because I couldn't see anyone.

Q. How did you do that with that injury?

A. On this.

Q. You hopped?

A. Yes.

Q. You did that all in one minute?

A. Yes, sir. And I grabbed the house phone and I sat at the front door and called 9-1-1.

Q. I could hear that part. I know that part. But your story is everything happened in the master bedroom.

A. (Inaudible.)

Q. I'm asking you, did everything happen in the master bedroom? Is that what you are sticking to?

A. Yes, sir.

Q. I'm sorry?

A. Yes, sir.

Q. All right.

A. I don't remember Ry - - (Inaudible) - - I didn't kill - - I was trying to leave, sir.

Q. I get that. I get that Tyrone, I do.

A. My dad was already on the phone.

Q. I know, I know, and we are going to talk to him, we will, but right now, Tyrone, I want to - - I want you to be able to understand, okay, that what you are telling me and what I will more than likely be able to prove are two very different things.

A. Yes, sir.

Q. Okay. Tyrone, I'm not out to get ya on anything, I just want you to tell me the truth.

A. I understand, sir.

Q. Okay.

A. I understand, sir.

Q. Okay. You are telling me everything you know.

A. Yeah. I didn't - -

(T2455-61; State Exhibit 56)

E. EDWARD JOHNSON PHONE CALL

Tyrone Johnson's father Edward was called as a state witness. At 6:36 p.m. on October 21, 2018 he received a video call from his son. Tyrone was upset to the point of being hysterical, and he wanted his father to come and get him (T2296-97,2306). A female arm came into view and was hitting Tyrone in the shoulders and face (T2298,2307). Edward also heard a female voice, but he could not make out what she was saying (T2306-07).⁴ Tyrone's phone fell to the floor; it didn't shut off initially so it was showing the ceiling (T2298,2307-08). Edward was able to hear, at very faint volume, two sounds which sounded like gunshots (T2298-99,2308). Then the phone shut off. Edward tried unsuccessfully two or three times to call back. Then, on his last attempt at 6:46 Tyrone's phone picked up. Edward couldn't make out what Tyrone was saying. He

⁴ On re-direct Edward was asked if he told Detective Florio that he heard the female say "He's got to get out." Edward didn't recall saying that, but if it was in the video then he said it. However, there was no video, so no impeachment occurred (T2310-11,2467-70).

later learned that Tyrone was calling 911. Edward's voice can be heard on the 911 recording (T2300,2309).

On cross-examination, Edward testified that Tyrone's son had committed suicide ten months earlier, and Tyrone was still taking it very hard at the time of the phone call (T2304-06).

F. PENALTY PHASE

The state's penalty-phase witnesses were the medical examiner Dr. Mainland, who testified in support of the EHAC aggravating factor⁵ (T2833-64), and two victim impact witnesses, Denise White (Ricky's aunt) and Amber Hewitt (his grandmother) (T2891-2906). At the close of Ms. Hewitt's testimony the state introduced, over defense objection, a YouTube videotape of Ricky being interviewed by his mother Stephanie prior to what was to have been an audition by Ricky and his band classmates for America's Got Talent. [State Exhibit 62; T2898-2901,2904-06]. The defense contended, inter alia, that this was improper and unnecessarily prejudicial victim impact evidence because Stephanie herself

⁵ Especially heinous, atrocious, or cruel.

was one of the murder victims (second-degree), and the video would evoke the jury's sympathy for her as well as her son; yet the jury had no proper role in determining a sentence for Stephanie's murder (T2793-2808,2868-70).

The defense called Edward Johnson, who gave additional testimony about his video phone call with Tyrone immediately before the shooting "[H]is emotion, his physical facial features, it was like he had an out-of-body experience or something within him that he just went totally haywire to where it's him but it's not him. And I'm asking him, What's wrong. And he's crying. And, Daddy, come get me." Edward knew there was something "wrong, bad wrong." A female's hand was hitting him. "And he's saying, Stop hitting me. And then he finally says, Well, they say that's why my son's dead. And I'm like, Who's they? You know, Son, come back. Cool down. Time your time and talk to me. What in the world is going on?" (T2925).

Even before the suicide of Tyrone's son (and Edward's grandson) Devin, Tyrone suffered from mental and emotional problems from his time in the military. He was on multiple medications for depression and anxiety (T2918). The additional

impact of Devin's suicide was devastating. Tyrone and Devin were "like two peas in a pod." They were always having fun together and talking everything out; college, career, future plans (T2921-22).

When they got the call about Devin's death, Tyrone "just lost it"; he couldn't understand why something like that would happen (T2922-23).

Edward explained that his family and Stephanie's family are related through marriage, and both sides of the family are hurting as a result of what happened. The impact is immeasurable (T2927-28).

Other members of Tyrone's family testified in the penalty phase, including his mother Laura, his surviving sons Kiyon, Jacob, and Jordan, and his daughter Amaria. [Tyrone's brother Al's testimony in the penalty phase and Spencer hearing, and his intervening e-mail to defense attorney Kane, are set forth in Part G, infra]. Kiyon, age 25, described Tyrone as a loving, caring, and inspiring father who gave him and his siblings a good life (T2994-97). After Devin died it was like Tyrone had lost his best friend as well as a son (T2999). Kiyon got a call from his dad the day before the shooting occurred. Tyrone was an emotional wreck and "he

wasn't himself." He was asking Tyrone what he was doing wrong; like he needed some insight into what he was feeling (T2997-99).

Amaria, who was expecting her second child, testified that her dad was always supportive and gave good advice. When she became pregnant with her first child as a teenager, her dad was, like any father, disappointed, but he prepared her and supported her for everything. "Bought my baby his first football before he was even here." He motivated her to stay in school even when she got discouraged (T3002-05).

Tyrone's youngest sons, 17 year old twins Jacob and Jordan, also confirmed that their father has always been there for his children and kept them on the right path (T3006-15). Jacob testified that the death of their oldest sibling Devin was a breaking point that had a severe impact on their family (T3008-09).

Stephanie Bergen was the managing attorney for Children's Legal Services, a unit of the Florida Attorney General's office. In that capacity, she hired Tyrone Johnson as a paralegal in March 2017 (T3022-27). During the six or seven months he worked there she observed and learned of his rapidly increasing mental and emotional decline. During the interview process Tyrone "was clean

cut, presented himself very well, extremely articulate, very professional”, likeable and appeared to have all the qualities and abilities to carry out the job (T3025,3031). He passed the background check (T3028). At some point during his employment, Ms. Bergen was alerted to problems. Tyrone’s job performance, attendance, behavior, even his appearance, grooming, and physical health (he was now limping and using a cane) were deteriorating (T3028-34,3041-48). Around June he disappeared for a time and no one could find him. Ms. Bergen was so concerned she called law enforcement and reached out to his family in South Carolina. Ultimately she learned where he had been; at the V.A. They had taken his phone and he’d been unable to communicate. He apologized, and at that point there was no indication that he would lose his job (T3032-33).

Things got worse from there. Descriptions of his demeanor and behavior at work - - observed only after his V.A. commitment (T3048; see T3093) - - included frustrated, annoyed, upset, agitated, unraveled, irritated, stressed, and struggling (T3044-48). In September Tyrone was given the choice to be terminated or

resign; he chose the latter option (T3035-37). He thanked Ms. Bergen and expressed no hostility (T3037).

Aubrey Land, now retired after a long career with the Florida Department of Corrections, interviewed Tyrone Johnson, reviewed his military, educational, and work records, and concluded that he could be productive and would adjust well to the structured environment in prison (T3050-52,3060-62).

Marion Wright of South Carolina is the president of a community service fraternity, which Tyrone joined in January 2016 and became an active participant and valued member (T3111-29). Wright visited Tyrone after Devin's suicide and attended the funeral. Tyrone was devastated. He became withdrawn and jumpy, and Wright was concerned for his mental health (T3129-33).

Wright visited Tyrone in jail in Tampa after the shooting deaths of Stephanie and Ricky Willis to provide him with emotional support. "I tried. I tried. You know, he was so remorseful and just - - " (T3133-34).

Dr. Scot Machlus, a forensic psychologist, met with Tyrone 14 times (for a total of 16 ½ hours), conducted psychological testing, reviewed records, and spoke with many family members (T3146-

52,3193). Dr. Machlus concluded that at the time of the shootings Tyrone was suffering from extreme mental and emotional disturbance and that his ability to conform his conduct to the requirements of law was substantially impaired (T3152-53,3192,3205-06). [Dr. Machlus did not find that Tyrone was unable to appreciate the criminality of his actions; the doctor's conclusion that the mitigating circumstance applied was based on substantial impairment of his ability to conform his actions to the requirements of law (T3205-06).]. He also found that there were other mitigating factors in Tyrone's background which would mitigate against imposition of the death penalty (T3153).

One of the family members Dr. Machlus spoke with is Tyrone's other brother Al.⁶ Dr. Machlus learned that their father had separated from their mother, and he was only sporadically present in the children's lives. This left their mother to be a single parent of four, exhausted from working two or three jobs to make ends meet and also going to nursing school. As a result, the day-to-day

⁶ This brother, named Edward Alsheron Johnson, goes by both Al and Ed (T3155; see T2295,2301,3550,3659). To avoid confusion with their father Edward, the brother will be referred to throughout this brief as Al.

caretaking and disciplining of the children was often delegated to other family members (T3153-57). These included Tyrone and Al's grandmother Vicki and their uncle Oscar. "And the issue with that is that they had heavy hands. They. . . used corporal punishment to discipline the children to the point that it was abusive. Tyrone and his brother talked about how when his grandma Vicki [was] disciplining, they were made to strip naked and beaten with extension cords, cords from lamps, fan belts, and a black strap. They both talked about a saying that she would have, grandma Vicki, that we're getting married today" (T3157) [Dr. Machlus didn't know what that meant, so he asked Tyrone, who didn't know either. But Al explained that Vicki said that because she was "getting across the point that this is a day you're never going to forget" (T3157)]. Al told Dr. Machlus that "violence was the norm in the family" (T3159). Other family members confirmed this, and the violence was multigenerational (T3157-58).

When Tyrone first went to the V.A. for psychological treatment around 2013, seeking help for his own agitation and anger, he told his counselor about the constant violence and aggression he grew up in (T3160,3164-65, 3170-71). The V.A. records indicated that

while in the military in 2000 the baseplate of a 200-pound artillery shell crushed his right ankle, causing multiple fractures. [His ankle is now held together by eight screws which need to be periodically replaced]. The same year another artillery round fell from the back of a truck and smashed his hand (T3162-63).

Tyrone's physical pain magnified the depression he has had throughout his life. Beginning with the near-absence of his father, the physical abuse he suffered, and the family violence he witnessed, "when you start off that way, it kind of just spirals downwards. You go from having a dysfunctional childhood to then it leading to dysfunctional relationships, dysfunctional marriages, dysfunctional friendships, socialization, work habits. It affects one's entire life when you start off life in that manner" (T3161-62).

The V.A. records documented that in 2012 Tyrone attempted suicide by walking in front of traffic (T3165-66). 2016 records noted the following symptoms of depression: crying, isolation, loneliness, poor sleep, poor appetite (T3166). He was prescribed numerous antidepressant medications (T3167-68). In June 2017 he was Baker Acted due to suicidal ideation and depression exacerbated by physical pain and disability (T3166). "He felt

backed into a corner, hopeless, at wit's end. And it affected his work. In fact, he lost his job three months later" (T3166). [Asked if the descriptive terms used by Tyrone's supervisor Stephanie Bergen - - frustrated, annoyed, upset, agitated, unraveled, irritable, stressed, struggling - - were consistent with what the V.A. observers were reporting, Dr. Machlus answered "Yes" (T3167)].

The suicide of Tyrone's son Devin in December 2017 accelerated his downward spiral. Dr. Machlus analogized Tyrone's mental and emotional deterioration to a dam breaking, and his ability to control his impulses was compromised (T3168-73). As described by his brother even his facial features changed, and he couldn't even say Devin's name without bawling and sobbing (T3173).

In September 2018 Tyrone had surgery on his right ankle, and he was prescribed additional medications including the painkiller Oxycodone, on top of the medications he was already receiving (T3174). The effects resulted in even more inability to control his impulses (T3175).

On the evening the shootings took place, Tyrone and his girlfriend Stephanie got in a verbal argument about the TV, which

escalated. Stephanie made the remark about “that’s why your son killed himself because he’s a bitch just like you” (T3175). Tyrone’s father Edward told Dr. Machlus about seeing Stephanie hitting Tyrone during the video call. Edward said that Tyrone at that moment “looked like someone with their soul snatched out” (T3175).

De. Machlus testified, “[I]t reached this culminating point to there was no control over his behavior, no control over his impulses, no control over his agitation and aggression” (T3175-76).

Tyrone’s mental diagnoses include generalized anxiety disorder, obsessive compulsive disorder, paranoid personality disorder, and antisocial personality disorder (T3176-81,3199-3202). Dr. Machlus restated his conclusion that at the time of the shootings on October 21, 2018 Tyrone was suffering from the extreme effects of emotional disturbance which impaired his ability to conform his conduct to the requirements of law (T3192). [Dr. Machlus further stated that his opinions regarding these statutory mental mitigators is not altered by the fact that one of Tyrone’s several diagnoses is antisocial personality disorder (T3201-02)].

Additional mitigating considerations noted by Dr. Machlus include Tyrone's military service and awards, his educational achievements including Bachelor's and Master's degrees, his work experience throughout his adult life⁷, his good jail record resulting in his becoming a trustee, and his close and loving relationships with his children (T3185-89).

The state called forensic psychiatrist Dr. Wade Myers as its rebuttal witness (T3240-44,3281). After being retained, Dr. Myers reviewed numerous records and documents, including the V.A. records, and the night before the penalty phase he interviewed Tyrone Johnson in the jail for 65 minutes (T3244-45,3249,3271). Tyrone answered all of Dr. Myers' questions, but he was "very guarded", and Dr. Myers didn't feel it was appropriate to dig too deeply or push boundaries (T3250,3259,3271-75). Dr. Myers felt like he'd reached a point of diminishing returns, and "I just didn't feel like I walked away with a whole lot of information from my interview"

⁷ Prior to his disastrous stint with the Florida A.G.'s office in 2017 when his mental stability unraveled, Tyrone worked as a counselor and shift supervisor at the Beaufort [S.C.] Marine Institute; and as a paralegal for private attorneys, then for a magistrate court, and then (for 4-5 years) for the South Carolina Supreme Court.

(T3250,3271). He asked Tyrone if he had been abused as a child, and Tyrone said he hadn't been (T3250,3274-76).

According to Dr. Myers, Tyrone best fits the diagnosis of antisocial personality disorder (T3251-54,3257). His medical records at times contained a diagnosis of acute clinical depression, as well as suicidal ideation after Devin's death (T3255,3261-62). Dr. Myers does not believe that Tyrone suffers from anxiety disorder, OCD, or para-noid personality disorder (T3255-57). Dr. Myers never spoke with any of Tyrone's family members, but he didn't believe that would have made any difference in his evaluation (T3268-71).

G. THE AL JOHNSON FIASCO

Al Johnson, Tyrone's older (by two years) brother, was called as a defense witness in the jury penalty phase. Al was currently a pastor and a school administrator in the Columbia, South Carolina area, but he and Tyrone grew up in Beaufort (T2965-67). Their parents separated for a time, and the grandparents on both sides were the authority figures in the family (T2966-68). Defense counsel asked Al about their maternal grandmother Victoria: was there any-

thing unpleasant or abusive in how he and his siblings were corrected or punished? (T2968). Al - - to defense counsel's surprise - - answered "Definitely not" and "No" (T2968-69). He volunteered, "My grandmother I would say taught us to be responsible and love one another" (T2968).

MR. KANE [defense counsel]: Now, Mr. Johnson, I understand that some of this can be unpleasant. I understand that you're put in a position where you're now being asked very personal questions by somebody you barely know. And you're being asked to answer these questions in front of an entire courtroom full of people, some of whom you do know very well and others you've never met including this jury, right?

AL JOHNSON: Correct.

Q. Okay, do you recall visiting with me in Beaufort?

A. I do.

Q. And do you recall my asking you specifically about your grandmother Victoria?

A. I do.

Q. Do you recall the phrase "we're getting married today"?

A. My grandmother would use that phrase often when she would talk about the - - our discipline. But it was - - let me be very clear that my grandmother when she took on that role of disciplining us, it was never an abusive or out of the line disciplinary action. If she had to physically spank us or, as in the country they say beat you, but it wasn't a beating, it was a spanking, it was never with - - in

hatred or malice or leaving bruises or things of that manner.

Q. All right. Do you recall characterizing it quite differently when we met?

A. You would have to refresh that conversation.

(T2969-70).

At this point the prosecutor objected, and a bench conference ensued in which the prosecutor asserted that defense counsel was improperly trying to impeach his own witness. Defense counsel replied that he didn't call Al for the purpose of impeaching him; "I had no idea that he was going to change his testimony and now become an advocate for the - - ." The judge agreed that "that's not why he called him", and allowed defense counsel to ask Al whether he made the prior statement "because you might be able to call somebody else to impeach him on it. . . . If he denies it you got to move on" (T2974).

Defense counsel then asked Al if he remembered a meeting in Beaufort on August 30 or 31 at which defense attorneys Kane and Spradley, mitigation specialist Dana Tilton, investigator Darryl Griffin, and Dr. Scot Machlus were present (T2975). Al recalled that meeting. When the subject of discipline came up, he acknowledged

telling the defense team that his grandmother Victoria was “tough”. He remembered hearing stories about his grandmother beating his mother on her wedding day, but he couldn’t say whether that actually happened (T2976-77). When asked about whether he witnessed domestic violence between his parents, Al chafed at the question: “I’m going to answer your question, but I want to preface this to, we’re asking questions about Tyrone’s character or Tyrone’s childhood and growing up and his livelihood. I don’t see the relevancy of my parents’ life to his life” (T2977). However, he acknowledged that when he and Tyrone were young children their father beat their mother, and on one occasion she covered the children (one of whom was Tyrone, who was three or four at the time) with her naked body so they wouldn’t get hit. “My father was a martial artist and . . . he had a pair of nunchucks during that altercation.” According to Al, there was no more domestic violence from the time their parents separated (when Al was 6 or 7, making Tyrone 4 or 5), nor was there violence after their parents reconciled many years later (T2978-79).

On cross-examination, Al agreed that as a general rule he and his brother had a pretty good upbringing (T2989-90). As far as his

grandparents' involvement, he agreed with the prosecutor's characterization "[I]t takes a village" (T2991).

After the jury returned a death verdict (T3423-24), the Spencer hearing was tentatively scheduled for some time in April or May 2022 (T3442-46). On April 18 there was a telephone conversation between defense counsel Jamie Kane and Al Johnson (T3584,3592-94), and eight days later Al sent an e-mail to Mr. Kane (T3583-84)⁸ in which he expressed the following:

First, I would like to say that in no way have I, nor will I ever attempt to misinform or make light of the courts time nor efforts to render a reasonable, just, intelligent, and informed decision in this case.

During the trial in November, I consumed with emotions, watching my family on both sides of the courtroom become further divided as a family unit and I sat and watched the hate expelled from the facial expressions and the hurtful stares exchanged by family members that were once bound by the love that binds family disintegrate into blank and disconnected emotions. I watched siblings turn a cold shoulder to each other and would not even speak as if they were not born to the same mother and father. My nephews, niece and their cousins all sat tense across from each other with blank stares and hurt in their eyes. A courtroom ready to erupt and a judge, jury, and attorneys that did not or maybe did know what was going on in front of their very eyes. This enhanced my emotions as my life's

⁸ Subsequently, in the Spencer hearing this e-mail was introduced by the defense (at the prosecutors' request when defense counsel began using it in his direct examination of Al) as Defense Exhibit 1 (T3585-86; R3835-38).

work in the ministry was about to come under scrutiny and my status within our family was about to be put on trial as I in some way attempt to paint a picture of and through my families darkest and most intimate moments without making light of or condoning what my brother had done.

Three lives were lost on that awful day, two gain their wings and became our watchful angels while the other mentally, emotionally, and spiritually! Although my brother lives, he will never be the same and neither will our families. Two families that were once one are now divided and will possibly never again be reunited because of the hurt we all feel and after words that have been said while in an emotional state that can never be taken back has built walls that some will probably never let down.

April 4, 2021, Easter Sunday morning we lost the Matriarch of our family, Victoria S. Taylor. And as one of her 5 grandboys that she reared as her own, I felt I was being asked to defame her character and dishonor her memory in a courtroom filled with strangers and family alike. A wound that was still fresh on top of my nephew Devin's tragic death and a grieving process that not had yet been allowed to happen in the midst of a murder trial and a family's devastation were all overwhelming and proved to outweigh my ability to process and speak to this court intelligently and in a way that would depict not only the hurt that I was and still am processing personally but to also provide this court with a clear picture of my families love and bond and also some of its not so proud moments that have shaped and influenced each day of our lives today some more severely than other!

I left this court feeling personally defeated and overwhelmed. I have never been in a situation such as this, maybe none of us have in this room today. One that I hope this family will never have to endure ever again and one that I hope none of your families will ever have to endure.

How could I tell the story and not dishonor a woman that has always loved all of her offspring, community, and strangers unconditionally? How could I not dishonor my heartstring with four of her children sitting in that courtroom along with strangers and just 6 months earlier laid her to rest?

No, I assure you I will not be dishonest, nor will I cover the truth with more untruths to make things appear to be what they are not. But me and my brother's experiences growing up within the same household and community are different although the same (if that makes sense). I chose to make my experiences building blocks for my personal success where he allowed those very experiences to break him. Today, I laugh at the fond memories and statements of my elders with my family and children; where Tyrone does not see those experiences as so fond, but as a hurt and he has never truly moved on from that stage in his life.

I have had five months to process, seek assistance for my own sanctity and to understand how these experiences have played a part in my brother's current status! Again, I cannot condone nor make light of what my brother has done but today, I would like the opportunity to share and be as transparent as I can be about our upbringing and experiences that may help you build a more clearer picture of my brother and his mental, emotional, and spiritual state.

I will not and won't dishonor my grandparents' memories, my parents nor my families name, but I will tell you the truth and be as transparent as I can be with the questions that are asked today.

(R3836-37)

In the remaining portions of the e-mail, Al talks about what a life sentence would mean for his family, and the healing process for

both sides of the family (T3837). He indicates that fighting in the house-hold was commonplace in the early years, but faded as his parents and grandparents got older (T3837). The third and last page of the e-mail appears to be incomplete, but it does state that Victoria was the primary disciplinarian because Laura worked several jobs. The question “We are getting married today meaning?” is posed but not answered (T3838).

At a hearing on April 29, three days after defense counsel received the Al Johnson e-mail and three days before the Spencer hearing was scheduled to begin (T3459), counsel informed the court that the defense intended to call Al as a Spencer hearing witness. Counsel explained that Al’s penalty phase testimony regarding the extent of physical abuse and domestic violence had been “dramatically different” from what the defense had expected based on their conversations in Beaufort. As a result the prosecutor was able to argue to the jury that there had been no abuse (T3460-61,3466):

MR KANE: And there was very little we could do about that. And so I’ve spoken to Mr. [Al] Johnson and I’ve told him that the way we had inferred his testimony, that it was quite different than what he had told us in South Carolina. And he does not disagree with that. And he has outlined for us in great detail what they suffered as children. And I haven’t gone into detail with Mr. Terry [prosecutor] but I’ve told Mr. Terry that we intend on

calling [Al] Johnson as a witness to essentially admit that what he said in trial is not true.

(T3461)

Mr. Kane stated that he didn't know what the prosecutor's intent was, "[b]ut I think we may have a problem" (T3462). It quickly became clear that he did indeed have a problem:

MR. TERRY [prosecutor]: Judge, all I said to Mr. Kane was that if he's going to come in here and state under oath that he lied when he was under oath previously, he needs to be aware that we could and probably will charge him with perjury. I mean, this is a very serious matter. You're in front of a jury on a death penalty case and you're going to come in here now and say you lied back then while you were under oath at that time. That's - - I mean that's a crime. That's perjury. That's a felony.

And all I said to Mr. Kane was if he comes in here and says he lied, he's going to be charged with a crime so you need to advise him of that.

(T3462).

Judge Sabella said "That's a conflict, I think. I think he needs his own representation" (T3462). The prosecutor agreed, saying that Al should have his own lawyer who can advise, "[a]nd I'll talk to that person, too", because Al was setting himself up for a potential perjury charge (T3462-63).

The judge reiterated that he was concerned about a conflict, noted that neither he nor the prosecutor nor defense counsel could

give Al legal advice, and said, “[t]his is a surprise. This is bigger - - I think this is bigger than the jury instruction issue” (T3467). The prosecutor re-emphasized that Al needed to be aware and have legal representation, “[b]ecause if Mr. Kane is going to call him to the stand to testify and he admits that he lied, I can promise Your Honor that our office is going to press charges against him. I mean, we can talk with Mr. Warren [the elected State Attorney] but I have no doubt Mr. Warren’s going to tell me absolutely we’re going to charge him with perjury because on a death penalty case in front of a jury and you’re going to come in here now and say you lied, well, then that is a serious matter” (T3468).

Judge Sabella’s staff attorney advised him that perjury in this capital case would be a second-degree felony, “so I just want to throw that out there” (T3468-69). The judge pointed out that this would be punishable by up to 15 years in Florida state prison (T3471). It was further discussed that Al would need conflict-free counsel; either by appointment or else he would have to hire his own attorney (T3471-72), The prosecutor observed that Al could have been lying before, or he could be lying now to try and save his brother; “We don’t know

now what's the truth if he comes in here and he says something different" (T3473).

THE COURT: Potentially going to come in now and say we were abused.

MR. TERRY [prosecutor]: Is that what he's going to say? Then that's perjurious clearly.

(T3473)

The Spencer hearing was postponed. At a status hearing on May 5 defense counsel pointed out that if Al Johnson's penalty phase testimony was not truthful "then we're dealing with the issue of whether or not we would have ever called [him] in the first place had we known what he was going to testify to, which is damage that cannot be estimated since this was a jury decision (T3497).

On June 13, 2022, defense counsel filed a Motion for New Trial – Sentencing Phase in which he contended that Al Johnson's altered testimony had undermined the reliability of the jury penalty proceeding and verdict (R344-48).

The effect of Al's denials was to convert him from an indispensable mitigation witness to adverse childhood experiences to an adverse State witness who now testified that either no such experiences occurred or that the occasions were so isolated as to render them insignificant to Tyrone's development. Prior to his taking the stand, Al never gave the Defense any indication that his testimony

would be any different than what he had reported on numerous occasions throughout the Defense investigation.

(R344).

Counsel set forth the following facts as related by Al during the defense mitigation investigation:

- a) Edward Johnson, their father, was an alcoholic prone to extreme outrage and violence;
- b) The beatings inflicted on Laura Johnson, their mother, by Edward were witnessed by Tyrone and Al;
- c) Tyrone and Al witnessed Laura being beaten by Edward at least 3-4 times a month;
- d) Al recalls that he was as young as 3-years-old when he first witnessed his father beating his mother and that it continued until he was an adult;
- e) Because Laura worked, disciplining Tyrone and his siblings fell mainly to Laura's mother, Victoria Simmons;⁹
- f) The children from a very young age, including Tyrone, were made aware of impending punishment by Victoria telling them "We're getting married today";
- g) Whenever Victoria said those words, the child understood that he would be made to strip naked and that Victoria, without exception, would inflict a severe beating;
- h) Often after making the children strip, Victoria whipped Tyrone and his siblings with an electrical cord (lamp or appliance);

⁹ The grandmother is referred to in Al's e-mail as "the Matriarch of our family, Victoria S. Taylor" (R3836).

i) It is well-known to the family, including Al, that Victoria severely beat/whipped Laura on her wedding day as Laura was putting on her wedding dress and upon Victoria realizing that Laura was pregnant at the time (she was carrying Al).

(R340-41).

Defense counsel noted that Al had provided this information to the defense team as early as 2018 (shortly after the charged crime occurred), and reaffirmed it during the defense team's visit to South Carolina in August 2021 (R341-42). Yet his testimony under oath during the jury penalty phase three months later, to the defense's surprise, was markedly different; there was "definitely not" anything unpleasant or abusive about Victoria's conduct toward himself or Tyrone or Laura, and her discipline amounted to nothing more than spanking; it was never abusive or out-of-line (R342-43).

The prejudice, counsel asserted, from Al's becoming a de facto witness for the prosecution, was compounded by the prosecutor's closing argument to the jury, in which he pointed to Al's testimony as rebutting the defense's proffered mitigating factor of childhood abuse (R344-45). Defense counsel wrote:

The description, details, and depth of abuse repeatedly confirmed by Al throughout the Defense investigation stands in stark contract to his November 2021 testimony, which resulted in an incomplete and

misleading understanding by the jury of Tyrone's life history. When Al testified that the abuse never occurred, he derailed a mitigation defense built on four (4) years of investigation into the history of abuse. Courts attach great significance to an abusive background in fashioning a just and appropriate sentence in death penalty cases. The Defense had gathered such mitigation from a thorough investigation, but still relied on the mitigation witnesses to communicate that information truthfully to the jury. Al's expected testimony about the abuse suffered by him and his siblings as children and adolescents was critical to the evidence in mitigation, and that took on greater importance where the jury was weighing a death sentence for a defendant with no criminal record.

Counsel cited case law recognizing the significance of mitigating evidence of a defendant's abused or traumatic childhood (R346-47), and noted that a single juror's vote for life would have precluded a death sentence (T346). He therefore asserted that Al's untruthful or significantly downplayed characterizations of the abuse witnessed and endured by the Johnson children deprived Tyrone of a fair sentencing proceeding" (R345).¹⁰

The Spencer hearing finally took place on July 29, 2022. At the outset, Judge Sabella noted that "[a]pparently we had reached out to regional counsel" for the purpose of representation of or consultation

¹⁰ These arguments concerning Al Johnson were reasserted in a subsequent Motion for New Trial – Sentencing Phase filed after the Spencer hearing and after the death sentence was imposed (R575-84; see T3776-77).

with Al Johnson. Attorney Richard Smith identified himself as regional conflict counsel. At Judge Sabella's direction, attorney Smith met with Al, and then advised the judge that Al had requested representation. After determining that Al's financial situation entitled him to appointed counsel, the judge pro forma appointed the Public Defender and immediately declared a conflict; then appointed regional counsel (T3511-13,3539-40,3547-55). A 20-minute recess was taken to allow attorney Smith to confer with Al (T3555-56).

Upon calling Al (who was physically present) to the stand, defense counsel successfully moved to exclude his and Tyrone's father Edward - - who was present via Zoom - - from the (virtual) courtroom during Al's testimony (T3557-68). Counsel asserted ". . . I have a good faith basis to believe that the presence of family members impacted Mr. [Al] Johnson's original testimony. And I believe that he's continuing to receive pressure from external influences such as family members and he's affected by that" (T3560).

Defense counsel reminded Al of the meeting in a Beaufort hotel lobby at the end of August or beginning of September 2021 in which members of the defense team - - attorneys Kane and Spradley, Dr.

Machlus, Ms. Tilton, Mr. Griffin - - were present (T3572-75). Al was not pleased to be asked to come to court to testify as a mitigation witness because he doesn't like courtrooms or crowds, but he was willing to do what was necessary (T3576-77). Asked about the e-mail he had sent to defense counsel after the penalty phase trial with regard to their grandmother Victoria, Al said ". . . if you ask me questions that are not related to who she was, I'm going to tell you that's not the truth or that's not who she was. So I will not defame her, defame my family name. And I will not defame or embarrass myself in that effort" (T3580).

Asked whether the punishments inflicted by Victoria "were in any way abusive or excessive", Al answered the same way he did in the penalty phase: "They were not - - abusive or excessive" (T3580). Asked ". . . [I]s that what you told us in Beaufort?" Al equivocated, explaining that as a child you might feel angered because you were punished but when you became an adult you see it differently (T3581). "Police were never called. We were never abused. We were punished. We were beat. We were spanked. Beat is not - - that's a term of just saying for punishment. Spanking. But we were not

closed fist. We were not made to do anything abusive or neglectful” (T3581).

According to Al, Victoria kept a cut off piece of a belt in her car, but she never threatened them with it and never beat them to the point of leaving welts. She would use the phrase “I’m going to cut your behind”, but that is a figure of speech that Al uses with his own children. Victoria never made them strip naked (although their mom Laura would say “take them clothes off that I bought”) (T3581-83). Al acknowledged that he was closer to their grandmother Victoria (she “was my heartstring”) than Tyrone was. Al stayed over there constantly while Tyrone didn’t like being there (T3583).

Defense attorney Kane then examined Al regarding his statements in the e-mail he’d sent in April (T3583-88). The prosecutor asked to have the e-mail introduced into evidence if counsel was going to read from it, and it was admitted as Defense Exhibit 1 (T3585-86; R3835-38). Al said “You’ve asked - - you’ve brought statements - - and maybe I need to discuss it with my attorney” (T3588). Defense counsel said “Out of an abundance of caution, your Honor, let him talk to his lawyer”, the judge said “Only if he requests”, and Al then did so (T3588-89). After a brief out-of-

the-courtroom conference with his attorney Mr. Smith, Al returned (T3989-90). There was some back-and-forth, with growing antagonism, between Al and defense attorney Kane concerning their interactions right after the jury penalty trial (and the ensuing phone conversation and e-mail) (T3590-92). The judge then granted counsel's request to declare Al a hostile witness (T3593).

Mr. Kane asked Al if he agreed that his courtroom testimony in the penalty trial had been dramatically different from what he reported to Tyrone's defense team in Beaufort. Al replied "I would say, yes, it was dramatically different but it was not the untruth" (T3596). Asked to speak candidly about what he said in Beaufort about "what your brother suffered at the hands of grandma Vic", Al said "I can't tell you what I said in Beaufort" because he had asked for a trans-crypt of that conversation and hadn't received one. Kane rephrased the question to "Tell us what you remember." Al said "if you ask me a question about my grandmother, I'm going to give you an honest answer and tell you exactly what was said or done with my grand-mother. But you haven't asked me a question."

MR. KANE: I can help you out. Just forget about Beaufort.

AL: You can't help me. I don't trust you.

MR. KANE: What did your brother suffer at the hands of your grandmother?

AL: My brother suffered nothing at the hands of my grandmother because my grandmother was not an animal or abusive or - - or mean or ugly to us as children. Was she tough? As I said before, yes. She was tough.

(T3596-97).

Defense counsel said “But we also asked you in Beaufort about abuse, excessive punishment. We asked you about belts and whips and lamp cords because you-all mentioned them. That information doesn’t come from us. So what is it - - was there something pleasant about a lamp cord? Is there something pleasant about a belt strap?” All answered that he had no recollection of ever being punished with any kind of cord, and if Tyrone said he was then that was his recollection (T3599-3600). To the best of Al’s knowledge, both himself and Tyrone were treated fairly and were not abused (T3603-04). Asked if his statement would be any different in light of the fact that Dr. Machlus and Ms. Tilton were going to be testifying, Al said it would be the same (T3603).

Regarding the phrase “getting married today”, Al was asked if he recounted in Beaufort that that meant you were going to get a

beating so severe, so momentous, that you would never forget it. Al said he did not remember making such a statement (T3504-05).

Al acknowledged telling Dana Tilton in Beaufort that it was a regular and normal occurrence for their father to beat their mother, and telling Dr. Machlus “I recall nothing but the violence”, but he insisted that these events took place in early childhood and ceased by the time he was six or seven (when Tyrone would have been four or five)(T3605-06,3611-17). Al reiterated that there was nothing abusive or unpleasant about their grandmother Victoria’s conduct toward himself or his siblings. Instead of beating, abusing, or excessively punishing them, she taught them to be responsible and love one another (T3216).

Al asserted that in his penalty phase testimony he was as transparent as he could be about his upbringing. Defense counsel asked him why, then, did he ask for another shot in his April e-mail? Al said he wasn’t asking for another shot, and claimed that the e-mail had been “turned over and turned around to mean more than what it really is and, you know, I’ve learned a lot” (T3617-18).

MR. KANE: When you take your statements from the e-mail, you talked about how there were certain factors that were weighing on you and you were struggling your testimony, right? Is that true? You were struggling with

your testimony because of family, cameras, publicity, strangers, juries, correct?

AL: No.

MR. KANE: You were not struggling with that?

AL: No.

(3619-20)

Defense attorney Kane then confronted Al (a hostile witness) with numerous statements Al made in the e-mail. Al continued to insist that his penalty phase testimony was truthful; there was no abuse; and he will not defame or dishonor his grandmother “by making her seem like she wasn’t the sweet Christian woman at home that she portrayed in church” (T3620-30). Al now claimed that when he asked rhetorically in the e-mail how he could tell the story without dishonoring his grandmother’s memory, he was referring to family hearsay stories the children heard from older relatives (T3631-34). Al agreed with Mr. Kane, though, that in their three hour conversation in Beaufort, which was frequently dominated by the subject of domestic violence, collateral family members were not discussed (T3634-35).

On cross-examination the prosecutor asked Al if his penalty phase testimony and his current testimony in the Spencer hearing

were truthful, and Al said yes it was (T3636,3639-41). Asked if he thought defense counsel had tried to mischaracterize his testimony, Al replied “I think it was totally” (T3639-40). Asked if he believed the April e-mail he wrote to the defense had been mischaracterized, Al again replied “Totally” (T3640). [Defense counsel’s objection that “[t]he email speaks for itself” was overruled (T3640)].

Mitigation specialist Dana Tilton testified that Al Johnson told the defense team in Beaufort that he and his siblings frequently witnessed or endured domestic abuse (“It became the norm”) beginning when Al was three years old and continuing until his adulthood (T3653-54). Dr. Machlus (who had already given impeachment testimony in the jury penalty phase that Al had spoken in Beaufort about Tyrone and the other siblings being stripped naked and beaten with electrical cords, fan belts, and a black strap (T3157)) reiterated that Al had told them, in regard to the regular beatings their father inflicted on their mother with his hands and martial arts implements, “I remember nothing but the violence. It was the norm” (T3660-61). Dr. Machlus did not recall a specific timeframe, but he had no reason to question Ms. Tilton’s notes (T3661-64).

[Other defense witnesses in the Spencer hearing included two detention deputies at the jail who testified that Tyrone was always helpful, respectful, and mature, and that he mentored younger inmates, kept the peace, and contributed to the overall welfare of the pod (T3533-46). Another witness, Kervens Beauplan, was a Marine veteran who met Tyrone at the V.A. Beauplan was struggling with thoughts of suicide and Tyrone helped him deal with his depression, even though Tyrone himself was going through a lot having recently lost his son to suicide (T3517-31)].

In the September 14, 2022 hearing on the defense's motion for a new jury penalty trial defense counsel asserted that (1) he would never have called Al Johnson as a mitigation witness had he known that Al was going to contradict what he'd told the defense in Beaufort and turn himself into a state witness; (2) that Al in his e-mail had essentially admitted that his penalty phase testimony was false; (3) that the state's threat to prosecute Al for perjury had coerced him into repeating his penalty phase testimony instead of recanting it; and (4) that as a result Tyrone Johnson was denied a fair and constitutional penalty proceeding (T3715-25).

On January 3, 2023 the trial judge denied the defense's motions for a new trial and for a new penalty phase (T3867-68; R769-70).

SUMMARY OF ARGUMENT

I. The state introduced a videotaped interrogation of Johnson by two detectives. The second portion consisted of accusatory questions and comments by the detectives which served only to show the jurors that the detectives disbelieved Johnson's account of the shootings (and thereby predisposed the jurors to disbelieve it), without provoking relevant responses from Johnson or any statements which differed from what he'd said in the first portion of the interview. The trial court's refusal - - based on his expressed belief that anything can be cured with a jury instruction - - to grant the defense's motion to redact the accusatory questions and comments was reversible error.

II. The trial court erred in refusing to grant a mistrial when the arresting officer - - after he'd been cautioned by a prosecutor that the contents of Johnson's wallet was immaterial - - put before the jury his baseless speculation that a 100 dollar bill found in Johnson's wallet was counterfeit.

III. Johnson's right to a fair trial was compromised when the prosecutor, in his first-phase rebuttal closing argument, made a

burden-shifting comment to the jury which emphasized that defense counsel had not raised a diminished capacity defense. Counsel could not have raised a diminished capacity defense because it is prohibited under Florida law.

IV. Tyrone Johnson's older brother Al was called by the defense as a mitigation witness in the jury penalty phase because - - based on the defense team's conversation with Al in Beaufort, South Carolina - - counsel expected him to testify that Tyrone Johnson grew up in a dysfunctional family in which violence was the norm, and that Tyrone was subjected to abusive and humiliating punishments, in the guise of discipline, especially by his grandmother Victoria. But defense counsel Kane was blindsided in front of the jury when Al unexpectedly denied that any abuse was inflicted, said that the violence between their parents had ended by the time Tyrone was four or five, and said that on the whole he and Tyrone had a pretty good upbringing. Al's testimony not only sabotaged his brother's case in mitigation, it undermined the credibility of the defense's mental health expert Dr. Machlus, and it could easily have cost Tyrone at least one juror vote needed to avoid a death sentence.

Al subsequently sent a lengthy e-mail to defense attorney Kane expressing severe misgivings and regrets about his penalty-phase testimony, and explaining that he'd been torn by conflicting family loyalties, the presence of strangers in a courtroom "ready to erupt", his own personal concerns about his life's work in the ministry and his status within the family, and the emotional turmoil of being asked to "defame" or "dishonor" the memory of his recently deceased grandmother Victoria. Al said he would now "like the opportunity to share and be as transparent as I can be about our upbringing and experiences that may help you build a more clearer picture of my brother and his mental, emotional, and spiritual state."

The prosecutor's response was to make it abundantly clear that if Al's Spencer hearing testimony was inconsistent with his testimony in the penalty trial he would be prosecuted for perjury (which, as the trial judge noted, is a second-degree felony carrying a potential 15-year prison sentence). This threat was obviously conveyed to Al (who, when unable to retain an attorney, was appointed conflict counsel). The prosecutor's threat had its intended coercive effect of preventing Al's potential recantation. Instead Al's Spencer hearing testimony repeated what he'd said in the penalty phase, but with the added

feature of antagonism toward defense counsel Kane so pronounced that Al was declared a hostile witness. He accused defense counsel of “totally” mischaracterizing his e-mail, and when asked if he had been struggling during his penalty phase testimony “because of family, cameras, publicity, strangers, jurors, correct?”, Al answered “No.”

This entire fiasco deprived Tyrone of due process and a fair jury penalty trial.

V. Florida’s statutory provision allowing the introduction of victim impact evidence before the jury in a capital sentencing trial is unconstitutional. Alternatively, the trial court went beyond the limitations of the Payne decision by allowing the state to introduce an emotionally inflammatory video-and-audiotape of Ricky (the victim of the first-degree murder) being interviewed for an America’s Got Talent audition by his mother Stephanie (the victim of the second-degree murder).

VI. The trial court abused his discretion, tainted his weighing process, and violated the constitutional requirement of individualized sentencing by using a flawed legal analysis to reduce the weight of both the “impaired capacity” and “no prior criminal history” statutory

mitigating factors, by accepting the state's suggestion that they are mutually exclusive.

VII. Johnson's death sentence is proportionally unwarranted, as this is not among the least mitigated first-degree murders.

Alternatively, Florida's abandonment of proportionality review renders this state's capital sentencing scheme violative of the Eighth and Fourteenth Amendments due to its lack of adequate safeguards against arbitrary and capricious infliction of the death penalty.

[ISSUE I]

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE THE SECOND PORTION OF THE VIDEO-TAPED INTERROGATION, BECAUSE IT SERVED ONLY TO IMPROPERLY SHOW THE JURY THAT THE DETECTIVES DISBELIEVED JOHNSON'S EXPLANATION OF THE SHOOTINGS, AND BECAUSE THE GREAT MAJORITY OF THE DETECTIVES' COMMENTS DID NOT PROVOKE ANY RELEVANT RESPONSES FROM JOHNSON

A. APPLICABLE LAW

Two basic principles of law are (1) that a witness' opinion of an accused's credibility, or his guilt or innocence, is inadmissible, and (2) that there is a heightened danger of unfair prejudice when such opinions are expressed by an investigating police officer. See, e.g., Jackson v. State, 107 So.3d 328,339-40 (Fla. 2012); Martinez v. State, 761 So.2d 1074,1079-80 (Fla. 2000); Davis v. State, 360 So.3d 809,814 (Fla. 2d DCA 2023); Thomas v. State, 363 So.3d 1153,1154-55 (Fla. 2d DCA 2023); Floyd v. State, 349 So.3d 519,520-21 (Fla. 5th DCA 2022); Louidor v. State, 162 So.3d 305,310 (Fla. 3d DCA 2015); Gaines v. State, 155 So.3d 1264,1271 (Fla. 4th DCA 2015); Roundtree v. State, 145 So.3d 963,965 (Fla. 4th DCA 2014). As this Court recognized in Sheppard v. State, 151 So.3d 1154,1168 (Fla.

2014)(although rejecting Sheppard’s claim due to lack of an objection below):

[W]e reiterate that a jury is inclined to give great weight to the statements made by law enforcement officers by virtue of their position. See *Tumblin v. State*, 29 So.3d 1093, 1101 (Fla. 2010). For this reason great care should be taken by law enforcement and by prosecutors that such statements expressing belief in the defendant’s guilt or belief that the defendant is lying generally not be placed before the jury. There is “increased danger of prejudice when the investigating officer is allowed to express his or her opinion about the defendant’s guilt.” *Martinez v. State*, 761 So.2d 1074, 1080 (Fla. 2000). As we cautioned in *Jackson*, “It is especially troublesome when a jury is repeatedly exposed to an interrogating officer’s opinion regarding the guilt or innocence of the accused. *Jackson*, 107 So.3d at 340.

Nevertheless, a jury may - - when given a limiting instruction - - hear an interrogating officer’s statements about a crime if, and only if, they provoke a relevant response from the defendant, such as inculpatory admissions, or statements inconsistent with the defendant’s previous statements. See, e.g., *King v. State*, 260 So.3d 985, 996 (Fla. 2018); *McMillian v. State*, 214 So.3d 1274, 1286 (Fla. 2017); *McWatters v. State*, 36 So.3d 613, 638 (Fla. 2010). However, when the officers’ accusations of guilt or lying do not provoke a relevant response, the accusations remain inadmissible. See *Jackson*, 107 So.3d at 340-41 (“The great majority of the detectives’

statements . . . did not provoke relevant responses”; “While the detectives may have intended to secure a confession by consistently expressing their conviction in Jackson’s guilt, they did not secure a confession through-out their thirty-seven minute dialogue”).

In Smith v. State, 292 So.3d 46, 49-50 (Fla. 5th DCA 2020), the appellate court noted that as in Jackson the detectives never secured a confession from Smith, and “[i]ndeed, several of the improper comments did not provoke relevant responses at all.” The court in Smith distinguished King, where “[i]n contrast from the interview here, the detective’s comments in King gave proper context to the entirety of the interrogation, which elicited several incriminating and inconsistent statements from the defendant.” See also Bush v State, 295 So.3d 179, 205 (Fla. 2020)(“The exchange between Bush and Detective Tice did not involve personal opinions or prejudicial expressions of guilt. The questioning obtained relevant responses because Bush’s account of what he did in the townhome evolved throughout the conversation from no contact with the sofa to looking under it”); Roundtree v. State, supra, 145 So.3d at 966 (“Here, as in Jackson, the vast majority of the officer’s statements did not provoke a relevant response from appellant. Indeed, the officer never secured a confession

from appellant”); Gaines v. State, supra, 155 So.3d at 1272 (“As in Roundtree, the detective’s statements did not provoke any relevant responses because appellant maintained his innocence”).

B. MOTION IN LIMINE AND OBJECTION BELOW

The defense filed a pretrial motion in limine pertaining to the two-part interrogation of Johnson by Detectives Florio and Tabor, seeking to exclude or redact numerous statements made by the detectives in the second portion of the interview (R254-60; see R3817-19). The objection was argued, overruled by the judge, and renewed at trial (T2121-43,2381,2391), and both portions of the interrogation were introduced and played to the jury during the testimony of Detective Florio (State Exhibit 56; T2391-2447,2450-62).

In the argument below, defense counsel asserted that just as in Jackson the detectives repeatedly and forcefully expressed their negative opinion of the credibility of Johnson’s statements as to how the shootings occurred, and, just as in Jackson, Johnson made no admissions and never changed his description of the events (T2021-29,2136-37). The prosecutor thought that Johnson’s case “is somewhere between” Jackson and Bush, though she opined it was closer

to Bush (T2130). She maintained that the challenged statements by the detectives were relevant to provide context and to allow the jury to see Johnson's reactions (T2129-36). The prosecutor suggested a limiting jury instruction (T2135).

Defense counsel countered that "[t]he case law is quite clear, there has to be an actual admission or a relevant response" made as a result of the interrogator's accusatory questions or comments. Here, Johnson's version of the events did not change from what he had related from the start (T2136-37).

Judge Sabella said "[Y]esterday when I received Jackson and read it, it scared me", because no one wants to try this case twice. However, when he took a death penalty certification class a few years back, "I will never forget a couple of things that were summarized by the Justice who spoke. And one was, the quickest way to get a reversal in a death penalty case is for the judge to go out of their lane, to do things that they are not authorized; . . . But the other thing he said is, there's very few things that cannot be fixed with an instruction to the jury" (T2137-38). Judge Sabella noted that in 2016 - - after Jackson and before Bush - - a standard jury instruction 2.8 was adopted, and "that's my position, 2.8 fixes any of those issues

that could arise from law enforcement opinion or any of that other stuff” (T2139).

Judge Sabella said he would give the instruction if requested (T2139). The state requested it (T2142-43). Asked later if the defense also wanted the instruction to be given, defense counsel said yes (T2379-80), but she renewed her objection to the introduction of the unredacted video interrogation itself, and she made it clear that she was preserving any issues related to the motion in limine (T2381, 2391).

C. OPENING STATEMENT – THE PROSECUTOR SETS THE TABLE

In his opening statement, the prosecutor told the jurors that they would see and hear a two-part interrogation of Tyrone Johnson “and you will hear what he says happened” (T1748). “Now I remind you that you are going to find that he is not a very trustworthy narrator” (T1748). The prosecutor related how Johnson told the detectives that all the shooting happened in the master bedroom and he was just firing wildly. Midway through the interview Detective Florio stepped out and talked with the crime scene detective; then he returned and told Johnson that his story made no sense in light of

what he'd been told. "Gave him every opportunity to explain what happened. He says no, no, no, it all happened in the master bedroom" (T1750, see also 1749). However, said the prosecutor, "Evidence does not lie, ladies and gentlemen. An individual can tell you whatever he wants to tell you, but the evidence does not lie" (T1750). And moments later, "The evidence does not lie, ladies and gentlemen. He did not give an explanation as to why there was this evidence over here, because there is no explanation that takes away from the fact that he went and hunted down that little boy and shot him under a bed. There is no explanation for that" (T1750-51).

D. THE SECOND PORTION OF THE VIDEOTAPED INTERROGATION WAS INADMISSIBLE

The second portion of the videotaped interrogation, in which Detectives Florio and Tabor repeatedly express their opinions that Tyrone Johnson's description of the shooting was not credible and was refuted by the physical evidence, was inadmissible for any purpose. It was also extraordinarily prejudicial, in that it predisposed the jury to disbelieve Johnson's heat of passion defense and to believe (as the detectives obviously did) that the crime scene

evidence refuted Johnson's account of the shootings, showed that Ricky retreated to his bedroom and Johnson followed him and shot him there, and thus proved that the killing was premeditated. And the second - - accusatory - - portion of the interrogation was not admissible on a "relevant response" theory because Johnson never wavered from the events as he described them in the first portion. While he admitted from the outset that he was the person who shot Stephanie and Ricky, he maintained throughout the entire interview that all of the shooting took place in the master bedroom. Johnson never said anything contradicting that in the second portion of the interview, although both detectives certainly did.

See Pausch v. State, 596 So.2d 1216,1218 (Fla. 2d DCA 1992)(quoting the trial judge, "frankly you're absolutely right, 95 percent of that tape that I've heard so far is all Detective Bonsall, and the other five percent is . . . Ms. Pausch saying the same thing that she said the whole time").

In the first portion of the interview, Johnson told the detectives that there had been an argument over what to watch on TV that escalated, and it culminated in Stephanie saying to Johnson that she could see why his son killed himself like a bitch because you're a

bitch. Johnson was packing to leave the house and the relationship, and (as corroborated by Johnson's father, a state witness who was on a video call with Johnson), Stephanie was hitting him on the head and shoulders. According to Johnson, Ricky - - who had left the room - - came back in and got on Johnson's shoulder. Johnson pushed him off. Stephanie was standing over Johnson brandishing a PlayStation, and at that point he grabbed the gun off the floor and started firing, and he just kept firing (T2405-26,2429-39,2443-47). Stephanie fell to the floor when she was shot, and Ricky fell to the floor right beside her when he was shot (T2421,2434,2437-38,2447). Johnson then went outside and called for help because his cell phone was off; then went back inside and called 911 on the house phone (T2421-22,2437).

The second portion of the interrogation consisted of Detectives Florio and Tabor repeatedly and forcefully telling Johnson that they did not believe his account of the incident, and that the crime scene evidence convinced them that Ricky had tried to hide in his bedroom (on the other side of the apartment), and that Johnson had followed him and shot him there. As in Jackson, Smith, Roundtree, Gaines, and Pausch, the detectives' accusatory statements of opinion did not

provoke any (further) inculpatory or inconsistent responses from Johnson. Instead he continued to insist that all of the shooting took place in the master bedroom, and that he just kept firing (T2453-54,2457). When Detective Florio said “I’m asking you, did everything happen in the master bedroom? Is that what you are sticking to?”, Johnson said “Yes, sir.” (T2460-61).

So the jury heard nothing from Johnson in the second portion of the interrogation that was materially different from what he said in the first portion. What they did hear was Detective Florio’s and Detective Tabor’s opinions of what the crime scene evidence showed, in the form of accusatory comments and questions: “there is also evidence to show that the young man was more than likely trying to get away from you”; “it appears that what you are telling me doesn’t make sense with the scene”); “If what you tell me doesn’t make sense with that scene, ‘cuz the thing is this, man, and I been doing this job a long time, I know that evidence will never lie to me. . . but people will try to minimize and try to make themselves out to be something that it’s not”; “I hope that it matches your story. What I’m being told right now it doesn’t”; “Do you want a tragic situation where shit went bad or do you want Tyrone is manipulating anything and he

murdered his girlfriend and he chases her 10-year-old son throughout the house, killed him and dumped his body next to his mother?"; "We need you to tell us what happened in Ry's room. We know something happened in there"; "How did you get to Ry's room?"; "Tyrone, . . . I'm gonna have to disagree with you there"; "So it's very possible that you could have moved from the master bedroom to Ry's room because Ry was scared and he was trying to get away from you"; "So there is only one explanation for the shell casings and bullet holes in his room?"; "what you are telling me and what I will more than likely be able to prove are two very different things"; "Tyrone, I'm not out to get you or anything, I just want you to tell me the truth" (T3450-61).

In particular, Detective Florio's comment that he's been doing this job a long time and he knows the evidence will never lie to him but people (read "suspects") will, echoed the prosecutor's three-times repeated remark in opening statement. It was for the jurors - - uninfluenced by respect for or deference to police detectives' experience and training - - to determine whether they believed beyond a reasonable doubt that the crime scene evidence disproved Johnson's heat of passion defense and proved premeditation. The

detectives' opinions of Johnson's credibility or guilt had no legitimate bearing on the jury's role as factfinder, and should have had no influence on the outcome of this trial. If Detective Florio and Detective Tabor had testified on the stand that they believed Johnson's "story" was a lie or that the crime scene evidence convinced them that the shooting was premeditated, such an egregious intrusion into the province of the jury would plainly have necessitated reversal of Johnson's convictions. It should be no different where, as here, the detectives' opinions were presented to the jury through the vehicle of a videotaped interview which produced no inculpatory or inconsistent responses, and in which (as Florio put it) Johnson stuck to the story he related in the initial portion of the interrogation.

Johnson admitted from the outset that he shot Stephanie and Ricky. Clearly in the second portion Detectives Florio and Tabor were trying to obtain a confession that the killing of Ricky was deliberate, or at least to obtain further inculpatory or inconsistent statements beyond what they already had. If that effort had been successful, then their accusatory comments and questions would likely have been admissible for the limited purpose of showing how they

provoked relevant responses and putting those responses in context. [And that is where the standard jury instruction comes into play, since under no circumstances would the detectives' opinions on credibility or guilt be admissible as substantive evidence]. But because Florio's and Tabor's accusations and opinions did not result in any further inculpatory or inconsistent statements by Johnson, those opinions served no purpose other than to prejudice the jurors and predispose them to agree with the detectives' view of what the crime scene evidence showed. Consequently, the redactions requested by the defense in its motion in limine should have been granted. Jackson; Smith; Roundtree; Gaines; Pausch.

E. THE JURY INSTRUCTION NEITHER "FIXED" THE ERROR NOR CURED THE PREJUDICE

Judge Sabella understood that he was venturing into dangerous territory by allowing the state to introduce the taped interrogation without the redactions requested in the defense's motion in limine ["when I received Jackson and read it, it scared me"], but he also cited the received wisdom that "there's very few things that cannot be fixed with [a jury] instruction" (T2137-38). The judge therefore

concluded that the standard jury instruction 2.8, which was adopted after Jackson and before Bush, “fixes any of those issues that could arise from law enforcement opinion on any of that other stuff” (T2139). For that reason he denied the defense’s motion, overruled its objection, and allowed the state to introduce both portions of the videotaped interrogation (T2139,2381,2391).

The judge was wrong. The preamble to Florida Standard Jury Instructions in Criminal Cases, Section 2.8 says this:

Police opinions and statements regarding guilt are generally inadmissible and must be redacted from recordings introduced into evidence unless redaction would make the defendant’s relevant admissions incomprehensible. If a recorded interview cannot be appropriately redacted, the trial judge must, upon request, give the following limiting instruction immediately before the recorded interview is played for the jury.

The instruction then cautions the jurors that they are to consider the officers’ opinions and statements not for their truth but only to explain the reactions and responses they elicit from the defendant (see T2392).

In the instant case, redaction of Detective Florio’s and Detective Tabor’s opinions as to Johnson’s guilt of premeditated murder and lack of credibility would not have rendered Johnson’s relevant admissions incomprehensible because, as previously discussed, he

made no relevant admissions during the second portion of the interview. Everything he admitted to was contained in great detail in the first portion. The second portion simply amounted to him sticking to his account of what happened, in the face of repeated accusatory questioning and commentary by the two detectives. [If the state contends that Johnson's demeanor could have made the second portion relevant, this Court can view State Exhibit 56 and see for itself that his demeanor was essentially the same throughout]. So while it may be true that redaction of the detectives' opinions would have rendered the interview incoherent (since, as in Pausch, that's pretty much all there was), there was no valid reason to introduce the second portion at all, in the absence of relevant admissions by Johnson and in the absence of statements inconsistent with his earlier statements. See Roundtree, 145 So.3d at 966.

As recognized in the preamble, standard instruction 2.8 is a limiting instruction which should be given only when (1) redaction is impossible and (2) the recorded interview is admissible for one purpose and inadmissible for another. See Section 90.107, Florida Statutes. Here, however, the detectives' opinions were not admissible for any purpose. Their opinions, in and of themselves, were

irrelevant and highly prejudicial. And as a conduit to explain Johnson's relevant admissions and/or inconsistent statements, he made none. A limiting instruction is appropriate only when the proffered evidence is admissible for at least one valid purpose; the instruction does not convert inadmissible evidence into admissible evidence. See Keus v. Brooks Drug Inc., 652 A.2d 475,480 (Vt. 1994)("Here, however, the opinions contained in the reports were not admissible in the first place. A limiting instruction, while appropriate for properly admitted basis evidence, can only draw attention to the improperly admitted evidence and will not cure the error").

F. THE IMPROPER INTRODUCTION OF THE DETECTIVES'
OPINIONS ON PREMEDITATION AND CREDIBILITY REQUIRES
REVERSAL FOR A NEW TRIAL

For all of the foregoing reasons, the introduction of the accusatory second portion of the videotaped interview, which contained repeated and forceful assertions of the two detectives' opinions and very little else, was error amounting to an abuse of discretion. Jackson, 107 So.3d at 339 and 344; Roundtree, 145 So.3d at 965-66; Gaines, 155 So.3d at 1271-72. The main contested issue at trial was whether the killing of Ricky Willis was premeditated or

whether it was done in the heat of passion, and that in turn depended on whether the jury unanimously determined beyond a reasonable doubt that the crime scene evidence (1) refuted Johnson's defense, and (2) proved the state's case. The jury's decision should not have been tainted or influenced by Detective Florio's and Detective Tabor's opinions on the matter. Police officers are generally regarded by jurors "as disinterested and objective and therefore highly credible" and consequently "the danger of improperly influencing the jury becomes particularly grave." Martinez, 761 So.2d at 1080; see Jackson, 107 So.3d at 340. When the jury hears a law enforcement officer like Detective Florio tell a defendant like Johnson that he's been doing this job a long time and he knows that the evidence will never lie to him (but people will), and then continues to insist - - along with his colleague - - that Johnson is lying in his "story" that the shooting all took place in the master bedroom, that is likely to resonate with the jurors and predispose them to reject the defense and convict as charged. The prosecutors obviously believed that the second portion of the interrogation video was important to their case, or they wouldn't have fought so hard to introduce it over objection. The state cannot show beyond a reasonable doubt that it could not

have contributed to the verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Johnson's convictions, and his death sentence for the Ricky Willis homicide, should be reversed for a new trial.

[ISSUE II]

THE TRIAL COURT ERRED BY DENYING JOHNSON'S
MOTION FOR MISTRIAL WHEN THE ARRESTING
OFFICER PUT BEFORE THE JURY BASELESS
SPECULATION THAT A 100 DOLLAR BILL IN JOHNSON'S
POSSESSION WAS COUNTERFEIT

Former deputy sheriff Dalton Lewis was a relatively run-of-the-mill witness at trial, or would have been if he hadn't taken it upon himself to lob a skunk into the jury box.¹¹ Lewis was one of the officers who responded to the apartment complex after the 911 call. He encountered a black male (Tyrone Johnson) who was sitting on the ground by the door to the screened porch with a cell phone in his hand. He was crying, breathing rapidly, and kept saying he was sorry. Lewis handcuffed him and remained with him until he was placed in a patrol car (using a wheelchair due to his foot injury). He then drove Johnson to the CID at the jail to be interviewed. Lewis did not participate in the interview (T1826-53).

By the time of the trial, Dalton Lewis was no longer employed by the Sheriff's Office. At the outset of his direct examination he

¹¹ See, e.g., Davis v. State, 718 So.2d 874, 877 (Fla. 5th DCA 1998); Martex Corporation v. Artiles, 354 So.3d 1122, 1125 (Fla. 3d DCA 2023).

explained that he left at the end of August, for family related reasons, for a position at the V.A. as an HR specialist (T1827).

At the time of the arrest, Lewis searched Johnson's person (T1840). Asked whether, aside from his white socks, he took anything else into evidence, Lewis answered "He had a blue wallet in his back pocket that I secured, had business cards, bank cards and 100-dollar bill which I suspected to be counterfeit (T1840). Defense counsel objected (which was sustained) and moved for a mistrial (T1840). The prosecutor said that Lewis "is not an expert on what was in the wallet. I had no idea he was going to say that" (T1841). The prosecutor suggested that the comment could be cured by an instruction to disregard it. Defense counsel disagreed, saying an instruction would only "make it worse because then it seems like there's something being hidden from the jury" (T1841). "It was a toy piece of money that he had that had nothing to do with anything related to this case and now it's in front of the jury" (T1841). Judge Sabella reserved ruling on the motion for mistrial (T1842).

After one more witness testified, the judge returned to the subject of the pending motion for mistrial, asking the state what was the importance of the contents of the wallet? One prosecutor said "He

volunteered that on his own”, while the other prosecutor went further, “I specifically told him it didn’t matter what was in the wallet” (T1872; see T3836). The judge agreed, “Stuff like that happens. It is in no way your fault” (T1872-73). The state proposed an instruction that there was “no evidence there is any counterfeit money”, and the judge said he would give it if the defense requested it or if the parties agreed on a formulation. As for the motion for mistrial, “I tell you what, you want a ruling. I’m going to deny the mistrial. So that’s preserved for the record. It’s denied (T1873-74). [No curative instruction was subsequently requested by the defense, and none was given].

[Near the end of the first phase of the trial, after the jury had retired to deliberate, the prosecutor disclosed a matter of which his office had just been notified; that former deputy Dalton Lewis was now the subject of an internal investigation (for conduct not shown to be related to Johnson’s case)(T2755-58). Lewis was subsequently charged with one count of felony tampering with physical evidence and 72 misdemeanor counts of unlawfully withholding or detaining records (R593-723; T3824-34). In the hearing on the motion for new trial, the prosecutor said he notified the defense as soon as he

became aware, and he asserted that if he had known that Lewis was under investigation he would not have called him as a witness (T3827-31). The prosecutor further took the position that any issues related to the investigation and/or prosecution of former deputy Lewis should be raised by postconviction motion and not on a motion for new trial (T3830)].¹²

Irrelevant evidence of bad character or propensity to crime is presumptively prejudicial. See, e.g., Straight v. State, 397 So.2d 903, 908 (Fla. 1981). And the prejudicial impact is only enhanced when the “other crime” is - - as here - - pure speculation. Ryan v. State, 457 So.2d 1084, 1090 (Fla. 4th DCA 1984)(“Unsubstantiated statements which concern references to other crimes committed by a defendant are particularly condemned by the Florida courts”); see Huff v. State, 437 So.2d 1087, 1090-91 (Fla. 1983); Ford v. State, 50 So.3d 799,800 (Fla. 2d DCA 2011). In Ryan, Huff, and Ford, the references to unsubstantiated criminal activity were made by the prosecutor in closing argument. The fact that this particular skunk

¹² To the extent that potential issues involving disclosure, nondisclosure, or late disclosure of former deputy Lewis’ criminal investigation would require future evidentiary development, Johnson reserves the right to raise them by postconviction motion.

was tossed into the jury box during the state's evidentiary case by the police officer who arrested Johnson makes the prejudice worse, not better, because of the high degree of credibility jurors accord law enforcement officers, who - - in contrast to the attorneys in an adversarial trial - - are perceived as objective and disinterested.¹³ See, e.g., Jackson, 107 So.3d at 339-40; Martinez, 761 So.2d at 1080; Davis, 360 So.3d at 814; Bowles v. State, 381 So.2d 326, 328 (Fla. 5th DCA 1980); Stribbling v. State, 778 So.2d 452, 455 (Fla. 4th DCA 2001). Also, it should not be lost sight of that former deputy Lewis was specifically told by one of the prosecutors before he took the stand that it didn't matter what was in Johnson's wallet, yet he saw fit to toss the skunk anyway. See Fleurimond v. State, 10 So.3d 1140, 1142-43, 1147 (Fla. 3d DCA 2009).

In Long v. State, 407 So.2d 1018 (Fla. 2d DCA 1981) testimony characterizing Long as a shoplifting suspect was found to be improper and highly prejudicial where there was no proof that he had committed any such offense. See also Phillips v. State, 591 So.2d 987, 989 (Fla. 1st DCA 1991)(collateral crime evidence inadmissible

¹³ While, at some point in this trial, former deputy Lewis came under investigation for crimes related to his employment, the jury did not know that.

absent proof that the former crime was committed and committed by the person on trial).

As the trial court recognized, this issue is preserved because defense counsel moved for a mistrial and the judge denied it. James v. State, 695 So.2d 1229, 1234 (Fla. 1997); Evans v. State, 995 So.2d 933, 947 n.19 (Fla. 2008); Davis v. State, supra, 360 So.3d at 813-14. When the state first suggested an instruction to disregard former deputy Lewis' improper comment, defense counsel expressed that such an instruction would only highlight the remark. By the time the state proposed a re-worded instruction that there was no evidence that there was any counterfeit money, another witness had testified and the jury had just left the courtroom for an hour-long lunch break (T1871-74). Any instruction after that would amount to asking the jurors not to think of a white elephant. See United States v. Schneider, 157 F.Supp.2d 1044, 1068 (N.D. Iowa 2001); State v. Bartlett, 631 P.2d 321, 325 (N.M. 1981). Such an instruction would have been ineffective, and defense counsel was under no obligation to request one or agree to one. Ayalavillamizar v. State, 134 So.3d 492, 498 (Fla. 4th DCA 2014). Additionally, former deputy Lewis' gratuitous and likely deliberate reference to unsubstantiated criminal

conduct could easily have prejudiced Johnson in the penalty phase as well, because one or more jurors may have refused to find (or given less weight to) an important mitigating factor. Johnson had no significant history of prior criminal activity, but jurors, recalling Lewis' reference to the suspected counterfeit money, may have thought otherwise.

In the hearing on Johnson's motion for new trial, Judge Sabella expressed that the counterfeit money comment was weighing on his mind and he didn't like it, but he ultimately denied relief on the basis that it was an isolated occurrence (T3834-39; R769-70). However, the fact that the arresting officer only injected unsubstantiated criminal suspicion into Johnson's trial one time does not obviate its prejudicial impact. See Morton v. State, 972 So.2d 1088 (Fla. 5th DCA 2008); Elliott v. State, 590 So.2d 538 (Fla. 2d DCA 1991). Johnson's motion for mistrial should have been granted and his convictions and death sentence should be reversed for a new trial.

[ISSUE III]

JOHNSON WAS DEPRIVED OF A FAIR TRIAL BY THE STATE'S IMPROPER ARGUMENT TO THE JURY WHICH (1) SHIFTED THE BURDEN OF PROOF, AND (2) FAULTED HIM FOR NOT PRESENTING A DIMINISHED CAPACITY DEFENSE (WHICH FLORIDA LAW PROHIBITS HIM FROM PRESENTING).

In his first-phase rebuttal closing statement, over defense objection, the trial judge allowed ("I'm going to let you do it") the prosecutor to make the following argument to the jury:

And, obviously, ladies and gentlemen, you can consider all the evidence. I mean, that's the point of what you do here, is to consider all the evidence. But you have not heard a mental health defense. You have not heard insanity. There's been no doctor who's testified before you today and told you that he was insane or didn't have the ability to form any requisite intent to commit the crime. So - - and they have not alleged that PTSD is what caused him to do this. They have not said that. You have not heard that argument from the defense, so I urge you to keep that in mind.

(T2712-13)

This argument was patently improper and even rises to the level of fundamental error¹⁴, not only because it shifted the burden of proof, but also because the defense was precluded by Florida law

¹⁴ Johnson contends that this issue is preserved, but is also arguing fundamental error in the event that this Court finds the objection below insufficient.

from presenting to the jury evidence or argument that Johnson - - because of PTSD or any other mental disorder or disability short of insanity - - didn't have the ability to form any requisite intent to commit the crimes. Chestnut v. State, 538 So.2d 820 (Fla. 1989); Evans v. State, 946 So.2d 1, 11 (Fla. 2006); Beckman v. State, 230 So.3d 77, 87-89 (Fla. 3d DCA 2017). Here, the prosecutor turned Florida's rule prohibiting a "diminished capacity" defense on its head, by using Johnson's failure to present a defense which he could not lawfully have presented as a reason for a finding of guilt.

The prosecutor pointed out to the jury "There's been no doctor who's testified before you today. . . ." If Florida law allowed a diminished capacity defense, Johnson possibly could have called Dr. Machlus in the first-phase, or another expert or experts, to substantiate such a defense. But since he was prohibited from doing so, it was grossly unfair to allow the state to use Johnson's failure to present a diminished capacity defense or mental health experts as a reason the jury should find him guilty as charged. The harmful effect of such an argument is self-evident, and Johnson should be granted a new trial.

[ISSUE IV]

THE TOTALITY OF THE CIRCUMSTANCES
SURROUNDING THE PENALTY-PHASE TESTIMONY OF
TYRONE JOHNSON'S BROTHER AL, FOLLOWED BY THE
STATE'S THREAT TO PROSECUTE AL FOR PERJURY IF
HE RECANTED, DEPRIVED TYRONE JOHNSON OF A
FAIR AND RELIABLE PENALTY DETERMINATION

“The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” Allen v. Butterworth, 756 So.2d 52, 59 (Fla. 2000); quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(plurality opinion). See also Johnson v. Mississippi, 486 U.S. 578, 584 (1988)(“The fundamental respect for humanity underlying the Eighth Amendment’s prohibition against cruel and unusual punishment gives rise to a special ‘need for reliability in the determination that death is the appropriate punishment’ in any capital case”).

Now that this Court - - mistakenly in Johnson's view¹⁵ - - has concluded that it need not (indeed cannot) review the question of whether an individual defendant's death sentence is proportionally warranted, it becomes that much more imperative that the Court pay close attention to whether the penalty trial which resulted in a jury's death verdict was infected by circumstances which made it unreliable.

Here Tyrone Johnson was deprived of a fair and reliable jury penalty trial, in violation of the Eighth and Fourteenth Amendments, by the misleading, self-serving, and probably false testimony of his brother, Al Johnson. That unexpected testimony sabotaged Tyrone's case in mitigation, and undermined the credibility of his mental health expert Dr. Machlus. Defense counsel was blindsided because, he asserted, when Al met with the defense team in his and Tyrone's hometown of Beaufort, South Carolina, he had recounted a long family history of violence and child abuse which Tyrone and his siblings had suffered, and now, instead, he was telling the jury there was no abuse and the violence between the parents had stopped by the time Tyrone was four or five.

¹⁵ See Issue VII, infra,

Al's turnabout created a credibility contest between two defense witnesses, and (as defense counsel asserted in his motion for a new penalty trial) converted Al from an indispensable mitigation witness to an adverse state witness. In contrast to Al's unexpectedly benign portrayal of the Johnson siblings' pleasant childhood experiences, Dr. Machlus testified that Al had told them in Beaufort that their grandmother Victoria would make the children strip naked and beat them with extension cords, cords from lamps and belts, and a black strap. Dr. Machlus said that Al told him that violence was the norm in the family, and it was multigenerational. Al, on the other hand, told the jury that as a general rule he and Tyrone had a pretty good childhood, and as far as his grandparents' involvement, Al agreed with the prosecutor's characterization that "[I]t takes a village."

In April 2022, five months after the jury penalty trial (and before Johnson's June 2022 original Motion for New Trial – Sentencing Phase, and before the July 2022 Spencer hearing), Al sent a lengthy and anguished e-mail to defense attorney Jamie Kane, in which he expressed that he was conscience-stricken and regretful about his penalty phase testimony, and he would now "like the opportunity to share and be as transparent as I can be about our upbringing and

experiences that may help you build a more clearer picture of my brother and his mental, emotional, and spiritual state.” Al made it clear that his penalty phase testimony had been affected by the presence of once-loving family members now divided by hatred; by “a courtroom ready to erupt and a judge, jury, and attorneys that did not or maybe did know what was going on in front of their very eyes”; by the fact that Al’s life’s work in the ministry and his status within the family was about to come under scrutiny as he “attempt[ed] to paint a picture of and through my families darkest and most intimate moments”; and, perhaps most importantly, the rhetorical question of how could he, in a courtroom full of strangers and family alike, dishonor the memory and defame the character of his beloved grandmother Victoria, who had been laid to rest just six months earlier (R3836-38).

Three days after receiving this e-mail, and three days before the Spencer hearing was scheduled to begin [It was continued until July as a consequence of the developments involving Al Johnson], defense counsel Kane informed the trial court that he intended to call Al as a witness “to essentially admit that what he said in trial is not true.” Mr. Kane had conveyed Al’s anticipated recantation to the

prosecutor, “[b]ut I think we may have a problem.” The problem, as the prosecutor immediately made clear, was that if Al came in and admitted that his testimony before the jury was false the state intended to charge him with perjury. When the judge observed that this created a conflict and Al needed his own legal representation, the prosecutor quickly agreed that Al should have his own lawyer “[a]nd I’ll talk to that person, too”, because Al was setting himself up for a potential perjury charge. When the judge noted that this was a surprise, and bigger than the jury instruction issue, the prosecutor re-emphasized that if Al were to take the stand and admit his lied, “I can promise Your Honor that our office is going to press charges against him, and (while he would talk with the elected State Attorney) “absolutely we’re going to charge him with perjury.” The judge “threw out there” that that would be a second-degree felony punishable by fifteen years imprisonment.

Importantly, the prosecutor acknowledged that Al could have been lying when he testified before the jury, or he could be lying now to save his brother; “We don’t know now what’s the truth if he comes in here and he says something different.”

On June 13, 2022 defense counsel filed a motion seeking a new penalty trial on the ground, inter alia, that Al's untruthful characterization of the abuse witnessed and endured by the Johnson children (including Tyrone) had undermined the reliability of the jury penalty proceeding, especially in light of the fact that even a single juror's vote for life would have precluded a death sentence.

The Spencer hearing finally took place on July 29, 2022. By that time it is apparent that the threat of a perjury charge had been communicated to Al, because - - during the judge's inquiry into whether he was financially qualified for appointed counsel - - Al was asked if he had been able to consult with any attorney other than Mr. Smith of the Regional Counsel's office prior to his appearance here today, and he answered that he had been "calling around" but had not obtained a lawyer (T3551). Al requested counsel, Mr. Smith was appointed, and they conferred.

When Al took the stand after consulting with his lawyer, he did not recant his penalty phase testimony. Nor did he attempt to paint a picture of his family's darkest and most intimate moments. Far from it, Al's testimony echoed his penalty phase testimony (except that now he was so antagonistic toward defense counsel that he was

declared a hostile witness). He maintained that he and his siblings were never subjected to abusive or excessive punishment, and he specifically denied that their grandmother Victoria ever made them strip naked. “My brother suffered nothing at the hands of my grandmother because my grandmother was not an animal or abusive or - - or mean or ugly to us as children” (though he acknowledged that she was “tough”). Al continued to insist that there was nothing abusive or even unpleasant about Victoria’s conduct, and that any domestic violence in the family had ceased by the time Tyrone was four or five.

Asked by defense counsel Kane why, then, did he ask for another shot to tell the whole story in his April e-mail, Al replied that he wasn’t asking for another shot, and that the e-mail had been “turned over and turned around to mean more than what it really is and - - I’ve learned a lot.” Counsel, referring to the e-mail, said “You were struggling with your testimony because of family, cameras, publicity, strangers, jurors, correct?” and Al answered “No.” On cross Al claimed that both that his penalty phase testimony and his current testimony were truthful, and that defense counsel had “totally” tried to mischaracterize his testimony and the e-mail.

Defense counsel's objection that "[t]he e-mail speaks for itself" was overruled.

Constitutional case law is legion that the state may not use threats of perjury or intimidating tactics which substantially interfere with a witness' decision to testify for a defendant. State v. Feaster, 877 A.2d 229, 242-45 (N.J. 2005). ("Such conduct, even if motivated by good faith, cannot be tolerated, particularly in a capital case"). While merely warning a witness of the consequences of perjury does not necessarily demand reversal, a showing of substantial interference with the witness' "free and unhampered" determination to testify amounts to a due process violation.¹⁶ See, e.g., Webb v. Texas, 409 U.S. 95 (1972); United States v. Stuart, 507 F.3d 391, 398 (6th Cir. 2007); Newell v. Hanks, 283 F.3d 827, 837-38 (7th Cir. 2002); United States v. Foster, 128 F. 3d 949, 953 (6th Cir. 1997); United States v. Pinto, 850 F.2d 927, 932 (2nd Cir. 1988); United States v. Morrison, 535 F.2d 223, 224-28 (3rd Cir. 1976); State v.

¹⁶ While harmless error analysis applies, the burden on direct appeal is on the prosecution to show beyond a reasonable doubt that the constitutional error was harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Chapman v. California, 386 U.S. 18 (1967); United States v. Hasting, 461 U.S. 499 (1974); United States v. Foster, infra, 128 F.3d at 953.

Feaster, *supra*, 877 A.2d at 240-46; F.C.L. v. Agustin, 350 P.3d 482, 487 and n.4 (Or. App. 2015); Woolfolk v. Commonwealth, 339 S.W.3d 411, 417 (Ky. 2011); People v. Coffman, 96 P.3d 30, 72 (Cal. 2004); State v. Melvin, 388 S.E.2d 72, 77-80 (N.C. 1990).

Florida case law is in accord. See Muhammad v. State, 782 So.2d 343, 356-58 (Fla. 2001); Demps v. State, 416 So.2d 808 (Fla. 1982); Hendrix v. State, 82 So.3d 1040 (Fla. 4th DCA 2011); Bell v. State, 479 So.2d 147 (Fla. 2d DCA 1985); Reese v. State, 382 So.2d 141 (Fla. 4th DCA 1980).

The intimidation or threat need not come from the judge. A threat to prosecute for perjury may well be even more intimidating to the witness if it comes from the prosecution (which, unlike the judge, is vested with the decision whether or not to file a criminal charge). See Morrison, 535 F.2d at 228; Melvin, 388 S.E.2d at 79 (each applying Webb principle to prosecutorial conduct). In Feaster, 877 A.2d at 232:

At the [postconviction] hearing, defendant intended to call Michael Sadlowski, a key State's witness who had recanted his trial testimony in a certified statement made to defendant's attorneys. Before Sadlowski took the stand at the hearing, the prosecutor indicated to Sadlowski's attorney that there would be "considerations" if he testified consistent with his recantation statement. When called as a witness, Sadlowski withdrew his certified statement and

invoked his Fifth Amendment privilege against self-incrimination. Defendant contends that the prosecutor's thinly veiled threat to prosecute Sadlowski for perjury deprived him of a critical witness. We agree. We will not theorize whether Sadlowski would have invoked the privilege even in the absence of a prosecutorial threat. We now hold that the prosecutor substantially interfered with Sadlowski's decision to testify and, therefore, denied defendant a witness who might have supported his claim that he was wrongly convicted and sentenced to death. The prosecutor's interference with that witness' decision to testify violated defendant's state constitutional due process and compulsory process rights.

What happened in Tyrone Johnson's case is quite factually similar to Feaster, but there are three noteworthy differences. First, while it is true that the New Jersey Supreme Court relied on its state constitution, it also discussed at length the applicable federal due process and compulsory process case law (including Webb v. Texas) which similarly prohibit prosecutorial interference with a defense witness' testimony [877 A.2d at 238, 240-43 and n.5 and 8], and it also emphasized "the heightened requirement of reliability that attaches to a death verdict" [Id., at 259]. That echoes the heightened reliability requirement of the Eighth Amendment [Id., at 238].

While Feaster and the instant case both involve an important witness who was dissuaded from recanting or changing his trial testimony by a prosecutorial threat of a perjury charge, in Feaster the

intimidation “effectively drove the witness off [the] stand” [Id., at 232 and 240], while here the intimidation locked Al Johnson into repeating his jury penalty phase testimony and effectively converted him into a state witness who became affirmatively hostile to defense counsel. That, if anything, is worse. In Muhammad, this Court observed that “[t]he rationale of [the 4th DCA’s decision in] Reese is that if a witness is threatened with perjury charges in light of a prior inconsistent statement, the witness might be coerced to give the same testimony as that in the prior statement, not because it is the truth but because of judicial pressure from the threat of perjury charges.” See also Melvin, 388 S.E.2d at 79-80 (if the perjury admonition “likely precluded a witness ‘from making a free and voluntary choice whether or not to testify’ . . . or changed the witness’ testimony to coincide with the judge or prosecutor’s view of the facts, . . . then a defendant’s right to due process may have been violated”)(citations omitted); People v. Crabtree, 276 N.W.2d 478 (Mich. App. 1979)(reversal required where prosecutor made “a thinly-veiled threat of a perjury charge against the victim if she changed her story from that given at the preliminary examination”).

The third major difference between Feaster (and Crabtree) and the instant case is that here the prosecutor's threat was at the opposite end of the spectrum from "thinly veiled." The prosecutor did much more than insinuate that there would be "considerations" if Al Johnson contradicted his penalty phase testimony. Upon being advised of Al's potential recantation, prosecutor Terry told defense attorney Kane that if Al "comes in here and says he lied, he's going to be charged with a crime so you need to advise him of that". Mr. Terry told Judge Sabella "I can promise Your Honor that our office is going to press charges against him"; "absolutely we're going to charge him with perjury." Mr. Terry stated that Al should have his own lawyer "and I'll talk to that person, too".

These statements, intended to convey to Al the certainty of criminal charges if he contradicted his penalty phase testimony are a textbook example of the "unnecessarily strong terms" condemned in Webb, 409 U.S. at 97-98. Contrast People v. Murray, 634 N.Y.S. 2d 587, 588 (4th Dept. 1995)(finding no due process or compulsory process violation where "[a]lthough the record shows that the District Attorney advised the nephew of the penalties associated with perjury,

it does not indicate that the District Attorney threatened to prosecute the nephew for perjury if he testified on defendant's behalf").

Moreover, in Webb the Supreme Court found a due process violation even though some of the threats of a perjury prosecution and other consequences "may have been beyond the power of [the] judge to carry out." Here, in contrast, the power to prosecute Al for perjury was in the hands of the State Attorney's office, and the prosecutor could not have made it any clearer that a perjury prosecution would be the inevitable consequence if Al were to testify inconsistently with what he said in the penalty phase.

Unlike United States v. Foster, supra, 128 F.3d at 952 and 954 (where the prosecutor's ill-advised "warning" was made to the witness Williams' attorney but Williams himself could not be located), the state cannot credibly argue that we don't know whether the prosecutor's threat was conveyed to Al Johnson. Before his Spencer hearing testimony Al told the judge he'd been calling around but he had been unable to retain an attorney. Conflict counsel was appointed to represent him, and he conferred with that attorney during a 20-minute recess immediately before he took the stand. The hostility he displayed toward defense attorney Kane, his adamant

refusal to say anything different from his very damaging (to his brother) penalty phase testimony, and his insistence that Mr. Kane was “totally” mischaracterizing his e-mail (when the e-mail - - introduced into evidence and part of the record on appeal - - speaks for itself and amply shows that Al was having a crisis of conscience over his failure to tell the story of his family’s darkest moments) are all powerful indicators of a witness frightened into compliance with the state’s wishes. The e-mail is replete with Hamlet-like mea culpas, regrets, and rhetorical questions about how Al was torn by conflicting family loyalties; “a courtroom ready to erupt”; personal concerns that “my life’s work in the ministry was about to come under scrutiny and my status within our family was about to be put on trial”; and (repeatedly) the emotional turmoil of being asked to “defame” or “dishonor” his beloved grandmother in a courtroom full of strangers and family. Yet when asked by defense counsel in the Spencer hearing whether he had said in his e-mail that there were certain factors that were weighing on him when he initially testified before the jury, and he was struggling with his testimony because of family, cameras, publicity, strangers, jurors, correct?, Al answered “No.”

Not only the content but especially the tone of Al's testimony after being intimidated by the threat - - by the certainty - - of criminal prosecution is so radically divergent from what he expressed in his e-mail that it is beyond imagination that the perjury threat (and the prospect of a 15-year prison sentence) did not have its intended effect on Al.

It is also extremely important that even the prosecutor himself - - when he issued the perjury threat - - did not assert a firm belief that Al's penalty-phase testimony was true and if he recanted that would be false. What the prosecutor said was "Now it's also possible that he's lying now to try and save his brother. I mean, I don't know. We don't know now what's the truth if he comes in here and says something different (T3473). See Reese v. State, supra, 382 So.2d at 144 ("Unfortunately, as with any key witness whose memory is suddenly refreshed when confronted with the prospect of jail, one cannot be certain which version of the facts is indeed the "truth"); Muhammad v. State, supra, 782 So.2d at 357 (rationale of Reese is that if a witness is threatened with perjury charges he might be coerced to give the same testimony as before, not because it is the truth but because of the threat of prosecution). Muhammad and

Reese recognize that this casts doubt on the ultimate reliability of the witness' testimony.

It should also be noted that the reason Al was facing the prospect of prosecution for perjury as a second-degree felony carrying a potential 15-year prison sentence (see T3468-71) is because this is a death penalty case. See Fla. Stat. §837.02(2). The reason for enhanced punishment for perjury in a capital case dovetails with the requirement of heightened reliability in a capital case. And while the state may be harmed if a defendant receives an undeserved life sentence based on perjured testimony in his favor, that pales in comparison to the irreparable harm to a defendant who is sentenced to death and executed based on perjured testimony.

Here, even the prosecutor acknowledged that we don't know which version of Al's story is true and which is false. Here, the jury heard devastating rebuttal of mitigation from a witness - - the defendant's own brother - - who was called by the defense as a mitigation witness. And here there are strong and multiple reasons for concern that Al's jury penalty-phase testimony was false: in light of (1) the fact that defense counsel was obviously blindsided (and would have been a fool to call him if he'd known what Al was about to

say); (2) that Dr. Machlus testified about Al's inconsistent statements in Beaufort; and (3) that Al's own e-mail to defense attorney Kane - - which triggered the perjury threat - - now showed his severe misgivings about what he'd done in the penalty trial, tried to rationalize the internal and external pressures which were influencing his testimony at that time, and asked for "the opportunity to share and be as transparent as I can be about our upbringing and experiences that may help you build a more clearer picture of my brother and his mental, emotional, and spiritual state" (R3837). Yet, after the perjury threat, when he finally had the opportunity he'd asked for, he merely repeated his penalty phase testimony in a much angrier manner, and accused defense counsel of distorting his words.

Al's penalty-phase testimony was absolutely devastating to Tyrone's chance to avoid a death sentence. It would have taken only a single juror's vote to save his brother's life, but not only did Al fail to provide the expected mitigation regarding Tyrone's abused and traumatic upbringing, Al effectively rebutted it. While he had his own self-interested reasons to testify as he did, the jurors would have been unaware of those reasons. What they heard was the defendant's own brother saying their childhood was on the whole

pleasant and no abuse occurred. This, in turn, could only have undermined the defense's mental health expert, Dr. Machlus, and negatively affected the jurors' assessment of his opinions on the extreme mental or emotional disturbance and impaired capacity statutory mitigators, as well as the childhood trauma and family background nonstatutory mitigators.

If Al had been allowed to testify freely in the Spencer hearing, without fear of prosecution for a second degree felony, he might well have recanted his penalty-phase testimony, and Judge Sabella might well have granted Tyrone's motion for a new jury penalty trial. Because of the state's blatantly coercive perjury threat, we'll never know. Therefore Tyrone Johnson's death sentence violates even basic standards of reliability, much less the heightened reliability required by the Eighth Amendment. This Court should reverse for a

new penalty trial.¹⁷

¹⁷ One foreseeable problem in a new penalty trial is that Al has likely been ruined as a witness. Potentially the state could ameliorate that situation by offering him immunity from any perjury prosecution. Or, especially in light of Fla.R.App.P. 9.142(a)(5) and this Court's supervisory authority over cases in which a death sentence has been imposed [see State v. Okafor, 306 So.3d 930, 933 (Fla. 2020); Urbin v. State, 714 So.2d 411, 419 (Fla. 1998)], this Court could apply the federal Third Circuit's reasoning in United States v. Morrison, *supra*, 535 F.2d at 228-29, and require the state to offer Al immunity from a perjury prosecution. But even if the result is that Al's usefulness as a mitigation witness has been irreparably compromised, the defense would simply be in a position of seeking other family witnesses to the violence, abuse, and dysfunction in the Johnson family when Tyrone was growing up. At this point it may well be that a penalty trial without Al will be much fairer and more reliable than a penalty trial with Al.

[ISSUE V]

THE TRIAL COURT ERRED BY (1) DENYING JOHNSON'S CONSTITUTIONAL OBJECTION TO THE INTRODUCTION BEFORE THE JURY OF VICTIM IMPACT EVIDENCE IN A CAPITAL PENALTY TRIAL, AND (2) ALLOWING THE STATE TO INTRODUCE A VIDEOTAPED INTERVIEW OF RICKY BY HIS MOTHER STEPHANIE

In a pretrial motion, Johnson argued, inter alia, (1) that the introduction of victim impact evidence in a capital penalty phase is unconstitutional because it “is likely to confuse jurors and lead to imposition of the death penalty based on inflamed emotions”; (2) that because under Florida law victim impact evidence cannot be weighed as an aggravating factor it makes no sense to intentionally expose jurors to such highly prejudicial evidence and then expect them not to consider it in reaching their life-or-death decision; and therefore (3) that the introduction of victim impact evidence in Johnson’s penalty trial would violate the Sixth, Eighth, and Fourteenth Amendments as well as the Florida Constitution (R200-05; see T3768-83).

Recognizing that this constitutional argument has been rejected by this Court, Johnson now reasserts it for preservation purposes, and to invite the Court to reconsider its position, especially in light of the trial court’s ruling which allowed the prosecution to introduce,

over vehement defense objection (T2792-2808; 2867-70,2907-08; see R339-40), a videotaped interview of the child victim, Ricky, of the first-degree murder (for which the jury was to recommend that Johnson be sentenced to death or life imprisonment), where the interviewer was Ricky's mother, Stephanie, who was the adult victim of the second-degree murder (for which the jury had no role in determining sentence).

The videotape, which was introduced into evidence as State Exhibit 62¹⁸, shows Ricky answering Stephanie's questions about his activities and interests (T2904-06). They are practicing for an "America's Got Talent" audition for Ricky's band class (T2797). Ricky is on camera, while Stephanie's voice is heard throughout the conversation, interacting playfully with her son:

Hello there everyone. I have my son Ricky Willis here with me. I have a few questions to ask him. We'll start by, where are you from? I'm from Beaufort, South Carolina. How long have we known each other? No. How old are you? Nine years old. What grade you are you in? Fourth grade. What is your favorite subject in school and why? Math because it's easy. Hmm. What sports do you wish you had at your school and why? Flag football because I'm a good thrower and - - and I can make a touchdown. It's easy. What about soccer? You don't like soccer anymore.

¹⁸ The CDs copied in undersigned counsel's record on appeal are apparently mislabeled, and the objected-to videotape is marked as S-61.

I do but I want flag football. Wow. Okay. Name some of your favorite places to go here in Tampa, Florida and why. I want to go to WWE Raw and I want - - what is your favorite place? I want to go to Altitude. Your favorite place? The Amalie Arena. You've already gone there, but okay. And? Altitude. You're asking me to take you. And Altitude? Um-hmm. Why do you like Altitude so much? Because I know how to do a lot of flips and and they have a foam pit. You like that foam pit. Yea, I do. What T.V. shows are you into right now? WWE Raw and Smackdown and the show Andi Mack. If you could think five years back - - well, no, actually four years back to when you were five, what were your T.V. shows then? Your favorite T.V. shows. Shake It Up and Good Luck Charlie. Yea, Good Luck Charlie was my favorite T.V. show. If you could have a pet, what would it be? A puppy that stays small forever. Would you clean up after that puppy or would you try to make me do it? Both. Knowing you, you would make me do it. No. And what is your dream destination? I want to go to Hollywood so I can meet the characters who play Drake and Josh. So you want to meet the Disney characters? One of them used to be a Disney character, but - - but not - - he quit so he could be a YouTuber. Yeah, that's your other favorite thing, YouTube. But thank you for interviewing with me, son. Nice job.

(T2904-06).

Video evidence “has its own characteristics different from written or photographic evidence, that creates the potential for more intense, more biased, minimally probative, and unfairly prejudiced emotional responses from jurors. See Christine M. Kennedy, Victim Impact Videos: The New Wave of Evidence in Capital Sentencing Hearings, 26 Quinnipiac L.Rev. 1069, 1104 (2008). Even assuming

arguendo that victim impact evidence, when properly limited, is not barred by the Eighth Amendment, it can still amount to a due process violation when it is so unduly prejudicial as to render a jury penalty trial fundamentally unfair. Payne v. Tennessee, 501 U.S. 808, 825 (1991); Wheeler v. State, 4 So.3d 599, 606-09 (Fla. 2009). So, for example, a victim-impact video did not violate the boundaries established in Payne in State v. Allen, 994 P.2d 728, 749-51 (N.M. 2000). There the prosecution called the victim's mother to lay the foundation for introducing a videotaped depiction of the victim at a campground during an elk hunting expedition. Neither the victim nor any other person were in view during most of the video, there were no close-ups, and the victim did not speak. "Under these narrow circumstances", the New Mexico Supreme Court believed that the video "falls within the type of 'quick glimpse of the life of which [the defendant] chose to extinguish", and Allen was not unfairly prejudiced. 994 P.2d at 751.

The video in the instant case is at the opposite end of the unfair prejudice spectrum. In addition to its obvious emotional impact, it strongly tends to arouse sympathy not only for Ricky but for his mother Stephanie. As defense counsel reminded the trial court, the

jury had no proper role in sentencing for the second-degree murder of Stephanie. Stephanie could not be considered a victim-impact witness, since she and Ricky were killed within moments or minutes of each other and (according to the state's premeditation theory as to Ricky) Stephanie would never have known of Ricky's death. Nor was Stephanie's uniqueness as an individual, or the loss to the community caused by her death, relevant to the jury's role in determining Johnson's sentence for the murder of Ricky. The U.S. Supreme Court's Payne decision is premised on the proposition that just as a capital defendant may present mitigating evidence to show himself as a human person and not merely a murderer, so may the prosecution, within due process limits, present the victim of the capital homicide as a unique individual and not merely a murder victim. 501 U.S. at 825-27.

The reason the "America's Got Talent" interview violates the limitations of Payne is because it not only humanized Ricky to the jury, it humanized Stephanie to the jury. In the first phase of this trial Stephanie did not come across as a particularly sympathetic person. Tyrone Johnson's out-of-character explosion of violence was triggered when, in the course of an argument that started over what

to watch on TV, Stephanie, who had apparently been drinking¹⁹, made a despicable remark to Tyrone, whose beloved oldest son had recently committed suicide (sending Tyrone's life and mental health into a downward spiral): "I can see why your son killed his self like a bitch, because you're a bitch" (T2415). Tyrone said "This relationship is over", placed a video call to his father in South Carolina asking him to come get him in the morning, and began packing. Stephanie was hitting him as he packed.

Even in the light most favorable to the state, the killing of Stephanie was not premeditated and the killing of Ricky was not pre-planned. Tyrone Johnson lived a crime-free life for 42 years until his life and mental health continued to unravel with his son Devin's suicide, and Stephanie cruelly but unwittingly lit the match that caused him to explode. Judge Sabella in his sentencing order found and gave moderate weight to the mitigating circumstance that Tyrone "did not initiate the physical aggression giving rise to the events in this case" (R545-46), and he found and gave great weight to the mitigating circumstance of Tyrone's grief over the loss of his son (R542).

¹⁹ Toxicology came back at .06 (T2562).

That is not to suggest that Stephanie (and certainly not Ricky) in any way deserved to be killed. But by using victim impact evidence outside the Payne limitations, and pertaining to the victim of the second-degree murder as well as the victim who was the subject of this death penalty trial, the state was able to humanize Stephanie and make her much more emotionally relatable to the jurors. This could easily have cost Tyrone Johnson the one juror vote (or more) which he needed to avoid a death sentence.

It is a “bedrock principle of our criminal justice system” that every effort must be made to ensure that jurors not base their decision on sympathy for the victim or prejudice against the defendant. Cardona v. State, 185 So.3d 514, 519 (Fla. 2016); Andres v. State, 254 So.3d 283, 301 (Fla. 2018). This principle is, if anything, enhanced where the jury’s decision is life-or-death and where the reliability of the proceeding is constitutionally guaranteed. That is where victim impact evidence in general is problematic, because it plays to the jurors’ personal identification with the victim or victims, yet they are somehow expected not to consider it in reaching their verdict. Such an expectation - - especially when the jury is presented with emotionally impactful video and audio evidence

amounting to a mother's and son's voices from the grave - - is simply incompatible with human psychology. See, e.g. Bandes, Empathy, Narrative, and Victim Impact Statements, 63 U.Chi.L.Rev. 361 (1996). But even assuming arguendo that victim impact evidence, when it falls within the limitations of the Payne decision, continues to withstand constitutional scrutiny, the introduction of this video of the child victim of the first-degree murder being interviewed by his own mother, the victim of the second-degree murder, could only have inflamed the jurors' emotions against Tyrone Johnson and contributed greatly to their death verdict. Johnson's death sentence should be reversed for a new penalty trial.

[ISSUE VI]

BY APPLYING A SERIOUSLY FLAWED LEGAL ANALYSIS TO DENIGRATE TWO IMPORTANT MITIGATING FACTORS - - JOHNSON'S IMPAIRED CAPACITY AND HIS LACK OF A PRIOR CRIMINAL HISTORY - - AND ESSENTIALLY USING EACH OF THESE MITIGATORS TO NEGATE THE WEIGHT OF THE OTHER, THE TRIAL JUDGE ABUSED HIS DISCRETION, TAINTED HIS WEIGHING PROCESS, AND VIOLATED THE CONSTITUTIONAL REQUIREMENT OF INDIVIDUALIZED CONSIDERATION OF MITIGATION

A. THE LIMITS TO A TRIAL COURT'S DISCRETION IN WEIGHING MITIGATING CIRCUMSTANCES

This Court recently explained in a nutshell:

Mitigation is “a constitutionally indispensable part of the process of inflicting the penalty of death.” *Woodson v. North Carolina* 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed2d 944 (1976). “[T]he sentencer in capital cases must be permitted to consider any relevant mitigating factor.” *Eddings v. Oklahoma*, 455 U.S. 104, 112. 102 S.Ct 869, 71 L.Ed.2d 1 (1982), “may not refuse to consider any mitigating evidence.” *Butler v. State*, 842 So.2d 817, 831 (Fla. 2003), and “must expressly evaluate each statutory and nonstatutory mitigating circumstance proposed by the defendant,” *Ault v. State*, 53 So.3d 175, 186 (Fla. 2010). Because a capital sentencing court is required to give due consideration to each mitigating circumstance that exists relative to each individual defendant, there can be no constitutional requirement that capital codefendants who appear equally culpable on the facts of a case receive the same sentence. This individualized consideration of mitigation has been described as “[t]he core substantive ingredient” of a capital defendant’s right to individualized sentencing. *Puiatti v. McNeil*, 626 F.3d 1283, 1314 (11th

Cir. 2010) (“The core substantive ingredient in the constitutional right to an ‘individualized sentencing’ is mitigation evidence relevant to the capital defendant as an individual or unique person. . .”).

Cruz v. State, __So.3d__ (Fla. July 6, 2023)[2023 WL 4359497,p.5].

The Eighth Amendment requires the sentencer “to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual.” Allen v. Stephan, 42 F.4th 223, 248 (4th Cir. 2022) (emphasis in opinion), cert.den. sub nom Chestnut v. Allen, 143 S.Ct 2517 (2023); quoting Abdul-Kabir v. Quarterman, 550 U.S. 243, 246 (2007). A sentencer can only impose a death sentence “after considering all of the aggravators and all of the mitigators, and weighing them in a way that conforms with Eighth Amendment jurisprudence.” Allen, 42 F.4th at 259.

A Florida judge’s assignment of weight to one or more mitigating circumstances is reviewed under an abuse of discretion standard. See, e.g., Tundidor v. State, 221 So.3d 587, 605 (Fla. 2017); Bevel v. State, 983 So.2d 505, 521 (Fla. 2008). The judge’s discretion in this regard is limited not only by the aforementioned constitutional precepts, and the significant caveat that his assessment of weight must be supported by competent substantial evidence [see, e.g.,

Tundidor, at 605: Sheppard v. State, 151 So.3d 1154,1174 (Fla. 2014)], but also by broadly applicable requirements of Florida law. A judge’s discretionary decision must be supported by logic and justification²⁰, and (the flip side of that) it cannot be arbitrary, fanciful, or unreasonable.²¹ Judicial discretion is never unbridled. Waldon v. Waldon, 305 So.3d 634, 637 (Fla. 3d DCA 2020); In re Guardianship of Sitter, 779 So.2d 346, 348 (Fla. 2d DCA 2000). See also Judge Wetherell’s concurring opinion in In re Jane Doe 13-A, 136 So.3d 723, 727 (Fla. 1st DCA 2014) (quoting Barber v. State, 5 Fla. 199, 206-09 (1853) (Thompson, J. concurring), which in turn cites Lord Coke for the proposition that “whoever hath power to act at discretion, is bound by the rule of reason and of law”).

That is why a decision of a trial judge which would ordinarily fall within his discretion but which is based on a legally flawed analysis is not a proper exercise of discretion and should be

²⁰ See, e.g., Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990); Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980); Leonard-Boyce v. Van Winkle, 324 So.3d 34, 35 (Fla. 2d DCA 2021); McGlade v. State, 941 So.2d 1185, 1188 (Fla. 2d DCA 2006).

²¹ See, e.g., Tundidor, 221 So.3d at 605; Huff, 569 So.2d at 1249; Swilley v. State, 295 So.3d 362, 364 (Fla. 2d DCA 2020); Nebergall v. State, 293 So.3d 517, 529 (Fla. 4th DCA 2020).

accorded little or no deference by a reviewing court. See Canakaris, 382 So.2d at 1202; Marinec v. Progressive Select Ins. Co., 351 So.3d 181, 183-84 (Fla. 2d DCA 2022); R.J. Reynolds Tobacco Co. v. Schlefstein, 284 So.3d 584, 589 (Fla. 4th DCA 2019); Meyers v. Shontz, 251 So.3d 992, 1000 (Fla. 2d DCA 2018); Wilson v. Smith, 126 So.3d 413, 417 (Fla. 2d DCA 2013); Robbie v. Robbie, 591 So.2d 1006, 1009 (Fla. 4th DCA 1991); Deckard v. Deckard, 590 So.2d 35 (Fla. 4th DCA 1991). “Application of the correct legal rule is not a matter of discretion.” Wagner v. Wagner, 383 So.2d 987, 988 (Fla. 4th DCA 1980).

B. THE TRIAL COURT’S WEIGHING PROCESS WAS IMPERMISSIBLY SKEWED BY HIS FAULTY LEGAL ANALYSIS OF TWO IMPORTANT STATUTORY MITIGATING FACTORS, AND THUS VIOLATES JOHNSON’S CONSTITUTIONAL RIGHT TO INDIVIDUALIZED CONSIDERATION OF MITIGATION BEFORE THE DEATH PENALTY CAN BE IMPOSED.

The trial court’s assignment of slight weight to the “impaired capacity” mitigator and only moderate weight to the “no significant history of prior criminal activity” mitigator was based on a fundamental misunderstanding of each. (A misunderstanding which

was invited by the state in its sentencing memorandum (R494-95,497)).

The mental mitigating factors - - “those establishing substantial mental imbalance and loss of psychological control” - - are among the weightiest under Florida law. Santos v. State, 629 So.2d 838, 840 (Fla. 1994). Here, the trial court found, based on the testimony of Dr. Machlus, that Johnson’s ability to conform his conduct to the requirements of law was impaired; “However, in light of the fact that Defendant has no prior criminal history and was otherwise able to sufficiently conform his conduct during his years of military service and various jobs, the Court affords this mitigating circumstance slight weight” (R537-38).

This statutory mitigating factor refers to the defendant’s capacity to conform his conduct to the requirements of law at the time he broke the law and committed the charged homicide. It does not require him to be a lifelong criminal (if it did, the impaired capacity and no prior history mitigators would be mutually exclusive) or ne’er-do-well. See, e.g., Peterson v. State, 2 So.3d 146, 159 (Fla. 2009) (questioning properly focused on Peterson’s state of mind at the time of the offense as it related to the impaired capacity

mitigator); Williams v. State, 37 So.3d 187, 204-05 and n.11 (Fla. 2010); Sexton v. State, 997 So.2d 1073, 1084 (Fla. 2008); Larkins v. State, 739 So.2d 90, 93 (Fla. 1999); Jackson v. State, 704 So.2d 500, 503 (Fla.1998); Miller v. State, 332 So.2d 65, 68 (Fla. 1976).

While it's true that Dr. Machlus was of the opinion that Johnson's traumatic childhood experiences was one of the root causes of his chronic depression and impulsivity (see R537), his testimony properly focused on Johnson's mental state leading up to the time of the crimes (unraveling) and at the moment he began shooting (the dam broke). When, during an argument, Stephanie made the remark about "that's why your son killed himself because he's a bitch like you", that "reached this culminating point to there was no control over his behavior, no control over his impulses, no control over his agitation and aggression)" (T3175-76).

Importantly, Judge Sabella's denigration of the impaired capacity mitigator was not based on any reservations concerning Dr. Machlus' credibility, nor was it based on the rebuttal testimony from

Dr. Myers.²² Instead it is simply and wrongly based on the judge's misapprehension that a defendant's impaired capacity to conform his conduct at the time of the crime can be negated or diminished by his relatively good conduct for the first four-plus decades of his life.

Similarly, Johnson's longtime military service (resulting in painful and debilitating injuries) and his productive employment history are positive and mitigating attributes; they do not detract from his mental mitigation at the time of the crime for which the state is seeking to put him to death.

In devaluing impaired capacity - - which is meant to focus on the time of the crime - - Judge Sabella instead focused on Johnson's whole lifetime. Conversely and arbitrarily, in devaluing his lifetime history of not committing crimes, the judge focused instead on the few minutes on October 21, 2018 when the charged murders occurred (R539).

"The Legislature intended absence from the criminal arena to be weighed favorably for a defendant in a capital case." Mikenas v. State,

²² State witness Dr. Myers thought Johnson best fit the diagnosis of antisocial personality disorder. Dr. Myers did not offer, nor was he asked by either party to offer, any opinion on the applicability of the mental mitigating factors. Nor did he address the circumstances of the shooting incident.

367 So.2d 606, 610 (Fla. 1978). The mitigator refers to “the length of time [the defendant] obeyed the law prior to committing the crime.” Burns v. State, 699 So.2d 646, 648 n.4 (Fla. 1997). “[T]he less criminal activity on the defendant’s record, the more consideration should be afforded this mitigating circumstance.” State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

Judge Sabella found that this mitigating factor “has been established by the greater weight of the evidence and is uncontroverted.” Nevertheless, he assigned it only moderate weight. That, in and of itself, might not be an abuse of discretion, but the reason he gave for that assignment of weight most certainly is. Citing Ramirez v. State, 739 So.2d 568, 582 (Fla. 1999), and with no further explanation, he wrote, “However the circumstances of this double murder ‘militate against’ this factor” (R539).

This is legal error, pure and simple, and therefore not a proper exercise of discretion. In Ramirez this Court pointed to two deficiencies in the sentencing order, one of which was the judge’s diminishment of the weight to be accorded the “no significant history of prior criminal activity” mitigator because Ramirez had been

prosecuted as a juvenile for a prior auto burglary. 739 So.2d at 581.

On appeal this Court said:

The trial court further erred in finding that the defendant's arrest as a juvenile for stealing a ten-dollar bill from the dashboard of a pick-up truck "militat[ed] against giving significant weight" to the mitigating factor that Ramirez had "no significant history of prior criminal activity." Adjudication on the juvenile arrest was withheld, and Ramirez successfully completed an alternative program. . . . The circumstances of this crime do not "militate against" giving this statutory factor "significant weight." The trial court abused its discretion in so finding.

739 So.2d at 582.

Here, Judge Sabella seriously misconstrued Ramirez, believing it authorized him to factor in the circumstances of the charged homicides to reduce the weight of the no prior criminal history mitigator. To the contrary, Ramirez obviously refers to the circumstances of a prior offense as something which may or may not affect the weight (or existence) of the no prior history mitigator.

Also Ramirez was eighteen at the time of his capital offense, while Tyrone Johnson was forty-two. Therefore, Ramirez properly got the benefit of the age mitigator while Johnson does not (R539). On the other hand, the length of time Johnson obeyed the law is much longer than in Ramirez. See Burns v. State, supra. It is also worth re-emphasizing that these were not pre-planned murders, Johnson is

not the one who initiated the physical violence, the shootings were triggered by a cruel remark by Stephanie about Johnson's son's suicide, and Johnson's mental and emotional state was extremely vulnerable to overreaction. As Dr. Machlus said, the dam broke.

Now that this Court has jettisoned its appellate review of whether the death penalty is proportionally warranted [see Issue VII, infra], it now becomes more important than ever that the Court scrupulously review the trial court's findings regarding aggravating and mitigating circumstances. See Proffitt v. Florida, 428 U.S. 242, 252-53 (1976). Here the trial court's faulty and illogical analysis of two highly significant mitigating factors - - essentially agreeing with the state that impaired capacity and no prior criminal history are mutually exclusive and largely canceled each other out (see R495, 496-97) - - skewed his weighing process and deprived Johnson of his constitutional right to individualized consideration of mitigation. See Cruz v. State, supra, 2023 WL 4359497 p.5; Allen v. Stephan, supra.

[ISSUE VII]

TYRONE JOHNSON’S DEATH SENTENCE SHOULD BE REDUCED TO LIFE IMPRISONMENT BECAUSE THIS IS NOT AMONG THE LEAST MITIGATED FIRST DEGREE MURDERS; OR, IN THE ALTERNATIVE, FLORIDA’S CAPITAL SENTENCING SCHEME IS NOW VIOLATIVE OF THE EIGHTH AMENDMENT’S REQUIREMENT OF ADEQUATE SAFEGUARDS AGAINST ARBITRARY AND CAPRICIOUS INFLICTION OF THE DEATH PENALTY AS A RESULT OF THE COMBINATION OF (1) THIS COURT’S ABANDONMENT OF PROPORTIONALITY REVIEW BASED ON ITS MISREADING OF PULLEY V. HARRIS, AND (2) FLORIDA’S SCHEME MAKES NEARLY EVERY FIRST DEGREE MURDER DEFENDANT DEATH-ELIGIBLE

[Johnson’s constitutional arguments on this point have been rejected by this Court; Johnson raises them for purposes of preservation and to urge this Court to reconsider].

Under this Court’s former proportionality review - - which is necessary to safeguard against arbitrary imposition of the death penalty and to preserve the constitutionality of Florida’s capital sentencing system - - this Court conducted a two-pronged inquiry to “determine whether the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders.” Davis v. State, 121 So.3d 462,499 (Fla. 2018); Crook v. State, 908 So.2d 350,357 (Fla. 2005); Cooper v. State, 739 So.2d 82, 85 (Fla. 1999); Almeida v. State, 748 So.3d 922,933 (Fla. 1999)(emphasis in

opinions); see also Delgado v. State, 162 So.3d 971,982 (Fla. 2015). Thus, even in cases where the “most aggravated” prong is satisfied, “we are next required to determine whether [the] case also falls within the category of the least mitigated of murders for which the death penalty is reserved.” Crook, 908 So.2d at 357 (emphasis in opinion); see also Cooper, 739 So.2d at 85-86.

Florida case law has consistently held that “substantial mental deficiencies merit great consideration in evaluating a defendant’s culpability in a proportionality assessment.” Crook, 908 So.2d at 358. See Miller v. State, 373 So.2d 882,886 (Fla. 1979) (recognizing legislative intent “to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse”); Davis v. State, supra, 121 So.3d at 501 (“We have held sentences of death to be disproportionate in a large number of other cases involving substantial mental health mitigation”).

In Johnson’s case, the trial court found three statutory mitigating factors (including both mental mitigators), although his assignment of weight as to two of the three was infected by

erroneous legal analysis. He found numerous nonstatutory mitigating factors, fifteen of which were accorded moderate weight and one (Johnson's son Devin's suicide) great weight. The capital homicide was not pre-planned, and Johnson did not initiate the verbal and then physical aggression which triggered it. In short, this is not among the least mitigated of first-degree murders, and Johnson's death sentence should be reduced to life imprisonment without possibility of parole.

If this Court refuses to perform proportionality review, then Johnson's death sentence violates the Eighth Amendment's requirement that a state's capital sentencing scheme must contain adequate safeguards against arbitrary and capricious infliction of the death penalty. See Furman v. Georgia, 408 U.S. 238 (1972). In Lawrence v. State, 308 So.3d 544 (Fla. 2020) this Court misread the United States Supreme Court's then-36-year-old decision in Pulley v. Harris, 465 U.S. 37 (1984) as holding that the Eighth and Fourteenth Amendments never require comparative proportionality review in death penalty appeals, when in fact Pulley contains no such sweeping holding. To the contrary - - in the specific context of California's 1977 capital punishment statute - - the U.S. Supreme

Court held that proportionality review is not constitutionally mandated so long as a state's capital sentencing scheme otherwise provides sufficient safeguards against arbitrary imposition of the death penalty. Pulley expressly assumes the possibility that a state's system can be so lacking in checks on arbitrariness that it would not pass constitutional muster without proportionality review, but "the 1977 California statute is not of that sort." 465 U.S. at 51. Florida's, in contrast, is of that sort, because its sixteen aggravating factors - - any single one of which makes a first-degree murder defendant death-eligible - - does not genuinely narrow the class of defendants who are eligible for the death penalty.

As documented by Justice Labarga in his dissenting opinion in Lawrence, 308 So.3d at 553-54, this Court since 2019 has methodically dismantled five decades of precedent designed to ensure that the death penalty is not imposed in an arbitrary,

capricious, biased, and/or unreliable manner.²³ Johnson requests that this Court recognize that the death penalty is proportionally unwarranted in his case, and reduce his sentence to life imprisonment based on the compelling mitigating circumstances. Otherwise, he submits that the Court's abandonment of proportionality review, for no apparent reason other than its mistaken belief that Pulley requires it to do so, renders this state's entire capital sentencing scheme violative of the Eighth and Fourteenth Amendments and the core principles of Furman.

²³ And now the Florida legislature has seen fit to eliminate one last safeguard, the requirement of jury unanimity. Unanimity is essential to the reliability of a penalty verdict, and it ensures that minority jurors will have a voice as well as a vote. The California statute reviewed in Pulley and the federal death penalty law [FDPA] require unanimity, as do the overwhelming majority of those states which still have the death penalty. Only Alabama and now Florida allow nonunanimous death verdicts, and only Florida permits a death sentence to be imposed despite the disagreement of four (death qualified) jurors. While the new 8-4 amendment is not at issue in Johnson's case, it is a further illustration of the lengths to which this state is going to eliminate all the guardrails.

CONCLUSION

Johnson respectfully requests this Court to reverse his convictions and death sentence and remand for a new trial [Issues I, II, III]. Alternatively, he requests the Court to reverse his death sentence, and remand for a new jury penalty phase [IV, V], resentencing [VI], or a life sentence [VII].

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Assistant Attorney General Christina Pacheco at Christina.pacheco@myfloridalegal.com and capapp@myfloridalegal.com, on this 5th day of October, 2023.

CERTIFICATION OF COMPLIANCE

I certify that this document contains 26,447 words (excluding the portions exempted by Fla.R.App.P. 9.045(e)). I also hereby certify that this document was generated by computer using Microsoft Word with Bookman Old Style 14-point font in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

/s/ Steven L. Bolotin

HOWARD L. "REX" DIMMIG, II
Public Defender
Tenth Judicial Circuit
(863)534-4200

STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number 0236365
P. O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.org
sbolotin@pd10.org
kstockman@pd10.org

SLB/kas