IN THE SUPREME COURT OF FLORIDA

JUSTIN RYAN MCMILLIAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC10-2168

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

In its ARGUMENT section, the State provides additional details of facts pertinent to each issue and explicitly disputes McMillian's use of some facts as he uses them in his arguments on the issues (IB 46-76). At this juncture, as authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the basic case and facts.[1]

Timeline.

The following table provides the sequence of several of the significant events pertaining to the murder and the case. The table can serve as guide or index to parts of the record.

DATE	NATURE OF EVENT
01/09/2009, Fri	At lunch, Defendant McMillian told the victim's mother (Janice Stubbs) that the victim "doesn't want" him "any more"; he said that "they had broken up and that was it" (XIII 498-501); Defendant said that he is quitting his job at U.P.S. and going back to Georgia (XIII 528);
01/11/2009, Sun	Early morning hours, Defendant's car seen backed-in near victim's (Danielle Stubbs')townhome when the victim was being dropped off there (SE 74; Compare XIV 695-96 698-99 with XIII 520), and shortly thereafter, Defendant shown in surveillance video at Gate Store

[1] The record on appeal consists of 23 volumes numbered as such. They will be referenced by volume number and any applicable page numbers. For example, "XIII 501-502" designates pages 501-502 of volume XIII. State and defense exhibits will be referenced as "SE" and "DE" followed by any applicable exhibit number, as introduced into evidence. Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

	near victim's townhouse (SE 167, introduced at XIII 430, discussed at XIII 457-58,[2] 483; XIV 712-16; XX 1832; published to the jury at XIV 716) and Gate phone records show at about the time that Defendant was at the Gate Store, calls were made from its pay phone to victim's cell phone, and, shortly thereafter, a call from victim's cell phone was made to that pay phone (XVI 1123-27; SE 168 at V 807; XIV 762; SE 169 at V 819 et seq.); Subsequently that morning, the victim's parents and brother could not locate the victim (E.g., XIII 503-507); Defendant called the victim's family twice and indicated to the victim's mother that he did not know the victim's whereabouts (XIII 503-506); The victim found by her father (Harold Stubbs), her mother (Janice Stubbs), and her brother (Hunter Stubbs) shot dead next to the bed in the upper bedroom of her townhouse (XIII 508-509, 539-40, 557-58; see SE 126, SE 155, XIV 619); Police arrived in two or three minutes (XIII 540; see also XIII 532);
1/12/2009, Mon	11:10am Defendant called police and, in a recorded statement (SE 163), told police operator that he has been in Georgia since "3:00 o'clock yesterday morning" and "came straight here from the club" (XIV 763-68); 12:20pm Detective Wolcott retuned Defendant's call, and in a recorded statement (SE 164), Defendant told Detective Wolcott that he did not have a key to the victim's new apartment (XIV 780, 782); he last saw the victim "about 6:00 o'clock Saturday evening" (XIV 774-75); his relationship with the victim "is so perfect" (XIV 786); agreed to meet with the Detective in a couple of hours (XIV 787-91), but the Defendant failed to show up (XIV 791);

[2] Defense counsel's opening statement conceded that McMillian is at the Gate Store making the phone call at 4:07. (See XIII 483) McMillian also testified that he was the person in the Gate Store's surveillance video and that he called the victim from there. (See XVIII 1459-60, 1495-96, 1527-29; XIX 1575, 1579, 1588)

1/14/2009, Wed	Defendant McMillian engaged in a shootout with police (XIV 795 et seq.): Officer Bowen in marked police car activated blue lights and air horn but car Defendant driving did not initially react (VX 805-806), then after turning on to Fireside Drive, Defendant abruptly stopped car (XV 807) and shot at Officer Bowen (XV 809-810, 833, 839-40, 854, 875); Defendant McMillian was shot several times and taken to the hospital (E.g., XV 857-60,903-905);
1/29/2009	In a recorded conversation (SE 166; see also transcript at III 543-81[3]) with Detectives Wolcott and McClain at Shands Hospital, Defendant McMillian gave multiple versions of what he said he recalled happening the night of the murder (Compare XVI 1149-50; SE 166 at ~00:11:18; III 551-52 with XVI 1173-74 with XVI 1174-75; III 568 with XVI 1182-83; III 572-73); at one point, Defendant said that he shot the victim twice, the first time in bed, and after she rolled out of bed, the second time (III 572-73; see also XVI 1182-83); Defendant said that when he was engaged in the shootout, he never saw a marked police car but, instead, he "shot at the black Explorer, like a gray Explorer" (XVI 1159);
2/2/2009	Arrest and Booking Report for this Murder (1: 1; see also iX 1733-34; X 1844, 1849-50);

[3] The recording of the Defendant's statement (SE 166) was played for the jury during the trial, resulting in the court reporter transcription showing "inaudible" a number of times. At a motion to suppress hearing, the parties stipulated (X 1794) to the transcript of Defendant McMillian's 1/29/2010 statement to the police, which was SE 4 at that hearing and is located at III 543-81. The defense apparently prepared the transcript (See IX 1746, 1768), and although there may have been some insignificant errors in it (See IX 1749), defense counsel repeatedly relied on the content of that transcript at the motion to suppress hearing. (See IX 1749-50, 1754-57; X 1818-24, 1829-30, 1832-33, 1835, 1840-42, 1852-53, 1867-68) Therefore, to the degree that the stipulated transcript resolves an "inaudible" to reveal an incriminating admission, it can be validly used on appeal for its content.

2/12/2009	Defendant McMillian appeared in court for review of his bond status (VIII 1496-98);
3/26/2009	Indictment for First Degree Murder and Possession of a Firearm by a Convicted Felon (I 9-11);
1/4/2010	Defendant requested to speak with police, and in a videotaped statement, Defendant said that at 3:30am, he saw the victim's light on and entered the victim's townhouse, where he discovered the victim's dead body (XIX 1650-51, 1664-65); the State introduced this statement in its rebuttal case;
1/13/2010	Defense's motion arguing Ring v. Arizona (I 119-33), which the trial court heard on 2/10/2010 (IX 1676-77) and denied on 2/19/2010 (III 506);
4/5/2010 & 4/12/2010	Evidentiary hearing on motion to suppress defendant's 1/29/2009 statement to the police at which parties stipulated (X 1794) to a transcript of the police interview (SE 4 at hearing, III 543-81); IX 1725-88; X 1794-1884);
6/14/2010	Jury selection began (XI 33);
6/18/2010	Jury verdicts of guilty of First Degree Murder, "further find[ing] that the killing was premeditated"[4] and that the Defendant discharged a firearm, and, on the Attempted Murder count, finding Defendant guilty of the lesser offense of attempted second-degree murder and that Defendant discharged a firearm (XX 1929-30; V 886-91);
6/30/2010	Jury penalty phase (XXII 2042-XXIII 2346), in which jury recommended death by a vote of 10 to 2 (XXIII 2342-45; VII 1212);
8/27/2010	Spencer hearing at which the parties argued concerning additional felonies with which McMillian had been charged and at which no additional evidence was presented (X 1952-72);
9/7/2010 & 9/14/2010	The parties submitted sentencing memoranda (VIII 1437-46, 1420-36); State argued for the two aggravators of

[4] The jury did not place a check, or any other mark, next to the felony murder option. (See V 886)

	felony probation and prior violent felony (VIII 1440-43) and against the mitigator of no significant history of prior criminal activity (VIII 1443); the defense argued against aggravators (VIII 1424-26) and for several mitigators, including no significant prior criminal history (VIII 1429);
10/1/2010	Sentencing in which Judge David Gooding sentenced McMillian to death (X 1974-81; VIII 1456-83).

Events Immediately Prior to the Murder and Leading Up to Discovery of the Victim's Body and Arrival of Police at Murder Scene.

The homicide in his case concerns the murder of 26-year-old Danielle Stubbs (XIII 492).[5] McMillian shot her twice: in the arm and in the head (See, e.g., XIV 723-28). The following are events leading up to the murder, including a prior boyfriend-girlfriend relationship between McMillian and Danielle, and, about two days prior to the murder, indicating that he and Danielle had broken up.

About April 2008, Defendant McMillian and victim Danielle Stubbs started a "relationship." (XIII 523) Danielle occasionally brought McMillian home with her. (XIII 495)[6] Janice, Danielle's mother, said

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[5] On January 12, 2009, at the time of the Medical Examiner's autopsy Ms. Stubbs was 5' 1" and 180 pounds (XIV 726).

Defendant Justin McMillian's date of birth is April 6, 1984 (I 1), making him 24 years old at the time of this January 11, 2009, murder (Compare, e.g., XIII 503, 509 with XIV 683-97). According to a February 2, 2009, Arrest and Booking Report, Defendant Justin McMillian was 6' tall and 225 pounds.

[6] On cross-examination, Janice Stubbs answered a compound question concerning how often Danielle and McMillian were together, "holding hands, hugging each other," with "Yes, they were." (XIII 524)

that she had not seen any cuts or bruises on Danielle indicative of domestic violence (XIII 525-26).

The **week of January 5, 2009**, the victim, Danielle Stubbs, moved from an apartment on Collins Road to the townhouse on Pineverde (XIII 496), that she was renting (XVI 1120-21) and where her body was eventually discovered (E.g., XIII 508-509, 540).

Danielle's mother, Janice Stubbs, testified that McMillian "didn't have one item in" the Collins Road apartment. (XIII 496) The victim's father, Harold Stubbs, testified that he helped with the move, and among the items that he moved, he had "purchased just about everything in that house." He continued, "He [McMillian] didn't have anything." (XIII 537) While she was assisting the victim move, Janice never saw a gun. (XIII 497)

Janice testified that, on **Tuesday** morning, January 6, 2009, she packed up the victim's kitchen for the victim's move. (XIII 526) Janice indicated that "[w]e started moving **between Wednesday and Thursday**." (XIII 496)

On **Thursday**, Danielle's mother, Danielle's father, Danielle's brother, her brother's friend, and one of her friends assisted her moving. (XIII 497; see also XIII 537) They rented a U-Haul for the move. (XIII 497) Later, Thursday evening, after he got off work at U.P.S. (XIII 526-27), McMillian assisted with the move (XIII 497). Thursday evening, Harold (the victim's father) assisted with the move "after [he] got off from work." (XIII 537)

On **Friday**, after a sale of two couches to Danielle's co-worker (XIII 680-81), Allen Morris (XIII 523), did not materialize, McMillian and the victim "drove the U-Haul to Danielle's apartment and he took the couches out of the apartment." Janice testified, "We drove around to the dumpster and he put them there." (XIII 498)

On Friday, McMillian, Janice, and the victim traveled in Janice's vehicle to Olive Garden for lunch. (XIII 498-99, 528) Janice testified that the victim, Danielle, "treated us for helping her move." (XIII 499) At the Olive Garden, McMillian explained to Janice that he and the victim were breaking up:

> While we were at Olive Garden he said that Danielle doesn't want me any more, and I said, well, Justin, didn't Danielle ask you to go to Georgia to see about your children and just try to get a relationship with them because he did love his kids and she wanted him to do that and they said -- he said they had broken up and that was it.

(XIII 500-501) On cross-examination, Janice reiterated and elaborated:

> A. He said that he and Danielle had a discussion and what they talked about was they were breaking up and he was going to Georgia to see about his children. There was some problems going on with his children and he wanted to go and see about them and see some family members.
>
> Q. Okay.
>
> A. And he did tell me he was quitting his job at that time.
>
> Q. Ma'am?
>
> A. He told me he was quitting his job at that time and going back to Georgia.
>
> Q. Quitting his job at U.P.S.?
>
> A. Yes.

(XIII 528) And, on re-direct examination, Janice again testified about McMillian indicating that his relationship with Danielle was over. (XIII 533)

On Friday, after eating at the Olive Garden, at about 4 or 5:00pm, McMillian and the victim traveled with Janice "back to the apartments," "they got out of" Janice's vehicle, and Janice never saw her daughter alive again. (XIII 499-500) When Janice last saw the victim on Friday afternoon, there was "still stuff to do" that was planned for Sunday and Monday concerning the move, including cleaning the Collins Road apartment, dropping off the keys to the Collins Road apartment, buying some food at the commissary for Danielle's apartment, and buying some mirrors at Kirkland's. (XIII 501-502, 503)

On **Saturday** at about 2:00-3:00pm, Janice spoke with Danielle. (XIII 502)

On **Saturday night, January 10, 2009**, Danielle went out with several co-workers (XIV 682-83). One of the co-workers was Allen Morris, who was a nurse at the naval hospital and a former corpsman in the Navy. (XIV 680-81) Danielle was a triage clerk at the hospital, and she had worked at that hospital for about two years. (XIII 522) That night, Allen and Danielle rendezvoused at Doug Pipenbright's apartment, and, at "maybe a little after 11:00 or so, 11:30-11:45[pm]," Allen drove the three of them to the clubs in his 2003 Monte Carlo. (XIV 684-85) Allen and Danielle had sexual intercourse in Allen's car. (XIV 687)

At about 2:45am on Sunday, January 11th, Allen, Doug, and Danielle left the club and went back to Doug's place, about 45-minutes away. Along the way, Allen pulled over twice so Danielle could "vomit out the car." (XIV 688; see also XIV 705-706) Danielle had a bad stomachache, and she was intoxicated, but she was able to communicate, and it was not otherwise obvious that she was drunk. (XIV 688-89) Because of Danielle's condition, Allen talked her into letting him drive her home and leaving her Nissan Altima at Doug's place. (XIV 689-91)

In his 2003 white Monte Carlo, Allen then drove Danielle to her Pineverde residence. Along the way, at Danielle's request, they swung into a McDonald's "to put something in her stomach." Allen placed the order for her and gave her the bag of food. (XIV 691-93) Allen described the last part of the route: "From McDonald's onto Collins and from there she gave me directions to her home." (XIV 693) Subsequently, the police recovered in the victim's townhouse a McDonald's receipt showing purchase 1/11/2009, at or **between 3:30am and 3:39am** (last digit of time stamp, which would show minute, not legible). (See XIV 621-22, 643, 676)

Allen testified that, at "**around 3:30ish**," he and Danielle arrived at Danielle's Pineverde residence. Danielle pointed out her residence. They stopped up the street, where Danielle could "gather herself" and eat some food. They had "general conversation." (XIV 694-5) About five minutes later, he pulled up in front of Danielle's

residence. Allen noticed a champagne-colored Cadillac parked outside her residence, backed in, facing towards the street. (XIV 695-96) Allen saw no one around the vehicle. (XIV 696) Allen identified SE 74 as the car he saw (XIV 698-99), and Janice Stubbs, the victim's mother, had identified SE 74 as McMillian's car (XIII 520).[7] Allen observed Danielle walk up the driveway and towards the front of her home, and "she waved" and Allen waved back and drove off. Allen never saw Danielle alive again. (XIV 697)

On **January 11, 2009**, a surveillance video (SE 167), date and time stamped 1/11/09 **4:04am**, shows McMillian entering a Gate Store at 5480 Collins Road and getting change for a $5.00 bill. (See also XIII 430, 457-58, 483; XIV 712-16; XX 1832) The Gate Store is located "roughly an eighth to a quarter of a mile" from the Danielle's Pineverde residence. (XVI 1125) A pay phone (904-269-8304) is located in a corner of the store's parking lot. (XIV 711-17) The victim's cell phone (904-424-3995) was recovered in her Pineverde townhouse. (XIV 621, 761-62; XVI 1123; SE 58) McMillian essentially admitted to the police that he knew the victim's cell phone number. (See XIV 783) Phone records showed that calls were made from that Gate Store to Danielle's cell phone on January 11, 2009, at **4:07:15am** (for 63 seconds) and **4:08:31am** (for 24 seconds), and from Danielle's phone to

[7] After the murder, on January 14, 2009, when the police found McMillian, McMillian exited his champagne-colored Cadillac and started a shootout with the police. (XIV 798-XV 811)

the Gate Store's pay phone at **4:09:02am** (for two seconds). (XVI 1125-26; SE 168 at V 807; see also XIV 762; SE 169 at V 819 et seq. discussed at XVI 1127)

Sunday morning, January 11, 2009, Janice Stubbs, Daneille's mother, stopped by one of Danielle's apartments, but, because Danielle was not there, Janice concluded that Danielle must be at the other apartment, so Janice decided to go to the commissary at this juncture. While at the commissary, McMillian called Janice on her cell phone and asked "where was Danielle," but the conversation was cut short because Janice's phone was disconnected due to bad reception on the naval base. (XIII 503-504) After finishing shopping at the commissary, Janice went by Danielle's Pineverde apartment, "and she still wasn't there." Janice continued: "So then I got kind of nervous, so I drove to the old apartment again to see if she was there cleaning." (XIII 504) Janice then drove back to the Pineverde apartment, and Danielle still was not there. (XIII 504) At this point, Janice looked for Danielle at the job site of one of Danielle's friends, but Danielle was not there. (XIII 504-505)

Sunday night, while Janice was at her home, McMillian called again, this time to a phone in her son's room. Janice continued:

> [H]e has never called that phone before, so I ran into my son's room and I picked the phone up and I said, Justin, why are you calling on this line? You know, what's going on? He's, oh, Ms. Janice, I'm in Georgia right now. You know, I had to come see about my children. I don't know where Danielle is. I just don't know where she is. I'll try to call around and find some people to see what's going on. I said, okay, Justin.

(XIII 505-506) McMillian also told Janice that he knew that Danielle had gone out with some friends on Saturday night and had been planning the outing since Wednesday. (XIII 506)

Concerned about Danielle, Janice called her husband, Harold Stubbs, at work to assist in looking for Danielle. (XIII 507, 538) Janice and Harold's son, Hunter, also assisted in the search for Danielle. (XIII 507-508) Janice called the police, but they "were taking a little long" to arrive, so, at about 9:00pm (XIII 539, 545), Danielle's parents (Janice and Harold) and her brother (Hunter) "jumped in the car and drove on over" to the Pineverde townhouse. (XIII 508)

When they arrived at the Pineverde townhouse, the front door was locked. (XIII 532) Janice asked Harold and Hunter to go through the back while she waited at the townhouse's front door. (XIII 508) Harold and Hunter "went straight in" through the back sliding glass door. (XIII 508, 532) Harold described what happened at this juncture:

> ... So we went to the back door and checked the sliding door and it was open and it don't have any resistance. It slides open very easy. So I said, huh. Hunter ran in, went upstairs and immediately started screaming.

Harold opened the sliding door, let Harold in, and walked one step behind him. (XIII 546)

Referring to photographs (SE 18, 23) of an interior view showing some of the vertical blinds at the back sliding door on the floor of the apartment, Harold testified that when they moved his daughter

into the townhouse, the blinds were not in that condition, and, on Sunday night, neither he nor his son knocked the blinds to the ground. (XIII 542-44) On cross-examination, Harold referenced SE 18 again and said that to enter the townhouse through the back sliding door, the blinds can be pulled aside. (XIII 547-48)[8] Harold indicated that the "[f]ront door was locked. Even the top bolt from the inside was locked." (XIII 539; see also XIII 541-42, 548-49). He indicated his wife, Janice, had indirectly told him that Danielle had given McMillian a key to the residence (XIII 548-50) He said that he let his wife in, they went upstairs, and they found their daughter's body. He continued:

> Q ... Did the police end up coming soon after?
>
> A. Yes. I immediately dialed 911 and they were in route so they were there in two or three minutes.

(XIII 539-40) Harold clarified that the back screen door that leads to the sliding door was unlocked, and so was the sliding door. (XIII 541; see SE 73) Concerning these events, Janice testified:

> ... Hunter ran up the stairs immediately and my husband opened the front door up for me, and by the time Hunter got to the foot of the stairs he just started screaming.
>
> Q. Did you end up going upstairs?

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[8] Cross-examination referenced Harold's deposition concerning the vertical blinds, but the prosecutor's objections were sustained, for example, on the ground of incompleteness. (See XIII 550-52)

On cross-examination and re-direct examination, Harold explained that he did not tell the police about the blinds because he was preoccupied about his daughter at the time. (See XIII 552-53)

A. Yes, I did.

Q. Okay. Tell us as best you can what you saw upstairs.

A. My daughter was laying there. She was looking so beautiful. Her face was so pretty. She was in a pool of blood. The blood was so thick like from her head to her toes she just drained of blood. She had no clothes on except for a little top -- little tank top, and I laid on the floor with her. I rubbed her face, her lower back close to her buttocks and I just rubbed her and rubbed her face ... .

(XIII 508-509) Hunter punched a hole in the drywall near the door of the victim's upstairs bedroom on the opposite side of the room from where Danielle's body was found. (See XIII 520, 544; SE 54).

Janice testified that the police arrived at the Pineverde townhouse "right after we got there" (XIII 531), "[w]ithin minutes" (XIII 532). Accordingly, as block-quoted above, Harold testified that "I immediately dialed 911 and they were in route so they were there in two or three minutes" (XIII 540).

Preservation of Murder Scene.

Officer Rebecca Pike testified that, pursuant to a missing person investigation, the evening of Sunday, January 11, 2009, she could not locate the victim at the victim's Collins Road apartment, and she was en route to the victim's 8378 Pineverde residence when she received a "priority call," which means that it is "urgent" and "run[ning] lights and siren to the call." (XIII 557) When she arrived at the Pineverde townhouse, the victim's family was outside of the apartment. (XIII 557-58, 594-95) Officer Pike, along with Officer Johns, "clear[ed] the residence" by ensuring that no one else was inside it and located the victim's body. (XIII 558-59) No one else

was inside. (XIII 559) Officer Pike also ensured that nothing in the residence was touched or disturbed. (See XIII 558-62) In her testimony, the officer referenced photographs of aspects of the townhouse. (XIII 559-62) The Officer recalled nothing about the disturbed blinds. (See XIII 560) Officer Pike left the residence and remained outside while other officers arrived to process the scene. (XIII 593) Subsequently in the evening of January 11, 2009, Crime Scene Detective William Whittlesey arrived at the murder scene. (XIII 597-98) He was the lead crime scene investigator. (XIII 598) He testified, "Upon my arrival the scene was secured and the residence was evacuated." (XIV 665) Detective Whittlesey testified concerning numerous aspects of the crime scene, including items discussed in the next sub-section. (See XIV 604 et seq.)

Murder-Scene-Related Evidence.

The State's argument in ISSUE I relies on, among other evidence, the following.

SE #	**DEPICTED IN EXHIBIT**
Victim's Bedroom (murder scene)	
126	Diagram showing general layout of the bedroom and, when Detective Whittlesey arrived, relative locations of live .45 bullet, a .45 shell casing in front of bed, and another .45 casing next to victim's body on the floor on the far side of the bed; also shows location of victim's cell phone; objects

	marked with numbered nearby placards; (See XIV 631-33, 641-43, 670-72) [9]
44, 46	View from hallway/stair area to inside the victim's bedroom; live .45 round of ammunition on floor slightly in front of door (SE 44); close-up of the live .45 round (SE 46); (See XIV 614-15, 641-42)
54	View of hallway from inside bedroom, with live .45 round on floor next to door; essentially focuses on same area as SE 44, except viewed from other side;[10]
47, 49	View of bloody bed and skirt at bottom of victim's bed almost touching floor; (See XIV 615, 616)
50	Shows skirt wrapping around bed towards victim's body and extending to close to floor and shows that victim's body and the shell casing next to her cannot be seen from this view next to chest-of-drawers; (See XIII 561)
51, 57, 67	Views of bloody bed showing trail of blood stains leading to side of bed next to where victim's body on floor; (See XIV 617, 620, 626)
63, 64	Spent bullet on bloody bed; (See XIV 624-25)
65, 66	Holes in sheets consistent with bullet hole; (See XIV 625-26; see also XIV 638-40, 673-75)
55, 56	Shell casing next to chest-of-drawers; also, bed skirt in SE 55; (See XIV 618-19, 642-43, 670-71)
155	Victim's body on floor, with visible bullet wound to arm and second shell casing visible in pool of blood between her right knee and right shoulder; blood spatter behind victim on wall around night light; a top on her torso; also shows bed skirt; (See XIII 509, 561-62; XIV 619, 620)
157	Closer view of blood spatter on wall around night light

[9] Some of the photos were taken with the placards, and some were taken without them (Compare, e.g., SE 48, 49, & 156 with SE 58)

[10] SE 54 also shows the hole in the wall that the victim's brother punched. (See XIII 544; see also XIV 617)

	behind victim's body; (See XIV 620)
158	Shows closer, but darker, view, than SE 155; SE 158 also shows, with throw-pillow removed, a view of victim clutching comforter; (See XIV 626-27; see also XIII 429)
70, 71, 72	Holes in comforter, with bullet pulling out some of comforter's stuffing (See XIV 627-29)
156	View looking over victim's body towards bloody bed; (See XIV 619-20)
58	Victim's cell phone next to McDonald's bag in victim's bedroom; (See XIV 621; see also XIV 761)
59	Close-up of McDonald's receipt showing purchase 1/11/2009, at or between 3:30am and 3:39am (last digit of time stamp, which would show minute, not legible); (See XIV 621-22, 643, 676)
Downstairs of Victim's Townhouse, Showing Vertical Blinds on Floor and Couch and Other items on Floor Downstairs[11]	
18, 19, 23-29	Views of two slats of blinds on floor and one on couch; view of remaining vertical blinds on wall; SE 27 and 28 show underwear and a sock under a slat of the blinds, which are separated in SE 29; (See XIII 542-44, 546-49, 550-53, 559-60; XIV 606, 607-610) The victim's sleepwear (SE 79) is also intertwined in the clothing; (Compare XIII 521-22 & XIV 634-35 with XIV 609-10)
21, 22	Iron and a sock on floor near couch and blinds; (See XIII 543; XIV 607; XVIII 1558)
Bullets, Holster, & Clothing in McMillian's Car	
74, 75, 123	McMillian's car (SE 74), which contained a box of .45 bullets in the glovebox (SE 75), a holster in between-seats compartment (SE 123[12]), and men's clothing in the trunk (See XIII 520, XIV 649-53; see also XIV 798-XV 811)

[11] Defendant McMillian testified that Danielle was a "[v]ery neat" person. (XVIII 1527; see also XVIII 1528). SE 15 et seq. show the general neatness of the townhome.

[12] The photograph is dark, so it is difficult to see the holster. (See XIV 651)

Detective Whittlesey indicated that a .45 caliber pistol is a "large handgun." (XIV 673) If an automatic gun is held upright, "most guns do eject to the right." (XIV 671)

There was additional testimony concerning the live round on the victim's bedroom floor and how the murder weapon functions. (See 615, 618-19, 970-72, 982-83, 997, 1060-61, 1069-73, 1097-98) The murder weapon (SE 9), which was subsequently recovered at another scene where Defendant McMillian engaged in a shootout with the police (See XV 860, 865, 982; SE 144, 145, 146), was introduced into evidence.[13]

As noted in the table above, SE 126, the diagram on the upstairs bedroom, shows the relative locations of placards that were placed near the two shell casings. (See XIV 631-33, 641-43) Detective Whittlesey testified that placard #15 is "that second [.45] casing that was found next to the victim's body." (XIV 632-33) Placard #15 is shown in SE 126 and is partially visible at the very bottom of SE 158. He acknowledged one of the shell casings as "near the decedent on the other side of the bed," (XIV 671) which is also depicted next to the victim in SE 155. (In SE 155, the shell casing is between the

[13] Thus, the prosecutor argued to the jury that McMillian manually ejected the live round on the victim's bedroom floor because he tried to fire at the victim a total of three times or because, in addition to firing at the victim three times, McMillian pulled the slide back not realizing that there was already a round in the chamber. (XIX 1732)

victim's right knee and her right shoulder.[14]) Referring to placard #15, the Detective also testified: "This is the casing that was found on the ground next to the victim." (XIV 641-42) Detective Whittlesey acknowledged that the second .45 casing was "in the blood." (XIV 627)

Detective Whittlesey testified that shell casings can be kicked (XIV 671-72); however, as listed in the table above, photographs SE 47, 49, 50, 55, and 155 are among those that show a skirt wrapping around the bed and extending close to the floor.

Whittlesey noticed no powder burns on the comforter and the sheets at the murder scene and noted no stippling on the victim. (XIV 673-75) He said he was not an expert on stippling. (XIV 678)

In addition to the victim's father testifying that neither he nor the victim's brother tore down the blinds when they entered the townhouse through the back sliding glass door (See XIII 542-44), he also said they did not knock-to-the-ground the iron located on the floor of the townhouse (XIII 543). When asked "do you recall yourself messing up any blinds?," Officer Pike, responded, "I don't recall" (XIII 560); she also testified that when she cleared the townhouse, she took care not to touch or disturb anything (XIII 559).

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[14] SE 158's photograph must be zoomed in order to see the shell casing.

Danielle's mother indicated that, for sleepwear, Danielle "usually wore socks, little shorts, underwear. We never slept ... braless or underless (sic), and we always have socks on our feet." (XIII 521)

Autopsy.

Dr. Giles, the medical examiner, testified that, on January 12, 2009, he conducted an autopsy on the victim. (XIV 723-24) Dr. Giles indicated that the victim sustained two gunshot wounds: one through her right arm and one into her head. (XIV 726) The victim was alive when she was shot in the arm; she was also alive when she was shot in the head. (XIV 747-48) He saw no stippling or other evidence of "close range of fire or contact range of fire." (XIV 733) The gunshot wound to the victim's arm was "in and out" (XIV 727), entering the outside of her arm and exiting the inside (XIV 727-28). Unless there had been complications due to, for example, an infection, this wound would not have been fatal. (XIV 728-29) When he cut open the arm, he found next to the bone "some pieces of yellow fuzzy material" with pieces of lead attached to it. (XIV 736-37, 746) The gunshot wound to the head was fatal. (XIV 723, 732) The gunshot wound to the head would have rendered the victim unconscious "almost immediately," and she would have died within a "small number of minutes at the most." (XIV 748)

The doctor described the bullet as entering at the top where the skull curves. (XIV 731) He continued:

> It broke the top called the cap or skullcap of the skull and it broke the base or the bottom of the skull on both sides,

especially the bones on the top of the eyes and then the very top and then it tore through the brain just a little bit on the top right side but more on the left side because it's going downward and it caused bleeding.

(XIV 731-32) The medical examiner acknowledged that the track, from the victim's perspective, went from right to left, slightly downward, and slightly backward, or, in his words, "the left and the down and the back." (XIV 734) Parts of the bullet were recovered inside her head. (XIV 735)

"Just based on the autopsy," Dr. Giles indicated that either wound could have been inflicted first. (XIV 747-48) The doctor responded to a follow-up question:

Q. And assuming, sir, for this question that her body was found on the side of the bed but there was evidence that indicated that she had been shot while on the bed in terms of -- in the arm, would your evidence, your autopsy be consistent with her having been shot in the arm, have moved off the bed, got close to the ground and then shot also in the head?

A. That's one way it could happen.

(XIV 747-48)

Testifying on cross-examination Dr. Giles was unwilling, **based on his autopsy**, to specify the order or precise timing of the two gunshot wounds; instead, he would not rule out possibilities. He testified:

Q. Dr. Giles, can -- we know that Ms. Stubbs suffered from two gunshot wounds. Can you tell the sequence of the shots, which shot came first, which shot came second?

A. Based only on the autopsy, no.

Q. Okay. Do you think they may have been simultaneous or very much around the same time,[15] round one and round two?

A. Yes, sir.

Q. Might be a difficult question, but can you tell with any degree of certainty where the shooting started in this incident and where it finished?

A. You're talking about the death scene now?

Q. The death scene, yes, sir.

A. I have not been there. I've seen pictures. Some people have explained it to me but I haven't really tried to formulate much more than that. There are a few general questions that Mr. de la Rionda asked before.

(XIV 749-50)

Dr. Giles also referenced "a few other minor injuries, blunt force injuries." He said there were bruises on the "left side of her forehead ... and the upper back." The bruises were "pretty fresh, ... very close to the time of death." It was possible that the injuries occurred from a fall from the bed to the floor "[i]f that happened." (XIV 752-53) When asked whether "freaky, wild sex in the back of an automobile ... could have caused" the bruises, the doctor responded that it was also "possible." (XIV 753) On redirect-examination, the doctor indicated that it was also possible that the blunt force trauma to the victim's forehead and back could have occurred as a result of a struggle close to the time of the victim's death. (XIV 753-54)

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[15] In contrast with the doctor's testimony, McMillian states (IB 8) that "the shots were probably simultaneous or around the same time. 14:750."

Dr. Giles saw no vaginal injuries (XIV 747), and he obtained vaginal, anal, and oral swabs from the victim. (XIV 742-43, 745) Dr. Giles obtained a hair from the victim's right hand and some hair "from the left hand around the small finger and the index fingertip." (XIV 743-44; SE 102; see also XIV 739) He also obtained fingernail clippings from the victim. (XIV 738-41, SE 91-93)

Defendant McMillian's Shootout with Police.

The lead Homicide Detective for this murder was Brian Wolcott. (XIV 757-58) On Monday, January 12, 2009, the Detective talked with Defendant McMillian. (XIV 763-91) McMillian agreed that he would come to the police station to discuss the murder. (XIV 785-91) When McMillian did not show-up for the meeting, the Detective enlisted the assistance of a task force. (XIV 791; see also XV 849-53) Task Force members were staking out a house where they located McMillian's Cadillac. (XV 914-16) At about the time the police confirmed that McMillian was inside the house, McMillian exited it with two other males and got into McMillian's Cadillac, with McMillian driving. Task Force members followed McMillian's car. (XIV 799-800; XV 806, 852-55, 915-18; see also XV 862) Some task force members were in marked police cars (XIV 797-98; XV 940-41), and some were in unmarked vehicles with police-type lights inside (XIV 851-52, 899-901, 917-18, 920, 930, 942).

Subsequently, Officer K. W. Bowen, a uniformed police officer (XIV 797, 820-21; SE 133) in a marked Jacksonville police car (XIV 797-98;

XV 806 820; e.g., SE 132) was positioned immediately behind McMillian's car. Officer Bowen activated his blue lights and air horn a few times. (XV 805) No one in the car responded, and the Cadillac maintained the same speed. (XV 806-807) After McMillian turned right onto Fireside Drive, McMillian abruptly stopped the car, and Officer Bowen stopped behind McMillian's car. Both passenger doors of the Cadillac popped open. All three occupants of the Cadillac exited. (XV 807-809, 853-54, 901-902) Two males exited the passenger side of McMillian's Cadillac, they were not armed, and "[t]hey immediately went to ground." (XV 902; see 807-808) While the two passengers exited and "went to ground," Defendant McMillian "exited the driver's side ... [and] began firing" at the police. (XV 902)

Officer Bowen testified that when he stopped his police car, he opened his door and followed the police dog out of his police car; the dog was on a leash. (XV 807-809) Officer Bowen continued: "I'm actually behind my door using my door as cover in case there's gunfire." (XV 809) Officer Bowen saw the two passengers "going to ground as if they're surrendering," but he saw that they were not McMillian and then heard gunfire and "saw Mr. McMillian shooting at" him. (XV 809-810) After McMillian started shooting at Officer Bowen, Officer Bowen decided to "deploy" the dog, but the dog was "facing the wrong way" and followed Bowen to the back of his police car and grabbed another officer, Calhoun, instead of McMillian. (XV 811-13, 902-903) At the time that the dog engaged him and knocked him to the

ground, Officer Calhoun was located at the rear quarter panel of Bowen's police vehicle. (XV 902, 908, 910)

McMillian was shooting and "continuously walking" and then, after he was shot a couple of times, McMillian started running. This was all "really quick." (XV 875) McMillian ran "in a zigzag pattern," initially pointing the gun over his shoulder, and then ran between some houses, where he was found on the ground. (XV 813-15, 857-60, 866)

Officer Bowen was not hit by any gunfire. (XV 813) Detective Calhoun indicated that no officer had been "hit." (XV 903) There were two bullet holes in Officer Bowen's marked police car: one in the left headlight and one in the driver's door in a logo of the Jacksonville Sheriff's office. (XV 814, 834, 966-68, 999-1000; SE 138, 139, 140, 141) The hole in the car door was not "clean" so a dowel could not be used to determine the angle in which the gunshot entered the door. (XV 996)

Rescue was called for McMillian, who was wounded in several places. (XV 859-60, 874-75) He was subsequently taken to Shands Hospital. (XV 935, 938).

McMillian's .45 semi-automatic Desert Eagle (SE 9) was recovered at the shootout scene. (XV 860, 865, 982; SE 144) There was a round in the chamber of McMillian's .45 (XV 971, 977) and seven live rounds in the gun's magazine (XV 971), totaling eight rounds (XV 977-78). The hammer of McMillian's gun was in the cocked, ready-to-fire,

position when it was found on the ground. (SE 145; XV 865; see also XV 971-72) A .45 shell casing (SE 8) was recovered in the grass. (XV 972-73, 980; SE 148, 149) A projectile (SE 11) was recovered inside of Officer Bowen's door. (XV 981) And another projectile (SE 10) was found underneath Officer Bowen's car. (XV 980, 981)

Like at the murder scene in the victim's bedroom, a live .45 round of ammunition was also found on the ground at the shootout scene (XV 968-69, 979-80; SE 142, 143).

Additional Forensics.

Laura Draga, an expert in **firearms examination and identification** (XVI 1057-58), testified that McMillian's gun recovered at the shootout scene fired the two cartridge casings recovered at the murder scene.[16] (Compare XVI 1063-66 with XVI 1074; see also XVI 1976-77) McMillian's gun also fired the cartridge casing and two projectiles recovered from the shootout scene and inside the police car door. (Compare XVI 1068-69 with XVI 1074-75) Ms. Draga also testified that all the cartridges and casings "had a Winchester head stamp" (XVI 1088) were .45 caliber (See XVI 1063-69, 1073-75), she noted no indication that McMillian's gun malfunctioned (XVI 1097-1098), and the trigger pulls on the gun of 13 pounds for double-

[16] She also testified that a projectile pertaining to the murder was a match. (Compare XVI 1066 with XVI 1075; see also XVI 1099-1100)

action and 4¾ pounds for single-action were within the normal range (XVI 1097).

As mentioned supra, Dr. Giles, the Medical Examiner, obtained hair from the victim's hands and fingernail clippings and swabs from the victim's body. The **hairs** were not "suitable for DNA analysis." (XVI 1012) However, Kristin Schaad, a DNA analyst (XVI 1020-21), testified that the **fingernail clippings** (SE 92 & 93) had noticeable "red brown staining" and tested presumptively positive for blood. (XVI 1033-34) The clippings had more red brown staining on the inside than their outside. (XVI 1034) The DNA profile from the underside of those clippings "matched the DNA profile from Mr. McCmillian" as the major donor. (XVI 1034-35) Ms. Schaad was unable to determine any other donors (XVI 1035-36), and on redirect-examination testified:

> The DNA profiles from the foreign contributor from the fingernails matches the DNA profile from Mr. McMillian.

(XVI 1050)[17]

On cross-examination, she acknowledged that "passionate lovemaking on occasions" and grabbing each other making sex" would be sufficient to obtain the DNA result, but she continued:

> I can't speak to the situation, but my opinion on this actual profile from the fingernail clippings is that it most likely came from either blood or tissue.

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[17] Thus, any suggestion that this testimony supports the existence of "other foreign donors" (See IB 9) would be incorrect.

(XVI 1046) She also indicated that "it would probably take a good amount of tissue or blood to have a lot of results under the nail most likely." (XVI 1046-47) On re-direct examination, she indicated that the amount of tissue or blood under the victim's fingernails would be from more than a "light scraping of the skin" and would be from a "more forceful scrape." (XVI 1050)

Vaginal and anal swabs from the victim tested positive for semen. (XVI 1008-1009) Ms. Schaad testified that the vaginal swabs (SE 95, XVI 1029) contained a mixture, meaning "that there is DNA from more than one individual there." (XVI 1029) McMillian was the "major donor" (XVI 1029, 1044, 1052), with McMillian's DNA profile matching the DNA in the vaginal swabs at odds of 1 in 1.4 quadrillion African Americans (XVI 1029-31, 1044, 1050-51) There was also a minor contributor to the vaginal swab DNA, but there was too little to determine a DNA profile. (XVI 1031) Ms. Schaad testified that the DNA from the anal-rectal swabs (SE 96, XVI 1031) matched McMillian's DNA, and there was insufficient information to exclude or include Allen Morris. (XVI 1031-32, 1045, 1049, 1051)

Defendant McMillian's Post-Murder Statements.

The State's case-in-chief[18] included evidence that McMillian made five statements about this case: **(1,2)** On Sunday, January 11, 2009,

[18] As discussed infra, McMillian also testified (at XVIII 1399 et seq.), which resulted in the rebuttal introduction of a video of

two statements to the victim's mother indicating that he did not know Danielle's whereabouts and that Danielle had gone out with some friends Saturday night (See XIII 503-504, 506); **(3)** on Monday 11;10am, January 12, 2009, a call to the police communications center indicating that he heard that the victim is dead and he has been in Georgia since "3:00 o'clock yesterday morning" and "came straight here from the club" (XIV 763-68); **(4)** on Monday 12:20pm, January 12, 2009, to Detective Wolcott indicating that he was "trying to figure out what the hell is going on" (XIV 771) and has "nothing to hide" (XIV 786), that at about 2am Sunday, he left Jacksonville and "went straight to Georgia" (XIV 784-85), that he and the victim "have not gotten into one altercation" (XIV 777; see XIV 786; but see XIV 782), and that he would meet with the Detective in a couple of hours (XIV 787-91), but the Defendant failed to show up (XIV 791); and, after being seriously wounded while engaging in a shootout with police, **(5)** on January 29, 2009, to Detectives Wolcott and McClain, initially indicating that he left Jacksonville before the victim was killed (See III 553-54), then, after confronted with evidence identifying his gun as the murder weapon (III 559-60), admitting shooting the

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McMillian's January 4, 2010, statement to police, which was videotaped "door to door" (XIX 1634 et seq.). Also, when called as his witness, McMillian's father testified that the Defendant told him that he was not involved in this murder and that he was in Georgia (XVII 1306-1307).

victim in bed while she slept, then, after she rolled out of bed, shooting the victim again (III 572-73, 576).

On January 29, 2009, when questioned about the surveillance video showing him at the Gate store, he said that was "[w]ay way before" "it happened" and he was buying with cash a "cell phone charger and a $10.00 phone card." (III 574-75; see also XVI 1185-87) When asked what the police should tell Danielle's mom and dad, McMillian responded: "I apologize. I made the wrong decision. Yes I did. I wanted to take my own life but I couldn't. I planned on it." (III 577; see also XIV 1189)

The Trial Defense.

After the State rested its case-in-chief (XVII 1229), the defense called a number of witnesses in the guilt phase.

Antonio "Gregory" Smith, the Defendant's cousin (XVIII 1250-51), testified about January 14, 2009, when he and Mr. Mosley got into the Defendant's Cadillac and left the residence (XVII 1242-43) to go to a store (XVII 1243-48). "As far as [he] recalled," they had music on in the car. (XVII 1247) McMillion was driving, took a right onto Fireside, and stopped the car, and, without any prompting by anyone, all three occupants exited. Until then, Antonio said that he had not seen or heard any police car. (XVII 1247-49, 1254) Antonio said he heard shots and went to the ground. (XVII 1249, 1254)

Betty Smith, the Defendant's aunt testified about McMillian spending the night at her house January 13th on the floor in the

living room. (XVII 1259-61) He slept over there periodically, about once a week, and most of those times, he slept in the living room. (XVII 1269-70)

Edwin McMillian, Defendant's father (XVII 1274), testified that the Defendant graduated from high school. (XVII 1274-75) The father has never seen the Defendant with a firearm. (XVII 1289-90) The father had never taken any of his sons shooting. (XVII 1293) The Defendant knows the difference between right and wrong, and the father taught the Defendant to tell the truth. (XVII 1291) The father testified on cross that, when he asked the Defendant if he was involved in the murder, "at that time he told me he wasn't." "He told me he didn't do it." Initially, the father denied that the Defendant said he was in Georgia during the murder, then testified, "He told me he was in Georgia ..." (XVII 1306-1307)

From June 2008 through January 2009, the Defendant was not living with the father (XVII 1293), but he would spend the night at the father's residence about once or twice a week (XVII 1295).

After the Defendant was shot in his shootout with police, the father said that he went to see the Defendant in Shands hospital, but he was not allowed to see him. (XVII 1287-88) He said, "We went back two days straight to try and speak to anyone that would allow us to see Justin. We were denied entry. We were denied access." He went to the Chaplain's office and then went to his son's room and saw his son for "maybe ten minutes." The Defendant was chained to the bed,

"incoherent as to basic motor skills, and "had a ventilation tube in his mouth" (XVII 1289) so the Defendant communicated by blinking his eyes" (XVII 1308). The father assumed that the Defendant could tell who he was. (XVII 1308) He did not see his son again until February at the jail. (XVII 1288)

Ashley Walker, Defendant McMillian's sister and Edwin McKinnon's daughter (XVII 1309-10), testified that the Defendant periodically spent the night at their dad's house. (XVII 1321) She testified about McMillian dating Danielle Stubbs (XVII 1312) and spending some time at the victim's family's house. (XVII 1312) She had never seen any abusive behavior by the Defendant towards the victim. (XVII 1312) She testified about being with Defendant McMillian on Saturday night, January 10, until January 11th at about 2:45am or 3:00am, when the Defendant left, saying he had plans. (XVII 1317-18) He was talking about going up to Georgia, but she was not sure if he intended to move up there. (XVII 1321-22) When the defendant left, he seemed all right to drive and he was not slurring his words. (XVII 1318) "Blanding or Collins" is about six or seven minutes away from the father's house, where they had been talking. (XVII 1318)

Cameron McKinnon, the Defendant's younger brother, testified that, on January 10, 2009, he dropped his sister off at the club, and, sometime between 1am and 3am the next morning, he chatted with the Defendant and their sister outside their father's house. The Defendant "was calm as ever. He was usual Justin." (XVII 1326) He and

his sister went inside, and he could not recall if the Defendant left then. (XVII 1327)

Defendant McMillian testified at length in the guilt phase. (See XVIII 1399-XIX 1597) The Defendant said he graduated from high school 176 of 196 in his class. (XVIII 1401) He tried to get into the Navy but failed the aptitude test. (XVIII 1401) When he received his IQ score, it was 76. In June 2006, KBR (Halliburton) hired him as a civilian employee. He took numerous tests to get the position. He went through extensive training and went to Afghanistan then Iraq. He lived under combat conditions, received incoming fire, but he did not shoot back. (XVIII 1404-1405) He testified about being able to "opt to stay the six to eight months" or leave the assignment early. (XVIII 1405) He made good money on the job, and his last contract was for $196,000. (XVIII 1406) He said, in January 2009, he still had $9,000 in the bank. (XVIII 1413) He still had a valid passport and a security clearance. (XVIII 1414) He testified that he planned to go back overseas when there was an opening. (XVIII 1406) In late December 2008, his previous supervisor indicated a possibility of returning overseas "around the February time frame." (XVIII 1417)

He was planning on going back to Georgia (XVIII 1411-12, 1524) and then spending some time with his brother in Virginia before he left the country (XVIII 1417). He planned to go back to Iraq to make some money. (XVIII 1552)

The Defendant testified about his relationship with Danielle. and sleeping with her. (XVIII 1407-1410) The Defendant was still married during this time, and he had five-to-ten female friends. (XVIII 1550-51)

He said that early in their relationship, Danielle became pregnant, and he was "excited about having another child" and he intended to support Danielle and their child even while he was overseas. (XVIII 1419) He said that they agreed that she would have the child. (XVIII 1454) He said they discussed marriage but that he needed to get divorced first. (XVIII 1420)

The Defendant said that, on Wednesday or Thursday, January 7 or 8, 2009, he and Danielle started moving to a townhouse at 8378 Pineverde Lane. (XVIII 1412-13) He recalled going out to lunch with Danielle, her mother, and Mrs. Stubbs' niece. (XVIII 1416) He denied that there was any breakup (XVIII 1524), contrary to the victim's mother's testimony about their conversation at Olive Garden. He said that he put his clothes in the trunk of his car on January 10 (XVIII 1418) and that he did not keep it a secret from Danielle that he intended to return to Georgia and overseas (XVIII 1418). He said he was "packing to go to Georgia, not move." (XVIII 1549)

According to the Defendant, on Saturday, January 10, 2009, in the evening he was exhausted, but Danielle wanted to go out, so he declined to go (XVIII 1422), but they had sex on the couch (XVIII 1423-24). Danielle left, and he said he got a second wind and met

some others at Sharky's club. (XVIII 1424-27) At about 2:30 or 3:00 am, he left Sharky's and went to his parents' house, where he talked with his brother and sister. (XVIII 1427-29)

Defendant testified that, instead of leaving for Georgia, he then went back to Pineverde because he "had some items over there" that he "needed to take ... to Georgia." (XVIII 1429) He said the items were his gun, his cell phone, and two or three pairs of pants. (XVIII 1553) He said he went inside, fixed a drink, then went back outside, sat in his car, and smoked. (XVIII 1430-32) A little after 3am, while the Defendant was still smoking in his car, the victim returned to the Pineverde townhouse in a white Monte Carlo (XVIII 1434), which let her out and left and she waved at the driver (XVIII 1436, 1437). She walked by the Defendant's car, about two feet from her, but did not see him because his windows are tinted. (XVIII 1436, 1437) His testimony continued:

> A. I opened the [car] door and I said, I mean, hey, you, like speaking to her. And she turned around and acknowledged me. And she was like: Why you sitting in the car. And I said? I was smoking. She was like: Okay. You coming in? And I'm like: Yeah.

The both then went inside, according to McMillian. (XVIII 1438)

He said he did not force himself on Danielle and there was no physical struggle. (XVIII 1441) Two days after the murder, there were no marks on his body from the sex that he could see. (XVIII 1485) He denied that heir sex was "wild." (XVIII 1558) On cross, he said he did not know how Danielle got his DNA under her fingernails. (XVIII 1559) On cross, the Defendant also said that he had vaginal sex with

Danielle both times that day, not anal sex. He did not know how his DNA got into her anus. (XVIII 1555)

He said she took off her underwear. (XVIII 1442-43) He said she went upstairs without any clothes on. (XVIII 1442) He said that the victim slept nude every night. (XVIII 1526) [SE 155 shows the victim's body on the floor with clothing on her upper torso.] He indicated that Danielle was "[v]ery neat" and tidy and said that that her leaving her underwear downstairs did not make her "un-neat." (XVIII 1527)

He said that he and Danielle talked about his plans to return to Georgia and Iraq "earlier in the evening, and it came up again later on that night." (XVIII 1441-42) Danielle got "upset." (XVIII 1442) Danielle told him that she slept with her co-worker Allen Morris that night. (XVIII 1444) He said that this "upset" him but it did not make him "angry." (XVIII 1444-45) He did not get into any type of "rage." (XVIII 1445) He said he told her sleeping with a fellow employee was disrespectful to a lot of people. (XVIII 1445)

When he went upstairs, they both laid down and did not go to sleep. (XVIII 1446; XIX 1568-69) They never turned on the lights in the bedroom, according to the Defendant. (XVIII 1446) Sometime after they laid down, he said he got up to get ready to leave for Georgia and used the bathroom. (XVIII 1446) He said he turned the light on in the bathroom to get dressed. (XVIII 1447) As he was getting dressed

in the bathroom, she was awake, and he told her that he was getting ready to leave. (XVIII 1447)

The Defendant continued:

> Q. What did Danielle say when you told her -- when you were exiting the bedroom?
>
> A. The statement that was made was: I knew you were going to leave anyway so I killed your child. . . . .
>
> Q. When she told you that she had killed the baby and she had an abortion, how did you react to that?
>
> A. At that current time, that's when I made the biggest mistake of my life, not intentionally, but I did fire in the direction that she was at.
>
> Q. What did you do -- how many times did you fire that gun?
>
> A. I fired twice.
>
> Q. Twice?
>
> A. Yes, sir.
>
> Q. Was the room dark?
>
> A. Everything was dark.
>
> Q. Everything was dark?
>
> A. Yes, sir.
>
> Q. The whole upstairs was dark?
>
> A. Yes, sir.
>
> Q. And after you shot twice into the dark room, what did you do?
>
> A. I left.

(XVIII 1453-55; see also XVIII 1459, 1512) He acknowledged that the first time he has "told anybody about the abortion was today, [to] this jury." (XVIII 1515) On cross, the Defendant testified as follows:

Q. ... You get up. You retrieve your gun from the dresser, you said?

A. Yes, sir.

Q. In the dark, right?

A. Yes, sir.

Q. And you hadn't placed that gun there, right?

A. I had moved it there.

Q. Oh, you had moved it there? When had you moved it there? ...

A. Earlier that day.

Q. Earlier that day. So you went earlier and you got the gun, even though you knew you were leaving, and you just moved it up by the dresser instead of taking it out into the trunk of your car, in your car where the rest of the clothes were, right?

A. Yes, sir. . . . .

Q. Okay. So you put it there and then all of a sudden, in the dark, you went and grabbed this gun, right?

A. As I was leaving, yes, sir.

Q. As you were leaving. So you're walking out the door.

A. Yes, sir.

Q. And then she said something and you turned around, right?

A. Yes, sir.

Q. And then you shot.

A. Yes, sir.

Q. Okay. And where did you shoot?

A. In the dark.

Q. And tell us -- pretend that's the bed over there. Where did you shoot? You're at the front door. Where did you shoot? Just point in that area where you shot.

A. Toward the bed.

Q. Towards the bed?

A. Yes, sir.

Q. So you pointed where she was. You shot where she was.

A. Yes, sir.

Q. Okay. And isn't it true, sir, that she then actually rolled off the bed for protection, took the comforter with her, and you came around and pointed the gun right at her head and shot her again?

A. No, sir.

Q. Well, how did she get shot in the head.

A. (No response.)

Q. You want a little more time to think about it?

A. You want me to tell how you she got shot in the head?

Q. Yeah.

A. I don't know.

Q. You are well aware, sir, are you not, that the shots to the head occurred in the bedroom, right? You would agree with that, right?

A. Yes, sir.

Q. And you would agree that the shot to the head did not occur while she was laying in the bed.

A. I couldn't tell you, sir. The lights was off and I shot in the dark.

(XVIII 1559-XIX 1567) On redirect examination, when the Defendant was asked whether the police asked "what triggered you at that moment when you shot Danielle Stubbs?", the Defendant did not respond, then, after the Judge asked him if he could provide an answer, the Defendant said, "no." (XIX 1590-91) Then, when asked a leading question, "no one ever mentions anything about an abortion, is that right," he responded, "No, sir." (XIX 1591) When asked whether he had the gun in his hand when the victim "blurted out abortion," he said, No, sir. It was in my waistline." (XVIII 1516-17) He acknowledged

that he was "upset but not angry at Danielle" the morning of the murder. He said that "[u]pset is emotional. Anger is a strong emotion." (XVIII 1516) He said that he was not thinking clearly and he was confused "[a]bout everything that was going on." (XVII 1525-26)

He denied moving after the first shot. (XIX 1581; 1594) He denied that he went around the bed and shot Danielle. (XIX 1569) He denied that the shot to the head was intentional. (XIX 1576) He denied thinking "for a while" before he shot Danielle. (XVIII 1497) In response to leading questions, the Defendant said that he cared for Danielle, that it happened and then he panicked. (XVIII 1494-95)

He could not "explain" how the live bullet got on the floor of the victim's bedroom. (XIX 1582)

Defendant McMillian testified that he never entered the townhouse through the back sliding door. (XVIII 1434, 1450-51; see also XIX 1575) He said that the entire time he was at the Pineverde "those days" as well as when he went back inside the night he shot the victim, "the blinds were intact." (XVIII 1433)

He said that after the shooting in the bedroom, he "drove down the street to a Gate gas station." (XVIII 1459) He said that he did not want to go back to the house because he thought that he "might have hit her." (XIX 1572) At the Gate station, he got change to make a phone call, as the surveillance video shows. He called Danielle from there "hoping that she would answer," but she did not answer, and he

left the State of Florida. (XVIII 1459-60, 1495; see XVIII 1528-29) On cross, he said that he did not even anonymously call for rescue or the police because he "panicked" and "wasn't thinking," although he admitted that he was "thinking enough to go to the phone and get some change and call her." (XIX 1574)

The Defendant also testified about his shootout with the police. While driving, the Defendant noticed an unmarked, "regular" black or gray Explorer SUV behind him. (XVIII 1469) The black Explorer was "like" one that some people used who tried to rob him on the northside (XVIII 1479), but he did not report the attempted robbery to the police (XVIII 1506). The Defendant made a right turn on to Fireside and, according to the Defendant, stopped to get his cell phone in the trunk of the car to "call Quan and let him know" that he was "at the entrance." (XVIII 1470, 1478, 1520) The Defendant said he "never" saw a "marked vehicle." (XVIII 1479) At this point, he testified: "When I got out of my car to go to the trunk of my car, I noticed a dog coming at me. And, again, I overreacted, shot at the dog. ... It was a big black dog." (XVIII 1479-80) On cross, he denied trying to hit the dog (XVIII 1506) and said he was not "aiming to shoot -- to kill the dog." (XVIII 1519)

The Defendant testified, "I'm not a resistant person." (XVIII 1483) On cross, he said that if the police had approached him, he would have complied, but then he admitted that in Georgia he fled from, and eluded, the police, who were chasing him with lights on.

(XVIII 1509-1510) He said he eluded the police in Georgia because he had narcotics and an illegal firearm and then, after getting rid of the "possessions," turned himself in, and he admitted that, in this case, he "knew, even under [his] theory, [he] had killed somebody ...." (XVIII 1510)

He said that his .45 Desert Eagle gun was originally in a Reebock shoe box and located on the dresser, and he moved it from there moved it to, referring to SE 52's photograph, "beside the TV, on the stand-up dresser," on the side away from the bathroom. (XIX 1596-97) He said that he doesn't keep the gun in the holster because it would make the gun "very visible,' and because he is not license to carry it, he has to keep it "conceal[ed]." (XVIII 1522)

On cross-examination, the Defendant admitted that he did not tell his father what he had done; admitted that he did not tell Danielle's mother what he did; admitted that, when he called the police the first time, he did not tell the police what he had done; and, admitted that on January 12th he lied to Detective Wolcott too. (XIX 1570-72)

The Defendant testified that, in the hospital, on January 29, 2009, he told the police what he "could remember that happened." (XIX 1572) When asked if he lied to the police at the hospital when he said that the gun had been at the residence for two weeks, he said that "[t]iming was bad," he had "just" come out of a coma, and he "didn't remember a lot of stuff." (XIX 1574) At some point, he said,

"they had me on morphine." (XVIII 1487) However, on cross, he claimed to know details of what he told the police at the hospital and what he did not tell the police at that time:

> Q. And in the hospital, did you say anything about the abortion?
>
> A. There's a lot of things that I didn't say at the hospital that I said today.

(XVIII 1514)

The Defendant said that on January 4, 2010, he lied about everything. (XIX 1570) Later on cross, he said he does not remember exactly what he told the police on January 4. (XIX 1579-80)

State's Rebuttal.

In rebuttal, the State called **Detective Rudy McClain**. (See XIX 1607 et seq.) The State introduced and played, as impeachment, a January 14, 2009, audio recording of the police interview of Antonio Smith. (XIX 1609-20)

Detective Bryan Wolcott was recalled as the final witness of the guilt-phase. A receipt from the victim's purse was discussed; it was for a "therapeutic abortion." Also found in the victim's purse was paper with phone numbers to the "Rape Crisis Center." (XIX 1633-34) The Detective also testified concerning Defendant McMillian's January 4, 2010, statement to the police. (XIX 1634 et seq.) As a result of his request to speak with the police, the Defendant was transported to the homicide office and videotaped "door-to-door." (XIX 1637) The videotape (SE 177) was played for the jury, and a drawing that the Defendant and Detective drew (SE 178) was also introduced. (XIX 1639

et seq.)[19] He said he came back to get his gun. (XIX 1656) When he arrived at the Pineverde townhouse at about 3:30am, he saw a light on "upstairs" and he knew he had not left a light on and did not see her car there, so he went upstairs; he saw her slumped over and dead by the window with his "pistol laying on the bed." (XIX 1650-51, 1664-65) He said he did not know who shot Danielle. (XIX 1675) He was inside three-to-five minutes. (XIX 1667) He said he went to Georgia. (XIX 1668) The Defendant said that his relationship with Danielle was "good" (XIX 1659) and they did not have any issues (XIX 1662). He loved her, and he wanted to marry her. (XIX 1680-81)

He said he did not recall the police interviewing him in the hospital, but, "I was good." (XIX 1674) later, he said he recalled seeing the officer in the hospital. (XIX 1686)

Penalty Phase & Sentencing.

In the jury penalty phase (XXII 2042-XXIII 2346), the state called Marcus Williams (XXII 2045-55) and Andrew Durrance (XXII 2056-68). The defense called Dr. Krop (XXII 2108-55); the Defendant's father, Edwin McKinnon (XXII 2160-95); his life-long friend, Durrell Grant (XXII 2195-2200); his sister, Ashley Walker (XXII 2201-XXIII 2215); his younger brother, Cameron McKinnon (XXIII 2215-2220); his wife, Sheneka McMillian (XXIII 2220-2233); and, the Defendant's step-mother, Lavonia McKinnion (XXIII 2233-44). In a colloquy with the

[19] A transcript of this interview can also be found at V 834-69.

trial court, McMillian indicated that he will not testify in the jury penalty phase. (XXIII 2245-48)

Marcus Williams (XXII 2045-55) testified. On June 9, 2005, when he was a police officer for the City of Glennville, at 7:58pm (XXII 2048) he conducted a traffic stop of the Defendant because he knew that the Defendant had a suspended driver's license and the driver, Defendant McMillian, and several passengers in his car did not have their safety belts on. (XXII 2046-47) The officer was in a marked police car, activated his lights and siren and rolled down his window and verbally instructed McMillian to pull over. (XXII 2047-48, 2051-52) Instead of pulling over, McMillian "made several turns and failed to stop." (XXII 2047-48) McMillian increased speed up to over 120 miles per hour. He fled through residential streets where there were children playing. (XXII 2048-49) There were a lot of children in the area, including one that McMillian nearly struck. (XXII 2050) He ran four or five stop signs. (XXII 2049) An hour or two later, McMillian showed up at the police station. (XXII 2051) McMillian said his cousin was driving his car, and he wanted to file a stolen-car report. (XXII 2051-52, 2055) When the officer told McMillian that he would be charged with giving a false report of a crime, McMillian recanted, confessed, and said, "I had you, man. I had you. I left you about a half mile back." (XXII 2052) He said he saw the kids in the area playing but that they were in a ditch and that he was traveling at about 80 mph. (XXII 2053) He was arrested and cited for felony

fleeing and attempting to elude due the speed, reckless driving, driving on a suspended license, and a safety belt violation. (XXII 2053) The officer could not recall the disposition of the case. (XXII 2054)

The State also called **Andrew Durrance** (XXII 2056-68), who testified that on January 3, 2008, as a first offender (XXII 2063), Justin McMillian was placed on five years felony probation for attempting to elude a law enforcement officer and misdemeanor probation for other offenses. Adjudication of guilt was withheld. (XXII 2059-60, 2064) First offender probation meant that McMillian had not previously been convicted of a felony offense. (XXII 2066-67)

Dr. Krop (XXII 2108-55), forensic psychologist, was called as a defense witness. He reviewed records and reports and tested and interviewed McMillian. (XXII 2114-20) He had not read McMillian's trial testimony. (XXII 2150) In a **January 27, 2010, interview** with McMillian, the Defendant denied committing this murder (XXII 2130) and said he saw her light on, went inside, and discovered her on the floor already dead, with his gun on her bed. (XXII 2133) In a **March 10, 2010, interview**, the Defendant admitted killing Danielle. (XXII 2136, 2138-39) McMillian said he had a lot to drink, that he did not go to her house to hurt her, that he went to her place to get his gun. (XXII 2142-43) He got his gun and smoked marijuana and drank some more inside his car. (XXII 2143-44) He already had the gun in his waist when the victim arrived. She asked him why he is in the

car, and he responded that she did not want him smoking weed in her house. (XXII 2144-45) He argued with her about his leaving. (XXII 2145) She grabbed his keys and went upstairs, and she called him on his cell and asked him to come upstairs. (XXII 2146) He went upstairs, and she had changed into lingerie and told him he needed to figure out what he wanted. (XXII 2146-47) They talked about other women with whom he was involved with and about the man she had been with. She said that she and the other man were not serious. (XXII 2147) He asked her if she was "fu--ing him," and she indicated, a couple of times. (XXII 2147-48) The Defendant told Dr. Krop that, out of anger, he shot her. She said "ow" like she had been injured. She fell off the side of the bed. He said, although he should have walked downstairs then, he shot her again. (XXII 2148-49) He said he then walked over to her and knew she was dead. (XXII 2149)

Counseling records showed that McMillian, at age 15, was sent to an alternative school for fighting, and at age 18, expelled from school. (XXII 2124-25) McMillian was charged with a simple battery in a convenience-store incident in which he was involved in a fight with three people. (XXII 2129) McMillian had numerous driving with a suspended license offenses and the fleeing-and-attempting-to-elude offense, and he was still on probation at the time of this murder. (XXII 2129-30) McMillian told Krop that he has some difficulty controlling his temper "when he feels he's getting run over." McMillian said that "when you do things for other people and then

they don't either appreciate it or take advantage, ... then at that point he can lose his temper." (XXII 2139)

Dr. Krop testified concerning some head injuries. He said that records showed that McMillian was in an accident, suffered a concussion, and a CAT scan was negative for any structural damage. (XXII 2137-38) McMillian said he had a football head injury, but there were no medical records for it because he did not go to the hospital. (XXII 2118) McMillian reported no seizures or major illness. (XXII 2128)

Krop testified that "psychological testing did show mild to moderate impairment in the frontal and temporal lobes of the brain which would be consistent with the memory issues that Mr. McMillian reported to me." (XXII 2119-20) Dr. Krop could not say whatever impairments McMillian sustained was from prior concussions or from being shot by the police when he was apprehended in this case. (See XXII 2136)

Records showed McMillian as a child diagnosed with ADD, disorganized type. (XXII 2120-21, 2153) Dr. Krop did not diagnose McMillian with ADD as an adult. (XXII 2121, 2153) Dr. Krop also did not diagnose McMillian with any mental illness. (XXII 2120, 2151) McMillian tested at borderline intelligence. (XXII 2121)

McMillian said that "things started when his mom rejected him" at age three. (XXII 2140) Krop thought that McMillian's father and step-mother have been "excellent parents," and McMillian "described her in

very glowing terms." (XXII 2140-41) Over-all, he was "raised in a pretty stable family environment." (XXYY 2141) There is no indication that McMillian was abused sexually, physically, or psychologically, but feeling unwanted by his biological mother "might be considered emotional abuse." (XXII 2141)

Dr. Krop believed that McMillian shot the victim as an emotional reaction, "partly his insecurity, partly his jealousy." (XXII 2151-53) But he did not opine that McMillian met any of the statutory mental mitigators (See XXII 2151-53).

McMillian's friend and family testified about McMillian's background and relationships with them, their children, and his children. (XXII 2160-2244)

Judge David Gooding sentenced McMillian to death, finding aggravators of (1) felony probation (great weight) and (2) prior violent felony (great weight), and finding mitigators of no significant history of prior criminal activity (little weight) and several non-statutory mitigators. Judge Gooding also sentenced McMillian to a consecutive prison term for the attempted second-degree murder of Officer Bowen. (X 1974-81; VIII 1456-83)

SUMMARY OF ARGUMENT

ISSUE I, contests the sufficiency of evidence for the premeditation of First Degree Murder. A couple of days prior shooting Danielle Stubbs in the arm and in the head, McMillian essentially told Danielle's mother that Danielle had dumped him and that he is

quitting his job and going to Georgia. Prior to the murder, McMillian had even packed the bulk of his clothes in the trunk of his car. The day of the murder, at about 3:30am, McMillian was waiting in his car near the victim's townhouse and saw someone bring her home. Contrary to his story, he was not allowed in Danielle's townhouse then, because surveillance video and phone records show that, about a half hour later he called the victim's cell phone from a nearby Gate store; the victim was alive then because she placed a two-second call back to the Gate store. After somehow gaining entry to the victim's apartment, the victim put up a struggle, as indicated by McMillian's DNA found under the victim's fingernails, and as indicated by clothing, an iron, and three blinds-slats strewn on the floor and on a couch in an otherwise very tidy downstairs of the victim's townhouse.

In addition to evidence of motive of rejection, waiting outside the victim's new residence at about 3:30am, and a struggle, also evidence in the murder scene of the victim's upstairs bedroom alone is sufficient for premeditation. The victim was found with a non-fatal bullet wound to her arm and a fatal gunshot wound to her head. On the floor of that bedroom were a live round of .45 ammunition next to the bedroom door, a spent .45 shell casing closer to the victim than the live round, and a second spent .45 shell casing, yet closer to the victim, next to the victim's body and in a pool of her blood. Thus, McMillian left a trail of a bullet and two shell casings

demonstrating that he moved closer to the victim as he ejected a round of live ammunition, fired, and fired again.

Consistent with McMillian's trail of a .45 bullet and two .45 casings was a trail of blood from the victim leading from one side of the bed to the other side of the bed, near where the victim's body was found kneeling on the floor. There was blood spatter low on the wall and directly behind the victim's body. The location of the bullet holes in the sheets on the bed and blood there demonstrate that the victim was shot there, and the blood trail and spatter indicate that she then moved off the bed and on to the floor, where McMillian shot her again.

The head wound rendered her unconscious almost immediately, so the gunshot to the arm was first on the bed, then she moved off the bed, then McMillian executed her by shooting her in the head as he moved closer to her. At one interview, McMillian admitted to police that he shot the victim, she moved off the bed, and he shot her again.

McMillian also confirmed his guilt by fleeing to Georgia, by concocting several stories in a futile effort to show he had nothing to hide, and by shooting at the police and attempting to run away when they tried to apprehend him a few days after the murder. He fired at the police with the same .45 semi-automatic gun that he used to kill the victim, and, like the murder scene, a live .45 round was found on the ground at the shootout scene, indicating that prior to firing, McMillian ejects and re-chambers a round.

Competent evidence far surpasses the requisite "moment" required for the premeditation. ISSUE I has no merit.

ISSUE II attacks the trial court's death sentence affording great weight to McMillian's felony probation. However, this issue was not preserved, and, there was a reasonable basis for that weight.

ISSUE III, attacking the proportionality of the sentence, also lacks merit. Here, the great weight reasonably afforded to (1) McMillian's felony probation and (2) his prior violent felony of shooting it out with police when they tried to apprehend him more than outweighed the weak mitigation.

ISSUE IV raises a Ring claim, which this Court has correctly rejected many times. Further, here the jury voted 10-2 for death, thereby satisfying Ring, and here the aggravator of prior violent felony, found by the jury and the judge, renders Ring's jury-finding requirement inapplicable.

None of the appellate issues merit any relief.

ARGUMENT

OVERARCHING STANDARD OF APPELLATE REVIEW.

Rulings of the trial court[20] are purportedly the subject of an appeal. Accordingly, this Court recently re-affirmed the "Tipsy Coachmen" principle that a "trial court's ruling should be upheld if

[20] Even in cases of fundamental error, the focus is on a trial court ruling, that is, one that should have been rendered.

there is any legal basis in the record which supports the judgment." State v. Hankerson, 65 So.3d 502, 505-507 (Fla. 2011). See also Robertson v. State, 829 So.2d 901 (Fla. 2002)(collected cases and analyzed the parameters of "right for any reason" principle of appellate review); Butler v. Yusem, 44 So.3d 102, 105 (Fla. 2010)("key to this ["Tipsy Coachman"] doctrine is whether the record before the trial court can support the alternative principle of law"); Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("... affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it"); Jaworski v. State, 804 So.2d 415, 419 (Fla. 4th DCA 2001)("we are obligated to entertain any basis to affirm the judgment under review, even one the appellee has failed to argue"); Ochran v. U.S., 273 F.3d 1315, 1316 (11th Cir. 2001)("We conclude that summary judgment for the defendant was appropriate, but for a different reason").

ISSUE I (SUFFCIENCY FOR PREMEDITATION): WHETHER THE EVIDENCE WAS SUFFICIENT FOR PREMEDITATION. (IB 46-59, RESTATED)

McMillian claims that the evidence in this case is insufficient for premeditation. It appears that, by the defense's motion for judgment of acquittal after it presented its case, ISSUE I was preserved below. (See XIX 1601-1602; compare XVII 1231-34; 1700-1701) However, ISSUE I should be rejected. There was competent substantial evidence, for the jury to lawfully find McMillian guilty of First Degree Murder based on premeditation. The competent, substantial evidence included Defendant McMillian pulling out his gun, aiming it

at the victim, Danielle Stubbs, shooting her in the arm as she lay in her bed in her townhouse, then, after she moved to the floor leaving a blood trail on the bed, the Defendant moving towards her, re-aiming and shooting her in the head, killing her.

Within a couple of days prior to killing Danielle Stubbs, McMillian knew that Danielle did not "want" him "any more" and that "they had broken up." McMillian had a motive. Evidence also indicated that McMillian saw someone in a Monte Carlo bring Danielle home at about 3:30am, then McMillian called the victim from a nearby Gate store, she called back, then shortly thereafter McMillian killed her.

There was evidence of a struggle inside the victim's townhouse. Blinds' slats, some clothing, and an iron were on the floor downstairs, and McMillian's DNA was under the victim's fingernails.

McMillian confirmed his guilt by concocting multiple stories and shooting at the police and trying to run away.

A. The Standard of Appellate Review of Sufficiency.

"A trial court's denial of a motion for judgment of acquittal is reviewed de novo to determine solely if the evidence is legally sufficient." Durousseau v. State, 55 So.3d 543, 556 (Fla. 2010).

"A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. ... The credibility and probative force of conflicting testimony should not be determined on

a motion for judgment of acquittal." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). See also, e.g., Reynolds v. State, 934 So.2d 1128, 1145-46 (Fla. 2006)(summarizing principle; collecting cases).

The "fact that the evidence is contradictory does not warrant a judgment of acquittal," Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998). An argument that the evidence was not weighty in its probative value is not a ground for setting aside a conviction for insufficiency, See, e.g., Brown v. State, 959 So.2d 146, 150 (Fla. 2007)(rejected argument that "the trial court should have weighed Dr. McClain's testimony more heavily and ..."). Thus, "[a]fter hearing all of the evidence in this case, the jury clearly chose not to believe [the Defendant's] version of the facts," Woods v. State, 733 So.2d 980, 986 (Fla. 1999).

"If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury." Taylor v. State, 583 So.2d 323, 328 (Fla. 1991).

Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981)(footnotes omitted), a seminal case, summarized these principles:

> As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict

and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

The State disputes McMillian's apparent assumption (See IB 47) that this case falls under Florida's circumstantial evidence rule. State v. Law, 559 So.2d 187, 188 (Fla. 1989), explained that the circumstantial evidence rule "applies where a conviction is wholly based on circumstantial evidence." Here, in contrast to a "wholly" circumstantial case, direct evidence showed that the crime scene was the victim's townnhouse where Defendant McMillian was also located at the time of that fatal injuries were inflicted upon the victim. See Orme v. State, 677 So.2d 258, 261-62 (Fla. 1996)("direct evidence presented by the State placed Orme at the scene of the crime around the time of Redd's death ..."; "cannot be deemed entirely circumstantial"). But see Delgado v. State, 948 So.2d 681, 690 (Fla. 2006)("Although the evidence is circumstantial ..."; forensic evidence put defendant at crime scene).

Thus, Perry v. State, 801 So.2d 78, 84 n.6 and accompanying text (Fla. 2001), reviewed sufficiency of evidence for premeditation and indicated that it was "not a wholly circumstantial case" where, like here, evidence tied the defendant to the crime scene. Here, for example, McMillian admitted before trial (III 572-73, 576; see also XVI 1181-83, 1187-88; SE 166, starting at about 44:30) and during trial (E.g., XVIII 1454-55, 1559-XIX 1567; XIX 1590-91) that he shot the victim, and McMillian's DNA was found, among other places, underneath the victim's fingernails (XVI 1034-35).

However, even if the circumstantial evidence test is used here, the State is not required to conclusively rebut every possible variation of events that could be inferred from evidence that ostensibly supports the defendant's hypothesis of innocence. Instead, the State need only introduce competent evidence that is inconsistent with the defendant's theory of events. See Darling v. State, 808 So.2d 145, 155-56 (Fla. 2002) (quoting State v. Law, 559 So.2d 187, 188-89 (Fla. 1989)). Accordingly, Durousseau, 55 So.3d at 556-57, explained:

> When faced with a motion for judgment of acquittal in a circumstantial evidence case, the trial court must determine whether there is a prima facie inconsistency between the evidence, viewed in light most favorable to the State, and the defense theory or theories....Under the circumstantial evidence standard, when there is an inconsistency between the defendant's theory of innocence and the evidence, when viewed in a light most favorable to the State, the question is one for the finder of fact to resolve and the motion for judgment of acquittal must be denied.

Accord Boyd v. State, 910 So.2d 167, 181 (Fla. 2005)("a]ny question as to whether the evidence was sufficient to overcome all hypotheses of innocence was for the jury to decide"); Woods v. State, 733 So.2d 980, 986 (Fla. 1999)(collecting cases; "circumstantial evidence rule does not require the jury to believe the defendant's version of the facts where the State has produced conflicting evidence").

Regardless of the test that is used, the evidence in this case was sufficient for the conviction. There was "competent evidence that is inconsistent with the defendant's theory of events," that is, that he killed the victim without premeditating. The State next discusses the

parameters of premeditation for which the State was required to produce competent evidence.

B. Nature of Premeditation.

It is important to note that, here, the mental-intent-related aggravator of cold, calculated, and premeditated (CCP) is not at issue. CCP requires, for example, heightened premeditation. See, e.g., Russ v. State, 2011 WL 4389041, *10-13 (Fla. Sept. 22, 2011); Asay v. State, 580 So.2d 610, 613 (Fla. 1991). Here, although it could be argued that evidence of a motive and evidence of McMillian lying in wait for the victim to come home at about 3:30am supports CCP, the trial court did not find CCP. (See VIII 1463-66) Instead of CCP, at issue here is the conviction for First Degree Murder based upon premeditation, which is less demanding than CCP in its proof requirements.

Abdool v. State, 53 So.3d 208, 216-17 (Fla. 2010), recently summarized the standard of appellate review applied to premeditation:

> Whether there is competent substantial evidence to support a finding of premeditation will depend on whether the record shows that there was 'a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act about to be committed and the probable result of that act.' ... '[E]vidence of premeditation includes "the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted."'... Whether a premeditated design to kill was formed prior to a killing is a question of fact for the jury. ...

Accordingly, premeditation requires "a prior intention to do the act in question," but "this intention should have been conceived for any

particular period of time." It can be "a moment before the act." Matthews v. State, 177 So. 321, 324-25 (Fla. 1937).

Davis v. State, 26 So.3d 519, 530 (Fla. 2009)(quoting Boyd v. State, 910 So.2d 167, 181 (Fla. 2005)), reiterated that "'[p]remeditation may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.'"

"Whether the State's evidence fails to exclude all reasonable hypotheses of innocence is a question of fact for the jury." Perry v. State, 801 So.2d 78, 84 (Fla. 2001). "Moreover, whether premeditation exists is a question of fact for the jury, but the jury is not required 'to believe the defendant's version of the facts when the State has produced conflicting evidence.'" Perry, 801 So.2d at 84 (quoting Spencer v. State, 645 So.2d 377, 381 (Fla. 1994)).

Motive is not an element of premeditated First Degree Murder and premeditation can be proved without evidence of a motive. See, e.g., Matthews, 177 So. at 324-25. Even CCP can be proved without proving motive. See Davis v. State, 2 So.3d 952, 962 (Fla. 2008). However, motive can be a very probative method of proving premeditation. See Norton v. State, 709 So.2d 87, 92 (Fla. 1997)("While ... motive is not an essential element of homicide, where, as here, the proof of a crime rests on circumstantial evidence, 'motive may become ... important'"; state conceded no motive)(citing Daniels v. State, 108 So.2d 755, 759 (Fla. 1959).

C. Facts Resulting from Standard of Review.

1. Evidence and Inferences Supporting Premeditation.

"[A]fter all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment," Tibbs, and "there is an inconsistency between the defendant's theory of innocence and the evidence, when viewed in a light most favorable to the State," Durousseau:

- McMillian had a **motive** for killing Danielle Stubbs: After they had dated a number of months, the victim was breaking up with McMillian, he was quitting his Jacksonville job and going back to Georgia (XIII 500-501, 528, 533; XIV 779-80); he also intended to go to Virginia and overseas (XVIII 1417-18, 1428-29, 1552) and he had actually packed a volume of his clothing in the trunk of his car (XIV 652-53; XVIII 1418, 1528, 1548-49, 1560, 1589-90), and he was in Georgia within hours of the murder (See, e.g., XIII 505-506; XIV 763-68; XVIII 1417-18, 1552); at about 3:30am, shortly prior to the murder, McMillian observed someone bring Danielle to her Pineverde home (See XVIII 1434-37; Compare XIV 695-99 with SE 74; XIII 520; XIV 798-800; XV 805-14, 914-17);

- **Contrary to McMillian's story suggesting that the victim voluntarily invited him inside her townhouse as she arrived home** (See XVIII 1437-38), instead, shortly after the victim arrived home, phone records (XVI 1125-27; SE 168 at V 807; XIV 762; SE 169 at V 819 et seq.), corroborated by a surveillance video (SE 167; XIV 712-16; see XIII 483; XX 1832), establish that McMillian called the victim from a pay phone at a nearby Gate store, and, the victim called that pay phone for two seconds;

- Consistent with McMillian's motive, there was evidence of a **struggle** in the victim's townhouse in which she was murdered, including --

  - **three slats of blinds** torn down from the sliding glass door area and scattered on the floor and nearby couch (SE 18, 19, 23-29; see XIII 542-43, 559-60; XIV 606, 607-610), which the victim's father testified that neither he nor

his son tore down when they arrived at the townhouse (XIII 542-44);

- in an otherwise very neatly kept and organized downstairs of the townhouse (See, e.g., SE 15-33; see also XVIII 1527), **clothing**, including the victim's sleepwear, and an **iron** on the floor downstairs (SE 21, 22, 27, 28, 29; XIV 607-609; Compare XIII 521-22 & XIV 634-35 with XIV 609-10);

- **fresh bruises** on the victim's forehead and back (XIV 752-54);[21]

- **McMillian's DNA in blood/tissue on the underside of Danielle's fingernails** (XVI 1033-35)[22]; and,

- there was some **hair** (SE 101, 102) in the victim's left and right hands (XIV 739, 743-44; 1011)[23];

- Evidence of a **motive**, evidence of **barred access** to the victim's townhouse, and evidence of a **struggle** also contradict McMillian's story that he did not consider shooting at the victim until he shot her (See, e.g., XVIII 1516-17);

- Defendant McMillian **pulling out his gun** (See, e.g., XVIII 1452-55),[24] **aiming** it at the victim, Danielle Stubbs, and

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[21] The medical examiner, Dr. Giles, said that it was possible that the bruises could have been caused by a fall from the bed or from recent "freaky, wild sex," but, consistent with the other evidence of a struggle, he also testified that the bruises could have occurred as a result of a struggle. (XIV 752-54).

[22] Although the DNA analyst testified that "passionate lovemaking on occasions" and grabbing each other making sex" would be sufficient to obtain the DNA result, but she also said that "I can't speak to the situation, but my opinion on this actual profile from the fingernail clippings is that it most likely came from either blood or tissue"; that "it would probably take a good amount of tissue or blood to have a lot of results under the nail most likely" (XVI 1046-47); and that the amount of tissue or blood under the victim's fingernails would be from more than a "light scraping of the skin" and would be from a "more forceful scrape" (XVI 1050).

[23] The hairs were not "suitable for DNA analysis." (XVI 1012)

[24] Other evidence conflicted with McMillian's story that his gun just happened to be on the TV dresser, including his statement that he put

shooting her in the arm as she lay in her bed in her townhouse (See SE 158; XIV 727-29), then, **after she moved to the floor** leaving a blood trail on the bed (See SE 155, 158, 156, 57, 63, 65, 67), the Defendant **moving towards her**, as indicated by the locations of the shell casings (See SE 126, 55, 56, 155; XIV 626-27, 632-33, 641-42), **re-aiming and shooting her in the head**, rendering her unconscious "almost immediately" and killing her (XIV 748, 723, 732) and leaving blood spatter on the wall behind her (SE 157; XIV 620);

- **McMillian even admitted** to **shooting** the victim as she lay on the bed, the victim trying to get out of bed and **rolling out of the bed** and then **shooting the victim the second time** (III 572-73; see also XVI 1182-83; at ~44:30-46:45 on the audio recording)[25]

- McMillian admitted, "I made the **wrong decision** ..." (III 577; see also XIV 1189);

- Evidence of McMillian's **extreme consciousness of guilt**, including his **multiple lies** (E.g., compare XIII 503-506; XIV 763-68; XIV 777, 785, 786 with III 571-73, 576; see also McMillian's January 4, 2010, story introduced in rebuttal at XIX 1634 et seq.) and the version he initially told Dr. Krop at XXII 2130, 2133-36) while attempting to prove to the police that he had "nothing to hide" (XIV 786); and his **shootout with police** when they attempted to apprehend him (See XIV 795 et seq.), including firing a bullet from his

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it there "2 weeks ago" (III 573; see also XVI 1183-84; at about 46:45 on audio recording), when the victim had just moved in there that week (See, e.g., XIII 496-97, 526, 536-37); instead, ammunition (SE 75) and the holster SE 123) were in McMillian's car (SE 75, 123; XIV 649-52).

[25] At the time, McMillian was in the hospital on Motrin (XVI 1134; III 544), and McMillian said that the pain had "gone away" (III 543). When McMillian testified at trial he said he indicated that he could recall details of what he told the police at the hospital. Thus, he knew that "in the hospital there were "a lot of things that [he] didn't say ... that [he] said" at the trial (XVIII 1514), including about the abortion (XVIII 1515), and he recalled that, in the hospital, he told the police what he "could remember that happened" (XIX 1572). Then, after being confronted with incriminating detail, he did not "recall" (XIX 1572) and the police interview at hospital came at a "bad" time after he "just came out of a coma" (XIX 1574).

.45 murder weapon into the police shield-logo on a marked police car door (SE 140, 141, 153; XV 814, 834, 967-68, 999-1000)

In sum, competent evidence showed that McMillian was "conscious of the nature of the act about to be committed and the probable result of that act," Abdool. It actually showed more than the requisite "moment ... as will allow the accused to be conscious of the nature of the act," Abdool.

2. McMillian's Incorrect Facts.

In violation of the appellate standard of review that requires "**all reasonable inferences**" from the trial evidence to be "resolved **in favor of the verdict**," McMillian states a number of self-serving factual conclusions and suggestions.

In discussing the medical examiner's testimony, McMillian suggests (IB 54) that it could not be determined "which shot was fired first." However, one cannot "almost immediately" be rendered unconscious by a gunshot into the brain (See XIV 748) and then crawl to the other side of the bed and crawl off the bed, as indicated by the bullet hole through the sheets on the bed (SE 65, 66), the bullet recovered there (SE 63, 64), and the blood in the area of the bullet hole (SE 63, 65), and the blood trail leading to the other side of the bed (See SE 155, 156, 49, 50, 51, 57, 63, 65, 67) where the victim's body was found on the floor (SE 155, 158). (See also citation-documented bullets in preceding section; Statement of Facts supra)

The evidence of the bullet hole in the sheets and accompanying blood and blood trail leading off the bed, plus the blood spatter on the wall behind the victim (SE 157; XIV 620) rebut McMillian statements (IB 54) that "Danielle was on the bed when the shot**s** were fired" and that she may have moved off the bed after "both" shots were fired."

McMillian's argument, in discussing the medical examiner's testimony, that the shots "may have been fired simultaneously or nearly so" (IB 54), is rebutted by the foregoing evidence. The medical examiner was testifying only concerning his autopsy results, not factoring in the other evidence in the case, and also, the question was further ambiguously qualified as "very much around the same time." (See XIV 749-50)

Further, the locations of the two empty shell casings (See SE 126), with one in front of the bed near the TV dresser (SE 55, 56) and one located in the victim's blood next to her on the side of the bed (SE 155; XIV 626-27, 632-33, 641-42), demonstrate that McMillian fired one round and then moved his position to fire the second round into the victim's head after she had moved to the floor. Therefore, contrary to the Initial Brief's argument, the trial court's sentencing order's finding that prior to firing the second shot, the "defendant mov[ed] towards her" is not "pure speculation," but, instead, supported by the evidence.

Indeed, the trail of ammunition actually begins next to the bedroom door, where a live .45 round was found (SE 44, 46, 54; XIV 614-15, 642). The live round near the bedroom door, then a casing near the front of the bed, then another casing next to the victim's body, reasonably inferring that McMillian re-chambered a live round near the bedroom door, moved towards the victim and shot the victim in the arm, then, after the victim moved to the floor, McMillian again moved towards the victim and fired the fatal shot into her head. Thus, McMillian testified that he was going out the bedroom door when he began shooting. (XVIII 1453-55; XVIII 1559-XIX 1567)[26]

If McMillian's Reply Brief argues that the victim's family kicked the shell casing to its location next to the body, there is no evidence to prove it, and, to the contrary, photographs SE 47, 49, 50, 55, and 155 show a skirt wrapping around the bed and extending close to the floor that would have blocked the path of a kicked shell casing. Further, the victim's family was only in the townhouse for a few minutes before the police arrived (XIII 540; see also XIII 531-32, 557-58), found the victim's family already outside the townhouse (XIII 558, 594-95), and secured the scene (See XIII 558-59).

The physical and crime scene evidence is consistent with the part of McMillian's statement to the police in which he said he shot the

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[26] McMillian could not "explain" how the live bullet got on the floor of the victim's bedroom. (XIX 1582)

victim as she lay on the bed, the victim tried to get out of bed and rolled out of the bed, and then he shot her again (III 572-73; see also XVI 1182-83; at ~44:30-46:45 on the audio recording).

Thus, McMillian's argument that the gunshots were "virtually simultaneous[]" "two quick shots" as an instantaneous emotional reflex (IB 57, 58) was rebutted by competent evidence.

The Initial Brief suggests (IB 54 n.10) that there was no evidence of a struggle. The photographs do substantially show the townhouse as "neat as a pin" (IB 54 n.10), but the contrast between that neatness and the other evidence demonstrates the struggle. In spite of that neatness and in stark contrast to it, three blind slats were strewn on the floor, the iron was on the floor, and items of clothing were on the floor. Additional facts supporting a struggle included, as bulleted above, the bruises, McMillian's blood under the victim's fingernails, and hair in the victim's hand. In addition, the contextual background supports concluding that there was a struggle: the victim breaking up with McMillian, McMillian seeing someone bring the victim home at 3:30am, and McMillian calling the victim from the nearby Gate store after the victim arrived home and before he killed her.

The Initial Brief says (IB 54 n.10) that the "testimony about the slats was conflicting." To the contrary, as bulleted above, the evidence showed the blinds on the floor at three places near their origin at the back sliding door, and the victim's father testified

that neither he nor his son tore them down when they arrived at the townhouse shortly prior to the police securing the scene. The Officer who first arrived at the scene recalled nothing about the disturbed blinds (XIII 560), but she flatly agreed that she took care not to touch or disturb anything (XIII 559; see also XIV 665).

McMillian says (IB 55; see also IB 58) that there was "no evidence of prior difficulties ... between McMillian and Stubbs." This is incorrect. Instead, as bulleted supra, the victim was breaking up with McMillian, he was quitting his Jacksonville job and going to Georgia, shortly prior to the murder McMillian observed someone bringing Danielle home at about 3:30am, and shortly after the victim arrived home and shortly prior to the murder McMillian called the victim's cell while he was at a nearby Gate Store; she was still alive when McMillian called her because she also called the Gate Store number in a two-second call.

McMillian says (IB 56) that when Allen Morris dropped off the victim, the victim "exhibited no concern or fear" even though McMillian's car was backed-in near the victim's apartment. McMillian's argument overlooks that Allen Morris did not see the victim safely enter her apartment (XIV 697) and that the windows on McMillian's Cadillac were tinted so that she initially did not see McMillian (See III 564, 570-71; XVIII 1436, 1437; SE 74). Most importantly, about a half hour later, McMillian did not make phone calls from inside the victim's apartment, but rather from a nearby

Gate store to the victim's cell phone in her townhouse; contrary to McMillian's story, Danielle had not allowed McMillian to enter her townhouse when she arrived home.

McMillian argues (IB 57) that the "only trial evidence offered concerning the location of the gun is that it was already in Stubbs' bedroom." Contrary to McMillian's conclusion, it was McMillian who said that the gun was located on the dresser (See, e.g., XVIII 1452-53) among his vast array of lies.

Moreover, contrary to McMillian's version that he grabbed the gun from the dresser, put it in his waistband, then pulled it out as an emotional reaction and blindly shot towards the victim twice, he also testified that all these events occurred in the dark (See XVIII 1453-55), so dark he could not see the victim's location when he shot her twice (See XVIII 1559-XIX 1567). If he could not see the victim in that darkness, then he could not see his gun, which he said was on the far side of the dresser, away from the bathroom where he said he just exited, and on the other side of the TV (XIX 1596-97). Also, in a statement to the police that the State introduced in rebuttal (XIX 1649-51, 1664-65), as well as in a statement to Dr. Krop (XXII 2133), McMillian said that the light was on in the victim's apartment when he arrived. Indeed, the bedroom was not so dark that McMillian could not see his target, as McMillian proved through his statement to the police in which, in essence, he was able to see that his target was in bed when he shot her the first time, then rolled out of bed, then

out of bed when he shot her the second time. Indeed, he was able to see her well enough to fire two rounds so that both rounds hit their intended target, Danielle, and when one shot did not kill her, he moved and fired another shot into her head.

In sum, instead of blindly grabbing his gun and blindly shooting in the dark, McMillian had a motive to kill the victim, laid in wait in his car, somehow gained access to the townhouse, struggled with the victim, and was able to see well enough that the two shots he fired hit their mark each time, even after she had moved off the bed. McMillian assured that Danielle was dead when the first shot did not complete his intent. He premeditated. The evidence is sufficient.

D. Case Law Supporting the Trial Court's Ruling.

McMillian's supposed hypothesis of innocence is not even that he killed the victim in a rage or in anger, as at trial he denied having any such "strong" emotions when he killed her. Instead, he was "upset" with her. (XVIII 1445, 1516) Even if he had asserted rage, "the jury reasonably could have rejected as untruthful [the defendant's] testimony that he [killed] the victim in a rage." Taylor v. State, 583 So.2d 323, 329 (Fla. 1991).

In Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988), the defendant decided to kill the victim "only after he became angered because Ms. Edwards pressed the alarm button." There, CCP was rejected, but, even though there was evidence of an angry reaction, "the evidence unquestionably demonstrates premeditation." Here, McMillian admitted

that he was not even angry, and as bulleted supra, there is substantial additional evidence of premeditation.

In Pietri v. State, 644 So.2d 1347, 1347, 1350 (Fla. 1994), like here the defendant was convicted on a theory of premeditated murder. Like here, the defendant "argues that the trial court should have ... reduced the charges from first- to second-degree murder." In Pietri, the defendant was on escape status and shot Officer Chappell from "a distance of three to eight feet" as the officer approached pursuant to a traffic stop. The defendant possessed a gun he stole in a burglary and shot the officer with it. "[T]he gun required the use of both hands and removing the gun from the holster. The officer was shot in the heart ...." The defendant ran away from the scene, and subsequently he carjacked a car and again attempted to evade capture in a high speed chase. The defendant "testified that Chappell stopped him while he was planning to sell stolen goods. Pietri admitted shooting Chappell, but said he had not planned to kill the officer and did not aim for his heart." Pietri, 644 So.2d at 1350.

In Pietri and here, there was proof of a motive for the murder, here the victim dumping the defendant. In Pietri and here, the Defendant fired a gun a short distance away from the victim into a vital area of the body. In Pietri and here, the defendant had to do an act to get his gun, even arguably accepting McMillian's story, he had to pull the gun from his waistband. As in Pietri, the defendant confirmed his consciousness of guilt with flight, here by fleeing to

Georgia and concocting multiple lies to pretend that he had nothing to hide and then, a few days later, by shooting towards police and running away.

In Pietri, the defendant fired only once, whereas here McMillian fired twice, including once into the non-vital area of the victim's arm, then after the victim moved off the bed, fired again into her head, killing her. According to his own testimony, as he went to leave out the door, he decided to shoot towards the victim, and the crime scene evidence includes a live bullet near the bedroom door, indicating he re-chambered a round prior to firing twice at a moving target. And, there are the two additional casings from fired rounds, with one closer to the victim than the live round on the floor, and one immediately next to the victim in her pool of blood.

Moreover, here the defendant waited outside the victim's townhouse at 3:30am, saw her come home with someone else, and then, prior to killing her, called her from a nearby Gate store, and somehow entered her townhouse, and then engaged in a struggle prior to McMillian shooting the victim twice. Here, even more than in Pietri, 644 So.2d at 1352, "[t]he jury determines whether the evidence fails to exclude all reasonable hypotheses of innocence. ... Although [the defendant] testified that he shot [the victim] but did not intend to kill him, the jury is not required to believe a defendant's testimony."

Indeed, McMillian's trial testimony that he did not intend to kill the victim when he shot the victim two times out of two shots in the

dark when she was at two different locations, and including a fatal shot to the head, is absurd on its face.

Here, as in Delgado v. State, 948 So.2d 681, 690 (Fla. 2006), there was "more than sufficient evidence of premeditation was presented." As in Delgado, the defendant "had a motive based on his relationship with the victim[] ... ." And here, like Delgado, the physical evidence contradicted the defendant's theory.

Thus, there is no doubt that as the victim moved off the bed and as McMillian shot her twice, "the decision was made," which "is sufficient to prove premeditation," Middleton v. State, 426 So.2d 548, 550 (Fla. 1982).

Asay v. State, 580 So.2d 610, 612-63 (Fla. 1991), rejected a challenge to premeditation. There and here, "there was sufficient evidence from which the jury could have concluded that, prior to discharging the fatal shot, [the defendant] was conscious of the fact that he was going to shoot [the victim] and that [the victim] would likely die as a result of being shot." There and here, "[t]he evidence supports the jury's rejection of [the defendant's] contention that the shooting was an “impulsive” reaction to the confrontation." There and here, a motive was shown while the defendant was armed with a gun. There, "Asay proceeded to pull the gun from his back pocket and shoot Booker in the abdomen. Bubba testified that Booker was not armed and was backing away at the time he was shot." Here, McMillian's trial testimony admitted that he

pulled the gun from his waistband; the evidence also showed that he shot the victim as she lay helpless on the bed, and then, as she attempted to "back[] away" from McMillian by crawling off the bed, McMillian shot her again. After the shooting, like Assay, McMillian attempted to explain his actions, which actually corroborated evidence that he had a motive for killing the victim due the failed relationship with her. And, more than Asay's evidence, here there was the evidence of the struggle, the trail of blood and the trail of a .45 live bullet and two .45 shell casings, and McMillian's extreme consciousness of guilt through his multiple lies, fleeing twice, and his shootout with police.

The evidence of premeditation here is much stronger than in Hernandez-Alberto v. State, 889 So.2d 721, 731-32 (Fla. 2004), where evidence of the defendant knocking the victim to the ground by hitting her in the head and "then remov[ing] a gun from his fanny pack and fir[ing] a shot into her back as she lay face down" was sufficient. There and here, "the defendant had sufficient time to form the state of mind necessary for premeditated murder."

Lindsey v. State, 636 So.2d 1327, 1329 (Fla. 1994), upheld premeditation. There, like here, a victim decided to break off the relationship with the defendant, and evidence, including the defendant following the victims shortly before they were killed, conflicted with the defendant's story. There, each of the two victims died from one gunshot and yet evidence of premeditation was

sufficient as to each. Here, where McMillian waited outside the victim's home, was not granted access when she first arrived home, struggled with the victim, and fired the two shots, the totality of evidence for premeditation is stronger than in Lindsey.

In Hayward v. State, 24 So.3d 17, 24-26, 44-46 (Fla. 2009), as here, the defendant concocted stories to cover up what he had done. There, as here, the victim sustained two gunshot wounds, one non-fatal and one fatal, with the victim in two different positions when the shots were fired. There, as here, the fatal shot "was consistent with [the victim] having been shot from above, while kneeling." There was a motive in both cases. There, the State disproved "Hayward's hypothesis that he was merely an observer" and "establishe[] a premeditated intent to kill by the assailant." Here, the evidence of premeditation is stronger than in Hayward.

Peterka v. State, 640 So.2d 59, 68 (Fla. 1994), upheld premeditation where there was a motive and the defendant shot the victim in the head while "the victim was in a reclining position." There, the gun was fired close to the victim's head, and here, in addition to other evidence bulleted above, after wounding the victim in the arm, the defendant took more careful aim at the victim's head after she had moved to a kneeling position on the floor.

Tillman v. State, 21 So.3d 163, 165 (Fla. 4th DCA 2009), upheld premeditation where the defendant hit the victim then shot the victim once. There, the defendant left the scene "'nonchalantly,' an action

more characteristic of intent rather than an accident." Here, McMillian shot the victim twice as they both were in different locations, and fled twice, and shortly after the murder "'nonchalantly" asked about the victim's whereabouts when he knew he had shot her, and also tried to act like he had nothing to hide through his lies.

In Holland v. State, 773 So.2d 1065, 1068, 1074-75 (Fla. 2000), and here, there was a motive. There, "Holland grabbed Officer Winters' gun and shot him. Officer Winters died of gunshot wounds to the groin and lower stomach area." Here, McMillian admitted that he grabbed his gun and shot the victim twice. There was evidence of a struggle in both cases. The defendant ran away in both cases, here twice and compounded by McMillian's shootout with police. And, here, McMillian waited at 3:30am outside the victim's home, called from nearby, and shot, moved, and shot again while the victim attempted to back away from him off the bed.

Under the foregoing case law, as supported by the facts bulleted supra, evidence was more than sufficient for premeditation.

E. McMillian's Case Law, Not Applicable.

McMillian discusses several cases (IB 46-53) and then reaches sweeping conclusions that a prior threat, an execution-style shot to the back of the head, and a struggle are insufficient for premeditation (IB 53). McMillian overlooks that each of the cases he discusses is bound to their total facts that are not applicable here.

In Mungin v. State, 689 So.2d 1026 (Fla. 1995)(discussed at IB 47-48), "Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head." In contrast, here, McMillian shot the victim twice, there was evidence that in between the two shots the victim moved from the bed to a kneeling position on the floor, where McMillian moved closer to execute her with a shot to the head. Here, unlike Mungin, there was evidence of a struggle, and McMillian had a motive as the victim recently dumped him and then he waited for the victim to come home at 3:30am, saw another person bring her home, and he was initially denied entry her townhouse. In addition, shortly after the murder, here the Defendant coolly played out his ruse when, after killing the victim, he called the victim's mother and then the police and, in essence, expressed concern that he did not know the victim's location and initiated his attempted alibi that he was in Georgia at the time of the murder. McMillian told more lies, and he shot at police with the same gun that he used to kill Danielle Stubbs.

In Norton v. State, 709 So.2d 87, 92-93 (Fla. 1997)(IB 48-49), unlike here, there was no evidence of a motive, and like Mungin and unlike here, in Norton there was only one gunshot and no evidence concerning the circumstances surrounding two shots. Unlike Mungin and Norton, here there was evidence of a struggle, and there was evidence of a "continuing attack," as McMillian shot the victim laying helpless on her bed, the victim moved off the bed and, as she was

kneeling on the floor, McMillian moved closer and executed her. In Norton, like Mungin, and unlike here, there was no evidence of the defendant's cold and calm attempt, starting within hours of the murder, to prove he had nothing to hide.

In Green v. State, 715 So.2d 940, 944 (Fla. 1998)(IB 50-51), unlike here, there were two perpetrators and no evidence regarding who inflicted what injuries under what circumstances, other than they killed the victim because she "got crazy." Moreover, in Green, 715 So.2d at 944, it was "undisputed that Green's intelligence is exceedingly low," while here, in the guilt phase, the trier of fact had heard evidence that McMillian graduated from high school (XVII 1274-75) and had heard McMillian's multiple statements, including recordings of them, demonstrating his intelligence; the trier of fact had even heard McMillian responsively testify at length concerning his detailed version of events. For example, at one point, he displayed a rather sophisticated view of the system when he responded, "Who can prove that the dead bolt was locked?" (XIX 1576).

McMillian's level of intelligence, demonstrated in the guilt phase, also contrasts with Kirkland v. State, 684 So.2d 732 (Fla. 1996)(IB 51-52). Morrison v. State, 818 So.2d 432, 452-53 n.12 and accompanying text (Fla. 2002), explained:

> Morrison relies upon *Kirkland v. State*, 684 So.2d 732 (Fla.1996), where this Court found insufficient evidence in the record to support the finding of premeditation necessary to sustain defendant Kirkland's first-degree murder conviction. Kirkland, however, was 'mildly retarded' and 'there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill

> the victim at any time prior to the homicide.' *Kirkland*, 684 So.2d at 734-35. Morrison is not mildly retarded and, given the nature of the weapon used and the manner in which the homicide was committed, as well as the nature and manner in which the wounds were inflicted, the jury was amply justified in concluding that it demonstrated Morrison's intent to kill. Moreover, ample evidence was presented that Morrison did not have any money just prior to homicide and he, by his own admission, was seeking money for crack. Therefore, it cannot be said that there was 'scant, if any, evidence' to indicate Morrison committed the homicide according to a preconceived plan as considered by the *Kirkland* Court.

Here, there was no evidence that McMillian was retarded, and McMillian's high school degree, statements, and trial testimony belie any such suggestion. And here, as discussed at length multiple times supra, "the manner in which the homicide was committed, as well as the nature and manner in which the wounds were inflicted, the jury was amply justified in concluding that it demonstrated ... intent to kill." Here, as in Morrison, there also was a motive, and the other evidence discussed supra clearly distinguish this case from Kirkland.

The Initial Brief (IB 52-53) also discusses Hoefert v. State, 617 So.2d 1046 (Fla. 1993), but it is distinguishable because of the sheer lack of evidence there. In Hoefert, unlike here, "the State was unable to prove the manner in which the homicide was committed and the nature and manner of any wounds inflicted." Here, in contrast with Hoefert, as detailed supra, the crime scene evidence of the two shootings and perpetrator and victim movement in between the shots, evidence of a struggle, the motive due to the victim dumping McMillian, McMillian waiting outside the victim's townhouse at 3:30am, seeing her arrive, then calling her about a half hour later

from a nearly Gate store, and McMillian's cold attempted cover-up demonstrate premeditation.

In sum, none of the cases McMillian discusses is on point. None of them include the totality of incriminating evidence here, as bulleted supra and as detailed further in the "STATEMENT OF THE CASE AND FACTS supra. Here, the evidence was more than sufficient for premeditation, and the trial court correctly denied the defense's motions for judgment of acquittal.

ISSUE II (WEIGHT OF FELONY PROBATION AGGRAVATOR): WHETHER THE TRIAL COURT WAS UNREASONABLE IN GIVING GREAT WEIGHT TO THE FELONY PROBATION AGGRAVATOR. (IB 60-66, RESTATED)

ISSUE II contends that the trial court unreasonably afforded great weight to the felony-probation aggravator because an underlying circumstance of the felony was a withhold of adjudication and because the trial court also found the mitigator of no significant prior criminal history. However, defense counsel failed to present these arguments to the trial court, and, in any event, the trial court was reasonable in giving great weight to a felony probation based upon McMillian's 120 MPH flight from the police and endangering children playing in a residential neighborhood. ISSUE II should be rejected, and the trial court should be affirmed.

A. Failure to Preserve in the Trial Court.

The defense failed to present the trial court with ISSUE II's arguments, thereby failing to afford the trial court an opportunity to correct ISSUE II's argued error and failing to preserve it for

appellate review now. See Buzia v. State, 926 So.2d 1203, 1208 (Fla. 2006)(claim that "contemporaneous guilty verdict for the attempted murder of Mrs. Kersch was not a “conviction" for prior violent felony aggravator, unpreserved). In this case, at the Spencer hearing the defense did not discuss the ISSUE II arguments. (See X 1952-72) The defense's sentencing memorandum argued that the trial court could not lawfully find felony probation at all because McMillian had not been adjudicated guilty, but it did not pose the arguments presented here. (See VIII 1424-25) On October 1, 2010, the trial judge filed his Sentencing Order. (VIII 1456-83) On October 22, 2010, McMillian's counsel filed a Notice of Appeal (VIII 1486), and for the interim period (between the Sentencing order and the Notice of Appeal, the State has found no pleading or hearing in which the defense presented to the trial judge the arguments in ISSUE II. Therefore, ISSUE II is not preserved below.

B. Standard of Review and Reasonable & Competent Basis of Trial Court's Order.

If the merits of ISSUE II are reached, the State submits that the decision of, and reasoning in, the trial court's order are reasonable therefore meriting affirmance.

The standard of appellate review is whether appellant can demonstrate that the trial court abused its discretion and whether there was competent substantial evidence supporting the decision. See, e.g., Buzia v. State, 926 So.2d 1203, 1216 (Fla. 2006). Abuse of discretion is measured by reasonableness: "'[D]iscretion is abused

only where no reasonable man would take the view adopted by the trial court.'" Buzia; see also Sexton v. State, 775 So.2d 923, 935 (Fla. 2000)("competent substantial evidence supports the existence of the CCP aggravator, but also that the trial court did not abuse its discretion by affording it 'great weight'").

Therefore, the question becomes whether McMillian has demonstrated on appeal that the trial court was unreasonable in affording great weight to the felony probation aggravator and whether there was competent and substantial evidence supporting the finding. Here, McMillian has failed to meet his appellate burdens.

The following was the trial court's reasoning in finding and weighing this aggravator:

> **1. The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation. §921.141(5)(a), Fla. Stat. (2009).**
>
> On June 9, 2005, the Defendant was arrested in Glennville, Tattnall County, Georgia for felony fleeing and eluding. Officer Marcus Williams testified during the penalty phase that on that date, he observed the Defendant driving, and because he was aware that the Defendant’s license was suspended, he attempted to stop him. The Defendant failed to stop, and initiated a high speed chase, at speeds of up to 120 miles per hour, through a residential area. Officer Williams testified that there were children playing in the area and that the Defendant nearly struck one child. During the guilt phase, the Defendant admitted fleeing from the police during this incident, and testified that he did so because he was in possession of narcotics and a firearm.
>
> The Defendant was on felony probation at the time he committed the Capital Murder. The State introduced a certified copy of the Judgment and Sentence, indicating that the Defendant pled guilty to felony fleeing and eluding on January 3, 2008, and was placed on probation for a period of five years. The Defendant's probation officer, Andrew Durrence, explained that the Defendant received first offender treatment, whereby he entered a plea of guilty, but

> he was not adjudicated guilty and the final disposition of guilt was withheld upon his successful completion of his probation. Mr. Durrence also testified that as conditions of his probation, the Defendant was prohibited from committing any new violation of the law and from possessing any type of firearm. This Court finds that for the purpose of determining what is considered a conviction as to aggravators for capital sentencing, a plea of guilty serves as a conviction and an adjudication of guilt is not required. McCrae v. State, 395 So. 2d 1145, 1153-54 (Fla. 1981), cert. denied, 454 U.S. 1041, 102 S.Ct. 583, 70 L.Ed.2d. 486 (1981). The testimony that the Defendant entered a plea of guilty to the felony fleeing and eluding and the Judgment and Sentence placing him on probation for the offense proves beyond all reasonable doubt the existence of this aggravating circumstance. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed in this case.

(VIII 1464-65, bold and underling in original)

The trial court's finding is based upon competent substantial evidence, which was reasonable to afford great weight. In the penalty phase, a Georgia probation officer testified that, in 2008, McMillian was placed on felony probation for five years for a fleeing incident and remained on probation through the time the probation officer testified. (See XXII 2056-68) Conditions of probation were that McMillian not violate the law and not possess a firearm. (See XXII 2057-58) The probation sentence was introduced into evidence. (XXII 2059) A Georgia police officer testified to the details of the 2005 offense underlying the felony probation. In that incident, McMillian ran from the police in a high speed chase at speeds up to over 120 MPH through the residential neighborhood where a lot of children were playing and where McMillian narrowly missed hitting a child. (See XXII 2045-55) In the guilt phase, McMillian, in fact, did admit

fleeing from the police during this incident because he was in possession of narcotics and a firearm. (See XVIII 1509-1510)

Moreover, after McMillian succeeded in eluding Officer Williams (XXII 2050-51), who had recognized McMillian driving the car and knew he had a suspended driver's license (XXII 2046-47, 2051), McMillian came to the police station and lied to the police by stating that his cousin was driving his vehicle at the time (XXII 2051), then when the officer told McMillian that he would be charged with filing a false police report, McMillian confessed to the eluding and bragged, "I had you, man. I had you. I left you about a half mile back." (XXII 2052)

In essence, McMillian incorrectly contends that, regardless of how weighty and aggravated other facts of this aggravator were, the withhold of adjudication per se precludes "great weight." Here, McMillian incorrectly overlooks --

- the high speed chase, up to and over 120 MPH endangering a lot of children in a residential area;
- McMillian narrowly missing a child;
- the condition of probation prohibiting possessing firearms that McMillian violated during his shooting Danielle Stubbs twice and during his shootout with police; indeed,
- McMillian said that his possession of a firearm, as well as narcotics, is what motivated him to run from the Georgia police; and,
- McMillian lying to the police about his cousin driving the car during the chase and then bragging about eluding the officer when it was clear that the officer saw him driving.

These facts provide a reasonable basis for the trial court affording this aggravator great weight and merit affirming the trial court.

Reviewing the trial court's weight of this aggravator, it is also important to consider its status as independent from even other parts of Section 921.141(5)(a), Fla. Stat.:

> (5)(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control **or on felony probation**.

Thus, Merck v. State, 763 So.2d 295, 299 (Fla. 2000), explained that --

> the Legislature amended section 921.141(5)(a) to add 'or on probation,' ch. 96-290, § 5, Laws of Fla., and further revised subsection (5)(a) again to specify 'felony probation' and previous felony conviction. Ch. [9]6-302, § 1, Laws of Fla. Pursuant to these amendments, probationary status did not become a statutory aggravator until May 30, 1996.

Merck held that, there, the retroactive application of the distinctive felony probation aggravator violated ex post facto. Accord Lukehart v. State, 776 So.2d 906, 925 (Fla. 2000)("an entirely new aggravator to be considered in determining whether to impose a death sentence"). Here, this distinctive aggravator was properly found and applied. There is no per se prohibition of affording great weight due to withholding adjudication of guilt in the statute, and, under the facts of this case, this weight was reasonable.

As McMillian mentions (IB 62), Blake v. State, 972 So.2d 839, 847 (Fla. 2007), explicitly affirmed the trial court's weight of this aggravator. There, although the trial court gave the aggravator "some weight," the facts involved in the offense for which the defendant was on probation did not rise to the level of aggravation here, where McMillian's actions in the underlying felony **endangered several children**, including **narrowly missing one**, and was **motivated to hide**

his firearm and drugs, and in **this murder he perpetrated it with a firearm** and **shot at police with a firearm** when they tried to apprehend him for this murder. As in his actions fleeing from responsibility in Georgia, here McMillian **fled to Georgia after he murdered Danielle**, then **attempted to flee from the police when they apprehended him**. Facts underlying the felony probation include McMillian **lying to the Georgia police**, as **he lied to the police (and others) here multiple times**. In Georgia, McMillian lied about driving until confronted, and here, McMillian lied about being at the murder scene until he was confronted with the firearms identification. Here, McMillian even lied to Dr. Krop. In Blake, the trial court reasonably weighed the aggravator "some"; here, the trial court reasonably weighed it "great."

Indeed, McMillian's discussion (IB 62-63) essentially concedes that the weight an aggravator can factor-in how the facts of a prior crime relate to the facts of the current case. Here, in contrast to cases on which McMillian attempts to rely, the facts of the felony underlying the felony probation are aggravated beyond the mere label of felony probation, but rather include numerous aspects that overlap the facts in this murder case.

Moreover, the felony probation started in January 2008 (XXII 2059), only about a year before this murder, and McMillian committed the prior felony underlying the felony probation in June 2005 (XXII

2047), less than four years prior to committing this January 2009 murder.

Accordingly, this Court has upheld proportionality of the death sentence where the trial court gave felony probation great weight. See Simpson v. State, 3 So.3d 1135, 1149 (Fla. 2009)(felony probation aggravator, afforded "great weight"); Taylor v. State, 937 So.2d 590, 601, 604 (Fla. 2006)("murder was committed while Taylor was on felony probation," "great weight"); see also England v. State, 940 So.2d 389, 408 (Fla. 2006)(trial judge's factors included "could not ignore ... that the murder was committed while England was still on probation for a former felony").

McMillian also argues (IB 64-66) that the trial court's finding and giving little weight to the mitigator of no-significant-prior-criminal-history conflicts with the great weight it assigned to felony probation. For the reasons that the trial court detailed in its sentencing order (VIII 1467-68), awarding this mitigator any weight was, if anything, a gratuity: the Georgia eluding charge and facts; numerous arrests for driving on a suspended license; school discipline for fighting in school; and a prior probation for fighting. See, e.g., Hayward v. State, 24 So.3d 17, 46 (Fla. 2009)("We 'will not disturb the sentencing judge's determination as to "the relative weight to give to each established mitigator" where that ruling is "supported by competent substantial evidence in the record"'").

Accordingly, Everett v. State, 893 So.2d 1278, 1280-81, 1287-88 (Fla. 2004), analyzed proportionality, in part, using the trial court findings of "(3) lack of significant history of prior criminal activity (little weight)" and "(1) appellant was a convicted felon under a sentence of imprisonment at the time of the murder." While Everett did not discuss any interface between the aggravator and the mitigator, their coexistence was not troublesome.

Here, the trial court expressly factored into its evaluation of no-significant-prior-criminal-history mitigator that McMillian was not adjudicated guilty of a felony including the eluding charge:

> Accordingly, the evidence of the Defendant's prior criminal history, **while not of the nature of violent felony convictions**, substantially reduces the weight of this mitigating circumstance.

(VIII 1468) For a discussion of factors that can be considered in weighing this mitigator, see, for example, Davis v. State, 2 So.3d 952, 964-65 (Fla. 2008)("State may rebut the no significant history of prior criminal activity statutory mitigating factor with evidence of 'criminal activity,' not solely convictions").

Sexton v. State, 775 So.2d 923, 929, 934 (Fla. 2000), held that the trial court was within its discretion to give great weight to CCP while also giving great weight to "extreme mental or emotional disturbance." As here, there were circumstances that supported the relative weights.

In essence, ISSUE II attempts to second guess the trial court's evaluation of the significance of the withholding adjudication

concerning the felony probation in terms of its great-weight of the felony probation and in terms of its little weight for no-significant-prior-criminal-history, but appellate second-guessing is not the standard of appellate review. Instead, here, the trial court reasonably gave great weight to felony probation given all of the facts associated with that aggravator, and the trial court reasonably gave little weight to no-significant-prior-criminal-history given all the facts associated with that mitigator.

In any event, given the aggravated facts associated with the felony probation and especially given the prior violent felony of McMillian resisting apprehension by engaging in a shootout with the police, any error was harmless. See, e.g., Davis, 2 So.3d at 964-65.

The trial court merits affirmance, if the merits are reached.

ISSUE III (PROPORTIONALITY): WHETHER THIS CASE'S DEATH SENTENCE IS PROPORTIONATE TO OTHER CASES' DEATH SENTENCES. (IB 67-74, RESTATED)

McMillian complains that the death sentence here is disproportionate with other cases.

Here, the jury vote was 10 to 2 recommending the death sentence. (XXIII 2342-45; VII 1212)

Phillips v. State, 39 So.3d 296, 305 (Fla. 2010)(internal citations omitted), explained the standard of review:

> In death penalty cases, this Court performs a proportionality analysis in order to prevent the imposition of unusual punishments under the Florida Constitution. ... In deciding whether death is a proportionate penalty, this Court considers 'the totality of the circumstances in a case' and compares the case with other capital cases. ... 'Proportionality review is not simply a comparison between the number of aggravating and mitigating circumstances.'

> ... And '[t]his Court's function is not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial judge.' ...

As a preliminary but important matter, the State disputes McMillian's assertions (IB 68-70, 73) that this murder was simply an "emotional, spur-of-the-moment violent encounter" and simply a murder through "reflex[]." Instead, as discussed at length under ISSUE I supra, there was substantial evidence of premeditation.

McMillian (IB 69) also attempts to minimize his past history of fighting and lawlessness. McMillian was charged with a simple battery in a convenience-store incident in which he was involved in a fight with three people. (XXII 2129) Counseling records showed that McMillian, at age 15, was sent to an alternative school for fighting, and at age 18, expelled from school. (XXII 2124-25) McMillian had numerous driving with a suspended license offenses and, as discussed in ISSUE II supra, he was on probation for an aggravated fleeing-and-attempting-to-elude offense at the time of this murder. Indeed, as discussed in ISSUE II, underlying facts for the felony probation not only concerned McMillian endangering several children but also lying to the police, like here, and also, when caught, arrogantly proclaiming to the officer, "I had you, man. I had you. I left you about a half mile back."

In addition to the felony probation, which was properly weighted, the trial court also found prior violent felony and gave it great weight. (VIII 1465-66) McMillian has not contested the trial court's

finding of prior violent felony or its great weight. More specifically, the trial court found, beginning with the pertinent part of the trial court's "Facts" section:

> On Wednesday, January 14, 2009, Jacksonville Sheriff's Office detectives and members of a joint task force came into contact with the Defendant. The Defendant was driving a Cadillac. Officer K. W. Bowen, in a marked police car, got behind the Defendant's car, activated his blue lights and siren, and stopped the Defendant. The Defendant got out of his car with a gun at his side, then turned and started firing at Officer Bowen and the other law enforcement personnel. Officer Bowen was standing behind his open driver's side door, and was able to take cover behind the door and in the back of his car. Fortunately, Officer Bowen was not injured. Officer Bowen's car was struck by gunshots twice, in the driver's side door and on the driver's side front headlight. Other officers returned fire, and the Defendant was shot numerous times, including a grazing wound to his head. The Defendant dropped his gun and fled the area. He was captured a short distance away and transported to the hospital for treatment for his injuries.
>
> The Defendant's gun was recovered, and ballistics testing was conducted on the gun and on the casings recovered from Danielle Stubbs' home and from the scene of the shooting with police. A firearms expert testified that all of the casings from Danielle Stubbs' home were fired from the Defendant's gun, and that they matched the casings from the scene of the police shooting.
>
> ...
>
> **2. The Defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to the person. § 921.141(5)(b), Fla. Stat. (2009).**
>
> In addition to convicting the Defendant of the first degree murder of Danielle Stubbs, the jury also convicted the Defendant of the attempted murder of Officer Bowen. '"[T]he contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate episodes."' Frances v. State, 970 So. 2d 806, 816 (Fla. 2007) (quoting Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990)). The trial testimony established that upon being stopped by Officer Bowen, the Defendant got out of his car and turned and began shooting at him, attempting to kill him. Officer Bowen was not injured because he was able to take cover behind his car and other officers fired back at the Defendant. The Defendant used the

> same firearm used to murder Danielle Stubbs when he shot at Officer Bowen. This evidence, along with the jury's verdict in the guilt phase of this case, proves beyond all reasonable doubt the existence of this aggravating circumstance. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed in this case.

(VIII 1461-62, 1465-66, bold and underlining in original)

Concerning mitigation, while the trial court reasonably gave only little weight to no-significant-prior-criminal-history (VIII 1466-68), the trial court also, through a lengthy and detailed factual analysis, explicitly rejected statutory mental mitigation. (VIII 1468-73) The trial court pointed out McMillian's lie to Dr. Krop when he denied any culpability for this murder; instead, he told Krop that he found her dead body. (VIII 1468-69) Subsequently, McMillian changed his story and told a story about the victim inviting him upstairs and attempting to entice him with her change into lingerie and then killing her as a reaction to her having sex with someone else. (VIII 1468-69) The trial court correctly observed that "[b]oth of the Defendant's statements to Dr. Krop were different from the statement he originally gave to Detective Wolcott[] and the Defendant's testimony at trial." (VIII 1469-70; see XXII 2130-49) The trial court pointed out, concerning McMillian's head injuries, that Dr. Krop found records of a prior traffic accident but CAT scan results were negative. (VIII 1470; see XXII 2137-38) Concerning a purported football injury, McMillian did not go to the hospital and there were no medical records to corroborate it. (VIII 1470; see XXII 2118)

Concerning Dr. Krop's opinion of "mild to moderate impairment in McMillian's brain" (IB 70), Dr. Krop could not determine "whether the Defendant suffered the impairment prior to or after the murder." It could have been caused from the shootout with police. (VIII 1471; see XXII 2136)

Dr. Krop opined that McMillian was not incompetent, and McMillian suffered no physical or psychological abuse as a child. (VIII 1471-72; see XXII 2114, 2141) McMillian's intelligence tested at the borderline range, and McMillian does not suffer from any mental illness. (VIII 1472; see XXII 2120-21, 2151) As a child, McMillian was diagnosed with ADD, but he does not currently suffer from it. (VIII 1472; see XXII 2120-21, 2153)

The trial court pointed out that the jury rejected McMillian's story that he "lost it" because it found the murder to be premeditated. (VIII 1472)

Accordingly, the trial court rejected the mental mitigator. (VIII 1472-73) After finding McMillian's trial testimony concerning the supposed trigger for killing Danielle "suspect, at best" (VIII 1480), and subsequently pointing to Defendant's "contradictory and often self-serving statements" (VIII 1478), the trial court did give a nonstatutory mitigator of "mental or emotional distress" "some weight" based on Dr. Krop's testimony (VIII 1479-81).

Other non-statutory mitigation that the trial court considered were religious faith (very slight weight); love for family and

friends (little weight); consistent history of employment (little weight); biological mother was not an active participant in his upbringing (slight weight); I.Q.[27] (little weight), admitted culpability for the murder (rejected); exhibited appropriate behavior during his trial (slight weight); relationship between the Defendant and the victim's family (rejected); and as mentioned in the preceding paragraph, mental or emotional distress (some weight).

In sum, the aggravation for the felony probation and the shootout with police was twice "greatly weighted" and grounded on aggravating facts, while the mitigation was properly weighed mostly as "little" and "slight," with only two mitigators rising to the level of "some weight." Given the very serious aggravation and the sparse mitigation, under this court's case law, the death sentence was proportionate.

This Court has characterized prior violent felony as among the weightiest aggravators. See, e.g., Silvia v. State, 60 So.3d 959, 974 (Fla. 2011)("prior violent felony aggravator is considered one of the weightiest aggravators"; citing Sireci v. Moore, 825 So.2d 882, 887 (Fla. 2002)). Accordingly, Silvia, 60 So.3d at 974, string-cited to cases that are also pertinent here:

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[27] The trial court pointed out that McMillian has his high school diploma. (VIII 1478; see XVII 1274-75; see also discussion in colloquy of high school diploma, at XI 14, and no impeding physical or mental condition, at XI 15).

> *Evans v. State*, 838 So.2d 1090, 1097–98 (Fla.2002) (upholding the death sentence as proportionate after defendant killed his brother's girlfriend during a fight and where the court found two aggravators (prior violent felony and on probation), no statutory mitigators, and five nonstatutory mitigators (little or some weight)); *Floyd v. State*, 850 So.2d 383, 392–93, 408–09 (Fla. 2002) (determining that death sentence was proportionate after defendant killed mother-in-law and where there were three aggravators (avoid arrest, prior violent felony, and on probation), no statutory mitigators, and four nonstatutory mitigators (all little weight)); *Robinson v. State*, 761 So.2d 269, 272–73 (Fla. 1999) (finding the death penalty proportionate where defendant killed his girlfriend and there were three aggravators (pecuniary gain, avoid arrest, and CCP), two statutory mitigators (extreme emotional distress (some weight) and ability to conform conduct to the requirements of the law (great weight)), and eighteen nonstatutory mitigators).

Here, the prior violent felony is especially egregious where McMillian shot at police while, in the line of duty, they were trying to apprehend him.

Phillips v. State, 39 So.3d 296, 301-302, 305-306 (Fla. 2010), is especially persuasive because, like here, it involved prior violent felony assigned great weight and based on the defendant's shootout shortly after the murder. There, the only other aggravation was during an armed robbery and avoid arrest. There, no statutory mitigating circumstances were found, but the trial court also considered twenty-five nonstatutory mitigating circumstances and assigned each a relevant weight. Here, the trial court did find one statutory mitigator but, as discussed in ISSUE II, reasonably gave it little weight and found weak nonstatutory mitigation. Unlike here, Phillips included childhood mental illness (slight weight); suffered childhood learning disabilities (slight weight); had a difficult birth (slight weight); was raised by a mentally ill mother (some

weight); was raised without any stable father figure (slight weight); suffered physical abuse as a child (some weight); and suffered mental abuse as a child (moderate weight). In other words, the mitigation was stronger in Phillips, and here the prior violent felony of shooting at the police was even stronger than in Phillips. Phillips upheld the death penalty. It should be upheld here.

In Bailey v. State, 998 So.2d 545, 551 n.3,4 and accompanying test (Fla. 2008), the trial court found two aggravators akin to those here: (1) previously convicted of a felony and under the sentence of imprisonment or placed on community control or probation and (2) avoid a lawful arrest or effecting an escape from custody. There, the murder was killing an officer, and here a prior violent felony involved a shootout with the police. There, as here, the trial court rejected statutory mental mitigation and found a weak statutory mitigator (there, age) and found other weak mitigation, including low IQ. Moreover, in Bailey, unlike here, the trial court found that "Bailey had a history of mental health problems (found to be reasonably established but given little weight)" and "Bailey came from a broken home (found to be reasonably established but given little weight). Bailey, 998 So.2d at 552. Bailey "h[e]ld that the sentence of death is proportional," 998 So.2d at 554, and the death sentence should be upheld here.

McMillian relies on a number of inapplicable cases. He discusses (IB 71, 72) Wilson v. State, 493 So.2d 1019 (Fla. 1986), but Evans v.

State, 838 So.2d 1090, 1097-99 n.6 and accompanying text (Fla. 2002), expressly receded from excluding the emotionally saturated domestic context on which Wilson relied. Thus, Evans affirmed the death penalty where it involved the defendant killing his "brother's seventeen-year-old girlfriend, Angel Johnson, during an argument over her alleged unfaithfulness to Evans' brother." Evans, 838 So.2d at 1092. Moreover, aggravators in Evans, 838 So.2d at 1097, like here, included prior violent felony and committed while Evans was on probation. In Evans, the mitigation was at least at the same level as here, including, for example, abused or deprived childhood as a result of his mother's crack addiction (little weight), exemplary work habits (little weight), charitable or humanitarian deeds (some weight), counseled youth (little weight). Evans, 838 So.2d at 1099 (citing Blackwood v. State, 777 So.2d 399, 412 (Fla. 2000) (defendant had been involved in relationship with the victim several months before the murder; HAC; no significant history of prior criminal conduct and eight nonstatutory mitigators), upheld proportionality.

Unlike here, Ross v. State, 474 So.2d 1170 (Fla. 1985)(IB 71, 72), involved a frenzied murder by someone who had no prior violence in his background and where the "victim realized the appellant was having difficulty controlling his emotions." Unlike here, in Farinas v. State, 569 So.2d 425 (Fla. 1990)(IB 71, 72), the murder was "under the influence of extreme mental or emotional disturbance" and the defendant was "obsessed" with jealousy over an extended period that

climaxed with the heat-of-passion-type abduction and murder. Unlike the circumstances here, White v. State, 616 So.2d 21 (Fla. 1993)(IB 71, 72-73), turned on its distinctive facts, including the defendant's pre-murder animal-like and bizarre behavior and the presence of both the mental mitigators of extreme mental or emotional disturbance and substantially impaired. Finally, in contrast with the 10-2 jury vote for death here, Douglas v. State, 575 So. 2d 165, (Fla. 1991)(IB 71, 73), is clearly inapplicable as a jury override. Also, Douglas, unlike here, involved a defendant without a violent history.

Therefore, McMillian's cases are not applicable, and this death sentence is proportionate. See also McLean v. State, 29 So.3d 1045, 1052-53 (Fla. 2010)(felony probation, during robbery, prior violent felony, contemporaneous conviction for attempted first-degree murder; mental mitigators of mental or emotional disturbance, capacity or conform substance abuse issues, family problems, brain injury, and miscellaneous factors; collecting cases); Frances v. State, 970 So.2d 806, 812, 820-21 (Fla. 2007)(prior violent felony as contemporaneous murder and "during the course of a robbery"; mitigators of age and various family-related mitigation); Taylor v. State, 937 So.2d 590, 601-604 (Fla. 2006)(two prior violent felonies, pecuniary gain, felony probation; some mental or emotional disturbance at the time of the crime (some weight), psychological trauma from abuse and neglect during his formative years (some weight), neurological impairments

affecting his ability to control impulses (some weight), good worker and dependable employee (minimum weight) ...); England v. State, 940 So.2d 389, 408-409 (Fla. 2006)(felony probation, prior violent felony, during robbery, HAC; ... "terrible childhood full of abuse, uncertainty and abandonment ... torn from his siblings and raised by [an] abusive man"); Grim v. State, 841 So.2d 455, 460, 464 (Fla. 2003)(under sentence, prior violent felonies, during sexual battery; disruptive home life and child abuse (significant weight), hard-working employee (significant weight), mental health problems, marital problems and situational stresses (great weight), ...); Heath v. State, 648 So.2d 660 (Fla. 1994) (prior violent felony, during robbery; statutory mitigator of extreme mental or emotional disturbance); Duncan v. State, 619 So.2d 279, 284 (Fla. 1993)(prior violent felony of second degree murder; "[o]ther than Duncan's statements ..., there was no evidence that Duncan 'went nuts' prior to the [murder]).

ISSUE IV (RING): WHETHER RING V. ARIZONA WAS VIOLATED? (IB 75-76, RESTATED)

McMillian asserts that Florida's death penalty statute violates Ring v. Arizona, 536 U.S. 584 (2002). In a motion, defense counsel presented a Ring claim to the trial court. (I 119-33). The trial court denied the motion. (III 506) Therefore, ISSUE IV was preserved below. However, it has no merit.

As this Court has recently explained while rejecting several arguments attempting to assert Ring's applicability, "we have

repeatedly rejected constitutional challenges to Florida's death penalty under *Ring*." Ault v. State, 53 So.3d 175, 205-206 (Fla. 2010)(citing Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) and King v. Moore, 831 So.2d 143 (Fla. 2002)). Indeed, Florida, in contrast with Arizona, the maximum penalty for First Degree Murder is, and has been, death. Compare §782.04(1) with §775.082, Fla. Stat. A jury determination is not required to increase the penalty. In Florida, Ring does not apply.

Even if Ring applied in Florida, here the jury actually found the prior violent felony (V 889-90), making McMillian death-eligible, that is, clearly indicating the death penalty as the maximum penalty for McMillian. Even without that jury finding of the prior violent felony, the trial court properly found the prior-violent-felony aggravator (VIII 1465-66); Silvia v. State, 60 So.3d 959, 978 (Fla. 2011), recently applied this principle:

> *Ring* does not apply to this case because one of the aggravating circumstances found by the trial court in this case was Silvia's prior conviction for a violent felony — the contemporaneous conviction for the attempted murder of Betty Woodard. *See Jones v. State*, 855 So.2d 611, 619 (Fla.2003) (recognizing that the prior violent felony aggravator is 'a factor which under Apprendi [*v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000),] and *Ring* need not be found by the jury'). Therefore, we deny relief on this claim.

Accord Phillips v. State, 39 So.3d 296, 302 (Fla. 2010)("because the prior violent felony aggravator applies in this case ..., *Ring* does not apply"); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348 (2000)("**Other than the fact of a prior conviction**, any fact that increases the penalty

for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"); Ring, 536 U.S. at 597 n.4 ("No aggravating circumstance related to past convictions in his case"; "fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence").

Moreover, the jury in this case recommended death by a vote of 10 to 2. (XXIII 2342-45; VII 1212) As this Court explained in State v. Steele, 921 So.2d 538, 544-46 (Fla. 2005), a jury recommendation of death is a jury finding at least one aggravator, thereby satisfying any Ring requirement. Steele noted that this Court's interpretation of Ring is "is consistent with the United States Supreme Court's assessment of Florida's capital sentencing statute" in Jones v. United States, 526 U.S. 227, 250-51 (1999), discussing Hildwin v. Florida, 490 U.S. 638 (1989). See also Ault, 53 So.3d at 205 (rejecting a Ring challenge; "to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt the existence of at least one aggravating circumstance listed in the capital sentencing statute"; citing Steele).

McMillian has been provided more than Ring requires. ISSUE IV has no merit.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's conviction and sentence of death.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on October 26, 2011: Nada M. Carey; Assistant Public Defender; Leon County Courthouse; 301 South Monroe Street, Suite 401; Tallahassee FL 32301.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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