IN THE SUPREME COURT OF FLORIDA

JOHN KALISZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-580

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR HERNANDO COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This case presents a direct appeal from the Circuit Court for Hernando County, Florida , following the Appellant's convictions for first degree murder and sentences of death. This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Kalisz." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

Unless indicated otherwise, bold-typeface emphasis is supplied. Cases cited in the text of this brief and not within quotations are italicized. Other emphases are contained within the original quotations.

STATEMENT OF THE CASE

On February 3, 2010, the grand jury of Hernando County, Florida indicted John Kalisz for the January 14, 2010, murders of Kathryn Donovan and Deborah Tillotson. (V1, R10-12).[1] Following various pre-trial proceedings, Kalisz' trial began on January 17, 2012. The jury found the Defendant guilty of two counts of Murder in the First Degree with a Firearm—one for each victim, Kathryn Donovan (Count 1) and Deborah Tillotson (Count 2); two counts of Attempted First Degree Murder with a Firearm—one for each victim, Manessa Donovan (Count 3) and Amy Louise Wilson (Count 4); and Burglary of a Dwelling with a Firearm (Count

[1] Cites to the record are by volume number, "V_" followed by "R_" for the page number.

5). The trial court granted the Defendant's pre-trial request for severance of Count 6, Possession of a Firearm by Felon.[2] The capital convictions proceeded to the penalty phase and on January 26, 2012, the jury returned two advisory sentences of death by a unanimous vote of twelve to zero (12-0) for each murder. The trial court held a *Spencer*[3] hearing on February 17, 2012. The trial court imposed the two death sentences on March 6, 2012. The Defendant filed a notice of appeal on March 23, 2012. The Appellant filed his *Initial Brief* on or about December 7, 2012. This answer follows.

STATEMENT OF THE FACTS

The State relies on the following facts from the evidence and testimony presented at trial.

The 911 Call

On January 14, 2010, the Hernando County Sheriff's Office (HCSO) received an emergency 911 call from the home of Kathryn Donovan in Brooksville, Florida. During the 911 call, Amy Wilson said she and three other

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[2] At the sentencing hearing on March 6, 2012, the State announced a nolle prosequi as to the felon in possession of a firearm charge: Count 6 of case in the court below 2010-CF-0114. (V7, R1067).

[3] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

people had been shot. (V11, R460).[4] Ms. Wilson said that, "a man came to the house and started shooting. He has gray hair . . . a ball cap . . . [and] a blue sweatshirt." (V11, R461). Wilson identified the other victims in the home as Manessa Donovan, Kathryn "Kitty" Donovan, and Deborah "Debi" Tillotson. All four of them had been shot and none of them could move. (V11, R461, 462, 463).

The Murders at Donovan's House

Manessa Donovan[5] lived with her mother, Kathryn Donovan. From her home, Donovan (or "Kitty" as she was known by most people) operated a business where she employed Deborah Tillotson, Amy Wilson, and her daughters Suzanna Grief and Manessa.[6] (V11, R492, 495). The Defendant, John Kalisz is Donovan's brother and Manessa's uncle. (V11, R488, 489). Manessa knew that her Uncle John drove a white Ford van with Colorado license plates. (V11, R490). On January 14, 2010, Manessa was pregnant. (V11, R461).

In the mid-afternoon of January 14, 2010, everyone was finishing their work

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[4] Denise Maloney, assistant manager for the communications center, HCSO, testified that all 911 calls are digitally recorded. (V11, R455). The call was published to the jury. (V11, R456, 460-67, State Exh. 1).

[5] For clarity purposes, only Manessa's first name will be used to distinguish from her mother, Kathryn Donovan.

[6] Donovan ran a "Color Analysis" business from her house in Brooksville, Florida. (V11, R463-64, 492). Grief was not working that day.

for the day. (V11, R495). Manessa, Tillotson, and Wilson were in the backyard, which was fenced and gated. (V11, R493, 496). Wilson was cleaning up items from work inside a backyard shed, Tillotson had stepped out to smoke a cigarette, and Manessa was petting her horse next to the back porch. (V11, R496). Manessa then heard her mother yell from inside the house, "What the hell are you doing here?" immediately followed by three gunshots. Manessa and Tillotson moved toward the closed, sliding glass doors to check on Donovan. (V11, R496, 497, 498). Donovan was inside lying against the glass door, on the floor between a table and some boxes. (V11, R498). Manessa saw a bullet hole through one of the glass doors. She saw Kalisz standing directly in front of the glass door on the other side. (V11, R498). Tillotson was standing right behind Manessa. (V11, R 498).

"The next thing I remember," Manessa said, "is my uncle standing right in front of me holding the gun in my face." (V11, R498). Kalisz held the gun within inches of her face. (V11, R499). "He did not say a word and neither did I. He just stared at me for a moment." (V11, R499). "Then," Manessa said, "I remember him shooting me once, and I believe I fell to the ground. He then stood over me and shot me about three or four more times." (V11, R499). Kalisz shot Manessa in her stomach, left hip, ribs, and her right hand. (V11, R505). Manessa closed her eyes and acted as though she were dead and when she opened them again, she saw Kalisz walking toward Wilson. (V11, R499). Manessa then saw Wilson run toward

the side of the yard. Kalisz shot Wilson once and she fell to the ground. (V11, R500). Wilson "was pleading for her life," asking Kalisz, "Please don't kill me." (V11, R500, 501). Kalisz shot her again and then headed toward the front of the house. (V11, R500-501). Wilson called out to Tillotson and Manessa, and then she called 911. (V11, R501). Because of her injuries from the gunshots, Manessa could not move and she could not see where Tillotson was located. (V11, R500). Wilson could not move either and remained on the side of the yard. (V11, R501).

When Sheriff's deputies arrived, Manessa told them that Kalisz had "shot everybody." (V11, R502). As emergency personnel removed Manessa from the scene, she saw Tillotson lying on the back porch close to the house. (V11, R502). Manessa could not determine if Kalisz had been drinking that day. Kalisz did, however, "recognize [her] very well." (V11, R510). Manessa said that Kalisz "look[ed] like he was possessed by a demon."[7] (V11, R512).

Amy Wilson Green[8] was working for Donovan's home-based business on

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[7] After Manessa recovered from her wounds, she made a statement to defense investigator Sarah Flynn prior to trial that on the day of the shootings, Kalisz' "eyes were black. I thought he was on drugs. He was like a statue. There was no recognition. I think he was demon possessed." (V11, R510, 512).

[8] By the time of trial, Amy Louis Wilson—as she is identified in Count 4 of the indictment—married and had taken the name Amy Wilson Green. For clarity, Amy Wilson Green will be referred to as Wilson or Amy Wilson, her name at the time of the shooting.

January 14, 2010. (V13, R747, 748). Wilson was in Donovan's backyard walking toward the sliding glass doors when she "heard a big bang, and then saw Kitty slide down the glass door" inside the home. (V13, R749, 750). Wilson "heard another bang" and then yelled for Manessa and Tillotson "to run." (V113, R750). Kalisz—identified in court as the gunman—then shot Wilson in the stomach causing her to fall face-first into the dirt. (V13, R751, 753). Wilson heard "a lot of screaming, a lot of banging," and "gunshots," as she got up to run. Kalisz "opened fire on all of us," Wilson said. (V13, R751). As she ran, Kalisz came up behind Wilson and kicked her foot out from underneath her and she fell to the ground. As Wilson rolled over onto her back, Kalisz pointed the gun in her face. She rolled to her left side as Kalisz shot her again. The bullet entered her right shoulder and lodged in her neck.[9] (V13, R752). Wilson said that she then "played possum," pretending to be dead so Kalisz would stop shooting and leave. (V13, R753). Kalisz turned his attention elsewhere and Wilson was eventually able to call 911. (V13, R754).

Deputy Giselle Mulverhill, HCSO, responded to the 911 call about a

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[9] Medical personnel informed Wilson that the bullet could not be removed from her neck as the procedure might cause paralysis. (V13, R755). Wilson is still in pain and unable to work as a result of her injuries. (V13, R755).

shooting at Donovan's home. (V11, R514, 515, 516). Armed with her agency issued shotgun, Deputy Mulverhill entered Donovan's yard through an open gate that was lined up with the driveway—she did not know whether the shooter was still at the house. (V11, R517). Another deputy had arrived as backup. (V11, R517). Deputy Mulverhill scanned the property for a suspect. (V11, R517). Amy Wilson staggered toward Deputy Mulverhill with "blood all over her" and a bullet wound in her stomach. (V11, R517). She got Wilson to lie down and tried to calm her as she relayed information to the dispatcher. (V11, R518). Deputy Mulverhill then checked on Manessa and found her lying in the fetal position, sobbing. Deputy Mulverhill could see bullet wounds in Manessa's hand and stomach, "blood all over her shirt," and she "was having a hard time breathing." (V11, R518, 519). Deputy Mulverhill asked, "Who did this to you?" and Manessa responded, "My uncle, John Kalisz." (V11, R519). Deputy Mulverhill requested that backup units to form a perimeter around the house and to check inside the home for a suspect. (V11, R519). Deputy Mulverhill next found Tillotson on the back porch lying against the house where she had fallen into potting soil and garden tools. (V11, R520). Deputy Mulverson could see that Tillotson "was breathing, but not well." (V11, R520). Tillotson had a large, dark spot on her left leg and two gunshot wounds to her stomach "that were very close to each other." (V11, R520). Emergency Medical Personnel (EMS) were in route to the home.

(V11, R521). Mulverhill then looked inside the open, sliding glass doors and saw Donovan lying nearby in between the glass door and the table. "It didn't appear she was breathing," Mulverhill said. Deputy Mulverhill checked for a pulse but was unsure whether or not she could feel Donovan's heartbeat. (V11, R521). Mulverhill then moved Donovan onto her back to assist EMS when they arrived. (V11, R521). Donavan and Tillotson both succumbed to their gunshot wounds and died at the scene. (V13, R919). Sheriff's deputies did not locate Kalisz at Donovan's home.

The Day Before the Murders

Todd Linville was friends with John Kalisz. (V12, R575, 576). He knew Kalisz drove a Ford van. (V12, R577). On January 13, 2010, Kalisz came to Linville's home in Brooksville at about 10:00 p.m. (V12, R577, 578, 579). Linville said that Kalisz "was a wreck . . . hopeless." (V12, R594). Kalisz told Linville that he had a bottle of alcohol with him which surprised Linville because he had never seen Kalisz drink and knew Kalisz was a member of Alcoholics Anonymous (AA). (V12, R580). Linville invited Kalisz into his home. Within an hour, Linville saw Kalisz take "a sip . . . about an ounce or two" from the bottle of alcohol. (V12, R582, 593). Kalisz eventually fell asleep in a chair about 4:30 on the morning of January 14, 2010. (V12, R580, 581, 582, 594).

At about 7:30 a.m., Kalisz told Linville about his plans for the day. Kalisz

was going to talk to his brother, attend a noon meeting, and speak to someone about his parole. Linville initially said that Kalisz did not mention any plans to go to his sister's house. (V12, R583, 584). Linville said Kalisz called him later that day about 3:00 p.m. Kalisz talked about "taking care of a problem. That he had been to his sister's house" and "taken care of all of them." (V12, R584-85). Linville believed Kalisz was in a state of despair. Linville asked Kalisz, "How do you feel now?" and Kalisz responded, "I don't feel anything." (V12, R594-95). Linville began driving towards the Donovan's home and called 911 on his way. Upon being told the shootings had occurred, Linville was then instructed to go to the Sheriff's Office where he gave a statement to Detective George Loydgren, HCSO. (V12, R585-586). Linville said that he still considered Kalisz to be his friend. Linville became combative and elusive when being questioned at trial by the State. The prosecutor had to confront Linville several times with the statement that he provided Detective Loydren.

During his statement, Linville told Detective Loydren that Kalisz "told me last night . . . I have got a 9-millimeter, and I have these clips, and I have got seven clips and I have got more, and, they are hollow points . . . ." (V12, R587-88). Detective Loydgren asked Linville, "Well, who was he going to take out?" Linville replied, "His sister." (V12, R589, 597). Linville told Detective Loydgren that Kalisz indicated he was going to kill Donovan and her family because they had

ruined his life so he was going to ruin theirs. (V12, R590, 592). Further, if anyone tried to stop him, Kalisz would put a gun to his own head, it "doesn't matter if they are a cop." (V12, R592, 593). Linville said Kalisz disliked Donovan and blamed her for his problems and that she had cost him his inheritance. (V12, R595, 597).

Earlier on the Day of the Murders

Larry Lemon had known Kitty Donovan for 15 years. He also was acquainted with Donovan's daughters, Manessa and Suzy, and the Defendant, John Kalisz. (V11, R468, 469, 470, 489). Early in the afternoon of January 14, 2010, Lemon saw Kalisz driving his van near a farm where Lemon occasionally worked. (V11, R469, 472, 474). Lemon recognized the white, Ford Aerostar van as Kalisz' by its Colorado license tags. (V11, R472). Kalisz was not allowed on the farm property without Lemon's permission. (V11, R473). Kalisz drove up to Lemon and asked if he could shoot his gun on the property. Kalisz had recently called Lemon several times, so Lemon agreed since Kalisz "was there already." (V11, R473). Lemon said Kalisz acted "strange," but it was normal for Kalisz to do so. Kalisz did not appear to be intoxicated. (V11, R478).

Kalisz showed Lemon a black, nine millimeter semiautomatic hand gun which also contained a red-dot laser sight. (V11, R473-74). On the day before, Kalisz had visited the Sportsman's Attic where he purchased two magazines for a nine millimeter Beretta handgun, one box of Federal full metal jacket ammunition,

and one box of Mach Tech hollow point ammunition.[10] (V12, R562-564). As Lemon worked around the farm, he heard Kalisz shoot the gun between five to seven times. (V11, R474). Lemon said that after Kalisz finished with "target practice," he asked Lemon if he could help him with anything but Lemon said no. Shortly thereafter, Lemon noticed a laser dot on a tree behind him, "as if he had just pointed [the gun] at me." Lemon told Kalisz to leave. Kalisz sat in his van for about ten minutes before pulling on to the road, where he stayed for quite a while. (V11, R475-76, 477). Lemon looked towards Kalisz' van a while later and it was gone.

Amanda Prestigiacomo was Donovan's next-door neighbor. (V11, R479-80). In the afternoon of January 14, 2010, Prestigiacomo and her five-year-old daughter Allison were walking in their neighborhood when she noticed a Ford van with Colorado plates driving nearby. (V11, R480-81). The male driver was "driving erratic." Prestigiacomo was also concerned because the van did not have Florida plates, and "we know everybody in the neighborhood," she said. (V11, R481). Prestigiacomo saw the van park in the side yard of Donovan's home. (V11,

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[10] On February 9, 2010, HCSO Detectives went to Sportsman's Attic and obtained a copy of a receipt which FDLE recovered from Kalisz' van. (V13, R877-78). The receipt indicated "John" made a purchase on January 13, 2010, for two Beretta magazines and two boxes of ammunition. (V8, R174, State Exh. 44).

R482). After Prestigiacomo and her daughter Allison returned home, Allison played outside near the Donovan house. (V11, R482). A short time later—maybe ten to fifteen minutes—Allison ran in the house and told Prestigiacomo that police were outside. (V11, R483).

Shootout at the Gas Station in Dixie County

After the murders at the Donovan house, HCSO released a "Be On the Look Out" (BOLO) for Kalisz and his white Ford Aerostar van. (V12, R632-33, 638). Major Dean Miller, Major Scott Harden, Captain Chad Reed, and Lieutenant Michael Brannin from the Dixie County Sheriff's Office (DCSO) responded to the BOLO just before five o'clock in the afternoon of January 14, 2010. (V12, R630, 632; V12, R644, 645; V15, R1063-1065). Lt. Brannin was dressed in plain clothes and was driving an unmarked Chevrolet pick-up truck that day when he encountered Kalisz' van on U.S. 19 and followed it. Maj Miller was driving an unmarked white Ford F-150 pickup truck. (V12, R646). Other marked and unmarked patrol units followed as well. (V12, R632; V12, R635-36).

Lt. Brannin followed Kalisz into a gas station. When Kalisz pulled up to a gas pump, Brannin pulled in front of the van. (V12, R636, 637). Maj. Miller parked to the side and behind Brannin's vehicle by the gas pumps. (V12, R649). Lt. Brannin exited his truck and walked toward the back left fender of Kalisz' van. He positioned himself about 15 feet away from the van in order to identify the

driver. Maj. Miller exited his truck with his sidearm drawn. Lt. Brannin was looking at the van when he saw Kalisz brandish a firearm. Kalisz was still seated in the van. (V12, R637, 638, 640). Deputies shouted for Kalisz to "show his hands." (V12, R649). Kalisz raised his pistol at the officers and gunfire erupted. (V12, R649). Lt. Brannin fired four shots into the van's windshield. (V12, R639, 642-43, 649). Brannin heard other gunshots. "Shots were simultaneous," he said, "The shooting was over very fast." (V12, R640). Kalisz' van rolled into Brannin's truck. (V12, R640). Maj. Miller made his way around the back of the van to the front by the driver's side where he could see Kalisz laying on his side. (V12, R649-650). Kalisz's weapon was on the seat next to him. (V12, R649). Miller reached in the van's window, unlocked the door, removed Kalisz' weapon, and placed it on the roof of the van. (V12, R649). Kalisz was removed from the van and handcuffed. Miller checked him for wounds. Kalisz had been shot several times and was transported to the hospital. (V12, R641). During the gun battle between DCSO and Kalisz, Capt Chad Reed was fatally shot.[11] Maj. Miller requested that Florida Department of Law Enforcement (FDLE) handle the "officer involved shooting" investigation. (V12, R651).

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[11] The State did not present any evidence of Capt. Reed's death during the guilt phase of trial. Kalisz later pled guilty to first degree murder and was sentences to life in prison for Capt. Reed's death. (V15, R1066-67, Penalty Phase State Exh. 3).

Agent Barbara McGraw, FDLE, and Brittany Auclair, crime scene technician, investigated the shooting at the gas station. (V12, R653, 654; V12, R663, 664-65).[12] Auclair sketched and photographed the scene and also collected evidence that included Kalisz' handgun, wallet, and cell phone. (V12, R665, 666, 668, 670, 671). In addition, she collected: five firearm magazines located near and around Kalisz' van; nine loose rounds of 9-millimeter bullets located inside Kalisz' van; one empty ammunition box and two boxes of live, 9-millimeter ammunition, also located inside Kalisz' van. (V12, R674, 678-81). Auclair also collected a spent shell casing and a gun shop receipt for 9- millimeter ammunition from inside the van. (V12, R683, 685, 687). Kalisz' van was seized and transported for processing. (V12, R656, 658). Auclair attended the autopsy of Capt. Chad Reed, DCSO. (V15, R1057-58). Auclair collected a projectile and a piece of jacketing that was removed from Capt. Reed's body during the autopsy, and subsequently submitted to the firearms section of FDLE. (V15, R1058, 1059).

After the Murders—The Investigation, Autopsies, and Forensics

The day after the murders, Larry Lemon learned about the shooting at Donovan's home, so he went to the Sheriff's office. (V11, R476). Lemon then led

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[12] Agent April Glover, FDLE, also assisted in the investigation of the shooting at the gas station. (V12, R728, 730).

detectives to the farm[13] and showed them the area where Kalisz' fired the handgun. (V11, R477; V12, R567). Detective Jill Morrell, HCSO, located and collected four empty shell casings. (V12, R571, 572, 573).

Angelique Lees, forensic technician, HCSO, testified that she and two other specialists processed the crime scene at the Donovan home. She photographed and videotaped[14] the scene and also collected evidence. (V11, R525-26, 528, 529). Lees collected eleven expended shell casings as well as one live nine-millimeter round and bullet fragments and projectiles. (V11, R535, 536-37, 538, 541, 543). On June 16, 2010, Lees went to Tampa General Hospital and collected a projectile that was surgically removed from Manessa. (V11, R551, 553).

Detective George Loydgren, HCSO, interviewed Amy Wilson while she was hospitalized subsequent to the shootings. (V12, R600, 603). Loydgren observed a gunshot wound to Wilson's right shoulder as well as a "through and through" gunshot wound to her lower right abdomen with the exit wound under her lower left breast. (V12, R605, 606). Loydgren also spoke with Larry Linville on January 15, 2010. Linville told Detective Loydgren about his conversation with Kalisz. After interviewing Linville, Detective Loydgren went to the hospital and showed

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[13] The farm was about 17 minutes from Donovan's home. (V12, R571).

[14] The videotape was published to the jury. (V11, R530-33).

Manessa Donovan a photo lineup. Manessa identified Kalisz as the shooter. (V12, R606-07, 608-09).

Dr. Kyle Shaw, medical examiner, performed the autopsies on Tillotson and Donovan. (V13, R887, 890, 905).[15] Tillotson had a bullet wound to her upper right arm which created abrasions and caused a fractured arm. (V13, R893-94). This wound was irregular as it exhibited "pseudo stippling." Shaw said, "pseudo stippling . . . is most consistent with an intermediate target which has shattered . . . wood with splinters, hard plastic which can shatter or glass which can shatter." (V13, R894, 918). Tillotson also had a bullet wound to her thigh. (V13, R897, 900-01). In addition, Tillotson had two adjacent gunshot wounds to her abdomen. (V13, R898). These bullets travelled from Tillotson's lower left abdomen in an upward direction and lodged in her right lung and right chest area. (V13, R900). Dr. Shaw removed projectiles and fragments from Tillotson's body and submitted them to the HCSO forensic technician. (V13, R901). In Dr. Shaw's opinion, Tillotson died as a result of multiple gunshot wounds. (V13, R903).

Donovan had a bullet wound to the lower right side of her back which exited

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[15] The autopsies of Donovan and Tillotson were performed on January 15, 2010, and were also attended by Detective Jill Morrell, HCSO (V12, R567), and Jennifer Briere, forensic specialist, HCSO (V12, R616, 617). Briere photographed the bodies and collected their clothing and projectiles which were removed by the medical examiner. The projectiles and fragments were sent to the Florida Department of Law Enforcement (FDLE) for analysis. (V12, R617-18, 619, 620).

her left chest that Dr. Shaw described as a "through and through" gunshot wound. (V13, R908, 911, 913, 915). She had a second bullet wound on the lower right side of her back, closer to her spine which did not exit her body. (V13, R911, 914). Donovan also had a third bullet wound just above her buttocks on the lower back that entered the back part of one of her pelvis bones. (V13, R911, 914). Dr. Shaw recovered two projectiles from Donovan's body and submitted them to the HCSO forensic technician. (V13, R915, 916). In Dr. Shaw's opinion, Donovan died as a result of multiple gunshot wounds. (V13, R917). Dr. Shaw further opined that if the gunshots to Donovan and Tillotson had been inflicted within a short period of time, the victims would have lost consciousness rapidly and died. (V13, R919).

Josh Wright, firearms analyst, FDLE, examined Kalisz' Beretta 9-millimeter handgun. (V12, R693, 699-700). After test-firing the gun, Wright determined the safety mechanisms operated properly. The trigger pull was within the manufacturer's specifications. In addition, the gun contained a "crimson trace grip" which, when the handle of the gun is gripped, produces a red laser point in the direction of where the projectile will be fired. (V12, R701, 702). Wright said the gun fires 9-millimeter caliber ammunition. The boxes of ammunition that were collected from Kalisz' van contained cartridges that could be fired from Kalisz' gun. (V12, R703-04). The magazines that we collected from Kalisz' van fit the Defendant's handgun. (V12, R706-707).

Wright examined fired cartridges recovered at the Donovan home and the gas station in Dixie County—submitted by the HCSO and the FDLE Live Oak office—and determined the cartridges were fired from Kalisz' nine-millimeter Beretta handgun. (V12, R707-20). Wright also analyzed the projectiles that were recovered by HCSO from the bodies of Donovan and Tillotson during their autopsies and determined that those projectiles were fired from Kalisz' pistol. Additionally, Wright examined the projectile removed from Capt. Chad Reed and determined that it had been fired from Kalisz' handgun. (V15, R1060-62).

Kalisz' Statements

On January 27, 2010, Agents April Glover and Barbara McGraw, FDLE, and Detective Bryan Faulkingham,[16] HCSO spoke to Kalisz at Shands Hospital.[17] (V12, R734, R776, 778, 879). This was the first day that Kalisz was able to talk to law enforcement. (V13, R880). Agent Glover said Kalisz was interviewed for three hours, with a break during that time. At the end of the interview, Kalisz agreed to be further interviewed. Agent Glover said Kalisz was able to respond appropriately

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[16] Detective Faulkingham investigated the shootings at Donovan's home. (V13, R776, 778, 879). While en route to the crime scene, Faulkingham was given a description of Kalisz as well as his vehicle. (V13, R780). Faulkingham later learned that Kalisz had been apprehended and taken into custody in Dixie County. (V13, R780).

[17] Kalisz had been hospitalized for 13 days. (V12, R738).

but "at times" he did "come off subject." (V12, R740). Glover was aware that Kalisz did not know the date or what city he was in. (V12, R740). Kalisz was in custody and restrained to the bed "because of his combativeness to the nurses." Kalisz was under arrest and not free to leave. (V12, R738-39).

Kalisz indicated he knew his *Miranda*[18] rights after Faulkingham read them. (V12, R735, 736). The Defendant did not execute a written waiver of his *Miranda* rights, however, he gave no indication that he did not want to talk to the law enforcement officers. (V12, R662). Kalisz indicated that he understood his constitutional rights.[19] (V12, R736). Kalisz even said to the agents "you've seen my record." (V13, R792). Kalisz started saying that he did not "believe that all the things I have been going through have been legal, through the legal channels. So

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[18] *Miranda v. Arizona*, 384 U.S. 436 (1966). (V12, R660). Faulkingham first read Kalisz his *Miranda* rights and Kalisz verbally indicated that he understood them and began answering questions and talking without any indication that he did not wish to speak to law enforcement. (V12, R662) (V13, R784, 884) (V13, R792, 794-95).

[19] At the suppression hearing and at trial, Detective Faulkingham testified that Kalisz said he had been read his *Miranda* rights "a million times." (V7, R934, 945; V13 R794). The transcript attributes the "a million times" statement to Detective Faulkingham, "and you said you've been read those before . . . okay, a million times already." (V13, R794). At the suppression hearing Detective Faulkingham indicated that he may have spoken over Kalisz but that Kalisz said he had been read his *Miranda* rights "a million times" before. Agent Glover also heard Kalisz say he had been read *Miranda* a million times before. (V7, R959-960; V12, R736-737).

I've got a real hard time with talking." (V13, R793-794). "But then," Kalisz continued, "I don't have a real hard time with anything. I mean, I'm on my way out." (V13, R794). The agents asked Kalisz' permission to videotape and audiotape the conversation to which Kalisz agreed. (V12, R735, 737, 739, 741) (V13, R782-783, 785, 794-95, 880). Detective Faulkingham recorded the interview. (V12, R658-59, 661). A redacted version of the interview was published to the jury. (V13, R787, 790-861, 866-76).

Michael Johnson, licensed clinical social worker, had spoken with Kalisz on January 27, 2010, prior to Kalisz meeting with law enforcement. Subsequent to their conversation, Kalisz agreed to speak with police. (V12, R721-25). Johnson did not know if Kalisz was taking pain medication at that time. (V12, R725-26). In Johnson's opinion, Kalisz "was oriented to self," and knew he was in the hospital, but was unsure of the city he was in and did not know the correct date. (V12, R726). Johnson was present while detectives read Kalisz his *Miranda* rights. Kalisz indicated he understood them. (V12, R727).

During the interview, Detective Faulkingham asked Kalisz if he recalled what had happened. Kalisz said, "I am coming outta Hernando" and he remembered "a little bit" of what had occurred. (V13, R791). Kalisz asked, "What am I being charged with" and "Is it even worth being charged or letting these charges go on?" (V13, R791, 792). Kalisz did not know the correct date and thought he was in a

Hernando County hospital. Faulkingham informed Kalisz that he was in Shands hospital and that it was January 27, 2010. (V13, R796, 882). When Faulkingham asked Kalisz, "Do you know how you got hurt?" Kalisz replied, "Um, I think I do know how." (V13, R797). Detective Faulkingham said Kalisz did not fall asleep during the interview but at some points he closed his eyes. At times, Kalisz did not give appropriate answers to questions. (V13, R882-83). But, Detective Faulkingham said that overall Kalisz responded appropriately to the questions asked of him. (V13, R785, 881).

Kalisz said he lived in a mobile home[20] in Spring Hill, Florida. He was there about two weeks ago and had attended a "Christmas party at AA." (V13, R798, 882). Kalisz said to law enforcement, "friends, family," treat him poorly, "like it's a game to them." Further, "All this stuff that went on with Manessa, everything were total lies." (V13, R800-01). Kalisz said he spent his inheritance fighting charges for "something I never did." He said Manessa is "a pig." Kalisz told Faulkingham to look through police reports to find out what had previously happened between him and Manessa. (V13, R801). When asked about what happened previously between Manessa and him, Kalisz said, "talking to a guy who

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[20] The mobile home burned down two days prior to the shootings. (V13, R855, 885).

doesn't have a lawyer sitting in front of him. I'm a little hesitant to begin with." (V13, R801).[21]

Kalisz said he had been sober for 19 years, attended AA meetings, and "I help people." (V13, R801). He has two sisters that live in Connecticut, and "one sister in Florida, one brother in Florida." Kalisz said his sister Kitty, "pig of a sister of mine," lived on Wilhelm Road with her daughter, Manessa. Kalisz said Kitty did not like him. (V13, R803). Kalisz recalled that the last time he talked to Kitty and Manessa was "way before the trial."[22] (V13, R804).

Kalisz told Faulkingham that Kitty ruined his roofing career. (V13, R807). Kalisz bought a gun "last week" for "the operation that I was going to put families through." (V13, R809, 810). Kalisz wanted "to erase the hell out [that][23] Kitty and her blood line." (V13, R811). Kalisz' "plan" was to "stop the s - - t . . . with bullets." (V13, R813). Kalisz planned to use "whatever kind" of guns he had and "however [sic] many it took" to carry out his "plan." (V13, R813). He bought guns

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[21] When Kalisz made the statement about not having a lawyer in front of him, he was speaking in context of the discussion about the prior charges that involved Manessa and her boyfriend.

[22] Kalisz pled no contest in 2009 to Aggravated Assault with a Deadly Weapon. (V8, R208-09). Kalisz explained that in November 2009, he put a knife to Manessa's boyfriend's chest. (V13, R831-32).

[23] "That" appears in the transcript but is not audibly heard on the recordings.

"all over the place" but getting ammunition was a problem. (V13, R813-14). Kalisz recalled shooting his gun for practice at "Charlie's, one of Kitty's ex-husbands" prior to the shootings at Kitty's home. (V13, R828).

Kalisz said Kitty "ain't gonna get her dues." Faulkingham asked Kalisz, "Why don't you think she is gonna get her dues?" In turn, Kalisz asked Faulkingham, "Did she live . . . from what happened that day . . . when I went over there and started shooting everybody." (V13, R816-17). Kalisz said he shot "five, six" people. (V13, R817). Kalisz thought Kitty's other daughter Suzy was at the house, along with another female that he did not know. (V13, R818, 883). Kalisz said there were 17 rounds in the magazine. (V13, R818). Kalisz did not know who he shot first. "Whoever it was didn't even matter." However, Kalisz thought he first shot someone outside of the house. (V13, R818). Kalisz shot Kitty "until the bullets ran out." Further, "I shot everybody until the bullets ran . . . until they shut up." (V13, R819-820).

Kalisz called his sister Linda after the shootings. He told Linda, "it was over." (V13, R820). Kalisz planned "to get the hell outta Florida" after the shootings. (V13, R821). Kalisz recalled getting stopped by a police officer at the gas station. He said, "Some guy pulled an AK . . . and pulled mine." (V13, R821). Kalisz was "pretty sure" someone else beside himself got shot because "too many rounds went off." He remembered "guns going off." (V13, R822). Kalisz thought

he was outside his van when he started shooting. He said, "Somebody kept saying don't shoot." (V13, R824). Kalisz said he shot a "9-millimeter . . . a 747" handgun at the gas station. He did not know how many police officers he shot. (V13, R826-27). Kalisz "fired a lot of friggin rounds." (V13, R837). He admitted he was shooting at "Police." (V13, R838). Kalisz said he needed to talk to his sister and that he had told her "everything." (V13, R839, 884). He is closest to his sister, Linda, in Connecticut. (V13, R846).

Kalisz planned on driving to Pennsylvania after the shootings because "there is another wrecked family down there."[24] (V13, R829, 832). Kalisz said he did not "have enough time to do everything . . . f - - -ing Dan[25] and his mother." (V13, R852). If he had first gotten to Dan and his mother, "then I might not have got Kitty," which was his main objective. (V13, R852-53).

Kalisz did not remember buying gun accessories shortly before the shootings. He "didn't need them." (V13, R845). His gun had a red laser sight on the grip. (V13, R856). He had "maybe ten, 12" magazines with him the day of the shootings. He was carrying a Beretta nine-millimeter. (V13, R857-58). Kalisz said

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[24] Kalisz said that something happened "to multiple people" in Pennsylvania "years ago" but he did not want to elaborate. (V13, R834, 835).

[25] "Dan" was Manessa's boyfriend, the victim of the aggravated assault in 2009. (V13, R804).

he sponsors Todd Linville (in AA) but Linville would not have known Kalisz' plans. "He didn't know anything about anything." (V13, R851).

Kalisz decided to shoot Kitty after his probation officer (Ms. Whipple) told him he could not return to Colorado to get his work tools. (V13, R854). Kalisz said he entered Kitty's house through the back door. Kitty said, "What the f - -k are you doing?" (V13, R859). Kalisz kept shooting until "there was nobody else alive and then I got in my car and left." (V13, R861).

Kalisz stopped at the gas station in Dixie County to get gas—he did not know police were following him. He may have reached for his credit card when he first stopped at the gas station, but he could not remember for sure. (V13, R867). When Kalisz saw the police officers around his van, his gun was in his belt buckle on the front of his pants. (V13, R866, 867). Kalisz said, "I figured it'd be over by then and if it wasn't over by then, there was a possibility of making it out." (V13, R868). One police officer was telling Kalisz to get out of the van. (V13, R868). He thought an officer attempted to get in his van through the passenger side door. Kalisz stopped him, "with my gun apparently." (V13, R869).

Kalisz recalled drinking "a couple of hits . . . maybe a couple of shots" that day. (V13, R871). He had resented Kitty for a while . . . he had "plans" for Kitty. (V13, R872-73). Kalisz did not know his niece Manessa was pregnant at the time he shot her. (V13, R874). Kalisz had not spoken to either Kitty or Manessa for

months prior to the shootings. (V13, R874).

On January 23, 2012, Kalisz was found guilty on all counts. (V14, R1022-23). The penalty phase was held January 25, 2012.

The Penalty Phase

Aggravation

In addition to the evidence from the guilt phase of trial, the State presented the following evidence in aggravation.

Sheena Whipple is a probation supervisor for the Department of Corrections. In November 2009, Whipple was Kalisz' probation officer subsequent to Kalisz' plea to a charge of aggravated assault with a deadly weapon and contributing to the delinquency of a minor. (V15, R1068, 1069-70, Penalty Phase State Exh. 4). Subsequent to the events that occurred at the gas station, Kalisz pled guilty to first degree murder for the shooting death of Capt. Reed. On February 10, 2011, Kalisz was sentenced to life in prison for Capt. Reed's murder. (V15, R1066-67, Penalty Phase State Exh. 3).[26]

Victim Impact

Nicole Tillotson DiConsiglio and Lauren Tillotson, Tillotson's daughters, read statements to the jury. (V15, R1071, 1074-81, 1082-86).

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[26] See V8, R200-01.

Mitigation

At the penalty phase, the defense called several of Kalisz' family and friends to testify. The defense also presented the testimony of a forensic psychologist.

Linda Pleva is Kalisz' younger sister by five years. Their sister Kathryn Donovan was the oldest of seven siblings. (V15, R1087-88). Pleva said Kalisz served in the army but that it was not "a good experience." In the early 1980's, after Kalisz' discharge from the Army, Pleva and Kalisz "became very close" and did "a lot of partying." They drank together and played pool. Kalisz did not have a home, "he just sort of drifted around with different people." Kalisz spent his days and evenings drinking until he fell asleep. (V15, R1089, 1090). Pleva lent Kalisz her car, supplied him with alcohol, and provided him with her home. "I would help him do whatever he wanted to do." (V15, R1090).

Pleva stopped "enabling" Kalisz when she realized how her own behavior affected on her children. Kalisz "drifted out west" and became homeless. (V15, R1090). For the next 15 years, Pleva heard from Kalisz every few months. He "usually" called Pleva from jail. (V15, R1091). In early 1990, Kalisz called Pleva to tell her he was sober. (V15, R1091-92). Kalisz began to sound different. He had "a little bit of self-respect." (V15, R1092). However, in August 1990, Pleva learned their brother Michael, who "was a terrible alcoholic," had committed

suicide.[27] (V15, R1093). Pleva told Kalisz about Michael's suicide after the funeral service had taken place. Kalisz then "came home." (V15, R1093). Pleva had not seen him for eight years. (V15, R1093).

When Kalisz arrived home, Pleva said Kalisz looked "vibrant, and healthy again." He was "self-confident" and had "clarity in his eyes." Pleva and Kalisz have maintained a close relationship since then. (V15, R1094). Pleva said Kalisz eventually settled in Estes Park, Colorado. "It just seemed to be where he needed to be." (V15, R1094). Kalisz got a phone and maintained a post office mailbox. (V15, R1094-95). Kalisz was a roofer by trade and hired people that needed jobs. Pleva was not sure if he was their AA sponsor. Kalisz "dedicated his life to helping people." (V15, R1095).

In 2004, Kalisz developed severe back problems which affected his roofing business. He also suffered several heart attacks. (V15, R1096). In 2008, Pleva's and Kalisz' mother died. (V15, R1096). Just prior to her passing, Kalisz said he had to leave. "I got work to do. I got to go home." He packed his vehicle and left. The siblings were "all kind of shocked." (V15, R1097). Pleva learned a few months later that Kalisz had returned to Colorado "and just broke down." (V15, R1098).

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[27] Pleva said her three brothers are all alcoholics. (V15, R1093).

Pleva said Kalisz was living in Spring Hill, Florida, in 2009. (V15, R1100). During that year, Kalisz was placed on probation for "legal problems" involving Manessa and Kathryn Donovan. (V15, R1098). Kalisz learned he was not allowed to return to Colorado, his "sanctuary." (V15, R1099). In January 2010, Kalisz' mobile home exploded, "it burned to the ground." Kalisz lost his few remaining possessions. (V15, R1100, 1103). Immediately after Kalisz lost his home, Pleva spoke to him. Kalisz "sounded worse than . . . ever." He was "filled with despair. He was extremely depressed. He was lost . . . absolutely hopeless." (V15, R1101).

Pleva talked to Kalisz late in the morning of January 14, 2010. (V15, R1104). Pleva was concerned "because his trailer had blown up and he had lost everything." (V15, R1104). Kalisz again called Pleva late in the afternoon. Kalisz "told me it was over." Kalisz said he was near Donovan's home and he was "heading south." (V15, R1104-05). Their brother Robert lived in Clearwater, Florida. (V15, R1105).

Rebecca Bernaducci is Kalisz' older sister and lives in Connecticut. (V15, R1106). She said they grew up in a "cold household . . . emotionless." In order to "cope" with their upbringing, the siblings started drinking as teenagers—Bernaducci, her brothers and Donovan. (V15, R1107). Although the sisters eventually stopped drinking, Bernaducci's brothers had a harder time giving up alcohol. Her brother Michael committed suicide at 40 years old. (V15, R1108).

Kalisz did not attend Michael's funeral. (V15, R1109). During Kalisz' homeless periods, Bernaducci did not have contact with him. (V15, R1108). However, she did visit Kalisz in Colorado in 1992. She said, "We had a great time." (V15, R1110). They attended AA meetings together: "it is like everybody knew him and loved him." (V15, R1110). For the next 15 years, Kalisz' life "was about AA. He was devoted to it." (V15, R1111). Kalisz also helped Bernaducci's daughter get sober. (V15, R1112). Shortly before their mother died, Kalisz returned to Colorado "where he could show emotion" even though all the siblings stayed with their mother. (V15, R1113, 1114).

Subsequent to Kalisz' trailer burning down, their brother Robert visited Kalisz. Kalisz showed no emotion when Robert found Kalisz' AA chips in the rubble. Bernaducci said, "We figured something was really, really wrong with him to dismiss these . . . chips the way he did. They were so important to him . . . something wasn't right." (V15, R1114). Bernaducci was close to Donovan and spoke to her on a monthly basis after Donovan had moved to Florida. (V15, R1107).

Tammy Debaise met Kalisz and his siblings in 1976. She dated Robert Kalisz for a short time and then re-connected with him in 1993. (V15, R1116-17). Tammy and Robert married in 1995. Kalisz attend their wedding and "took pictures." (V15, R1117). Debaise and Robert divorced a few years later. In 1998,

Debaise moved to Estes Park, Colorado, and lived with Kalisz. They were together for about five years. (V15, R1118). Debaise said Kalisz suffered several heart attacks in 2004. (V15, R1138).

Debaise said Kalisz was very involved in AA. Together, they went to open AA meetings and traveled around the United States. (V15, R1118, 1124, 1130). Kalisz "sponsored" other AA members, and performed service work. (V15, R1118-19, 1126). Debaise said, "every time you see John, he would be talking AA." (V15, R1121).

Debaise said Kalisz told her he left his mother's side prior to her passing because "he could not handle" it. (V15, R1130). Debaise was aware that Kalisz had legal problems in Florida in 2009. (V15, R1133). After talking to Kalisz' probation officer, Debaise agreed to the probation terms and was willing to assist Kalisz if he was permitted to return to Colorado. (V15, R1134). Kalisz' roofing equipment and truck were in Colorado. However, his tools were eventually stolen. (V15, R1135). Debaise spoke to Kalisz after his trailer burned down. Kalisz told Debaise, "I lost everything." (V15, R1137).

Mark McQuery is a friend of Kalisz' whom he met at an AA meeting in Colorado in the early 1990s. (V15, R1140, 1141-42). They were very close friends. Kalisz was "very serious about getting sober." (V15, R1142). Kalisz sponsored many alcoholics in AA. (V15, R1149). Over the years, McQuery saw Kalisz at

various AA conventions and assemblies. Kalisz was "really relaxed and smiling a lot more . . . life was good for him." However, McQuery had not seen Kalisz for more than 10 years. (V15, R1150).

Peter Tippette met Kalisz in 1995 at an AA meeting in Colorado. Together, they attended the same meetings for the next 15 years. (V15, R1151-52). Tippette said Kalisz was very involved in the service aspect of AA, in particular, sponsoring other alcoholics. (V15, R1153, 1155). Tippette occasionally utilized Kalisz' roofing skills "because he did excellent work and for a reasonable price." (V15, R1158). Tippette last saw Kalisz in 2008. (V15, R1159).

Seth Paumen was a neighbor of Kalisz' in 2003 in Loveland, Colorado. (V15, R1159-60). Kalisz was a good neighbor and they occasionally socialized together. (V15, R1161). As a roofer, Kalisz worked hard and did a good job. Many people utilized his services. In addition, Kalisz was a good person to work for. (V15, R1161). Paumen said Kalisz was very involved in AA. (V15, R1163). Subsequent to Kalisz' heart attacks in 2004, he could no longer work like he used to. Although Kalisz was "still happy John," Paumen said "you could tell there was more anxiety in his life." (V15, R1164). Paumen last saw Kalisz in November 2009. (V15, R1165).

Todd Linville met Kalisz at an AA meeting in Brooksville, Florida. (V15, R1166). Kalisz became Linville's sponsor. (V15, R1167). After Kalisz' legal

troubles began in 2009, Linville got a new sponsor. (V15, R1167). Linville said it appeared that Kalisz "was sort of being pushed to the side" at AA meetings. (V15, R1169).

Linville saw Kalisz on January 13, 2010. Kalisz was "distraught, helpless, defeated, and in turmoil." Kalisz repeatedly tried to call his own AA sponsor but did not get a hold of him. (V15, R1169). However, Linville said there are other AA meetings held in the Brooksville area. (V15, R1170).

Robert McMakin's videotaped deposition was published for the jury. (V15, R1171-72). McMakin met Kalisz at an AA meeting in Texas ten years prior to trial. However, he had not seen Kalisz for five years. (V15, R1172, 1181). McMakin was Kalisz' AA sponsor and sponsored Kalisz via "long distance." (V15, R1173). Kalisz "was very serious about the program." (V15, R1175). McMakin said Kalisz "seemed to be real kind to people" that had a lot of problems. (V15, R1176). Kalisz also sponsored other AA members and shared "anything that he had with someone else in the program. He would give people his last dollar." (V15, R1177). McMakin said Kalisz "loved" AA. "It saved his life." (V15, R1180). Kalisz never indicated to McMakin that he had psychological problems. (V15, R1181).

McMakin spoke to Kalisz subsequent to his arrest in this case. Kalisz told him that he had been charged with the murder of his sister and another woman.

McMakin then said Kalisz told him that he was concerned he had killed a law enforcement officer "because that law enforcement officer had two small children." (V15, R1182-83). In addition, Kalisz was "bothered" that he could not leave Florida because he was on probation. (V15, R1183).

Phyllis McMakin's videotaped deposition was published for the jury. (V15, R1184). She met Kalisz through her husband Robert around 1990. (V15, R1185). Kalisz visited their home when he came through Texas on his way to Florida or Connecticut. (V15, R1186-87). At some point, Kalisz lived in Texas before he moved to Colorado. Kalisz was very active in AA. (V15, R1187). He was also helpful to the McMakins. (V15, R1189-90). Phyllis said Kalisz called their home after his mobile home burned down in January 2010. Kalisz was "very distraught. Very depressed, frustrated." He was also "emotional" which was unusual for Kalisz. (V15, R1188). That was the last time Phyllis spoke to Kalisz before his arrest. (V15, R1190). Phyllis said Kalisz never said he had been abused as a child and never said he had any psychological problems. However, Phyllis said Kalisz had lived a rough life. (V15, R1191).

Dr. Peter Bursten, a forensic psychologist, initially evaluated Kalisz on February 24, 2010.[28] Bursten reviewed police reports and medical records,

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[28] Bursten also met with Kalisz on April 8, 2010, December 4, 2011, and

conducted telephone interviews with Kalisz' family members, and reviewed other background information related to Kalisz. (V16, R1207, 1211-12). Bursten said Kalisz' father was an alcoholic and physically abused Kalisz. As a result of his father's treatment, Kalisz became "very oppositional, very angry, very defiant." He started abusing substances at age 12, "alcohol use, a fair amount of drug use." (V16, R1213, 1214). Kalisz left home at age 16 and joined the Army a year later. (V16, R1235). After Kalisz left the military, he began living "on the streets," abusing alcohol and drugs. (V16, R1214).

Bursten said Kalisz was very straight-forward during the interview but "emotionally very constricted and non-expressive." (V16, R1214, 1217). Kalisz' sister Linda Pleva told Bursten that the family was not allowed to express emotions as children. (V16, R1215). In Bursten's opinion, Kalisz dealt with his problems in early adulthood by abusing alcohol. (V16, R1215). However, Kalisz joined AA in 1990 and became a strong advocate for the program for approximately the next twenty years. (V16, R1216). But, in Bursten's opinion, Kalisz' participation in the program did not "fix" Kalisz' problems. Kalisz was only able to "manage himself" through the doctrine of AA. He focused on others' problems and did not delve into his own core issues which contributed to substance dependency. (V16, R1216-17).

December 7, 2011. Face-to-face interviews totaled about seven hours. (V16, R1212). Bursten estimated he spent 20 hours on this case. (V16, R1237).

In Bursten's opinion, Kalisz' "self esteem was highly tied to his identity in AA and his success in AA." (V16, R1218).

Bursten said Kalisz had numerous charges and convictions from age 20 to age 35 that involved drunk and disorderly conduct, defrauding an innkeeper, and public intoxication. (V16, R1220). However, Kalisz' life began to "unravel" in 2008 when Kalisz' mother died. (V16, R1218-19). Kalisz was estranged from his father throughout his life but his mother was always very supportive. (V16, R1219). However, Bursten said Kalisz' ex-wife (Gloria)[29] had spoken to Kalisz in 2009 and that Kalisz told Gloria he "was happy to be in Florida. He was happy to be around Kitty. He spoke very fondly of their relationship." (V16, R1221). However, during 2009, Kalisz was convicted of a "criminal offense" involving Kitty Donovan's family that "was very negative and impactful for Kalisz." (V16, R1219-20). As a result, Donovan was angry with Kalisz and they became estranged. (V16, R1221). Kalisz' others sisters, Linda and Becky, also withdrew from Kalisz at this time. (V16, R1222). As a result of Kalisz conviction involving Donovan's family, Kalisz was placed on probation and had to remain in Florida.[30]

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[29] Kalisz was married to his childhood sweetheart Gloria for about 9 months at age 17. They divorced after he joined the military. (V16, R1221).

[30] Bursten was aware that Florida has a process when probation can be transferred to another State. (V16, R1233). However, it was Kalisz' perception that he could

He was not allowed to return to Colorado where he had "developed a very strong identity"—a home, employment and relationships. (V16, R1223, 1224). Kalisz blamed Donovan for the 2009 convictions and subsequent probation. (V16, R1236).

Bursten said Kalisz no longer had any self-esteem within the AA community due to his conviction. (V16, R1225). In addition, Kalisz lost his mobile home to an explosion.[31] "His life was falling apart." (V16, R1226). In Bursten's opinion, Kalisz suffered from an acute distress disorder as well as antisocial personality traits.[32] (V16, R1227, 1233). After Kalisz' trailer exploded, Bursten said Kalisz "saw his life degenerate and he blamed his sister." Kalisz felt "immediate depression . . . hopeless . . . helpless . . . the future is black . . . alone . . . no support

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not transfer his probation and was "stuck" in Florida. (V16, R1238).

[31] Carl Sauerwein, LP gas inspector for the Florida Department of Agriculture, investigated the January 12, 2010, fire that occurred at Kalisz mobile home. (V15, R1193-94). In Sauerwein's opinion, an explosion occurred when someone attempted to light the stove after an open gas line leaked a high concentration of gas into the RV. The explosion engulfed the RV very quickly which resulted in a complete loss of the home. (V15, R1196). Sauerwein could not conclude whether or not the explosion was due to faulty repair or an accident. (V15, R1196).

[32] Bursten utilized the DSM-IV-TR for this clinical diagnosis. (V16, R1227). American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000. In his testimony Dr. Bursten speaks about a "diagnostic and statistical manual," ostensibly referring to the most recent DSM. (V16, R1227).

. . . anxiety . . . feelings of things aren't real." (V16, R1229). Kalisz lost the ability to control his behavior and his judgment was inhibited. (V16, R1230).

Bursten said acute stressor disorder does not normally result in murder. (V16, R1231). Kalisz "coped as poorly as one could cope with all these things . . . until . . . the last click." Kalisz "didn't go crazy. (Kalisz) lost his sense of himself, his identity, his reasons for living, he was faced with intense feelings of anger, and he very inappropriately projected them onto his sister, and of course, other people were killed in the process." (V16, R1232). Kalisz expressed anger and hate toward Donovan but not toward her daughter, Manessa. (V16, R1235, 1236). Bursten did not have any concerns about Kalisz' competency. Kalisz was not insane at the time of the murders and "absolutely" understood right from wrong. (V16, R1233). Bursten said individuals with antisocial personality traits tend to blame others for their wrongdoings and tend to be callous and cynical. The victims are "blamed" for being foolish. (V16, R1233).

Melissa Williams, Kalisz' friend and former neighbor, testified via video. (V16, R1240). Williams met Kalisz in Colorado in 1995. Kalisz was "great. He was a good neighbor. He was always there when I needed him, any time for anything." (V16, R1241). Williams also worked for Kalisz with his roofing company. He was very good to his employees. "Safety First" was Kalisz' main theme. Kalisz was very involved in AA. "He had a special way of getting to know

people." Williams respected Kalisz "very much." She found Kalisz "inspiring." (V16, R1242, 1243).

Ronald McAndrew had a lengthy career working in the department of corrections and is "thoroughly" familiar with the prison system. (V16, R1244-45). McAndrew spent "quality time" with Kalisz, met with him twice during these proceedings, and spoke with two of Kalisz' acquaintances from the past. (V16, R1248, 1251). McAndrew explained that inmates serving a life sentence are incarcerated in "open population" as long as they abide by the rules and regulations. Inmates mingle amongst one and other and are housed in bay dormitory-type units. (V16, R1249, 1255). However, McAndrew said inmates have been known to get drugs,[33] make alcohol within DOC institutions, or commit crimes against each other or correctional officers. (V16, R1255).

McAndrew said an AA program is the kind of program a warden would want to have developed within the prison system. (V16, R1250). In McAndrew's opinion, Kalisz would be "a leader in this area, and someone who was highly respected in terms of conducting Alcoholics Anonymous or Narcotics Anonymous." McAndrew said Kalisz would be an asset to the general population

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[33] Kalisz was charged with having contraband in his jail cell on August 10, 2011, prior to the start of this trial. (V16, R1257). At the Sentencing hearing on March 6, 2012, the State announced a nolle prosequi of the contraband charge: case number 2011-CF-1737. (V7, R1067).

in the DOC system. (V16, R1251, 1256). McAndrew was aware that inmates can earn "gain time" or "conditional release" within the Florida DOC system. (V16, R1252, 1254). However, McAndrew "doubts" that an inmate with multiple life sentences would be granted conditional release. (V16, R1259).

On January 26, 2012, the jury returned two advisory sentences of death by a unanimous vote of twelve to zero (12-0) for the murder of each victim. (V16, R1315).

***Spencer* Hearing**

On February 17, 2012, the trial court held a *Spencer* Hearing. The State presented written victim impact statements from the following individuals: Nancy Ferguson, Tillotson's sister; Randy Buckley, Tillotson's brother; Miranda Buckley Essman, Tillotson's niece; Marvin Buckley, Tillotson's brother; Barbara Buckley, Tillotson's mother, and Mark DiConsiglio, Tillotson's son-in-law. The State did not present anything else. (V7, R1059).

The defense reiterated that victim impact statements should not be considered as aggravation. The defense also presented written statements from Tammy Debaise and Linda Pleva, both of whom testified at the penalty phase. The written statements provided additional information about Kalisz' history that the witnesses would like to have said on the stand. (V7, R1060). The Defendant declined to make a statement. Nothing further transpired at the *Spencer* hearing.

Sentencing and Trial Court Findings.

The trial court held a hearing on March 6, 2012 to announce findings and sentences as to the convictions.[34] The defendant did not make a statement at the hearing.

Aggravation

The trial court found the following aggravating circumstances and supported each with findings of fact, found in the trial court's sentencing order. (V6, R829-847).

1. The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation pursuant to Section 921.141(5)(a) of the Florida Statutes. (Great Weight).

    a. In 2009 the Defendant pled guilty to a reduced charge of contributing to the delinquency of a minor[35] and aggravated assault with a deadly weapon[36] and was placed on ten years felony probation. Additionally, the contemporaneous first degree murders served as aggravation for

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[34] Prior to the announcement of the sentences, the State announced a nolle prosequi for Count 4 of the indictment in this case, possession of a firearm by a convicted felon, and the possession of contraband charge in case number 2011-CF-1737. Regarding the Defendant's violation of probation for case numbers 2008-CF-2758 and 2009-CF-197, the State tendered as evidence the testimony of Probation Officer Whipple from the penalty phase in this case and the jury's verdict form from the prior 2008 and 2009 cases. The State also asked the court to take judicial notice of the court files and probation orders from those respective cases.

[35] The original charge was showing obscene material to a minor. Case number 2008-CF-2758.

[36] Case number 2009-CF-197.

each other as well as the contemporaneous attempted first degree murder convictions and the armed burglary conviction in this case.

b. Manessa Donovan, the victim of attempted first degree murder in Count III in this case, was the victim in the contributing to the delinquency of a minor case. One of the conditions of Kalisz' probation was to have no contact with Manessa Donovan.

2. The Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person pursuant to Section 921.141(5)(b) of the Florida Statutes. (Great Weight).

a. The contemporaneous first degree murders in this case served as prior conviction for each other and the contemporaneous attempted first degree murders in this case also served as prior capital felonies for the two murders.

b. The first degree murder of Capt Chad Reed, DCSO served as a prior capital felony conviction for this aggravator.

3. The Defendant knowingly created a great risk of death to many persons pursuant to Section 921.141(5)(c) of the Florida Statutes. (Great Weight).

a. The evidence established that the shooting took place in a residential neighborhood. At least one bullet passed through a glass door to the outside. After the defendant murdered Donovan he began shooting outside in the backyard in an attempt to murder the remaining occupants of the residence. At least twelve (12) bullet casings were recovered inside and outside of the residence.

b. Competent, substantial evidence supports a finding that the Defendant engaged in "indiscriminant shooting" in the direction of at least four people who were put in "an immediate and present risk of death," and were "in the line of fire." Under these circumstances there was more than a mere possibility of death but rather a "high probability."

4. The capital felony was committed while the Defendant was engaged in the commission of a burglary pursuant to Section 921.141(5)(d) of the Florida Statutes. (Moderate Weight).

5. The capital felony was committed for the purposes of avoiding or preventing

lawful arrest or effecting an escape from custody pursuant to Section 921.141(5)(e) of the Florida Statutes. (Moderate Weight).

a. Two of the victims in this case were relatives of the Defendant who could easily identify him—Kathryn and Manessa Donovan, Kalisz' sister and niece.

b. Tillotson's murder occurred only after she witnessed Donovan's murder.

c. None of the victims posed a threat to the Defendant and all were "unarmed and caught off guard" by the Defendant's shooting.

6. The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification pursuant to Section 921.141(5)(i) of the Florida Statutes.

a. The killing was the product of cool and calm reflection, not prompted by emotional frenzy, panic, or rage. By the Defendant's own admission, he purchased a gun and ammunition magazines about a week prior to the murders. The Defendant admitted that he wanted to "wipe out [Donovan's] entire bloodline," and that he "was going to take out my sister and her family." "I hate my sister." "They ruined my life."

b. The Defendant went to a sporting goods store and purchased ammunition and additional magazines on the day prior to the murders. Also, the Defendant's gun was equipped with a red-dot laser sight, "a piece of equipment that is used to ensure the accuracy of the kill shot." The defendant had 24 hours to reflect on his plan to kill.

c. The Defendant conducted target practice on the day of the murders, continuing to reflect on his plan to kill.

d. The Defendant's intention was to kill Kathryn and Manessa Donovan, and anyone else who happened to be present. When he arrived at the home he immediately killed Donovan and then hunted for Manessa. He shot Wilson and killed Tillotson as they crossed his path.

Mitigation

The trial court found the following statutory-mitigating-circumstance:

1. The capital felony was committed with the Defendant was under the influence of extreme mental or emotional disturbance pursuant to Section 921.141(6)(b) of the Florida Statutes. (Little Weight).

    a. The court found that the mitigation had been established by the greater weight of the evidence based primarily on the testimony of the Defendant's mental health professional.

    b. However, because the Defendant was competent, not insane, had the ability to understand right from wrong, and had anti-social personality traits, the court gave the mitigation little weight.

The trial court found the following non-statutory mitigation and gave it the corresponding weight.

1. The Defendant has a long, well-documented history of alcohol and drug abuse (chronic alcohol dependence). (Some Weight).

2. The Defendant successfully overcame his alcohol addiction. (Some Weight).

3. The Defendant helped others through Alcoholics Anonymous; the Defendant maintained gainful employment; and the Defendant performed kind and generous deeds for others.[37] (Little Weight).

The trial court concluded that the nature and quality of the "appalling" aggravating circumstances in this case "far outweigh the paucity of mitigation circumstances." (V6, R 845). The trial court also found that even in the absence of the cold, calculated and premeditated aggravator, the remaining five aggravators "seriously outweigh the existing mitigators." (V6, R845). After considering the

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[37] The defense listed these three mitigation factors individually, but the trial court found they are intertwined and considered them as one.

jury's recommendation and the balance of aggravation and mitigation the trial court imposed the death penalty for each first degree murder conviction.

SUMMARY OF ARGUMENT

Law enforcement carefully advised Kalisz of his *Miranda* rights and did not initiate any questioning before Kalisz was fully advised. Kalisz indicated that he understood his rights and even commented "you've seen my record." None of the law enforcement officers engaged in any sort of trickery or cajoling to induce Kalisz into talking. Kalisz is a mature, intelligent adult with numerous experiences in the criminal justice system. Kalisz clearly understood his rights and never indicated that he did not want to talk to the officers. The medication that Kalisz was administered in the hospital did not affect his cognitive function to the point of rendering his statements unknowing or involuntary.

When Kalisz engaged in indiscriminant shooting at the Donovan home he placed many people in great risk of harm. Four people were shot, two people were killed, other families were close to the Donovan home in the neighborhood and a little girl was playing outside near the scene when the shooting started. Within two hours of the murders at the Donovan home, while Kalisz was attempting to flee from the state, he started a gun fight with sheriff's deputies and killed a police officer. At least 11 people were placed at a great risk of harm by Kalisz' gunfire.

Kalisz did not attempt to conceal his identity when he began shooting at the Donovan home. Donovan and Manessa knew Kalisz and everyone could identify

him. One of the reasons that Kalisz killed Donovan was because she was a witness to Kalisz' previous criminal activity. That Kalisz also wanted to take revenge on Donovan and her family does not negate his desire to eliminate Donovan as a witness. The sole reason Kalisz killed Tillotson was because she witnessed Donovan's murder. Kalisz did not know Tillotsona and had no reason to kill her other than the fact that she was standing there watching him kill Donovan and attempt to kill Manessa.

The autopsy photographs were not unfairly prejudicial, the jury was not instructed on improper aggravation, the victim impact testimony was proper, and Florida's capital sentencing scheme is constitutional. Even if Kalisz prevails on issues I through VI of his appeal, three uncontested and weighty aggravators remain, making the death sentence proportional.

ARGUMENT

ISSUE I: WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPRESS HIS STATEMENTS

The Appellant challenges the admissibility of the statements he made to law enforcement during his interrogation on January 27, 2010, at Shands Hospital in Gainesville, Florida. Law enforcement audio and video recorded the interrogation. At a pre-trial hearing, the Appellant moved to suppress his statements. The trial court found that the State had proven by a preponderance of the evidence that the statements were knowingly, intelligently, and voluntarily provided and denied the Defendant's motion. The State played a redacted version of the video recorded interrogation at trial. The circumstances that the Appellant challenges regarding his statements to law enforcement are: 1) whether there was a proper waiver of his *Miranda* rights, and 2) whether he was intoxicated by pain medicine to the point that his statements were not voluntary.

A. The Standard of Appellate Review

In reviewing a trial court's ruling on a motion to suppress, an appellate court accepts a trial court's findings so long as they are supported by competent, substantial evidence. *Hall v. State*, 37 Fla. L. Weekly S537 (Fla. Aug. 30, 2012) (*citing Thomas v. State,* 894 So.2d 126, 136 (Fla. 2004)). However, a trial court's application of the law to the historical facts is reviewed de novo. *Hall v. State*, 37

Fla. L. Weekly S537 (Fla. Aug. 30, 2012) (*citing Cuervo v. State,* 967 So.2d 155, 160 (Fla. 2007); *Connor v. State,* 803 So.2d 598, 608 (Fla. 2001)).

B. Case Law Supporting the Trial Court's Finding

"A trial court's ruling on a motion to suppress comes to us clothed with a presumption of correctness and, as the reviewing court, we must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." *Delhall v. State,* 95 So. 3d 134, 150 (Fla. 2012) (*quoting Connor v. State,* 803 So. 2d 598, 605 (Fla. 2001); *Murray v. State,* 692 So. 2d 157, 159 (Fla. 1997)). As we explained in *Connor,* a trial court's ruling on a motion to suppress is a mixed question of law and fact that ultimately determines constitutional rights and should be reviewed using a two-step approach—deferring to the trial court's findings of fact as long as they are supported by competent, substantial evidence, but reviewing de novo a trial court's application of law to the historical facts. *Delhall,* 95 So. 3d at 150.

"The prosecution . . . does not need to show that a waiver of *Miranda* rights was express. An implicit waiver of the right to remain silent is sufficient to admit a suspect's statement into evidence. *Berhuis v. Thompkins,* 130 S. Ct. 2250, 2261, 176 L. Ed. 2d 1098 (2010) (*citing North Carolina v. Butler,* 441 U.S. 369 (1979). **A defendant may waive the right to remain silent by responding to questions by the interrogating officer.** *Id.* at 2250. (emphasis added)

"The 'totality of the circumstances' to be considered in determining whether a waiver of *Miranda* warnings is valid based on the two-pronged approach of . . . may include factors that are also considered in determining whether the confession itself is voluntary." *Ramirez v. State*, 739 So. 2d 568, 575 (Fla. 1999). The factors this Court considered in *Ramirez* that are applicable to the facts in this case are: 1) the manner in which the *Miranda* rights were administered, including any cajoling or trickery; 2) the suspect's age, experience, background, and intelligence; 3) the location of the questioning; and 4) whether the interrogators secured a written waiver of the *Miranda* rights at the outset or after inculpatory statements were already made by the suspect. *Ramirez*, 739 So. 2d at 576. Additionally, while not an absolute bar to the admissibility of a confession, intoxication is a factor in challenging a confession's voluntariness. *Burns v. State*, 584 So. 2d 1073, 1076 (Fla. 4th DCA 1991), *see also Thomas v. State*, 456 So. 2d 454 (Fla. 1984). "Unless [a suspect's intoxication reaches a state] of mania, it does not affect the admissibility of a statement, but may affect its weight or credibility with the fact finder." *Thomas*, 456 So. 2d at 458. **A statement provided while the defendant was hospitalized and had been administered pain medicine may be admissible.** (emphasis added). *Escobar v. State*, 699 So. 2d 988, 993-994 (Fla. 1997) (remanded for a new trial on other grounds). In *Escobar*, the defendant was hospitalized after being wounded in a shootout with California Highway Patrol.

The defendant had been administered morphine on the day law enforcement took his statements from the hospital room. *Id.*

In this case, Kalisz was clearly under arrest and not free to leave the hospital when he was questioned by law enforcement. But as this Court analyzes the facts under the prongs of *Ramirez*, Kalisz' statements were properly obtained. As the audio and video recording clearly demonstrate, Detective Faulkingham carefully advised Kalisz of his *Miranda* rights and did not initiate any questioning before Kalisz was fully advised of his rights. Kalisz was asked multiple times whether he understood his rights and not only did he indicate that he understood his rights, Kalisz sarcastically commented, "you've seen my record." None of the law enforcement officers engaged in any sort of trickery or cajoling to induce Kalisz into talking. Kalisz is a mature, intelligent adult with numerous experiences in the criminal justice system. While Kalisz did not execute a written waiver of *Miranda*, he clearly understood his rights and never indicated that he did not want to talk to the officers – he began answering their questions. Kalisz quipped once about not having a lawyer with him, but that comment was made in the context of their discussion about the previous charges from 2009 that involved Manessa and her boyfriend—charges for which Kalisz had already been convicted. Kalisz never unequivocally invoked his right to remain silent or seek counsel from a lawyer.

As to the issue of intoxication, the medication that Kalisz was administered

in the hospital did not render his statements unknowing or involuntary, nor did it induce a state of mania.[38] At the suppression hearing, Dr. Goldberger, a forensic toxicologist, testified that Kalisz gave slow responses to law enforcement "from time to time," but other times "he was very deliberate, even to the point that I thought he was quite animated." (V7, R920-921). Although there were times when Kalisz' speech was slurred, Dr. Goldberger opined that the slurred speech was "not the usual slurred speech that I'd seen . . . by someone who was impaired by a drug." (V7, R921). Dr. Goldberger opined that Kalisz' statement "these people had him screwed up on drugs" was in general reference to his disturbed outlook on life. (V7, R922-933). In Dr. Goldberger's opinion, Kalisz' "faculties were not impaired to the extent he could not give consent or factual information regarding the event." (V7, R918). Dr. Buffington testified at the suppression hearing for the defense and opined that Kalisz demonstrated cognitive impairment, "disorientation, confusion, mental clouding, short of attention span, sedation, altered speech, and tangential thought." (V7, R983-984, 994). However, the pain medicine that was of the most concern to Dr. Buffington, a pharmacologist, Roxicet, was administered to Kalisz

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[38] On January 27, 2010 Kalisz had been administered ten milligrams of Roxicet, a pain medication; Metoprolol, a hypertension medication; Quentiapine, a schizophrenia medication; Clindamycin, an antibiotic; Cephapine, an antibiotic; Omeprazole, an acid reflux medication; and Basotracin, an antibiotic. (V7, R980, 992).

nine hours prior to the meeting with law enforcement. Furthermore, Dr. Buffington admitted that he did not listen to the audio tape that contained the initial portion of Kalisz' interview when he was advised of his *Miranda* rights—he read only a portion of the written transcript. (V7, R987). Dr. Buffington admitted that hearing the phraseology and intonation on the audio would have been more helpful than a black and white transcript. (V7, R987).

C. Appellant's Case Law Distinguishable

In addition to *Miranda* and *Ramirez*, the Appellant cites *Traylor v. State*, 596 So. 2d 957 (Fla. 1992) and *Oregon v. Elstad*, 470 U.S. 298 (1985). Those cases are distinguishable from the facts in this case. In *Elstad*, law enforcement obtained incriminating statements from the suspect before they provided him with *Miranda* warnings. 470 U.S. at 298. The central issue in *Elstad* was whether the written confession the defendant provided subsequent to *Miranda* was voluntary and purged of any taint from the improperly obtained pre-*Miranda* statements. *Id.* The Court in *Elstad* found that the post *Miranda* statement was admissible and held that "the *Miranda* presumption does not require that fruits of otherwise voluntary statements be discarded as inherently tainted." *Id.*

In *Traylor*, the defendant was a suspect in two murders, one in Alabama and one in Florida. 596 So. 2d at 960. Counsel had been appointed to the defendant for the Alabama case but not for the Florida case and the defendant had spoken with

his lawyers about the Alabama case. Without knowing that counsel had been appointed for the Alabama case, Florida law enforcement officers initiated questioning of the defendant about both murders after advising him of his *Miranda* rights and obtaining a waiver. *Id.* This Court held that the Traylor's confession to the Florida murder was properly obtained. *Id.* at 973.

In *Ramirez*, law enforcement initiated questioning of a minor and obtained incriminating statements from the 17-year-old prior to advising him of his Miranda rights. 739 So. 2d at 572. When law enforcement finally provided the warnings, one of the detectives downplayed the significance of *Miranda*. *Id.* This Court held that "the actions of the police in this case were the kind of 'cajoling' and 'trickery' about which the Supreme Court warned in *Miranda*." *Id.* at 576.

There are several facts in this case that distinguish it from *Elstad*, *Traylor*, and *Ramirez*. Unlike all three of those cases, law enforcement did not obtain any incriminating statements from Kalisz prior to advising him of his Miranda warnings. Secondly, Kalisz never invoked his rights to remain silent or speak with a lawyer. Thirdly, Kalisz was a mature adult with years of experience in the criminal justice system. He even commented to law enforcement about his criminal history when he indicated that he understood his rights. This case does not present the constitutional violations that we at issue in *Elstad*, *Traylor*, and *Ramirez*.

D. Harmless Error

Even if this court finds that the confession was improperly obtained, the Appellant has conceded harmless error as it applies to his convictions and only challenges the statements as they were applied to the cold, calculated, and premeditated CCP aggravator at sentencing. First, there is independent evidence to support the CCP aggravator even without the confession to law enforcement on January 27, 2010. The Defendant purchased ammunition and additional magazines for his semi-automatic pistol the day before the murders. The Defendant's pistol was equipped with a laser sight to improve the accuracy of his shots. The Defendant made admissions about his plan to take out his sister to Todd Linville prior to the murders. The day of the murders, the Defendant engaged in target practice right before the murders at a farm seventeen minutes away Donovan's house. None of the victims in this case posed a threat to Kalisz. They were all unarmed and surprised by his presence when he showed up at Donovan's house and began shooting. Lastly, Kalisz' made a phone call after the murders to tell Mr. Lemon and his sister that he had "taken care of the problem."

Secondly, even if this Court finds that the aggravator was applied in error, such error was harmless. When this Court strikes an aggravating factor on appeal, "the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence." *Jennings v. State,* 782 So. 2d 853,

863 n. 9 (Fla. 2001); *see also Douglas v. State,* 878 So. 2d 1246, 1268 (Fla. 2004) ("Striking [an] aggravator necessitates a harmless error analysis."). *See also Hill v. State*, 643 So. 2d 1071, 1073 (Fla. 1994) ("When this court strikes one or more aggravating circumstances relied upon by a trial judge in sentencing a defendant to death, we may conduct a harmless error analysis based on what the sentencer actually found in determining whether the sentence of death is still appropriate.") *Diaz v. State,* 860 So. 2d 960, 968 (Fla. 2003) (harmless error found after court struck HAC).

Even without the CCP aggravator—and even if the Appellant prevails on issues II and III—three independent, uncontested, and weighty aggravators remain. At the time of the murders, Kalisz was on felony probation for contributing to the delinquency of a minor and aggravated assault with a deadly weapon. Kalisz was convicted of those offenses in 2009 after a plea of nolo contendere. The victims in those cases were Manessa Donovan and her boyfriend. As a condition of the felony probation, Kalisz was ordered to have no contact with Manessa, whom he attempted to murder in this case. The contemporaneous murders of Donovan and Tillotson and attempted murders of Wilson and Manessa all served as prior capital felonies for each death sentence; in addition to the prior capital felony for Capt. Reed's murder and the prior violent felony for aggravated assault in 2009. Finally, the Defendant committed the murders during the course of a burglary. The

remaining, uncontested aggravation significantly outweighs the mitigation in this case and therefore any error in the trial court finding CCP is harmless beyond a reasonable doubt.

ISSUE II: WHETHER THE APPELLANT KNOWINGLY CREATED A GREAT RISK OF HARM TO MANY PEOPLE

The Defendant challenges the trial court's finding of the statutory aggravator that Kalisz knowingly created a great risk of harm to many people (hereinafter "great risk aggravator"). The Defendant objected to the court instructing the jury on this statutory aggravator at the penalty phase of trial. The trial court found that, despite this Court's "rule of four" in *Johnson v. State*, 696 So. 2d 317 (Fla. 1997), the Defendant engaged in "indiscriminant shooting" placing at least four persons in "an immediate and present risk of death," resulting in a "high probability" of death.

A. The Standard of Appellate Review

The review of a trial court's finding of an aggravating factor is limited to whether the trial court applies the correct law and whether its finding is supported by competent, substantial evidence. *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997); *see also Cave v. State*, 727 So. 2d 227, 230 (Fla. 1998).

B. Case Law Supporting the Trial Court's Finding

To support a finding of this aggravator, the State must prove that the Defendant knowingly created a great risk of death to many persons. *Johnson*, 696 So. 2d at 325. To establish this aggravator, there "must be a likelihood or high

probability of death." *Id.* This Court has previously defined "many persons" to mean four or more persons other than the victim. *Id.* Where the Defendant engages in "indiscriminant shooting" towards more than one victim, the victims can be considered to be in "an immediate and present risk of death" and "in the line of fire." *Silvia v. State*, 60 So. 3d 959, 972 (Fla. 2011).

While *Johnson* requires a strict counting test—there must be a victim plus four more people—this Court previously found the aggravator to apply in arson cases even where the burned structure contained only one person. *See Way v. State*, 496 So. 2d 126, 128 (Fla. 1981) (only a child playing and the two murder victims lying in the garage with blunt force trauma to the head occupied the house at the time of the fire, but police and firemen were endangered in their rescue attempt and combustible materials were present in the garage area); *Welty v. State*, 402 So. 2d 1159, 1164 (Fla. 1981) (aggravator found where six people were asleep, not in the burned condominium unit, but simply in the same building of contiguous condominium units as the one burned); *King v. State*, 390 So. 2d 315, 320 (Fla. 1980) (*receded from on other grounds by Strickland v. State*, 437 So. 2d 150 (Fla. 1983) ("When the appellant intentionally set fire to the house, he should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as the firefighters and the police who responded to the call").

While the arson cases predate *Johnson*, they illustrate a salient point: indiscriminate shooting in a residential neighborhood and at a roadside gas station places everyone in the neighborhood, at the gas station, and the police that respond in just as much danger as the neighbors of a burning house or condominium and the firefighters who respond. Another factor that is not clear in the *Johnson* case: when does the counting start and when does it stop? In *Parker v. State*, this Court found that the defendant had placed 23 people in danger in addition to the murder victim. 641 So. 2d 369, 377 (Fla. 1994). However, 16 of those people were in the store the defendant robbed prior to the homicide. *Id.* at 372. The 17th endangered person was a deputy who was shot at in the parking lot outside while responding to the robbery. *Id.* The 18th through 22nd endangered persons were five family members in a car the defendant fired into when he attempted to commandeer their vehicle. *Id.* Upon hearing about the robbery, the murder victim went outside a neighboring establishment along with several other patrons and the victim pursed the defendant down the street. *Id.* The *Parker* facts do not indicate that the "several other patrons" pursued the defendant with the victim and it does not appear that they were counted in the Court's analysis. *Id.* When the victim was shot while running down the street after the defendant, one person witnessed the victim clutch his stomach and fall to the ground—the 23rd endangered person. *Id.* In the *Parker* fact pattern, only one person actually witnessed the defendant kill the victim and it

is unclear as to whether that witness was even in the line of fire when the victim was shot. In *Parker*, this Court counted persons whom the defendant put in great risk of danger from four separate and distinct events both leading up to and in flight from the murder.

Furthermore, this Court has found that crimes that occurred days apart can be connected in an "episodic sense." *Fotopoulos v. State*, 608 So. 2d 784 (Fla. 1992) (*citing Bundy v. State*, 455 So. 2d 330, 345 (Fla. 1984). In *Fotopoulos*, the defendant and his co-conspirator video tapped the murder of the first victim and then Fotopoulos used the video as leverage to get the co-conspirator to contract a hit-man to kill Fotopoulos' wife for insurance proceeds. *Fotopoulos*, 608 So. 2d at 786. After the hit-man was unsuccessful, Fotopoulos killed the hit-man in an attempt to cover up the conspiracy. *Id.* The second murder in *Fotopoulos* occurred several days after the first and this Court affirmed the trial court's ruling that the two offenses were connected. *Id.* at 790.

Kalisz' actions during and after the murders in this case are clear indicators of the great danger to which he exposed so many people. When Sheriff's deputies responded to the Donovan home with shotguns and weapons drawn, they were responding to an active shooter and four people had already been gunned down. Although he had fled the Donovan home when the deputies arrived, Kalisz' deadly shootout with the more than a half-dozen DCSO deputies at the gas station—where

he killed Capt. Reed—makes it crystal clear that he would not have surrendered if he had still been at the Donovan home when HCSO arrived. When DCSO deputies responded to the BOLO less than two hours after the Donovan and Tillotson murders, Kalisz was still in flight from those murders and rather than surrendering he started a public gunfight and killed a police officer. Law enforcement gave Kalisz a chance to surrender and they had to shoot him multiple times before he lowered his weapon. Every law enforcement officer that responded to the 911 call at the Donovan home and the BOLO in Dixie County was in great danger. Kalisz told Todd Linville the night before the Donovan and Tillotson murders that he was going to take his sister out and he did not care if the police tried to stop him. Kalisz told law enforcement that his plan was to "erase the hell out of Kitty and her blood line" with "as many bullets as it takes" then "get out of Florida."

Amanda Prestigiacomo and her five-year-old daughter were walking out in the neighborhood when Kalisz arrived at Donovan's home. It is reasonable to infer that Prestigiacomo's daughter was outside playing when Kalisz began firing bullets in any direction he saw a person standing in the backyard. Donovan's neighbors were in danger when Kalisz gunned down everyone on the Donovan property. One of the bullet's Kalisz fired at Donovan passed through the glass door in the direction of the occupants of the backyard and whoever was beyond the yard. Bullets that can travel from inside to outside through glass doors can travel from

outside to inside through glass doors and windows. Kalisz should have foreseen that his flurry of deadly gunfire would pose a great risk to those in the neighborhood. Every neighbor inside and outdoors in the vicinity of the Donovan home was in grave danger when Kalisz began his barrage of deadly shooting, especially five-year-old Allison Prestigiacomo who was playing outside when the gunfire started.

If the murders that occurred days apart in the *Fotopoulos* case are connected episodically, then the murders and the shootout in this case that occurred within two hours of one another are certainly connected episodically. But for the geographic accident of Kalisz traveling into another judicial circuit, these crimes would likely have been joined for the same trial. *Fotopoulos*, 608 So. 2d at 789 (*citing* Fla. R. Crim. P. 3.150). During the course of the murders at the Donovan house and the shootout in Dixie County in flight from the murders, Kalisz knowingly created a great risk of death to the following persons: all four victims at Donovan's house, Amanda Presigiacomo and her five-year-old daughter, and at least five Dixie County Sheriff's deputies. If the sequence of events in the *Parker* case merit counting 23 individuals from four separate, episodically connected transactions, then certainly the 11 people Kalisz endangered in two separate, episodically connected transactions should be counted as the sum of persons Kalisz endangered.

Even if the Court does not connect the murders and the shootout to reach the required number under *Johnson*, the facts of this case demonstrate the flaw in *Johnson's* arithmetic formula: just because four people in addition to the victim were not in the immediate line of fire all at the same time does not mean that many people were not exposed to great risk or danger leading up to, during the course of, and in flight from the murders. While the Court could strike this aggravator in Kalisz' case and his death sentences will likely remain (three uncontested and weighty aggravators remain even if the Appellant prevails on issues I, II, and III), this Court should modify its ruling in *Johnson* to prevent indiscriminate active shooters from avoiding this aggravation simply because a particular number is not met, or that a particular number of people was not present all in one vicinity. For the great risk aggravator to not apply to the facts and circumstances of this case and others like it equates to reasoning that a defendant had not formed premeditation to kill simply because he thought about killing for fifty seconds rather than one minute.

C. Appellant's Case Law Distinguishable

The Appellant cites *Williams v. State*, 574 So. 2d 136 (Fla. 1991) and *Alvin v. State*, 548 So. 2d 1112 (Fla. 1989) to support his claim that the facts in this case do not support the great risk aggravator. Those cases, however, are distinguishable from the facts in this case. In *Williams*, the defendant robbed a bank that was

occupied by several people. 574 So. 2d at 138. During the robbery, the defendant shot the bank security guard. *Id.* But Williams only intended to kill the security guard and he did not engage in indiscriminant shooting towards the several bank patrons. *Id.* In *Alvin*, during a robbery-turned-shooting, there was one murder victim, one attempted murder victim, and two bystanders. While the attempted murder victim as actually shot, the facts did not establish that the two bystanders where in the line of fire or even near the gunfire at all. *Id.*

In this case, Kalisz went to the Donovan home intent on killing his sister and "her bloodline." In his effort to kill Donovan and Manessa with "as many bullets as it took," Kalisz engaged in indiscriminate shooting inside and outside of the house, firing in any direction where he saw a person without regard for his surroundings or whether there were neighbors that lie beyond his targets. In connection to the murder at the Donovan home, Kalisz was tracked down in flight from the murders by law enforcement in Dixie County and indiscriminately fired his weapon towards at least five police officers, killing one of them. By way of analogy, if Kalisz had been the defendant in the *Williams* or *Alvin* cases, he would have killed, wounded, or fired at as many bank patrons or bystanders that he could until he ran out of bullets.

D. Harmless Error

Even if this Court finds that the aggravator was applied in error, such error

was harmless. When this Court strikes an aggravating factor on appeal, "the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence." *Jennings,* 782 So. 2d at 863; *Douglas,* 878 So. 2d at 1268 ("Striking [an] aggravator necessitates a harmless error analysis."); *Hill*, 643 So. 2d at 1073 ("When this court strikes one or more aggravating circumstances relied upon by a trial judge in sentencing a defendant to death, we may conduct a harmless error analysis based on what the sentencer actually found in determining whether the sentence of death is still appropriate.") *Diaz,* 860 So. 2d at 968 (harmless error found after court struck HAC).

As articulated under the first issue above, at the time of the murders, the Defendant was on felony probation for contributing to the delinquency of a minor and aggravated assault with a deadly weapon. Manessa Donovan and her boyfriend were the victims in those cases. The Defendant was under a no contact order with Manessa when he committed the murders. The contemporaneous murders and attempted murders all served as prior capital felonies for each death sentence, in addition to the murder of Capt. Reed and the prior violent felony of aggravated assault in 2009. Finally, the Defendant committed the murders during the course of a burglary. The remaining, uncontested aggravation significantly outweighs the mitigation in this case and therefore any error in the trial court finding the great risk aggravator is harmless beyond a reasonable doubt.

ISSUE III: WHETHER THE TRIAL COURT ERRED IN FINDING THE MURDERS WERE COMMITTED FOR THE PURPOSE OF ELIMINATING WITNESSES OR AVOIDING ARREST

The Appellant contends that the trial court improperly found that the murders were committed for the purpose of eliminating witnesses and avoiding lawful arrest (hereinafter "avoid arrest aggravator"). The Defendant objected to the trial court instructing the jury on this aggravator at the penalty phase of trial.

A. The Standard of Appellate Review

The review of a trial court's finding of an aggravating factor is limited to whether the trial court applies the correct law and whether its finding is supported by competent, substantial evidence. *Willacy*, 696 So. 2d at 695.

B. Case Law Supporting the Trial Court's Finding

The law is well-settled that when the victim is not a law enforcement officer, the witness elimination aggravator requires clear proof that the defendant's dominant or only motive was the elimination of a witness. *Menendez v. State*, 368 So. 2d 1278 (Fla. 1979); *Riley v. State*, 366 So. 2d 19 (Fla. 1978). The fact that the defendant had other motives for the killing does not preclude the application of this factor. *Howell v. State*, 707 So. 2d 674 (Fla. 1998). **[This factor may be proved by circumstantial evidence from which the motive for the murder may be inferred,]** (emphasis added) without direct evidence of the offender's thought processes. *Swafford v. State*, 533 So. 2d 270, 276 n. 6 (Fla. 1988), *cert. denied*, 489

U.S. 1100 (1989). When evaluating the avoid arrest aggravator, this Court has considered "whether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant." *McGirth v. State*, 48 So. 3d 777, 792-93 (Fla. 2010) (*citing Nelson v. State,* 850 So. 2d 514, 526 (Fla. 2003).

This case is similar to *Correll,* where this Court said: It is also likely that Correll's daughter, Tuesday, was a witness to the murders. Since the relationship between Tuesday and her father appeared cordial, it is difficult to see why she was killed except to eliminate her as a witness. *Correll v. State,* 523 So. 2d 562, 568 (Fla. 1988). In *Willacy v. State*, this Court held:

> When Sather surprised Willacy burglarizing her house, he bludgeoned her and tied her hands and feet. At that point, Sather posed no immediate threat to Willacy: She was incapable of thwarting his purpose or of escaping and could not summon help. There was little reason to kill her except to eliminate her as a witness since she was his next door neighbor and could identify him easily and credibly both to police and in court.

696 So. 2d 693,696 (Fla. 1997).

In *McGirth*, the defendant never made an effort to conceal his identity from his victims. *McGirth*, 48 So. 3d at 793. McGirth ordered his co-defendant to shoot the victims' daughter because she could identify them. *Id.* The evidence indicates that McGirth probably could have accomplished the robbery of the Miller home

without killing Diana or attempting to kill James. *Id.* Diana posed no resistance to McGirth or his codefendants as she was virtually immobilized after being shot once in the chest. *Id.* James also did not offer any resistance toward McGirth or the other codefendants as he had been pinned to the floor. *Id.* McGirth easily obtained access to the Miller's van and their property. *Id.* Once McGirth and his codefendants obtained the victims' property and secured a getaway, there was no reason to kill Diana and attempt to kill James except to eliminate them both as witnesses. *Id.*

In this case, Kalisz went to the Donovan home to kill Donovan and her family out of revenge for the convictions he received in 2009 that involved Manessa and her boyfriend. Kalisz believed that Donovan and Manessa had lied to authorities about the facts and circumstances that gave rise to the 2009 convictions. While the convictions resulted in a no contest plea and there was no trial, it is reasonable to infer that Kalisz believed that Donovan and Maneesa would have been witnesses against him had there been a trial. Although Kalisz elected murder as his means of recourse, he could have sought post conviction relief to have his plea set aside and proceed to trial, at which point Donovan and Manessa would have become the witnesses against him. That Kalisz had more than one motive for killing Donovan does not negate his motive to eliminate her as a witness to the events that resulted in his 2009 convictions. Furthermore, both Donovan and

Manessa were relatives of Kalisz' and could easily identify him—in fact Manessa did identify him at trial in this case. Donovan was not armed and did not pose a threat to Kalisz when he killed her. In fact, she was caught by surprise to see Kalisz in her home when he gunned her down.

Tillotson was an employee of Donovan's. She did not know Kalisz and he did not know her. Donovan was the first victim to be shot when Kalisz began his rampage, and Tillotson was standing outside on the opposite side of the glass door looking at Kalisz when he shot Donovan. Tillotson was unarmed and did not pose a threat to Kalisz. Tillotson was standing right behind Manessa when Kalisz shot Donovan and then Manessa. While Kalisz had more than one motivation for killing Donovan and attempting to kill Manessa, he had no known quarrel with Tillotson other than the fact that she was standing there watching the first murder. Kalisz had plans to abscond from the state once he completed his massacre of Donovan "and her bloodline." He made no effort to conceal his identity. Tillotson and Wilson could easily identify Kalisz in court—in fact, Wilson did identify him at trial in this case. The only motivation that Kalisz had for killing Tillotson was that she was standing there watching him kill Donovan and attempt to kill Manessa, and so she was next.

C. Appellant's Argument is Distinguishable

While the State does not dispute the Appellant's representation of this

Court's opinions cited in the initial brief, the Appellant's argument centers on Kalisz' motive to kill Donovan and her bloodline and overlooks the other motives that are established by competent, substantial circumstantial evidence. In *Swafford v. State*, 533 So. 2d 270, 276 (Fla. 1988) this Court held that the avoid arrest aggravator "has been approved on the basis of circumstantial evidence." In *Farina v. State*, 801 So. 2d 44, 54 (Fla. 2001) this Court outlined several of the circumstantial factors for determining whether the avoid arrest aggravator is established: whether the victims knew and could identify the killer; whether the killer used gloves, wore a mask, or made incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant – the same factor articulated in *McGirth,* 48 So. 3d at 792-93.

In this case several of those circumstantial factors are present as well as some direct admissions by the Defendant. Kalisz admitted that he had a plan to "take care" of his sister and that he did not care who stood in his way. He admitted that he meant to shoot anyone he saw during the slaughter at the Donovan home. As previously discussed, Kalisz made no attempts to conceal his identity; Donovan and Manessa knew him and Tillotson and Wilson got a clear look at him. None of the victims offered any resistance or posed a threat to Kalisz. He simply gunned them down in cold blood.

D. Harmless Error

Alternatively and secondarily, even without the avoid arrest aggravator, death is still the proper penalty. Even without this aggravator, four strong aggravating factors remain: under felony probation, prior Capital and violent felonies, during the commission of a burglary, and cold, calculated, and premeditated. Under these facts, any error is harmless. *Jennings,* 782 So. 2d at 863; *Douglas,* 878 So. 2d at 1268; *Hill*, 643 So. 2d at 1073. Even if the Appellant prevails on this issue and the others he raises in this appeal, the remaining aggravation far outweighs the mitigation in this case.

ISSUE IV: WHETHER THE TRIAL COURT INSTRUCTED THE JURY ON IMPROPER AGGRAVATION, TAINTING THE JURY'S RECOMMENDATION AND REQUIRING A NEW PENALTY PHASE

The Appellant claims that because the trial court allowed improper evidence during the guilt phase and instructed the jury on improper aggravating factors, the jury's advisory sentences were tainted, the trial court's findings were improper, and this Court's proportionality review will be based on a tainted record. The success of this claim is contingent upon the Appellant prevailing on all or some of issues I, II, and III above. The Appellant offers no additional case law to support this issue other than the factors this Court outlined in *State v. Dixon,* 283 So. 2d 1 (Fla. 1973) about removing arbitrariness from sentencing. The State rests on its arguments to issues I, II, and III and submits that they are dispositive of those

issues. As to the Appellant's analysis under the *Dixon* factors, the State responds as follows.

The Evidentiary Hearing

Even if this Court finds that Kalisz' confession was improperly obtained, contrary to the Appellant's assertion, there is direct and circumstantial evidence to support a finding of the cold, calculated, and premeditated aggravator. The Defendant purchased ammunition and additional magazines prior to the murders and his pistol was equipped with a laser sight to improve his accuracy. The Defendant made admissions about his plan to "take out" his sister prior to the murders. The Defendant engaged in target practice earlier on the day of the murders. The victims were unarmed and posed no threat to Kalisz. The victims were all surprised when Kalisz showed up and began shooting. Lastly, Kalisz' made a phone call after the murders and said that he had "taken care of the problem."

The Jury's Recommendation, The Trial Court's Decision, and This Court's Review

Under the facts of this heavily aggravated case, the jury was likely to recommend death whether or not they heard instructions about the great risk aggravator or the avoid arrest aggravator. The suppression of Kalisz' confession from January 27, 2010 would not have affected the outcome of the jury's recommendation either. The Defendant attempted a quadruple murder with

indiscriminate gunfire in a residential neighbor with children playing in the street and was successful in killing two of his targets. While trying to flee the state after the murders, the Defendant started a shootout with police officers in another county and killed a deputy. Kalisz was on felony probation at the time of the murders and he conducted the slaughter during the course of a burglary. Even accounting for Kalisz' mental health mitigation, the aggravation is significantly weightier. Whether viewed through the eyes of a layman juror, an experienced trial judge, or sage justices, Kalisz' murders were appalling and the balance of the facts bear heavily towards death.

ISSUE V: WHETHER THE TRIAL COURT ERRED IN ADMITTING GRAPHIC AUTOPSY PHOTOGRAPHS THAT ASSISTED THE MEDICIAL EXAMINER'S TESTIMONY

The Appellant next challenges the admissibility of certain autopsy photographs that were admitted into evidence and published to the jury during the testimony of the medical examiner. The Defendant objected to the admissibility of the photographs at trial. The trial court overruled the Defendant's objection and found the photographs relevant to prove identity, the presence of wounds, and would assist the medical examiner in his description of the victim's wounds to the jury.

A. The Standard of Appellate Review

A trial judge's ruling on the admissibility of evidence will not be disturbed

but absent an abuse of discretion. *Kearse v. State*, 662 So. 2d 677, 684 (Fla. 1995).

B. Case Law Supporting the Trial Court's Finding

The test for admissibility of photographs under Florida law is relevance. *Dennis v. State*, 817 So. 2d 741, 763 (Fla. 2002) (autopsy photographs of victims who were bludgeoned to death with the blunt end of a shotgun were relevant to show the extent of the victims' injuries); *See also Pope v. State*, 679 So. 2d 710, 713 (Fla. 1996). Photographs that assist the medical examiner in describing the nature of the victim's injuries and cause of death are relevant and admissible. *Nixon v. State*, 572 So.2d 1336, 1342 (Fla. 1990) (photographs taken at the coroner's office which showed the victim's head and upper torso used to explain the pathologist's testimony regarding the nature of the victim's injuries and the cause of her death). Even graphic images are admissible when they are relevant. *Mansfield v. State*, 758 So.2d 636, 648 (Fla. 2000) (admission of photographs depicting mutilation of the victims genitalia and an autopsy photograph of victim's brain not an abuse of discretion). *Gudinas v. State*, 693 So. 2d 953, 963 (Fla. 1997) (graphic images of a stick protruding from victim's vagina and photos of her body in the morgue where relevant to nature of injuries and aggravation).

This Court has previously approved the admission of photographs that were relevant to explain a medical examiner's testimony or to show the manner of death and/or the location of the wounds. *See Floyd v. State*, 808 So. 2d 175 (Fla. 2002)

(autopsy photographs of stab wounds that also depicted internal organs); *Larkins v. State*, 655 So. 2d 95 (Fla. 1995) (pictures of the victim lying in a pool of blood at the crime scene). Additionally, "[this Court has] also explained that '[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.'" *Chavez v. State,* 832 So. 2d 730, 763 (Fla. 2002) (*quoting Henderson v. State,* 463 So.2d 196, 200 (Fla. 1985)).

In the realm of graphic murder pictures, the autopsy photographs objected to in this case pale in comparison to others that this Court has found admissible. The photographs of Donovan and Tillotson's autopsies were not bloody or gory. They did not show cleaved flesh, open cavities, mangled limbs, or mutilation of any sort. Donovan and Tillotson were depicted in their autopsy photographs with clean, intact bodies and small, cleaned bullet wounds that caused no malformations to the natural state of their bodies. Based on the testimony of the medical examiner, the worst damage—the fatal damage—done by the bullets was on the inside of their bodies, something the photographs did not depict. The photographs in this case were clinical in nature and relevant to facts about which the medical examiner testified.

C. Appellant's Case Law, Not Applicable

The Appellant cites *Ruiz v. State*, 743 So. 2d 1, 8 (Fla. 1999) to support his argument that the photographs were improperly admitted at trial. The facts in Ruiz,

however, are distinguishable from the facts in this case. In Ruiz, during the penalty phase, the prosecution showed an enlarged photograph of the bloody, disfigured head and upper torso of the victim. *Id.* at 8. The standard size photo had already been published to the jury in the guilt phase and the prosecutor gave no relevant basis for submitting the gruesome photograph at the penalty phase. *Id.* In this case, the photographs of Donovan and Tillotson were bland, clinical autopsy pictures that were used to assist the medical examiner with relevant testimony about the victim's injuries during the guilt phase of trial.

The Appellant also cites *Almeida v. State*, 748 So. 2d 922, 929-930 (Fla. 1999) to support his argument. The facts in *Almeida* are also distinguishable from this case. In *Almeida*, the prosecution submitted an autopsy photograph that depicted the gutted, open body cavity of the victim. *Id.* In this case, the Donovan's and Tillotson's bodies were closed and did not depict any open cavities or interior portions of their bodies. Furthermore, defense counsel's claim at trial during a sidebar argument that the injuries and identity are not in dispute does not alleviate the State of its burden to prove the elements of the offenses charged beyond and to the exclusion of every reasonable doubt. As sure as the prosecutor does not make relevant use of the autopsy photographs through the medical examiner's testimony to prove identity and that the gunshot wounds were the cause of death, the defendant may exercise his constitutional right to stand silent and then succeed on

a motion for judgment of acquittal or in a verdict of not guilty.

D. Harmless Error

Furthermore, any possible error in the admission of this evidence would be harmless beyond a reasonable doubt. Kalisz challenges the admission of only two pictures, which were referred to and published for the jury during the testimony of the medical examiner. Given the direct evidence establishing Kalisz' guilt, including the eyewitness testimony of the two surviving victims and Kalisz' incriminating statements to Mr. Lemon and Mr. Linville, the minor role played by this photo in the State's case renders any possible error harmless. *Hertz v. State*, 803 So. 2d 629 (Fla. 2001); *See also Almeida*,748 So. 2d at 929-930.

ISSUE VI: WHETHER THE VICTIM IMPACT STATEMENTS TAINTED THE JURY'S RECOMMENDATION

In this next issue, the Appellant challenges the admissibility of the victim impact statements that were read to the jury at trial. The Defendant objected to the victim impact testimony being presented to the jury during the penalty phase of trial.

A. The Standard of Appellate Review

The standard for review of a trial judge's decision to admit victim impact evidence is abuse of discretion. *See Sexton v. State*, 775 So. 2d 923, 932 (Fla. 2000); *Holland v. State*, 775 So. 2d 1065, 1071 (Fla. 2000).

B. Case Law Supporting the Trial Court's Finding

In *Payne v. Tennessee*, 501 U.S. 808, 825 (1991), the United States Supreme Court held that evidence and argument pertaining to the personal characteristics of the murder victim and the impact of the victim's death on his family members are valid means of advising the sentencer of the specific harm caused by the defendant's unlawful conduct. Florida's constitutional provisions and legislative enactments make it clear that "victim impact evidence is to be heard in considering capital felony sentences." *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995), *cert. denied*, 116 S.Ct. 571 (1995). Victim impact evidence "should be limited to that which is relevant . . . ." *Bonifay v. State*, 680 So. 2d 413, 419 (Fla. 1996). Victims should refrain from providing characterizations and opinions about the crime. *Sexton*, 775 So. 2d at 932.

In this case, Tillotson's daughters read prepared statements about their mother during the penalty phase. The statements demonstrated Tillotson's uniqueness to the community and her family. The statements were not overly emotional or inflammatory. The victim impact statements did not mention the Defendant at all. Tillotson's daughters only spoke about what their mother meant to them and how she would be missed by her family. The victim impact statements did not ask the jury to impose the death penalty or take revenge on Kalisz for their mother's death. The victim impact statements in this case complied with the guidelines set out in *Payne* and in this Court's interpretation of the Florida

Constitution.

C. Appellant's Case Law Not Applicable

The only additional case law the Appellant cites beyond *Payne* and *Windom* is *Booth v. Maryland*, 482 U.S. 496 (1987). *Booth*, however, was overruled by *Payne* and is therefore inapplicable to the Court's analysis of this issue.

D. Harmless Error

Even if the victim impact evidence was admitted in error, such error is harmless beyond a reasonable doubt considering the strong aggravation against the Defendant. *Sexton v. State*, 775 So. 2d 923, 932-933 (Fla. 2000) (*citing Windom*, 656 So. 2d 438-439); *See also Alston v. State,* 723 So.2d 148, 160 (Fla.1998) (victim's mother exceeded the scope of testimony allowed under *Payne.* The Court found that this testimony was harmless beyond a reasonable doubt "given the strong case in aggravation and the relatively weak case for mitigation."). With or without the victim impact testimony, Kalisz' murders are aggravated with prior capital murders and prior capital felonies, a prior violent felony for which he was on felony probation, and burglary.

ISSUE VII: WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL UNDER *RING v. ARIZONA*

Finally, the Appellant claims that Florida's death penalty statute is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). At trial, defense counsel preserved this issue through a pre-trial motion.

A. The Standard of Appellate Review

The constitutionality of Florida's death penalty statute is a question of law reviewed by this Court de novo. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *cert. denied*, 537 U.S. 1070 (2002).

B. Case Law Supporting the Trial Court's Finding

First, the United States Supreme Court has reviewed and upheld Florida's capital sentencing statute for what is now approaching thirty years. *Bottoson*, 833 So. 2d at 695 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"). This court has continued to abide by the United States Supreme Court's caution against assuming what its future decisions may be. *Evans v. Sec'y, Dept. of Corr.,* 699 F.3d 1249, 1252 (11th Cir. 2012) (when a Supreme Court's decision with direct application to a case appears to rest on reasons rejected in a more recent line of decisions, we must follow the directly applicable decision and leave to the high Court the prerogative of overruling its own decisions). *See also Evans v. State/McNeil,* 995 So. 2d 933 (Fla. 2008).

Secondly, this Court has "repeatedly rejected the assertion that Ring requires aggravating circumstances be found individually by a unanimous vote."

Oyola v. State, 99 So. 3d 431, 449 (Fla. 2012). *See also Frances v. State*, 970 So. 2d 806, 822 (Fla. 2007); *Hernandez-Alberto v. State*, 889 So. 2d 721, 733 (Fla. 2004). Lastly, this Court has gone further in its analysis to specifically hold that *Ring* does not apply to cases that involve the prior violent felony aggravator, the prior capital felony aggravator, and under sentence of imprisonment or felony probation aggravator. *Victorino v. State*, 23 So. 3d. 87 (Fla. 2009) (*Ring* does not apply to cases that include the prior violent felony aggravator, the prior capital felony aggravator, or the under-sentence-of-imprisonment aggravator, and Victorino's case includes all three). Similar to *Victorino*, Appellant's death sentences are supported by jury findings beyond a reasonable doubt of the prior (contemporaneous) capital felony aggravator for both murders and both attempted murders and the burglary aggravator in this case, and the Defendant's pleas to the capital murder of Capt. Reed and the aggravated assault from 2009 for which the Defendant was on felony probation.

For these reasons, Appellant's claim does not merit relief.

CONCLUSION

Based on the foregoing analysis, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentences of death.

Respectfully submitted and certified,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on February 15, 2013: **George D.E. Burden** burdenb@pd7.org, **Leonard R. Ross** ross.len@pd7.org, **Kathy Young** young.kathy@pd7.org.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,

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