

IN THE SUPREME COURT OF FLORIDA

TYRONE T. JOHNSON, :

Appellant, :

vs. :

Case No. SC23-55

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This reply brief is directed to Issues I, IV, and VI. As to the remaining issues Johnson will rely on his initial brief.

The state's answer brief is referred to herein as SB. All emphasis is supplied unless otherwise indicated.

[ISSUE I] THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE THE SECOND PORTION OF THE VIDEOTAPED 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

The state says the detectives “gave Johnson an opportunity to change his story” [SB 30]. The point is, he didn't.¹ If the detectives' accusatory questioning during the second portion of the interview had resulted in further inculpatory statements, or statements inconsistent with the version of events he described in the first portion, then the second portion would have been admissible to show Johnson's relevant responses, and the prejudicial impact of the detectives' repeated comments that they didn't believe his initial account might at least be ameliorated by the limiting instruction. But - - contrary to the trial judge's expressed belief that “there's very few things that cannot be fixed with an instruction to the jury (T2137-39) - - the preamble to the standard instruction 2.8 recognizes that police opinions and statements regarding a defendant's guilt are generally inadmissible. The

¹ See also Presentence Investigation, p.3 (“The defendant was confronted about [evidence in Ricky's bedroom] and he did not change his statement”).

instruction does not change that. Instead, as the preamble further recognizes, the interrogating officers' opinions must be redacted from recordings sought to be introduced into evidence unless redaction would render the defendant's relevant admissions incomprehensible. Only then does the limiting instruction come into play, directing 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.

Johnson's appellate counsel does not disagree that redacting the detectives' repeated comments that they believed Johnson was lying, and that he followed Ricky Willis into the child's bedroom and deliberately shot him there, would have made Johnson's answers incomprehensible. But the reason why the detectives' opinions were inadmissible and incurably prejudicial is because Johnson, when confronted with the detectives' insistence that he was lying, made no relevant admissions or inconsistent statements. In Pausch v. State, 596 So.2d 1216, 1218 (Fla. 2d DCA 1992) the trial judge observed "[F]rankly, 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." The

same is true here. The second portion of the interview is all Detectives Florio and Tabor, with Johnson continuing to give the same account he gave earlier. In fact, near the end of the second interview Detective Florio - - after his accusatory questioning and repeated expressions of disbelief had failed to achieve the desired result - - said to Johnson:

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.

(T2460; State Exhibit 56)

The state, citing numerous cases, correctly points out that “[c]onfronting a defendant with evidence of his or her guilt is a routine part of a custodial interrogation” [SB 31]. That is certainly true. If Detectives Florio’s and Tabor’s questioning in the second portion of the interview had achieved its intended result - - if Johnson admitted that he followed Ricky into his bedroom and shot him there, or if Johnson made statements inconsistent with the version he gave the detectives in the first portion - - then there would have been no Fifth

Amendment or Miranda problem with the admissibility of the entire custodial interrogation. But the issue here does not involve the Fifth Amendment or Miranda. Rather, the issue concerns the admissibility of Detective Florio's opinion and Detective Tabor's opinion - - repeatedly expressed - - that Johnson's "story" was a lie, when that tactic did not produce any relevant responses beyond what Johnson had already admitted to in the initial interview. See, e.g., Jackson v. State, 107 So.3d 328 (Fla. 2012); Smith v. State, 292 So.3d 46 (Fla. 5th DCA 2020); Gaines v. State, 155 So.3d 1264, 1270-72 (Fla. 4th DCA 2015); Roundtree v. State, 145 So.3d 963 (Fla. 4th DCA 2014); Pausch v. State, 596 So.2d 1216 (Fla. 2d DCA 1992).

The state addresses none of the latter four cases. In attempting to distinguish Jackson the state relies on Bush v. State, 295 So.3d 179, 204-06 (Fla. 2020)[SB 29-31]. However, it is Bush that is distinguishable, because Bush made inconsistent statements regarding his whereabouts at the time of his estranged wife's murder, and his explanation of his actions when he returned to the crime scene several days after the murder "evolved" throughout the recorded interviews. 295 So.3d at 188, 201-02, 205. Specifically, there were two locations in the townhome which "would have been significant only to the per-

son who murdered [Nicole]”, one of which was the sofa where the missing baseball bat (which Nicole usually kept by her bed for protection) was hidden. Bush’s description of his actions changed during the detective’s interrogation from (1) denying that he ever looked in the sofa; to (2) being “pretty sure” he never reached in the sofa; to (3) admitting that he might have looked under the sofa but claiming he was looking for a telephone that was not sitting on its receiver. 295 So.3d at 189-90, 202- 205.

In contrast, Johnson’s account of the circumstances of the shooting of Stephanie and Ricky did not change or “evolve”. Instead, while Detectives Florio and Tabor repeatedly insisted that Johnson’s account was untrue and that they knew from the physical evidence that Ricky must have been hiding in his own bedroom and Johnson found him there and shot him, Johnson just as insistently maintained that he was never in Ricky’s bedroom, and all of the shooting occurred in the master bedroom when he shot wildly as Stephanie was verbally and physically attacking him. [This, in turn, was crucial to the issue of whether the killing of Ricky was or was not premeditated. And since there was no claim of felony murder, and since the killing of Stephanie was charged as second degree murder, the jury’s finding of pre-

meditation in the death of Ricky was indispensable for a death sentence, or even to proceeding with a penalty phase]. Therefore, the two detectives' repeated comments that they believed Johnson was not telling the truth and they believed the physical evidence refuted his version of events was nothing more than that - - law enforcement officers' opinions. And that is inadmissible and incurably prejudicial, with or without a jury instruction. As this Court recognized in Sheppard v. State, 151 So.3d 1154, 1168 (Fla. 2014)(although rejecting Sheppard's claim under "fundamental error" review where there was no motion in limine and no objection at trial):

[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.

Johnson's consistent statement throughout both portions of the interview was that the shooting happened in the master bedroom. If

the prosecutor thought it was important to inform the jury that Johnson denied ever going into Ricky's room, he could simply have asked Detective Florio on the stand, "Did you at any time ask if he went into Ricky's room", and the detective would have answered "He told us he never went into Ricky's room." That would have conveyed Johnson's response without conveying (repeatedly and emphatically) to the jury that the detectives disbelieved Johnson's response, or that in the detectives' opinion the physical evidence contradicted Johnson's response. The problem here is that the focus of the second portion of the interview was not on what Johnson said, but on what Detectives Florio and Tabor said to him.

The state, grasping at straws, suggests that Johnson's demeanor when answering the detectives' questions might provide a basis for its introduction of the second portion of the interrogation [SB 27-28]. The state, says "Moreover, at times it almost appeared that Johnson was pretending to cry. He often resorted to this apparently fake cry when confronted with the evidence against him." "When the detective stated, 'Well, there are two people dead tonight' Johnson responded by appearing to cry" [SB 27-28].

Neither undersigned counsel for Johnson nor appellate counsel for the state qualifies as an expert in determining whether a person's emotion is real or feigned. We do know that Tyrone Johnson, a middle-aged man with no significant criminal history who had recently lost his beloved oldest son to suicide, had just shot and killed his girlfriend after she made an outrageously hurtful comment about his son's suicide, and after she was hitting Johnson as he was trying to pack to leave. We know that Johnson and Stephanie had been friends since childhood and had family members in common, and that up to that time Johnson had had a good relationship with her son Ricky. So there was ample reason why he might be genuinely distraught and broken after what had just happened sank in. This Court can review the videotapes of both portions of the interrogation for itself [see Almeida v. State, 737 So.2d 520, 524 n.9 (Fla. 1999)], and determine whether the state's "fake cry" argument is or is not supported by the actual evidence. Undersigned counsel for Johnson would particularly call the Court's attention to the first eleven minutes (pre-Miranda) of the initial interview, in which Johnson, hobbling from a foot injury, is shaking, sobbing, hyperventilating, and barely able to speak. Again, while this Court can and should reach

its own conclusion, if the state's self-serving perception is right that Johnson's emotions were feigned then his performance is Oscar-worthy. As the interrogation wore on Johnson's hyperventilation may have subsided and he may have become somewhat calmer, but there is nothing about his demeanor - - and certainly no observable change in his demeanor - - that would justify introduction of the detectives' repeatedly expressed opinion that his version of events was false.

The truth or falsity of Johnson's statements, and the truth or falsity of his defense at trial that the homicides were committed in the heat of passion, was for the jury to determine - - uninfluenced by the opinions of the interrogating officers. Similarly, the question of whether Johnson's defense was refuted by the physical evidence was for the jurors, not the detectives, to determine. The improper introduction before the jurors of the detectives' opinions, stated and restated throughout the second interview, that his account was refuted by the physical evidence could only have predisposed them to agree with the detectives, accept the prosecution's theory of the case, and reject Johnson's defense. Since jurors are inclined to give great weight to the opinions of law enforcement officers by virtue of their position [Sheppard], the state cannot show beyond a reasonable doubt that

the improperly admitted videotape of the second portion of the interview - - introduced over strenuous defense objection² - - did not contribute to the jury's rejection of Johnson's heat of passion defense (as to both homicides), or to the jury's verdict of premeditated murder of Ricky (upon which Johnson's death sentence is predicated). See, e.g., State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The convictions and death sentence should be reversed for a new trial.

² Contrast Sheppard.

[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 JOHNSON OF A FAIR AND RELIABLE PENALTY DETERMINATION

Only by completely ignoring Al's e-mail to defense counsel Kane, and - - even more egregiously - - by completely ignoring the prosecutor's threat to prosecute Al for perjury in a capital case (with a potential fifteen year prison sentence) if he now recanted or testified different from what he said before the jury in the penalty phase, does the state manage to (1) utterly misconstrue Johnson's entire argument in this Point on Appeal, which is a due process argument based inter alia on Webb v. Texas, 409 U.S. 95 (1972) and its progeny³ [nowhere addressed in the state's answer brief, SB 20, 43-47], and (2) wrongly submit a superficial "Nothing to see here, folks" argument that there is no cognizable claim for this Court to review [SB 20, 43-44].

The state makes it sound like Johnson is merely complaining on appeal that "Al didn't testify in the manner that Johnson desired" during the penalty phase and again during the Spencer hearing [SB 43]. What the state chooses to omit - - Al's e-mail to defense counsel

³ See Johnson's initial brief at p.58-61, 97-107, and Florida, federal and other state case law cited at p.97-98.

regretting his penalty phase testimony and describing the family pressures he felt to downplay his brother Tyrone's experience of violence and abuse; the ensuing perjury threat made by the prosecutor; and Al's open hostility to defense counsel in the Spencer hearing after the perjury threat - - speaks volumes. Even the prosecutor, when he made the perjury threat, did not claim that Al's penalty phase testimony (which blindsided the defense because it was blatantly inconsistent with what he told them in Beaufort pre-trial) was true and that any recantation would be false. Rather, the prosecutor acknowledged that Al could have been lying before or he could be lying now; "We don't know now what's the truth if he comes in here and he says something different" (T3473).

So the state ensured that Al would not say something different by threatening him with a perjury charge if he did. This coercion and intimidation had its intended effect of locking Al into repeating, rather than recanting, his damaging penalty phase testimony. See Reese v. State, 382 So.2d 141, 144 (Fla. 4th DCA 1980)("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, 782 So.2d 343, 357

(Fla. 2001)(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); 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 state contends that Johnson was not deprived of a fair and reliable penalty proceeding because “While Al did not testify about the physical abuse Johnson suffered as a child, Johnson’s expert, Dr. Machlus, did, and therefore the jury learned of the abuse” [SB 44]. First of all, Al did not merely “not testify” about the physical and emotional abuse, he affirmatively and emphatically told the jury that there was nothing abusive or unpleasant in how he and his siblings were disciplined or punished (T2968-70), and that on the whole he and his brother Tyrone had a pretty good upbringing (T2989-90). That put Al’s testimony in conflict with the testimony of Dr. Machlus, and could only have predisposed the jury to disbelieve the defense’s expert (who testified after Al told the jury there was “Definitely not”⁴ any

⁴ T2968-69.

abuse). Al became a de facto state witness, and his turnabout not only sabotaged his brother's case in mitigation and likely impacted the jury's weighing of mitigating versus aggravating factors, it also undermined the credibility of the defense's mental health expert, and could easily have cost Johnson at least one juror vote needed to avoid a death verdict. [If the jury resolved the conflict between Al and Dr. Machlus in favor of the defendant's own brother over the hired and compensated psychologist, it may also have disregarded or given little weight to Dr. Machlus' opinions that Johnson was suffering from extreme mental or emotional disturbance at the time of the crime and that his ability to conform his conduct to the requirements of law was substantially impaired].

The fairness and reliability of the jury penalty trial was fatally compromised by Al's conduct, but maybe the state might have a point in suggesting that there's nothing the trial court or this Court could do to set things right [SB 20, 43-44, 47] if that was all that happened. But as recounted in Johnson's initial brief ["The Al Johnson Fiasco", p. 34-57], that was far from all that happened. Before the penalty phase the defense team had spoken with Al in his and Tyrone's (and Stephanie's) home town of Beaufort, South Carolina and that is where

they learned of the childhood abuse and violent family background. That is why they called Al in the first place, but – as the state points out - - “the witness did not testify to the facts that Johnson had anticipated” [SB 20]. End of story, according to the state’s argument. Not quite. Al himself came to regret and feel guilty about his performance in Johnson’s penalty trial, and he sent a lengthy apologetic e-mail to defense attorney Jamie Kane, explaining that his surprise testimony had been the product of conflicting family loyalties, concern for his own status within the family and in the community, and his inability to bring himself to dishonor the memory of his recently deceased grandmother, in front of four of her children sitting in the courtroom [R3836-37]. He was now seeking an opportunity to redeem himself by providing the court with “some of [our family’s] not so proud moments that have shaped and influenced each day of our lives today some more severely than other!” Unlike Al himself (who had chosen to make these experiences “building blocks for my personal success”), Tyrone had “allowed those very experiences to break him.” Al continued “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"⁵ (R3836-37).

However, when defense counsel Kane advised Assistant State Attorney Terry of Al's change of heart, Mr. Terry - - who, as previously discussed, admitted that he didn't know whether Al was telling the truth then or now - - reacted by making it clear to all that if Al were to now testify inconsistently with his jury penalty phase testimony he would be charged with perjury, and he needed to be advised of that. Accordingly, Al needed his own lawyer and, Mr. Terry continued, "I'll talk to that person, too." Judge Sabella noted that because this was a capital case, perjury would be a second-degree felony punishable by 15 years imprisonment.

As an obvious result of the prosecutor's intimidation Al - - for the second time - - did a 180 degree about-face, and when he testified in the Spencer hearing (immediately after conferring with his own court-

⁵ The Spencer hearing, which was scheduled to begin six days after defense counsel received Al's e-mail, was postponed after the prosecutor announced he would charge Al with perjury if he testified inconsistently with his testimony in the jury penalty phase.

appointed lawyer) he angrily reaffirmed his penalty phase testimony that he and Tyrone were never abused or excessively punished. In sharp contrast to the remorseful tone of his e-mail to defense counsel Kane, Al was now extremely combative toward Mr. Kane; so much so that the trial court declared him a hostile witness. In the e-mail Al writes of attempting to paint a picture of the Johnson family's "darkest and most intimate" and "not so proud" moments; experiences which motivated Al but broke Tyrone. In the e-mail Al writes at length of the external and internal pressures he was facing while testifying before the jury in a courtroom full of family and strangers:

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 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.

... ..

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?

(R3836-37)

Left the courtroom feeling personally defeated and overwhelmed.

Family secrets to be aired in front of strangers; 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.” Enhanced emotions as his status within the family and his life’s work in the ministry were about to come under scrutiny. His status was “about to be put on trial.” Contrast that with Al’s exchange with defense counsel in the Spencer hearing after the perjury threat:

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)

Al’s e-mail shows that he had an important family story to tell, and that the internal pressures he felt had prevented him from telling it to the jury. He wanted to tell it now. But the prosecutor saw fit to prevent Al from telling it by applying external pressure. Plainly the state’s threat of a perjury prosecution carrying a potential fifteen year prison sentence had its intended effect of intimidating Al and locking him into repeating his prior testimony. Remarkably, the state’s ar-

gument on appeal fails to address or even mention the e-mail or the perjury threat [SB 20, 43-47].

Contrary to the state's superficial response - - which appears to be premised on its misapprehension that Johnson's complaint is merely that his brother twice did not testify in the manner Johnson wished - - this is a due process issue which is cognizable on appeal, and can and should be remedied by this Court by affording him a new jury penalty trial. Since Webb v. Texas, supra, Florida, federal, and other state case law makes it clear that the state may not use threats of perjury or intimidating tactics which substantially interfere with a witness' decision to testify for a defendant. [See cases cited at p.97-98 of Johnson's initial brief]. "Such conduct, even if motivated by good faith, cannot be tolerated, particularly in a capital case." State v. Feaster, 877 A.2d 229, 242-45 (N.J. 2005). Here, the state fails to discuss the due process case law because it fails to even recognize the due process issue.

Moreover, it cannot even be said that prosecutor Terry acted in good faith, because he did not even assert that he believed that Al's jury penalty phase testimony was truthful. Once the prosecutor's perjury threat was communicated to Al, and the severe ramifications

of testifying inconsistently with what he'd said to the jury was explained by Al's appointed lawyer, self-preservation required Al to reaffirm his prior testimony. Thus the perjury threat substantially interfered with Al's ability to make a "free and unhampered determination"⁶ whether to truthfully testify in support of Tyrone's motion for a new jury penalty trial. That is a due process violation plain and simple.

Moreover, had Al not been dissuaded by the perjury threat from recanting his penalty phase testimony, there is a strong reason to believe that Judge Sabella would have found his recantation to be credible and granted Tyrone's motion for a new jury penalty phase. Al's original testimony was inconsistent with what he'd told the defense team in Beaufort, and inconsistent with the information he'd given to Dr. Machlus. Al's heartfelt e-mail to defense attorney Kane amounted to an apology and a self-serving series of excuses for why he had testified the way he did, and he expressed a determination to get the family story right if given a second chance to tell it. [Instead - - after the perjury threat - - he repeated the same story, but now with resentment and animosity directed at the defense attorney to whom he'd

⁶ See, e.g., United States v. Foster, 128 F.3d 949, 953 (6th Cir. 1997)

sent the e-mail]. Finally, it is important to note that Judge Sabella, in finding that the “impaired capacity” mitigating factor was proven by the greater weight of the evidence, credits Dr. Machlus’ testimony that Tyrone was abused as a child, and does not even mention Al’s contrary testimony that no abuse occurred (R537).⁷ [While the state might then claim “harmless error” on the theory that Al’s penalty phase and Spencer hearing testimony did not affect the judge’s sentencing order, such an argument would ignore the devastatingly harmful impact Al’s testimony likely had on the jury. (Especially in light of the fact that under the unanimity statute then in effect even a single juror’s vote for life imprisonment would have precluded a death sentence)].

Johnson was seeking a new jury penalty phase based on Al’s anticipated recantation, and the prosecutor’s perjury threat foreclosed that possibility. The only meaningful and appropriate remedy and/or sanction for the due process violation is for this Court to reverse and remand for a new penalty trial before a newly impaneled jury.

⁷ While it’s true that Judge Sabella accorded the impaired capacity mitigator slight weight, he did so not because of any doubts about Dr. Machlus’ credibility, but because of the judge’s legal error in diminishing the weight of the impaired capacity mitigator due to Johnson’s lack of a prior criminal history, and due to his years of military service and holding jobs. See Issue VI.

In this regard, the state offers a puzzling contention that undersigned appellate counsel somehow waived this issue by “not present[ing] [it] as a challenge to the trial court’s denial of his motion for a new penalty phase” [SB 47]. The undersigned is pretty sure that’s exactly what he presented, and his argument on appeal substantially tracks defense counsel’s argument in Johnson’s motion for a new penalty phase, and in the hearing on that motion (see R339-48, 575-84; T3715-25). Undersigned appellate counsel intentionally did not argue for a new Spencer hearing or for resentencing by the trial judge because those would be wholly inadequate to remedy the harm caused by Al’s testimony coupled with the prosecutor’s perjury threat. Johnson’s entire Point on Appeal is focused on the need for a new jury penalty phase. See Initial Brief, p. 56, 59-61, 90-92, 99-100, 106-08. If the state thinks the undersigned failed to use certain “magic words” in his argument he is at a loss to imagine what those might be.⁸

⁸ If this Court were to agree with the state that the undersigned inadvertently waived his argument, any claim of ineffective assistance can be addressed via a habeas petition. See Johnson v. Wainwright, 498 So.2d 938 (Fla. 1986).

The state's obligatory "harmless error" argument is based on (1) its mistaken assumption that "the additional desired testimony of Al would have only served to corroborate testimony already before the jury and would not have provided any additional mitigation" and (2) its assertion that "[t]his was a heavily aggravated case" (SB 45-46). As previously discussed, the problem with Al's testimony before the jury was not that it failed to provide cumulative corroboration for Dr. Machlus, but that it contradicted Dr. Machlus. If the jury or individual jurors believed Al, his testimony negated the mitigating factors of childhood abuse and family violence, and also could easily have negatively impacted jurors' assessment of Dr. Machlus' credibility with regard to the statutory mental mitigators.

As for the state's "heavily aggravated" assertion, undersigned appellate counsel would concede that there was substantial aggravation (although not overwhelming aggravation to the degree that this Court has seen in many other capital appeals). What the state ignores is the fact that this case also involves substantial mitigation. Judge Sabella found three important statutory mitigating factors (including extreme mental or emotional disturbance and impaired capacity, as well as Johnson's lack of a prior criminal history), and numerous nonstat-

utory mitigators, fifteen of which he accorded moderate weight and one (Johnson's son Devin's suicide) great weight. The homicides were not pre-planned, and Johnson did not initiate the verbal and physical aggression. [It should not be lost sight of that Stephanie's mocking of Devin's suicide is what precipitated the events].

Moreover, while Judge Sabella's weighing of two of the three statutory mitigators was negatively impacted by legal error [Issue VI], the jury might well have given the extreme mental or emotional disturbance and impaired capacity mitigators greater weight based on the testimony of Dr. Machlus [see Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988)] if Dr. Machlus' credibility had not been placed in doubt by Al's conflicting testimony.

For all of these reasons the state cannot show beyond a reasonable doubt that Al's probably false and misleading testimony before the jury - - which Al was prevented from recanting by the prosecutor's blatant perjury threat - - did not contribute to the jury's penalty verdict, and did not cost Tyrone Johnson the one (or more) jury vote that he needed to avoid a death sentence. See, e.g. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

One last point needs to be addressed. The state, citing State v. Bloom, 497 So.2d 2 (Fla. 1986), asserts that the trial could not make the state offer AI immunity when the state was not willing to do so, because “doing so would encroach upon the prosecutor’s executive function.” [SB 20, 43]. While Bloom does broadly recognize a state attorney’s discretion in deciding whether or how to prosecute, it has nothing to do with issuing perjury threats to intimidate a defense witness, as condemned in the Webb v. Texas line of cases. And Johnson is not contending on appeal that Judge Sabella should have ordered the state to offer AI immunity; only that the prosecutor violated Johnson’s due process rights by issuing his emphatic perjury threat in the first place. The possibility of immunity was only brought up very briefly in a footnote [p. 108, n. 17] in Johnson’s initial brief in the context of what might occur in a new penalty trial, now that the state’s perjury threat has destroyed AI’s value as a potential defense witness. Undersigned counsel noted that the state could voluntarily offer AI immunity, or else this Court could apply the federal Third Circuit’s reasoning in United States v. Morrison, 535 F.2d 223, 228-29 (3rd Cir. 1976) and require the state to offer AI immunity from a perjury prosecution. While under ordinary circumstances a court has no

inherent power to grant use immunity to a defense witness over the state's objection, there may be an exception where a defense witness' testimony has been tainted by prosecutorial misconduct. See United States v. Morrison, *supra*; Jones v. State, 54 So.3d 589, 591 and n.1 (Fla. 4th DCA 2011); State v. Nessim, 587 So.2d 1344 (Fla. 4th DCA 1991); State v. Whitehead, 519 So.2d 1145 (Fla. 3^d DCA 1988); State v. Montgomery, 467 So.2d 387 (Fla. 3^d DCA 1985). Intimidating a defense witness by means of a threat of the certainty of a perjury prosecution if he were to testify inconsistently with his prior testimony is prosecutorial misconduct which can (and did here) rise to the level of a due process violation, and that is especially true when, as here, the witness' testimony is critical to a life-or-death determination, and when, as here, the prosecutor issuing the threat admits that even he doesn't know which version is truthful.

But even if the state were correct that it cannot be required to remedy its own misconduct by offering Al immunity in a new penalty trial, that would not obviate the need for a new penalty trial. Even if unable to present Al as a mitigation witness, the defense could still investigate the availability of other family witnesses, and it could still

present the testimony of Dr. Machlus (without fear of his being contradicted by Al).

Under the totality of the circumstances, this entire debacle deprived Tyrone Johnson of a fair and reliable 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

The state relies on the wrong Bevel case. In Bevel v. State, 983 So.2d 505, 522 (Fla. 2008) [SB 53] the trial court assigned little weight to the mitigating factor of low IQ due to a total absence of evidence as to any functional deficits, or any relationship to the circumstances of the crime. In Tyrone Johnson's case, in contrast, the relevant mitigating factor was not low IQ, but impaired capacity (which relates to the time of the crime) and no prior criminal history (which relates to a defendant's entire lifetime, or at least his or her adolescence and adulthood). Judge Sabella effectively flipped these, by diminishing impaired capacity because of Johnson's lack of a prior criminal history (as well as his years of military service and gainful employment), and diminishing Johnson's lack of a criminal history based on a unexplained reference to the circumstances of the charged crime.

The impaired capacity mitigator does not mean the defendant was impaired at “every moment of his life.” Bevel v. State, __ So.3d __ (Fla. 2023)[2023 WL 7030452, p. 5-6]. This statutory mitigator - - which is (or should be) among the weightiest under Florida law⁹ - - focuses on 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 a feckless slacker. See, e.g., Peterson v. State, 2 So.3d 146, 159 (Fla. 2009) (questioning was properly focused on Peterson’s state of mind at the time of the offense as it related to the impaired capacity mitigator).¹⁰

In contrast, it is the “no prior history” mitigator which, unsurprisingly, focuses on the defendant’s history. It refers to the length of time he or she “obeyed the law prior to committing the crime.” Burns v. State, 699 So.2d 646, 648 n.4 (Fla. 1997). Tyrone Johnson was forty-two years old, and the homicides occurred in quick succession when his girlfriend Stephanie made a vicious remark about the sui-

⁹ See Santos v. State, 629 So.2d 838, 840 (Fla. 1994).

¹⁰ See also cases cited at p. 122 of Johnson’s initial brief.

cide of Johnson's son Devin, and she then began hitting Johnson as he was packing to leave their relationship. So, contrary to Judge Sabella's statement that the circumstances of the double murder "militate against" the no prior history mitigating factor, there was no legally valid reason to diminish its weight. Moreover, the judge misunderstood the one case which he cited in support of his conclusion, Ramirez v. State, 739 So.2d 568, 582 (Fla. 1999), believing it authorized him to use the charged crime to reduce the weight of the no prior history mitigator; when in fact Ramirez plainly 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.

Judge Sabella's seriously flawed analysis is legal error pure and simple; not - - as the state would have it - - a proper exercise of his discretion based on the evidence. The judge expressed no misgivings about the credibility of Ms. Bergen (Johnson's supervisor at the Children's Legal Services unit at the Attorney General's office) who observed the precipitous decline in Johnson's mental and emotional and even physical condition during the year or so leading up to the shootings; or that of his four surviving children who described him as a loving, involved parent who became an emotional wreck after Devin's su-

icide; or especially that of Dr. Machlus, whose testimony 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).

To devalue this important, even compelling, mitigating factor solely because Johnson functioned relatively well and refrained from criminal activity for many years before his life unraveled is far from a proper exercise of discretion; just as the converse - - devaluing his lack of a criminal history based solely on the circumstances of the charged crime is far from a proper exercise of discretion. The prosecutor may well have led Judge Sabella down this primrose path by his wrong suggestion that the impaired capacity and no prior history mitigators are somehow mutually exclusive, or that each negates the existence or weight of the other (see R495-97). In any event, the judge's weighing process was impermissibly skewed - - not by discretionary assessment of the evidence but by legal error. Mitigation is a constitu-

tionally indispensable part of the process of inflicting the penalty of death. Cruz v. State, 372 So.3d 1237, 1244 (Fla. 2023). The Eighth Amendment requires the sentencer to give meaningful consideration and effect to all mitigating evidence that might provide a basis for imposing a sentence of life imprisonment as an alternative to the death penalty¹¹, and that simply did not happen here.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, 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].

¹¹ See, e.g., Allen v. Stephan, 42 F.4th 223, 248 (4th Cir. 2022), cert.den. sub nom Chestnut v. Allen, 143 S.Ct 2517 (2023); quoting Abdul-Kabir v. Quarterman, 550 U.S. 243, 246 (2007).

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Assistant Attorney General Christina Pacheco at Christina.pacheco@myfloridalegal.com, on this __24th__ day of January, 2024.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I certify that this document contains 7,028 words (excluding the portions exempted by Fla.R.App.P. 9.045(e)), and that it complies with the applicable font and word-count limit requirements.

/s/ Steven L. Bolotin

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SLB/kas