IN THE SUPREME COURT OF FLORIDA

JUSTIN RYAN MCMILLIAN,

Appellant,

v. **CASE NO. SC10-2168**

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

NADA M. CAREY
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. **0648825**
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
nada.carey@flpd2.com
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGE(S)**

CONSTITUTIONS AND STATUTES

STATEMENT OF THE CASE[1]

On March 26, 2009, the Duval County Grand Jury indicted Justin Ryan McMillian for the first-degree murder of Danielle Stubbs and possession of a firearm by a convicted felon. R1:9-11. On January 20, 2010, the firearm possession charge was severed, and the murder charge was consolidated with another case charging McMillian with the attempted first-degree murder of Officer Kenneth Bowen. 3:489-90.

On March 29, 2010, the defense filed a motion to suppress McMillian's statement to police, 3:520-23, which, after a hearing on April 5 and 12, was denied. 3:538.

McMillian was tried by jury on June 14-18, 2010. At the close of the state's case and at the close of all the evidence, McMillian's motions for judgment of acquittal on premeditation and felony murder were denied. 17:1231-34, 19:1701.

On count 1, the jury was charged by special verdict with premeditated and felony murder (during a burglary and/or sexual battery). The jury found McMillian guilty of first-degree murder with premeditation but not guilty of felony murder. On count 2, the jury found McMillian guilty of the lesser-included offense of attempted second-degree murder. The jury further found that

[1]References to the twenty-three-volume record on appeal are designated by the volume number and the page number. All proceedings were before Duval County Circuit Judge David Gooding.

McMillian discharged a firearm during the commission of both crimes. 5:886-91, 20:1929-30.

The defense filed a Motion for New Trial on June 23, 2010, which was denied on June 29. R21:1975.

The penalty phase of the trial was held June 30, 2010. The jury, by a vote of 10 to 2, recommended death. 7:1212, 2343.

At the Spencer hearing on August 27, 2010, no new evidence was presented. 10:1954-72.

On October 1, 2010, the trial court sentenced McMillian to death, finding two aggravating factors: prior violent felony (the contemporaneous attempted second-degree murder) and committed while on felony probation. In mitigation, the court found (1) no significant history of prior criminal activity (little weight); (2) evidence of mental or emotional distress (some weight); (3) religious faith (very slight weight); (4) love for family and friends (little weight); (5) consistent history of employment (little weight); (6) defendant's biological mother was not an active participant in his upbringing (slight weight); (7) defendant's IQ of 76 (little weight); (8) defendant exhibited appropriate behavior during trial (slight weight). On count 2, McMillian was sentenced to 30 years with a 20-year minimum mandatory, consecutive. 8:1447-83; 10:1974-82; Appendix A.

Notice of appeal was timely filed October 22, 2010. 8:1486.

STATEMENT OF FACTS

Guilt Phase

State's Case

Appellant and the victim, Danielle Stubbs, 26, had been dating since April 2008. Danielle's mother, Janice Stubbs, testified the couple was "always together" and that McMillian attended family functions, came over most holidays, and was well-behaved and respectful. Mrs. Stubbs never saw any signs of violence in the relationship and thought Danielle would tell her if she was being mistreated. 13:523-26.

On Thursday and Friday, January 8 & 9, 2009, Danielle moved from her apartment on Collins Road to a townhouse on Pineverde with her family's and McMillian's help. 13:496-97. Mrs. Stubbs testified that Justin told her that Friday that he and Danielle had a discussion about breaking up, that she didn't want him anymore, and he was going back to Georgia to see about his children. 13:501, 529. On Saturday, Mrs. Stubbs talked to Danielle on the phone, and Danielle was wondering why Justin was hanging out with her friends since she and Justin "were done." Mrs. Stubbs asked Danielle why she gave Justin her keys, and she said she gave him the keys to make copies and was upset he hadn't come right back. 13:530.

On Saturday night, Danielle went out with some co-workers from the naval hospital emergency room. Allen Morris testified he

met Danielle at Doug Pipenbright's apartment and then drove the three of them to a club at the beach in his '03 Monte Carlo. 14:681-85. Danielle was wearing black pants and a darker colored shirt. 14:697. During the evening, Morris and Danielle had sexual intercourse in his car. 14:687. They left the club around 2:45 a.m., pulling over a couple of times to let Danielle vomit because she was feeling sick. Morris took Doug home, then drove Danielle home. They stopped at McDonald's and arrived at her house around 3:30 a.m. Morris drove past the house, made a U-turn, and then stopped for a few minutes because Danielle wanted to "gather herself." She ate a little, they talked. When he pulled up in front of her house, he saw a champagne Cadillac backed into the driveway. Danielle got out and walked up the driveway. When she got near the front door, she waved, and Morris waved back and drove off. 14:687-97.

On Sunday morning, Mr. (Harold) and Mrs. Stubbs were unable to locate Danielle or her car. 13:503. Justin called that morning and asked where Danielle was, and she told him she didn't know, she thought she was with him. Later that evening, he called their home phone and said he didn't know where she was, that she had gone out with friends Saturday night, and he was in Georgia with his children. 13:504-06. Around 9 p.m., the Stubbs called the police and then went with their son, Hunter, to the Pineverde townhouse. 13:505-511. Finding the front door locked, Harold and

Hunter entered through the unlocked sliding glass door in back. Harold Stubbs testified that Hunter ran inside, went upstairs, and started screaming. Harold let his wife in the front door, and they went upstairs and found Danielle on the floor beside her bed. Janice Stubbs testified that her daughter was lying in a pool of blood "so thick like from her head to her toes she just drained of blood." 13:509. Janice said she laid on the floor and rubbed her daughter's face and her lower back.[2] Harold testified that in entering through the sliding glass door, they would have walked through the vertical slats or pulled them to the side but denied inadvertently knocking any slats down as they came through the

[2]At this point during the testimony, the jury was removed, and the judge and lawyers discussed an apparent outburst from the victim's older brother that had occurred in the courtroom. The defense moved for a mistrial, which the trial judge took under advisement. The trial court also instructed the jurors to disregard any sort of outburst they may have observed. 13:509-18. Later that same morning, there was another outburst, characterized by the prosecutor as someone crying and being escorted out of the courtroom. The defense renewed its motion for mistrial, and the trial judge polled the jurors individually as to what they had seen or heard, whether they would be affected by what they had seen or heard, whether they would remain impartial, and whether they could disregard the disturbance. One juror saw someone pushing someone and heard people upset. Some jurors saw something but didn't hear anything; some heard noise but couldn't make out what they heard, and one juror didn't see or hear anything. All stated they would not be affected and would remain impartial. 13:562-593. Later the same day, defense counsel brought to the court's attention placards and balloons outside the courtroom door, stating, "Welcome home, Duval," which apparently referred to the person who had been escorted out of the courtroom. Defense counsel did not want the jury polled. 14:655-62. The trial judge later denied the motion for mistrial without further argument. 15:892.

door.[3] Harold further testified that the bottom lock and deadbolt on the front door were locked. 13:539-52.

Officer Pike arrived at the townhouse a few minutes later and found the Stubbs and their son outside. Pike did not recall the blinds being awry when she cleared the home. 13:558-60.

Detective Whittlesey was the crime scene investigator at the Pineverde townhouse, a two-bedroom loft home. 13:598. Whittlesey testified that there was a paper napkin on the living room couch downstairs and a sock and iron on the floor. 14:607. The slat from the blinds that was on the floor in front of the stairs was lying on top of a pair of shorts, underwear, and a sock, indicating the clothing was deposited there first. 14:608-09. An ironing board was standing up against the wall. 14:612. A Smirnoff Green Apple bottle was on the counter between the downstairs bathroom and the living room. 14:675. A shirt and Jaguars ball cap were at the top of the stairs. 14:614. At the top of the stairs, just outside the bedroom door, was a .45 caliber live round. In the bedroom, the pillows and sheets were on the bed with blood stains on them. 14:615-17. The sheets had bullet holes in them. 14:625. A .45 caliber bullet was on the bed. 14:622. The victim was on the floor beside the bed in a pool of blood. 14:619. The victim was on top of a comforter that

[3]Mr. Stubbs was shown State's Exhibit 18, which showed three knocked-down slats, one by the stairs, one in the living room by the rug, and another one draped over the sofa.

had a bullet hole in it and was blood stained on the bottom side. 14:628-29, 641. There were no powder burns on the comforter or sheets and no stippling on the victim. 14:673-75. A .45 caliber spent casing was in the blood. 14:624. Another .45 caliber spent casing was at the right foot of the dresser/TV stand that was in front of the bed, close to the bathroom side. 14:618. Whittlesey testified that if a .45 pistol is held in a straight upright position, the rounds eject to the right and that a shell casing will roll if kicked. 14:671.

A McDonald's bag and Danielle's cell phone were on the night stand to the left of the bed. The receipt showed the purchase had been made at the McDonald's on Blanding on January 11 between 3:30 and 3:39 a.m.[4] 14:621.

Two or three cigar butts were found outside the apartment. 14:631, 668.

Dr. Jesse Giles performed the autopsy. Danielle was 5'1" tall, 180 pounds, and was wearing a purple, spaghetti strap tank top and bra. 14:726,738. The cause of death was skull fractures and brain lacerations with hemorrhage due to a gunshot wound to the head. 14:723. She also received a gunshot wound to her right arm. The head wound was to the top of the head, at the side, right where the skull is curving. A piece of the bullet probably

[4]The last digit on the McDonald's receipt showing the time of purchase was illegible.

exited as it hit her, and the rest broke through the skull, went through the brain, and stopped under the skin at the left temple area. 14:731-32. There was no evidence of close-range fire or contact range, no gunpowder flack, soot, charring, or stippling. 14:733. The track went leftward, slightly downward and slightly backward across the top of the head. 14:734. Part of a bullet was recovered from inside her brain. 14:735. The bullet to the arm entered through the back right side of the right arm and came out on the inside right arm. The bullet did not hit any bone and would not have been fatal. 14:726-28. Inside the arm wound next to the bone were three tiny pieces of lead stuck to some pieces of yellow fuzzy material. 14:737. She lived for at most minutes after the shot to the head and probably would have been unconscious immediately. 14:747. Dr. Giles couldn't say which shot was first. She was alive for both. The arm wound would have hurt if she was awake when it happened. 14:748. The shots were probably simultaneous or around the same time. 14:750. She had a bruise on her left forehead and a bruise on the upper back, which could have happened from a fall from bed to floor. 14:753.

Kristin Schaad, a DNA analyst, testified that McMillian's semen, along with that of another contributor who couldn't be determined, was in the victim's vagina. The anal swab had a mixture of semen, which included McMillian and did not exclude Allen Morris. 16:1029-32. Semen from both Morris and McMillian

was on the victim's underwear. 16:1036, 1038. DNA was found inside and outside her acrylic fingernails. McMillian's DNA and that of other foreign donors who couldn't be determined was inside the nails. 16:1035-36. Schaad testified the DNA on the fingernails could be the result of passionate lovemaking. She thought the DNA came from blood or tissue, 16:1046, and came from a forceful rather than light scraping of the skin. 16:1050.

The day after Stubbs' was found, Monday, January 12, at 11:10 a.m., McMillian called the Duval County Sheriff's Office and spoke to a dispatcher. In that conversation, which was recorded, McMillian said his girlfriend had been found dead in her apartment and his father had advised him to call. He said he had been in Georgia since 3 a.m. on Sunday, and that he came straight to Georgia after he and his sister left the club. The dispatcher took an address and phone number and said someone would call him back. 14:766-67.

At 12:20 p.m., Detective Wolcott returned McMillian's call. 14:769. In that conversation, which also was recorded, Detective Wolcott asked Justin if he knew anything that might help them, and Justin said he was driving Danielle's car a few weeks before when a tall, dark-skinned guy in a white Monte Carlo came up and asked him if that was Danielle's car. 14:771-74. Justin said he last saw Danielle at 6 p.m. on Saturday, when he returned her car keys, which she had left in his jacket. When he spoke to her last,

around 9 p.m., she said she and some friends from work were going to a club. He had stayed with her at her old apartment and at the new place Thursday and Friday nights. He had told her if they weren't going to stay together, he was moving back to Georgia. She never gave him a key to her house. 14:775-80. He was at Sharky's club with his sister on Saturday night. They left around 1:30, and he took his sister to their parents' house. He talked to his sister and brother and left for Georgia around 2 a.m. 14:776, 784-85. Justin told Wolcott he was heading back to Jacksonville in a few minutes and agreed to meet Wolcott at the police station. 14:785-90.

When Justin failed to show up, Detective Wolcott called in the Jacksonville Sheriff's Office (JSO) Task Force to assist in apprehending McMillian, and on January 14, the Task Force located McMillian at his aunt's house on Strato Road in Jacksonville. Five Task Force cars were around the corner when three males left the house in a brown Cadillac. Agent Scott Cargile, with the U.S. Marshal's Service, with Clay County Detective Michael Calhoun riding shotgun, followed the Cadillac in an unmarked 2008 Ford Explorer. Behind Cargile was JSO K-9 Officer Kenneth Bowen, in a marked JSO vehicle and wearing a police vest marked with K-9. Behind Bowen were JSO Deputy Stafford in a marked vehicle, and JSO

Detective Pinkney in an unmarked Nissan.[5] After traveling 1/8 of a mile, Agent Cargile radioed Deputy Bowen and directed him to pass his car and conduct a felony traffic stop on the Cadillac. 15:800, 826. The pretext for the stop was a 2004 misdemeanor warrant from Georgia.[6] 15:822.

Deputy Bowen testified that he switched places with the Marshal's car at Firestone and Melvin and activated his blue lights after turning onto Firestone. He tapped on the horn a couple of times but thought the driver didn't see him, as he got no reaction from the occupants. The passengers stared ahead the whole time, never checked their mirrors, and never sped up or slowed down. After traveling 1/10 of a mile, the suspect vehicle turned right onto Fireside Drive. 15:826. After completing the turn, the car came to quick stop. As Bowen started to exit his vehicle, the doors of the Cadillac opened, and the two passengers exited. Bowen had his dog on a leash, and as he exited, the dog came across his lap to get out before him. Bowen saw the two passengers go to the ground and as he stood up, he heard gunfire and saw McMillian shooting at him from outside the driver's door. Bowen released the dog with a command to attack McMillian and

[5]Although no testimony was presented regarding the occupant of the fifth vehicle, Stafford testified the fifth vehicle was unmarked.

[6]Officers Bowen and Calhoun testified they were unaware the warrant had been dismissed because the statute of limitations had expired. 15:822, 914.

retreated to the back of his car. The dog came to the back of the car with Bowen, however, and attacked Deputy Calhoun, who along with Agent Cargile, was returning fire. Bowen ordered the dog to release Calhoun, then fired at McMillian, who was running down the street. McMillian ran to the left between two houses, where he collapsed and was taken into custody. None of the officers was hit but Bowen's car was hit in the driver's side headlight and the driver's side door through the JSO shield. 15:805-815, 818. Bowen testified the dog did not run toward McMillian when it got out of the car and that McMillian was shooting at him before he released the dog. Bowen is 6'3" and the dog is about 20-21 inches off the ground, at the shoulder. 15:833-834.

Agent Cargile testified he was wearing a vest identifying him as U.S. Marshal. The Explorer had police lights inside the car that were invisible unless activated. 15:851-52. Cargile asked Bowen to make the stop because Bowen was in a marked car. 15:853. After Bowen came around, both cars activated their lights, heading south down Firestone. McMillian slowed down and turned onto Fireside. Cargile came around to Bowen's left and saw the passenger and driver side doors of McMillian's vehicle open. One passenger came out and got on the ground. McMillian got out and started shooting in Bowen's direction. Cargile parked, got out, and started shooting at McMillian over the door and hood of his car. Deputy Calhoun had also gotten out but Cargile was focused

on McMillian and didn’t see what either Bowen or Calhoun were doing. 15:871. Cargile didn’t see the dog or see Calhoun get thrown down by the dog. Cargile shot 10-12 rounds with a Glok .40-caliber. McMillian started running, Calhoun shot his M4 rifle, and McMillian ran between two houses. McMillian was pointing the gun back over his shoulder initially but Cargile didn’t see the gun when McMillian ran between the houses. 15:856-57. They found McMillian lying down, with his arms beneath him. They cuffed him, saw he had been shot, and called Fire and Rescue. 15:858-860.

Deputy Calhoun was wearing jeans, a T-shirt, and a vest with U.S. Marshal on it. 15:898. Calhoun testified that Cargile’s car stopped directly behind Bowen’s car, and as Calhoun exited, he saw two black males exit the passenger side of the suspect vehicle and one black male exit the driver’s side. The passenger side males ran about 25 feet and went down to the ground as shots started being fired. Calhoun did not command them to get down. McMillian began firing toward Bowen’s and Cargile’s vehicles. Calhoun exited and took a position on the passenger side of Bowen’s vehicle. Bowen and his dog went to the back of their vehicle, and the dog knocked Calhoun down behind Bowen’s car. The dog was released, as shots were being fired by both sides. Calhoun stood up and saw McMillian firing towards Cargile and shot him once with his M4 rifle, striking him on the left side. 15:900-05. Calhoun

saw the dog get out before Bowen but he was more focused on where the shots were coming from. 15:922.

Deputy Stafford testified that when Bowen activated his lights, the Cadillac didn't accelerate or stop. As the Cadillac and Bowen turned onto Fireside, the passengers' doors opened and the car rolled to a stop. As Stafford exited his car, he heard gunshots from the left side of the Cadillac, and the passengers jumped out. Stafford ordered the passengers to the ground, as did others behind him, and they complied. Stafford never fired a weapon. His view was obstructed until he saw the suspect flee between two houses. 15:940-44.

Deputy Pinkney, in the fourth vehicle back, heard gunshots but never fired his weapon. He moved Cargile's vehicle to allow rescue access to McMillian, and when he got out of the vehicle, he found McMillian's gun, a .45 caliber Desert Eagle semiautomatic, lying in the street 30 feet in front of the suspect's vehicle. 15:931-34, 951, 16:1075.

When McMillian's car was searched on January 16, police found a box of Winchester .45 automatic bullets, eleven rounds, inside the glove box, a holster on the back seat, and a large quantity of men's clothing in the trunk. 14:650-52.

On January 29, 2011, Detectives Wolcott and McClain interviewed McMillian at Shands Hospital. The interview was audio recorded without McMillian's knowledge. 16:1128-30. The

detectives testified they had gone to the hospital several times before, including one occasion when they were allowed to obtain his fingerprints, but McMillian was unconscious. 16:1199. When they called on January 29, 2011, they learned he had been moved from ICU. 17:1205. The nurse told them he was on Motrin. They didn't know he was on an I.V. until they got in the room and didn't know what he had been taking for the prior two weeks. 17:1205-07, 1211.

Wolcott testified McMillian was lying back in bed, didn't appear to be under the influence of drugs, and didn't seem to have any problems understanding him. McMillian was read his rights and said he understood them. He signed the rights form but his signature was not legible, so Wolcott wrote his name. The nurse came in several times to check on his wounds during the interview. 16:1130-36.

The audio recording, State's Exhibit 6, which was played for the jury, is summarized as follows.[7] McMillian initially told the detectives that he last saw Danielle when he came back from the race track in Georgia on Friday around 7:00 p.m. He returned her car keys, which were in his pocket. She said she was going to do some running around, and they parted around 8:30 p.m. His cousin told him what happened the next morning. When the detectives told

[7]This summary is taken from the court reporter's transcript of the recording. 16:1139-95. There also is a written transcript, State's Exhibit 4. 3:543-581.

McMillian that he previously had told them Danielle was going out with friends on Saturday night, McMillian said he wasn't sure about the day, then said he went to the track on Saturday. That night, he and his sister went to a club until about 1:30, he took his sister back to his parents' house, and he left for Georgia around 2 a.m. 16:1144-55. He never had a discussion with Danielle about breaking up. The last time they talked, she said she wanted to be married before she turned 28. They were intimate at her house that night. She was wearing a black shirt and jeans. 16:1155-58. Asked what he was thinking when the police cars were behind him, he said, "Honestly I didn't see no marked car." 16:1158. He thought the truck behind him was the same truck that had tried to pull something on him on the north side. When told the car behind him was a canine officer in a marked car, he said, no, it was a black Explorer. He wouldn't shoot at police because "I ain't ready to die right now." He got out and started shooting at the truck. 16:1160-61.

The detectives then told McMillian that the casings and bullets from the Pineverde crime scene matched the gun McMillian used in the shootout. 16:1162. They asked if he and Danielle were fighting or arguing, and he said, no. Asked if he was mad at her, he said she was mad at him. He was sitting in his car smoking when the white Monte Carlo dropped her off. She walked past McMillian's car, and he opened his car door. They went

inside, had sex downstairs on the couch, then went upstairs. She was intoxicated, and was wearing a black tank top and pink shorts. She was lying in bed. The gun was already upstairs. He couldn't remember what happened. They lay down for a while, and she was shot dead when he left. He knew she was dead because she wasn't moving. She was on the floor by the bed. He didn't call anyone because he panicked. 16:1169-75. When she was dropped off, he couldn't see who was in the Monte Carlo, but she told him who it was. He said, "you just hanging out with niggers all night," and she responded, "whatever." 16:1179-81. They had sex on the couch, and when they got upstairs, he lost it, and shot her twice while she was lying on the bed. They had been sleeping. She rolled out of bed after the first shot, and he shot her again. He had put the gun there two weeks ago. It was behind the TV. He grabbed his jacket, put on his pants, and went out the front door. Asked if he locked the door, he said he just closed it and went to Georgia. When told about the Gate video with him in it, he said he went to the Gate store before she came home. He bought a cell phone charger and a $10 phone card, paid for in cash. He thought it was before she came home. She was asleep when he shot her. 16:1188. He said to apologize to her parents. He wanted to take his own life but couldn't. On January 14, if he had seen the police cars, he probably would have run. He didn't know they were police officers at first, and then he saw JSO. He deserved to be

punished and didn’t think he could “live like this too much longer.” 16:1193.

Laura Draga, FDLE firearms analyst, testified the three .45 cartridge cases and .45 bullet found at the Pineverde scene were fired by the Desert Eagle pistol. 16:1074.

J. A. Gay was the evidence technician at the Fireside Drive scene. Gay testified the distance from the Cadillac to Bowen’s vehicle, door to door, was 21 feet. 15:960. Eight .40-caliber shell casings were found behind and to the left of Bowen’s car. 15:963. A bullet hole was in the left headlight, and a bullet was on the ground under the left front wheel. A bullet hole and bullet were in the driver’s door. 15:965-67, 976. A live .45 caliber round was found on the ground. The .45-caliber Desert Eagle was found with the hammer cocked, in the ready to fire position, and seven others in the chamber. 15:969, 978. A spent .45-caliber shell casing was in the grass. 15:972-73. Gay didn’t measure from the ground to the bullet hole in the car door or headlamp and didn’t know the height from the ground to the top of the police cruiser. 15:994-96.

The phone records for Danielle’s cell phone showed two incoming calls from the Gate gas station around the corner from her apartment at 4:07:15 (63 seconds) and 4:08:31 a.m. (24 seconds). A call from Danielle’s cell phone to the Gate station was made at 4:09:04 (2 seconds). The phone records from the Gate

station phone showed one call to Daniell's cell phone, at 4:07:45. Officer Wolcott testified it wasn't uncommon for phone records to be inconsistent. 16:1123-27.

A video from the Gate station at 5480 Collins Road recorded on January 11, 2009, showed McMillian entering the store. James Mattingly, a Gate employee, testified that it appeared McMillian came inside to get change, probably for a $5 bill, as the video record indicated there was no sale. 14:714.

Detective Wolcott testified he spoke to Mr. McKinnon, Justin's father, two times. Mr. McKinnon did not ask Wolcott to call him when Wolcott wanted Justin down there or that he would make sure Justin came. Wolcott didn't recall asking for McKinnon's assistance in finding Justin. The first conversation Wolcott recalled was on January 28 at 11:35 a.m., when McKinnon called to get an update on his son. 17:1214-15.

Defense Case

Antonio Smith, Justin's cousin, was in Justin's car when Justin was apprehended. Smith testified he was living with his mother, Betty Smith, on Strato Road at the time. That morning, Mr. Mosley, a friend of his mother's, came by the house, and he, Justin, and Mosley left in the brown Cadillac. Smith thought they were going to the store. The music was on, and the windows were rolled up. Smith saw no police cars and heard no sirens down to

Firestone. He first saw the police after they stopped and he was outside the car. He didn't know why they stopped and couldn't remember why they all got out. He didn't recall anyone ordering him out or on the ground. He got on the ground because he heard gunshots. 17:1240-56.

Betty Smith, Justin's aunt, testified that Justin slept at her house on January 13, 2009, which he did periodically. That night, the motion light kept flickering, which was unusual. She went outside but didn't see anything. 17:1258-71.

Edwin McKinnon, Justin's father, testified that he was retired U.S. Navy and currently working for the IRS. He lived with his wife, her oldest daughter, Ashley, his son, Cameron, and Ashley's three children. Justin was his oldest son. Justin was married to Sheneka McMillian, and they had two children, whom Justin was very close to. Justin worked for KBR in Iraq and Afghanistan for two years. While he was overseas, they separated, but they stayed in close contact because of the children. Justin and Danielle started dating when he returned from overseas. She came to the house, and Justin spent some holidays with her family. Mr. McKinnon learned what happened when someone called and threatened Justin. Mr. McKinnon called a detective he had spoken to previously on another matter and asked if they needed to speak to Justin. The detective said no, not now, and McKinnon asked them to call him if anything came up. 17:1272-84. McKinnon

called again to see if they needed Justin to come in for questioning, and the officer said Detective Wolcott was now handling Justin's case. McKinnon called Wolcott and asked if Justin needed to come down, and offered to bring him down, but was again told, not at this time. 17:1286. Next, he found out Justin had been shot. He went to Shands several times but wasn't allowed in or given any information. He went to the Chaplain and was told they didn't allow anyone in unless they thought the person might not make it through the night. They were then allowed to see Justin for 10 minutes. He was chained to the bed, in a coma, and on a ventilator. Mr. McKinnon didn't see him again until he was in jail. McKinnon said Justin was not jealous or possessive, that he was good hearted and would give you the shirt off his back. Justin had worked hard since he was 14 years old and always protected those littler than him. From June 2008 to January 2009, Justin stayed with friends, with Danielle, and at the McKinnon's house. He had stored most of his belongings at their secondary residence. Justin spent 1-2 nights a week at the McKinnon's house. 17:1287-95. On cross-examination, Mr. McKinnon said he wasn't positive it was Wolcott he talked to. 17:1302. When he asked Justin if he was involved in Danielle's death, Justin said he didn't do it. 17:1306-07.

Ashley Walker, Justin's sister, said her brother, Cameron, drove her to Sharky's about 12:15 a.m., where she met Justin and a

friend. Justin was drinking but was not drunk. He was in a good mood. He drove her home a little after 2 a.m., they sat outside talking with Cameron for about 45 minutes, and Justin left around 3. He had been talking about going to Georgia. 17:1312-21.

Cameron McKinnon, 20, said he dropped Ashley off at Sharky's between 11 and 12. Justin and Ashley returned between 1 and 3 a.m., just as Cameron was pulling up. They talked outside for an hour, then he and Ashley went inside. Justin was calm, his usual self. 17:1325-27.

Justin testified on his own behalf. He was born in Glennville, Georgia, and in addition to his brother, Cameron, and his sister, Ashley, he had four other brothers and sisters, Jatavia, Jessica, and Jarvis McMillian, Edwin McKinnon, and Christina. He graduated near the bottom of his class in high school, 176 out of 196. He failed the ASVAB test to get into the Navy. He and his wife, Sheneka McMillian, had two children, Justin, Jr., and Justasia. He and Sheneka separated while he was overseas. They were still married and he supported them but they weren't together as a couple. He worked for KBR in Afghanistan and Iraq for 2-1/2 years as a civilian employee in a war zone. He took many tests before he was hired and learned his IQ was 76. He returned to the states in April 2008 and met Danielle in May. He saw her every day after their first date. He stayed at her Collins Road apartment, helped around the house, and took her to

and from work. In June, they picked his kids up in Georgia to spend the weekend with them. Most of his belongings were in his house in Georgia, but he kept his personal belongings with him, which were in his car at the time of the shooting. He was planning to move back to Georgia and then return overseas. He had been hired by UPS in August 2008. He had money in a bank in Houston, and in January 2009 had about $9,000. He helped Danielle move to Pineverde and slept there after she moved. He put his clothes in his car trunk on January 10. He had been told he might be sent back overseas in February and had planned to spend some time with his kids and his brother in Virginia before he left. He and Danielle had talked about this. 18:1399-1418.

Early in their relationship, Danielle became pregnant. He was excited about having the child but she had a miscarriage. She got pregnant again, and they agreed she would have the child and he would support the child like he supported his children in Georgia. They had talked about marriage. 18:1418-20.

On Friday night, he and Danielle went to her friend Nikki's house, and Justin made plans to go with Nikki's boyfriend to a racetrack in Valdosta the next day. He left about 8:00 a.m. the next morning and returned around 5:00 p.m. Danielle wanted to go out, but he was tired. They had sex on the couch and Danielle smoked marijuana. She left, and he went to a friend's house, then his parents' house, where he rested. He went to his cousin's

house and then to Sharky's. His sister came around 12 or 1. He had a few drinks but was not intoxicated. They left around 2:30 or 3:00 and went to his parents' house, where his brother was just pulling up. 18:1421-28. He then went to Pineverde to get some things he wanted to take with him to Georgia. No one was home. He went inside with the key Danielle had given him, fixed a drink, and went outside to smoke because Danielle didn't want smoking in the house. The blinds weren't on the floor when he went inside. 18:1428-33. When Danielle came home a little after 3:00, he was sitting in his car, smoking. The car, a white Monte Carlo, rode by the house, then came back and dropped her off. She walked right by his car and waved, and the Monte Carlo pulled off. She couldn't see him because of the tint. He opened his door, and she asked why he was sitting in the car, and he said he was smoking. She asked him to come in, and they went inside. He was intoxicated but not drunk. She was pretty intoxicated. She was wearing black pants and a black top. They went in, talked, and had sex. He brought his drink back into the house, Smirnoff. 18:1433-40. They had talked about his plans to go to Georgia earlier that evening and it came up again. She seemed upset. They went upstairs to the bedroom. She wasn't wearing clothes because she had taken off her underwear and pants. She was upset about him leaving with her being pregnant. She told him she had been with Allen Morris, a co-worker, that night and had slept with

him. 18:1440-44. He was upset but not angry and told her it was disrespectful to her family and the people she worked with to have sex with a fellow employee. They both laid down on the bed. After a while, he got up, went into the bathroom, turned on the lights, and got dressed. The lights in the bedroom were off, and Danielle was lying on the bed. He turned off the light when he left the bathroom and put the gun in his waistline, where he usually kept it, and told Danielle he was leaving. His gun had been sitting on the other side of the television set. The gun, which had been at the Collins Road apartment, had been packed in a box and brought to Pineverde by Danielle. He had had the gun since he came home from overseas. He carried it for protection. He didn't want to leave it in his car during the move because he was afraid Danielle's mother would ride in his car and see it. 18:1449. When he said at the hospital that the gun had been there for 20 days, he meant the Collins Road house. 18:1450.

When he told Danielle he was leaving, she said, "I knew you were going to leave anyway so I killed your child," and explained that she had an abortion. 18:1453. He was caught off guard and was hurt. He reacted by firing twice in her direction. The room was dark, the whole upstairs was dark. Then he left. He had put the keys on the hook when they entered the house. 18:1454-59. He went to the Gate station, got change to make a phone call, and called Danielle, but got no response. He went to Georgia because

he didn’t know what to do. He spoke to the police from Georgia and made arrangements to return to Jacksonville. He knew he had to stand up to what he had done. When he got back from Georgia, it was raining. He went to his parents’ house and told his father that Wolcott wanted him to come downtown. They called Wolcott and were told he had to come downtown. Due to the rain and the time, his father told the detective the police could come to the house. Wolcott said he would set something up but never called back. 18:1459-65.

He stayed at his aunt’s the night of the 13th. On the 14th, a police car passed by while he was outside making a phone call. He wasn’t hiding. He was taking Eric Mosley to the store but went to meet a friend on Fireside first. He never saw any police cars. He noticed the black SUV when he turned onto Melvin. On Firestone, he saw the SUV swerve around, as if to avoid traffic. He thought it was an accident and kept driving. His car windows were up going down Firestone, and he never looked in his rearview mirror after seeing the SUV swerve. The car caught his attention earlier because someone in a black Explorer had tried to rob him previously. He took a right onto Fireside. He was meeting his friend, LaQuan Mitchell, at the front entrance of the neighborhood. He got out to get a phone out of the trunk to call Quan and tell him he was there. 18:1465-79.

When he got out of the car, he saw a dog coming at him. The dog was alone. It was not with a handler. He overreacted and shot at the dog. 18:1479. He shot twice and immediately got shot in the stomach. Then he noticed a person standing beside a patrol car and saw other people in civilian clothing, khakis and white T-shirts, shooting at him. When he shot at the dog, it turned and went the other way. He saw a marked car and started to drop his weapon but an officer opened fire on him. He ran to avoid getting killed. He ran in front of his car and got shot in the head and dropped his gun. He ran between the houses and got shot with a bigger gun, which knocked him down. If the police had approached him as he was standing in his aunt's front yard, he would have complied because "I will comply to orders and I'm not resistant." He did not intend to injure or shoot any police officer. He was hit seven times. 18:1481-84.

He didn't know he was in the hospital until the day he spoke to Wolcott. He was on a lot of medications, including a morphine IV at one point. He had no memory of his parents' visit. After he spoke with Wolcott and McClain, his lungs collapsed, he had another surgery, and he was in the hospital another 4-5 weeks. 18:1487-88.

He spoke with Wolcott and McClain again on January 4, 2010. A "jailhouse lawyer" told him they'd find him guilty if he told them he did it. He "got kind of lost not being able to speak to his

lawyer," so he asked to talk to the detectives. He wanted his lawyer there but was under the impression he didn't need to be there. He told the detectives that when he got to Danielle's, she was dead, and the gun was on the bed, which wasn't true. 18:1494. He cared very much for Danielle and was looking for a future with her. When it happened, he panicked. When he called her at 4:07, he was hoping she would answer. He remembered calling her only once that night. 18:1494-95.

On cross-examination, McMillian admitted an officer had attempted to pull him over in Georgia once, and he had fled. He fled to get rid of some narcotics and a firearm that were in the car and then turned himself in. 18:1509-10.

He didn't know how the live round ejected. He was not trained in firearms. The dog was in front of the door when he shot at it. When asked didn't he see the blue lights when he was shooting, he said, "1:30 in the afternoon, you don't see any lights, sir." 18:1516-19. He didn't keep his gun in the holster because he wasn't licensed to carry. 18:1522. He was going to Georgia, but he and Danielle were still together. 18:1524. They did not have an exclusive relationship and he was not concerned that she was having sex with someone else. He wasn't in a rage when he shot her but wasn't thinking clearly and was confused about the abortion. 18:1526. He made one call from the Gate

station. She didn't call back. He didn't use his cell phone because it wasn't on. 18:1529.

He packed his clothes up the night before Danielle moved because she didn't want her mom to know he was living with her. 18:1547. He told Wolcott he had been approached by a white Monte Carlo while driving her car because that had happened. He went to Pineverde that night to get his firearm, cell phone, and some pants he had left over there. He was the only one with a key at that time. He had vaginal sex with her that day, not anal sex. 18:1555. He had moved the gun earlier that day from the bedside table to the dresser. She said what she said, and he turned around and shot towards the bed. 18:1559-61. He didn't know if she was in bed when she got shot to the head. 19:1567. When he laid down, he didn't pull the cover over him. He did not go around the bed and shoot her and didn't tell police that at the hospital. He told them what he could remember. 19:1572. He heard a noise when he shot her. 19:1578, 1578. He shot repetitively, two shots. 19:1573. He learned she had died when his cousin called him. He didn't call 911 because he panicked. 19:1574. The shot to the head was not intentional. He left through the front door. The bottom lock was locked but not the dead bolt. 19:1576-77. He was standing in the same place when he fired both shots, right by the door. 19:1581. In the shootout with police, he got shot in the chest, the stomach, twice in the

back, the head, the thumb, and the side. The head wound fractured his skull. 19:1583.

On redirect, he said Detectives Wolcott and McClain never asked him what triggered the shooting. 19:1591. The gun was in a Reebok shoe box on the dresser until it was moved to the stand-up dresser, beside the TV. 19:1596-97.

State's Rebuttal

In rebuttal, the state played a tape recording of the police interview with Antonio Smith the day of the shootout. Asked, "Why do you think you're down here," Smith said, "Police pulled over the car and I got out of the car and ran." 19:1626. Detective McClain said Smith was describing what happened, not saying what he had prior knowledge of. 19:1630.

Wolcott testified a receipt for a therapeutic abortion at the Florida Women's Center was found in Danielle's purse. Also in the purse were phone numbers and the words, Rape Crisis Center. 19:1633-35. The Florida Women's Center receipt was dated 12-1-08, amount $100. 19:1698.

A videotape of McMillian's January 4th statement was shown to the jury. In the interview, McMillian said he used his key to go inside, went upstairs, and saw Danielle lying there. The pistol was on the bed, jammed, with the clip hanging out. 19:1650. She had taken the gun out of his car that Friday and put it on her

dresser. He shot at the dog coming at him and didn't see police until they stopped him. He got out to get his cell phone from the trunk, heard the dog, saw it coming, and fired at it. The dog turned around, and McMillian got shot. He started to put his gun down, but an officer shot him from behind. He wanted to marry Danielle, and they had talked about it. They last had sex on Friday night. She wanted a kid. 19:1649-83.

Penalty Phase

Marcus Williams testified that he was a police officer in Glennville, Georgia, on June 9, 2005, when he attempted to stop McMillian for driving with a suspended license. McMillian did not stop when Williams activated his lights and siren, so Williams pursued him through a black residential area at speeds of up to 120 m.p.h. and through several stop signs for 5 to 15 minutes. Williams said McMillian nearly struck a child during the pursuit. Williams' supervisor called off the dangerous pursuit, and an hour later, McMillian showed up at the police department. He initially said his cousin was driving but later admitted he was the driver. He said he saw the kids but they were in the ditch. He thought he was going about 80 m.p.h. He was charged with fleeing and eluding a police officer, a felony because of the speed he was traveling, and with reckless driving, driving while license suspended, and a safety belt violation, all misdemeanors. 22:2045-54.

Andrew Durrence, a probation officer, testified that McMillian was placed on probation on January 3, 2008. He received five years probation on the fleeing and eluding and 12 months each on the misdemeanors. As a result of the felony sentence, he was not allowed to possess a firearm. He received first offender treatment, and the judge withheld adjudication of guilt pending completion of probation. 22:2059-67.

The state also presented victim impact statements by Harold Stubbs; Darianne Stubbs, Danielle's younger sister; and Michael Smith and Keioffa Henry, two of Danielle's friends. 22:2068-97.

Dr. Harry Krop, a licensed clinical psychologist, testified for the defense. Dr. Krop's assistant met with Justin initially, and Dr. Krop then met with him four times.[8] Dr. Krop reviewed Justin's school records from Duval County and Georgia, his medical and psychological records from NAS Jacksonville, his medical records from Liberty Regional Medical Center, and his medical records from Shands Hospital. 22:2113-14. Krop also reviewed numerous police reports related to the present offenses, fifteen to twenty depositions, and prior police reports from Georgia. Krop interviewed Justin's father, stepmother, and brother. Krop also conducted a battery of psychological and neuropsychological tests over a two-day period to determine whether Justin had brain

[8]He was seen January 19, 2010; January 27, 2010; February 24, 2010; March 10, 2010; June 9, 2010. 22:2124.

damage. Dr. Krop felt the testing was important because Justin and his family reported that he had been involved in some motor vehicle accidents and had sustained a football injury. The medical records from Liberty Medical Center confirmed that Justin had sustained a concussion in a 2006 car accident. Dr. Krop testified that a concussion is a head injury, and the negative CAT scan showed only that there was no structural damage. He also had a neck injury in addition to the head injury. There were no medical records supporting an earlier football injury because he didn't go to the hospital, but Justin told Krop that the collision split the helmet of the other person and that he was unconscious for about five minutes, which could have damaged his brain. 22:2115-18, 2127, 2138.

Krop testified that everything Justin said about his family history, school history, vocational history, and history of involvement with the law, was substantiated from records or talking to family. 22:2120.

Justin told Dr. Krop, and the records substantiated, that he went to counseling when he was 11 or 12 because of behavioral and academic problems in school. 22:2121, 2128. He was diagnosed with ADD, disorganized type, which no doubt contributed to his behavioral and academic issues. Krop did not view him as having ADD as an adult, however. 22:2121.

Dr. Krop did not think Justin had any diagnosable mental illness at the time of the offenses though he was now very depressed. 22:2120, 2150.

The neuropsych testing showed Justin was functioning in the borderline range of intelligence, in the bottom 10th, or possibly 15th, percentile of the population. 22:2121.

McMillian reported that he had some memory deficits and periods he referred to as blank outs or blackouts. He was abusing alcohol in the year leading up to the offense. The testing showed mild to moderate impairment in the frontal and temporal lobes of the brain, which was consistent with the reported memory issues. The frontal lobe is responsible for executive functions, or higher level processes, such as problem solving, planning, judgment, and impulse control. An impulsive person doesn't think about the consequences of his behavior but reacts emotionally to the stimulus and often doesn't use the best judgment. This was the part of Justin's brain that the testing showed was impaired. 22:2119-22. Krop couldn't say if the brain injury was the result of injuries to his head before the murder or the head injury he sustained when police shot him after the murder. 22:2136.

Dr. Krop said McMillian described his state at the time of the incident as very highly emotionally charged. When a person is in that type of state, he may react differently than he would under other circumstances. Although he'd had some fights and some

behavioral problems before, this incident was way out of proportion to his past behavior. 22:2123.

Dr. Krop testified that Justin was sent to an alternative school at age 15 for fighting and was expelled from Duval County Schools for fighting at age 18. The records indicated that he repeated the ninth grade several times and was then sent into a vocational track. He had been married for seven years. He reported that he has difficulty controlling his temper when he felt betrayed or taken advantage of. Family members also said he had trouble controlling his temper when he felt he, his friends, or his family were being taken advantage of. 22:2124-26.

His prior criminal history showed he was charged with simple battery after a fight involving three people at a convenience store and placed on one year's probation. He had many driving-with-license-suspended charges, all involving the same officer and within a short period of time, and a fleeing and eluding charge from that same officer. 22:2129.

When Krop spoke with McMillian on January 27, he denied committing the murder. He said he split up with his wife because she was cheating on him while he was in Iraq and he would never do what his wife did to him. He described Danielle as down-to-earth, the opposite of his wife. He was living on savings from his time in Iraq. He said the relationship was very intense, meaning that they were able to talk about everything, including his marriage

and his kids. He had never felt as close or felt he could share as much with anyone as he could with Danielle. He had a lot of female friends but Danielle wanted to be the only one. He said he went to a friend's house that night, had some drinks, smoked some marijuana, then went to Danielle's house. He saw her on the floor, saw his gun on the bed, grabbed the gun, and left. A few days later, he was going to get his cell phone, and the police were there, and a dog started coming at him. He shot at the dog twice, not to kill him. 22:2131-35.

At the March 10th interview, he admitted that he killed Danielle. He said he was not generally a violent person. He knew he needed help over the years but he didn't know where to get it. He said things happen when you hold things in, that it had been that way his whole life. When he did things for people and they didn't appreciate it or took advantage, he could lose his temper. 22:2139. He attributed this to his mom abandoning him. Family interviews confirmed that his mother abandoned him at age 3, and his father, who was in the military, and stepmother, stepped in when he was 5. They were decent people and raised him as best they could. There was no evidence of abuse other than the psychological abuse caused by his mother's abandonment of him. 22:2140-41.

He said he had a lot to drink the night of the murder. He didn't go into the house with the intention of hurting Danielle.

He reacted, he didn't mean it. He went to the townhouse because he was going to Georgia to see his kids and his gun was there. He had a key. He was smoking some marijuana outside in the car and drank more alcohol, some Smirnoff. He had the gun with him. While he was sitting there, Danielle came home. She walked to the front door, and he got out of his car. She asked him why he was in the car, and he told her because she didn't want him to smoke weed in the house. He told her he was going to Georgia. He asked her who dropped her off, and she said, a friend. They argued about his leaving. He didn't understand why she didn't want him to leave. He asked her why she was worried about him when she was with someone else. He started to turn around, and she grabbed his car keys and walked upstairs with the keys. She called him on his cell phone and asked him to come upstairs and he went upstairs. When he got upstairs, she told him he needed to figure out what he wanted. She had changed into lingerie. She talked to him about other women he was interested in and then told him that she and the man she had been with weren't serious. He asked her if she was f---- him, and she said she had a couple of times. That's when he reacted. He pulled the gun and shot her the first time. She was sitting in the bed when he shot her. He said he should have walked downstairs but she fell off the side of the bed, said, ow, or something like that, like she had been injured, and he shot her again. When asked why he shot her again, he said, out of

anger. He then walked over to her and knew she was dead. He tried to shoot himself and discharged the bullet but it wasn't in the chamber. 22:2149.

At the June 9 meeting, Dr. Krop met with McMillian briefly to assess his competency. 22:2149.

Asked if he factored into his evaluation that McMillian initially lied to him, Dr. Krop said he did and that it was not unusual for people to lie to him, even when they'd already admitted culpability to the police. About 75% of the 1500 defendants he had evaluated were not truthful about their involvement in the crime. Krop was aware that Justin had told some things differently at trial but had not read his testimony. 22:2150, 2154.

Asked if he believed McMillian had "lost it" from an "impulse standpoint," Dr. Krop said he believed that McMillian had reacted so emotionally partly from his insecurity and partly from jealousy but the main reason this was so emotional for him was because he felt so deeply for Danielle. He recognized what he had done, and some of his behavior afterward, the shoot-out with police, was somewhat self-destructive. 22:2152-53.

The defense also presented the testimony of Justin's father and stepmother, Edwin and Lavonia McKinnon; his sister, Ashley; his brother, Cameron; his wife, Sheneka; and a longtime friend, Durrell Grant.

Edwin McKinnon testified that after he retired from the Navy, he went to school under the GI bill, and now works for the IRS. Edwin and Justin's biological mother, Caroline McMillian, were not a couple when Justin was born. After Edwin sought and was awarded custody of Justin, Edwin's mother, Dr. Reverend Eva Pearl Jordan, raised him while Edwin was stationed 165 miles away. During that time, Edwin came home every weekend. Justin had a good relationship with his grandmother. 22:2161-65.

When Justin was three years old, Edwin married Lavonia, who was from the same hometown, and when Justin was five, they moved to Jacksonville and became a family unit. Justin was "head over heels in love" with Lavonia, considered her to be his mother, and called her "mom." He had his grandmother's name tattooed on one arm and his mother's name on the other. Justin got along well with his brothers and sister. He loved them dearly and they loved him. The family was very close: "[A]ll we do is spend time together." 22:2167-73.

The children were raised in the church and attended regularly. Justin went willingly and was part of the children's ministry and later the youth ministry. 22:2168.

Justin attended Christian Preschool in Glennville and another Christian preschool when the family moved to Jacksonville. On the base, he attended several different elementary schools. When Edwin went out to sea in 1991-1992, his wife moved back to

Georgia, where Justin attended Walker Elementary. When Edwin returned, Justin went to Jeff Davis Middle School and Forest High in Jacksonville. In the interim, he went to alternative school, Lackawanna and Grand Park. During his senior year, there was an issue with another boy at school. Edwin spoke to the resource officer and assistant principal but was told they couldn't do anything until something happened. Justin was then involved in an incident that led to his scheduled expulsion. Edwin got the expulsion rescinded, and Justin transferred to Tattnall County, Georgia, where he graduated from high school. Justin played football, soccer, and track. He sustained a head injury in football while Edwin was at sea but Edwin didn't think he received any treatment. 22:2171-72.

After Edwin was awarded custody of Justin, he did everything he could to insure that his mother remained a part of his life. When they visited his hometown, he gave Justin the opportunity to spend time with his mother. She subsequently had more children, and Edwin would drop Justin off at his mother's. As Justin got older, he wanted more time with his mother and grew resentful that he did not have enough of her attention or didn't feel she loved him enough. 22:2173.

At age 14, Justin decided he wanted to work at the bakery. He wanted to do anything they would hire him to do, sweep, take out the garbage, anything. They hired him, and he was ecstatic.

Over the years, he worked at Riley's, Popeye's, Food Lion, Wal-Mart, CSX. He loved to work. During his senior year, Navy recruiters came to his high school, and he decided to join the Navy like his dad. Edwin didn't know if he decided not to go or was disqualified. 22:2173-74.

Justin's grades were not good. He tried but had difficulty grasping things. Edwin could not accept that he may have had a learning disability, even though his grades and conduct suggested he might have one. 22:2175-76. Edwin's mother tested Justin for learning disabilities. Edwin didn't know the results but thought that if she had diagnosed a disability, she would have taken steps to deal with it. 22:2193-94.

Justin was overseas in Iraq or Afghanistan for several years working with the contractor KBR. He came back for both of his brothers' high school graduations. Edwin's youngest son, who was in school in California when the crime occurred, transferred to the local community college and visits his brother on his regular visit day without fail. When Edwin, Jr., is home on leave, he visits as well. Justin had a close relationship with his children, Justasia and Justin, Jr. He had their names tattooed on his arm. Edwin had seen Justin with his children. He loved them dearly, and they loved him. Edwin felt the children needed Justin in their lives. Edwin said he would continue to visit his son as often as possible. 22:2185-91.

Durrell Grant, Glennville, Georgia, testified that he worked for the Georgia Department of Transportation, grew up with Justin, and has known him his whole life. Durrell drove down to the trial with Justin's biological mother, Caroline McMillian. Durrell said Justin had a good relationship with his brothers and sister in Georgia, that he loved them, and they loved him. He was a very loving father, took very good care of his kids, and would do anything for them. Durrell would do whatever it took to make sure Justin's children could still have a relationship with their father, including taking them to the prison. 22:2196-99.

Ashley Walker, 27, testified that she and Justin had always been close. She relied on him for guidance. Her children love him to death, and he loves them. When they see him, they run and hug him, and he throws them up in the air, which they love. The family always did things together as they were growing up, cookouts, theme parks, birthday parties. She had seen Justin with his children. They love him. Justin is very close with his brothers. Edwin couldn't be there because he's in the Navy but would be there if he could. Ashley had visited Justin at the jail and talks to him on the phone once or twice a week. 23:2201-14.

Cameron McKinnon, 20, testified that Justin was more like a father figure, as their father was in the Navy and gone a lot. Justin looked after him, made sure he was okay, "was my protector, my guider and my mentor, everything." Cameron had seen Justin

with his children, whom he loves like he loves Cameron, Edwin, and Ashley. He takes good care of his kids, and they love him. He has the same relationship with Ashley's children, has nothing but love for his family. Before this occurred, Justin saw his children every chance he got. They'd call him, and he'd call them. 23:2217-18.

Sheneka McMillian testified she and Justin got married in August 2002. They had two children, Justasia, 4, and Justin, Jr., 3. Justin worked the whole time they were married, at Food Lion, Wal-Mart, UPS, CSX, and overseas. He treated her "like a wife should be treated." He took care of his family financially, even after they separated. After they separated, he talked to his children every day or two. He talks to them on the phone from the jail. The children love their father, and he loves them, spent time with them when he could, and was good to them. Sheneka said she believed Justin could be a productive part of his children's lives even while locked up and could give them advice and guidance. She would allow the MacKinnon's to take the children to see their father. She never sought court-ordered child support because Justin provided for them, bought groceries, and gave her money any time she asked him. 23:2221-32.

Lavonia McKinnon married Edwin in November 1987. She already had Ashley, he already had Justin, and together, they had Edwin, Jr., 21, and Cameron, 20. When they got married, Edwin was on

active duty and Edwin’s mother had custody of Justin. As a boy, Justin was rambunctious, full of life, wild, active, into everything, loving. He talked to anybody, hugged everybody. He and Ashley got along great from the start. He adores his grandmother but she was unable to attend the trial because she has been sick and has dementia. The boys all got along. He loves them and they love him. Justin harassed the bakery people until they hired him. He took care of his family, was a great father, and a great husband. Lavonia had visited Justin in jail and talks to him on the phone twice a week. 23:2234-42.

SUMMARY OF ARGUMENT

Issue 1. The state's evidence was insufficient to prove the killing of Danielle Stubbs was premeditated because the state's evidence is consistent with a spur-of-the moment attack, as in a reflexive lashing out in anger. This Court should reduce appellant's conviction to second-degree murder.

Issue 2. The trial court abused its discretion in assigning great weight to the felony probation aggravator where the underlying felony was a 2005 fleeing and eluding charge, a first offense, for which adjudication was withheld, and where the trial court contradictorily found the mitigating circumstance of no significant history of criminal activity.

Issue 3. Assuming this was a premeditated killing, the death penalty is not proportionately warranted for this spontaneous act of violence arising from uncontrolled emotions. Because this Court has reduced the death sentence to life in similar cases involving more or equally culpable defendants, McMillian's death sentence should be vacated.

Issue 4. This Court should re-examine its prior cases and declare Florida's capital sentencing proceedings unconstitutional pursuant to Ring v. Arizona.

ARGUMENT

Issue 1

THE STATE'S EVIDENCE WAS INSUFFICIENT TO PROVE THE KILLING OF DANIELLE STUBBS WAS PREMEDITATED.

This issue was preserved by appellant's motions for judgment of acquittal at the close of the state's case and at the close of all the evidence. 17:1231; 19:1701.

The standard of review is de novo. State v. Williams, 742 So. 2d 509 (Fla. 1st DCA 1999).

Premeditation is defined as:

> more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of the act.

Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997)(quoting Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986)).

Premeditation may be proved by circumstantial evidence. Norton v. State, 709 So. 2d 87 (Fla. 1997); Holton v. State, 573 So. 2d 284 (1990), cert. denied, 500 U.S. 960 (1991). Evidence from which premeditation may be inferred 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.

Holton, 573 So. 2d at 289 (quoting Larry v. State, 104 So. 2d 352, 354 (Fla. 1958)).

Where the evidence of premeditation is circumstantial, however, a special standard of review applies:

> In a case. . . involving circumstantial evidence, a conviction cannot be sustained – no matter how strongly the evidence suggests guilt –unless the evidence is inconsistent with any reasonable hypothesis of innocence.

Mungin v. State, 689 So. 2d 1026, 1029 (Fla. 1995), cert. denied, 522 U.S. 833 (1997). It is not enough if the facts suggest merely "a strong probability of guilt." Owen v. State, 432 So. 2d 579, 581 (Fla. 2d DCA 1983). The circumstances, when taken together, "must be of a conclusive nature and tendency, leading on the whole to a reasonable and moral certainty that the accused . . . committed the offense charged." Id. (emphasis added).

To prove premeditation by circumstantial evidence, therefore, "the evidence must be inconsistent with every other reasonable inference that could be drawn." Larry, 104 So. 2d at 354; accord Long v. State, 689 So. 2d 1055, 1057 (Fla. 1997). Where the evidence fails to exclude all reasonable hypotheses that the homicide occurred other than by premeditated design, the conviction for premeditated murder cannot be sustained. Coolen, 696 So. 2d at 741; Hoefert v. State, 617 So. 2d 1046, 1048 (Fla. 1993); Hall v. State, 403 So. 2d 1319, 1321 (Fla. 1981).

In Mungin v. State, 689 So. 2d 1026 (Fla.), cert. denied, 522 U.S. 833 (1997), this Court found the evidence insufficient to

establish premeditation where the defendant shot and killed a store clerk:

> The State presented evidence that supports premeditation: The victim was shot once in the head at close range; the only injury was the gunshot wound; Mungin procured the murder weapon in advance and had used it before; and the gun required a six-pound pull to fire. But the evidence is also consistent with a killing that occurred on the spur of the moment. There are no statements indicating that Mungin intended to kill the victim, no witnesses to the events preceding the shooting, and no continuing attack that would have suggested premeditation. Although the jury heard evidence of collateral crimes, the jury was instructed that this evidence was admitted for the limited purpose of establishing the shooter's identity.

Id. at 1029; see also Jackson v. State, 575 So. 2d 181 (Fla. 1991)(evidence of premeditation insufficient where victim shot in chest at distance of three feet and evidence consistent with spontaneous, reflexive shooting).

The Court also found insufficient evidence of premeditation in Norton v. State, 709 So. 2d 87 (Fla. 1997). There, the victim, Lillie Thornton, was found lying face down in an open field with a gunshot wound in the back of her head. There were no signs of struggle and no injuries indicating defensive wounds. Norton and Thornton had been dating, were seen together the night she was killed, and Thornton's blood was found in Norton's car, along with a shell casing of the same caliber removed from her skull. Norton had purchased cleaning supplies the morning Thornton's body was found and had removed the carpeting from his car. From this

evidence, this Court concluded that although the jury could have inferred that an unlawful killing occurred, the evidence was insufficient to prove premeditation. As in Mungin, there were no witnesses to the shooting, no evidence of a continuing attack or struggle, no evidence suggesting Norton intended to kill the victim, and no signs of prior difficulties or domestic confrontations. Further, although there was evidence Norton owned a gun, his ownership of a gun did not indicate he intended to use it. Id. at 93. Nor, said the Court, was the location of the wound sufficient to establish premeditation:

> While the nature of the crime and the manner of the wound inflicted may constitute evidence of how the killing occurred, it is not sufficient evidence of premeditation. The gunshot wound inflicted in this case is also consistent with a homicide committed in the spur of the moment.

709 So. 2d at 93. Based on the lack of evidence of what happened immediately before and during the homicide, this Court concluded that the state failed to carry its burden in establishing premeditation and thus reduced his first-degree murder conviction to manslaughter.[9]

[9]Manslaughter is defined as: "The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter . . . " s. 782.07, Fla. Stat. (2009).

This Court also has found insufficient evidence of premeditation in multiple stabbing cases. In Green v. State, 715 So. 2d 940 (Fla. 1998), the victim, Karen Kulick, visited her former boyfriend, Gulledge, the evening of May 21, 1988, angry and intoxicated. Kulick was arrested when she refused to leave and released from custody a few hours later at 2 a.m. Her body was found at 3:30 a.m. on May 22, in the middle of an intersection with her legs spread apart. Her body exhibited evidence of stab wounds and blunt trauma, but the cause of death was manual strangulation.

Green's then-roommate, Franklin, testified that Green and Franklin's stepson went to Kulick's residence the afternoon before her body was found and returned, with Green screaming that her "daddy .. . got after them with a gun" and that he, Green, "was going to kill her before the night was out." Franklin further testified that Kulick telephoned, asking him for a ride, at 1:30 a.m., but he refused, and that shortly after, he heard Green drive away in his car. Franklin's wife and stepdaughter testified they overheard Green say, "I'll get even with the bitch. I'll kill her," and, "I'll get the bitch." Angelo Gay, incarcerated with Green in 1995, testified that Green said he and his buddy picked up a girl in front of the jail, "did things" to her, and "the bitch got crazy on us." Gay said Green said he threw the girl's body out on the highway wearing only her shoes.

In finding the evidence insufficient to support premeditated murder, this Court stated:

> We find that the record in this case supports the reasonable hypothesis that Kulick's murder was committed without any premeditated design. On the night of the murder, Kulick was intoxicated and had a heated argument with Gulledge, her former boyfriend and employer. Kulick was arrested and charged with disorderly conduct and resisting arrest. She was angry and intoxicated upon her release from custody, as indicated by her blood alcohol level at the time of her death. Gay testified that Green confessed that he and a friend picked Kulick up in front of the jail and "did things" to her. Green related that "the bitch got crazy" and he and his friend killed her. There were no witnesses to the events immediately preceding the homicide. Although Kulick had been stabbed three times, no weapon was recovered and there was no testimony regarding Green's possession of a knife. Moreover, there was little, if any, evidence that Green committed the homicide according to a preconceived plan. Finally, although not controlling, it is undisputed that Green's intelligence is exceedingly low. The State argues that the nature of Kulick's wounds provides circumstantial evidence of premeditation. The State also notes that several witnesses testified to hearing Green proclaim in a fit of rage that he was going to kill Kulick. However, the nature of Kulick's wounds and the testimony regarding Green's alleged statements are insufficient evidence of premeditation in light of the strong evidence militating against a finding of premeditation.

715 So. 2d at 944.

Similarly, in Kirkland v. State, 684 So. 2d 732 (Fla. 1996), this Court concluded that premeditation had not been established despite evidence of a prolonged attack against the victim, Coretta Martin, and a history of friction between them. At the time of Coretta Martin's murder, Kirkland was living with Coretta's

mother, Teresa Martin, Coretta, and Coretta's brother, Gregory. Teresa and Gregory found Coretta's dead body when they returned home after a trip. She had suffered a severe neck wound, caused by many slashes, which had caused her to bleed to death or suffocate. The victim suffered other injuries that appeared to be the result of blunt trauma. There was evidence that both a knife and a walking cane were used in the attack.

In finding this evidence insufficient to establish premeditation, the Court said:

> First and foremost, there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide. Second, there were no witnesses to the events immediately preceding the homicide. Third, there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide. Indeed, the victim's mother testified that Kirkland owned a knife the entire time she was associated with him. Fourth, the State presented scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan. Finally, while not controlling, we note that it is unrefuted that Kirkland had an IQ that measured in the sixties.

684 So. 2d at 735.

In Hoefert v. State, 617 So. 2d 1046 (Fla. 1993), the Court found insufficient evidence of premeditation even though the strangled victim was found partially nude and the defendant had a history of strangling women while raping them. In finding the state failed to prove premeditation, this Court said:

> Even taking the evidence presented in the light most favorable to the State, . . . , the State merely established the following: Hunt accompanied Hoefert to his apartment and was found dead in that apartment several days later; the cause of Hunt's death was asphyxiation; Hoefert had strangled several other women while either raping or assaulting them; and Hoefert attempted to conceal his crime by failing to report Hunt's death to the authorities, by digging a large hole in his yard where he planned to bury Hunt's body, and by fleeing to Texas.
>
> Although we find that the circumstantial evidence in this case is consistent with an unlawful killing, we do not find sufficient evidence to prove premeditation.

Id. at 1049.

These cases collectively clarify that any one or two bits of evidence suggesting premeditation aren't sufficient proof of premeditation. A prior threat to commit murder isn't enough; a single, seemingly execution style shot to the back of the head isn't enough; a struggle (or lack of struggle) isn't enough. These alone are insufficient proof of premeditation because they do not negate a spur-of-the moment killing. No matter how strongly the circumstantial evidence points toward guilt, the evidence must nonetheless rebut any reasonable hypothesis of a lesser offense. The circumstances, when taken together, "must be of a conclusive nature, leading on the whole to a reasonable and moral certainty" that the accused committed premeditated murder and not a lesser offense. See Owen.

In the present case, taking the evidence in the light most favorable to the state, the evidence established that McMillian

shot Stubbs in the upper arm and in the head. The medical examiner could not say which shot was fired first but testified that the shots may have been fired simultaneously or nearly so. The shots were not fired at close range. The arm wound was not lethal but the shot to the head was lethal and probably would have caused unconsciousness immediately. Blood on the sheets and pillows indicated Danielle was on the bed when the shots were fired. Inside the arm wound was some material that may have come from the comforter. Her body, along with the comforter, was found slumped on the floor beside the bed, indicating that she moved, rolled, or slid to the floor after one or both bullets were fired. In his statement to police, McMillian said that he shot once, she rolled off the bed, and he shot a second time.[10]

---

[10]In its recitation of "Facts" in the sentencing order, the trial court made several statements that are not supported in the record. First, the court stated there was "evidence of a struggle." 8:1459. There was no testimony by the evidence technician that the scene showed evidence of a struggle. Furthermore, the photographs show an apartment that was neat as a pin, with the exception of some items and boxes that apparently had not yet been unpacked. The testimony about the slats was conflicting. The trial judge also stated that after being shot in the arm, Stubbs grabbed the comforter, moved to the floor, and while "cowering on the floor trying to protect herself, the Defendant moved towards her" and shot her in the head. 8:1460. The part about Stubbs cowering and the defendant moving towards her is pure speculation. The trial court also stated that McMillian told the detectives that he shot Stubbs once and "then went to the side of the bed" and shot her again. 8:1462. The part about moving to the side of the bed is not in appellant's statement to the detectives. It was the state's theory that appellant broke into Stubbs house and sexually assaulted her

This limited evidence is insufficient to prove premeditation. As in Mungen, Norton, Kirkland, and Hoefort, there was no suggestion that McMillian mentioned, threatened, exhibited, or possessed intent to kill Danielle Stubbs prior to the actual homicide. And, as evidenced in Green, even a threat or statement of intent to kill is not alone sufficient to constitute proof of intent.

There was no evidence of prior difficulties or domestic confrontations between McMillian and Stubbs. Nor was there evidence that McMillian was possessive, jealous, vindictive, or in any way abusive toward Stubbs during their entire time together. In fact, all the evidence suggests that the two were quite comfortable and amiable together. Danielle's mother testified he came to family functions, birthdays, and most holidays, that she saw him twice a week during the time he and Danielle dated, and that he was always well-behaved and respectful. Mrs. Stubbs further testified that she believed Danielle would have told her if Justin was mistreating her. Mrs. Stubbs further testified that Justin told her the Friday before Danielle was killed that he and Danielle were breaking up; Mrs. Stubbs did not say Justin was angry or upset when he told her this.

(downstairs?) before he shot her (upstairs). The jury rejected this theory.

There were no signs of domestic difficulties the day of the homicide. Justin's sister, Ashley, testified she was with Justin at a club that night, from midnight until about 2 a.m., and he was happy and in a good mood. Cameron, Justin's brother, testified he talked with Justin and Ashley at their parents' house later that night and Justin was his usual, calm self. He was talking about going to Georgia that night to see his kids.

In Mungin, Norton, Kirkland, and Hoefort, there were no witnesses to events during or immediately prior to the homicide who could testify about intent, and in the present case only Allen Morris, who dropped Danielle off at her apartment that night, was briefly present shortly before the homicide. Morris testified that although Justin's car was parked in the driveway when he dropped Danielle off, she walked up to the house, and waved good-bye. There was no evidence of any sort of problem just moments before the fatal incident; Stubbs exhibited no concern or fear that McMillian was waiting when she was dropped off after a date around 3:30 a.m.

As in all five discussed cases, there is no evidence of a preconceived plan to kill, that McMillian had to do something first in order to kill. He made no special arrangements; he made no effort to conceal his car in Stubbs' driveway when she was dropped off. Nor, as noted in Kirkland and Norton, is there any evidence that he made special arrangements to acquire a weapon or

that his prior ownership of a weapon constituted an intent to use it against anyone, let alone his girlfriend Stubbs. The only trial evidence offered concerning the location of the gun is that it was already in Stubbs' bedroom.

The nature of the wounds are consistent with a lack of premeditation and are consistent with a spur-of-the-moment attack, as in a reflexive lashing out in anger. Stubbs was shot once in the head and once in the arm, virtually simultaneously according to the medical examiner, and not at close range. The state presented no evidence inconsistent with a spur-of-the-moment shooting, fueled by passion and strong emotions. In Mungin and Norton, both victims were shot in the back of the head once. Here, one moment McMillian and Stubbs are talking, the next moment he grabs his gun and fires two shots in rapid succession. One kills Stubbs. The medical examiner couldn't say which bullet hit first. The victims in Green and Kirkland suffered multiple wounds--multiple stabbings, blunt instrument blows--and the victim in Hoefert was strangled, all requiring some degree of extended, ongoing effort, but even these were not of themselves sufficient to constitute premeditation. McMillian fired two shots in quick succession, probably less than a couple of seconds apart.

The state can argue that two shots indicate a continuing attack, suggesting a fully formed purpose to kill. That might be true if there were several shots into the head at close range, but

that isn't the case. Instead, the evidence – two shots fired in rapid succession not at close range – is at least equally consistent with a spur-of-the-moment lashing out in anger.

A conviction of premeditated murder cannot be sustained unless the evidence rebuts any reasonable hypothesis of innocence. Here, we have a young man eight months after returning from two-and-a-half years of employment in combat zones in Iraq and Afghanistan. After months of dating his girlfriend with absolutely no known incidents of anger, frustration, or even unkindness, they break up, and he snapped shortly after she returned home from her date and sexual liaison with another man at 3:30 a.m. This is the classic scenario for a heated emotional confrontation between lovers, or ex-lovers. There were two quick shots from a gun he already owned and either routinely carried with him or had left at her apartment. There were no prior indications of intent, the only witness present shortly prior to the incident saw no sign of any trouble, and there is no evidence whatever of any sort of preconceived plan. The evidence is wholly consistent with a spur-of-the moment shooting with a weapon of convenience and no intent to kill. Premeditation requires "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Roberts v. State, 510 So. 2d 885 (Fla. 1988). Second-degree murder, on the other hand, is committed when an unintended death results from an act "imminently dangerous to another and

evincing a depraved mind regardless of human life."[11] Section 782.04(2), Fla. Stat. (2009); Marasa v. State, 394 So. 2d 544, 545 (Fla. 5th DCA), review denied, 402 So. 2d 613 (Fla. 1981). Here, the state failed to carry its burden of establishing premeditation, and this Court must reduce McMillian's conviction to second-degree murder.

[11]An act is imminently dangerous to another and evincing a depraved mind if it is an act (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, (2) is done from ill will, hatred, spite, or evil intent, and (3) is of such a nature that the act itself indicates an indifference to human life. Marasa, 394 So. 2d at 545.

Issue 2

THE TRIAL COURT ABUSED ITS DISCRETION IN GIVING GREAT WEIGHT TO THE FELONY PROBATION AGGRAVATOR.[12]

The trial court properly found as an aggravating circumstance that McMillian was on felony probation at the time of the murder. The trial court abused its discretion, however, in giving this aggravator great weight where McMillian was serving probation on one case, a 2005 fleeing and eluding, resulting in first offender status and adjudication withheld. Assigning this aggravator great weight also was inconsistent with the trial court's finding as a mitigating circumstance that McMillian had no significant prior criminal history.

A trial court's decision as to the weight afforded an aggravating circumstance is reviewed on appeal for abuse of discretion. See, e.g., Sexton v. State, 775 So.2d 923, 934 (Fla. 2000).

In the present case, the trial court found the felony probation aggravating circumstance based on evidence showing that McMillian was on probation for felony fleeing and eluding when the capital crime was committed. In his sentencing order, the trial judge wrote:

---

[12]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." s. 921.141(5)(a), Fla. Stat. (2009).

> On June 9, 2005, the Defendant was arrested in Glennville, Tattnall County, Georgia, for 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 mile 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 on guilt was withheld upon his successful completion of probation. Mr. Durrence also testified that as a condition 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.

8:1465 (emphasis in original).

While the weight to be given an aggravating circumstance is within a trial court's discretion, that discretion must be exercised in a reasonable manner. That is, there must be "logic and justification for the result." Cannakiris v. Cannakiris, 382 So. 2d 1197, 1203 (Fla. 1990); see also Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

Appellant has found only once case in which this Court has addressed a trial court's assignment of weight to the felony probation aggravator. See Blake v. State, 972 So. 2d 839, 847 (Fla. 2007)(finding no abuse of discretion where trial court assigned "some weight" to felony probation aggravator that was based on four felonies--three involving driving while license suspended and one involving grand theft auto).

This Court has addressed the trial court's assignment of weight to the prior violent felony aggravator, however, and has recognized that the circumstances of the underlying felony or felonies are relevant in determining what weight to give the prior violent felony aggravator. Franklin v. State, 965 So. 2d 79, 96 (Fla. 2007). For example, this Court held the trial court did not abuse its discretion in assigning great weight to the prior violent felony aggravator where the aggravator was based on the defendant's previous convictions for first-degree murder and attempted robbery where the jury found that Blake possessed a

firearm but did not discharge a firearm resulting in death. Blake, 972 So. 2d 846-47; see also Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996)(characterizing prior violent felony aggravator as "weighty" where aggravator was based on "second-degree murder bearing many of the earmarks of present crime"); Duncan v. State, 619 So. 2d 279, 284 (Fla. 1993)(affirming death sentence where single aggravating factor of prior second-degree murder of fellow inmate was weighed against numerous mitigators).

This court also has discounted the weight of the prior violent felony aggravator based on the underlying circumstances. See, e.g., Jorgenson v. State, 714 So. 2d 423 (Fla. 1998)(weight of prior violent felony aggravator based on 1967 second-degree murder minimized because old and defendant shot man who was attacking his sister and had no other criminal activity since 1973 release); Larkins v. State, 739 So. 2d 90 (Fla. 1999)(prior violent felony, a 1973 manslaughter conviction, minimized because occurred over 20 years earlier and defendant had since led a crime-free life); Sexton v. State, 775 So. 2d 923, 934 (Fla. 2000)(no abuse of discretion in affording little weight to 1965 robbery conviction because of its temporal remoteness); Urbin v. State, 714 So. 2d 411 (Fla. 1998)(discounting prior convictions of armed robbery, armed burglary, and armed kidnapping in home invasion committed two weeks after murder); Terry v. State, 668

So. 2d 954, 965 (Fla. 1996)(aggravated assault conviction discounted because occurred at same time as murder, was committed by codefendant, and involved threat of violence with inoperable gun).

Just as the Court has reviewed and discounted the weight of the prior violent felony aggravator based on the underlying circumstances, the Court should here review and discount the weight of the felony probation aggravator based on the underlying circumstances. McMillian was placed on probation after pleading guilty to fleeing and eluding, a felony due to the speed he was traveling. He was given first offender status, and adjudication was withheld. The aggravator thus is based on appellant's first and only felony offense, for which he served no jail or prison time, and which caused no harm to others. It makes no logical sense for a court to assign such a relatively weak aggravator great weight, the same weight that courts routinely assign to CCP and HAC. See Larkins, 739 So. 2d at 95 (holding that CCP and HAC "are two of the most serious aggravators set out in the statutory scheme"). To do so negates any purpose, use, or logic in assigning weight.

Furthermore, the trial judge's assignment of "great weight" to the felony probation aggravator appears to be pro forma, as the trial judge gave no explanation for this determination and, in effect, came to the opposite conclusion in evaluating and finding

the mitigating circumstance of no significant prior criminal history. In finding this mitigator, the trial judge wrote:

> It was established during the penalty phase that the Defendant had no convictions for violent felonies prior to the commission of the murder of Danielle Stubbs. To rebut this mitigating circumstance, the State can rely on evidence of arrests and other evidence of criminal activity that did not result in a conviction. Davis v. State, 2 So. 3d 952, 964 (Fla. 2008); Dennis v. State, 817 So. 2d 741, 764 (Fla. 2002); Lucas v. State, 568 So. 2d 18, 22 n.6 (Fla. 1990). During the penalty phase of the trial, the State introduced the Judgment and Sentence for the felony fleeing and eluding charge. Further, although no person was injured during this incident, the testimony of Officer Williams established that it involved a high speed chase at speeds of up to 120 miles per hour, which took place in a residential area and endangered the lives of nearby children. The State also presented other evidence of prior criminal activity. Dr. Krop testified that he reviewed various police reports which corroborated the felony fleeing and eluding arrest, as well as numerous arrests for driving on a suspended driver's license. In addition, based upon his review of the Defendant's school records, Dr. Krop testified that the Defendant was sent to an alternative school at the age of 15 for fighting, and that he was expelled from the Duval County School system at the age of 18 for fighting. The Defendant's father, Edwin McKinnon, testified that an "altercation" did take place between the Defendant and another individual during his senior year, but denied that the Defendant was expelled. He testified that the Defendant was scheduled to be expelled, but that he was able to get that rescinded and the Defendant was allowed to transfer to a school in Georgia and graduate there. Finally, Dr. Krop also testified that the Defendant was previously charged with battery for fighting and placed on one year of probation.
>
> Accordingly, the evidence of the Defendant's prior criminal history, while not of the nature of violent felony convictions, reduces the weight of this mitigating circumstance. The Court finds this mitigating circumstance proven, but gives it little

> weight in determining the appropriate sentence to be imposed in this case.

8:1468 (emphasis in original).

The trial court thus found that McMillian had no significant prior criminal history, taking into consideration the fleeing and eluding charge, as well as some lesser run-ins with the law, yet contradictorily also determined that his probation status for this insignificant crime was entitled to great weight. These findings are irreconcilable. The trial court's assignment of "great weight" to the felony probation aggravator was arbitrary, unreasonable, and an abuse of discretion. This error requires resentencing by the trial judge.

Issue 3

THE DEATH SENTENCE IS NOT PROPORTIONATELY WARRANTED BECAUSE THIS COURT HAS REDUCED DEATH SENTENCES TO LIFE IN PRISON IN SIMILAR CASES INVOLVING EQUALLY OR MORE CULPABLE DEFENDANTS.

This Court has long recognized that the law of Florida reserves the death penalty for "only the most aggravated and least mitigated" of first-degree murders. State v. Dixon, 283 So. 2d 1, 7-8 (Fla. 1973)(finding a "legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes"), cert. denied, 416 U.S. 943 (1974); see also Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998); Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999); Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

In deciding whether the death sentence is proportionate in a particular case, the Court has summarized the guiding principles as follows:

> [W]e make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence. We consider the totality of the circumstances of the case and compare the case to other capital cases. This entails a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. In other words, proportionality review is not a comparison between the number of aggravating and mitigating circumstances.

Williams v. State, 37 So. 3d 187, 198 (Fla. 2010)(quoting Offord v. State, 959 So. 2d 187, 189 (Fla. 2007)(internal quotations and citations omitted)). The standard of review is de novo. See Larkins v. State, 739 So. 2d 90 (Fla. 1999).

Applying these principles, it is apparent that the present case is neither the most aggravated nor the least mitigated case for which the law has reserved the ultimate sanction of death. In other cases involving circumstances similar to those presented here--an emotional, spur-of-the-moment violent encounter--this Court has held the death penalty disproportionate.

The present case involves only two aggravating factors, committed while on felony probation and prior violent felony.

As discussed in Issue 2, supra, the circumstances of the felony probation aggravator are not compelling: a 2005 fleeing and eluding, first offender treatment, adjudication withheld, no one harmed. This is a relatively weak aggravator.

The prior violent felony aggravator, though serious, must be viewed under the particular circumstances of this case. In the present case, the prior violent felony was McMillian's attempted second-degree murder conviction based on the shots he fired during the shoot-out with police three days after the homicide. Although the jury, by its verdict, found this act was "imminently dangerous to another and demonstrated a depraved mind without regard for

human life,"[13] no one was harmed. Furthermore, the offense occurred days after the murder, and thus does not involve a return to violent crime after a period of incarceration. See Urbin v. State, 714 So.2d 411 (Fla. 1998)(noting that prior violent felony used as an aggravator occurred after the murder). McMillian had never been to prison and, other than a couple of fights with no apparent injuries to anyone, had shown no violent criminal propensities before the instant murder.[14]

The circumstances of the murder also militate against the death penalty. This tragedy was the result of an emotional encounter involving little, if any, premeditation. McMillian and Stubbs had broken up or were breaking up after an eight-month relationship, unmarked by any type of violence. McMillian had planned to return to Georgia to be with his children prior to going oversees for another stint with the military contractor, KBR. There is nothing in the record to show that this was a planned killing. Rather, the record reflects that the shooting was committed reflexively and was an emotional reaction to Stubbs' admission that she had sex with another man and/or had aborted the child she and McMillian had recently conceived.

[13]See s. 782.04(2), Fla. Stat. (2009).

[14]Dr. Krop noted that McMillian had been arrested for battery and had been involved in one or two fist fights in school.

Dr. Krop testified McMillian was in a highly emotional state when he fired the shots, and that he overreacted because he cared so deeply for the victim. Neuropsychological testing revealed that McMillian has memory deficits and mild to moderate brain damage to the frontal and temporal lobes, i.e., to the part of the brain responsible for problem solving, planning, judgment, and impulse control. Dr. Krop explained that when a person's impulse control is impaired, the person reacts emotionally and doesn't think about the consequences of their behavior. The trial court credited this testimony, finding as a mitigating factor that McMillian suffered from mental and emotional distress at the time of the murder.[15] This Court long has recognized mental mitigation as among the most compelling. See Miller v. State, 373 So. 2d 882 (Fla. 1979)("a large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of mental illness, uncontrolled emotional state of mind, or drug abuse"); Kramer v. State, 619 So. 2d 274 (Fla. 1993)(reducing sentence to life despite aggravating factors of prior violent felony and HAC where defendant under extreme emotional distress and had severely impaired capacity to conform his conduct to requirements of law at the time the crime was committed).

[15]The trial judge gave this mitigating factor "some weight."

There were other compelling mitigating circumstances. McMillian's father, stepmother, brother, sister, and wife all testified that he was a loving son, brother, and husband. His brother, Cameron, six years younger, described him as a father figure, "my protector, my guider, my mentor, everything." McMillian has two young children who love him and need him. Family members and friends testified that he loves and has taken good care of his children. After McMillian and his wife separated, he visited his children often, talked to them every day or two, and continued to financially support his family. Despite an IQ in the borderline retarded range, 76, McMillian finished high school, and since the age of 14 has demonstrated a remarkable work ethic. His father, stepmother, and wife all testified that he has worked since the age of 14, doing anything he could get hired to do. He managed to pass the tests necessary to obtain a job with the military contractor KBR and worked for two-and-a-half years as a civilian employee in a war zone.

McMillian's death sentence is disproportionate when compared with other cases in which this Court reversed the death sentence on proportionality grounds. See Farinas v. State, 569 So. 2d 425 (Fla. 1990); Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Ross v. State, 474 So. 2d 1170 (Fla. 1985); White v. State, 616 So. 2d 21 (Fla. 1993); Douglas v. State, 575 So. 2d 165, 167 (Fla. 1991);

In Wilson v. State, this Court vacated the death sentence where the defendant was convicted of killing his father in a heated confrontation, where there were two valid aggravating circumstances, HAC and prior violent felony, and no mitigating circumstances.

In Ross v. State, this Court vacated the death sentence where the defendant killed his wife, where the killing was HAC but was mitigated by the fact that the defendant had been drinking and the killing had occurred during an angry dispute.

In Farinas v. State, this Court vacated the death sentence where the defendant shot his former girlfriend three times, first paralyzing her and then shooting her twice in the head. The murder was heinous, atrocious, and cruel (HAC) and was committed during a kidnapping but there was mitigating evidence that the defendant was under the influence of extreme emotional disturbance due to intense jealousy.

Like the above-cited cases, the killing in the present case was the result of an emotional confrontation, occurred upon reflection of short duration, and involved a similar balance of aggravation and mitigation.

This Court also has found the death sentence disproportionate in cases that, unlike the present case, involved preplanning. In White, the defendant's relationship with the victim had ended badly, and months later, he assaulted the victim's date with a

crowbar. While in jail for that incident, White swore he would kill his former girlfriend. When he was released, he obtained a shotgun, drove to the victim's place of employment where he encountered her in the parking lot, and shot her after she turned to run. After she fell down, he approached her and fired a second shot into her back, said, "I told you so," and drove off. After considering the emotional circumstances, this Court concluded that the death sentence was disproportionate.

In Douglas v. State, the defendant, who had been involved in a relationship with the victim's wife, abducted the victim and his wife, tortured them over a four-hour period by forcing them to perform sexual acts at gunpoint, hit the victim so forcefully in the head with the rifle that the stock shattered, and then shot him in the head.

When the facts of the present case are compared to the preceding cases, it is clear that worse crimes and equally–-or more-–culpable defendants have received sentences of life imprisonment. The present offense was an unplanned, reflexive killing, the product of uncontrolled emotions. The defendant, despite severe mental limitations, including brain damage and an IQ of 76, had been a loving, nonviolent, hard-working contributor to his family and to society prior to this incident. In the pantheon of capital crimes, this is not one of the most aggravated and least mitigated. Death is a disproportionate penalty for

McMillian, and this Court should reverse his death sentence and remand for imposition of a life sentence with no possibility of parole.

Issue 4

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH BECAUSE FLORIDA'S CAPITAL SENTENCING PROCEEDINGS ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

This issue was preserved by McMillian's Motion to Declare Florida's Death Sentencing Procedure Unconstitutional under Ring. 1:119-133. The standard of review is de novo.

The death penalty was improperly imposed in this case because Florida's death penalty statute is unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended to the capital sentencing context the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences. Section 921.141, Florida Statutes (2009), does not provide for such jury determinations.

McMillian acknowledges that this Court has adhered to the position that it is without authority to declare section 921.141 unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied,

537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002).

Additionally, McMillian is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So. 2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statute with the constitutional requirements of Ring. See e.g., Marshall v. Crosby, 911 So. 2d 1129, 1133-1135 (Fla. 2005)(including footnotes 4 & 4, and cases cited therein); Steele. At this time, McMillian asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare section 921.141 unconstitutional. McMillian's death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Issue 1, vacate appellant's conviction with directions that the conviction be reduced to second-degree murder; Issue 2, reverse for resentencing; Issues 3-4, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

NADA M. CAREY
Assistant Public Defender
Florida Bar No. **0648825**
Leon County Courthouse
301 South Monroe Street, Suite 401
Tallahassee, FL 32301
(850) 606-8500
nadaC@leoncountyfl.gov
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished By electronic transmission to **CAROLYN SNURKOWSKI**, Assistant Attorney General, Counsel for the State, The Capitol, Tallahassee, Florida, 32399-1050, and a copy has been mailed to appellant, **JUSTIN RYAN MCMILLIAN**, #133220, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this date, May 31, 2011.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY THAT, pursuant to Florida Rule of Appellate Procedure 9.210, this brief was typed in Courier New 12 Point.

Respectfully submitted,

_____

Nada M. Carey
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

JUSTIN RYAN MCMILLIAN,

Appellant,

v. **CASE NO. SC10-2168**

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX TO
INITIAL BRIEF OF APPELLANT

APPENDIX	**DOCUMENT**
A	Sentencing Order