

NORMAN BLAKE MCKENZIE
APPELLANT

L.T. CASE NO: 06001864CFMA

H.T. CASE NO: SC20-243

VS

STATE OF FLORIDA
APPELLEE

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RECORD ON APPEAL

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MARCH 18, 2020	<u>TRANSCRIPT OF PROCEEDINGS FROM (03/14/2019) BEFORE JUDGE MALTZ - HEARING</u>	1022 - 1058
MARCH 30, 2020	<u>ORDER RESCHEDULING STATUS CONFERENCE</u>	1059 - 1060
APRIL 08, 2020	<u>AMENDED ORDER RESCHEDULING STATUS</u>	1061 - 1062

CONFERENCE

APRIL 17, 2020

TRANSCRIPT OF PROCEEDINGS FROM (11/22/19)
BEFORE JUDGE MALTZ - SPENCER HEARING

1063 - 1157

<u>Date</u>	<u>Docket Description/Text</u>
April 27, 2020	TRANSCRIPT OF PROCEEDINGS FROM (08/26/19) BEFORE JUDGE MALTZ - JURY TRIAL
April 17, 2020	TRANSCRIPT OF PROCEEDINGS FROM (11/22/19) BEFORE JUDGE MALTZ - SPENCER HEARING
April 08, 2020	FELONY STATUS CONFER SET FOR 06/04/2020 AT 1:30 PM IN 328/ , JDG: MALTZ, HOWARD M. AMENDED ORDER RESCHEDULING STATUS CONFERENCE
March 31, 2020	FELONY STATUS CONFER SET FOR 05/08/2020 AT 1:30 PM IN 328/ , JDG: MALTZ, HOWARD M.
March 30, 2020	ORDER RESCHEDULING STATUS CONFERENCE
March 18, 2020	TRANSCRIPT OF PROCEEDINGS FROM (03/14/2019) BEFORE JUDGE MALTZ - HEARING
March 10, 2020	TRANSCRIPT OF PROCEEDINGS FROM (11/28/2018) BEFORE JUDGE MALTZ - HEARING
February 26, 2020	COURT REPORTERS ACKNOWLEDGMENT
February 24, 2020	TRANSCRIPT OF PROCEEDINGS FROM (02/14/) BEFORE JUDGE MALTZ - SENTENCING SC ORDER SC ACKNOWLEDGMENT OF NEW CASE (SC20-243)
February 20, 2020	COURT REPORTERS ACKNOWLEDGMENT FELONY STATUS CONFER SET FOR 04/09/2020 AT 1:30 PM IN 328/ , JDG: MALTZ, HOWARD M. ORDER SCHEDULING STATUS CONFERENCE AMENDED DESIGNATION TO COURT REPORTER ORDER TO PROCEED WITHOUT PAYMENT OF COSTS DECLARING DEFENDANT INSOLVENT FOR PURPOSES OF APPEAL ORDER FOR TRANSCRIPTION OF PROCEEDINGS NOA TO SUPREME COURT
February 19, 2020	
February 18, 2020	MOTION TO PROCEED WITHOUT PAYMENT OF COSTS DECLARING DEFENDANT INSOLVENT FOR PURPOSES OF APPEAL MOTION FOR TRANSCRIPTION OF PROCEEDINGS DESIGNATION TO COURT REPORTER DIRECTIONS TO THE CLERK JUDICIAL ACTS TO BE REVIEWED NOTICE OF APPEAL +++++ ON APPEAL +++++
February 17, 2020	VERIFICATION
February 14, 2020	TRANSPORT ORDER RETURNED WITH BOOKING SHEET FINGERPRINT CARD HEARING NOTES SENTENCING ORDER
February 05, 2020	LETTER TO THE JUDGE / WIFE'S STATEMENT
December 06, 2019	DEFENDANT'S SENTENCING MEMORANDUM STATE'S SENTENCING MEMORANDUM

<u>Date</u>	<u>Docket Description/Text</u>
November 25, 2019	ORDER TO TRANSPORT
November 22, 2019	ORDER SCHEDULING SENTENCING HEARING NOTES
November 21, 2019	TRIAL EXHIBITS LIST (DEFENSE) TRIAL EXHIBITS LIST (STATE) ACKNOWLEDGMENT FILED FELONY SENTENCING SET FOR 02/14/2020 AT 1:30 PM IN 328/ , JDG: MALTZ, HOWARD M.
November 20, 2019	TRANSPORT ORDER RETURNED WITH BOOKING SHEET
November 18, 2019	ORDER ON MOTION TO PERMIT HEARING TESTIMONY VIA SKYPE
October 23, 2019	MOTION TO PERMIT HEARING TESTIMONY VIA SKYPE
October 08, 2019	CRIMINAL WITNESS SUBPOENA FOR JURY TRIAL
August 29, 2019	ORDER TO TRANSPORT ORDER SCHEDULING SPENCER HEARING JURY TRIAL NOTES (DAY 3) NOTIFICATION RE:PRE-SENTENCE INVESTIGATION ACKNOWLEDGMENT FILED FELONY HEARING SET FOR 11/22/2019 AT 9:00 AM IN 328/ , JDG: MALTZ, HOWARD M. VERDICT CT 2 VERDICT CT 1 LETTERS FROM JURORS JURY INSTRUCTIONS FOR PENALTY PROCEEDING FELONY JURY TRIAL SET FOR 08/29/2019 AT 8:45 AM IN 328/ , JDG: MALTZ, HOWARD M.
August 28, 2019	JURY TRIAL NOTES (DAY 2) TRIAL EXHIBITS LIST (STATE) TRIAL EXHIBITS LIST (DEFENSE) JUROR QUESTION FELONY JURY TRIAL SET FOR 08/28/2019 AT 8:45 AM IN 328/ , JDG: MALTZ, HOWARD M.
August 27, 2019	JURY TRIAL NOTES (DAY 1) PROSECUTOR: JOHNSON, KENNETH MARK ASSIGNED FELONY JURY TRIAL SET FOR 08/27/2019 AT 8:45 AM IN 328/ , JDG: MALTZ, HOWARD M.
August 26, 2019	JURY SELECTION NOTES
August 23, 2019	MOTION FOR PROPER PROCEDURE FOR POST-CHALLENGE QUESTIONING OF PROSPECTIVE JURORS HEARING NOTES
August 21, 2019	FELONY HEARING SET FOR 08/23/2019 AT 8:30 AM IN 328/ , JDG: MALTZ, HOWARD M. EMAIL FROM JUDGE'S OFFICE HEARING 8/23 @8:30AM DEFENSE SUPPLEMENTAL WITNESS LIST FOR PENALTY PHASE
August 20, 2019	SECOND AMENDED NOTICE OF INTENT TO PRESENT EXPERT TESTIMONY OF MENTAL MITIGATION STATE'S UNOPPOSED MOTION TO PRESENT VIDEO-CONFERENCE TESTIMONY

<u>Date</u>	<u>Docket Description/Text</u>
August 17, 2019	STATE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE THAT THE DEFENDANT WOULD NOT BE ELIGIBLE FOR PAROLE IF SENTENCED TO LIFE IMPRISONMENT AS A MITIGATING CIRCUMSTANCE
August 13, 2019	FELONY HEARING SET FOR 08/26/2019 AT 8:30 AM IN 328/ , JDG: MALTZ, HOWARD M. EMAIL FROM JUDGE'S OFFICE IN REGARDS TO A HEARING SET 08/26/2019 @8:30AM STATES MOTION IN LIMINE REGARDING DISPUTED REDACTIONS OF DEFENDANTS INTERVIEW ON OCTOBER 5 2006
August 12, 2019	SUPPLEMENTAL DISCOVERY/WITNESS LIST
August 07, 2019	NOTICE OF TAKING TELEPHONIC DEPOSITION
August 06, 2019	NOTICE OF TAKING DEPOSITION
August 05, 2019	AMENDED NOTICE OF INTENT TO PRESENT EXPERT TESTIMONY OF MENTAL MITIGATION
August 02, 2019	AMENDED NOTICE OF INTENT TO PRESENT EXPERT TESTIMONY OF MENTAL MITIGATION
May 10, 2019	SUPPLEMENTAL DISCOVERY/WITNESS LIST
May 07, 2019	ORDER GRANTING DEFENDANT'S MOTION TO CONTINUE AND RESCHEDULING PENALTY PHASE TRIAL
May 06, 2019	FELONY JURY SELECTION SET FOR 08/26/2019 AT 9:00 AM IN 328/ , JDG: MALTZ, HOWARD M. =DEFENDANT PRESENT/STATE PRESENT/ATTORNEY BARRETT APPEARS BY PHONE/COURT REPORTER RHONDA BOUNDS PRESENT/ATTORNEY BARRETT REQUEST A CONTINUANCE OF THE PENALTY PHASE TRIAL/STATE ARGUMENT/DEFENDANT GIVES TESTIMONY/DEFENSE CONTINUANCE GRANTED/CASE RESET TO AUGUST 26/2019/JUDGE TO SEND OUT ORDER/DEFENDANT TO REMAIN IN ST. JOHNS COUNTY UNTIL FURTHER ORDER OF THE COURT
May 02, 2019	FELONY STATUS CONFER SET FOR 05/06/2019 AT 3:30 PM IN 328/ , JDG: MALTZ, HOWARD M.
March 27, 2019	SUPPLEMENTAL DISCOVERY/WITNESS LIST
March 21, 2019	ORDER DENYING DEFENDANT MOTION TO STRIKE STATES AMENDED NOTICE OF AGGRAVATING FACTORS AS UNTIMELY AND GRANTING STATES MOTION TO AMEND NOTICE OF AGGRAVATING FACTORS
March 18, 2019	ORDER RESCHEDULING PENALTY PHASE TRIAL
March 15, 2019	SUBPOENA FOR DEPOSITION
March 14, 2019	HEARING NOTES ACKNOWLEDGMENT FILED FELONY JURY SELECTION SET FOR 05/20/2019 AT 9:00 AM IN 328/ , JDG: MALTZ, HOWARD M. STATE'S AMENDED MEMORANDUM OF LAW IN OPPOSITION OF DEFENDANT'S MOTION TO STRIKE STATE'S AMENDED NOTICE OF AGGRAVATING FACTORS STATE'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO STRIKE STATE'S AMENDED NOTICE OF AGGRAVATING FACTORS
March 12, 2019	SUPPLEMENTAL DISCOVERY/WITNESS LIST NOTICE OF CANCELLATION OF DEPOSITION
March 11, 2019	EMAIL FROM JA FELONY HEARING SET FOR 03/14/2019 AT 3:00 PM IN 328/ , JDG: MALTZ, HOWARD M. MOTION TO CONTINUE PENALTY PHASE
March 04, 2019	TRANSPORT ORDER RETURNED WITH BOOKING SHEET

<u>Date</u>	<u>Docket Description/Text</u>
March 01, 2019	WITNESS SUPOENA
February 28, 2019	ORDER ON STATE'S MOTION TO COMPEL MAJOR CASE PRINTS FROM THE DEFENDANT
February 27, 2019	NOTICE OF TAKING DEPOSITION
	STATE'S MOTION TO COMPEL MAJOR CASE PRINTS FROM THE DEFENDANT CASE REOPENED FOR OTHER
February 20, 2019	MOTION TO STRIKE STATE'S AMENDED NOTICE OF AGGRAVATING FACTORS AS UNTIMELY
February 19, 2019	ORDER ON STATES MOTION TO COMPEL DEFENDANT TO SUBMIT TO EXAMINATION BY STATE MENTAL HEALTH EXPERT (PENALTY PHASE)
February 18, 2019	STATE'S MOTION TO COMPEL DEFENDANT TO SUBMIT TO EXAMINATION BY STATE MENTAL HEALTH EXPERT (PENALTY PHASE)
	NOTICE OF TAKING DEPOSITION
	FELONY HEARING SET FOR 03/25/2019 AT 9:00 AM IN 328/ , JDG: MALTZ, HOWARD M.
	ORDER TO TRANSPORT
February 15, 2019	NOTICE OF INTENT TO PRESENT EXPERT TESTIMONY OF MENTAL MITIGATION
February 14, 2019	SUPPLEMENTAL DISCOVERY/WITNESS LIST
February 11, 2019	SUPPLEMENTAL DISCOVERY/WITNESS LIST
February 01, 2019	SUPPLEMENTAL DISCOVERY/WITNESS LIST
January 23, 2019	STATE'S MOTION TO AMEND NOTICE OF AGGRAVATING FACTORS
December 07, 2018	ORDER ON DEFENDANTS MOTION TO PROHIBIT ANY REFERENCE TO THE JURY'S SECOND PHASE DECISION AS "ADYSORY" OR A "RECOMMENDATION"
	ORDER ON DEFENDANTS MOTION TO PRODUCE WRITTEN VICTIM IMPACT STATEMENTS AND TO REQUIRE THE VICTIM IMPACT WITNESSES TO READ THE STATEMENTS
	ORDER ON DEFENDANTS MOTION TO PERMIT ACCUSED TO APPEAR WITHOUT RESTRAINTS AT ALL PROCEEDINGS
	ORDER ON DEFENDANTS MOTION TO EXCLUDE EVIDENCE OR ARGUMENT DESIGNED TO CREATE SYMPATHY FOR THE DECEASED
	ORDER ON DEFENDANTS MOTION TO DECLARE FLORIDA'S CAPITAL SENTENCING SCHEME UNCONSTITUTIONAL AS VIOLATIVE OF THE EIGHTH AMENDMENT, CORRESPONDING ARTICLE I, SECTION 17 FLORIDA CONSTITUTION, AND EVOLVING STANDARDS OF DECENCY AND INCORPORATED MOTION TO TAKE JUDICIAL NOTICE
	ORDER ON DEFENDANTS MOTION TO DECLARE SECTIONS 921.141 AND/OR 921.141(6)(D) FLORIDA STATUTES AND/OR THE (6) (D) STANDAD INSTRUCTION UNCONSTITUTIONAL FACIALLY AND AS APPLIED AND TO PRECLUDE THEIR APPLICATION AT BAR
	ORDER ON DEFENDANTS MOTION TO DECLARE SECTION 921.141, FLORIDA STATUTES UNCONSTITUTIONAL AND/OR TO DECLARE SECTION 921.141 (6)(I) FLORIDA STATUTES UNCONSTITUTIONAL FACIALLY AND AS APPLIED
	ORDER ON DEFENDANTS MOTION TO DECLARE F.S. 921.141(1), FLORIDA STATUTES UNCONSTITUTIONAL AND TO BAR STATE'S USE OF HEARSAY EVIDENCE AT PENALTY PHASE
	ORDER ON DEFENDANTS MOTION TO DECLARE FLA. STAT. 921.141

<u>Date</u>	<u>Docket Description/Text</u>
	UNCONSTITUTIONAL BASED ON A VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS AND BECAUSE OF A VIOLATION OF THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION, OR IN THE ALTERNATIVE TO DETERMINE LIFE IS THE MAXIMUM PENALTY
	ORDER ON DEFENDANTS MOTION TO DECLARE SECTION 921.141, FLORIDA STATUTES UNCONSTITUTIONAL FOR LACK OF ADEQUATE APPELATE REVIEW
	ORDER ON DEFENDANTS MOTION TO DECLARE SECTION 921.141, FLORIDA STATUTES UNCONSTITUTIONAL FOR FAILURE TO PROVIDE JURY ADEQUATE GUIDANCE IN THE FINDING OF MITIGATION CIRCUMSTANCES, AND TO PRECLUDE DEATH SENTENCE
	ORDER ON DEFENDANTS MOTION TO DECLARE FLA. STAT. 921.141 UNCONSTITUTIONAL BECAUSE IT EXPANDS RATHER THAN NARROWS THE CLASS OF DEFENDANT'S ELIGIBLE FOR THE DEATH PENALTY
	ORDER ON DEFENDANTS MOTION TO COMPEL DISCLOSURE OF MITIGATING CIRCUMSTANCES
	ORDER ON DEFENDANTS MOTION TO ALLOW VICTIM IMPACT EVIDENCE BEFORE THE JUDGE ALONE
	ORDER ON DEFENDANTS MOTION FOR PROPER PROCEDURE FOR POST-CHALLENGE QUESTIONING OF PROSPECTIVE JURORS
	ORDER ON DEFENDANTS MOTION TO BAR EXECUTION BY LETHAL INJECTION
	ORDER ON DEFENDANTS MOTION IN LIMINE REGARDING REFERENCE TO NON-ENUMERATED MITIGATING FACTORS OR CIRCUMSTANCES
	ORDER ON DEFENDANTS MOTION FOR SPECIAL VERDICT FORM CONTAINING FINDINGS OF FACT BY THE JURY
	ORDER ON DEFENDANTS MOTION TO EXCLUDE VICTIM IMPACT EVIDENCE AND ARGUMENT AND/OR TO DECLARE SECTION 921.141(8), FLORIDA STATUTES UNLAWFUL AND UNCONSTITUTIONAL AND/OR TO DECLARE SECTION 921.141, FLORIDA STATUTES UNLAWFUL AND UNCONSTITUTIONAL
	ORDER ON DEFENDANTS MOTION FOR LIST OF PROSPECTIVE JURORS IN ADVANCE OF JURY SELECTION
	ORDER ON DEFENDANTS MOTION FOR JUROR QUESTIONNAIRE TO SUPPLEMENT VOIR DIRE
	ORDER ON DEFENDANTS MOTION FOR INTERROGATORY PENALTY PHASE VERDICT
	ORDER ON DEFENDANTS MOTION FOR INDIVIDUAL VOIR DIRE AND SEQUESTRATION OF JURORS DURING VOIR DIRE
	ORDER ON DEFENDANTS MOTION FOR IMPOSITION OF LIFE SENTENCE
	ORDER ON DEFENDANTS MOTION FOR FINDINGS OF FACT BY THE JURY
	ORDER ON DEFENDANTS MOTION FOR DISCOVERY OF PROSECUTORIAL INVESTIGATIONS OF PROSPECTIVE JURORS
December 04, 2018	NOTICE OF FILING (QUESTIONNAIRE FOR PROSPECTIVE JURORS)
November 28, 2018	TRANSPORT ORDER RETURNED WITH BOOKING SHEET
	HEARING NOTES
November 02, 2018	AMENDED NOTICE OF TAKING DEPOSITION
November 01, 2018	NOTICE OF TAKING DEPOSITION

<u>Date</u>	<u>Docket Description/Text</u>
October 18, 2018	MOTION TO LIMIT VICTIM IMPACT EVIDENCE MOTION TO EXCLUDE VICTIM IMPACT EVIDENCE AND ARGUMENT AND/OR TO DECLARE SECTION 921.141(8), FLORIDA STATUTES UNLAWFUL AND UNCONSTITUTIONAL AND/OR TO DECLARE SECTION 921.141, FLORIDA STATUTES UNLAWFUL AND UNCONSTITUTIONAL MOTION FOR SPECIAL VERDICT FORM CONTAINING FINDINGS OF FACT BY THE JURY MOTION IN LIMINE REGARDING REFERENCE TO NON-ENUMERATED MITIGATING FACTORS OR CIRCUMSTANCES MOTION TO PROHIBIT ANY REFERENCE TO THE JURY'S SECOND PHASE DECISION AS "ADYSORY" OR A "RECOMMENDATION" MOTION TO DECLARE SECTION 921.141, FLORIDA STATUTES UNCONSTITUTIONAL AND/OR TO DECLARE SECTION 921.141 (6)(I) FLORIDA STATUTES UNCONSTITUTIONAL FACIALLY AND AS APPLIED MOTION IN LIMINE TO REQUIRE STATE TO PROFFER AND AND ALL VICTIM IMPACT EVIDENCE MOTION TO DECLARE SECTION 921.141 AND/OR SECTION 921.141(6)(F) FLORIDA STATUTES AND/OR THE (6)(F) STANDARD JURY INSTRUCTION UNCONSTITUTIONAL AS APPLIED MOTION TO DECLARE SECTIONS 921.141 AND/OR 921.141(6)(D) FLORIDA STATUTES AND/OR THE (6) (D) STANDAD INSTRUCTION UNCONSTITUTIONAL FACIALLY AND AS APPLIED AND TO PRECLUDE THEIR APPLICATION AT BAR MOTION TO DECLARE SECTIONS 921.141 AND/OR 921.141(6)(B) FLORIDA STATUTES AND/OR THE STANDARD (6) (B) INSTRUCTION UNCONSTITUTIONAL FACIALLY AND AS APPLIED MOTION TO DECLARE SECTION 921.141, FLORIDA STATUTES UNCONSTITUTIONAL FOR FAILURE TO PROVIDE JURY ADEQATE GUIDANCE IN THE FINDING OF MITIGATION CIRCUMSTANCES, AND TO PRECLUDE DEATH SENTENCE MOTION TO DECLARE SECTION 921.141, FLORIDA STATUES UNCONSTITUTIONAL FOR LACK OF ADEQUATE APPELATE REVIEW MOTION TO DECLARE F.S. 921.141(1), FLORIDA STATUTES UNCONSTITUTIONAL AND TO BAR STATE'S USE OF HEARSAY EVIDENCE AT PENALTY PHASE MOTION FOR LIST OF PROSPECTIVE JURORS IN ADVANCE OF JURY SELECTION MOTION TO BAR EXECUTION BY LETHAL INJECTION MOTION FOR FINDINGS OF FACT BY THE JURY MOTION TO ALLOW VICTIM IMPACT EVIDENCE BEFORE THE JUDGE ALONE MOTION FOR PROPER PROCEDURE FOR POST-CHALLENGE QUESTIONING OF PROSPECTIVE JURORS MOTION FOR INDIVIDUAL VOIR DIRE AND SEQUESTRATION OF JURORS DURING VOIR DIRE MOTION TO DECLARE FLA. STAT. 921.141 UNCONSTITUTIONAL BECAUSE IT EXPANDS RATHER THAN NARROWS THE CLASS OF DEFENDANT'S ELIGIBLE FOR THE DEATH PENALTY DEFENDANT'S MOTION TO PERMIT ACCUSED TO APPEAR WITHOUT RESTRAINTS AT ALL PROCEEDINGS MOTION FOR IMPOSITION OF LIFE SENTENCE MOTION FOR INTERROGATORY PENALTY PHASE VERDICT MOTION TO PRODUCE WRITTEN VICTIM IMPACT STATEMENTS AND TO

<u>Date</u>	<u>Docket Description/Text</u>
	REQUIRE THE VICTIM IMPACT WITNESSES TO READ THE STATEMENTS MOTION TO DECLARE FLA. STAT. 921.141 UNCONSTITUTIONAL BASED ON A VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS AND BECAUSE OF A VIOLATION OF THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION, OR IN THE ALTERNATIVE TO DETERMINE LIFE IS THE MAXIMUM PENALTY MOTION TO DECLARE FLORIDA'S DEATH PENALTY SCHEME UNCONSTITUTIONAL AND PRECLUDE THE PROSECUTION FROM SEEKING THE DEATH PENALTY DUE TO THE FAILURE TO MEET MINIMUM CONSTITUTIONAL REQUIREMENTS SET FORTH IN FURMAN V. GEORGIA AND ITS PROGENY MOTION TO EXCLUDE EVIDENCE OR ARGUMENT DESIGNED TO CREATE SYMPATHY FOR THE DECEASED MOTION FOR DISCOVERY OF PROSECUTORIAL INVESTIGATIONS OF PROSPECTIVE JURORS MOTION FOR DISCLOSURE OF PENALTY PHASE EVIDENCE MOTION TO COMPEL DISCLOSURE OF MITIGATING CIRCUMSTANCES MOTION TO DECLARE FLORIDA'S CAPITAL SENTENCING SCHEME UNCONSTITUTIONAL AS VIOLATIVE OF THE EIGHTH AMENDMENT, CORRESPONDING ARTICLE I, SECTION 17 FLORIDA CONSTITUTION, AND EVOLVING STANDARDS OF DECENCY AND INCORPORATED MOTION TO TAKE JUDICIAL NOTICE MOTION FOR JUROR QUESTIONNAIRE TO SUPPLEMENT VOIR DIRE
October 12, 2018	ORDER TO TRANSPORT HEARING NOTES
August 23, 2018	FELONY HEARING SET FOR 11/28/2018 AT 9:00 AM IN 328/ , JDG: MALTZ, HOWARD M. FELONY JURY TRIAL SET FOR 03/25/2019 AT 9:00 AM IN 328/ , JDG: MALTZ, HOWARD M. FELONY JURY SELECTION SET FOR 03/25/2019 AT 9:00 AM IN 328/ , JDG: MALTZ, HOWARD M. ORDER SCHEDULING PENALTY PHASE TRIAL
July 31, 2018	ACKNOWLEDGMENT FILED FELONY STATUS CONFER SET FOR 10/12/2018 AT 1:30 PM IN 328/ , JDG: MALTZ, HOWARD M. HEARING NOTES
July 30, 2018	WAIVER OF APPEARANCE AT STATUS CONFERENCE
April 13, 2018	ACKNOWLEDGMENT FILED FELONY HEARING SET FOR 07/31/2018 AT 9:00 AM IN 328/ , JDG: MALTZ, HOWARD M.
February 13, 2018	ACKNOWLEDGMENT FILED FELONY HEARING SET FOR 04/13/2018 AT 9:00 AM IN 328/ , JDG: MALTZ, HOWARD M. =DEF ATTY PRES - HIRED EXPERT TO EXAMINE DEFT - HRG TO BE SCHEDULED
February 12, 2018	NOTIE OF DEMAND FOR DISCOVERY
February 08, 2018	NOTICE OF APPEARANCE AS SECOND CHAIR
February 07,	WAIVER OF DEFENDANT'S ATTENDANCE AT STATUS HEARING

<u>Date</u>	<u>Docket Description/Text</u>
2018	
November 09, 2017	TRANSPORT ORDER RETURNED WITH BOOKING SHEET
	ACKNOWLEDGMENT FILED - SIGNATURE PAD NOT WORKING FELONY STATUS CONFER SET FOR 02/13/2018 AT 9:00 AM IN 328/ , JDG: MALTZ, HOWARD M.
October 23, 2017	ORDER TO TRANSPORT
September 22, 2017	STATES DISCOVERY EXHIBIT/WITNESS LIST AND DEMAND FOR RECIPROCAL DISCLOSURE
September 06, 2017	EMAIL FROM S MILLER REF DEFT CAN BE TAKEN BACK TO DOC
September 05, 2017	HEARING NOTES
	ACKNOWLEDGMENT FILED FELONY STATUS CONFER SET FOR 11/09/2017 AT 9:00 AM IN 328/ , JDG: MALTZ, HOWARD M.
August 28, 2017	STATE'S RENEWED NOTICE OF INTENT TO SEEK THE DEATH PENALTY AND LIST OF AGGRAVATING FACTORS
June 26, 2017	NOTICE EMAILED TO ATTORNEY (DEFENDANT) MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION AND EVIDENCE FAVORABLE TO DEFENDANT NOTICE OF (DEMAND FOR) DISCOVERY NOTICE OF APPEARANCE, WRITTEN PLEA OF NOT GUILTY, WAIVER OF ARRAIGNMENT, REQUEST FOR COPY OF INDICTMENT OR INFORMATION AND REQUEST FOR TEN DAYS TO FILE MOTIONS
June 22, 2017	DEFENSE ATTORNEY: BARRETT, JUNIOR ALPHONSO ASSIGNED DEFENSE ATTORNEY: COUNSEL, REGIONAL ASSIGNED ORDER ALLOWING PUBLIC DEFENDER TO WITHDRAW AND APPOINTING REGIONAL CONFLICT COUNSEL
June 21, 2017	MOTION TO WITHDRAW AND APPOINT REGIONAL CONFLICT COUNSEL
June 20, 2017	NOTICE OF ACCEPTANCE OF ELECTRONIC SERVICE DEFENSE ATTORNEY: PHILLIPS, MATTHEW DEAN ASSIGNED
June 19, 2017	DEFENSE ATTORNEY: DEFENDER, PUBLIC ASSIGNED FELONY STATUS CONFER SET FOR 09/05/2017 AT 1:30 PM IN 328/ , JDG: MALTZ, HOWARD M. ORDER ON DEFENDANT'S FIRST SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCES
May 08, 2017	MOTION HEARING NOTES
April 20, 2017	ORDER GRANTING STATE'S MOTION REQUESTING PERMISSION TO APPEAR BY TELEPHONE FOR THE CASE MANGEMENT CONFERENCE SET FOR MAY 8, 2017 NOTICE OF SUPPLEMENTAL AUTHORITY
April 17, 2017	STATE'S MOTION REQUESTING PERMISSION TO APPEAR BY TELEPHONE FOR THE CASE MANAGEMENT CONFERENCE SET FOR MAY 8, 2017
March 15, 2017	FELONY STATUS CONFER SET FOR 05/08/2017 AT 1:30 PM IN 328/ , JDG: MALTZ, HOWARD M.
March 14, 2017	ORDER RESCHEDULING CASE MANAGEMENT CONFERENCE
March 01, 2017	STATE'S MOTION FOR A CONTINUANCE OF THE CASE MANAGEMENT CONFERENCE
February 28, 2017	FELONY STATUS CONFER SET FOR 03/08/2017 AT 1:30 PM IN 328/ , JDG: MALTZ, HOWARD M.

<u>Date</u>	<u>Docket Description/Text</u>
February 15, 2017	ORDER SCHEDULING CASE MANAGEMENT CONFERENCE 03/08/2017 @ 1:30PM STATE'S RESPONSE TO DEFENDANT'S FIRST SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCES
January 25, 2017	PROSECUTOR: SINGLETON, VIVIAN ASSIGNED
January 24, 2017	MOTION FOR EXTENSION OF TIME AND MOTION TO TOLL TIME
January 09, 2017	FIRST SUCCESSIVE MOTION TO VACATE JUDGEMENT OF CONVICTION AND SENTENCES CASE REOPENED FOR POST CONV RELIEF DEFENSE ATTORNEY: DRISCOLL, JAMES L JR ASSIGNED JUDGE MALTZ, HOWARD M.: ASSIGNED DEFENSE ATTORNEY: SELF, SELF ASSIGNED
January 22, 2015	+++++ OFF APPEAL +++++ APPEAL INFORMATION SHEET (SC12-986) SUPREME COURT MANDATE DATED 1/6/15 - OPINION FILED 12/11/14 PER CURIAM AFFIRMED (SC12-986)
April 23, 2014	SUPREME COURT ORDER DATED 4/17/14 AFFIRMING THE DENIAL OF THE RULE 3.851 MOTION AND THE PETITION FOR WRIT OF HABEAS CORPUS (SC12- 986)
October 24, 2013	DEFENSE ATTORNEY: SELF, SELF ASSIGNED
September 14, 2012	SECOND SUPPLEMENTAL RECORD ON APPEAL TO FL SUPRREME COURT (VOLUME XIII) (SC12-986)
August 31, 2012	SUPREME COURT ORDER DATED 8-28-2012 - MOTION TO SUPPLEMENT THE RECORD IS GRANTED (DUE 9-27-2012)
July 17, 2012	SUPPLEMENTAL RECORD TO SUPREME - (VOLUMES XI & XII) (SC12-986)
July 12, 2012	PROCEEDINGS BEFORE JUDGE BERGER ON 7-6-2012
July 09, 2012	ORDER SUBSTITUTION ORIGINAL DOCUMENT
July 06, 2012	REPORT ON STATUS CONFERENCE
June 19, 2012	FELONY STATUS CONFER SET FOR 07/06/2012 AT 11:00 AM IN 277/ , JDG: BERGER, WENDY W
June 18, 2012	NOTICE OF HEARING (STATUS CONFERENCE 7/6/12 @ 11AM) NOTICE OF HEARING (STATUS CONFERENCE 7-6-12 @ 11AM) (ATTACHED FROM EMAIL DATED 6-18-12 FROM SUSAN) EMAIL FROM SUSAN MILLER REGARDING NOTICE OF HEARING SET FOR 7-6- 12 11AM STATUS REPORT ON RECORD PREPARATION
June 14, 2012	EMAIL FROM SUSAN MILLER SETTING STATUS CONFERENCE HEARING FOR 7/6/12 @ 11AM IN CHAMBERS
June 11, 2012	RECORD ON APPEAL TO SUPREME COURT (SC12-986)(10 VOLUMES)
June 07, 2012	PROCEEDINGS BEFORE JUDGE BERGER ON 1-13-2012 PROCEEDINGS BEFORE JUDGE BERGER ON 10-27-2011 PROCEEDINGS BEFORE JUDGE BERGER ON 8-3-2011 PROCEEDINGS BEFORE JUDGE BERGER ON 6-1-2011 PROCEEDINGS BEFORE JUDGE BERGER ON 03-2-2011 PROCEEDINGS BEFORE JUDGE BERGR ON 12-15-2010
May 21, 2012	DEFENDANTS AMENDED DESIGNATION TO APPROVED COURT REPORTER AND REPORTERS ACKNOWLEDGMENT
May 18, 2012	SUPREME COURT ORDER DATED 5-14-12 (SC12-986) SUPREME COURT ACKNOWLEDGEMENT OF NEW CASE (SC12-986)
May 11, 2012	LETTER TO SUPREME COURT - NOTICE OF APPEAL
May 09, 2012	DEFENDANT'S DESIGNATION TO APPROVED COURT REPORTER AND REPORTERS ACKNOWLEDGMENT

<u>Date</u>	<u>Docket Description/Text</u>
	DEFENDANT/APPELLANT'S DIRECTIONS TO THE CLERK STATEMENT OF JUDICIAL ACTS TO BE REVIEWED NOTICE OF APPEAL +++++ ON APPEAL +++++
April 23, 2012	EMAIL FROM LAW CLERK TO JUDGE BERGER DTD 04/13/2012
April 16, 2012	ORDER ON MOTION FOR REHEARING - DENIED
April 09, 2012	MOTION TO STRIKE STATES MOTION TO STRIKE
April 04, 2012	STATES MOTION TO STRIKE "SUPPLEMENT TO MOTION FOR REHEARING"
April 02, 2012	STATES RESPONSE TO MOTION FOR REHEARING
March 29, 2012	SUPPLEMENT TO MOTION FOR REHEARING
March 20, 2012	MOTION FOR REHEARING
March 09, 2012	2 CD'S INTERVIEW WITH DEFT AND SJC SO T. BURRES
March 08, 2012	REOPENED CASE CLOSED WESTLAW SUPREME COURT OF FLORIDA. NORMAN BLAKE MCKENZIE, APPELLANT V. STATE OF FLORIDA, APPELLEE ORDER ON MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE (DENIED) STATE'S RULE 3.851(F) (5) FLORIDA RULES OF CRIMINAL PROCEDURE WITNESS AND EXHIBIT LIST
January 13, 2012	2 DVD OF DEFENDANTS INTERVIEW WITH DET BURRES HEARING NOTES AFFIDAVIT OF MARK D. CUNNINGHAM, PHD ABPP WITNESS LIST (DEFENSE)
January 10, 2012	ORDER TO TRANSPORT PRISONER
January 04, 2012	NOTICE OF HEARING (CASE MANAGEMENT CONFERENCE)
December 29, 2011	STATE'S REQUEST TO SET CASE MANAGEMENT CONFERENCE
October 27, 2011	FELONY STATUS CONFER SET FOR 01/13/2012 AT 1:30 PM IN 264/ , JDG: BERGER, WENDY W =DEFT NOT PRESENT/COURT REPORT LOUISE POMAR/DAVID HENDRY & BARBARA DAVIS PRESENT BY PHONE - STATUS CONFERENCE FOR 90 DAYS OUT -
October 26, 2011	FELONY HEARING SET FOR 10/27/2011 AT 2:00 PM IN 264/ , JDG: BERGER, WENDY W
October 11, 2011	STATES RESPONSE TO MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE AND MOTION FOR SUMMARY DENIAL OF ALL CLAIMS
September 15, 2011	MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE
August 11, 2011	NOTICE OF HEARING (11/9/2011 AT 2:00 PM - STATUS CONFERENCE/TEMEPHONIC CONFERENCE)
August 03, 2011	FELONY STATUS CONFER SET FOR 11/09/2011 AT 2:00 PM IN 264/ , JDG: BERGER, WENDY W =DEFT NOT PRESENT/STATUS CONFERENCE/NOVEMBER 9TH AT 2PM FOR STATUS CONFERENCE
June 14, 2011	FELONY STATUS CONFER SET FOR 08/03/2011 AT 1:30 PM IN 264/ , JDG: BERGER, WENDY W AMENDED NOTICE OF HEARING (STATUS CONFERENCE-TELEPHONIC CONFERENCE 8/3/11 @ 130PM)
June 03, 2011	FELONY STATUS CONFER SET FOR 08/09/2011 AT 2:00 PM IN 264/ , JDG: BERGER, WENDY W
June 02, 2011	NOTICE OF HEARING (STATUS CONFERENCE-TELEPHONIC HEARING 8/9/11 @

<u>Date</u>	<u>Docket Description/Text</u>
	2PM)
June 01, 2011	FELONY HEARING SET FOR 08/03/2011 AT 1:30 PM IN 264/ , JDG: BERGER, WENDY W
	=ALL PARTIES PRESENT -STATUS CONFERENCE- CON'T HRG 8/3 @130PM
April 11, 2011	ORDER ON IN CAMERA INSPECTION OF PUBLIC RECORDS
March 18, 2011	REQUEST FOR JUDICIAL NOTICE
March 08, 2011	FELONY HEARING SET FOR 06/01/2011 AT 1:30 PM IN 328/ , JDG: BERGER, WENDY W
March 07, 2011	NOTICE OF HEARING (STATUS CONFERENCE)
March 02, 2011	=DEFT NOT PRESENT/STATUS CONFERENCE UPDATE/ASA CALHOUN/ASST ATTY GEN KEN NUNNELLY/CCRC DAVID HENDRY/CCRC JAMES DRISCOLL APPEARED TELEPHONICALLY/JUDGE BERGER IN RECEIPT OF RECORDS AND WILL FINISH REVIEWING BY THE END OF THE WEEK/COVER LETTERS FROM REPOSITORIES WILL BE FAXED TO ALL PARTIES/NEXT STATUS CONFERENCE TO BE SCHEDULED FOR JUNE 1, 2011 @ 1:30 PM/ALL PARTIES ALLOWED TO APPEAR TELEPHONICALLY
February 04, 2011	LETTER DTD 2/2/11 FROM FL DEPARTMENT OF STATE (SEALED RECORDS SHIPPED TO CLERK)
	NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO CLERK OF THE CIRCUIT COURT
January 07, 2011	FELONY HEARING SET FOR 03/02/2011 AT 1:30 PM IN 328/ , JDG: BERGER, WENDY W
	ORDER SCHEDULING STATUS CONFERENCE
	ORDER (ORDER FOR AN IN CAMERA INSPECTION)
December 15, 2010	HEARING NOTES - JUDGE BERGER HAS FILE
November 12, 2010	FELONY HEARING SET FOR 12/15/2010 AT 1:30 PM IN 328/ , JDG: BERGER, WENDY W
November 10, 2010	MOTION TO COMPEL PRODUCTION OF RECORDS
November 09, 2010	CASE REOPENED FOR POST CONV RELEASE
	NOTICE OF HEARING (12-15-10 @ 130PM)
June 17, 2010	NOTICE OF APPEARANCE
May 28, 2010	NOTICE OF COMPLIANCE BY THE SECRETARY OF THE DEPT OF CORRECTIONS
	NOTICE OF DELIVERY OF EXEMPT PUBLIC RECORDS TO RECORDS REPOSITORY
April 22, 2010	NOTICE OF COMPLIANCE BY THE STATE ATTORNEY'S OFFICE, 7TH JUDICIAL CIRCUIT
April 20, 2010	NOTICE OF COMPLIANCE BY THE MARION COUNTY SHERIFFS OFFICE
April 07, 2010	NOTICE OF COMPLIANCE BY THE CITRUS COUNTY SHERIFF'S OFFICE
March 25, 2010	NOTICE OF COMPLIANCE BY LEVY COUNTY SHERIFF'S OFFICE
	LETTER DTD 3/18/10 TO LEVY COUNTY SHERIFFS OFFICE FROM OFFICE OF THE STATE ATTORNEY
	NOTICE OF APPEARANCE (FOR POST CONVICTION)
March 05, 2010	+++++ OFF APPEAL +++++
	APPEAL INFORMATION SHEET (SC07-2101)
	NOTICE TO SECRETARY OF DEPARTMENT OF CORRECTIONS OF AFFIRMANCE OF DEATH PENALTY (SC07-2101)
	NOTICE TO STATE ATTORNEY OF AFFIRMANCE OF DEATH PENALTY (SC07-

<u>Date</u>	<u>Docket Description/Text</u>
	2101)
	SUPREME COURT ORDER - OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL MIDDLE REGION APPOINTED TO HANDLE POSTCONVICTION PROCEEDINGS (SC07-2101)
	SUPREME COURT MANDATE DATED 3/3/2010 - OPINION FILED 1/7/10 PER CURIAM AFFIRMED (SC07-2101)
February 18, 2010	SUPREME COURT - ORDER - MOTION FOR REHEARING IS HEREBY DENIED (SC07-2101)
May 04, 2009	SUPREME COURT - FLORIDA DEPARTMENT OF CORRECTIONS TO SEND PSI IN SEALED ENVELOPE
February 21, 2008	LETTER TO SUPREME COURT - AMENDED RECORD ON APPEAL (8 VOLUMES) (SC07-2101)
February 20, 2008	- ALL COPIES OF RECORD ON APPEAL RECEIVED BACK FROM SUPREME COURT/PUBLIC DEFENDER'S OFFICE/ATTY GENERAL'S OFFICE
January 28, 2008	SUPREME COURT ORDER - RECORD ON APPEAL TO BE RETURNED FOR CORRECTIONS (SC07-2101)
January 15, 2008	SECOND REPORT ON STATUS CONFERENCE 011608/SB = STATUS CONFERENCE ON RECORD ON APPEAL - JUDGE TO ISSUE REPORT
January 11, 2008	REPORT ON STATUS CONFERENCE 011408/SB LETTER TO SUPREME COURT - RECORD ON APPEAL (8 VOLUMES) (SC07-2101)
January 08, 2008	SUPREME COURT DIRECTIONS (AMENDED ORDER) (SC07-2101)
January 04, 2008	= APPEAL STATUS CONFERENCE - COURT REPORTER LOUISE POMAR - CLERK SHEILA BATTELL PRESENT - JUDGE TO ISSUE REPORT FELONY HEARING COURT EVENT COMPLETED
January 03, 2008	= APPEAL STATUS CONFERENCE CONTINUED TILL 1/4/08 @8:30AM
January 02, 2008	FELONY HEARING SET FOR 01/03/2008 AT 01:30 IN M/328, JDG: BERGER, WENDY W
December 07, 2007	PROCEEDINGS BEFORE JUDGE BERGER 10-19-07
December 06, 2007	PROCEEDINGS BEFORE JUDGE BERGER 8-23-07 (VOL V)
	PROCEEDINGS BEFORE JUDGE BERGER 8-22-07 (VOL IV)
	PROCEEDINGS BEFORE JUDGE BERGER 8-21-07 (VOL III)
	PROCEEDINGS BEFORE JUDGE BERGER 8-20-07 (VOL II)
	PROCEEDINGS BEFORE JUDGE BERGER 8-20-07 (VOL I)
December 03, 2007	PROCEEDINGS BEFORE JUDGE BERGER 8-27-07 120407/JM
	PROCEEDINGS BEFORE JUDGE BERGER 8-10-07 120407/JM
	PROCEEDINGS BEFORE JUDGE BERGER 8-7-07 120407/JM
	PROCEEDINGS BEFORE JUDGE BERGER 7-11-07 120407/JM
November 28, 2007	PROCEEDINGS BEFORE JUDGE BERGER 10-12-07 113007/JM
November 19, 2007	SUPREME COURT DIRECTIONS (CORRECTED ORDER)(SC07-2101)
November 16, 2007	FILE CHECKED OUT TO JUDGE BERGER (W/OUT FILE - SUPREME COURT DIRECTIONS-SC07-2101) 111607/JM
November 15, 2007	SUPREME COURT DIRECTIONS (SC07-2101) 111607/JM
	SUPREME COURT ACKNOWLEDGMENT OF NEW CASE (SC07-2101)
November 01, 2007	LETTER TO SUPREME COURT - NOTICE OF APPEAL 110107/JM

<u>Date</u>	<u>Docket Description/Text</u>
October 30, 2007	ORDER DETERMINING INDIGENCY FOR APPEAL PURPOSES MOTION TO PROCEED WITHOUT PAYMENT OF COSTS TO APPOINT THE OFFICE OF THE PUBLIC DEFENDER FOR PURPOSES OF APPEAL AND TO DIRECT THE STATE OF FLORIDA TO PAY COURT REPORTER FEES 103007/JM DESIGNATION TO COURT REPORTER AND REPORTER'S ACKNOWLEDGMENT 103007/JM STATEMENT OF JUDICIAL ACTS TO BE REVIEWED 103007/JM NOTICE OF APPEAL 103007/JM +++++ ON APPEAL +++++ APPEAL DATE SET TO 10/30/2007
October 19, 2007	CASE CLOSED CASE# 06001864CFMA - SENTENCED: IMPOSED: 10/19/2007 EFFECTIVE DATE: 10/19/2007 - DEFENDANT SENTENCED AS TO CHARGE: 002 CHRG 002 CONCURRENT W/ CHARGE 0 06001864CFMA 1 MAX CONF - PRISON DEATH - CHRG 002 CREDIT FOR TIME SERVED - 8 MONTHS 16 DAYS - CHRG 002 SENTENCE PROVISION - SENTENCING GUIDELINES- CHRG 002 SENTENCE PROVISION - CAPITAL OFFENSE - CHRG 002 CASE# 06001864CFMA - SENTENCED: IMPOSED: 10/19/2007 EFFECTIVE DATE: 10/19/2007 - DEFENDANT SENTENCED AS TO CHARGE: 001 CHRG 001 CONSECUTIVE W/ CHARGE 0 9999999999999999 MAX CONF - PRISON DEATH - CHRG 001 CREDIT FOR TIME SERVED - 8 MONTHS 16 DAYS - CHRG 001 SENTENCE PROVISION - SENTENCING GUIDELINES -CHRG 001 SENTENCE PROVISION - CAPITAL OFFENSE - CHRG 001 DEFENDANT APPEARED Self FOR JURY TRIAL SEQ: 1,SEQ: 2 DEFT'S PRIOR CONVICTION/101907 TT DEFT'S PRIOR CONVICTION/101907 TT DEFT'S PRIOR CONVICTION/101907 TT DEFT'S PRIOR CONVICTION/101907 TT DEFT'S PRIOR CONVICTION/101907 TT DEFT'S PRIOR CONVICTION/101907 TT DEFT'S PRIOR CONVICTION/101907 TT DEFT'S PRIOR CONVICTION/101907 TT DEFT'S PRIOR CONVICTION/101907 TT DEFT'S PRIOR CONVICTION/101907 TT DEFT'S PRIOR CONVICTION/101907 TT DEFT'S PRIOR CONVICTION/101907 TT DEFT'S PRIOR CONVICTION/101907 TT DEFT'S PRIOR CONVICTION/101907 TT RESTITUTION ORDER \$9,874.00 FOR REIMBURSEMENT TO CRIMES COMPENSATION TRUST FUND/101907 TT VICTIM INFORMATION FORM/101907 TT VICTIM INFORMATION FORM/101907 TT VICTIM INFORMATION FORM/101907 TT VICTIM INFORMATION FORM/101907 TT VICTIM INFORMATION FORM/101907 TT SENTENCING GUIDELINES SCORESHEET/101907 TT JUDGMENT/SENTENCE WITH FINGERPRINTS ATTACHED/101907 TT UNIFORM COMMITMENT TO CUSTODY OF DOC/101907 COURT MINUTES/101907 TT SENTENCE IS CONSECUTIVE WITH 9999999999999999-9 - CNT 1 SPECIAL SENT PROV - CAPITAL OFFENSE - CNT 2 SPECIAL SENT PROV - SENTENCING GUIDELINES - CNT 2

<u>Date</u>	<u>Docket Description/Text</u>
	CREDIT FOR TIME SRV FOR 8 MOS 16 DYS - CNT 2
	SENTENCE IS CONCURRENT WITH 06001864CFMA -1 - CNT 2
	DEATH PRISON - CNT 2
	DEFENDANT SENTENCED AS FOLLOWS: - CNT 2
	DEFENDANT APPEARED Self FOR NO TRIAL TRIAL SEQ: 2,SEQ: 1
	ASSESSED CF COURT COSTS ONLY 373.00 DUE 10/16/2017
	SPECIAL SENT PROV - CAPITAL OFFENSE - CNT 1
	SPECIAL SENT PROV - SENTENCING GUIDLINES - CNT 1
	CREDIT FOR TIME SRV FOR 8 MOS 16 DYS - CNT 1
	DEATH PRISON - CNT 1
	DEFENDANT SENTENCED AS FOLLOWS: - CNT 1
	ADJUDICATED GUILTY SEQ: 1,SEQ: 2
	DEFENDANT APPEARED SELF FOR NO TRIAL TRIAL SEQ: 1,SEQ:
	VERDICT OF Guilty SEQ: 1,SEQ: 2
	DEFENDANT ENTERED PLEA OF NOT GUILTY SEQ: 1,SEQ: 2
	FELONY SENTENCING COURT EVENT COMPLETED
	=DEFT PRESENT/SENT CT 1 & CT 2 DEATH/CC W/CT 1 AND CSEC W/ANY
	ACTIVE/ADJ G/CREDIT TS 256 DAYS/101907 TT
	SENTENCING ORDER/101907 TT
	MEMORANDA OF LAW/101907 TT
	++LETTER TO JUDGE BERGER FROM VICTIMS DAUGHTER
	++LETTER TO JUDGE BERGER FROM VICTIMS SISITER
	++LETTER TO JUDGE BERGER FROM DEFT/101907 TT
	E-MAIL TO SHERYL FROM JUDGE BERGER REGARDING PSI/101907 TT
	++LETTERS (7) TO JUDGE BERGER FROM VICTIMS FAMILY MEMBERS/101907
	TT
	DEFENSE TRAIL EXHIBIT CONTROL LIST/101907 TT
	STATE TRIAL EXHIBIT CONTROL LIST/101907 TT
October 12, 2007	FELONY SENTENCING SET FOR 10/19/2007 AT 09:00 IN M/328, JDG: BERGER, WENDY W
	COURT MINUTES/NOTICE/101207 TT
	=9:25 STATES STATEMENTS/9:33 DEFENSE STATEMENTS/9:43 DEFENSE
	COSE/101207 TT
August 30, 2007	PER E-MAIL FROM SUSIE/COURT DATE FOR 08/31/07 HAS CANCELLED/083007
	TT
August 28, 2007	PSI ORDERED/082807 TT
August 27, 2007	COURT MINUTES/DEFT DECLINES PUBLIC DEFENDER FOR SPENCER
	HEARING/PSI ORDERED/HEARING SET FOR 10/12/07 @ 9:00 FOR SPENCER
	HEARING/08/31/07 WILL REMAIN SET PENDING WITNESS STATEMENTS
	=DEFT PRESENT/COURT REPORTER RHONDA BOUNDS PRESENT
	-FILE CHECKED OUT TO JUDGE BERGER/082707 TT
	PER E-MAIL FROM SUSIE, SET HEARING FOR 08/27/07 @ 3:00/082707 TT
August 23, 2007	VERDICT IN PENALTY PHASE CT 2-IMPOSE DEATH PENALTY
	VERDICT IN PENALTY PHASE CT 1-IMPOSE DEATH PENALTY
	PENALTY PROCEEDINGS-CAPITAL CASES/JURY INSTRUCTIONS
	COURT MINUTES/SPENCER HEARING SET FOR 08/31/07 @ 9:00/082307 TT
	FELONY HEARING SET FOR 08/31/2007 AT 09:00 IN M/328, JDG: BERGER, WENDY W
	FELONY JURY TRIAL COURT EVENT COMPLETED
	9:23 COURT IN SESSION/REVIEW/9:30 COURT IN RECESS 10:08 JURY
	SEATED/10:11 STATES OPENDING STATEMENTS 10:14 NO STATEMENT BY

<u>Date</u>	<u>Docket Description/Text</u>
	DEFENSE/10:14 STATE CALLS 1ST WITNESS DET. TIM ROLLINS-SWORN/10:16 WITNESS EXCUSED/10:17 STATE CONTINUES/10:19 STATE CALLS MS JOHNSON (MR JOHNSONS DAUGHTER)-SWORN VICTIM IMPACT STATEMENT READ BY MS JOHNSON/10:23 WITNESS EXCUSED/10:23 STATE CALLS MS. WHITMAN-SWORN VICTIM IMPACT STATEMENT READ BY MS WHITMAN-READ STATEMENT OF MS LUKE (MR. PEACOCKS SISTER)/10:37 WITNESS EXCUSED/10:37 JURY TO JURY ROOM/10:51 JURY SEATED/10:52 STATES CLOSING ARGUEMENT/11:13 STATE RESTS/11:13 JURY TO JURY ROOM 11:26 JURY SEATED/11:27 DEFENSE CLOSING/11:40 JURY IN JURY ROOM/11:46 JURY SEATED/11:46 DEFENSE CONTINUES/12:00 DEFENSE RESTS/12:02 JURY INSTRUCTIONS READ TO JURY BY JUDGE BERGER/12:12 JURY IN DELIBERATIONS/12:14 INSTRUCTIONS TO ALTERNATE JURORS/12:14 COURT IN RECESS/1:27 COURT IN SESSION/JURY HAS VERDICT/1:29 JURY SEATED/1:31 VERDICT READ-RECOMMEND DEATH IMPOSE DEATH PENALTY/1:32 JUDGE POLLS JURY/1:34 JUDGE READS TO JURY REGARDING JURY PRIVLEDGE/1:35 JURY DISMISSED/082307 TT
August 22, 2007	COURT MINUTES/FERRETTA HEARING/DEFT REQUEST TO REPRESE SELF-GRANTED/VALERINO & QUETTI APPOINTED AS STAND BY COUNSEL/082307 TT FELONY JURY TRIAL SET FOR 08/23/2007 AT 10:00 IN M/328, JDG: BERGER, WENDY W 2:05 JUDGE ADVISES FERRETTA HEARING TO BEGIN/DEFT STATEMENTS/JUDGE APPOINTS VALERINO & QUETTI AS STANDBY COUNSEL/DEFT REQUEST TO REPRESENT SELF-GRANTED 2:36 REVIEW JURY INSTRUCTIONS/3:48 BREAK/3:51 COURT IN SESSION-REVIEW JURY INSTR/4:25 AJORN UNTIL 9:15 AM FELONY JURY TRIAL DISPOSED COURT DATE 8:58 DEFT STATEMENT-REQUEST TO CONTINUE WITH PENALTY PHASE. JUDGE WILL HAVE JURY BACK @ 10 ON 08/23/07 ANOTHER FERETTA HEARING WILL BE DONE TODAY @ 2:00 9:14 STATES STATEMENTS/9:15 JURY SEATED/9:16 JUDGE INSTRUCTIONS TO JURY TO RETURN AT 10:00 AM ON 08/23/07 9:18 JURY DISMISSED/
August 21, 2007	DEFENSE ATTY: VALERINO, JAMES R ASSIGNED COURT MINUTES/JUDGE APPONTED PD'S OFFICE TO REPRESENT DEFT IN PENALTY PHASE/MOTION FOR CONTINUANCE BY PD'S ON PENALTY PHASE-GRANTED/SET PENALTY PHASE 10/22/07 @ 9:00/082207 TT VERDICT-COUNT II/082207 TT VERDICT-COUNT I/082207 TT QUESTIONS FROM JURY/082207 TT JURY INSTRUCTIONS/082207 TT FELONY JURY TRIAL SET FOR 10/22/2007 AT 09:00 IN M/328, JDG: BERGER, WENDY W FELONY JURY TRIAL COURT EVENT COMPLETED SUPPLEMENTAL DISCOVERY/WITNESS LIST 082207/JM SUBPOENA FOR DEPOSITION (RETURNED NOT SERVED-DEP. ROLLINS) 082107/DMC SUBPOENA FOR DEPOSITION (RETURNED SERVED-DEP HAYWARD SUBPOENA FOR DEPOSITION (RETURNED SERVED-DEP. HARRISON 8:52 COURT RESUMES WITH REVIEW OF JURY INSTRUCTIONS 9:13 JURY SEATED/9:14 STATE CALLS 7TH WITNESS DR. STEINER-SWORN/9:40 WITNESS EXCUSSED/9:40 JURY EXCUSED TO JURY ROOM/9:41 HOUSEKEEPING

<u>Date</u>	<u>Docket Description/Text</u>
August 20, 2007	MATTERS 9:43 JURY SEATED/9:44 STATE AND DEFENSE REST CASE/9:45 JURY DISMISSED UNTIL 10:30/9:46 RESUME JURY INSTRUCTIONS/10:00 COURT IN RECESS UNTIL 10:30/10:35 COURT IN SESSION-REVIEW JURY INSTRUCTIONS 11:02 JURY SEATED/11:03 STAETS OPENING ARGUEMENT 11:33 DEFENSE CLOSING STATEMENT/11:37 STATES CLOSING ARGUEMENT/11:38 JUDGE GIVE JURY INSTRUCTIONS/12:07 JURY IN DELIBERATIONS/12:07 ALTERNATE JURORS GIVEN INSTRUCTIONS/12:13 COURT IN RECESS/12:29 ALTERNATE JURORS REQUEST TO LEAVE AND NOT REMAIN IN COORDINATION ROOM- ALTERNATE JURORS GIVEN INSTRUCTIONS & ADVISED TO RETURN AT 9:00 AM ON 08/22/07 UNLESS CALLED/12:35 COURT IN RECESS/1:50 VERDICT RETURNED-GUILTY BOTH COUNTS-1ST DEGREE MURDER/1:57 JURY DISMISSED/COURT IN RECESS (20 MIN) 2:31/COURT IN SESSION/2:32 COURT IN RECESS/3:27 JUDGE APPOINTS PUBLIC DEFENDERS OFFICE TO REPRESENT DEFT IN PENALTY PHASE/3:30 PD ASKS FOR CONTINUANCE/3:32 STATE OBJECTS TO LENGTH OF TIME UNTIL PENALTY PHASE/3:34 DEFENSE ARGUEMENTS/3:55 COURT DISMISSED UNTIL 9:00 AM ON 08/22/07 TT =DEFT PRESENT/9:00 JURY SELECTED/11:25 DEFENSE QUESTIONING OF JURORS/11:30 JURORS EXCUSED FOR BREAK-INDIVIDUAL; QUESTION OF JURORS WITH MEADIA KNOWLEDGE/12:00 JURY SEATED & SELECTED/12:00 JURORS SWORN/1:45 STATE ADVISED DEFT WOULD LIKE TO STIPULATE TO SEVERAL ITEMS OF EVIDENSE/2:00 JURY SEATED/2:06 STATES OPENING STATEMENTS/2:12 DEFT OPENDING STATEMENTS/S:25 STATES 1ST WITNESS- PERRY PRIVETT-SWORN/S:39 WITH EXCUSED 2:41 STATES 2ND WITNESS- JULIE AUBREY-SWORN/2:56 WITNESS EXCUSED/2:57 STATES 3RD WITNESS- PATRICK ANDERSON-SWORN/3:08 WITNESS EXCUSED/3:09 STATES 4TH WITNESS-SARGENT LEE-SWORN/3:19 WITNESS EXCUSED 3:20 STATES 5TH WITNESS-DET. TIM BURRES-SWORN/3:45 WITNESS EXCUSED/3:15 15 MIN BREAK/3:17 JURY EXCUSED 3:18 JURY OUT/4:09 JURY SEATED/4:10 STATE CALLS 6TH WITNESS-DET. TIM ROLLINS-SWORN/4:21 WITNESS EXCUSED 4:25 JURY EXCUSED UNTIL 9:00 AM ON 08/21/07/4:26 JURY OUT/4:26 BREAK UNTIL 4:45/4:55 COURT BACK IN SESSION-REVIEW JURY INSTRUCTIONS/5:50 COURT DISMISSED UNTIL 8:30 AM ON 08/21/07
August 17, 2007	CRIMINAL WITNESS SUBPOENA FOR DEPOSITION/STATEMENT DEP C LEE SERVED 8-13-07 082107/JM CERTIFICATE/DIGITAL COURT REPORTER (ATTACHED CD IN CD BOX) 081707/JM
August 10, 2007	MOTION FOR CONTINUANCE/081007 TT COURT MINUTES/NOTICE/081007 TT =DEFT PRESENT/DEFT REQUEST TO REPRESENT SEFT-GRANTED FERETTA HEARING COMPLETED/FOUND COMP TO WAIVE COUNSEL LSFT/081007 TT FELONY HEARING COURT EVENT COMPLETED
August 07, 2007	SUBPOENA FOR DEPOSITION - DEP GALENTINE SERVED 7-16-07 SUBPOENA FOR DEPOSITION - DEP ROLLINS UNSERVED 8-2-07 SUBPOENA FOR DEPOSITION - DEP BURRES SERVED 8-2-07 FILE CHECKED OUT TO JUDGE BERGER IN COURTROOM 080707/A COURT MINUTES/NOTICE 080707/ABK FELONY HEARING SET FOR 08/10/2007 AT 01:00 IN M/328, JDG: BERGER, WENDY W FELONY DOCKET CALL COURT EVENT COMPLETED =DEFENSE MOTION FOR CON'T/DEFT REQUEST TO REPRESENT SELF-SET FOR HRG IN RE OF 8/10 @1:00PM/MOTION FOR CON'T-TAKEN UNDER ADVISEMENT

<u>Date</u>	<u>Docket Description/Text</u>
	080707/ABK
August 06, 2007	SUBPOENA FOR DEPOSITION - L HAMMOND UNSERVED 8-2-07 SUBPOENA FOR DEPOSITION - P JOHNSON SERVED 8-2-07 SUBPOENA FOR DEPOSITION - B REESE SERVED 8-2-07 SUBPOENA FOR DEPOSITION - P ANDERSON SERVED 8-2-07
August 03, 2007	AMENDED SUBPOENA FOR DEPOSITION - DR STEINER SERVED 8-2-07 080307/JM SUBPOENA FOR DEPOSITION - DR STEINER SERVED 8-2-07
August 01, 2007	NOTICE OF TAKING DEPOSITION 080207/JM
July 31, 2007	NOTICE OF TAKING DEPOSITION 080107/JM
July 30, 2007	SUBPOENA FOR DEPOSITION - DEP HARRISON SERVED 7-17-07
July 24, 2007	SUBPOENA FOR DEPOSITION - SGT F LAWING RETURNED UNEXECUTED 7-23-07 072507/JM
July 23, 2007	SUBPOENA FOR DEPOSITION -K. PFEIFFER -SERVED 072407/RF SUBPOENA FOR DEPOSITION -B. REESE -SERVED 072407/RF SUBPOENA FOR DEPOSITION -DET KOVALCIK -UNSERVED SUBPOENA FOR DEPOSITION -DEP KEISLER -SERVED 072407/RF SUBPOENA FOR DEPOSITION -DEP BURREN -SERVED 072407/RF SUBPOENA FOR DEPOSITION -DEP CRAFTON -SERVED 072407/RF SUBPOENA FOR DEPOSITION DEP. ROLLINS -SERVED SUBPOENA FOR DEPOSITION -DEP. HAYWARD -UNSERVED
July 19, 2007	SUBPOENA FOR DEPOSITION - P PRIVETTE SERVED 7-16-07 SUBPOENA FOR DEPOSITION - J AUBRY SERVED 7-16-07 SUBPOENA FOR DEPOSITION - DEP THORNTON SERVED 7-17-07 072007/JM SUBPOENA FOR DEPOSITION - DEP TIMKO SERVED 7-17-07 SUBPOENA FOR DEPOSITION - SGT LEE RETURNED UNEXECUTED 7-17-07 072007/JM
July 17, 2007	SUBPOENA FOR DEPOSITION - P ANDERSON RETURNED UNEXECUTED 7-16-07 071807/JM
July 12, 2007	NOTICE OF TAKING DEPOSITION 071307/JM NOTICE OF TAKING DEPOSITION 071207/JM
July 11, 2007	SUPPLEMENTAL DISCOVERY/WITNESS LIST 071207/JM COURT MINUTES/NOTICE 071107/ABK FELONY JURY TRIAL SET FOR 08/20/2007 AT 09:00 IN M/328, JDG: BERGER, WENDY W FELONY DOCKET CALL SET FOR 08/07/2007 AT 09:00 IN M/328, JDG: BERGER, WENDY W FELONY PRETRIAL COURT EVENT COMPLETED =DEFT MOTION TO CON'T-MOOT/ORAL MOTION FROM PD TO WITHDRAW-DENIED/SET FOR DC 8/7 @9AM & JT 8/20 @9AM/DEFT TO REMAIN IN ST JOHNS COUNTY JAIL UNTIL CASE IS RESOLVED 071107/ABK
May 23, 2007	SUPPLEMENTAL DISCOVERY/WITNESS LIST 052307/JM
May 22, 2007	CORRECTED BOOKING SHEET 052207/JM
May 21, 2007	FELONY PRETRIAL DISPOSED COURT DATE
May 17, 2007	++ORDER (TRANSPORT DEFT FROM FL DEPT OF CORRECTIONS TO ST JOHNS COUNTY FOR PRE-TRIAL 5/21/07 AT 1:30 PM)
May 16, 2007	FELONY PRETRIAL SET FOR 05/21/2007 AT 01:30 IN M/328, JDG: BERGER, WENDY W
May 15, 2007	COURT MINUTES/0515807 TT =DEFT NOT PRESENT/TRANSPORT ORDER TO BE DONE/PT SET 07/11/07 @ 1:30/051507 TT

<u>Date</u>	<u>Docket Description/Text</u>
	FELONY PRETRIAL SET FOR 07/11/2007 AT 01:30 IN M/328, JDG: BERGER, WENDY W
May 03, 2007	FELONY PRETRIAL COURT EVENT COMPLETED
April 17, 2007	SUPPLEMENTAL DISCOVERY/WITNESS LIST 050307/JM
April 02, 2007	SUPPLEMENTAL DISCOVERY/WITNESS LIST 041707/JM
March 29, 2007	++ORDER (TO TRANSPORT FOR PRETRIAL 5/15) 040207/DMC
	DEMAND FOR RECIPROCAL DISCLOSURE 032907/DH
	STATES DISCOVERY EXHIBIT/WITNESS LIST 032907/DH
March 22, 2007	MOTION TO CONTINUE PRETRIAL 032307SDW
	NOTICE OF APPEARANCE (VAL QUETTI) 032207SDW
March 15, 2007	COURT MINUTES 031607/RF
	=DEFT NOT PRESENT/RESET TO 5/15/07 @ 130 STATE TO DO NEW PICKUP ORDER 031607/RF
	FELONY PRETRIAL SET FOR 05/15/2007 AT 01:30 IN M/328, JDG: BERGER, WENDY W
	FELONY PRETRIAL COURT DATE RESET
March 02, 2007	NOTICE OF INTENT TO PARTICIPATE IN DISCOVERY 030507/JM
	NOTICE OF STATE'S INTENT TO SEEK THE DEATH PENALTY
February 21, 2007	++ORDER (TRANSPORT DEFT FROM MARION COUNTY JAIL TO ST JOHNS COUNTY JAIL FOR PRETRIAL 3/15/07 AT 1:30 PM)
February 16, 2007	DEFENSE ATTY: QUETTI, VAL ASSIGNED
	PROSECUTOR: FRANCE, CHRISTOPHER ASSIGNED
February 15, 2007	APPLICATION FOR CRIMINAL INDIGENT STATUS 021607/ABK
	COURT MINUTES/NOTICE 021607/ABK
	FELONY PRETRIAL SET FOR 03/15/2007 AT 01:30 IN M/328, JDG: BERGER, WENDY W
	FELONY ARRAIGNMENT COURT EVENT COMPLETED
	=ARRN/PLED NG/SET FOR PT 3/15 @130PM 021607/ABK
February 07, 2007	FELONY ARRAIGNMENT SET FOR 02/15/2007 AT 01:30 IN M/328, JDG: BERGER, WENDY W
	FIRST APPEARANCE FORM (2/7/07)-DEFT NOT INDIGENT/WILL HIRE PRIVATE ATTORNEY-NO BOND 020707/DH
	SERVED WARRANT/CAPIAS (2/6/07) 020707/DH
February 06, 2007	ARREST SEQ: 1,SEQ: 2
	WARRANT FOR ARREST Executed ST JOHNS COUNTY SHERIFFS DEPT By HORTON
January 31, 2007	++ORDER (TRANSPORT DEFT FROM MARION COUNTY TO ST JOHNS COUNTY FOR ARRAIGNMENT/APPT OF DEFENSE COUNSEL)
October 17, 2006	FILED SEQ: 1,SEQ: 2
	**INTERIM PRESENTMENT 101706/RF
	**INDICTMENT 101706/RF
October 06, 2006	++(COPY) WARRANT ISSUED (NO BOND) 100606/JM
	SWORN COMPLAINT 100606/JM
	WARRANT FOR ARREST FOR SWORN COMPLAINT FILED
	JUDGE BERGER, WENDY W ASSIGNED
	CASE FILED WITH CLERK
October 05, 2006	SWORN COMPLAINT SEQ: 1,SEQ: 2

Filing # 50918213 E-Filed 01/09/2017 11:58:27 AM

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR ST. JOHNS COUNTY, FLORIDA
CASE NUMBER: CF 06-01864**

STATE OF FLORIDA

Plaintiff,

v.

NORMAN BLAKE MCKENZIE,

Defendant.

_____ /

**FIRST SUCCESSION MOTION TO VACATE
JUDGMENT OF CONVICTION AND SENTENCES**

Comes now NORMAN BLAKE MCKENZIE, the Defendant in the above-captioned action, and respectfully moves this Court for an Order, pursuant to Florida Rule of Criminal Procedure 3.850 and Florida Rule of Criminal Procedure 3.851, vacating and setting aside the judgment of conviction and sentences, including his sentences of death, imposed upon the Defendant by the Circuit Court, in and for St. Johns County, Florida. In support of this motion, pursuant to the Florida Rules of Criminal Procedure, Mr. McKenzie states the following:

(A) JUDGMENT AND SENTENCES UNDER ATTACK.

Mr. McKenzie was charged by indictment with two counts of first-degree murder. The jury found Mr. McKenzie guilty as charged. Mr. McKenzie proceeded to a penalty phase. The jury recommended death by a vote of 10-2 for each murder charge. Following a *Spencer* hearing, the Circuit Court of the Seventh Judicial Circuit, in and for St. Johns County, Florida, imposed a death sentence for each first-degree murder charge. The Florida Supreme Court affirmed the conviction and death sentences on appeal. *McKenzie v. State*, 29 So.3d 272 (Fla. 2010). Mr.

McKenzie filed a Petition for a Writ of Certiorari to the Supreme Court of Florida. The United States Supreme Court denied the petition on October 4, 2010.

(B) CLAIMS RAISED AND DISPOSITION

Direct Appeal

POINT I: Fundamental error occurred when the trial court excused potential juror Irena Schultz for cause in contravention of Appellant's constitutional right to a fair trial by a neutral magistrate.

POINT II: Fundamental error occurred when the trial court's rulings deprived Appellant of his Sixth Amendment Constitutional Rights.

POINT III: In contravention of Appellant's Constitutional Rights guaranteed by the Eighth Amendment as well as the Florida Constitution, the trial court erred by imposing two death sentences for two distinct capital murders without an individualized finding of fact for each separate murder.

POINT IV: The death sentences are disproportionate due to the peculiar and unique posture of this case.

POINT V: Florida's death sentencing scheme is unconstitutional under the Sixth Amendment pursuant to *Ring v. Arizona*.

The Florida Supreme Court denied relief on each point. *McKenzie v. State*, 29 So.3d 272 (Fla. 2010).

Postconviction

CLAIM I: STATE ACTION DENIED MR. MCKENZIE A FULL AND FAIR SENTENCING IN VIOLATION OF MR. MCKENZIE'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THIS COURT SHOULD HEAR MR. MCKENZIE'S MITIGATION EVIDENCE DURING A POSTCONVICTION HEARING TO FAIRLY DETERMINE WHETHER HIS DEATH SENTENCE IS CONSTITUTIONALLY PERMISSIBLE.

CLAIM II: MR. MCKENZIE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE COURSE OF IDS REPRESENTATION CAUSING HIM TO DISMISS COUNSEL. THE SUBSEQUENT PENALTY PHASE OF HIS TRIAL DID NOT PROVIDE AN ACCURATE BAROMETER OF HIS MORAL CULPABILITY OR DEATH WORTHINESS FOR THIS OFFENSE, THUS DEPRIVING THE SENTENCING AND REVIEWING COURTS VITAL INFORMATION AND A FAIR PROPORTIONALITY ANALYSIS. MR. MCKENZIE'S RIGHTS UNDER THE FIFTH, SIXTH,

EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WERE VIOLATED.

CLAIM III: THE STATE OF FLORIDA'S LETHAL INJECTION STATUTE, FLA. STAT. § 922.105, AND THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATES ARTICLE II, SECTION 3 AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION.

CLAIM IV: THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE 6TH, 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The Florida Supreme Court affirmed the denial of the rule 3.851 motion and denied the petition for writ of habeas corpus. *McKenzie v. State*, 153 So. 3d 867, 885 (Fla. 2014), on reh'g (Dec. 11, 2014).

(C) NATURE OF RELIEF SOUGHT

1. Mr. McKenzie respectfully requests that he be granted leave to amend as necessary.
2. Mr. McKenzie requests that this Court vacate his death sentences.
3. Any other relief that this Court may find appropriate.

(D) CLAIMS NOT REQUIRING AN EVIDENTIARY HEARING UNLESS NECESSARY

The claim and sub-claims that follow come before this Court with a complete trial record and a complete postconviction record. Both records are more than sufficient for this Court to render a decision that is right and follows the United States Constitution and Florida Constitution. Nevertheless, depending how the Florida Supreme Court rules an evidentiary hearing may become necessary.

CLAIMS

IN LIGHT OF *HURST*, *RING*, AND *APPRENDI*, MR. MCKENZIE'S DEATH SENTENCES VIOLATE THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND ARTICLE I, SECTIONS 15 AND 16 OF

THE FLORIDA CONSTITUTION.

Hurst v. Florida, 136 S. Ct. 616 (2016) is a landmark decision issued by the United States Supreme Court that declared Florida's death penalty system unconstitutional. Based on *Hurst*, other case law, and the implications arising therefrom, Mr. McKenzie's death sentences violates the United States Constitution and the Florida Constitution. This Court should vacate Mr. McKenzie's death sentences.

1. Mr. McKenzie's Death Sentences Should Be Vacated Because They Are Unconstitutional Based On *Hurst*, Prior Precedent And Subsequent Developments Because Mr. McKenzie Was Denied His Right To A Jury Trial On The Facts That Led To His Death Sentences.

Before Mr. McKenzie's sentencing procedures, the United States Supreme Court issued *Apprendi* and *Ring*. In *Apprendi*, the Court held that in a non-capital case, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000). The Court recognized that the principles supporting a jury trial,

extend[] down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...."

Id. at 477, 2356 (citations omitted). Justice Scalia, in concurrence, added,

It sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. (Judges, it is sometimes necessary to remind ourselves, are part of the State-and an increasingly bureaucratic part of it, at that.). The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.

Id. 498, 2367.

In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), the Court held that “[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” *Id.* at 589, 2432.

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Court stated the crux of *Ring*, that

“‘the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury’s guilty verdict.’” Had Ring’s judge not engaged in any factfinding, *Ring* would have received a life sentence. Ring’s death sentence therefore violated his right to have a jury find the facts behind his punishment.”

Hurst, 136 S.Ct. at 621. (Internal quotes omitted). The Court applied *Ring* directly to Florida’s death penalty system and found:

The analysis the *Ring* Court applied to Arizona’s sentencing scheme applies equally to Florida’s. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: “It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury’s findings of fact with respect to sentencing issues than does a trial judge in Arizona.” *Walton v. Arizona*, 497 U.S. 639, 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); accord, *State v. Steele*, 921 So.2d 538, 546 (Fla.2005) (“[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely”).

As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst’s authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst’s sentence violates the Sixth Amendment.

Hurst v. Florida, 136 S. Ct. at 621-22.

The findings of fact statutorily required to render a defendant death-eligible are elements of the offense that separate first degree murder from capital murder under Florida law, and form part of the definition of the crime of capital murder. Mr. McKenzie’s death sentences were obtained under the exact death penalty scheme found unconstitutional in *Hurst*. Mr. McKenzie’s death

sentences, imposed without the proper jury fact-finding, violates the Sixth Amendment under *Ring* and *Hurst*.

Mr. McKenzie raised the issue of the unconstitutionality of Florida's death penalty scheme on direct appeal. Mr. McKenzie's death sentences were imposed after *Ring*, contrary to *Ring*, and despite *Ring*. Mr. McKenzie's direct appeal arguments, however, did not have the clear statement to and specific application to Florida of *Hurst* when he raised the unconstitutionality of his death sentences.

Without regard to any issues of retroactivity possible or application of harmless error, Mr. McKenzie asserts, without equivocation that he was denied his right to a jury trial on the essential elements that led to his death sentences in violation of the United States Constitution and the corresponding provisions of the Florida Constitution. Because the State denied Mr. McKenzie a jury trial on the essential elements necessary for a death sentence, this Court should vacate Mr. McKenzie's death sentences.

2. This Court Should Vacate Mr. McKenzie's Death Sentences Because, In Light Of *Hurst* And Subsequent Cases, Mr. McKenzie's Death Sentences Violate The Eighth Amendment Because His Death Sentences Were Contrary To Evolving Standards Of Decency And Is Arbitrary And Capricious.

"Death is different." *Woodson v. North Carolina*, 428 U.S. 208, 305 (1976). The United States Supreme Court has made clear:

Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. [] Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.

Thompson v. Oklahoma, 487 U.S. 815, 856, 108 S. Ct. 2687, 2710, (1988)(internal citations omitted).

In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972), the United States Supreme

Court found that the death penalty, as applied throughout the United States, violated the Eighth and Fourteenth Amendment's prohibition of cruel and unusual punishment. *Id.* at 239–40, 2727. The Court did not find the death penalty itself was unconstitutional and later allowed the death penalty under narrow circumstances. See *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976), *et al. Furman* "recognize[d] that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg*, 428 U.S. at 188, 96 S. Ct. at 2932.

The Supreme Court has recognized the importance of a jury in meeting the commands of the Eighth Amendment. As stated in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, "one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system." *Id.* at 181–82, 2929, citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1775 (1968). A jury is "a significant and reliable objective index of contemporary values because it is so directly involved. *Id.* citing *Furman v. Georgia*, 408 U.S., at 439-440, 92 S.Ct., at 2828-2829 (Powell, J., dissenting). Mr. McKenzie had no jury and thus death sentence had none of the Eighth Amendment reliability of a jury verdict. A sentencer must consider "any relevant mitigating evidence," *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct 1821 (1987). The majority opinion in *Lockett v. Ohio*, 438 U.S. 586, 605; 98 S. Ct. 2954, 2964-65(1978) explained:

[T]hat the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 605; 2954 (Emphasis and footnotes omitted).

To meet the requirements that the death penalty be limited to the most aggravated and least mitigated of murderers, the Supreme Court requires, "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* at 189, 2932. In *Gregg*, the Court upheld Georgia's death penalty scheme and found,

The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant.

Id. at 206, 2940–41. Mr. McKenzie, unlike all post-*Hurst* defendants will have, had no jury to determine his death sentences in the guided manner necessary to avoid his being condemned to death in an arbitrary and capricious manner.

In Mr. McKenzie's case, the advisory panel was instructed that, although the court was required to give great weight to its recommendation, the recommendation was only advisory. Had this been an actual jury trial, this would have been contrary to *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633(1985). In *Caldwell*, the Supreme Court stated and held that it:

has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

Id. at 341, 2646. Any reliance or argument based on the advisory recommendation in Mr. McKenzie's case is misplaced and fails to rise to the level of constitutional equivalence based on

Caldwell. An advisory panel accurately instructed on its role in an unconstitutional death penalty scheme does not meet the Eighth Amendment requirements of *Caldwell*.

The Supreme Court has also limited the death penalty under the Eighth Amendment based on evolving standards of decency.

The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The provision is applicable to the States through the Fourteenth Amendment. *Furman v. Georgia*, 408 U.S. 238, 239, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*); *Robinson v. California*, 370 U.S. 660, 666–667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463, 67 S.Ct. 374, 91 L.Ed. 422 (1947) (plurality opinion). As the Court explained in *Atkins*, the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic “ ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’ ” 536 U.S., at 311, 122 S.Ct. 2242 (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)). By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

The prohibition against “cruel and unusual punishments,” like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles*, 356 U.S. 86, 100–101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion).

Roper v. Simmons, 543 U.S. 551, 560–61, 125 S. Ct. 1183, 1190 (2005). Florida has been an outlier, for a very long time. The United States Supreme Court and the Florida Supreme Court’s decision on remand show that standards of decency have evolved to require that a jury find all of the facts necessary to sentence Mr. McKenzie to death, beyond a reasonable doubt by a jury.

On remand in *Hurst v. State*, the Florida Supreme Court found that the right to a jury trial found in the United States Constitution required that all factual findings be made by the jury unanimously under the Florida Constitution. The Florida Supreme Court found that the Eighth

Amendment's evolving standards of decency and bar on arbitrary and capricious imposition of the death penalty require a unanimous jury fact- finding.

[T]he the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. *See Gregg*, 428 U.S. at 199, 96 S.Ct. 2909. The Supreme Court subsequently explained in *McCleskey v. Kemp* that “the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in *Gregg*.” *McCleskey v. Kemp*, 481 U.S. 279, 303, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Hurst v. State, 202 So. 3d 40, 59–60 (Fla. 2016). The Court cited to Eighth Amendment concerns finding that, “in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge.” *Id.* at 54. (Emphasis in original). “In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida’s right to a trial by jury, we conclude that juror unanimity in any recommended verdict resulting in death sentence is required under the Eighth Amendment.” *Id.* at 59.

The Florida Supreme Court went a step further than the United States Supreme Court did in *Hurst v. Florida* based on evolving standards of decency requiring unanimous jury recommendations for death sentences. “Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least

amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with 'evolving standards of decency.'" (internal citations omitted)." *Hurst v. State*, at 60.

Mr. McKenzie was sentenced to death in violation of the Eighth Amendment. His death sentences were arbitrary and capricious because he was sentenced without a jury to ensure the reliability of his sentences. Any reliance on the non-unanimous advisory panel is misplaced and a violation of *Caldwell*. Mere recommendations of 10-2 would be inadequate under the *Hurst v. State*. To subject Mr. McKenzie to the death penalty based on Florida's previous unconstitutional system when a non-unanimous jury advisory recommendation would today violate the United States and/or the Florida Constitution, is the very definition of arbitrary and capricious. As Justice Stewart stated in concurrence, "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310, 92 S. Ct. at 2763 (Potter, J, concurring).

Following *Hurst v. Florida* and *Hurst v. State*, Mr. McKenzie is ensconced in a class of individuals who may not be subject to the death penalty. Mr. McKenzie was sentenced to death without the reliability of jury fact finding and unanimity. His death sentences violates the Eighth and Fourteenth Amendments. This Court should vacate his death sentences.

3. This Court Should Vacate Mr. McKenzie's Death Sentences Because The Fact-Finding That Subjected Mr. McKenzie To The Death Sntences Was Not Proven Beyond A Reasonable Doubt.

In *In re Winship* the United States Supreme Court held that the elements necessary to adjudicate a juvenile and subject him or her to sentencing under the juvenile system required each fact necessary be proved beyond a reasonable doubt. The Court made clear, "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable

doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970).

In *Ivan V. v. City of New York*, the Supreme Court applied Winship's proof-beyond-a-reasonable doubt standard retroactively, stating,

'Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.' *Williams v. United States*, 401 U.S. 646, 653, 91 S.Ct. 1148, 1152, 28 L.Ed.2d 388 (1971). See *Adams v. Illinois*, 405 U.S. 278, 280, 92 S.Ct. 916, 918, 31 L.Ed.2d 202 (1972); *Roberts v. Russell*, 392 U.S. 293, 295, 88 S.Ct. 1921, 1922, 20 L.Ed.2d 1100 (1968).

Winship expressly held that the reasonable-doubt standard 'is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' . . . 'Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' 397 U.S., at 363—364, 90 S.Ct., at 1072.

Plainly, then, the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in Winship was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function, and Winship is thus to be given complete retroactive effect.

Ivan V. v. City of N.Y., 407 U.S. 203, 204—05, 92 S. Ct. 1951, 1952, (1972). In *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975), the Court held that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case. *Id.* at 704, 1892. Thus, under the Due Process Clause, it is the state, and the state alone, which must prove each element beyond a reasonable doubt and has the burden of persuasion. Again, this right was so fundamental that the

United States Supreme Court found no issue with retroactive application in *Hankerson v. N. Carolina*, 432 U.S. 233, 240–41, 97 S. Ct. 2339, 2344, (1977).

The jury trial of *Hurst v. Florida* mandates that the State prove each element beyond a reasonable doubt. Mr. McKenzie was denied a jury trial on the elements that subjected him to the death penalty. It necessarily follows that he was denied his right to proof beyond a reasonable doubt. The Florida Supreme Court also made it abundantly clear that Mr. McKenzie has the right to proof beyond a reasonable doubt. This Court should vacate his death sentences.

4. In Light Of *Hurst*, Mr. McKenzie's Death Sentences Should Be Vacated Because They Were Obtained In Violation Of The Florida Constitution.

On remand, the Florida Supreme Court applied the Supreme Court's decision in *Hurst* in light of the Florida Constitution and held:

As we will explain, we hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Hurst v. State, 202 So.3d at 44. In *Perry v. State*, --So.3d - - 2016 WL 6036982 (Fla. 2016). The Florida Supreme Court found Florida's post-*Hurst* revision of the death penalty statute was unconstitutional and found:

In addressing the second certified question of whether the Act may be applied to pending prosecutions, we necessarily review the constitutionality of the Act in light of our opinion in *Hurst*. In that opinion, we held that as a result of the longstanding adherence to unanimity in criminal jury trials in Florida, the right to a jury trial set forth in article I, section 22 of the Florida Constitution requires that in cases in which the penalty phase jury is not waived, the findings necessary to increase the

penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury.⁴ *Hurst*, SC12-1947, — So.3d at —, slip op. at 4. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation for death. *Id.* at — — — —, —, at 23–24, 36.

Perry v. State, No. SC16-547, 2016 WL 6036982, at *1 (Fla. Oct. 14, 2016)

Thus, the new statute was unconstitutional. The increase in penalty imposed on Mr. McKenzie was without any jury at all. No unanimous jury found "all aggravating factors to be considered," "sufficient aggravating factors exist[ed] for the imposition of the death penalty," or that "the aggravating factors outweigh the mitigating circumstances." *Id.* Lastly, there was no "unanimity in the final jury recommendation for death." *Id.*

Moreover, Mr. McKenzie has a number of rights under the Florida Constitution that are at least coterminous with the United States Constitution, and possibly more extensive. This Court should also vacate Mr. McKenzie's death sentence based on the Florida Constitution. Article I, Section 15(a) provides:

(a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

Article I, Section 16(a) provides in relevant part:

(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges . .

In *Hurst*, the United States Supreme Court applied *Ring* to Florida's system and held that a jury must find any fact that subjects an individual to a greater penalty. Prior to *Apprendi*, *Ring*, and *Hurst*, the United States Supreme Court addressed a similar question in a federal prosecution and held that: "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt" *Jones v. United States*, 526 U.S. 227, 232, 119 S. Ct.

1215, 1219 (1999). Because the State proceeded against Mr. McKenzie under an unconstitutional system, the State never presented the aggravating factors of elements for the Grand Jury to consider in determining whether to indict Mr. McKenzie. A proper indictment would require that the Grand Jury find that there were sufficient aggravating factors to go forward with a capital prosecution. Mr. McKenzie was denied his right to a proper Grand Jury Indictment. Additionally, because the State was proceeding under an unconstitutional death penalty scheme, Mr. McKenzie was never formally informed of the full "nature and cause of the accusation" because the aggravating factors were not found by the Grand Jury and contained in the indictment.

This Court should vacate Mr. McKenzie's death sentences because his death sentences were obtained in violation of the Florida Constitution.

5. The Court's Denial Of Mr. McKenzie's Postconviction Claims Must Be Reheard And Determined Under A Constitutional Framework.

Mr. McKenzie raised claims in his postconviction motion that were adjudicated under an unconstitutional system. In applying the law to the facts raised in Mr. McKenzie's postconviction motion, this Court determined Mr. McKenzie's ineffective assistance of counsel claims, and other claims, based on the constitutionally incorrect analysis that it was the judge that was required to, and did, make the findings of fact. In light of *Hurst*, Mr. McKenzie incorporates his previously filed postconviction claims filed under Florida Rule of Criminal Procedure 3.851 and denied by this Court. To the extent that it is even possible, this Court should rehear Mr. McKenzie's previously denied claims and vacate Mr. McKenzie's death sentences.

6. Harmless error

None of the error pleaded in this case was harmless. The United States Supreme Court and the Florida Supreme Court have allowed harmless error analysis in determining whether to grant relief following *Hurst v. Florida* and subsequent cases. This, however, applies only to the claim involving the Sixth Amendment. With the Eighth Amendment, the state is prohibited from carrying

out cruel and unusual punishment or arbitrary and capricious punishment. Ever. Accordingly, harmless error has no application to the violation of Mr. McKenzie's Eighth Amendment rights.

The advisory panel recommended death by 10-2 margins. While this does not suffice to meet *Hurst v. Florida*'s jury requirement or *Hurst v. State*'s unanimity requirement, see *Caldwell*, it does counter any attempt by the State to show that the Sixth Amendment violations in this case are harmless - - beyond a reasonable doubt. Removed from the constitutional responsibility that subjected a fellow citizen to death, the advisory panel still returned a recommendation that would have required a life sentence if the advisory panel were a jury acting under a constitutional system.

Moreover, Mr. McKenzie's case, as seen at trial and in postconviction was highly mitigated. While he was denied an evidentiary hearing in postconviction, Dr. Mark Cunningham provided a report that detailed Mr. McKenzie's long history of substance abuse, deprivation, and trauma that he suffered from at the time of offense and throughout his life. Upon review of the mitigation, Mr. McKenzie's case is clearly one of the most mitigated, even with the aggravation present in his case.

While the burden of proving harmlessness beyond a reasonable doubt lies solely with the State, the judicial considerations of newly discovered evidence should apply. In *Hildwin v. State*, 141 So. 3d 1178 (Fla.2014), the Florida Supreme Court explained that when presented with newly discovered evidence:

[T]he postconviction court must consider the effect of the newly discovered evidence, in addition to all of the evidence that could be introduced at a new trial. *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013). In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a 'total picture' of the case.

Id. at 1184. This includes the evidence adduced at trial and postconviction proceedings, "even consider testimony that was previously excluded as procedurally barred or presented in another proceeding in determining if there is a probability of an acquittal." *Swafford v. State*, 125 So. 3d

760, 776 (Fla. 2013)(citations omitted).

Any attempt by the State to argue that the constitutional violations argued in this motion were harmless beyond a reasonable doubt fails. This Court should vacate Mr. McKenzie's death sentence.

7. Conclusion

Following *Furman v. Georgia*, 408 U.S. 238, 379, 92 S. Ct. 2726 (1972), Florida enacted a system, upheld by the courts, that prevented any of the decision makers from taking responsibility. For years, Florida told the advisory panel, incorrectly called a jury, that the weighing of aggravating factors was advisory and that the responsibility lies with the trial judge. The trial judge "gave great weight" to the "recommendation" of the sentencing panel limiting the responsibility of the trial judge. When reviewing the decisions of the trial court, the Florida Supreme Court, and the federal courts under AEDPA, gave great deference to each previous court. Florida ultimately had no decision maker with the ultimate responsibility for determining a death sentence. *Hurst* made clear that the responsibility clearly lies with a jury. The right to a jury trial predates the United States Constitution and is the mark of a civilized society. Mr. McKenzie was sentenced to death without a jury trial on the essential elements that purported to justify his death. Mr. McKenzie's death sentences violate the Sixth, Eighth and Fourteenth Amendments and the Florida Constitution. This Court should vacate his sentences.

(E) PLEADING REQUIREMENTS OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.851(E)(2)(c)

i. Witness Names, Addresses and Telephone Numbers

Any other witness necessary for a just determination of the issues.

ii. Witness Availability

Unknown

iii. Documents

The record on appeal from the direct appeal of Mr. McKenzie's death sentences.

The record on appeal from the appeal from the denial of postconviction relief.

The state and federal case law reporting the decisions in Mr. McKenzie's case.

iv. Prior Unavailability

Mr. McKenzie raised an issue concerning *Ring* on direct appeal. The Florida Supreme Court found:

As noted by the State, the constitutional challenges raised by McKenzie are unpreserved because they were not presented by McKenzie below. *See Perez*, 919 So.2d at 359. Further, even if they had been raised, they lack merit. One of the aggravating factors found by the trial court was McKenzie's prior convictions for eight violent felonies (plus the conviction for the murder of the other victim here), and this is a factor which, pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring*, does not need to be found by a jury. *See Jones v. State*, 855 So.2d 611, 619 (Fla.2003). Moreover, this Court has consistently rejected *Caldwell* challenges to the standard penalty-phase jury instructions. *See, e.g., Evans v. State*, 975 So.2d 1035, 1053 (Fla.2007); *Mansfield v. State*, 911 So.2d 1160, 1180 (Fla.2005); *Card v. State*, 803 So.2d 613, 628 (Fla.2001). Accordingly, we again reject these claims.

McKenzie v. State, 29 So. 3d 272, 287–88 (Fla. 2010). *Hurst v. Florida* and the Florida Supreme Court's subsequent decisions were not available for Mr. McKenzie to present his claims based on *Hurst*. *Hurst* gave the expanded claims contained in this motion viability. Mr. McKenzie submits that the decisions in *Hurst v. Florida* and the decisions that followed are changes in the law, clarification of existing law, and newly discovered evidence in the sense that *Hurst* overcame prior unconstitutional decisions that prevented a remedy for all of the constitutional violations that occurred in Mr. McKenzie's case. Mr. McKenzie asserts unequivocally that these decisions are retroactive and that any decision to the contrary violates his rights. *Ring*, *Hurst v. Florida* and *Hurst v. State* apply retroactively to Mr. McKenzie's case. *See Mosley v. State*, No. SC14-2108, 2016 WL 7406506, at *25 (Fla. Dec. 22, 2016).

CONCLUSION AND RELIEF SOUGHT

Mr. McKenzie requests the following relief, based on his prima facie allegations demonstrating violation of his constitutional rights:

1. That he be allowed leave to amend this motion should new claims, facts, or legal precedent become available to counsel;
2. That he be granted an evidentiary hearing at a reasonable time if necessary; and
3. That his sentences of death be vacated.

CERTIFICATION

The undersigned attorneys hereby verify that the contents of this motion have been discussed fully with the Defendant, that Rule 4-1.4 of the Rules of Professional Conduct has been complied with, and that this motion is filed in good faith.

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WE HEREBY CERTIFY that a true copy of the foregoing has been furnished by e-mail to
all counsel of record and the assigned judge on January 9, 2017.

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Attached: Copy of the Judgment and Sentences

Judgment and Sentence

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR ST.
JOHNS COUNTY, FLORIDA.

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA

v.

NORMAN BLAKE MCKENZIE,
Defendant.

FILED 10-19-07
CHERYL STRICKLAND
CLERK CIRCUIT COURT
ST. JOHNS COUNTY
BY *[Signature]*
DEPUTY CLERK

SENTENCING ORDER

The Defendant, Norman Blake McKenzie, was tried before this Court on August 20, 2007 through August 21, 2007. The jury found the Defendant guilty of each of the two counts of First Degree Murder charged in the Indictment – Count I for the murder of Randy Wayne Peacock and Count II for the murder of Charles Frank Johnston. On August 23, 2007, the jury recommended, by a vote of 10 to 2, that a sentence of death be imposed on the Defendant for the murder of each victim.

On October 12, 2007, the State and the Defendant were permitted to present additional evidence to the Court at the *Spencer* hearing. The Defendant was, once again, offered the services of counsel, but he declined, indicating it was his desire to continue to represent himself. The Defendant read a prepared statement and presented additional argument to the Court. The State offered no new evidence, instead relying on the evidence presented at trial. The State did, however, acknowledge that the Defendant had sufficiently proven several mitigating factors, but argued that the aggravating factors far outweighed any mitigating circumstances offered by the Defendant. The State and the Defendant were also permitted to provide the Court with a sentencing memorandum. The Defendant provided the Court with a copy of his written statement. The State did not file a sentencing memorandum. Final sentencing was set for this date, October 19, 2007.

The Court is mandated by section 921.141, Florida Statutes, to evaluate all aggravating and mitigating factors in making its decision. This Court has heard and considered the evidence presented in both the guilt phase and penalty phase of the Defendant's trial, has considered the

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additional arguments presented by the State and the Defendant at the sentencing hearing held on October 12, 2007, has had the benefit of reviewing the evidence introduced in both phases of the trial, as well as the presentence investigation completed by the Department of Corrections. In addition, the Court has reviewed the handwritten statement provided by the Defendant and has heard arguments from the State and the Defendant both in favor of and in opposition to the death penalty. After carefully considering and weighing all factors, aggravating and mitigating, relevant to sentencing, the Court now finds as follows:

FACTS

The evidence presented at trial establishes that on October 4, 2006, the Defendant, Norman Blake McKenzie, drove to the home shared by his victims, Randy Wayne Peacock and Charles Frank Johnston, with the intent to rob and kill them. The Defendant and the victims were not strangers. The Defendant, a contractor, had done some work for them in the past.

Patrick Anderson, the victims' neighbor, testified that he was at the house for several hours on October 4, 2007, working on the victims' brakes. He testified that he left around 7:00 p.m. after several hours of work, and that at the time he left, the Defendant and Mr. Peacock were working on their cars under the carport. At some point, Mr. Peacock begins cooking soup in the kitchen, leaving the Defendant and Mr. Johnston outside. According to the Defendant, he asked Mr. Johnston for a piece of wood and a hammer to pound out a dent in his vehicle; a gold Kia Sorrento. The Defendant was given a hatchet with a hammer end and a blade end. When Mr. Johnston went into the shed to find a piece of wood, the Defendant followed him with the hatchet in hand. When Mr. Johnston was toward the back corner of the shed, the Defendant struck him in the head with the blade end of the hatchet, which knocked the victim to the ground. The Defendant then struck Mr. Johnson again once or twice and left the shed.

The Defendant, with hatchet in hand, then entered the residence, where Randy Peacock was cooking soup on the stove. The Defendant approached Mr. Peacock from behind and struck him multiple times in the head with the hammer end of the hatchet. The Defendant then returned to the shed, where he noticed Mr. Johnston was still alive. He struck Mr. Johnston again with the hatchet then placed the hatchet on top of a bucket in the shed. The Defendant left the shed and returned to Mr. Peacock. Mr. Peacock was struggling to get up. The Defendant then grabbed a butcher knife and stabbed Mr. Peacock multiple times.

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Mr. Johnston died after suffering four "chop wounds" to the head. Mr. Peacock suffered four blunt force trauma wounds to the back of the head and six stab wounds to the chest, abdomen, back, and neck. He died as a result of his injuries.

After stabbing Mr. Peacock, the Defendant searched for his victims' wallets. He found wallets and keys, left his personal vehicle at the residence, and drove off in Mr. Peacock's green Chrysler convertible. The Defendant abandoned Mr. Peacock's car in Alachua County and was later arrested in Citrus County. At the time of his arrest, the Defendant was found in possession of Randy Peacock's wallet. Charles Johnston's wallet was found when Mr. Peacock's car was recovered in Alachua County.

The Defendant was interviewed twice by detectives from the St. Johns County Sheriff's Office; once on October 5, 2006 and again on February 6, 2007. On both occasions, post Miranda, the Defendant confessed to killing Mr. Johnston and Mr. Peacock. According to Detective Rollins, the Defendant told him he went to the home of Randy Peacock and Charles Johnston, planning to kill them for money.

AGGRAVATING FACTORS

1. **The Defendant has been previously convicted of another capital offense or of a felony involving the use of violence to some person.**

The State has proven beyond and to the exclusion of every reasonable doubt that the Defendant was contemporaneously convicted of two counts of first degree murder in the present case. The Court can and does consider these contemporaneous convictions as a previous conviction of another capital offense.

Additionally, the state has proven beyond and to the exclusion of every reasonable doubt that the Defendant has been previously convicted of the following offenses:

The State of Florida v. Norman Blake McKenzie, Case No.: 01-2006-CF-005261-A, Alachua County Florida, May 17, 2007.

Count One: Burglary while Armed with a Firearm and with an Assault and Battery.

Count Two: Kidnapping with a Firearm.

The State of Florida v. Norman Blake McKenzie, Case No.: 01-2006-CF-005259-A,
Alachua County Florida, May 17, 2007.

Attempted Robbery with a Firearm.

The State of Florida v. Norman Blake McKenzie, Case No.: 01-2006-CF-00586-A,
Alachua County Florida, May 17, 2007.

Robbery with a Firearm.

The State of Florida v. Norman Blake McKenzie, Case No.: 01-2006-CF-00532-A,
Alachua County Florida, May 17, 2007.

Robbery with a Firearm

The State of Florida v. Norman Blake McKenzie, Case No.: 01-2006-CF-00585-A,
Alachua County Florida, May 17, 2007.

Robbery with a Firearm.

The State of Florida v. Norman Blake McKenzie, Case No.: 42-2006-CF-004213-A,
Marion County Florida, March 6, 2007.

Carjacking while Armed.

The State of Florida v. Norman Blake McKenzie, Case No.: 90-19206CF10, Broward
County Florida, May 28, 1991.

Strong Arm Robbery.

The prior judgments, stipulated into evidence by the Defendant, coupled with the testimony and evidence in this trial, proves beyond any doubt that, as to each victim, the Defendant has eight prior convictions for crimes involving the use of violence, and a simultaneous conviction for first degree murder, which is a capital offenses.

This aggravating factor has been proven beyond a reasonable doubt and the Court gives it great weight.

2. **The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or an attempt to commit the crime of robbery.**

The State has proven this aggravating factor beyond a reasonable doubt. The Defendant gave two statements to detectives regarding his motive for the offense. According to Detective Burres, the Defendant told him he went to the victims' home for the purpose of stealing their money. He told Detective Rollins, in a separate interview, that he went to the victims' home intending to kill them and steal their money. In addition, the evidence introduced at trial established that after killing Randy Peacock and Charles Johnston, the Defendant took their wallets, money and credit cards, and also stole Randy Peacock's car. Upon arrest, the Defendant was found in possession of Randy Peacock's wallet. Charles Johnston's wallet was found in Randy Peacock's abandoned car.

The Court finds the existence of this aggravating circumstance and gives it great weight.

3. **The crime for which the defendant is to be sentenced was committed for financial gain.**

The State has proven beyond a reasonable doubt that the Defendant planned to go to the to the victim's house to kill them and take their money. After killing the victims, the Defendant took their wallets, money and credit cards, and also stole Randy Peacock's car.

The Court recognizes, however, that this aggravating circumstance merges with the aggravating circumstance that the capital felony was committed while the Defendant was engaged in the commission of or an attempt to commit the crime of robbery. Accordingly, these two aggravating circumstances will be considered as one and no added weight will be given to this aggravating circumstance.

4. **The crime for which the defendant is to be sentenced was committed in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification.**

In Jackson v. State, 648 So. 2d 85 (Fla. 1994), the Florida Supreme Court set forth four factors the state must establish in order to satisfy this aggravating factor. First, the killing was

the product of cool and calm reflection rather than an act prompted by emotional frenzy, panic, or fit of rage. Second, the Defendant had a careful plan or prearranged design to commit murder before the fatal incident. Third, the Defendant exhibited heightened premeditation. Fourth, the Defendant had no pretense of moral or legal justification.

The State has proven beyond a reasonable doubt that the killing was the product of cool and calm reflection rather than an act prompted by emotional frenzy, panic, or fit of rage. The Defendant told Detective Rollins that he went to the victims' home with the intent to rob and kill them. The evidence shows the Defendant was at the victims' home for several hours working on his car before he committed the murders. He waited until the victims' 21 year old neighbor, Patrick Anderson, went home and the second victim, Randy Peacock, went inside the house before he carried out his plan to kill his first victim, Charles Johnston. There is no evidence at all to suggest that the defendant was enraged or in the middle of some sort of emotional frenzy or panic. He calmly asked Mr. Johnston for a hammer and a piece of wood to pound out a dent in his car. When Charles Johnston handed the Defendant a hatchet, which had a blade end and a hammer end, and then proceeded to look for a piece of wood in the shed, the Defendant coolly and calmly followed him. When the victim got to the back corner of the shed, the Defendant struck him with the blade end of the hatchet. The victim fell to the ground and the Defendant struck him once or twice again. According to the Defendant, the victim had no idea what was about to occur.

After striking Charles Johnston with the hatchet, the Defendant left the shed and walked to the house. The Defendant, hatchet in hand, quietly entered the home and came up behind Mr. Peacock, who was cooking soup on the stove in the kitchen. He struck Mr. Peacock multiple times in the head with the hammer end of the hatchet. Mr. Peacock fell into the pot of soup. Like Mr. Johnston, Mr. Peacock had no idea what the Defendant was about to do.

After striking Randy Peacock multiple times in the head, the Defendant returned to the shed. When he noticed Charles Johnston moving, he struck him one more time with the hatchet. When he had finished the job he had come to do, the Defendant laid the hatchet on a bucket in the shed and returned to Mr. Peacock.

When the Defendant re-entered the home he noticed Mr. Peacock struggling to stand up. The Defendant grabbed a knife and began stabbing the victim multiple times. After stabbing Mr. Peacock, the Defendant washed the knife and placed it in the kitchen sink. He then began

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searching for the victims' wallets. The Defendant found the victims' wallets and keys and left the home in Randy Peacock's car.

The State has proven beyond a reasonable doubt that the Defendant had a careful plan or prearranged design to commit murder before the fatal incident. Again, the evidence establishes that the Defendant went to the victims' home with the intent to rob and kill them. He knew his victims, having done work for them in the past. He waited for hours until the opportunity was right. When the neighbor leaves and Mr. Peacock returns to the house, the Defendant is left alone with his first victim. It is at this time that the Defendant asks for his weapon, a hammer, under the guise of needing it to pound out a dent in his car. When Mr. Johnston enters the shed at the request of the Defendant to find a piece of wood, the Defendant follows him in and carries out his plan. Once the first victim is left incapacitated in the shed, the Defendant turns his sights on his second victim, Randy Peacock, who is alone inside the home. Once the Defendant's plan to kill the victims had been done, he took their wallets and stole their car, thereby carrying out his prearranged design to rob and kill.

The State has proven beyond a reasonable doubt that the Defendant exhibited heightened premeditation. Heightened premeditation is demonstrated by a substantial period of reflection. The Defendant was at the home for hours before he committed the murders. He waited for the opportune moment before carrying out his plan. In total, he struck Charles Johnston in the head with the hatchet four separate times. He struck him once and Mr. Johnston fell to the ground. He struck him once or twice again and then left the shed. The Defendant then approached his second victim in the house, which is a good distance from the shed. Once inside the house, he struck Randy Peacock four times in the head with the hammer end of the hatchet. He then left Mr. Peacock and returned to the shed where he found Mr. Johnston was still alive. The Defendant struck Mr. Johnston again with the hatchet, killing him. The Defendant left the hatchet in the shed and returned to the house, where he noticed Randy Peacock was attempting to get up off the floor. Having left the hatchet in the shed, the Defendant grabbed a butcher knife and stabbed Randy Peacock six times in the chest, abdomen, back, and neck, killing him. These facts show a particularly lengthy, methodic or involved sense of atrocious events and a substantial period of reflection and thought by the Defendant.

Finally, the State has proven beyond a reasonable doubt that the Defendant had no pretense of moral or legal justification. There is no justification or excuse for committing such

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brutal and atrocious acts. The evidence shows the Defendant calmly interacted with both victims for hours. No argument ever ensued between them and the victims had no reason to suspect the Defendant would kill them.

Based on the evidence presented at trial, the court finds that this aggravating circumstance has been proven beyond and to the exclusion of every reasonable doubt as to both victims. Having found the existence of this aggravating circumstance, the Court assigns it great weight.

No other aggravating circumstances were proven by the State or considered by the Court.

MITIGATING CIRCUMSTANCES

The Defendant presented no evidence at trial to suggest the presence of any statutory mitigating circumstance. However, during the separate sentencing hearing, the Defendant argued he was high on cocaine at the time he committed the offense. This Court has reviewed each statutory mitigating circumstance and finds that although no evidence was introduced during trial to support the existence of a statutory mitigating circumstance, the Defendant's argument at the Spencer hearing, that he was high on cocaine at the time the murders were committed, coupled with the bank records introduced by the Defendant during the penalty phase of the trial, is sufficient to entitle the Defendant to consideration by the Court of the following statutory mitigating circumstance:

The Crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

The fact that a Defendant was intoxicated or under the influence of narcotics can support establishment of this factor. See, Hollsworth v. State, 522 So. 2d 348 (Fla. 1988). The Defendant called no witnesses during the guilt and penalty phases of his trial and chose not to take the stand in his own defense. During the penalty phase, he admitted a number of bank records into evidence. The bank records show that between July 3, 2006 and October 2, 2006, the Defendant was withdrawing large amounts of money. Without more, this evidence is insufficient to establish this mitigating circumstance. However, during the separate sentencing

hearing, which was held on October 12, 2007, the Defendant argued to the Court that he was high on cocaine at the time the murders were committed. He also indicated that when he was arrested in Citrus County on the day after the homicides, he had just placed an eight-ball of cocaine in his mouth. Although Detective Burres testified that the Defendant told him he committed the offense due to his addiction, no additional evidence was presented during the course of the trial to corroborate the Defendant's argument that he was intoxicated at the time of the offense or that he was in possession of an eight-ball of cocaine at the time of his arrest.

The fact that the Defendant may wish to have this mitigating circumstance considered based on his statement to the court that he was intoxicated at the time he committed the murders, does not overcome the other evidence in the case that establishes in overwhelming fashion that the Defendant was in complete control of his faculties when these heinous crimes were committed.

After carefully considering all the evidence in this case, as well as the Defendant's arguments regarding intoxication, the Court is not reasonably convinced that this mitigating circumstance was established by the evidence. Therefore, the Court finds this mitigating circumstance does not apply and gives it no weight.

NON-STATUTORY MITIGATING CIRCUMSTANCES

Any of the following circumstances that would mitigate against imposition of the death penalty:

- a. Any aspect of the defendant's character, record, or background.**
- b. Any other circumstance of the offense.**

The Defendant offered no testimony or witnesses during the penalty phase of his trial. He did, however, introduce a number of bank records into evidence. At the separate sentencing hearing he presented additional argument regarding his drug addiction, and read a prepared statement. The Defendant did not ask the Court to consider any specific non-statutory mitigating factor. Nevertheless, the Court is required to consider all mitigating evidence found anywhere in the record regardless of whether it is advanced by the Defendant. See, Farr v. State, 621 So. 2d 1368 (Fla. 1993). Additionally, the State conceded that a number of non-statutory mitigating

circumstances did exist. Therefore, after reviewing all the testimony and evidence presented in this case, as well as the Defendant's presentence investigation (PSI), having, additionally, considered the demeanor of the Defendant during the course of the trial and sentencing hearing, and having reviewed and considered the Defendant's prepared statement and the arguments of the State and the Defendant, the Court finds the following non-statutory mitigating circumstances have been reasonably established:

1. The Defendant suffers from an addiction to cocaine.

The Defendant admits to having a drug addiction and claims he was high on cocaine at the time the offense was committed. According to the PSI, the defendant reported that he had used cocaine since he was 14 years old. At one point, he claimed he was using \$1000.00 worth of cocaine a day. Carol Landrue, the Defendant's fiancée, reported to the probation officer preparing the PSI, that the Defendant had visible track marks on his arm from years of use. Ms. Landrue stated that there were times when the Defendant would not use cocaine at all, but that when he did use, he would disappear for days at a time. No other illegal substances were mentioned by the Defendant.

During the trial, Detective Burres testified that the Defendant told him he committed the crime due to his addiction. The Defendant also admitted bank records into evidence, which showed that large amounts of cash were being withdrawn from his account in the months and days leading up to the offense. The Defendant, additionally, argued that when he was arrested, he placed an eight-ball of cocaine in his mouth, which could have killed him. According to the Defendant, he is not the same man today as he was when he killed the victims on October 4, 2006. The Defendant claims that his demeanor is completely different when he is using cocaine and that he would not have committed this offense if he were sober.

The evidence introduced at trial establishes that the Defendant was fully aware of what was going on and was in complete control of his faculties at the time he killed Charles Johnston and Randy Peacock. In addition, during the Defendant's opening and closing arguments, the Defendant was able to describe, in great detail, the horrible events that took place on October 4, 2006. Although the State concedes, and the Court so finds, that this non-statutory mitigating

factor exists, as it relates to the murder of Charles Johnston and Randy Peacock, the Court assigns it little weight.

2. The Defendant suffered abuse as a child.

The Defendant provided a written statement to the Court at his sentencing hearing. In the Defendant's statement, he writes, "I had an experience long ago with a child psychologist as a small boy. I recall running out of that office in tears. Never have I ever again trusted those working in that field. Quite frankly, I never trusted anyone..." The Defendant did not elaborate on this statement during the sentencing hearing and called no witnesses to testify on his behalf. However, in the PSI, the Defendant's fiancée, Carol Landrua, commented that the "Defendant's parents should be the ones incarcerated and not him." She would not go into any detail and no evidence was presented to establish what, if any, effect the alleged abuse had on the Defendant. Therefore, the Court gives this mitigating circumstance little weight.

3. The Defendant displayed good behavior during the course of this trial and all subsequent court proceedings.

Unlike most cases, the Court had ample opportunity to interact with the Defendant during the course of the trial because the Defendant chose to represent himself in this matter. The Court acknowledges that the Defendant was polite, cordial, and otherwise well behaved throughout all court proceedings. He exhibited appropriate behavior at all times when interacting with the Court, opposing counsel, and the jury. The Court gives this mitigating circumstance some weight.

4. The Defendant expressed remorse.

During the Spencer hearing the defendant addressed the Court and the victims' families and apologized for what he had done. In addition, he stated "Though I am not much of a man, man enough I am to know when I have been wrong. Consequently, I have not put up much of a

fight in these proceedings.” The Defendant’s main goal throughout the trial was to expedite the proceedings and expiate for what he had done. He has admitted committing these murders from the beginning. The Court believes his remorse is genuine and assigns this mitigating circumstance some weight.

5. The Defendant cooperated with police.

The Defendant’s statements to police were instrumental in securing his own conviction. In addition, when he was initially arrested in Citrus County, the Defendant handed over the victim’s wallet to police. The Court gives this mitigating factor some weight.

6. Employment Background.

The Defendant obtained his GED and has specialized certificates in Architectural Design. At the time the crimes were committed, the Defendant was employed as an architect and draftsman with Johnson, Graham, and Malone, earning \$63,000.00 per year plus bonuses. The Defendant earned a good income, and yet murdered the victims for the purpose of taking their money. The Court assigns this mitigating factor very little weight.

7. The Defendant is currently serving a life sentence and the mandatory minimum sentences for the murders of Charles Johnston and Randy Peacock is life without the possibility of parole.

The length of the Defendant’s mandatory sentence may be considered a mitigating circumstance. See, Jones v. Stare, 569 So. 2d 1234 (Fla. 1990). The PSI, as well as the Defendant’s judgment and sentence, indicates that on March 6, 2007, the Defendant was sentenced to serve life in prison for the offense of Armed Carjacking with a Firearm in Marion County, Florida. In addition, the minimum sentence the court can impose in the present case is two life sentences without the possibility of parole. The Court has considered this mitigating circumstance and assigns it little weight.

CONCLUSION

The Jury recommended, by a vote of 10 to 2, that the Defendant be sentenced to death for the murders of Randy Peacock and Charles Johnston. Under certain circumstances, the Court would afford their recommendation great weight. In this case, however, although the Defendant represented himself, admitted some bank records, and gave a closing statement to the jury during the penalty phase, the amount of mitigation placed before the jury was minimal. In fact, the Defendant chose to represent himself, in part, because he disagreed with his counsel's wish to put on certain mitigation evidence. Given these circumstances, pursuant to Muhammed v. State, 782 So. 2d 323 (Fla. 2001), the Court declines to give the jury's recommendation great weight in this case.

As it must, this court has independently established, considered, and weighed the mitigating circumstances against the aggravating circumstances. Despite the existence of a number of mitigating circumstances and the weight assigned to each by this Court, the nature and quality of those factors pale in comparison to the strength of the aggravating circumstances established in this case. The Court now finds that the aggravating circumstances far outweigh the mitigating circumstances. The contemporaneous convictions for the murders of Charles Johnston and Randy Peacock coupled with the Defendant's previous convictions for eight violent crimes, the fact that the murders were committed during the course of a robbery and for pecuniary gain, and the cold, calculated, and premeditated manner in which these murders were committed, greatly outweighs the non-statutory mitigating circumstances established by the record. Even in the absence of the cold, calculated, and premeditated aggravating circumstance, the Court finds that the remaining aggravating circumstances would far outweigh the mitigating circumstances.

It is therefore,

ORDERED AND ADJUDGED:

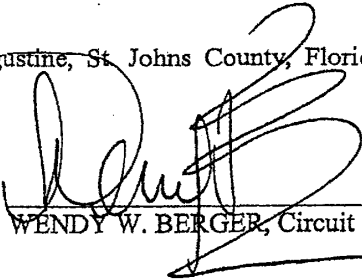
1. As to Count One of the Indictment, the First Degree Murder of Randy Wayne Peacock, the Court adjudicates you guilty of the offense, and sentences you, Norman Blake McKenzie, to death.
2. As to Count Two of the Indictment, the First Degree Murder of Charles Frank Johnston, the Court adjudicates you guilty of the offense, and sentences you, Norman

CIR 61335 PAGE 24
MINUTE

Blake McKenzie, to death. This sentence shall run concurrent with the sentence in Count One.

3. It is Ordered that you, Norman Blake McKenzie, be taken by the proper authority to the Florida State Prison, and there be kept in close confinement until the date of your execution is set.
4. It is further Ordered that on such scheduled date, you, Norman Blake McKenzie, be put to death.
5. You are hereby notified that this sentence is subject to automatic review by the Florida Supreme Court.

DONE AND ORDERED, in St. Augustine, St. Johns County, Florida, this 19th day of October, 2007.


WENDY W. BERGER, Circuit Court Judge

cc:

Ms. Angela Corey, Assistant State Attorney
Mr. Christopher France, Assistant State Attorney
Mr. Norman Blake McKenzie, Defendant
Mr. James Valerino, Esquire, Standby Counsel
Ms. Val Quetti, Esquire, Standby Counsel

Felony Court Minutes/Not
In the County/Circuit Court,
St. Johns County, State of Florida

CD Time

26-1864CF

Norman McKenzie

1. First Degree murder
2. First Degree murder

Atty: Self ASA: France Crt Rptr: Paulita Kundi

Def. Present ☒ N Estreat Bond/Issue Capias/Bond\$ _____ FCIC NCIC ADJ STATES
Arrn: ☒ N PLEA: ☒ NG NC VOP/CC: Admitted/Denied/Found in Violation
Adj: ☒ W/H PROB: Revoc/Reins Modified: Prob Term: Successful/Unsuccessful

Found Guilty

Cnt 1 Chg/Less death D/M/Y ☒ J / DOC / Drg OF / PROB / CC ☒ C/SEC W/ Any Act

Cnt 2 Chg/Less death D/M/Y ☒ J / DOC / Drg OF / PROB / CC ☒ C/SEC W/ ct 1

Cnt 3 Chg/Less _____ D/M/Y ☐ J / DOC / Drg OF / PROB / CC ☐ C/SEC W/ _____

Cnt 4 Chg/Less _____ D/M/Y ☐ J / DOC / Drg OF / PROB / CC ☐ C/SEC W/ _____

Cnt 5 Chg/Less _____ D/M/Y ☐ J / DOC / Drg OF / PROB / CC ☐ C/SEC W/ _____

W/CREDIT 2560 DAILY JAIL TIME _____ Work Release Authorized _____

PSI/FDR PTI EPIC ADI Drug Court Nolle Prosequi DL Revoked _____ m/y
No Contact/Violent Contact w/Victim-family _____

Declared: Sex Offender / Sexual Predator / Adult Sanction / Youthful Offender/ Blood Drawn

Bond \$ _____ Reduced/Increased to \$ _____
Remain in Cnty Jail until bed space is available _____ Report to County Jail _____ by _____

Next Court Appearance: Defense/State/ Joint Con't

ARRN DC JT S VOP-HRG HRG PT :

Other/Spec Cond: _____

Copy: SA SO PD/ATTY DEPT PROE _____ 30 days to Appeal

ATTENTION: PERSONS WITH DISABILITIES

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact Mary Bratos at (904) 827-3617, 4010 Lewis Speedway, St. Augustine Florida 32084 within 2 working days of your receipt of this notice; if you are hearing or voice impaired, call 1-800-933-8771; THIS IS NOT A COURT INFORMATION LINE. For information on your case, call (904) 819-3618

CHERYL STRICKLAND

CLERK OF THE CIRCUIT COURT

BY: Rebecca

DEPUTY CLERK

I Hereby acknowledge that I have received a copy of the above notice This 19 day of October, 2007

DEFENDANT OR ATTORNEY FOR DEFENDANT

Paper# 89

Case #

06001864CF

Defendant: Norman Blake McKenzie Case Number: 06-1864CF

STATE OF FLORIDA
UNIFORM COMMITMENT TO CUSTODY
OF DEPARTMENT OF CORRECTIONS

The Circuit Court of St Johns County in the Spring Term, 2007, in the case of:

STATE OF FLORIDA

vs

Norman Blake McKenzie
Defendant

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DEPARTMENT OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the offense specified herein in the above styled Court, and having been duly convicted and adjudged guilty of and sentenced for said offense by Court, as appears from the attached certified copies of Indictment/Information, Judgment and sentence, and Felony Disposition and Sentence Data form which are hereby made parts hereof:

Now therefore, this is to command you, the Sheriff, to take, keep and within a reasonable time after receiving this commitment, safely deliver the said defendant, together with any pertinent Investigation Report prepared in this case, into custody of Department of Corrections of the State of the Florida: and this is to command you, the said, Department of Corrections, by and through your Secretary, Regional Directors, Superintendents, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Department of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable Wendy W. Berger,

Judge of Said Court, as also Cheryl Strickland, Clerk,

and the Seal thereof, this the 19th day of October 2007.

CHERYL STRICKLAND, Clerk of the Circuit Court

By: _____
Deputy Clerk

2

PAPER NO. 90

CASE NO. 06001864CF

Filing # 51567422 E-Filed 01/24/2017 03:19:12 PM

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL
CIRCUIT, IN AND FOR ST. JOHNS COUNTY, FLOIRDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO. 2006-1864-CFAES
DEATH PENALTY CASE

NORMAN BLAKE MCKENZIE,

Defendant.

_____ /

MOTION FOR EXTENSION OF TIME AND MOTION TO TOLL TIME

COMES NOW, the State of Florida, by and through the undersigned Assistant Attorney General, and moves this Honorable Court for an extension of time and motion to toll time to file its answer to Defendant's Successive Motion for Post Conviction Relief filed in the above-styled cause on January 9, 2017, and as grounds therefore states:

1. Florida Rule of Criminal Procedure 3.851(f)(3)(B) imposes a 20-day response time for the filing of an answer following the proper filing of a successive postconviction motion.
2. The undersigned counsel requires additional time to file its answer due to undersigned counsel's substantial workload. The undersigned is presently working on nine (9) answers to successive postconviction motions, all


due on or before January 30-31, 2017. In addition, undersigned counsel is required to attend an all-day evidentiary hearing in a Capital Case on January 30, 2017, in St. Johns County, Florida.

3. The State therefore requests that this Honorable Court grant an additional thirty (30) days to file its answer to the instant successive postconviction motion, such that the new date for the answer to be filed will be on or before March 1, 2017.
4. The instant motion is made in good faith and not for purposes of delay.
5. Undersigned counsel has not contacted opposing counsel.
6. The State requests that this Honorable Court toll this time period until the resolution of the instant motion.

WHEREFORE, the State requests that this Court grant a motion for extension of time to file its answer to Defendant's successive motion for postconviction relief and toll the time for the filing of its answer until the Court has ruled on the instant motion.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

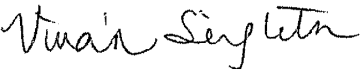
/s/ 

VIVIAN SINGLETON
ASSISTANT ATTORNEY GENERAL
Florida Bar #728071

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Daytona Beach, FL 32118
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 24, 2017, a true and correct copy of the above has been furnished by e-mail/e-portal to: The Honorable Howard Maltz, smiller@circuit7.org (Susan Miller, JA), The Richard O. Watson Judicial Center, 4010 Lewis Speedway, St. Augustine, FL 32084; Office of the State Attorney, Rosemary L. Calhoun, Assistant State Attorney, calhounr@sao7.org, eservicestjohns@sao7.org, 251 N. Ridgewood Avenue, 3rd Floor, Daytona Beach, FL 32115; Capital Collateral Regional Counsel-Middle, David Dixon Hendry, Assistant CCRC, hendry@ccmr.state.fl.us, James L. Driscoll, Jr., Assistant CCRC, driscoll@ccrc.state.fl.us, and George William Brown, brown@ccmr.state.fl.us, support@ccrc.state.fl.us, CCRC-Middle, 12973 N. Telecom Parkway, Temple Terrace, FL 33637, the attorneys for Defendant.

/s/ 

VIVIAN SINGLETON
ASSISTANT ATTORNEY GENERAL

Filing # 52519700 E-Filed 02/15/2017 11:10:07 AM

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR ST. JOHNS COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO. 2006-1864-CFAES

NORMAN BLAKE MCKENZIE,

Defendant,

_____/

**STATE’S RESPONSE TO DEFENDANT’S FIRST SUCCESSIVE MOTION
TO VACATE JUDGMENT OF CONVICTION AND SENTENCES**

COMES NOW the State of Florida, by and through the undersigned Assistant Attorney General and pursuant to *Florida Rules of Criminal Procedure* 3.851, makes the following response to the Defendant’s First Successive Motion to Vacate Judgment of Conviction and Sentences. (Hereinafter “Motion to Vacate”).

a. Procedural background

Norman Blake McKenzie was convicted of the first-degree murders of Randy Peacock and Charles Johnston. *McKenzie v. State*, 29 So. 3d 272, 277 (Fla. 2010). The following facts were established during the guilt phase:

The evidence presented at trial established that on October 5, 2006, two Flagler Hospital employees became concerned when Randy Peacock, a respiratory therapist at the hospital, did not report to work. The two employees drove to the home that Peacock shared with Charles Johnston. Upon their arrival, they noticed that Peacock's vehicle, a green convertible, was not there. When the employees

entered the residence, they found Peacock lying face down on the kitchen floor in a pool of blood. When deputies from the St. Johns County Sheriff's Office (SJSO) arrived, they secured the scene and subsequently located the body of Charles Johnston in a shed that was also located on the property. While processing the crime scene, law enforcement officers located a hatchet inside the shed that appeared to have blood on its blade and handle. A butcher knife was found in the kitchen sink. Deputies observed a gold sport utility vehicle (SUV) in the driveway and determined that it was registered to Norman Blake McKenzie.

The deputies subsequently spoke with a neighbor of the victims. The neighbor stated that on October 4, 2006, he went to the victims' home to assist Johnston with repairs on his vehicle. When the neighbor first arrived, Johnston was not there but Peacock was present and was speaking with a man whom the neighbor later identified in a photo lineup as McKenzie. The neighbor confirmed that he saw Peacock speaking with McKenzie between 4:30 and 7 p.m., and that he also observed a gold SUV in the driveway. The neighbor departed the victims' residence before dark.

McKenzie subsequently had an encounter with a Citrus County sheriff's deputy during which Randy Peacock's wallet was recovered from one of McKenzie's pockets. Further, Charles Johnston's wallet was located in a vehicle that McKenzie had recently operated. McKenzie agreed to speak with SJSO deputies on two separate occasions during which he confessed to the murders of Peacock and Johnston.

McKenzie explained that he went to the victims' residence on October 4, 2006, to borrow money from Johnston because of his drug addiction. When he first arrived, only Peacock and the neighbor were present; however, Johnston returned home around dusk. The neighbor left after briefly speaking with Johnston, and at some point, Peacock went inside the residence. McKenzie then asked Johnston for a hammer and a piece of wood so that he could knock some "dings" out of the door of his SUV. Johnston could not locate a hammer and gave McKenzie a hatchet. While walking into the shed to locate a piece of wood, McKenzie struck Johnston in the head with the blade side of

the hatchet. Johnston fell to the floor and McKenzie struck him again. McKenzie then entered the home, approached Peacock, who was cooking in the kitchen, and struck him with the hammer side of the hatchet approximately two times.

McKenzie returned to the shed, and when he observed that Johnston was still alive, he struck Johnston one or more times with the hatchet. McKenzie removed Johnston's wallet from his pocket, placed the hatchet on top of a bucket inside the shed, and re-entered the residence. McKenzie observed that Peacock was struggling to stand up, so he grabbed a knife and stabbed Peacock multiple times. McKenzie then placed the knife in the sink, took Peacock's wallet and car keys, and departed in Peacock's vehicle.

Id. at 275-6.

The jury recommended the death penalty for each murder by a vote of ten to two. *Id.* at 277. The trial court followed the jury's recommendation and sentenced the Defendant to death for both murders. The trial court found that four aggravating circumstances had been proven beyond a reasonable doubt – 1) McKenzie had previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person, (eight prior convictions and the contemporaneous murder of the other victim); (2) the murders were committed while McKenzie was engaged in the commission of a robbery; (3) the murders were committed for pecuniary gain(merged with robbery aggravator); and (4) the murders were cold, calculated, and premeditated (CCP). *Id.* at 277-8.

The trial court concluded that McKenzie had failed to prove the existence of the statutory mitigating circumstance that he was under the influence of an extreme

emotional or mental disturbance at the time of the murders. *Id.* at 278. The trial court, who ordered the preparation of a presentence investigation report, found a total of seven nonstatutory mitigating factors: (1) McKenzie suffered from a cocaine addiction; (2) McKenzie was the victim of child abuse; (3) McKenzie exhibited good behavior during court proceedings; (4) McKenzie expressed remorse; (5) McKenzie cooperated with police; (6) McKenzie possesses a GED and certificates in architectural design; and (7) McKenzie is currently serving a life sentence for armed carjacking, and the minimum mandatory sentence for the murders is life without the possible of parole. *Id.* at 277-8.

On appeal, the Florida Supreme Court affirmed the death sentence. *Id.* at 288. Certiorari review was denied by the United States Supreme Court. *McKenzie v. Florida*, 562 U.S. 854, 131 S. Ct. 116 (2010).

McKenzie sought postconviction relief, in which he raised four claims. *McKenzie v. State/Sec'y*, 153 So. 3d 867, 873 (Fla. 2014). The first claim alleged that due to State action, McKenzie was denied a full and fair capital sentencing phase, and the postconviction court should now consider McKenzie's mitigation evidence to determine whether his death sentences are constitutional. *Id.* In his second claim, McKenzie reiterated that his counsel was ineffective, which led McKenzie to choose to represent himself. *Id.* at 874. McKenzie's third claim challenged the constitutionality of Florida's lethal injection procedure and statute.

His final claim challenged the constitutionality of Florida's death penalty statute in light of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2002). *McKenzie*, 153 So. 3d at 874. The postconviction court held a hearing pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993). On March 8, 2012, the trial court summarily denied McKenzie's motion without an evidentiary hearing. *McKenzie*, 153 So. 3d at 874.

The Florida Supreme Court affirmed the denial of postconviction relief. *Id.* at 885. McKenzie also filed a petition for a writ of habeas corpus in which he raised one claim, which was also denied. *Id.*

McKenzie filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida on January 21, 2015, raising 13 grounds. On October 12, 2016, the district court stayed the Defendant's case pending the resolution by the Florida Supreme Court of the impact of the *Hurst v. Florida*, 136 S. Ct. 616 (2016) decision, including any decisions rendered in *Lambrix v. State*, SC16-56, *Asay v. State*, SC16-223, and *Perry v. State*, SC16-547.

b. The *Hurst/Perry* decisions.

On January 12, 2016, the United States Supreme Court ruled in *Hurst* that Florida's sentencing scheme, which permitted the judge alone to find the existence of an aggravating circumstance, is unconstitutional under the Sixth Amendment of

the United States Constitution. *Hurst* is an extension of *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi*. In *Ring*, an Arizona capital sentencing scheme that permitted a judge rather than the jury to find the facts necessary to sentence a defendant to death was held to be unconstitutional.

In October 2016, the Florida Supreme Court ruled in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and *Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016), that the Sixth Amendment required that all of the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. *Hurst*, 202 So. 3d at 44. The specific findings include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. *Id.* The *Hurst* decision also included a holding that under the Eighth Amendment to the United States Constitution, the jury's recommended sentence of death must be unanimous in order for the trial court to impose a sentence of death. *Id.* The Court ruled that a harmless error review would focus on the effect of the error on the trier of fact and that there is no reasonable possibility that the error contributed to the sentence. *Id.* at 68.

In *Perry*, the Florida Supreme Court ruled that *Hurst v. Florida* did not declare the state's death penalty to be unconstitutional but the amended capital sentencing statute could not be applied constitutionally to pending prosecutions because it did not require unanimity. *Perry*, at *1.

Neither the *Hurst v. Florida* ruling nor the *Hurst v. State* ruling addressed the issue of retroactivity. Subsequently, in a recent Florida Supreme Court ruling that consolidated two cases, *Mosley v. State/Jones*, 41 Fla. L. Weekly S629, 2016 WL7406506 (Fla. Dec. 22, 2016), the court addressed the issue of retroactivity for cases that became final after the ruling in *Ring*. The court analyzed the *Hurst* issue using *Witt v. State*, 387 So. 2d 922 (Fla. 1980), which provides a framework for determining whether a change in decisional law should be applied retroactively. The court stated the following:

Defendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring* should not suffer due to the United States Supreme Court's fourteen-year delay in applying *Ring* to Florida. In other words, defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring* should not be penalized for the United States Supreme Court's delay in explicitly making this determination. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Witt*, 387 So. 2d at 925. Thus, *Mosley*, whose sentence was final in 2009, falls into the category of defendants who should receive the benefit of *Hurst*.

Mosley at *25.

In *Hurst v. State*, the Florida Supreme Court set out the requirements for a harmless error analysis based upon a *Hurst* claim. “Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence.” *Hurst*, 202 So. 3d at 68, citing *Zack v. State*, 753 So. 2d 9, 20 (Fla. 2000).

ARGUMENT

Claim 1 McKenzie’s death sentences should be vacated because they are unconstitutional based on *Hurst*, prior precedent and subsequent developments because McKenzie was denied his right to a jury trial on the facts that led to his death sentences.

McKenzie argues that his death sentences, imposed without the proper jury fact finding, violate the Sixth Amendment under *Ring* and *Hurst*. McKenzie argues that he was denied his right to a jury trial on the essential elements that led to his death sentences in violation of the United States Constitution and the corresponding provisions of the Florida Constitution, and as a result, his death sentences should be vacated. Motion to Vacate at 6.

Despite McKenzie’s argument, his death sentences should not be vacated because any *Hurst* error is harmless. The Defendant’s violent attacks upon his two victims were substantial. McKenzie struck Charles Johnston in the head with the blade side of a hatchet in a shed. *McKenzie*, 29 So. 3d at 275. After Johnston fell to the floor, McKenzie struck him again. Later, the Defendant struck Johnston

again with the hatchet after realizing he was still alive. *Id.* An autopsy conducted on Charles Johnston revealed that the cause of his death was extensive head trauma due to the infliction of four “chop” wounds. *Id.* at 276. The trauma to Johnston's skull was consistent with the blade side of the hatchet that was recovered from the shed. *Id.*

McKenzie struck Randy Peacock with the hammer side of the hatchet about two times. *Id.* at 275-6. When he observed that Peacock was struggling to stand up, he grabbed a knife and stabbed Peacock multiple times. Peacock died from six stab wounds which caused extensive bleeding, with a contributory cause of blunt-force trauma to the head. *Id.* at 276. The stab wounds suffered by Peacock were consistent with the knife found in the kitchen sink and the blunt-force trauma was consistent with the hammer side of the hatchet that was recovered from the shed. *Id.*

During the penalty phase, a deputy testified that when McKenzie spoke to law enforcement, he stated that he went to the victims' residence with the intent to kill Peacock and Johnston for their money. *Id.* at 277. The State introduced eight prior convictions for the following crimes: burglary while armed with a firearm and with an assault or battery; kidnapping with a firearm; strong-arm robbery; attempted robbery with a firearm; robbery with a firearm (three separate convictions); and carjacking. Finally, victim impact statements written by Charles

Johnston's daughter and Randy Peacock's sister were read to the jury. After the State rested its case, McKenzie advised that he would not offer any mitigation evidence to the jury. However, following the prosecutor's closing statement, McKenzie was allowed to place bank records into evidence for the purpose of demonstrating his financial behavior in the months before these crimes. *Id.*

Based upon the significant aggravating evidence presented and the lack of mitigation argued to the jury, it is reasonable that the jury would have unanimously recommended that McKenzie be sentenced to death. The Defendant brutally killed two people. After initially beating the victims with a hatchet, McKenzie went back to each man after noticing that neither of them was dead. He viciously beat Johnston again with the hatchet and stabbed Peacock to death until he was certain that he had killed both of them.

McKenzie chose not to present mitigation evidence during the penalty phase other than the bank records. *McKenzie*, 153 So. 3d at 878. But now, ironically, the Defendant argues that he was denied his constitutional right to jury fact finding.

Nonetheless, if the jurors had been told that unanimity was a requirement in order for the jury to recommend a death sentence, a reasonable jury would have unanimously found the existence of aggravating factors proven beyond a

reasonable doubt; that the aggravating factors were sufficient; and that the aggravating factors outweighed the mitigating circumstances.

In the recent case of *Hall v. State/Jones*, 42 Fla. L. Weekly S153, 2017 WL 526509 (Fla. Feb. 9, 2017), the Florida Supreme Court stated that it “is inconceivable that a jury would not have found the aggravation in Hall’s case unanimously, especially given the fact that three of the aggravators found were automatic (i.e., under sentence of imprisonment, previously convicted of another violent felony, and the victim was a law enforcement officer). *Id.* at *23.

The same can be said in the instant case where the jury would have unanimously found that McKenzie had previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person (eight prior convictions and the contemporaneous murder of the other victim).

The jury would have determined that this aggravator had been proven beyond a reasonable doubt and was sufficient. With the defense presenting only the bank records in mitigation, no rational jury, as the trier of fact, would have determined that the mitigation was sufficiently substantial to call for a life sentence. There is no reasonable possibility that any *Hurst* error contributed to McKenzie’s death sentences. The Defendant’s death sentences should not be vacated.

Claim 2 This Court should vacate McKenzie’s death sentences because, in light of *Hurst* and subsequent cases, McKenzie’s death sentences violate the Eighth Amendment because his death sentences were contrary to evolving standards of decency and is arbitrary and capricious.

The Defendant argues that the Eighth Amendment was violated when the jury was instructed that its recommendation was only advisory. Motion to Vacate at 8-9. McKenzie argues that “[h]is death sentences were arbitrary and capricious because he was sentenced without a jury to ensure the reliability of his sentences.” Motion to Vacate at 11.

Contrary to his arguments, McKenzie was sentenced with a jury who heard evidence of aggravating factors. McKenzie was given the opportunity to present mitigation evidence and chose to only present bank records. The Eighth Amendment only places limits on the imposition of the death penalty in that it cannot be imposed in an arbitrary or capricious manner. It is reserved for the most aggravated and least mitigated of crimes.

The circumstances that surround this case – the brutal killing of two men - greatly outweigh the limited mitigation in the case, as argued in the previous claim. No rational trier of fact would determine that the minimal mitigation offered before the jury – bank records - were sufficiently substantial to call for leniency. Any *Hurst* error was harmless beyond a reasonable doubt and a new penalty phase is not warranted.

Claim 3 This Court should vacate McKenzie’s death sentences because the fact-finding that subjected McKenzie to the death sentences was not proven beyond a reasonable doubt.

The Defendant argues that he “was denied a jury trial on the elements that subjected him to the death penalty. It necessarily follows that he was denied his right to proof beyond a reasonable doubt.” Motion to Vacate at 13.

This argument is meritless. A jury heard testimonial evidence of aggravation and was presented bank records as mitigating evidence during the penalty phase. The jury considered the evidence that was presented, deliberated and recommended that McKenzie be sentenced to death.

The case law presented by McKenzie in support of this claim - *In re Winship*, 397 U.S. 358 (1970), *Ivan V. v. City of New York*, 407 U.S. 203 (1972) and *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975) – all focus on the requirement that a conviction for a crime be proven beyond a reasonable doubt. If McKenzie is arguing that the jury did not perform the finding of facts necessary to recommend a death sentence, then that claim was argued in Claim 1. Thus, Claim 3 is redundant and should be denied.

Claim 4 In light of *Hurst*, McKenzie’s death sentences should be vacated because they were obtained in violation of the Florida Constitution.

Here, the Defendant references the new statute being unconstitutional and argues that the increase in penalty imposed on him was without any jury at all. He

argues that no unanimous jury found all of the aggravating factors considered, that they were sufficient or that they outweighed the mitigating factors. McKenzie also argues that he “has a number of rights under the Florida Constitution that are at least coterminous with the United States Constitution, and possibly more extensive.” Motion to Vacate at 14.

However, the Defendant does not specify which rights to which he refers. McKenzie also argues that his sentences should be vacated based on the Florida Constitution and that the aggravating factors were not found by the Grand Jury nor contained in the indictment. Motion to Vacate at 15.

The Defendant’s arguments are without merit. The constitutionality of the new death penalty statute is not relevant in this case because McKenzie was sentenced prior to the enactment of the new statute.

The Defendant’s reference to a sentence being imposed on him “without any jury at all” is misleading because it gives the impression that there was no jury present during the penalty phase, which is not true. While it is true that the jury’s recommendations for death were not unanimous, no rational jury would have determined that the mitigation – the bank records - called for a life sentence over the significant aggravation in the case. The Defendant beat two men continuously with a hatchet and stabbed one of the men to death. There is no reasonable possibility that any *Hurst* error contributed to McKenzie’s death sentences.

Claim 5 The Court’s denial of McKenzie’s postconviction claims must be re-heard and determined under a constitutional framework.

Lastly, McKenzie argues that the claims raised under his postconviction motion were adjudicated under an unconstitutional system. The Defendant argues that in applying the law to the facts raised in his postconviction motion, this Court “determined Mr. McKenzie’s ineffective assistance of counsel claims, and other claims, based on the constitutionally incorrect analysis that it was the judge that was required to, and did, make the findings of fact.” Motion to Vacate at 15. McKenzie argues that this Court should re-hear his previously denied claims and vacate his death sentences.

This claim has no merit. McKenzie argues that his case, “as seen at trial and in postconviction was highly mitigated.” Motion to Vacate at 16. This argument is incredulous considering that the only mitigation the Defendant offered to the jury at trial were bank records. McKenzie had an opportunity to present more mitigation before the jury and he chose not to do so.

Nevertheless, in the Successive Motion to Vacate, McKenzie argues that while he was denied an evidentiary hearing in postconviction, Dr. Mark Cunningham provided a report that detailed the Defendant’s long history of substance abuse, deprivation, and trauma that he suffered from at the time of offense and throughout his life. However, the mitigation that McKenzie wants to

present now could have been given to the jury during the penalty phase of the trial, which the Florida Supreme Court noted in affirming the trial court's denial of the Defendant's motion for postconviction relief:

A number of the subclaims presented in the first issue on appeal arise from McKenzie's decision to represent himself during his capital criminal proceeding. Based upon his knowing, intelligent, and voluntary waiver of his right to counsel, and due to either inadvertence, lack of legal experience, or a definitive decision, evidence that might have been considered by the jury or the trial court as mitigation was not presented. The fact that McKenzie may have made ill-advised decisions while he represented himself does not establish that he is entitled to a "do-over" of his penalty phase or any phase of his underlying trial in the postconviction context. If this approach was adopted, many competent capital defendants would elect to represent themselves during trial as a delaying tactic. Instead, the cautionary statement in *Behr* [*v. Bell*, 665 So.2d 1055(Fla.1996)] applies with equal force here: "[A] defendant who represents himself has the entire responsibility for his own defense, even if he has standby counsel. Such a defendant cannot thereafter complain that the quality of his defense was a denial of 'effective assistance of counsel.'" 665 So.2d at 1056–57 (quoting *Faretta* [*v. California*], 422 U.S. at 835 n. 46, 95 S.Ct. 2525). In light of the foregoing, we affirm the summary denial of the subclaims presented in McKenzie's first postconviction claim.

Additionally, because McKenzie's second claim on appeal essentially constitutes a presentation of the mitigation evidence that McKenzie would have offered if this Court had granted him relief on his first claim, we reject this claim as well. Contrary to McKenzie's misrepresentation on rehearing, our analysis has not discounted "expertise in psychology and addiction." Rather, we reiterate that McKenzie had no desire to present experts in these fields while he acted as his own counsel, and his belated attempt to do so during the postconviction proceedings was improper.

McKenzie, 153 So. 3d at 884.

This last claim by McKenzie is simply an attempt by the Defendant to ask this Court to reconsider the same facts alleged in his previously-filed postconviction motion, but apply law that did not exist at the time that this Court's Order was rendered. The rules do not authorize this Court to revisit an identical factual claim merely because of a subsequent change in the law.

McKenzie contends that because he seeks a new sentencing hearing, the validity of his present conviction must be tested by viewing it in terms of whether he would receive the same sentence under the revised capital sentencing statute. This procedure, he contends, is mandated because of the cumulative analysis required under *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014) and *Swafford v. State*, 125 So. 3d 760 (Fla. 2013). However, neither case addresses the circumstance presented here where the law governing sentencing procedures has been revised. The Florida Supreme Court has never required the procedure espoused by McKenzie. The Defendant is not entitled to any relief for this claim.

CONCLUSION

Based on the foregoing arguments and authorities, Defendant's successive postconviction motion is without merit, and the State respectfully requests that it be denied. Any *Hurst* error is harmless and an evidentiary hearing is not required.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Vivian Singleton

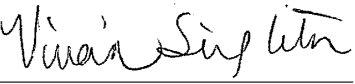
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CO-COUNSEL FOR STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 15, 2017, a true and correct copy of the above has been furnished by e-mail/e-portal to: The Honorable Howard Maltz, smiller@circuit7.org (Susan Miller, JA), The Richard O. Watson Judicial Center, 4010 Lewis Speedway, St. Augustine, FL 32084; Office of the State Attorney, Rosemary L. Calhoun, Assistant State Attorney, calhounr@sao7.org, eservicestjohns@sao7.org, 251 N. Ridgewood Avenue, 3rd Floor, Daytona Beach, FL 32115; Capital Collateral Regional Counsel-Middle, David Dixon Hendry, Assistant CCRC, hendry@ccmr.state.fl.us, James L. Driscoll, Jr., Assistant CCRC,

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Telecom Parkway, Temple Terrace, FL 33637, the attorneys for Defendant.

/s/ 

VIVIAN SINGLETON
ASSISTANT ATTORNEY GENERAL

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.: 06001864CF
DIVISION: 56

v.

NORMAN BLAKE MCKENZIE,
Defendant.

_____ /

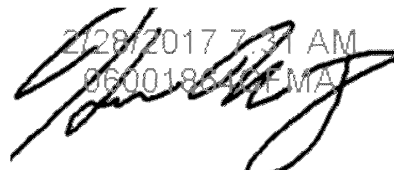
ORDER SCHEDULING CASE MANAGEMENT CONFERENCE

PLEASE TAKE NOTICE that on the **8th day of March, 2017, at 1:30 p.m.**, a case management conference will be held on the following:

**DEFENDANT'S FIRST SUCCESSIVE MOTION TO
VACATE DEATH SENTENCE**

before the undersigned judge, in Courtroom 328, of the Richard O. Watson Judicial Center, 4010 Lewis Speedway, St. Augustine, Florida. Counsel for both State and Defense may appear telephonically through conference call upon proper motion and order.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 28 day of February, 2017.


e-Signed 2/28/2017 7:31 AM
06001864CFMA

CIRCUIT JUDGE

Copies to:
Vivian Singleton, Assistant Attorney General

Filed for record 02/28/2017 07:31 AM Clerk of Court St. Johns County, FL

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Louise Pomar, Official Court Reporter
lpomar@circuit7.org



REQUESTS FOR ACCOMMODATIONS BY PERSONS WITH DISABILITIES If you are a person with a disability who needs an accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact Court Administration, 125 E. Orange Ave., Ste. 300, Daytona Beach, FL 32114, (386) 257-6096, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the appearance is less than 7 days; if you are hearing or voice impaired, call 711.

THESE ARE NOT COURT INFORMATION NUMBERS



SOLICITUD DE ADAPTACIONES PARA PERSONAS CON DISCAPACIDADES

Si usted es una persona con discapacidad que necesita una adaptación para poder participar en este procedimiento, usted tiene el derecho a que se le proporcione cierta asistencia, sin incurrir en gastos. Comuníquese con la Oficina de Administración Judicial (Court Administration), 125 E. Orange Ave., Ste. 300, Daytona Beach, FL 32114, (386) 257-6096, con no menos de 7 días de antelación de su cita de comparecencia ante el juez, o de inmediato al recibir esta notificación si la cita de comparecencia está dentro de un plazo menos de 7 días; si usted tiene una discapacidad del habla o del oído, llame al 711.

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JUDICIAL**

Filing # 53123953 E-Filed 03/01/2017 10:58:02 AM

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR ST. JOHNS COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO. 55-2006-CF-001864-XXAXMX

NORMAN BLAKE MCKENZIE,

Defendant,

_____/

STATE'S MOTION FOR A CONTINUANCE OF THE CASE
MANAGEMENT CONFERENCE

COMES NOW the State of Florida, by and through the undersigned Assistant Attorney General and files this Motion for Continuance of the Case Management Conference.

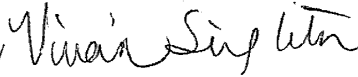
1. A Case Management Conference in the above-styled case is scheduled for March 8, 2017.
2. The undersigned counsel is scheduled to present oral arguments in another death penalty case in Tallahassee on March 8, 2017.
3. Assistant State Attorney Rosemary Calhoun also has a prior commitment and is unavailable to attend the Case Management Conference.
4. The State requests that the Case Management Conference be continued to another date so that the State can attend.

5. Opposing counsel David Hendry, with CCRC, has been contacted regarding this motion and states that he has no objection to the State's motion.

WHEREFORE, the State respectfully asks this Court to grant this Motion for the above reasons.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ 

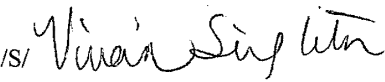
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capapp@myfloridalegal.com

CO-COUNSEL FOR STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 1, 2017, a true and correct copy of the above has been furnished by e-mail/e-portal to: The Honorable Howard Maltz, smiller@circuit7.org (Susan Miller, JA), The Richard O. Watson Judicial Center,

4010 Lewis Speedway, St. Augustine, FL 32084; Office of the State Attorney, Rosemary L. Calhoun, Assistant State Attorney, calhounr@sao7.org, eservicestjohns@sao7.org, 251 N. Ridgewood Avenue, 3rd Floor, Daytona Beach, FL 32115; Capital Collateral Regional Counsel-Middle, David Dixon Hendry, Assistant CCRC, hendry@ccmr.state.fl.us, James L. Driscoll, Jr., Assistant CCRC, driscoll@ccrc.state.fl.us, and George William Brown, Assistant CCRC, brown@ccmr.state.fl.us, support@ccrc.state.fl.us, CCRC-Middle, 12973 N. Telecom Parkway, Temple Terrace, FL 33637, the attorneys for Defendant.

/s/ 

VIVIAN SINGLETON
ASSISTANT ATTORNEY GENERAL

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.: 06001864CF
DIVISION: 56

v.

NORMAN BLAKE MCKENZIE,
Defendant.


ORDER RESCHEDULING CASE MANAGEMENT CONFERENCE

PLEASE TAKE NOTICE that on the **8th day of May, 2017, at 1:30 p.m.**, a case management conference will be held on the following:

**DEFENDANT'S FIRST SUCCESSIVE MOTION TO
VACATE DEATH SENTENCE**

before the undersigned judge, in Courtroom 328, of the Richard O. Watson Judicial Center, 4010 Lewis Speedway, St. Augustine, Florida. Counsel for both State and Defense may appear telephonically through conference call upon proper motion and order.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 14 day of March, 2017.


3/14/2017 3:15 PM
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e-Signed 3/14/2017 3:15 PM
06001864CFMA

CIRCUIT JUDGE

Copies to:
Vivian Singleton, Assistant Attorney General

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Louise Pomar, Official Court Reporter
lpomar@circuit7.org



REQUESTS FOR ACCOMMODATIONS BY PERSONS WITH DISABILITIES If you are a person with a disability who needs an accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact Court Administration, 125 E. Orange Ave., Ste. 300, Daytona Beach, FL 32114, (386) 257-6096, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the appearance is less than 7 days; if you are hearing or voice impaired, call 711.

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JUDICIAL**

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**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR ST. JOHNS COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO. 55-2006-CF-001864-XXAXMX

NORMAN BLAKE MCKENZIE,

Defendant,

_____ /

**STATE'S MOTION REQUESTING PERMISSION TO APPEAR BY
TELEPHONE FOR THE CASE MANAGEMENT CONFERENCE SET FOR
MAY 8, 2017**

Comes now, the State, by and through the undersigned counsel and pursuant to Fla. R. Jud. Admin. 2.530, hereby respectfully requests that the Office of the Attorney General and the State Attorney's Office be permitted to appear telephonically for the case management conference scheduled for May 8, 2017 at 1:30 p.m.

WHEREFORE, the State respectfully asks this Court to grant this Motion.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

s/ Vivian Singleton
VIVIAN SINGLETON

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CO-COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 17, 2017, a true and correct copy of the above has been furnished by e-mail/e-portal to: The Honorable Howard Maltz, smiller@circuit7.org (Susan Miller, JA), The Richard O. Watson Judicial Center, 4010 Lewis Speedway, St. Augustine, FL 32084; Office of the State Attorney, Rosemary L. Calhoun, Assistant State Attorney, calhounr@sao7.org, eservicestjohns@sao7.org, 251 N. Ridgewood Avenue, 3rd Floor, Daytona Beach, FL 32115; Capital Collateral Regional Counsel-Middle, David Dixon Hendry, Assistant CCRC, hendry@ccmr.state.fl.us, James L. Driscoll, Jr., Assistant CCRC, driscoll@ccrc.state.fl.us, and George William Brown, Assistant CCRC, brown@ccmr.state.fl.us, support@ccrc.state.fl.us, CCRC-Middle, 12973 N. Telecom Parkway, Temple Terrace, FL 33637, the attorneys for Defendant.

s/Vivian Singleton
VIVIAN SINGLETON

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

NORMAN BLAKE MCKENZIE,

Defendant.

CASE NO. 06001864CF

DIVISION: 56

Death Penalty Case

NOTICE OF SUPPLEMENTAL AUTHORITY

COMES NOW, Defendant, Norman Blake McKenzie, by and through the undersigned counsel, pursuant to Fla. R. App. P. 9.225, and gives notice of his intent to rely on the following supplemental authority in support of previously raised arguments, particularly on the issue of whether the *Hurst* error was harmless in this case:

1. *Dubose v. State*, 210 So.3d 641, 657 (Fla. February 9, 2017) (*Hurst* error not harmless where jury vote was 8-4 for the murder of an eight year old girl. “We have also determined that in cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless.”)

2. *Johnson v. State*, 205 So.3d 1285 (Fla. 2016) (***Hurst* error not harmless in a case with 11-1 votes for each of the three (3) murder convictions, including the murder of a sheriff’s deputy**);

3. *Simmons v. State*, 207 So.3d 860 (Fla. 2016) (*Hurst* error not harmless where the jury vote was 8-4 for the stabbing and beating murder and rape of the female victim, and where the jury completed a special verdict form indicating unanimous votes for three aggravating circumstances);

4. *Franklin v. State*, 209 So.3d 1241 (Fla. November 23, 2016) (*Hurst* error not harmless in the murder of a prison guard where the defendant had previously been serving a life sentence and the jury vote was 9-3);

5. *Williams v. State*, 209 So. 3d 543 (Fla. January 19, 2017) (*Hurst* error not harmless where the jury vote was 9-3 for the murder of an 81 year old female during the commission of a kidnapping and robbery);

6. *Armstrong v. State*, -- So. 3d --, 2017 WL 224428 (Fla. January 19, 2017) (*Hurst* error not harmless where the jury vote was 9-3 for the murder of a sheriff's deputy);

7. *Kopsho v. State*, 209 So. 3d 568 (Fla. January 19, 2017) (*Hurst* error not harmless where the jury vote was 10-2 for the murder of the defendant's wife);

8. *Calloway v. State*, -- So. 3d --, 2017 WL 372058 (Fla. January 26, 2017) (*Hurst* error not harmless in a case with 7-5 votes for each of five execution style murders committed during the commission of armed robbery, armed burglary, and armed kidnapping);

9. *McGirth v. State*, 209 So. 3d 1146 (January 26, 2017) (***Hurst* error not harmless where the jury vote was 11-1 for the murder and robbery of the female victim, and attempted murder of the victim's husband**);

10. *Hojan v. State*, --So. 3d --, 2017 WL 410215 (January 31, 2017) (*Hurst* error not harmless in a case with 9-3 votes for double murder committed during the commission of a armed robbery and armed kidnapping); and

11. *Durousseau v. State*, --So 3d --, 2017 WL 411331 (January 31, 2017) (*Hurst* error not harmless where the jury vote was 10-2 for the murder by strangulation and rape of the female victim).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on April 20, 2017, we electronically filed the foregoing Notice with the Clerk of the Court by using Florida Courts e-portal filing system which will send a notice of electronic filing to all parties and to Circuit Court Judge Howard M. Maltz.

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Dubose v. State, 210 So.3d 641 (2017)

42 Fla. L. Weekly S143

210 So.3d 641
Supreme Court of Florida.

Rasheem Diquoine DUBOSE, Appellant,
v.
STATE of Florida, Appellee.

No. SC10-2363

February 9, 2017

Synopsis

Background: Following mistrial in first trial, defendant was convicted on retrial in the Circuit Court, Duval County, Lawrence Page Haddock, Jr., J., of first-degree premeditated murder, first-degree felony murder, and shooting into a building, arising from death of eight-year-old child, and was sentenced to death.

Holdings: The Supreme Court held that:

- ^[1] defendant was not entitled to new trial based on allegations of juror misconduct;
- ^[2] trial court's error in asking jurors questions about how alleged misconduct affected their individual verdicts was harmless beyond a reasonable doubt;
- ^[3] any juror misconduct in allegedly educating other jurors on meaning of facial teardrop tattoo did not prejudice defendant, and thus did not require reversal;
- ^[4] evidence was sufficient to support conviction for first-degree premeditated murder;
- ^[5] home's partially fenced yard was part of curtilage of victim's home, so as to support first-degree felony murder conviction based on burglary;
- ^[6] defendant was not entitled to change of venue from county where crime occurred; and
- ^[7] error in imposing death sentence under unconstitutional capital sentencing scheme was not harmless.

Convictions affirmed, death sentence vacated, remanded for new penalty phase proceeding.

Canady and Polston, JJ., concurred as to conviction and dissented as to sentence.

An Appeal from the Circuit Court in and for Duval County, Lawrence Page Haddock, Jr., Judge—Case No. 162006CF018285AXXXMA

Attorneys and Law Firms

Richard Randall Kuritz, Jacksonville, Florida, for Appellant

Pamela Jo Bondi, Attorney General, Carolyn Marie Snurkowski, Associate Deputy Attorney General, and Berdene Bevione Beckles, Assistant Attorney General, Tallahassee, Florida; and Lisa-Marie Krause Lerner, Assistant Attorney General, West

Dubose v. State, 210 So.3d 641 (2017)

42 Fla. L. Weekly S143

Palm Beach, Florida, for Appellee

Opinion

PER CURIAM.

On January 3, 2007, Rasheem Dubose was charged by indictment in Duval County with first-degree murder for the killing of Drewshawna Washington-Davis and with shooting into a building. The charge of one count of possession of a firearm by a convicted felon was later added. The State sought the death penalty. The State originally tried Dubose along with his two brothers, who were charged with the same crimes stemming from the same incident. Though the three brothers were tried together, Dubose had a separate jury. Dubose's first trial resulted in a hung jury and a mistrial was declared. His brothers were convicted on all counts and sentenced to life in prison.

Dubose's second trial began in February 2010. The jury found Dubose guilty of both first-degree premeditated murder and felony murder, with burglary as the underlying felony. He was also found guilty of shooting into a building. The jury voted for *645 imposition of the death penalty by a vote of eight to four. On December 9, 2010, the trial court followed the jury's recommendation and sentenced Dubose to death.

Dubose now appeals his convictions and sentences. We have jurisdiction. See art. V § 3(b)(1), Fla. Const. For the reasons set forth in this opinion, we affirm Dubose's convictions and vacate his sentence of death.

I. STATEMENT OF THE CASE & FACTS

On July 26, 2006, at approximately 4:00 p.m., Willie Davis, Jr., drove his girlfriend, Cinee Tinsley, to the home where she lived with her mother and siblings. As Davis turned onto Tinsley's street, he noticed Dubose's younger brother walking in the street. Davis swerved in an attempt to hit Dubose's younger brother with the car, but was unsuccessful. Dubose's younger brother continued down the street, away from Tinsley's home. Dubose had been on Tinsley's porch with Tinsley's brother and had witnessed the incident. When Davis pulled into Tinsley's yard, Dubose walked toward the car, speaking to Davis through the car window. Davis got out of the car and argued with Dubose for approximately one minute and then returned to the car. Davis quickly drove away from Tinsley's home with Tinsley still inside the car. Davis drove to his father's house, retrieved a gun, and drove back toward Tinsley's home. On the way back to Tinsley's home, Davis told Tinsley "I'm going to make him get naked in the street."

Davis returned to Tinsley's home and saw Dubose still in the front yard with Tinsley's older brother. Davis got out of the car, grabbed Dubose by his shirt, pushed him against a wall, put the gun to the back of his head, and screamed at him to empty his pockets. Dubose complied and emptied his pockets as commanded, after which Davis ridiculed him for not having any money in his pockets. Davis then ordered Dubose to pull his pants down; again, Dubose complied. Tinsley's mother came out of the house and asked Davis to stop what he was doing. He stopped, but Dubose said something that caused Davis to re-engage with him. Tinsley's mother grabbed Dubose and pulled him into her home. Davis and Tinsley left the scene in Davis's car. Dubose left the Tinsley home a short time later on foot.

Dubose went home and told his two younger brothers that Davis had attempted to rob him. After Dubose made a phone call, he threw and shattered his brother's phone and said, "I'm going to kill this nigger." Dubose left his home shortly thereafter. Dubose's younger brother continuously made phone calls to Maxie Wilson, the brothers' cousin, who is a known drug dealer. That day, Maxie Wilson was driving a white Impala rental car, with his friend Sherman Eley in the passenger seat. After finally answering the phone and speaking with Dubose's younger brother, Maxie Wilson drove to the home of the Dubose brothers. Upon arrival, Dubose's brothers got into the back seat of Wilson's car. One of them was armed with a nine-millimeter firearm. Maxie Wilson drove around the corner where Dubose was standing in front of a house. Dubose got into the back seat of the car.

Then, Dubose instructed Maxie Wilson to drive around the corner to where Davis's mother lived. Once they arrived at the

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house, they saw Davis's car parked in the front yard. One of the brothers initially prepared to shoot at Davis's car, but was instructed not to by Sherman Eley. The brothers circled the house again and pulled onto a dirt road behind the house. Maxie Wilson parked the car near the backyard fence line of the victim's house and provided the brothers with two more guns, a .45 *646 caliber pistol and a Glock-nine with an extended magazine, which were both in the car with him prior to the incident. Dubose's brothers armed themselves with the nine-millimeter gun and the .45 caliber gun. Dubose armed himself with the Glock-nine. The Dubose brothers exited the vehicle then jumped a fence to enter Davis's mother's backyard.

Davis and Tinsley had gone to his mother's house after the incident. When they arrived, Davis's mother and stepfather were in the dining area of the residence. Davis was seated on a couch by the window on the side of the house. Three children, including Davis's eight-year-old niece, Drewshawna, were in the bedroom. When the gunfire began, the initial shots were sporadic and then became more continuous. Immediately after the shooting stopped, Tinsley ran to the bedroom to check on the welfare of the children. Drewshawna, who had been shot in the back, lay on top of her younger cousins in a protective position.

After the shooting, the Dubose brothers returned to Maxie Wilson's white Impala. During the car ride, one of the brothers received a phone call that a child had been killed in the shooting. With Sherman Eley still in the passenger seat, Maxie Wilson drove the brothers to a house owned by David Craighton in a secluded, wooded area. Maxie Wilson had previously requested permission to reside at Craighton's home, under the auspices that he needed a place to live with his girlfriend and young child. While at the house, the brothers gave their clothing and weapons to Maxie Williams. Maxie Williams left the brothers at the house, drove Sherman Eley back to his car, which had been parked at an apartment complex in a different neighborhood, and disposed of the clothes and weapons in a dumpster at that apartment complex. The firearms were never recovered. On the evening of July 30, 2006, Craighton came to his house to find the Dubose brothers occupying it. Craighton used a large stick to hold the brothers in the house until the police arrived and arrested them.

Reconstruction of the bullet trajectories revealed that twenty-nine bullets struck the residence, some from the side and some from the rear. Twenty-three of these shots were fired from Dubose's Glock-nine, including the gunshot that killed Drewshawna. The fatal bullet entered the residence through the window on the side of the house, traveled through at least two walls, and entered the bedroom. Someone looking through this window would not have seen the victim in the bedroom, but possibly would have seen someone sitting on the couch near the dining area.

Penalty Phase: State's Witnesses

The penalty phase began on March 9, 2010. The State offered victim impact statements from the victim's grandmothers, the victim's aunt, and the victim's third-grade teacher. The State also offered testimony from Officer Scott Medlock, the officer involved in Dubose's conviction for resisting arrest with violence. Officer Medlock explained his pursuit and subsequent physical altercation with Dubose after he fled following a suspicious person stop. The officer also explained that Dubose apologized and stated that he was not attempting to harm the officer, he just wanted to be free. The officer testified that in hindsight he believed that the defendant was not attempting to harm him, but that belief does not, however, lessen the seriousness of Dubose's actions.

Penalty Phase: Defense Witnesses

In addition to Dubose's family members, who testified on his behalf, Clinical Psychologist and Neurologist, Dr. Hyman Eisenstein, testified as an expert. Dr. Eisenstein testified that Dubose's results on the *647 Comprehensive Test of Basic Skills (CTBS) from first through eighth grade indicate that he scored between the 2nd and 18th percentile (on the low end, 98 percent of the population scored better than him, and on the high end, 82 percent of the population scored better than him). He testified Dubose had academic impairment disability from the first grade through the ninth grade. The doctor also testified that Dubose quit school in the ninth grade but prior to that may have been promoted through special programs or simply promoted despite the fact that he had been failing. Dr. Eisenstein stated there was no indication at all that Dubose was

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malingering.

Dr. Eisenstein indicated that at the age of 25 years and 11 months, Dubose received an IQ Score of 73 on the Peabody Picture Vocabulary, which is equivalent to a ten year old child. He also testified that Dubose received a grade equivalent to a four year old on the WRAT4 (Wide Range Achievement Test, Fourth Edition); he scored in the sixty-ninth percentile on the reading comprehension portion, with anything below the seventieth percentile being considered mild mental retardation. Dubose's verbal comprehension scores on the WAIS-IV (Wechsler Adult Intelligence Scale, Fourth Edition) equaled 70. A new feature of the WAIS-IV is the GAI (general ability index), upon which the defendant scored a 75, in the borderline range. Dr. Eisenstein concluded that Dubose's full scale IQ score was 82, which placed him in the low average range. A PET scan was not conducted, but Dr. Eisenstein stated that other factors present in Dubose's life indicated the possibility that he has sustained some brain damage. Dr. Eisenstein assumed that Dubose has frontal lobe damage, which may have made it difficult for him to get over being humiliated by Davis. On cross-examination, Dr. Eisenstein acknowledged that Dubose actually began the tenth grade before he dropped out, and that there were various behavior problem reports in elementary school. On redirect, Dr. Eisenstein opined that Dubose's three-year participation in football and his participation in boxing could have caused brain impairment.

Dr. Alan Fox, professor at Northeastern University, also testified as an expert for the defense. Dr. Fox explained that poor neighborhoods such as the one where Dubose was raised sometimes have a "code," which is the idea of being respected and important, despite the lack of education or employment. He further explained that in this type of environment, "violence is seen as an appropriate, virtually a required response to being disrespected, being humiliated." Dr. Fox reviewed the thirteen DCF reports which contained information that Dubose's father was arrested for abuse; he determined that Dubose always tried to protect the rest of the family from their father. Dr. Fox testified that because Dubose had no positive role models in his life and because his grandmother worked so much, he modeled himself after other young men in the neighborhood. Associating himself with the people in his neighborhood, opined Dr. Fox, is what taught Dubose the necessity of fighting.

On cross-examination, Dr. Fox acknowledged that on the date of the shooting, Dubose knew right from wrong, he knew that killing was wrong, and that at every step in the events of the day, he could have made different decisions. He also explained that the code of the street may have a different definition of right from wrong than the conventional meaning. Dr. Fox further acknowledged that persons who grow up in rough neighborhoods, may have a better appreciation for the consequences of violence. Dr. Fox stated that the combination of the risk factors in Dubose's life were "tremendous." Dr. Fox *648 opined that the message Dubose may have intended to send was one of deterrence, "Don't mess with us. We're not weak. We won't take it lying down [,]" as opposed to retribution which could have been accomplished by finding Davis and doing something to him personally, one-on-one. Dr. Fox acknowledged that he met with Dubose for a total of forty-five minutes to an hour.

Spencer Hearing

At the conclusion of the penalty phase, the jury recommended by a vote of eight to four that Dubose be sentenced to death for the murder of Drewshawna. Prior to sentencing, the court held a Spencer hearing on November 10, 2010. In consideration of the time between the penalty phase and the Spencer hearing, some of the witnesses repeated their testimony from the penalty phase. Multiple family members and mental health experts testified at the Spencer hearing, including Dr. Eisenstein and Dr. Waldman.

Dr. Eisenstein and Dr. Waldman restated their conclusions that Dubose suffered from frontal lobe damage that significantly impaired his ability to control his impulses. As further mitigation, the defense offered a report that evaluated the results of Dubose's PET scan. Dubose was administered the PET scan in anticipation of the Spencer hearing. Dr. Ruben C. Gur, who evaluated the results and wrote the report that was admitted into evidence, concluded that Dubose suffered abnormalities in regions of the brain that play a significant role in regulating behavior.

II. ANALYSIS

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Juror Misconduct

¹¹Dubose argues that the trial court erred in denying his motion for a mistrial based on juror misconduct. On April 23, 2010, Dubose filed a motion for a mistrial based on alleged juror misconduct. Attached to the motion was an affidavit from a juror. The motion alleged that the jurors had conducted internet research regarding the meaning of the defendant's facial tattoo during the penalty phase deliberations. Also attached were numerous articles regarding the meaning and definition of a teardrop tattoo.¹ The juror's affidavit also stated that the jurors used their cell phones to Google "tear drop tattoos on gang members" to find out what that tattoo meant. Allegedly, they learned that the tattoo is what gang members receive after they kill someone. In addition, the juror alleged that racial references were also made during the deliberations.

¹ Dubose's motion informed the trial court that Dubose's facial tattoo was actually a dollar sign, not a tear drop.

The trial judge held a hearing during which he questioned the juror about some of the allegations made in her affidavit. Much of the testimony that the affiant juror provided was related to unauthorized cell phone usage during the trial. She stated that she did not observe anyone using a cell phone during the guilt phase deliberations, but recalled the jury foreperson using his cell phone on breaks and during sidebars, although she could not see what he was doing on his cell phone. The affiant juror also observed the foreperson on the phone during the penalty phase, but she could not hear his conversation. She also admitted that she used her iPod touch device during the breaks, but she stated that she only played games on it because she could not access the internet in the courthouse.

The affiant juror told the judge that no one appeared to be conducting internet *649 research during deliberations. She also testified that another juror, whom she identified by seat and physical description, used his phone during penalty phase deliberations, but was not observed making a phone call. She further alleged that the jury was not reminded that they were not allowed to have their cell phones during the penalty phase deliberations, and that the phones were not confiscated prior to deliberations.

When questioned regarding her statement that other jurors conducted internet research regarding the meaning of Dubose's facial tattoo, the affiant juror explained that the discussion of Dubose's tattoo occurred during a break and resulted from the defendant cutting his dreadlocks after the guilt phase, thereby making his facial tattoo more visible in the penalty phase. Further, in consideration of the juror's testimony that she could not see what the two jurors who had used their phones were actually doing, the court found her not to be credible on this issue.

When questioned regarding her responses during the polling of the jury in the guilt and penalty phases, the affiant juror inquired as to whether she could be subjected to perjury charges, and ultimately refused to state whether she agreed that the announced verdict reflected her vote. She stated that she did not have a problem with the answer that she gave to the polling question during the guilt phase, but that her answer during the penalty phase bothered her. She explained that she went along with the verdict because she has three children and she did not want to be singled out in a courtroom filled with spectators and media. She further expressed some concern for her children because gang members were involved.

She stated that after the guilt phase, but before the penalty phase, she attempted to contact the trial judge by email, because she did not want to address her concerns in front of the other jury members. She admitted that her emails did not mention that she was a juror in the case and did not state her name or the purpose of her request for an appointment with the judge. She admitted to contacting the Public Defender's Office, a private attorney, and Dubose's defense counsel, claiming to be a friend of a juror in the Dubose case. She was unclear as to who drafted the finalized affidavit that was presented to the trial court. She explained that a private attorney helped her draft her affidavit, typed it, and emailed it to her. She then explained that she spoke on the phone with Dubose's counsel and ultimately met him for lunch to discuss what she perceived to be juror misconduct. Following this initial meeting, she briefly met Dubose's counsel in a parking lot to sign the affidavit that had already been printed and notarized. When the trial judge attempted to gain some clarity on the drafting of the affidavit, the juror refused to answer any more questions.

After the juror interview, the defense made additional arguments in support of a new trial. The trial court entered a written order denying a mistrial and a request for a new trial. The trial court determined that allegations in the juror's affidavit and the defense counsel's motions were contradicted by the information that the juror provided at the hearing. The trial court

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compared the allegations set forth in the juror's affidavit, those raised in the defendant's motions, and the testimony provided by the juror at the hearing, and ultimately found, based in part on the juror's demeanor, that the juror was biased in favor of the defendant and unreliable.²

² At the hearing, the juror was not questioned concerning her allegations of racial references and that the video of the defendant's police interview needed subtitles in order for the jury to understand Dubose's English.

*650 This Court heard oral argument in this case on October 8, 2013. Thereafter, we remanded the case to the trial court for further inquiry of the remaining jurors on the juror misconduct issue, specifically regarding allegations of racial remarks made by jurors; jurors' knowledge of the victim's great-grandmother's burned down house; and cell phone/internet research conducted by the jurors. The trial court subpoenaed the twelve jurors and two alternates. Twelve of the fourteen jurors responded by appearing and giving testimony. One juror had relocated to Georgia and was unable to be served. The affiant juror is the only juror who was served and refused to appear. A significant portion of the proceedings on remand was used to coordinate a date, time and method to interview the affiant juror. The trial court offered to interview her in person, by telephone, and by video; she refused all methods.

Consistent with its initial denial of a mistrial and the request for a new trial, the trial court ultimately found that the affiant juror was not credible and that the examination of the other jurors did not support the allegations made in the motions and the affidavit. Additionally, the trial judge found that the affidavit submitted to the court alleging juror misconduct was not drafted by the juror, but was drafted by Dubose's counsel and that following Dubose's second trial, which is the subject of this appeal, Dubose's attorney formed an attorney-client relationship with the affiant juror. There is competent, substantial evidence in the record to support the trial court's finding, and we, therefore, deny relief on this issue.

The evidence from the jurors interviewed supports the conclusion that some of the jurors had cell phones and tablet devices during the guilt and penalty phases and during breaks, but not during deliberations. None of the interviewed jurors testified that any of the jurors actually used their electronic devices to conduct research related to the case or made disparaging racial remarks about the defendant. There is evidence that the complaining juror improperly used her electronic device to contact Assistant Public Defender Fred Gazaleh, apparently while court was in session. Gazaleh testified that he assumed that court was in session, based on the time of day that he received the messages, and therefore did not feel comfortable responding to the messages. Despite the misconduct on the part of the complaining juror, there is no evidence that the use of the electronic devices contributed to the jury verdict.

At the hearing on remand from this Court, none of the jurors recalled any racial remarks or any remarks about the defendant's hair. Some of the jurors had some knowledge of someone involved in the case or the victim's great-grandmother's housing burning down. Others said they had no knowledge of this event or anyone involved in the case. None of the jurors saw any other juror conducting internet research, although several of the jurors had cell phones and other electronic devices. Several of the jurors indicated that remarks were made about the quality of the video and that the defendant's voice was mumbled as he did not speak clearly into the microphone. The testimony on remand did produce evidence that during the penalty phase, one member of the jury stated that a teardrop tattoo indicated that someone had been to jail or was remembering somebody who died. This was not *651 evidence adduced at trial. Furthermore, the evidence indicates that this remark was not made during the course of deliberations nor to the entire jury panel.

¹²Following the trial court's decision on remand, Dubose filed a motion in this Court for additional briefing, alleging that the trial judge had asked the jurors improper questions regarding how the juror misconduct allegations affected their individual verdicts. Although the trial court indeed conducted an improper inquiry as to matters that inhere to the jury verdict, we find that this error was harmless.

¹³In State v. Hamilton, 574 So.2d 124 (Fla. 1991), this Court agreed with the test formulated by the Fifth Circuit Court of Appeals³ and adopted by the Eleventh Circuit Court of Appeals⁴ that when questioning jurors regarding allegations of juror misconduct, a judge or counsel is to limit the inquiry to an "objective demonstration of extrinsic factual matter disclosed in the jury room," and "must not inquire into matters relating to the jurors' thought processes." Id. at 129. "Having determined the precise quality of the jury breach, if any, the [trial] court must then determine whether there was a reasonable possibility that the breach was prejudicial to the defendant." Id. (quoting United States v. Howard, 506 F.2d 865, 869 (5th Cir. 1975))

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(emphasis added)). This test was reiterated by this Court in Keen v. State, 639 So.2d 597 (Fla. 1994).

³ See United States v. Howard, 506 F.2d 865 (5th Cir. 1975).

⁴ See United States v. Perkins, 748 F.2d 1519 (11th Cir. 1984).

During the inquiry of the jurors in Keen, the trial judge asked them whether an article concerning the tactics of defense attorneys in criminal cases found in the jury room influenced their decisions; the jurors stated that it did not. Id. at 599. The trial judge denied the defendant's motion for a new trial, but this Court reversed. Id. at 599–600. We found that the trial judge erred in questioning jurors about the items which factored into their decision-making process. Id. at 599. We also found that we could not say beyond a reasonable doubt that the trial court error was harmless, and we concluded that the defendant was entitled to a new trial. Id. at 600 (citing State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986)); see also Devoney v. State, 717 So.2d 501 (Fla. 1998).

The trial judge in this case also made an inquiry into matters that factored into the jury's decision-making process; such an inquiry was error. Nonetheless, it does not appear that the trial court relied on the improper inquiry to deny the motions for mistrial and for a new trial on remand. The trial judge instead found that none of the other jurors committed juror misconduct, and he denied the motions on this basis. Therefore, the asking of the improper question was not the basis of the denial of the motions. Under the circumstances of this case, the trial court's error was harmless beyond a reasonable doubt. See DiGuilio, 491 So.2d at 1139.

Additionally, regarding any allegation that racial remarks, unauthorized materials, or outside research affected the verdict, relief is not warranted. No juror testified that any racial remarks were made. While the evidence from the jurors interviewed supports the conclusion that some of the jurors had cell phones and tablet devices during breaks and lunch in the guilt and penalty phases, no juror recalled anyone's use of electronic devices during deliberations. Further, each of the jurors denied using his or her cell phone to access the internet or to conduct outside research. To the extent that cell phones were inside the jury room and could be considered *652 unauthorized materials in the jury room, based on the evidence in this case, "it is not reasonable to assume that jurors derived any prejudicial legal or factual conclusions" from these devices. Hamilton, 574 So.2d at 130–31.

¹⁴ Assuming that one juror educated the other jurors on the meaning of a teardrop tattoo during the penalty phase after observing a tattoo on the defendant's face—which apparently was not a teardrop—there was conflicting testimony as to the brevity of the discussion and the source of the juror's knowledge is unclear. Whether or not it could be considered to be improper discussion and not a matter inhering in the verdict, there is no reasonable probability that this breach was prejudicial during the penalty phase of his trial. See id. Dubose had already been convicted of murder and during the penalty phase, the jury was informed that Dubose had a prior violent felony. In addition, through the testimony of Dubose's own witness, the jury learned that Dubose had been incarcerated awaiting the trial of this case.

Sufficiency of the Evidence

¹⁵ ¹⁶ ¹⁷ ¹⁸ The evidence in a capital case is judged to be sufficient when it is both competent and substantial. See Phillips v. State, 39 So.3d 296, 308 (Fla. 2010). In conducting its review, this Court looks at the evidence in the light most favorable to the State to determine if a rational trier of fact could find the elements of the crime were proven beyond a reasonable doubt. See Rodgers v. State, 948 So.2d 655, 674 (Fla. 2006) (quoting Bradley v. State, 787 So.2d 732, 738 (Fla. 2001)). Furthermore, when a general verdict is rendered by the jury after the jury was instructed on both premeditated first-degree murder and first-degree felony murder, this Court will affirm the conviction if either form of first-degree murder is supported by competent, substantial evidence. See Crain v. State, 894 So.2d 59, 73 (Fla. 2004). Here, the jury was instructed on both first-degree premeditated murder and first-degree felony murder, with burglary being the underlying felony. The defendant

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was convicted of first-degree murder under either theory.⁵

⁵ The jury additionally found that the defendant discharged a firearm causing death or great bodily harm during the commission of the offense.

¹⁹First, there is sufficient evidence in this case to support a conviction for first-degree premeditated murder. This Court has stated that

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

Bradley, 787 So.2d at 738 (quoting Woods v. State, 733 So.2d 980, 985 (Fla. 1999)). Premeditation may be inferred from such facts as “the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.” Id. (quoting Norton v. State, 709 So.2d 87, 92 (Fla. 1997)).

The State introduced competent, substantial evidence of Dubose’s guilt. The State proved that the Dubose brothers stealthily drove around the back of Vonnie Frazier’s home, jumped a fence to get closer to the house and stood in the yard while relentlessly spraying the house with bullets. Dubose’s premeditated design to kill is evidenced by the fact that he armed *653 himself with a weapon, went to the victim’s home with the weapon displayed, and shot that weapon, a Glock-nine with the capability to travel through at least two walls, into an open window of an occupied home. One of these bullets ultimately killed Drewshawna. Therefore, we find that the facts of this case provide competent, substantial evidence to support Dubose’s first-degree premeditated murder conviction.

Additionally, the State presented sufficient evidence to support the first-degree felony murder conviction. The jury found Dubose guilty of first-degree felony murder, with burglary as the underlying felony. Burglary is a qualifying felony that supports a conviction for first-degree felony murder. See § 782.04(1)(a)2.e., Fla. Stat. (2006). As discussed below, the State’s evidence demonstrated that the Dubose brothers unlawfully entered the curtilage of Vonnie Frazier’s home, committing burglary, when they shot Drewshawna. Therefore, because we find that Dubose had premeditated intent to kill, and that he committed a burglary during the shooting, we affirm his conviction for first-degree murder.

Burglary

¹¹⁰ ¹¹¹Dubose argues that the underlying felony, burglary, was not proven at trial, and he therefore cannot be convicted of felony murder. In Dubose’s first trial, defense counsel filed a motion in limine with a memorandum of law to prohibit the State from arguing felony murder on the theory of burglary, arguing that the gap in the fence allowing for the driveway prevents the yard from being considered curtilage under this Court’s decision in State v. Hamilton, 660 So.2d 1038 (Fla. 1995). This motion was denied. The defense renewed this motion at the beginning of the second trial. The trial court once again denied this motion. Therefore, this claim was preserved. See Steinhorst v. State, 412 So.2d 332, 338 (Fla.1982) (“in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.”) (emphasis added).

During the jury charge conference, the State moved the trial court to add a sentence to the verdict form at the end of the definition of a structure, to read: “The space of ground immediately surrounding the structure does not have to be totally enclosed.”⁶ In objecting to the State’s motion, defense counsel argued the standard jury instruction is sufficient. Defense counsel then generally argued that the victim’s home did not have a gate and was not capable of being totally enclosed. Relying on this Court’s decision in Hamilton, the trial court denied the State’s motion.

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⁶ Based on the statements of the prosecutors, two previous juries had asked this same question. It is not clear from the record whether the prosecutors are referring to the juries that found the other Dubose brothers guilty, or if one of the referenced juries includes the jury in Dubose's first trial, where a mistrial was declared.

Dubose's brother raised this same argument in his appeal to the First District Court of Appeal. Dubose v. State, 75 So.3d 383, 384–85 (Fla. 1st DCA 2011). In finding that "the fencing around the residential yard in the instant case ... satisfies the enclosure requirement in Hamilton," the First District stated:

The area surrounding a dwelling or structure must lie within "some form of an enclosure" to be considered part of the curtilage. State v. Hamilton, 660 So.2d 1038, 1044–45 (Fla. 1995). In this case, the yard of the home Appellant and his brothers fired upon had a chain link fence around it, with an opening in front for the driveway. This court recently held that the enclosure "need not be continuous[,] and an ungated opening *654 for ingress and egress does not preclude a determination that the yard is included in the curtilage of the house."

Id. at 385. We approve the reasoning and decision of the First District in Dubose, and find that the trial court did not commit reversible error by allowing the instruction on felony murder based on burglary to go to the jury.

Motion for Change of Venue

^{12]}Dubose argues that the trial court should have granted his motion for change of venue. We find that the trial judge did not err in denying Dubose's motion. Section 47.121, Florida Statutes (2010), states that "[a] change of venue shall be granted when it appears impracticable to obtain a qualified jury in the county where the action is pending." This Court has determined that some knowledge of the case by potential jurors is not sufficient reason standing alone to require a change of venue. In McCaskill v. State, 344 So.2d 1276 (Fla. 1977), we articulated the test as follows:

Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

Id. at 1278 (quoting Kelley v. State, 212 So.2d 27, 28 (Fla. 2d DCA 1968)); accord Manning v. State, 378 So.2d 274, 276 (Fla. 1979).

^{13]} ^{14]}As this Court made clear in Rolling v. State, 695 So.2d 278, 285 (Fla. 1997), in ruling on a motion for a change of venue, the trial court should consider: "(1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury." In evaluating the first prong,

the trial court must consider numerous factors, such as: (1) the length of time that has passed from the crime to the trial and when, within this time, the publicity occurred; (2) whether the publicity consisted of straight, factual news stories or inflammatory stories; (3) whether the news stories consisted of the police or prosecutor's version of the offense to the exclusion of the defendant's version; (4) the size of the community in question; and (5) whether the defendant exhausted all of his peremptory challenges.

Id. at 285 (citations omitted).

The first three factors of the first prong can best be addressed collectively. The shooting in this case occurred on July 26, 2006. The first trial, involving all three defendants, occurred in January 2010. Jury selection in the second trial began on February 8, 2010. Prior to the first trial, the defense filed a pretrial motion to change venue, citing extensive pretrial publicity. The defense attached a study regarding the effects of pretrial publicity on juror verdicts, along with numerous news articles

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addressing the story. Most of the news articles attached to the defendant's motion are dated the same week that the crime occurred and contained basic facts obtained as the story developed. The major basis for many of the news articles was the fact that the Mayor of Jacksonville funded a task force to allow the Sheriff to pay police officers more overtime, in order to patrol "high risk" areas in Jacksonville, to deal with the widespread murders in the areas. In these articles, the mayor and the sheriff urged the community to assist in decreasing the *655 crime rate and generally warned all of the criminals that they would be caught.

The news articles published close in time to the crimes also provided information such as who the persons of interest were and the reason for the shooting, as alleged by neighbors. Many of the news reports cited the basis for the shooting as a retaliatory or "respect shooting," indicating that the suspects at that time shot into the house in retaliation for a robbery that occurred earlier that day. The news reports attached to the motion detail the court appearances of the brothers, as well as the person that the brothers were allegedly aiming for, Willie Davis, Jr. On the one-year anniversary of the victim's death, there was an article advertising a memorial service, which a few of the jurors remembered seeing. There were two articles attached, dated early February 2008, which detailed the disciplinary files of all three brothers since they were arrested for the crimes.

In one of these articles, a representative of the Jacksonville Sheriff's Department made multiple disparaging remarks about all three defendants, referring to them as "miscreants," "a menace to society," calling their behavior "despicable," and stating that "they are in the right place." The articles attached that were written in 2009 (the latest dated May 2009) provided information about court hearings and indicated that the state sought to have separate trials, and seek the death penalty for Dubose and life sentences for the other two defendants. The latest dated article attached to the motion was dated the same week as the trial, and included a detailed timeline of events since the incident and a diagram of the home where the victim was shot.

The attached articles do not indicate that the entire community was biased against Dubose in a manner that would make it impossible to choose an impartial jury. Additionally, the attached articles do not exclude the defendants' version of events; some of the articles even include excerpts from the police interrogation where the defendant denies any involvement in the crime. Further, even considering the disparaging remarks made by the representative of the Sheriff's Department, there was no indication that any of the jurors read that article, or adopted those views to the point that the jurors' ability to be impartial was jeopardized. Although the defense renewed its motion for a change of venue at the beginning of the second trial, there is no evidence that the defense supplemented the record with news reports that occurred after the first trial, but before the second trial.

As to the fourth factor of the first prong, there were no arguments made that the defendants could not receive a fair trial in Duval County, based on the size of the county. During the individual voir dire process, each juror indicated that, if chosen for the jury, he or she could be fair and impartial and only decide the case based on the evidence presented in the trial. Finally, the defense used all ten of its peremptory challenges, along with three additional challenges that were requested and granted.⁷ A fourth additional peremptory challenge was requested, but denied.

⁷ The defense raised a standing objection to any juror that had knowledge that there was a mistrial in Dubose's previous trial. The court consistently denied this motion, reasoning that the jurors are qualified as long as they do not share the information with another juror and as long as the juror states that the knowledge of the previous mistrial will not affect his or her impartiality. The defense sought additional peremptory challenges, reasoning that it used at least three of its peremptory challenges on potential jurors that the defense argues should have been stricken for cause. In recognizing that the trial court had the authority to grant the peremptory challenges "free and liberally," the court granted both sides three additional peremptory challenges, following individual requests by the defense. The court denied the defense's request for a fourth additional peremptory challenge.

*656 As to the second prong, the defense and the State were able to agree on a jury panel and two alternates with approximately five jurors remaining who had not been stricken. The defense counsel did not appear to have any difficulty in selecting jurors who indicated that they could be fair and impartial in this case. In fact, even the potential jurors who had extensive prior knowledge of the case indicated that their knowledge did not result in any bias toward the defendant.

This case is distinguishable from Manning v. State, 378 So.2d 274 (Fla. 1979), where this Court determined that the trial court abused its discretion in denying the defendant's motion to change the venue of the trial. Manning was a young, Black

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male from a different county who was arrested in a rural county and charged with murdering two Caucasian sheriff's deputies. *Id.* at 276. The pretrial publicity included information provided to the media regarding the version of events represented by the state attorney's office and the local sheriff's department, which contradicted the version of events given by the appellant shortly after his arrest. *Id.* at 275. Every person on Manning's perspective jury "had prior knowledge of the alleged crimes through news media accounts and community discussion." *Id.*

The defense attached various newspaper articles to the motion, as well as affidavits of fifteen persons, including the defendant, stating that because of bad feelings and prejudice against the defendant and because of the adverse publicity concerning the case, the affiants were convinced by reason of personal observations and knowledge of the conduct and statements by various persons in Columbia County that the defendant could not receive a fair and impartial trial in that county. In addition, the defendant alleged that local police officers made various threats against his life, physically and verbally abused him, and harassed his mother when she came to visit him in jail.

Id. The jury found the appellant guilty and recommended imposition of the death penalty.

In this case, the defendant lived in the same county where the crime occurred. As expected, the death of an innocent child may draw just as much emotion and media attention as the killing of two police officers. Here, fifty-three of the sixty-nine potential jurors admitted to seeing or hearing media coverage of the case. The individual voir dire sessions revealed that while few potential jurors knew intricate details of the case or had followed the first trial, many of the potential jurors only read or heard from the media reports that a child was killed in a "drive by" shooting, where she was not the target, which is essentially the same information that was provided to the potential jurors during the court's summary at the beginning of jury selection. One of the alternate jurors had the most information about the case, and was able to recite the basic facts and procedural posture of the case.

Of the 53 jurors who admitted to previously hearing some information about the case, six were chosen to serve on the jury and two were chosen as alternates. The other six jurors indicated that they had not previously heard about the case before reporting for jury duty. Although Dubose claims that the media attention surrounding the incident portrayed Dubose and his brothers in a very negative light, none of the potential or actual jurors indicated that *657 the media attention caused them to view Dubose or his brothers with any preconceived bias or hostile feelings. Therefore, the trial court properly denied Dubose's motion for change of venue.

Cumulative Error

^[15]The defense argues that it was denied a fair trial based upon the trial court's failure to grant its motion for change of venue and its motion for mistrial based on juror misconduct. However, where the individual claims of error are without merit, the claim of cumulative error must fail. *Griffin v. State*, 866 So.2d 1, 22 (Fla. 2003). It does not appear that the trial court committed error in denying the defendant's motions for change of venue and for mistrial. Therefore, the defense is not entitled to relief on this claim.

Constitutionality of the Sentencing Statute

^[16]Dubose contends that his death sentence is unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). During the pendency of Dubose's direct appeal, the United States Supreme Court found Florida's capital sentencing scheme unconstitutional in violation of the Sixth Amendment right to a jury trial. *Hurst v. Florida*, — U.S. —, 136 S.Ct. 616, 619, 193 L.Ed.2d 504 (2016). In *Hurst v. State*, we explained that the jury in a capital case must find the following facts unanimously: "the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." 202 So.3d 40, 53 (Fla. 2016). We have determined that section 775.082(2), Florida Statutes, does not require us to remand all

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death penalty cases for the imposition of a life sentence. See *id.* at 63–66. See also *Franklin v. State*, — So.3d —, 41 Fla. L. Weekly S573, 2016 WL 6901498 (Fla. Nov. 23, 2016). We have also determined that in cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless. See *Id.* at —, at S575.

Because the recommendation of death in this case was not unanimous, we cannot find beyond a reasonable doubt that the error did not contribute to Dubose’s sentence. Accordingly, Dubose is entitled to relief, and we need not address the proportionality of his sentence or his other claims relating to the penalty phase.⁸

⁸ Dubose also claimed the following related to his penalty phase: (1) trial court erred in refusing to consider as mitigation Dubose’s attempt to enter into a plea agreement; and (2) the trial court erred in denying Dubose’s motions for continuance based on the defense’s request for a PET scan amid suspicions of brain injuries and in denying a continuance of the *Spencer* hearing to allow a continuance to have testimony regarding the PET scan that was done between the penalty phase hearing and the *Spencer* hearing.

III. CONCLUSION

For the above stated reasons, we affirm Dubose’s convictions, vacate Dubose’s death sentence, and remand for a new penalty phase proceeding.

It is so ordered.

LAWSON, J., did not participate.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.

CANADY and POLSTON, JJ., concur as to the conviction but dissent as to the sentence.

All Citations

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Johnson v. State, 205 So.3d 1285 (2016)

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205 So.3d 1285
Supreme Court of Florida.

Paul Beasley JOHNSON, Appellant,
v.
STATE of Florida, Appellee.

No. SC14-1175.

Dec. 1, 2016.

Synopsis

Background: Defendant was convicted in the Circuit Court, Polk County, Donald G. Jacobsen, C.J., of first-degree murder and was sentenced to death. The Supreme Court, 438 So.2d 774, affirmed on direct appeal. Defendant subsequently petitioned for writ of habeas corpus after death warrant was signed.

[Holding:] The Supreme Court held that penalty phase jury's failure to find facts necessary to support imposition of death sentence was not harmless error.

Vacated and remanded.

Perry, J., filed opinion concurring in part and dissenting in part.

Polston, J., dissented.

Attorneys and Law Firms

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Opinion

PER CURIAM.

This case is before the Court on appeal from sentences of death. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. Because the jury that recommended Johnson's death sentences did not find the facts necessary to sentence him to death, we vacate Johnson's death sentences and remand this case to the circuit court for a new penalty proceeding. *See Hurst v. Florida*, — U.S. —, 136 S.Ct. 616, 624, 193 L.Ed.2d 504 (2016); *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Hurst v. State*, 202 So.3d 40 (Fla.2016).

FACTS

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In 1981, Paul Beasley Johnson was convicted of, among other crimes, three counts of first-degree murder in the deaths of William Evans, Daryl Ray Beasley, Jr., and T.A. Burnham. *Johnson v. State*, 438 So.2d 774, 775–76 (Fla.1983). We affirmed Johnson's convictions and death sentences on direct appeal. *Id.* at 780. After the Governor signed a death warrant for Johnson, we granted Johnson's petition for a writ of habeas corpus, holding that appellate *1287 counsel in Johnson's direct appeal was ineffective for failing to raise a claim related to the sequestration of the jurors. *Johnson v. Wainwright*, 498 So.2d 938, 939 (Fla.1986).

Following a 1987 mistrial, Johnson was retried and was again convicted and sentenced to death. *Johnson v. State*, 608 So.2d 4, 8 (Fla.1992).

The following evidence was presented at the new trial. The evening of January 8, 1981 Johnson and his wife visited their friends Shayne and Ricky Carter. During the evening they all took injections of crystal methedrine and smoked marijuana. Johnson left the Carters' home later in the evening, and Ricky testified that Johnson said he was going to get more drugs and that he might steal something or rob something. Shayne testified that Johnson said that he was going to get money for more drugs and that "if he had to shoot someone, he would have to shoot someone."

A taxicab company dispatcher testified that driver William Evans went to pick up a fare at 11:15 p.m. on January 8 and called in to confirm the fare fifteen minutes later. Around 11:55 p.m. a stranger's voice came over the radio. Among other things, the stranger said that Evans had been knocked out. He stayed in touch with the dispatcher off and on until about 2:00 a.m. The dispatcher did not hear Evans after 11:30 p.m., and workers in an orange grove found Evans' body on January 14. Evans had been robbed and shot twice in the face. Searchers found his taxicab, which had been set on fire, in an orange grove about a mile from Evans' body.

When she got off work in the early hours of January 9, 1981, Amy Reid and her friend Ray Beasley went to a restaurant for breakfast. Johnson approached them in the parking lot and asked for a ride, claiming that his car had broken down. Beasley agreed to drive Johnson to a friend's house. During the drive, Johnson asked Beasley to stop the car so that he could urinate. While out of the car, Johnson asked Beasley to come to the rear of the car. When Reid looked back, she saw Johnson holding a handgun pointed at Beasley. She then locked the car's doors, moved to the driver's seat, and drove away to look for help.

Reid telephoned the sheriff's department from a convenience store, and deputies Clifford Darrington and Samuel Allison responded to her call around 3:45 a.m. The deputies drove Reid back to where she had left Johnson and Beasley, but found no one there. Back in the patrol car they heard a radio call from another deputy, Theron Burnham, advising that he had seen a possible suspect on the road. When they arrived at Burnham's location, they found his patrol car parked with the motor running, the lights on, and a door open, but could not see Burnham. Johnson, however, walked in front of their car, spoke to them, and then began firing at them with a handgun. The deputies returned Johnson's shots, and he ran across a field and disappeared among some trees. Allison then found Burnham's body in a roadside drainage ditch. He had been shot three times, and his service revolver was missing.

Later that day, Beasley's body was found seven-tenths of a mile from where Burnham was killed. He had been shot once in the head, and his body was in a weedy area and could not be seen from the road. Although there were some coins in his pockets, his wallet was gone. The following afternoon Johnson's wife was still at the Carters' home. They saw a police sketch of the suspect in the *1288 night's events in a newspaper and discussed whether it looked like Johnson. Johnson telephoned the Carters' home, and, after speaking with him, his wife became very upset. Ricky Carter asked Johnson if he had done the killings reported in the newspaper, and Johnson replied: "If that's what it says." Carter went to pick up Johnson, taking a shirt that Johnson changed into. Johnson threw the shirt he had been wearing, which had been described in the newspaper, out the car's window. While driving home, Carter heard Johnson's wife ask, "You killed him, too?" to which Johnson replied, "I guess so." At the Carters' home Johnson told them that he hit the deputy with his handgun when told to place his hands on the patrol car and then struggled with him, during and after which he shot the deputy three times.

The authorities arrested Johnson for the Beasley and Burnham murders on January 10 and charged him with Evans' murder the following week. Reid, Allison, and Darrington identified him, and his fingerprints were found in Evans' taxicab.

While Johnson was in jail awaiting trial, inmate James Leon Smith was in a cell near him. At trial Smith testified that

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Johnson told him that he killed a taxicab driver and set the taxicab on fire to destroy his fingerprints, that he shot Beasley while Beasley was on his knees and stole one hundred dollars from Beasley, and that he shot the deputy.

We affirmed Johnson's convictions and sentences. *Id.* at 13.

Johnson filed an initial postconviction motion in 1994. *Johnson v. State*, 769 So.2d 990, 992 (Fla.2000). The postconviction court denied the motion, and we affirmed. *Id.* at 1006. In 2002, we denied Johnson's petition for a writ of habeas corpus. *Johnson v. Moore*, 837 So.2d 343, 348 (Fla.2002). Johnson filed a successive postconviction motion in 2003. The postconviction court denied Johnson's motion, and we affirmed. *Johnson v. State*, 933 So.2d 1153 (Fla.2006) (table decision).

In 2007, Johnson filed a second successive postconviction motion. *Johnson v. State*, 44 So.3d 51, 56 (Fla.2010). The postconviction court denied Johnson's claim. *Id.* Shortly thereafter, the Governor signed a second death warrant. *Id.* With both the appeal and death warrant pending, Johnson filed a third successive postconviction motion. *Id.* We held that newly discovered evidence revealed that the jailhouse informant, James Leon Smith, "was acting as a government agent, and his testimony and notes concerning Johnson's statements should have been suppressed." *Id.* at 64. We further held that "the misconduct of the original prosecutor in this case, Hardy Pickard, ... tainted the State's case at every stage of the proceedings and irremediably compromised the integrity of the entire 1988 penalty phase proceeding." *Id.* at 64, 73. While we found any problem harmless as to Johnson's convictions, we reversed the postconviction court's denial of Johnson's second postconviction motion, vacated the sentences of death, and ordered a new penalty phase proceeding before a new jury. *Id.* at 68–69, 73–74.

Following a new penalty phase proceeding in 2013, the jury recommended that Johnson be sentenced to death by votes of eleven to one for each of the three murders. The sentencing court considered six statutory aggravating circumstances,¹ *1289 three statutory mitigating circumstances,² and ten nonstatutory mitigating circumstances,³ and imposed the death sentences. Johnson now appeals to this Court.

¹ (1) The sentencing court found that Johnson had committed a prior violent felony and gave that factor great weight as to all three murders. (2) The sentencing court found that Johnson had murdered Evans during the commission of a kidnapping or arson but gave it no weight because it may have constituted improper doubling. Additionally, the sentencing court explicitly did not find that Johnson had murdered Beasley during a kidnapping or arson. (3) The sentencing court found that Johnson had murdered both Evans and Beasley for financial gain and gave that factor great weight as to both murders. (4) The sentencing court explicitly did not find that Johnson had murdered Burnham in order to avoid arrest because this factor merged with the law enforcement victim aggravating factor. (5) The sentencing court found that one of Johnson's victim, T.A. Burnham, was a law enforcement officer engaged in the performance of his official duties and gave that factor extreme great weight. (6) The sentencing court found that Johnson had murdered both Evans and Beasley in a cold, calculated, and premeditated manner, and gave that factor very great weight as to both murders.

² The sentencing court found that: (1) Johnson committed the murder while under the influence of extreme mental or emotional disturbance and gave that factor slight weight; (2) Johnson had an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law and gave that factor slight weight; and (3) other factors in Johnson's character, background, or life mitigate against the imposition of the death penalty and gave that factor moderate weight.

³ The sentencing court found that: (1) Johnson suffered from brain damage and drug use that may have impaired his ability to reflect on and consider his actions and gave that factor moderate weight; (2) Johnson was the biological son and grandson of violent alcoholics and gave that factor slight weight; (3) Johnson's mother was sick throughout her pregnancy and had a traumatic childbirth with him, and gave that factor slight weight; (4) Johnson's mother suffered physical abuse from Johnson's father while Johnson was developing in the womb and gave that factor slight weight; (5) Johnson was abandoned by his biological father and mother as a toddler and gave that factor very slight weight; (6) Johnson was raised by his elderly paternal grandparents and gave that factor slight weight; (7) Johnson had attempted to reunite with his son and wife, and gave that factor slight weight; (8) Johnson began to abuse alcohol, drugs, and inhalants at a young age and gave that factor slight weight; (9) Johnson could be punished by the imposition of three consecutive life sentences and gave that factor very slight weight; and (10) Johnson could be required to serve those three life sentences consecutively after he has completed the other prison terms to which he had been sentenced, and

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gave that factor very slight weight.

ANALYSIS

[1] Johnson argues that his death sentences violate *Ring* and *Hurst v. Florida* because his penalty phase jury did not find the facts necessary to sentence him to death. We agree. *See Hurst v. Florida*, 136 S.Ct. at 624; *Ring*, 536 U.S. at 609, 122 S.Ct. 2428; *Hurst*, 202 So.3d at 59. We reject the State's contention that Johnson's contemporaneous convictions for other violent felonies insulate Johnson's death sentences from *Ring* and *Hurst v. Florida*. *See Hurst*, 202 So.3d at 53 n. 7. However, we also reject Johnson's argument that section 775.082(2), Florida Statutes (2015), requires that we remand Johnson's case to the trial court for imposition of a life sentence. *See Hurst*, 202 So.3d at 47.

[2] [3] [4] [5] [6] Because a sentencing error "in which the judge rather than the jury made all the necessary findings to impose a death sentence [] is not structural error incapable of harmless error review," the only remaining question is whether the violation of *Hurst v. Florida* in this case was harmless. *Hurst*, 202 So.3d at 67. We conclude that the error was not harmless beyond a reasonable doubt.

The harmless error test, as set forth in *1290 *Chapman [v. California]*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967),] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

State v. DiGuilio, 491 So.2d 1129, 1135 (Fla.1986). In the context of a sentencing error, the relevant question is whether "there is [a] reasonable possibility that the error contributed to the sentence." *Zack v. State*, 753 So.2d 9, 20 (Fla.2000).

[I]n the context of a *Hurst v. Florida* error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to *Hurst's* death sentence in this case.

Hurst v. State, 202 So.3d at 68. We also clarify what the test is not:

The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

DiGuilio, 491 So.2d at 1139.

After reviewing the evidence in this case, we cannot conclude beyond a reasonable doubt that the *Hurst v. Florida* sentencing error in this case would have been harmless beyond a reasonable doubt. *Cf. Hurst v. State*, 202 So.3d at 82–83.

The facts of this case obviously include substantial aggravation. Johnson set out on a drug-fueled hunt for money to purchase more drugs, so determined to succeed that "if he would have to shoot someone, he would have to shoot someone." Johnson murdered a taxi driver who had been dispatched to pick up a fare, a Good Samaritan who Johnson tricked into believing that his car was broken down, and a deputy sheriff who had stopped Johnson as part of the manhunt for the perpetrator of Johnson's two earlier murders.

However, "[t]he record in this case demonstrated that the evidence of mitigation was extensive and compelling." *Id.* Johnson suffered brain damage, making him more prone to drug dependency, and at the time of the murders was under the influence of a form of drug-induced psychosis and delirium. Following a lifetime of drug abuse that began at a very young age, Johnson had been ingesting marijuana and crystal methedrine on the night of the murders, which impacted his ability to

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appreciate the criminality of his conduct. Johnson's upbringing contributed to his problems. He was abandoned by his parents to his elderly grandparents after birth, and both Johnson's biological father and biological grandfather were violent alcoholics. Johnson was held back numerous times in school and never progressed beyond the seventh grade. Even before his birth, Johnson suffered: his mother was sick throughout the pregnancy and received little or no prenatal care; and Johnson's biological father regularly beat Johnson's mother while she was pregnant with Johnson. Over the past thirty years, Johnson has been a good prisoner with few disciplinary reports and has been very remorseful concerning the murders.

We are unable to conclude "beyond a reasonable doubt [that] there is no possibility that the *Hurst v. Florida* error in this case contributed to the sentence." *Id.* As in *Hurst*,

[b]ecause there was no interrogatory verdict, we cannot determine what aggravators, *1291 if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

Id. On this record, with a nonunanimous jury recommendation and a substantial volume of mitigation evidence, we simply cannot conclude, "beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *State v. Ring*, 204 Ariz. 534, 65 P.3d 915, 946 (2003). Accordingly, "we must find reversible error and remand the case for resentencing." *Id.*

CONCLUSION

In light of the foregoing, we vacate Johnson's death sentence and remand for a new penalty phase proceeding.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and PERRY, JJ., concur.

PERRY, J., concurs in part and dissents in part with an opinion.

POLSTON, J., dissents.

QUINCE and CANADY, JJ., recused.

PERRY, J., concurring in part and dissenting in part.

I concur in the majority's decision to vacate Johnson's death sentences because they violate the Sixth Amendment. *See* majority op. at 1286; *see also Hurst v. State*, 202 So.3d 40, 75–76 (Fla.2016).

However, I respectfully dissent from the majority's decision not to apply the plain text of section 775.082(2), Florida Statutes. Because his death sentences are unconstitutional, Johnson is entitled to the remedy that the Legislature has specified. The sentencing court must sentence him to life in prison. *See* § 775.082(2), Fla. Stat. (2015).

The statute's language is clear and unambiguous.

In the event *the death penalty in a capital felony is held to be unconstitutional* by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the

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court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

Id. (emphasis added). We need engage in no further legal gymnastics to carry out the will of the Legislature. *See, e.g., English v. State*, 191 So.3d 448, 450 (Fla.2016) (“When the statutory language is clear or unambiguous, this Court need not look behind the statute’s plain language or employ principles of statutory construction to determine legislative intent.”).

Life in prison is the default position for a defendant convicted of capital murder. In order to increase that default sentence to death, there must be a constitutional means of imposing a death sentence. The majority and I agree that Johnson was not sentenced to death in a manner compliant with the Constitution. Accordingly, death is not an option: the sentencing court must impose life sentences pursuant to section 775.082(2), Florida Statutes. For that reason, I would remand this case to the trial court for the imposition of life *1292 sentences. *See Hurst v. State*, 202 So.3d at 75–76 (Perry, J., dissenting).

All Citations


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Simmons v. State, 207 So.3d 860 (2016)

41 Fla. L. Weekly S622

 KeyCite Blue Flag – Appeal Notification
Petition for Certiorari Docketed by FLORIDA v. ERIC LEE SIMMONS, U.S., March 24, 2017

207 So.3d 860
Supreme Court of Florida.

Eric Lee SIMMONS, Appellant,
v.
STATE of Florida, Appellee.

No. SC14-2314
|
[December 22, 2016]

Synopsis

Background: Following affirmance, 934 So.2d 1100, of his convictions for kidnapping, sexual battery, first degree murder and sentence of death, defendant filed motion for postconviction relief. The Circuit Court, Lake County, T. Michael Johnson, J., denied the motion, and defendant appealed. Defendant also filed petition for writ of habeas corpus. The Supreme Court, 105 So.3d 475, affirmed in part, reversed in part, remanded, and denied writ. On remand, the Circuit Court, Lake County, Don F. Briggs, C.J., imposed the death sentence at resentencing proceeding. Defendant appealed.

Holdings: The Supreme Court held that:

- [1] jury's written findings as to aggravating factors and mitigation were insufficient to meet the requirements of the Sixth Amendment as mandated in *Hurst v. Florida*, or the requirements of Florida's right to jury trial, and
- [2] error in imposing death sentence in the absence of a unanimous finding by the jury that the aggravating factors were sufficient, or that they outweighed the mitigating circumstances, was not harmless.

Vacated and remanded.

Perry, J., filed opinion concurring in part and dissenting in part.

Canady and Polston, JJ., dissented.

An Appeal from the Circuit Court in and for Lake County, Don F. Briggs, Chief Judge—Case No. 352001CF002577XXXXXX

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Opinion

*861 PER CURIAM.

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Simmons v. State, 207 So.3d 860 (2016)

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Eric Lee Simmons appeals the death sentence imposed after a resentencing proceeding. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons explained below, we vacate the sentence and remand for resentencing based on Hurst v. State (Hurst), 202 So.3d 40 (Fla. 2016). Although the jury was provided an interrogatory verdict form in this case, the jury did not unanimously conclude that the aggravating factors were sufficient, or that the aggravating factors outweighed the mitigating circumstances. These findings are necessary pursuant to our decision in Hurst.

FACTS AND PROCEDURAL BACKGROUND

Simmons, age twenty-seven at the time of the murder, was convicted of the December 2001 kidnapping, sexual battery, and stabbing and beating death in Lake County, Florida, of Deborah Tressler, a woman Simmons had befriended. Simmons was sentenced to death after a unanimous jury recommendation in the first penalty phase. Pursuant to section 921.141, Florida Statutes (2003), the trial court found three aggravating factors: prior violent felony; commission of murder during the commission of, or attempt to commit, a sexual battery, a kidnapping, or both; and that the murder was especially heinous, atrocious, or cruel. These were found by the trial court to outweigh eight nonstatutory mitigating circumstances identified by the court.

On direct appeal, this Court affirmed the convictions and death sentence. Simmons v. State, 934 So.2d 1100 (Fla. 2006). Simmons then filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851. The motion was denied by the trial court, and Simmons appealed to this Court. Simmons also filed a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel. We denied the petition for habeas relief and affirmed the denial of relief on all postconviction claims but one. We vacated the sentence of death and remanded for a new sentencing proceeding because trial counsel failed to fully investigate and present mitigating evidence regarding Simmons's childhood and mental health. Simmons v. State, 105 So.3d 475 (Fla. 2012).

At the conclusion of the new penalty phase, the jury returned a special interrogatory verdict indicating a unanimous finding that each of the three following aggravating factors was established beyond a reasonable doubt: (1) prior violent felony; (2) the murder was committed while Simmons was engaged in the commission of a sexual battery, a kidnapping, or both; and (3) the murder was especially heinous, atrocious, or cruel. The jury unanimously rejected the two proposed statutory mental health mitigating circumstances,¹ but six jurors found that a list of 29 nonstatutory mitigating circumstances was established by the greater weight of the evidence. The jury then issued an advisory sentence recommending death by a vote of eight to four.

¹ See § 921.141(6)(b), Fla. Stat. (the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance); § 921.141(6)(f), Fla. Stat. (substantial impairment of the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law).

After a Spencer² hearing, the trial court entered a sentencing order imposing a sentence of death. Simmons then filed a notice of appeal of the death sentence to this Court, raising six issues.³ The State filed a *862 cross-appeal on the issue of the trial court's order denying the State's objection to PET scan⁴ evidence, but subsequently filed a notice of voluntary dismissal of the cross-appeal.

² Spencer v. State, 615 So.2d 688 (Fla. 1993).

³ Simmons contended that: (1) relevant expert mitigation was erroneously excluded at the second penalty phase; (2) the trial court erred in weighing mitigating evidence and erroneously rejected the statutory mitigator of substantial inability to conform conduct to the requirements of law; (3) the death sentence is disproportionate; (4) the jury was incorrectly instructed on the "especially heinous, atrocious, or cruel" aggravator; (5) the trial court erred in denying a mistrial after the jury heard that the penalty

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proceeding was a resentencing; and (6) Simmons is entitled to relief under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

4 Positron Emission Tomography.

Shortly before oral argument was held in this case, the United States Supreme Court issued its decision in Hurst v. Florida (Hurst v. Florida), —U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), in which the Supreme Court held that the procedure by which defendants are sentenced in capital cases in Florida was unconstitutional. The Supreme Court held that the jury, not the judge, must make all the critical findings necessary for imposition of a sentence of death. Hurst v. Florida, 136 S.Ct. at 622. Because of the import of the Supreme Court's Hurst v. Florida decision in this case, we ordered supplemental briefing to be filed prior to oral argument. Further, after the issuance of our decision on remand in Hurst, we permitted the parties to file additional supplemental briefing. We will discuss the impact of Hurst v. Florida and Hurst on Simmons's appeal after a more detailed review of the underlying facts in this case.

The evidence presented during the guilt phase of trial established the following:

[O]n December 3, 2001, at approximately 11:30 a.m., John Conley, a Lake County Sheriff's Office (LCSO) deputy, discovered the body of Tressler in a large wooded area commonly used for illegal dumping.

....

The medical examiner, Dr. Sam Gulino, observed the victim and the surroundings at the scene on December 3, 2001, with the victim lying on her left side with her right arm over her face. Dr. Gulino estimated the time of death was twenty-four to forty-eight hours before the body was discovered.

Dr. Gulino performed an autopsy, which revealed numerous injuries. Tressler suffered some ten lacerations on her head, as well as numerous other lacerations and scrapes on her scalp and face. There was a very large fracture on the right side of her head, and her skull was broken into multiple small pieces that fell apart when the scalp was opened. Dr. Gulino opined that this injury and the injuries to her brain resulted in shock and ultimately Tressler's death. There was another fracture that extended along the base of the skull, resulting from a high-energy impact; bleeding around the brain; and bruises in the brain tissue where the fractured pieces of skull had cut the brain. There were numerous stab wounds on the neck, a long cut across the front and right portions of the neck, and other bruises and cuts. There was little bleeding from these injuries, indicating that the victim was already dead or in shock at the time of the injuries. The victim also suffered a stab wound in the right lower part of her abdomen that extended into her abdominal cavity and probably occurred after she received the head injury. There were also injuries to her anus with bruising on the right buttock extending into the anus, and the wall of the rectum was lacerated. These injuries were inflicted before death. Dr. Gulino opined that these injuries would be painful and not the result of consensual anal intercourse. The victim suffered numerous defensive wounds on her forearms *863 and hands. There was also a t-shaped laceration on the scalp and an injury at the base of her right index finger that was patterned, as if a specific type of object, like threads on a pipe, had caused it. Dr. Gulino opined that the attack did not occur at the exact spot where Tressler was found because of the lack of blood and disruption to the area, but stated that the position of Tressler's body was consistent with an attack occurring in that area.

On December 4, 2001, Robert Bedgood, a crime scene technician, collected evidence from Tressler's body during the autopsy. Dr. Jerry Hogsette testified that, based on the temperature in the area of Tressler's body and the development of the insect larvae taken from Tressler's body, Tressler had been killed between midnight on December 1, 2001, and early Sunday morning, December 2, 2001.

....

Andrew Montz testified that late on the night of December 1, 2001, he was at the Circle K convenience store at the intersection of State Road 44 and County Road 437 in Lake County. Mr. Montz saw a white four-door car heading northbound on 437, stopping at the traffic light very slowly, when a woman opened the passenger door and screamed,

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"Somebody help me. Somebody please help me." The driver pulled the woman back into the car and ran the red light quickly. Mr. Montz stated that the woman was wearing a white T-shirt or pajama-type top. He was not able to see the driver and described the car as a Chevy Corsica/Ford Taurus-type car with a dent on the passenger side, black and silver trim on the door panel, and a flag hanging from the window. After viewing a videotape of a white 1991 Ford Taurus owned by Simmons a year later, Mr. Montz identified it as being the car he saw on December 1. Mr. Montz initially told lead Detective Stewart Perdue that the car had spoked rims, but after viewing spoked rims at an auto parts store, he concluded that the rims on the car he saw were not spoked.

Sherri Renfro testified that she was at the same Circle K as Montz between 11:30 and 11:40 p.m. with her sister-in-law's boyfriend, Shane Lolito. She also saw a white car slowly approach the red light, the passenger door open, and a woman yell for help while looking directly at Ms. Renfro. Ms. Renfro yelled at the driver to stop, but he did not, and Ms. Renfro got into her van and chased after the car. She traveled in excess of the speed limit, but was unable to get close to the car and eventually lost track of it.... Ms. Renfro subsequently identified Simmons' white Ford Taurus as the car she saw at the intersection, and she recognized the interior, the bumper sticker, and the flag on the car. Ms. Renfro identified Tressler as the woman in the car when shown a photograph of her.

....

Simmons waived his Miranda rights and stated that he was friends with Tressler and had tried to help her improve her living conditions. Simmons explained to Detective Perdue that on December 1, 2001, he and Tressler had been watching the Florida-Tennessee football game at his apartment in Mount Dora. The reception was bad, so Tressler asked him to take her to the laundromat or her trailer so she could watch the game. He took her to the laundromat and then drove home because Tressler and he were supposed to go to work together early the next morning for his father's landscaping business. He stated that he had engaged in sexual intercourse with Tressler on one occasion approximately two weeks before the interview, even though Simmons' semen was found in Tressler's vaginal washings *864 during her autopsy. During a break in the interview, the detectives learned that blood had been found in Simmons' car. After the detectives informed Simmons of this, he stated, "Well, I guess if you found blood in my car, I must have did it."

Simmons, 934 So.2d at 1105-08 (footnotes omitted). Mitochondrial DNA (mtDNA) evidence found in Simmons's car was consistent with that of Tressler's mother.⁵ Id. at 9.

⁵ The State's forensic DNA analyst explained that mtDNA is inherited maternally, and mtDNA testing is a better technique than Short Tandem Repeat (STR) technique when the blood sample is degraded, as it was in this case. See Simmons, 934 So.2d at 1108.

Because this jury did not hear the evidence that was initially presented during the guilt phase of trial, the State presented much of the same evidence through live witnesses during the new penalty phase proceeding. Other evidence of aggravating circumstances was presented by way of stipulation and by a certified copy of prior convictions. The defense then presented its case for mitigation, and the State presented rebuttal evidence.⁶

⁶ The mitigation evidence included testimony from Dr. Edward Wiley, a pathologist who testified that Tressler could have been unconscious when much of the injuries were inflicted. Pastor Bill Cox testified that Simmons grew up with an abusive father. Simmons's aunt, Faye Byrd, testified that Simmons was mentally slow growing up and that his home life was disruptive. Simmons's sister, Ashley Simmons, testified that their father was strict and sometimes abusive and that Simmons had a learning disability. Simmons's father, Terry Simmons, testified that Simmons was almost suffocated as a baby, was rushed to the hospital, and thereafter was slow mentally. Simmons's mother testified that she and her husband were strict and would also fight in front of the children. Simmons's aunt, Ruby D'Antonino, testified that Simmons was slow to develop as a child and that his grandfather was abusive to him. Eric Mings, Ph.D., a forensic psychologist specializing in neuropsychology, testified concerning Simmons's childhood and traumatic childhood incidents. Dr. Frank Wood, a neuroscientist and clinical neuropsychologist, testified concerning PET scan imaging of Simmons's brain. Dr. Michael Foley, a diagnostic radiologist, testified about the PET scan images. Dr. Joseph Wu, a psychiatrist and neurocognitive imaging director, explained the import of Simmons's PET scan. Dr. Mark Cunningham, a clinical and forensic psychologist, testified about Simmons's childhood familial and community factors affecting his development and actions; and finally Simmons's daughter testified about how much she misses her father. The State presented a psychiatric and neurology expert and a physician who was board certified in diagnostic radiology to rebut the PET scan evidence.

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After the jury issued its advisory verdict, the trial court held a Spencer hearing at which Simmons presented Dr. Cunningham to testify that Simmons was intellectually disabled as a child. No evidence was presented as to whether Simmons is intellectually disabled as an adult. Dr. Cunningham also testified that, in his opinion, Simmons would adjust well to life in prison without the possibility of parole. Several correctional officers testified about Simmons's conduct in prison.

The trial court issued its sentencing order and, in finding and weighing the aggravating factors, the court found that Simmons had been convicted of a prior aggravated assault on a law enforcement officer in Lake County in 1996, which Simmons conceded. The arrest affidavit for that prior crime indicated Simmons was being pursued in a high-speed chase and deliberately veered into the officer's lane, causing him to take evasive action to avoid a collision. The trial court found this aggravating factor was proven beyond a reasonable doubt and gave it moderate weight. The court also found that the murder of Tressler was committed while Simmons was engaged in or attempting to commit a sexual battery, a kidnapping, or *865 both. Simmons had been found guilty of the crimes of sexual battery and kidnapping in the first trial when he was convicted of the murder. The court assigned this aggravating factor great weight.

As a third aggravating factor, the trial court found the murder was especially heinous, atrocious, or cruel based on the testimony about Tressler's injuries and the fact that prior to her death, she appeared terrified as she attempted to escape from Simmons. Based on evidence that Tressler was in fear when she was kidnapped, had multiple defensive injuries inflicted by more than one weapon, and endured a painful anal injury and multiple blows to her head, the court found that the murder was committed in an especially heinous, atrocious, or cruel manner. This aggravating factor was assigned great weight.

In mitigation, the trial court found that the statutory mitigating circumstance that the murder was committed while Simmons was under the influence of an extreme mental or emotional disturbance had not been proven by the greater weight of the evidence. The jury likewise unanimously rejected this statutory mitigator in the interrogatory verdict. As to the statutory mitigating circumstance that Simmons's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, the jury unanimously rejected this mitigator, and the trial court also found it was not proven. The trial court did find mitigation under the statutory catch-all provision that includes any other factors in the defendant's background that would mitigate against imposition of the death penalty. The trial court found, as did six members of the jury, that 29 mitigating circumstances were established, which were each accorded varying degrees of weight by the court.⁷ Considering all 29 mitigating circumstances in the aggregate, the trial court accorded this nonstatutory mitigation moderate weight overall. Two additional mitigating circumstances, which were not presented to the jury, were considered by the trial court based on evidence presented at the Spencer hearing. Mitigating circumstance (30), that Simmons was intellectually disabled as a child, was found proven by the greater weight of the evidence and given moderate weight. Mitigating circumstance (31), that Simmons would adjust well to life in prison, was found proven and the court gave it slight weight.

⁷ These mitigating circumstances included evidence of a brain abnormality; learning disability; ADHD (Attention Deficit Hyperactivity Disorder); low IQ; alcohol abuse; lack of social skills; lack of education and academic achievement; being a hard worker; assisting his family; being loving to children, his family, and animals; being religious; lack of paternal guidance and bonding; childhood poverty; sexual, verbal, and physical abuse of self and family members in childhood; and being a loving father.

Lastly, the trial court separately considered the expert testimony presented at the Spencer hearing concerning the question of Simmons's intellectual disability in light of the United States Supreme Court decision in Hall v. Florida, — U.S. —, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), which held that Florida's strict cutoff of an IQ score of 70 could not be constitutionally enforced to preclude consideration of the remaining prongs of the test for intellectual disability as a bar to the death penalty. The Supreme Court held that the trial court must take into consideration the standard error of measurement of plus or minus five points along with the other two factors—adaptive deficits and onset before age 18.⁸ The trial court proceeded to evaluate the Spencer hearing expert testimony in light of the three-prong test for intellectual *866 disability and concluded that Simmons's subaverage intellectual functioning did manifest before age 18 and was most likely caused by his early childhood brain injury after a near-suffocation incident. The court found that Simmons's range of test scores, mostly in the low 70s, when viewed with credible evidence that Simmons suffered oxygen deprivation as a child, indicated that subaverage general intellectual functioning was sufficiently established, and required further consideration of the adaptive deficit prong of the test.

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- ⁸ Section 921.137(1), Florida Statutes (2014), provides generally that for a defendant to be intellectually disabled and not subject to the death penalty, the defendant must prove significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.

As to the adaptive deficit prong, the trial court concluded that there was little evidence that focused on current deficits in adaptive functioning. Credible evidence was presented that as an adult, Simmons was able to function in the community, maintain employment, handle a bank account, and drive a car. Although evidence showed Simmons was immature for his age, he lived on his own, took care of his infant daughter, and was a father figure to his daughter's half-brothers. On this issue, the trial court concluded that there was a lack of credible evidence of concurrent deficits in adaptive behavior that is required for proof of intellectual disability. However, the sentencing order stated that "this court has duly considered mitigating evidence wherever it was presented in the record and has assigned moderate weight as nonstatutory mitigation to its findings of brain damage, learning disability, low IQ, ADHD, and evidence indicating mild intellectual disability as a child."⁹

- ⁹ We do not have before us a claim for intellectual disability as a bar to the death penalty. Both parties, in their briefs, agree that this last prong, adaptive functioning, was "superfluous" because Simmons was not attempting to prove intellectual disability as a bar to the death penalty, but presented the evidence at the Spencer hearing simply as nonstatutory mental health mitigation.

After entry of the sentencing order in which the trial court imposed a sentence of death, this appeal ensued. Although Simmons presents multiple issues on appeal, we conclude that the Hurst claim is dispositive. Therefore, we decline to reach the other issues raised.

ANALYSIS

In Hurst v. Florida, the United States Supreme Court held that Florida's capital sentencing scheme violated the Sixth Amendment. 136 S.Ct. at 621. The Supreme Court concluded that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Id. at 619. On remand from the Supreme Court, we held that "in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge." Hurst, 202 So.3d at 54. We further held that a unanimous jury recommendation is required before a trial court may impose a sentence of death. Id. Finally, we determined that the error defined in Hurst is capable of harmless error review. Id. at 67.¹⁰

- ¹⁰ We rejected Hurst's contention that in light of Hurst v. Florida, section 775.082(2), Florida Statutes (2015), mandates that all sentences of death be commuted to life in prison without the possibility of parole. Id. at 66. We reject a similar claim raised by Simmons.

¹¹ *867 We conclude that Hurst error occurred in this case even though the jury did make written findings as to the aggravating factors and the mitigation. Although this information was helpful to the trial court when Simmons was sentenced, it does not meet the requirements of the Sixth Amendment as mandated in Hurst v. Florida and the requirements of Florida's right to jury trial under article I, section 22, of the Florida Constitution, as we explained in Hurst. Although the interrogatory verdict provided in this case states the aggravating factors unanimously found by the jury, it does not show unanimous findings that the aggravating factors are sufficient to warrant imposing death, nor does it show that the jury unanimously found that the aggravating factors outweighed the mitigating circumstances. Significantly, the jury recommendation for death was not unanimous.

- ¹² Because Hurst error occurred in this case, we turn to the question of whether that error was harmless. The State, as

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beneficiary of the error, must prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of a death sentence did not contribute to Simmons's death sentence in this case. We conclude that the State cannot meet this burden.

The jury voted eight to four in favor of death. Even though the jurors unanimously found the aggravating factors, we cannot determine with any certainty which aggravating factors the jurors may have found sufficient to support imposition of death, nor can we determine whether four jurors voted for life because the aggravators were insufficient, the mitigators were weightier, or simply as an exercise of mercy.¹¹ We decline to speculate as to the reasons why four jurors voted for life in this case. Thus, we cannot say beyond a reasonable doubt that there is no possibility that the Hurst error contributed to the jury recommendation of death in this case.

¹¹ The nonstatutory mitigation was submitted to the jury as one list containing 29 possible mitigating circumstances with only one aggregate vote called for. The jury's vote of six to six in finding those circumstances established, although indicating that only six jurors found all 29 circumstances proven, does not negate the possibility that other jurors found some or even most of the 29 circumstances proven.

CONCLUSION

In light of the foregoing, Simmons's death sentence is vacated, and the case is remanded to the trial court for a new penalty phase proceeding.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.

PERRY, J., concurs in part and dissents in part with an opinion.

CANADY and POLSTON, JJ., dissent.

PERRY, J., concurring in part and dissenting in part.

I concur with the majority's determination that the Sixth Amendment requires that we vacate Simmons's death sentence. However, because Florida law requires that Simmons be sentenced to life in prison as a consequence of his unconstitutional death sentence, I disagree with the majority's decision to remand for a new penalty phase proceeding instead of remanding for imposition of a life sentence. See § 775.082(2), Fla. Stat. (2016).

As I explained fully in Hurst v. State, 202 So.3d 40, 75–76 (Fla. 2016) (Perry, J., concurring in part and dissenting in part), there is no compelling reason for this Court not to apply the plain language of section 775.082(2), Florida Statutes. Because the majority of this Court has determined that Simmons's death sentence was unconstitutionally imposed, Simmons is entitled *868 to the clear and unambiguous statutory remedy that the Legislature has specified:

In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

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See § 775.082(2), Fla. Stat. (emphasis added). The plain language of the statute does not rely on a specific amendment to the United States Constitution, nor does it refer to a specific decision by this Court or the United States Supreme Court. Further, it does not contemplate that all forms of the death penalty in all cases must be found unconstitutional. Instead, the statute uses singular articles to describe the circumstances by which the statute is to be triggered. Indeed, the statute repeatedly references a singular defendant being brought before a court for sentencing to life imprisonment. I consequently cannot agree that the statute was intended as a fail-safe mechanism for when this Court or the United States Supreme Court declared that the death penalty was categorically unconstitutional. Cf. Hurst v. State, 202 So.3d at 66.

All Citations


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Franklin v. State, 209 So.3d 1241 (2016)

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 KeyCite Blue Flag – Appeal Notification
Petition for Certiorari Docketed by FLORIDA v. RICHARD P. FRANKLIN, U.S., March 28, 2017

209 So.3d 1241
Supreme Court of Florida.

Richard P. FRANKLIN, Appellant,
v.
STATE of Florida, Appellee.

No. SC13-1632.

Nov. 23, 2016.

Synopsis

Background: Defendant was convicted in the Circuit Court, Columbia County, Paul Spurgin Bryan, J., of first degree murder and was sentenced to death. He appealed.

Holdings: The Supreme Court held that:

[1] evidence demonstrated premeditated killing, and

[2] error in permitting jury to recommend sentence of death without finding facts necessary to sentence him to death was not harmless.

Affirmed in part, vacated in part, and remanded.

Canady and Polston, JJ., concurred in part and dissented in part.

Attorneys and Law Firms

*1242 Nancy Ann Daniels, Public Defender, and Nada Margaret Carey, Assistant Public Defender, Second Judicial Circuit, Tallahassee, FL, for Appellant.

Pamela Jo Bondi, Attorney General, and Robert James Morris, III, Assistant Attorney General, Tallahassee, FL, for Appellee.

Opinion

PER CURIAM.

This case is before the Court on appeal from a judgment of conviction of first-degree murder and a sentence of death. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons discussed below, we affirm the conviction, vacate the sentence of death, and remand for a new capital sentencing proceeding.

*1243 STATEMENT OF THE CASE & FACTS

Franklin v. State, 209 So.3d 1241 (2016)

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Richard Franklin appeals his conviction and sentence for the first-degree murder of Sergeant Ruben Thomas. At all relevant times, Franklin was an inmate at the Columbia Correctional Institution (CCI), Annex Unit in Columbia County, Florida. He was serving life sentences for prior convictions of first-degree murder and armed robbery with a firearm as well as a term of years for a prior conviction of aggravated battery with a firearm. Franklin was residing in room 3206 on the second floor of Quad 3, T Dorm. Two or three months before the murder in question, Franklin's cellmate, Robert Acree, sold Franklin the murder weapon: a 10.5 inch by 1.5 inch shank or knife.

Thomas was a corrections officer at CCI. On the night of his murder, Thomas was working the 4 p.m. to 12 a.m. shift in T Dorm as the dorm sergeant. He and dorm Officer Bradley Myer were stationed in the officer's station or control room. The officer's station was surrounded by a large octagon-shaped sallyport or vestibule that, in turn, separated the officer's station from the four surrounding quads where the inmates resided. There was an additional area within the sallyport that separated the sallyport from the entrance to the officer's station, with an outer swinging door leading into the additional area and an inner door leading from that area into the officer's station. Because the control consoles for T Dorm's quads were located in the officer's station, at least one officer always had to be present in the officer's station in order to operate the controls.

On March 18, 2012, shortly after the 10:30 p.m. master count of the inmates, Franklin removed from the air vent in his cell a piece of cardboard that typically was used to control the cell's temperature. He then used the Quad 3 intercom to summon Thomas to the cell under the false pretense that water was leaking from the vent. Thomas informed Myer that he was going to inspect an inmate's cell. Once Thomas entered Quad 3, he generally inquired about who had water coming from their vent, to which Franklin responded, "Up here, Sarge," and called out his cell number.

Thomas approached the cell, and Franklin called him to the back to look up at the vent. Witnesses testified that Thomas was carrying a bag of potato chips at that time and did not appear prepared to fight. The record generally reflects that either as Thomas was inspecting the vent or as soon as he looked back down, Franklin punched him in the face, breaking his nose and causing it to bleed "real bad." A brief tussle ensued, during which time Franklin hit Thomas in the stomach and chest area and knocked Thomas's radio out of his hand. Thomas's panic button also ended up on the floor.

Thomas managed to disengage himself and flee from the cell. Myer testified that he saw Thomas running across the second-floor catwalk toward the front of the quad, down the staircase, out the quad's sliding entrance door, and toward the outer officer's station door in the sallyport. By the time Thomas reached the bottom of the staircase, Franklin emerged from the cell while brandishing his shank and ran or "fast walked" in the same direction as Thomas. The sliding entrance door was closing, but Franklin managed to capture it and push it back far enough to squeeze through into the sallyport.

As Thomas approached the officer's station, he hollered, "back door, back door," meaning for Myer to unlock the outer door to the officer's station. Myer complied and simultaneously radioed for backup. Once Thomas got through the outer door, *1244 he tried to close it. However, Franklin caught up and wedged his foot in the doorway to prevent the door from shutting and locking. Franklin testified that he initially did not think he would catch Thomas, but when he was able to wedge the outer door, he got excited and thought to himself, "I got you," and that he had an opportunity to "whup [Thomas's] ass."

A struggle over the outer door ensued; Thomas tried to pull the door closed while Franklin attempted to force it open. Each time the door opened, Franklin struck at Thomas with the shank in a downward motion. Inmate Samuel Selig specifically recalled Franklin burying the shank into Thomas' neck, causing blood to squirt inside the vestibule area just outside the officer's station. He also recalled the outer door eventually closing, after which Thomas fell to his hands and knees, coughed up blood, and rolled over onto his back. The struggle lasted approximately thirty seconds.

By that time, inmates in each quad had gathered on the quad windows in observation. They began beating on the glass and hollering. Franklin subsequently walked around the vestibule and made a cutthroat gesture with his right thumb toward the inmates. He then entered Quad 2.¹

¹ The record reflects that several events relevant to Franklin's other convictions occurred while he was in Quad 2. Chiefly, he sucker punched Officer William Brewer, crushing his orbital socket and causing partial vision loss in his right eye. Franklin also confiscated Brewer's pepper spray canister.

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Captain Michelle Nipper responded to the annex. Upon arriving at T Dorm, she ordered the officers to lock down the inmates in each quad. A standoff at the Quad 2 door eventually began between Franklin and the corrections officers; Franklin was locked inside the quad, and the officers were gathering in front of the quad door within the vestibule. At some point, Franklin brandished his shank and a canister of pepper spray. Captain Nipper ordered Franklin to relinquish the items and surrender, but he refused. Franklin removed prison uniforms from a laundry bag, tied them together, and fastened the garments to the outside of the showers and the fire exit door to prevent the officers from entering the quad through that door. He returned to the quad's front door, bellowed to Nipper, "Bitch, you ain't taking me alive," and violently shook the door.

Shortly thereafter, the Designated Armed Response Team or "DART" members arrived at T Dorm. Franklin entered cell 2108 on Quad 2's first floor and broke the sprinkler head, causing the fire alarm and strobe lights to activate. Because water erupted from the sprinkler system, an ankle-high flood filled the quad and vestibule.

Additional officers, along with Assistant Warden Tony Anderson, had arrived at Quad 2's front entrance by that time. Franklin continued to disobey the officers' orders to relinquish his weapons and surrender himself. One of the officers sprayed Franklin with chemical gas through a porthole in the quad door in an attempt to force him to relinquish the weapons. Franklin wiped his face off and said in a "pissed off" manner, "I'm going to get another one of y'all, y'all come on. I'm ready for you." Franklin also attempted to spray the officers with his canister of pepper spray but ran out.

Using a non-lethal round, a DART member shot Franklin in the upper torso. Franklin fell to the floor and dropped his shank and pepper spray. The officers then rushed into the quad, administered *1245 more of the chemical gas, and apprehended Franklin.

Thomas died as a result of a laceration wound almost three inches in depth to the left side of his neck. The jugular vein and small blood vessels from the subclavian artery were cut. Thomas's left lung was punctured, and as a result, one fifth of his blood filled the left chest cavity and caused the lung to collapse. Thomas also sustained incised wounds on the right side of his face and the left scalp, a fractured temporal bone, eight sharp-force defensive wounds on his arms, and at least fourteen blunt-force defensive wounds to other parts of his body.

On June 19, 2013, a jury convicted Franklin of first-degree premeditated murder.² During the penalty phase, the State presented evidence of Franklin's prior convictions and also permitted Thomas's mother and his fiancée to read prepared victim impact statements. The defense called Franklin's father and sister in mitigation. Franklin also testified in his defense, during which he explained the circumstances surrounding his prior convictions. The jury ultimately recommended a sentence of death by a nine-to-three vote.

² Franklin was also charged with one count of possession of contraband by an inmate and one count of aggravated battery on a law enforcement officer in connection with him striking Officer Brewer in Quad 2. He was convicted as charged on the first count and, as to the second, convicted of the lesser included offense of felony battery.

Following a *Spencer*³ hearing, the trial court, on August 2, 2013, sentenced Franklin to death.⁴ In imposing the death sentence, the trial court found five aggravating factors,⁵ no statutory mitigating factors, and seven nonstatutory mitigating factors.⁶ It concluded "that the aggravating factors clearly, convincingly, and beyond a reasonable doubt outweigh the mitigating factors. In fact, the mitigating evidence 'is minimal and does not come close to outweighing the aggravating factors.'" This appeal follows.

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

⁴ The trial court also sentenced Franklin to terms of years of five and fifteen years for the felony battery and possession of contraband convictions, and ordered all of the sentences to run consecutively to each other and to the sentences imposed for Franklin's prior convictions.

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- ⁵ The aggravators were: (1) previously convicted of a felony and under a sentence of imprisonment or placed on community control or on felony probation—great weight; (2) prior violent felony conviction—great weight; (3) capital felony was committed to disrupt or hinder the lawful exercise of any governmental function—substantial weight; (4) the murder was especially heinous, atrocious, or cruel—very great weight; and (5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification—very great weight. The trial court also found an additional aggravating circumstance—the victim was a law enforcement officer engaged in the performance of his official duties—but merged it with the disrupt/hinder aggravator.
- ⁶ Regarding the nonstatutory mitigators, the trial court found that Franklin: (1) had a childhood and adolescent years that were troubled, unstable, and violent—little weight; (2) was a great brother and uncle—little weight; (3) suffered a head injury from a gunshot wound as a teenager—some weight; (4) was effectively abandoned by his family—little weight; (5) intervened when a fellow inmate was being attacked—some weight; (6) exhibited good behavior during trial—little weight; and (7) exhibited remorse—very little weight.

ANALYSIS

Sufficiency of the Evidence

^[1] ^[2] Franklin chiefly argues that the record does not support his conviction of *1246 first-degree murder. He admits that he murdered Thomas using a homemade shank but contends that the evidence presented at trial failed to show a premeditated design to kill him. In every capital case involving the imposition of the death penalty, this Court independently reviews the record to ensure there was sufficient evidence to sustain the conviction. *Dausch v. State*, 141 So.3d 513, 517 (Fla.2014). There was sufficient evidence to sustain a conviction “if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt.” *Johnston v. State*, 863 So.2d 271, 283 (Fla.2003) (citing *Banks v. State*, 732 So.2d 1065 (Fla.1999)); see also *Dausch*, 141 So.3d at 517 (outlining elements of first-degree premeditated murder); § 782.04(1)(a) 1., Fla. Stat. (2012).

^[3] According to this Court’s precedent,

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

Bradley v. State, 787 So.2d 732, 738 (Fla.2001) (quoting *Woods v. State*, 733 So.2d 980, 985 (Fla.1999)). Premeditation may be inferred from circumstantial evidence such as “the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.” *Id.* We have deemed evidence sufficient to support a finding of premeditation where it demonstrated a break between an initial crime and the ultimate decision to kill the victim. See *Miller v. State*, 42 So.3d 204, 228 (Fla.2010) (“Miller’s statements that there was a break between his initial struggle with Smith during the attempted robbery and the ultimate decision to fatally stab her indicate that he was conscious of the nature of the act he was about to commit and the probable result of that act.”).

^[4] Applying these principles, we conclude that the evidence in this case sufficiently demonstrates a premeditated killing. Regarding the nature of the murder weapon, Franklin killed Thomas with a homemade shank that he acknowledged was a dangerous weapon. The shank was 10.5 inches long and 1.5 inches wide. Its blade was extremely rough and caused jagged edges around Thomas’s laceration and incised wounds. Expert testimony indicated that because the blade was blunt, more force was required to push it through one’s skin than that required for a standard knife. Finally, Franklin testified that he wrapped rope around the shank’s handle so it would not fall off his wrist, presumably when using it in combat.

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Next, the defense presented direct evidence that Thomas conducted three unnecessary “shakedowns” or searches of Franklin’s cell, spoke with Franklin aggressively, and at one point ensured that Franklin was either the last inmate to eat or did not eat at all at dining time. Franklin testified that several days before the murder, a “childish” altercation regarding one of the dorm gates developed between him and Thomas. After he realized that discussing the altercation in private would not resolve the issue, Franklin invited Thomas to “handle [it] head up” in his cell or at the barber shop. According to Franklin, Thomas responded, “If you want me in there, you know how to get me down there.”

Franklin and his roommate, Robert Acree, testified that on the night in question, *1247 Franklin removed a piece of cardboard from the cell vent that Acree typically used to control the air circulation. Franklin then used the quad intercom system to summon Thomas to the second-floor cell under the false pretense that water was leaking from the vent. Acree and another inmate testified that Thomas was eating a bag of potato chips and did not appear prepared to fight when he arrived at Franklin’s cell. They also testified that once Thomas came into the cell and looked up at the vent, Franklin punched Thomas in his face, causing his nose or mouth to bleed profusely. Acree further explained that Thomas appeared shocked and caught unaware. A tussle ensued, during which time Franklin hit Thomas twice more and knocked his radio out of his hand. The record reflects that Thomas’s panic button also fell to the floor.

In light of these incidences, there undoubtedly were previous difficulties between the parties. The evidence nevertheless shows that Franklin unilaterally decided to resolve his and Thomas’s dispute in a violent manner. And the fact that Franklin created the opportunity and need to engage in physical combat before sucker punching Thomas militates against the conclusion that the attack was not adequately provoked.

Even based on Franklin’s version of the events, we are not convinced that Thomas expected a fight. Franklin testified that once Thomas came to the back of the cell and looked up at the vent, Franklin asked, “[W]hat’s up? What’s up now?” Thomas simply “laughed ... and he went to eating his chips.” At that point, Franklin struck Thomas. On cross-examination, Franklin explained that he perceived Thomas’s laughing as not taking the situation seriously and that Franklin wanted to get the “fun and game[s] over with” because the joke was going to continue.

As to the nature and manner of the homicide and wounds inflicted, Thomas managed to disengage himself from the initial tussle and run out of the cell, down the front staircase, and out of Quad 3 toward the officer’s station. State witnesses testified that Franklin chased Thomas in the same direction. As Thomas was pulling closed the outer door to the officer’s station, Franklin caught up and wedged his foot in the doorway, preventing the door from shutting and locking. A struggle over the outer door ensued, and each time the door opened and exposed Thomas’s body, Franklin stabbed Thomas with the shank in a downward motion. Inmate Samuel Selig specifically recalled Franklin burying the shank into Thomas’s neck, causing blood to squirt inside the vestibule to the officer’s station. This episode lasted approximately thirty seconds.

Medical expert Valerie Rao testified that Thomas sustained a fatal laceration almost three inches in depth to the left side of his neck. The jugular vein and small blood vessels from the subclavian artery were cut and the left lung punctured, which caused one fifth of Thomas’s blood to drain into his left chest cavity and his left lung to collapse. Rao testified that Thomas sustained one-inch incised wounds to his right cheek and just outside his right eye, and eight sharp-force defensive wounds on his arms. Rao also found a four-inch-long, top-to-bottom incised wound on Thomas’s left scalp, along with a fracture to his skull underneath the wound. She opined that the bent tip of the shank’s blade was consistent with having been caused by a forceful blow to Franklin’s scalp. Rao determined that a considerable amount of force was exerted in order to fracture Thomas’s skull and cause the blade’s tip to bend.

This evidence shows that Franklin stabbed Thomas at least twelve times—with considerable force being used to inflict *1248 some, if not all, of the stab wounds. Also, the stabs wounds were inflicted not in a single, continuous manner, but at various points throughout the struggle at the officer’s station door. As such, Franklin was afforded multiple intervals to reflect upon the fact that he was injuring Thomas with each overhand strike and inevitably would stab Thomas to death. The evidence further shows that there was a break between Franklin’s initial assault upon Thomas in the second-floor cell and the subsequent decision to fatally stab him outside of the first-floor officer’s station. *See id.* at 228. Given these factors, we conclude that Franklin exhibited a fully formed conscious purpose to kill Thomas. *See Bradley*, 787 So.2d at 738.

Based on the evidence presented at trial, a rational trier of fact could find the existence of the elements of first-degree

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premeditated murder beyond a reasonable doubt. See *Johnston*, 863 So.2d at 283. Accordingly, we conclude that the record sufficiently supports Franklin's conviction.

Ring & Hurst v. Florida Claim

¹⁵¹ Franklin contends that Florida's capital sentencing scheme is unconstitutional in light of the United States Supreme Court's decisions in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Hurst v. Florida*, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), because the jury that recommended death did not find the facts necessary to sentence him to death. We agree. See *Hurst v. State*, 202 So.3d 40, 41 Fla. L. Weekly S433, S439, 2016 WL 6036978 (Fla. Oct. 14, 2016). In light of the non-unanimous jury recommendation to impose a death sentence, we reject the State's contention that any *Ring*- or *Hurst v. Florida*-related error is harmless. See *id.* at 73–74, at S443. We also reject the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*. See *id.* at 78–79, at S438.

¹⁶¹ However, we reject Franklin's argument that section 775.082(2), Florida Statutes (2015), requires that we remand his case to the trial court for imposition of a life sentence. See *id.* at 63–64, at S440. Accordingly, we vacate Franklin's death sentence and remand this case for a new penalty phase proceeding.

CONCLUSION

For the foregoing reasons, we affirm Franklin's conviction of first-degree murder, vacate Franklin's death sentence, and remand for a new penalty phase proceeding.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, and PERRY, JJ., concur.

CANADY and POLSTON, JJ., concur in the conviction, but dissent as to the sentence.

All Citations

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209 So.3d 543
Supreme Court of Florida.

Donald Otis WILLIAMS, Appellant,
v.
STATE of Florida, Appellee.

No. SC14-814
|
[January 19, 2017]

Synopsis

Background: Defendant was convicted in the Circuit Court, Lake County, Mark Anthony Nacke, J., of kidnapping, robbery, and first-degree murder, and was sentenced to death. Defendant appealed.

Holdings: The Supreme Court held that:

- ^[1] medical examiner's opinion testimony regarding victim's cause of death was not based on speculation or conjecture, and thus was not outside her field of expertise;
- ^[2] admission of medical examiner's opinion that victim's cause of death was homicide did not invade province of jury;
- ^[3] prosecutor's suggestions that defendant had engaged in sexual misconduct did not individually amount to fundamental error;
- ^[4] cumulative effect of prosecutor's improper comments during closing argument of guilt phase was not so prejudicial that it vitiated entire trial;
- ^[5] convictions for first-degree murder, kidnapping, and robbery were supported by sufficient evidence;
- ^[6] imposition of death penalty violated requirements of *Hurst v. State*, 202 So.3d 40; and
- ^[7] imposition of death penalty in violation of requirements of *Hurst v. State*, 202 So.3d 40, was harmless error.

Convictions affirmed; sentence reversed and remanded.

Canaday and Polston, JJ., concurred as to conviction and dissented as to sentence.

Perry, Senior Justice, filed opinion concurring in part and dissenting in part.

West Codenotes

Recognized as Unconstitutional

Fla. Stat. Ann. § 921.141

*547 An Appeal from the Circuit Court in and for Lake County, Mark Anthony Nacke, Judge—Case No. 352011CF000105XXXXXX

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Opinion

PER CURIAM.

Donald Otis Williams, who was fifty years old at the time of the crime, was convicted of the 2010 kidnapping, robbery, and first-degree murder of eighty-one-year-old Janet Patrick. A jury recommended that Williams be sentenced to death for the murder by a vote of nine to three, and the trial court, after concluding that the aggravating factors outweighed the mitigating circumstances, imposed the death penalty. Williams appeals his convictions and death sentence. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const.

For the reasons set forth below, we affirm Williams' convictions but reverse the death sentence based on the United States Supreme Court's opinion in Hurst v. Florida (Hurst v. Florida), — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and this Court's opinion on remand in Hurst v. State (Hurst), 202 So.3d 40 (Fla. 2016). Although a special verdict form was used in Williams' penalty phase, the jury did not unanimously conclude that there were sufficient aggravating factors to impose death or that the aggravation outweighed the mitigation—critical findings that must be made by a unanimous jury under the Sixth Amendment of the *548 United States Constitution and article I, section 22, of the Florida Constitution. See Hurst, 202 So.3d at 43–44. Further, the jury's recommendation for death by a vote of nine to three in this case does not satisfy the constitutional requirement explained in Hurst that the jury's final sentencing recommendation be unanimous. Id. Thus, we conclude that the Hurst error in Williams' sentencing was not harmless beyond a reasonable doubt. See id. at 66–69. Accordingly, we reverse Williams' sentence of death and remand for a new penalty phase.

FACTS AND PROCEDURAL HISTORY

The Guilt Phase

The victim, Janet Patrick, was last seen alive on October 18, 2010, after shopping for groceries at Publix near her home in Lake County, Florida. The defendant, Donald Otis Williams, through both security video and eyewitness testimony, was identified as accompanying her at Publix and getting into the passenger seat of her vehicle, a white Chevrolet Impala. Multiple witnesses testified that they later saw Williams in a white Chevrolet similar to the one owned by the victim. One of the witnesses, an acquaintance of Williams, testified that Williams borrowed his shovel in the days following the victim's disappearance, and never returned it. On October 23, a law enforcement officer found Williams in Polk County, Florida sitting in the victim's car with her credit cards in his pocket.

While in police custody, Williams gave interviews to the media, in which he admitted to being with the victim at Publix but denied harming her. He told the press that he and the victim were abducted by an unidentified assailant. Williams claimed that during the abduction, both he and the victim were in the trunk and prayed together, and the victim told Williams that she was afraid something "too personal" for Williams to discuss with the press was going to happen to her. According to Williams, the assailant beat the victim and eventually stopped the car somewhere in Polk County, where he ordered Williams to put the victim on the ground. Williams claimed that he was then able to escape in the victim's car.

Law enforcement officers investigated Williams' story about an assailant but were unable to corroborate it. Witnesses who interacted with Williams in the days following the victim's disappearance testified that there was no indication that he had

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been abducted. Williams eventually repudiated the story. The day after Williams' press interviews, law enforcement found the victim's nude, partially skeletonized remains in Polk County beneath two tires in a wooded area a mile and a half from Williams' former residence, where he lived from 1991 to 1996.

Crime scene investigators documented and processed the scene where the body was found. They found the victim's grocery shopping list next to her remains. There were drag marks that lined up to where the body was found. Officials did not find any jewelry on or near the body or inside the car, nor did they find the victim's wallet or purse. The body itself was unclothed, with the exception of a pair of socks and a medical alert necklace, and severely decomposed.

The medical examiner, Dr. Barbara Wolf, performed the autopsy and reviewed the victim's medical records, photos from the crime scene, Lake County Sheriff's Office reports, laboratory reports, and interviews that Williams gave to the media. Because of the condition of the victim's body when it was found, Dr. Wolf testified that the cause of death could not be determined, *549 but ruled out accidental death and opined that the manner of death was homicide. Carlton Jane Beck Findley, an expert in forensic entomology, determined that the victim most likely died between sunrise on October 19, 2010, and sunset on October 20, 2010. Katie Skorpinski, an expert in forensic anthropology, examined the remains at the C.A. Pound Human Identification Lab at the University of Florida and found that the body had no fractures from around the time of death, no signs of thermal damage, and no other perimortem damage.

Crime scene investigators processed the victim's automobile. Testifying at trial, they explained the various items that were recovered from the vehicle. In the trunk, they found two separate pieces of trunk carpeting, the spare tire cover from beneath the trunk carpeting, a spare tire locking device, and a piece of plastic irrigation tubing. In the passenger compartment, they found another piece of plastic irrigation tubing on the front passenger floorboard, a towel on the dashboard, one pair of green and white shorts on the backseat, two pairs of underwear briefs—one inside of the other—on the backseat, one pair of jeans on the floor in front of the driver's seat, a walking cane, and various other items.

Later, in a nearby cemetery, where some of Williams' family members were buried, law enforcement found the shovel that Williams had borrowed from his acquaintance in the days after the victim's disappearance. Tubing similar to that which was found in the victim's vehicle was found near the shovel. An expert in the field of trace evidence analysis testified that the tubing found at the cemetery appeared to have been stretched and had characteristics consistent with being connected to the piece of tubing that had been in the trunk.

Dr. Mohammad Amer, an expert in DNA profiling, then testified regarding the scientific significance of these items. He testified that objects recovered from inside the trunk of the victim's vehicle contained blood stains that matched the victim. Specifically, on the carpeting of the trunk, Dr. Amer testified about a stain that "gave chemical indications for the presence of blood," which had a mixed DNA profile, with the major DNA profile of this stain matching the victim's profile. The other profile was indeterminate. The major DNA profile matching the victim had a frequency of occurrence for unrelated individuals of one in 620 quadrillion Caucasians, one in 45 quintillion African-Americans, and one in 170 quadrillion Southeastern Hispanics.

Dr. Amer testified that the spare tire cover also had a stain giving "chemical indications for the presence of blood" that had a partial DNA profile that matched the victim with statistical chances of the partial profile occurring in the population of one in 12 Caucasians, one in 31 African-Americans, and one in 10 Southeastern Hispanics. The spare tire locking device had four stains that gave "chemical indications for the presence of blood," three of which resulted in partial profiles matching the victim. In two of the stains, the statistical chances of finding the partial profile were one in 470 Caucasians, one in 1.7 billion African-Americans, and one in 290 million Southeastern Hispanics. In the third stain, the statistical chances of the profile being found in the population were one in 1 billion Caucasians, one in 4.1 billion African-Americans, and one in 500 million Southeastern Hispanics. There were also two stains inside the trunk lid, which both "gave chemical indications for the presence of blood" that matched the victim's DNA profile. In one of those stains, the frequency of occurrence of that DNA profile was one in 2 quadrillion. In *550 the other stain, the frequency of occurrence was one in 310 quadrillion.

Dr. Amer also testified about various items found inside the interior of the victim's vehicle. He tested some of the items and found DNA that matched Williams' DNA profile. These items included the towel that was found on the dashboard, which contained Williams' complete DNA profile. The chances of this DNA profile occurring in the population were one in 2.5 quintillion Caucasians, one in 3.5 quintillion African-Americans, and one in 19 quintillion Southeastern Hispanics. Dr. Amer

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also tested the pair of green and white shorts found in the backseat, which contained a hair. The shorts contained cells with a partial profile matching Williams, with the chances of appearing in the population of one in 18 quadrillion, and the hair contained a partial profile matching Williams, with the chance of finding it in the population of one in 290,000.

Dr. Amer also testified regarding other items found in the interior of the vehicle that contained the DNA of both Williams and the victim. Specifically, these items were the pair of jeans that was found on the floor in front of the driver's seat and the two pairs of underwear briefs, which had been found lying, one inside of the other, on the backseat. Dr. Amer swabbed the "friction points" of the jeans—inside of the crotch area, inside the pockets, and the waistband area—and found DNA with a mixed profile matching Williams and the victim. The major contributor to the mixed profile matched Williams, with chances of being found in the population of one in 2.5 quintillion Caucasians, one in 3.5 quintillion African-Americans, and one in 19 quintillion Southeastern Hispanics. The minor contributor matched the victim with chances of being found in the population of one in 160,000 Caucasians, one in 290,000 African-Americans, and one in 160,000 Southeastern Hispanics.

Dr. Amer also testified about hairs that were on both of the pairs of briefs that had been found. One of these hairs matched Williams, and two hairs matched the victim. Inside one of these pairs of briefs, Dr. Amer found a semen stain in the front crotch area, and the DNA profile of the semen stain matched Williams with chances of this profile being found in the population of one in 3.9 quintillion. Dr. Amer noted that it is not uncommon to find semen in the crotch area of a male's underwear. Inside the pair of briefs containing the semen stain, Dr. Amer also found a mixture of epithelial cells (skin cells). The victim and Williams were included as possible contributors to the mixture of skin cells with chances of being found in the population of one in forty.

Inside the crotch area of the other pair of briefs, Dr. Amer found a mixture of skin cells matching the victim and Williams with statistical chances of their DNA profile being found in the population of one in 2.8 million. On cross-examination, conducted by the defendant, who represented himself for most of the guilt phase, Dr. Amer acknowledged that it could be possible for DNA to transfer if someone touched someone with their hands and then put their hands somewhere else, or if two items of clothing from two different people were commingled. Although the DNA mixture of the defendant and victim was located on the inside of the briefs, Dr. Amer also acknowledged that it is not uncommon to obtain a mixed profile on an outer garment, and this would be possible on an article that was touching a car seat that had been used for a long time.

Dr. Amer was recalled via telephone the day after he testified in person and was asked by the prosecutor whether he could determine if the skin cells resulted from *551 vaginal secretions. He testified that he could not determine whether the skin cells came from that source.

Sally Streeter, Williams' probation officer,¹ testified that Williams did not have a place to live as of October 8, 2010. Williams' brother wired Williams fifty dollars on Saturday, October 16, and told him that he would not be sending any more money. Williams later told a detective that on October 18, the day he was with the victim at Publix, he was wearing multiple layers of clothing, including two pairs of underwear and shorts under a pair of jeans. This description was consistent with the articles of clothing found inside the vehicle by crime scene investigators and tested for DNA by Dr. Amer.

¹ The jury was not told that Sally Streeter was Williams' probation officer during the guilt phase. The jury was informed that Williams was on probation only during the penalty phase.

In his defense case-in-chief, Williams called witnesses to support his position that he was suffering from a mental illness or seizures at the time of the crime. These witnesses included family members, who testified about Williams' behavior and experiences since they had known him, and two people who saw him and the victim in Publix on the day of the victim's disappearance. He also called psychiatrist Dr. Alan S. Berns, who testified that he had diagnosed Williams with bipolar affective disorder with associated psychotic features and post-traumatic stress disorder (PTSD). Dr. Berns testified that, after meeting with Williams in 2012 and reviewing some of Williams' medical records, he determined Williams had a history of alcohol abuse, cannabis use, and possible use of ephedra. On cross-examination, Dr. Berns testified that, in his professional opinion, Williams was not legally insane at the time of the offense.

Williams called forensic psychologist Dr. Steven N. Gold, who also testified—based on his review of Williams' records, a meeting with Williams in 2013, and speaking with Williams' family members—that Williams had bipolar disorder and

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PTSD. Finally, Williams called neurologist Dr. Jean Cibula, who specializes in epilepsy and had conducted a week-long epilepsy assessment of Williams in 2012. Dr. Cibula testified that she was unable to document objective evidence of a seizure disorder.

After calling these witnesses, Williams requested that the trial court reappoint the former defense counsel who represented him for approximately two years prior to his decision to represent himself in the beginning of 2013. When defense counsel resumed representation, they recalled two witnesses who had testified during the State's case-in-chief, as well as Corporal Tamara Dale, who reviewed the security footage from the residential development where the victim lived but was unable to verify whether the victim's vehicle entered or exited.

The State presented several witnesses in rebuttal, including individuals who interacted with Williams close to the time of the crime, who testified that he did not appear to be suffering from mental illness or hallucinations. The State also offered its own experts, including Dr. Ava Land, a clinical psychologist, and Dr. Rafael Perez, a psychiatrist, who both disputed the diagnosis of bipolar disorder. Instead, both experts diagnosed the defendant with antisocial personality disorder and alcohol abuse, and Dr. Perez additionally thought Williams might be malingering.

The jury found Williams guilty of one count of robbery, one count of kidnapping, and one count of first-degree felony murder.

***552 The Penalty Phase**

During the penalty phase, the State called the victim of Williams' previous carjacking arrest to establish the prior violent felony aggravating factor. The carjacking victim testified that Williams forced himself into her vehicle and sexually assaulted her. She further testified that she had agreed to Williams pleading to carjacking as opposed to sexual battery and kidnapping to avoid testifying in court at that time. The State presented victim impact evidence through testimony of the victim's friends and acquaintances and photographs and a poem that the victim carried with her.

Williams called his brothers, Randy and David Williams, who both testified about Williams' childhood and their abusive father. Additionally, Williams' son, Ron Jon Williams, and Williams' longtime girlfriend, Shirley Kay Harvey, testified in mitigation. Williams also presented mental mitigation. He called Dr. Gold again, who opined that Williams suffered from, among other things, PTSD, severe substance abuse, and bipolar disorder. Dr. Gold also stated that Williams would qualify for the statutory mitigating circumstances that he was under the influence of an extreme mental or emotional disturbance at the time of the crime and that his capacity to appreciate the criminality of his conduct was substantially impaired.

Similar to Dr. Gold, Dr. Berns testified again during the penalty phase, stating that Williams had bipolar disorder as well as brain abnormalities from a history of head injuries. As a result, Dr. Berns opined that Williams might have problems with impulse control and qualifies for the statutory mitigating circumstance that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

Williams called Dr. Eric L. Mings, a neuropsychologist who reviewed Williams' records and performed neuropsychological testing on Williams in 2012. Dr. Mings testified that Williams' MRI and PET scans were consistent with bipolar disorder, and the neuropsychological test results reflected a deterioration in brain functioning that could be the result of seizures or alcohol abuse. He also concluded that Williams suffered from mild neurocognitive disorder as a result of a traumatic brain injury in an area of the brain associated with emotions that control behavior. He concluded that, consistent with the statutory mitigating circumstance, Williams' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

At the conclusion of the penalty phase, the jury recommended that Williams be sentenced to death by a vote of nine to three after completing a special verdict form, which showed that the jury unanimously found the following aggravating factors: Williams was on felony probation at the time of the murder; Williams was previously convicted of a felony involving the use of violence; the murder was committed while Williams was involved in a kidnapping; and, the victim was particularly vulnerable due to advanced age or disability. However, after being told by the trial court that the jury only needed to fill out

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the mitigation verdict form if it found the listed mitigating circumstances by a majority of the jury, the jury left that form completely blank.

The trial court held a Spencer² hearing during which the State called Dr. Land, who testified that after watching videos *553 from a Dollar General Store depicting Williams approaching another elderly woman and reviewing the statements of the employees at Publix, there was no indication of a reaction consistent with a flashback. Dr. Land, who had interviewed Williams, testified that, during her interviews with him, Williams never told her that he had been sexually abused by his father but, instead, stated that he had been sexually abused by three people, one of whom was his stepmother, who assaulted him inside a white car.

² Spencer v. State, 615 So.2d 688 (Fla. 1993).

In its sentencing order, the trial court found and gave great weight to each of the following four statutory aggravating factors: (1) Williams was on felony probation at the time of the murder; (2) Williams was previously convicted of a felony involving the use or threat of violence; (3) the murder was committed while Williams was involved in a kidnapping; and (4) the murder victim was particularly vulnerable due to advanced age or disability. These were the same aggravating factors that the jury found unanimously as indicated by its special verdict form. In addition, the trial court found that the State had proven the aggravating factor that the murder was committed for pecuniary gain and afforded it some weight. The jury found this aggravating factor by a vote of nine to three.

The trial court found one statutory mitigating circumstance—that Williams' capacity to conform his conduct to the requirements of the law was substantially impaired. As to this mitigating circumstance, the trial court explained in detail the conflicting experts' testimony and concluded:

This Court is faced with experts looking at the same facts and coming to very different conclusions. This Court finds, however, that even with the differing diagnoses proffered by the experts, it would be reasonable to conclude that under any of the diagnoses, the Defendant would fulfill the criteria for this mitigator. Dr. Land's definition of antisocial personality disorder being a person who does not conform to what is expected in society. It involves a lot of rule-breaking, deceitfulness and a lack of moral judgment. It is also characterized by a lack of empathy or an inability to feel compassion for the victims of an individual's actions. This Court finds that pursuant to either set of diagnoses, the Defendant has proven this mitigator by the greater weight of the evidence.

However, the trial court rejected the statutory mitigating circumstance that the crime was committed while Williams was under the influence of extreme mental and emotional disturbance, explaining:

As an initial matter, this Court must address the issue of the Defendant's veracity. The record is replete with instances of the Defendant fabricating stories to serve his purpose. A primary example is his fabrication that Ms. Patrick and he were kidnaped by a black man behind the Publix store. There are numerous other examples Thus, this Court finds it cannot rely on evidence to support a mitigator if it is solely based on the Defendant's truthfulness. This Court finds there must be some independent evidence other than the words of the Defendant to support the finding of a mitigator.

Respectfully, as stated above, this Court finds this mitigator has not been proven by the greater weight of the evidence. This Court had five very well qualified experts who could not agree on a diagnosis of the Defendant. This Court finds it significant [that] the defense experts did not view the videos showing the interaction of the Defendant and Ms. Patrick on the day Ms. Patrick disappeared. Dr. Gold concluded the Defendant *554 killed Ms. Patrick while under the influence of extreme mental or emotional disturbance. Moreover, Dr. Gold admitted the Defendant never told him what he was thinking or feeling at the time the crime was committed. It is not apparent that any of the experts asked the Defendant about his actions at the time of the crime. Thus, it is mere speculation as to what occurred at the time of the abduction and death of Ms. Patrick. Moreover, the basis for Dr. Gold's, Dr. Bern's and Dr. Ming's diagnoses was, in large part, the Defendant relating of his symptoms. As noted above, this Court finds this to be very problematic and unreliable. This Court finds this mitigator was not proven by the greater weight of the evidence and accords it no weight.

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(Footnote omitted.)

The trial court also found thirteen nonstatutory mitigating circumstances and afforded each the following weight: (1) Williams manifested appropriate courtroom behavior (slight weight); (2) he served in the Marines (slight weight); (3) he abused drugs and alcohol from an early age (some weight); (4) he would be a model prisoner (some weight); (5) he suffered physical, mental, and emotional abuse as a child (some weight); (6) he was involved in a serious collision which resulted in a broken leg (little weight); (7) his father and grandfather were abusive alcoholics (some weight); (8) his father abused his mother in his presence (some weight); (9) he suffered head injuries while growing up (some weight); (10) he was a good father (slight weight); (11) he was a good companion to the mother of his child (slight weight); (12) he was a hard worker (slight weight); and (13) he helped others (some weight).³ After this evaluation of the aggravating factors and mitigating circumstances, the trial court sentenced Williams to death, concluding that the aggravating factors far outweighed the mitigating circumstances.

³ The trial court also found that Williams did not prove that he had been sexually abused as a child and afforded this proposed mitigating circumstance no weight because all of the evidence presented in support of it was based on Williams' "questionable veracity."

ANALYSIS

On direct appeal to this Court, Williams alleges that the trial court erred in (1) failing to give counsel adequate time to properly prepare the case after reappointment; (2) allowing the medical examiner to testify as to matters beyond her medical expertise; (3) allowing the jury to hear that Williams had a criminal past during the guilt phase; (4) permitting prosecutorial misconduct during voir dire and closing arguments; (5) allowing the State to introduce evidence of Williams' prior violent felony and argue for an unsupported aggravating factor in the penalty phase; (6) allowing the introduction of improper victim impact evidence; and (7) denying jury instructions and a verdict form enumerating each nonstatutory mitigating circumstance. Williams also alleges that (8) the aggravating factors fail to narrow the field of persons eligible for the death penalty, and (9) he is entitled to relief based on Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Through supplemental briefing, Williams argues that he is entitled to relief on the Ring claim based on the United States Supreme Court's recent decision in Hurst v. Florida.

Because we determine that Williams is entitled to a new penalty phase proceeding under Hurst, we address only Williams' guilt phase claims and none of the other penalty phase claims. In addition, we address whether the evidence in this case was sufficient to sustain Williams' first- *555 degree felony murder conviction, which this Court is independently obligated to review in death penalty cases.

I. Denial of a Continuance

¹¹⁾Williams' first claim is that the trial court erred by not providing an "adequate" continuance during the guilt phase once the Public Defender's Office was reappointed to the case during the middle of the guilt phase. Williams asserts that this caused prejudice, specifically in the guilt phase, because defense counsel was not adequately prepared for the DNA evidence the State presented at trial that Williams asserts was based on a supplemental report dated April 1, 2013, which was issued after the DNA expert's 2011 report and 2012 deposition, and, more importantly, after counsel was discharged.

On the morning of Wednesday, August 21, 2013—after six days of trial and two and a half days into Williams' defense presentation—Williams moved to reappoint counsel. After being reappointed, defense counsel moved for a mistrial, or, in the alternative, a continuance, so that it could adequately prepare to represent Williams. Defense counsel requested an expedited transcript of testimony that had already occurred, stating that preparation could take weeks and that it had not worked out a mitigation case by the time it was relieved of duties in February 2013. The trial court denied the motion for mistrial and

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continued the trial until Monday, August 26. The trial court reasoned that “the Public Defender’s Office was representing [Williams] for over two years and we were at the eve of trial when Mr. Williams decided to represent himself, so that had the advantage of getting this case prepared for trial.” Defense counsel was provided with audio recordings of the first six days of trial.

At a status hearing on Friday, August 23, defense counsel renewed the motion for mistrial and moved alternatively for a further continuance for the remainder of the guilt phase. Counsel explained that he was “trying to struggle through listening to the tape that the court reporter ha[d] furnished [counsel].” The trial court denied the motions and indicated it had not yet made a decision on whether to grant a continuance between the guilt and penalty phases. When the parties reconvened for the rest of the guilt phase on Monday, August 26, defense counsel renewed the motions for mistrial and a further continuance. Counsel said that he could not hear the testimony on recall of Dr. Amer, the DNA expert, but did not specify how much time was needed. The trial court again denied the motions.

¹² ¹³ We have stated that “[a] court’s ruling on a motion for continuance will only be reversed when an abuse of discretion is shown.” Smith v. State, 170 So.3d 745, 758 (Fla. 2015) (quoting Snelgrove v. State, 107 So.3d 242, 250 (Fla. 2012)). As explained in Smith:

This standard is generally not met “unless the court’s ruling on the continuance results in undue prejudice to the defendant.” Snelgrove, 107 So.3d at 250. ... “While death penalty cases command our closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance.” Doorbal [v. State], 983 So.2d [464,] 486 [(Fla. 2008)] (quoting Hernandez-Alberto v. State, 889 So.2d 721, 730 (Fla. 2004)).

Id. at 758–59.

This Court has held that a trial court does not abuse its discretion in denying a continuance “where the requesting party has unjustifiably caused the delay or requests an indefinite suspension of the proceedings.” *556 Snelgrove, 107 So.3d at 251. In Wyatt v. State, 641 So.2d 1336, 1340 (Fla. 1994), the defendant told his counsel that he did not want to call any witnesses in mitigation, and the night before the penalty phase, knowing of their unavailability, instructed counsel that he wanted his mother and sister to testify on his behalf. This Court determined there was no abuse of discretion in the trial court refusing to suspend the penalty phase proceedings indefinitely. Id.

In this case, the trial court granted at least one continuance requested by defense counsel before Williams began self-representation. When Williams sought to represent himself, defense counsel had been representing Williams for about two years, and the trial was set to begin less than a month later. After defense counsel was reappointed, the trial court gave defense counsel a short continuance from the day Williams sought reappointment of counsel, which was a Wednesday, to the following Monday. While defense counsel moved for a longer continuance on the basis that it could not hear some of the trial testimony on the audio recordings, defense counsel did not specify a definite time frame that it needed for an additional continuance.

This case is factually distinguishable from Wike v. State, 596 So.2d 1020, 1025 (Fla. 1992), the case upon which Williams relies, in which this Court determined that the trial court abused its discretion by denying a continuance where the request was for “a short period of time and for a specific purpose.” In this case, defense counsel was given a short continuance but then requested additional continuances, not for “a short period of time,” but for an unspecified amount of time.

Williams specifically asserts that as a result of being denied a longer continuance, defense counsel could not listen to the testimony of Dr. Amer, the DNA expert, and was unable to review the April 2013 DNA report, and therefore did not know to object to part of the State’s rebuttal closing argument in the guilt phase based upon that testimony. Williams claims that defense counsel would have objected to the State’s suggestion that a sexual battery had taken place because a mixture of the victim’s and Williams’ DNA was found inside both pairs of underwear briefs that had been on the backseat, by arguing that the evidence did not support the implication.

However, Williams has failed to demonstrate prejudice. Defense counsel did not inform the trial court that they could not hear the lengthy live testimony of the DNA expert, which involved a discussion of all the DNA findings, including the mixture of Williams’ and the victim’s DNA on the pairs of underwear briefs, but rather stated that they could not hear the

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DNA expert's testimony when he was recalled by the State, which was done telephonically. During this telephonic testimony on recall, the DNA expert stated only that he could not determine whether skin cells were from vaginal secretions, and it therefore neither added to nor detracted from his in-person testimony. Even without being granted an additional continuance to allow defense counsel to listen to the telephonic testimony or read the April 2013 report, defense counsel could have objected to the State's inference that Williams had sexually battered the victim because they knew that the State did not charge Williams with a sexual offense.

We conclude that defense counsel's inability to hear Dr. Amer's telephonic testimony, which did not add to or detract from his live trial testimony, was neither a basis for a further continuance without a specific request to obtain an audible recording or transcript of this brief testimony, nor the *557 basis for a mistrial. There was no undue prejudice to Williams, and any difficulty caused by Williams requesting reappointment of counsel was a result of a conscious choice by Williams to discharge counsel, proceed pro se, and then change his mind again near the end of the guilt phase.

Both the State and Williams were entitled to orderly and timely proceedings. After the trial court granted a short continuance, it did not abuse its discretion in denying the motion for an additional continuance for an unspecified length of time. Because the trial court did not abuse its discretion in denying a longer continuance and acted appropriately in providing time for defense counsel to review the testimony that had already been heard, we conclude that Williams is not entitled to relief with respect to this claim.

II. Medical Examiner's Testimony During the Guilt Phase

In his second claim, Williams contends that the trial court erred by allowing the medical examiner, Dr. Wolf—who testified while Williams was still pro se—to opine that the manner of death was homicide based on evidence outside her area of expertise, and that such an opinion invades the province of the jury on the ultimate question for the jury's determination. We disagree.

Without objection, Dr. Wolf, who performed the autopsy and was qualified in the field of forensic pathology, testified that she was unable to determine the cause of death because the remains were only bones with some skin attached. Because of the body's condition, Dr. Wolf was unable to observe any apparent injuries that could have accounted for the victim's death. Dr. Wolf explained that “[i]n a case such as this, where the cause of death isn't obvious, we take into account every available information.”

Accordingly, Dr. Wolf, in trying to determine the cause and manner of death, reviewed the victim's medical records to familiarize herself with the victim's medical history and condition, and concluded that the victim was not suffering from any life-threatening diseases. She also reviewed photos from the crime scene, Lake County Sheriff's Office reports, laboratory reports, and interviews that Williams gave to the media. She consulted with professionals at the C.A. Pound Human Identification Lab for anthropological assistance due to the body's skeletonized state.

She explained that the “manner of death” refers to whether the death was an accident, suicide, homicide, natural, or otherwise undetermined. Dr. Wolf determined that the manner of death in this case was, with a reasonable degree of medical certainty, a homicide. She stated, “There was nothing specific that I could say, that's what caused this death,” so “the cause of death was certified as homicidal violence of unknown means, meaning that by my review of the circumstances and the scene of death, I was confident that the death was a homicide, but I could not determine specifically how she was killed.”

Because of the state of the victim's body, Dr. Wolf could rule out certain possibilities such as being struck in the face or being manually strangled, but could not rule out other causes of death, such as strangulation by ligature, shooting, or stabbing. She concluded that the physical facts did not support the story that Williams gave to the press that the victim was beaten in the passenger's seat or was alive inside the trunk. Dr. Wolf also ruled out accidental death.

¹⁴¹ ¹⁵¹Because Williams failed to object to Dr. Wolf's testimony, he must show fundamental error in order to be entitled to relief. See *Doty v. State*, 170 So.3d 731, 743 (Fla. 2015). An error is fundamental if *558 it “reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.”

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Anderson v. State, 841 So.2d 390, 403 (Fla. 2003). This is a “high burden, which requires an error that goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.” Bailey v. State, 998 So.2d 545, 554 (Fla. 2008)(quoting sources omitted).

A. Whether the Medical Examiner Testified Outside Her Area of Expertise

This Court has previously recognized that medical examiners, whether they personally performed the autopsy or not, may testify as to their opinions based upon objective evidence. In Geralds v. State, 674 So.2d 96, 100 (Fla. 1996), this Court determined that the trial court did not abuse its discretion by allowing the medical examiner to provide an opinion based upon review of slides taken at the murder scene and during the autopsy, the medical examiner’s written records, and previous testimony. Similarly, in Capehart v. State, 583 So.2d 1009, 1013 (Fla. 1991), this Court determined that a proper predicate for the medical examiner’s opinion as to the cause of death had been established where her opinion was “based upon the autopsy report, the toxicology report, the evidence receipts, the photographs of the body, and all other paperwork filed in the case.”

However, an expert cannot simply rely on baseless assertions or conjecture. See Hawkins v. State, 933 So.2d 1186, 1188–89 (Fla. 4th DCA 2006) (the medical examiner’s opinion that the victim died as a result of an injection of silicone into subcutaneous tissue that travelled into the bloodstream was inadmissible because the medical examiner admittedly did not know whether this conclusion was true, conceded she was not an expert regarding the mechanism or speed that silicone migrates through the body, did not review any literature regarding the effects of silicone in the body, and could not point to anything to support her conclusion); Fisher v. State, 361 So.2d 203, 204 (Fla. 1st DCA 1978) (it was error to allow the medical examiner to opine that the victim’s knife wounds were more characteristic of those made by a woman than a man because this opinion was “simply based on vague notions of stereotyped characteristics of the men and the women in our culture and it bore no relationship to [the defendant] other than she was a woman”); Wright v. State, 348 So.2d 26, 30–31 (Fla. 1st DCA 1977) (the medical examiner’s testimony went beyond his competence when opining that the victim had severe injuries that were inflicted prior to being buried by the defendant’s bulldozer, based in part upon how moist earth would act as an anchor to the body, how far apart the treads of the bulldozer were, and how bulldozers work).

¹⁶The record in this case does not support Williams’ assertion that Dr. Wolf’s testimony was based on speculation and conjecture or was “unsupported by any discernible, factually-based chain of underlying reasoning.” See Mt. Sinai Med. Ctr. of Greater Miami, Inc. v. Gonzalez, 98 So.3d 1198, 1202 (Fla. 3d DCA 2012) (quoting Div. of Admin. v. Samter, 393 So.2d 1142, 1145 (Fla. 3d DCA 1981)). Dr. Wolf stated that when the cause of death is not obvious, as a medical examiner, she takes into account all the available information. To form her opinion, she consulted with an anthropological expert and relied upon the police reports, the autopsy, the victim’s medical records, and photos of the scene. Accordingly, Dr. Wolf did not testify outside her field of expertise.

***559 B. Whether the Medical Examiner’s Opinion Testimony Invaded the Province of the Jury**

¹⁷Williams also claims that Dr. Wolf’s opinion testimony invaded the province of the jury. However, this claim is without merit because Dr. Wolf’s opinion, which was based on her training and experience, assisted the jury in understanding the evidence, and she did not testify to conclusions that the jury was qualified to make or to the ultimate question for the jury’s determination—whether Williams was guilty of the crimes for which he was charged.

We have determined that a trial court has not abused its discretion when permitting an expert to testify if the expert’s testimony, based on his or her training and expertise outside of the common understanding of the jury, assisted the jury in understanding the evidence or determining a fact in issue. See McWatters v. State, 36 So.3d 613, 630–31 (Fla. 2010) (concluding that an expert’s opinion, based on his training and experience, that a rape occurred helped the jury assess “what” happened); Smith v. State, 28 So.3d 838, 856 (Fla. 2009) (denying the defendant’s claim that the medical examiner’s opinion invaded the province of the jury because it assisted jurors in deciding what happened, not who was responsible for the acts

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perpetrated against the victim). Likewise, in this case, Dr. Wolf provided an opinion based on her training and experience as a medical examiner, which assisted the jury in understanding the evidence.

Moreover, Dr. Wolf did not opine as to the ultimate question to be determined by the jury. Dr. Wolf did not implicate Williams as being guilty of first-degree murder. Medical examiners have been permitted to opine in many cases that the manner of death was a "homicide," though in those cases, this Court did not address whether that opinion invaded the province of the jury. See, e.g., Larkin v. State, 147 So.3d 452, 457 (Fla. 2014) (involving a medical examiner who opined that the manner of death of the victim was a homicide); Brown v. State, 143 So.3d 392, 397 (Fla. 2014) (same); Kalisz v. State, 124 So.3d 185, 191 (Fla. 2013) (same).

Williams argues that Ruth v. State, 610 So.2d 9 (Fla. 2d DCA 1992), and Gurganus v. State, 451 So.2d 817 (Fla. 1984), support his position, but those cases are distinguishable. In Ruth, the defendant was charged with "maintaining an airplane used for keeping or selling drugs." 610 So.2d at 10. The use of the defendant's aircraft was a necessary element of the crime with which the defendant was charged. Id. The expert witness, a customs agent, testified, "I believe the aircraft was used and was set up to smuggle narcotics." Id. at 11. The Second District held this was inadmissible as this was the "sole evidence" that went to the ultimate act for which the defendant was charged. Id. Here, Dr. Wolf's expert testimony is not the "sole evidence" of the crimes of which Williams has been charged.

In Gurganus, 451 So.2d at 821, the trial court had excluded the defense expert's testimony as to whether the defendant's actions were those of a "depraved mind" or a "premeditated plan," legal terms with specific legal definitions. This Court determined that the trial court did not err in excluding this testimony because it was a "legal conclusion no better suited to expert opinion than to lay opinion, and as such, was an issue to be determined solely within the province of the jury." Id.

For all these reasons, Dr. Wolf's testimony as to the manner of death was not error, let alone fundamental error. Accordingly, we deny relief as to this claim.

*560 III. Guilt Phase Testimony Revealing Williams' Criminal Past

¹⁸In his third claim, Williams argues that the trial court abused its discretion in denying three motions for mistrial made by his newly reappointed counsel when State witnesses referenced Williams' criminal history in the State's rebuttal case. Prior to these three instances, when Williams was acting pro se, Williams and his witnesses referred to his criminal history. First, Williams stated in his opening statement that he had been to trial once before on a misdemeanor, but that he was acquitted. Next, during Williams' direct examination of his brother Randy, Randy stated, "2010, are you speaking about when you were released from prison?" Additionally, defense expert, Dr. Berns, testified during Williams' direct examination that Williams had told him that he "had been arrested a few times for DUI, and once, I believe for a disorderly intoxication."

After defense counsel resumed representation, defense counsel moved for a mistrial three times due to comments made in the State's rebuttal case. Each motion was denied. In the first instance, the State's rebuttal witness Howard Lawrence, head of the mental health department at the Lake County Detention Center, explained the specific medications prescribed to Williams to rebut the suggestion that they were prescribed to treat a psychiatric condition or a seizure disorder, and explained that these medications were prescribed to Williams for mood stabilization and to aid sleep. In that context, Lawrence explained in general that sociopathy was "another [way] of depicting antisocial personality disorder in a person that's got a lengthy criminal history who looks like he's probably vying for some medicine because he's ... irritable and disgruntled and probably not sleeping too well." Defense counsel moved for a mistrial after this comment.

The second motion for mistrial occurred during the rebuttal testimony of Dr. Rafael Perez, a psychiatrist who treated Williams beginning in 2010, who was called to rebut the suggestion that Williams had suffered from seizures or bipolar disorder and to also testify regarding the reasons for Williams' prescribed medications. Dr. Perez referred to records from Williams' previous prison stay, using the term "department of corrections," but was immediately interrupted by the prosecutor, who stated, "Well, we don't want to go into the location." Then, defense counsel moved for a mistrial.

Finally, the last motion for mistrial was also made during direct examination of Dr. Perez, after the prosecutor used the word

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“inmate” in reference to those records. After the first two references to Williams’ criminal history, the trial court instructed the jury to disregard the comments, but defense counsel declined the suggestion for a curative instruction after the third reference.

^{[9] [10]} A trial court should grant a motion for mistrial only “when an error is so prejudicial as to vitiate the entire trial.” Smith, 170 So.3d at 757 (quoting Jackson v. State, 25 So.3d 518, 528 (Fla. 2009)). “[T]his Court reviews a trial court’s ruling on a motion for mistrial under an abuse of discretion standard.” Id. (quoting Jackson, 25 So.3d at 528).

As we have recently explained, “[r]emarks that relate to a defendant’s prior imprisonment are to be evaluated in the context of the surrounding circumstances and do not always require reversal.” Fletcher v. State, 168 So.3d 186, 207 (Fla. 2015). Here, during Williams’ self-representation, he and his witnesses informed the jury that Williams had been in prison, *561 had been arrested a few times, and had been to trial on a misdemeanor offense. By the time the improper statements were made, the jury was already aware that Williams had at least some criminal history and had been in prison. See Evans v. State, 800 So.2d 182, 189 (Fla. 2001) (where a State witness referred to the defendant’s prior criminal record, any possible error resulting from this remark was harmless because the defendant admitted on the stand that he had two felony convictions).

In this case, as a result of the defendant’s own remarks and those of his witnesses, the jury was aware of some criminal history. The statements that occurred during the State’s rebuttal of Williams’ defense that his mental illness precipitated the murder were brief; the trial court gave curative instructions after the first two times and the fleeting comments were not the focus of the witnesses’ testimony. Accordingly, the trial court did not abuse its discretion in denying a motion for mistrial.

IV. Prosecutor’s Comments During Voir Dire and Guilt Phase Closing Arguments

^[11] In his fourth claim, Williams alleges that the State engaged in prosecutorial misconduct during voir dire and guilt phase closing arguments. Because no objections were raised to any of these allegedly improper comments, Williams is entitled to relief only if fundamental error occurred as a result of these comments. Mordenti v. State, 630 So.2d 1080, 1084 (Fla. 1994). “[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process.” State v. Johnson, 616 So.2d 1, 3 (Fla. 1993) (citing D’Oleo-Valdez v. State, 531 So.2d 1347 (Fla. 1988); Ray v. State, 403 So.2d 956 (Fla. 1981)).

A. Voir Dire

^[12] Williams identifies two instances of alleged impropriety made by the prosecutor during voir dire, which occurred when Williams was acting pro se. Neither comment was objected to. First, Williams alleges that the State improperly suggested more evidence of the crime not presented in the guilt phase would be adduced during the penalty phase through the following comments:

And after you all have returned verdicts on all three counts, then and only then, if the Defendant is found guilty of murder in the first degree, we will present additional evidence and give additional arguments and additional law to help you to make this life and death decision that we were talking about.

(Emphasis added.)

Later, the prosecutor made the statement that the State would present additional evidence two more times during voir dire:

But if and only if the jury unanimously decides he’s guilty of first degree murder, additional evidence presented going to the Defendant’s background, going to his character, possibly going to additional factors in the crime itself are allowed per the statute, things that you may not be allowed to hear in the

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first phase of the trial become relevant when you're trying to decide what is a fair sentence.

These statements mainly reflect what is stated in section 921.141(1), Florida Statutes (2010), which provides that in the penalty proceeding, "evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the *562 aggravating or mitigating circumstances." We conclude there was no error, much less fundamental error.

^[13]Williams also alleges that it was improper for the prosecutor to comment during voir dire that "would you agree that while you have the Defendant's life in your hands, you also have justice for the victim and the victim's family also in your hands?" (Emphasis added.) Later on, the State engaged a specific juror, and told that juror that in addition to Williams' life being at stake, "justice for [a] little old lady," was also at stake.

Florida courts have condemned comments asking for justice for the victim and this Court has reversed a conviction as a result of that type of improper comment. See Cardona v. State, 185 So.3d 514, 522 (Fla. 2016); Davis v. State, 136 So.3d 1169, 1197 (Fla. 2014); Crew v. State, 146 So.3d 101, 110 (Fla. 5th DCA 2014); Edwards v. State, 428 So.2d 357, 359 (Fla. 3d DCA 1983). Thus it was improper for the prosecutor to appeal to "justice for [a] little old lady." The comments—to which Williams did not object—however, were early in the trial during voir dire and not repeated. Therefore, we conclude that the prosecutor's error in making these comments did not "reach[] down into the validity of the trial itself" to the extent that a verdict of guilt could not have been obtained without the assistance of the alleged error. Doty, 170 So.3d at 743 (quoting Snelgrove, 107 So.3d at 257).

B. Guilt Phase Closing Argument

^[14]Next, Williams takes issue with three aspects of the State's guilt phase closing arguments, which occurred after defense counsel was reappointed. First, Williams alleges it was improper for the State to suggest that an uncharged sexual battery took place. Specifically, the prosecutor stated:

These are the two pair of underwear ... with their DNA, the numbers were 1 in 2.8 million, inside the crotch of one of the two pair of underwear Directly north of that particular spot where that DNA was found is his semen, [defense counsel] suggested, well, it wasn't very much. Well, I don't know. I don't recall any testimony about the size of the stain. It was enough to get a clear reading. It's his semen above, towards the fly there, DNA. Her blood inside her trunk Under those tires she's wearing a pair of those, kneehighs That's all she's wearing.

The prosecutor went on to say:

Is it a coincidence that she's naked and a mixture of his and her DNA is found on the inside of the crotch of his briefs, just below a semen stain that happens to be his? Is that just another coincidence? Probably not.

Finally, the prosecutor stated: "[I]t's clear from the evidence that then, after he's won over her trust, he took advantage of her, I would suggest to you, in more ways than one." None of these arguments were objected to and no motion for a mistrial was made on the basis of these comments.

^[15]Although prosecutors are "permitted wide latitude in closing arguments" and are allowed to make inferences reasonably drawn from the evidence, they "are not permitted to make improper argument." Merck v. State, 975 So.2d 1054, 1061 (Fla. 2007). These comments were improper because there was not enough evidence to lead to the reasonable inference that Williams engaged in sexual misconduct, and the State never charged Williams with having committed a sexual offense against the victim.

The evidence of sexual misconduct was insufficient to allow the prosecutor to insinuate it occurred. Specifically, the DNA

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expert testified that it was not uncommon *563 to find semen inside the crotch area of a man's underwear. And although both of the briefs that were found on the backseat contained a mixture of the victim's and Williams' skin cells inside the crotch area, the DNA expert indicated that it would be possible for skin cells to transfer if the clothing of two people was commingled.

Further, the State never charged Williams with a sexual offense, and courts condemn arguments suggesting a defendant is guilty of an uncharged crime. See Huff v. State, 437 So.2d 1087, 1090-91 (Fla. 1983) (reversing a conviction where the prosecutor suggested in closing that the defendant was guilty of an uncharged crime); Jackson v. State, 690 So.2d 714, 717 (Fla. 4th DCA 1997) (same). Thus, the State's innuendo that a sexual battery took place was improper.

Williams also challenges some of the prosecutor's other comments as being unsupported embellishments appealing to the jurors' emotions. However, we disagree and conclude that the rest of the prosecutor's statements were fair inferences reasonably drawn from the evidence and, therefore, not improper.

^[16]We must next determine if any of these comments, whether individually or cumulatively, amounted to fundamental error. See Braddy v. State, 111 So.3d 810, 838 (Fla. 2012). This Court does not "examine the allegedly improper comments in isolation," but examines the totality of errors in the closing argument and determines whether the cumulative effect of the numerous improprieties deprived Williams of a fair trial. Id. at 843 (quoting Card v. State, 803 So.2d 613, 622 (Fla. 2001)).

^[17]The prosecutor's guilt phase closing argument suggestion that Williams had engaged in sexual misconduct did not amount to fundamental error. The error was accompanied by the fact that admissible evidence in the guilt phase showed that Williams stated that the victim feared that something "too personal" for Williams to tell the press would happen to her, that a mixture of Williams' and the victim's DNA was found in both pairs of black briefs that were found in the backseat of the car, and that the victim's body was found in the nude. That evidence was admitted without objection and would have allowed the jurors to potentially reach the conclusion for themselves that Williams had sexually battered the victim. In this context, the comments did not rise to the level of fundamental error.

^[18]We have determined that these comments do not individually constitute fundamental error. We now consider whether the cumulative effect of the improper comments denied Williams his right to a fair guilt phase trial. See id. Considering the prosecutor's remarks, in addition to not individually amounting to fundamental error, we conclude that these improprieties do not cumulatively constitute fundamental error, which would entitle Williams to a new guilt phase proceeding. There were a small number of improper remarks made during the course of the entire guilt phase. Further, there was a substantial amount of evidence to convict Williams on all three of the charges for which he was indicted—kidnapping, robbery, and first-degree felony murder—such that the cumulative effect of these improper comments was not so prejudicial that it vitiated the entire trial. See Chandler v. State, 702 So.2d 186, 191 n.5 (Fla. 1997).

V. Sufficiency of the Evidence

^[19] ^[20]The Court has a mandatory obligation to independently review the sufficiency of the evidence in every case in which a sentence of death has been imposed. See *564 Davis v. State, 148 So.3d 1261, 1270 (Fla. 2014); see also Fla. R. App. P. 9.142(a)(5). "In reviewing the sufficiency of the evidence, the question is whether, 'after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.' " Davis, 148 So.3d at 1270 (quoting Simmons v. State, 934 So.2d 1100, 1111 (Fla. 2006)).

^[21] ^[22]The evidence in a capital case is judged to be sufficient when it is both competent and substantial. See Davis v. State, 121 So.3d 462, 494 (Fla. 2013). This Court "views the evidence in the light most favorable to the State to determine whether a rational trier of fact could have found beyond a reasonable doubt the existence of the elements of the crime." Fletcher, 168 So.3d at 221 (citing Bradley v. State, 787 So.2d 732, 738 (Fla. 2001)).

^[23]In this case, Williams was the last person to be seen with the victim on Monday, October 18, 2010, at Publix. At the time, Williams was homeless and living on money wired to him by his family. One of his brothers, however, had just informed him that he would no longer send Williams money.

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Multiple witnesses testified that, in the days following the victim's disappearance, they saw Williams driving in a white Chevrolet like the one owned by the victim. One witness saw that Williams had a pouch full of credit cards and enough cash to buy beer and fast food, and another witness saw Williams buy several beers with cash. During this time, Williams also borrowed, without returning, a shovel from his acquaintance.

On Saturday, October 23, the victim's white Chevrolet Impala was found in the parking lot of a closed-down restaurant in Polk County, with the license plate obscured by leaves and branches. Williams was found sitting in the car with the victim's credit cards in his pocket. Various items were collected from the vehicle, including irrigation-type tubing on the floor in front of the front passenger seat and in the trunk, two pairs of underwear briefs, jeans, and a cane. The victim had been using a cane the day of her disappearance.

The DNA evidence suggested that Williams was in close contact with the victim. There was DNA inside the "friction points" of the pair of jeans that was found on the floor in front of the driver's seat matching both Williams and the victim. The two pairs of briefs found on the backseat had hairs on them matching Williams and the victim. There were skin cells matching Williams and the victim inside of both pairs of briefs. The DNA evidence also showed that the victim's blood was in the trunk. Specifically, bloodstains found on the trunk carpeting, spare tire cover, and spare tire locking device matched the victim's DNA.

On October 25, Williams gave the press an interview, during which he stated that he was with the victim at Publix, but claimed an unknown assailant abducted them and killed the victim and that Williams was able to escape in the victim's vehicle. However, the physical evidence did not support this story, and Williams eventually admitted that he had fabricated the story.

The victim's body was ultimately discovered underneath two tires in an area a mile and a half from Williams' former residence. The body, which was mostly unclothed aside from socks and a medical alert necklace, was badly decomposed and was devoid of a purse or jewelry. In a nearby cemetery where Williams' family members were buried, law enforcement found the shovel that Williams borrowed. Tubing, which appeared to have been stretched, was found near the shovel and *565 was consistent with the tubing that was found in the victim's vehicle.

The medical examiner opined that the manner of death was a homicide, though she was unable to ascertain the precise cause of death. Although Williams placed his mental health at issue and suggested that he did not recall what happened due to a seizure, hallucination, or blackout, the State presented a significant amount of evidence to cast doubt on that claim.

Therefore, competent, substantial evidence existed to support Williams' convictions.

VI. Hurst v. Florida and Hurst

Williams next argues that the trial court erred in sentencing him to death under Florida's former death penalty statute, which violates the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). After briefing and oral argument had taken place in this case, the United States Supreme Court decided Hurst v. Florida. In Hurst v. Florida, the United States Supreme Court determined that "[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's." 136 S.Ct. at 621-22. Therefore, Florida's capital sentencing scheme was unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Id. at 619. On remand from the United States Supreme Court, in Hurst, we concluded:

[W]e hold that the Supreme Court's decision in Hurst v. Florida requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of Hurst v. Florida and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and

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the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Hurst, 202 So.3d at 44. The decisions in Hurst v. Florida and Hurst apply to this case, which we review on direct appeal. See State v. Johnson, 122 So.3d 856, 861 (Fla. 2013) (citing Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); Smith v. State, 598 So.2d 1063, 1066 (Fla. 1992)).

Following Hurst v. Florida, we ordered that Williams and the State file supplemental briefs to address its impact on this case. Further, Williams requested and we granted leave to file supplemental briefing based on our holding in Hurst. Through supplemental briefing, Williams argues that his death sentence was imposed in violation of Hurst v. Florida and Hurst, and, as a result, his death sentence must be commuted to a life sentence pursuant to section 775.082(2), Florida Statutes (2010). Alternatively, he argues that he must get a life sentence because Hurst error is structural error and, therefore, not amenable to harmless error review. The State argues that no error occurred at all in this case, but if it has, it is harmless.

*566 In Hurst, we rejected the argument that section 775.082(2) requires commutation to a life sentence of a death sentence that was imposed in violation of Hurst v. Florida. Hurst, 202 So.3d at 66. We also determined that Hurst errors are capable of harmless error review. Id. at 67. Thus, we must determine whether a Hurst error occurred in Williams' penalty phase and, if so, whether the error was harmless beyond a reasonable doubt.

^[24]First, we determine that a Hurst error occurred in Williams' penalty phase. In this case, the special verdict form used for the penalty phase showed that the jury unanimously found that four out of the five aggravating factors presented by the State were proven beyond a reasonable doubt. This only satisfies the first finding the jury must make to impose death in Florida, as explained further in Hurst. See id. at 53–54. The jury did not indicate any findings as to the sufficiency of the aggravating factors, nor did the jury indicate whether it determined that the aggravating factors outweighed the mitigation presented. See id.

While special verdict forms, like the one used in Williams' penalty phase, provide courts with more information about the jury's decision-making process than usual, the information provided by the verdict form in this case did not meet the constitutional requirements of Hurst. Nor did the jury unanimously recommend a sentence of death, as is required by article I, section 22, of the Florida Constitution under Hurst. Id. at 44. Accordingly, there was a Hurst error in this case. We, therefore, consider whether the error in Williams' penalty phase was harmless beyond a reasonable doubt.

[25] [26] [27] [28] [29] [30] [31] [32] [33] As we explained in Hurst:

The harmless error test, as set forth in Chapman and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986). Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So.2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," DiGuilio, 491 So.2d at 1137, and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:

The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

DiGuilio, 491 So.2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." Id.

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Hurst, 202 So.3d at 68.

¹³⁴For the following reasons, we conclude that the State in this case has not *567 proven beyond a reasonable doubt that the error was harmless. Although four out of five aggravating factors were found unanimously, due to the jury's nine to three recommendation for death, we cannot conclude beyond a reasonable doubt that the jury also unanimously found that there were sufficient aggravating factors to impose death, or that the aggravators outweighed the mitigation. See § 921.141, Fla. Stat. (2015), invalidated by Hurst v. Florida, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504; Hurst v. Florida, 136 S.Ct. at 621; Hurst, 202 So.3d at 68.

It is clear that three jurors voted for Williams to receive a life sentence. We cannot speculate why these three jurors did not find that sufficient aggravating factors existed to impose death or that those aggravating factors outweighed the mitigation, or whether the three jurors, in fact, made those findings but were following the trial court's instructions that they were not required to recommend death. See Hurst, 202 So.3d at 58 (quoting Fla. Std. Jury Instr. (Crim.) 7.11 Penalty Proceedings—Capital Cases).

In this case, there was a significant amount of mitigation presented during the penalty phase. Williams called his brothers, who testified about their abusive father, and several doctors, who testified about Williams' post-traumatic stress disorder, substance abuse, and other mental mitigation. Williams attempted to establish the statutory mitigating circumstances of being under the influence of extreme mental or emotional disturbance and diminished capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, as well as nonstatutory mitigation.

The fact that the jury left the mitigation form blank does not affect our analysis. Based on the record, the jury apparently left the form blank because it was following the instructions on the special verdict form, and the trial court's instructions for the jurors to leave the form blank unless a majority of the jury found the listed mitigating circumstances to exist. In other words, the fact that the jury left the form blank does not indicate that no jurors found any of the mitigation.

Furthermore, even if not a single juror found that any mitigation was established, there is still no way to ascertain whether the jury unanimously concluded that sufficient aggravation existed to warrant a death sentence. Based on the jury vote of nine to three, we cannot conclude that the Hurst error in this case was harmless beyond a reasonable doubt. For these reasons, we grant Williams relief based on Hurst. Accordingly, we reverse the sentence of death and remand for a new penalty phase.

CONCLUSION

After a thorough review of all the issues raised by Williams, as well as a review of whether sufficient evidence supports Williams' convictions, we affirm Williams' convictions for first-degree murder, kidnapping, and robbery, but we reverse his sentence of death and remand for a new sentencing proceeding pursuant to Hurst.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.

CANADY and POLSTON, JJ., concur as to the conviction and dissent as to the sentence.

PERRY, Senior Justice, concurs in part and dissents in part with an opinion.

PERRY, Senior Justice, concurring in part and dissenting in part.

I concur with the majority's decision to affirm Williams' convictions and its determination *568 that the Sixth Amendment

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requires that we vacate Williams' death sentence. However, because Florida law requires that Williams be sentenced to life in prison as a consequence of his unconstitutional death sentence, I disagree with the majority's decision to remand for a new penalty phase proceeding instead of remanding for imposition of a life sentence. See § 775.082(2), Fla. Stat. (2016).

As I explained fully in Hurst v. State, 202 So.3d 40, 75–76 (Fla. 2016) (Perry, J., concurring in part and dissenting in part), there is no compelling reason for this Court not to apply the plain language of section 775.082(2), Florida Statutes. Because the majority of this Court has determined that Williams' death sentence was unconstitutionally imposed, Williams is entitled to the clear and unambiguous statutory remedy that the Legislature has specified:

In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

See § 775.082(2), Fla. Stat. (emphasis added). The plain language of the statute does not rely on a specific amendment to the United States Constitution, nor does it refer to a specific decision by this Court or the United States Supreme Court. Further, it does not contemplate that all forms of the death penalty in all cases must be found unconstitutional. Instead, the statute uses singular articles to describe the circumstances by which the statute is to be triggered. Indeed, the statute repeatedly references a singular defendant being brought before a court for sentencing to life imprisonment. I consequently cannot agree that the statute was intended as a fail-safe mechanism for when this Court or the United States Supreme Court declared that the death penalty was categorically unconstitutional. Cf. Hurst, 202 So.3d at 64.

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Armstrong v. State, --- So.3d ---- (2017)
2017 WL 224428, 42 Fla. L. Weekly S15

2017 WL 224428
Supreme Court of Florida.

Lancelot Uriley ARMSTRONG, Appellant,
v.
STATE of Florida, Appellee.
Lancelot Uriley Armstrong, Petitioner,
v.
Julie L. Jones, etc., Respondent.

No. SC14-1967

No. SC15-767

[January 19, 2017]

Synopsis

Background: Following affirmance of his convictions and death sentence for first-degree murder, attempted murder, and armed robbery, 642 So.2d 730, defendant filed motion for postconviction relief, which was denied. On defendant's appeal, the Supreme Court, 862 So.2d 705, vacated defendant's death sentence and remanded for a new penalty hearing after concluding one of defendant's prior violent felony aggravators had been invalidated. Following affirmance of the death sentence imposed on remand, 73 So.3d 155, defendant filed motion to vacate his sentence. The Circuit Court, Broward County, Michael L. Gates, J., denied motion. Defendant appealed and also petitioned for writ of habeas corpus.

[Holding:] The Supreme Court held that trial court's constitutional error in imposing death sentence, based on non-unanimous jury recommendation, was not harmless beyond a reasonable doubt.

Reversed and remanded.

Perry, Senior Justice, filed opinion concurring in part and dissenting in part.

Canady and Polston, JJ., dissented.

An Appeal from the Circuit Court in and for Broward County, Michael L. Gates, Judge—Case No. 061990CF005417B88810
And an Original Proceeding—Habeas Corpus

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Opinion

PER CURIAM.

Armstrong v. State, --- So.3d --- (2017)

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*1 Lancelot Uriley Armstrong appeals an order of the circuit court denying his motion to vacate his sentence of death filed under Florida Rule of Criminal Procedure 3.851, and petitions this Court for a writ of habeas corpus. We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const. For the following reasons, we vacate Armstrong's sentence and remand for a new penalty phase consistent with Hurst v. State, 202 So.3d 40 (Fla. 2016).

Armstrong was convicted of the February 17, 1990, first-degree murder of Deputy John Greeney, attempted murder of Deputy Robert Sallustio, and armed robbery. The jury recommended a sentence of death by a vote of nine to three, which this Court affirmed. Armstrong v. State (Armstrong I), 642 So.2d 730 (Fla. 1994).

On appeal from the denial of postconviction relief, this Court vacated Armstrong's death sentence and remanded for a new penalty phase after concluding that one of his prior violent felony aggravators had since been invalidated. Armstrong v. State (Armstrong II), 862 So.2d 705, 715 (Fla. 2003). After the second penalty phase, the jury again recommended the death sentence by a vote of nine to three. On his second direct appeal, this Court affirmed the sentence of death. Armstrong v. State (Armstrong III), 73 So.3d 155, 161 (Fla. 2011).

On May 29, 2013, Armstrong filed a motion to vacate his sentence pursuant to Florida Rule of Criminal Procedure 3.851, raising ten claims. The circuit court denied relief on each of Armstrong's claims. Armstrong now appeals and also petitions for a writ of habeas corpus.

⁽¹⁾ ⁽²⁾ Because Armstrong was condemned by a vote of nine to three, we find that Armstrong's sentence is a result of a Hurst v. Florida, --- U.S. ---, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), error. We therefore must consider whether the error was harmless beyond a reasonable doubt. See Hurst, 202 So.3d at 67.

The harmless error test, as set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

Id. at 68 (quoting State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986)).

The jury in this case recommended death by a vote of nine to three. While the aggravators are such that no reasonable juror would not have found their existence,¹ we cannot determine that the jury unanimously found that the aggravators outweighed the mitigation. We can only determine that the jury did not unanimously recommend a sentence of death.

¹ The trial court found the following aggravators in this case: (1) Armstrong was convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while Armstrong was engaged or was an accomplice in the commission of or an attempt to commit the crime of robbery; and (3) the victim in this capital felony was a law enforcement officer engaged in the performance of his duties. Armstrong, 73 So.3d at 165.

*2 Because we cannot make these determinations, we cannot say that there is no possibility that the error did not contribute to the sentence. We therefore determine that the error in Armstrong's sentencing was not harmless beyond a reasonable doubt. Accordingly, we reverse the postconviction court's order and remand for a new penalty phase. See Hurst, 202 So.3d at 69.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.

PERRY, Senior Justice, concurs in part and dissents in part with an opinion.

CANADY and POLSTON, JJ., dissent.

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PERRY, Senior Justice, concurring in part and dissenting in part.

I agree with the majority that the Hurst v. Florida, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), error in this case is not harmless beyond a reasonable doubt. However, as I expressed in Hurst v. State, 202 So.3d 40, 75 (Fla. 2016) (Perry, J., concurring in part and dissenting in part), “[t]here is no compelling reason for this Court not to apply the plain language of section 775.082(2), Florida Statutes.” I therefore dissent to the majority’s decision to remand for a new penalty phase and would instead remand for the imposition of a life sentence.

All Citations

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Kopsho v. State, 209 So.3d 568 (2017)

42 Fla. L. Weekly S15

209 So.3d 568
Supreme Court of Florida.

William M. KOPSHO, Appellant,
v.
STATE of Florida, Appellee.
William M. Kopsho, Petitioner,
v.
Julie L. Jones, etc., Respondent.

No. SC15-1256

No. SC15-1762

[January 19, 2017]

Synopsis

Background: Following affirmance of his first-degree murder conviction and sentence of death, 84 So.3d 204, defendant filed postconviction motion to vacate the judgment of conviction and sentence. The Fifth Judicial Circuit Court, Marion County, David Brent Eddy, J., summarily denied motion. Defendant appealed and petitioned for a writ of habeas corpus.

[Holding:] The Supreme Court held that trial court's constitutional error in imposing death sentence, based on non-unanimous jury recommendation, was not harmless beyond a reasonable doubt.

Reversed and remanded.

Perry, Senior Justice, filed opinion concurring in part and dissenting in part.

Canady and Polston, JJ., dissented.

*569 An Appeal from the Circuit Court in and for Marion County, David Brent Eddy, Judge—Case No. 422000CF003762CFAXXX
And an Original Proceeding—Habeas Corpus

Attorneys and Law Firms

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Pamela Jo Bondi, Attorney General, Tallahassee, Florida; and Stacey E. Kircher, Assistant Attorney General, Daytona Beach, Florida, for Appellee/Respondent

Opinion

PER CURIAM.

William Kopsho appeals an order of the Fifth Judicial Circuit Court denying his motion to vacate his conviction of

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first-degree murder and sentence of death, filed under Florida Rule of Criminal Procedure 3.851, and petitions this Court for a writ of habeas corpus. We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const. For the following reasons, we vacate Kopsho's sentence and remand for a new penalty phase. See Hurst v. State, 202 So.3d 40, 69 (Fla. 2016).

The facts of this case were presented in this Court's opinion on direct appeal. See Kopsho v. State, 84 So.3d 204, 209–10 (Fla. 2012). After the penalty phase, the jury voted ten to two to impose a death sentence, and the trial court sentenced Kopsho to death. Id. at 210. On direct appeal in 2012, this Court affirmed Kopsho's conviction and sentence. Id. at 211.

Kopsho filed his postconviction motion to vacate the judgment of conviction and sentence on November 19, 2014. After a case management conference held on March 9, 2015, the circuit court determined that no evidentiary hearing was warranted and entered an order summarily denying Kopsho's initial postconviction motion on March 23, 2015.

While Kopsho's appeal from the summary denial of his motion for postconviction relief was pending, the United States Supreme Court issued its decision in Hurst v. Florida, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), holding, in short, "that Florida's capital sentencing scheme [is] unconstitutional to the extent that it fail[s] to require the jury, rather than the judge, to find the facts necessary to impose the death sentence." Hurst, 202 So.3d at 43–44 (citing Hurst v. Florida, 136 S.Ct. at 619).

^[1] ^[2] *570 Because Kopsho was condemned to death by a vote of ten to two, we find that Kopsho's sentence is the result of a Hurst v. Florida error. We therefore must consider whether the error was harmless beyond a reasonable doubt. See Hurst, 202 So.3d at 67.

The harmless error test, as set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967),] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

Id. at 68 (quoting State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986)).

The jury in this case recommended death by a vote of ten to two. While three of the aggravators in this case are such that no reasonable juror would not have found their existence,¹ we cannot determine that the jury unanimously found that the aggravators outweighed the mitigation. We can only determine that the jury did not unanimously recommend a sentence of death.

¹ The trial court found the following aggravators in this case: (1) that at the time of the murder Kopsho was under a sentence of imprisonment or on felony probation; (2) that Kopsho had committed a prior violent felony; (3) that the murder was committed during an armed kidnapping; and (4) that the murder was cold, calculated, and premeditated. Kopsho, 84 So.3d at 210. The evidence presented at trial included Kopsho's confession that he planned to kill Lynne once she told him that she had slept with her former supervisor but that he had to stay calm until he had the opportunity. Id. at 208. Kopsho repeatedly referred to the crime as premeditated in his multiple confessions. Id. at 209–210.

Because we cannot make these determinations, we cannot say that there is no possibility that the error did not contribute to the sentence. We therefore determine that the error in Kopsho's sentencing was not harmless beyond a reasonable doubt.

Accordingly, we reverse the postconviction court's order and remand for a new penalty phase. See Hurst, 202 So.3d at 69.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.

PERRY, Senior Justice, concurs in part and dissents in part with an opinion.

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CANADY and POLSTON, JJ., dissent.

PERRY, Senior Justice, concurring in part and dissenting in part.

I agree with the majority that the Hurst v. Florida, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), error in this case is not harmless beyond a reasonable doubt. However, as I expressed in Hurst v. State, 202 So.3d 40, 75 (Fla. 2016) (Perry, J., concurring in part and dissenting in part), “[t]here is no compelling reason for this Court not to apply the plain language of section 775.082(2), Florida Statutes.” I therefore dissent to the majority’s decision to remand for a new penalty phase and would instead remand for the imposition of a life sentence.

All Citations

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Calloway v. State, --- So.3d ---- (2017)
2017 WL 372058, 42 Fla. L. Weekly S45

2017 WL 372058
Supreme Court of Florida.

Tavares David CALLOWAY, Appellant/Cross-Appellee,
v.
STATE of Florida, Appellee/Cross-Appellant.

No. SC10-2170

[January 26, 2017]

Synopsis

Background: Defendant was convicted in the Circuit Court, Miami-Dade County, Dava J. Tunis, J., of five counts of first-degree murder, as well as armed robbery, armed kidnapping and armed burglary, and the jury recommended a sentence of death for each count of first-degree murder by a vote of seven to five. Defendant appealed and State cross-appealed.

Holdings: The Supreme Court held that:

- [1] defendant was not entitled to attempt to precommit potential jurors to a recommendation of a life sentence based on expected evidence;
- [2] a *Frye* hearing was necessary before defense expert could testify regarding the effect of coercion in the form of threats;
- [3] State properly impeached defendant's testimony with evidence of collateral criminal conduct;
- [4] use of statements from codefendant's confession to impeach defense expert did not violate Confrontation Clause;
- [5] testimony of substitute medical examiner regarding causes of death and injuries to victims did not violate Confrontation Clause;
- [6] defendant could not relitigate guilt phase issues during penalty-phase closing argument;
- [7] medical records of defendant's father were not relevant at penalty phase;
- [8] evidence supported convictions; and
- [9] imposition of death penalty on nonunanimous jury recommendation that included insufficient factual findings violated the right to jury trial.

Reversed and remanded.

Polston, J., concurred as to the conviction and dissented as to the sentence.

Perry, Senior Justice, concurred in result as to the conviction and concurred in part and dissented in part as to the sentence.

Canady, J., concurred in result as to the conviction and dissented as to the sentence.

An Appeal from the Circuit Court in and for Miami-Dade County, Dava J. Tunis, Judge—Case No. 131998CF016016000XX

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2017 WL 372058, 42 Fla. L. Weekly S45

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Opinion

PER CURIAM.

*1 Tavares David Calloway was convicted of five counts of first-degree murder for the deaths of Derwin Copeland, Frederick McGuire, Adolphus Melvin, Gary St. Charles, and Trenton Thomas, along with armed robbery, armed kidnapping, and armed burglary with an assault or battery. A jury recommended a sentence of death for each count of first-degree murder by a vote of seven to five. We have jurisdiction: See art. V, § 3(b)(1), Fla. Const.

FACTS AND PROCEDURAL HISTORY

1997

On January 21, 1997, eighteen-year-old Anthony Strachan was at home in his family's apartment on 580 Northwest 64th Street in Miami, cutting a friend's hair. Strachan went into the kitchen and, through the kitchen window, saw one of his neighbors, "Shorty," standing outside on 64th Street with two unknown men. One man, who wore a skull cap and a heavy brown coat that resembled a field or military jacket, was taller than Shorty. Strachan saw Shorty walk up the apartment stairs and past the jalousie kitchen door of his family's apartment with one of the unfamiliar men. At some point later in the day, Strachan heard loud booming noises that he assumed were from a neighbor's stereo. He opened the front door to see if anything outside might explain the noise, but saw nothing and closed the door.

Strachan later walked downstairs to retrieve something from his mother's car. On his way back to the apartment, he heard the door of Apartment 8 open and saw the unfamiliar man exiting the apartment complex. He and Strachan nodded at each other as they passed. The unidentified man appeared to be older than Strachan and held a small box the size of a shoe or cigar box that Strachan recognized as one often carried by Shorty. The brown coat he wore struck Strachan as unusually heavy for the weather in Miami.

Elsewhere that day, Latonya Taylor was concerned about her fiancé, Adolphus "Tank" Melvin. He was supposed to pick up their two-year-old son from day care, but the day care center called her and informed her that Melvin never arrived. She attempted to contact him via his beeper and cell phone, but he did not respond. She called her friend, Gwendolyn James, to ask if she had been in contact with Melvin or his friend Trenton Thomas, James's fiancé. James paged Thomas, who also did not respond.

Taylor drove to an apartment in Liberty City that was the residence of Gary "Shorty" St. Charles, where she had previously dropped Melvin off. She saw Melvin's car in the parking lot, heard loud music playing from one of the upstairs apartments, and assumed that it emanated from St. Charles's apartment. When she opened the door to Apartment 8, she found a grisly scene, ran with her son to the nearby home of Melvin's sister, and called the police.

When the police arrived, they found the bodies of Melvin, Thomas, St. Charles, and Derwin Copeland. Frederick McGuire was still alive, and paramedics transported him to the hospital for treatment, where he died the next day. All five men had been shot once in the head, execution style. Their ankles had been bound with duct tape, and their hands and wrists were bound behind their backs with duct tape. Duct tape also covered their eyes and mouths. The men were clad only in underwear and undershirts; their clothing and shoes were piled in a corner of the living room. Styrofoam containers filled with half-eaten

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food were found on the dining room table. Officers noticed that the music on the stereo was very loud, even over the noise of nearby I-95.

*2 The initial investigation of the apartment and surrounding areas lasted for nearly twenty hours. The apartment appeared to have been ransacked before the officers arrived. Although crime scene investigators collected blood samples, they did not specifically search for DNA because DNA collection was not the standard practice of the City of Miami Police Department in 1997. Eighty-nine latent fingerprint cards were lifted from around the apartment, although most of the prints were later found to have matched the victims. All of the pieces of duct tape that were recovered from the apartment were commingled in one plastic bag, but the pieces were later separated. One empty roll of duct tape was found on the floor near the piles of clothing. Investigators also recovered five spent .45 caliber shell casings.

The medical examiner estimated that the time of death for Melvin, Thomas, Copeland, and St. Charles was between 3:00 p.m. and 7:00 p.m. Their wounds were consistent with a .45 caliber firearm, which resulted in an immediate loss of consciousness and death. McGuire was similarly instantly incapacitated, although he did not die until the following day. Additionally, Thomas's head wound featured stippling, which indicated that he was shot at close range. None of the men exhibited defensive wounds.

Although investigators found no significant quantity of drugs in the apartment, they did find marijuana residue and drug paraphernalia. Additionally, a small bag of marijuana was found in the clothing of Melvin. Investigators also recovered cash from under a waterbed mattress and a gold medallion under the body of Melvin, but there was no jewelry or marijuana found on any of the other victims. They concluded that Melvin was the leader of a small group involved in marijuana packaging and distribution. St. Charles, who resided in the apartment, served as his "second-in-command," and Thomas and McGuire oversaw the packaging of the marijuana. Copeland was not believed to have been formally involved in the group's activities, but he had recently been in a car accident and was dependent on Melvin, his uncle, for transportation. Despite several months of investigation by the City of Miami Police Department, the case went cold.

1998

On May 11, 1998, Detective George Law received a phone call from a woman who did not identify herself. Law had investigated the murder of Michael Gosha, whose family and friends had informed Law that Gosha was last seen alive with a man identified as "Black." The woman advised Law that "Black" was Tavares Calloway, who knew Gosha and was involved in the quintuple murders from 1997, along with "Tote."

On May 12, 1998, Detective Kelvin Knowles brought Antonio "Tote" Clark to the police station. Clark signed a Miranda¹ waiver, and eventually told the police that he and Calloway had gone to St. Charles's apartment to commit a robbery at the direction of Dwight Campbell, who was also known as Frank. Clark said he was unarmed and did not expect anyone to die. Calloway had instructed the victims to remove their clothing to be sure they were not armed and told Clark to bind them with duct tape. Calloway shot the men, and he and Clark left the scene.

¹ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Based on Clark's statement, Detective Knowles was dispatched to pick up Calloway, who had a bench warrant for driving with a suspended license. Knowles was unable to make contact with Calloway initially, but he left a card indicating that Calloway should call him. When Calloway called, Knowles informed him of the bench warrant and indicated that detectives needed to speak with him about other matters. Calloway agreed to come to the station and asked Knowles for transportation. He was nineteen years old.

Calloway arrived at the station around 3:00 p.m. on May 13 and was directed to an interview room with a two-way mirror. He was not handcuffed, and officers elected not to record the interview. Detectives Law and Alberto Borges began to question him, and Calloway signed a Miranda waiver at 3:31 p.m. Law asked Calloway if he wanted water, which Calloway

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declined, explaining that he was fasting that day because he was a born-again Christian. Calloway appeared relaxed and calm. Although Calloway was nineteen years old, Law thought he looked older and seemed mature for his age.

*3 Law initially questioned him about the Gosha homicide, and Calloway admitted that he and Gosha planned and participated in the home invasion robbery of Shellie Wilson ("Twin"), and that Calloway suspected Gosha was murdered in retaliation for that robbery. Borges then asked him about the quintuple homicides, but Calloway denied involvement and repeatedly told them to "find the facts." When Borges showed Calloway photographs of the victims taken from the apartment, Calloway did not respond, other than to repeat, "find the facts." Around 5:00 p.m., Law and Borges left Calloway alone in the interview room.

Detective Ervins Ford, who had viewed the questioning from the attached observation room, entered the interview room after 7:00 p.m. In an effort to build rapport, Ford asked Calloway about his background and upbringing. Calloway explained that his grandmother had raised him and imposed regular church attendance and nightly Bible study in the household. Ford retrieved a Bible from one of the desks in the homicide office and returned to the interview room. Calloway became noticeably more comfortable and confident with Ford as Calloway began to recite passages from the Bible. Calloway referenced many passages that concerned God's vengeance and seemed to identify with the Archangel Gabriel, whom Calloway described as God's punisher. When Ford asked him whether the victims had been punished by their deaths, Calloway replied that they should have seen it coming because they had been selling drugs for a long time and "were doing a lot of dirt." After watching Calloway from the observation room, Detective Tony Davis entered, told Calloway that the Bible states "thou shall not kill," and walked out of the room with the Bible. Ford exited the room as well.

Over the course of the evening, several officers asked Calloway if he needed anything, offers which he declined. At approximately 8:00 p.m., Detective Knowles returned to the interview room and listened as Calloway told him that the victims were bad people, drug dealers, and they worked for the devil. Around 11:00 p.m., Detective Juan Gonzalez entered and falsely informed Calloway that his fingerprints were found in Apartment 8 in 1997. Calloway responded that perhaps he had been to a hardware store and touched a door. When Gonzalez pressed him as to how a door with his fingerprints on it ended up in Apartment 8, Calloway became defensive and told Gonzalez to do his job and leave the room, which he did.

Law returned to the interview room at approximately 1:00 a.m. on March 14, along with Detective George Pereira from the Miami-Dade County Police Department to discuss the Twin home invasion robbery, which Pereira had investigated. They did not discuss the quintuple homicides with Calloway at that time. Calloway denied Pereira's request to record the interview. Pereira reminded Calloway of his Miranda rights, and Calloway repeated that he did not want a lawyer and did not indicate that he wished to end the questioning.

Gonzalez returned between 2:30 a.m. and 3:00 a.m., and Calloway provided some biographical information, including that three months before the murders, he had lived next door to Campbell, whom Calloway did not know well. Gonzalez told Calloway that his fingerprints were found on duct tape that was used to restrain the victims, which Gonzalez knew to be false. Calloway responded evasively that he used duct tape for many reasons, but did not know how duct tape with his fingerprints came to be in Apartment 8. When asked if he knew any of the victims, Calloway said that he knew Melvin as an unpopular snitch. Although Borges noticed a shift in Calloway's demeanor at this point, he directed the interview to stop, given the late hour. Several officers slept at their desks, and Calloway was left alone in the interview room to sleep.

*4 Around 8:00 a.m. on May 14, Law checked on Calloway and found him asleep in the interview room. After Calloway was awakened by Law, Calloway asked to call his girlfriend, Diane Odom. Law directed him to a telephone and observed the phone call, but did not listen to the conversation. He saw Calloway's demeanor change and decided to resume questioning when they returned to the interview room. At some point that morning, one of the officers brought Calloway breakfast, which he eventually ate.

Law began by telling Calloway that he could tell Calloway loved his girlfriend. Law and Detective Willie Everett then began to confront Calloway with inculpatory evidence. Law told Calloway that they knew he was at the crime scene because his fingerprints were found on the door and on duct tape recovered from the scene.² Everett also told Calloway that they had information that he wore camouflage clothing and sunglasses that day.³ Everett also told Calloway that if he was a good Christian, God would want him to confess. The detectives saw him tear up, put a hand on his shoulder, and told him it would be ok. Calloway said that if they would give him a minute, he would tell them everything.

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² During trial, Law admitted this was a ruse to pressure Calloway to confess. Neither Calloway's fingerprints nor his DNA were ever recovered from the apartment.

³ During their questioning, Sergeant Eunice Cooper slipped a note under the door of the interrogation room. The note contained a list of questions that the detectives should ask, including whether "Black" wore army fatigues, a hat, or sunglasses on the day of the murders; whether he had come from the catwalk adjacent to I-95; if he carried anything, specifically a new jacket, shoe box, or cigar box; and if the "Haitian boy downstairs" was approached near the car. When Everett later asked Cooper where she had obtained the information, she replied that she was not at liberty to disclose her source. He did not question her response.

Around 9:00 a.m. on May 14, Calloway told them that three days before the murders in January 1997, he had gone to Liberty Market to purchase camouflage clothing and sunglasses in preparation for a "lick," meaning a robbery.⁴ On January 21, 1997, Michael Gosha came to him and said it was time to do the lick. They went to Campbell's home first, and then Calloway and Clark went to St. Charles's residence on 580 Northwest 64th Street. Calloway wore an Army hat and camouflage clothing.

⁴ Calloway was eighteen years old in January 1997.

When they arrived, they saw St. Charles exit a car. Calloway used a .45 caliber gun to place St. Charles in a chokehold and force their way into Apartment 8, where they found Melvin and three other men eating from Styrofoam containers. Calloway demanded to know where the drugs were and ordered everyone to get on the floor and remove their clothing and jewelry. Calloway told Clark to find something to restrain the men, and when Clark turned up empty-handed, he sent Clark to purchase tape. Clark returned with duct tape, and they began to tape everyone. When they ran out of duct tape, Calloway directed Clark to purchase more. Calloway placed tape across the eyes of the victims, "because they were looking" at him.

At a loss for what to do next, Calloway sent Clark to Campbell for further instructions. Clark returned and told him that Campbell said to kill two of the men. Calloway responded that killing only two of them would create problems because they could identify Calloway and would retaliate. Clark returned to Campbell's apartment and reported to Calloway that Campbell said to kill everyone. Calloway increased the volume of the stereo to muffle the sounds of gunshots. He shot each of the victims in the head once. Calloway and Clark took two pounds of marijuana, jewelry, cell phones, beepers, and cash; wiped down any fingerprints they might have left; and fled to Campbell's house. They informed him they had completed the lick and went to the home of another friend. A short time later, Calloway disposed of the gun and provided the stolen jewelry to a relative of Gosha's to pawn.

⁵ Law asked Calloway if they could have a stenographer record a formal, sworn statement, and Calloway agreed. Additional details were included in the statement, including that before they settled on Melvin as the target of the lick, Calloway and Campbell discussed other potential targets. Calloway also indicated that Atwon "Twon" Davis waited for Clark and him in the parking lot while they were in the apartment before driving them to a friend's house.⁵ Gosha, Clark, and Calloway distributed the items taken from the apartment among themselves before they parted ways. Calloway later burned his clothing.

⁵ Officers later learned that Davis was incarcerated at the time of the homicides and therefore could not have driven Calloway and Clark from the crime scene.

Law arranged for Diane Odom to come to the police station. When she arrived, Law and Everett left Odom and Calloway alone and unmonitored in the interrogation room. He was crying and told her he had to come clean and get right with God. Sergeant Cooper later saw Calloway in the homicide office, and he told her that if he had not confessed, they would never have been able to prove his involvement.

Around 1:00 p.m., Calloway agreed to show Law and Everett the area where he disposed of the gun. Calloway, who was not

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handcuffed because the officers thought he was cooperative, Odom, Everett, and Law drove in a van first to Liberty Market, where Calloway told the detectives he had purchased clothing for the lick. They then drove to the area where Calloway claimed to have disposed of the gun, which was a litter-strewn field. Despite a brief search, the gun was not found.

The officers then proceeded to the home of one of Calloway's relatives, where he spoke to and hugged his family members. The officers left Odom with Calloway's relatives and eventually returned with Calloway to the police station. Upon their return, Calloway reviewed and signed his transcribed statement, twenty-six hours after he first entered the police station. Ultimately, eleven police officers questioned Calloway over the course of approximately eighteen hours, during which time he was not handcuffed.

On May 26, 1998, a grand jury indicted Calloway and Clark on eight counts: five counts of first-degree murder, one count of armed robbery, one count of armed kidnapping, and one count of armed burglary with an assault or battery. The joint indictment was eventually severed.

Discovery

In 2008, Detective Borges first learned that Strachan may have witnessed some of the events that day. At that point, it was revealed that Sergeant Cooper, the author of the note that was slipped under the door during Calloway's confession, had received information from one of her friends, Val Williams. Williams, the mother of Strachan and who worked in the property department of the City of Miami Police Department, approached Cooper sometime in 1997 and provided Cooper with information that provided the basis for several questions on the note. However, Williams asked Cooper not to share the information because Williams did not want her son to be involved in the investigation. At the time, Cooper did not think the information was sufficient to identify any particular suspect and incorrectly believed Strachan to be a minor, so she honored Williams's request. Cooper did not reveal the source of her information until 2008, when the note was brought to her attention again. When Borges learned that Strachan may have had information regarding the homicides, he and another officer flew to Arizona, where he then lived, to interview him.

In October 2008, the trial court held a suppression hearing regarding Calloway's confession that lasted several days and was continued until March 2009. At the conclusion of the hearing, the State and Calloway contested whether a Frye⁶ hearing was necessary to determine whether Dr. Richard Ofshe, an expert witness in the field of false confessions, could testify for the defense. The trial court ruled that both Dr. Ofshe and Dr. Michael Welner, a rebuttal witness for the State, could testify, but only after Calloway himself testified that his confession was false. However, Calloway did not testify during the suppression hearing; therefore, neither doctor testified at that time.

⁶ Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Guilt Phase

*6 During trial, the State presented testimony from each of the officers who participated in the interrogation. In anticipation of Calloway's defense that his confession was false and "fed" to him by officers, the State presented evidence during its case-in-chief to counter that defense. Every officer who testified denied that anyone had threatened, coerced, or promised Calloway anything to obtain a confession. Additionally, each officer testified that Calloway did not request an attorney or otherwise invoke his Miranda rights.⁷

⁷ The videotaped testimony of Detective Everett, taken in 2003 before Calloway testified or Cooper disclosed Strachan as a witness, did not reference either an invocation of Calloway's Miranda rights or Cooper's note.

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Detective Borges testified that some of the contemporaneous media coverage of the murders did not accurately portray certain details. He explained that he was familiar with many of the details from the January 1997 investigation that he did not disclose to Everett or Law before they obtained the confession. He also offered testimony that Calloway himself provided certain details that were unknown to officers in May 1998, but were later confirmed by Strachan, such as the fact that Calloway first encountered St. Charles downstairs. Further, Borges testified that Clark's fingerprints were found on the sticky side of certain pieces of duct tape, which confirmed both Clark's and Calloway's accounts that Clark taped the victims.⁸

⁸ Clark did not testify during trial, but his statement, taken the day before Calloway was arrested, was used for impeachment purposes.

Law denied that he or Everett "fed" Calloway specific details when they questioned him, or that they rehearsed anything with him before his statement was recorded. Law flatly denied that he "tricked [Calloway] into thinking he was a police agent" who would assist the detectives with the apprehension of the "real" murderers. Law also testified that that he did not recognize the note written by Cooper, nor did he remember it from their interrogation of Calloway.

Fabrice Nelson, the lead crime scene investigator in January 1997, testified with respect to evidence recovered from the apartment. Guillermo Martin, a latent fingerprint examiner, testified that latent prints lifted from the freezer door and the sticky side of duct tape pieces recovered from Apartment 8 matched those of Clark. Martin admitted that of the sixty-four latent fingerprint cards of value recovered, thirty-four cards remained unidentified, and none matched the known prints of Calloway. Over objections from the defense, the State also presented the testimony of medical examiner Dr. Bruce Hyma, in the place of Dr. Charles Siebert, the original medical examiner.

Latonya Taylor testified that she recognized her fiancé, Adolphus Melvin, by the underwear that he wore when he was killed, which she had purchased for him. She also described the jewelry that he usually wore, which, along with his wallet, cell phone, and beeper, she never saw after he left for the day on January 21, 1997. Gwendolyn James, the fiancée of Trenton Thomas, also testified that Thomas's pager was never found after that day. Adolphus Thornton, who knew Calloway as "Black" and was a friend of his nephew, Michael Gosha, testified that Calloway approached him in January 1997 to pawn a distinctive gold bracelet. A few days later, Thornton learned that Melvin had been murdered and recognized the bracelet as belonging to him.

Strachan testified that in January 1997, he assumed the booming noises were music played from loud speakers; however, he had since served in the Marines and thought he recognized the noises to be the sounds of gunshots, although he could not definitely categorize the noises. After he informed his mother of what he had observed, his mother moved their family out of the apartment that very day and they did not return. After he testified that the person he saw in January 1997 seemed to be several years older than himself, he admitted that he was unable to identify Calloway in a photographic array during a police interview in 2008 or during trial in 2009.

*7 The State also presented testimony from Diane Odom, Calloway's girlfriend at the time of his arrest. She testified that she saw Calloway after he confessed and drove with Calloway and the officers to search for the gun. On direct examination, she testified that Calloway did not tell her that her life was in danger when officers dropped her off with members of Calloway's family that day.

After the State rested, defense counsel proceeded on a theory that Calloway's confession was false and induced as part of a plan with the police to lure the real murderers from hiding. In support of this theory, defense counsel presented testimony from Calloway and Dr. Ofshe, a sociologist who testified as an expert on factors that can cause a false confession.

Calloway's testimony conflicted with that of various police witnesses. For example, he testified that when he signed the Miranda paperwork upon his arrival at the police station, no one explained that he was under arrest or reviewed the protections of the Miranda rights. He also asserted that he requested an attorney several times from several different officers, and at one point, Borges retorted that "the devil in a suit" could not save him and he would "fry for this." He also claimed that Ford, rather than himself, stated that the victims were bad people who worked for the devil. Further, he testified that several officers provided him with nonpublic details about the murders, including that a robbery also occurred; the apartment

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was a marijuana packaging center; the victims were killed execution style; the stereo volume was high; and the weapon used was a .45 caliber gun.

After being left alone in the interview room, Calloway testified that Law returned at some point in the late night or early morning with a “glazed, crazy” look. Law said he had been speaking with the deceased Gosha, who told Law who had killed him. Calloway thought Law might have experienced a religious vision and replied that if Law had really spoken to Gosha, Gosha would have told him that Calloway was a good person who was not involved in the murders of either Gosha or the five men in 1997. Law returned sometime later, looking calmer, and explained that the men who killed Gosha intended to target Calloway next. Law implied that Calloway and his family were under surveillance. However, Law said it would help Calloway if he made a false statement and to think about his family before declining this opportunity to help them. After speaking with Odom, Calloway agreed to provide a false confession to protect his family. He testified that he was under the impression that he would spend three months in jail so that the police could apprehend the real murderers. The State extensively impeached Calloway with an earlier interview between Dr. Ofshe and Calloway. Calloway defended inconsistent or incoherent statements by reference to his age at the time of the arrest (19), naivety, ignorance, use of slang, and lack of education.

Dr. Ofshe offered testimony regarding the manner in which a police interview may become a coercive interrogation that results in a confession. He explained that Calloway’s account indicated the presence of many sources of “contamination,” meaning that Calloway was potentially aware of evidence from either media accounts or the officers themselves. Dr. Ofshe offered his opinion that “[t]he quality of the interrogation was extremely poor throughout”; however, the trial court precluded him from further testifying whether it was his opinion that the confession was false. The court also ruled that Dr. Ofshe could not compare statements in Cooper’s note and Strachan’s testimony to Calloway’s confession.

*8 The State impeached Dr. Ofshe with inconsistencies in the notes that Calloway provided to him before their interview. For example, when Dr. Ofshe interviewed Calloway in 2001, Dr. Ofshe told Calloway that it did not make sense that Calloway told the police he had fabricated the story about sending Clark to purchase duct tape, when Clark had recounted the same detail the day before Calloway was arrested. Dr. Ofshe admitted that he disregarded many of the details that Calloway recounted as too confusing until he learned about Cooper’s note and the substance of Strachan’s testimony.

Defense counsel also presented testimony from Rupert Butcher, a latent fingerprint examiner from the City of Miami Police Department. He testified that the duct tape collected from Apartment 8 was commingled and seized improperly.

During rebuttal, the State presented testimony from several witnesses who disputed Calloway’s testimony. Law explained that he was only minimally involved with the 1997 quintuple homicides prior to Calloway’s arrest and therefore could not have provided him with details about the homicides. Law and Borges denied that Borges told Calloway that he “would fry” for this and that a lawyer, “a devil in a suit,” could not help him, or that they denied him an attorney upon his request. Law denied that he approached Calloway early on the morning of May 14 and told Calloway that he had spoken to Gosha in a dream, or that he arranged a deal with Calloway. The State also presented detectives from the Miami-Dade County Police Department who had investigated the Twin robbery. Calloway testified that he was a victim of that robbery; however, Detective Pereira countered that Calloway admitted his involvement with that robbery.

Dr. Michael Welner, a psychiatrist, agreed that false confessions do occur, but emphasized that they are a rare phenomenon. He also explained that research has demonstrated that false confessions tend to be made more often by individuals who are compliant or suggestible, particularly those who suffer from mental illness or qualify as intellectually disabled. Dr. Welner stated that he had no evidence to indicate that Calloway was particularly compliant or suggestible, suffered from mental illness, or was actively psychotic at the time of his arrest and confession.

After a trial that lasted over two months, the jury returned a guilty verdict on all counts on July 30, 2009.

Penalty Phase

During the penalty phase, the State presented victim impact testimony from Dorothy White, the mother of Trenton Thomas;

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Katherine Lowe, the sister of Frederick McGuire; Carolyn Raphael, the sister of Gary St. Charles; Errol Kelly, the nephew of Adolphus Melvin; and Gloria Copeland, the mother of Derwin Copeland. The State then rested.

Diane Odom, Calloway's girlfriend at the time of his arrest, testified that Calloway helped her with her children during their relationship. He picked them up from school, taught them how to play football and ride bikes, and spent three to five days a week with them. Eugene Anderson, a relative to Calloway by marriage, explained that he occasionally hired Calloway to assist him with his carpet installation business and that Calloway gave his earnings to Eugene's wife, Shante, for their children.

Joan King and Juanita Perry testified that before his arrest, Calloway regularly attended church. In addition to attending services three times a week, he participated in youth activities, helped clean the church, and served as an usher.

Eugene Hill, Calloway's step-grandfather, provided testimony about Calloway's impoverished childhood. His stepdaughter and Calloway's mother, Shirley Hill, moved to Miami to live with him and his wife, Hester Hill. Eugene tried to provide for Calloway and his brother, Reginald, and to discipline them, but he was eventually injured and was unable to continue to support Shirley and her family.

*9 Shante Anderson, Calloway's second cousin, testified regarding Calloway's difficult childhood. When Calloway's mother moved her children to Liberty City, they lived in a crowded two-bedroom apartment with Eugene and Hester Hill, Cherry Hill, and Cherry's two children. Eugene was strict and threatened to discipline the children with his belt. After Shirley moved out of the apartment when Calloway was approximately thirteen years old, she, Calloway, and Reginald were evicted at least twice from various apartments around Liberty City. It was rare that Shirley kept more than milk and cereal to feed Calloway and Reginald. Calloway would visit his grandparents' home, where Hester would feed him without Eugene's knowledge or permission.

Reginald Calloway further testified to the hardships he and his brother endured. He stated that Eugene frequently beat Calloway with a belt during the time they lived with him and their mother was largely absent during this time. Despite the difficulties, Calloway encouraged his brother to stay in school and served as a surrogate father figure.

Calloway's mother, Shirley, explained that she was often abused by Solomon Calloway, the father of Calloway and Reginald, and that he once attempted to drown her in a bathtub. When Calloway was one or two years old, she moved her children to a small, one-bedroom trailer in Georgia. Despite the move, Solomon visited the trailer and beat Shirley with a switch nearly every day. Solomon would also beat Calloway with the switch. She recounted one incident when she and Solomon were fighting and Calloway, then a toddler, handed her a bat to use in self-defense. The abuse continued until she moved to Miami to live with her mother and stepfather, when Calloway was five or six years old.

After she moved out of their home and into a one-bedroom apartment with her sons, she spent her income on drugs, rather than rent, electricity, groceries, or other basic needs for her children. When Calloway was approximately fourteen, she moved the family again, this time to the Scott Projects, which she described as a "war zone" where drugs were openly sold and fights occurred regularly. Her drug abuse intensified, and she testified that at that point in her life, nothing but crack cocaine mattered to her, not even her children. Instead of using food stamps to feed her children, she traded the food stamps for drugs.

On February 3, 2010, the jury recommended the death penalty for all five murders, each by a vote of seven to five. On April 13, 2010, the court held a Spencer⁹ hearing. Dr. Jethro Toomer, a clinical psychologist, testified for the defense. Dr. Toomer explained that the instability, poverty, and parental abandonment that Calloway experienced throughout his life affected his cognitive processing, impulse control, and ability to engage in personal relationships. However, Dr. Toomer admitted that Calloway's participation in planning the robbery and murders demonstrated that he was capable of controlling his impulses.

⁹ Spencer v. State, 615 So.2d 688 (Fla. 1993).

The trial court issued its sentencing order on October 1, 2010. The court concluded that the State had established beyond a reasonable doubt the existence of six aggravating circumstances: prior conviction of a capital felony, § 921.141(5)(b), Fla. Stat. (1997) (great weight); capital felony committed in the course of a kidnapping, § 921.141(5)(d) (great weight); capital

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felony committed for the purpose of avoiding arrest, § 921.141(5)(e) (great weight); capital felony committed for pecuniary gain, § 921.141(5)(f) (great weight); capital felony was heinous, atrocious, or cruel (HAC), § 921.141(5)(h) (exceptionally great weight); and capital felony was committed in a cold, calculated, and premeditated manner (CCP), § 921.141(5)(i) (extremely great weight).

*10 The court found one statutory mitigating circumstance, Calloway's age at the time of the murders, section 921.141(6)(g), Florida Statutes, and gave it some weight. The court also acknowledged the existence of the following nonstatutory mitigating circumstances: Calloway had an unstable and impoverished background (slight weight); he was often abandoned by his mother, who was a crack addict (some weight); as a very young child, he witnessed his father physically abuse his mother (slight weight); he demonstrated poor performance in school, has a low-normal IQ, and dropped out of school (minimal weight); he grew up in the Scott Projects, a rough neighborhood rife with narcotics and violence (slight weight); he suffered emotional deprivation at the hands of his caregivers, his mother and step-grandfather (little weight); he was exposed to chronic violence throughout his life (little weight); he was deprived of a nurturing mother (little weight); he grew up in abject poverty (slight weight); he was born into a dysfunctional family (minimal weight); he became normalized to violence (little weight); he lacked guidance and a father-son relationship (slight weight); he lacked a role model (no weight); he faced unstable living conditions throughout his life (little weight); he was active in his church and exhibited genuine religious beliefs (no weight); his aunt and grandmother passed away while he was in jail, and he was upset because he was unable to attend their funerals (no weight); he did not flee from the police (no weight); his mother still loves him (no weight); he was a good father figure to the children of his former girlfriend, Diane Odom (some weight); he encouraged his cousins to do well (minimal weight); he is considerate, generous, and concerned about his family (some weight); he will die in prison regardless of what sentence he receives (no weight); the police would not have solved the crimes if he had not confessed (some weight); Clark, his codefendant, was sentenced to life imprisonment (no weight); he did not receive recommended psychological counseling (some weight); he was employed at the time of his arrest (slight weight); and he used poor judgment and engaged in impulsive behavior (minimal weight).¹⁰

¹⁰ The court determined that Calloway did not present mitigating evidence that the capital felony was committed while he was under the influence of a mental or emotional disturbance. The court also rejected his claim that it should consider as a mitigating circumstance that he was a follower, when "[t]he evidence proved that he was clearly a leader in the commission of these crimes."

The court concluded that the aggravating circumstances, particularly HAC and CCP, far outweighed the mitigating circumstances. The trial court sentenced Calloway to death for the murders, and imposed life sentences for the armed robbery, armed kidnapping, and armed burglary with an assault or battery convictions. This appeal follows.

DISCUSSION

Voir Dire

¹¹The first error that Calloway alleges is that the trial court improperly limited the scope of voir dire. Specifically, defense counsel sought to ask potential jurors whether they would consider a life recommendation when faced with five murder victims and the anticipated multiple aggravating circumstances. During a hearing on this issue, the defense argued that they would be unable to explore juror bias and intelligently exercise preemptory strikes without these questions. The State generally agreed that the defense should be permitted to ask whether jurors would commit to weighing the aggravating and mitigating circumstances. However, the State contended that defense counsel should not be permitted to attempt to commit the jurors to a predetermination by asking if jurors could still consider life after hearing about multiple certain aggravating circumstances, which would convert voir dire into a pretrial of the case.

The trial court explained that prospective jurors had been asked whether they could commit to fairly weighing aggravating and mitigating circumstances before making their recommendation. When defense counsel responded, "The problem is, they don't know what the aggravators are yet," the court answered, "That's the way it is," and reminded defense counsel that the

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jurors are given similar instructions before deliberation. Defense counsel replied:

I don't want to find out their attitude towards applying that instruction at the end of the case. It's too late for me to have explored whether they would be overwhelmed by [preconceived] notions of bias against [heinous], atrocious, and cruel.

A case where someone tortured someone[,] tied them up and subject[ed] them to pain, no, I can't give them life. I need to know that at the beginning because they don't know what the aggravators are going to be, either the law or the potential factual scenario. And if they would be overwhelmed that they can't apply the law or they have a bias such that I would use a pre-emptory, I need to know about it in jury selection.

The court stated that defense counsel had failed to present any authority to support that position, and the jury should not be requested to engage in pretrial determinations. It ultimately concluded that the parties could probe the venire about potential bias regarding the number of victims and the potential for financial gain, given that the indictment included the armed robbery charge.

*11 ¹²This Court will not disturb a ruling of a trial court regarding the scope of voir dire absent a finding of an abuse of discretion. *E.g., Chamberlain v. State*, 881 So.2d 1087, 1095 (Fla. 2004). This standard is only met if no reasonable person would arrive at the same conclusion as that of the trial court. *Trease v. State*, 768 So.2d 1050, 1053 n.2 (Fla. 2000) (citing *Huff v. State*, 569 So.2d 1247, 1249 (Fla. 1990)). This Court has previously found no abuse of discretion in the exclusion of questions pertaining to potential jurors' familiarity with stories about prisoners who had been released from death row, or their views regarding mitigation. *Darling v. State*, 808 So.2d 145, 160 (Fla. 2002); *Vining v. State*, 637 So.2d 921, 926-27 (Fla. 1994); see also *Hoskins v. State*, 965 So.2d 1, 13 (Fla. 2007) (finding no abuse of discretion in excluding the use of autopsy photographs during voir dire). However, we have held that an abuse of discretion occurred when a trial court prevented defense counsel from questioning prospective jurors about whether they would accept voluntary intoxication as a defense in a case that required specific intent to be established. *Lavado v. State*, 492 So.2d 1322, 1323 (Fla. 1986); see also *Johnson v. State*, 590 So.2d 1110, 1110 (Fla. 2d DCA 1991) (trial court abused its discretion in excluding questions about defendant's status as a convicted felon to probe for potential bias).

¹³It is a well-settled principle in Florida that parties may not question potential jurors during voir dire about evidence that is expected to be presented during trial and request an initial decision from prospective jurors as to how they will rule in the case. *Hoskins*, 965 So.2d at 13 ("The purpose of voir dire is to obtain a fair and impartial jury, whose minds are free of all interest, bias, or prejudice, not to shock potential jurors or to obtain a preview of their opinions of the evidence." (citations omitted)); *Franqui v. State*, 699 So.2d 1312, 1322 n.5 (Fla. 1997) (citing *Vining*, 637 So.2d at 921; *Dicks v. State*, 83 Fla. 717, 93 So. 137, 138 (1922)). "Such a procedure would revolutionize jury trials." *Dicks*, 93 So. at 137.

We distinguish this case from *Lavado*, which involved whether the jury could accept the theory of the defense. In *Barnhill v. State*, 834 So.2d 836, 846 (Fla. 2002), this Court explained how such a question was critical to the defendant's right to a fair trial:

If counsel knows nothing more of the jurors, the single thing defense counsel must ascertain is whether the prospective jurors can fairly and impartially consider the defense offered by the defendant. See *Lavado v. State*, 492 So.2d 1322 (Fla. 1986). A trial judge abuses his or her discretion if he or she precludes counsel from asking specific questions about bias or prejudice against the defendant or the defense theory, even if the judge permits the general question as to whether the prospective juror can follow the law. *Id.*

(Emphasis supplied); see also *Johnson*, 590 So.2d at 1110. Unlike the circumstances in *Lavado* or *Johnson*, the questions here pertained to obtaining a pretrial decision on anticipated aggravating circumstances that could only be explained through a discussion of the underlying facts, rather than an aspect of Calloway or his theory of the case. Therefore, neither *Lavado* nor *Johnson* provides support for Calloway's proposition that the trial court abused its discretion.

Here, defense counsel sought to precommit jurors to a recommendation of a life sentence based on expected evidence. Calloway asserts that the trial court's exclusion of such questions was inconsistent with a subsequent ruling that permitted questions regarding the number of victims and the potential pecuniary gain aggravating circumstance. However, the court explained that the potential jurors were aware of the number of victims and that the murders had occurred during the course of a robbery because they had been informed of the crimes with which Calloway had been charged. What they had not been

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informed of at that time were the particular facts of the crime—namely, that the victims had been duct-taped, blindfolded, and gagged while they listened to Calloway and Clark debate whether to kill some or all of them. The trial court permitted defense counsel to ask hypothetical questions about jurors' general views on aggravation; however, defense counsel could not ask them whether they would precommit to a life sentence in light of specific aggravating circumstances. Such questions would have pretried the case in voir dire. See Hoskins, 965 So.2d at 13; Franqui, 699 So.2d at 1322 n.5. Therefore, we conclude that the trial court did not abuse its discretion when it issued the one limitation.

Whether a Frye Hearing Was Necessary

*12 On cross-appeal, the State claims that the trial court erred when it failed to conduct a Frye hearing before it allowed Dr. Ofshe to testify as an expert.¹¹ The State contends that had a Frye hearing been held, Dr. Ofshe would not have been permitted to testify as an expert. During a pretrial suppression hearing in 2008, the State insisted that Dr. Ofshe be subject to a Frye hearing before he could testify. However, the trial court ruled that his testimony would not become relevant until Calloway testified that his confession was false. Calloway did not testify until trial in 2009, and the trial court ruled that a Frye hearing would not be held at that point, based on United States v. Hall, 93 F.3d 1337, 1342 (7th Cir. 1996), and Boyer v. State, 825 So.2d 418 (Fla. 1st DCA 2002).

¹¹ The Frye standard was in place at the time of Calloway's trial in 2009.

¹⁴ ¹⁵ ¹⁶ ¹⁷ Under the Frye standard, the proponent of the evidence sought to be admitted must prove to the trial court by a preponderance of the evidence that the scientific principles and methodology of the expert witness are generally accepted by the relevant scientific community. Marsh v. Valyou, 977 So.2d 543, 547 (Fla. 2007); Ramirez v. State, 810 So.2d 836, 844 (Fla. 2001). Frye hearings only apply to novel scientific methodologies; once the methodology has been established and recognized by the relevant scientific community, a Frye hearing becomes unnecessary. See, e.g., King v. State, 89 So.3d 209, 228–29 (Fla. 2012) (concluding that tool-mark identification did not require a Frye hearing). Frye determinations are legal rulings that are reviewed de novo. Brim v. State, 695 So.2d 268, 274 (Fla. 1997). Frye errors are subject to being reviewed for harmless error. Ramirez, 810 So.2d at 845 (citing Hadden v. State, 690 So.2d 573, 581 (Fla. 1997)). An error is harmless if there is no reasonable possibility that it affected the verdict. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986).

In Flanagan v. State, 625 So.2d 827, 828 (Fla. 1993), this Court explained that not all expert testimony requires a Frye hearing:

[P]ure opinion testimony, such as an expert's opinion that a defendant is incompetent, does not have to meet Frye, because this type of testimony is based upon the expert's personal experience and training. While cloaked with the credibility of the expert, this testimony is analyzed by the jury as it analyzes any other personal opinion or factual testimony by a witness. Profile testimony, on the other hand, by its nature necessarily relies on some scientific principle or test, which implies an infallibility not found in pure opinion testimony. The jury will naturally assume that the scientific principles underlying the expert's conclusion are valid. Accordingly, this type of testimony must meet the Frye test, designed to ensure that the jury will not be misled by experimental scientific methods which may ultimately prove to be unsound. See Stokes v. State, 548 So.2d 188, 193–194 [(Fla. 1989)] ("A courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments. If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use.").

(Emphasis supplied.) We subsequently concluded that based upon the reasoning in Flanagan, a Frye hearing must be held before an expert could testify about the psychological effects of sexual abuse upon a child. Hadden, 690 So.2d at 579–80.

¹⁸ We have also previously considered whether Dr. Ofshe's testimony requires a Frye hearing before it may be presented to a jury. In Williamson v. State, 994 So.2d 1000, 1007–08 (Fla. 2008), the prosecution theorized that the defendant threatened a key State witness, Charles Panoyan. In support of this theory, Dr. Ofshe testified for the State that the threats made by Williamson indicated a degree of control or influence over Panoyan. Id. at 1009. The following exchange occurred during

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trial:

*13 Q. [The State] But did you have the opportunity to discern any kind of control or influence that had been exercised by Dana Williamson according to the attestation of Charles Panoyan, which degrees or kinds of control you recognized?

A. [Dr. Ofshe] Yes.

....

Well, in reviewing the history of Mr. Panoyan's experience in connection with the invasion and death and the assaults at the Decker residence, and over the course of the investigation that followed, including his incarceration and ultimate decision to speak about what happened, the pattern that he displays is a pattern of someone who has, for one [sic] of a better word, been terrorized, and someone who is acting in response to a credible threat, not only to himself, but also, and to some degree, more importantly, to members of his family.

And that the manner in which he responds at various points indicates quite clearly that he has a great concern about something happening to his family

....

The point at which he chose to do certain things reflects the kind of threat and fear he was acting under, and the particular decisions that he made to me are completely consistent with what he says about the sort of threats that he was exposed to.

Id. (emphasis supplied). The postconviction court summarily denied Williamson's claim that trial counsel was ineffective for failure to request a Frye hearing before Dr. Ofshe testified. Id. However, on appeal we explained that the court should have determined whether Dr. Ofshe's testimony regarding the effect of the defendant's coercion on the witness was generally accepted by the relevant scientific community. Id. at 1010 (citing Hadden, 690 So.2d at 575-76; Flanagan, 625 So.2d at 828). We concluded that the summary denial of the claim was error and remanded to the postconviction court for an evidentiary hearing. Id.

In this case, we hold that under Williamson, a Frye hearing was necessary before Dr. Ofshe was permitted to testify. Although Calloway asserts that the testimony in Williamson is factually distinguishable from the testimony presented below, we disagree. In both Williamson and this case, Dr. Ofshe's testimony ultimately concerned how coercion in the form of threats made to an individual or his family can influence that individual's behavior. Moreover, we have explained that the testimony involved in both Williamson and Hadden involved expert testimony that was more than pure opinion evidence and therefore required a Frye hearing. Williamson, 994 So.2d at 1010; see also Flanagan, 625 So.2d at 828 ("Profile testimony, on the other hand, by its nature necessarily relies on some scientific principle or test, which implies an infallibility not found in pure opinion testimony."). As in Williamson, Hadden, and Flanagan, Dr. Ofshe's testimony consisted of more than a pure opinion from an expert. In fact, Dr. Ofshe was not permitted to offer an opinion as to whether Calloway's confession was false, coerced, or otherwise unreliable, but instead only explained that false confessions occur and what factors might produce a false confession. This evidence was supported by research referenced by Dr. Ofshe during his testimony and included a discussion of the rate of occurrence of false confessions and his model of false confessions. His testimony therefore relied upon a scientific or academic principle or test, which constitutes evidence that requires a review of its underlying methodology and acceptance before it can be presented to a jury. See Williamson, 994 So.2d at 1009-10; Hadden, 690 So.2d at 575-76; Flanagan, 625 So.2d at 828.

*14 ¹⁹However, this error was harmless. The primary witnesses for the defense were Calloway and Dr. Ofshe, whose testimony lent academic credence to Calloway's claim that he was pressured by the police to give a false confession. The central issue of the case was whether Calloway provided a false confession out of fear for himself and his family. Even assuming that the trial court would have entirely excluded testimony from Dr. Ofshe after a proper Frye hearing—which we do not conclude today¹²—the jury nonetheless convicted Calloway of five counts of first-degree murder, armed robbery, armed kidnapping, and armed burglary, after it heard extensive testimony from Dr. Ofshe that the confession may have been the product of coercion and an illicit deal with law enforcement. The State does not allege any harm suffered by this error. Under these circumstances, we conclude there is no reasonable possibility that the failure to conduct a Frye hearing prior to Dr. Ofshe's testimony ultimately affected the verdict.

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- ¹² Because no Frye hearing occurred below, we decline to address whether Dr. Ofshe's testimony would have satisfied the Frye standard.

Limitations on Testimony of Dr. Ofshe

¹¹⁰The next error that Calloway alleges occurred is that the trial court so limited the testimony of Dr. Ofshe that it was rendered meaningless. To demonstrate that Calloway's confession was false and coerced, defense counsel sought to introduce Dr. Ofshe's methodology, which requires a comparison between objective facts available beyond what is revealed in a confession and the "facts" developed during the confession. Dr. Ofshe was permitted to explain at length and with few interruptions how an interrogation occurs and what factors an interrogator might use to obtain a confession. During redirect, he was also allowed to discuss studies that examined false confessions and tactics that might induce a false confession. He further stated that he saw the existence of "powerful motivators" that were likely to induce a false confession in Calloway's account of the interrogation. However, the court prevented Dr. Ofshe from comparing what he called "objectively knowable facts," such as the information available from Strachan's testimony and Cooper's notes, with the "facts" in Calloway's confession. The trial court explained that both the "facts" as framed by Dr. Ofshe and his assessment of witness credibility were matters for the jury.

¹¹¹ ¹¹²We review evidentiary rulings by a trial court for abuse of discretion. Frances v. State, 970 So.2d 806, 813–14 (Fla. 2007). An expert may testify about an opinion developed from facts not in evidence before the jury. § 90.704, Fla. Stat. (1997). However, experts may not comment on the credibility of other witnesses. Frances, 970 So.2d at 814; Feller v. State, 637 So.2d 911, 915 (Fla. 1994). This limitation is intended to minimize any effect that the expert status of the witness may have on the jury's reception of the testimony. See Feller, 637 So.2d at 915; State v. Townsend, 635 So.2d 949, 958 (Fla. 1994) ("[G]reat care must be taken by a trial judge in determining what testimony of an expert is admissible because a jury often places great emphasis on the testimony of experts").

In Frances, an expert attempted to testify about the defendant's general knowledge and comment on the credibility of other witnesses. 970 So.2d at 814. We found no abuse of discretion in excluding such testimony. We noted that expert testimony that did not require specialized knowledge was not admissible, and experts cannot vouch for other witnesses. Id. However, in Boyer, the First District concluded that the wholesale exclusion of Dr. Ofshe's testimony regarding false confessions was harmful error. 825 So.2d at 419–20. The district court concluded that the jury should have been allowed to consider evidence relevant to the voluntariness of the defendant's confession, and the jury was free to determine the credibility of Dr. Ofshe's testimony. Id.

However, Dr. Ofshe's excluded testimony here would have exceeded the scope of the testimony contemplated in Boyer. Without the limitations imposed by the trial court below, his testimony would have evaluated the credibility of his fellow witnesses, which is not permitted. Frances, 970 So.2d at 814; Feller, 637 So.2d at 915. Unlike in Boyer, Dr. Ofshe was allowed to testify and explain how false confessions might occur. Where the trial court drew the line was when Dr. Ofshe attempted to compare different versions of the facts to each other to suggest that the version provided by Calloway in his confession was not reliable. Allowing Dr. Ofshe to explain that he determined that Calloway's confession was false because it conflicted with Strachan's descriptions of what he observed on January 21, 1997, would have exceeded the permissible scope of expert testimony.¹³ His opinion was not simply based upon facts and observations not before the jury, but instead relied upon his assessment of the credibility of witnesses and evidence that were before the jury. Such testimony would allow Dr. Ofshe, not the jury, to determine which version of the facts was correct by implying that Strachan provided a more reliable account than Calloway himself provided to the police after his 1998 arrest. See Frances, 970 So.2d at 814. Therefore, we conclude that the trial court did not abuse its discretion when it placed these specific limitations on the testimony of Dr. Ofshe.

- ¹³ Dr. Ofshe himself admitted that he did not fully understand Calloway's confession and description of his confession in their 2001 interview until after he learned about Strachan's observations and Cooper's note several years after the interview.

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Cross-Examination of Odom

*15 Calloway next alleges that the trial court improperly limited the scope of cross-examination of Diane Odom, who was Calloway's girlfriend at the time of his arrest and who testified during the State's case-in-chief. Calloway spoke to Odom on the phone on the morning of his confession, and she came to the police station that morning at his request. She also rode in the van with Calloway and Detectives Law and Everett while they toured areas that Calloway visited before and after the murders. Calloway proffered that he told Odom that he was concerned for her safety and that of her family, and in response, she temporarily relocated her family. According to Calloway, this demonstrated the validity of the threats revealed by Detective Law before Calloway confessed.

The record does not reflect the exact date of this alleged communication. Before trial, the State suggested that Calloway communicated these threats to Odom two weeks after his arrest. However, during trial, defense counsel proffered that Calloway informed Odom of the threats during the phone call on the morning of his confession. Calloway himself offered conflicting testimony on this matter. During direct examination, he testified that when he saw her at the police station shortly after he confessed, he told her he needed to "get right with God," and that he had a deal with Detective Law that would resolve everything within three months, but he did not tell her about the threats because he did not want her to panic. During redirect examination, however, defense counsel elicited that Calloway had communicated concerns for her safety at some point that day, and she temporarily moved out of her apartment immediately.

During direct examination, the State asked Odom if she was afraid for her life when she left Calloway, Everett, and Law after the van ride:

Prosecutor: Were you at that time, Ms. Odom told by Tavares Calloway that your life could be in danger?

Odom: No. Not at that time, no.

Prosecutor: Were you told you needed to be careful and watch out at that time?

Odom: No. I don't remember at that time. No. Not at that time.

(Emphasis supplied.) The court sustained objections from the State when defense counsel asked Odom during cross-examination what she was afraid of when she stayed with family members of Calloway for two weeks following his arrest. Defense counsel argued that the earlier answer from the State's direct examination opened the door to other statements made by Calloway to Odom that showed that she was afraid. The court ruled that the witness herself added the words, "not at that time," which did not amount to a door being opened to further questioning about hearsay statements made between Calloway and Odom. The court also noted that Calloway was free to recall Odom during his case, which did not occur. Calloway now asserts that these limitations were improper.

¹³Self-serving hearsay statements are generally inadmissible. *Kaczmar v. State*, 104 So.3d 990, 1000 (Fla. 2012) (citing § 90.803(18), Fla. Stat. (2007)). However, if a partial statement, writing, or recording is admitted, the rule of completeness permits the opposing party to introduce other portions of that same statement, writing, or recording in the interest of fairness. *Id.* (citing § 90.108(1), Fla. Stat. (2007));¹⁴ *Reese v. State*, 694 So.2d 678, 683 (Fla. 1997) (explaining that the statutory rule of completeness, which only governs writings or recordings, has been applied to testimony). This rule is not an absolute right, but rather a matter of fairness that falls within the discretion of the trial court. *Larzelere v. State*, 676 So.2d 394, 402 (Fla. 1996). The trial court should consider the relative reliability of the complete statement in its ruling on the admissibility of the full statement. *Jordan v. State*, 694 So.2d 708, 712 (Fla. 1997).

¹⁴ Neither section 90.803 nor section 90.108 has been substantially altered since 1997, the year of these crimes.

*16 In *Reese*, the defendant alleged that the trial court improperly restricted his cross-examination of a witness. 694 So.2d at

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683. The witness testified during direct examination that she visited the defendant in jail after he had been arrested and he confessed to her. However, the defendant was not permitted to ask her about prior jailhouse conversations between them, in which she allegedly refused to speak to the defendant until he confessed to her. We approved the ruling of the trial judge, who indicated that the defendant was free to recall the witness during his case. *Id.* at 683–84. We held that the rule of completeness was not violated after noting that the conversations were not directly related to each other and were separated by several weeks in time. Therefore, we concluded that no abuse of discretion occurred. *Id.*

^[14]As in *Reese*, the statements about the purported threats that would complete the allegedly misleading testimony of Odom may have been separated by several weeks in time. The State indicated that Calloway informed Odom of these threats two weeks after his arrest, not on the morning of May 14. Calloway also testified that he did not communicate the threats on the morning of May 14 because he did not want her to panic. However, Calloway later testified during his redirect examination that Odom moved out of her home on May 14, suggesting to the jury that the threats may have been contemporaneously communicated to Odom. This separation in time and apparent contradiction by Calloway as to when he informed Odom not only render it less likely that the admission of Calloway's complete statement would provide proper context for the jury, but also suggest that his statement is not entirely reliable. *Reese*, 694 So.2d at 683–84; *Jordan*, 694 So.2d at 712 (“The amount of time that passed between Jordan’s first statement and his second statement only increases the unreliability of the hearsay.”). Moreover, Calloway was free to recall Odom in his defense and chose not to do so. Therefore, we conclude that the trial court did not abuse its discretion to limit the cross-examination of Odom.

Admission of Collateral Criminal Conduct

Calloway next claims that the State improperly admitted two instances of collateral criminal conduct without proper foundation. According to Calloway, the State first improperly impeached him with evidence of a prior arrest for carrying a concealed firearm. During his direct testimony, Calloway explained that he mixed up the terms “clip” and “hammer” during his statement to Law and Everett, and the officers corrected him. Calloway stated, “I fired five shots and I had two left in the hammer. See there go my ignorance right there. I said [hammer]. So I’m thinking revolver. When he obviously just said clip and I tried to catch, I mean he like, you know the clip. And I’m like, yeah, yeah, yeah, the clip.” (Emphasis supplied.)

The trial court agreed with the State that Calloway placed his character and knowledge of weapons at issue with this statement and allowed the State to ask Calloway if he possessed a .38 caliber firearm on February 2, 1996, which he admitted was true. The State also asked him whether he was charged with carrying a concealed firearm as a result of that possession, which Calloway also admitted was true.

He also alleges that the State improperly impeached him about his involvement in the Twin robbery with Gosha. During his interrogation, Calloway admitted that he and Gosha planned to rob Twin, and that Gosha was murdered a few days after the robbery. Calloway was initially considered a witness in the Gosha homicide and informed officers that he suspected Gosha was killed in retaliation for the Twin robbery. Before trial, the parties stipulated that they would not discuss the Gosha homicide before the jury.

*17 Calloway testified on direct examination that when he was first brought to the police station, he was under the impression that he would sign some paperwork with regard to the bench warrant, offer the police assistance with the Gosha investigation, and be free to leave. He explained Gosha was a friend who drove a nice car, but he did not judge Gosha for choices that Gosha had made in his life. Later, when Law entered the room on the morning of May 14, 1998, to resume questioning, Calloway testified that Law had a “zombie like” look upon his face and told Calloway that he had spoken to Gosha in a dream. Calloway replied:

[W]ell maybe if you talk to [Gosha], he can tell you about my character. He can tell you what’s going on with me. He can tell you, man I’m not that type of individual. He can tell you who killed him. He can tell what’s going on and he can also tell you I’m not that type of person.

He also testified that he fabricated certain details about the homicides and robbery based on what he had seen in movies because he would not know how to rob someone. Furthermore, when he created the false confession allegedly in collusion

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with Law and Everett, he admitted that he knew Melvin, St. Charles, and Thomas, and that if he had simply robbed them, they would have been able to identify him. However, he added, "Anyone who knows me knows, you know you ain't got to worry about me because I wasn't living that type of life style. Not in the form of aggressive, ruggish, thuggish type of individual." He also described himself as a hardworking individual who attended church regularly and helped supervise his girlfriend's children.

In rebuttal, the State recalled Law and Pereira to challenge Calloway's account. The court agreed with the State that Calloway opened the door to further questioning about Gosha's homicide and the robbery they had planned together. Law testified that Calloway admitted that he and Gosha planned the Twin robbery, during which Calloway pretended to have been a victim along with Twin. Pereira, who was part of the investigation team from the Miami-Dade County Police Department regarding the Twin robbery, confirmed Calloway's involvement in that robbery.¹⁵ Before Law and Pereira were recalled in rebuttal, the trial court instructed the jury to only consider their testimony to evaluate witness credibility and that Calloway was not on trial for any crimes beyond those enumerated in the indictment. Before this Court, Calloway asserts that the repeated references to collateral criminal conduct resulted in prejudicial error.

- ¹⁵ The State also presented Detective William Hladky from the Miami-Dade County Police Department, who was the lead investigator on the Twin robbery, but was out of town when Calloway was arrested. Pereira filled in during Hladky's absence and was called to the City of Miami Police Department during Calloway's interrogation. As far as Hladky knew, Calloway was simply a witness to the robbery.

¹¹⁵ ¹¹⁶ ¹¹⁷ A party can "open the door" to otherwise inadmissible evidence through testimony from a witness. Rodriguez v. State, 753 So.2d 29, 42-43 (Fla. 2000). In the interests of fairness and "the truth-seeking function of a trial," the opposing party may in turn present inadmissible evidence that qualifies, explains, or limits previously admitted evidence. Id. We have approved of the admission of evidence of prior criminal conduct to impeach a defendant who has opened the door to such evidence. Id. at 42. This door is only opened after the defendant presents misleading testimony, at which point the State may present evidence of prior criminal conduct to prevent the jury from being misled as to the defendant's character. Robertson v. State, 829 So.2d 901, 913 (Fla. 2002) (citing Bozeman v. State, 698 So.2d 629, 630 (Fla. 4th DCA 1997)). However, such evidence should be cautiously admitted, due to concerns that it may unfairly prejudice the defendant. Rodriguez, 753 So.2d at 42 ("The issue is not always whether the door has been opened, but rather how wide it has been opened."). Moreover, a criminal defendant who chooses to take the stand subjects his or her own credibility to impeachment by the prosecution. Butler v. State, 842 So.2d 817, 827 (Fla. 2003) (noting that a defendant who testified on direct examination that he would never hurt the victim could be impeached about a prior incident in which he choked the victim).

*18 ¹¹⁸ We agree with the trial court that Calloway opened the door to impeachment by the State on both of these issues. With respect to his prior arrest for carrying a concealed weapon, Calloway broadly claimed to be "ignorant" about guns. To prevent the jury from being misled about his familiarity with guns, the court permitted the State to ask whether he previously possessed and had been arrested for carrying a .38 caliber concealed firearm. However, the court narrowly tailored the admission of evidence of prior criminal conduct to Calloway's familiarity with guns, which was a matter that he himself introduced, and excluded further evidence of his arrest record, which included more than a dozen arrests in the six years prior to the arrest in this case. See Butler, 842 So.2d at 827; Rodriguez, 753 So.2d at 42-43. The trial court did not abuse its discretion when it permitted this narrow inquiry into his prior criminal activities.

¹¹⁹ Likewise, Calloway opened the door to cross-examination about his participation in the Twin robbery. He stated several times on direct examination that he would not know how to commit a robbery and he was not the sort of individual who would engage in violent criminal activity such as robbery or homicides. He also testified that early in the interrogation, he offered to help officers with the Gosha investigation. However, witnesses for the State explained that he actually told them that he and Gosha planned the robbery; as part of that plan, he pretended to be a victim of the robbery; and Gosha was probably murdered in retaliation for that crime. Calloway chose to testify in his defense, and his credibility became a critical issue in this case. We therefore conclude that he placed his credibility at risk of impeachment. See Butler, 842 So.2d at 827. Accordingly, we find no abuse of discretion by the trial court.

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Impeachment by Statement from Nontestifying Codefendant

Calloway also claims that the State violated his rights under the Confrontation Clause when he was impeached by statements made by his codefendant, Clark, who did not testify during Calloway's trial. The day before Calloway was arrested, Clark was arrested and confessed that both he and Calloway were involved in the 1997 homicides. He also admitted that Dwight Campbell directed them to rob the victims, but he did not expect that anyone would be killed. He told officers that Calloway sent him to the store during the robbery to purchase the duct tape that was used to bind and gag the victims. He also stated that Calloway ordered the victims to remove their clothing to ensure that none of them was armed. Finally, Clark told them that Calloway was the sole shooter.

During his confession, Calloway provided a substantially similar account to detectives, which was admitted into evidence during the State's case-in-chief. Calloway admitted that he directed Clark to purchase something to restrain the victims, and that when Clark ran out of duct tape, he sent Clark back to the store to purchase more. He also admitted that he was the shooter. However, Calloway testified during direct examination that he could not remember if he had fabricated these details, or if officers "fed" him this information in their quest to implicate Campbell via Calloway's confession.

Before Dr. Ofshe interviewed Calloway in 2001, he asked Calloway to write down his account of the interrogation and confession. In the interview, Calloway told Dr. Ofshe that he fabricated details that involved Clark during his confession. Dr. Ofshe was aware that Clark had provided the police with a similar statement and told Calloway it seemed unlikely that he could make up such details that were previously provided to the police by Clark. He testified that he told Calloway to "think about it and see what it is that he actually knows and what it is that he's just telling me."

During his direct examination, Dr. Ofshe indicated that Calloway could have learned of certain details provided in his confession either from local media or from the interrogating officers. During cross-examination, the State asked a series of questions about whether contradictory statements make a confession more or less reliable, according to Dr. Ofshe's theory of false confessions. The State asked whether Dr. Ofshe was aware that Clark had previously informed officers that he and Calloway sought direction from Campbell, or that Clark purchased duct tape on Calloway's instructions. Dr. Ofshe admitted that it would be highly unlikely that Clark would provide the same details the day before Calloway allegedly fabricated them. He testified that the contradiction did not necessarily make Calloway's account less reliable, but he admitted that when he pointed out the potential inconsistency, Calloway became less understandable in their interview. He also agreed with the State that Clark's confession contradicted Calloway's earlier statement that officers told Calloway to include them as a means to inculcate Campbell. Dr. Ofshe ultimately agreed that his opinion regarding Calloway's confession would change if it was proven that Calloway had lied to him about a significant matter.

*19 ^[20] ^[21] Calloway insists that when the State impeached Dr. Ofshe with Clark's statement, Calloway's rights under the Confrontation Clause were violated. We review challenges based on the Confrontation Clause de novo. See McWatters v. State, 36 So.3d 613, 637 (Fla. 2010). The Confrontation Clause does not permit the admission of a confession of a nontestifying codefendant to be used substantively against the defendant. Bruton v. United States, 391 U.S. 123, 136-37, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Both this Court and the United States Supreme Court have explained that statements of a codefendant should be viewed with particular skepticism, given the motivation to implicate another person. Ramirez v. State, 739 So.2d 568, 579 (Fla. 1999) (citing Lee v. Illinois, 476 U.S. 530, 541, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986); Farina v. State, 679 So.2d 1151, 1155 (Fla. 1996)). In Ramirez, we concluded that it was reversible error to admit extensive details from a codefendant's statement that incriminated Ramirez. 739 So.2d at 579-81. Although Ramirez opened the door to limited questions regarding whether there was evidence that contradicted his testimony, the door was not so widely opened as to permit the details of the codefendant's confession. Id. at 580-81 (citing Pacheco v. State, 698 So.2d 593, 595-96 (Fla. 2d DCA 1997)).

However, it is equally clear that a codefendant's incriminating statements that are admitted for nonhearsay purposes, such as impeachment, do not invoke the protections of the Confrontation Clause. E.g., Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985); McWatters, 36 So.3d at 637-38 ("The Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' " (quoting Crawford v. Washington, 541 U.S. 36, 60 n.9, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004))); see also Kansas v. Ventris, 556 U.S. 586, 594, 129 S.Ct. 1841, 173 L.Ed.2d 801 (2009) (holding that a statement obtained in violation of the Sixth Amendment could nonetheless be used for impeachment purposes).

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^[22]In this case, limited information from Clark's confession that incriminated Calloway was used to impeach Dr. Ofshe. Dr. Ofshe presented a theory on direct examination that Calloway could have learned many of the details provided in his confession from alternate sources, such as media reports or the interrogating officers, which would make his confession less reliable. To discredit Dr. Ofshe's theory, the State asked Dr. Ofshe whether he was aware that Clark had provided a similar account two days before Calloway was arrested. When Dr. Ofshe admitted that he was aware of these statements, the State then asked Dr. Ofshe about his earlier statement to Calloway that pointed out the apparent contradiction, and when pressed, Dr. Ofshe equivocated. At one point, Dr. Ofshe stated that there could be other reasons for the apparent contradiction, such as memory error; however, he later admitted that if Calloway had indeed lied to him, Dr. Ofshe would have to reevaluate his assessment of Calloway and Calloway's confession.

Moreover, unlike in Bruton, Ramirez, or Pacheco, Clark's full confession was not admitted during trial to prove Calloway's guilt. Instead, the State used two specific details from Clark's confession to conduct a narrow cross-examination of Dr. Ofshe to question his assessment of Calloway's veracity, and ultimately, Dr. Ofshe's credibility. This use of Clark's incriminating statements did not violate the Confrontation Clause. Street, 471 U.S. at 414, 105 S.Ct. 2078; McWatters, 36 So.3d at 637-38.

Bolstering of Witnesses for the State

Next, Calloway claims that the State improperly bolstered the credibility of Detective Everett, one of the detectives who elicited the confession, and Fabrice Nelson, the lead crime scene technician. During the cross-examination of Sergeant Eunice Cooper, defense counsel asked her about a policy of the City of Miami Police Department, which required felony suspects to be handcuffed during transport. On redirect, Cooper explained that the policy allowed for officer discretion:

*20 Prosecutor: Was Sergeant Willie Everette [sic] at that time a capable police detective?

Defense counsel: Objection. Calls for an opinion.

Prosecutor: As a supervisor, your Honor.

The Court: Overruled.

Defense counsel: Character evidence of the witness. Bolstering.

The Court: Overruled. It's something that is of her knowledge.

Sergeant Cooper: Yes. Sergeant Everette [sic] was a capable supervisor and Sergeant Everette [sic] used his discretion.

Prosecutor: What about physically, Sergeant Cooper. Was [he] a physical capable adult male?

Sergeant Cooper: Yes.

Prosecutor: Was he a confident police officer?

Defense counsel: Objection. Relevance.

The Court: Sustained.

Calloway also alleges that the State improperly bolstered the testimony of Nelson through the cross-examination of Rupert Butcher, a fingerprint expert who was called by the defense. Nelson was the lead crime scene investigator in 1997 and testified about the forensic evidence collected from the apartment during the State's case-in-chief. At the time of trial, Butcher was a senior latent fingerprint examiner for the City of Miami Police Department, but he was not employed by the city in 1997 and was not involved in the investigation until 2003. He testified on direct examination that the manner in which duct tape was collected and commingled was not a standard collection procedure. During cross-examination, the State elicited testimony from Butcher that because he was not involved in the investigation until at least 2003, he had no way of

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knowing whether Nelson acted improperly. After the State confirmed with Butcher—without objection—that there was no reason to suggest that Nelson improperly preserved evidence or “did a sloppy job” in 1997, the following exchange occurred:

Prosecutor: Didn’t Fabrice Nelson do an excellent job of collecting [and] preserving evidence from this scene as we can see it in State’s Exhibit 28.

Defense counsel: Objection. He has no way of knowing. He was not there. Calls for improper opinion.

The Court: You can answer, sir if you know.

Butcher: Again, well I wasn’t there to know exactly but based on the gravity or amount of evidence that he actually collected and processed, I would say that he did a very good job of processing the evidence.

During redirect examination, defense counsel also elicited from Butcher that Nelson “did a very good job” preserving and documenting the evidence at the crime scene.

¹²³ ¹²⁴ Generally, this Court will not reverse a decision regarding the admissibility of evidence absent an abuse of discretion by the trial court. *E.g.*, Hall v. State, 107 So.3d 262, 273 (Fla. 2012) (citing Ray v. State, 755 So.2d 604, 610 (Fla. 2000)). However, it is erroneous to permit a witness to comment on the credibility of another witness because the jury alone determines the credibility of witnesses. Tumblin v. State, 29 So.3d 1093, 1101–02 (Fla. 2010); Knowles v. State, 632 So.2d 62, 65–66 (Fla. 1993); Page v. State, 733 So.2d 1079, 1080–81 (Fla. 4th DCA 1999) (citing Barnes v. State, 93 So.2d 863 (Fla. 1957)). Testimony from a police officer about the credibility of another witness may be particularly harmful because a jury may grant greater credibility to the officer. Tumblin, 29 So.3d at 1101–02 (“Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions.” (citations and ellipses omitted)); Seibert v. State, 923 So.2d 460, 472 (Fla. 2006). Improper bolstering is reviewed for harmless error. *See* Johnson v. State, 969 So.2d 938, 955 (Fla. 2007); Knowles, 632 So.2d at 66.

*21 ¹²⁵ Improper bolstering can result in harmful error when the credibility of the bolstered witness is of critical importance to the State. The Fourth District Court of Appeal in Page concluded that the State allowed a police witness to improperly bolster the credibility of a confidential informant. 733 So.2d at 1080–81. The officer testified that the informant, who was the only witness to the alleged drug transaction, had previously provided “very trustworthy and reliable” information. *Id.* at 1081. The Fourth District concluded that this erroneous statement was reversible partially because the main goal of the defense was to question the credibility of that informant. *Id.* at 1080–81; *see also* Tumblin, 29 So.3d at 1101–03 (finding an abuse of discretion to permit bolstering by a key witness).

¹²⁶ However, in this case, Cooper’s testimony did not constitute improper bolstering of Everett. Cooper was not asked whether any particular statements by Everett during his videotaped testimony were incorrect, unreliable, or otherwise untrustworthy. Instead, her testimony explained the department’s handcuff policy, which was a matter of officer discretion. The jury viewed videotaped testimony of Everett, who was then undergoing treatment for cancer and passed away by the time of trial. The question from the prosecutor and answer from Cooper merely informed the jury that during Calloway’s interrogation and transport in the van, Everett could have handcuffed Calloway if he felt it was appropriate, but chose not to do so. This did not amount to improper bolstering of Everett’s credibility.

¹²⁷ Even if we were to conclude that this constituted bolstering, any error in Cooper’s testimony would be harmless. Cooper, who testified for a single day in a trial that lasted more than two months, provided a single statement that Everett was capable and used his discretion regarding the handcuff policy. Although there is a general concern that one officer complimenting the professional work of another may improperly influence the jury, *see* Tumblin, 29 So.3d at 1101–02, the handcuff policy only tangentially related to the main issue of the trial—whether Calloway’s confession was forced or coerced. It was undisputed that Calloway was not handcuffed during his interrogation or the van ride. Thus, whether Everett was capable or used his discretion with regard to the handcuff policy was irrelevant to the question of whether Calloway’s confession, which occurred before the handcuff issue during the van ride, was forced or coerced. Unlike the disputed testimony in Page or Tumblin, the State’s case against Calloway did not hinge on Everett’s credibility regarding the use of handcuffs. Therefore, we conclude that there is no reasonable possibility that any error in Cooper’s testimony could have affected the verdict. *See* DiGuilio, 491 So.2d at 1135.

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Moreover, Butcher's testimony did not constitute bolstering. Defense counsel sought to undermine the credibility of the forensic investigation conducted by Fabrice Nelson through the testimony of Butcher. Defense counsel did not object to several questions regarding the quality of Nelson's work before the aforementioned exchange, nor did defense counsel object to later comments about the quality of Nelson's work. Indeed, during redirect questioning by defense counsel, Butcher repeated that Nelson "did a very good job" in the 1997 investigation. Rather than constitute improper bolstering, this exchange was the product of an unsuccessful attempt to attack the forensic work of Nelson. Defense counsel opened the door to cross-examination regarding Butcher's opinion of Nelson's conduct, and the State sought to rehabilitate Nelson's competency. We conclude that the trial court did not abuse its discretion when it allowed this testimony.

Burden Shifting in Guilt Phase Closing Statements

*22 The next issue raised is whether the State impermissibly shifted the burden of proof to Calloway during its guilt phase closing statements. The State began its guilt phase rebuttal argument with the following statement:

We know exactly what this case comes down to. We have known this all along. Absolutely nothing. Nothing, nothing has changed. We are still here with the situation of do you believe all the evidence in this case of the officers and civilians alike each of them which supports the other[,] or do you believe his story?

Calloway objected, claiming misstatement of the evidence, which the court overruled; the court instructed the jury to rely on its own recollection of the evidence.¹⁶

¹⁶ Defense counsel raised two burden-shifting objections to statements later in the rebuttal closing statement that were overruled, but Calloway challenges only the statement quoted above in his appeal.

^[28] ^[29] ^[30] Although parties enjoy wide latitude during closing statements, they may not resort to improper argument. E.g., Merck v. State, 975 So.2d 1054, 1061 (Fla. 2007) (citing Gore v. State, 719 So.2d 1197, 1200 (Fla. 1998)). Attorneys must raise contemporaneous objections to preserve the claim for appellate review. Id.

[W]e consistently have stated that proper preservation entails three components. First, a litigant must make a timely, contemporaneous objection. Second, the party must state a legal ground for that objection. Third, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection ... below.

Harrell v. State, 894 So.2d 935, 940 (Fla. 2005) (internal quotation marks and citations omitted) (some emphasis supplied).

^[31] ^[32] ^[33] Unpreserved errors made in closing statements are reviewed for fundamental error. Merck, 975 So.2d at 1061. An error so fundamental as to require reversal "must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 124 So.2d 481, 484 (Fla. 1960). Fundamental error must amount to a denial of due process, and consequently, should be found to apply where prejudice follows. J.B. v. State, 705 So.2d 1376, 1378 (Fla. 1998); see also F.B. v. State, 852 So.2d 226, 229 (Fla. 2003).

^[34] During trial, defense counsel objected to the statement, but only objected on the grounds of misstatement of the evidence. Therefore, Calloway did not preserve this issue and we review it for fundamental error. See Merck, 975 So.2d at 1061; Harrell, 894 So.2d at 940.

^[35] We conclude that no fundamental error occurred during the State's closing statement. This remark is the only statement that Calloway alleges shifted the burden from the State to prove Calloway's guilt beyond a reasonable doubt. The State's closing statement, which included both an initial and rebuttal statement, continued for more than a day. During this time, the State extensively reviewed all of the evidence placed before the jury during the two-month long trial. Cf. Merck, 975 So.2d at

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1061 (noting that a single improper argument did not mandate reversal). Even when viewed cumulatively with the burden-shifting objections Calloway subsequently raised, which he does not now challenge, this error was not to the level as to fundamentally deny Calloway the right to due process. See J.B., 705 So.2d at 1378. We therefore deny this claim.

Substitute Medical Examiner

*23 Calloway also claims that the State violated Calloway's rights under the Confrontation Clause when it allowed a substitute medical examiner to testify. In support of this claim, Calloway relies upon the decision of the United States Supreme Court in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310–11, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), which concluded that forensic analysts who provide testimonial evidence must be subject to confrontation by the defendant.

The trial court allowed Dr. Hyma to testify in place of Dr. Siebert with regard to the causes of death and injuries to the victims. Dr. Siebert was the medical examiner who performed the autopsies, but moved to North Florida by the time of trial. In a 2007 discovery deposition, Dr. Siebert claimed that the reason for his relocation was that then-Attorney General Charlie Crist had filed complaints against Dr. Siebert, which led to an audit of his records and a temporary lapse in his medical license. Dr. Siebert alleged that this investigation was politically motivated and a retaliation against him for a controversial decision he had made in an unrelated autopsy several years after these homicides, but he was never formally disciplined.

Before and during trial, defense counsel objected that the State had failed to demonstrate that Dr. Siebert was unavailable, in violation of Crawford.¹⁷ Without expressly concluding that Dr. Siebert was unavailable, the trial court ruled that Dr. Hyma could offer his own opinion and be subject to cross-examination during trial. Dr. Hyma testified that he reviewed photographs and a descriptive narrative taken from the crime scene; body diagrams and sketches; police records; medical records; and Dr. Siebert's autopsy reports to prepare his opinion regarding the causes of death. He testified that Dr. Siebert was part of the investigative team that responded to the crime scene in 1997, and a homicide officer likely attended the autopsies conducted by Dr. Siebert. During redirect, Dr. Hyma confirmed that he developed his own objective findings regarding the causes of death and stated that he primarily relied on photographs taken from the scene. At the conclusion of his testimony, the court read to the jury that the parties stipulated to the legal identity of the victims.

¹⁷ The State suggested that Dr. Siebert was unavailable because he was in North Florida at the time: "Dr. Siebert no longer works in this jurisdiction and we made a choice not to bring an expert from a remote location back to this jurisdiction to testify in this trial." However, the State was willing to transport Anthony Strachan from Arizona and Dr. Richard Welner from New York to Florida during the guilt phase.

¹³⁶When there is a Confrontation Clause challenge to an evidentiary ruling of a trial court, we conduct a de novo review. See McWatters, 36 So.3d at 637. Crawford violations are reviewed for harmless error. Barnes v. State, 29 So.3d 1010, 1027–28 (Fla. 2010) (citing Rodgers v. State, 948 So.2d 655, 665 (Fla. 2006)); see also Bullcoming v. New Mexico, 564 U.S. 647, 668 n.11, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011) (suggesting that a harmless error analysis could apply to violations of the Confrontation Clause (citing Melendez-Diaz, 557 U.S. at 329 n.14, 129 S.Ct. 2527)).

¹³⁷Florida law historically permitted a substitute medical examiner to testify in the place of the medical examiner who performed the autopsy. See, e.g., Schoenwetter v. State, 931 So.2d 857, 870–71 (Fla. 2006) (citing Geralds v. State, 674 So.2d 96 (Fla. 1996)); Capehart v. State, 583 So.2d 1009, 1012–13 (Fla. 1991) (permitting a substitute medical examiner to testify as an expert about facts or data that were not admitted into evidence); Ramirez v. State, 542 So.2d 352, 355 (Fla. 1989). However, the United States Supreme Court in Crawford explained that the Sixth Amendment requires the declarant of a testimonial hearsay statement in a criminal case to testify at trial, unless the witness is unavailable and the defendant is afforded a prior opportunity to cross-examine the witness. 541 U.S. at 68, 124 S.Ct. 1354.¹⁸

¹⁸ We did not consider the impact of Crawford in Schoenwetter because the defendant failed to preserve the issue. See 931 So.2d at 871.

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*24 In State v. Belvin, 986 So.2d 516 (Fla. 2008), this Court reviewed the admissibility of forensic reports in light of Crawford. The Court concluded that the reports were testimonial, and their admission violated Crawford because the right to confront the witness during a discovery deposition was not a sufficient substitute for the right to confront a witness in court. 986 So.2d at 524–25 (citing State v. Lopez, 974 So.2d 340, 349–50 (Fla. 2008); Blanton v. State, 978 So.2d 149, 155 (Fla. 2008)).

In 2009, the Supreme Court concluded in Melendez-Diaz that affidavits prepared by forensic technicians were testimonial under Crawford. Therefore, the defendant had the right under the Confrontation Clause to confront the analysts who prepared the affidavits, absent (1) a finding that the analysts were unavailable, and (2) the defendant's having had a prior opportunity to cross-examine them. 557 U.S. at 311, 129 S.Ct. 2527.

This Court subsequently distinguished both Belvin and Melendez-Diaz and approved of the testimony of a supervising witness who offered her own opinion based on data generated by a team of analysts. Smith v. State, 28 So.3d 838, 853–55, 855 n.12 (Fla. 2009). The trial court in that case permitted an FBI team supervisor to testify about her conclusion that a DNA sample matched the known profile of the defendant. Id. at 853. This Court explained that unlike the experts in Belvin or Melendez-Diaz, the expert in Smith drew her own conclusions from the raw data generated by several members of her team and—more importantly—testified during trial, where she was subject to cross-examination as to those conclusions. 28 So.3d at 854–55. Therefore, her testimony did not violate the Confrontation Clause. Id.

Following Melendez-Diaz, the United States Supreme Court further elaborated on the admissibility of forensic laboratory reports in Bullcoming, 564 U.S. 647, 131 S.Ct. 2705, and Williams v. Illinois, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012). In Bullcoming, a majority of the Court held that a surrogate testifying witness could not be used to admit a forensic report written by a nontestifying technician. 564 U.S. at 663, 131 S.Ct. 2705. In that case, the original analyst who had performed a blood alcohol content test was unexpectedly placed on unpaid leave on the eve of trial, but the prosecution did not claim that the analyst was unavailable. Id. at 661–62, 131 S.Ct. 2705. In criticizing the use of testimony from a surrogate witness who did not offer an independent opinion, defense counsel was denied the opportunity to question the original analyst about the procedures used, or explore why the analyst had been placed on unpaid leave. Id. The Court concluded that testimony from the surrogate witness did not cure the underlying violation of Bullcoming's right under the Sixth Amendment to confront the original analyst. Id. at 663, 131 S.Ct. 2705.

In a concurring opinion, Justice Sotomayor emphasized the narrow scope of Bullcoming:

[T]his is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue.... It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results....

... [T]his is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted in evidence. See Fed. Rule Evid. 703 (explaining that facts or data of a type upon which experts in the field would reasonably rely in forming an opinion need not be admissible in order for the expert's opinion based on the facts and data to be admitted).... We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence.

*25

This case does not present, and thus the Court's opinion does not address, any of these factual scenarios.

Id. at 672, 131 S.Ct. 2705 (Sotomayor, J., concurring in part). Four Justices dissented on the basis that they concluded that the evidence was not testimonial under the Confrontation Clause. Id. at 674–84, 131 S.Ct. 2705 (Kennedy, J., dissenting).

In Williams, a plurality of the Supreme Court concluded that an expert witness could offer an opinion about a forensic report without ultimately testifying to the underlying truth of that report. 132 S.Ct. at 2227–28. The report itself was prepared by a nontestifying witness, but was not admitted. Id. The plurality, written by Justice Alito and joined by Chief Justice Roberts and Justices Kennedy and Breyer, further held that the report itself would not have violated the Confrontation Clause, even if

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it had been admitted. *Id.* at 2242. The plurality concluded that the report was not testimonial because it was generated at a time when a dangerous, unknown rapist was at large. *Id.* at 2243–44 (citing *Michigan v. Bryant*, 562 U.S. 344, 359–62, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011)).¹⁹ Justice Thomas concurred in the judgment on the basis that the evidence was admissible “solely because [the report] lacked the requisite ‘formality and solemnity’ to be considered ‘testimonial’ for the purposes of the Confrontation Clause.” *Id.* at 2255 (Thomas, J., concurring in the judgment) (citing *Bryant*, 562 U.S. at 361, 131 S.Ct. 1143).

¹⁹ In *Bryant*, the Court explained that statements made to an officer in the course of an active police investigation were not testimonial and therefore not subject to the Confrontation Clause because the primary purpose of such statements was to assist the police in that investigation. 562 U.S. at 359–62, 131 S.Ct. 1143.

¹³⁸With the exception of *Smith*, this Court has not considered whether a substitute forensic technician, specifically a medical examiner, may testify in the wake of *Melendez-Diaz*, *Bullcoming*, and *Williams*. Despite the lack of a clear majority opinion in *Williams*, the factual similarities between this case and *Williams*, as well as our decision in *Smith*, lead us to conclude that the surrogate testimony of Dr. Hyma did not violate Calloway’s rights under the Confrontation Clause. First, Dr. Hyma was available during trial to testify and was subject to cross-examination. See *Smith*, 28 So.3d at 853–55, 855 n.12. Second, unlike in *Bullcoming*, the autopsy reports of Dr. Siebert were not admitted through the testimony of Dr. Hyma. See *Williams*, 132 S.Ct. at 2238–40 (plurality opinion) (finding no Confrontation Clause violation in the admission of an expert opinion that relies upon data not directly in evidence); *Bullcoming*, 564 U.S. at 668, 131 S.Ct. 2705 (Sotomayor, J., concurring in part). Instead, Dr. Hyma clearly explained to the jury that his independent opinion was derived from the photographs taken by investigators at the scene and from Dr. Siebert’s autopsy reports. It was this independent opinion that was available during trial and subject to cross-examination. See *Smith*, 28 So.3d at 853–55. Although the expert in *Smith* supervised several analysts, both the expert in *Smith* and Dr. Hyma testified that they drew their own independent conclusions. See *id.* Therefore, Calloway was afforded the in-court opportunity to cross-examine the State’s expert about the causes of death, and no violation of the Confrontation Clause occurred.

*26 ¹³⁹Even if we were to conclude that an error occurred, it would be harmless. The sole purpose of producing Dr. Siebert in this case would be to impugn his credibility by asking about the 2006 audit of his records, which Dr. Siebert claimed had been politically motivated and baseless. During his discovery deposition, Dr. Siebert claimed that many of the errors he had supposedly committed were typos and did not undermine his medical findings; however, defense counsel pointed to at least one instance in which he allegedly mistook the gender of a cadaver. Regardless of such disputes, in this case, the causes of death were not challenged, and the parties stipulated to the legal identity of the victims.²⁰ Furthermore, Dr. Hyma’s testimony was a relatively short component of a lengthy guilt phase of a trial that spanned more than two months. We conclude that any error in allowing Dr. Hyma to testify in Dr. Siebert’s place had no reasonable possibility of affecting the verdict and was therefore harmless. See *Barnes*, 29 So.3d at 1027–28; *DiGuilio*, 491 So.2d at 1135.

²⁰ Additionally, had Dr. Siebert testified, it may have resulted in a collateral discussion as to whether he actually committed significant errors throughout his career. The ultimate result of the audit was unclear. Dr. Siebert claimed that he was never formally disciplined, but admitted that he was removed from his professional position. See *Williams*, 132 S.Ct. at 2236 (plurality opinion) (expressing concern about potential juror confusion).

Limitations on Penalty Phase Closing Statement

The next issue that Calloway challenges is the limitation imposed on defense counsel during the closing statement of the penalty phase. The only new evidence that the State presented during the penalty phase consisted of victim impact testimony; the State presented no further evidence of aggravating circumstances beyond Calloway’s conviction. During closing statements of the penalty phase, the following exchange occurred:

Defense Counsel: ... We’re here now to discuss the aggravators. We are here to discuss how the aggravators were proven

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to and we are here to discuss have you really heard sufficient reliable evidence beyond a reasonable doubt that these aggravators have occurred One of the aggravators is that the crime was cold, calculated[,] and premeditated.... Let's look at what was presented to prove it was cold, calculated[,] and premeditated.

Well, we are told that it went on over a period of time. We are told that someone left and got tape and came back, we're told all of these facts but other than what Mr. Calloway said in that statement there is no corroborating evidence—

State: Objection.

The Court: Sustained.

Defense Counsel: —to prove the aggravators.

The Court: The jury is to rely on the recollection of the evidence presented.

Defense Counsel: Well, as you rely on it, as you rely on what you heard, you will recall that there was nothing to corroborate—

State: Objection.

The Court: Sustained.

In a subsequent sidebar conference, defense counsel claimed that there was no evidence to corroborate certain details in Calloway's confession, such as the length of time the victims were held captive and duct-taped by Calloway and Clark. The trial court disagreed with that assessment of the evidence in record, sustained objections from the State, and instructed the jury to rely on its recollection of the evidence.

Before this Court, the parties dispute whether this limitation was proper. Calloway asserted that the trial court improperly curtailed statements by defense counsel that challenged whether the State had proven the HAC and CCP aggravating circumstances beyond a reasonable doubt. The State claimed instead that the trial court properly prevented defense counsel from relitigating the guilt phase because defense counsel sought to establish a lack of evidence that corroborated Calloway's confession.

[40] [41] [42] [43] Parties are afforded wide latitude during their closing statements, subject to the discretion of the trial court. See, e.g., Pham v. State, 70 So.3d 485, 492 (Fla. 2011). During the penalty phase, the State is required to establish aggravating circumstances beyond a reasonable doubt. Gonzalez v. State, 990 So.2d 1017, 1029 (Fla. 2008). Although defendants are permitted to challenge evidence of aggravating circumstances presented by the State, they cannot do so in a way that relitigates the underlying determination of guilt by the jury. Duest v. State, 855 So.2d 33, 40 (Fla. 2003) (citing Way v. State, 760 So.2d 903, 916 (Fla. 2000); Waterhouse v. State, 596 So.2d 1008, 1015 (Fla. 1992)). A defendant may not introduce evidence of residual doubt either to challenge a presented aggravating circumstance or establish a nonstatutory mitigating circumstance. E.g., Reynolds v. State, 934 So.2d 1128, 1152 (Fla. 2006) (noting that this Court has long rejected the use of lingering doubt as a nonstatutory mitigating factor); Duest, 855 So.2d at 40 (barring the use of a residual doubt argument to challenge an aggravating circumstance); see also Oregon v. Guzek, 546 U.S. 517, 526–27, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006) (refusing to recognize a constitutional right to consider residual doubt as mitigation evidence).

*27 In England v. State, 940 So.2d 389, 404–05 (Fla. 2006), the defendant sought to testify on his behalf during the penalty phase. The trial court excluded this testimony after it concluded that the testimony would relitigate the matter of his guilt, rather than present relevant, mitigating evidence. Id. We concluded that this was not an abuse of discretion. Id.

[44] Here, Calloway asserts that defense counsel did not attempt to relitigate his guilt during penalty phase closing statements; rather, defense counsel sought to challenge whether the State had proven the HAC and CCP aggravating circumstances beyond a reasonable doubt. However, defense counsel presented no specific precedent either during trial or before this Court to support his claim that he could challenge the HAC and CCP aggravating circumstances by questioning the reliability of Calloway's confession presented during the guilt phase in the closing statements of the penalty phase. This proposed argument was not only an inaccurate description of the evidence in record, as noted by the trial court, but it also sought to undermine an issue determined in the guilt phase, the validity of Calloway's confession. The trial court did not prevent

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defense counsel from making proper arguments before the jury. Therefore, we conclude that the trial court acted within its discretion to prevent this improper argument. England, 940 So.2d at 404–05; Duest, 855 So.2d at 40.

Exclusion of Medical Records of Calloway's Father

^{145]}Next, Calloway submits that the trial court improperly excluded the medical records of his father, Solomon Calloway, as mitigation. When Calloway was five or six years old, his mother took him and his brother Reginald to live in Miami, and his father remained in Georgia. Solomon was diagnosed with schizophrenia and post-traumatic stress disorder (PTSD) in 2002, while Calloway was in custody and awaiting this trial. The day before the penalty phase commenced, defense counsel presented the State with voluminous evidence of Solomon's medical records. Defense counsel hoped to discuss Solomon's diagnoses to explain his bizarre behavior towards, and ultimate abandonment of, Calloway. The trial court allowed defense counsel to present evidence of Solomon's violence towards Calloway and his mother, and his abandonment of his children, but excluded Solomon's medical records as irrelevant. Calloway argues before this Court that this exclusion improperly limited his presentation of mitigation evidence.

^{146]}In Lockett v. Ohio, 438 U.S. 586, 604–05, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court concluded that a defendant must be permitted to present any mitigating evidence that concerns “any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” More recently, the Court rejected a test that required proposed mitigating evidence to have some “nexus” to the underlying crime to be relevant and therefore admissible. Tennard v. Dretke, 542 U.S. 274, 283–88, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004). Instead, the Court explained that there was no unique definition of relevancy applicable to capital sentencing:

When we addressed directly the relevance standard applicable to mitigating evidence in capital cases in McKoy v. North Carolina, 494 U.S. 433, 440–441, 110 S.Ct. 1227, 108 L.Ed.2d 369, (1990), we spoke in the most expansive terms. We established that the meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context, and thus the general evidentiary standard—any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence—applies.... We quoted approvingly from a dissenting opinion in the state court: “Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.” Thus, a State cannot bar the consideration of evidence if the sentencer could reasonably find that it warrants a sentence less than death.

*28 Once this low threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence.

Id. at 284–85, 124 S.Ct. 2562 (some citations omitted).

We have reiterated the role that relevance plays in the admission of potentially mitigating evidence. Farina v. State, 937 So.2d 612, 619 (Fla. 2006) (“As with all evidence, however, mitigating evidence must meet a threshold of relevance.”). Similarly, in Hill v. State, 515 So.2d 176, 177–78 (Fla. 1987), this Court found no abuse of discretion by a trial court's exclusion of mitigating evidence that concerned the character of the defendant's family members, rather than the character of the defendant himself:

The record reflects that five persons, including Hill's mother and father, testified as character witnesses for the defense. The judge refused to permit appellant's mother to testify that she cared for appellant's cousins, as well as her own children. Similarly, the judge declined to allow defense counsel to question appellant's father regarding his own ill health and past job responsibilities. In our view, the excluded evidence focused substantially more on the witness's character than on appellant's. There has been no showing that the trial court abused his discretion in excluding the testimony

Id. (emphasis supplied) (citing Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett, 438 U.S. 586, 98 S.Ct. 2954); see also Hess v. State,

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794 So.2d 1249, 1269 (Fla. 2001) (“What Lockett does require is the admission of evidence that establishes facts relevant to the defendant’s character, his prior record, and the circumstances of the offense in issue.”).

Although the trial court did not allow defense counsel to present evidence of Solomon’s medical diagnoses, defense counsel were permitted to elicit vivid, undisputed²¹ testimony about the abuse Calloway and his mother suffered at the hands of Solomon, including that (1) Solomon attempted to drown Shirley in a bathtub when Calloway was an infant; (2) Solomon regularly visited the trailer that Shirley lived in with Calloway and beat both of them with a switch; and (3) once when Calloway was a toddler, he handed his mother a bat to defend herself against Solomon. After Shirley relocated her children to Miami, Calloway had little contact with his father.

²¹ Although Calloway suggests that Shirley’s history of drug abuse and neglect may have diminished her credibility before the jury, the State minimally challenged her testimony with limited cross-examination.

The trial court drew the line at the introduction of evidence of Solomon’s medical diagnoses, which were not made until 2002, several years after Calloway was arrested in 1998 and long after he lost contact with his father in the 1980s. Furthermore, during trial, defense counsel only provided Solomon’s medical records to the State on the eve of opening statements for the penalty phase. In its ruling to exclude the records, the court noted that the State had been denied a fair opportunity to review the evidence and prepare a rebuttal. Defense counsel also admitted that they could not prove that Solomon’s violent behavior in the 1980s resulted from either diagnosis. Additionally, Calloway did not present any evidence during the penalty phase that suggested that he suffered from mental health issues himself. Calloway only presented Dr. Toomer during the Spencer hearing, who testified that Calloway’s background likely diminished his cognitive processing, but ultimately offered no medical diagnosis for Calloway.

*29 We conclude that Solomon’s medical diagnoses were not relevant to Calloway’s background. The fact that Solomon was diagnosed with schizophrenia and PTSD decades after abusing Calloway and Shirley does not make the uncontroverted fact that Calloway both witnessed and suffered abuse from Solomon more or less probable. See § 90.401, Fla. Stat. (1997) (“Relevant evidence is evidence tending to prove or disprove a material fact.”). The jury heard unchallenged evidence regarding Solomon’s abusive behavior, which is a mitigating factor in Calloway’s background. See Lockett, 438 U.S. at 604–05, 98 S.Ct. 2954. However, the ultimate cause of that behavior pertained to the character of Solomon, not Calloway. See Hill, 515 So.2d at 177–78. Therefore, Solomon’s medical records were not relevant mitigating evidence of Calloway’s background, and the trial court did not abuse its discretion to exclude them.

Sufficiency

^{147]} ^{148]} Although Calloway does not raise the issue, this Court has an independent obligation to review the record for competent, substantial evidence that supports the defendant’s convictions. E.g., Brown v. State, 143 So.3d 392, 407 (Fla. 2014) (citing Blake v. State, 972 So.2d 839, 850 (Fla. 2007); Fla. R. App. P. 9.142(a)(5)). If a rational trier of fact may conclude, upon a review of the evidence in the light most favorable to the State, that the elements of the crime have been proven beyond a reasonable doubt, we will affirm the convictions. Id.

^{149]} ^{150]} Calloway’s confession constitutes direct evidence of guilt under Florida law. Simmons v. State, 934 So.2d 1100, 1111 (Fla. 2006). Although his testimony challenged that confession, it is the duty of the jury, not this Court, to weigh conflicting evidence. See Hertz v. State, 803 So.2d 629, 646 (Fla. 2001). Calloway admitted that he purchased clothing and planned the robbery with Campbell several days before the crimes occurred. After he and Clark subdued, gagged, and blindfolded Melvin, Copeland, Thomas, McGuire, and St. Charles with duct tape, he and Clark debated for some period of time about which men to kill. Calloway sent Clark to speak to Campbell for advice, and when Clark informed him that Campbell said they only needed to kill two men, Calloway replied that if only two were killed, the remaining men would identify them. Clark returned to Campbell, who approved of killing all of the men, and before executing them, Calloway increased the volume of the stereo to muffle the sound of gunshots.

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Additionally, Calloway confessed that he accosted St. Charles in the parking lot, placed St. Charles in a chokehold, and gained entry to St. Charles's apartment with a .45 caliber gun pointed at St. Charles. He further stated that he and Clark took marijuana, jewelry, phones, beepers, and cash from the victims before they exited the apartment. Anthony Strachan also testified that he saw St. Charles downstairs in the parking lot with two unidentified black men, one of whom he later saw exit St. Charles's apartment with a small box that belonged to St. Charles. Latonya Taylor stated that Melvin frequently wore a gold and diamond bracelet that she never saw after his death. Adolphus Thornton testified that he helped Calloway pawn a distinctive gold bracelet that he recognized as Melvin's a few days after the murders. Calloway's confession, coupled with corroborating testimony from Strachan, Taylor, and Thornton, supplied competent, substantial evidence of the first-degree murders of Melvin, Thomas, Copeland, St. Charles, and McGuire, as well as for the convictions for armed robbery, armed kidnapping, and armed burglary.

Hurst v. Florida

Finally, Calloway asserts that Florida's death penalty sentencing scheme, which allows a non-unanimous jury to recommend the death penalty, violates the Sixth and Fourteenth Amendments under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). During the pendency of this appeal, the United States Supreme Court issued its decision in Hurst v. Florida, in which it held that Florida's capital sentencing scheme violated the Sixth Amendment. See — U.S. —, 136 S.Ct. 616, 621, 193 L.Ed.2d 504 (2016). The Supreme Court concluded that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* at 619. On remand from the Supreme Court, we held that "before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." Hurst v. State (Hurst v. State), 202 So.3d 40, 53 (Fla. 2016). We further held that a unanimous jury recommendation is required before a trial court may impose a sentence of death. See *id.* Finally, we determined that a Hurst error is capable of harmless error review. See *id.* at 67.

*30 ^[51]New rules of law announced by this Court or the United States Supreme Court will apply to all cases that are pending on direct review or are otherwise not finalized. State v. Johnson, 122 So.3d 856, 861 (Fla. 2013) (citing Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); Smith v. State, 598 So.2d 1063, 1066 (Fla. 1992)). This case is before us on direct appeal; therefore, Calloway's appeal is subject to Hurst v. Florida and Hurst v. State.

^[52] ^[53]For the reasons expressed in Hurst v. State, Calloway is entitled to a new penalty phase. The jury in this case made no factual findings regarding the aggravation, mitigation, or relative weight of either before it recommended that Calloway be sentenced to death for each victim by a vote of seven to five. His sentences, therefore, are contrary to the Sixth Amendment as interpreted Hurst v. Florida and Hurst v. State. Further, we cannot conclude that this error was harmless beyond a reasonable doubt in light of the nonunanimous jury recommendation. Compare Hurst v. State, 202 So.3d at 53–55 (concluding that a new penalty phase was required following a seven-to-five jury recommendation of a death sentence) with King v. State, SC14–1949, slip op. at 41–48, — So.3d —, 2017 WL 372081 (Fla. Jan. 26, 2017) (noting that any Hurst v. Florida sentencing error was harmless beyond a reasonable doubt in part because the jury unanimously recommended a death sentence). As in Hurst v. State, "We decline to speculate as to why seven jurors in this case recommended death and why five jurors were persuaded that death was not the appropriate penalty." 202 So.3d at 69. Therefore, we must remand this matter for new penalty phase. See *id.*

CONCLUSION

With regard to the State's cross-appeal, we conclude that the trial court erred when it failed to conduct a Frye hearing before Dr. Ofshe was permitted to testify, but this error was harmless. We also reject Calloway's guilt phase claims and conclude

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that sufficient evidence supported his convictions. We further conclude that, with the exception of the Hurst v. Florida claim, Calloway's penalty phase claims are meritless. However, we reverse and remand this matter to the circuit court for a new penalty phase pursuant to Hurst v. State.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.

POLSTON, J., concurs as to the conviction and dissents as to the sentence.

PERRY, Senior Justice, concurs in result as to the conviction and concurs in part and dissents in part as to the sentence.

CANADY, J., concurs in result as to the conviction and dissents as to the sentence.

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McGirth v. State, 209 So.3d 1146 (2017)

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209 So.3d 1146
Supreme Court of Florida.

Renaldo Devon MCGIRTH, Appellant,

v.

STATE of Florida, Appellee.

Renaldo Devon McGirth, Petitioner,

v.

Julie L. Jones, etc., Respondent.

No. SC15-953

|

No. SC16-341

|

[January 26, 2017]

Synopsis

Background: Following affirmance of his convictions for first degree murder, attempted first degree murder, and other offenses as well as his sentence of death, 48 So.3d 777, defendant filed postconviction motion to vacate judgment of conviction and sentence. The Circuit Court, Marion County, Brian David Lambert, J., denied motion. Defendant appealed and filed petition for writ of habeas corpus.

Holdings: The Supreme Court held that:

[1] postconviction court conducted sufficient inquiry before determining that appointed counsel was not providing ineffective assistance;

[2] postconviction court conducted adequate *Faretta* inquiry into whether defendant, who elected to represent himself in postconviction proceedings, knowingly and voluntarily waived right to counsel;

[3] postconviction court's reappointment of defendant's appointed counsel as standby counsel was not abuse of discretion;

[4] postconviction court did not abuse its discretion when it permitted defendant to represent himself during competency hearing;

[5] defendant's waiver of his right to present evidence on claims for which evidentiary hearing had been granted was knowing, intelligent, and voluntary; but

[6] trial court's error in not having jury unanimously find each fact necessary to impose sentence of death was not harmless.

Denial of postconviction relief affirmed; habeas corpus petition granted; death sentence vacated and remanded.

Polston, J., concurred in part and dissented in part with opinion, in which Canady, J., concurred.

*1149 An Appeal from the Circuit Court in and for Marion County, Brian David Lambert, Judge—Case No. 422006CF002999CFAXXX, And an Original Proceeding—Habeas Corpus

Attorneys and Law Firms

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Pamela Jo Bondi, Attorney General, Tallahassee, Florida; and Stacey E. Kircher, Assistant Attorney General, Daytona Beach, Florida, for Appellee/Respondent

Opinion

*1150 PER CURIAM.

Renaldo Devon McGirth appeals an order of the circuit court denying his amended motion to vacate judgment of conviction and sentence of death filed pursuant to Florida Rule of Criminal Procedure 3.851. He further petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. For the reasons that follow, we affirm the denial of postconviction relief. However, we grant the habeas petition and order that McGirth receive a new penalty phase proceeding based on *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016).

FACTS AND PROCEDURAL BACKGROUND

Trial and Direct Appeal Proceedings

McGirth was convicted of the 2006 first-degree murder of Diana Miller, the attempted first-degree murder with a firearm of James Miller, robbery with a firearm, and fleeing to elude a law enforcement officer operating a marked patrol vehicle. *McGirth v. State*, 48 So.3d 777, 781–82 (Fla. 2010), *cert. denied*, 563 U.S. 940, 131 S.Ct. 2100, 179 L.Ed.2d 898 (2011). The jury recommended the death penalty for the murder of Diana by a vote of eleven to one, and the trial court sentenced McGirth to death. *Id.* at 784–85. The facts of the crimes were described in the opinion on direct appeal:

James and Diana Miller ... lived in The Villages, a gated retirement community situated in Marion County, Florida. Their daughter, Sheila Miller, who was in her late thirties at the time, was residing with them while she recovered from injuries sustained in an automobile accident that left her confined to a wheelchair. [n.1]

[N.1.] Sheila's dependence on her parents had often proven to be a source of contention between her parents as her father opposed supporting her. Sheila had battled drug and alcohol abuse since her teenage years and had been convicted of possession of cocaine and for uttering false or worthless checks. She had stolen from her parents and at one point stole her mother's identity to obtain a credit card. Sheila's relationship with her parents deteriorated to the point that her father obtained an injunction against her.

McGirth, a prior acquaintance of Sheila, Jarrord Roberts, and Theodore Houston, Jr., visited Sheila at the Miller home on the afternoon of July 21, 2006. Sheila greeted McGirth with an embrace at the front door, after which the three men followed her inside the residence. ... After some discussion, Sheila, McGirth, and Houston went into Sheila's bedroom, while Roberts remained in the living room with Diana. Once in the bedroom, McGirth pointed a small, silver gun in Sheila's direction Diana was then called into Sheila's bedroom where McGirth pushed her onto the bed. Sheila told Diana to give McGirth all of her money. Diana responded that she only had seventy dollars and explained that she did not keep that kind of money at the house. McGirth, in turn, insisted she had money because she lived in The Villages. After agreeing to get the money, Diana raised her hands in the air and was making her way toward the bedroom door to retrieve money when McGirth stood in front of the bedroom door and shot her once in the chest McGirth then instructed Houston to pick up the shell casing from the floor and wipe down any objects the men had touched to remove fingerprints. As she bled on Sheila's bed, Diana whispered to McGirth, "Please call 911; you just shot *1151 me in the heart." However, her pleas for help were ignored.

At some point, Roberts collected wallets and car keys ... and handed them to McGirth. ... James had just finished his

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shower when he was grabbed by the arm and dragged to Sheila's bedroom where he was forced to lie on the floor while one of the men pinned his head with a foot. After the men obtained the couple's credit cards and a personal identification number, Diana, still conscious, was taken to the computer room in an unsuccessful attempt to purchase cell phones online. A few minutes later Diana was able to crawl back into Sheila's bedroom.

McGirth and Houston removed Sheila from the home and Roberts placed her in the Millers' van. ... McGirth and Houston returned to the home. Soon thereafter, as Houston was leaving the house with some items, McGirth shot James and Diana in the backs of their heads as they lay on the bedroom floor. James survived the gunshot wound and was able to climb out of the bedroom window and summon the assistance of a neighbor.

McGirth, Roberts, and Sheila left in the Millers' van, while Houston followed in the silver Ford in which the men arrived. Following McGirth's orders, Sheila withdrew \$500 from an automated teller machine (ATM) nearby and gave the money to McGirth, who subsequently divided the money into thirds. The four then drove to a K-Mart store in Belleview where McGirth and Sheila attempted to locate a particular type of cell phone. A few minutes later the men left the silver Ford in the K-Mart parking lot and took Sheila in the van to a mall At the mall, efforts to withdraw money from various ATMs and purchase items from stores failed.

At the Miller residence, law enforcement officers secured the scene and issued a BOLO ("be on the lookout") alert for a red van occupied by three black males and a possible kidnap victim. A police officer spotted the van at a convenience store in Ocala When McGirth ... drove the vehicle out of the parking lot, the police officer activated his siren and lights which prompted McGirth to pull over When the officer ordered the driver to shut the van off, McGirth sped away. A high-speed chase in excess of 100 miles per hour ensued. As he drove the vehicle ... McGirth handed the gun to Houston and ordered him to shoot Sheila because she could identify them. Houston, however, did not do so. The police ultimately used stop sticks to slow the van and then disabled it by employing the [Precision Immobilization Technique] maneuver, which caused the van to roll several times. ... McGirth and Roberts were able to get out of the van and fled in opposite directions, but were apprehended and taken into custody shortly thereafter.

The police found bloody, folded money totaling \$259 in McGirth's pocket, and his fingerprints were identified on two paper items from James's wallet.

Id. at 782–83 (some footnotes omitted).

In imposing a sentence of death, the trial court found the existence of five aggravating circumstances: (1) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP) (great weight); (2) the murder was heinous, atrocious, or cruel (HAC) (great weight); (3) prior violent felony, based on the contemporaneous conviction for the attempted murder of James Miller (great weight); (4) the murder occurred during the commission of a robbery (great *1152 weight); and (5) the murder was committed primarily to avoid arrest (moderate weight). Id. at 784.

The court found McGirth's age (eighteen) to be a statutory mitigating circumstance and assigned it significant weight. Id. The court additionally found fifteen nonstatutory mitigating circumstances: (1) McGirth had a close bond with his siblings (very slight weight); (2) he grew up in a poor family (little weight); (3) he grew up in an abusive home (little weight); (4) neglect by his custodial parents (little weight); (5) substance abuse (very slight weight); (6) intermittent exposure to positive role models (some weight); (7) testimony that characterized McGirth as a follower and not a leader (no weight); (8) a diagnosis of conduct disorder (very little weight); (9) a diagnosis of antisocial personality disorder (very little weight); (10) exposure to people with criminal histories (some weight); (11) a strong religious background (little weight); (12) good courtroom conduct (slight weight); (13) significant family losses (little weight); (14) he can benefit from a structured environment (slight weight); and (15) he was deprived of a relationship with his biological father (some weight). Id. at 785. The trial court found that McGirth's IQ score of 98 was not a mitigating factor, and it also rejected the proposed nonstatutory mitigating factor that he acted under the influence and domination of another. Id. at 785 n.6. Additionally, while the trial court did not find that letters requesting mercy for McGirth were a nonstatutory mitigating factor, it stated that even if a request for mercy constituted nonstatutory mitigation, only "very slight weight" would be given. Id.

On direct appeal, McGirth raised eight issues: (1) whether the trial court erred in admitting *Williams'* rule evidence during the guilt phase; (2) whether the trial court erred in its response to a jury question concerning the law on principals; (3)

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whether the trial court erred in admitting victim impact evidence during the penalty phase; (4) whether a prosecutorial remark during closing statements warranted a new penalty phase; (5) whether the trial court erred in finding the CCP aggravator; (6) whether the trial court erred in finding the HAC aggravator; (7) whether the trial court erred in finding the avoid arrest aggravator; and (8) whether Florida's death penalty scheme violates Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and related cases. 48 So.3d at 785. This Court rejected all claims and affirmed McGirth's convictions and sentences. Id. at 797.

¹ Williams v. State, 110 So.2d 634 (Fla. 1959).

Postconviction Proceedings

In 2012, McGirth through Capital Collateral Regional Counsel–Middle Region (CCRC–M) filed a Motion to Vacate Judgment of Conviction and Sentence, raising nine claims, some with multiple subparts. The claims, in brief,² were: (1) the State committed Brady and Giglio violations;³ (2) newly discovered evidence; (3) ineffective assistance of counsel during the guilt phase; (4) ineffective assistance of counsel during the penalty phase; (5) cumulative error; (6) a Caldwell violation occurred;⁴ *1153 (7) McGirth may be incompetent at the time of execution; (8) Florida's capital sentencing statute violates Ring and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and (9) Florida's capital sentencing statute fails to prevent arbitrary and capricious imposition of the death penalty, and lethal injection constitutes cruel and unusual punishment. McGirth sought an evidentiary hearing on claims (1) through (4). In its response to the motion, the State conceded that an evidentiary hearing was required on these claims.

² McGirth ultimately chose to represent himself and waived an evidentiary hearing on the claims for which a hearing had been granted. Because the claims raised in the motion are not before the Court, we do not discuss them except where relevant to our analysis.

³ Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

⁴ Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

At the September 23, 2013, evidentiary hearing, McGirth expressed that he and CCRC–M counsel were experiencing conflict. McGirth asked that CCRC–M be discharged, and that the postconviction court either appoint new counsel or permit him to represent himself. The postconviction court conducted a Nelson⁵ inquiry and concluded that CCRC–M was not providing ineffective assistance. The court then stated that if McGirth still wanted to discharge counsel, it would treat his request as an exercise of the right to self-representation. McGirth confirmed that he wished to represent himself. Thereafter, the court conducted a Faretta⁶ inquiry and concluded that McGirth was competent to make the decision to represent himself, and that his decision was knowing and voluntary.⁷ CCRC–M was ultimately appointed as standby counsel.⁸

⁵ Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973).

⁶ Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

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⁷ In 2014, Florida Rule of Criminal Procedure 3.851 was amended to preclude capital defendants from representing themselves in postconviction proceedings. See In re Amends. to Fla. Rules of Jud. Admin.; Fla. Rules of Crim. P.; and Fla. Rules of App. P.—Capital Postconviction Rules, 148 So.3d 1171, 1180–81 (Fla. 2014). The rule as amended applies to postconviction motions filed on or after January 1, 2015, and “[m]otions pending on that date are governed by the version of this rule in effect immediately prior to that date.” Id. at 1180. Because McGirth filed his postconviction motion in 2012, this amendment did not impact his ability to represent himself.

⁸ Capital Collateral Regional Counsel–Southern Region (CCRC–S) was initially appointed as standby counsel. However, it filed a motion for reconsideration, noting that the postconviction court found no actual conflict between McGirth and CCRC–M, and no ineffective representation by CCRC–M. CCRC–M also filed a “Motion and Memorandum of Law Regarding Appointment of Standby Counsel,” stating that “[a]s a result of ... discussions with Mr. McGirth, and with the agreement of Mr. McGirth, counsel for CCRC–M is prepared to act as standby counsel for Mr. McGirth.” CCRC–M contended that it was in the best posture to serve because “[a]ny other counsel would have to start essentially from ground zero. The sheer bulk of materials in this case, exceeding well over 30,000 pages, would be burdensome on any counsel not already familiar with the materials.” The postconviction court granted the motion for reconsideration and reappointed CCRC–M as standby counsel.

On the day the evidentiary hearing was due to commence, CCRC–M filed a Motion to Determine Competency. CCRC–M contended that McGirth was exhibiting behavior and symptoms that called his competency into question. The postconviction court appointed Dr. Gregory Prichard and Dr. Robert Berland to evaluate McGirth. During the competency hearing, McGirth expressed the desire to represent himself, and the court conducted another Faretta inquiry. The court concluded that McGirth knowingly and voluntarily waived his right to counsel during the competency hearing and permitted McGirth to represent himself with the assistance of standby counsel. The court subsequently found McGirth competent to proceed, and the evidentiary *1154 hearing was rescheduled to commence on February 16, 2015.

McGirth filed pro se motions that amended claims (1) and (3) and added claim (10), which contended that the State engaged in a discriminatory prosecution based upon the fact that the three codefendants were African–American, and Sheila Miller was Caucasian. McGirth further asserted that trial counsel was ineffective for failing to raise a claim pursuant to McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).⁹ On February 5, 2015, McGirth filed a motion for continuance of the evidentiary hearing. On February 9, 2015, he filed a Composite Motion to Appoint Conflict Free Co–Counsel or Conflict Free Counsel, and also a Motion to Stay the Transport of Witnesses.

⁹ This Court has described the McCleskey decision as follows:
[I]n McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), the Supreme Court held that studies showing disproportionate impact of death sentences on black defendants as compared to white defendants were not sufficient to find the state’s administration of the death penalty violated a black defendant’s right to equal protection. However, the Court went on to say, “[T]o prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in his case acted with discriminatory purpose.” Id. at 292, 107 S.Ct. 1756.
Freeman v. State, 761 So.2d 1055, 1068 (Fla. 2000) (alteration in original).

During a February 13, 2015, hearing, the court held that the motion to transport was moot because the witnesses named in the motion had already been brought to Marion County, and denied the motion for continuance and the composite motion. Once these rulings were announced, McGirth submitted a motion to disqualify. The court orally denied the motion as insufficient and untimely, and later issued an order to that effect.

At the February 16, 2015, evidentiary hearing, McGirth announced that he would waive the presentation of evidence and instead “preserve the right to appeal all rulings up to this point.” On April 14, 2015, the postconviction court entered an order that denied McGirth’s amended rule 3.851 motion. The order addressed the claims for which an evidentiary hearing had been granted and concluded that, due to McGirth’s failure to offer any evidence, the burden of proof had not been met.

This appeal follows. On February 24, 2016, McGirth filed a petition for writ of habeas corpus with this Court.

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ANALYSIS

Sufficiency of the Nelson Inquiry

¹¹McGirth first contends that the Nelson inquiry conducted by the postconviction court was insufficient. Based upon our thorough review of the record, we disagree. In Nelson, the Fourth District Court of Appeal articulated a procedure to be followed when a defendant seeks to discharge court-appointed counsel based upon incompetence:

[T]he trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the *1155 State may not thereafter be required to appoint a substitute.

274 So.2d at 259. We adopted this procedure in Hardwick v. State, 521 So.2d 1071, 1074 (Fla. 1988). However, we have explained that where a defendant seeks to discharge counsel based upon a difference of trial strategy, and not incompetency, a Nelson inquiry is not required. See McKenzie v. State, 29 So.3d 272, 282 (Fla. 2010). Based upon the applicable law, our analysis is two-pronged. First, we must determine whether McGirth alleged that CCRC-M was ineffective, thereby triggering a Nelson inquiry. Second, if we conclude that McGirth did allege ineffectiveness as a basis for seeking the discharge of CCRC-M, we must next determine whether the inquiry conducted by the postconviction court was sufficient.

With regard to the first prong, we conclude that McGirth did challenge the effectiveness of his counsel. McGirth clearly expressed to the postconviction court that he felt CCRC-M was raising frivolous issues and refusing to present what McGirth felt were meritorious issues. McGirth expressed frustration that CCRC-M had not presented a McCleskey claim based upon Brady evidence that allegedly would have shown Sheila Miller was a perpetrator of the crimes, and not a victim. He believed that counsel was focusing too much on mental health issues, opining that eighty percent of CCRC-M's time was spent exploring mental health, and only twenty percent was dedicated to guilt phase issues. He felt that, with regard to any mental health claims, it was going to be a "standoff" between experts.

There are admittedly comments by McGirth that appear to be a difference of opinion as to strategy. For example, McGirth stated that while he recognized the accomplishments of the CCRC-M attorney, this did not mean that the attorney was the "best fit" for him. This comment is very similar to the statement made by the defendant in McKenzie in seeking to discharge counsel:

I don't think they're incompetent. I mean, they passed the Bar exam, okay? That in itself is an accomplishment. I don't think I could pass the Bar exam. ... Do I think they're incompetent? No, I don't. But do I think that they have my best interest ... at hand? No, I don't. I think they have their own best interest at hand.

29 So.3d at 282. However, whereas the defendant's primary complaint in McKenzie was that counsel waived his right to speedy trial without first consulting him—something counsel could do under the law—McGirth's expressed reasons for seeking the discharge of CCRC-M are more akin to a claim of ineffectiveness. These reasons were: (1) CCRC-M insisted on pursuing claims that McGirth believed had no chance of success, and focusing on mental health issues; and (2) CCRC-M was not presenting claims that McGirth felt were meritorious. Further, McGirth believed that he would be prejudiced by CCRC-M's failure to present claims that he thought had merit:

[If CCRC-M] come[s] in with these frivolous motions and you deny me, and then I try to come back later and say hey, I want to raise this, [the attorneys for the State] or whoever, they gonna say well, why didn't you raise that in post-conviction and [CCRC-M will] be somewhere else representing somebody else ... and I'll be sitting on death row stuck because, all because I couldn't get the issues in the motion because me and [my] attorney was at a clash on how to best represent me.

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We conclude that McGirth's dissatisfaction constituted a challenge to CCRC-M's effectiveness, *1156 thereby triggering a Nelson inquiry.

[2] [3] As to the second prong, we conclude that the Nelson inquiry was sufficient. The postconviction court allowed McGirth a full opportunity to explain why he believed counsel was not representing him properly. When McGirth declined to name specific witnesses who CCRC-M was planning to present that he disagreed with, the court stated, "I want to give you every chance to tell me how you think they're being ineffective. I don't want to cut you off if you want to tell me." The court also gave CCRC-M the opportunity to respond to McGirth's complaints. The attorney from CCRC-M stated that (1) he had planned to present one of the claims desired by McGirth in a habeas petition if the motion for postconviction relief was denied, but he could incorporate it into closing statements if permitted by the court; and (2) he had not heard about the McCleskey issue until the morning of the hearing, but it was consistent with the Brady claim that had already been raised in the postconviction motion; i.e., the State had failed to disclose evidence that indicated Sheila Miller was actually a perpetrator, and not a victim.¹⁰

¹⁰ McGirth is correct that CCRC-M failed to mention at the hearing that Sheila, during an emergency room interview on the day of the offenses, allegedly stated she shot her mother. This statement purportedly was made in front of a detective, the detective's supervisor, and an assistant state attorney. Further, according to McGirth, a detective who was investigating the crimes against the Millers was allegedly ordered by a supervisor to stop pursuing Sheila as a possible suspect. However, the postconviction court cannot be faulted for failing to inquire deeper into this claim where nothing discussed during the hearing indicated its existence. "[A] trial judge's inquiry into a defendant's complaints of incompetence of counsel can be only as specific and meaningful as the defendant's complaint." Lowe v. State, 650 So.2d 969, 975 (Fla. 1994). We note that McGirth was allowed to amend his postconviction motion to add both this claim and the McCleskey claim.

Lastly, the court noted that it had reviewed the postconviction motion filed by CCRC-M. That motion presented claims such as: (1) the State failed to disclose to the defense a witness who believed Sheila was involved in the crimes against her parents, and would have testified that Sheila did not seem to care about her parents and spoke about them having money; (2) newly discovered evidence that while in jail, Sheila stated that she had her mother killed; (3) trial counsel was ineffective during the guilt phase for failing to object to the introduction of prejudicial photographs; and (4) trial counsel was ineffective during the penalty phase for failing to present a detective who would have testified that Sheila was concerned the codefendants would implicate her, and for failing to conduct an adequate investigation into mitigating evidence. With regard to the latter, the motion included allegations such as: (1) McGirth suffers from a seizure disorder that was first recognized while he was an infant; (2) he suffered multiple head injuries for which he never sought treatment; and (3) he was beaten regularly by his aunt, who was forced to care for him while his mother was incarcerated.¹¹

¹¹ This description does not encompass all claims raised, but is only intended to demonstrate the comprehensiveness of the motion.

Based upon the foregoing, we conclude that the postconviction court conducted a sufficient Nelson inquiry before it determined that CCRC-M was not providing ineffective assistance to McGirth. Accordingly, we reject this claim as without merit.

Adequacy of the Faretta Inquiry

[4] [5] [6] [7] [8] [9] [10] McGirth next contends that the Faretta inquiry conducted by the postconviction *1157 court during the September 23 hearing was inadequate. The applicable law with regard to a defendant who seeks to exercise his right to self-representation is as follows:

It is well settled that the accused has the right to self-representation. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). However, it is also settled that the defendant must unequivocally elect to represent himself. State v. Craft, 685 So.2d 1292, 1295 (Fla. 1996). Further, after the defendant elects to represent himself, the court must conduct a

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colloquy to ensure the accused is making a knowing waiver. Hardwick v. State, 521 So.2d 1071, 1074 (Fla. 1988). This Court approved a standard colloquy for a trial court to employ in Amendment to Fla. Rules of Crim. Pro. 3.111(d)(2)-(3), 719 So.2d 873 ([Fla.]1998). The standard Faretta inquiry requires the judge to explicitly state the pitfalls of self-representation. The colloquy also requires the judge to state that the defendant's access to legal resources will be limited while in custody and that the defendant is not required to possess special skills in order to represent himself. Amendment, 719 So.2d at 877.

However, a trial judge is not required to follow the colloquy word for word. See Smith v. State, 956 So.2d 1288, 1290 (Fla. 4th DCA 2007). Rather, the essence of the colloquy is to ensure the defendant makes a knowing and voluntary waiver of counsel. See Porter v. State, 788 So.2d 917, 927 (Fla. 2001). In order to ensure the waiver is knowing and voluntary, the trial court must inquire as to the defendant's age, experience, and understanding of the rules of criminal procedure. Id. When reviewing a trial court's handling of a request for self-representation, the standard of review is abuse of discretion. Holland v. State, 773 So.2d 1065, 1069 (Fla. 2000).

Aguirre-Jarquín v. State, 9 So.3d 593, 602 (Fla. 2009).

We conclude that the Faretta inquiry here was completely adequate. After McGirth unequivocally articulated his desire to represent himself, the court thoroughly discussed the advantages of representation and the pitfalls of proceeding pro se. The postconviction court warned McGirth that "it's almost always unwise to represent yourself in court," and discussed the disadvantages of self-representation. These included that (1) McGirth would not receive special treatment by the court or the State; (2) he would not be entitled to additional prison library privileges; (3) he would be expected to abide by the law and the rules of procedure; and (4) if he is unsuccessful in his postconviction proceedings, he will not be able to raise his lack of knowledge or skill as a basis for relief on appeal. The court described the benefits of representation by counsel as follows:

[T]hey could obviously call witnesses for you, question witnesses against you, present evidence on your behalf, can advise you about whether to testify or not testify, they know the rules of evidence, know what evidence can and cannot come in. And they can also preserve any errors that they believe that I may commit during this hearing so that ... the Florida Supreme Court can properly review that.

The court stated for the record McGirth's age, education, and IQ score; confirmed that McGirth could read and write; verified that McGirth was not under the influence of drugs, alcohol, or medications; indicated that McGirth followed along during his trial and was not disruptive; and even noted during the Nelson inquiry that McGirth was "clearly conversant with things and talking about McCleskey and ... a recent case that I dealt with *1158 in a different setting a few weeks ago, but I mean, he's on the cutting edge of new US Supreme Court cases, for lack of a better term." Both the State and the court inquired as to any mental health issues which might impede McGirth's ability to represent himself, and McGirth denied that he was experiencing symptoms or that he was on any medication other than ibuprofen. When McGirth misunderstood the limited role of standby counsel, the court clarified that role and reiterated that the limited assistance McGirth would receive from standby counsel was one of the disadvantages of self-representation.

Based upon the foregoing, the postconviction court did not abuse its discretion when it concluded that McGirth was making a knowing and voluntary waiver of counsel and allowed McGirth to represent himself during the postconviction proceedings. We reject this claim.

CCRC-M as Standby Counsel

^[11]McGirth asserts that the postconviction court erred when it reappointed CCRC-M as standby counsel. As part of this claim, he notes that CCRC-M failed to provide him with copies of all of the records from his case within the time ordered by the postconviction court. He also appears to assert that CCRC-M interfered with his right to self-representation by filing the motion for determination of competency. With regard to standby counsel, we have explained:

[T]he appointment of standby counsel under Faretta is constitutionally permissible; it is not constitutionally required. Goode v. State, 365 So.2d 381 (Fla. 1978), cert. denied, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979). Faretta

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recognizes that the trial court may, over a defendant's objection, "appoint 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." 422 U.S. at 835 n.46, 95 S.Ct. at 2541 n.46.

Jones v. State, 449 So.2d 253, 258 (Fla. 1984). Therefore, although McGirth requested legal assistance, the postconviction court was not constitutionally required to appoint standby counsel. It nonetheless elected to do so. As previously discussed, the court initially appointed CCRC-S as standby counsel. However, the State, CCRC-S, and CCRC-M all filed pleadings asserting that there was no conflict between CCRC-M and McGirth, and CCRC-M was the entity best suited to serve as standby counsel. CCRC-M's motion specifically noted that McGirth agreed to the reappointment of CCRC-M. Given that the court had previously found no conflict between CCRC-M and McGirth, and the fact that CCRC-M was the entity most familiar with McGirth's case, we conclude that the reappointment of CCRC-M as standby counsel did not constitute an abuse of discretion.

¹¹²McGirth's further complaints are without merit, in that the actions of CCRC-M did not interfere with his right to self-representation. In its pleading seeking reappointment as standby counsel, CCRC-M acknowledged that preparation of the record materials had taken substantially longer than anticipated. However, nothing in the record indicates that CCRC-M was derelict in its obligation to provide McGirth with the materials so that he could represent himself. Rather, the reason CCRC-M had difficulty complying with the two-week deadline imposed by the postconviction court was the sheer volume of the materials to be produced (well over 30,000 pages, according to CCRC-M). Further, there is no indication that McGirth was prejudiced by CCRC-M's failure to produce the materials within the time period *1159 initially ordered by the court because he received extensions of time to file his amended rule 3.851 motion.

¹¹³With regard to McGirth's assertion that CCRC-M interfered with his right to self-representation by filing a motion to determine competency, we have stated that the role of standby counsel is to assist a court in conducting orderly and timely proceedings. Behr v. Bell, 665 So.2d 1055, 1056 (Fla. 1996). Logically speaking, if standby counsel has a good-faith concern that a pro se defendant is incompetent to continue with self-representation, counsel should be able to present that concern to the court. We conclude that allowing standby counsel to make such a request, when it is in good faith, would facilitate orderly and timely court proceedings because it would help to prevent a potentially incompetent defendant from representing himself and then challenging his competency on appeal.

As previously noted, CCRC-M filed a pleading suggesting that McGirth was exhibiting behavior and symptoms that called his competency into question. These included increasingly unfocused, distant, and detached attention; odd thinking and inappropriate attention to detail; increasingly severe headaches; bizarre behavior during legal consultations, such as head bobbing; and abruptly jumping from one line of discussion to another. CCRC-M stated that it had a "good faith basis to believe there are reasonable grounds to question Mr. McGirth's present competence to proceed or to represent himself."¹² During the hearing at which CCRC-M's motion was discussed, the State agreed to a determination in an abundance of caution:

The safest course of conduct, of course would be, appoint the experts, put off the [evidentiary] hearing, have them examine him, reset the hearing for a later time. The risk of not doing it, obvious to all of us, it goes to the Supreme Court, they say you should have done it, send it back and we do it all over again.

If the Court chooses caution, I certainly am not going to object to that. In part, I would almost suggest caution in this case as opposed to going forward.

Based upon the allegations presented in the motion, and the State's agreement to a determination, we conclude that the postconviction court's decision to have McGirth evaluated for competency did not interfere with his right to self-representation.

¹² This language tracks Florida Rule of Criminal Procedure 3.851(g)(2) with regard to when collateral counsel may request a competency determination: "Collateral counsel may file a motion for competency determination and an accompanying certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the death-sentenced defendant is incompetent to proceed."

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Accordingly, McGirth is not entitled to relief on this claim.

Self-Representation at the Competency Hearing

¹¹⁴McGirth next contends that the postconviction court erred when it permitted him to represent himself during the competency hearing. He further asserts that the competency hearing was insufficient. We address each argument in turn.

¹¹⁵In determining whether a defendant is competent to proceed, a court must consider whether he “has sufficient present ability to consult with counsel with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the pending collateral proceedings.” Hernandez-Alberto v. State, 126 So.3d 193, 204 (Fla. 2013) (quoting Hardy v. State, 716 So.2d 761, 763 (Fla. 1998)); see also *1160 Fla. R. Crim. P. 3.851(g)(8)(A). The United States Supreme Court in Godinez v. Moran, 509 U.S. 389, 399–401, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993), concluded that the competence required to stand trial, plead guilty, and waive the right to counsel is the same, although the waiver of a constitutional right must also be knowing and voluntary. We have explained the standard for review of a competency determination as follows:

“It is the duty of the trial court to determine what weight should be given to conflicting testimony.” Alston v. State, 894 So.2d [46,] 54 [(Fla. 2004)] (quoting Mason v. State, 597 So.2d 776, 779 (Fla. 1992)). “The reports of experts are ‘merely advisory to the [trial court], which itself retains the responsibility of the decision.’ ” Id. (quoting Hunter v. State, 660 So.2d 244, 247 (Fla. 1995)). Thus, when the experts’ reports or testimony conflict regarding competency to proceed, it is the trial court’s responsibility to consider all the relevant evidence and resolve such factual disputes. Id.; see also Hardy, 716 So.2d at 764.

“Where there is sufficient evidence to support the conclusion of the lower court, [this Court] may not substitute [its] judgment for that of the trial judge.” Alston, 894 So.2d at 54 (quoting Mason, 597 So.2d at 779). A trial court’s decision regarding competency will stand absent a showing of abuse of discretion. Id.; see also Hardy, 716 So.2d at 764; Carter v. State, 576 So.2d 1291, 1292 (Fla. 1989).... A trial court’s decision does not constitute an abuse of discretion “unless no reasonable person would take the view adopted by the trial court.” Alston, 894 So.2d at 54 (quoting Scott v. State, 717 So.2d 908, 911 (Fla. 1998)).

Hernandez-Alberto, 126 So.3d at 204–05 (some alterations in original).

¹¹⁶We have held that a capital defendant may waive the right to counsel and represent himself during a competency hearing where no reasonable doubt has been raised as to his mental competence. See Larkin v. State, 147 So.3d 452, 464 (Fla. 2014). The determination that a defendant is competent to represent himself at a competency hearing is reviewed for abuse of discretion. See id. McGirth attempts to factually distinguish Larkin on the basis that Larkin was thirty-eight years old at the time of the proceeding, had attended college for two years, and grew up in a comfortable home with an intact family, whereas McGirth grew up in relative poverty, attained a high school diploma while in jail, had allegedly suffered head injuries, and had been diagnosed with a psychotic disturbance. McGirth also contends that he repeatedly requested new counsel, whereas the defendant in Larkin did not.

Neither of these distinctions warrants a conclusion that the postconviction court abused its discretion when it allowed McGirth to represent himself during the competency proceeding. First, regardless of McGirth’s background, the record demonstrates that he understood legal concepts and could articulate his position clearly. Second, the postconviction court had previously found that CCRC–M was not providing deficient representation. Therefore, although McGirth may have requested substitute counsel, he did not have a right to the appointment of alternate counsel. See Weaver v. State, 894 So.2d 178, 188 (Fla. 2004) (“[I]f a trial court decides that court-appointed counsel is providing adequate representation, the court does not violate an indigent defendant’s Sixth Amendment rights if it requires him to keep the original court-appointed lawyer or represent himself.”). Therefore, Larkin is applicable to McGirth.

*1161 We conclude that, despite the allegations presented in CCRC–M’s motion for a competency determination, no reasonable doubt as to McGirth’s competence had been demonstrated to the postconviction court. During the hearing on

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whether to have McGirth evaluated for competency, the court noted that it had not seen anything over the years that called into question McGirth's competency.¹³ In fact, in the order appointing the experts, the court expressly stated it was granting a competency determination only in an abundance of caution. Further, at the beginning of the competency hearing, the postconviction court specifically stated that it had read the evaluations prepared by Dr. Prichard and Dr. Berland. We have similarly reviewed these evaluations, which are part of the record on appeal but are sealed and confidential. Our review of the evaluations, as well as the entire postconviction record, leads us to conclude that a reasonable doubt as to McGirth's competency had not been established. Accordingly, the court did not abuse its discretion when it permitted McGirth to represent himself during the competency hearing after it conducted a second full Faretta inquiry.¹⁴

¹³ The same judge presided over both McGirth's capital trial and the postconviction proceedings.

¹⁴ McGirth relies upon two cases in which federal courts held that where a defendant's competence is reasonably in question, a court may not allow that defendant to waive the right to counsel and proceed pro se until resolution of the issue of competency. See United States v. Klat, 156 F.3d 1258, 1263 (D.C. Cir. 1998); United States v. Purnett, 910 F.2d 51, 56 (2d Cir. 1990). However, in Klat, the trial court made an express finding that there was "reasonable cause" to believe the defendant was incompetent to stand trial. 156 F.3d at 1262. In Purnett, the trial court sua sponte questioned the defendant's competency because it believed the defendant had acted in an inappropriate manner. 910 F.2d at 53. Because the court here saw nothing to indicate that McGirth was incompetent to proceed, these cases are distinguishable.

¹⁷ McGirth next contends that the competency hearing was insufficient. We disagree. During the hearing, two experts testified on direct examination and cross-examination as to their conclusions with regard to McGirth's competency, and the parties were permitted to make closing statements to the court. In determining that McGirth was competent, the court did not rely exclusively upon the expert reports:

I was the judge that presided over Mr. McGirth's trial ... and so I've had a chance to see Mr. McGirth over the years, as well as these proceedings. I know we do have conflicting testimony from the doctors regarding the competency of Mr. McGirth That being said, it's my job to determine what weight is to be given to the conflicting testimony because at the end of the day, it's my decision.

And, you know, I've also had a chance to read Mr. McGirth's various pro se motions throughout the post-conviction proceedings.

In the order adjudicating McGirth competent to proceed, the court reaffirmed that it had "never observed any behavior of the Defendant suggestive of incompetence." Based upon the expert evaluations, the pleadings filed and the arguments made by McGirth during the postconviction proceedings, and the court's own observations over the years, we conclude that the court did not abuse its discretion when it determined that McGirth was competent to proceed.

Based upon the foregoing, this claim is without merit.

***1162 Motion to Disqualify**

¹⁸ McGirth contends that the postconviction court improperly denied the motion to disqualify because during the proceedings, the court allegedly exhibited a pattern of preferential treatment to the State and punitive treatment of McGirth for choosing to represent himself. We have explained:

A motion to disqualify a judge "must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy." Rivera v. State, 717 So.2d 477, 480-81 (Fla. 1998) (quoting Jackson v. State, 599 So.2d 103, 107 (Fla. 1992)). The judge should grant a motion to disqualify if "it shows that the party making the motion has a well-grounded fear that he or she will not receive a fair trial from the presiding judge." Barwick v. State, 660 So.2d 685, 691 (Fla. 1995). However, the fact that a judge has ruled adversely to the party in the past does not constitute a legally sufficient ground for a motion

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to disqualify.

Thompson v. State, 759 So.2d 650, 659 (Fla. 2000). Having reviewed the entire record in this case, there is nothing to indicate that the postconviction court was prejudiced or biased against McGirth. Contrary to McGirth's assertions, the court was courteous, fair, and accommodating throughout the proceedings. The court granted McGirth multiple extensions of time, appointed an investigator to assist him, and consistently honored McGirth's desire to represent himself after emphasizing during each Faretta inquiry that it was inadvisable for him to do so.

This claim is without merit.

Waiver of the Evidentiary Hearing

[19] [20] McGirth next asserts that his waiver of the evidentiary hearing was not valid. We disagree. A defendant can waive an evidentiary hearing on a claim provided that the waiver is knowing, intelligent, and voluntary. See Gore v. State, 24 So.3d 1, 13–14 (Fla. 2009). At the beginning of the hearing, and after stating that he did not wish to be represented by CCRC–M, McGirth moved to waive the evidentiary hearing, but “preserve the right to appeal all rulings up to this point.” The postconviction court conducted another detailed inquiry in which it first confirmed that McGirth understood he had the right to present evidence. The court then conducted a third Faretta inquiry, during which it articulated the advantages of counsel and the disadvantages of self-representation. The court further informed McGirth that he bears the burden at the postconviction stage to demonstrate the merits of his case, and “by waiving that, you’re not putting on any evidence, so there’s no evidence for me to rule in your favor on the evidentiary matters.” The court also explained that if it found McGirth had knowingly and voluntarily waived his right to proceed with the evidentiary hearing, it had “no choice, unless there’s something in the record right now, other than to deny your notion [sic] on the evidentiary issues.” McGirth stated that he understood the implications of his waiver.

With regard to competency, the court confirmed that McGirth was not under the influence of alcohol, drugs, or medication; he had no physical problems that would limit his self-representation; he had not been told not to use a lawyer; and he is able to read, write, and understand the English language. McGirth again confirmed that he did not want CCRC–M to represent him. The State noted:

And so the record is clear and so Mr. McGirth understands, we’ve been trying to keep track this morning of the witnesses actually being here, and of the 21 that’s listed on the notice of filing that they’ve been served, almost all of them are actually present outside of the courtroom *1163 ready and willing to testify. And that includes nearly all of the whole list as last we were taking roll.

The witnesses included McGirth’s codefendants, as well as an individual who allegedly heard Sheila Miller state while in the Marion County jail, “I had my own momma killed.” The State had agreed to pay the travel expenses of two experts who were scheduled to testify on the third day of the evidentiary hearing.

The State also confirmed that McGirth understood the implications of his waiver:

STATE: [I]f you don’t put on evidence, then there is no support in the record for those claims that you made; for instance about Brady, that evidence was hid or false evidence was used in your trial. Unless you put on evidence of that, there is nothing in the record that either Judge Lambert nor the appellate court can use to uphold those claims that you’ve made.

You understand that?

McGIRTH: Yeah.

STATE: Your Honor, I think with that I think Mr. McGirth clearly has the legal right and the Constitutional right to choose whether to present evidence or not. The witnesses are here, they’re ready to go forward. If he chooses not to do that, I believe that’s within his ability and his right.

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McGirth confirmed that he understood he could present evidence and appeal any issues previously raised, but still chose to waive his right to an evidentiary hearing. When asked if he wished to provide a reason for the waiver, McGirth replied in the negative. After the inquiry, the court concluded that McGirth was competent to waive his right to an evidentiary hearing, and that his waiver was freely and voluntarily made.

Based upon the colloquy conducted by the postconviction court, we conclude that McGirth was competent to waive his right to present evidence on those claims for which an evidentiary hearing had been granted, and his waiver was knowing, intelligent, and voluntary. Both the court and the State ensured that McGirth understood the consequences of his waiver—that the court would be compelled to deny these claims as unproven, and this Court would be compelled to affirm the denial of those claims for lack of evidence. Further, the court conducted a third full Faretta inquiry to ensure that McGirth did not wish to have the assistance of counsel in deciding whether to waive the evidentiary hearing.

In light of the foregoing, this claim is rejected.

PETITION FOR WRIT OF HABEAS CORPUS

^[21]McGirth presents three claims in his petition for writ of habeas corpus. Because we conclude that the Hurst claim is dispositive, we decline to address the others. In Hurst v. Florida, — U.S. —, 136 S.Ct. 616, 621, 193 L.Ed.2d 504 (2016), the United States Supreme Court held that Florida's capital sentencing scheme violated the Sixth Amendment. The Supreme Court concluded that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Id. at 619.

On remand from the Supreme Court, we held that "in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge." *1164 Hurst, 202 So.3d at 54. We further held that a unanimous jury recommendation is required before a trial court may impose a sentence of death. Id. Finally, we determined that the error defined in Hurst is capable of harmless error review. Id. at 67.¹⁵

¹⁵ We rejected Hurst's contention that in light of Hurst v. Florida, section 775.082(2), Florida Statutes (2015), mandates that all sentences of death be commuted to life in prison without the possibility of parole. Id. at 65–66. We reject a similar claim raised by McGirth in his appeal from the denial of postconviction relief.

^[22]In Mosley v. State, 41 Fla. L. Weekly S629, S640, 209 So.3d 1248 (Fla. Dec. 22, 2016), we held that Hurst applies retroactively to those postconviction defendants whose sentences became final after the United States Supreme Court's 2002 decision in Ring. There is no dispute that McGirth's death sentence became final during this time frame.¹⁶ Thus, McGirth falls into the category of defendants to whom Hurst is applicable. Accordingly, at issue is whether the error that occurred during McGirth's penalty phase proceedings was harmless beyond a reasonable doubt. In the context of a Hurst error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to the sentence.

¹⁶ Further, we note that McGirth presented a Ring challenge both on direct appeal and in his motion for postconviction relief.

We conclude that the State cannot meet this burden. Although the prior violent felony aggravating circumstance was found unanimously by the jury by virtue of McGirth's conviction for attempted first-degree murder of James Miller, whether this aggravating circumstance was "sufficient" to qualify for the death penalty would also be a jury determination. Because the jury vote was eleven to one, there is no way of knowing if such a finding was unanimous. The same rationale applies to the aggravating factor that the murder occurred during the commission of a robbery. Moreover, there is no way of knowing if the jury found any of the other aggravating circumstances unanimously, or if any aggravators that were unanimously found were

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also unanimously found to be sufficient to qualify for the death penalty.

Further, this was not a case that completely lacked mitigation. McGirth was only eighteen years old at the time of the murder, the bare minimum age to be eligible for the death penalty. See Roper v. Simmons, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The trial court gave “significant” weight to this statutory mitigating circumstance. McGirth, 48 So.3d at 784. Additionally, among the evidence that the jury heard in mitigation was that McGirth did not know his father while he was growing up, he was devastated by the death of his grandmother, and he was a witness to domestic violence. As with the aggravators, there is no way to know whether the jury unanimously found that any mitigation established during the penalty phase was outweighed by the aggravation.

In sum, any attempt to determine what findings were made by the one juror who voted for life and the eleven jurors who voted for death would amount to speculation, and cannot rise to the level of proof beyond a reasonable doubt. Accordingly, the error in this case cannot be considered harmless.

CONCLUSION

For the foregoing reasons, we affirm the denial of postconviction relief. However, *1165 we grant the petition for writ of habeas corpus, vacate McGirth’s death sentence, and remand for a new penalty phase proceeding.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., and PERRY, Senior Justice, concur.

POLSTON, J., concurs in part and dissents in part with an opinion, in which CANADY, J., concurs.

POLSTON, J., concurring in part and dissenting in part.

I concur with the majority’s decision to affirm the denial of postconviction relief. However, I dissent to the majority’s decision to grant the habeas petition and order a new penalty phase proceeding based on Hurst v. State, 202 So.3d 40 (Fla. 2016).

CANADY, J., concurs.

All Citations

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Supreme Court of Florida.

Gerhard HOJAN, Appellant,
v.
STATE of Florida, Appellee.
Gerhard Hojan, Petitioner,
v.
Julie L. Jones, etc., Respondent.

No. SC13-5
|
No. SC13-2422
|
[January 31, 2017]

Synopsis

Background: After defendant's death sentence and convictions for, inter alia, two counts of first-degree murder and one count of attempted first-degree premeditated murder were affirmed on appeal, 3 So.3d 1204, defendant filed a motion for postconviction relief. The Circuit Court, Broward County, Paul Lawrence Backman, J., summarily denied the motion. Defendant appealed, and filed petition for writ of habeas corpus.

Holdings: The Supreme Court held that:

- [1] defendant's postconviction claim that his trial counsel was ineffective for failing to challenge certain forensic evidence in a *Frye* hearing was insufficiently pleaded and lacking merit;
- [2] Vienna Convention on Consular Relations did not apply to prosecution of defendant;
- [3] fact that defense counsel and prosecutor mutually agreed to jury and the alternates by way of the off-the-record out-of-court jury selection procedure at which defendant was not present did not deprive defendant of due process;
- [4] defendant was not entitled to evidentiary hearing on postconviction claim that counsel in capital murder trial failed to ensure that he had a competent mental health evaluation for purposes of preparing mitigation evidence;
- [5] trial counsel was not deficient in adequately advising defendant about the reality of being sentenced to death row;
- [6] defendant could not establish the prejudice prong concerning his allegation that trial counsel was ineffective for failing to advise him about the consequences of waiving mitigation;
- [7] defendant's postconviction challenge to bar rule that prohibited post-trial juror interviews was an attempted fishing expedition in the guise of a constitutional challenge; and
- [8] error in permitting judge to find facts necessary to impose sentence of death was not harmless.

Summary denial of postconviction motion affirmed; petition for writ of habeas corpus denied; death sentence vacated; and

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remanded for new penalty phase.

Canady, J., filed an opinion concurring in part and dissenting in part in which Polston, J., concurred.

Perry, Senior Justice, concurred in part and dissented in part.

An Appeal from the Circuit Court in and for Broward County, Paul Lawrence Backman, Judge—Case No. 062002CF005900B88810 and an Original Proceeding—Habeas Corpus

Attorneys and Law Firms

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Opinion

PER CURIAM.

*1 Gerhard Hojan was convicted of two counts of first-degree murder, one count of attempted first-degree premeditated murder, one count of attempted first-degree felony murder, three counts of armed kidnapping, and two counts of armed robbery. Hojan was sentenced to death. This Court affirmed his convictions and sentences on direct appeal. Hojan v. State, 3 So.3d 1204 (Fla.), cert. denied, Hojan v. Florida, 558 U.S. 1052, 130 S.Ct. 741, 175 L.Ed.2d 521 (2009).

Hojan now appeals the denial of his initial motion for postconviction relief and petitions this Court for a writ of habeas corpus. We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const. For the reasons that follow, we affirm the postconviction court's denial of relief but grant Hojan a new penalty phase based on the United States Supreme Court's decision in Hurst v. Florida, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision in Hurst v. State (Hurst), 202 So.3d 40 (Fla. 2016).¹

¹ We previously issued a decision in this case on September 3, 2015. See Hojan v. State, 180 So.3d 964 (Fla.), reh'g denied, (Dec. 18, 2015). After the United States Supreme Court released Hurst v. Florida, we granted Hojan's motion to recall mandate, re-opened his case numbers SC13-5 and SC13-2422, and permitted supplemental briefing. We withdraw our previous opinion, and replace it with this opinion.

FACTS

This Court summarized the relevant facts on direct appeal as follows:

Gerhard Hojan was charged with armed robbery, armed kidnapping, attempted murder, and murder arising out of the events of Monday, March 11, 2002. The evidence presented at Hojan's trial established that at approximately 4 a.m., Hojan and Jimmy Mickel entered the Waffle House where the victims, Barbara Nunn, Christina De La Rosa, and Willy Absolu worked. Hojan and Mickel had eaten at that Waffle House on several prior occasions, and the victims recognized and knew Hojan and Mickel. Mickel had also previously worked at that Waffle House. Additionally, Nunn knew Mickel and Hojan from attending a club where Mickel and Hojan worked and where they had previously admitted Nunn for free.

After eating breakfast, Mickel exited the Waffle House. He returned with a pair of bolt cutters and went toward the

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employee section of the restaurant. Hojan produced a handgun and ordered Nunn, De La Rosa, and Absolu into the back of the kitchen, where he directed them into a small freezer and shut them inside. While Mickel cut the locks to various cash stores, Hojan returned to the freezer a total of three times. First, Hojan returned and demanded that the victims give him any cell phones they had. Next, he returned and demanded their money. Finally, he returned and ordered the victims to turn around and kneel on the floor. Nunn protested and tried to persuade Hojan not to kill them, but Hojan nevertheless shot each of the victims....

Nunn survived and awoke later with Absolu's legs on top of her body. She crawled out of the freezer and went next door to a gas station. There, with the help of the night attendant, she called 911 and subsequently her mother and sister.... Prior to her helicopter flight, Nunn gave law enforcement officers a taped statement, in which she identified Mickel and Hojan as being involved....

*2 Hojan was convicted of two counts of first-degree murder for the death of Absolu and De La Rosa; one count of attempted first-degree premeditated murder as to Nunn; one count of attempted first-degree felony murder as to Nunn; three counts of armed kidnapping; and two counts of armed robbery. State v. Hojan, No. 02-5900CF10B (Fla. 17th Cir. Ct. sentencing order filed Aug. 2, 2005) at 1 (Sentencing Order). The jury recommended death by a vote of nine to three, and the trial court followed that recommendation and imposed two death sentences for the murders of Absolu and De La Rosa. In sentencing Hojan to death, the trial court found six aggravators, one statutory mitigator, and two nonstatutory mitigators....

On appeal, Hojan raises five claims. He argues that (1) the surviving victim's statement to an officer at the scene was not an excited utterance; (2) the trial court improperly treated Hojan's waiver of the opportunity to present mitigating evidence in the penalty phase as a waiver of his opportunity to present motions challenging the death penalty; (3) his confession should have been suppressed; (4) Florida's death penalty statute is unconstitutional; and (5) the trial court committed error under Koon v. Dugger, 619 So.2d 246 (Fla. 1993), and Muhammad v. State, 782 So.2d 343 (Fla. 2001). We independently assess the sufficiency of the evidence and the proportionality of Hojan's sentence. We find no error under Hojan's five asserted claims, find that sufficient evidence exists, and conclude that the death sentence is proportional. Accordingly, we affirm the trial court's order sentencing Hojan to death.

Hojan, 3 So.3d at 1207-09 (footnote omitted).

On November 19, 2010, Hojan filed a "Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend," raising nine claims, which the circuit court treated as Hojan's initial postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.851.²

² In his rule 3.851 motion, Hojan raised the following claims: (1) section 119.19, Florida Statutes, and Florida Rule of Criminal Procedure 3.852 are unconstitutional facially and as applied to him (Claim I—amended); (2) the one-year time limit established by rule 3.851 for filing a motion for postconviction relief violates his rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution and article I, section 2 of the Florida Constitution (Claim II); (3) trial counsel was allegedly ineffective during pretrial and the guilt phase (consisting of four subclaims) (Claim III); (4) the trial court erred by permitting the State to present Williams rule evidence consisting of testimony of two witnesses attesting that they had seen Hojan in the past few months with a gun similar to the murder weapon (Claim IV), Williams v. State, 110 So.2d 654 (Fla. 1959); (5) trial counsel was allegedly ineffective for failing to adequately advise Hojan about the risks of waiving mitigation evidence during the penalty phase (Claim V—amended); (6) Rule Regulating the Florida Bar 4-3.5(d)(4) burdens Hojan's exercise of fundamental constitutional rights—including the right to due process (Claim VI); (7) newly discovered evidence is available to show that the forensic science used to convict and sentence Hojan was unreliable and invalid (Claim VII); (8) Florida's lethal injection protocol is both facially unconstitutional and unconstitutional as applied to Hojan's case (Claim VIII—amended); and (9) Florida's death penalty scheme is unconstitutional because it violates the principles of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (Claim IX).

*3 The circuit court entered an order that summarily denied all of Hojan's claims for postconviction relief. This appeal follows. Hojan also petitions this Court for a writ of habeas corpus.³

³ In the present appeal, Hojan raises the following claims: (1) The circuit court erred in failing to grant an evidentiary hearing on the

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issue that Hojan's convictions are unreliable; (2) trial counsel provided ineffective assistance for failing to adequately advise Hojan about waiving mitigation evidence during the penalty phase; (3) the circuit court abused its discretion in denying access to records, held by certain state agencies, pertaining to Hojan's case; (4) there is newly discovered evidence establishing that the forensic science used to convict and sentence Hojan was unreliable and invalid; (5) the Bar rule that prohibits his lawyers from interviewing jurors to determine if there was any constitutional error present, unduly burdens his exercise of his rights; and (6) Florida's lethal injection protocol and procedures violate the Eighth Amendment of the United States Constitution.

ANALYSIS

Standard of Review—Postconviction Motion

⁽¹⁾ ⁽²⁾ ⁽³⁾ ⁽⁴⁾ ⁽⁵⁾ ⁽⁶⁾ ⁽⁷⁾ ⁽⁸⁾ We have previously established that there is a presumption that claims for relief sought in a rule 3.851 motion are presumptively entitled to a postconviction evidentiary hearing. However, the circuit court's summary judgment denying a defendant's rule 3.851 motion will be upheld if there is a conclusive showing that defendant is not entitled to relief, or the claim(s) is insufficiently pleaded.

"A defendant is normally entitled to an evidentiary hearing on a postconviction motion 'unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient.' " Valentine v. State, 98 So.3d 44, 54 (Fla. 2012) (quoting Franqui v. State, 59 So.3d 82, 95 (Fla. 2011)). An evidentiary hearing must be held on an initial 3.851 motion whenever the movant makes a facially sufficient claim that requires factual determination. See Amendments to Fla. Rules of Crim. Pro. 3.851, 3.852, & 3.993, 772 So.2d 488, 491 n.2 (Fla. 2000). "[T]o the extent there is any question as to whether a rule 3.851 movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required." Walker v. State, 88 So.3d 128, 135 (Fla. 2012). However, merely conclusory allegations are not sufficient—the defendant bears the burden of "establishing a 'prima facie case based on a legally valid claim.'" Valentine, 98 So.3d at 54 (quoting Franqui, 59 So.3d at 96).

"To uphold the trial court's summary denial of claims raised in an initial postconviction motion, the record must conclusively demonstrate that the defendant is not entitled to relief." Everett v. State, 54 So.3d 464, 485 (Fla. 2010). When reviewing the circuit court's summary denial of an initial rule 3.851 motion, we will accept the movant's factual allegations as true and will affirm the ruling only if the filings show that the movant has failed to state a facially sufficient claim, there is no issue of material fact to be determined, the claim should have been brought on direct appeal, or the claim is positively refuted by the record. See Walker, 88 So.3d at 135. Finally, "[b]ecause a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review." Seibert v. State, 64 So.3d 67, 75 (Fla. 2010) (citing State v. Coney, 845 So.2d 120, 137 (Fla. 2003) (holding that pure questions of law that are discernable from the record are subject to de novo review)).

*4 Barnes v. State, 124 So.3d 904, 911 (Fla. 2013). As we explain below, we affirm the circuit court's summary denial of Hojan's motion for postconviction relief.

Merits—Postconviction Motion

Trial Court Error

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Hojan raised four subclaims pertaining to alleged trial court error: (1) failure to subject certain analysis of forensic evidence introduced by the State's expert witness to a Frye⁴ hearing; (2) failure to inquire into whether Hojan knowingly, intelligently, and voluntarily waived his Miranda⁵ rights; (3) failure to recognize that Hojan was entitled to relief under the Vienna Convention;⁶ and (4) failure to disallow the jury selection process, as unorthodox and unconstitutional.

⁴ Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

⁵ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

⁶ Hojan specifically identifies Article 36(1)(b) of the Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (Dec. 24, 1969) (Vienna Convention).

In light of the record before us, we determine that the circuit court found conclusive evidence that Hojan was not entitled to relief based on any of the subclaims under his overall claim of trial court error. Notwithstanding the absence of trial court error, we specifically comment below about Hojan's assertion that the jury selection procedure in his case was unorthodox and unconstitutional.

Frye Hearing

¹⁹Hojan asserts that he was entitled to an evidentiary hearing to address counsel's ineffectiveness for failing to challenge certain forensic evidence analysis in a Frye hearing. However, the record shows that the circuit court did not err in summarily denying this subclaim as being insufficiently pleaded and lacking merit. Relying on the authority of Ramirez v. State, 810 So.2d 836 (Fla. 2001), the circuit court rejected as conclusory Hojan's assertion that a 2009 report promulgated by the National Academy of Sciences (NAS), pertaining to forensic science, established that tool mark and bullet rifling evidence did not satisfy the criteria for admissibility under Florida law.

In addition, the circuit court did not err in concluding that Hojan's subclaim was insufficiently pleaded because he never alleged that the 2009 NAS report undermines the reliability of the analyses of forensic evidence in his case.

In Ramirez we explained why the forensic evidence that Hojan challenged is generally admissible in criminal trials:

The theory underlying tool mark evidence ... is generally accepted in the scientific community and has long been upheld by courts. Many of the analytical methods that were developed for use with tool marks in general have been applied to knife marks in particular and have similarly been accepted by courts.

Ramirez, 810 So.2d at 845. Furthermore, the circuit court did not err in summarily denying relief because it is well-established that "the Frye standard is the proper standard for admission of novel scientific expert testimony." Hadden v. State, 690 So.2d 573, 577 (Fla. 1997) (citing Stokes v. State, 548 So.2d 188, 194-95 (Fla. 1989)).

Furthermore, the circuit court did not err in summarily denying an evidentiary hearing regarding Hojan's assertion that trial counsel was ineffective for failing to challenge allegedly conclusive testimony given by Carl Haemmerle, the State's expert witness. The circuit court properly ruled that Hojan failed to specify any information that counsel could have elicited during voir dire that would have warranted Haemmerle's exclusion as an expert. Thus, the circuit court properly concluded that Hojan insufficiently pleaded this sub-issue. See Barnes, 124 So.3d at 911 (stating merely conclusory statements are insufficient to establish the requirement for a factual determination).

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Miranda Waiver

*5 ^[10] ^[11] The circuit court did not err in summarily denying as procedurally barred Hojan's assertion that counsel was ineffective for not challenging during the suppression hearing the legal sufficiency of Hojan's waiver of his rights under Miranda. The circuit court correctly recognized that Hojan raised this issue during his direct appeal, where this Court rejected it as an argument of trial court error. Hojan, 3 So.3d at 1212 ("After hearing the testimony of several law enforcement officers, the trial court denied Hojan's motion The trial court found that (1) Detective Anton read Hojan his Miranda rights and asked Hojan if he understood those rights; (2) Hojan replied that he was read them and understood them; and (3) after Hojan affirmed that he had been read Miranda warnings, '[t]he Defendant was still willing to talk with [Anton]' on the tape Ultimately, the trial court held that Hojan was advised of his Miranda rights prior to being questioned and that he voluntarily waived those rights.") (footnote omitted). Contrary to Hojan's assertion that this precise issue presently before us was not previously addressed during his direct appeal, we disagree with Hojan and conclude, as did the trial court, that a criminal defendant may not relitigate any issue previously decided in his direct appeal, merely guised as an allegation that trial counsel was ineffective.

Vienna Convention

^[12] We find that there was conclusive evidence in the record to support the circuit court's finding that: (1) Hojan was born in the United States and he is still a citizen of this nation; and (2) Hojan was arrested and imprisoned for committing crimes in the United States (Florida).

Therefore, despite Hojan's assertion that his father is a German national and his mother a Jamaican national, the circuit court correctly relied on existing case law in concluding that the Vienna Convention does not apply in Hojan's case. Compare Darling v. State, 808 So.2d 145, 165-66 (Fla. 2002) (holding the Vienna Convention applied where a capital defendant, charged with first-degree murder in the United States, was a foreign national and citizen of the Bahamas), with Lugo v. State, 2 So.3d 1, 17-18 (Fla. 2008) (holding the Vienna Convention did not apply where the defendant, an American citizen in the Bahamas, sought for crimes committed in the United States, was arrested by Bahamian authorities at the request of United States officials).

The circuit court reasonably concluded that even if Hojan had been able to become eligible for consular assistance from Germany or Jamaica, his rule 3.851 motion failed to allege that he would have sought such assistance under the Vienna Convention. Considering the record before us, the circuit court did not err in ruling that Hojan's rule 3.851 motion was insufficiently pleaded and conclusory. See Knight v. State, 923 So.2d 387, 403 (Fla. 2005) ("Conclusory allegations without more are insufficient to state a claim for relief in post conviction proceedings." (citing Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989); Freeman v. State, 761 So.2d 1055 (Fla. 2000))); Freeman, 761 So.2d at 1061 ("The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden." (citing Kennedy, 547 So.2d at 912)); Ragsdale v. State, 720 So.2d 203, 207 (Fla. 1998) ("We have encouraged trial courts to hold evidentiary hearings on postconviction motions. However, where the motion lacks sufficient factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied.").

Jury Selection Procedure

^[13] Hojan's allegation that his defense attorney and the prosecuting attorney colluded to select the jury at a time when he was not present and participating with his defense team initially caused us great concern. It is a well-settled proposition of law, which the circuit court acknowledged in its final order, that a criminal defendant has a right to be present at every critical stage of his or her trial. See Muhammad v. State, 782 So.2d 343, 351 (Fla. 2001) ("Criminal defendants have a due process

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right to be physically present in all critical stages of trial, including the examination of prospective jurors.”)

The record before us reflects that Hojan was present during the voir dire of the entire venire that took place in open court, on the record, and before the presiding judge. In addition, Hojan was present for all of the cause challenges of the potential jurors and the trial court’s rulings thereon on the record. After reviewing the record before us, we find that the unusual procedure employed in the selection of Hojan’s jury did not violate his rights to due process under the law.

*6 The unusual aspect of the jury selection process occurred when counsel for the parties agreed, sometime after the close of the trial proceedings for the day prior to the intervening weekend, to forego the exercise of any peremptory challenges to any of the remaining venirepersons. At that time, off the record and when Hojan and the presiding judge were not present, the attorneys agreed on twelve jurors and four alternate jurors. On the following Monday, counsel informed the trial court, on the record, that they had mutually agreed to the jury and the alternates by way of the aforementioned out-of-court jury selection procedure. The trial court granted defense counsel approximately forty-five minutes to confer with Hojan about the stated jury selection procedure. Afterward, the trial judge conducted an extensive colloquy with Hojan to ensure that he agreed to the jury and ratified the jury selection procedure that his defense counsel had engaged in with the prosecution.

THE COURT: Mr. Hojan, the individuals whose names I’ve called out—you’ve been sitting here since we started picking this jury last Tuesday; is that correct?

MR. HOJAN: Yes, sir.

THE COURT: And you had an opportunity Tuesday and Wednesday—even though we dismissed the panel that were here Tuesday and Wednesday until we started again in the afternoon—you’ve been here participating with your lawyers through every stage of the jury selection process; correct?

MR. HOJAN: Yes, Your Honor.

THE COURT: And you’ve consulted with your lawyers as it relates to the challenges for cause that were raised by the Defense?

MR. HOJAN: Yes, Your Honor.

THE COURT: And you’re aware that as of today we have twenty-seven individuals that have not been stricken for cause?

MR. HOJAN: Yes, Your Honor.

....

THE COURT: And of course you were here during all of the questioning with those individuals; correct?

MR. HOJAN: Yes, Your Honor.

THE COURT: Is that an acceptable group of individuals to try your case?

MR. HOJAN: Yes, Your Honor.

....

THE COURT: And they’re acceptable to you; correct?

MR. HOJAN: Yes, Your Honor.

THE COURT: Now, you understand in the process of selecting a jury, in addition to challenges for cause, both the State and the Defense have what we call preemptory challenges, which you can utilize to strike individuals from the panel?

MR. HOJAN: Yes, sir.

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THE COURT: Your side has ten and the State has ten for a total of twenty.

MR. HOJAN: Yes, Your Honor.

THE COURT: You understand that effectively we have not gone through the process of actually exercising strikes?

MR. HOJAN: Yes, Your Honor.

....

THE COURT: So, effectively, without the exercise of preemptory strikes, effectively both sides were striking certain individuals to get us to the twelve primary, four alternates.

MR. HOJAN: Yes, Your Honor.

THE COURT: And these individuals are acceptable to you to try the case?

MR. HOJAN: Yes, Your Honor.

THE COURT: Are you under the influence of any alcohol or drugs?

MR. HOJAN: No, Your Honor.

THE COURT: Do you need additional time or wish additional time with your lawyers to consult with them on this matter?

MR. HOJAN: No, Your Honor.

THE COURT: And, in fact, you have had an opportunity, at this point it's more like forty-five minutes, to sit, talk with your lawyers, to go through this process?

MR. HOJAN: Yes, Your Honor.

THE COURT: And understand the jury and the selection of the jury has to be acceptable to you?

MR. HOJAN: Yes, Your Honor.

THE COURT: This is your case.

MR. HOJAN: Yes, Your Honor.

THE COURT: And you've involved yourself and participated in this selection process; correct?

MR. HOJAN: Yes, Your Honor.

THE COURT: And again, they are acceptable?

MR. HOJAN: Yes, Your Honor.

The record shows that there was no critical stage of Hojan's trial for which he was not present. There is competent, substantial evidence in the record from which we conclude that all the venirepersons who were not previously dismissed by the trial court for cause by the close of proceedings on the preceding Friday, in fact, returned to participate in the next day trial court proceedings. Because there is no record evidence that any of the venirepersons were excluded by the out-of-court jury selection procedure and that all were present in court until after the trial court had formally excused them, we are satisfied that Hojan was not deprived of his right to due process by being involuntarily absent from a critical stage in his trial. Because Hojan ratified the jury selection procedure after-the-fact, the circuit court did not err in summarily denying relief as to this subclaim. See Muhammad, 782 So.2d at 352 ("In State v. Melendez, 244 So.2d 137, 139 (Fla. 1971), defense counsel consented to the continued examination, challenging, and empaneling of the jury even though the defendant was physically

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absent from the courtroom. This Court held that no error occurs when the defendant is represented by counsel who waives the presence of the defendant and the defendant later ratifies the action of counsel.”); see also Kormondy v. State, 983 So.2d 418, 429 (Fla. 2007) (“As this Court held in Amazon v. State, 487 So.2d 8, 11 (Fla. 1986), ‘[a] capital defendant is free to waive his presence at a crucial stage of the trial. Waiver must be knowing, intelligent, and voluntary. Counsel may make the waiver on behalf of a client, provided that the client, subsequent to the waiver, ratifies the waiver either by examination by the trial judge, or by acquiescence to the waiver with actual or constructive knowledge of the waiver.’”). Furthermore, because the circuit court found that the postconviction record conclusively shows neither party exercised any of its peremptory challenges, the circuit court properly concluded that Hojan was not entitled to any relief because he was not involuntarily absent during such a critical stage of his trial. See Muhammad, 782 So.2d at 352.

*7 ^[14]Notwithstanding the absence of trial court error in the jury selection of Hojan’s trial, we caution in the strongest terms that counsel should refrain from engaging in any off-the-record agreements about the selection of the jury in a criminal trial. We especially emphasize this caution in capital murder cases where the defendant is subject to the ultimate and immutable sentence of death. There is no reason for counsel to engage in any trial procedure that gives even an impression—be it ever so slight—that an impropriety has occurred or that the defendant may have been deprived of a fair trial. We will be inflexible and intolerant of any actual violations of defendants’ rights that occur as a result of “creative” procedures used during the critical stages of criminal trials.

^[15] ^[16]It is our expectation and charge to the lawyers and judges of Florida that every stage of the criminal trial of any person shall be conducted on the record so that the reviewing courts will have the benefit of the clearest and most complete record from which to evaluate the propriety of the trial proceedings. We put all on notice that we will be ever vigilant to fulfill our role as the oversight body of Florida’s Judicial Branch in ensuring that every person is afforded a fair trial and that the proper administration of justice is scrupulously maintained.

Ineffective Assistance of Trial Counsel—Failure to Advise about the Consequences of Waiving Mitigation During the Penalty Phase

The circuit court properly concluded that the issue of Hojan’s waiver of his right to present mitigation evidence was procedurally barred because that issue was fully addressed during his direct appeal.

In summary: (1) Hojan knowingly, intelligently, and voluntarily waived his right to mitigation, and thus Koon was satisfied; (2) there is no evidence in the record that the trial court gave the jury’s recommendation “great weight,” as was prohibited in Muhammad; (3) it was reasonable for the trial court not to force Hojan’s mother to testify when her son had expressly asked her not to testify; (4) Hojan is barred from claiming that [Attorney] Moldof’s performance was ineffective in the presentation of mitigating evidence because Hojan waived presentation of mitigation evidence; and (5) there is evidence in the record that the trial court considered the contents of the PSI. Accordingly, we deny all five of Hojan’s subclaims in this issue.

Hojan, 3 So.3d at 1217.

No Competent Mental Health Evaluation

^[17]The circuit court properly summarily denied Hojan’s subclaim that trial counsel failed to ensure that he had a competent mental health evaluation for purposes of preparing mitigation evidence in accordance with the requirements of Ake v. Oklahoma, 470 U.S. 68, 84, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). This subclaim is procedurally barred because Hojan failed to raise the issue on direct appeal. See Floyd v. State, 18 So.3d 432, 456 (Fla. 2009) (“Floyd did not raise an Ake claim in his direct appeal and, therefore, this claim is procedurally barred.”) (citing Marshall v. State, 854 So.2d 1235, 1248 (Fla. 2003)).

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Reality of Death Row

^[18] ^[19] Similarly, the circuit court did not err in summarily denying Hojan's subclaim that trial counsel was deficient in adequately advising Hojan about the reality of being sentenced to death row. The record demonstrates that trial counsel and the trial court repeatedly discussed with Hojan the consequences of waiving mitigation during the penalty phase and, subsequently, during the Spencer hearing. Spencer v. State, 615 So.2d 688 (Fla. 1993). Moreover, the record shows that Hojan signed a notarized document attesting that he instructed his defense team to cease any investigation of mitigating circumstances in his case. In that notarized document, Hojan also acknowledged that without presenting mitigation evidence, he was more likely to be sentenced to death. Therefore, the record conclusively shows that Hojan was not entitled to relief because he cannot establish that counsel was deficient.' See Barnes, 124 So.3d at 911; Power v. State, 886 So.2d 952, 959-61 (Fla. 2004) (stating that this Court will not overrule the trial court's conclusion that counsel's performance was not deficient when the record demonstrates that evidence that the defendant interfered with trial counsel's ability to obtain and present mitigating evidence).

⁷ Under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in order for a defendant to obtain relief based on an allegation of ineffectiveness of trial counsel he or she must

[f]irst ... identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Occhicone v. State, 768 So.2d 1037, 1045 (Fla. 2000) (quoting Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986)).

Lethal Injection Protocol

*8 ^[20] The circuit court properly concluded that Hojan's trial counsel was not ineffective for failing to explain the lethal injection protocol and the risks associated with its use of pentobarbital. Specifically, the circuit court reasonably relied on Peede v. State, 955 So.2d 480, 502-03 (Fla. 2007), in concluding that trial counsel cannot be deemed ineffective for not anticipating a then future change in the lethal injection protocol. Thus, we find no error occurred as to this matter.

No Prejudice

^[21] Furthermore, the circuit court concluded that Hojan was not prejudiced concerning the aforementioned subclaims in light of the six aggravating circumstances found in Hojan's case. See Hojan, 3 So.3d at 1208 ("The aggravators found were: (1) Hojan committed a prior capital felony—the contemporaneous murders and attempted murder; (2) Hojan committed the murders in the course of an armed kidnapping; (3) the murders were committed to avoid arrest; (4) the murders were committed for financial gain; (5) the murders were heinous, atrocious, or cruel (HAC); and (6) the murders were cold, calculated, and premeditated (CCP)."). The circuit court further noted that even in the absence of a mitigation case, the trial court found one statutory mitigating circumstance—no significant prior criminal history. However, as the circuit court observed, Hojan was only able to articulate that he could offer proof that supported two nonstatutory mitigating circumstances—a history of parental abandonment and neglect, and evidence of child abuse and head trauma. Thus, the circuit court's conclusion that Hojan could not establish the prejudice prong concerning his allegation that trial counsel was ineffective for failing to advise him about the consequences of waiving mitigation during the penalty phase, is based on conclusive record evidence. Therefore, the circuit court did not err in summarily denying Hojan an evidentiary hearing as to this subclaim.

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Access to Files and Other Public Records Pertaining to His Case

^[22]The record before us shows that the circuit court did not err in concluding that Hojan's public records request was facially insufficient. As presented in this appeal, Hojan's public records requests do not specify: (1) the purpose for which Hojan needs these files and other records, or (2) how he would use the public records to collaterally attack his convictions or sentences. Moreover, Hojan merely alleges that his defense counsel satisfied the requirements of Florida Rule of Criminal Procedure 3.852 "to obtain the requested additional public records" and that "the records sought are relevant to [his] postconviction claims." In addition, to the extent Hojan raised facial and as-applied constitutional challenges concerning sections 27.7081 and 119.19, Florida Statutes, and rule 3.852 in the postconviction proceeding, these constitutional challenges are waived because Hojan has not raised them in the present appeal. See Rose v. State, 985 So.2d 500, 509 (Fla. 2008) ("Rose has merely stated a conclusion and referred to arguments made below. Thus, we consider the issue waived for appellate review."); see also Hodges v. State, 885 So.2d 338, 357 (Fla. 2004) ("[T]he substantive issue underlying Hodges' claim is procedurally barred because Hodges could have but did not raise the argument on appeal." (citing Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995))).

Allegation that Newly Discovered Evidence Affected Forensic Evidence Admitted at Trial

*9 ^[23]The record shows that in denying an evidentiary hearing on Hojan's claim that the NAS Committee's 2009 report pertaining to forensic science constitutes newly discovered evidence, the circuit court reasonably relied on the requirements established in our prior decisions. See Schwab v. State, 969 So.2d 318, 325 (Fla. 2007) ("First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial."); Johnston v. State, 27 So.3d 11 (Fla. 2010) ("As we explain below, we agree with the postconviction court that the report[, National Academy of Sciences titled, "Strengthening Forensic Science in the United States: A Path Forward" (2009),] presented by Johnston does not constitute newly discovered evidence.... The report cited by Johnston does not meet the test for newly discovered evidence...."). In light of its application of our precedent, we find that the circuit court did not err in arriving at its conclusion of law that the 2009 NAS report does not constitute newly discovered evidence that could affect the outcome of Hojan's trial.

Bar Rule that Prohibits Post-Trial Juror Interviews

^[24]The circuit court provided three reasons why it rejected Hojan's claim that Rule Regulating The Florida Bar 4-3.5(d)(4)⁸ unconstitutionally denies him the opportunity to fully explore possible misconduct and biases of the jury for purposes of demonstrating the unfairness of the trial. First, relying on Troy v. State, 57 So.3d 828 (Fla. 2011), the circuit court concluded that the claim was procedurally barred because it should have been addressed on direct appeal. Second, the present claim has been repeatedly analyzed and rejected by this Court. See, e.g., id. at 841; Sweet v. Moore, 822 So.2d 1269, 1274 (Fla. 2002); Johnson v. State, 804 So.2d 1218, 1225 (Fla. 2001). Third, Hojan neither alleged that he filed a motion requesting permission to interview any juror nor alleged any specific juror misconduct. We agree with the circuit court's conclusion that Hojan's claim was an attempted fishing expedition in the guise of a constitutional challenge to Bar rule 4-3.5(d)(4); these types of fishing expeditions are prohibited under existing Florida law. See Arbelaez v. State, 775 So.2d 909, 920 (Fla. 2000) (rejecting the defendant's claim relating to his inability to interview jurors because it amounted to a request to "conduct 'fishing expedition' interviews with the jurors after a guilty verdict is returned"). Thus, the record before us demonstrates that the circuit court neither erred in drawing its legal conclusions nor in entering a summary judgment pertaining to this claim.

⁸ Rule Regulating the Florida Bar 4-3.5(d)(4) states that a lawyer shall not, after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a

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notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview. The provisions of this rule do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings or as authorized by court rule or written order of the court.

Florida's Lethal Injection Protocol

In light of our decisions in Valle v. State, 70 So.3d 530 (Fla. 2011), and Lightbourne,⁹ the circuit court correctly rejected Hojan's claim that this State's current lethal injection protocol violates the Eighth Amendment to the United States Constitution because the administration of the drugs is procedurally inadequate. As the circuit court aptly points out, this specific Eighth Amendment challenge has previously been raised by other defendants and rejected by this Court. See, e.g., Tompkins v. State, 994 So.2d 1072, 1080–82 (Fla. 2008); Power v. State, 992 So.2d 218, 220–21 (Fla. 2008); Woodel v. State, 985 So.2d 524, 533–34 (Fla.), cert. denied, 555 U.S. 1036, 129 S.Ct. 607, 172 L.Ed.2d 465 (2008); Schwab v. State, 969 So.2d 318 (Fla. 2007). Furthermore, Hojan has not presented any compelling reason why we should reconsider our position on this matter. Accordingly, we conclude that the circuit court did not err in summarily denying Hojan any relief as to this claim.

⁹ Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007).

Standard of Review—Habeas Corpus

*10 It is well settled in existing case law that

[c]laims of ineffective assistance of appellate counsel are appropriately presented in a petition for writ of habeas corpus. See Freeman, 761 So.2d [1055, 1069 (Fla 2000)]. Consistent with the Strickland standard, to grant habeas relief based on ineffectiveness of appellate counsel, this Court must determine first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986); see also Lynch v. State, 2 So.3d 47, 84–85 (Fla. 2008); Freeman, 761 So.2d at 1069. In raising such a claim, "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." Freeman, 761 So.2d at 1069; see also Knight v. State, 394 So.2d 997, 1001 (Fla. 1981).

Jackson v. State, 127 So.3d 447, 476 (Fla. 2013).

Merits—Habeas Corpus

Hojan alleges that his appellate counsel was ineffective during his direct appeal for failing to raise three issues that would have warranted a reversal of the judgments of guilt or the sentences imposed. First, he alleges that appellate counsel unreasonably failed to raise on direct appeal that Hojan was involuntarily absent from the jury selection, which is a critical stage of the trial proceedings. Second, he alleges that appellate counsel unreasonably failed to raise on direct appeal that the trial court erred in admitting remote prior bad acts that were unduly prejudicial. Third, he alleges that appellate counsel unreasonably failed to raise on direct appeal how the Fourth District's decision in Jimmy Mickel's direct appeal should have impacted the review of the trial court's finding of the cold, calculated, and premeditated (CCP) aggravating circumstance and

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this Court's proportionality analysis.

Involuntary Absence of the Defendant

As we previously discussed, the record is clear about the fact that Hojan subsequently ratified the jury selection procedure that was employed during his trial. Therefore, we do not find any reason that trial counsel acted unreasonably by not doing anything to preserve this sub-issue at trial for subsequent review on direct appeal. See Muhammad, 782 So.2d at 352. Accordingly, had appellate counsel chosen to raise the issue of Hojan's absence when the jury was selected on direct appeal, such a claim would have been rejected as unpreserved and meritless. See Stephens v. State, 975 So.2d 405, 426 (Fla. 2007) ("[A]ppellate counsel cannot be deemed ineffective for failing to raise this claim on direct appeal because even if he had done so, this Court would have declined to address the merits of the claim." (citing Lukehart v. State, 776 So.2d 906 (Fla. 2000))).

Impermissible Admission of Bad Act Evidence

*11 ^[25]Even though the prior bad acts subclaim was not raised on direct appeal, appellate counsel's failure to do so does not constitute ineffectiveness. The rule governing the admissibility of evidence related to other crimes, wrongs, or acts that was established in Williams v. State, 110 So.2d 654 (Fla. 1959) has been codified in section 90.404, Florida Statutes.

Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

§ 90.404(2)(a), Fla. Stat. (2002).

The circuit court's order denying Hojan's rule 3.851 motion drew the following notable conclusion:

[T]he testimony of witnesses Kendrick and Burkhardt, which established that [Hojan] possessed a gun similar to the one used to shoot the victims in this case, does not fall within the Williams rule.... The testimony was properly admitted to show that [Hojan] possessed the same type of weapon [as used in these crimes] ... especially since [Hojan] did not want to stipulate that he possessed the murder weapon.

Based on the record before us, we independently conclude that because the testimonial evidence challenged by Hojan is not the kind of evidence that violates the Williams rule, appellate counsel cannot be deemed ineffective for not raising a meritless challenge pertaining to this subclaim during Hojan's direct appeal. See Stephens, 975 So.2d at 426.

Failure to Consider the Decision in Former Codefendant's Case

^[26]Hojan argues that the following excerpt from Mickel v. State, 929 So.2d 1192 (Fla. 4th DCA 2006), demonstrates appellate counsel's ineffectiveness as to this subclaim because it lends clear support for a conclusion that Mickel substantially dominated Hojan during the entire criminal episode that resulted in Hojan's convictions and sentences:

The judge, after reviewing the [pre-sentencing investigation report], hearing comments from the victim's families, considering the evidence at Mickel's trial, and considering the state's recommendation, stated:

There is no question having sat through both Mr. Hojan's trial and your trial that you were the mastermind behind this

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entire thing. You manipulated Mr. Hojan. He was there, he did your bidding, and the three times that he left that freezer and went back to your location, there was no question what was going on at that point. You were telling him, no witnesses, no witnesses, no witnesses, and he went back and he went forth, and he went back, and he pulled the trigger and that pull of the trigger was a cold, calculated, premeditated act that was precipitated by your direction. No question about that.

The court sentenced Mickel to five consecutive life sentences. *Id.* at 1195–96.

In *Lawrence v. State*, 846 So.2d 440 (Fla. 2003), we considered the claim that the trial court abused its discretion by not recognizing there was sufficient evidence for finding the substantial domination mitigating circumstance. *Lawrence*, 846 So.2d at 448–50.

We, however, do not find support in the record for Lawrence’s contentions. There was no evidence presented or proffered indicating how Rodgers’ record influenced Lawrence’s behavior in the instant crime. While Lawrence argued to the trial court that the time Lawrence and Rodgers spent together in a mental hospital suggested that Lawrence knew the substance of Rodgers’ record, no evidence was presented or proffered to further this assertion. The mere possibility that Lawrence might have been able to establish this foundation through his own testimony does not create a constitutional infirmity. *See State v. Raydo*, 713 So.2d 996, 1000 (Fla. 1998). Moreover, if the trial court erred in excluding Rodgers’ record, that error was harmless given the extensive evidence in the record regarding Rodgers’ history with Lawrence. *See State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla. 1986).

*12 Regarding the trial court’s finding that the substantial domination mitigator was not established by the evidence, we find that there is competent, substantial evidence to support the trial court’s finding.

Id. at 449.

Here, Hojan attempts to establish that appellate counsel was ineffective for failing to raise the issue that is premised on the trial judge’s characterization of his former codefendant Jimmy Mickel as the “mastermind” to substantiate his substantial domination subclaim. However, the record in Hojan’s case is more reminiscent of that found in *Lawrence*, namely, Hojan’s conclusory claim only points to a “mere possibility” that the trial judge’s denomination of Mickel as the mastermind “establish[es] [a] constitutional infirmity.” *See id.* In such light it is unclear how Hojan’s claim constitutes a fully developed issue that appellate counsel reasonably could have raised during his direct appeal. Thus, appellate counsel was not ineffective as to this subclaim. *See Floyd*, 18 So.3d at 458 (“This Court has held that ‘[i]f a legal issue “would in all probability have been found to be without merit” had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel’s performance ineffective.’ ” (quoting *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000) (quoting *Williamson v. Dugger*, 651 So.2d 84, 86 (Fla. 1994))); *Stephens*, 975 So.2d at 426 (same).

Hurst v. Florida & Hurst

¹²⁷After we issued our original opinion in this case and denied rehearing, the United States Supreme Court issued its opinion in *Hurst v. Florida*. In *Hurst v. Florida*, the United States Supreme Court declared our capital sentencing scheme unconstitutional because “[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough.” *Hurst v. Florida*, 136 S.Ct. at 619.

Pursuant to the Supreme Court’s decision in *Hurst v. Florida*, Hojan filed a motion to recall mandate, reopen his habeas corpus case, and permit supplemental briefing. We granted the motion, and Hojan now contends that he is entitled to relief under *Hurst v. Florida* because of his nine-to-three jury vote recommending death. As we held in *Mosley v. State*, 41 Fla. L. Weekly S629, — So.3d —, 2016 WL 7406506 (Fla. Dec. 22, 2016), because the Supreme Court specifically found that “[t]he analysis the Ring Court applied to Arizona’s sentencing scheme applies equally to Florida’s” death penalty. *Id.* at —, at S637. In *Mosley*, we determined that *Hurst v. Florida* and *Hurst* apply retroactively to defendants, like Hojan, whose sentences were not yet final when the Supreme Court issued *Ring*. *See Mosley*, 41 Fla. L. Weekly at S636, — So.3d at —.

Because we conclude that *Hurst* applies to Hojan, we next examine whether any *Hurst* error was harmless beyond a reasonable doubt. On remand from the United States Supreme Court, in *Hurst* we explained the appropriate standard for

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harmless error review:

Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So.2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, “the harmless error test is to be rigorously applied,” [State v. DiGuilio, 491 So.2d [1129,] 1137 [Fla. 1986], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury’s failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst’s death sentence in this case. We reiterate:

*13 The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

DiGuilio, 491 So.2d at 1139. “The question is whether there is a reasonable possibility that the error affected the [sentence].” Id.

[²⁸] Hurst, 202 So.3d at 68 (alteration in original). As applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found all facts necessary to impose death and that death was the appropriate sentence.

Following Hojan’s penalty phase, the jury recommended a sentence of death by a vote of nine to three. For both murders, the trial court found that the following aggravators applied, each of which was given great weight: “(1) Hojan committed a prior capital felony—the contemporaneous murders and attempted murder; (2) Hojan committed the murders in the course of an armed kidnapping; (3) the murders were committed to avoid arrest; (4) the murders were committed for financial gain; (5) the murders were heinous, atrocious, or cruel (HAC); and (6) the murders were cold, calculated, and premeditated (CCP).” Hojan, 3 So.3d at 1208. Additionally, the trial court found one statutory mitigator and two nonstatutory mitigators, each given little weight. Id. The trial court found that the aggravating factors far outweighed the mitigating factors and sentenced Hojan to death.

Given the jury vote of nine to three to recommend a sentence of death, it is impossible for this Court to conclude that the Hurst error in this case was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, we affirm the circuit court’s summary denial of Hojan’s postconviction motion, and we deny the claims in Hojan’s petition for a writ of habeas corpus. However, we grant Hojan’s supplemental claim for relief under Hurst v. Florida. Accordingly, we vacate the death sentence and remand this case for a new penalty phase.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.

CANADY, J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs.

PERRY, Senior Justice, concurs in part and dissents in part.

POLSTON, J., concurs.

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CANADY, J., concurring in part and dissenting in part.

I agree that the circuit court's denial of Hojan's postconviction motion should be affirmed and that Hojan's habeas petition should be denied. But I dissent from the decision to vacate the sentence of death. See Mosley v. State, 41 Fla. L. Weekly S629, --- So.3d ---, 2016 WL 7406506 (Fla. Dec. 22, 2016) (Canady, J., concurring in part and dissenting in part).

POLSTON, J., concurs.

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2017 WL 411331

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Supreme Court of Florida.

Paul DUROUSSEAU, Appellant,

v.

STATE of Florida, Appellee.

No. SC15-1276

[January 31, 2017]

Synopsis

Background: Defendant was convicted by a jury in the Circuit Court, Duval County, Jack Marvin Schemer, J., of first-degree murder and death sentence was imposed. Defendant appealed. The Supreme Court, 55 So.3d 543, affirmed. Defendant moved for postconviction relief. The Circuit Court, Duval County, Jack Marvin Schemer, J., denied defendant's motion to vacate his conviction of first-degree murder and sentence of death, and defendant appealed.

Holdings: The Supreme Court held that:

^[1] defense counsel's collective questioning of jurors during voir dire did not prejudice murder defendant, and therefore, did not amount to ineffective assistance;

^[2] defense counsel was not ineffective for failing to exhaust all of her peremptory challenges, for failing to request additional challenges, and for failing to challenge the jury panel;

^[3] defense counsel's failure to inquire further into potential juror who only served as an alternate juror, and who never deliberated in defendant's murder trial, did not prejudice defendant, and thus, was not ineffective assistance;

^[4] defense counsel was not ineffective for failing to further question two jurors who ultimately served on murder defendant's jury and deliberated as to his guilt and punishment;

^[5] defense counsel was not ineffective for failing to strike an alternate juror and two other jurors who ultimately served on murder defendant's jury and deliberated as to his guilt and punishment; but

^[6] error in imposing death sentence on murder defendant in violation of his Sixth Amendment right to jury trial, under capital sentencing scheme in which judge rather than jury made all the necessary findings to impose a death sentence, was not harmless.

Vacated in part and remanded.

Canady, J., filed opinion concurring in part and dissenting in part, in which Polston, J., concurred.

Perry, Senior Justice, filed opinion concurring in part and dissenting in part.

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Durousseau v. State, --- So.3d --- (2017)

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Recognized as Unconstitutional

Fla. Stat. Ann. § 775.082(2)

An Appeal from the Circuit Court in and for Duval County, Jack Marvin Schemer, Judge—Case No. 162003CF010182AXXXMA

Attorneys and Law Firms

Richard Adam Sichta of The Sichta Firm, LLC, Jacksonville, Florida; and Billy Horatio Nolas, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Tallahassee, Florida, for Appellant

Pamela Jo Bondi, Attorney General, Carine L. Mitz, Assistant Attorney General, and Robert James Morris, III, Assistant Attorney General, Tallahassee, Florida, for Appellee

Opinion

PER CURIAM.

*1 Paul Durousseau appeals an order of the Fourth Judicial Circuit Court denying his motion to vacate his conviction of first-degree murder and sentence of death, filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons discussed below, we affirm the circuit court's denial of postconviction relief but vacate Durousseau's sentences and remand for resentencing in light of Hurst v. Florida, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), as interpreted by Hurst v. State (Hurst), 202 So.3d 40 (Fla. 2016).

STATEMENT OF FACTS

We discussed the facts of this case in our opinion on direct appeal. See Durousseau v. State, 55 So.3d 543, 548–50 (Fla. 2010). Paul Durousseau was sentenced to death for the murder of Tyresa Mack. In 1999, Mack's sister and stepfather found Mack's body in her apartment. She was naked from the waist down, and a white cord was wrapped around her neck. Durousseau's DNA was found inside Mack's vagina. In 2003, Durousseau was indicted on five counts of first-degree murder for the deaths of five women. The similar methodology of the crimes caused investigators to conclude that Mack was one of Durousseau's victims. Durousseau was arrested for Mack's murder.

In 2007, Durousseau was found guilty of the first-degree murder of Mack. After the penalty phase, the jury voted ten to two to impose a death sentence. The trial court found four aggravating factors: (1) Durousseau was previously convicted of a felony involving the use or threat of violence; (2) the murder was committed while the defendant was engaged in the commission of a robbery or sexual battery; (3) the murder was committed for pecuniary gain; and (4) the murder was especially heinous, atrocious, or cruel. The trial court did not find any statutory mitigating circumstances, but it did find sixteen nonstatutory mitigating circumstances.¹ Ultimately, the trial court sentenced Durousseau to death. Id. at 550. On December 9, 2010, this Court rejected all of Durousseau's claims² on direct appeal. Id. at 564, cert. denied, 132 S.Ct. 149 (2011).

¹ The trial court found the following sixteen nonstatutory mitigators: (1) Durousseau was raised in a broken home (little weight); (2) Durousseau was raised without the benefit of his natural father and lost the love and support of his stepfather at an early age (little weight); (3) Durousseau grew up in poverty and came from a deprived background (little weight); (4) Durousseau was raised in a violent neighborhood and was exposed to violence and the threat of violence to his person on a daily basis (little weight); (5) Durousseau personally witnessed his stepfather physically abuse his mother (moderate weight); (6) Durousseau was beaten as a means of discipline as a child (little weight); (7) Durousseau worked continuously through his adult life (little to moderate weight); (8) Durousseau enlisted and served in the United States Army for approximately six years (moderate weight); (9) Durousseau has supported his two children and is a loving and caring father (little weight); (10) Durousseau has been a loving, respectful son to his mother and cared for her during several periods of illness and incapacitation (moderate weight); (11) Durousseau has been a good brother to his siblings and to other family members, helping to care for and watch over his cousins (moderate to significant weight).

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weight); (12) Durousseau saved his cousin's life and his brother's life (moderate weight); (13) Durousseau has the support of family and friends who continue to love him (little weight); (14) Durousseau has alcohol abuse issues on both the maternal and paternal sides of his family; despite this, Durousseau has never abused alcohol or illicit drugs (very little weight); (15) society can be protected by a life sentence without parole (very little weight); (16) Durousseau has exhibited good behavior during the trial of this cause (little weight).

- ² Durousseau raised the following claims on direct appeal: (1) the trial court erred in admitting Williams rule evidence of the two other murders; (2) the trial court erred in denying Durousseau's motion for judgment of acquittal of felony murder with robbery as the underlying offense and that the evidence is legally insufficient to support the pecuniary gain aggravator; (3) the trial court erred in rejecting an expert's opinion testimony regarding mental mitigation in favor of conflicting lay testimony; (4) the evidence was insufficient to support a first-degree murder conviction; and (5) the trial court erred in denying Durousseau's motion to declare Florida's capital sentencing scheme unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Durousseau, 55 So.3d at 550.

*2 On October 1, 2012, Durousseau filed a motion for postconviction relief in the circuit court. Durousseau raised two claims in his postconviction motion: (1) that counsel was ineffective for failing to request additional physical and psychiatric testing; and (2) that counsel was ineffective for failing to conduct a meaningful voir dire. However, before the evidentiary hearing, Durousseau abandoned his first claim. On April 9, 2015, the postconviction court began an evidentiary hearing that lasted two days. Ultimately, the postconviction court denied Durousseau's claim that counsel had failed to secure additional physical and mental testing. Durousseau appealed to this Court, arguing that trial counsel was ineffective because she failed to conduct meaningful voir dire. While his appeal was pending in this Court, the United States Supreme Court decided Hurst v. Florida, --- U.S. ---, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), holding that Florida's death penalty sentencing statute violated the Sixth Amendment. In light of Hurst v. Florida, Durousseau filed supplemental briefing, arguing that his death sentence should be vacated.

ANALYSIS

Durousseau alleges that (1) his counsel was ineffective during voir dire, and (2) his death sentence violates Hurst v. Florida. We first reject Durousseau's claim that his trial counsel, Ann Finnell, was ineffective during voir dire.³ We then hold that Durousseau's death sentence is unconstitutional under Hurst v. Florida.

- ³ In light of our decision that Hurst v. Florida requires us to vacate Durousseau's death sentence, we decline to address Durousseau's argument that Finnell was ineffective because she failed to adequately inquire of the venire members about their attitudes toward aggravating and mitigating factors affecting the imposition of the death penalty and did not sufficiently question the voir dire with the specific aggravators and mitigators that applied to Durousseau.

Ineffective Assistance of Counsel

First, Durousseau argues that Finnell was ineffective for asking more collective questions than individual questions. Second, Durousseau argues that the postconviction court erred in finding that Finnell was not ineffective for failing to inquire further of, and move to strike, two specific jurors and one alternate juror. We reject both arguments.

[1] [2] [3] [4] [5] [6] [7] [8] [9] In accordance with Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we review claims of ineffective assistance of counsel as follows:

First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside

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the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Long v. State, 118 So.3d 798, 805 (Fla. 2013) (quoting Bolin v. State, 41 So.3d 151, 155 (Fla. 2010)). Additionally,

[t]here is a strong presumption that trial counsel's performance was not deficient. See Strickland, 466 U.S. at 690, 104 S.Ct. 2052. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689, 104 S.Ct. 2052. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." Id. "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So.2d 1037, 1048 (Fla. 2000). Furthermore, where this Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument. Melendez v. State, 612 So.2d 1366, 1369 (Fla. 1992).

*3 In demonstrating prejudice, the defendant must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. 2052.

Long, 118 So.3d at 805–06 (parallel citations omitted).

Because both prongs of the Strickland test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo.

Shellito v. State, 121 So.3d 445, 451 (Fla. 2013) (citing Mungin v. State, 79 So.3d 726, 737 (Fla. 2011); Sochor v. State, 883 So.2d 766, 771–72 (Fla. 2004)).

^[10]With respect to claims that counsel was ineffective during voir dire, the "[e]ffective assistance of trial counsel includes a proficient attempt to empanel a competent and impartial jury through the proper utilization of voir dire, challenges to venire members for cause, and the proper employment of peremptory challenges to venire members." Nelson v. State, 73 So.3d 77, 85 (Fla. 2011). The test for competency and impartiality is whether a juror is capable of placing any bias aside and is willing to render a verdict recommendation based exclusively on the evidence and instruction of law presented at trial. Id.

^[11] ^[12] ^[13]In reviewing an attorney's performance, we must be highly deferential and make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S.Ct. 2052. In light of the challenges in evaluating counsel's performance, we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. If the defendant fails to make a showing of one Strickland prong, it is not necessary to analyze whether the defendant satisfies the other prong. Id. at 691–692, 104 S.Ct. 2052.

^[14] ^[15]To establish deficiency, a defendant must first specifically identify acts or omissions of counsel that were manifestly outside the wide range of reasonably competent performance under prevailing professional norms. Lynch v. State, 2 So.3d 47, 56–57 (Fla. 2008). Counsel will not be deemed deficient where her actions constituted a strategy within the bounds of professional norms. Occhicone, 768 So.2d at 1048 (concluding it was a reasonable strategy to not present additional evidence at trial to ensure the defendant would have the first and last word during closing argument). "The issue is not what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense." Id. at 1049.

^[16]First, Durousseau argues that Finnell was ineffective for asking more collective questions than individual questions that would have led to an informed method of exercising juror challenges. We affirm the postconviction court's finding that Finnell's collective questioning did not prejudice Durousseau.

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Durousseau suggests that he may have been prejudiced by trial counsel's failure to ask individual questions of the venire members or by counsel's failure to follow up with additional questions. Specifically, Durousseau hypothesizes that Finnell lacked a complete understanding of the jury in light of her failure to ask more individual questions. Durousseau likewise hypothesizes that as a consequence, Finnell's jury strikes were based on incomplete information. We have previously rejected ineffective assistance claims like these.

*4 To show prejudice, [the defendant] argues that [his trial counsel] could possibly have learned more about the jurors' views and used his peremptory challenges in a different manner to obtain a more defense-friendly jury. Such speculation fails to rise to the level of ineffective assistance under Strickland.

Johnson v. State, 921 So.2d 490, 503–04 (Fla. 2005) (footnote omitted). We have likewise rejected “alleg[ations] that if counsel had ‘followed up’ during voir dire with more specific questions, there would have been a basis for a for-cause challenge” as “mere conjecture.” Reaves v. State, 826 So.2d 932, 939 (Fla. 2002); see also Wade v. State, 156 So.3d 1004, 1033 (Fla. 2014) (“Wade’s claim that ‘there would have been a basis for a for cause challenge if counsel had followed up during voir dire with more specific questions is speculative.’” (quoting Green v. State, 975 So.2d 1090, 1105 (Fla. 2008))).

Durousseau’s arguments are likewise conjectural and speculative. Durousseau asserts that Finnell’s failure to ask sufficient individual questions precluded her from obtaining the information necessary to make intelligent use of juror challenges. Durousseau does not identify what information individual questioning would have revealed, nor how that information could have changed his jury make-up or lead to a different result. Accordingly, we affirm the postconviction court’s finding that Durousseau did not suffer any prejudice.

¹¹⁷Second, Durousseau argues that the postconviction court erred in finding that Finnell was not ineffective for failing to exhaust all of her peremptory challenges, failing to request additional challenges, and failing to challenge the jury panel. We again affirm the postconviction court’s findings in denying these claims.

The postconviction court found that Durousseau did not identify any prospective juror that would have been better qualified to sit on the jury than the jury eventually seated. Durousseau’s argument on appeal contains the same defect. We have held that this defect is fatal to this type of claim of ineffective assistance of counsel. See, e.g., Peterson v. State, 154 So.3d 275, 282 (Fla. 2014) (“Peterson does not point to any particular venire member [who] would have been better qualified to serve in place of a seated juror.”). Accordingly, we affirm the postconviction court’s finding.

Durousseau also specifically argues that Finnell should have further inquired into three of the potential jurors: (1) alternate juror Markley, (2) juror Norrie, and (3) juror Cummins. The postconviction court rejected Durousseau’s ineffective assistance of counsel claims regarding Finnell’s questioning and challenging of these jurors. We likewise affirm the postconviction court’s findings with regard to these three jurors.

¹¹⁸As to juror Markley, the postconviction court found that Finnell’s actions did not prejudice Durousseau because juror Markley was an alternate juror and never deliberated in Durousseau’s trial. We agree. Assuming that further questioning would have revealed information demonstrating, for instance, juror Markley’s bias against Durousseau, “prejudice can be shown only where one who was actually biased against the defendant sat as a juror.” Carratelli v. State, 961 So.2d 312, 324 (Fla. 2007) (emphasis added); see also Dillbeck v. State, 964 So.2d 95, 102 (Fla. 2007) (upholding a postconviction court’s finding, which stated, “Two of the complained of jurors were alternates only who did not participate in the jury’s verdict. Dillbeck cannot show prejudice based on alternate jurors [who] never served.”) Because juror Markley served only as an alternate juror, we affirm the postconviction court’s finding.

*5 ¹¹⁹As to jurors Norrie and Cummins—who served on Durousseau’s jury and deliberated as to his guilt and punishment—we likewise affirm the postconviction court’s findings that Finnell was not deficient for her allegedly insufficient questioning of these two jurors. Durousseau does not identify the particular information that further questioning of these two jurors would have revealed, and so cannot demonstrate that this undiscovered information would have produced grounds to disqualify either juror. As we earlier noted, a postconviction movant cannot demonstrate counsel’s ineffectiveness with speculative assertions that further questioning of a juror during voir dire could have developed more information that

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may have disqualified the juror. See Wade, 156 So.3d at 1033; Green, 975 So.2d at 1105; Johnson, 921 So.2d at 503–04; Reaves, 826 So.2d at 939.

^[20] ^[21] Durousseau also argues that Finnell was ineffective for failing to strike alternate juror Markley and jurors Norrie and Cummins from the jury. The postconviction court also rejected this claim, and we affirm. A postconviction movant “must demonstrate that [a particular juror] was actually biased, not merely that there was doubt about [the juror’s] impartiality.” Owen v. State, 986 So.2d 534, 550 (Fla. 2008). Durousseau does not allege that any of the three were actually biased and thus prejudiced Durousseau at trial. Rather, Durousseau merely raises the possibility that alternate juror Markley and jurors Norrie and Cummins might have deserved a for-cause challenge, and counsel was ineffective for failing to strike these potentially problematic jurors. Accordingly, we affirm the postconviction court’s rejection of this claim. Id.

^[22] Durousseau also argues that we should not apply the “actual bias” standard in this case because Finnell’s failure to better inquire of jurors is responsible for Durousseau’s inability to point to specific information about juror bias. We reject this contention because it is the postconviction movant’s responsibility to demonstrate juror bias, irrespective of the alleged failures of trial counsel. See, e.g., Boyd v. State, 200 So.3d 685, 699 (Fla. 2015). Once the postconviction movant identifies the juror’s bias, the movant must identify the manner in which trial counsel was deficient by failing to uncover information during voir dire that would have demonstrated the bias. See id. Accordingly, we reject Durousseau’s argument and determine that we appropriately apply the “actual bias” standard in this case.

Durousseau has failed to demonstrate that his counsel was ineffective during voir dire. Accordingly, we reject his ineffective assistance of counsel claims.

Hurst v. Florida & Hurst

In Hurst v. Florida, the United States Supreme Court held that Florida’s capital sentencing scheme is unconstitutional because “[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough.” 136 S.Ct. at 619. Durousseau’s death sentence was imposed under an unconstitutional capital sentencing statute. Hurst v. Florida and Hurst apply retroactively to Durousseau, whose sentence became final in 2010. See Mosley v. State, 41 Fla. L. Weekly S629, --- So.3d ---, 2016 WL 7406506 (Fla. Dec. 22, 2016). The remaining question is whether the Hurst error was harmless beyond a reasonable doubt.

^[23] ^[24] A Hurst error is capable of harmless error review. See Hurst, 202 So.3d at 67. Here we determine that the Hurst error during Durousseau’s penalty phase proceeding was not harmless beyond a reasonable doubt. As this Court explained in Hurst:

The harmless error test, as set forth in Chapman [v. California], 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967),] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

*6 Hurst, 202 So.3d at 68 (quoting State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986)). The Court further discussed the lens through which harmless error should be evaluated:

Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So.2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, “the harmless error test is to be rigorously applied,” DiGuilio, 491 So.2d at 1137, and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury’s failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst’s death sentence in this case. We reiterate:

The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

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DiGuilio, 491 So.2d at 1139. “The question is whether there is a reasonable possibility that the error affected the [sentence].” Id.

Hurst, 202 So.3d at 68 (alteration in original). Regarding the right to a jury trial, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors and that the aggravating factors outweighed the mitigating circumstances. See id. at 44.

^[25]In the present case, the jury did not make any of the requisite factual findings beyond a reasonable doubt. Rather, the jury only issued a recommendation of death by a vote of ten to two. Further, although the aggravating circumstance of a prior violent felony was found unanimously by virtue of Durousseau’s previous murder convictions, whether this aggravating circumstance was sufficient to impose death requires a unanimous jury determination. Hurst, 202 So.3d at 44. Moreover, there is no way of knowing if the jury found any of the other three aggravating circumstances unanimously or, if any aggravators were unanimously found, whether the jury also unanimously found those aggravators sufficient to qualify for a death sentence. Further, we cannot conclude that the two jurors who voted to recommend life found that the aggravation outweighed the mitigation.

Accordingly, we conclude that the Hurst violation was not harmless, and Durousseau is entitled to a new penalty phase. As we have done for other capital defendants, we reject Durousseau’s argument that section 775.082(2), Florida Statutes (2015), entitled him to be resentenced to life imprisonment. See Hurst, 202 So.3d at 44, 63–66.

CONCLUSION

Because Durousseau’s death sentence was imposed in violation of the Sixth Amendment right to a jury determination of every critical finding necessary for the imposition of the death sentence and Florida’s independent right to jury trial, and because we conclude that the Hurst error is not harmless beyond a reasonable doubt, we vacate Durousseau’s death sentence and remand for a new penalty phase.

*7 It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.

CANADY, J., concurs in part and dissents in part with an opinion, in which POLSTON, J., concurs.

PERRY, Senior Justice, concurs in part and dissents in part with an opinion.

CANADY, J., concurring in part and dissenting in part.

I concur with the decision to affirm the denial of relief regarding Durousseau’s conviction. But I dissent from the decision to require a new penalty phase. As I have previously explained, Hurst v. Florida, —U.S.—, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), should not be given retroactive effect. See Mosley v. State, — So.3d —, 2016 WL 7406506 (Fla. Dec. 22, 2016) (Canady, J., concurring in part and dissenting in part).

POLSTON, J., concurs.

PERRY, Senior Justice, concurring in part and dissenting in part.

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I concur with the majority's decision to affirm the postconviction court's denial of relief as it pertains to Durousseau's convictions and determination that the Sixth Amendment requires that we vacate Durousseau's death sentence. However, because Florida law requires that Durousseau be sentenced to life in prison as a consequence of his unconstitutional death sentence, I disagree with the majority's decision to remand for a new penalty phase proceeding instead of remanding for imposition of a life sentence. See § 775.082(2), Fla. Stat. (2016).

As I explained fully in Hurst v. State, 202 So.3d 40, 75–76 (Fla. 2016) (Perry, J., concurring in part and dissenting in part), there is no compelling reason for this Court not to apply the plain language of section 775.082(2), Florida Statutes. Because the majority of this Court has determined that Durousseau's death sentence was unconstitutionally imposed, Durousseau is entitled to the clear and unambiguous statutory remedy that the Legislature has specified:

In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

See § 775.082(2), Fla. Stat. (emphasis added). The plain language of the statute does not rely on a specific amendment to the United States Constitution, nor does it refer to a specific decision by this Court or the United States Supreme Court. Further, it does not contemplate that all forms of the death penalty in all cases must be found unconstitutional. Instead, the statute uses singular articles to describe the circumstances by which the statute is triggered. Indeed, the statute repeatedly references a singular defendant being brought before a court for sentencing to life imprisonment. I consequently cannot agree that the statute was intended as a fail-safe mechanism for when this Court or the United States Supreme Court declared that the death penalty was categorically unconstitutional. Cf. Hurst v. State, 202 So.3d at 40 (Perry, J., concurring in part and dissenting in part).

All Citations

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**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR ST. JOHNS COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO. 55-2006-CF-001864-XXAXMX

NORMAN BLAKE MCKENZIE,

Defendant,

_____ /

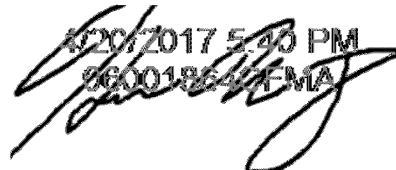
**ORDER GRANTING STATE'S MOTION REQUESTING PERMISSION TO APPEAR
BY TELEPHONE FOR THE CASE MANAGEMENT CONFERENCE
SET FOR MAY 8, 2017**

This cause came before the Court pursuant to the State's Motion Requesting to Appear by Telephone at the Case Management Conference scheduled for May 8, 2017 at 1:30PM. The Court having reviewed the Motion and being fully advised in its premises, it is:

ORDERED and ADJUDGED that the State's motion is GRANTED.

Any counsel wishing to appear telephonically shall call **888-670-3525**. The participant passcode is **8470026713**. When prompted, enter your Passcode followed by #.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 20 day of April, 2017.


4/20/2017 5:40 PM
06001864CFMA
e-Signed 4/20/2017 5:40 PM
06001864CFMA

CIRCUIT JUDGE

Copies Furnished to:

Vivian Singleton, Asst. Attorney General
Vivian.Singleton@myfloridalegal.com
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Rosemary Calhoun, Asst. State Attorney
calhounr@sao7.org; eservicestjohns@sao7.org,

David Dixon Hendry, Assistant CCRC
hendry@ccmr.state.fl.us

James L. Driscoll, Jr., Assistant CCRC
driscoll@ccrc.state.fl.us

George William Brown, Assistant CCRC
brown@ccmr.state.fl.us
support@ccrc.state.fl.us

Hearing Notes

DATE: May 8, 2017

CIRCUIT JUDGE: H MALTZ

STATE ATTORNEY: ROSEMARY CALHOUN/VIVIAN SINGLETON

DEFENSE ATTORNEY: DAVID HENDRY/JAMES DRISCOLL

CLERK: A KING

BAILIFF: N/A

COURT REPORTER: ANDREA GORMAN

STATE VS.: MCKENZIE, NORMAN BLAKE

CASE #: 06001864CFMA

DEFENDANT'S FIRST MOTION TO VACATE DEATH SENTENCE

DEFENSE ARGUMENT @1:31PM (HENDRY)

ARGUMENT ON HURST

COURT INQUIRY @1:30PM SETTING ASIDE THE SENTENCE OR
CONVICTION

DEFENSE RESPONSE-SENTENCE

STATE ARGUMENT @1:34PM (SINGLETON)

COURT INQUIRY @1:37PM IN REGARDS TO RULINGS BY FLORIDA
SUPREME COURT

NO RULING AS OF YET A RULING FROM US SUPREME COURT

MATTER TAKEN UNDER ADVISEMENT-COURT TO SUBMIT ORDER

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

_____ /

**ORDER ON DEFENDANT'S FIRST SUCCESSIVE MOTION
TO VACATE JUDGMENT OF CONVICTION AND SENTENCES**

THIS CAUSE came before the Court on Defendant's "First Successive Motion to Vacate Judgment of Conviction and Sentences" filed pursuant to Rule 3.851, Fla. R. Crim. P. on January 9, 2017. The Court has considered Defendant's Motion, the State's response thereto, and has considered the arguments of counsel. Being fully advised in the premises, the Court finds as follows:

Defendant was charged by Indictment with two counts of First Degree Murder. The jury found Defendant guilty as charged. At the penalty phase, the Jury recommended death by a vote of 10-2 for each murder charge and the Court sentenced Defendant to death for both murders. The Court found that four aggravating circumstances had been proven beyond a reasonable doubt.¹ The

¹ The Court found the State proved the third aggravating factor (crime committed for financial gain)

Court found seven non-statutory mitigating factors. The Florida Supreme Court affirmed Defendant's conviction and sentence on direct appeal. Defendant filed a Petition for Writ of Certiorari in the United States Supreme Court which was denied on October 4, 2010. Defendant sought post-conviction relief, and on March 8, 2012, the Court summarily denied Defendant's motion without an evidentiary hearing. The Florida Supreme Court affirmed the denial of post-conviction relief. Additionally, Defendant filed a Petition for Writ of Habeas Corpus which was also denied. Defendant filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida on January 21, 2015, which was stayed pending the resolution by the Florida Supreme Court of the impact of the *Hurst v. Florida* decision. ___ U.S. ___, 136 S. Ct. 616, 621 (2016).

Presently before the Court is Defendant's "First Successive Motion to Vacate Judgment of Conviction and Sentences." The Defendant filed his Motion in light of the change in Florida law following the United States Supreme Court's ruling in *Hurst v. Florida* that Florida's capital sentencing scheme was unconstitutional because the judge, and not the jury, made the necessary findings of fact to impose the death sentence. Thereafter, the Florida Supreme Court held that before a judge may consider imposing a death sentence, the jury "must

beyond a reasonable doubt, but recognized that it merged with the second aggravating factor (crime committed while engaged in commission of robbery) and noted that no added weight would be given to the third aggravating factor.

unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt.” *Hurst v. State*, 202 So. 3d 40, 57 (Fla. 2016). In addition, the Florida Supreme Court determined a jury must unanimously find that the aggravating factors are sufficient to impose a death sentence and outweigh the mitigating circumstances, and a jury’s recommendation of a death sentence must be unanimous. *Id.*

The Florida Supreme Court has held that the *Hurst* rulings apply retroactively to defendants whose death sentences became final *after* the issuance of the opinion in *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016); *Asay v. State*, 210 So. 3d 1 (Fla. 2016). In the instant case, the Defendant’s death sentence was final after *Ring*, and for that reason, he is entitled to the retroactive application of *Hurst*.

This Court now turns to the question of whether the *Hurst* error constituted harmless error and looks to the precedent established by the Florida Supreme Court. In every opinion involving cases where *Hurst* was retroactively applicable and the jury did not return a unanimous recommendation of death, the Florida Supreme Court has held that the *Hurst* error was not harmless and has remanded those cases for a new penalty phase. *See Hodges v. State*, 213 So. 3d 863 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *Smith v. State*, 213

So. 3d 722 (Fla. 2017) (*Hurst* error not harmless with jury vote of 10-2 and 9-3); *Ault v. State*, 213 So. 3d 670 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3 and 10-2); *Anderson v. State*, ___ So. 3d ___, 2017 WL 930924 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4); *Dubose v. State*, 210 So. 3d 641 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 8-4); *Durousseau v. State*, ___ So. 3d ___, 2017 WL 411331 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *Hojan v. State*, 212 So. 3d 982 (Fla. 2017) (*Hurst* error not harmless where jury vote was 9-3); *McGirth v. State*, 209 So. 3d 1146 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 11-1); *Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (*Hurst* error not harmless where jury vote was 7-5); *Kopsho v. State*, 209 So. 3d 568 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 10-2); *Armstrong v. State*, 211 So. 3d 864 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3); *Williams v. State*, 209 So. 3d 543 (Fla. 2017) (*Hurst* error not harmless where the jury vote was 9-3, and where the jury completed a special verdict form indicating unanimous vote for four aggravating circumstances); *Franklin v. State*, 209 So. 2d 1241 (Fla. 2016) (*Hurst* error not harmless where the jury vote was 9-3); *Simmons v. State*, 207 So. 3d 860 (Fla. 2016) (*Hurst* error not harmless where the jury vote was 8-4, and where the jury completed a special verdict form indicating unanimous votes for

three aggravating circumstances); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (*Hurst* error not harmless where jury vote was 11-1 for each of the three murder convictions); *Mosley*, 209 So. 3d at 1248 (*Hurst* error not harmless where the jury vote was 8-4). In all the foregoing cases with post-*Ring* non-unanimous jury death recommendations, the Florida Supreme Court remanded the cases for new penalty phases.

Therefore, despite the Florida Supreme Court having previously determined the Defendant's death sentence lawful, based on the foregoing recent precedent of the Florida Supreme Court, this Court is duty-bound to find that the *Hurst* rulings apply to the Defendant because his death sentence became final after *Ring*. Thus, given that the Jury's death recommendation in this case was not unanimous, based on the aforementioned Florida Supreme Court precedent, this Court is duty-bound to find the *Hurst* error in this case is not harmless; therefore, the Court is obligated to vacate the Defendant's death sentence and Defendant is entitled to a new penalty phase.

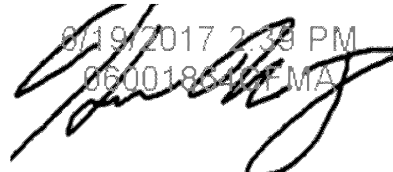
Based on the foregoing:

1. The Defendant's First Successive Motion to Vacate Judgment of Conviction and Sentences pursuant to Florida Rule of Criminal Procedure 3.851, is hereby GRANTED insofar as the Defendant's

death sentences are VACATED.²

2. A new penalty phase shall be granted if the State still desires to seek the death penalty.
3. The Office of the Public Defender is appointed to represent Defendant.
4. A status hearing is scheduled to occur on September 5, 2017 at 1:30 p.m., in courtroom 328 of the Richard O. Watson Judicial Center, 4010 Lewis Speedway, St. Augustine, Florida 32084.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 19 day of June, 2017.

6/19/2017 2:39 PM
06001864CFMA

e-Signed 6/19/2017 2:39 PM
06001864CFMA

CIRCUIT JUDGE

Conformed copies to:

Vivian Singleton, Asst. Attorney General
Vivian.Singleton@myfloridalegal.com; CapApp@myfloridalegal.com

Rosemary Calhoun, Asst. State Attorney

² While the Court is vacating the Defendant's death sentence, there is no basis to vacate his conviction.

calhounr@sao7.org; eservicestjohns@sao7.org

David Dixon Hendry, Asst. CCRC

hendry@ccmr.state.fl.us

James L. Driscoll, Jr., Asst. CCRC

driscoll@ccrc.state.fl.us

George William Brown, Asst. CCRC

brown@ccmr.state.fl.us; support@ccrc.state.fl.us

Louise Pomar, Official Court Reporter

lpomar@circuit7.org

Office of the Public Defender, St. Johns County

Office of the State Attorney, St. Johns County

Filing # 57984107 E-Filed 06/20/2017 11:15:13 AM

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,

v.

NORMAN BLAKE MCKENZIE
DC#648711,

Defendant.

CASE NO.: 2006-01864-CF
JUDGE HOWARD M. MALTZ

NOTICE OF ACCEPTANCE OF ELECTRONIC SERVICE

Comes now the Office of the Public Defender, Seventh Judicial Circuit, and provides the underlying email address for electronic service in the above-styled case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to:
Rosemary L. Calhoun, Assistant State Attorney, 251 North Ridgewood Avenue, Daytona Beach,
FL 32114, on June 20, 2017.

/s/ Matthew D. Phillips

MATTHEW D. PHILLIPS
ASSISTANT PUBLIC DEFENDER
Florida Bar Number: 857580
251 North Ridgewood Avenue
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(386) 239-7730
phillips.matt@pd7.org

Filing # 58034047 E-Filed 06/21/2017 08:15:08 AM

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,

v.

NORMAN BLAKE MCKENZIE
DC#648711,

Defendant.

CASE NO.: 2006-01864-CF
JUDGE HOWARD M. MALTZ

MOTION TO WITHDRAW
AND APPOINT REGIONAL CONFLICT COUNSEL

COMES NOW the Office of the Public Defender, by and through the undersigned Assistant Public Defender, and moves to withdraw as counsel of record due to a conflict of interest and requests this Court issue an order appointing substitute counsel pursuant to **Fla. Stat. 27.5303(1)(a)**; and, further

I HEREBY CERTIFY that the Public Defender, James S. Purdy, or his designee, Chief Assistant Public Defender Craig S. Dyer, has reviewed the grounds which cause the conflict of interest and approves of the filing of this motion.

WHEREFORE, the Office of the Public Defender has certified conflict and moves for the appointment of the Office of Criminal Conflict and Civil Regional Counsel for the Fifth District.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by delivery to: Rosemary L. Calhoun, Assistant State Attorney, 251 North Ridgewood Avenue, Daytona Beach, FL 32114; the Office of Criminal Conflict and Civil Regional Counsel, 101 Sunnyside Road, Suite 310, Casselberry, FL 32707; and to the Defendant, on June 21, 2017.

/s/ Matthew D. Phillips
MATTHEW D. PHILLIPS
ASSISTANT PUBLIC DEFENDER
Florida Bar Number: 857580
251 North Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7730
phillips.matt@pd7.org

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,

v.

NORMAN BLAKE MCKENZIE
DC#648711,

Defendant.

CASE NO.: 2006-01864-CF
JUDGE HOWARD M. MALTZ

**ORDER ALLOWING PUBLIC DEFENDER TO WITHDRAW
AND APPOINTING REGIONAL CONFLICT COUNSEL**


THIS CAUSE having come before this Court upon the motion of the Office of the Public Defender, Seventh Judicial Circuit, and the Court finding that an irreconcilable conflict of interest exists, it is, therefore

ORDERED and ADJUDGED that the Motion to Withdraw is GRANTED and the Office of the Public Defender, Seventh Judicial Circuit, is relieved from further responsibility in the above-styled cause. It is further

ORDERED that the **Office of Criminal Conflict and Civil Regional Counsel for the Fifth District** is appointed as attorney of record for the Defendant in the above-styled cause. It is further

ORDERED that any discovery materials received by the Public Defender's office in the above-styled cause shall be made available within three (3) business days from the date of this Order to the Regional Counsel's office for pickup at the Office of the Public Defender in the county of venue.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 22 day of June, 2017.


6/22/2017 8:41 AM
06001864CFMA
e-Signed 6/22/2017 8:41 AM
06001864CFMA

CIRCUIT JUDGE

Copies to:

Rosemary L. Calhoun, Assistant State Attorney

Filed for record 06/22/2017 09:30 AM Clerk of Court St. Johns County, FL

Matthew D. Phillips, Assistant Public Defender
Norman Blake Mckenzie DC#648711, Defendant
Office of Criminal Conflict and Civil Regional Counsel, 101 Sunnytown Road, Suite 310, Casselberry, FL 32707
mortiz@rc5state.com Telephone Number: (407) 389-5140

Filing # 58229255 E-Filed 06/26/2017 10:39:42 AM

**IN THE CIRCUIT COURT,
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR ST JOHNS COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

**Case No. 2006-CF-1864
Judge Maltz**

vs.

**NORMAN BLAKE MCKENZIE,
Defendant.**

**NOTICE OF APPEARANCE, WRITTEN PLEA OF NOT GUILTY,
WAIVER OF ARRAIGNMENT, REQUEST FOR COPY OF INDICTMENT
OR INFORMATION AND REQUEST FOR TEN DAYS TO FILE MOTIONS**

COMES NOW the OFFICE OF CRIMINAL CONFLICT AND CIVIL REGIONAL COUNSEL and enters this Notice of Appearance on behalf of the Defendant, and pursuant to R. Crim. P. 3.030(a) respectfully requests all pleadings, every order not entered in open court, every written motion, every written notice, demand and similar paper be served upon it at the mailing address set forth below.

Pursuant to R. Crim. P. 3.160(a) and 3.170(a), the Defendant, by and through undersigned counsel, enters this Written Plea of Not Guilty, waives reading of the indictment or information upon which the Defendant will be tried and waives arraignment.

Further, pursuant to R. Crim. P. 3.140(m), the Defendant, by and through undersigned counsel, respectfully requests that a copy of the indictment or information be forwarded to undersigned counsel at the mailing address set forth below. Lastly, pursuant to R. Crim. P. 3.190(c), Defendant by and through undersigned counsel, respectfully requests ten days in which to file motions addressing the indictment or information.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service to the **Office of the State Attorney**, eservicestjohns@sao7.org on June 26, 2017.

/s/ Junior Barrett

JUNIOR BARRETT
FL Bar No.: 785687
Assistant Regional Counsel
Office of Criminal Conflict &
Civil Regional Counsel, 5th District
101 Sunnyside Road, Suite 310
Casselberry, FL 32707
(407) 389-5140
(407) 389-5139
jbarrett@rc5state.com

Filing # 58229255 E-Filed 06/26/2017 10:39:42 AM

**IN THE CIRCUIT COURT,
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR ST JOHNS COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

**Case No. 2006-CF-1864
Judge Maltz**

vs.

**NORMAN BLAKE MCKENZIE,
Defendant.**

_____ /

NOTICE OF (DEMAND FOR) DISCOVERY

COMES NOW the Defendant, by and through undersigned counsel, and pursuant to R. Crim. P. 3.220 files this "Notice of Discovery" expressing the Defendant's intent to participate in the discovery process provided by these rules, including the taking of discovery depositions. Undersigned counsel request the prosecuting attorney disclose to undersigned counsel and permit inspection, copying, testing and photographing of the information and material within the State's possession or control noted in R. Crim. P. 3.220(b)(1), (b)(2), (b)(3), (f), (h), (i) and (j).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service to the **Office of the State Attorney**, eservicestjohns@sao7.org on June 26, 2017.

/s/ Junior Barrett

JUNIOR BARRETT
FL Bar No.: 785687
Assistant Regional Counsel
Office of Criminal Conflict &
Civil Regional Counsel, 5th District
101 Sunnyside Road, Suite 310
Casselberry, FL 32707
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Filing # 58229255 E-Filed 06/26/2017 10:39:42 AM

**IN THE CIRCUIT COURT,
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR ST JOHNS COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

**Case No. 2006-CF-1864
Judge Maltz**

vs.

**NORMAN BLAKE MCKENZIE,
Defendant.**

_____ /

**MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION
AND EVIDENCE FAVORABLE TO DEFENDANT**

The Defendant, by and through undersigned counsel, and respectfully moves this Court for an Order directing the Government forthwith to make inquiry and disclose all the following which is within the possession, custody or control of the State Attorney's Office, or any other prosecutorial or law enforcement agency personnel, the existence of which is known, by the attorney for the Government or any member of the prosecutorial team:

1. The criminal records of any proposed witnesses whose credibility may be an issue at trial, including juvenile adjudications and pending criminal charges.
2. Any and all records and information revealing prior misconduct or bad acts, probative of untruthfulness, attributed to proposed government witnesses whose credibility may be in issue at trial.
3. The present status of, and any and all threats, express or implied, made to a proposed Government witness as to: criminal investigations, prosecutions or potential prosecutions which are pending or could be brought against the witness; any probationary, parole or deferred prosecutions pending or which could be initiated against the witness; any tax, immigration, administrative, or judicial claim or dispute which may be instituted against the witness by the Government or any state.
4. The existence and identification of each occasion on which a proposed

Government witness has testified or after having been ordered to testify or given the opportunity to testify, has refused to testify before any court, grand jury or other body or otherwise narrated in relation to Defendant or the facts surrounding the charges contained in the Indictment.

5. Any and all other records and information which arguably could be beneficial or useful to the probative forces of the Government's evidence or which arguably could lead to such records or information, and any such records or information which minimizes the involvement of Defendant and as a result is material to punishment.
6. All the above five items with respect to any non-witness or declarant whose statements will or may be offered in evidence during trial.
7. Any documentary evidence which is inconsistent with a proposed witness's expected testimony on a material or substantial matter.
8. Any written, recorded, or oral statement, concerning a material or substantial matter, which was made by a proposed Government witness, any individual interviewed by the prosecutorial team, a co-defendant, or an unindicted co-conspirator, that is inconsistent with statements made by another individual.

WHEREFORE, defendant moves for an Order requiring disclosure of the requested information.

MEMORANDUM IN SUPPORT

Due process prohibits the suppression by the Government of evidence favorable to the accused or discrediting its own case. Upon Defendant's request, the Government must disclose all such information. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). This requirement of disclosure includes any information which concerns witnesses' credibility as well as matters concerning the guilt or innocence of the defendant. *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1967); *Napue v.*

Illinois, 360 U.S. 264, 79S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)

As observed by the Supreme Court in Napue v. Illinois:

“The jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life or liberty may depend.” 360 U.S. at 269.

Disclosure of information tending to impeach witnesses’ credibility must be timed to enable effective preparation for trial. United States v. Polisi, 416 f. 2d 573, 578, (2ND Cir. 1969); United States v. Baxter, 492 F. 2d 150, 173-174)9th Cir. 1973); cert. denied, 417 U.S. 940 (1974). As stated in United States v. Pollack, 534 F. 2d 964, 973 (D.C. Cir. 1976):

“Disclosure by the government must be at such time as to allow the defense to use the favorable material effectively in preparation and presentation of its case, even if satisfaction of this criterion requires pretrial disclosure”.

Likewise, the Fifth Circuit has recognized that the timing of disclosure must be “appropriate” to allow proper implementation of Brady v. Maryland and that disclosure may come too late if it is only given at trial. See: United States v. Campagnuolo, supra; United States v. Harris, 458 F. 2d 670,677 (5th Cir. 1972), cert. denied 409 U.S. 888, 93, S. Ct. 195, 34 L. Ed. 2d 145 (1972).

1. Information concerning prior convictions and juvenile adjudications is squarely within Rule 609, Federal Rule of Criminal Procedure. See also: Davis v. Alaska, 415 U.S. 308; 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (allowing cross-examination into prosecution witness’s juvenile probation status imposed following adjudication of delinquency).

Since the Government has ready access to the F.B.I. computerized “rap sheet” and defendant does not, it is appropriate that the Government make the requested disclosure. There is an affirmative “obligation on the part of the prosecution to produce certain evidence actually or constructively in its possession or accessible to it in the interests of inherent fairness.” Calley v. Callaway, 519 F. 2d 184, 223 (5th Cir 1975) (**en banc**) ; see also United States v. Auten, 623 F. 2d 478 (5th Cir. 1980).

2. Federal Rules of Evidence 608 (b) allows impeachment of a witness through specific instances of conduct for the purpose of attacking his credibility, if probative or untruthfulness.
3. Exposure of a witness’s motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Davis v. Alaska, supra. Allowing cross-examination as to a witness’s credibility to “the largest possible scope” is especially important where a prosecution witness has had prior dealings with the prosecution or other law enforcement officials. The possibility exists that his testimony was motivated by the desire to please the prosecution in exchange for the prosecutor’s actions in having some or all of the charges against him dropped, secured immunity, or assuring lenient treatment in sentencing. United States v. Mayer, 556 F. 2d 245 (5th Cir. 1977). Giglio v. United States, 405 U.S. 105, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972).

Likewise, the defendant is entitled to be advised of the negative as well as the positive inducements which may motivate prosecution witnesses to “color” their testimony. See: United States v. Bonnano, 430 F. 2d 1060 (2nd cir. 1970) (indictment pending against

government witness should be disclosed to defense).

4. The request paragraph 4 of the Motion seeks in part early disclosure of Jencks materials to the extent that due process requires. United States v. Campagnuolo, supra.

A previous refusal to testify by a Government witness who later testifies at trial is probative of his motivations in testifying and should be disclosed. Similarly, the frequency and nature of an informer's or co-conspirator's testimony on behalf of the Government is probative of his credibility and motivations.

5. Since impeachment necessarily embodies many forms, to the extent that the prosecution may recognize such information, it may not be suppressed.
6. Defendant is entitled to impeach the credibility of non-witnesses whose hearsay statements have been introduced. Federal Rules of Evidence 806. Thus, any disclosure of impeachment information to which the defense is entitled applies to non-witness declarants as well as witnesses who actually testify.
7. An effective method of testing the credibility of a witness is to impeach him with his prior inconsistent statements. Such requests have been held valid even if the declarant is an accomplice or the Government elects not to present the declarant at trial. See Scurr v. Niccum, 620 F. 2d 186 (8th Cir. 1980) (prior inconsistent statements of accomplice); Monroe v. Blackburn, 607 F. 2d 148 (5th Cir. 1979) (victim's prior statement to police inconsistent with trial testimony); United States v. Polisi, 416 F. 2d 573 (2nd Cir. 1969) (prosecutor erred in failing to give defense counsel statements of a non-testifying co-defendant which were inconsistent with testifying co-defendants and material to issue of punishment).

CONCLUSION

Should doubt arise as to whether information is subject to disclosure, there is no alternative but that “*the prudent prosecutor will resolve doubtful questions in favor of disclosure.*” Cannon v. Alabama, 558 F.2d 1211 (5th Cir. 1977), quoting United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

“It is now clear the Brady imposes an affirmative duty on the prosecutor to produce at the appropriate time requested evidence which is materially favorable to the accused either as direct or impeaching evidence.” Williams v. Dutton, 400 F. 2d 797, 800 (5th Cir. 1968), cert denied 393 U.S. 1105, 89 S. Ct. 908, 21 L.Ed.2d(1969).

The constitutional principles of fairness, due process, and right to confrontation inperplay to require, as a matter of Constitutional right, the requested disclosure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service to the **Office of the State Attorney**, division @sao9.org on June 26, 2017.

/s/ Junior Barrett

JUNIOR BARRETT
FL Bar No.: 785687
Assistant Regional Counsel
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Civil Regional Counsel, 5th District
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Filing # 60978040 E-Filed 08/28/2017 09:20:24 AM

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE
_____ /

**STATE'S RENEWED NOTICE OF INTENT TO SEEK THE DEATH PENALTY
AND LIST OF AGGRAVATING FACTORS**

COMES NOW, R.J. LARIZZA, State Attorney for the Seventh Judicial Circuit, by and through the undersigned Assistant State Attorney, and, pursuant to Florida Statutes § 782.04(1)(b), hereby renews its previously-filed notice of the state's intent to seek the death penalty against the defendant. The state intends to prove and has reason to believe it can prove beyond a reasonable doubt the following aggravating factors:

1. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
2. The capital felony was committed while the defendant was engaged in the commission of, or attempted commission of, a robbery.
3. The capital felony was committed for pecuniary gain.
4. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by delivery to JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, CASSELBERRY, FL 32707, on August 28, 2017.

Respectfully submitted:

s/ K. MARK JOHNSON
ASSISTANT STATE ATTORNEY
FLORIDA BAR NO.: 0378320
2446 DOBBS RD.
ST. AUGUSTINE, FL 32086
(904) 209-1300
ESERVICESTJOHNS@SAO7.ORG

**IN THE CIRCUIT COURT OF THE 7th JUDICIAL CIRCUIT
ST. JOHNS COUNTY, FLORIDA**

STATE OF FLORIDA -vs- NORMAN BLAKE MCKENZIE

CASE #: 06001864CFMA

Judge: HOWARD M. MALTZ

Division: 56

Charges: Ct 1 FIRST DEGREE MURDER (FILED)
Ct 2 FIRST DEGREE MURDER (FILED)

ACKNOWLEDGMENT

I ACKNOWLEDGE THAT:

- (1) I am required to keep my current telephone number and mailing address known to my attorney and the clerk of this court at all times.
- (2) Continuation requested by _____.

Requirements:

- (3) I am personally to appear in court for:

<u>Event</u>	<u>Judge</u>	<u>Courtroom</u>	<u>Date</u>	
FELONY STATUS CONFER	MALTZ, HOWARD M.	Courtroom 328	11/09/2017	9:00 am

FAILURE TO COMPLY WITH ANY OF THE ABOVE REQUIREMENTS MAY RESULT IN A CAPIAS FOR MY ARREST AND INCARCERATION WITHOUT BOND UNTIL TRIAL.

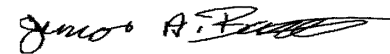
WITNESS my hand this 5TH day of September, 2017.



By: DEPUTY CLERK

DEFENDANT

NORMAN BLAKE MCKENZIE
314 NW 12TH AVE APT 5
GAINESVILLE, FL 32601



ATTORNEY FOR DEFENDANT

CC: Bond Depositor

JUNIOR ALPHONSO BARRETT
101 SUNNYTOWN ROAD
SUITE 310
CASSELBERRY, FL 32707

NOTICE REGARDING THE AMERICAN WITH DISABILITIES ACT OF 1990

In accordance with the Americans With Disabilities Act, If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please see the enclosed notice as amended per the Seventh Judicial Circuit Administrative Order #W-2010-096 for instructions or view on our website at www.clk.co.st-johns.fl.us/misc/adanotice/pdf.

Hearing Notes

DATE: September 5, 2017
CIRCUIT JUDGE: H MALTZ
STATE ATTORNEY: J DUNTON
DEFENSE ATTORNEY: J BARRETT
CLERK: A KING
BAILIFF: STOKES
COURT REPORTER: L POMAR

STATE VS.: MCKENZIE, NORMAN BLAKE
CASE #: 06001864CFMA

STATUS HEARING

COURT REQUIRING DEFT TO BE PRESENT

11/9/17 @9AM FOR STATUS CONFERENCE

Filing # 61872584 E-Filed 09/22/2017 12:50:14 PM

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL
CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA**

CASE NUMBER: CF06-01864 FELONY

STATE OF FLORIDA
Plaintiff

vs.

NORMAN BLAKE MCKENZIE
Defendant

STATE'S DISCOVERY EXHIBIT

The State of Florida, pursuant to the Defendant's Notice of Discovery under Rule 3.220, Florida Rules of Criminal Procedure, discloses the following:

1.	3.220(b)(1)(A)	Names and addresses – See attached Witness List	<u> x </u>
2.	3.220(b)(1)(B)	Witness statements	<u> x </u>
3.	3.220(b)(1)(C)	Defendant Statements	<u> x </u>
4.	3.220(b)(1)(D)	Co-Defendant Statements	<u> </u>
5.	3.220(b)(1)(E)	Recorded grand jury testimony of defendant	<u> </u>
6.	3.220(b)(1)(F)	Papers or objects obtained from defendant	<u> x </u>
7.	3.220(b)(1)(G)	Material or information provided by confidential informant	<u> </u>
8.	3.220(b)(1)(H)	Electronic surveillance of conversations	<u> x </u>
9.	3.220(b)(1)(I)	Search and seizure	<u> x </u>
10.	3.220(b)(1)(J)	Reports or Statements of Experts	<u> x </u>
11.	3.220(b)(1)(K)	Papers or objects not obtained from defendant.	<u> x </u>

12. 3.220(b)(1)(L) Any tangible paper, objects or substances in the _____
possession of law enforcement that could be tested
for DNA.

All tangible objects as provided by Rules of Criminal Procedure 3.220(b)(1)(F) and 3.220(b)(1)(K), unless "NONE" indicated below, may be inspected, photographed and tested during the regular and ordinary business hours after 48 hours written notice at: _____

The State demands Notice of Alibi in compliance with Rule 3.200 F.R.Cr.P. The offense charged occurred on 10/04/2006 between the hours of 0001 and 2359, in the vicinity of ST. JOHNS County, Florida.

This document will serve as authorization for Attorney for Defendant, or his designated representative, after timely written notice to the State, to conduct the said discovery of tangible objects, in the above-styled cause.

I DO HEREBY CERTIFY that a copy hereof has been furnished to the office of JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707 by hand/mail/bin on August 31, 2017.

R.J. LARIZZA
STATE ATTORNEY

s/MARK JOHNSON

ASSISTANT STATE ATTORNEY
FLORIDA BAR #: 0378320
2446 DOBBS ROAD
ST AUGUSTINE, FL 32086
ESERVICESTJOHNS@SAO7.ORG

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NUMBER: CF06-01864

**STATE OF FLORIDA
Plaintiff**

vs.

**NORMAN BLAKE MCKENZIE
Defendant**

WITNESS LIST

Category A witnesses present during defendant/co-defendant statements:

Other Category A witnesses:

1. PATRICK MICHAEL ANDERSON, 7709 PALMO FISH CAMP ROAD, ST AUGUSTINE, FL 32092
2. JULIE DELANO AUBRY, 3237 TURTLE CREEK ROAD, SAINT AUGUSTINE, FL 32086
3. DR. PREDRAG BULIC, OFFICE OF THE MEDICAL EXAMINER DISTRICT 23, 4501 AVENUE A, ST AUGUSTINE, FL 32084 (DR. STEINER IS DECEASED)
4. THOMAS BUONGIORNE, FORMERLY WITH FDLE, 731 TARA FARMS DRIVE, MIDDLEBURG, FL 32068
5. TIMOTHY R BURRES, 4015 LEWIS SPEEDWAY, ST AUGUSTINE, FL 32084
6. HENRY SAMUEL CRAFTON, FORMERLY WITH SJSO, ADDRESS TO BE PROVIDED
7. JERRY F FINDLEY, 2004 BLANKENBAKER ROAD, STATESBORO, GA 30458
8. JEREMY J GALENTINE, FORMERLY WITH SJSO, ADDRESS TO BE PROVIDED
9. EMILY D M HAINES, 921 NORTH DAVIS STREET, BUILDING E, JACKSONVILLE, FL 32209
10. DS CRAIG E HARRISON, 4015 LEWIS SPEEDWAY, ST AUGUSTINE, FL 32084
11. DS JAMES D HAYWARD, 4015 LEWIS SPEEDWAY, ST AUGUSTINE, FL 32084
12. DS THOMAS S KEISLER III, 4015 LEWIS SPEEDWAY, ST AUGUSTINE, FL 32084
13. CAROL A LANDRUA, 668 CASE COVE ROAD, CANDLER, NC 28715
14. SGT. JAY F LAWING JR, 4015 LEWIS SPEEDWAY, ST AUGUSTINE, FL 32084
15. STEVE LEARY, FORMERLY FDLE, ADDRESS TO BE PROVIDED
16. SGT. CHRISTINE MEARES, 4015 LEWIS SPEEDWAY, ST AUGUSTINE, FL 32084
17. PERRY L PRIVETTE, 3249 CALLE CORTEZ ROAD, ST AUGUSTINE, FL 32086
18. MINDI SUE RAMAGE, FORMERLY WITH FDLE, 8051 JULIET LANE , NUMBER 304, MANASSAS, VA 20109
19. BRENT NELSON REESE, 2635 ADA ARNOLD ROAD, ST AUGUSTINE, FL 32092
20. PAUL MATTHEW ROBINSON, FORMERLY WITH SJSO, 1248 LOCH TANNA LOOP, JACKSONVILLE, FL 32259
21. TIMOTHY ROY ROLLINS, 4015 LEWIS SPEEDWAY, ST AUGUSTINE, FL 32084
22. KAREN HORTON STEVENS, 156 COUNTY ROAD 13 SOUTH, ST AUGUSTINE, FL 32092
23. DS JAMES A THORNTON, 4015 LEWIS SPEEDWAY, ST AUGUSTINE, FL 32084
24. M.I. TIMKO, FORMERLY WITH SJSO, C/O DS WILSON, ST JOHNS COUNTY SHERIFFS OFFICE, 4015 LEWIS SPEEWAY, ST. AUGUSTINE, FL 32084

Category B witnesses:

1. MICHAEL DIETRICH, 2716 RAVINE HILL DRIVE, MIDDLEBURG, FL 32068
2. LISA G HAMMOND, 7823 GLEASON DRIVE APT 603, KNOXVILLE, TN 37919
3. DEREK MAYO, 415 ROBERTS STREET, GREEN COVE SPRINGS, FL 32043
4. THOMAS MEYER, 2832 SHEEPHEAD COURT, ST AUGUSTINE, FL 32092
5. JENNIFER NIST, 3657 GAINES ROAD, ST AUGUSTINE, FL 32084
6. FRANK MATHIS, FORMERLY WITH SJSO, ADDRESS TO BE PROVIDED

Category C witnesses:

1. CHARLES E BRADLEY II, 4015 LEWIS SPEEDWAY, ST AUGUSTINE, FL 32084
2. PREDRAG BULIC, OFFICE OF THE MEDICAL EXAMINER DISTRICT 23, 4501 AVENUE A, ST AUGUSTINE, FL 32084 (DR. STEINER IS DECEASED)
3. AMANDA MARIE DAVIS CAMERON, 8095 CR 208, ST AUGUSTINE, FL 32092
4. DAVID CHRISTOPHER, FORMERLY WITH SJSO, ADDRESS TO BE PROVIDED
5. MICHAEL D HARTSELL, 4015 LEWIS SPEEDWAY, ST AUGUSTINE, FL 32084
6. ANGIE HOSFORD, SJSO, 4015 LEWIS SPEEDWAY, ST AUGUSTINE, FL 32084
7. ROBERT LINDSEY, FORMERLY WITH SJSO, ADDRESS TO BE PROVIDED
8. ROBERT M MITCHELL, 48 BAKERS CREEK RD, WARWICK, RI 02886
9. MATTHEW ROBINSON, FORMERLY WITH SJSO, 1248 LOCH TANNA LOOP, JACKSONVILLE, FL 32259
10. DS JOSEPH C ROMER, 4015 LEWIS SPEEDWAY, ST AUGUSTINE, FL 32084
11. SGT. PEGGY G TENNYSON, 4015 LEWIS SPEEDWAY, ST AUGUSTINE, FL 32084
12. DS JAMES C WENSIL, 4015 LEWIS SPEEDWAY, ST AUGUSTINE, FL 32084
13. CST STEFANIE ELLIOTT WHITTINGTON, 4015 LEWIS SPEEDWAY, ST AUGUSTINE, FL 32084
14. MICHAEL E WORTHEN, 3200 PORT ROYALE DR N, FORT LAUDERDALE, FL 33308

Similar fact evidence/FS 90.404(2):

The State will amend and supplement with additional responses as necessary.

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864 FELONY

STATE OF FLORIDA
Plaintiff

vs.

NORMAN BLAKE MCKENZIE
Defendant

DEMAND FOR RECIPROCAL DISCLOSURE

COMES NOW the State of Florida through its undersigned Assistant State Attorney, pursuant to Florida Rules of Criminal Procedure, Rule 3.220(d) and demands the following reciprocal disclosures:

1. Within fifteen (15) days after receipt by the defense of the State's Discovery Exhibit, a written list of all witnesses and their addresses whom the defense expects to call as witnesses at the trial or hearing.
2. Within fifteen (15) days after receipt by the defense of compliance by the State with Florida Rules of Criminal Procedure, Rule 3.220(b), the State reciprocally demands:
 - (a) The recorded, signed or written statement of any person whom the Defendant expects to call as a witness.
 - (b) Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.
 - (c) Any tangible papers or objects which the defense counsel intends to use in the hearing or trial.

I HEREBY CERTIFY that a true copy hereof has been furnished to the Office of JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, by hand/mail/bin this on August 31, 2017.

s/MARK JOHNSON

ASSISTANT STATE ATTORNEY
FLORIDA BAR #: 0378320
2446 DOBBS ROAD
ST AUGUSTINE, FL 32086
ESERVICESTJOHNS@SAO7.ORG

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

_____ /

ORDER TO TRANSPORT

THIS CAUSE having come before this Court and being fully advised in the premises, it
is,

ORDERED:

That authorities with the DEPARTMENT OF CORRECTIONS shall deliver custody of
the Defendant, **NORMAN BLAKE MCKENZIE, W/M, DOB: 07/08/1964, DC# V648711**, to
the Sheriff of St. Johns County, and further that the Sheriff of St. Johns County shall keep the
said Defendant in close custody and have the Defendant present before the undersigned in
courtroom 328, of the Richard O. Watson Judicial Center, St. Augustine, Florida, on **November
9, 2017 at 9:00 a.m.**, for the purpose of a Status Conference on his resentencing, and held until
such time that the Defendant is resentenced.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 23 day of
October, 2017.



CIRCUIT JUDGE

Copies to:
Office of the State Attorney
Junior Barrett, Esq.
St. Johns County Sheriff's Office, Transportation

Filed for record 10/23/2017 03:54 PM Clerk of Court St. Johns County, FL

**IN THE CIRCUIT COURT OF THE 7th JUDICIAL CIRCUIT
ST. JOHNS COUNTY, FLORIDA**

STATE OF FLORIDA -vs- NORMAN BLAKE MCKENZIE

CASE #: 06001864CFMA

Judge: HOWARD M. MALTZ

Division: 56

Charges: Ct 1 FIRST DEGREE MURDER (FILED)
Ct 2 FIRST DEGREE MURDER (FILED)

ACKNOWLEDGMENT

I ACKNOWLEDGE THAT:

- (1) I am required to keep my current telephone number and mailing address known to my attorney and the clerk of this court at all times.
- (2) Continuation requested by **COURT**.

Requirements:

STATUS CONFERENCE HELD / DEFT MAY BE RETURNED TO DOC & DOES NOT NEED TO BE PRESENT FOR 2/13 COURT DATE

- (3) I am personally to appear in court for:

<u>Event</u>	<u>Judge</u>	<u>Courtroom</u>	<u>Date</u>	
FELONY STATUS CONFER	MALTZ, HOWARD M.	Courtroom 328	02/13/2018	9:00 am

FAILURE TO COMPLY WITH ANY OF THE ABOVE REQUIREMENTS MAY RESULT IN A CAPIAS FOR MY ARREST AND INCARCERATION WITHOUT BOND UNTIL TRIAL.

WITNESS my hand this 9TH day of November, 2017.



By: DEPUTY CLERK

DEFENDANT

NORMAN BLAKE MCKENZIE
314 NW 12TH AVE APT 5
GAINESVILLE, FL 32601

CC: Bond Depositor

ATTORNEY FOR DEFENDANT

JUNIOR ALPHONSO BARRETT
101 SUNNYTOWN ROAD
SUITE 310
CASSELBERRY, FL 32707

NOTICE REGARDING THE AMERICAN WITH DISABILITIES ACT OF 1990

In accordance with the Americans With Disabilities Act, If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please see the enclosed notice as amended per the Seventh Judicial Circuit Administrative Order #W-2010-096 for instructions or view on our website at www.clk.co.st-johns.fl.us/misc/adanotice/pdf.

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

ORDER TO TRANSPORT

THIS CAUSE having come before this Court and being fully advised in the premises, it is,

ORDERED:

That authorities with the DEPARTMENT OF CORRECTIONS shall deliver custody of the Defendant, **NORMAN BLAKE MCKENZIE, W/M, DOB: 07/08/1964, DC# V648711**, to the Sheriff of St. Johns County, and further that the Sheriff of St. Johns County shall keep the said Defendant in close custody and have the Defendant present before the undersigned in courtroom 328, of the Richard O. Watson Judicial Center, St. Augustine, Florida, on **November 9, 2017 at 9:00 a.m.**, for the purpose of a Status Conference on his resentencing, and held until such time that the Defendant is resentenced.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 23 day of October, 2017.



CIRCUIT JUDGE

Copies to:
Office of the State Attorney
Junior Barrett, Esq.
St. Johns County Sheriff's Office, Transportation

I HEREBY CERTIFY THAT THIS DOCUMENT
IS A TRUE AND CORRECT COPY AS APPEARS
ON RECORD IN ST. JOHNS COUNTY, FLORIDA
WITNESS MY HAND AND OFFICIAL SEAL
THIS 23rd DAY OF Oct 20 17
CLERK OF THE CIRCUIT COURT AND COMPTROLLER

BY  D.C.



06-1864CF_{me}

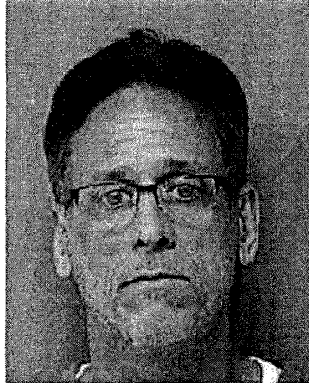
Filed for record 11/09/2017 12:50 PM Clerk of Court St. Johns County, FL



ST. JOHNS COUNTY SHERIFF'S OFFICE
MCKENZIE, NORMAN BLAKE
BOOKING INFORMATION



☐ HIGH PROFILE ☐ SUICIDAL ☐ ESCAPE RISK ☒ HOLD Agency: BORROWED @ DOC

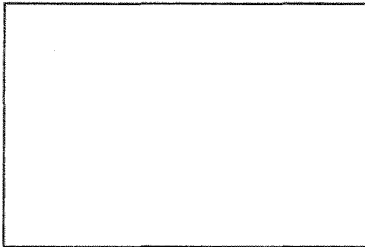


Booking No: SJSO17JBN004951 MNI No: SJSO99MNI055145 Cell Assigned: SJSO* BKG*003*001
Address : UNION CORRECTIONS Telephone Number: 904 8230921
City, State Zip: RAIFORD, FL 32083 Citizenship: UNITED STATES
SSN : [REDACTED] DOB: 07/08/1964 Place of Birth: POLK County: POLK
DL No: M252622642480 City, State: WINTER HAVEN, FLORIDA
SID No: Race Gender Height Weight Hair Eyes Build Skin Hand
FBI No: W M 6'02" 227 Bro Bro

Occupation: DOC INMATE Employer : UNEMPLOYED
Telephone:

Date Booked: 11/08/2017 Date Released: Searched By: PITTENGER, DALE
Time Booked: 13:04 Time Released: Printed By:
Booked By: BROMBERG, MELISSA Inmate Phone PIN:
Property Bag No: Photo By: PITTENGER, DALE

Right Index Finger In



MNI No



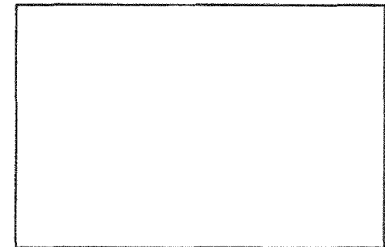
SJSO99MNI055145

Booking No



SJSO17JBN004951

Right Index Finger Out



- I have been advised any property valued over \$100 is to be released or mailed at my own expense within five (5) days.
- I understand that my phone/canteen passcode are confidential and created by me. I will not share this number with anyone. I am fully responsible for all usage and monetary obligations associated with the passcode. SJSO is not responsible for loss of funds to my account.

X

Defendant Signature

Date

Officer Signature

Date

Booking No: SJSO17JBN004951

MNI No: SJSO99MNI055145

Printed On: 11/08/2017 14:20

User Name: DJOHNSON

Page 1 of 1

MCKENZIE, NORMAN BLAKE
BOOKING INFORMATION

Case/Charge Report

Case Number: CASE0001

Court Case Number: 06-1864CF

Court:

Bond Information: By Judge:

Arrest Number:

By LEO:

Offense No:

OBTS:

Arresting Agency: COURT

Arresting Officer:

Case Comments: 11/8/2017 HERE ON TRANSPORT ORDER SENTENCED DOC DEATH ROW

Sentence Information

☐ Dept of Corrections

☐ Good Conduct Gain Time

☐ Extra Gain Time

Start Date:

Actual Time Served:

☐ Weekender

Length:

Time Worked in Jail:

Credit for Time Served:

Gain Time Credit:

End Date:

Time Remaining:

Charge Number: CHRG0001

Counts: 1 Statute: 782.04.1a1

Bond : \$0.00

Charge Code: HOMICIDE

Charge Description:

Status: DOC LIFE

MURDER FIRST DEGREE PREMEDITATED

Comments:

No comments available.

Charge Number: CHRG0002

Counts: 1 Statute: 782.04.1a1

Bond : \$0.00

Charge Code: HOMICIDE

Charge Description:

Status: DOC LIFE

MURDER FIRST DEGREE PREMEDITATED

Comments:

No comments available.

X

Inmate Signature

MCKENZIE, NORMAN BLAKE

Booking No: SJSO17JBN004951

MNI No: SJSO99MNI055145

Printed On: 11/08/2017 13:36

User Name: MBROMBERG

Page 2 of 2

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IN THE CIRCUIT COURT OF THE SEVENTH
JUDICIAL CIRCUIT, IN AND FOR ST JOHNS
COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

Case Number: CF06-01864

vs.


NORMAN BLAKE MCKENZIE,
Defendant.

WAIVER OF DEFENDANT'S ATTENDANCE AT STATUS HEARING

COMES NOW the Accused, Norman Blake McKenzie, by and through the undersigned attorney, pursuant to Florida Rule of Criminal Procedure 3.180(3), and hereby waives the presence of the accused at the status hearing set for February 13, 2018. The undersigned attorney will appear on behalf of the accused at all scheduled status hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail/hand delivery to the Office of the State Attorney, 2446 Dobbs Rd., St. Augustine, Florida 32086, this the 7th day of February 2018.


Junior A. Barrett
Florida Bar No. 785687
Assistant Regional Counsel
Office of Regional Criminal Conflict &
Civil Regional Counsel, 5th District
101 Sunnyside Road, Suite 310
Casselberry, FL 32707
(407) 389-5140
jbarrett@rc5state.com
tcollins@rc5state.com

Filing # 67717201 E-Filed 02/08/2018 03:42:37 PM

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND
FOR ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.

CASE NO: 2006-CF-001864-A

NORMAN MCKENZIE,
Defendant.

NOTICE OF APPEARANCE
AS SECOND CHAIR

COMES NOW, the undersigned attorney, Kenneth Hamburg, and enters this Notice of Appearance as Second Chair on behalf of the Defendant, and pursuant to Florida Rule of Criminal Procedure 3.030(a) respectfully requests all pleadings, every order not entered in open court, every written motion, every written notice, demand and similar paper be served at the below-noted mailing address.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, ereceipts@sao7.org on February 8, 2018.

/s/ Kenneth Hamburg

KENNETH HAMBURG, ESQUIRE

FL. Bar No. 69008

Assistant Regional Counsel

Office of Regional Criminal Conflict &

Civil Regional Counsel, 5th District

101 Sunnyside Road, Ste. 310

Casselberry, FL 32707

(407) 389-5140

(407) 389-5139

khamburg@rc5state.com

Filing # 67811039 E-Filed 02/12/2018 10:41:50 AM

IN THE CIRCUIT COURT OF THE SEVENTH
JUDICIAL CIRCUIT, IN AND FOR ST JOHNS
COUNTY, FLORIDA.

CASE NO.:2006-CF-1864

STATE OF FLORIDA,
Plaintiff,
vs.

NORMAN MCKENZIE ,
Defendant.

_____ /

NOTICE OF DEMAND FOR DISCOVERY

The Defendant, NORMAN MCKENZIE, by and through the undersigned counsel, respectfully demands that the Office of the State Attorney, within fifteen (15) days after service of this notice, disclose to defense counsel and permit defense counsel to inspect, copy, test and photograph or control the following information and material within the State's possession or control and which the state intends to use or present as part of his resentencing hearing:

1. The names and current addresses of any and all persons known to the prosecutor to have information which may be relevant to the offense charged and to any defense with respect thereto whether the state intends to call them during Defendant's resentencing.

2. The statement of any and all persons whose name is furnished in compliance with the preceding paragraph. The term "statement," as used herein, includes a written statement made by said person and signed or otherwise adopted or approved by him. This shall include any and all statements of any kind or manner made by such person and written or recorded or summarized in any writing or recording. The term "statement" is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case.

3. Any written or recorded statements and the substance of any oral statements made by the accused, including a copy of any statements contained in the police reports or report summaries, together with the name and address of each

witness to the statements. This should include, but not be limited to, statements taken from the accused.

4. Any written or recorded statements and the substance of any oral statements made by a co-defendant to include prior guilt and penalty phase testimony.

5. Any tangible papers or objects that were obtained from or belonged to the accused to include those the state intends to present during Defendant's resentencing.

6. Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons to include those prepared as part of Defendant's prior penalty phase.

7. Any tangible papers or objects that the prosecuting attorney intends to use in the resentencing hearing.

8. Any and all photographs taken of the Defendant or of any portion of his body connected with the alleged offense.

9. Any and all photographs taken of the crime scene and/or of the victim of the crime or otherwise relating to this case.

10. Any photographs that have been exhibited for the purpose of establishing the identity of the perpetrator of the crime.

11. Any photographs that the state previously used as part of Defendant's prior penalty phase and that the state intends to present to the jury during the upcoming penalty phase of Defendant.

12. Any and all consideration or promises of consideration given to or made on behalf of State witnesses to include co-defendants.

13. Any and all prosecutions, investigations, or possible prosecutions pending that could be brought against any witnesses and any probationary, parole or deferred prosecution status of the witnesses.

14. Any and all records and information revealing felony convictions attributed to each state's witness.

15. Any and all records and information showing prior misconduct or bad acts committed by the state's witnesses.

16. Any information that tends to show that the accused had consumed alcohol and/or drugs prior to the commission of the offense.

17. Any information that any of the state's witnesses had consumed alcohol and/or drugs prior to witnessing the events that gave rise to their respective testimony.

18. Any statements of witnesses that conflict either internally or with another statement of the same witness.

19. Any psychiatric, psychological, or mental evaluations taken by a state's witness or any evidence of psychiatric, psychological or mental treatment of any state's witness.

20. Any psychiatric, psychological, or mental evaluations taken of Defendant by state's expert(s) and any reports generated by said experts as part of Defendant's prior sentencing.

21. Any victim impact statements, documents or other presentation the state intends to present during the upcoming resentencing.

22. Any internal documents or other evidence of any law enforcement official's misfeasance, malfeasance or negligence whether by acts of omission or commission, in the performance of his/her duties, concerning this specific case whether before, during or after the prior trial and sentencing of Defendant.

23. Any evidence indicating that the decedent and the accused had had any argument, disagreement or fight prior to the time of the incident.

24. Any evidence that the accused acted in self-defense or was provoked by the alleged victim prior to the incident other than what has been previously provided.

25. Any evidence that indicates the decedent was an alcoholic or drug-dependent person.

26. Any evidence concerning the mental stability or personality characteristics of the decedent that may have led to the fight between the accused and the decedent.

27. Any evidence of behavior of Defendant while incarcerated.
 28. Any evidence of alcohol or drug abuse of Defendant.
 29. Any medical history of Defendant.
 30. Any employment history of Defendant.
 31. All psychological and psychiatric records of the Defendant including tests, observations, diagnosis and treatment.
 32. The legal history of the Defendant including all arrests, dispositions, incarcerations, paroles, probations, and placements.
 33. Any marital and family history of client and parents.
 34. Any social history of Defendant.
 35. Any alcohol, drug and legal history of Defendant's parents and siblings.
 36. Any employment history of parents and siblings.
 37. Any medical history of parents and siblings.
 38. Any educational history of parents and siblings.
 39. Any psychological history of parents and siblings.
 40. Any marital history of parents.
 41. Any marital history of the Defendant.
- The above is requested pursuant to Florida Rule of Criminal Procedure 3.220(a)(1)(I) through (xi) and (2), inclusive.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, this 12th day of February, 2018.

/s/ JUNIOR BARRETT

Junior A. Barrett
Florida Bar No. 785687
Assistant Regional Counsel
Office of Regional Criminal Conflict &
Civil Regional Counsel, 5th District
101 Sunnyside Road, Suite 310
Casselberry, FL 32707
(407) 389-5140
jbarrett@rc5state.com
tcollins@rc5state.com

**IN THE CIRCUIT COURT OF THE 7th JUDICIAL CIRCUIT
ST. JOHNS COUNTY, FLORIDA**

STATE OF FLORIDA -vs- NORMAN BLAKE MCKENZIE

CASE #: 06001864CFMA

Judge: HOWARD M. MALTZ

Division: 56

Charges: Ct 1 FIRST DEGREE MURDER (FILED)
Ct 2 FIRST DEGREE MURDER (FILED)

ACKNOWLEDGMENT

I ACKNOWLEDGE THAT:

- (1) I am required to keep my current telephone number and mailing address known to my attorney and the clerk of this court at all times.
- (2) Continuation requested by **DEFENSE**.

Requirements:

STATUS CONF

- (3) I am personally to appear in court for:

<u>Event</u>	<u>Judge</u>	<u>Courtroom</u>	<u>Date</u>	
FELONY HEARING	MALTZ, HOWARD M.	Courtroom 328	04/13/2018	9:00 am

FAILURE TO COMPLY WITH ANY OF THE ABOVE REQUIREMENTS MAY RESULT IN A CAPIAS FOR MY ARREST AND INCARCERATION WITHOUT BOND UNTIL TRIAL.

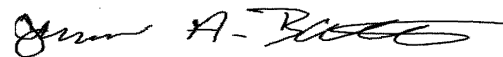
WITNESS my hand this 13TH day of February, 2018.



By: DEPUTY CLERK

DEFENDANT

NORMAN BLAKE MCKENZIE
314 NW 12TH AVE APT 5
GAINESVILLE, FL 32601



ATTORNEY FOR DEFENDANT

JUNIOR ALPHONSO BARRETT
101 SUNNYTOWN ROAD
SUITE 310
CASSELBERRY, FL 32707

CC: Bond Depositor

NOTICE REGARDING THE AMERICAN WITH DISABILITIES ACT OF 1990

In accordance with the Americans With Disabilities Act, If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please see the enclosed notice as amended per the Seventh Judicial Circuit Administrative Order #W-2010-096 for instructions or view on our website at www.clk.co.st-johns.fl.us/misc/adanotice/pdf.

**IN THE CIRCUIT COURT OF THE 7th JUDICIAL CIRCUIT
ST. JOHNS COUNTY, FLORIDA**

STATE OF FLORIDA -vs- NORMAN BLAKE MCKENZIE

CASE #: 06001864CFMA

Judge: HOWARD M. MALTZ

Division: 56

Charges: Ct 1 FIRST DEGREE MURDER (FILED)
Ct 2 FIRST DEGREE MURDER (FILED)

ACKNOWLEDGMENT

I ACKNOWLEDGE THAT:

- (1) I am required to keep my current telephone number and mailing address known to my attorney and the clerk of this court at all times.
- (2) Continuation requested by _____.

Requirements:

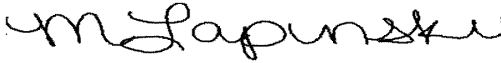
STATUS

- (3) I am personally to appear in court for:

<u>Event</u>	<u>Judge</u>	<u>Courtroom</u>	<u>Date</u>	
FELONY HEARING	MALTZ, HOWARD M.	Courtroom 328	07/31/2018	9:00 am

FAILURE TO COMPLY WITH ANY OF THE ABOVE REQUIREMENTS MAY RESULT IN A CAPIAS FOR MY ARREST AND INCARCERATION WITHOUT BOND UNTIL TRIAL.

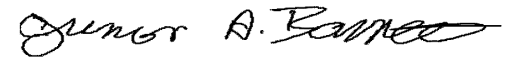
WITNESS my hand this 13TH day of April, 2018.



By: DEPUTY CLERK

DEFENDANT

NORMAN BLAKE MCKENZIE
314 NW 12TH AVE APT 5
GAINESVILLE, FL 32601



ATTORNEY FOR DEFENDANT

JUNIOR ALPHONSO BARRETT
101 SUNNYTOWN ROAD
SUITE 310
CASSELBERRY, FL 32707

CC: Bond Depositor

NOTICE REGARDING THE AMERICAN WITH DISABILITIES ACT OF 1990

In accordance with the Americans With Disabilities Act, If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please see the enclosed notice as amended per the Seventh Judicial Circuit Administrative Order #W-2010-096 for instructions or view on our website at www.clk.co.st-johns.fl.us/misc/adanotice/pdf.

Filing # 75707785 E-Filed 07/30/2018 04:09:25 PM

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL
CIRCUIT IN AND FOR ST JOHNS COUNTY, FLORIDA

CASE NO: 552006CF001864A000XX

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE
Defendant.

WAIVER OF APPEARANCE AT STATUS CONFERENCE

COMES NOW, the Defendant, NORMAN BLAKE MCKENZIE, acting with the undersigned counsel, and hereby waives his appearance at any Status Conference scheduled in this case as permitted by Florida Rules of Criminal Procedure 3.180.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 30TH day of July, 2018.

/S/ JUNIOR BARRETT

Junior Barrett, ESQUIRE
FL. Bar No. 785687
Assistant Regional Counsel
Office of Regional Criminal Conflict &
Civil Regional Counsel, 5th District
101 Sunnyside Road, Suite 310
Casselberry, FL 32707
(407) 389-5140
tcollins@rc5state.com

Hearing Notes

DATE: July 31, 2018
CIRCUIT JUDGE: H. MALTZ
STATE ATTORNEY: LEWIS
DEFENSE ATTORNEY: BARRETT
CLERK: GELL
BAILIFF: STOKES
COURT REPORTER: ANDREA GORMAN

STATE VS.: MCKENZIE, NORMAN BLAKE
CASE #: 06001864CFMA

CHARGE #: FIRST DEGREE MURDER (2 COUNTS)

ATTORNEY PRESENT ON BEHALF OF DEFT @934

COURT ADDRESSES ATTORNEY REGARDING HIS STATUS ON
MITIGATION @934

COURT ADDRESSES THE STATE ON STATUS AND DEFERS TO COURT
ON THE SCHEDULE @935

COURT CONTINUES CASE TO ANOTHER STATUS CONFERENCE @936

**IN THE CIRCUIT COURT OF THE 7th JUDICIAL CIRCUIT
ST. JOHNS COUNTY, FLORIDA**

STATE OF FLORIDA -vs- NORMAN BLAKE MCKENZIE

CASE #: 06001864CFMA
Judge: HOWARD M. MALTZ
Division: 56
Charges: Ct 1 FIRST DEGREE MURDER (FILED)
Ct 2 FIRST DEGREE MURDER (FILED)

ACKNOWLEDGMENT

I ACKNOWLEDGE THAT:

- (1) I am required to keep my current telephone number and mailing address known to my attorney and the clerk of this court at all times.
- (2) Continuation requested by _____.

Requirements:

DO NOT NEED A TRANSPORT ORDER- DEFT PRESENCE NOT NEEDED

- (3) I am personally to appear in court for:

<u>Event</u>	<u>Judge</u>	<u>Courtroom</u>	<u>Date</u>	
FELONY STATUS CONFER	MALTZ, HOWARD M.	Courtroom 328	10/12/2018	1:30 pm

FAILURE TO COMPLY WITH ANY OF THE ABOVE REQUIREMENTS MAY RESULT IN A CAPIAS FOR MY ARREST AND INCARCERATION WITHOUT BOND UNTIL TRIAL.

WITNESS my hand this 31ST day of July, 2018.



By: DEPUTY CLERK

DEFENDANT

NORMAN BLAKE MCKENZIE
314 NW 12TH AVE APT 5
GAINESVILLE, FL 32601



ATTORNEY FOR DEFENDANT

CC: Bond Depositor

JUNIOR ALPHONSO BARRETT
101 SUNNYTOWN ROAD
SUITE 310
CASSELBERRY, FL 32707

NOTICE REGARDING THE AMERICAN WITH DISABILITIES ACT OF 1990

In accordance with the Americans With Disabilities Act, If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please see the enclosed notice as amended per the Seventh Judicial Circuit Administrative Order #W-2010-096 for instructions or view on our website at www.clk.co.st-johns.fl.us/misc/adanotice/pdf.

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

_____ /

ORDER SCHEDULING PENALTY PHASE TRIAL

This matter is before this Court for resentencing on Counts I and II (First Degree Murder), pursuant to this Court's Order Granting Defendant's Successive Motion to Vacate Death Sentence, pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, 577 U.S. ____; 136 S.Ct. 616 (2016). *See also Mosley v. State*, 209 So.3d 1248, 1283 (Fla. 2016); *Asay v. State*, 210 So.3d 1 (Fla. 2016) (establishing the retroactivity of *Hurst* rulings to Defendants whose death sentences became final after the issuance of the opinion in *Ring v. Arizona*, 536 U.S. 584 (2002)).

Accordingly, it is ORDERED AND ADJUDGED that

1. This matter shall be scheduled for a penalty phase jury trial to commence with jury selection on March 25, 2019 at 9:00 a.m. Immediately upon completion of jury selection, the penalty phase trial will begin.

2. The parties have indicated they will be ready for the penalty phase trial at that time, and that it should take no longer than one week to conduct the penalty phase trial, including jury selection.

3. The Clerk of Court is ordered to separately issue a sufficient number of juror summons to assure 60 prospective jurors are available for voir dire on March 25, 2019.

4. Voir dire in this case will take place in courtroom 264. Once voir dire is completed the trial will commence in courtroom 328.

5. This matter is scheduled for a status conference on October 12, 2018 at 1:30 p.m. and a hearing scheduled on all pending motions and status conference on November 28, 2018 at 9:00 a.m.

6. The parties shall file all motions no later than November 21, 2018. Copies of the motions shall be delivered to the judge's chambers no later than that date.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 23 day of August, 2018.

A handwritten signature in black ink, appearing to be "John H. J.", is centered on the page.

CIRCUIT JUDGE

Conformed copies to:
Jason Lewis, Asst. State Attorney
Junior Barrett, Esq., Defense counsel
Jury Coordinator, St. Johns County Clerk of Court
Court Reporter; Stenographers@circuit7.org

Hearing Notes

DATE: October 12, 2018
CIRCUIT JUDGE: MALTZ
STATE ATTORNEY: JOHNSON
DEFENSE ATTORNEY: BARRETT
CLERK: GELL
BAILIFF: STOKES
COURT REPORTER: RHONDA BOUNDS

STATE VS.: MCKENZIE, NORMAN BLAKE
CASE #: 06001864CFMA

CHARGE #: FIRST DEGREE MURDER (X2)

STATUS CONFERENCE

COURT ADDRESSES BOTH PARTIES ON HOW THEY ARE COMING
ALONG WITH THE CASE @140

STATE TO DO TRANSPORT ORDER FOR DEFT TO BE HERE BY THE
NEXT HEARING @142

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

_____ /

ORDER TO TRANSPORT

THIS CAUSE having come before this Court and being fully advised in the premises, it is,

ORDERED:

That authorities with the DEPARTMENT OF CORRECTIONS shall deliver custody of the Defendant, **NORMAN BLAKE MCKENZIE; DC#: 648711; W/M; DOB: 07/08/1964;** to the Sheriff of St. Johns County, and further that the Sheriff of St. Johns County shall keep said Defendant in close custody and have the Defendant present before the undersigned in courtroom 328, of the Richard O. Watson Judicial Center, St. Augustine, Florida, on **November 28, 2018 at 9:00 a.m.**, for the purpose of HEARING AND STATUS CONFERENCE, until such time that the above-styled case has been concluded, and the Defendant returned to the custody of the DEPARTMENT OF CORRECTIONS.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 12 day of October, 2018.



CIRCUIT JUDGE

Copies to:
K. Mark Johnson, Asst. State Attorney
Junior A. Barrett, Esq.
St. Johns County Sheriff's Office, Transportation

Filing # 79525417 E-Filed 10/18/2018 12:34:34 PM

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION FOR JUROR QUESTIONNAIRE
TO SUPPLEMENT VOIR DIRE**

COMES NOW the Defendant, Norman Blake McKenzie, by and through his undersigned attorney, respectfully moves this Honorable Court pursuant to Rule 3.300, Florida Rules of Criminal Procedure, to order that voir dire in this cause be supplemented by a juror questionnaire submitted for completion to each prospective juror. The Defendant asserts the following grounds in support of this Motion:

1. Defendant's case is back for resentencing as a result of the Florida Supreme Court's decision in **Hurst v. Florida**, 202 So. 3d 40 (2016).
2. The state has filed a renewed Notice of Intention to Seek the Death Penalty.
3. Allowing juror questionnaire to be used to supplement voir dire will permit, inter alia, the attorneys to focus their questions and inquiries as well as allow the potential jurors to give more reflective thoughts to inquiries and questions without the added pressure of worrying about other jurors' reactions to those responses.

4. Allowing questionnaires also permits those jurors who may be less inclined to be more open to do so without having to verbalize their position to questions and inquires on areas that may be considered by them to be personal and/or sensitive.

5. **Hurst** makes it even clearer of the need to carefully interview, screen and select jurors to find jurors who can be faithful to their positions and the law even if faced with the pressure of other jurors who may try to unduly influence their vote.

6. The issues involve in selecting a jury for resentencing is narrower than one that would decide guilty or innocence in addition to life without the possibility of parole or death ergo the inquire into whether or not a jury can be fair and impartial in determining the ultimate issue as to whether Defendant should live or die can only be enhanced if jurors are free to respond to questions without the presence and influence of other jurors.

7. To deny this Motion will deny the Defendant the right to due process, a fair trial, and an impartial jury as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 9 and 16, Florida Constitution.

WHEREFORE, the Defendant, Norman Blake McKenzie, respectfully requests this Honorable Court to supplement the voir dire examination with the attached questionnaire and preliminary instruction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service

delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this
18th day of October, 2018.

/S/ JUNIOR BARRETT

JUNIOR BARRETT, ESQUIRE
FL. Bar No. 785687
Assistant Regional Counsel
Office of Regional Criminal Conflict &
Civil Regional Counsel, 5th District
101 Sunnyside Road, Suite 310
Casselberry, FL 32707
(407) 389-5140
tcollins@rc5state.com

Filing # 79525417 E-Filed 10/18/2018 12:34:34 PM

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO DECLARE FLORIDA'S CAPITAL SENTENCING SCHEME
UNCONSTITUTIONAL AS VIOLATIVE OF THE EIGHTH AMENDMENT,
CORRESPONDING ARTICLE I, SECTION 17 FLORIDA CONSTITUTION, AND
EVOLVING STANDARDS OF DECENCY AND INCORPORATED MOTION TO TAKE
JUDICIAL NOTICE**

COMES NOW, the Defendant, Norman Blake McKenzie, through the undersigned counsel, and moves this Court pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article, 1, Section 9 and 17 of the Florida State Constitution and other applicable law to bar the death sentence as violative of the constitutional provisions cited *supra*, and in light of the overwhelming evidence that Florida's Death Penalty Statutory Scheme encompassing, but not all inclusive of Florida Statute section 921.141 (as amended March 2017), violates societies evolving standards of decency. Further, Defendant requests this Court take judicial notice of Justice Breyer's dissenting opinion in ***Glossip v. Gross***, 135 S. Ct. 2726, 2755-80 (2015), pursuant to Florida Evidence Code 90.202. In support, counsel states the following:

1. Defendant was previously convicted of two counts of First Degree Capital Murder and is set for resentencing.
2. The State filed a Renewed Notice of Intent to Seek the Death Penalty and list of aggravating factors on or about August 28, 2017.

**SOCIETIES EVOLVING STANDARDS OF DECENCY DECLARE FLORIDA'S
DEATH PENALTY SCHEME UNCONSTITUTIONAL**

The criminal punishment of death is a vast area of law that captures our societies evolving standards of decency. In 1977, the Supreme Court held death to be an impermissibly excessive punishment for the rape of an adult woman. *Coker v. Georgia*, 433 U.S. 584, 593-596, 97 S. Ct. 2861, 53 L.Ed.2d (1977). Equally, applying the Eighth Amendment analysis, the U.S. Supreme Court ruled that the execution of the mentally retarded, now regarded as "intellectually disabled," and that of juveniles, was prohibited due to evidence of a decline in death verdicts for those groups around the country and a trend in state legislatures of exempting those groups from eligibility for the death penalty. *Atkins v. Virginia*, 122 S. Ct. 2242 (2002) (holding that the executions of mentally retarded criminals was cruel and unusual punishment and prohibited by Eighth Amendment pursuant to currently prevailing standards); *Roper v. Simmons*, 543 U.S. 551 (2005)¹ (after considering evolving standards of decency, held it was cruel and unusual within the meaning of the Eighth Amendment, held children are constitutionally different because of their "lack of maturity and underdeveloped sense of responsibility").

¹ There is a current movement to expand the ruling in *Roper* from 18 years of age to that of 25 years of age based upon neuroimaging studies that demonstrate the adolescent brain continues to mature well into one's 20's up to the age of 25 years of age.

In recent years, there has been a general decline of public support for the death penalty, a precipitous decline in death sentences by juries and an increasing moratorium for one reason or another based upon constitutional infirmities of various death penalty schemes or total eradication of the death penalty by state legislatures. This general societal decline in support for the death penalty is clearly delineated in the approximate 200 prisoners on death row based upon *non-unanimous* death recommendations, which are now making their way through Florida's criminal justice system for resentencing in light of the Court's ruling in **Hurst v. State**, 202 So.3d 40 (201).²

Texas and Georgia's death penalty statutes were struck down as being unconstitutional as constituting cruel and unusual punishment in violation of the Eighth and Fourteenth amendments. **Furman v. Georgia**, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The *Furman* court's decision resulted in the invalidation of death penalty statutes in 26 states, including Florida's death penalty statute. While many state legislatures reinstated their death penalty schemes after **Furman's** moratorium in the mid 1970's, there are currently 19 states (Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, and the District of Columbia), which have abolished the death penalty. Delaware was added to this list on August 2, 2016, when the Delaware Supreme Court struck down its death penalty

² Resentencing is, of course, dependent upon the date one's conviction became final. *Hurst* only applies to condemned prisoners whose conviction and sentence became final after June 24, 2002, the date of *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002). There is pending legislation seeking to make *Hurst* retroactive in spite of the Florida Court's ruling in *Asay v. State*, 210 So. 3d 1 (Dec. 22, 2016). See 2018 S.B. 870 (amending Florida Statute section 921.141 to include new subsection (9), which reads in part: The Legislature finds that the court's decision not to apply *Hurst v. State* in the cases of inmates whose death sentences became final before June 24, 2002, will result in a *miscarriage of justice* for those inmates.

procedures as unconstitutional. **Rauf v. Delaware**, 145 A.3d 430 (Del. 2016).³ In reality, the recent trend demonstrates that the death penalty undermines the dignity of human life it so desperately seeks to protect and has become a punishment in name only.

The use of the death penalty is also now confined to a minority of counties.⁴ In 2012, a review of 3,000 counties in the United States showed 35% of the country's death sentences came from nine counties. "These nine counties represent less than 1% of the counties in the U.S. and less than 1% of the counties with the death penalty in the U.S."⁵ As of July 2012, the southern states defined by the federal government as a region bound on the outer edge by Texas up to Virginia have been responsible, since 1976, for 82% of the executions; over half of these 1,065 executions have been in Texas and Virginia (591). The death penalty in America is a uniquely southern practice and the South, alone, does not represent the nation's standards of decency.

A scan of recent media is also illuminating. On March 15, 2017, Florida State Attorney Aramis Ayala of the Ninth (9th) Judicial Circuit covering Orange and Osceola counties in central Florida announced that her office would no longer pursue the death penalty. Ayala stated that the death penalty is overly expensive, slow, inhuman and does not increase public safety and announced that her office would not seek the death penalty in a high-profile murder case in which a man was accused of killing his pregnant

³ Delaware's death penalty scheme was deemed violate of the Sixth Amendment for the same reasons expressed in *Hurst. Id. Rauf* at 433

⁴ Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B. U. L. Rev. 227, (2012).

⁵ Death Penalty Information Center, *The Clustering of the Death Penalty*.

<http://www.deathpenaltyinfo.org/clustering-death-penalty>. The nine counties are: CA, Los Angeles (6), Riverside (4); NV, Clark (3); TX, Dallas (2), Tarrant (2); GA, Newton (2); FL, Sumter (2), Polk (2), Duval (4).

girlfriend, gunning down an Orlando police officer and triggering a massive manhunt. As a result of Ayala's public rebuke of Florida's Death Penalty, Governor Rick Scott, pursuant to his authority under Florida statute section 27.14(1) (2017), and Article IV, section 1(a), of the Florida Constitution, issued several executive orders reassigning the prosecution of "death-penalty eligible" cases to State Attorney Brad King of the Fifth Judicial Circuit. **Ayala v. Scott**, 224 So.3d 755, 756 (Fla. 2017). Ayala petitioned the Florida Supreme Court for a *writ of quo warranto* challenging Governor Rick Scott's authority of reassignment. In a 5-2 decision, the Florida Supreme Court held the Governor had not abused his broad discretion and held the executive reassignment orders did not exceed his authority. *Id* at 760.

Ayala was not the first public officer to express a general distain for the death penalty. For instance on June 20, 2013, the Oregon Supreme Court upheld Governor John Kitzhaber's legal authority to grant a reprieve to a death-row inmate suing to be executed.⁶ In granting the reprieve, Governor Kitzhaber made the finding, and the court accepted his authority to so find, that "Oregon's application of the death penalty is not fairly and consistently applied, and I do not believe that state-sponsored executions bring justice."⁷ On June 14, 2013, six months after leaving the Ohio State Supreme

⁶ *Haugen v. Kitzhaber* (CC 12C16560; CA A152412; SC S060761), June 20, 2013.

⁷ Previously in 2011 Governor Kitzhaber issued a moratorium on all executions for the remainder of his term. Governor John Kitzhaber, Press Release: November 22, 2011, http://www.oregon.gov/gov/media_room/pages/press_releasesp2011/press_112211.aspx. Governor Kitzhaber based his decision in large part on this emerging consensus: "Courts (and society) continue to reinterpret when, how and under what circumstances it is acceptable for the state to kill someone. Over time, those options are narrowing. Courts are applying stricter standards and continually raising the bar for prosecuting death penalty cases. Consider that it was only six years ago that the U.S. Supreme Court reversed itself and held that it is unconstitutional to impose capital punishment on those under the age of 18. For a state intent on maintaining a death penalty, the inevitable result will be bigger questions, fewer options and higher costs."

Court, during a tenure in which 49 men were executed, Justice Evelyn Stratton announced that she no longer supported capital punishment stating, “I have evolved to where I don’t think the death penalty is effective.”⁸ On May 22, 2013, Colorado Governor John Hickenlooper granted a “temporary reprieve” to a man scheduled for execution because “Colorado’s system of capital punishment is imperfect and inherently inequitable.”⁹

The myriad no-unanimous Florida jury decisions, legislative acts, and examples of public opinion referenced above all provide evidence that the death penalty no longer accords with the evolving standards of decency in our society. As such, based upon our societies evolving standards of decency, the Capital Sentencing Scheme in Florida is draconian and is no longer a true sentiment of its constituents, making its implementation unconstitutional under the Eighth Amendment of the United States Constitution and corresponding Article I, Section 17 of the Florida Constitution.

FLORIDA'S DEATH PENALTY SCHEME VIOLATES THE EIGHTH AMENDMENT AND CORRESPONDING ARTICLE I, SECTION 17 OF FLORIDA CONSTITUTION

Florida's death penalty scheme entered a downward tailspin with the ruling in **Hurst v. Florida**, 136 S.Ct. 616 (2016) wherein Florida's "hybrid" capital sentencing scheme, under which an advisory jury makes a recommendation to a judge, and the

⁸ Columbus Dispatch, “Former Judge Stratton Says She’s Now Opposed to Death Penalty,” <http://www.dispatch.com/content/stories/local/2013/06/13/Former-Justice-Stratton-says-shes-against-death-penalty.html>

⁹ Denver Post, “Nathan Dunlap Granted “Temporary Reprieve” by Governor,” http://www.denverpost.com/breakingnews/ci_23299865/nathan-dunlap-temporary-reprieve-from-governor

judge makes the critical findings needed for imposition of a death sentence, was held to violate ones Sixth Amendment Right to a trial by jury. *Id.* The ruling was based upon the long elucidated and well-reasoned ruling in **Ring v. Arizona**, 122 S.Ct. 2428 (2002). What remains resolute in our ever-evolving society is one's Eighth Amendment Right *against* cruel and unusual punishment that reads:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Florida's Constitution, Article I, Section 17:

Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court, which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

The issues raised herein are not novel legal concepts and were more-or-less spawned from Justice Steven's memorandum in **Lackey v. Texas**, 514 U.S. 1045, 1045-1046, 115 S.Ct. 142, 131 L.Ed.2d 304 (1995), wherein a death row inmate sought petition for certiorari raising whether or not his seventeen (17) year stretch on death row violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* The Court denied the petition; however, Justice Stevens addressed his concerns about the continued constitutionality of the death penalty. More specifically, Justice Stevens opined that the Court

in **Gregg v. Georgia**, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), held that the Eighth Amendment does not prohibit the death penalty, but rested the decision upon the death penalty serving two principal social purposes: that of retribution and deterrence. *Id.* **Gregg**, at 183, 986 S.Ct., at 2929-30. These two societal penological purposes are now far gone.

This issue was also raised by the various proponents against execution by electrocution. Our Florida Supreme Court held in **Jones v. State**, 701 So.2d 76, 79 (Fla. 1997), that "[i]n order for a punishment to constitute cruel or unusual punishment, it must involve 'torture or a lingering death' or the infliction of unnecessary and wanton pain.'" (*citing Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d (1976)). The crucial question quite often has been determined on an as applied basis and is typically developed *post-conviction* because of how much an individual inmate may suffer because of the method of execution.

As our society has advanced, it has shown its increasing discomfort with the imposition of the various methods of execution and our inquisition as to whether or not the punishment of death, in today's society truly provides that of retribution to the society and victims, and deterrence. In the past, it was common for a condemned inmate to be hanged, shot, killed with cyanide gas, or electrocuted. As our standards evolved and society matured, we, as a society, have determined those methods of execution violated our standards of decency. The rejection of nooses, bullets, gas and electricity showed not only discomfort with the method of execution, but also the death penalty itself. Moreover, the judicial process has not made retribution to society and the victims obsolete. By the time a "guilty" capital prisoner is executed, retribution has been delivered three-fold through his or her time on death row. Retribution to the victims has

turned into dual torment through the up and down rollercoaster of collateral review, mandates of reversal, new trials, stays of execution, new sentencing phases, and the cancellation of executions based upon an inability to carry out the execution.¹⁰ Which begs the question, *who* is the Government truly providing retribution and punishment *to*?

The vast majority of jurists fail to focus on the pre-execution procedure when analyzing ones Eighth Amendment protections and attendant due process claims. While one might argue that the current method of execution in Florida is inhumane, cruel and unusual, and statistically, it appears to be just so, the courts should also concentrate on the experience of the condemned prisoners *on* death row. Physical pain has always garnered more sympathy and empathy from others than psychological upset. This psychological versus physical pain dichotomy is often seen in cases of child neglect and abuse. Many children suffer the throws of psychological and emotional abuse without recourse. It is only when *physical* evidence of abuse surfaces, i.e., bruises, scars and the like, that state agencies and law enforcement take note, and quite often their attention is too late.

While much litigation has focused on the manner of execution, the more daunting judicial task should focus on the torturous effects of simply being a capital prisoner on death row, especially in light of the even more exhausting collateral judicial reviews of capital prisoners. After all, while execution is the ultimate punishment, by design the

¹⁰ Florida. Alva Campbell (11-15-2017): Lethal Injection execution cancelled after four failed attempts to find a suitable vein.; Alabama. Ronald Bert Smith, Jr. (12-8-2016): Lethal Injection execution with controversial sedative Midazolam wherein Smith heaved, gasped and coughed while struggling to breath for 13 minutes after administration of drugs.; Georgia. Brandon Jones (2-3-2016): Legal Injection execution wherein executioners spent 32 minutes unsuccessfully trying to insert an IV into Jones' arms. Physician was asked to violate medical ethics for assistance and spent 13 minutes stitching an IV near Jones' groin before his death.

punishment begins well before ones proverbial condemned death walk to their government-sanctioned execution. If punishment can violate the Eighth Amendment only upon a showing of "torture or a lingering death" or the "infliction of unnecessary and wanton pain," then surely the time is ripe for such challenges to our State's dysfunctional capital punishment. *Id. Georgia* 428 U.S. 153.

Justice Stephen Breyer's and Justice John Paul Stevens' concerns with the combination of "uncertainty of execution and long delay" in capital proceedings as "arguably cruel" was expressed in **Foster v. Florida**, 123 S.Ct. 470, 154 L.Ed.2d 359 (2002). In **Foster**, the Court denied a Petition for Certiorari to the Supreme Court of Florida, wherein *Foster* spent more than 27 years in prison since his initial sentence of death. *Foster's* death warrant was issued twice, was given three judicial reprieves and ultimately punished "by death and . . . by more than a generation spent in death row's twilight." *Id.* Indeed, statistically, years spent on death row are now reaching double and triple decades.¹¹

Nearly all of condemned prisoners spend their time on death row in isolation for 22 or more hours per day. *Infra Glossip*, 135 S. Ct. 2726, 2755 (citing *American Civil Liberties Union (ACLU), A death Before Dying; Solitary Confinement on Death Row* 5 (July 2013)). This occurs, even though the American Bar Association on Criminal Justice Standards suggests that inmates on death row be housed in conditions similar to that of general population. *Id.* (**Glossip**, Breyer, J., citing *ABA Standards for Criminal Justice: Treatment of Prisoners* 6 (3d ed. 2011)). The extent of the dehumanizing effects

¹¹ According to Florida Department of Corrections "Execution List" from 1976-present, Florida shows from 2010-2017, at least twenty (20) death row inmates awaiting execution for at least two (2) decades. [www. http://www.dc.state.fl.us/oth/deathrow/execlist.html](http://www.dc.state.fl.us/oth/deathrow/execlist.html) (October 31, 2017) Michael Lambrix, of whom was executed on March 23, 2017 awaited his execution for thirty-three (33) years. Mark Asay and Jerry W. Correll both stood at death's door for twenty-nine (29) years. Notably, Thomas Knight aka Askari Muhammad waited thirty-nine (39) years. *Id.*

of solitary confinement is poignantly explained by Justice Breyer in *Glossip*, and the undersigned requests this court take judicial notice of same pursuant to Florida's Evidence Code section 90.202, as if full incorporated herein. (See **Glossip v. Gross**, 135 S. Ct. 2726 (2015) and Fla. Admin. Code §§33-601.830 (2016)).¹²

In 2015, in **Glossip v. Gross**, 135 S.Ct. 2726, 192 L.Ed.2d 761 (June 16, 2015), Justice Breyer with Justice Ginsburg joining in dissent, addressed the continued constitutionality, as written, application of the death penalty and addressed the cruelty based upon the lack of reliability, its arbitrariness, and the "excessively long periods of time individuals typically spend on death row, *alive* but under sentence of death. *Id.* at 2755-73.

This very concern emerged again as recently as November 17, 2017, in **Jefferson Dunn, Comm. Ala. Dept. of Corrections v. Vernon Madison**, --U.S. --- (2017); 27 Fla. L. Weekly Fed. S2, (Nov. 17, 2017). Justice Breyer continued his now seemingly methodical attempt at illustrating one of the obvious difficulties with the administration of the death penalty and again +called for a reconsideration of the constitutionality of the death penalty itself. *Id.*

Vernon Madison, more than 30 years ago, was convicted for shooting a law enforcement officer execution style, was found guilty of capital murder, and sentenced to death. In 2016, Madison petition the trial court to suspend his death sentence because he had become incompetent to be executed. *Id.* Madison's petition was denied because the trial court held pursuant to **Ford v. Wainwright**, 477 U.S. 399 (1986), and **Panetti v. Quarterman**, 551 U.S. 930 (2007), that he suffered from a mental illness, which deprived him of the mental capacity to rationally understand that

¹² Death Row inmates are housed in solitary confinement. Death Row inmates are allowed to a minimum of six hours per week of exercise out doors and are allowed one-hour weekly visitations.

he is being executed as a punishment for a crime. *Id.* The trial court concluded that Madison "understands that he [was] going to be executed because of the murder he committed." *Id.*

Madison filed a petition for writ of habeas corpus in Federal District Court, and the District Court agreed. The Eleventh Circuit Court, however, reversed because in their view, it was "undisputed fact that Madison 'has no memory of his capital offense,' it [must] inescapably follow that he 'does not rationally understand the connection between his crime and his execution.'" 851 F.3d at 1185-1186. The United States Supreme Court issued a *per curiam* opinion reversing the Eleventh Circuit Court of Appeals. However, Justice Breyer again, true to form, took the opportunity, along with Justice Ginsburg, to redirect the Court to focusing on reconsideration of the constitutionality of the death penalty itself, rather than developing case-by-case constitutional jurisprudence. *Id.*

Madison lived half of his life on death row. During his time on death row, he suffered severe strokes, which caused vascular dementia and numerous other significant physical and mental problems. He was legally blind, his speech was slurred, he was incontinent and could not walk independently. *Id.* As Justice Breyer and Ginsburg corrected noted, Madison's condition is one of many 'growing in number' of aging condemned death row inmates. *Id.*

Additionally, on November 15, 2017, Ohio called off the execution of a gravely ill and physically debilitated death -row prisoner, 69 year old Alva Campbell¹³, after his execution failed. Execution personnel failed in four attempts to find a vein for the IV line

¹³ Ironically, Campbell petitioned the Federal Court to allow him to be executed by firing squad.

and Mr. Campbell was granted a temporary reprieve. The execution was delayed for nearly an hour as executioners assessed his veins, used ultra-violet lights to probe his arm for veins, sticking him twice in his right arm, once in his left arm and once in the leg. Mr. Campbell's execution was rescheduled and is set for June 5, 2019.

The Court along with Florida's Supreme Court invariably agree a punishment of death is different than other punishments, even to that of Life in Prison. Moreover, our Constitution provides that the United States apply the death penalty consistent with the Constitution of the United States. It appears that our death penalty is not and cannot be applied in accordance with the Constitution of the United States and is thus unconstitutional both as written and as applied.

The Florida Supreme Court requires that this Court be given an opportunity "at an early stage in the proceedings" to correct such constitutional error. Implicit in that requirement is that this Court has the power to grant relief. If not, then the "preservation" requirement is irrational and a denial of Due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

In conclusion, one's constitutional right cannot be substituted or interchanged for a distinctive constitutional deprivation. Constitutional rights should be applied and act in uniformity. Accordingly, because Florida's death penalty is constitutionally invalid as set forth above, Defendant objects to Florida's death penalty statute, to the procedures used in the prosecution of this case, to "death qualification" of the jury, and to imposition of any sentence

other than life imprisonment. All objections based upon the United States Constitution and the Constitution of Florida previously and hereafter made by counsel for Defendant are adopted into this objection and memorandum of law.

WHEREFORE, the Defendant, Norman McKenzie, through his undersigned counsel of record requests this Honorable Court enter an Order declaring Florida's Death Penalty Scheme Unconstitutional both as applied and as written, and further hold such Unconstitutional based upon United States Constitution and the Constitution of Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

/S/ JUNIOR BARRETT

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

MOTION TO COMPEL DISCLOSURE OF MITIGATING CIRCUMSTANCES

COMES NOW, the Defendant, Norman Blake McKenzie, by and through his undersigned attorney, pursuant to Florida Rules of Criminal Procedure 3.220 and Section 921.141, Florida Statutes, respectfully requests this Honorable Court to enter an Order compelling the State of Florida to disclose all information they have regarding the mitigating circumstances that exist in the above-styled cause.

As grounds for this Motion, the Defendant states:

1. That Section 921.141(6), Florida Statute, lists several mitigating circumstances that might be considered regarding imposition of the death penalty in the above-styled cause.

2. That both the Florida Supreme Court and the United States Supreme Court have ruled that the number of mitigating circumstances that may be available to a defendant charged with a capital murder is unlimited and not restricted to those just listed in the statute.

3. That the Office of the State Attorney, having been given greater resources by the Legislature to investigate and prepare cases than the Office of the Public Defender, is in a better position to disclose and to discover through the course of their investigation mitigating circumstances that might be available to the Defendant.

4. That the Office of the State Attorney is required by the Rules of Criminal Procedure and by the standards of Due Process as announced by the United States Supreme Court and the Florida Supreme Court to reveal all favorable evidence to the defendant prior to trial.

5. That the Defendant's investigation and preparation of the case in anticipation of the State seeking the death penalty in the above-styled cause would be more efficient, more orderly, and said investigation and preparation would be expedited by the State having disclosed to counsel for the Defendant all information they have that might be used as mitigating circumstances in the above-styled cause.

6. That the Defendant would be denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Florida Constitution should he not be afforded this information.

7. That the Defendant would be denied his right to be informed of the nature of the accusation as guaranteed by his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Florida Constitution should he not be afforded this information.

8. That the Defendant would be denied his right to a jury trial as governed by the standards of due process as guaranteed by the Sixth and Fourteenth Amendments to

the United States Constitution and Article I, Section 22 of the Florida Constitution should he not be afforded this information.

9. That should the Defendant not be afforded this information, he might be forced to waive his right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution.

10. That should the Defendant not be afforded this information, he would be denied his right against cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution.

11. That should be Defendant be afforded this information, counsel for the Defendant would devote more of his energy and time toward developing other aspects of the case which are not discoverable by the State and must be prepared by counsel.

WHEREFORE, the Defendant, Norman Blake McKenzie, respectfully requests this Honorable Court to enter an Order compelling the State of Florida to disclose all favorable evidence they have regarding not only the guilt/innocence phase of the trial in the above-styled cause, but all favorable evidence including mitigating circumstances which may be used in the penalty phase should the State seek the death penalty in the above-styled cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

/S/ JUNIOR BARRETT

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

MOTION FOR DISCLOSURE OF PENALTY PHASE EVIDENCE

COMES NOW the Defendant, Norman Blake McKenzie, by and through his undersigned attorney, moves this Honorable Court for an Order requiring that the State of Florida disclose to defense counsel and permit defense counsel to inspect, copy, test and photograph, the following information and material within the State's possession or control as they relate to the issue of penalty phase:

A. The names and addresses of all persons known to the prosecutor to have information that may be relevant to the issue of punishment in this cause.

B. Statement of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein means a written statement made by said person and signed or otherwise adopted or approved by him or a stenographic, mechanical, or electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital or an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such

oral statements.

C. Any written or recorded statement and the substance of any oral statements made by the Defendant, including a copy of any statement contained in police reports or report summaries, together with the name and address of each witness to the statement.

D. Any written or recorded statements and the substance of any oral statements made by a co-defendant if the trial is to be a joint one.

E. Those portions of recorded Grand Jury minutes that contain testimony of the Defendant.

F. Any tangible papers or objects, that were obtained from or belonged to the Defendant.

G. Whether the State has any information that has been provided by a confidential informant.

H. Whether there has been any electronic surveillance, including wiretapping, of the premises of the Defendant, or of conversations to which the Defendant was a party; and any documents relating thereto.

I. Whether there has been any search or seizure and any documents relating thereto.

J. Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

K. Any tangible papers or objects which the prosecuting attorney intends to use in the penalty phase hearing and which were obtained from or belonged to the

Defendant.

L. Any material information within the State's possession or control, which tends to negate the guilt of the Defendant as to the offense charged.

M. Any material information within the State's possession or control that tends to negate or assist the defense with respect to the aggravating circumstances of Section 921.141, Florida Statutes (1983).

N. Any material information within the State's possession or control that tends to assist or otherwise help the Defendant in preparing mitigating circumstances pursuant to Section 921.141, Florida Statutes (1983).

O. Any material information within the State's possession or control, which tends to assist or otherwise help the Defendant in preparing mitigating circumstances not specifically listed in Section 921.141, Florida Statutes (1983).

As grounds for this Motion, the Defendant would allege as follows:

1. The Defendant in this above-styled cause is charged by Indictment with Murder in the First Degree, a capital offense, Kidnapping and Sexual Battery.

2. The Defendant has been declared indigent and the Office of the Public Defender has been appointed to represent him.

3. Disclosure of the above-styled information is required by Florida Rule of Criminal Procedure 3.220.

4. Disclosure of the above-styled information is required pursuant to Section 921.141, Florida Statutes (1983).

5. Disclosure of the above-styled information is required by Article I, Sections 1, 2, 9, 16, 17, 21, and 22, Florida Constitution.

6. Disclosure of the above-styled information is required pursuant to Articles V, VI, VIII, and XIV, United States Constitution.

WHEREFORE, the Defendant, Norman Blake McKenzie, moves this Honorable Court enter its Order requiring the State Attorney to disclose to defense counsel the above-styled information and permit defense counsel to inspect, copy, test and photograph those materials as they relate to the issue of penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION FOR DISCOVERY OF PROSECUTORIAL
INVESTIGATIONS OF PROSPECTIVE JURORS**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned attorney, respectfully moves this Honorable Court to order the prosecuting attorney to make available to the defense any background investigation of prospective jurors that has been performed by the State Attorney's Office and as grounds therefore would allege as follows:

1. Defendant was previously convicted on two counts of First Degree Murder and is present before this Honorable Court for resentencing based upon the **Hurst v. State**, 202 So.3d 40 (2016).

2. It is the practice of some State Attorney's Offices to do a background investigation of prospective jurors, including but not limited to criminal histories, through their own investigation and with the assistance of law enforcement.

3. For the defense to duplicate the investigation of the State Attorney's Office and law enforcement in this regard would be both costly and time consuming and would

require funds not available to an indigent defendant through the Public Defender's Office.

4. To deny the defense access to jury venire investigation performed by the State Attorney's Office is to give the prosecution an unfair advantage in jury selection, which is an all-important aspect of every criminal trial.

5. Denial of access therefore violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Section 9, 16, 17 and 22 of the Florida Constitution. See *People v. Murtishaw*, 631 P.2d 446 (Cal. 1981).

WHEREFORE, Defendant, Norman Blake McKenzie, requests this Court order the prosecuting attorney to make available to the defense any background investigation of prospective jurors that has been performed by the State Attorney or law enforcement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email delivery to Office of the State Attorney, eservicesjohn@sa7.org this 18th day of October, 2018.

/s/ JUNIOR BARRETT

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO EXCLUDE EVIDENCE OR ARGUMENT DESIGNED
TO CREATE SYMPATHY FOR THE DECEASED**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned attorney and hereby moves this Honorable Court to prohibit evidence or argument designed to create sympathy for the deceased, including, but not limited to, the impact of the offense on the friends and/or family of the deceased, the impact of the offense on the community, the life history of the deceased, or any personal characteristics of the deceased. He would further move the Court to prohibit such evidence or argument in the guilt-innocence phase, the penalty phase before the jury, and sentencing before the judge. As grounds, he would state:

1. Florida law has consistently held that evidence designed to create sympathy for the deceased is inadmissible in the guilt/innocence phase. The Florida Supreme Court recently reaffirmed this line of cases in **Jones v. State**, 569 So.2d 1234 (Fla. 1990). See also **Lewis v. State**, 377 So.2d 640 (Fla. 1979); **Rowe v. State**, 120 Fla. 649, 163 So.2d (1985); **Ashmore v. State**, 214 So.2d 67 (Fla.1st DCA 1968);

Hathaway v. State, 100 50.2d 682 (Fla. 3d DCA 1958). Florida law has consistently prohibited such evidence in the guilt-innocence phase of any trial (capital or otherwise). This type of evidence is not relevant to any issue in the guilt-innocence phase. It is virtually always highly inflammatory and prejudicial. Assuming *arguendo*, that such evidence is relevant, its prejudice outweighs any possible probative value. **Fla. Stat.** 90.403. The admission of such evidence would violate McKenzie's fundamental rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and fourteenth Amendments to the United States Constitution.

2. The admission of evidence concerning the deceased or the circumstances of the offense are also inadmissible under Florida law at the penalty phase or before the judge. **Fla. Stat.** 921.141 specifically limits the prosecution to the aggravating circumstances listed in the statute. None of these aggravating circumstances related to the character or personal characteristics of the deceased or the impact of the death on the friends and family of the deceased. The Florida Supreme Court has recognized that the statutory limit on aggravating circumstances forbids the introduction of this kind of evidence. **Grossman v. State**, 525 So.2d 833 (Fla. 1988).

Florida's death penalty statute, section 921.141, limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute. §921.141(5). The impact of the murder on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence. **Blair v. State**, 406 So.2d 1103 (Fla.1981); **Miller v. State**, 373 50.2d 882 (Fla.1979); **Riley v. State**, 366 So.2d 19 (Fla.1978).525 So.2d at 842

This type of evidence is inadmissible, as it does not fall within any of the statutory aggravating circumstances.

3. The Florida Supreme Court has specifically disapproved the introduction of this kind of evidence before the judge alone. **Grossman, supra; Patterson v. State**, 513 So.2d 1257, 1263 (Fla. 1978); **Owen v. State**, 560 So.2d 207, 211 (Fla.1990).

4. **Fla. Stat.** 921.143 does not allow this type of evidence in capital cases. Although this statute allows the victim or next of kin to speak at sentencing, the Florida Supreme Court has specifically held in **Grossman, supra**, that this statute does not apply to capital cases. 525 So.2d at 842. The Court stated:

Accordingly, we hold that the provisions of section 921.143 are invalid insofar as they permit the introduction of victim impact evidence as an aggravating factor in death sentencing. *Id.* (Footnotes omitted).

5. The prosecution may attempt to argue that **Payne v. Tennessee**, 111 S.Ct. 2597 (1991) somehow authorizes the introduction of this type of evidence. Nothing could be further from the truth. First, it must be noted that **Payne** only deals with whether "the Eighth Amendment bars victim impact evidence during the penalty phase of a capital trial." *Id.* at 2601. There is nothing in the opinion that indicates that the admission of such evidence in the guilt-innocence phase would not violate the Due Process Clause of the Fourteenth Amendment. Indeed, **Payne** itself states that in some specific circumstances the evidence can be "so unduly prejudicial" that its introduction in either phase violates the Due Process Clause of the Fourteenth Amendment. 111 S.Ct. at 2608. Secondly, **Payne** itself continues to prohibit "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence." *Id.* at 2611 n.2. Finally, **Payne**, like any United States Supreme

Court decision, merely deals with the question of whether the practice at issue violates the United States Constitution. Neither **Payne**, nor any other United States Supreme Court case, deals with the question of whether such evidence is admissible under state law.

6. Victim sympathy evidence is clearly inadmissible under Florida law. A long line of Florida cases, as detailed in **Jones, supra**, prohibits such evidence in the guilt-innocence phase. The introduction of such evidence in the penalty phase, or before the judge, would violate the clear limits on aggravating circumstances imposed by **Fla. Stat.** 921.141. **Grossman, supra**.

7. The Florida Supreme Court has implicitly recognized that **Payne, supra**, has no impact on cases such as **Jones** and **Grossman** as they are based on Florida law. In **Taylor v. State**, 583 So.2d 323 (Fla.1991), the Florida Supreme Court reversed for a new penalty phase due to the prosecutor making an argument designed to invoke sympathy for the deceased. 583 So.2d at 329-330. The Court relied on its prior opinion in **Hudson v. State**, 522 So.2d 802 (Fla. 1988), in which it held such argument to be improper "because it urged consideration of factors outside the scope of the jury's deliberation. 522 So.2d at 809. The opinion in **Taylor** was issued on June 27, 1991, the same day as **Payne, supra**. Compare 583 So.2d 323 with 111 S.Ct. 2597. The Florida Supreme Court denied rehearing without modifying the opinion, on August 20, 1991, well after **Payne**. Id. at 323. This is an implicit recognition that Florida law continues to prohibit this type of evidence at both phases and at sentencing.

8. The recent addition of **Florida Statute** 921.141(7) does not allow the introduction of this type of evidence. This is true for three separate reasons. (l) This

evidence is still irrelevant to the statutory aggravating factors. Thus, it is inadmissible as irrelevant. (2) The statute is unconstitutional under the Florida and United States Constitutions. This is true in three respects. (A) The Legislature had no authority to pass such a law as it violates the exclusive right of the Florida Supreme Court to regulate practice and procedure, pursuant to Article V, Section 2 of the Florida Constitution. (B) The statute is unconstitutional pursuant to Article I, Sections 2, 9, 17, and 21 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (C) The statute is violative of the Florida and United States Constitutions as vague and overbroad. (3) The admission of this type of evidence would render Florida's capital felony statute unconstitutional under the Florida and United States Constitutions, as it would leave the jury without any guidance as to how to evaluate this very emotional type of evidence. **Fla. Stat.** 921.141(7) does not change the traditional rule that evidence must be relevant to be admissible. The statute states:

(8) VICTIM IMPACT EVIDENCE Once the prosecution has provided evidence of the existence of one or more aggravating factors as described in subsection (6), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

This section must be read in conjunction with Section 6 of the same statute which states: "Aggravating factors shall be limited to the following" and then lists the statutory aggravators. The Florida Supreme Court has consistently held that the prosecution is limited to the statutory aggravating circumstances. **Elledge v. State**, 346 So.2d 998, 1002-1003 (Fla. 1977). The United States Supreme Court relied, in part, on this

limitation in upholding the Florida Statute in ***Proffitt v. Florida***, 96 S.Ct. 2960 (Fla. 1975). The evidence described is clearly not an aggravating circumstance. Aggravating factors are listed in a different section and this section makes clear that this evidence is admissible only after the introduction of evidence that shows an aggravating factor. The only way to read Section 8 to be consistent with Section 6 is to read it to mean that the evidence described in Section 8 is admissible *if it is relevant* to prove an aggravating circumstance. Any other reading would be contrary to the plain language of Section 6, an extensive body of Florida law, and the United States Supreme Court's opinion in ***Proffitt***.

The reasoning of ***Grossman, supra*** that Florida Statute 921.143 does not authorize the introduction of this evidence, as it is irrelevant to any statutory aggravating circumstance applies equally to Section 7. As the Court stated in ***Grossman***:

Florida's death penalty statute, section 921.141, limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute. §921.141(5). The impact of the murder on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence. Blair v. State, 406 so.2d 1103 (Fla. 1981); Miller v. State, 373 So.2d 882 (Fla.1979); Riley v. state, 366 So.2d 19 (Fla. 1978). 525 So.2d at 842

This reading of the amended version of the statute is also consistent with well-established principles of statutory construction. It is an established rule of construction that the legislature is presumed to be aware of prior interpretations of a statute.

Burdick v. State, 594 So.2d 267,271 (Fla. 1992). The legislature is also presumed to have "at least tacitly approved" the prior interpretation. *Id.* at 271. Thus, we must

presume that the legislature was aware that the Florida Supreme Court had consistently held that the prosecution is limited to the aggravating circumstances listed in Section 6. We must also presume that the "legislature at least tacitly approved" of this interpretation. The only way to interpret Section 7 and fulfill this principle is to interpret it to hold that it merely makes this evidence admissible if it is relevant to prove an aggravating circumstance or to rebut a mitigating circumstance introduced by the defense. This interpretation is also consistent with the general rule that any ambiguities in statutory construction "must be construed in the manner most favorable to the accused." **Perkins v. State**, 576 So.2d 1310, 1312 (Fla. 1991).

This evidence is not relevant to any aggravating circumstance. The only aggravating circumstance that this type of evidence could even arguably be relevant to is 921.141(6) (h) the "especially heinous, atrocious, or cruel" aggravating circumstance. However, the Florida Supreme Court has specifically rejected this argument.

Moreover, the trial court justified its finding that the murder was especially cruel by reference to a plurality of patently improper factors. These factors included the fact that the victim was married; ran the store alone; had led an honest and good life; would be missed by the community; was an immigrant who had made a good life; and was a kind and likeable man. The trial court erred by considering these factors. The lifestyle, character traits, and community standing of the victim are not relevant to the determination of whether a given homicide was especially heinous, atrocious, or cruel. In light of the facts revealed in the record on appeal, we conclude that there is no evidentiary basis for a finding that the murder was especially heinous, atrocious, or cruel.

Jackson v. State, 498 So.2d 906, 910 (Fla. 1986). It must also be noted that the opinion in **Jackson** was decided before the decision in **Booth v. Maryland**, 482 U.S. 496 (1987). The opinion was solely based on traditional state law relevancy grounds

and was not based on the U.S. Constitution.

Section 8 is also unconstitutional on a variety of grounds. First, the legislature had no authority to pass this statute as it violates Article V, Section 2(a) of the Florida Constitution. It states, in part, "The Supreme Court shall adopt rules for the practice and procedure in all courts." The Florida Supreme Court has consistently held that this provision is exclusive and that any statute that invades this prerogative is invalid.

R.J.A. v. Florence Foster, Judge _____ So.2d, _____ 17 F.L.W. S327 (Fla. June 4, 1992); **Haven Federal Savings and Loan Association v. Kirian**, 579 So.2d 730 (Fla. 1991); **State v. Garcia**, 229 So.2d 236 (Fla. 1969).

The matters at issue in Section 8 are clearly procedural.

Practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof. "***In re Florida Rules of Criminal Procedure***, 272 So.2d 65, 66 (Fla. 1972) (Adkins, J., concurring). It is the method of conducting litigation involving rights and corresponding defenses. ***Skinner v. City of Eustis***, 147 Fla. 22, 2 So.2d 116 (1941). ***Haven, supra***, 579 So.2d at 730.

The Florida Supreme Court has also recently stated: "how (a lawsuit) is to be tried in an orderly manner is procedural." ***R.J.A., supra*** at 5328. The Florida Supreme Court has relied on these principles to invalidate a wide variety of statutes, involving such topics as juvenile speedy trial (***R.J.A., supra***), severance of trials involving counterclaims against foreclosing mortgagee (***Haven, supra***), waiver of a jury trial in a capital case (***Garcia, supra***), and the regulation of voir dire examination (***In Re Clarification of Florida Rules of Practice and Procedure***, 281 So.2d 204, 205 (Fla.

1973). The statute at issue here is an attempt to regulate "practice and procedure". It deals with "the method of conducting litigation", just as surely as the regulation of voir dire, waiver of jury trial, or severance. *Haven, supra* at 732. The Florida Supreme Court has recognized that rules of evidence "may be procedural" and thus the sole responsibility of the Florida Supreme Court. *In Re Evidence Code*, 372 So.2d 1369. The Florida Supreme Court adopted the evidence code as a rule of procedure out of its concern for this constitutional provision. Section 8 violates this provision and is unconstitutional.

The Florida Constitution also requires that this type of evidence be prohibited, as it provides broader protection than the United States Constitution for the rights of a capital defendant. The Florida Supreme Court has recently noted that Article I, Section 17 of the Florida Constitution prohibits "cruel *or* unusual punishment." *Tillman v. State*, 591 So.2d 167, 169 (Fla. 1991). (This wording is in sharp contrast to the ban on "cruel *and* unusual punishment" in the Eighth Amendment to the United States Constitution.)

The Court in *Tillman* explicitly held that a punishment, in a given case, is unconstitutional under the Florida Constitution if it is "unusual" due to the procedures involved. The allowance of this sort of victim sympathy evidence would violate Article I, Section 17. The existence of this evidence would be totally random; depending upon the extent of the deceased's family and friends, and their willingness to testify. The strength of this evidence would also depend on the articulateness of the friends and family.

The admission of this evidence would also violate the Due Process Clause of Article I, Section 9 of the Florida Constitution. In *Tillman, supra*, the Court states that Article I, Section 9 holds "that death is a uniquely irrevocable penalty, requiring a more

intensive level of judicial scrutiny or process than lesser penalties." *Id.* at 169. The Florida Supreme Court's recent opinion in ***Tillman*** is clear indication that this type of evidence violates Article I, Sections 9 and 17 in a capital case, even if it is permitted in other cases.

The admission of this evidence violates Article I, Sections 9 and 17 for four interrelated reasons. First, such evidence intrudes into the penalty decision considerations that have no rational bearing on any legitimate aim of capital sentencing. Second, this proof is highly emotional and inflammatory, subverting the reasoned and objective inquiry that the courts have required to guide and regularize the choice between death and lesser punishments. Third, victim impact evidence cannot conceivably be received without opening the door to proof of a similar nature in rebuttal or in mitigation, further upsetting the delicate balance the courts have painstakingly achieved in this area. Fourth, the evidence invites the jury to impose death sentence on the basis of race, class and other clearly impermissible grounds.

This type of evidence portrays grief-stricken relatives expressing their extreme sorrow, sense of loss, and anger over their bereavement -- often in highly emotion terms. They relate somatic and psychological symptoms of distress attributed by them to the murder, such as physical ailments, effects on pregnancy, lack of appetite, sleeplessness, nightmares, fears, and depression. Frequently, too, the adult survivors describe these conditions in their children. This event has no bearing on the circumstances of the crime or the defendant. Frequently, family members were not present at the time of the killing and have no relationship with the killer. Hence, they tend to dwell upon general good character traits and achievements of the deceased.

Unintended physical, emotional and psychological after-effects on relatives do not increase the moral blameworthiness of the killer beyond the onus he already bears for committing the murder, and are irrelevant. Allowing the type of evidence would inevitably make the entire system freakish and arbitrary and thus violative of Article I, Sections 9 and 17. Allowing victim impact evidence would necessarily expand the scope of future penalty trials beyond all reason.

Take as an instance the subject of the victim's character. What principle of logic or fairness could deem it relevant that the deceased was a good person and at the same time irrelevant that he or she was bad? Were the state permitted to prove that a victim was educated and hardworking, a defendant should be permitted to show that a victim was a sixth-grade dropout, who never worked a day in his life. Similarly, if it "matters" in the context of capital sentencing that one victim left a family who loved her, it also "matters" that another was hated by surviving relatives -- or, indeed, left no family at all. Does having a victim with a "bad" character somehow become a mitigating circumstance? The admission of this type of evidence inevitably leads to and highlights the race and class status of the victim.

This will be true because the family and friends of the deceased will inevitably tend to be of the same race and class as the deceased and this will inevitably lead to more educated and articulate white, middle class victim family members having more impact on judge and jury than poorer, minority, and less educated victim's family members. Thus, this statute violates Article I, Sections 9 and 17.

The statute at issue here is also unconstitutional under the Eighth and Fourteenth Amendments to the U.S. Constitution. In ***Payne v. Tennessee***, 111 S.Ct.

2597 (1991) the Court overruled its prior opinion in **Booth v. Maryland**, in very limited circumstances.

"We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial evidence on that subject, the Eight Amendment erects no **Per se** bar. A State may legitimately conclude that evidence about the impact of the murder on the victim's family is relevant." *Id.* at 2609.

The Court also stated that even this generally permitted evidence may be so "unduly prejudicial" that it violates the Due Process Clause of the Fourteenth Amendment. *Id.* at 2608. There is nothing in **Payne** that permits evidence concerning such unlimited and undefined evidence as that designed to show "uniqueness as a human being" and "loss to the community". This goes way beyond the scope of **Payne** and violates the Eighth and Fourteenth Amendments.

It must also be noted that Section 8 is far broader and vaguer than **Fla. State**. 921.143 that the Florida Supreme Court has held does not apply to capital sentencing. **Grossman v. State**, 525 50.2d 833, 842 (Fla. 1988). 921.143 limits the testimony to the victim's family. Section 7 states: "such evidence shall be designed to demonstrate the victim's uniqueness as a human being and the resultant loss to the community."

This sets absolutely no limit as to *who* can testify or *what* they can testify to. The phrase "loss to the community" contains no definition of community or limits on its membership. This could lead to anyone testifying or even to death sentencing by petition or public opinion poll. The phrase "uniqueness as a human being" places absolutely no limit on the evidence. This statute clearly does not meet the higher standard of due process in capital cases required by Article I, Sections 9 and 17.

The terms of Section 8 are vague and overbroad and are capable of a wide

variety of clearly impermissible uses. This section gives a defendant virtually no notice of the type of evidence that he is to defend against.

The introduction of this type of evidence would render the entire statutory scheme unconstitutional. The admission of this type of evidence would leave the judge and jury without any guidance as to how to use this evidence. As noted previously, this evidence does *not* constitute an aggravating circumstance. The jury is told that they are limited to the statutory aggravating circumstances. See Standard Jury Instructions In Criminal Cases. They are then told that they are told to weigh this evidence against that presented in mitigation. *Id.* This evidence clearly is not mitigating and it is within the statutory aggravating circumstances. Thus, neither the judge nor jury is left with any guidance as to how to weigh this evidence.

The admission of this evidence without any guidance as to how to use it is unconstitutional pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2,9,16, and 17 of the Florida Constitution. The failure to sufficiently guide discretion, with the possibility of arbitrary and discriminatory results, was a theme running throughout the opinions in ***Furman v. Georgia***, 92 S.Ct. 2726 (1972). The guiding of the judge and jury's discretion was a critical factor to both the Florida Supreme Court and the United States Supreme Court in upholding the facial constitutionality of the Florida statute. ***Proffitt v. Florida***, 96 S.Ct. 2960, 2969 (1976). ***State v. Dixon***. 283 So.2d 1 (Fla. 1973).

The United States Supreme Court has reversed several cases for jury instructions that fail to sufficiently define an aggravating factor. ***Espinosa v. Florida***, U.S., 6. F.L.W. Fed.S662 (June 29, 1992); ***Shell v. Mississippi***, 111 S.Ct. 313 (1990);

Maynard v. Cartwright, 108 S.Ct. 1853 (1988) (all three cases reversing for failure to adequately define the "heinous, atrocious, or cruel" aggravating factor). In **Mills v. Maryland** 108 S.Ct. 1860 (1988) the Court reversed because there was a "substantial possibility" the jury would misunderstand how to consider mitigating evidence. *Id.* at 1867. The jury is given absolutely no guidance how to handle this highly explosive and emotional evidence. This is far worse than merely being given inadequate guidance as to an aggravator as in **Espinosa, Shell**, and **Maynard**. This is unconstitutional under the Florida and United States Constitutions.

9. The prejudice from this evidence would virtually always outweigh its probative value, thus violating **Fla. Stat.** 90.403. This type of evidence is almost always a tearful, emotional recounting of the loss of a friend or loved one. As previously noted, this type of evidence has no relevance to any statutory aggravating factor. It will inevitably shift the judge's and jury's attention away from a reasoned weighing of aggravating factors and mitigating circumstances to a naked cry for vengeance.

WHEREFORE, Defendant, Norman Blake McKenzie, hereby moves this Honorable Court to issue its order to prohibit evidence or argument designed to create sympathy for the deceased; including, but not limited to, the impact of the offense on the friends and/or family of the deceased, the loss to the community, the life history of the deceased, or any personal characteristics of the deceased, in the guilt-innocence phase, the penalty phase before the jury, and sentencing before the judge.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service

delivery to the Office of the State Attorney, eservices@johns@sao7.org on this 18th day
of October 2018.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO DECLARE FLORIDA'S DEATH PENALTY SCHEME
UNCONSTITUTIONAL AND PRECLUDE THE PROSECUTION FROM SEEKING
THE DEATH PENALTY DUE TO THE FAILURE TO MEET MINIMUM
CONSTITUTIONAL REQUIREMENTS SET FORTH IN *FURMAN V. GEORGIA*
AND ITS PROGENY**

COMES NOW, Norman Blake McKenzie, by and through undersigned counsel, respectfully moves this Court, pursuant to the Fourth, Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 9, 12, 17, 22 of the Constitution of the State of Florida, as well as state statute, international law, case law including, **Furman v. Georgia**, 408 U.S. 238 (1972), **Gregg v. Georgia**, 428 U.S. 153 (1976), as well as statutory and jurisprudential authorities cited below, and all other applicable constitutional, statutory, treaty, customary international law, evolving international standards, and jurisprudential authority to declare Florida's death penalty scheme unconstitutional and preclude the prosecution from seeking a death penalty.

In support, counsel states:

1. Norman McKenzie is here for resentencing on two counts of first-degree murder and the State of Florida is seeking to take his

life by lethal injection.

2. “The fundamental respect for humanity underlying the Eighth Amendment’s prohibition against cruel and unusual punishment gives rise to a special ‘need for reliability in the determination that death is the appropriate punishment’ in any capital case.” **Johnson v. Mississippi**, 486 U.S. 578, 584 (1988) (citations omitted). It is well established that when a defendant’s life is at stake, a court must be “particularly sensitive to insure that every safeguard is observed.” **Gregg v. Georgia**, 428 U.S. 153, 187 (1976). This heightened standard of reliability is “a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties that death is different.” **Ford v. Wainwright**, 477 U.S. 399, 411 (1986).

Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The United States Supreme Court has repeatedly emphasized the principle that because of the exceptional and irrevocable nature of the death penalty, “extraordinary measures” are required by the Eighth and Fourteenth Amendments to ensure the reliability of decisions regarding both guilt and punishment in a capital trial. **Eddings v. Oklahoma**, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). See also **Beck v. Alabama**, 447 U.S. 625, 637-38 (1980); **Lockett v. Ohio**, 438 U.S. 586, 604 (1978); and **Gardner v. Florida**, 430 U.S. 349, 357-58 (1977).

3. The Florida capital sentencing scheme is arbitrary and standardless within the meaning of **Furman**, and thereby violates of Article I, Sections 2, 9, 12, 17, and 22 of the Florida Constitution and the 5th, 6th, 8th, and 14th Amendments of the United

States Constitution.

4. The arbitrariness and standardless discretion that determines capital sentencing in Florida violates the right of capital defendants to Due Process of Law, U.S. Const. Amends. V, XIV and the Florida Constitution as enumerated above.

5. The death penalty is arbitrarily applied because under Florida's Death Penalty (re-enacted in the 2017 legislative session) every murder now qualifies for the death penalty. There are so many "aggravators that virtually every murder is "death penalty eligible" leaving each murder to be totally and arbitrarily selected based on upon nonstatutory factors such as location by county, location by circuit, political environments, race, and ethnicity and economic status. This renders the statute vague and meaningless since the death penalty is reserved in theory for the worst murders with the least mitigation. See **Hess v. State**, 794 So. 2d 1249, 1269 (Fla. 2001).

6. Because the statute is vague, it is by definition unconstitutional and it violates Furman as it is arbitrarily applied jurisdiction to jurisdiction within the State of Florida. While it is most often imposed based upon bias, Florida politicians have now exerted a strong political influence rendering the death penalty to be imposed on a completely arbitrary basis. The location of the crime is often controlling as opposed to the facts and the law leaving the imposition to so-called discretion of the State Attorney. In reality, this results in a total and completely arbitrary application of the imposition of the death penalty. Evolving standards of human decency require application in this way be abolished as unconstitutionally arbitrary and uncertain. See **Furman**. This is the definition of 6th, 8th and 14th amendment violations in the U.S. and Florida constitutions.

7. Failure to declare Florida's death penalty scheme unconstitutional and preclude the prosecution from seeking a death penalty would deprive Defendant of the

independent state and federal constitutional guarantees to a fair trial with an impartial jury, right to present a defense, the effective assistance of counsel, due process of law, to equal protection of the laws, to freedom from cruel and unusual punishment as defined in **Furman**, and a reliable verdict and sentence as guaranteed by the U.S. and Florida Constitutions.

WHEREFORE, Defendant, Norman Blake McKenzie, by and through the undersigned attorney, moves this Honorable Court to declare Florida's death penalty scheme unconstitutional and preclude the prosecution from seeking a death penalty.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864

DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO DECLARE FLA. STAT. 921.141 UNCONSTITUTIONAL
BASED ON A VIOLATION OF THE DUE PROCESS CLAUSES OF THE
UNITED STATES AND FLORIDA CONSTITUTIONS AND BECAUSE
OF A VIOLATION OF THE SEPARATION OF POWERS CLAUSE OF
THE FLORIDA CONSTITUTION, OR IN THE ALTERNATIVE
TO DETERMINE LIFE IS THE MAXIMUM PENALTY**

The Defendant, Norman Blake McKenzie, by and through his undersigned attorney, and pursuant to *Fla. R. Crim. P.* 3.190, *Fla. sec* 90.402 and Article I, Sections 2 (basic rights), 9 (due process), 16 (rights of accused), 17 (cruel or unusual punishment) of the Florida Constitution, and the Fifth (due process), Sixth (jury trial), Eighth (cruel and unusual punishment), and Fourteenth (due process) Amendments to the United States Constitution, hereby moves this Honorable Court to grant this motion to declare *Fla. Stat. 921.141* unconstitutional based on a violation of the Due Process and Ex Post Facto clauses of the United States and Florida Constitutions and because it violates the Separation of Powers clause of the Florida Constitution, or in the alternative to determine life is the maximum penalty, and as grounds for said motion states the following:

1. The Defendant has been previously convicted of two counts of murder in the first degree and the State is again seeking the death penalty. As such, heightened standards of due process apply.

2. In response to **Hurst v. Florida**, 136 S. Ct. 616 (2016), the Florida Legislature amended *Fla. Stat.* 921.141 in March 2016. That statute modified the unconstitutional provision of the law that previously required only (*inter alia*) a bare majority of the jury to recommend death. Notwithstanding years of litigation challenging the constitutionality of that sentencing scheme based on the clear mandate of **Ring v. Arizona**, 122 S. Ct. 2428 (2002), the statute was not dealt a final death knell until the United States Supreme Court's decision in **Hurst**.

3. The pre-March 2016 statute was therefore unconstitutional at the very least since the **Ring** decision rendered in 2002, and because it never required unanimity, was likely unconstitutional since the death penalty was first established in Florida. Accordingly, the statute, which required, *inter alia*, a bare majority recommendation (rather than a unanimous verdict) has been unconstitutional for years before the instant offense.

4. On October 14, 2016, the Florida Supreme Court held the March 2016 amendment to *Fla. Stat.* 921.141 unconstitutional because it did not require a unanimous death penalty verdict. **Hurst v. State**, 202 So.3d 40 (Fla. 2016).

5. The Defendant's crime occurred in November of 2006, years after the **Ring** opinion, which held the Arizona statute, one almost indistinguishable to Florida's pre-March 2016 death penalty scheme, to be unconstitutional. Notwithstanding **Ring**, *Fla. Stat.* 921.141 was consistently upheld or the merits of the arguments failed to reach the United States Supreme Court until they finally squarely took up the issue in **Hurst**.

6. To state the obvious, life is a less severe sentence than death. At best, based on the above reasoning that Fla. Stat. 921.141 has been unconstitutional for several years before the murder alleged in this Indictment, the worst sentence the Defendant was truly exposed to all these years has been life in prison without the possibility of parole.

7. The Ex Post Facto provisions of the Due Process clause prohibiting a more severe sentence to be applied retroactively are violated if the Defendant is now exposed to the death penalty.

8. Because the March 2016 statute has been declared unconstitutional in **Hurst v State**, the most severe sentence the Defendant continues to be exposed to is life in prison without the possibility of parole.

9. The Florida Supreme Court issued **Evans v. State**, 213 So.3d 866 (Fla. February 20, 2017), that purports to fix the constitutional defects with the March 2016 statute. There are problems with this opinion that merit discussion and objection.

10. It is clear the March 2016 statute was a substantive change in the law. It modified in addition, amended an existing substantive statute concerning a substantive area of law. It is axiomatic that only the legislature may pass substantive laws. It is equally clear only the court may pass procedural laws or rules.

11. The **Evans** opinion changed a purely substantive provision of law, that violates the separation of powers doctrine set forth in Article II, Section 3, of the Florida constitution. Only the legislature may legislate.

12. It is exclusively the legislature who has the power to prescribe punishment, not the courts. **Woods v. State**, 740 So. 2d 20 (Fla 1st DCA 1999). In **Evan**, it is clear the Court violated this premise.

WHEREFORE, the Defendant, Norman Blake McKenzie, moves this Honorable Court to refuse to death qualify this jury and determine the maximum penalty is life in prison without possibility of parole based on the Due Process and Ex Post Facto clauses of the United States and Florida Constitutions and because it violates the Separation of Powers clause of the Florida Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO PRODUCE WRITTEN VICTIM IMPACT STATEMENTS
AND TO REQUIRE THE VICTIM IMPACT WITNESSES
TO READ THE STATEMENTS**

The Defendant, Norman Blake McKenzie, by and through his undersigned attorney, and pursuant to *Fla. R. Crim. P.* 3.190 and Article I, Sections 2 (basic rights), 9 (due process), 16 (rights of accused), 17 (cruel or unusual punishment) of the Florida Constitution, and the Fifth (due process), Sixth (jury trial), Eighth (cruel and unusual punishment), and Fourteenth (due process) Amendments to the United States Constitution, hereby moves this Honorable Court to grant this motion and as grounds, state the following:

1. The Defendant has been previously convicted of two counts of first-degree murder and is present for resentencing. The State has filed a Notice of Intent to Seek the Death Penalty. Enhanced levels of due process are therefore required. The penalty phase of the trial is scheduled to commence

2. While preserving these and other previous objections, the Defendant requests the defense be presented with a written version of the victim impact

statements of the witnesses the State intends to present, in advance of them being called.

3. Providing this material and directing the victim impact witnesses to read their statements in lieu of extemporaneous testimony will help to minimize the risk improper areas will be testified about. Otherwise, there is a heightened risk of a violation of the Defendants rights pursuant to Article I, Sections 2 (basic rights), 9 (due process), 16 (rights of accused), 17 (cruel or unusual punishment) of the Florida Constitution, and the Fifth (due process), Sixth (jury trial), Eighth (cruel and unusual punishment), and Fourteenth (due process) Amendments to the United States Constitution.

4. Such a procedure will give the defense an opportunity to make necessary objections in advance of the witness testimony, so the Court can make the appropriate rulings outside the presence of the jury and without undue disruption. Likewise, this procedure will avoid the prejudicial effect of having to interrupt an already sympathetic witness with objections during their testimony. Indeed, it is likely if an objection is necessary during the testimony, as a practical matter, the objection will be of little value because the cat will already be out of the bag and the damage will already have been done.

5. This procedure is requested in order to help insure as fair of a presentation of this necessarily inflammatory evidence as possible and helping to minimize the risk of a potential mistrial.

6. Further, the State suffers no prejudice in the Court granting this request.

WHEREFORE, the Defendant, Norman Blake McKenzie respectfully requests this motion be granted.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

MOTION FOR INTERROGATORY PENALTY PHASE VERDICT

COMES NOW THE DEFENDANT, Norman Blake McKenzie, by and through his undersigned attorney, and moves this Honorable Court for the use of an interrogatory penalty-phase verdict as outlined below, based on the following:

1. The above-named Defendant is before this court for resentencing based upon the Florida Supreme Court's decision in **Hurst v. Florida**, 202 So. 3d 40 (2016).
2. The State of Florida has again filed a Notice of Intention to Seek the Death Penalty under Florida Rule of Criminal Procedure 3.202.
3. Pursuant to Section 921.141, Florida Statutes, the Court will instruct the jury as to the aggravating factors and mitigating circumstances they must consider before reaching the ultimate question as to a sentence of death by lethal injection or life imprisonment without parole is appropriate.
4. To provide Due Process, meaningful appellate review, the right to a jury determination of the statutory elements underlying punishment and the right to a reliable sentence under Article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and

Fourteenth Amendments to the United States Constitution, the jury must determine the presence of the statutory elements upon which imposition of the death penalty is based. **Ring v. Arizona**, 536 U.S. 584, 122 S. ct. 2428, 153 L.Ed.2d 556 (2002); **State v. Dixon**, 283 So.2d 1, 8 (Fla. 1973) (aggravating factors in Section 921.141(6), Florida Statutes, actually "define the offenses" punishable by the death penalty.

In this regard, the sentencing determination of the jury actually determines the standard the trial court uses to make its written findings of fact because the evidence must be viewed in a light most favorable to the jury's sentencing determination to see whether a reasonable person could agree with it.

5. Similarly, a jury decision that death is the appropriate sentence must be as specific as possible to enable the trial court to determine whether jurors properly considered and appropriately weighed valid sentencing circumstances and applied the appropriate legal standard for each legal consideration required under Section 921.141, Florida Statutes.

6. The Standard Jury Instructions in Criminal Cases are suggested as a guide to trial courts. They should be modified to suit the facts of the case.

7. The above-named Defendant moves this Honorable Court to provide to the jury a verdict form, as part of the recording process to be used to document the finding of the existence of statutory aggravating facts that includes:

A. A provision outlining each aggravating factor and designating the burden of proof appropriate to find the factor, with a section indicating the vote of the jury as to that aggravating factor found, in substantially the following form:

We, the jury, by a vote of _ to __, find beyond and to the exclusion of every reasonable doubt that the crime for which the defendant is being sentenced was [e.g., committed for financial gain.]

In addition to clarifying the jury's determination, the above provision protects against a violation of the above-named Defendant's rights to be free from double jeopardy in the event that the case is remanded for re-sentencing, in that the court would know specifically which aggravating circumstances were rejected by the initial jury Amendments Five and Fourteen of the Constitution of the United States; article I, sections 9 and 16 of the Constitution of the **State of Florida; *North Carolina v. Pearce***, 395 U.S. 711 (1969).

The above provisions do not invade the province of the jury in capital sentencing in that the statement of the vote upon each aggravating factor is not any intimation as to the weight assigned to that circumstance by the jury. A separate provision requiring the jury to state the facts upon which the factor is found allows the trial court and the appellate court to determine whether the jury's recommendation conforms with applicable law. Thus, the verdict form should contain an inquiry asking, for each aggravating circumstance found, the factual basis for that finding, so that the inquiry would read substantially as follows:

"Our finding that the homicide was committed in an especially heinous, atrocious or cruel manner" is based on the following facts: (specify) -"

B: A provision outlining each mitigating circumstance defined by statute, a statement of the applicable quantum of proof, a statement of the jury's vote upon said circumstance and a section allowing the jury room to write in those non-statutory mitigating circumstances they find to be applicable. For example:

We, the jury, by a vote of___ to ___, are reasonably convinced that the defendant has no significant history of prior criminal activity, based upon the following:

We, the jury, by a vote of___ to ___, are reasonably convinced that, in addition to the mitigating factors listed above, the Defendant's lengthy record of employment is considered a mitigating circumstance.

C: A provision that the jury finds that the statutory aggravating factors so outweigh the mitigating circumstances that the death penalty is justified beyond a reasonable doubt.

8. The provisions requested above in the form of an interrogatory verdict would allow for more informed appellate review of sentencing and more consistent application of proportionality review by the Supreme Court of Florida.

9. Failure to grant the foregoing Motion would be in violation of the Due Process Clause of the United States Constitution as well as Amendments IV, V and XIV to the U.S. Constitution, as well as Art. 1, Sections 2, 9, 16, 17, 21 and 23 of the Florida State Constitution.

WHEREFORE, Defendant, Norman Blake McKenzie, moves this Honorable Court to provide a special interrogatory verdict form to the jury for use when the jury determination as to the appropriate punishment is made.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

MOTION FOR IMPOSITION OF LIFE SENTENCE

COMES NOW the Defendant, Norman Blake McKenzie, by and through undersigned counsel, and moves for imposition of life sentence as to his conviction for first-degree murder in the case above and as grounds therefor says:

1. The United States Supreme Court held in **Hurst v. Florida**, 136 S.Ct. 616 (2016) that Florida's capital sentencing scheme was unconstitutional partly because the judge, not the jury, was the ultimate trier of fact. In **Hurst**, the Florida Supreme Court held that based upon Florida constitutional right to jury trial and the Eighth Amendment to the United States Constitution, the Florida capital sentencing scheme as amended was unconstitutional because it did not require that the jury death recommendation be unanimous. **Hurst v. State**, 202 So. 3d 40 (Fla. 2016).

2. Norman McKenzie case is before the court because he was sentenced under the, now unconstitutional, Florida sentencing scheme. Conducting another penalty phase hearing/trial to determine whether a sentence of life without the possibility of parole or the death penalty should be imposed would violate the Double

Jeopardy Clause of the Fifth Amendment that is applicable to the States pursuant to the Fourteenth Amendment, under the doctrine of collateral estoppel.

The Fifth Amendment guarantee against double jeopardy is a right enforceable under the Fourteenth Amendment. **Benton v. Maryland**, 395 U.S. 784 (1969). In **Ashe v. Swenson**, 397 U.S. 436, 445 (1970) the Supreme Court held that collateral estoppel "is embodied in the Fifth Amendment guarantee against double jeopardy." Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* The Florida Constitution in Article I, § 9, also bars double jeopardy. However, death is procedurally different. Jury penalty verdict was not reduced to a final judgment Defendant's trial. Nevertheless, that difference does not preclude application of double jeopardy principles. The jury's penalty recommendation in a capital murder case can have double jeopardy consequences.

In **Wright v. State**, 586 So.2d 1024, 1032 (1991), the Florida Supreme Court stated:

Double jeopardy principles apply to the penalty phase of capital punishment trials in Florida under § 921.141 of the Florida Statutes (1985), because the Florida procedure is comparable to a trial for double jeopardy purposes. See **Brown v. State**, 521 So.2d 110 (Fla.), cert. denied, 488 U.S. 912, 109 S.Ct. 270, 102 L.Ed.2d 258 (1988); accord **Arizona v. Rumsey**, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984); **Bullington v. Missouri**, 451 U.S. 430, 101 SW.Ct. 1852, 68 L.Ed.2d 270 (1981). Although federal law provides some guidance for interpreting the

meaning of Florida's double jeopardy clause, we rely here on Article I, § 9 of the Florida Constitution, which "has historically focused upon the protection of the rights of the individual," **Booth v. State**, 436 So.2d 36, 39 (Fla. 1983) (McDonald, J., dissenting), and thus provides at the very least the same protection of individual rights as the federal constitution.

In the context of capital proceedings, the constitutional protection against double jeopardy provides that if a defendant has been in effect "acquitted" of the death sentence, the defendant may not again be subjected to the death penalty for that offense if retried or resentenced for any reason. See **Poland v. Arizona**, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986); **Rumsey; Bullington**. For example, in **Bullington** the jury voted to convict the accused of murder but it rejected the death penalty in favor of life imprisonment. The jury's judgment, however, was later vacated because the Missouri trial court had violated **Bullington's** constitutional right to a jury drawn from a fair cross section of the community.

Before Bullington could stand trial again, the United States Supreme Court ruled that Missouri could not subject the accused to the death penalty on retrial because the jury's vote as to the penalty in effect acquitted **Bullington** of the death penalty. The Court reasoned that "[h]aving received 'one fair opportunity to offer whatever proof it could assemble,' **Burks v. United States**, 437 U.S. 1, 16, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978), the State is not entitled to another." **Bullington**, 451 U.S. at 446, accord **Odom v. State**, 483 So.2d 343 (Miss. 1986) (an accused is not subject to death penalty in retrial for murder after jury declined to vote for death in first trial).

Similarly, in *Rumsey*, the trial court sentenced Rumsey to life imprisonment after finding that the state failed to prove any of the aggravating circumstances required under Arizona law to justify the death penalty. The Arizona Supreme Court reversed and remanded for a new sentencing, after which the trial court imposed the death sentence. The United States Supreme Court reversed, holding that Rumsey had been “acquitted” of the death sentence and therefore could not be resentenced to death. *Accord Brown*, 521 So.2d at 110 (defendant could not be resentenced to death after getting life sentence even though life sentence was based on trial court's erroneous interpretation of law).

Under well-settled Florida law, we have held that life imprisonment is the only proper and lawful sentence in a death case when the jury reasonably chooses not to recommend a death sentence. *Tedder v. State*, 322 So.2d 908 (Fla. 1975). Thus, when it is determined on appeal that the trial court should have accepted a jury's recommendation of life imprisonment pursuant to *Tedder*, the defendant must be deemed acquitted of the death penalty for double jeopardy purposes. Art. I, § 9, 17, Fla. Const. (Emphasis supplied.)

In *Hurst's* penalty phase, the jury rendered a 10 to 2 verdict recommending death. The trial court agreed and imposed a death sentence. On appeal, Hurst challenged the death sentence imposed by the trial court. The Florida Supreme Court affirmed. The United States Supreme Court held that Florida's capital sentencing scheme-violated the Sixth Amendment right to a jury trial on all elements of capital murder by empowering the judge, not the jury, to make the critical findings of fact. *Hurst v. Florida*, 136 S. Ct. 616 (2016).

On remand, the Florida Supreme Court held, in **Hurst**, that the current Florida death penalty sentencing scheme violated the Florida state constitutional right to trial by jury and the Eighth Amendment by requiring only a 10-2 vote and not a unanimous jury verdict for a death sentence recommendation. **Hurst v. State**, 202 So.3d 40 (Fla. 2016). The death sentence was vacated and the case remanded for further penalty phase proceedings.

Once the Florida Supreme Court decided that a unanimous jury verdict for a death sentence is required, the question now is what is to be the nature of the proceedings? Should Defendant be required to "run the gauntlet" of a penalty phase that is tantamount to a jury trial for the second time or should he, based upon the jury vote already rendered in this case, be sentenced to life in prison without the possibility of parole? Typically, the general rule is that when a defendant obtains reversal of his conviction the original conviction has been nullified, the slate is wiped clean and a new trial is held. **Poland v. Arizona**, 476 U.S. 147, 152 (1986). If that were to occur, the issue at a second penalty phase will be whether the jury unanimously recommends a death sentence.

If the State falls short of 12 votes, Defendant must be sentenced to life. The State failed to obtain a unanimous jury recommendation of a death sentence. The juries did their duty of rendering a verdict. The result is undisputed. The verdicts were clearly not unanimous. But for the unconstitutional sentencing scheme requiring the jury on a majority vote to recommend death, a verdict recommending life for Defendant would have been rendered. The guarantee against double jeopardy under the Fifth and Fourteenth Amendments to

the United States Constitution and Article I, § 9, of the Florida Constitution would be violated if constitutional and legal effect were not given to those votes for life.

3. Under the peculiar circumstances of this case, a new penalty phase that will amount to a new jury trial, to determine whether a life without the possibility of parole or death sentence should be imposed would violate the Due Process Clause of the Fourteenth Amendment and Article I, § 9 of the Florida Constitution. It would be fundamentally unfair in violation of due process under the federal and state constitutions to conduct a second penalty phase jury trial for Defendant.

This case arose in 2006. Defendant was tried and sentenced in 2007. For almost 11 years, he has been incarcerated on death row fighting an unconstitutional sentencing scheme that said that it is ok for 12 jurors to find him guilty but not all twelve is required to determine whether he lives or dies. He sat on death row not knowing whether justice would be served. Two jurors in his trial voted for life.

Defendant maintained that the federal and state constitutions required that those votes result in a verdict for life. On appeal, he did not seek to have those two votes vacated. Rather, he sought to have the judge's final judgment of death vacated. The jury's vote was not vacated. It would be fundamentally unfair to now require Defendant to run the gauntlet again before the life verdict that he received and that should have been entered because of the less than unanimous verdict is entered. The State should not be rewarded for creating and tenaciously defending an unconstitutional death penalty sentencing scheme by allowing it to do an end run around the 10 to 2 vote and rolling the dice again. To borrow an old equity concept, the State does not come with clean hands.

4. Per § 775.082(1) (a), F.S., because the procedure set forth in § 921.141 F.S. is unconstitutional and cannot be followed in this case, the defendant must be sentenced to life. § 775.082(l) (a), F.S. provides as follows:

(l)(a) Except as provided in paragraph (b), a person who has been convicted of a capital felony shall be punished by death if the procedure held to determine sentence **according to the procedure set forth in s. 921.141 results in a determination that such person shall be punished by death**, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

(Emphasis supplied.) Death cannot be obtained in this case by the procedure set forth in § 921.141 because the procedure is unconstitutional. See Perry, supra. Therefore, “otherwise such person shall be punished by life imprisonment.

WHEREFORE the Defendant, Norman Blake McKenzie, prays that the Court impose forthwith a life sentence upon the Defendant for his conviction of the offense of capital murder

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**DEFENDANT'S MOTION TO PERMIT ACCUSED TO APPEAR
WITHOUT RESTRAINTS AT ALL PROCEEDINGS**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned counsel and respectfully moves this Court for an order permitting Defendant to appear at all in-court proceedings (including all pre-trial hearings at which Defendant appears in court without restraint by any means, including shackles or a stun belt. In addition, once trial begins, Defendant requests that measures be taken to ensure that the jurors never see him in restraints in or out of the courtroom.

If this Court is not inclined to grant the instant motion on the record as it now stands, Defendant requests an evidentiary hearing to adduce evidence on the question whether there is a particularized justification for restraining.

MEMORANDUM IN SUPPORT

The presumption of innocence is a basic component of the fundamental right to a fair trial. See Coffin v. United States, 156 U.S. 432, 453 (1895). "The presumption of

innocence requires the garb of innocence, and regardless of the ultimate outcome, or the evidence awaiting presentation.” **Kennedy v. Cardwell**, 487 F.2d 101, 104 (6th Cir. 1973) (citation omitted). “[E]very defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man.” **Id.**

Defendant contends that there are no facts specific to this case that would justify restraint in any manner during trial—including by means of a stun belt, hand restraints, leg restraints, or other similar confinement. “The Fifth and Fourteenth Amendments [of the United States Constitution] prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion that they are justified by a State interest specific to a particular trial.” **Deck v. Missouri**, 544 U.S. 622, 629 (2005). “[G]iven their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case.” **Id.** at 632.

Deck recognized the serious concerns of a capital defendant at both the trial and penalty phases of trial. During the trial phase, the defendant has an interest in appearing free of restraints in order to preserve the presumption of innocence, due process rights, and effective assistance of counsel. However, should Defendant be found guilty at the trial phase, the interest remains because, “[a]lthough the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the ‘severity’ and ‘finality’ of the sanction, is no less important than the decision about guilt.” **Id.**

The Federal and the State Constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. amends. VI, XIX; **Gideon v.**

Wainwright, 372 U.S. 335, 340-41, (1963). “The use of physical restraints diminishes that right. Shackles can interfere with the Accused’s ‘ability to communicate’ with his lawyer. Indeed, they can interfere with a defendant’s ability to participate in his own defense, say by freely choosing whether to take the witness stand on his own behalf.” **Deck**, 544 U.S. at 631.

Defendant specifically asserts that there is no justification for restraining him with a stun device. Stun devices might be marginally less evident to observers; but they have an even greater chilling effect on the Accused’s ability to communicate with counsel because the fear of a debilitating electric shock excessively restrains Defendants from moving at counsel table for fear of being zapped by a deputy to quick to pull the trigger. And no matter the physical and psychological differences between stun devices and shackles, any restraining device runs afoul of Defendant’s constitutional rights absent a factual basis to justify restraining Defendant in any manner whatsoever. See **State v. Adams**, 103 Ohio St. 3d 508, 530, 817 N.E.2d 29, 53 (2004) (the decision to use a stun belt must be subjected to at least the same close judicial scrutiny required for the imposition of other physical restraints; if not, reversal is warranted).

The decision to use restraints is committed to the sound discretion of the trial court. But because their use is an “inherently prejudicial practice, restraints may be employed only as a ‘last resort.’” **Holbrook v. Flynn**, 475 U.S. 560, 568-69 (1986). When exercising this discretion, the court ***must*** hold a hearing to determine whether such measures are necessary. Id. at 569. The trial court must make a finding justifying

restraint that entails more than mere deference to the opinion or customs of the law enforcement personnel charged with keeping the accused in custody.

There is also substantial prejudice if Defendant is required to appear in restraints during the pre-trial proceedings. The harm is no less serious merely because the jury has yet to be empanelled. If Defendant appears in restraints during pre-trial proceeding covered by the media, the viewing public, from which the jury will be selected, will be led to a presumption of Defendant's guilt. Moreover, the prospective jurors will likely infer that Defendant is restrained because he is dangerous.

Providing adequate and routine courtroom security serves as a reasonable alternative to restraining Defendant, but only if the number of security personnel is not so great as to convey to the jurors the same unconstitutional message conveyed by restraints.

These above-mentioned concerns are all the more critical in a capital case. As the United States Supreme Court's jurisprudence has made evident, death is different; for that reason more process is due, not less. See **Lockett v. Ohio**, 438 U.S. 586, 605 (1978), **Woodson v. North Carolina**, 428 U.S. 280, 305 (1976) (plurality opinion). This is all the more so when a petitioner's life interest, protected by the "life, liberty and property" language in the Due Process Clause, is at stake in the proceeding. **Ohio Adult Parole Authority v. Woodard**, 523 U.S. 272, 288 (1998) (O'Connor, Souter, Ginsberg, and Breyer, J.J., concurring), id. at 291 (Stevens, J., dissenting) (recognizing a distinct, continuing, life interest protected by the Due Process Clause in capital cases). All measures must be taken to prevent arbitrary, cruel, and unusual results in a capital trial. See **Lockett**, 438 U.S. at 604; **Woodson**, 428 U.S. at 304-05.

WHEREFORE, Defendant, Norman Blake McKenzie, moves this Honorable Court allow him to appear without restraints at all in-court proceedings, and any other time the media or jurors might view Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018..

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO DECLARE FLA. STAT. 921.141 UNCONSTITUTIONAL
BECAUSE IT EXPANDS RATHER THAN NARROWS THE CLASS OF
DEFENDANTS ELIGIBLE FOR THE DEATH PENALTY**

The Defendant, Norman Blake McKenzie, by and through his undersigned attorney, and pursuant to *Fla. R. Crim. P.* 3.190 moves this Honorable Court to enter an order granting this motion to declare *Fla. Stat.* 921.141 unconstitutional because it expands rather than narrows the class of defendants eligible for the death penalty, and as grounds for this motion, states the following:

1. That the Defendant was previously convicted of two counts of murder in the first degree and the State has again filed a Notice of Intent to seek Death Penalty. Accordingly, he is entitled to heightened constitutional protections.

2. The Florida capital sentencing scheme is unconstitutional as it violates the basic precept that the death penalty be reserved for only the most aggravated and least mitigated crimes, or the so-called "worst of the worst." Since the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), those eligible to be put

to death in Florida has expanded exponentially rather than actually being narrowed. Aggravating factors must genuinely narrow the class of death eligible murderers. **Blanco v. State**, 706 So.2d 7(Fla. 1997), citing, **Zant v. Stephens**, 462 U.S. 862, 877 (1983). The Florida legislature has consistently expanded rather than narrowed the class of persons eligible to receive the death penalty.

3. It has now been over four (4) decades of Eighth Amendment jurisprudence that the United States Constitution has been interpreted to require States limit the class of murderers for which the death penalty may be applied. **Furman**, supra. In recent history, the United States Supreme Court has held the Eighth Amendment categorically precludes the death penalty from being sought for certain classes of murderers. See, **Atkins v. Virginia**, 530 U.S. 304 (2002) (the Eighth Amendment precludes imposition of the death penalty for mentally retarded defendants); **Roper v. Simmons**, 543 U.S. 551 (2004) (the death penalty held to be disproportionate as applied to juvenile murderers); and, **Kennedy v. Louisiana**, 554 U.S. 407 (2008) (the death penalty is disproportionate for the crime of child rape).

4. There is no question that the United States Constitution requires any death penalty scheme "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on a defendant compared to others found guilty of murder. **Loving v. United States**, 517 U.S. 448, 755 (1996); see also **Brown v. Sanders**, 540 U.S. 212,216 (2006) (It[s]ince **Furman v. Georgia**, 408 U.S. 238 (1972), we have required States to limit the class of murderers to which the death penalty may be applied.").

5. Post-**Furman** and up until 1986, Florida's death penalty statute had only nine (9) possible aggravating circumstances. Those aggravating factors included the following:

(6) Aggravating circumstances. Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb. (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.(h) The capital felony was especially heinous, atrocious, or cruel.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

6. In 1987, *Fla. Stat.* 921.141 (5) (j), renumbered as 921.141 (6) (j), was amended to add an additional aggravating factor; "The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties." *Fla. Sess. Law Servo Ch.* 87-368. (Senate Bill, 283). The next year, the statute was amended to include *Fla. Stat.* 921.141 (5) (k), now renumbered as 921.141 (6) (k), which reads as follows: "The victim of the capital felony was an elected or appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity." *Fla. Sess. Law Serv Ch.* 88-381 (H. B. 1653);

7. Four (4) years later, in 1991, *Fla. Stat.* 921.141 (5) (a), renumbered as 921.141 (6) (a), was amended to include those defendants who were not only under sentence of imprisonment but also to include those on community control. Subsequently, in 2010, this subsection was further amended to incorporate murderers on felony probation. It is apparent Florida has a substantial number of people in prison, on community control or on probation. This aggravating circumstance includes those on community control and felony probation,

regardless of the nature of the felony. Under this sentencing scheme, someone on felony probation for a crime as minor as possession of 20 grams or more of marijuana, an offense increasingly absolutely legal for recreational purposes in states throughout this county, will make that convicted murder defendant eligible for the death penalty.

8. In 1995, the legislature amended the statute to make those defendants convicted of murder eligible for the death penalty where "the victim of the capital felony was a person less than 12 years of age." *Fla. Stat.* 921.141 (5) (l), renumbered as 921.141 (6) (l). The next year, the Florida legislature again amended the statute to expand death penalty eligibility where the victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the Defendant stood in a position of familiar or custodial authority over the victim. *Fla. Stat.* 921.141 (5) (m), renumbered as 921.141 (6) (m). In that same bill, death penalty eligibility was further expanded to encompass situations where the capital felony was committed by a criminal street gang member, as defined in S. 874.03." *Fla. Stat.* 921.141 (5) (n), renumbered as 921.141 (6) (n). That subsection was later amended to cause anyone who commits a capital felony and is a criminal gang member, as defined in s. 874.0311 eligible to receive the death penalty.

9. The legislature expanded the list of aggravating circumstances to include not only those designated to be a sexual predator, but also to make individuals whose sexual-predator designation has been *removed*, regardless of the reason for the removal of the label. *Fla. Stat.* 921.141 (5) (o), renumbered as

921.141 (6) (o). This subsection reads as follows: "The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator *who had the sexual-predator designation removed.* " The clear reading of this statute would therefore permit death penalty eligibility to be applied to someone convicted of capital murder who had previously been *erroneously designated* as a sexual predator. Justification for this language to be included in the statute is thin at best.

10. Most recently, in 2010, the Florida legislature added yet another aggravating factor for the jury's consideration as set forth in *Fla. Stat.* 921.141 (5) (p), renumbered as 921.141 (6) (p). which reads as follows: "The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or S. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner." Thus, this section expands the class of death eligible murder defendants to include those who kill one who has a pending injunction or protective order in their favor and against the defendant, inclusive of that person's limited marital and biological family.

11. Finally, *Fla. Stat.* 921.141 (5) (b), renumbered as 921.141(6) (b), has been expanded to include those who kill during more enumerated felonies than was originally in the statute, including, "aggravated child abuse, and abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement."

12. In 1986, there were only nine (9) statutory aggravating circumstances. That number has now ballooned to (16) sixteen.

13. While the legislature has nearly doubled the statutory factors which would cause one to become eligible for the death penalty, the mitigating circumstances set forth in that statute have remained unchanged. While there are reasonable and humane justifications for the legislature to amend this antiquated list of statutory mitigating factors which contain draconian modifying language, no action on this front has taken place. For example, *Fla. Stat.* 921.141 (6) (b), renumbered as 921.141 (7) (b), requires the capital Defendant to be under "the influence of *extreme* mental or emotional disturbance" for that statutory mitigating factor to apply. *Regular* mental or emotional disturbance is not enough. Likewise, *Fla. Stat.* 921.141 (6) (e), renumbered as 921.141 (7) (e), requires one be "under *extreme* duress or under the *substantial* domination of another person" in order for that statutory mitigating factor to be submitted to the jury. Again, regular duress or domination by another is just not sufficient for our legislature. Thus, while the statutory scheme in Florida has continue to grow at a rapid and steady pace with respect to broadening those who may be subject to the death penalty, mitigating factors which would tend to narrow that class remain stagnant.

14. The statutory scheme here in Florida unquestionably does not conform to the teachings of the United States Supreme Court in their admonition that death penalty statutes must "genuinely narrow" the class of individuals subjected to this ultimate sentence. Quite to the contrary, Florida has done

nothing but expand the class of eligible defendants, often with the weakest justification for doing so.

15. For the reasons and authorities cited above, *Fla. Stat.* 921.141 is in violation Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and this court should enter an order declaring the statute unconstitutional.

WHEREFORE, Defendant, Norman Blake McKenzie, respectfully submitted that this COURT should enter an order declaring *Fla. Stat.* 921.141 unconstitutional because it expands rather than narrows the class of defendants eligible for the death penalty.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION FOR INDIVIDUAL VOIR DIRE AND SEQUESTRATION
OF JURORS DURING VOIR DIRE**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned attorney and moves this Honorable Court allow counsel to voir dire the prospective jurors individually, separate and apart each from the other and sequester the jurors from the courtroom during the voir dire in order to prevent the jury panel from hearing the questions being asked of and answers given by other jurors. In support of this motion, Defendant shows as follows:

1. At the time of the original offenses and trial, this cause had received extensive and prejudicial publicity in the news media that included descriptions of the acts Defendant was convicted of committing and comments by police personnel. Collective voir dire of the venire as to their familiarity with the crime, the victim, and the jurors' opinions will simply "educate" all jurors to prejudicial and incompetent material, thereby rendering it impossible to select a fair and impartial jury.

2. The instant case is a death penalty resentencing wherein the jurors will hear

that Defendant has already been convicted of 2 counts of first-degree murder and that they will be called upon to deliberate on the penalty of life without the possibility of parole or death.

3. Since voir dire inquiry will be conducted concerning the potential jurors' attitude concerning the death penalty, individual and sequestered voir dire is necessary and collective voir dire is inadequate to explore fully this sensitive and important issue.

4. Changes that have come about because of **Hurst v. Florida**, 202 So.3d 40 (2016), the most important of which is the requirement that the verdict be unanimous, require more indebt look into each potential juror's attitude towards the death penalty, a life sentence and their individual responsibility as a juror.

5. Collective voir dire of the venire without detailed inquiry into these matters would deprive Defendant of his right to obtain a jury of peers, free from bias and open-minded to their duty to render a fair verdict.

6. Collective voir dire will preclude the candor and honesty on the part of jurors that are necessary in order for counsel and Defendant to effectively selective a jury of his peers who will be fair and impartial.

**MEMORANDUM IN SUPPORT OF MOTION FOR INDIVIDUAL VOIR
DIRE AND SEQUESTRATION OF JURORS DURING VOIR DIRE**

The right to individual voir dire is within the purview of Rule 3.300(b), Fla. R. Crim. P. that provides, "Counsel for both State and Defendant shall be permitted to propound pertinent questions to the prospective juror after such examination by the Court."

Sequestration of jurors during voir dire, while within the sound legal discretion of the trial judge, is likewise a duty of the judge to protect the jury from untoward conduct in the

courtroom.

While Rule 3.300(b) has not been construed as creating a mandatory right to sequestration of jurors during voir dire, it is within the scope of the trial judge's powers to grant the request to conduct isolated examination. **Jones v. State**, 343 So.2d 921 (Fla. 3d DCA 1977); **Branch v. State**, 212 So.2d 29 (Fla. 2d DCA 1968).

In both **Jones** and **Branch**, the appellate courts held that the record failed to show that the trial courts did abuse their discretion in not allowing individual, sequestered voir dire examination of the jurors. However, **Jones** and **Branch** were not capital cases.

Because this is a capital case, voir dire must be conducted with **Wainwright v. Witt**, 469 U.S. 412, 83 L.Ed.2d 841, 105 S.Ct. 844 (1985) in mind. In particular:

A prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venire man in this regard is that he be willing to consider all of the penalties provided by state law and whether "his views about capital punishment would prevent or substantially impair his duties as a juror in accordance with his instructions and his oath".

If allowed to be conducted, voir dire inquiry into potential jurors' opinions concerning the death penalty is extremely critical where the Defendant faces the possibility of death by execution. The death penalty is extremely critical where a Defendant faces the possibility of death by execution. The death penalty is currently a hot public issue politically, emotionally and morally and such peer pressure is likely to be strongly perceived by some potential jurors. Collective voir dire on such a critical and sensitive issue is dangerous in that potential jurors may react under the scrutiny of their peers and offer less than candid responses to important questions. Additionally, jurors with some qualms concerning the death penalty may use what they could learn during a collective voir dire to tailor their

responses to eliminate themselves from the prospective jury. Additionally, improper questioning directed toward a particular juror could easily implant bias and cause a taint of the entire venire.

While sequestered voir dire is within the discretion of the trial judge, the exercise of the discretion must be tempered by recognition that both the State and U.S. Supreme Courts distinguished a higher procedural safeguard when applied to death penalty cases. That this State distinguishes between capital and non-capital cases is evidenced in at least two instances. First, Florida law requires 12 jurors in a capital case while only 6 jurors are required to try all other criminal cases. Rule 3.270, Fla. R. Crim. P. and Fla. Stat. §913.10. Second, Florida's death penalty statute provides for a bifurcated trial process. Fla. Stat. §921.141. No other criminal cases require the bifurcated process.

At least five justices of the U.S. Supreme Court have concluded that a death case "is a different kind of punishment than any other which may be imposed in this country." See **Gardner v. State**, 430 U.S. 349, 51 L.Ed.2d 393 (1977), implying that a higher standard of procedural due process is required.

WHEREFORE, Defendant, Norman Blake McKenzie, moves this Honorable court to permit individual voir dire and sequester jurors in this death penalty resentencing case as individual voir dire and sequestration of jurors is necessary to insure the selection of the fairest possible jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION FOR PROPER PROCEDURE FOR POST-CHALLENGE
QUESTIONING OF PROSPECTIVE JURORS**

COMES NOW the Defendant, Norman Blake McKenzie, through the undersigned counsel, and respectfully moves this Honorable Court to enter its order delineating the proper procedure for post-challenge questioning of prospective jurors. In support of this motion, the Accused provides the following:

1. "Article I, section 16, of the Florida Constitution and the Sixth Amendment to the United States Constitution, individually and collectively, guarantee an accused the right to a jury trial in a criminal case." **Dougherty v. State**, 813 So. 2d 217, 223 (Fla. 2d DCA 2002).

2. Implicit in that right is the right to a fair and impartial judge and jury that is free from bias. **Duncan v. Louisiana**, 391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

3. The United States Supreme Court has held that a defendant in a capital case has a constitutional right to actually remove jurors for cause, who would

vote to impose the death penalty despite assurances that they could be fair and impartial and would follow the law, if they are not “impartial and indifferent” as required by the Sixth Amendment to the United States Constitution. **Morgan v. Illinois**, 504 U.S. 719 (1992).

4. Further, the Defendant has the constitutional right to inquire in depth, concerning every juror’s true feelings about how an individual juror feels about the death penalty despite a general answer that the juror would be fair and impartial and would follow the law.

5. “A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind.” **Busby v. State**, 894 So. 2d 88, 95 (Fla. 2004), as revised on denial of reh’g (Feb. 3, 2005).

6. In a capital case, the sixth amendment requires a juror to be “impartial and indifferent”. **See Morgan**, 504 U.S. at 719.

7. When a juror is challenged for cause, the attorneys and the trial judge often try to “rehabilitate” the juror to once again make that juror acceptable.

8. “Rehabilitation” is improper if the goal is to get a juror to change or set aside his already expressed biased attitude.

9. A juror becomes subject to “rehabilitation” when he has stated something on the record that would otherwise disqualify that juror. Typically, this is when the court or counsel asks the so-called “magic question.”

10. The “magic question” is the practice of asking prospective jurors who have been challenged for cause if they will set aside their personal beliefs and decide the case based solely on the evidence and the court’s instructions of law.

11. The answer to that question is usually “yes,” especially when asked by a judge to a juror trying to cooperate and please the judge while trying to sound fair.

12. “Impartiality is not a technical conception. It is a state of mind.” **United_States v. Wood**, 299 U.S. 123, 145 (1936). “Determination of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.” **Wainwright v. Witt**, 469 U.S. 412, 424 (1985).

13. The Florida Supreme Court added:

It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias of prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?

Overton v. State, 801 So. 2d 877, 892 (Fla. 2001) (citing **Price v. State**, 538 So. 2d 486 (Fla. 3d DCA 1989).

14. The “magic question” is therefore determinative of nothing other than possibly a prospective juror’s willingness to please the judge, and should not be determinative of whether or not a juror should be excused. **See Price**, 538 So. 2d at 486.

15. Instead of relying on leading questions to try to get a juror to conform to the court’s instructions “the trial court must look at all of the evidence before it” to determine if a cause challenge is proper. **Denson v. State**, 609 So. 2d 627, 628 (Fla. 4th DCA 1992).

16. In order to prevent the due process violations that would be caused by asking leading questions of prospective jurors who have been challenged for cause,

the Accused respectfully submits that the Court adopt the following approach in his trial:

a. After a challenge for cause is made, if the Court believes there is an ambiguity or inconsistency in the prospective juror's answer, the parties will have a hearing outside the presence of the jurors with the judge to clarify the issue.

b. After clarification of the issue concerning the cause challenge the Court will ask **non-leading questions** that do not call for a self-assessment of the prospective juror's capacity to "follow the law" or to "be fair." The Accused submits that since the judge is required to be neutral, asking open, non-leading questions does not give a juror the appearance that the Court holds one position over another, as it may appear when the judge asks leading questions to clarify a particular issue.

c. These questions should focus only on the juror's "willingness to perform her duties in a fair and impartial manner," and should not be "tailored to rehabilitate her as a qualified juror." (citation omitted).

d. Lastly, the Accused submits that any questioning for the purpose of clarification on a challenge for cause be outside the presence of the other jurors so as not to convey a particular point of view, because when a court "lectures" or instructs a prospective juror about the duty to "follow the law" and "be fair" in front of the rest of the panel, "these lectures" [. . .] sen[d] a strong message that the court [does] not approve of those who volunteer that they [are] biased." (citation omitted). Knowing the court would not want to do that, the Accused again asks that follow-up questioning on cause challenges be done outside the presence of the other jurors.

17. Defendant, Norman Blake McKenzie makes this request pursuant to his constitutional rights to due process, effective assistance of counsel, and his right to equal protection under the law pursuant to Article I sec. 16 of the Florida Constitution and pursuant to the 4th, 5th, 6th, and 14th amendments to the US Constitution.

WHEREFORE, based on the foregoing arguments, the Defendant, Norman Blake McKenzie respectfully moves this Honorable Court to establish the procedure outlined above to help ensure that the process for selecting his jury will be protected under the rights due to him.

CERTIFICATE OF SERVICE

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO ALLOW VICTIM IMPACT
EVIDENCE BEFORE THE JUDGE ALONE**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned counsel, and moves that this Court allow victim impact evidence before the judge alone if the Court denies the Defendant's previous motion to exclude said evidence. As grounds, he states:

1. Florida Statute 921.141(7) provides:

(7) **Victim impact evidence.**--Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

This statute merely allows the prosecution to introduce victim impact evidence. It does not say whether this evidence is to be introduced to the judge or the jury. In Florida, both the judge and jury are involved in the sentencing process. Fla. Stat. 921.141;

State v. Dixon, 283 So. 2d 1 (Fla. 1973), **Espinosa v. Florida**, 505 U.S. 1079, 120 L. Ed. 2d 854, 112 S. Ct. 2926 (1992).

2. Victim impact evidence is more properly heard by the judge rather than the jury for several reasons. (1) This evidence is potentially highly inflammatory and improper. A judge can more easily keep such evidence within its proper limits. (2) In all other cases, only a judge hears such evidence. (3) This evidence could easily divert the jury from its proper role of weighing aggravating and mitigating circumstances.

3. The United States Supreme Court and Florida Supreme Court have held that some types of victim impact evidence are admissible. However, both courts have placed limits on what type of testimony is admissible as victim impact evidence: *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), **Windom v. State**, 656 So. 2d 432 (Fla. 1995). Florida Statute 921.141(7) also prohibits certain types of victim impact evidence.

In **Payne**, *supra* the majority opinion states:

Our holding today is limited to the holdings of **Booth v. Maryland**, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), and **South Carolina v. Gathers**, 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989), that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. **Booth** also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

Payne, *supra* 111 S. Ct. at 2611 n. 2. Thus, **Payne** explicitly prohibits certain types of victim impact evidence.

Three members of the United States Supreme Court also stated that the

Fourteenth Amendment imposed limits on the nature and quantity of victim impact evidence in addition to the Eighth Amendment's per se bar on certain types of victim impact evidence.

Trial courts routinely exclude evidence that is unduly inflammatory; where inflammatory evidence is improperly admitted, appellate courts carefully review the record to determine whether the error was prejudicial.

We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth Amendment effects no *per se* bar." *Ante*, at 2609. If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.

Id. at 2512 (Concurring opinion of Justices O'Connor, White, and Kennedy).

Additionally, three members of the court would hold that all victim impact evidence is inadmissible. Id. at 2619-2631. Thus, it is clear that every member of the United States Supreme Court agrees that the Eighth Amendment bars certain types of victim impact evidence and at least six members of the Court agree that victim impact evidence can be so extensive and/or inflammatory as to deny due process.

In Windom, supra, the Florida Supreme Court also imposed limits on this type of evidence. Windom dealt with the admissibility of the following evidence:

Windom attacks the admissibility of testimony by a police officer during the sentencing phase of the trial. The police officer was assigned by her police department to teach an

anti-drug program in an elementary school in the community in which the defendant and the three victims of the murders lived, and where the murders occurred. Two of the sons of one of the victims were students in the program. The police

officer testified concerning her observation about one of these sons following the murder. Her testimony involved a discussion concerning an essay which the child wrote. She quoted the essay from memory: "Some terrible things happened in my family this year because of drugs. If it hadn't been for DARE I would have killed myself." The police officer also described the effect of the shootings on the other children in the elementary school. She testified that a lot of the children were afraid.

656 So. 2d at 434. The majority of the Court held that the officer's testimony concerning the impact on the victim's son was admissible. However, the Court held the rest of the testimony to be inadmissible.

Victim impact evidence must be limited to that which is relevant as specified in section 921.141(7). The testimony in which the police officer testified about the effect on children in the community other than the victim's two sons was erroneously admitted because it was not limited to the victim's uniqueness and the loss to the community's members by the victim's death. Id.

Two members of the Florida Supreme Court wrote separately to note the danger of victim impact evidence.

The use of victim-impact evidence can pose a constitutional problem if misused....I do not believe the courts can or should encourage the use of victim-impact evidence when it in effect may invite jurors to gauge the relative worth of particular victims' lives. All human life deserves dignity and respect, including in the penalty phase of a capital trial. This includes victims of high stature in the community as well as those in humbler circumstances. It would not be especially difficult for one or the other side in a criminal case to prey on the prejudices some jurors may harbor about particular classes of victims. Subtle appeals to racism, caste-based notions, or similar concerns clearly would undermine the fundamental objective of a criminal trial--achieving justice. If the effect is either to aggravate the case for one type of victim but mitigate it for another in similar circumstances, then the Constitution is violated. The victim's high stature in the community is not a legal aggravating factor, just as a

victim's minority status does not lawfully mitigate the crime. In this sense, all human life stands at equal stature before the law. Courts must be vigilant to see that this equality is not undermined.

(Opinion of Justices Kogan and Anstead, concurring in part and dissenting in part).

Thus, it is clear that every member of the Court feels certain types of victim impact evidence are inadmissible. At least two members of the Court feel that this evidence is extremely risky and potentially dangerous. It is clear that the United States Supreme Court and the Florida Supreme Court have held that victim impact evidence must be strictly limited. The Courts also recognize that victim impact evidence is potentially inflammatory and improper. Given the tremendous dangers posed by this type of evidence, it makes far more sense to allow this evidence before the judge rather than the jury. A judge who is trained in the law has a much greater ability to disregard the inevitably emotional and inflammatory aspects of victim impact evidence and limit it to its proper role outlined in Fla. Stat. 921.141, and in **Payne** and **Windom**. It is extremely likely that a jury would be overwhelmed by such inevitably emotional testimony.

4. In all other cases victims or their families, speak at a sentencing before a judge alone. Fla. Stat. 921.143. This procedure is even more important in a capital case given the inevitable emotional nature of a homicide case and the higher standard of due process and unique need for reliability required by Article I, Section 17 of the Florida Constitution and the Eighth Amendment to the United States Constitution. **Gardner v. Florida**, 430 U.S. 349, 358, 97 S. Ct. 1197, 1204, 51 L. Ed. 2d 393 (1977); **Tillman v. State**, 591 So. 2d 167 (Fla. 1991).

5. This evidence also has a significant danger of deflecting the jury from its

proper role of weighing aggravating and mitigating circumstances. In Windom, *supra*, the Court held that this evidence is neither an aggravating circumstance, nor a mitigating circumstance. 656 So. 2d at 434. Fla. Stat. 921.141 outlines the jury's role as weighing aggravating factors and mitigating circumstances.

Victim impact evidence would detract from this duty.

The Standard Jury Instructions also make clear to the jury that their sole function is to weigh aggravating and mitigating circumstances. The opening penalty phase instructions state:

The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that...this evidence is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

The closing penalty phase instructions contain several references to the fact that the jury is to make the decision based solely on the weighing of aggravating and mitigating circumstances:

It is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole....

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances....

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

It is clear that both the statute and the Standard Jury Instructions anticipate the jury's decision being made solely based on aggravating and mitigating circumstances. The only way to reconcile the Standard Jury Instructions, Fla. Stat. 921.141(3), and 921.141(8) (victim impact) is to allow victim impact evidence to be introduced solely before the judge. Any other solution would inevitably deflect the jury from its proper task of weighing aggravating and mitigating circumstances.

WHEREFORE, the Defendant, Norman Blake McKenzie, respectfully requests this Honorable Court to issue its order to allow victim impact evidence before the judge alone if the Court denies the Defendant's previous motion to exclude said evidence, or grant such other relief as may be appropriate.

CERTIFICATE OF SERVICE

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

MOTION FOR FINDINGS OF FACT BY THE JURY

COMES NOW the Defendant, Norman Blake McKenzie, by and through undersigned counsel, requests this Court to direct the jury to return findings of fact as to aggravating and mitigating circumstances in concert with the jury's decision of the penalty to be imposed in this cause.

As grounds for this request, Defendant states:

1. Florida's statutory scheme for imposing a death sentence requires that the sentence be supported by findings of fact supporting the aggravating and mitigating circumstances. §921.141, Fla. Stat.; **State v. Dixon**, 283 So.2d 1 (Fla. 1973).

2. During the penalty phase, the jury is presented evidence as to aggravating and mitigating circumstances and instructed to return a recommendation based upon the jury's findings as to these circumstances.

3. This Court then considers the jury's recommendation and imposes a sentence. If the sentence is death, this Court must support the sentence with findings

of facts as to the aggravating circumstances.

4. The sentence of death is then subject to appellate review in the Supreme Court of Florida. This entails a review of the findings of fact to support the sentence.
5. To aid appellate review, this Court is required to file written findings supporting the sentence. ***State v. Dixon***, 283 So.2d 1 (Fla. 1973).

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CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

MOTION TO BAR EXECUTION BY LETHAL INJECTION

COMES NOW, the Defendant, by and through the undersigned counsel, and moves this Court pursuant to Art. I § 17 of the Florida Constitution and the Eighth Amendment to the United States Constitution to bar potential execution by lethal injection.

In support of his motion, the defendant states as follows:

1. Defendant has been previously convicted of two counts of first-degree murder and is here for resentencing under **Hurst v. Florida**, 202 So. 3d 40 (Fla. 2016).
2. If the jury unanimously decides that Defendant should die and this Honorable Court does not override that decision, he will face execution by lethal injection.
3. Defendant seeks to bar the State of Florida from using lethal injection because its use is unconstitutional and unlawful.
4. The Eighth Amendment to the U.S. Constitution prohibits the infliction of "cruel and unusual punishments." Article I § 17 of the Florida Constitution also prohibits

cruel and unusual punishment. The standard by which the United States Supreme court has interpreted the Eighth Amendment, is based upon the prohibition against “cruel and unusual punishment.” This interpretation by the United States Supreme Court clearly applies to the Florida Constitution’s prohibition under Art. I, § 17, Fla. Const.

5. The U.S. Constitution, and, therefore, Florida’s Constitution, forbid the infliction of unnecessary pain in the execution of a sentence of death. **Louisiana ex rel. Francis v. Resweber**, 329 U.S. 459, 463 (1947) (opinion of Reed, J.). For this reason, “The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence.” **Resweber**, 329 U.S. at 463. Further, “[p]unishments are cruel when they involve ... a lingering death.” **In re Kemmler**, 136 U.S. 436, 447 (1890); see also **Nelson v. Campbell**, 541 U.S. 637, 125 S.Ct. 2117, 2122, 158 L.Ed. 2d 924 (2004).

A punishment is constitutionally offensive if it involves the *foreseeable* infliction of suffering. **Furman v. Georgia**, 408 U.S. 238, 273 (1973) (*citing Resweber*, 329 U.S. at 463, for the proposition that had a failed execution been intentional and not unforeseen, the punishment would have been, like torture, “so degrading and indecent as to amount to a refusal to accord the criminal human status”) (emphasis added). Issues such as the probable length of time the condemned remains conscious of the process, the physical or psychological pain he or she suffers during this period and the time it takes for death to occur must all be taken into consideration in determining whether a means of execution violates the constitution. See **Fierro v. Gomez**, 865 F. Supp. 1387, 1413 (N.D. Cal. 1994), *aff’d*, 77 F.3d 301, 308 (9th Cir.

1996), *vacated on other grounds*, 519 U.S. 918 (1996)

("[D]eath by this [lethal gas] method is not instantaneous. Death is not extremely rapid or within a matter of seconds. Rather ... inmates are likely to be conscious for anywhere from fifteen seconds to one minute from the time that the gas strikes their face" and "during this period of consciousness, the condemned inmate is likely to suffer intense physical pain" from "air hunger"; "symptoms of air hunger include intense chest pains ... acute anxiety, and struggling to breathe.") Lethal injection executions, similar to lethal gas executions, are not quick.

In a decision issued recently, the United States Supreme Court explained how this test should be applied to methods of execution by lethal injection. In **Baze v. Rees**, 128 S.Ct. 1520 (2008), the Court considered the constitutionality of a written protocol adopted by the Kentucky Department of Corrections to implement execution by lethal injection. *Id.* at 1527. In a fractured plurality opinion, the Court upheld Kentucky's written protocol, citing the multiple, detailed safeguards Kentucky had adopted to minimize the possibility of a "botched" execution and highlighted Kentucky's lack of botched executions. The plurality also set forth a standard to assess the constitutionality of a particular method of execution: the Eighth Amendment is violated only if the execution method creates a "substantial risk of serious harm." *Id.* at 1531 (quoting Farmer v. Brennan, 511 U.S. 825, 842, 846 & n.9 (1994)).

Lethal Injection's History of Botched Executions

The history of execution by lethal injection in the United States is a miserable one. It has been characterized as "the most commonly 'botched' method of execution in the United States." Sims v. State, 754 So. 2d 657, 667, n.19 (Fla. 2000) (quoting

the expert testimony of Professor Michael Radelet)." Since 1985, there have been at least twenty-one executions by lethal execution that were botched. Marion Borg and Michael Radelet, On Botched Executions in Capital Punishment: Strategies for Abolition, pp. 143-168 (Peter Hodgkinson and William Schabas eds., 2001). "Lethal injection, meant to be the neat and modern execution method, [has been] plagued with problems, or

'execution glitches,' as they are also referred to in the business." Stephen Trombley, The Execution Protocol: Inside America's Capital Punishment Industry, p. p. 14 (1992). Texas, Oklahoma, Arkansas, Missouri, and Illinois have reported bungled attempts to dispatch prisoners by lethal injection. These mistakes include "blow-outs," improperly inserted catheters (no doubt attributable to the fact that, for ethical reasons, physicians are not involved in the process), flawed "cut-down" procedures, and the improper mixture of the solution(s) used in lethal injection. Id. Plainly, there is a disturbing history and one which the defense is now bringing to the attention of the Court, the prosecution and the DOC so there can be no principled argument in the future that similar problems with lethal injections were not foreseeable.¹

¹ Press reports on specific executions also report horrific incidents throughout the country and across the years. See, e.g. Scott Fornek and Alex Rodriguez, Gacy Lawyers Blast Method: Lethal Injections Under Fire After Equipment Malfunction, CHICAGO SUN-TIMES, May 11, 1994, at 5; Rich Chapman, Witnesses Describe Killer's 'Macabre' Final Few Minutes, CHICAGO SUN-TIMES, May 11, 1994, at 5; Rob Karwath & Susan Kuczka, Gacy Execution Delay Blamed on Clogged IV Tube, CHICAGO TRIB., May 11, 1994; Witnesses to a Botched Execution, ST. LOUIS POST-DISPATCH, May 8, 1995, at 6B. 34; Tim O'Neil, Too-Tight Strap Hampered Execution, ST. LOUIS POST-DISPATCH, May 5, 1995, at B 1; Jim Slater, Execution Procedure Questioned, KANSAS CITY STAR, May 4, 1995, at C8. 35; Sherri Edwards & Suzanne McBride, Doctor's Aid in Injection Violated Ethics Rule: Physician Helped Insert the Lethal Tube in a Breach of AMA's Policy Forbidding Active Role in Execution, INDIANAPOLIS STAR, July 19, 1996, at A1; Suzanne McBride, Problem With Vein Delays

The injection of pancuronium bromide and potassium chloride are guaranteed to produce a horrifying and agonizing death unless the prisoner is fully anaesthetized and remains anaesthetized throughout. This, in turn, depends wholly and solely upon the non-medical personnel accurately measuring out and then successfully administering an adequate dose of sodium pentothal:

Even a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation.

Chaney v. Heckler, 718 F.2d 1174, 1191 (D.C. Cir. 1983), rev'd on other grounds, 470 U.S. 821, 837-38 (1985). Dr. Mark Heath, an anesthesiologist, has explained that the common errors that bedevil such a process include infiltration (the failure to correctly insert an IV line in a vein); retrograde injections (the improper dilution of the lethal drugs with saline solution in the IV bag); IV tubing leakage (caused by the need to join lengths of IV tube together to reach behind the executioner's curtain); and, incorrect dosages (the failure to administer a sufficient dosage given the individual differences from one person to another, including matters as diverse as body mass and drug use history). See Affidavit of Dr. Mark Heath, M. D. ~ 27-35, *on file in State v. Stephen Howard Oken*, Ct. of App. of Md., No. 143 and Misc. No. 31 September Term 2003 (Motion for Stay of Execution and Supporting Exhibits, Exhibit 9, Appendix B, filed June 1, 2004, *motion denied*, State v. Oken, 851 A.2d 538 (Md. Ct. App. 2004)). As a result of these common errors, prisoners executed by

Execution, INDIANAPOLIS NEWS, July 18, 1996, at 1; Rhonda Cook, Gang Leader Executed by Injection Death Comes 25 Years after Boy, 11, Slain, ATLANTA JOURNAL CONSTITUTION, Nov. 7, 2001, p. B1; Store Clerk's Killer Executed in Virginia, N.Y. TIMES, Jan. 25, 1996, at A 19; Killer Helps Officials Find A Vein At His Execution, CHATTANOOGA FREE PRESS, June 13, 1997, at A7; Michael Graczyk, Reputed Marijuana Smuggler Executed for 1988 Dallas Slaying, ASSOCIATED PRESS, August 27, 1998; Sean Whaley, Nevada Executes Killer, LAS VEGAS REVIEW- JOURNAL, Oct. 5, 1998, at 1 A; Ron Moore, " At Last I can be with my Babies," SCOTTISH DAILY RECORD, May 4, 2000, at 24; Rick Bragg, Florida Inmate Claims Abuse in Execution, N.Y.

lethal injection suffer a substantial risk of serious harm during the administration of the pancuronium bromide and the potassium chloride.

Florida's Three Drug Cocktail Creates a Substantial Risk of Serious Harm

Under Florida law, a death sentence is to be “executed by lethal injection...under the direction of the Secretary of Corrections or secretary’s designee.” Fla. Stat. § 922.105(1). The statute prescribes no specific drugs, dosages, drug combinations, or the manner of intravenous access to be used in the execution process; nor does the statute require certification, training, licensure, experience, or demonstrated competence of those who participate in the execution process. All of the details of the execution process are to be determined by the Defendant Secretary. The procedures and protocols are developed by the Florida Department of Corrections (DOC) in secrecy and with unfettered ability to be revised whenever DOC wishes.

On September 19, 2013, the Florida Department of Corrections (DOC) adopted a new lethal injection protocol. Significantly, the new protocol calls for the use of midazolam hydrochloride as the first drug in Florida’s lethal injection protocol. The first drug’s role is to render the condemned unconscious, before the administration of the second and third drugs, or the condemned will suffer excruciating pain. Midazolam hydrochloride is a short-acting benzodiazepine better known by the trade name Versed. It is not a barbiturate, as was pentobarbital and sodium thiopental. It is often used as a sedative prior to the induction of

TIMES, June 9, 2000, at A14; Sarah Rember, Working Death Row, N.Y. TIMES, Dec. 17, 2000, at 1. Editorial, State-Sponsored Horror in Oklahoma, The New York Times, April 30, 2014.

anesthesia in surgical settings. The use of Midazolam hydrochloride is untested. The first execution with the use of this drug and dosage was the 2013 Florida execution of William Happ.

During, Happ's execution witnesses observed muscle movement minutes after midazolam was administered. This movement indicates consciousness and sensation. See: Florida Murderer Who Raped and Killed Woman is Left Writhing in Agony and Takes Twice as Long to Die as He is Executed Using New Untried Lethal Injection Drug. Daily Mail (Oct. 16, 2013).

Next, the person being executed is administered a neuromuscular blocking agent, vecuronium bromide, a curare-derived agent that paralyzes all skeletal or voluntary muscles, but which has no effect whatsoever on awareness, cognition or sensation.

Finally, the condemned is administered the agent actually designed to cause death -- potassium chloride, a chemical that causes death by cardiac arrest, an extremely painful process that activates nerve fibers in the veins as the drug proceeds through the prisoner's system and ultimately interferes with the rhythmic contractions of the heart and stops its beating. See generally Deborah W. Denno, When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What it Says about Us, 63 Ohio St. LJ.63, 95-99 (2002) (discussing the chemicals used in lethal injection and their medical effects).

Far from producing rapid loss of consciousness and a humane death, this particular combination of chemicals causes the inmate to suffer an excruciatingly painful, protracted death. The sequence of the administration of the chemicals, and

failure to provide professional medical monitoring of the effects of the drugs, virtually assure, however, that the actual pain and fear being suffered by the execution victim - the very things by which a court can judge whether a method of execution transgresses the constitutional standards -- will go undetected. Denno, at This particular combination of drugs was used on Oklahoma condemned inmate, Clayton Lockett on April 29, 2014. Mr. Lockett's execution was horribly botched. Lockett was administered the first drug in the protocol, midazolam, and declared unconscious. However, minutes later Lockett began to write, mumble and nod. The execution was halted and Lockett died 40 minutes later of a heart attack. See: M. Pearce, M. Hennessy-Fiske, and P. Dave, [Oklahoma halts double execution after one is botched](#), Los Angeles Times, April 29, 2014.

The Florida Department of Corrections has not published a complete and meaningful protocol for the lethal injection process. Another serious problem with any protocols is that they fail to provide any semblance of the medical standards that should attend an injection execution. Absent such standards, Defendant is not guaranteed that his execution would be carried out under procedures that minimize the risk of needless pain, suffering and the risk of lingering death. The protocols do not address nor has information been made available publicly about, among other issues, the following matters with regard to members of the execution squad:

- licensure for technical team members
- prior license revocation
- prior experience generally with medical procedures
- experience starting intravenous procedures

- experience with cut down procedures
- prior disciplinary actions
- pending or past criminal investigations

We do not know if the people who botched the Angel Diaz and the William Happ executions are still involved in current executions.

The U.S. Supreme Court in Baze noted that Kentucky has not experienced problems with lethal injection when the protocol is followed properly. However, in Florida we know the Department of Corrections members have not followed the procedures properly because of the botched executions that have occurred. These include but are not limited to Jesse Tafero (1990), Pedro Medina (1997), Bennie Demps (2000), Angel Diaz (2006) and William Happ (2013). The Florida Supreme Court has declined challenges against Florida's use of lethal injection. **Henry v. State**, 134 So.3d 938 (Fla. 2014); **Howell v. State**, 133 So.3d 511 (Fla. 2014); **Walton v. State**, 3 So.2d 1000 (Fla. 2009); **Peterson v. State**, 2 So.2d 146 (Fla. 2009); **Tompkins v. State**, 994 So.2d 1072 (Fla. 2008).

In the absence of a method of execution that utilizes both acceptable medical procedures and qualified personnel, Defendant, suffers an unconstitutional risk that he will be subjected to needless pain and otherwise inhumane and unconstitutional punishment in violation of the Constitution of the United States. The current death penalty protocol must be ruled inapplicable to Defendant since the DOC protocols and application of and/or failure to apply those protocols fail to assure that executions will be administered humanely. As a result, Florida's method of execution is substantially likely to result in severe harm to Defendant. Therefore, Florida's method of

execution violates Art. I § 17 of the Florida Constitution and the Eighth Amendment to the United States Constitution. Accordingly, Defendant requests that this Court find Florida' lethal injection protocol and its application unconstitutional and to enjoin the State from proceeding with Defendant's execution until the Department of Corrections adopts and effectively implements safeguards to avoid the risks noted above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicesctjohns@sao7.org on this 18th day of October, 2018.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION FOR LIST OF PROSPECTIVE JURORS IN
ADVANCE OF JURY SELECTION**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned counsel, pursuant to Florida Rules of Criminal Procedure, Rule 3.281 (1998), and respectfully moves this Honorable Court to enter its order authorizing and directing the Clerk of the Circuit Court to deliver to Defendant's counsel a listing of those jurors summoned for jury duty for the instant case immediately upon completion of said list, including copies of all juror questionnaires when returned to the Clerk. As grounds for said Motion, the Defendant would show:

1. That the Defendant is entitled to a list containing the names of prospective jurors summoned to try the case upon request. Rule 3.281, *supra*.
2. That the complexity of a capital voir dire makes it essential that the Defendant receive the list of jurors and questionnaires as they become available.

Florida Statutes Section 40.23 provides that jurors be allowed at least fourteen (14) days notice.

3. Immediate delivery of lists and questionnaires will provide for a more efficient voir dire process.

WHEREFORE, Defendant, Norman Blake McKenzie, respectfully submit that this Honorable Court should enter its order authorizing and directing the Clerk of the Circuit Court to provide prospective juror lists and questionnaires as they become available.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO DECLARE § 921.141 (1), FLORIDA STATUTES
UNCONSTITUTIONAL AND TO BAR STATE'S USE OF
HEARSAY EVIDENCE AT PENALTY PHASE**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned counsel and moves that this Honorable Court enter its order declaring section 921.141 (1), Florida Statutes unconstitutional and barring the state from using hearsay evidence during the penalty proceedings. The defense argues that, in authorizing the state's use of hearsay, the statute is unconstitutional. In favor of this motion, the defense says:

1. This is a capital case in which the prosecution asks this Court to impose the death penalty. Hence, heightened standards of due process apply. See Elledge v. State, 346 So.2d 998 (Fla. 1977) ("heightened" standard of review), Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."), Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir.1982) ("Reliability in the fact-finding aspect

of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."), and **Beck v. Alabama**, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." **Gregg v. Georgia**, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion) (citing cases).

2. An unconstitutional death penalty statute and use of hearsay by the state at capital sentencing violates article 1, sections 9 (due process), 16 (rights of accused), 17 (cruel or unusual punishment), 21 (access to courts), and 22 (trial by jury) of the Florida Constitution, and the fifth (due process), sixth (confrontation, jury trial), eighth (cruel and unusual punishment), and fourteenth (due process and incorporation) amendments to the United States Constitution.

3. Section 921.141(1), Florida Statutes, which governs capital sentencing hearings, states in pertinent part (emphasis added):

... In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating factors enumerated in subsection (6) and for which notice has been provided pursuant to s. 782.04(1)(b) or mitigating circumstances enumerated in subsections (7). Any such evidence that the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

...
Emphasis added.

4. The Confrontation Clauses of the state and federal constitutions secure to

criminal defendants the right to confront and cross-examine the state's witnesses. They generally bar the state's use of hearsay unless the evidence fits a firmly rooted hearsay exception or is accompanied by particularized guarantees of trustworthiness. **Idaho v. Wright**, 497 U.S. 805 (1990), **Ohio v. Roberts**, 448 U.S. 56 (1980).

5. The Confrontation Clauses apply to trial-like sentencing proceedings under **Specht v. Patterson**, 386 U.S. 605 (1967). In **Specht**, the Court ruled that a defendant had the right to confront and cross-examine witnesses against him at trial-like jury sentencing proceedings under the Colorado Sex Offenders Act. The Court reached this result notwithstanding that in **Williams v. New York**, 337 U.S. 241 (1948), it had declined to apply the Confrontation Clause to capital sentencing proceeding by a judge. Subsequently, in **Gardner v. Florida**, 430 U.S. 349 (1977), the Court made clear that it no longer approved of **Williams**.

6. Accordingly, in **Engle v. State**, 438 So.2d 803, 813-14 (Fla.1983), the court ruled that **Specht** required reversal of the death sentence where judge had considered a co-defendant's hearsay statement in making the sentencing decision, noting:

The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the fourteenth amendment to the United States Constitution. **Pointer v. Texas**, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. **Pointer v. Texas**. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. **Specht v. Patterson**.

7. Unfortunately, the court muddled the waters in **Rhodes v. State**, 547 So.

2d 1201 (Fla. 1989). There the state presented the capital sentencing jury with evidence about an offense committed by the defendant in Nevada. A police captain played a taped interview of the Nevada victim, and gave hearsay testimony about the statement. The Supreme Court ruled that the Confrontation Clause barred the state's use of the taped statement. Id. 1204. However, the court then ruled that the state could use the captain's hearsay testimony regarding the victim's statement, concluding that, because the defendant could cross-examine the captain, his hearsay testimony was admissible. Thus the court determined that capital sentencing is the sort of trial proceeding to which the Clause applies, but misunderstood the nature of the defendant's right to confront the source of the information against him. See also Waterhouse v. State, 596 So.2d 1008 (Fla.), cert. denied, 113 S.Ct. 418 (1992) (citing Rhodes).

8. Thus Rhodes reached the odd conclusion that, although it applies to capital proceedings, the Confrontation Clause is not violated by testimony founded on hearsay provided by persons whom the defendant cannot confront. Hence, Florida applies a flawed version of the Confrontation Clause. Florida's rule is directly contrary to the plain meaning of the Sixth Amendment: the defendant has the right to confront the government's witnesses in court. The state Supreme Court has suggested no reason to believe that the hearsay testimony was so reliable as to make confrontation and cross-examination unnecessary. Cf. Idaho v. Wright.

9. In view of the foregoing, the statute is unconstitutional insofar as it permits the state's use of hearsay at capital sentencing.

10. Further grounds will be argued ore tenus.

WHEREFORE, the Defendant, Norman Blake McKenzie, moves that this Court enter its order declaring section 921.141(1) unconstitutional and barring the state's use of hearsay at sentencing, or granting such other relief as may be appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

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IN THE CIRCUIT COURT, SEVENTH
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CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO DECLARE SECTION 921.141, FLORIDA STATUTES
UNCONSTITUTIONAL FOR LACK OF ADEQUATE APPELLATE REVIEW**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned counsel and moves that this Honorable Court enter its order declaring section 921.141, Florida Statutes, unconstitutional because in operation it does not permit sufficient appellate review.

In **Proffitt v. Florida** 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976), the Court upheld Florida's capital punishment scheme. Crucial to the plurality decision was the finding that Florida law required a heightened level of appellate review:

The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. §921.141(4) (Supp. 1976-1977). The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible and the Supreme Court of Florida like its Georgia counterpart considers its

function to be to "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." **State v. Dixon**, 283 So.2d 1, 10 (1973).

428 U.S. at 250-251.

The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." **Songer v. State**, 322 So.2d 481, 484 (1975).

Id. 252-53.

Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.

Nonetheless the petitioner attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency.

Id. 258-59.

The Defendant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the

evenhanded application of appellate review and the independent reweighing process envisioned in **Proffitt**. Hence the statute is unconstitutional.

A. Written findings regarding mitigating circumstances.

Precise written findings by the trial court are necessary to the system of appellate review required by **Proffitt**: "Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible...." *Id.* 250-251. The administration of this requirement has been so haphazard as to violate **Proffitt**. It was not until 1990 that the Supreme Court required specific findings of fact regarding mitigating evidence, and subsequent cases throw doubt on whether they are required by the Supreme Court even now; similarly, the administration of the requirement of factual findings regarding aggravating circumstances has been arbitrary.

It was not until June 1990, that the Supreme Court required for the first time¹ that the trial court make explicit findings regarding the mitigating circumstances. **Campbell v. State**, 571 So.2d 415 (Fla.1990) ("the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant"). But then, a mere three months later, the court upheld a death sentence in a case in which the trial did **not** "expressly evaluate each mitigating circumstance": In **Floyd v. State**, 569 So.2d 1225 (Fla.1990), the court upheld a sentencing order in which the trial judge said only the following about the mitigating evidence: "...this Court heard everything at the

¹ **Campbell** is directly contrary to prior Supreme Court decisions. *See, e.g., Mason v. State*, 438 So.2d 374, 380 (Fla. 1983) ("The trial judge need not have expressly addressed each non-statutory mitigating factor in rejecting the same, and we will not disturb his judgment simply because appellant disagrees with the conclusions reached.").

sentencing hearing that the Defendant chose to present. This Court now finds that sufficient mitigating circumstances which would require a lesser penalty do **not** exist." (Emphasis in original; ellipsis in Supreme Court's opinion). Hence, the **Campbell** requirement (which itself is required by **Proffitt** and **Rogers v. State**, 511 So.2d 526 (Fla.1987), *cert. denied*, 484 U.S. 1020 (1988) has been either overruled or is so readily ignored that its application (and therefore application of the death penalty) is arbitrary and capricious. Further, the failure to require such findings in the hundreds of pre-**Campbell** cases renders proportionality review arbitrary and capricious. In its application, section 921.141 violates **Proffitt** and it is therefore unconstitutional.

Similarly confused is the case law regarding rendition of the sentencing order. Until recently, the Supreme Court imposed no meaningful requirement of specificity in the findings, and did not even require that the findings be made at the time of sentencing. It was not until **Van Royal v. State**, 497 So.2d 625 (Fla.1986) that the court made some attempt at imposing a concurrency requirement. As Justice Ehrlich noted in his concurring opinion, there can be no meaningful weighing process unless rendition of the order is concurrent with imposition of the death sentence, *Id.* at 630.² But thereafter **Van Royal** was strictly limited to its facts and the court did not reverse death sentences even where the sentencing order was not rendered until months after sentencing. It was not until **Grossman v. State**, 525 So.2d 833, 841 (Fla. 1988) that the court ordered that the sentencing order be rendered at the time of sentencing. It

² Justice Ehrlich wrote: "I am of the opinion that the trial court's written findings with respect to aggravating and mitigating circumstances must at least be coincident with the imposition of the death penalty. It is inconceivable to me that any meaningful weighing process can take place otherwise."

was not until **Bouie v. State**, 559 So.2d 1113 (Fla.1990) that a death sentence was reversed for inadequacy of the trial court's findings. In view of the foregoing, the application of the death penalty statute violates **Proffitt**.

Finally, **Proffitt** contemplated appellate review in which the trial court would make specific findings regarding the aggravating circumstances and the Supreme Court would review the record to determine whether such findings were supported by the record. But appellate review has not operated in this way. For instance, in **Mason v. State**, 438 So.2d 374 (Fla. 1983), *cert. denied*, 465 U.S. 1051 (1984), the trial court found that the premeditation aggravating circumstance applied because the killer "had to lift his arm up and come down deliberately and with great force." J. Kennedy, ***Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases***, XVII ***Stetson L. Rev.*** 47, 72 (1987). Instead of reviewing the propriety of this determination, the court substituted its own finding: "The record shows that appellant broke into Mrs. Chapman's home, armed himself in her kitchen, and attacked her as she lay sleeping in bed. Nothing indicates that she provoked the attack in any way or that appellant had any reason for committing the murder. There was sufficient evidence for the trial court to find this circumstance applicable." 438 So.2d at 379.

B. Deferential review of questions of law and mixed questions of law and fact.

The Florida appellate system has an unconstitutional presumption in favor of the state on questions of law. Properly, questions of law and mixed questions of law and fact should be subject to *de novo* appellate review. *E.g.*, **Gibbs v. Air Canada**, 810,

1529, 1532, (11th Cir.1987) reh. denied 816 F.2d 688 (table) (questions of law) and **Smith v. Wainwright**, 777 F.2d 609, 615-616 (11th Cir.1985) (mixed questions of law and fact). Florida appellate review in capital cases has not complied with these requirements and therefore violates the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

Although the Supreme Court has sometimes engaged in *de novo* review of questions of law or of mixed questions of law and fact,³ it has at other times used a highly deferential standard of review. *E.g.*, **Porter v. State**, 429 So.2d 293, 296 (Fla.1983), *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983) (deference to trial court's failure to find apparently un rebutted mitigation), and **Johnson v. State**, 520 So.2d 565, 566 (Fla. 1988) (same).

From the foregoing, either Florida has an illegal presumption of correctness with respect to questions of law or mixed questions of fact and law, or appellate review is conducted in an arbitrary and inconsistent manner contrary to the requirements of **Proffitt** and of the Constitution. Further, the presumption of correctness on such issues is contrary to the constitutional and statutory requirement of strict construction of penal laws.

C. Construction of aggravating circumstances.

The failure to apply the due process requirement of strict construction is most apparent with regard to aggravating circumstances.

³ See, *e.g.*, **Mason v. State**, 438 So.2d 374 (Fla.1983), *cert. denied*, 466 U.S. 1051 (1984) (court substitutes its own finding as to premeditation circumstance).

A death penalty statute is unconstitutional if it has "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing" could occur. **Godfrey v. Georgia**, 446 U.S., 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion). A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. **Porter v. State**, 564 So.2d 1060, 1063-64 (Fla.1990), **Lowenfield v. Phelps**, 108 S.Ct. 546, 554 (1988).

Section 775.021(1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This principle of strict construction is not merely a maxim of statutory interpretation: it is rooted in fundamental principles of due process. **Dunn v. United States**, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) (rule "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Cit.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not "plainly and unmistakably" proscribed. [Cit.]"). This principle of strict construction of penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. **Bifulco v. United States**, 447 U.S.

381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). It applies to Florida capital proceedings. **Trotter v. State**, 576 So.2d 691, 694 (Fla.1990) (sentence of imprisonment aggravating circumstance).

Cases construing our aggravating factors have not complied with this principle. For instance, attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious, or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death eligible persons, or channel discretion as required by, *e.g.*, **Lowenfield v. Phelps**, 108 S.Ct. 546, 554-55 (1988). The aggravating circumstances mean pretty much what one wants them to mean, so that the statute is unconstitutional. *See* **Herring v. State**, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare **Herring** with **Rogers v. State**, 511 So.2d 526 (Fla. 1987) (overruling **Herring**) with **Swafford v. State**, 533 So.2d 270 (Fla. 1988) (resurrecting **Herring**), with **Schafer v. State**, 537 So.2d 988 (Fla. 1989) (reinterring **Herring**). *Compare also* **Provenzano v. State**, 497 So.2d 1177, 1183 (Fla. 1986) ("Heightened premeditation necessary for this circumstance does not have to be directed toward the specific victim." CCP applied to killing of bailiff who came out of courtroom while defendant was trying to kill two police officers), *with* **Amoros v. State**, 531 So.2d 1256 (Fla. 1988) (CCP improperly applied to killing of woman present when defendant sought to kill girlfriend).

As to HAC, compare **Raulerson v. State**, 358 So.2d 826 (Fla. 1978) (finding HAC), *with* **Raulerson v. State**, 420 SO.2d 567 (Fla. 1982) (rejecting HAC on same

facts). Compare also **Mills v. State**, 476 So.2d 172, 178 (Fla. 1985) (focus is on "intent and method" of defendant) with **Pope v. State**, 441 So.2d 1073, 1078 (Fla. 1984) ("nor is the defendant's mindset ever at issue").⁴ Compare also **Herzog v. State**, 439 So.2d 1372 (Fla. 1983) (HAC rejected where decedent semi-conscious), with **Jennings v. State**, 453 So.2d 1109, 1115 (Fla. 1984), vacated 470 U.S. 1002, rev'd on other grounds 473 So.2d 204 (1985) (HAC applied where decedent unconscious). Compare **Brown v. State**, 526 So.2d 903 (Fla. 1988) (HAC rejected where police officer beaten and killed during struggle for gun and must have known she was fighting for her life), with **Grossman v. State**, 525 So.2d 833 (Fla. 1988) (HAC applied where police officer beaten and killed during struggle for gun and must have known she was fighting for her life).⁵

Similarly, the "great risk of death to many persons" factor has been inconsistently applied and construed. Compare **King v. State**, 390 So.2d 315, 320 (Fla. 1980) (circumstance found where defendant set house on fire; defendant could have "reasonably foreseen" that the fire would pose a great risk) with **King v. State**, 514 So.2d 354 (Fla. 1987) (rejecting circumstance on same facts) with **White v. State**, 403 So.2d 331, 337 (Fla. 1981) (factor could not be applied "for what *might* have occurred,"⁴ In **Stano v. State**, 460 So.2d 890 (Fla. 1985), the court refused to apply **Pope** retroactively. This result scarcely promotes the evenhanded application of the death penalty required by **Proffitt**.

⁵ For extensive discussion of the problems with these circumstances, see Kennedy, *Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases*, 17 Stetson L. Rev. 47 (1987), and Mello, *Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller*, 13 Stetson L. Rev. 523 (1984).

but must rest on "what in fact occurred").

The "prior violent felony" circumstance has been broadly construed in violation of the rule of lenity. A strict construction in favor of the Defendant would be that the circumstance should apply only where the prior felony conviction (or at least the prior felony) occurred before the killing. The cases have instead adopted a construction favorable to the state, ruling that the factor applies even to contemporaneous violent felonies. See **Lucas v. State**, 376 So.2d 1149 (Fla. 1979).

The "under sentence of imprisonment" factor has similarly been construed in violation of the rule of lenity. It has been applied to persons who had been released from prison on parole. See **Aldridge v. State**, 351 So.2d 942 (Fla. 1977). It has been indicated that it applies to persons in jail as a condition of probation (and therefore not "prisoners" in the strict sense of the term). See **Peek v. State**, 395 So.2d 492, 499 (Fla. 1981).

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See **Swafford v. State**, 533 So.2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,⁶ it has been broadly interpreted to cover witness elimination. See **White v. State**, 415 So.2d 719 (Fla. 1982).

From the foregoing, Florida's appellate review does not fulfill the requirements of
⁶ See Barnard, **Death Penalty**, (1988 Survey of Florida Law), 13 Nova L. Rev. 907, 926 (1989).

Proffitt of strict appellate review so that the death penalty is reserved only for the worst homicides.

D. Reweighing.

As already noted, **Proffitt** calls for appellate reweighing of the aggravating and sentencing evidence and factors. 428 U.S. at 252-253 ("the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida").

The Florida Supreme Court has refused to meet this requirement of **Proffitt**, leaving such matters to the trial court. See **Smith v. State**, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and **Atkins v. State**, 497 So.2d 1200 (Fla. 1986).

E. Technicalities as bars to appellate review: the contemporaneous objection rule.

Proffitt contains the notion of consistency in resolution of the merits of issues on appeal. In keeping with the principle of full appellate review in capital cases, the general rule around the country is in favor of limiting the use of technical obstacles to appellate review in capital cases.⁷ Florida, however, has fostered the application of the contemporaneous objection rules⁸ and other procedural obstacles to appellate review

⁷ 41 C.J.S., Homicide §414, nn. 23-28.

⁸ Florida actually has several codified contemporaneous objection rules. The ones that usually apply to criminal cases are section 90.104, Florida Statutes (pertaining to evidentiary objections), and rule 3.390 (d) and (e), Florida Rules of Criminal procedure (pertaining to jury instructions). Various other rules and statutes (such as rules 3.600, Florida Rules of Criminal

although this policy has not been without inconsistency, as shown by recent decisions.

In **Floyd v. State**, 569 So.2d 1225 (Fla.1990), the court held that the trial court erred by refusing to grant the defense's cause challenge to a juror named Hendry, but then wrote:

However, our inquiry does not end there. Although the trial court erred in failing to excuse Hendry for cause, reversal is warranted under our case law only if Floyd exhausted his peremptory challenges, requested additional peremptories, and had that request denied by the trial court. *See Hamilton v. State*, 547 So.2d 630 (Fla.1989)]; *Moore v. State*, 525 So.2d 870 (Fla.1988)]; *Hill v. State*, 477 So.2d 553 (Fla.1985)]. Although Floyd used a peremptory to remove juror Hendry, and he exhausted his peremptory challenges, he failed to request any additional peremptories to replace the one used to excuse juror Hendry. Nor did he show that a juror unacceptable to him served on the jury. Thus, Floyd failed to preserve his position for appeal. *Reilly v. State*, 557 So.2d 1365, 1367 (Fla.1990); *Hill*, 477 So.2d at 556; *Young v. State*, 234 So.2d 341, 348-49 (Fla.1970), *receded from on other grounds*, *State v. Retherford*, 270 So.2d 363 (Fla.1972), *cert. denied*, 412 U.S. 953 (1973); *Rollins v. State*, 148 So.2d 274, 276 (Fla.1963).

569 So.2d at 1230. The obvious teaching of **Floyd** and prior cases is that, to preserve such an issue for appeal,⁹ one must exhaust one's peremptories, request additional peremptories, and have that request denied by the trial court.

Procedure (pertaining to motions for new trial), and 2.070, Florida Rules of Judicial Administration (pertaining to recording of court proceedings), and section 90.107, Florida Statutes (pertaining to limiting instructions)) also bear on preservation issues, as does a confused and sometimes contradictory body of ever-evolving case law.

⁹ One might say that in **Floyd** the court confused the logically distinct issues of preservation for appellate review and demonstration of prejudice. The court obviously reached the merits of the issue of whether the trial court erred by denying the cause challenge. Strictly speaking, it held that the defense failed to show that it was prejudiced by running out of peremptory challenges because it did not show that an objectionable person remained on the jury. See the discussion in **Hill**, 477 So.2d at 556.

However, when Melvin Trotter's attorney did exactly that in his capital trial the Supreme Court held that the issue was not preserved for review:

Trotter raises eight points on appeal. He first contends that the trial court erred in refusing to excuse four prospective jurors for cause, thus forcing the defense to expend peremptory challenges in removing them. He argues that because he eventually exhausted his peremptory challenges and was denied an additional one, reversal is required under state and federal law. We disagree. Under federal law, the defendant must show that a biased juror was seated. [FN4] **Ross v. Oklahoma**, 108 S.Ct. 2273 (1988). Trotter has made no such claim.

FN4. Alternatively, the defendant can show that state law governing peremptory challenges was not followed. **Ross v. Oklahoma**, 108 S.Ct. 2273 (1988).

Under Florida law, "[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." **Pentecost v. State**, 545 So.2d 861, 863 n.1 (Fla.1989). By this, we mean the following. Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. [FN5] This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted. [FN6] The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial. In the present case, after exhausting his peremptory challenges, Trotter failed to object to any venireperson who ultimately was seated. [FN7] He thus failed to establish this claim.

FN5. See **Hamilton v. State**, 547 So.2d 630 (Fla.1989) (reversible error where request for additional peremptory challenge to backstrike specific juror denied); **Rollins v. State**, 148 So.2d 274 (Fla. 1963) (no reversible error where peremptories exhausted and remaining juror to be selected was not challenged for cause).

FN6. In Moore v. State, 525 So.2d 870 (Fla.1988), and Hill v. State, 477 So.2d 553 (Fla.1985), this Court held that reversible error was committed when a challenge for cause was improperly denied, the defendant exhausted his peremptory challenges in removing the challenged juror, and the judge denied his motion for additional peremptory challenges. Neither of these opinions discussed the issue of whether it was necessary to object to a particular juror remaining on the panel in order to preserve the question of whether the judge erred in denying the earlier challenge for cause.

FN7. Trotter's request for an additional peremptory challenge was not made in connection with a particular venireperson; it was a general request for a challenge that could be exercised in the future.

Trotter v. State, 576 So.2d 691, 692-693 (Fla.1990).

The purpose of the contemporaneous objection rule is to prevent the defense from raising for the first time on appeal matters that were not presented to the trial court.

Castor v. State, 365 So.2d 701 (Fla.1978).¹⁰ It would seem that this purpose would be satisfied where the trial court directly rules on the merits of the issue advanced on

¹⁰ In Castor, defense counsel did not object to an incomplete re-instruction to the jury on manslaughter. The court wrote at page 703:

As a general matter, a reviewing court will not consider points raised for the first time on appeal. Dorminey v. State, 314 So.2d 134 (Fla.1975). Where the alleged error is giving or failing to give a particular jury instruction, we have invariably required the assertion of a timely objection. Febre v. State, 158 Fla. 853, 30 So.2d 367 (1947); see Williams v. State, 285 So.2d 13 (Fla.1973). The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal. See Rivers v. State, 307 So.2d 826 (Fla. 1st DCA), *cert. denied*, 316 So.2d 382 (Fla.1975); York v. State, 232 So.2d 767 (Fla. 4th DCA 1969).

appeal. However, in *Nixon v. State*, 572 So.2d 1336 (Fla.1990), the court held unpreserved an issue directly ruled on by the trial court. At the end of the prosecutor's argument to the jury in the guilt phase of his trial, the defendant's attorney moved for a mistrial arguing that the prosecutor had made an improper "Golden Rule" argument, noting that "at this time to instruct the jury to disregard it would be to no avail."¹¹ Although defense counsel had made no objection at the time of the challenged remark, the trial court treated the motion as an objection and ruled that the prosecutor's argument was not improper. On appeal, Mr. Nixon argued that counsel's motion for mistrial preserved the issue for appeal under *State v. Cumbie*, 380 So.2d 1031 (Fla. 1980).¹² Rejecting this argument, the court wrote:

¹¹ A "Golden Rule" argument is one that invites jurors to imagine themselves in the place of one of the parties (or, in a criminal case, in the place of the victim). *Joan W. v. City of Chicago*, 771 F.2d 1020, 1022 (7th Cir.1985) (such argument "has been universally condemned by the courts"). In *Nixon*, the prosecutor, in a somewhat confused discussion of his role in the litigation and of the emotions generated by the facts of the case, told the jury that he had "an obligation to make you feel just a little bit, just a little bit, of what [the decedent] felt because, otherwise, sometimes I think it's easy to forget that." 572 So.2d at 1340.

¹² In *State v. Cumbie* the court ruled that a motion for mistrial made after the jury retired to deliberate did not preserve for appeal an issue of improper prosecutorial argument, writing at pages 1033-1034:

Clark requires that a motion for mistrial be made "at the time the improper comment is made." In the present case, to have met this requirement, we hold that it would have been sufficient if Cumbie had moved for mistrial at some point during closing argument or, at the latest, at the conclusion of the prosecutor's closing argument. To avoid interruption in the continuity of the closing argument and more particularly to afford defendant [sic] an opportunity to evaluate the prejudicial nature of the objectionable comments in the context of the total closing argument, we do not impose a strict rule requiring that a motion for mistrial be made in the next breath following the objection to the remark. Here, Cumbie objected to the prosecutor's comment, and the trial court sustained the objection and instructed the jury to disregard this remark. If Cumbie felt that the judge's admonition was inadequate, he should have informed the judge of this fact at the time of his objection or, at the latest, at the end of the prosecutor's closing argument. The judge then may have been able to give additional curative instructions which may have remedied Cumbie's objection. The motion for mistrial in the present case, made after jury instructions and retirement of the jury for deliberation, however, came too late to preserve Cumbie's objection for appeal.

We do not construe **Cumbe** to obviate the need for a contemporaneous objection. The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system. A contemporaneous objection places the trial judge on notice that an error may have been committed and thus, provides the opportunity to correct the error at an early stage of the proceedings. **Castor v. State**, 365 So.2d 701, 703 (Fla.1978). While the motion for mistrial may be made as late as the end of the closing argument, a timely objection must be made in order to allow curative instructions or admonishment to counsel. As noted by defense counsel in this case, in many instances a curative instruction at the end of closing argument would be of no avail. Accordingly, defense counsel's motion for mistrial at the end of closing argument, absent a contemporaneous objection, was insufficient to preserve this claim under our decision in **Cumbe**. Even if the issue were properly preserved, we agree with the trial court that taken in context the comments complained of did not amount to a Golden Rule argument.

572 So.2d at 1341. The court's reliance on **Castor** is somewhat questionable, since **Castor** merely stands for the proposition that one cannot raise on appeal arguments that one did not make in the trial court. It would seem that one would be in compliance with **Castor** where the trial court rules on the merits of one's objection. In **Nixon**, the trial judge did rule on the merits and found the prosecutor's argument unobjectionable. Given this ruling, there is no likelihood that the trial court would have corrected the matter by giving a curative instruction, so that a request for such an instruction would have been useless under **Simpson v. State**, 418 So.2d 984 (Fla.1982). Thus the underlying premise of **Nixon** (that the trial court was not afforded the opportunity to remedy the situation) is invalid since the trial court would not have remedied the situation.

In **Nixon** the court made no mention of the fact that a month earlier, in

Occhicone v. State, 570 So.2d 902 (Fla.1990), it had not found a procedural bar where the trial court had refused to rule on the merits of an issue on the ground of procedural default. At Dominick Occhicone's trial, the state introduced evidence that he had been uncooperative when a deputy had tried to swab his hands for an atomic absorption test. The trial court denied counsel's objection to this testimony as untimely because counsel had not objected at a previous bench conference concerning the deputy's testimony. Defense counsel subsequently objected when the prosecutor referred to the testimony in final argument. Without addressing the apparent procedural bar, the court directly reached the merits and held the prosecutor's argument proper.

From the foregoing, Florida has not given the full appellate review in capital cases required by **Proffitt** and by section 921.141, Florida Statutes.

F. Inadequacy of appellate counsel.

Florida law has no minimum requirements for the adequacy of appellate counsel in appellate cases. The result is that the Supreme Court itself has decried the lack of competent attorneys handling capital appeals. See **Cave v. State**, 476 So.2d 180, 183, n. 1 (Fla. 1985). See also **Rose v. Dugger**, 508 So.2d 321, 325 (Fla. 1987) (appellate counsel "has either not clearly read the record or has not accurately presented its contents to this Court") and **Barclay v. Wainwright**, 444 So.2d 956 (Fla. 1984) (counsel acted under actual conflict of interest in 1977 appeal, to appellant's detriment). Obviously, the systemic lack of adequate counsel renders appellate review meaningless.

G. Tedder.

The failure of the Florida appellate review process is highlighted by the **Tedder**¹³ cases. As the court admitted in **Cochran v. State**, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply **Tedder** consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.¹⁴

H. Relief.

What relief should the court give if it finds the evidence insufficient as to a particular aggravating factor? The Florida Supreme Court has not established any set procedure, adopting radically different approaches from case to case.

Exemplary of the court's confused approach is its decision reversing Thomas Trotter's death sentence on the ground that the sentence of imprisonment circumstance had been improperly applied.¹⁵ In its initial decision, the court ordered a judge resentencing. **Trotter v. State**, 16 FLW S17, S18 (Fla. Dec. 20, 1990). However, on rehearing, the court ordered a jury resentencing, with no explanation for the change in the relief granted. 576 So.2d 691, 694.

¹³ **Tedder v. State**, 322 So.2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

¹⁴ In **Spaziano v. Florida**, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), the Court upheld the provisions of Florida law governing jury overrides against a facial attack, but left open the question of whether the jury override procedure could be later challenged upon a demonstration that it was applied in an arbitrary manner. The Court wrote: "We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case.... [T]here is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence, either in cases in which both the jury and the trial court have concluded that death is the appropriate penalty or in cases when the jury has recommended life and the trial court has overridden the jury's recommendation and sentenced the defendant to death." 468 U.S. at 466. **Cochran** supplies the evidence that the Court found lacking in **Spaziano**.

¹⁵ See also **Trotter II**, 690 So.2d 1234 (Fla., 1996).

Two decisions rendered the same day further muddy the waters. In **Capehart v. State**, 583 So.2d 1009 (Fla., 1991), the court affirmed Gregory Capehart's death sentence even though the trial court had improperly relied on the premeditation circumstance in justifying the death sentence,¹⁶ writing:

Having determined one aggravating circumstance was erroneously considered by the trial judge, we must determine whether this error was harmless. The record before us reflects three valid aggravating circumstances and one nonstatutory mitigating circumstance. Having carefully scrutinized the record in this case, we are persuaded beyond a reasonable doubt that even without the aggravating circumstance of cold, calculated, and premeditated murder, the trial court still would have found that the aggravating circumstances outweighed the mitigating evidence. Thus, the error was harmless beyond a reasonable doubt. See, e.g., Holton, 573 So.2d at 293. We therefore affirm the sentence of death.

Id. S450. The court gave no explanation for how it arrived at the conclusion that the trial court would have sentenced Mr. Capehart to death without the premeditation circumstance. More curious still is the court's failure to give any consideration to the effect that improper use of the circumstance might have had on the jury. Although the judge rejected most of Mr. Capehart's mitigating evidence, there is no reason to think that the jury did. One additional vote for life would have resulted in a life verdict, which

¹⁶ In addition to the premeditation circumstance, the trial court found three other aggravating circumstances (prior conviction of violent felony, engaged in sexual battery at time of murder, and especially heinous, atrocious, or cruel) and one mitigating circumstance ("Defendant is a poor black man exploding in anger over his frustration due to the ills of a discriminatory society heaped upon him"), rejecting various other nonstatutory mental mitigating evidence. The jury recommended a death sentence by a vote of seven to five.

could scarcely be overridden given the substantial amount of mitigating evidence presented to the jury.

Capehart is difficult to reconcile with **Omelus v. State**, 584 So.2d 563 (Fla., 1991). At Ulrick Omelus's sentencing proceeding after he was convicted as a principal in a contract murder, the state argued three aggravating factors: the pecuniary gain, premeditation, and heinousness circumstances. The trial court did not find the heinousness circumstance, but did apply the other two in sentencing Mr. Omelus to death pursuant to the jury's eight-to-four recommendation. The trial court found as a mitigating circumstance that the co-defendant, who actually committed the murder, was sentenced to life imprisonment. The Supreme Court found that the heinousness circumstance could not apply to Mr. Omelus,¹⁷ and reversed the sentence for a jury resentencing, writing:

Since the trial judge correctly did not include heinous, atrocious, or cruel as a factor in imposing the death sentence, the question that must be resolved in our harmless error analysis is whether the error in allowing this factor to be presented and considered by the jury requires a new sentencing proceeding. We find it difficult to consider the hypothetical of whether the trial court's sentence would have been an appropriate jury override if the jury had not received the argument on the heinous, atrocious, or cruel factor and had recommended a life sentence. Further, because the issue is not in this record, the parties have not argued the propriety of a jury override in the briefs or at oral argument. We conclude that it is not appropriate for us to attempt to address that question in this case under these circumstances.

Although the circumstances of a contract killing ordinarily justify the imposition of the death sentence, we are unable to affirm the death sentence in this case because, given the state's emphasis on the heinous,

¹⁷ Although the evidence apparently showed that the killing itself would qualify for application of the circumstance, the evidence did not show that Mr. Omelus intended that the co-defendant inflict a high degree of pain.

atrocious, or cruel factor during the sentencing phase before the jury, the fact that the trial court found one mitigating factor, and the fact that the jury recommended the death sentence by an eight-to-four vote, we must conclude that this error is not harmless beyond a reasonable doubt under the standard set forth in DiGuilio.

Id. S457.

Omeluy, on the other hand, is difficult to square with Herring v. State, 580 So.2d 135 (Fla., 1991). In 1981, Ted Herring was charged with first-degree murder of a convenience store clerk. The trial court followed the jury's eight-to-four recommendation of a death sentence, notwithstanding evidence of Mr. Herring's troubled childhood, psychological problems, learning disabilities, and low IQ. There was no evidence that he intended to kill the clerk prior to the robbery, but the trial court used the premeditation circumstance in sentencing him to death,¹⁸ and the Supreme Court affirmed. Herring v. State, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984). Three years later, in Rogers,¹⁹ the court specifically disapproved of the use of the circumstance in Mr. Herring's case. Accordingly, Mr. Herring argued on post-conviction that, under Rogers, his sentence was illegal. The Supreme Court rejected his claim:

While the cold, calculated, and premeditated aggravating factor no longer applies to the circumstances in Herring, we

find that this is not a change that requires a new sentencing hearing in this case. None of the facts and circumstances

¹⁸ In all, the trial court found four aggravating circumstances and two mitigating circumstances.

¹⁹ The court wrote in Rogers: "Since we conclude that 'calculation' consists of a careful plan or prearranged design, we recede from our holding in Herring v. State [cit.], to the extent it dealt with this question." 511 So.2d at 533.

that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a "conviction of a prior crime of violence" had been eliminated, that would have changed the facts and circumstances before the jury.

The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. **Herring** at 1057. Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury. See **Hill v. State**, 515 So.2d 176 (Fla.1987), cert. denied, 485 U.S. 993 (1988).

Id. S294.

Capehart, **Omelus**, and **Herring** reflect completely different approaches to the issue. Under **Capehart**, the court looked only at the effect of the aggravating factor on the judge's sentencing decision, without regard to its possible effect on the jury. In **Omelus**, however, the court did look to the potential effect on the jury, even though the evidence would have been the same without the circumstance. However, in **Herring**, the court held that striking the circumstance could not have affected the verdict where the striking did not affect the evidence.²⁰

J. Proportionality review.

In **Proffitt**, the Supreme Court emphasized the importance of proportionality

²⁰ See also **Jones v. State**, 569 So.2d 1234 (Fla.1990) (new jury sentencing ordered where striking of heinousness circumstance would result in exclusion of evidence of sexual abuse on corpse).

review as a means of limiting arbitrary application of the death penalty in Florida. The Florida Supreme Court has not adopted a precise procedure for the conduct of proportionality review, and its cases are sometimes difficult to reconcile with one another, as shown by the cases of Earnest Fitzpatrick and James Ernest Hitchcock.

In **Fitzpatrick v. State**, 527 So.2d 809, 812 (Fla.1988), the court reversed Mr. Fitzpatrick's death sentence where the trial judge had followed a jury recommendation of death. The court specifically wrote that it was reweighing aggravating factors and mitigating circumstances and that it was reversing solely because:

we believe that in comparison to other cases involving the imposition of the death penalty, this punishment is unwarranted in this case. See, **Ferry v. State**, 507 So.2d 1373 (Fla.1987); **Amazon v. State**, 487 So.2d 8 (Fla.), cert. denied, 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986).

Now both **Ferry** and **Amazon** involved life verdicts. Hence, one would safely assume from **Fitzpatrick** that one could rely on life verdict cases in making a proportionality argument. But in **Hitchcock v. State**, 578 So.2d 685, 693 (Fla.1990), the Supreme Court disapproved of reliance on life verdict cases in making a proportionality argument:

We also disagree with Hitchcock's claim that his death sentence is disproportionate. The court conscientiously weighed the aggravating circumstances against the mitigating evidence and concluded that death was warranted. The cases Hitchcock relies on are distinguishable, being primarily jury override cases, e.g., **Holsworth v. State**, 522 So.2d 348 (Fla.1988); **Welty v. State**, 402 So.2d 1159 (Fla.1981), cases dealing with domestic disputes, e.g., **Garron v. State**, 528 So.2d 353 (Fla.1988); **Wilson v. State**, 493 So.2d 1019 (Fla.1986), and cases with few valid aggravating circumstances and

considerable mitigating evidence, *e.g.*, ***Songer v. State***, 544 So.2d 1010 (Fla.1989). On the circumstances of this case, and in comparison with other cases, we find Hitchcock's sentence of death proportionate to his crime. *E.g.*, *Tompkins Doyle; Adams*.

For the reasons argued above, Florida's scheme of appellate review in capital cases is inadequate and unconstitutional because in operation it does not permit sufficient appellate review.

Further grounds will be argued *ore tenus*.

WHEREFORE, the Defendant, Norman Blake McKenzie, moves that this Honorable Court enter its order:

1. Declaring section 921.141, Florida Statutes unconstitutional and precluding the death penalty in this case; or
2. Granting such other relief as may be appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO DECLARE SECTION 921.141, FLORIDA STATUTES
UNCONSTITUTIONAL FOR FAILURE TO PROVIDE JURY
ADEQUATE GUIDANCE IN THE FINDING OF MITIGATION
CIRCUMSTANCES, AND TO PRECLUDE DEATH SENTENCE**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned counsel and moves that this Honorable Court enter its order declaring section 921.141 unconstitutional because it fails to provide adequate guidance to the jury as to the finding of mitigating circumstances. In support of this motion, the Defendant states:

1. Section 921.141, Florida Statutes governs capital-sentencing proceedings. Subsection 2(a) provides that after hearing all the evidence presented regarding aggravating factors and mitigating circumstances, a unanimous jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).

2. Subsection (2) (b) requires the jury to return findings identifying each aggravating factor found to exist and that the finding that an aggravator exists must be unanimous. Subsection 2(b) further requires that if at least one

aggravator is found, the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death.

3. Under subsection (2) (b) 2, the recommendation shall be made based on a weighing of all the following:

- a. Whether sufficient aggravating factors exist.
- b. Whether the aggravating factors exist which outweigh the mitigating circumstances found to exist.
- c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

4. The statute provides no guidance as to how the jury is to go about determining the existence of the sentencing factors or about how it is to go about weighing them. It establishes no standard of proof regarding mitigating circumstances. Hence, the statute is unconstitutional for failure to give the jury adequate guidance in finding and weighing the aggravating factors and mitigating circumstances. Further, it is unconstitutional as applied because it has been construed in an arbitrary fashion without compliance with due process and the constitutional prohibition of cruel and unusual punishment.

5. Further grounds will be argued ore tenus.

WHEREFORE, the Defendant moves this Honorable Court to grant appropriately pursuant to the above motion.

**MEMORANDUM OF LAW
GENERAL PROVISIONS OF CAPITAL SENTENCING
LAW: THE NEED FOR ADEQUATE GUIDELINES**

This is a capital case in which the prosecution is asking this Court to impose the death penalty. Accordingly, heightened standards of due process apply. See Elledge v. State 346 So.2d 998 (Fla. 1977) ("heightened" standard of review), Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."), Proffitt v. Wainwright, 685 F.2d 1227,1253 (11th Cir.1982) ("Reliability in the fact-finding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions"), and Beck v. Alabama, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion) (citing cases).

A death penalty statute is unconstitutional if it has "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing" could occur. Godfrey v. Georgia, 446 U.S., 420, 428,100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion). A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. Porter v. State, 564 So.2d 1060, 1063-64 (Fla.1990), Lowenfield v. Phelps, 108 S.Ct. 546, 554 (1988).

PROFFITT AND THE CONSTITUTIONALITY OF SECTION 921.141

In **Proffitt v. Florida**, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the Supreme Court upheld the constitutionality of section 921.141. How then can the defendant now contend that the statute is unconstitutional? Because the Court in **Proffitt** was not confronted with the issues raised in this motion. **Hitchcock v. Dugger**, 107 S.Ct. 1821 (1987) makes clear that the Court did not consider that **Proffitt** barred all challenges to the constitutionality of Florida's death penalty law. In **Hitchcock**, the Court held unanimously that section 921.141 was unconstitutional insofar as it limited the consideration of mitigating evidence. Thus, **Proffitt** is limited to the issues set out in its opinion and does not bar the consideration of issues such as those raised at bar.

HOW IS THE JURY TO FIND MITIGATION?

Section 921.141 requires that the jury determine whether sufficient mitigating circumstances exist to outweigh the aggravating factors, but sets out no method by which the jury is to do this. Section 921.141 has not been construed in a way to provide the jury adequate guidance in determining and weighing mitigation. Hence the statute is unconstitutional.

1. How many votes are necessary to find mitigation?

The statute is silent as to whether the mitigating circumstances are to be determined unanimously, or by a substantial majority, a bare majority, a plurality, or only by individual jurors. The Florida Supreme Court has never construed this aspect of the statute. This absence of guidance renders section 921.141 unconstitutional.

The Constitution requires strict guidance to the jury in capital sentencing. The Eighth amendment requires a higher standard of definiteness than does the Due Process Clause with respect to jury instructions in capital cases. See Maynard v. **Cattwright** 108 S.Ct. 1853 (1988). Jury instructions which preclude the full consideration of mitigating evidence are improper. Hitchcock.

In Mills v. Maryland, 108 S.Ct. 1860 the Court held unconstitutional jury instructions which did not adequately guide the jury as to how many votes were necessary to determine the existence of mitigating circumstances. There the Court considered a statute requiring a unanimous jury penalty verdict. The jury was instructed to determine the existence of aggravating and mitigating circumstances, but was not instructed as to how many votes were required to determine the existence of any particular mitigating circumstance. The Supreme Court held that the jury could reasonably have concluded that it could consider only mitigating circumstances found by unanimous vote. Noting that any limitation of the jury's consideration of mitigation is unconstitutional, the Court reversed Mills' death sentence.

The Court further clarified matters in McKoy v. North Carolina, 110 S.Ct. 1227 (1990). Holding unconstitutional a sentencing law that required jury unanimity as to mitigating circumstances, the Court wrote at page 1233 (emphasis in original):

The Constitution **requires** States to allow consideration of mitigating evidence in capital cases. Any barrier to such consideration must therefore fall.

The Court went on to note at pages 1233-34 that aggravating and mitigating circumstances are not to be treated alike:

A State may not limit a sentencer's consideration of mitigating evidence merely because it places the same limitation on consideration of aggravating circumstances.

Under section 921.141, the jury has no guidance as to whether there is a threshold number of votes required before mitigating evidence can be determined. Given the standard instructions, the jury could conclude that there is such a threshold and, as a result, could fail to consider mitigating evidence. Accordingly, section 921.141 is unconstitutional.

2. What is the standard of proof regarding mitigation?

Section 921.141 provides no standard for the proof of mitigating evidence. The jury instruction committee, apparently unexpectedly, has promulgated an instruction that the jury is to consider only mitigation after being "reasonably convinced" of its existence.¹ This instruction is improper for three reasons: (a) it invades the province of the Legislature; (b) it is an incorrect statement of Florida law; (c) it unconstitutionally limits the consideration of mitigating evidence.

(a) Article 2, section 3 of the Florida Constitution forbids the judiciary from exercising the powers of the Legislature: The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly

¹ In **Campbell v. State**, 571 So.2d 415, 419-20 (Fla.1990), the court wrote (footnotes omitted): The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Std. Jury Instr. (Crim.) at 81.

Thus, the court has established two standards: "reasonably established," and "reasonably convinced." The standard jury instructions, however, remain unchanged, and speak only of the "reasonably convinced" standard.

Branches of government. -- The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch

shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

substantive law and, as such, is a matter properly addressed by the Legislature. Section 921.001(1), Florida Statutes; **Smith v. State**, 537 SO.2d982 (Fla. 1989) (sentencing guidelines). Questions regarding standards of proof are manifestly "outcome-determinative" E.g. **Vinsant Painting & Decorating, Inc. v. Koppers Company, Inc.**, 822 F.2d 1022 (11th Cir.1987) (in diversity actions, federal courts must apply local law with respect to burden of proof in affirmative defenses). Hence, they are matters of substantive law.

From the foregoing, the question of the standard of proof regarding mitigating circumstances is one of substantive law, to be resolved by the Legislature. The promulgation of the "reasonably convinced" standard by the standard jury instruction committee violates the Florida Constitution's separation of powers. Hence, the "Reasonably convinced" standard is unconstitutional.²

(b) The "reasonably convinced" standard set out in the jury instructions is contrary to Florida law. Although the Supreme Court has adopted the standard instruction³ the instruction is contrary to statutory and constitutional provisions

² The promulgation of the "reasonably convinced" standard by the jury instruction committee also violates the Cruel and Unusual Punishment Clauses of the state and federal constitutions. A death penalty statute is constitutional only to the extent that it reflects the reasoned judgment by the people through their duly elected representatives in the Legislature. *Gregg*. Here we have a major provision of Florida's death penalty scheme substantially rewritten by a little known committee of lawyers.

³ Adoption of standard instructions by the Supreme Court does not necessarily mean that the instructions correctly state the law. **Yohn v. State**, 476 So.2d 123, 127 (Fla. 1985) (promulgation of standard instructions does not mean they are necessarily correct; standard jury instruction on insanity improper.). See also *Pope v. State*, 441 So.2d 1073 (Fla. 1984) (standard instruction on "heinous, atrocious or cruel").

regarding the construction of penal statutes.

Section 775.021(1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This principle, known as the "rule of lenity," is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. **Dunn v. United States**, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) (rule of lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Cit.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed. [Cit.]"). This principle of strict construction of penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. **Bifulco v. United States**, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). Use of the "reasonably convinced" standard, which (as set out below) is a very high standard of proof, is directly contrary to the requirement of law and constitution that the statute be strictly construed in favor of the defendant.

(c) Use of the "reasonably convinced" standard is contrary to the constitutional requirement that all mitigating evidence be considered and it imposes an unconstitutionally high standard of proof.

The state and federal constitutions require that all mitigating evidence be considered. **Hitchcock**. Any jury instruction that prevents consideration of all mitigating evidence is unconstitutional. **Mills**. Full consideration of mitigating evidence is essential in a capital case; the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime. **Penry v. Lynaugh**, 109 S.Ct. 2934 (1989).

The "reasonably convinced" standard is directly contrary to these well-established principles of law. Further, it is an unreasonably high standard of proof. A standard that the jury be "convinced" of the evidence "is more stringent than our tradition or the needs of justice warrant, and seems equivalent to the standard of 'clear, strong and convincing proof,' hitherto thought to be appropriate only in exceptional cases." ***McCormick's Handbook of the Law of Evidence*** 794-795 (E. Cleary 2d ed. 1972) (footnote omitted).

WHEREFORE, the Defendant, Norman Blake McKenzie, moves that this Honorable Court enter its order:

1. Declaring section 921.141, Florida Statutes unconstitutional and precluding the death penalty in this cause; or
2. Granting such other relief as is appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservices@johns@sao7.org on this 18th day of October, 2018.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO DECLARE SECTIONS 921.141 AND/OR 921.141(6) (b)
FLORIDA STATUTES AND/OR THE STANDARD (6) (b) INSTRUCTION
UNCONSTITUTIONAL FACIALLY AND AS APPLIED**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned counsel and moves this Honorable Court to enter its order declaring section 921.141 and/or section 921.141(6)(b) Florida Statutes, and the corresponding (5)(b) standard jury instruction unconstitutional, and precluding their application at bar for the following reasons:

1. The "prior violent felony" aggravating factor of section 921.141(6) (b)¹, and its corresponding standard instruction is unconstitutionally vague and overbroad, has been applied in an overbroad fashion, and in an arbitrary and inconsistent manner.

2. Because this unconstitutional circumstance has been and continues to be used as a basis for imposing a number of death sentences in this state, because its

¹ "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

unlawful use makes proportionality review arbitrary, and because its bare terms are all that is required to be read to sentencing juries, section 921.141, Florida Statutes as a whole is unconstitutional. See **Herring v. State**, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting in part).

3. Section 921.141(6)(b), its standard instruction, and the death penalty as applied in Florida thus violate the fifth, sixth, eighth and fourteenth amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution.

4. Further grounds will be argued **ore tenus**.

MEMORANDUM OF LAW

This is a capital case in which the prosecution is asking this Court to impose the death penalty. Accordingly, heightened standards of due process apply. See **Elledge v. State**, 346 So.2d 998 (Fla. 1977) ("heightened" standard of review), **Mills v. Maryland**, 108 S.Ct. 1860, 1866 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."), **Proffitt v. Wainwright**, 685 F.2d 1227, 1253 (11th Cir.1982) ("Reliability in the factfinding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."), and **Beck v. Alabama**, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." **Gregg v. Georgia**, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion) (citing cases).

A death penalty statute is unconstitutional if it has "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing" could occur. **Godfrey v. Georgia**, 446 U.S., 420, 428, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion). A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. **Porter v. State**, 564 So.2d 1060, 1063-64 (Fla.1990), **Lowenfield v. Phelps**, 108 S.Ct. 546, 554 (1988).

Section 775.021(1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This principle of strict construction is not merely a maxim of statutory interpretation: it is rooted in fundamental principles of due process. **Dunn v. United States**, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) (rule "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Cit.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not "plainly and unmistakably" proscribed. [Cit.]"). This principle of strict construction of penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. **Bifulco v. United States**, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). It applies to Florida capital proceedings.

Trotter v. State, 576 So.2d 691, 694 (Fla. 1990) (sentence of imprisonment aggravating circumstance).

Great care is needed in construing aggravating circumstances. In **Maynard v Cartwright**, 108 S.Ct. 1853, 1857-58 (1988), the Court wrote:

The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. [Cit.] Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in **Furman v. Georgia**, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The Court held in **Maynard** that jury instructions, which violate these principles, are unconstitutional.

Substantive due process and equal protection principles require a provision of law, including criminal statutes, to be rationally related to its purpose. **Reed v. Reed**, 404 U.S. 71 (1971), **Potts v. State**, 526 So.2d 104 (Fla. 4th DCA 1987), aff'd., **State v. Potts**, 526 So.2d 63 (Fla. 1988). The prior violent felony circumstance, as it has been interpreted, does not satisfy any of these constitutional concerns.

The first problem with the Florida Supreme Court's application of this circumstance is that it does not require the "prior" conviction be used as a basis for imposing a death sentence to be final. Even a conviction pending on appeal may be

used as a circumstance. See, e.g., **Ruffin v. State**, 397 So.2d 277, 282-83 (Fla. 1981), **Peek v. State**, 395 So.2d 492, 499 (Fla. 1981). Such an interpretation violates the due process and equal protection rights to an appeal and the eighth amendment narrowing requirement and proscription that death sentences "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process,'" or on "materially inaccurate" information. **Johnson v. Mississippi**, 108 S.Ct. 1981, 1986, 1989 (1988) (reversing affirmance of death sentence where sentence based on prior violent felony which was later vacated).

The second problem is the expansion of the circumstance to permit contemporaneous violent felony convictions to be treated as a "prior violent felony". Florida permits any conviction prior to sentencing to be treated as a prior violent felony, even if that conviction arises from the same criminal episode as the capital felony, and even if the capital and other charges are tried together. **Lucas v. State**, 376 So.2d 1149, 1152 (Fla. 1979). While the Court has limited the contemporaneous conviction **Gloss** on the circumstance to preclude its use where there is a single victim, **Wasko v. State**, 505 So.2d 1314, 1317-18 (Fla. 1987), that limitation does not save the circumstance. The Court's interpretation is not related to the purpose of the circumstance, i.e. to punish more severely those who have committed violent crimes in the past. "[T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant." **California v. Brown**, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring).

Use of a contemporaneous conviction ignores the legitimate inquiry into whether a person convicted of first-degree murder has a history of violence, and exposes those

who have no history of conviction for a violent felony to a greater likelihood of receiving death. The broad application of the circumstance thus fails to "genuinely narrow" the class of death eligible, is "wholly unrelated to the blameworthiness of the particular defendant," and relies on conduct that is "irrelevant to the sentencing process." **Zant v. Stephens**, 462 U.S. 862, 885 (1983).

The standard instruction is unconstitutionally vague, and similarly misleads jurors into considering unlawful and constitutionally irrelevant factors in deciding whether death is the appropriate sentence. The standard instructions instruct the trial judge as follows:

Since the character of a crime involving violence or threat of violence is a matter of law, when the State offers evidence under aggravating circumstance "2" the court should instruct the jury of the following, as applicable:

(Give a or b as applicable):

- a. The crime of (previous crime) is a capital felony
- b. The crime of (previous crime) is a felony involving the [use]
[threat] of violence to another person.

The trial court is thus required to direct the sentencing jurors to find a contemporaneous violent felony is actually "prior" under the Florida Supreme Court's case law, an instruction that is misleading, and unconstitutional, as discussed above. The (5) (b) standard instruction is thus also unconstitutional for the same reasons as is the circumstance, under the teachings of **Maynard**.

WHEREFORE, the Defendant, Norman Blake McKenzie, moves this Honorable Court to enter its order:

1. Declaring section 921.141 and/or section 921.141(6) (b), Florida Statutes unconstitutional, and precluding their application at bar; or
2. Granting such other relief as may be appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicesjohns@sao7.org on this 18th day of October, 2018.

/S/ JUNIOR BARRETT

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO DECLARE SECTIONS 921.141 AND/OR 921.141(6) (d)
FLORIDA STATUTES AND/OR THE (6) (d) STANDARD INSTRUCTION
UNCONSTITUTIONAL FACIALLY AND AS APPLIED
AND TO PRECLUDE THEIR APPLICATION AT BAR**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned counsel and moves this Honorable Court to declare sections 921.141 and/or 921.141(6)(d), Florida Statutes (1998) and its corresponding standard jury instruction unconstitutional for the following reasons:

1. Section 921.141(6), Florida Statutes sets out the aggravating factors that may be considered in determining whether to impose the death penalty in a first-degree murder case. It provides in pertinent part:

(6) AGGRAVATING FACTORS. -- Aggravating factors shall be limited to the following:

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, aggravated child abuse, abuse of an elderly or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

2. The felony murder aggravating factor of section 921.141(6) (d), Florida Statutes and its corresponding instruction is unconstitutional because it does not serve the limiting function required by the Constitution and creates an unlawful presumption of death, and an unlawful death presumption for the least aggravated form of first-degree murder.

3. Because this unconstitutional circumstance has been and continues to be used as a basis for imposing a number of death sentences in this state, because its unlawful use makes proportionality review arbitrary, and because its bare terms are all that is required to be read to sentencing juries, section 921.141, Florida Statutes as a whole is unconstitutional. See **Herring v. State**, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting in part).

4. Section 921.141(6)(d), Fla. Stat. (1998), the (6)(d) standard instruction and the death penalty as applied in Florida thus violate article 1, sections 9 (due process), 16 (rights of Defendant), 17 (cruel or unusual punishment), 21 (access to courts), and 22 (trial by jury) of the Florida Constitution, and the fifth (due process), sixth (notice; right to present defense), eighth (cruel and unusual punishment), and fourteenth (due process and incorporation) amendments to the United States Constitution.

5. Further grounds will be argued **ore tenus**.

MEMORANDUM OF LAW

This is a capital case in which the prosecution is asking this Court to impose the death penalty. Accordingly, heightened standards of due process apply. See **Elledge v. State**, 346 So.2d 998 (Fla. 1977) ("heightened" standard of review), **Mills v. Maryland**, 108 S.Ct. 1860, 1866 (1988) ("In reviewing death sentences, the Court has demanded

even greater certainty that the jury's conclusions rested on proper grounds."), **Proffitt v. Wainwright**, 685 F.2d 1227, 1253 (11th Cir.1982) ("Reliability in the fact-finding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."), and **Beck v. Alabama**, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." **Gregg v. Georgia**, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion) (citing cases).

A death penalty statute is unconstitutional if it has "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing" could occur. **Godfrey v. Georgia**, 446 U.S., 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion). A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. **Porter v. State**, 564 So.2d 1060, 1063-64 (Fla.1990), **Lowenfield v. Phelps**, 108 S.Ct. 546, 554 (1988).

Great care is needed in construing aggravating circumstances. In **Maynard v. Cartwright**, 108 S.Ct. 1853, 1857-58 (1988), the Court wrote:

The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. [Cit.] Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision

fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in **Furman v. Georgia**, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The Court held in **Maynard** that jury instructions that violate these principles are unconstitutional.

Instead of genuinely narrowing the class of persons eligible for the death penalty, the felony murder circumstance automatically expands the class of those eligible for the death penalty.¹ Cf. **Collins v. Lockhart**, 754 F.2d 258, 264 (8th Cir. 1985) ("We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function."). The felony murder circumstance repeats an element of the offense of felony murder, and creates an unlawful presumption that death is an appropriate sentence. See **Jackson v. State**, 502 So.2d 409, 413 (Fla. 1986) ("When there are one or more valid factors in aggravation and none in mitigation, death is presumed to be the appropriate penalty"); compare **Jackson v. Dugger**, 837 F.2d 1469, 1473 (11th Cir. 1988) ("Such a presumption, if employed at the level of the sentencer, vitiates the individualized

¹ A somewhat similar argument was rejected in **Bertolotti v. Dugger**, 883 F.2d 1053 (11th Cir. 1989), and apparently by the Florida Supreme Court in **Swafford v. State**, 533 So.2d 270, 277-78 (Fla. 1988). **Bertolotti** was wrongly decided with little analysis. Swafford is undermined by the Court's later opinion in **Porter v. State**, 564 So.2d 1060 (Fla., 1990), in which the Court adopted the reasoning in **Zant**, as applied to the "cold, calculated, and premeditated" circumstance. Neither **Bertolotti** nor **Swafford** involved the **Lockett/Hitchcock** argument made here.

sentencing determination required by the Eighth Amendment").

Felony murder is the least aggravated form of first-degree murder since it does not entail a premeditated design to kill another unlawfully. Hence, the felony murder aggravating circumstance creates a presumption of death for the least aggravated form of first-degree murder. It does the opposite of what the Constitution requires of an aggravating circumstance. Felony murder is the prosecution's theory in many if not most first-degree murders. A killing during an enumerated felony will turn a manslaughter into a first-degree murder and will then (through the aggravating circumstance) turn the first degree murder into a capital case. The circumstance thus does not serve the constitutionally mandated channeling function.

The felony murder aggravating circumstance, when applied to unpremeditated murder turns a mitigating circumstance into an aggravating circumstance. Lack of premeditation is a mitigating circumstance. See **Lockett v. Ohio**, 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L. Ed. 2d 973 (1978) (death sentence set aside where state death penalty statute did not provide for full consideration of, inter alia, mitigating factor of lack of intent to cause death). Because it prevents consideration of lack of intent to kill as mitigation, the felony murder circumstance violates **Hitchcock v. Dugger**, 107 S.Ct. 1821 (1987) (Florida death penalty statute improperly limited full consideration of mitigating circumstances).

In **Lowenfield v. Phelps**, 108 S.Ct. 546 (1988), the Court rejected a challenge to the portion of the Louisiana death penalty statute which called for the death penalty for a premeditated murder committed during the course of a violent felony, but in doing so distinguished Florida's statutory scheme. Louisiana's statute, the Court held, narrows the class of death eligible by narrowing the statutory definition of capital offenses. *Id.* at 555. Florida, on the other hand, defines first-degree murder broadly and uses only

aggravating factors to narrow the class of death eligible. Further, **Lowenfield** did not involve a Lockett/Hitchcock argument such as that made at bar. Section 921.141(6) (d), and the standard instruction the sentencing jury is required to follow, as shown above, do not meet the constitutional requirement of narrowing the class of persons eligible for the death penalty, and in fact has the opposite effect. See **Barnard Death Penalty**, 13 Nova L. Rev. 907, 917-22 (1989). The Florida felony murder circumstance, and the death sentencing scheme as a whole, are thus unconstitutional.

WHEREFORE, the Defendant, Norman Blake McKenzie, moves this Honorable Court to enter its order:

1. Declaring section 921.141 and/or section 921.141(6) (d), Florida Statutes and the (6) (d) jury instruction unconstitutional; or
2. Granting such other relief as may be appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicesjohns@sao7.org on this 18th day of October, 2018.

/S/ JUNIOR BARRETT

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO DECLARE SECTION 921.141 AND/OR SECTION
921.141(6) (f) FLORIDA STATUTES AND/OR THE (6) (f) STANDARD
JURY INSTRUCTION UNCONSTITUTIONAL AS APPLIED**

COMES NOW the Defendant, Norman Blake McKenzie, moves that this Honorable Court, in anticipation of the state's arguing "pecuniary gain" as an aggravator, enter its order declaring section 921.141 and/or section 921.141(6)(f), Florida Statutes and the corresponding (6)(f) standard jury instruction unconstitutional and precluding their application at bar. As grounds therefor the Defendant proffers:

1. The "pecuniary gain" aggravating circumstance of section 921.141(6) (f), Florida Statutes (1998)¹ unlawfully expands the class of death eligible defendants by repeating other aggravating factors, as does its corresponding standard jury instruction.
2. Because this unconstitutional circumstance has been and continues to be
3. Section 921.141(6) and its corresponding jury instruction, and the death penalty as applied in Florida thus violate the Fifth, Sixth, Eighth and Fourteenth

¹ "The capital felony was committed for pecuniary gain."

used as a basis for imposing a number of death sentences in this state, because its unlawful use makes proportionality review arbitrary, and because its bare terms are all that is required to be read to sentencing juries, section 921.141, Florida Statutes as a whole is unconstitutional. See **Herring v. State**, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting in part).

Amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution.

4. Further grounds will be argued ore tenus.

MEMORANDUM OF LAW

This is a capital case in which the prosecution is asking this Court to impose the death penalty. Accordingly, heightened standards of due process apply. See **Elledge v. State**, 346 So.2d 998 (Fla. 1977) ("heightened" standard of review), **Mills v. Maryland**, 108 S.Ct. 1860, 1866 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."), **Proffitt v. Wainwright**, 685 F.2d 1227, 1253 (11th Cir.1982) ("Reliability in the factfinding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."), and **Beck v. Alabama**, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." **Gregg v. Georgia**, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion) (citing cases).

A death penalty statute is unconstitutional if it has "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the

result that a pattern of arbitrary and capricious sentencing" could occur. **Godfrey v. Georgia**, 446 U.S., 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion). A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. **Porter v. State**, 564 So.2d 1060, 1063-64 (Fla.1990), **Lowenfield v. Phelps**, 108 S.Ct. 546, 554 (1988). Section 775.021(1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the Defendant. This principle of strict construction is not merely a maxim of statutory interpretation: it is rooted in fundamental principles of due process. **Dunn v. United States**, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) (rule "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Cit.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed. [Cit]"). This principle of strict construction of penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. **Bifulco v. United States**, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). It applies to Florida capital proceedings. **Trotter v. State**, 576 So.2d 691, 694 (Fla.1990) (sentence of imprisonment aggravating circumstance).

Great care is needed in construing aggravating circumstances. In **Maynard v.**

Cartwright, 108 S.Ct. 1853, 1857-58 (1988), the Court wrote:

The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the

facts of the case at hand; the statute is judged on an as-applied basis. [Cit.] Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in **Furman v. Georgia**, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The Court held in Maynard that jury instructions that violate these principles are unconstitutional.

This factor is straightforward, and has generally been strictly construed by the Florida Supreme Court. See **Simmons v. State**, 419 So.2d 316, 318 (Fla. 1982) (requiring proof of a pecuniary motivation beyond a reasonable doubt, and holding "such proof cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance"). The ease with which jurors and the courts can decide whether this factor applies, though, does not cure, and in fact heightens, its unconstitutional expansion of the class of death eligible by repeating other circumstances.

The pecuniary gain circumstance doubles felonies listed in the felony murder circumstance² by referring to the "same aspect of the defendant's crime." **Provence v. State**, 337 So.2d 783, 786 (Fla. 1976) (emphasis in original). In cases in which the prior violent felony³ circumstance, applied as the contemporaneous felony, also includes financial motive (such as robbery), there is another repetition. Finally, pecuniary gain refers to the "same aspect" of the defendant's conduct in some instances where the

² § 921.141(5) (d), Fla. Stat. (1998).

³ § 921.141(5) (b), Fla. Stat. (1998).

killing is also cold, calculated and premeditated. E.g. **Downs v. State**, 572 So.2d 895 (Fla.1990).

Such doubling of factors calling for a sentence of death violates the eighth amendment requirement that death sentencing procedures must provide a "meaningful basis for distinguishing the few cases in which death is appropriate from the many cases in which it is not. " **Furman v. Georgia**, 408 U.S. 238, 313 (1972) (White, J., concurring). "To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." **Zant v. Stephens**, 462 U.S. 862, 877 (1983). The existence of several aggravating factors calling for a sentence of death based on the same conduct of the defendant thus violates the eighth amendment. See **Lowenfield v. Phelps**, 108 S.Ct. 546 (1988).

The standard jury instruction simply tracks the statute, and the Florida Supreme Court has apparently disapproved of an instruction to the jury that it may not double circumstances. **Mendyk v. State**, 545 So.2d 846, 849 (Fla. 1989). The reading of the pecuniary gain circumstance and the others listed above likewise violate the eighth amendment.

The Supreme Court has made some effort at limiting the application of this circumstance by holding that it applies only where "the murder is an integral step in obtaining some sought-after specific gain." **Hardwick v. State**, 521 So.2d 1071, 1076 (Fla.1988). However, the standard jury instruction merely tracks the statute, and does

not inform the jury of this limitation. Hence, arbitrary and illegitimate application of the circumstance by juries is inevitable, in violation of the principles set out in Maynard.

WHEREFORE, the Defendant, Norman Blake McKenzie, moves that this Honorable Court enter its order:

1. Declaring section 921.141 and/or 921.141(6) (f), Florida Statutes and the (6) (f) jury instruction unconstitutional and precluding their application at bar; or
2. Granting such other relief as is appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicesjohns@sao7.org on this 18th day of October, 2018.

/S/ JUNIOR BARRETT

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION IN LIMINE TO REQUIRE STATE
TO PROFFER ANY AND ALL VICTIM IMPACT EVIDENCE**

COMES NOW, the Defendant, Norman Blake McKenzie, by and through the undersigned attorney, pursuant to Section 90.104, 90.105 and 90.403, Florida Statutes, and Fla. R. Crim. P. 3.190, and moves in limine to require the State to proffer, outside **the presence of the jury**, any and all victim impact evidence, and as grounds therefore would show as follows:

1. Victim impact evidence is inevitably and inherently extremely emotional and has a high probability of unduly and unfairly, and unconstitutionally prejudicing and inflaming the jury.
2. The definition of victim impact evidence in Section 921.141(7) is vague, ambiguous and difficult to interpret.
3. Victim impact witnesses are frequently, if not always, extremely emotional and difficult to "control" while testifying.

4. An emotional display during the presentation of evidence would likely deprive Defendant of a fair trial before an impartial jury under Art. I, § 22, Fla. Const. and the U.S. Const. amend. VI, as well as Due Process under Art. I, § 9, Fla. Const. and the U.S. Const. amendments V and XIV.

WHEREFORE, the Court should require the State to proffer, out of the presence of the jury, any and all victim impact evidence so that the Court can determine not only that the evidence is appropriate under the statute authorizing it, but also that the witnesses themselves are emotionally capable of maintaining appropriate decorum before the jury so as not to unfairly and unconstitutionally inflame the jury and prejudice the Defendant.

MEMORANDUM OF LAW

In the event the court denies the defendant's Motion to Declare §921.141(7), Florida Statutes, unconstitutional and allows the introduction of "victim impact" evidence under §921.141(7), the defendant respectfully objects and moves under §90.403, Florida Statutes, for a determination of the admissibility of the evidence that is to be presented. It follows that a proffer by the state is required so that this Court can determine the propriety and admissibility of the specific evidence sought to be presented in accordance with **Windom v. State**, 656 So.2d 432 (Fla. 1995).

Pursuant to § 90.104(2), Florida Statutes, "in cases tried by a jury, a court shall conduct proceedings, to the maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means." Except in circumstances not present here, "the court shall determine preliminary questions

concerning the . . . admissibility of evidence.” Section 90.105(1), Florida Statutes. Hearings on the admissibility of evidence shall be conducted out of the hearing of the jury. Section 90.105(3), Florida Statute.

Under Section 90.403, Florida Statute, *even if otherwise relevant*, victim impact evidence is *inadmissible* if the danger of unfair prejudice outweighs its probative value. A hearing is thus required to determine the admissibility of this evidence that has long been recognized by various courts as being highly emotional and potentially unfairly prejudicial. In that regard, unfair prejudice is the type of evidence that logically tends to inflame emotions and which tends to distract jurors or the court from conducting an impartial sentencing analysis. In ***Jones v. State***, 569 So.2d 1234, 1239 (Fla.1990), the court said the following on this issue:

A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.

See ***Urbain v. State***, 714 So.2d 411, 419 (Fla.1998) (Court has responsibility to monitor practices and control improper influences in imposing death penalty, noting, “Although this legal precept, and indeed the rule of objective, dispassionate law in general may sometimes be hard to abide, the alternative, a court ruled by emotion, is far worse.”). Particularly when presiding over a capital trial, judges are cautioned to be “vigilant [in the] exercise of their responsibility to insure a fair trial.” ***Bertolotti v. State***, 476 So.2d 130, 134 (Fla.1985).

Victim impact testimony presents information that does not pertain to the weighing of statutory aggravating and mitigating factors. An abuse of discretion in

presenting this type evidence occurs where the presentation of victim impact evidence is allowed to become a feature of the trial. The use of victim impact evidence has been carefully monitored by trial courts that were vigilant to guard against the possibility of improper emotional influences impacting on the jury's sentencing determination. See **Alston v. State**, 723 So.2d 148 (Fla.1998) (approved where victim's mother testified); **Benedith v. State**, 717 So.2d 472 (Fla.1998) (approved where victim's sister testified); **Davis v. State**, 703 So.2d 1055 (Fla.1997) (approved where written statement of victim's mother introduced); **Hauser v. State**, 701 So.2d 329 (Fla.1997) (approved where victim's mother and grandmother testified); **Moore v. State**, 701 So.2d 701 So.2d 545 (Fla.1997) (approved where victim's daughter testified);

The determination of the admissibility of victim impact evidence, as with all evidence, is within the sound discretion of a trial court. **State v. Maxwell**, 647 So.2d 871 (Fla. 4th DCA 1994), affirmed, 657 So.2d 1157 (Fla.1995). Trial courts should exclude victim impact evidence if it will become a feature to the extent that it denies a fair proceeding. Just as a judge may not, without first hearing the evidence, enter "a blanket order forbidding its admission without regard to the character of the evidence that the State intended to present to the jury," **State v. Johnston**, 743 So.2d 22 (Fla. 2d DCA 1999), neither can a judge make a blanket ruling that all such evidence is admissible.

A judge's exposure to improper victim impact evidence is a necessity in order to obtain a ruling on its admissibility. In that regard, a trial court's use of improper victim impact evidence to sentence a defendant to death may be harmless error based on the analysis that can be performed by the appellate court of the trial court's sentencing

order. See **Walls v. State**, 31 FLW S101 (Fla. February 9, 2006); **Card v. State**, 803 So.2d 613, 628 (Fla. 2001). If such evidence is improperly presented to the jury, the State will be unable to meet its burden of showing the exposure to such inflammatory and improper evidence did not influence the jury sentencing recommendation due to the absence of specific findings as to the weighing analysis performed by the jury.

An analogous situation occurs with collateral crime evidence that may be relevant to prove identity, plan, motive, common scheme, etc.. In **Williams v. State** 110 So.2d 654, 662 (Fla.1959), the Court ruled that, while evidence of unrelated criminal activity may be relevant to prove a defendant's guilt, "we emphasize that the question of the relevancy of this type of evidence should be cautiously scrutinized before it is determined to be admissible." (Emphasis added). See also **State v. Johnston**, 712 So.2d 1160 (Fla. 2d DCA 1998) ("trial judges must scrupulously examine the probative and prejudicial value of [victim impact] evidence before permitting its introduction."

The danger of William's Rule evidence, as with victim impact evidence, is that it tends to distract jurors from the task at hand and invite a verdict for reasons other than impartial application of the law to the facts. See **Davis v. State**, 276 So.2d 846 (Fla. 2d DCA 1973) (fundamental error to present Williams Rule evidence); **Green v. State**, 228 So.2d 397 (Fla. 2d DCA 1969) (absence of limiting instruction on proper use of Williams Rule evidence was prejudicial error).

The advantage of requiring an advance ruling on the admissibility of victim impact evidence is that, in the event of an adverse ruling, the state can timely seek discretionary review of the exclusion of its evidence and demonstrate why the court abused its discretion by excluding it. See e.g. **State v. Johnston**, 743 So.2d 22 (Fla. 2d

DCA 1999); **Wike v. State**, 698 So.2d 817 (Fla.1997) (state failed to preserve for appeal the trial court's exclusion of, as too prejudicial, the victim impact testimony from the victim's parents). If a pre-trial ruling is not made, the introduction of such evidence cannot be effectively monitored or controlled by the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicesjohns@sao7.org on this 18th day of October, 2018.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO DECLARE SECTION 921.141, FLORIDA STATUTES
UNCONSTITUTIONAL AND/OR TO DECLARE SECTION 921.141(6) (i)
FLORIDA STATUTES UNCONSTITUTIONAL FACIALLY AND AS APPLIED**

COMES NOW, the Defendant, Norman Blake McKenzie, by and through the undersigned counsel, moves that this Court enter its order declaring section 921.141 and/or section 921.141(6) (I), Florida Statutes and/or the (6) (I) jury instruction unconstitutional and precluding their application in this cause, and says:

1. Section 921.141(6), Florida Statutes sets out the aggravating circumstances that may be considered in determining whether to impose the death penalty in a first-degree murder case. It provides in pertinent part:

(5) AGGRAVATING CIRCUMSTANCES. -- Aggravating circumstances shall be limited to the following:

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

This "cold, calculated and premeditated" circumstance has been unconstitutionally applied in a manner inconsistent with its legislative purpose. It is unconstitutionally

vague and overbroad, is not capable of a constitutionally adequate narrowing construction, and has actually been applied in an arbitrary and inconsistent manner.

2. Because this unconstitutional circumstance has been and continues to be used as a basis for imposing a number of death sentences in this state, because its unlawful use makes proportionality review arbitrary, and because its bare terms are all that is required to be read to sentencing juries, section 921.141, Florida Statutes as a whole is unconstitutional. See **Herring v. State**, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting in part).

3. Section 921.141(6)(i), Florida Statutes, and the death penalty as applied in Florida thus violate the fifth, sixth, eighth and fourteenth amendments to the United States Constitution and article I, sections 9, 16, 17, 21 and 22 of the Florida Constitution for the reasons set forth.

MEMORANDUM OF LAW

This is a capital case in which the prosecution is asking this Court to impose the death penalty. Accordingly, heightened standards of due process apply. See **Elledge v. State**, 346 So.2d 998 (Fla. 1977) ("heightened" standard of review), **Mills v. Maryland**, 108 S.Ct. 1860, 1866 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."), **Proffitt v. Wainwright**, 685 F.2d 1227, 1253 (11th Cir.1982) ("Reliability in the factfinding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."), and **Beck v. Alabama**, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that

every safeguard is observed." **Gregg v. Georgia**, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion) (citing cases).

A death penalty statute is unconstitutional if it has "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing" could occur. **Godfrey v. Georgia**, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L. Ed. 2d 398 (1980) (plurality opinion). A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. **Porter v. State**, 564 So.2d 1060, 1063-64 (Fla.1990), **Lowenfield v. Phelps**, 108 S.Ct. 546, 554 (1988).

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penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. **Bifulco v. United States**, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). It applies to Florida capital proceedings. **Trotter v. State**, 576 So.2d 691, 694 (Fla.1990) (sentence of imprisonment aggravating circumstance).

Great care is needed in construing aggravating circumstances. In **Maynard v. Cartwright**, 108 S.Ct. 1853, 1857-58 (1988), the Court wrote:

The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. [Cit.] Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in **Furman v. Georgia**, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The Court held in **Maynard** that jury instructions that violate these principles are unconstitutional.

1. The "cold, calculated, and premeditated without any pretense of moral or legal justification" circumstance has not been applied in a manner consistent with its legislative purpose.

The constitutional principles of substantive due process and equal protection require that a provision of law be rationally related to its purpose. **Reed v. Reed**, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). See also **Moore v. City of East Cleveland**, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). This principle applies

to criminal enactments. See **State v. Walker**, 461 So.2d 108 (Fla. 1984). Thus, a criminal statute "must bear a reasonable relationship to the legislative objective and must not be arbitrary." **Potts v. State**, 526 So.2d 104 (Fla. 4th DCA 1987), *aff'd*, **State v. Potts**, 526 So.2d 63 (Fla. 1988). Due process requires that criminal provisions, including those affecting penalties, be strictly construed. **Bifulco v. United States**, 447 U.S. 381 (1980), **Dunn v. United States**, 442 U.S. 100, 112 (1979). The instant circumstance has been applied in a manner inconsistent with these principles and is therefore unconstitutional.

A. Failure to limit to "execution-type" killings.

The Legislature promulgated the circumstance in 1979 "to include execution-type killings as one of the enumerated aggravating circumstances." Senate Staff Analysis and Economic Impact Statement, SB 523 (May 9, 1979, revised). See also Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 907, 936-37 (1989). The standard construction is that it "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." E.g. **McCray v. State**, 416 So.2d 804, 807 (Fla. 1982). The qualifier "ordinarily" saps the circumstance of power to narrow the class of death eligible persons, and has resulted in application to situations far afield from what the Legislature intended. See, e.g., **Duest v. State**, 462 So.2d 446 (Fla. 1985) (killing during course of robbery without more); **Herring v. State**, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989 (1984) (defendant shot store clerk who made threatening move); **Phillips v. State**, 476 So.2d 194 (Fla. 1985) (defendant had to reload before firing final shot). Section 921.141(6) (i) has been applied in a manner inconsistent with its

legislative purpose and without regard to the requirement of strict construction of penal statutes.

B. Failure to limit to killings involving "heightened premeditation."

In **Porter v. State**, 564 So.2d 1060, 1063-64 (Fla.1990), the court wrote concerning the circumstance:

To avoid arbitrary and capricious punishment, this aggravating circumstance 'must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. **Zant v. Stephens**, 462 U.S. 862, 877 (1983) (footnote omitted). Since premeditation already is an element of capital murder in Florida, section 921.141(6) (i) must have a different meaning; otherwise, it would apply to every premeditated murder. Notwithstanding this statement, the circumstance has seldom been applied

such that it "ha[s] a different meaning" from mere premeditation. As shown in the next section of this memorandum, the circumstance has been sometimes construed to require "heightened" premeditation, but has also often been construed in a manner consistent with mere premeditation. It has not been strictly construed to conform to its legislative purpose, and has not been consistently interpreted or adequately narrowed.

2. The circumstance has been applied in such an inconsistent manner that it violates the Constitution.

The eight amendment requires that aggravating circumstances "must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not." **Lewis v. Jeffers**, 110 S.Ct. 3092, 3099 (1990). Judicial construction of the instant circumstance does not meet this constitutional requirement.

In **Herring v. State**, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989 (1984), the court upheld application of the circumstance where the defendant shot a store clerk

who made an apparently threatening move and then shot the clerk again after he fell to the floor. In dissent, Justice Ehrlich wrote that this holding could render the statute unconstitutional:

The majority relies on the second shot, fired after the clerk was on the floor, as evidence of the heightened premeditation. But the record clearly shows the shot was fired within the same time-frame as the first. While I agree that more than enough time elapsed to allow for premeditation, I cannot agree that appellant had sufficient time for cold calculation. We have, since **McCray** and **Combs**, gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated in section 921.141(5) (i), Florida Statutes (1981). Loss of that distinction would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality, **as applied**, of Florida's death penalty statute.

Justice Ehrlich's words were heeded by the court in **Rogers v. State**, 511 So.2d 526 (Fla. 1987), in which it specifically disapproved of *Herring*. The Supreme Court disapproved of the trial court's application of the circumstance where Rogers shot a man "playing hero" during an armed robbery.

The court wrote:

Where there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation." Since we conclude that "calculation" consists of a careful plan or prearranged design, we recede from our holding in **Herring v. State**, 446 So.2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984), to the extent it dealt with this question.

Id at 533. However, in **Swafford v. State**, 533 So. 2d 270, 277 (Fla. 1988), the Court resurrected **Herring**:

The evidence showed, however, that Swafford shot the victim nine times including two shots to the head at close range and that he had to stop and reload his gun to finish carrying out the shootings. This aggravating factor can be found when the evidence shows such reloading, **Phillips v. State**, 476 So.2d 194, 197 (Fla. 1985), because reloading demonstrates

more time for reflection and therefore "heightened premeditation." See **Herring v. State**, 447 So.2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

However, the issue is resurrected yet again. In **Farinas v. State**, 569 So.2d 425 (Fla.1990), the court rejected **Phillips** and **Herring** (and, sub silentio, **Swafford**¹ on the issue of reloading), writing in footnote 8:

The state's reliance upon **Phillips v. State**, 476 So.2d 194 (Fla. 1985), is misplaced. In **Phillips**, this Court held that because appellant had to reload his revolver in order for all of the shots to be fired, he was afforded ample time to contemplate his actions and choose to kill his victim, and the record therefore amply supported the finding that the murder was cold, calculated, and premeditated. Our decision in **Phillips** however was predicated on **Herring v. State**, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989 (1984). We receded from this portion of **Herring** in our decision in **Rogers v. State**, 511 So.2d 526 (Fla. 1986), cert. denied, 108 S.Ct. 733 (1988).

These revolutions in the law are typical of the confused and tormented caselaw on this circumstance. Consider the following:

¹ On another occasion, the court indicated that there was no difference between **Herring** and **Rogers** and that they were entirely consistent. In **Schafer v. State**, 537 So.2d 988, 991 (Fla. 1989), the court wrote:

There was no evidence to illustrate any prior calculation or prearranged plan or design. We have previously explained the elements necessary for this aggravating circumstance in **Smith v. State**, 515 So.2d 182 (Fla. 1987), cert. denied, -- U.S. --, 108 S.Ct. 1249, 99 L.Ed.2d 447 (1988); **Rogers v. State**, 511 So.2d 526 (Fla.1987), cert. denied, -- U.S. --, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988); **Herring v. State**, 501 So.2d 1279 (Fla.1986).

(a) Regarding the question of whether CCP can apply to transferred intent, compare **Provenzano v. State**, 497 So.2d 1177, 1183 (Fla. 1986) ("Heightened

premeditation necessary for this circumstance does not have to be directed toward the specific victim." Circumstance applied to killing of bailiff who came out of courtroom while defendant was trying to kill two police officers), with **Amoros v. State**, 531 So.2d 1256 (Fla. 1988) (circumstance improperly applied to killing of woman present when defendant sought to kill girlfriend).

(b) Regarding the question of whether bringing the weapon to the scene establishes the circumstance, compare e.g. **Swafford v. State**, 533 So.2d 270 (Fla. 1988), **Lamb v. State**, 532 So.2d 1051, 1053 (Fla. 1988), and **Huff v. State**, 495 So.2d 145 (Fla. 1986)(weapon brought to scene; circumstance found) with **Amoros v. State**, 531 So.2d 1256 (Fla. 1988), **Hamblen v. State**, 527 So.2d 800 (Fla. 1988), and **Lloyd v. State**, 524 So.2d 396 (Fla. 1988) (weapon brought to scene; circumstance rejected). In **Lloyd**, the defendant arrived at the victim's house with a .38 caliber pistol, demanding money and ordering the victim and her daughter into the bathroom. The victim was shot twice, the fatal shot being fired in contact with her head. The Supreme Court disapproved of the circumstance, writing that while there was a "suspicion that this was a contract killing," such was not proven beyond a reasonable doubt.

(c) As to the question of whether removing the decedent to a remote location establishes the circumstance, compare **Preston v. State**, 444 So.2d 939 (Fla. 1984) (decedent store clerk moved one and-a-half miles, then stabbed to death; *HELD*, trial court erred by applying circumstance) and **Cannady v. State**, 427 So.2d 723 (Fla.1983) (decedent hotel night auditor moved to remote location, then killed by five gunshots when he jumped up; *HELD*, trial court erred by applying circumstance), with **Card v. State**, 453 So.2d 17 (Fla. 1984) (trial court finding upheld where defendant

drove office clerk eight miles to wooded area and cut her throat; "The appellant had ample time during this series of events to reflect on his actions and their attendant consequences.").²

(d) As to whether the purpose of eliminating a witness establishes the circumstance, compare **Wright v. State**, 473 So.2d 1277 (Fla. 1985), cert. denied, 106 S.Ct. 870 (1986) (defendant killed burglary victim "because she recognized him and he did not want to go back to prison"; *HELD*, trial court erred by applying circumstance) and **Derrick v. State**, 581 So.2d 31 (Fla., 1991) (holding inconsistent findings of premeditation circumstance and witness elimination circumstance) with **Cooper v. State**, 492 So.2d 1059 (Fla. 1986) (defendant killed robbery victims when one of them recognized co-defendant; application approved).

(e) Does arming oneself during a burglary establish the circumstance? One can choose between **Harris v. State**, 438 So.2d 787 (Fla. 1983), cert. denied, 466 U.S. 963 (1984) (circumstance rejected because "the state presented no evidence that this murder was planned and, in fact, the instruments of death were all from the victim's premises") and **Mason v. State**, 438 So.2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984).³

² The phrase in Card about reflecting on "his actions and their attendant on sequences" is synonymous with the "premeditated design" element of first-degree murder. See **Owen v. State**, 441 So.2d 1111, 1113 n.4 (Fla. 3rd DCA 1983) (discussing "premeditation" and "deliberation").

³ For a detailed discussion of the inconsistencies between these two decisions (which were rendered on the same day), see Kennedy at 70 ff.

From the foregoing, the application of the circumstance in Florida does not meet the requirements set out by the Supreme Court in *Lewis*. Hence, the circumstance is unconstitutional. Because of its importance to the overall statutory scheme of §921.141, it makes the Florida death penalty statute unconstitutional, as pointed out by Justice Ehrlich in *Herring*.

3. The "without any pretense of legal or moral justification" phrase renders the aggravating circumstance unconstitutional.

The cold calculated and premeditated factor is the only one that requires the jury and court to make a finding that two seemingly unrelated elements apply before it may be used to support a sentence of death. It reads in full:

(i) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. §921.141, Fla. Stat. (emphasis supplied). The "without any pretense of moral or legal justification" language is vague and incoherent, unrelated to the first part of the circumstance, incapable of a narrowing construction, and has not been consistently or narrowly construed. It tells judge and jury not to apply the circumstance unless they find a false or half-baked reason for the killing that does not justify it on moral or legal grounds. In applying this circumstance, the Florida Supreme Court has had to stretch. Compare **Banda v. State**, 536 So.2d 221, 224-25 (Fla. 1988) (claim of self-defense rejected at guilt phase, but testimony of prior threats by victim, when given by disinterested witnesses, sufficient to preclude finding of circumstance), with **Cannady v. State**, 427 So.2d 723, 730-31 (Fla. 1983) (circumstance properly found where only self-defense evidence came from defendant himself). See also **Williamson v. State**,

511 So.2d 289, 293 (Fla. 1987). These distinctions are not sufficient under the eight amendment, and in any event are never explained to jurors, who hear only the standard instruction that comes right from the statutory language.

4. The standard jury instruction on the CCP circumstance is unconstitutional and renders the death penalty unconstitutional as applied because it is subjected to the judgment of unguided juries.

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instruction on the instant circumstance assures arbitrariness and maximizes discretion in reaching the penalty verdict. The Florida Supreme Court has promulgated standard jury instructions for use in the trial courts of this state. Although the trial courts may substitute correct statements of the law when standard jury instructions are incorrect, the institutional effect of the standard instructions renders Florida's capital sentencing scheme unconstitutional. All jury recommendations in cases resulting in a death sentence in the trial court affect proportionality review, leading to arbitrary application of the death penalty in Florida where the jury's recommendation has been infected by the unconstitutional circumstance.

The standard instruction on the instant circumstance tracks the statute.' The vague statutory language into applying this circumstance too broadly has misled the Florida Supreme Court. See **Rogers v. State**, 511 So.2d 526 (Fla. 1987) (condemning prior construction as too broad). The standard instruction invites arbitrary and uneven application. Its use necessarily results in improper application of the circumstance in

case after case. Since the statutory language is subject to a variety of constructions,⁵ the vague standard, instruction ensures arbitrary application, and is unconstitutional.

While the Florida Supreme Court has rejected this argument, there is a clear constitutional violation under the teachings of the United States Supreme Court. In

Brown v. State, 565 So.2d 304, 308 (Fla.1990), the court wrote:

Based on **Maynard v. Cartwright**, 108 S.Ct. 1853 (1988), **Brown** also argues that the standard instruction on the cold, calculated, and premeditated aggravating circumstance is unconstitutional. In **Maynard** the court held the Oklahoma instruction on heinous, atrocious, and cruel unconstitutionally vague because it did not adequately define that aggravating factor for the sentencer (in Oklahoma, the jury). We have previously found **Maynard** inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor. **Smalley v. State**, 546 So.2d 720 (Fla. 1989). We find **Brown's** attempt to transfer **Maynard** to this state and to a different aggravating factor misplaced. See **Jones v. Dugger**, 533 So.2d 290 (Fla. 1988), **Daugherty v. State**, 533 So.2d 287 (Fla. 1988). We therefore find no error regarding the penalty instructions.

However, in **Smalley** the Florida Supreme Court did **not** find **Maynard**⁶ inapplicable to Florida. **Smalley** rejected a jury instruction claim on the ground that the issue was not preserved in the trial court, and wrote that Florida's heinousness circumstance was not

⁵ The instruction is:

The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

⁶ See the argument above that this circumstance has not been consistently construed in a constitutionally narrow manner.

In **Maynard**, the Court held unconstitutional a jury instruction virtually identical with Florida's jury instruction on the "heinous, atrocious or cruel" circumstance. The Court opined that the instruction was so vague that it could not be applied by juries in a defining aggravating circumstances.

facially unconstitutional under **Maynard** because the Florida Supreme Court had given it a narrowing construction. Although **Cartwright** did not concern the particular aggravating circumstance here, it applies full force: "It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." **Walton v. Arizona**, 110 S.Ct. 3047, 3057 (1990). The instant circumstance is vague on its face, and the instruction based on it also is too vague to provide the constitutionally required guidance. It does not inform the jury of the following limiting constructions of the circumstance:

1) The "calculated" element of the circumstance requires that there be "a careful plan or prearranged design" evidencing "heightened premeditation," **Rogers v. State**, 511 So.2d 526, 533 (Fla.1987), and that the defendant "planned or arranged to commit murder before the crime began." **McKinney v. State**, 579 So.2d 80, 85 (Fla.1991).

2) The "cold" element precludes application of the circumstance to a killing "consummated by one in a rage." **Mitchell v. State**, 527 So.2d 179, 182 (Fla.1988).

3) The "without any pretense of moral or legal justification" element forbids application of the circumstance where there is "any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." **Banda v. State**, 536 So.2d 221, 225 (Fla.1988).

4) The premeditation circumstance has not been strictly construed. It fails to genuinely narrow the class of persons eligible for the death penalty. It is not rationally related to its purpose. Hence, it is unconstitutional.

Any holding that jury instructions in Florida capital sentencing proceedings need not be definite would directly conflict with the Cruel and Unusual Punishment Clauses of the state and federal constitutions. These clauses require accurate jury instructions during the sentencing phase of a capital case. See **Hitchcock v. Dugger**, 107 S.Ct. 1821, 1824 (1987) (sentence improper where "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances").

WHEREFORE, the Defendant, Norman Blake McKenzie, moves that this Court enter its order:

1. Declaring section 921.141 and/or 921.141(6)(i), Florida Statutes unconstitutional and precluding their application at bar; or
2. Granting such other relief as is appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

/S/ JUNIOR BARRETT

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO PROHIBIT ANY REFERENCE TO THE
JURY'S SECOND PHASE DECISION AS "ADVISORY" OR A
"RECOMMENDATION"**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned attorney, and moves this Court, pursuant to Article I, sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, to prohibit any reference to the jury's second phase role as being "advisory" or to its penalty phase verdict as being a "recommendation."

1. Defendant was previously convicted of two counts of first-degree murder and the State of Florida has filed a notice of their intent to again seek the death penalty.

2. References to the jury's role at penalty as being "advisory" or to the jury's penalty verdict as being a "recommendation" diminish the jury's sense of responsibility for the sentence in violation of Article I, sections 2, 9, 16, and 17

of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. **Caldwell v. Mississippi**, 472 U.S. 320(1985).

3. The Supreme Court in **Hurst v. Florida**, 136 S. Ct. 616 (2016), held Florida's capital sentencing scheme, under which an advisory jury makes a recommendation to a judge and the judge makes the critical findings needed for imposition of the death sentence, violates the Sixth Amendment right to a jury trial. See also **Ring v. Arizona**, 536 U.S. 584 (2002). The Florida Supreme Court extended **Hurst v. Florida** to comply with the Florida constitutional right to trial by jury by requiring a unanimous jury finding of aggravating factors, a unanimous jury finding that aggravating factors were enough to support a death sentence, a unanimous jury finding that the aggravating factors outweighed any mitigating circumstances, and a unanimous recommendation that death be imposed. **Hurst v. State**, 202 So. 2d 40 (2016).

Even before **Hurst** was decided, four members of the Court expressed concern about the issue of whether the jury's role was truly advisory in light of **Ring**. **Bottoson v. Moore**, 833 So. 2d 693, 703-33 (Fla. 2002). Justice Lewis most clearly expressed the need for prospective revisions of the jury instructions, which reference the jury's role as advisory:

Just as the high Court stated in **Caldwell**, *Florida's* standard jury instructions "minimize the jury's sense of responsibility for determining the appropriateness of death." **Caldwell**, 472 U.S. at 341, 105 S.Ct. 2633. *Ring* clearly requires that the jury play a vital role in determining the factors upon which the sentencing will depend, and Florida's jury instructions tend to diminish that role and could lead the jury members to believe they

are less responsible for a death sentence than they actually are. **Ring** has now emphasized the jury's role in this process and may compel Florida's standard penalty phase jury instructions to do the same.

Bottoson v. Moore, 833 So.2d 693, 731-733 (2002). The U.S. Supreme Court endorsed this reasoning by explicitly directing Florida to comply with **Ring. Hurst v. Florida**, 136 S.Ct. at 616.

As a result, instructing the jury that its decision to impose death is "advisory" or a "recommendation" would violate Article I, sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Defendant, Norman Blake McKenzie. hereby moves this Honorable Court to prohibit reference to the jury's decision that a death sentence is appropriate as "advisory" or a "recommendation."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION IN LIMINE REGARDING
REFERENCE TO NON-ENUMERATED
MITIGATING FACTORS OR CIRCUMSTANCES**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned counsel and hereby moves in limine to preclude reference, by counsel, witnesses, or by the court, to mitigating circumstances not specifically listed in §921.141(7), §§(a) through (g), as "non-statutory mitigating circumstances", and as grounds for said motion states as follows:

1. The Defendant is present for resentencing base upon **Hurst v. Florida**, 202 So. 3d 40 (2016).
2. The State filed a renewed notice of its intention to seek the death penalty.
3. It is not unusual for prosecutors as well as judges and even defense attorneys to refer to mitigating factors that are not among those specifically listed in §921.141(7), §§(a) through (g), as "non-statutory" mitigating factors, while those mitigating factors specifically listed in §§(a) through (g) are referred to as "statutory" mitigating circumstances.

4. Referring to these mitigating factors as "non-statutory" mitigating factors has the effect of communicating to the jury that will make a recommendation as to penalty that these mitigating factors are inferior to those mitigating factors specifically listed in the statute, by virtue of not being listed specifically in the statute.

5. In actuality, those factors not specifically enumerated in the statutes have never been held to have any different weight under the law than the so-called "statutory" mitigating factors. On the contrary, the jury must be instructed upon, and the judge must consider and weigh, any aspect of the offense or of the defendant's character or record that are mitigating. **Lockett v. Ohio**, 438 U.S. 586 (1978); **Eddings v. Oklahoma**, 455 U.S. 104 (1982); **Penry v. Lynaugh**, 492 U.S. 302 (1989).

6. To reflect this reality, the Florida Legislature amended the death penalty statute to include §921.141(7) (h) as a "statutory", or enumerated, mitigating circumstance: "The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty."

7. Whether law provided to the jury comes from statutory law or case law has never been deemed appropriate to provide to a jury trying any type of criminal case. For that reason, the standard jury instructions in criminal cases do not provide citation as to their sources for the jury, although some portions derive from statute and some from case law.

8. Permitting reference to these mitigating factors that are not specifically

enumerated as "non-statutory" has the effect of undermining the validity of the Florida death penalty sentencing scheme, by suggesting to the jury which mitigating circumstances should be given more weight than others should. It is exclusively the responsibility of the penalty phase jury, in the penalty phase of a capital case, to assign to each mitigating circumstance presented them the proper weight, as the jury sees fit.

WHEREFORE the Defendant, Norman Blake McKenzie, requests this Court to enter its Order precluding reference, by counsel, witnesses, or by the court, to mitigating factors not specifically listed in §921.141 (7), §§(a) through (g), as "non-statutory mitigating circumstances."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION FOR SPECIAL VERDICT FORM
CONTAINING FINDINGS OF FACT BY THE JURY**

COMES NOW The Defendant, Norman Blake McKenzie, by and through the undersigned counsel, and respectfully moves this Honorable Court to direct the jury to utilize a verdict form with specific findings as to the aggravating factors in this cause, in order to return findings of fact as to aggravating circumstances in concert with the jury's recommendation of the penalty to be imposed in this cause.

As grounds for this request, the Defendant states:

1. Florida's statutory scheme for imposing a death sentence requires that the sentence be supported by findings of fact supporting the aggravating and mitigating circumstances. Fla. Stat. §921.141, **State v. Dixon**, 283 So.2d 1 (Fla. 1973).
2. During the penalty phase, the jury is presented evidence as to aggravating and mitigating circumstances and instructed to return a recommendation based upon the jury's findings as to these circumstances.
3. If the jury was to recommend a death sentence, that recommendation, unless

overridden by the court, is then subject to appellate review in the Supreme Court of Florida. This entails a review of the findings of fact to support the sentence.

4. To aid appellate review, this Court is required to file written findings supporting the sentence. **State v. Dixon**, 283 So.2d 1 (Fla. 1973).

5. The review of this proceeding, as well as the jury's responsibility to weigh the evidence in consideration of their recommendation as to penalty, would be greatly enhanced by identification of which aggravating factors had been found to exist by the jury, beyond and to the exclusion of a reasonable doubt.

6. Specific findings of fact on a verdict form would also enhance the ability of counsel and the court to identify the issues, thereby focusing attention on what is at issue and eliminating extraneous issues, which would save the Court time and effort.

7. Specific findings of fact of a verdict form for penalty phase would also assist the Court in the preparation of its written findings as part of sentencing.

WHEREFORE, the Defendant, Norman Blake McKenzie, respectfully moves this Honorable Court to grant this motion and provide a specific verdict form for the jury, as described in this motion.

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ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**MOTION TO EXCLUDE VICTIM IMPACT EVIDENCE AND ARGUMENT AND/OR
TO DECLARE SECTION 921.141(8), FLORIDA STATUTES UNLAWFUL
AND UNCONSTITUTIONAL AND/OR TO DECLARE SECTION 921.141,
FLORIDA STATUTES UNLAWFUL AND UNCONSTITUTIONAL**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned counsel and moves this Court to prohibit victim impact evidence or argument. He also challenges the legality and constitutionality of Chapter 92-81, codified as Section 921.141(8), Florida Statutes, and the capital sentencing statute as a whole. In favor of this Motion, he cites to Florida Statutes 921.141 (8) that reads as follows:

(8) VICTIM IMPACT EVIDENCE. -- Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (6), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate

sentence shall not be permitted as a part of the victim impact evidence.

The victim impact provision is not a good fit on existing Florida capital sentencing law. It was passed to implement **Payne v. Tennessee**, 111 S.Ct. 2597 (1991), which overruled **Booth v. Maryland**, 107 S.Ct. 2529 (1987). **Payne** would seem sound authority, but the new law substantially tips the carefully balanced structure of Florida's capital sentencing law, Section 921.141, Florida Statutes, and is unlawful and unconstitutional.

The prosecution is seeking the imposition of the death penalty in this capital case. Accordingly, heightened standards of due process apply. See, **Elledge v. State**, 346 So.2d 998 (Fla. 1977) ("heightened" standard of review); **Mills v. Maryland**, 108 S.Ct. 1860, 1866 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."); **Proffitt v. Wainwright**, 685 F.2d 1227, 1253 (11th Cir. 1982) ("Reliability in the fact finding aspect of [capital] sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."); and **Beck v. Alabama**, 447 U.S. 625, 638 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to ensure that every safeguard is observed." **Gregg v. Georgia**, 428 U.S. 153, 187 (1976) (plurality opinion) (citing cases).

I. CHAPTER 92-81 IS UNLAWFUL TO THE EXTENT IT AUTHORIZES VICTIM IMPACT EVIDENCE AND ARGUMENT AT THE PENALTY PHASE OF A CAPITAL TRIAL WHERE VICTIM IMPACT IS IRRELEVANT TO ANY AGGRAVATING FACTOR.

Victim sympathy evidence has long been inadmissible under Florida law, even in the pre-**Booth** world. The introduction of such evidence in the penalty phase would violate the clear limits on aggravating circumstances imposed by Fla. Stat. 921.141.

Grossman, *infra*. Because the legislature did not add victim impact to the list of aggravating circumstances, Florida law continues to prohibit this type of evidence and argument at both phases and at sentencing.

Victim impact evidence is still irrelevant to nearly all statutory aggravating factors. Thus, it continues to be inadmissible as irrelevant, the legislature's feelings notwithstanding.

Section 921.141(6), Florida Statutes, specifically limits the prosecution to the aggravating circumstances listed in the statute. It says: "AGGRAVATING CIRCUMSTANCES. Aggravating circumstances shall be limited to the following . . . "Accord, **Elledge v. State**, 346 So.2d 998, 1002-1003 (Fla. 1977); **Provence v. State**, 337 So.2d 783 (Fla. 1976). Victim impact is not one of the listed aggravators. The Florida Supreme Court has recognized that the state law limit to statutorily listed aggravating circumstances precludes the introduction of victim impact evidence, for reasons which underlie the fundamental construction of Florida's capital sentencing scheme, and which stand independently of **Booth**.¹ In **Grossman v. State**, 525 So.2d 1 The United States Supreme Court relied on the limitation statutorily enumerated aggravating circumstances in upholding Florida's capital sentencing statute in **Proffitt v. Florida**, 96 S.Ct. 2960 (1975).

833 (Fla. 1988), the Florida Supreme Court held:

Florida's death penalty statute, section 921.141, limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute. Section 921.141(5). The impact of the murder on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a non-statutory aggravating circumstance that would not be an appropriate circumstance on which to base a death sentence. **Blair v. State**, 406 So.2d 1103 (Fla. 1981); **Miller v. State**, 373 So.2d 882 (Fla. 1979); **Riley v. State**, 366 So.2d 19 (Fla. 1978).

Grossman, 515 So.2d at 842²

Hastily passing the victim impact law, the legislature did not also amend Section 921.141(5), which continues to command that aggravating factors are limited to those set forth. Victim impact is still listed as an aggravating factor. Victim impact evidence and argument remain legally irrelevant to the sentencing process.³

Victim impact is nowhere listed as an independent aggravating circumstance.

Aggravating circumstances are listed only in Section 5 of Section 921.141. The only

² The Florida Supreme Court has implicitly recognized that **Payne**, supra, has no impact on cases such as **Jones** and **Grossman** as they are based on Florida law. In **Taylor v. State**, 583 So.2d 323 (Fla. 1991), the Florida Supreme Court reversed for a new penalty phase due to the prosecutor making an argument designed to invoke sympathy for the deceased. 583 So.2d at 329-330. The Court relied on its prior opinion in **Hudson v. State**, 522 So.2d 802 (Fla. 1988), in which it held such argument to be improper "because it urged consideration of factors outside the scope of the jury's deliberation." 522 So.2d at 809. The opinion in **Taylor** was issued on June 27, 1991, the same day at **Payne**, supra. Compare 583 so.2d 323 with 111 S.Ct. 2597. The Florida Supreme Court denied rehearing without modifying the opinion, on August 20, 1991, well after **Payne**. *Id.* at 323.

³ Neither does Fla. Stat. 921.143 allow victim impact evidence in capital cases. Although this statute allows the victim or next of kin to speak at sentencing, the Florida Supreme Court has specifically held in **Grossman**, supra, that this statute does not apply to capital cases. 525 So.2d at 842. The Court stated:

Accordingly, we hold that the provisions of Section 921.143 are invalid insofar as they permit the introduction of victim impact evidence as an aggravating factor in death sentencing. Id. (Footnotes omitted)

way to read the new Section 921.141(7) to be consistent with Section 5 is that the victim impact evidence described in Section 7 is admissible if it is relevant to prove an aggravating circumstance or rebut mitigation.

The reasoning of **Grossman**, that Florida Statute 921.143 does not authorize the introduction of victim impact evidence, as it is irrelevant to any statutory aggravating circumstance applies equally to the new Section 921.141(7). This reading of the amended version of statute is also consistent with well-established principles of statutory construction. It is an established rule of construction that the legislature is presumed to be aware of prior interpretations of a statute. **Burdick v. State**, 594 So.2d 267, 271 (Fla. 1992). The legislature is also presumed to have "at least tacitly approved" the prior interpretation. *Id.* at 271. Thus, it must be presumed that the legislature was aware that the Florida Supreme Court had consistently held that the prosecution is limited to the aggravating circumstances listed in Section 5. It must also be presumed that the legislature "at least tacitly approved" of this interpretation. The only way to interpret Section 7 and fulfill this principle is to interpret it to hold that it merely makes victim impact evidence admissible if it is relevant to prove an aggravating circumstance or to rebut a mitigating circumstance introduced by the defense. This interpretation is also consistent with the general rule that any ambiguities in statutory construction "must be construed in the manner most favorable to the accused". **Perkins v. State**, 576 So.2d 1310, 1312 (Fla. 1991).

Victim sympathy evidence is not an independent aggravating circumstance. The only aggravators to which victim impact evidence and argument arguably relate are

those that cast the status of the decedent as a reason for imposing a sentence of death: where the victim is a law enforcement officer or a public official. Sections 921.141(5) (j) and (k), Florida Statutes. However, those aggravators reflect a legislative determination that the victim's status as a law enforcement officer or public official is in and of itself aggravating, and do not recognize that additional evidence need be presented to further explain why the loss of such members of the community is a basis for imposing death. Victim impact is not relevant to any other aggravators.⁴ It must be excluded from the penalty phase in this case.

II. THE VICTIM IMPACT STATUTE IS UNCONSTITUTIONAL

A. Florida Statute 921.141(8) violates the Eighth and Fourteenth Amendments and Article I, Section 16 of the Florida Constitution

⁴ Victim impact is not relevant even to the "heinous, atrocious or cruel" aggravator. While HAC means all things to all people, the Florida Supreme Court has spoken to this precise issue, and holds victim impact is not a basis for finding HAC. In limiting the application of the "especially heinous, atrocious or cruel" aggravating circumstance the Florida Supreme Court writes:

Moreover, the trial court justified its finding that the murder was especially cruel by reference to a plurality of patently improper factors. These factors included the fact that the victim was married; ran the store alone; had led an honest and good life; would be missed by the community; was an immigrant who had made a good life; and was a kind and likeable man. The trial court erred by considering these factors. The lifestyle, character traits, and community standing of the victim are not relevant to the determination of whether a given homicide was especially heinous, atrocious, or cruel. In light of the facts revealed in the record on appeal, we conclude that there is no evidentiary basis for a finding that the murder was especially heinous, atrocious, or cruel.

Jackson v. State, 498 So.2d 906, 910 (Fla. 1986)

Jackson was decided before **Booth v. Maryland**, 482 U.S. 496 (1987) and was solely based on traditional state law relevancy grounds and not the United States Constitution.

Because the legislature did not add victim impact as an aggravating circumstance, and because Florida, unlike Tennessee, is a "weighing state", the introduction of victim impact evidence and argument in a Florida capital sentencing proceeding continues to violate the state and federal constitutions, in addition to Florida law.

While Florida law lists and limits aggravating factors to those set forth, the law reviewed by the Court in **Payne** set no such limits. Unlike Florida, Tennessee capital sentencing law is very broad; it provides no specific limits on aggravating factors, and sets no real evidentiary limits at penalty phase. The Tennessee statute says, in pertinent part:

In the sentencing proceeding, evidence may be presented as to any matter that the Court deems relevant to the punishment . . . Any such evidence which the Court deems to have probative value on the issue of punishment may be received regardless.

T.C.A. 39-13-204(c) (1982).

Tennessee is not a weighing state; Florida is. In a weighing state, aggravating factors must be carefully defined, see **Espinosa v. Florida**, 112 S.Ct. 2926 (1992), 1992), and the consideration of matters not relevant to aggravating factors renders a death sentence violative of the Eighth Amendment. **Sochor v. Florida**, 112 S.Ct. 2114 (1992); **Stringer v. Black**, 112 S.Ct. 1130 (1992). In **Sochor**, the Court explains:

In a weighing state like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating

circumstance in reaching the ultimate decision to impose a death sentence. See **Clemons v. Mississippi**, 494 U.S. 738, 752, 110 S.Ct. 1441, 1450, 108 L.Ed.2d 725 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility . . . of randomness," **Stringer v. Black**, 507 U.S. ___, ___, 112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (1992), by placing a "thumb [on] death's side of the scale", *id.*, at ___, 112 S.Ct. at 1137, thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty", *id.*, at ___, 112 D. Ct. at 1139.

Sochor, 112 S.Ct. at 2119.

Here, the legislature has invited sentencing juries and judges to consider evidence and argument favoring death which it has not defined as an aggravating factor (and, in fact, has not even defined). Because of the operation of Florida's capital sentencing statute, consideration of unlisted aggravation in the form of victim impact violates the eighth amendment. See **Sochor**, and **Stringer**.

B. Florida Statute 921.141(8) infringes the exclusive right of the Florida Supreme Court to regulate practice and procedure pursuant to Article V, Section 2, Florida Constitution

Florida Statute 921.141(8) violates Article V, Section 2(a) of the Florida Constitution, which states, in relevant part, "The Supreme Court shall adopt rules for the practice and procedure in all courts". The Florida Supreme Court has consistently held this provision is invalid. **R.J.A. v. Florence Foster, Judge** 603 So.2d 1167, (Fla., 1992); **Haven Federal Savings and Loan Association v. Kirian**, 579 So.2d 730 (Fla. 1991); **State v. Garcia**, 229 So.2d 236 (Fla. 1969). The matters at issue in the new Section 921.141(8) are clearly procedural.

Practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof". In re Florida Rules of Criminal Procedure, 272 So.2d 65, 66 (Fla. 1972) (Adkins, J., concurring). It is the method of conducting litigation involving rights and corresponding defenses. **Skinner v. City of Eustis**, 147 Fla. 22, 2 So.2d 116 (1941).

Haven, supra, 579 So.2d at 730.

The Florida Supreme Court has also stated: "how (a lawsuit) is to be tried in an orderly manner is procedural". **R.J.A., supra** at S328. The Florida Supreme Court has relied on these principles to invalidate a wide variety of statutes, involving such topics as juvenile speedy trial (**R.J.A., supra**), severance of trials involving counterclaims against foreclosing mortgagee (**Haven, supra**), waiver of a jury trial in a capital case (**Garcia, supra**), and the regulation of voir dire examination (In Re Clarification of Florida Rules of Practice and Procedure, 281 So.2d 205 (Fla. 1973). The statute at issue here is an attempt to regulate "practice and procedure". It deals with "the method of conducting litigation", just as surely as the regulation of voir dire, waiver of jury trial, or severance. **Haven, supra** at 732. The Florida Supreme Court has recognized that rules of evidence "may be procedural" and thus the sole responsibility of the Florida Supreme Court. **In Re Evidence Code**, 372 So.2d 1369. The Florida Supreme Court adopted the evidence code as a rule of procedure out of its concern for this constitutional provision. Florida Statute Section 921.141(8), Florida Statutes violates Article V. Section 2, of the Florida Constitution and is unconstitutional.

C. Florida Statute Section 921.141(8) is unconstitutional pursuant to Article I, Sections 2, 9, 16, 17 and 21 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution

The admission of victim impact evidence and argument would render Florida's capital felony statute unconstitutional under the Florida and United States Constitutions as it leaves the jury and judge with unguided discretion.

The Florida Constitution requires that victim sympathy evidence and argument be excluded from consideration where death is an appropriate sentence, and provides broader protection than the United States Constitution for the rights of a capital defendant. The Florida Supreme Court recently found significant the disjunctive wording of Article I, Section 17 of the Florida Constitution, which prohibits "cruel or unusual punishment." **Tillman v. State**, 591 So.2d 167, 169 (Fla. 1991).⁵ The Court in *Tillman* explicitly held that a punishment is unconstitutional under the Florida constitution if it is "unusual" due to the procedures involved. The allowance of victim sympathy evidence and argument would violate Article I, Section 17. The existence of this evidence is totally random, depending upon the extent of the deceased's family and friends, and their willingness to testify.

The admission of victim impact evidence and argument would also violate the Due Process Clause of Article I, Section 9 of the Florida Constitution. In **Tillman**, **supra**, the Court states that Article I, Section 9 holds "that death is a uniquely

⁵ This wording is in contrast to the ban on "cruel and usual punishment" in the Eighth Amendment to the United States Constitution.

irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than lesser penalties". *Id.* at 169. The Florida Supreme Court's opinion in **Tillman** is clear indication that victim impact evidence violates Article I, Sections 9 and 17 in a capital case, even if it is permitted in other cases.

The admission of victim impact evidence and argument violates Article I, Sections 9 and 17 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution for related reasons. First, such evidence intrudes into the penalty decision considerations that have no rational bearing on any legitimate aim of capital sentencing. Second, this proof is highly emotional and inflammatory, subverting the reasoned and objective inquiry that the courts have required to guide and regularize the choice between death and lesser punishments. Third, victim impact evidence cannot conceivably be received without opening the door to proof of a similar nature in rebuttal or in mitigation, further upsetting the delicate balance the courts have painstakingly achieved in this area. Fourth, the evidence invites the jury to impose a death sentence based on race, class and other clearly impermissible grounds.

Victim impact evidence portrays grief-stricken relatives expressing their extreme sorrow, sense of loss and anger over their bereavement -- often in highly emotional terms. They relate somatic and psychological symptoms of distress attributed by them to the murder, such as physical ailments, effects on pregnancy, lack of appetite, sleeplessness, nightmares, fears and depression. Frequently, too, the adult survivors describe these conditions in their children. These events have no bearing on the

circumstances of the crime or the character and background of the defendant, and victim impact evidence unlawfully interferes with consideration of mitigation. See, **Hitchcock v. Dugger**, 481 U.S. 393 (1987). Frequently, family members were not present at the time of the killing and have no relationship with the killer. Hence, they tend to dwell upon general good character traits and achievements of the deceased.

Unintended physical, emotional and psychological after-effects on relatives do not increase the moral blameworthiness of the killer beyond the onus he already bears for committing the murder and are irrelevant. Allowing that type of evidence would inevitably make the entire system freakish, arbitrary, and thus violative of Article I, Sections 9 and 17 and the Eighth and Fourteenth Amendments. Allowing victim impact evidence and argument would expand the scope of future penalty trials beyond all reason.

The admission of victim impact evidence and argument inevitably leads to and highlights the race and class status of the victim. This will be true because the family and friends of the deceased will inevitably tend to be of the same race and class of the deceased. This will inevitably lead to more educated and articulate white, middle class victim family members having more impact on judge and jury than poorer, minority and less educated victim's family members.

The statute at issue here is also unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution. In **Payne v. Tennessee**, 111 S.Ct. 2597 (1991) the Court overruled its prior opinion in **Booth**, in limited circumstances.

We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial evidence on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the impact of the murder on the victim's family is relevant.

Id. at 2609.

The Court also stated that even this generally permitted evidence might be so "unduly prejudicial" that it violates the Due Process Clause of the Fourteenth Amendment. *Id.* at 2608. There is nothing in **Payne** that permits evidence concerning such unlimited and undefined evidence as that designed to show "uniqueness as a human being" and "loss to the community". This goes way beyond the scope of **Payne** and violates the Eighth and Fourteenth Amendments.

D. Florida Statute Section 921.141(8) is violative of the Florida and United States Constitutions as vague and over broad

Section 921.141(8) is far broader and vaguer than Florida Statute 921-143 that the Florida Supreme Court has held does not apply to capital sentencing. **Grossman v. State**, 525 So.2d 833, 842 (Fla. 1988). 921.143 limits the testimony to the victim's family. Section 8 of 921.141, Florida Statutes, states: "such evidence shall be designed to demonstrate the victim's uniqueness as a human being and the resultant loss to the community".

This language puts absolutely no limit as to who can testify or what they can testify to. The phrase, "loss to the community", contains no definition of community or

limits on its membership. This could lead to anyone testifying or even to death sentencing by petition or public opinion poll. The phrase, "uniqueness as a human being", places absolutely no limit on the evidence. This statute clearly does not meet the higher standard in capital cases imposed by Article I, Sections 9 and 17 and the Fifth, Sixth, Eighth and Fourteenth Amendments.

A statute, especially a penal statute, must be definite to be valid. **Locklin v Pridgeon**, 30 So.2d 102 (Fla. 1947). An attack on a statute's constitutionality must "necessarily succeed" if its language is indefinite. **D'Alemberte v. Anderson**, 349 So.2d 164 (Fla. 1977). The statute at issue here clearly fails under any standard of definiteness under the United States and Florida Constitutions. The term "community" contains a wide variety of meanings. It can mean geographic community or it can mean people with perceived common interests. **See, Black's Law Dictionary** (containing several different definitions of the term). Even within the concept of a geographic community, it can mean anything from a neighborhood up to the "community of nations". The term "community" when applied to community of interest can mean virtually anything; including common hobbies, jobs, sports teams, political beliefs, religion, race or ethnicity. One of the most common ways in which the term "community" is in the racial or ethnic sense. The phrases "Black Community", "Hispanic Community", etc. are widely used. Testimony of the loss to members of a racial or ethnic community would clearly be forbidden under the Florida and United States constitutions. The terms of Section 8 are vague and overbroad and are capable of a

wide variety of clearly impermissible uses. This section gives a defendant virtually no notice of the type of evidence that he is to defend against.

The introduction of victim impact evidence would render the entire statutory scheme unconstitutional. The admission of this type of evidence would leave the judge and jury without any guidance as to how it is to be used. As noted previously, this evidence does not constitute an aggravating circumstance. The jury is told that they are limited to the statutory aggravating circumstances. **See, Standard Jury Instructions in Criminal Cases.** They are then told that they are to weigh this evidence against that presented in mitigation. Id. This evidence clearly is not mitigating and it is not within the statutory aggravating circumstances. Thus, neither the judge nor jury is left with any guidance as to how to weigh it.

The admission of victim sympathy evidence without any guidance as to how to use it is unconstitutional pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. The failure to sufficiently guide discretion, with the possibility of arbitrary and discriminatory results, is the theme running throughout the opinions in **Furman v. Georgia**, 92 S.Ct. 2726 (1972). The guiding of the judge and jury's discretion was a critical factor to both the Florida Supreme Court and the United States Supreme court in upholding the facial constitutionality of the Florida statute. **Proffitt v. Florida**, 96 S.Ct. 2960, 2969 (1976). **State v. Dixon**, 283 So.2d 1 (Fla. 1973).

The United State Supreme Court has reversed several cases for jury instructions that fail to sufficiently define an aggravating circumstance. **Espinosa v. Florida**, 112

U.S. 299, 6. F.L.W. Fed. S662 (June 29, 1992); **Shell v. Mississippi**, 111 S.Ct. 313 (1990); **Maynard v. Cartwright**, 108 S.Ct. 1853 (1988) (all three cases reversing for failure to adequately define the "heinous, atrocious, or cruel" aggravating circumstance). In **Mills v. Maryland**, 108 S.Ct. 1860 (1988), the Court reversed because there was a "substantial possibility" the jury would misunderstand how to consider mitigating evidence. *Id.* at 1867. The jury is given absolutely no guidance how to handle this highly explosive and emotional victim impact evidence and argument. This is far worse than merely being given inadequate guidance as to the HAC aggravator as in **Espinosa, Shell and Maynard**.

E. The victim impact law panders to racial sensitivities

Victim impact evidence is inadmissible in the current case. Both the United States Supreme Court and the Florida Supreme Court have recognized the special danger of racial prejudice infecting a capital sentencing decision in a case involving, i.e., a black defendant and a white deceased. **Turner v. Murray**, 106 S.Ct. 1683 (1986); **Robinson v. State**, 520 So.2d 1 (Fla. 1988). In **Turner, supra**, the Court held that the Sixth and Fourteenth Amendments to the United States Constitution mandated that a black capital defendant accused of killing a white person has a right to voir dire on racial prejudice. The Court stated:

Because of the range of discretion entrusted to the jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected... The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.

106 S.Ct. at 1687-1688.

The Court went on to state:

Our judgment in this case is that there was an unacceptable risk of racial prejudice infecting the capital sentencing proceeding. This judgment is based on a conjunction of three factors: the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case.

Id. at 1688-1689.

The Florida Supreme Court has also recognized the special danger of racial prejudice influencing a capital sentencing proceeding. **Robinson, supra**, at 6-8. The Court noted the long history of racial prejudice in our society and the need for the "unceasing attention" of the courts to eradicate it. Id. at 7.

The Court went on to state:

The situation presented here, involving a black man who is charged with kidnapping, raping and murdering a white woman, is fertile soil for the seeds of racial prejudice.

Id. at 7.

The Court reversed for re-sentencing due to the prosecutor intentionally bringing out the race of the victim in the defendant's prior violent felonies. Id. at 6-8. (The Court took this action even though prior violent felony is a statutory aggravating factor.) The Court relied on the fact that in a case where the defendant is black and the deceased is white, this constituted an unacceptable risk of the injection of racial prejudice in the case.

The introduction of the testimony of family or friends of this deceased would also serve to improperly highlight the fact that the deceased is of a different race than the defendant. Thus, as in ***Robinson*** and ***Turner***, it would create an unacceptable risk that racial prejudice would infect the proceedings pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 22 of the Florida Constitution. This is especially true, in light of the inevitably emotional nature of such testimony and the fact that it has no relevance to the statutory aggravating circumstances.

Denial of this Motion would violate the Defendant's rights to effective assistance of counsel, to present a defense, to compulsory process, to confront the evidence against him, to cross examine witnesses, to due process, to equal protection of the laws, to be free from cruel and unusual punishment and against compulsory self-incrimination, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution and Florida law.

WHEREFORE, Defendant, Norman Blake McKenzie, hereby moves this Honorable Court to issue its order to prohibit evidence or argument designed to create sympathy for the deceased; declare Section 921-141(8) unlawful and unconstitutional; and declare Section 921.141 unconstitutional in toto.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day

of October, 2018.

/S/ JUNIOR BARRETT

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

MOTION TO LIMIT VICTIM IMPACT EVIDENCE

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned counsel and hereby files his motion to limit victim impact testimony should the Court deny his previously filed motion to exclude all such testimony. He would urge the Court to impose the following limits on the testimony. (A) Only one witness may testify. (B) The witness must be an adult. (C) The State must proffer a proposed victim impact statement in writing. (D) The Court must hold a hearing on the admissibility of the evidence prior to its admission. (E) The Court must consider relevant caselaw, Fla. Stat. 90.403, and any other relevant statutes. (F) The testimony must be limited to the prepared statement. (G) No witness may testify if the witness is unable to control his or her emotions.

As grounds, he would state:

1. These are limitations approved by the New Jersey Supreme Court in **State v. Muhammad**, 678 A. 2d 164, 180 (N.J. 1996). See also **Conover v. State** (Oklahoma), 933 P. 2d 904 (Okla. Ct. Crim. App. 1997) and **Ledbetter v. State**

(Oklahoma), 933 P.2d 880 (Okla. Ct. Crim. App. 1997).

2. The United States Supreme Court and Florida Supreme Court have held that some types of victim impact evidence are admissible. However, both courts have placed limits on what type of testimony is admissible as victim impact evidence. **Payne v. Tennessee**, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); **Windom v. State**, 656 So. 2d 4320 (Fla. 1995). Florida Statute 921.14 (7) also prohibits certain types of victim impact evidence.

In **Payne**, supra the majority states:

Our holding today is limited to the holdings **Booth v. Maryland**, 482 U.S. 496, 107 S.Ct. 2529, 90 L.Ed.2d 440 (1987), and **South Carolina v. Gathers**, 490 U.S. 805, 109 S. Ct. 2297, 104 L.Ed.2d 876 (1989), that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. **Booth** also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

111 S.Ct. at 2611 n.2.

Thus, **Payne** explicitly prohibits certain types of victim impact evidence.

Three members of the United States Supreme Court also stated that the Fourteenth Amendment imposed limits on the nature and quantity of victim impact evidence. In addition to the Eighth Amendment, per se bar on certain types of victim impact evidence.

Trial courts routinely exclude evidence that is unduly inflammatory; where inflammatory evidence is improperly admitted; appellate courts carefully review the record to determine whether the error was prejudicial.

We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely

that if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no per se bar." Ante, at 2609. If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.

Id. at 2612 (Concurring opinion of Justices O'Connor, White, and Kennedy).

Additionally, three members of the Court would hold that all victim impact evidence is inadmissible. Id at 2619-2631. Thus, it is clear that every member of the United States Supreme Court agrees that the Eighth Amendment bars certain types of victim impact evidence and at least six members of the Court that victim impact evidence can be so extensive and or inflammatory as to deny due process.

In **Windom**, supra the Florida Supreme Court also imposed limits on this type of evidence. In Windom, the Court dealt with the admissibility of the following evidence:

Windom attacks the admissibility of testimony by a police officer during the sentencing phase of the trial. The police officer was assigned by her police department to teach an anti-drug program in an elementary school in the community in which the defendant and the three victims of the murders lived and where the murders occurred. Two of the sons of one of the victims were students in the program. The police officer testified concerning her observation about one of these sons following the murder. Her testimony involved a discussion concerning an essay, which the child wrote. She quoted the essay from memory: "Some terrible things happened in my family this year because of drugs. If it hadn't been for DARE, I would have killed myself." The police officer also described the effect of the shootings on the other children in the elementary school. She testified that a lot of the children were afraid.

656 So. 2d at 434. The Court held that the officer's testimony concerning the impact on the victim's son was admissible. However, the Court held the rest of the testimony to be inadmissible.

Victim impact evidence must be limited to that which is relevant as specified in section 921.141 (7). The testimony in which the police officer testified about the effect on children in the community other than the victim's two sons was erroneously admitted because it was not limited to the victim's uniqueness and the loss to the community's members by the victim's death.

Id.

Two members of the Florida Supreme Court wrote separately to note the dangers of victim impact evidence.

The use of victim-impact evidence can pose a constitutional problem if misused. I do not believe the courts can or should encourage the use of victim-impact evidence when it in effect may invite jurors to gauge the relative worth of particular victim's lives. All human life deserves dignity and respect; including in the penalty phase of a capital trial. This includes victims of high stature in the community as well as those in humbler circumstances. It would not be especially difficult for one or the other side in a criminal case to prey on the prejudices some jurors may harbor about particular classes of victims. Subtle appeals to racism, caste-based notions, or similar concerns clearly would undermine the fundamental objective of a criminal trial -- achieving justice. If the effect is either to aggravate the case for one type of victim but mitigate it for another in similar circumstances, then the Constitution is violated. The victim's high stature in the community is not a legal aggravating factor just as a victim's minority status does not lawfully mitigate the crime. In this sense, all human life stands at equal stature before the law. Courts must be vigilant to see that this equality is not undermined.

(Opinion of Justices Kogan and Anstead, concurring in part and dissenting in part).

Thus, it is clear that every member of the Court feels certain types of victim impact

evidence are inadmissible. At least two members of the Court feel that this evidence is extremely risky and potentially dangerous.

It is clear that the United States Supreme Court and the Florida Supreme Court have held that victim impact evidence must be strictly limited. The courts also recognize that victim impact is potentially inflammatory and improper.

3. Both *Payne* and *Windom* involved the testimony of one witness. **Payne**, *supra* at 2603. **Windom**, *supra* at 434. The witness in **Payne** only described the impact on the deceased's immediate family. *Id.* at 2603. Indeed the Court in **Payne** described the issue as only concerning testimony regarding the impact on the victim's family. *Id.* at 2603. In **Windom**, *supra* the witness described the effect on the victim's two sons and on the other children in the community. The Florida Supreme Court held the testimony concerning the effect on other children to be improper. The Florida Supreme Court seems to limit victim impact evidence to testimony concerning the impact on the victim's immediate family.

4. Allowing multiple witnesses concerning victim impact raises the precise danger outlined in the concurring opinion of Justices O'Connor, White, and Kennedy in **Payne**, *supra*. 111 S.Ct. at 2611-2613. It raises the danger that this evidence could become unduly inflammatory and thus violate the Due Process Clause of the Fourteenth Amendment. It also raises the concerns expressed by Justices Kogan and Anstead in **Windom**, *supra*; it would make the lives of prominent members of the community worth more than those of other people would. This could lead to one victim's life being worth more than another

due to the number of people who come forward to praise the victim. Allowing multiple witnesses concerning victim impact would also allow this evidence to become a feature of the penalty phase and distract the jury from its primary task of weighing aggravation and mitigation. This is extremely dangerous.

5. The limits imposed by the New Jersey Supreme Court are a logical and balanced attempt to satisfy the concerns expressed in **Payne** and **Windom**.

Further grounds will be argued ore tenus.

WHEREFORE, the Defendant, Norman Blake McKenzie, respectfully requests this Honorable Court to issue its order limiting victim impact evidence should the Court deny his previously filed motion to exclude all such testimony, or granting such other relief as may be appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of October, 2018.

/S/ JUNIOR BARRETT

JUNIOR BARRETT, ESQUIRE

FL. Bar No. 785687

Assistant Regional Counsel

Office of Regional Criminal Conflict &

Civil Regional Counsel, 5th District

101 Sunnyside Road, Suite 310

Casselberry, FL 32707

(407) 389-5140

tcollins@rc5state.com

Hearing Notes

DATE: November 28, 2018
CIRCUIT JUDGE: MALTZ
STATE ATTORNEY: M. JOHNSON
DEFENSE ATTORNEY: J. BARRETT / K. HAMBURG
CLERK: LAPINSKI, MEGAN
BAILIFF: STOKES
COURT REPORTER: R. BOUNDS

STATE VS.: MCKENZIE, NORMAN BLAKE
CASE #: 06001864CFMA

CHARGE #: FIRST DEGREE MURDER (2 COUNTS)

MISC. MOTION HEARINGS

-DEFT PRESENT W/ ATTY

-DEFENSE ADDRESSES COURT REGARDING MOTIONS THAT WERE
STIPULATED TO BY THE STATE - REQUESTS THAT COURT MAKE
EMAIL THAT LISTS MOTIONS THAT HAVE BEEN STIPULATED TO BY
BOTH PARTIES PART OF THE COURT RECORD - COURT WILL MAKE
EMAIL PART OF THE RECORD

-MOTION TO PERMIT ACCUSED TO APPEAR WITHOUT RESTRAINTS AT
ALL PROCEEDINGS: COURT WILL HAVE DEFT RESTRAINED DURING
PROCEEDINGS/RETAINTS WILL NOT BE SEEN BY JURY

-MOTION OF DISCLOSURE OF PENALTY PHASE EVIDENCE
-MOTION TO COMPEL DISCLOSURE OF MITIGATING CIRCUMSTANCES

-MOTION FOR DISCOVERY OF PROSECUTORIAL INVESTIGATION OF
PROSPECTIVE JURORS: DEFENSE ARGUMENT - COURT ASKS STATE TO
TURN OVER LIST OF PROSPECTIVE JURORS IF THEY RECEIVE LIST IN
ADVANCE - STATE HAS NO OBJECTION TO PROVIDE LIST TO DEFENSE
- COURT ORDER: ADDRESSES ARE NOT DISCLOSED TO DEFENSE &
THAT DEFENSE ATTYS DO NOT DISCLOSE INFORMATION TO
DEFENDANT PRIOR TO VOIR DIRE

-MOTION FOR JUROR QUESTIONNAIRE TO SUPPLEMENT VOIR DIRE:
COURT WILL NOT USE QUESTIONNAIRE EXCEPT THAT OF BASIC
BIOGRAPHICALLY INFORMATION

-MOTION FOR PROPER PROCEDURE FOR POST-CHALLENGE
QUESTIONING OF PROSPECTIVE JURORS: DENIED

-MOTION IN LIMINE REGARDING REFERENCE TO NON-ENUMERATED
MITIGATING FACTORS OR CIRCUMSTANCES: DEFENSE ARGUMENT -
STATE ARGUMENT - COURT RULING: GRANTED

-MOTION TO PROHIBIT ANY REFERENCE TO THE JURY'S SECOND PHASE
DECISION AS "ADVISORY" OR A "RECOMMENDATION": STATE HAS NO
OBJECTION

-MOTION TO EXCLUDE VICTIM IMPACT STATEMENTS: DEFENSE
ARGUMENT - COURT RULING: DENIED

-MOTION TO ALLOW VICTIM IMPACT EVIDENCE BEFORE THE JUDGE
ALONE - COURT RULING: DENIED

-MOTION IN LIMINE TO REQUIRE STATE TO PROFFER ANY AND ALL
VICTIM IMPACT EVIDENCE

-MOTION TO LIMIT VICTIM IMPACT STATEMENT TO ONE WITNESS:
STATE ARGUMENT/STATE WILL AGREE TO LIMIT TO 5 STATEMENTS -
COURT WILL DEFER RULING

-MOTION FOR SPECIAL VERDICT FORM CONTAINING FINDING OF
FACTS BY THE JURY

-MOTION FOR FINDING FACTS BY JURY

-MOTION FOR INTERROGATORY PENALTY PHASE VERDICT
COURT RULING: COURT WILL USE STANDARD VERDICT FORM

-REVIEW OF MULTIPLE MOTIONS TO DECLARE SECTION 921.141
UNCONSTITUTIONAL - COURT RULING AS TO EACH

-MOTION TO BAR EXECUTION BY LETHAL INJECTION - DENIED W/O
PREJUDICE

-MOTION FOR IMPOSITION OF A LIFE SENTENCE: DEFENSE
ARGUMENT - COURT RULING: DENIED

-ATTYS TO PREPARE PROPOSED ORDERS

-DEFENSE WILL SUBMIT EMAIL AS PART OF COURT RECORD

-DEFENDANT CAN BE RETURNED TO DOC

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

ORDER TO TRANSPORT

THIS CAUSE having come before this Court and being fully advised in the premises, it is,

ORDERED:

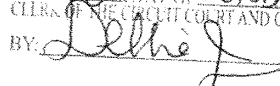
That authorities with the DEPARTMENT OF CORRECTIONS shall deliver custody of the Defendant, **NORMAN BLAKE MCKENZIE; DC#: 648711; W/M; DOB: 07/08/1964;** to the Sheriff of St. Johns County, and further that the Sheriff of St. Johns County shall keep said Defendant in close custody and have the Defendant present before the undersigned in courtroom 328, of the Richard O. Watson Judicial Center, St. Augustine, Florida, on **November 28, 2018 at 9:00 a.m.**, for the purpose of HEARING AND STATUS CONFERENCE, until such time that the above-styled case has been concluded, and the Defendant returned to the custody of the DEPARTMENT OF CORRECTIONS.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 12 day of October, 2018.



CIRCUIT JUDGE

Copies to:
K. Mark Johnson, Asst. State Attorney
Junior A. Barrett, Esq.
St. Johns County Sheriff's Office, Transportation

I HEREBY CERTIFY THAT THIS DOCUMENT
IS A TRUE AND CORRECT COPY AS APPEARS
ON RECORD IN ST. JOHNS COUNTY, FLORIDA
WITNESS MY HAND AND OFFICIAL SEAL
THIS 12th DAY OF OCTOBER 2018
CLERK OF THE CIRCUIT COURT AND COMPTROLLER
BY:  CC

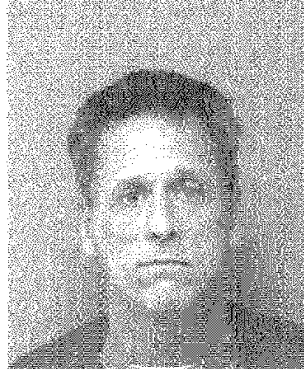




ST. JOHNS COUNTY SHERIFF'S OFFICE
MCKENZIE, NORMAN BLAKE
BOOKING INFORMATION



☐ HIGH PROFILE ☐ SUICIDAL ☐ ESCAPE RISK ☒ HOLD Agency: DOC



Booking No: SJSO18JBN005693 MNI No: SJSO99MNI055145 Cell Assigned: SJSO* BKG*003*003

Address : UNION CORRECTIONS

City, State Zip: RAIFORD, FL 32083

Telephone Number: 904 8230921

SSN [REDACTED] DOB: 07/08/1964

Place of Birth: POLK

Citizenship: UNITED STATES

DL No: M252622642480

City, State: WINTER HAVEN, FLORIDA County: POLK

SID No:

Race

Gender

Height

Weight

Hair

Eyes

Build

Skin

Hand

FBI No:

W

M

6'02"

227

Bro

Bro

Occupation: DOC INMATE

Employer : UNEMPLOYED

Telephone:

Date Booked: 11/27/2018 Date Released:

Searched By: WILSON, CHRISTOPHER

Time Booked: 15:42 Time Released:

Printed By:

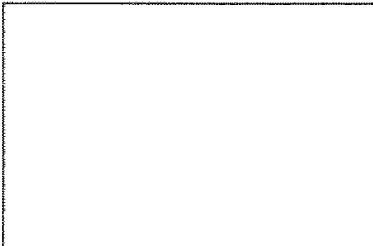
Booked By: EVANS, STEPHANIE L

Inmate Phone PIN::

Property Bag No:

Photo By: WILSON, CHRISTOPHER

Right Index Finger In



MNI No



SJSO99MNI055145

Booking No



SJSO18JBN005693

Right Index Finger Out



- I have been advised any property valued over \$100 is to be released or mailed at my own expense within five (5) days.
- I understand that my phone/canteen passcode are confidential and created by me. I will not share this number with anyone. I am fully responsible for all usage and monetary obligations associated with the passcode. SJSO is not responsible for loss of funds to my account.

X

Defendant Signature

Date

Officer Signature

Date

MCKENZIE, NORMAN BLAKE

Booking No: SJSO18JBN005693

MNI No: SJSO99MNI055145

Printed On: 11/27/2018 16:18

User Name: SEVANS

Page 1 of 2

MCKENZIE, NORMAN BLAKE
BOOKING INFORMATION

Case/Charge Report

Case Number: CASE0001

Court Case Number: 06-1864CF

Court:

Bond Information: By Judge:

Arrest Number:

By LEO:

Offense No:

OBTS:

Arresting Agency: ST. JOHNS COUNTY
SHERIFF'S OFFICE

Arresting Officer: SAILOR, CHIQUITA

Agency No:

Case Comments: 11/27/18 HERE ON ORDER TO TRANSPORT

SENTENCED DOC DEATH

Sentence Information

☐ Dept of Corrections

☐ Good Conduct Gain Time

☐ Extra Gain Time

Start Date:

Actual Time Served:

☐ Weekender

Length:

Time Worked in Jail:

Credit for Time Served:

Gain Time Credit:

End Date:

Time Remaining:

Charge Number: CHR0001

Counts: 1 Statute: 782.04.1a1

Bond : \$0.00

Charge Code: HOMICIDE

Charge Description:

Status: DEPT OF CORRECTIONS

MURDER FIRST DEGREE PREMEDITATED

Comments:

No comments available.

Charge Number: CHR0002

Counts: 1 Statute: 782.04.1a1

Bond : \$0.00

Charge Code: HOMICIDE

Charge Description:

Status: DEPT OF CORRECTIONS

MURDER FIRST DEGREE PREMEDITATED

Comments:

No comments available.

X

Inmate Signature

MCKENZIE, NORMAN BLAKE

Booking No: SJS018JBN005693

MNI No: SJS099MNI055145

Printed On: 11/27/2018 16:19

User Name: SEVANS

Page 2 of 2

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL
CIRCUIT, IN AND FOR ST JOHNS COUNTY, FLORIDA

STATE OF FLORIDA
Plaintiff,

CASE NO.: 06001864CFMA
DIVISION:

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

NOTICE OF FILING

Notice is hereby given that the Defendant, **NORMAN BLAKE MCKENZIE**, hereby files with the Court the following documents for the Court's consideration in the above-styled case:

– QUESTIONNAIRE FOR PROSPECTIVE JURORS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by hand/mail email delivery to the Office of the State Attorney, eservicestjohns@sao7.org this 4th day of December, 2018.

/s/ Junior Barrett

JUNIOR BARRETT
Fla. Bar No.: 785687
Assistant Regional Counsel
Office of Criminal Conflict & Civil
Regional Counsel, 5th District
101 Sunnyside Road, Ste. 310
Casselberry, FL 32707
(407) 389-5140
(407) 389-5139
jbarrett@rc5state.com
tcollins@rc5state.com

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

QUESTIONNAIRE FOR PROSPECTIVE JURORS

You are a potential juror for the hearing of Derrick McLean to determine whether he should be sentenced to life without the possibility of parole or death. In order to learn more about you, the Court and the lawyers have agreed to submit questions to you in writing. When the formal jury selection process begins in the court the lawyers or the judge may ask you about some of your answers.

Your answers to the following questions are very important. Although some of the questions are personal in nature, please be assured that they are necessary to the process, and that the court participants will keep all of your answers confidential. The sole purpose of the questionnaire is to help the prosecution and the defense select a fair and impartial jury. Please do not give "politically correct" answers or what you think the court or lawyers want to hear. All that is sought is your open and honest responses, whatever they may be.

It is not our intent to embarrass anyone. These questions could be asked in open court. The answers you give here will become part of the Court's public record and will be used by the judge and lawyers to assist in selecting a qualified jury. Rather than answering in writing, however, you have the right to request a private hearing with the judge and attorneys to answer specific sensitive questions.

If you wish to make further comments regarding any of your answers, please do so on the pages entitled "Additional Responses" attached to the end of this questionnaire and identify each additional response by the appropriate page and question number.

As you answer the questions that follow, please keep in mind that there are no "right" or "wrong" answers, only complete and incomplete answers. Complete answers are far more helpful than incomplete answers because they make long and tiresome questioning unnecessary and, by doing that, they shorten the time it takes to select a jury. Please **PRINT** your answers legibly. Please take all the time necessary to answer every question as fully and honestly as possible. Your complete written answers will save a great deal of time for the judge, for the lawyers, for your fellow jurors, and for you.

If you need more space to answer any questions more completely, there are blank pages at the end of the Questionnaire for you to use. Please indicate at the end of any of your answers if you are continuing your answer. Also, when you are using these blank pages, please indicate the question number for each continued answer. Sign your questionnaire when you are finished. Your answers will have the effect of a statement given to the Court under oath.

PERSONAL DATA

1. Juror Identification Number (Juror Badge Number) _____
2. Date of Birth _____ Place of birth _____
3. Race (circle one) Caucasian Hispanic African-American Asian Native America
Other (specify) _____
4. Current city/area of residence _____ Years there _____
5. Years of residence in Orange County _____ Years in Florida _____
6. Current Occupation: _____
7. Current Employer: _____ Years _____
8. Previous Occupation: _____ Years _____
9. Previous Employer: _____ Years _____
10. Marital Status: **(Circle all that apply)**
Single Married Divorced Widowed Living with Significant Other
11. Spouse's/Other's Occupation (Most recent occupation if retired) _____

12. If previously married, former spouse's occupation: _____
13. Please list the age, sex, occupation (or area of study) of each of your children

Age	Male/Female	Occupation (or area of study)	Marital Status
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
14. What is your highest level of education? _____
15. List any degrees, licenses, or certificates you have _____

16. Have you or any member of your immediate family been a party to any lawsuit? _____
17. Have you ever served as a juror? **(Circle one)** YES NO

18. Have you ever had any training, education or jobs or have you ever done any volunteer work in any of the following areas? **Circle** each one that applies to you

Medicine nursing psychology counseling drug/alcohol law

Corrections justice system mental health

19. Are you, or have you been a member of any organization that takes a position one way or the other on the death penalty? **(Circle one)** YES NO
If so, what organization(s)? _____

20. What are your general feelings about the death penalty? _____

21. What are your general feelings about life imprisonment without the possibility of parole? _____

22. Which would you say most accurately states your position on the death penalty: **(Circle one)**

Strongly in Favor Strongly Opposed Somewhat in Favor Somewhat Opposed
Neutral

23. Which of the following best describes your opinion of the death penalty? **(CHECK ONLY ONE)** If none of the options listed reflects your opinion regarding the death penalty, please describe your personal view of the death penalty in the space provided.

_____ I would never vote to impose the death penalty, regardless of the evidence

_____ I generally oppose the death penalty but could vote in favor of it under certain circumstances.

_____ I support the death penalty but would vote to impose it only in specific circumstances.

_____ I would always vote to impose the death penalty in an intentional murder case, regardless of the evidence

24. For what type of crimes, if any, do you believe the death penalty is the only appropriate penalty? _____

25. Are there any crimes that you personally find so horrible that you think that death should automatically imposed? **(Circle one)** YES NO
If YES, please explain why: _____

26. There are no circumstances under which a jury is instructed by the court to return a verdict of death. No matter what the evidence shows, the jury is always given the option in the penalty phase of choosing life without the possibility of parole.
- (a) Given the fact that you will have two options available to you, can you see yourself, in the appropriate case, rejecting the death penalty and choosing life imprisonment without the possibility of parole? **(Circle one)** YES NO
- (b) Given the fact that you have two options available to you, can you see yourself in the appropriate case, rejecting life imprisonment without the possibility of parole and choosing the death penalty instead? **(Circle one)** YES NO
27. When a judge sentence a defendant to life in prison without the possibility of parole, what does that mean to you or what do you understand that to mean? _____

28. Regarding the statement: "Anyone who intentionally kills another person should always get the death penalty." Do you **(Circle one)**
- | | |
|----------------|-------------------|
| Strongly agree | Strongly disagree |
| Agree somewhat | Disagree somewhat |
- Please explain: _____

29. What sort of psychological effects, if any, do you think continuous physical, emotional and or psychological abuse by a parent or guardian towards a child has on the child even into adulthood? _____

30. Do you believe that a person's background (e.g., his or her child rearing and experiences growing up) does not matter when it comes to whether or not he or she should be sentenced to death for a deliberate, intentional murder? **(Circle one)** YES NO
31. Do you believe that background information about a defendant is something relevant to the jury's consideration of penalty **(Circle one)**:
- Probably Possibly Unsure

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

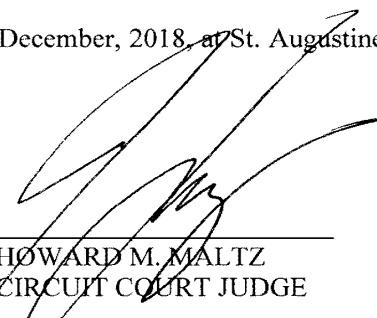
Defendant.

**ORDER ON DEFENDANT'S MOTION FOR DISCOVERY OF
PROSECUTORIAL INVESTIGATIONS OF PROSPECTIVE JURORS**

THIS CAUSE came before the Court on the defendant's Motion for Discovery of Prosecutorial Investigations of Prospective Jurors. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is GRANTED. The State shall, as agreed, provide the defendant with the results of any criminal background research in its knowledge or possession with regard to any venireperson. The State shall not, however, be required to turn over any record or other information prohibited by law or contract.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:21 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

ORDER ON DEFENDANT'S MOTION FOR FINDINGS OF FACT BY THE JURY

THIS CAUSE came before the Court on the defendant's Motion for Findings of Fact by the Jury. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED. The Court shall use the standard jury verdict forms promulgated by the Florida Supreme Court.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:21 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

ORDER ON DEFENDANT'S MOTION FOR IMPOSITION OF LIFE SENTENCE

THIS CAUSE came before the Court on the defendant's Motion for Imposition of Life Sentence. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:21 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

**ORDER ON DEFENDANT'S MOTION FOR INDIVIDUAL VOIR
DIRE AND SEQUESTRATION OF JURORS DURING VOIR DIRE**

THIS CAUSE came before the Court on the defendant's Motion for Individual Voir Dire and Sequestration of Jurors During Voir Dire. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED, except the Court will conduct an individual sequestered voir dire of any potential jurors who indicates that they may have been subject to pretrial publicity or have some knowledge of the case.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:21 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

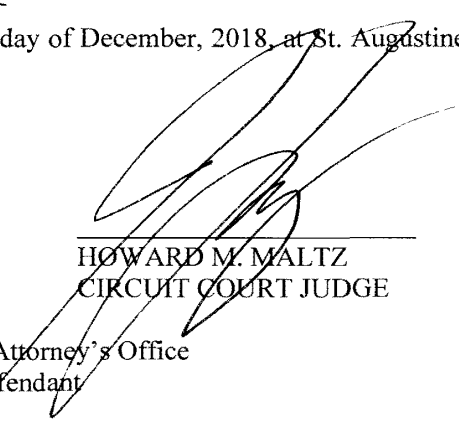
Defendant.

**ORDER ON DEFENDANT'S MOTION FOR
INTERROGATORY PENALTY PHASE VERDICT**

THIS CAUSE came before the Court on the defendant's Motion for Interrogatory Penalty Phase Verdict. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED. The Court shall use the standard jury verdict forms promulgated by the Florida Supreme Court.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:21 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

ORDER ON DEFENDANT'S MOTION FOR JUROR
QUESTIONNAIRE TO SUPPLEMENT VOIR DIRE

THIS CAUSE came before the Court on the defendant's Motion for Juror Questionnaire to Supplement Voir Dire. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:21 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

**ORDER ON DEFENDANT'S MOTION FOR LIST OF
PROSPECTIVE JURORS IN ADVANCE OF JURY SELECTION**

THIS CAUSE came before the Court on the defendant's Motion for List of Prospective Jurors in Advance of Jury Selection. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is GRANTED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

**ORDER ON DEFENDANT'S MOTION TO EXCLUDE VICTIM IMPACT EVIDENCE
AND ARGUMENT AND/OR TO DECLARE SECTION 921.141(8), FLORIDA
STATUTES UNLAWFUL AND UNCONSTITUTIONAL AND/OR TO DECLARE
SECTION 921.141, FLORIDA STATUTES UNLAWFUL AND UNCONSTITUTIONAL**

THIS CAUSE came before the Court on the defendant's Motion to Exclude Victim Impact Evidence and Argument and/or to Declare Section 921.141(8), Florida Statutes, Unlawful and Unconstitutional and/or to Declare Section 921.141, Florida Statutes, Unlawful and Unconstitutional. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:31 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

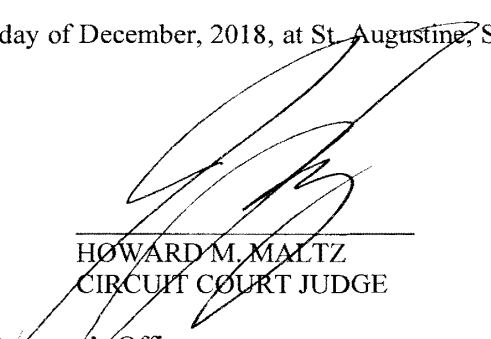
Defendant.

ORDER ON DEFENDANT'S MOTION FOR SPECIAL VERDICT
FORM CONTAINING FINDINGS OF FACT BY THE JURY

THIS CAUSE came before the Court on the defendant's Motion for Special Verdict Form Containing Findings of Fact by the Jury. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED. The Court shall use the standard jury verdict forms promulgated by the Florida Supreme Court.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:31 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

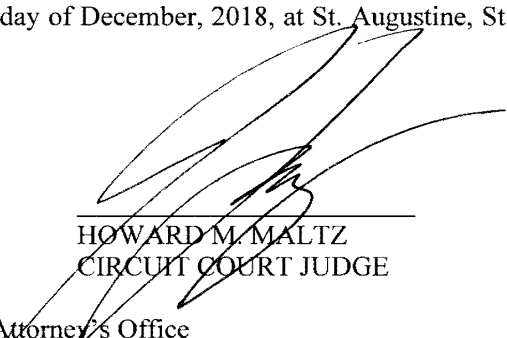
Defendant.

**ORDER ON DEFENDANT'S MOTION IN LIMINE REGARDING REFERENCE
TO NON-ENUMERATED MITIGATING FACTORS OR CIRCUMSTANCES**

THIS CAUSE came before the Court on the defendant's Motion in Limine Regarding Reference to Non-Enumerated Mitigating Factors or Circumstances. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is GRANTED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:31 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

**ORDER ON DEFENDANT'S MOTION TO BAR
EXECUTION BY LETHAL INJECTION**

THIS CAUSE came before the Court on the defendant's Motion to Bar Execution by Lethal Injection. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:31 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

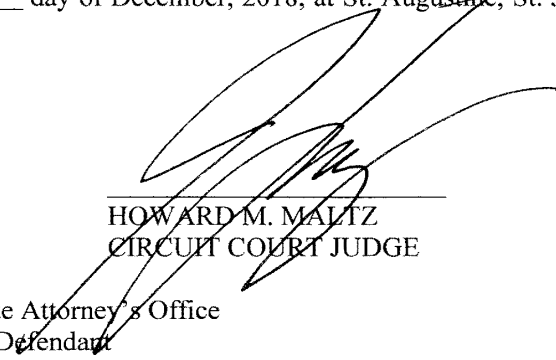
Defendant.

**ORDER ON DEFENDANT'S MOTION FOR PROPER PROCEDURE FOR
POST-CHALLENGE QUESTIONING OF PROSPECTIVE JURORS**

THIS CAUSE came before the Court on the defendant's Motion Proper Procedure for Post-Challenge Questioning of Prospective Jurors. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:31 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

**ORDER ON DEFENDANT'S MOTION TO ALLOW VICTIM
IMPACT EVIDENCE BEFORE THE JUDGE ALONE**

THIS CAUSE came before the Court on the defendant's Motion to Allow Victim Impact Evidence Before the Judge Alone. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:42 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

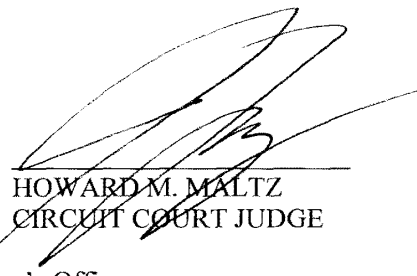
Defendant.

**ORDER ON DEFENDANT'S MOTION TO COMPEL
DISCLOSURE OF MITIGATING CIRCUMSTANCES**

THIS CAUSE came before the Court on the defendant's Motion to Compel Disclosure of Mitigating Circumstances. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is GRANTED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.


HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:42 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

**ORDER ON DEFENDANT'S MOTION TO DECLARE SECTION 921.141
UNCONSTITUTIONAL BECAUSE IT EXPANDS RATHER THAN NARROWS THE
CLASS OF DEFENDANTS ELIGIBLE FOR THE DEATH PENALTY**

THIS CAUSE came before the Court on the defendant's Motion to Declare Section 921.141 Unconstitutional Because it Expands Rather than Narrows the Class of Defendants Eligible for the Death Penalty. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:42 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

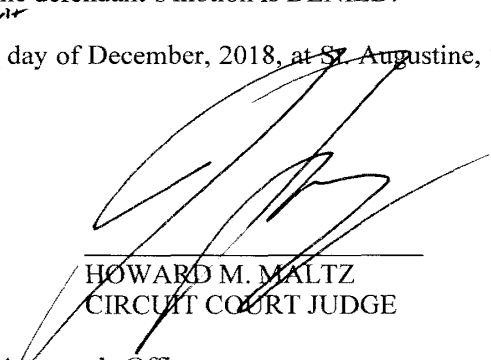
Defendant.

**ORDER ON DEFENDANT'S MOTION TO DECLARE SECTION 921.141 FLORIDA
STATUTES UNCONSTITUTIONAL FOR FAILURE TO PROVIDE JURY ADEQUATE
GUIDANCE IN THE FINDING OF MITIGATION CIRCUMSTANCES, AND TO
PRECLUDE DEATH SENTENCE**

THIS CAUSE came before the Court on the defendant's Motion to Declare Section 921.141 Florida Statutes Unconstitutional for Failure to Provide Jury Adequate Guidance in the Finding of Mitigation Circumstances, and to Preclude Death Sentence. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:42 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

**ORDER ON DEFENDANT'S MOTION TO DECLARE SECTION 921.141 FLORIDA
STATUTES UNCONSTITUTIONAL FOR LACK OF APPELLATE REVIEW**

THIS CAUSE came before the Court on the defendant's Motion to Declare Section 921.141 Florida Statutes Unconstitutional for Lack of Appellate Review. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

**ORDER ON DEFENDANT'S MOTION TO DECLARE SECTION 921.141 FLORIDA
STATUTES UNCONSTITUTIONAL BASED ON A VIOLATION OF THE DUE
PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS
AND BECAUSE OF A VIOLATION OF THE SEPARATION OF POWERS CLAUSE
OF THE FLORIDA CONSTITUTION, OR IN THE ALTERNATIVE TO DETERMINE
LIFE IS THE MAXIMUM PENALTY**

THIS CAUSE came before the Court on the defendant's Motion to Declare Section 921.141 Florida Statutes Unconstitutional Based on a Violation of the Due Process Clauses of the United States and Florida Constitutions and Because of a Violation of the Separation of Powers Clause of the Florida Constitution, or in the Alternative to Determine Life is the Maximum Penalty. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 02:42 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

**ORDER ON DEFENDANT'S MOTION TO DECLARE SECTION 921.141(1) FLORIDA
STATUTES UNCONSTITUTIONAL AND TO BAR STATE'S USE OF HEARSAY
EVIDENCE AT PENALTY PHASE**

THIS CAUSE came before the Court on the defendant's Motion to Declare Section 921.141(1) Florida Statutes Unconstitutional and to Bar State's Use of Hearsay Evidence at Penalty Phase. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.


HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 03:00 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

**ORDER ON DEFENDANT'S MOTION TO DECLARE SECTION 921.141 AND/OR
921.141(6)(b) FLORIDA STATUTES AND/OR THE STANDARD (6)(b) INSTRUCTION
UNCONSTITUTIONAL FACIALLY AND AS APPLIED**

THIS CAUSE came before the Court on the defendant's Motion to Declare Section 921.141 and/or 921.141(6)(b) Florida Statutes and/or the Standard (6)(b) Instruction Unconstitutional Facially and as Applied. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 03:00 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

**ORDER ON DEFENDANT'S MOTION TO DECLARE SECTION 921.141 AND/OR
921.141(6)(d) FLORIDA STATUTES AND/OR THE (6)(d) STANDARD INSTRUCTION
UNCONSTITUTIONAL FACIALLY AND AS APPLIED AND TO PRECLUDE THEIR
APPLICATION AT BAR**

THIS CAUSE came before the Court on the defendant's Motion to Declare Section 921.141 and/or 921.141(6)(d) Florida Statutes and/or the (6)(d) Standard Instruction Unconstitutional Facially and as Applied and to Preclude Their Application at Bar. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 03:00 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

**ORDER ON DEFENDANT'S MOTION TO DECLARE FLORIDA'S CAPITAL
SENTENCING SCHEME UNCONSTITUTIONAL AS VIOLATIVE OF THE EIGHTH
AMENDMENT, CORRESPONDING ARTICLE I, SECTION 17 FLORIDA
CONSTITUTION, AND EVOLVING STANDARDS OF DECENCY AND
INCORPORATED MOTION TO TAKE JUDICIAL NOTICE**

THIS CAUSE came before the Court on the defendant's Motion to Declare Florida's Capital Sentencing Scheme Unconstitutional as Violative of the Eighth Amendment, Corresponding Article 1, Section 17 of the Florida Constitution, and Evolving Standards of Decency and Incorporated Motion to Take Judicial Notice. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is DENIED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.


HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 03:00 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
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ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

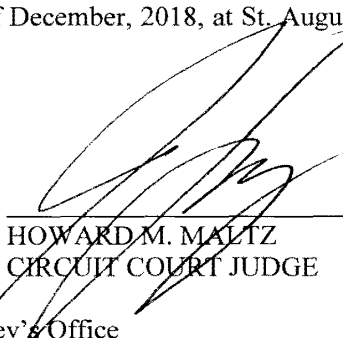
Defendant.

**ORDER ON DEFENDANT'S MOTION TO EXCLUDE EVIDENCE OR
ARGUMENT DESIGNED TO CREATE SYMPATHY FOR THE DECEASED**

THIS CAUSE came before the Court on the defendant's Motion to Exclude Evidence or Argument Designed to Create Sympathy for the Deceased. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is GRANTED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

**ORDER ON DEFENDANT'S MOTION TO PERMIT ACCUSED TO
APPEAR WITHOUT RESTRAINTS AT ALL PROCEEDINGS**

THIS CAUSE came before the Court on the defendant's Motion to Permit Accused to Appear Without Restraints At All Proceedings. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it it

ORDERED AND ADJUDGED that the defendant shall not appear before the jury in this cause with visible restraints. The defendant's motion as it relates to any proceeding during which the jury is not present is DENIED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 03:00 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

**ORDER ON DEFENDANT'S MOTION TO PRODUCE WRITTEN
VICTIM IMPACT STATEMENTS AND TO REQUIRE THE VICTIM
IMPACT WITNESSES TO READ THE STATEMENTS**

THIS CAUSE came before the Court on the defendant's Motion to Produce Written Victim Impact Statements and to Require the Victim Impact Witnesses to Read the Statements. The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is GRANTED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 03:00 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: CF06-01864

NORMAN BLAKE MCKENZIE,

Defendant.

**ORDER ON DEFENDANT'S MOTION TO PROHIBIT ANY
REFERENCE TO THE JURY'S SECOND PHASE DECISION AS
"ADVISORY" OR A "RECOMMENDATION"**

THIS CAUSE came before the Court on the defendant's Motion to Prohibit any Reference to the Jury's Second Phase Decision as "Advisory" or a "Recommendation." The Court, having reviewed and considered the defendant's motion, conducted a hearing thereon, and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED that the defendant's motion is GRANTED.

DONE AND ORDERED this 6th day of December, 2018, at St. Augustine, St. Johns County, Florida.



HOWARD M. MALTZ
CIRCUIT COURT JUDGE

cc: ASA K. Mark Johnson, State Attorney's Office
Junior Barrett, Counsel for Defendant

Filed for record 12/07/2018 03:07 PM Clerk of Court St. Johns County, FL

Filing # 83746819 E-Filed 01/23/2019 10:00:01 AM

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE
_____ /

STATE'S MOTION TO AMEND NOTICE OF AGGRAVATING FACTORS

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney and, pursuant to Section 782.04(1)(b), Florida Statutes, and Rule 3.181, Florida Rules of Criminal Procedure, moves this Honorable Court to allow the State to amend its notice of aggravating factors. As good cause, the State sets forth the following:

1. On June 19, 2017, this Court entered an order vacating the defendant's previously imposed death sentences in light of the Florida Supreme Court's ruling in *Hurst v. State*, 202 So.3d 40 (2016).

2. On August 28, 2017, the State filed a Renewed Notice of Intent to Seek the Death Penalty and List of Aggravating Factors. Prior to the original trial, the State had filed a notice to seek the death penalty and at trial asserted the following aggravating circumstances:

- a. The defendant was previously convicted on another capital felony or of a felony involving the use or threat of violence to the person.
- b. The capital felony was committed while the defendant was engaged in the commission of, or attempted commission of, a robbery.
- c. The capital felony was committed for pecuniary gain.

d. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

3. In its Renewed Notice, the State listed the same aggravating factors that were relied on during the previously-conducted penalty phase.

4. Since that time, the State has discovered that statements made by the defendant following his arrest gives it reason to believe that it can also prove beyond a reasonable doubt that the capital felony was heinous, atrocious, or cruel. Specifically, the defendant described attacking each victim in separate locations with a hatchet, returning to find each of them still alive and moving, and then attacking them a second time and completing the murders.

WHEREFORE, the State, for the grounds stated above, moves this Honorable Court to permit it to amend its notice of aggravating factors to include the HAC aggravating factor.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by delivery to JUNIOR BARRETT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, on January 23, 2019.

Respectfully submitted:

s/ K. MARK JOHNSON
ASSISTANT STATE ATTORNEY
FLORIDA BAR NO. 0378320
2446 DOBBS RD.
ST. AUGUSTINE, FL 32086
(904) 209-1300
ESERVICESTJOHNS@SAO7.ORG

Filing # 84303434 E-Filed 02/01/2019 03:20:18 PM

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE /

SUPPLEMENTAL DISCOVERY/WITNESS LIST

In compliance with Rule 3.220(b)(1)(i), FRCP, the State hereby furnished the names and addresses of every witness known to the State Attorney to have information which may be relevant to the offense(s) charges, or to any defense with respect thereto:

(A) Witnesses

1. Category A Witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or co-defendant pursuant to Rule 3.220 (b)(1)(A)(i)(3), F.R.Cr.P.

Det. Timothy R. Burress, St. Johns Co. Sheriff's Office, 4015 Lewis Speedway, St. Augustine, FL 32084

Dep. Tim Rollins, St. Johns Co. Sheriff's Office, 4015 Lewis Speedway, St. Augustine, FL 32084

Det. Erik Dice, Marion Co. Sheriff's Office, 692 NW 30th Ave., P.O. Box 1987, Ocala, FL 34478-1987

Other Category A witnesses:

Dr. Predrag Bulic, Medical Examiner's Office, 4501 Ave. A, St. Augustine, FL 32095

Amanda Genton Hewes, 403 SE Leroy Ct., Lake City, FL 32025

Charles McGuire, 2049 SE West Dunbrooke Cir., Port St. Lucie, FL 34952

Clarice B. Polczynski, 12338 NW 9th Ln., Newberry, FL 32669

Larry Vann, 239 Story Ln., Leesburg, GA 31763

Chantel Wilson, 323 Park Ave., Apt. G-3, Basalt, CO 81621

Dep. Nicholas Vickers, Alachua Co. Sheriff's Office, 2621 SE Hawthorne Rd., Gainesville, FL 32641

Dr. William R. Meadows, P.O. Box 822, Orange Park, FL 32067

2. Category B Witnesses pursuant to Rule 3.220(v)(1)(A)(ii), F.R.Cr.P.

3. Category C Witnesses pursuant to Rule 3.220(b)(1)(A)(iii), F.R. Cr.P

(B) Tangible papers or objects which the State intends to use at hearing or trial:

1. Any and all tangible evidence specifically listed in copies of written documents provided to Defense Counsel during Discovery.
2. Certified copy of Judgment & Sentence, Alachua Co. Case #2007-585CF
3. Certified copy of Judgment & Sentence, Alachua Co. Case #2007-586-CF
4. Certified copy of Judgment & Sentence, Alachua Co. Case #2007-532-CF
5. Certified copy of Judgment & Sentence, Alachua Co. Case #2006-5259-CF
6. Certified copy of Judgment & Sentence, Alachua Co. Case #2006-5261-CF
7. Certified copy of Judgment & Sentence, Marion Co. Case #2006-4213-CF
8. Certified copy of Judgment & Sentence, Broward Co. Case #1990-19206-CF
9. Certified copy of Judgment & Sentence, Broward Co. Case #1984-3709-CF
10. Incident Report in Alachua Co. Sheriff's Office case #06012342
11. Amended Information in Alachua Co. case #2006-5261-CF
12. Sworn Complaint in Gainesville Police Dept. case #02-06-019192
13. Information in Alachua Co. case #2007-532-CF
14. Sworn Complaint in Alachua Co. Sheriff's Office case #06012127
15. Information in Alachua Co. Case #2006-5259-CF
16. Complaint / Arrest Form in Broward Co. Sheriff's Office case #BS90-8-2028
17. Sworn Complaint in Gainesville Police Dept. case #02-06-019705
18. Information in Alachua Co. Case #2007-585-CF
19. Incident / Investigation Report in Gainesville Police Dept. case #02-06-019227
20. Information in Alachua Co. Case #2007-586-CF
21. Incident Reports in Marion Co. Sheriff's Office case #06048738
22. Information in Alachua Co. Case #2006-4213-CF
23. Supplemental Reports in Alachua Co. Sheriff's Office case #06012636
24. Incident Reports in Alachua Co. Sheriff's Office case #06048737
25. Reports in Alachua Co. Sheriff's Office case #0610050592
26. Reports in Citrus Co. Sheriff's Office case #0610072
27. Incident Reports in Levy Co. Sheriff's Office case #0610346
28. Video-recorded interview of Larry Vann
29. Video-recorded interviews (2) of Norman McKenzie by Dep. Tim Rollins & Det. Tim Burrell & transcripts
30. Constitutional rights form signed by Norman McKenzie (already in evidence)
- 31.
32. Crime scene photographs

- 33. Autopsy photographs
- 34. Hatchet (already in evidence)
- 35. Knife (already in evidence)
- 36. In-life photographs of Randy Peacock & Charles Johnston
- 37. Contents of wallet – Randy Peacock (already in evidence)
- 38. Contents of wallet – Charles Johnston (already in evidence)
- 39. Victim impact statements (to be provided at a later date)

The State demands compliance with Rule 3.220(d).

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail or delivery to: JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, on January 31, 2019.

s/K. MARK JOHNSON
ASSISTANT STATE ATTORNEY
BAR NO.: 0378320
2446 DOBBS ROAD
ST AUGUSTINE, FL 32086
(904) 209-1300
ESERVICESTJOHNS@SAO7.ORG

Filing # 84713468 E-Filed 02/11/2019 12:35:01 PM

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE /

SUPPLEMENTAL DISCOVERY/WITNESS LIST

In compliance with Rule 3.220(b)(1)(i), FRCP, the State hereby furnished the names and addresses of every witness known to the State Attorney to have information which may be relevant to the offense(s) charges, or to any defense with respect thereto:

(A) Witnesses

1. Category A Witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or co-defendant pursuant to Rule 3.220 (b)(1)(A)(i)(3), F.R.Cr.P.

Other Category A witnesses:

J. CESAR SALDANHA, 3488 ROSEMONT RIDGE ROAD, TALLAHASSEE, FL 32312

2. Category B Witnesses pursuant to Rule 3.220(v)(1)(A)(ii), F.R.Cr.P.
3. Category C Witnesses pursuant to Rule 3.220(b)(1)(A)(iii). F.R. Cr.P

(B) Tangible papers or objects which the State intends to use at hearing or trial:

1. Any and all tangible evidence specifically listed in copies of written documents provided to Defense Counsel during Discovery.

The State demands compliance with Rule 3.220(d).

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail or delivery to: JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707 on February 11, 2019.

s/K. MARK JOHNSON
ASSISTANT STATE ATTORNEY
BAR NO.: 0378320
2446 DOBBS ROAD
ST AUGUSTINE, FL 32086
(904) 209-1300
ESERVICESTJOHNS@SAO7.ORG

Filing # 84908685 E-Filed 02/14/2019 09:30:03 AM

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE /

SUPPLEMENTAL DISCOVERY/WITNESS LIST

In compliance with Rule 3.220(b)(1)(i), FRCP, the State hereby furnished the names and addresses of every witness known to the State Attorney to have information which may be relevant to the offense(s) charges, or to any defense with respect thereto:

(A) Witnesses

1. Category A Witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or co-defendant pursuant to Rule 3.220 (b)(1)(A)(i)(3), F.R.Cr.P.

Other Category A witnesses:

Marquette Susan (Lee) Fredrick, 2310 Bougainvillea Street, Sarasota, FL 34239

2. Category B Witnesses pursuant to Rule 3.220(v)(1)(A)(ii), F.R.Cr.P.
3. Category C Witnesses pursuant to Rule 3.220(b)(1)(A)(iii). F.R. Cr.P

(B) Tangible papers or objects which the State intends to use at hearing or trial:

1. Any and all tangible evidence specifically listed in copies of written documents provided to Defense Counsel during Discovery.

The State demands compliance with Rule 3.220(d).

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail or delivery to: JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, on February 14, 2019.

s/K. MARK JOHNSON
ASSISTANT STATE ATTORNEY
BAR NO.: 0378320
2446 DOBBS ROAD
ST AUGUSTINE, FL 32086
(904) 209-1300
ESERVICESTJOHNS@SAO7.ORG

Filing # 85007559 E-Filed 02/15/2019 02:30:41 PM

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL
CIRCUIT IN AND FOR ST JOHNS COUNTY, FLORIDA

CASE NO: 552006CF001864A

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE
Defendant.

**NOTICE OF INTENT TO PRESENT EXPERT
TESTIMONY OF MENTAL MITIGATION**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned attorney, and pursuant to Florida Rule of Criminal Procedure 3.202(b) and hereby gives notice of his intent to present expert testimony of mental mitigation during penalty phase of this case. In compliance with, the Defendant intends to present evidence of the following mental mitigation through the testimony of Dr. Eric Mings, PhD:

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
2. The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
3. That Defendant and his siblings suffered child abuse at the hands of his father.
4. That the Defendant was a victim of attempted sexual abuse by a teacher.
5. That Defendant and his sibling experienced a lack of adequate supervision after the divorce of his parents.
6. That Defendant witnesses his mother's constant abuse of drugs and alcohol.

7. That Defendant started huffing aerosol cooking oil at the age of 12.
8. That Defendant huffed spray paint as a child.
9. That Defendant had an early and chronic abuse and dependency on alcohol and drugs.
10. That Defendant's introduction into the prison system at a young age has damaged him mentally
11. That Defendant had a cocaine dependency relapse starting in July of 2006 up to and after the crimes at bar.
12. That Defendant had a 7 days plus of consistent and voluminous use of cocaine use and abuse from July to October of 2006.
13. That Defendant would not be eligible for parole.
14. Dr. Eric Mings, PhD is located at 1809 East Broadway, Suite 361, Oviedo, Fl. 32765

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-servicecc delivery to the Office of the State Attorney, eserviceccjohns@sao7.org on this 15th day of February, 2019.

/S/ JUNIOR BARRETT

Junior Barrett, ESQUIRE
FL. Bar No. 785687
Assistant Regional Counsel
Office of Regional Criminal Conflict &
Civil Regional Counsel, 5th District
101 Sunnyside Road, Suite 310
Casselberry, FL 32707
(407) 389-5140
tcollins@rc5state.com

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

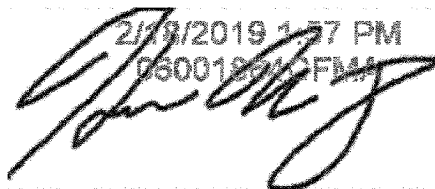
ORDER TO TRANSPORT

THIS CAUSE having come before this Court and being fully advised in the premises, it is,

ORDERED:

That authorities with the DEPARTMENT OF CORRECTIONS shall deliver custody of the Defendant, **NORMAN BLAKE MCKENZIE; DC#: 648711; W/M; DOB: 07/08/1964;** to the Sheriff of St. Johns County **no less than 20 days set forth below**, and further that the Sheriff of St. Johns County shall keep said Defendant in close custody and have the Defendant present before the undersigned in courtroom 328, of the Richard O. Watson Judicial Center, St. Augustine, Florida, on **March 25, 2019 at 9:00 a.m.**, for the purpose of HEARING, until such time that the above-styled case has been concluded, and the Defendant returned to the custody of the DEPARTMENT OF CORRECTIONS.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 18 day of February, 2019.

A handwritten signature in black ink is written over a rectangular digital stamp. The stamp contains the date and time '2/18/2019 1:57 PM' and the case number '06001864CFMA'.

e-Signed 2/18/2019 1:57 PM 06001864CFMA

CIRCUIT JUDGE

Copies to:
Junior Barrett, Esq.
Office of the State Attorney
St. Johns County Sheriff's Office, Transportation

Filed for record 02/18/2019 03:54 PM Clerk of Court St. Johns County, FL

Filing # 85094368 E-Filed 02/18/2019 02:50:12 PM

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

**NORMAN BLAKE MCKENZIE,
DEFENDANT.**

**STATE'S MOTION TO COMPEL DEFENDANT TO SUBMIT TO
EXAMINATION BY STATE MENTAL HEALTH EXPERT (PENALTY PHASE)**

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and pursuant to Rule 3.202, Fla. R.Crim. P., hereby moves this Honorable Court to compel the defendant to submit to an examination by a mental health expert chosen by the State. As grounds therefor, the State sets forth the following:

1. On October 17, 2006, a St. Johns County grand jury returned an Indictment and True Bill, charging the defendant with two counts of First Degree Murder.
2. The defendant's arraignment was scheduled for, and took place on, February 15, 2007.
3. On March 2, 2007, the State filed a notice of its intent to seek the death penalty.
4. On August 23, 2007, the defendant was found guilty as charged by a trial jury.
5. Following the vacation of the defendant's subsequently-imposed death sentence, the State filed a Renewed Notice of Intent to Seek the Death Penalty and List of Aggravating Factors.
6. On February 15, 2019, the defendant filed a Notice of Intent to Present Expert Testimony of Mental Mitigation during the penalty phase of the trial.

7. Rule 3.202, Fla. R.Crim. P., provides that if (1) the State has given notice of its intent to seek the death penalty within 45 days from the date of arraignment and (2) the defense has given notice of its intent to present, during the penalty phase, expert testimony of a mental health professional in order to establish mental mitigation circumstances, then “the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant shall be examined by a mental health expert chosen by the State.”

8. The undersigned has contacted counsel for the defendant regarding this matter, and he has indicated that he does not object to this motion.

WHEREFORE, the State respectfully requests this Honorable Court to issue an Order compelling the defendant to submit to a mental health evaluation by an expert retained by the State.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, electronic mail, and/or e-service delivery to JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, on this 18th day of February, 2019.

Respectfully submitted,

R.J. LARIZZA
STATE ATTORNEY

By: s/K. MARK JOHNSON
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0378320
4010 Lewis Speedway, Suite 2022, Bldg. A
St. Augustine, FL 32084
(904) 209-1620
ESERVICESTJOHNS@SAO7.ORG

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

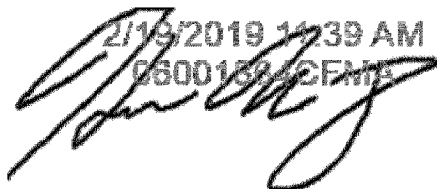
**NORMAN BLAKE MCKENZIE,
DEFENDANT.**

**ORDER ON STATE'S MOTION TO COMPEL DEFENDANT TO SUBMIT TO
EXAMINATION BY STATE MENTAL HEALTH EXPERT (PENALTY PHASE)**

THIS CAUSE, having come before the Court on the States Motion to Compel Defendant to Submit to Examination by State Mental Health Expert (Penalty Phase), and the Court, having reviewed the Motion and being otherwise fully advised in the premises thereof, IT IS HEREBY

ORDERED AND ADJUDGED that the State's Motion to Compel Defendant to Submit to Examination by State Mental Health Expert pursuant to Rule 3.202, Fla. R.Crim. P., is hereby GRANTED.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 19 day of February, 2019.

A handwritten signature in black ink is written over a rectangular digital stamp. The stamp contains the text "2/19/2019 11:39 AM" and "06001864CFMA" in a sans-serif font.

e-Signed 2/19/2019 11:39 AM 06001864CFMA

CIRCUIT JUDGE

cc: MARK JOHNSON, A.S.A.
BARRETT, JUNIOR

Filed for record 02/19/2019 12:53 PM Clerk of Court St. Johns County, FL

Filing # 85205754 E-Filed 02/20/2019 11:05:02 AM

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL
CIRCUIT IN AND FOR ST JOHNS COUNTY, FLORIDA

CASE NO: 552006CF001864A

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE
Defendant.

**MOTION TO STRIKE STATE'S AMENDED NOTICE OF
AGGRAVATING FACTORS AS UNTIMELY**

The Defendant, Norman Blake McKenzie, by and through his undersigned attorney, and pursuant to *Fla. R. Crim. P.* 3.181 moves this Honorable Court to enter an order granting this motion to strike state's amended notice of aggravating factors as untimely. As grounds for this motion, Defendant states the following:

1. That the Defendant was previously convicted, inter alia, of two counts of murder in the first degree and was sentenced to death.
2. That Defendant's sentence was vacated in accordance with the Florida Supreme Court decision in *State v. Hurst*, 202 So. 3d 40 (2016) and a new sentencing hearing was scheduled to begin on March 25, 2019.
3. That on or about August 28, 2017, the state filed a renewed notice of intent to seek Death Penalty and list of aggravating factors.
4. That on or about January 23, 2019, more than fifteen months after the Renewed Notice was filed, the state filed a motion to amend its notice of aggravating factors adding the aggravating factor of especially heinous, atrocious and cruel.

5. As a basis for the late filing, the state claims that the discovery of statements made by the defendant after his arrest provides the basis for this new aggravating factor.

6. Florida Rules of Criminal Procedure 3.181 states in pertinent part, "...The court may allow the prosecutor to amend the notice upon a showing of good cause."

7. The reason given in the state's motion does not establish good cause as the information that the state relied on was in the state possession since 2007 when the defendant was arrested and interviewed by law enforcement several times. The information was also available during the trial of defendant and was made a part of the trial through the testimony of detective Timothy Burres. (See Volume II of Trial Transcript)

WHEREFORE, Defendant, Norman Blake McKenzie, respectfully submitted that this COURT strikes state's amended notice of aggravating factors as untimely.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-servicecc delivery to the Office of the State Attorney, eserviceccjohns@sao7.org on this 20th day of February, 2019.

/S/ JUNIOR BARRETT

Junior Barrett, ESQUIRE
FL. Bar No. 785687
Assistant Regional Counsel
Office of Regional Criminal Conflict &
Civil Regional Counsel, 5th District
101 Sunnyside Road, Suite 310
Casselberry, FL 32707
(407) 389-5140
tcollins@rc5state.com

Filing # 85585828 E-Filed 02/27/2019 01:05:01 PM

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

**NORMAN BLAKE MCKENZIE,
DEFENDANT.**

**STATE'S MOTION TO COMPEL MAJOR
CASE PRINTS FROM THE DEFENDANT**

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and, pursuant to Rule 3.220(c)(1)(C), Florida Rules of Criminal Procedure, hereby moves this Honorable Court to issue an order to the defendant in the above-styled cause to submit to the taking of major case prints by an official with the St. Johns Co. Sheriff's Office. As grounds therefor, the State sets forth the following:

1. The State has obtained multiple certified Judgment and Sentences that establish numerous prior violent felony convictions against the defendant. All but one of these were entered into evidence during the previous trial. The State intends to enter or re-enter these into evidence during the upcoming retrial of the penalty phase as they are admissible as aggravating factors. Each of these convictions, including the one previously not offered into evidence, is accompanied by inked fingerprints from the defendant.

2. Major case prints are necessary for a fingerprint analyst to confirm that the convictions are, in fact, related to the defendant.

3. Pursuant to Rule 3.220(c)(1), Florida Rules of Criminal Procedure, a charging document has been filed against the defendant. Therefore, the Court may require him to submit to the taking of his fingerprints.

4. As required by Rule 3.220(c)(2), reasonable notice of the time and location for the taking of the fingerprints will be given to defense counsel should he desire to be present at that time.

5. The undersigned has made contact with Junior Barrett, counsel for the defendant, and he DOES NOT object to this motion.

WHEREFORE, the State respectfully requests this Honorable Court to grant its Motion to Obtain Major Case Prints from the Defendant.

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U.S. Mail, electronic mail, or e-service delivery to JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, on February 27, 2019.

Respectfully submitted,

R.J. LARIZZA
STATE ATTORNEY

By: s/K. MARK JOHNSON
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0378320
4010 Lewis Speedway, Suite 2022, Bldg. A
St. Augustine, FL 32084
(904) 209-1620
ESERVICESTJOHNS@SAO7.ORG

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO.: CF06-01864

STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE,

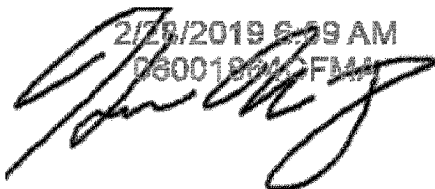
Defendant.

**ORDER ON STATE'S MOTION TO COMPEL
MAJOR CASE PRINTS FROM THE DEFENDANT**

THIS CAUSE, having come before the Court on the States Motion to Compel Major Case Prints from the Defendant, and the Court, having reviewed the motion and being otherwise fully advised in the premises herein, it is

ORDERED AND ADJUDGED that the State's Motion to Compel Major Case Prints from the Defendant is hereby GRANTED. The defendant shall make himself available to officials with the St. Johns Co. Sheriff's Office to provide major case prints as deemed necessary. The State shall give counsel for the defendant reasonable notice of the time and location for the taking of the prints should he desire to be present.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 28 day of February, 2019.

A handwritten signature in black ink is written over a digital timestamp. The timestamp is in a light blue or grey font and reads "2/28/2019 6:09 AM" followed by "06001864CFMA" on the next line.

e-Signed 2/28/2019 6:09 AM 06001864CFMA

CIRCUIT JUDGE

cc: K. Mark Johnson, Assistant State Attorney
Junior A. Barrett, Counsel for Defendant

Filed for record 02/28/2019 10:56 AM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

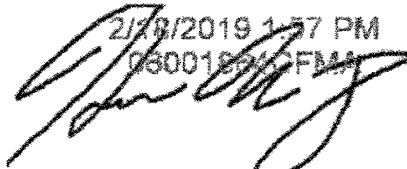
ORDER TO TRANSPORT

THIS CAUSE having come before this Court and being fully advised in the premises, it is,

ORDERED:


That authorities with the DEPARTMENT OF CORRECTIONS shall deliver custody of the Defendant, **NORMAN BLAKE MCKENZIE; DC#: 648711; W/M; DOB: 07/08/1964;** to the Sheriff of St. Johns County **no less than 20 days set forth below**, and further that the Sheriff of St. Johns County shall keep said Defendant in close custody and have the Defendant present before the undersigned in courtroom 328, of the Richard O. Watson Judicial Center, St. Augustine, Florida, on **March 25, 2019 at 9:00 a.m.**, for the purpose of HEARING, until such time that the above-styled case has been concluded, and the Defendant returned to the custody of the DEPARTMENT OF CORRECTIONS.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 18 day of February, 2019.

2/18/2019 1:57 PM
06001864CFMA


e-Signed 2/18/2019 1:57 PM 06001864CFMA
CIRCUIT JUDGE

Copies to:
Junior Barrett, Esq.
Office of the State Attorney
St. Johns County Sheriff's Office, Transportation

I HEREBY CERTIFY THAT THIS DOCUMENT
IS A TRUE AND CORRECT COPY AS APPEARS
ON RECORD IN ST. JOHNS COUNTY, FLORIDA
WITNESS MY HAND AND OFFICIAL SEAL
THIS 18th DAY OF February, 2019
CLERK OF THE CIRCUIT COURT AND COMPTROLLER
BY:  DC



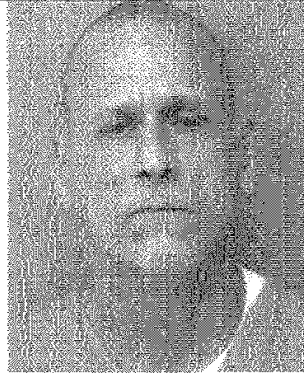
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Filed for record 03/04/2019 12:58 PM Clerk of Court St. Johns County, FL



ST. JOHNS COUNTY SHERIFF'S OFFICE
MCKENZIE, NORMAN BLAKE
BOOKING INFORMATION



☐ HIGH PROFILE ☐ SUICIDAL ☐ ESCAPE RISK ☒ HOLD Agency: BORROWED FROM DOC



Booking No: SJSO19JBN000940 MNI No: SJSO99MNI055145 Cell Assigned: SJSO* BKG*001*001

Address : UNION CORRECTIONS

City, State Zip: RAIFORD, FL 32083

Telephone Number: NONE

SSN : [REDACTED] DOB: 07/08/1964

Place of Birth: POLK

Citizenship: UNITED STATES

DL No: M252622642480

City, State: WINTER HAVEN, FLORIDA

County: POLK

SID No:	Race	Gender	Height	Weight	Hair	Eyes	Build	Skin	Hand
FBI No:	W	M	6'02"	227	Bro	Bro			

Occupation: INMATE

Employer : DEPARTMENT OF CORRECTIONS

Telephone:

Date Booked: 02/28/2019 Date Released:

Searched By: DALAGER, GERALD J III

Time Booked: 11:30 Time Released:

Printed By:

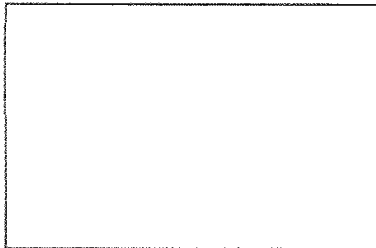
Booked By: PUTZ, DANIELLE M

Inmate Phone PIN::

Property Bag No: _____

Photo By: OLSON, DAVID A

Right Index Finger In



MNI No



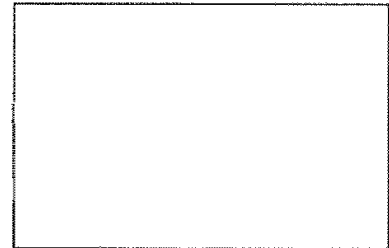
SJSO99MNI055145

Booking No



SJSO19JBN000940

Right Index Finger Out



- I have been advised any property valued over \$100 is to be released or mailed at my own expense within five (5) days.
- I understand that my phone/canteen passcode are confidential and created by me. I will not share this number with anyone. I am fully responsible for

X

Defendant Signature

Date

Officer Signature

Date

MCKENZIE, NORMAN BLAKE

Booking No: SJSO19JBN000940

MNI No: SJSO99MNI055145

Printed On: 02/28/2019 12:22

User Name: DPUTZ

Page 1 of 2

MCKENZIE, NORMAN BLAKE
BOOKING INFORMATION

Case/Charge Report

Case Number: CASE0001

Court Case Number: 06-1864CF

Court:

Bond Information: By Judge:

Arrest Number:

By LEO:

Offense No:

OBTS:

Arresting Agency: ST. JOHNS COUNTY
SHERIFF'S OFFICE

Arresting Officer:

Agency No:

Case Comments: 02/28/19 HERE ON TRANSPORT ORDER

CURR IN DOC- SENT. TO DEATH

Sentence Information

☐ Dept of Corrections

☐ Good Conduct Gain Time

☐ Extra Gain Time

Start Date:

Actual Time Served:

☐ Weekender

Length:

Time Worked in Jail:

Credit for Time Served:

Gain Time Credit:

End Date:

Time Remaining:

Charge Number: CHRG0001

Counts: 1 Statute: 782.04.1a1

Bond : \$0.00

Charge Code: HOMICIDE

Charge Description:

Status: DOC LIFE

MURDER FIRST DEGREE PREMEDITATED

Comments:

No comments available.

Charge Number: CHRG0002

Counts: 1 Statute: 782.04.1a1

Bond : \$0.00

Charge Code: HOMICIDE

Charge Description:

Status: DOC LIFE

MURDER FIRST DEGREE PREMEDITATED

Comments:

No comments available.

X

Inmate Signature

MCKENZIE, NORMAN BLAKE

Booking No: SJSO19JBN000940

MNI No: SJSO99MNI055145

Printed On: 02/28/2019 12:22

User Name: DPUTZ

Page 2 of 2

Filing # 86148101 E-Filed 03/11/2019 09:39:55 AM

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL
CIRCUIT IN AND FOR ST JOHNS COUNTY, FLORIDA

CASE NO: 552006CF001864A

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE
Defendant.

MOTION TO CONTINUE PENALTY PHASE

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned counsel and respectfully moves this Court to continue his penalty phase in the above captioned cause so that a mental health expert may be hired to assist in the investigation, development and presentation of mitigation to a jury. In support of this motion, the Defendant states as follows:

1. Defendant has been previously convicted of two counts of first-degree murder and is here for resentencing under **Hurst v. Florida**, 202 So. 3d 40 (Fla. 2016).
2. The State filed a Renewed Notice of Intent to Seek the Death Penalty and list of aggravating factors on or about August 28, 2017.
3. If the jury unanimously decides that Defendant should die and this Honorable Court does not override that decision, he will face execution by lethal injection.
4. Death penalty teams include a lead and second chair attorney, an investigator, a mitigation expert and at least one mental health expert in the form of a psychologist or psychiatrist.

5. Until a few days ago, Norman McKenzie's death penalty defense team had all those elements, however this was changed when Dr. Eric Mings, the psychologist hired to evaluate and assist in the preparation of a mitigation defense, sent a letter to Jeffrey Deen, Regional Counsel, Office of Criminal Conflict and Civil Regional Counsel-Fifth District, informing him that he, Dr. Mings, would not be able to continue working on death penalty cases because of health reasons.

6. That as a result of that announcement, Norman McKenzie's defense team is without a mental health expert and will need to hire a new mental health expert.

7. Prior to Regional Counsel being appointed to represent Mr. McKenzie, the Office of Capital Collateral Regional Counsel was appointed to represent Mr. McKenzie and as part of that office's representation Dr. Cunningham, a mental health expert, was hired.

8. After meeting with Mr. McKenzie, and talking to several family members and friends, Dr. Cunningham prepared and provided a sixty-page report that touched on extensive mitigation issues.

9. Going forward in this case without exploring areas covered and reported on by Dr. Cunningham through a qualified expert is clearly ineffective assistance of counsel.

10. Since Defendant chose, previously, to represent himself and since he decided not to present any real mitigation and clearly no mental health mitigation, the task of exploring, developing and presenting mitigation must begin from scratch.

11. A mental health expert is necessary to help investigate, develop, present and explain to a jury aspects of Mr. McKenzie's life that may be mitigating.

12. Mr. McKenzie's defense team will need to contact and retain a mental health expert.

13. Any mental health expert hired will need to come up to speed for trial.

14. To proceed to trial without a mental health expert is tantamount to ineffective assistance of counsel.

WHEREFORE, Defendant, Norman Blake McKenzie, moves this Honorable Court allow him to continue his case to give his defense team time to hire a mental health expert to assist in the investigation, preparation and presentation of mental health mitigation to a jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-servicecc delivery to the Office of the State Attorney, eserviceccjohns@sao7.org on this 11th day of March, 2019.

/S/ JUNIOR BARRETT

Junior Barrett, ESQUIRE
FL. Bar No. 785687
Assistant Regional Counsel
Office of Regional Criminal Conflict &
Civil Regional Counsel, 5th District
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**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE /

SUPPLEMENTAL DISCOVERY/WITNESS LIST

In compliance with Rule 3.220(b)(1)(i), FRCP, the State hereby furnished the names and addresses of every witness known to the State Attorney to have information which may be relevant to the offense(s) charges, or to any defense with respect thereto:

(A) Witnesses

1. Category A Witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or co-defendant pursuant to Rule 3.220 (b)(1)(A)(i)(3), F.R.Cr.P.

Other Category A witnesses:

2. Category B Witnesses pursuant to Rule 3.220(v)(1)(A)(ii), F.R.Cr.P.
3. Category C Witnesses pursuant to Rule 3.220(b)(1)(A)(iii). F.R. Cr.P

Sherry Shoup, Correctional Sentence Specialist, Custodian of Records, Union Correctional Institution, Florida Department of Corrections, 7819 NW 228th Street, Raiford, FL 32083 or mailing address; P.O. Box 1000, Raiford, FL 32026.

(B) Tangible papers or objects which the State intends to use at hearing or trial:

1. Any and all tangible evidence specifically listed in copies of written documents provided to Defense Counsel during Discovery.
2. DOC certified disciplinary records of Norman McKenzie, DC #648711 (34 pages).

The State demands compliance with Rule 3.220(d).

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail or delivery to: JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, on March 12, 2019.

s/K. MARK JOHNSON
ASSISTANT STATE ATTORNEY
BAR NO.: 0378320
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ST AUGUSTINE, FL 32086
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**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

**NORMAN BLAKE MCKENZIE,
DEFENDANT.**

**STATE'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION
TO STRIKE STATE'S AMENDED NOTICE OF AGGRAVATING FACTORS**

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and files this memorandum of law in opposition of the defendant's motion to strike the State's amended notice of aggravating factors. The factual and legal grounds for this memorandum are as follows:

PROCEDURAL HISTORY

On October 17, 2006, the defendant was indicted on two counts of First Degree Murder. On February 15, 2007, the defendant was arraigned on the indictment to which the defendant entered a plea of not guilty. On March 2, 2007, the State filed a notice of its intent to seek the death penalty pursuant to Rule 3.202 of the Florida Rules of Criminal Procedure. On August 21, 2007, the defendant was convicted as charged on all counts. The trial proceeded from the guilt phase to the penalty phase, during which the State relied on four aggravating circumstances:

1. the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;
2. the capital felony was committed while the defendant was engaged in the commission of, or attempted commission of, a robbery;
3. the capital felony was committed for pecuniary gain; and

4. the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

On August 23, 2007, the jury, by a vote of 10 to 2, recommended to the Court that the defendant be sentenced to death on both counts. On October 19, 2007, the Court followed the recommendation of the jury and sentenced the defendant to death.

Following the Florida Supreme Court's decision in *Hurst v. State*, 202 So.3d 40 (2016), this Court, on June 19, 2017, entered an order vacating the defendant's death sentences and re-docketed the case for a potential penalty phase trial in the event the State chose to seek the death penalty again. On August 28, 2017, the State filed a Renewed Notice of Intent to Seek the Death Penalty and List of Aggravating Factors. The aggravating factors listed by the State in the Renewed Notice restated those relied upon during the 2007 trial. On January 23, 2019, the State filed a Motion to Amend Notice of Aggravating Factors, seeking to add the "heinous, atrocious, and cruel" aggravating factor to those listed previously. On February 20, 2019, the defendant filed a Motion to Strike State's Amended Notice of Aggravating Factors as Untimely on the basis that the State did not have good cause to do so.

LEGAL ARGUMENT

In 1995, the Florida Supreme Court enacted Rule 3.202(a), which stated:

Rule 3.202. Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial; Notice and Examination by State Expert

- (a) Notice of Intent to Seek Death Penalty. The provisions of this rule apply only in those capital cases in which the state gives written notice of its intent to seek the death penalty within 45 days from the date of arraignment. Failure to give timely notice under this subdivision does not preclude the state from seeking the death penalty.

Amendments to Fla. Rule of Crim. Proc. 3.220 Discovery, 674 So.2d 83, 84 (Fla. 1995). As the title and remaining subsections indicate, the purpose of this rule was to provide the State with an incentive to voluntarily notify the defense of its intent to seek the death penalty early in the

litigation by providing it with an opportunity to have a mental health expert conduct an independent evaluation of a defendant in the event that the defense intended to offer mental mitigation evidence at trial. *See id.* Under the rule at that time, the State retained the ability to seek the death penalty even if it did not file a notice of intent to do so well beyond the 45 day limit and was not required to file a list of aggravating factors at all. The only consequence of failing to file a general death penalty notice within the 45-day timeframe was the potential loss of the opportunity to conduct an independent mental health evaluation if the defendant planned to offer mental mitigation evidence at trial.

This rule remained in place from 1995 until 2016 when the Legislature, in response to the Florida Supreme Court's decision in *Hurst*, amended Florida's capital punishment statute. The amendment codified a requirement that the State file a notice of intent to seek the death penalty, unconnected to the previous incentive to voluntarily do so. The amendment, now enacted in section 782.04(1)(b), Fla. Stat., provides:

(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment. If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause.

Ch. 2016-13, § 2, Laws of Fla. (2016).

After the legislature enacted section 782.04(1)(b), the Florida Supreme Court amended the applicable rules of procedure. Specifically, it amended Rule 3.202 and added new Rule 3.181. *See In re Amendments to Florida Rules of Criminal Procedure*, 200 So.3d 758, 759 (Fla. 2016). Rule 3.181, which virtually mirrors section 782.04(1)(b), states:

Rule 3.181. Notice to Seek the Death Penalty

In a prosecution for a capital offense, if the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant of the state's intent to seek the death penalty. The notice must be filed with the court within 45 days of arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause.

Id. at 759-60.¹

In his Motion to Strike, the defendant interprets Rule 3.181 (and, by extension, section 782.04(1)(b)), which was not promulgated until almost a decade after his 2007 indictment and arraignment, to preclude the State from amending its notice of aggravating factors unless it can show “good cause.” However, as the State will set forth below, his application of these recently-enacted provisions to his case is misplaced.

**RETROACTIVITY AND APPLICABILITY OF SECTION 782.04(1)(b)
AND RULE 3.181 TO THE DEFENDANT’S CASE**

To determine whether the notice requirement applies to the defendant’s case, the Court must first ascertain whether section 782.04(1)(b) is retroactive. In Florida, a law is presumed to apply prospectively absent contrary legislative intent. *See State v. Lavazzoli*, 434 So.2d 321, 323 (Fla.1983); *Bond v. State*, 675 So.2d 184, 185 (Fla. 5th DCA 1996). If the Legislature intends to make a statute retroactive, it can easily delineate retroactivity in the plain language of the law. *Promontory Enter., Inc. v. S. Eng’g & Contracting, Inc.*, 864 So.2d 479, 483 (Fla. 5th DCA 2004). The Legislature’s inclusion of an effective date for statutory amendments further rebuts any

¹ Rule 3.202, which is applicable only where the State desires to conduct an independent mental health exam was amended to read as follows:

(a) **Notice of Intent to Seek Death Penalty.** The provisions of this rule apply only if those capital cases in which the state gives timely written notice of its intent to seek the death penalty ~~within 45 days from the date of arraignment. Failure to give timely notice under this subdivision does not preclude the state from seeking the death penalty.~~

argument that the amendment is to be applied retroactively. It is not the court’s function to “divine legislative intent of retroactivity with guess or assumption.” *Id.* at 484 (citing *State, Dep’t of Revenue v. Zuckerman-Vernon Corp.*, 354 So.2d 353, 358 (Fla. 1977)).

In 2016, the Legislature enacted chapter 2016-13, laws of Florida, in response to the Supreme Court’s decision in *Hurst v. Florida*, 136 S.Ct. 616; 193 L.Ed.2d 504 (2016). *See* Fla. H.R. Comm. On Judiciary, Subcomm. On Criminal Justice HB 7101 (2016) Staff Analysis (Feb. 10, 2016). The Staff Analysis did discuss whether or not *Hurst* would apply retroactively based upon prior precedent, but it did not discuss the retroactive application of chapter 2016-13. *Id.* The final bill did not discuss retroactivity, and Section 7 of the bill stated that it would “take effect upon becoming a law.” Ch. 2016-13, Laws of Fla. (2016). The Governor signed the bill into law on March 7, 2016. Chapter 2016-13 amended section 782.04, Fla. Stat., upon its enactment and provided in subsection (b) as follows, in relevant part:

If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause.

There is no language in section 782.04(1)(b), Florida Statutes (2016) that demonstrates a clear legislative intent that it be applied retroactively; there is nothing in its legislative history suggesting a clear legislative intent that it be applied retroactively; and the Legislature’s inclusion of the statement “[t]his act shall take effect upon becoming a law” in Section 7 is unequivocal and rebuts any assumption of retroactivity. Thus, there is no basis for the Court to conclude that section 782.04(1)(b) or the complementary Rule 3.181 are retroactive and failure to comply with either should result in the State being precluded from amending its previously-filed list of aggravating factors.

Support for this argument can be found in *Jackson v. State*, 256 So.3d 975 (Fla. 1st DCA 2018), and *See Jackson*, 256 So.3d at 976. (unpublished opinion). Both of these decisions show that section 782.04(1)(b) and Rule 3.181 are not applicable to the defendant's case.

In *Jackson*, the defendant was indicted for first-degree murder on March 9, 2007. The State filed a notice of intent to seek the death penalty on March 14, 2007. However, it did not file a list of aggravating factors until over three years later when the court granted a defense motion for them to be ordered to do so. The defendant was later convicted and sentenced to death, but his appeal resulted in a reversal and granting of a new trial. The defense argued that the State violated section 782.04(1)(b) by failing to file a notice of aggravating factors within 45 days of arraignment. The First District Court of Appeals held that the 2016 amendment to section 782.04(1)(b), Fla. Stat., requiring such a notice does not apply retroactively to an arraignment that occurred in 2007. *See Jackson*, 256 So.3d at 976.

Although *Varnadore* involved an appellate court's *per curiam* denial of a writ of prohibition, its decision and background reinforces the opinion in *Jackson*. While *Jackson* involved a case in which a conviction and death sentence was imposed prior to the amendment to section 782.04 but was overturned afterward, *Varnadore* involved a case that was pending for four years prior to the amendment and remains pending even to this day. On March 22, 2012, Varnadore was indicted on two counts of first-degree murder. On March 29, he was arraigned. That same day, the State filed a general notice of intent to seek the death penalty. *Order Denying Def. Mot. To Preclude Jury Death Qualification, State v Varnadore*, No. 16-2012-CF-000501 (Fla. 4th Cir. Ct. Aug. 10, 2018). On December 13, 2013, the defendant filed a motion for statement of aggravating circumstances, which was granted on October 7, 2015. On August 3, 2018 – almost six and half years after the arraignment – the filed an amended notice of intent to

seek the death penalty and a notice of aggravating factors. The defendant sought to preclude the State from seeking the death penalty on the grounds that the State's notice violated the timeliness requirement of section 782.04(1)(b), Fla. Stat. (2016), and Rule 3.181, Fla. R.Crim. Pro. (2016). *See Memo. in Support of Mot. to Preclude Jury Death Qualification Pursuant to Section 782.04(1)(b), 921.141(1), Fla. Stat., and Fla. R.Crim. P. 3.181, State v Varnadore*, No. 16-2012-CF-000501 (Fla. 4th Cir. Ct. Aug. 6 2018). The trial court denied the defendant's motion, and the defendant petitioned for a writ of prohibition with the First District Court of Appeals. The First DCA denied the writ, citing their holding in *Jackson* that the 2016 amendment to section 782.04(1)(b), Fla. Stat., does not apply when the arraignment occurred prior to the date of the statutory amendment. *See Varnadore*, 2019 WL 17811, 44 Fla. L. Weekly D235 (Fla. 1st DCA 2019).

To the extent that the defense attempts to rely on *Chantiloupe v. State*, 248 So.3d 1191 (Fla. 4th DCA 2018), it is clearly distinguishable from the instant case. The defendant in *Chantiloupe* was indicted for, among other charges, first-degree murder and later arraigned on August 18, 2017. After 56 days, the State had not filed a notice of intent to seek the death penalty or a list of aggravating factors, so the defendant filed a motion to preclude them from doing so. The State filed the required notices three days later. Following a hearing at which time the State presented reasons for the untimely filing, the trial court granted the defendant's motion. On appeal, the Fourth District Court of Appeals affirmed the trial court's decision. In doing so, it emphasized that the arraignment date was a "critical [factor] to the resolution" of the case since it occurred after section 782.04(1)(b) and Rule 3.181 was enacted and promulgated. *See id.* at 1193. Therefore, the notice requirements therein were applicable. Because the State had not properly filed the notices within the 45-day window, the court held that State could only rely on Rule 3.050,

Fla. R.Crim. P., to obtain an enlargement of time. Under that rule, a trial court had the discretion to grant an extension of time “for good cause” if a party requested such an extension before the expiration of the period originally prescribed or could do so after the expiration of time if the failure to act was the result of “excusable neglect.” *See id.* at 1197-98. Because the trial court found that the State had failed to allege “a good faith delay, excusable neglect, or any other circumstances” which would justify the filing of the notice more than 45 days after the arraignment, the Fourth DCA held that the judge’s decision was not improper. *See id.* at 1200.

Norman McKenzie, the defendant in the instant case, was arraigned on February 15, 2007 – before either of the defendants in *Jackson* or *Varnadore* were arraigned and almost 10 years prior to the enactment of section 782.04(1)(b) and Rule 181. At that time, the State’s failure to provide a defendant with written notice of its intent to seek the death penalty within 45 days of arraignment did not preclude the State from seeking the death penalty. *See* Rule 3.202(a), Fla. R.Crim. Pro. (1995). Any penalty for failure to provide such notice within 45 days only came into effect when the Legislature enacted section 782.04(1)(b), Fla. Stat., in 2016. Nevertheless, the State provided the defendant with notice of its intent to seek the death penalty on March 2, 2007 – 15 days after he was arraigned. At the time the defendant was charged and throughout the pendency of his case, no penalty existed if the State did not also provide the defendant with a list of aggravating factors it believed it could prove beyond a reasonable doubt at trial.

Under the holding of *Jackson*, the State in this case was not required in any way to file a list of aggravating factors in this case since the charges and arraignment both predate the enactment of section 782.04(1)(b) and the Legislature did not explicitly make the amendment retroactive. Nevertheless, the State did so on August 28, 2017 with regard to four aggravating factors (in addition to the defendant being on notice of them since they were relied on during the original trial

in 2007) and essentially notified the defendant on January 23, 2019, of its intent to present evidence of a fifth aggravating factor – HAC – during the retrial of the penalty phase. Since the State is not technically required to provide a list of aggravating factors at all, it therefore is not required to show good cause to amend any notice that it voluntarily chooses to provide. To preclude the State from amending its list of aggravating factors would improperly impose a penalty that did not exist at the time the charges were filed. *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So.3d 873, 878 (Fla. 2010) (stating that a law cannot be applied retroactively when it imposes a new penalty). Accordingly, this Court should deny the Defendant’s motion to strike the State’s motion to amend its notice of aggravating factors.

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by electronic mail or e-service delivery to JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, on this 13th day of March, 2019.

Respectfully submitted,

R.J. LARIZZA
STATE ATTORNEY

By: s/K. MARK JOHNSON
ASSISTANT STATE ATTORNEY
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**IN THE CIRCUIT COURT, SEVENTH
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CASE NO: CF06-01864

STATE OF FLORIDA

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**STATE'S AMENDED MEMORANDUM OF LAW IN OPPOSITION OF DEFENDANT'S
MOTION TO STRIKE STATE'S AMENDED NOTICE OF AGGRAVATING FACTORS**

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litigation by providing it with an opportunity to have a mental health expert conduct an independent evaluation of a defendant in the event that the defense intended to offer mental mitigation evidence at trial. *See id.* Under the rule at that time, the State retained the ability to seek the death penalty even if it did not file a notice of intent to do so well beyond the 45 day limit and was not required to file a list of aggravating factors at all. The only consequence of failing to file a general death penalty notice within the 45-day timeframe was the potential loss of the opportunity to conduct an independent mental health evaluation if the defendant planned to offer mental mitigation evidence at trial.

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(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment. If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause.

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Id. at 759-60.¹

In his Motion to Strike, the defendant interprets Rule 3.181 (and, by extension, section 782.04(1)(b)), which was not promulgated until almost a decade after his 2007 indictment and arraignment, to preclude the State from amending its notice of aggravating factors unless it can show “good cause.” However, as the State will set forth below, his application of these recently-enacted provisions to his case is misplaced.

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argument that the amendment is to be applied retroactively. It is not the court’s function to “divine legislative intent of retroactivity with guess or assumption.” *Id.* at 484 (citing *State, Dep’t of Revenue v. Zuckerman-Vernon Corp.*, 354 So.2d 353, 358 (Fla. 1977)).

In 2016, the Legislature enacted chapter 2016-13, laws of Florida, in response to the Supreme Court’s decision in *Hurst v. Florida*, 136 S.Ct. 616; 193 L.Ed.2d 504 (2016). *See* Fla. H.R. Comm. On Judiciary, Subcomm. On Criminal Justice HB 7101 (2016) Staff Analysis (Feb. 10, 2016). The Staff Analysis did discuss whether or not *Hurst* would apply retroactively based upon prior precedent, but it did not discuss the retroactive application of chapter 2016-13. *Id.* The final bill did not discuss retroactivity, and Section 7 of the bill stated that it would “take effect upon becoming a law.” Ch. 2016-13, Laws of Fla. (2016). The Governor signed the bill into law on March 7, 2016. Chapter 2016-13 amended section 782.04, Fla. Stat., upon its enactment and provided in subsection (b) as follows, in relevant part:

If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause.

There is no language in section 782.04(1)(b), Florida Statutes (2016) that demonstrates a clear legislative intent that it be applied retroactively; there is nothing in its legislative history suggesting a clear legislative intent that it be applied retroactively; and the Legislature’s inclusion of the statement “[t]his act shall take effect upon becoming a law” in Section 7 is unequivocal and rebuts any assumption of retroactivity. Thus, there is no basis for the Court to conclude that section 782.04(1)(b) or the complementary Rule 3.181 are retroactive and failure to comply with either should result in the State being precluded from amending its previously-filed list of aggravating factors.

Support for this argument can be found in *Jackson v. State*, 256 So.3d 975 (Fla. 1st DCA 2018), and *Varnadore v. State*, 2019 WL 178116, 44 Fla. L. Weekly D235 (Fla. 1st DCA 2019). Both of these decisions show that section 782.04(1)(b) and Rule 3.181 are not applicable to the defendant's case.

In *Jackson*, the defendant was indicted for first-degree murder on March 9, 2007. The State filed a notice of intent to seek the death penalty on March 14, 2007. However, it did not file a list of aggravating factors until over three years later when the court granted a defense motion for them to be ordered to do so. The defendant was later convicted and sentenced to death, but his appeal resulted in a reversal and granting of a new trial. The defense argued that the State violated section 782.04(1)(b) by failing to file a notice of aggravating factors within 45 days of arraignment. The First District Court of Appeals held that the 2016 amendment to section 782.04(1)(b), Fla. Stat., requiring such a notice does not apply retroactively to an arraignment that occurred in 2007. *See Jackson*, 256 So.3d at 976.

Although *Varnadore* involved an appellate court's *per curiam* denial of a writ of prohibition, its decision and background reinforces the opinion in *Jackson*. While *Jackson* involved a case in which a conviction and death sentence was imposed prior to the amendment to section 782.04 but was overturned afterward, *Varnadore* involved a case that was pending for four years prior to the amendment and remains pending even to this day. On March 22, 2012, Varnadore was indicted on two counts of first-degree murder. On March 29, he was arraigned. That same day, the State filed a general notice of intent to seek the death penalty. *Order Denying Def. Mot. To Preclude Jury Death Qualification, State v. Varnadore*, No. 16-2012-CF-000501 (Fla. 4th Cir. Ct. Aug. 10, 2018). On December 13, 2013, the defendant filed a motion for statement of aggravating circumstances, which was granted on October 7, 2015. On August 3,

2018 – almost six and half years after the arraignment – the filed an amended notice of intent to seek the death penalty and a notice of aggravating factors. The defendant sought to preclude the State from seeking the death penalty on the grounds that the State’s notice violated the timeliness requirement of section 782.04(1)(b), Fla. Stat. (2016), and Rule 3.181, Fla. R.Crim. Pro. (2016). *See Memo. in Support of Mot. to Preclude Jury Death Qualification Pursuant to Section 782.04(1)(b), 921.141(1), Fla. Stat., and Fla. R.Crim. P. 3.181, State v Varnadore*, No. 16-2012-CF-000501 (Fla. 4th Cir. Ct. Aug. 6 2018). The trial court denied the defendant’s motion, and the defendant petitioned for a writ of prohibition with the First District Court of Appeals. The First DCA denied the writ, citing their holding in *Jackson* that the 2016 amendment to section 782.04(1)(b), Fla. Stat., does not apply when the arraignment occurred prior to the date of the statutory amendment. *See Varnidore*, 2019 WL 17811, 44 Fla. L. Weekly D235 (Fla. 1st DCA 2019).

To the extent that the defense attempts to rely on *Chantiloupe v. State*, 248 So.3d 1191 (Fla. 4th DCA 2018), it is clearly distinguishable from the instant case. The defendant in *Chantiloupe* was indicted for, among other charges, first-degree murder and later arraigned on August 18, 2017. After 56 days, the State had not filed a notice of intent to seek the death penalty or a list of aggravating factors, so the defendant filed a motion to preclude them from doing so. The State filed the required notices three days later. Following a hearing at which time the State presented reasons for the untimely filing, the trial court granted the defendant’s motion. On appeal, the Fourth District Court of Appeals affirmed the trial court’s decision. In doing so, it emphasized that the arraignment date was a “critical [factor] to the resolution” of the case since it occurred after section 782.04(1)(b) and Rule 3.181 was enacted and promulgated. *See id.* at 1193. Therefore, the notice requirements therein were applicable. Because the State had not properly

filed the notices within the 45-day window, the court held that State could only rely on Rule 3.050, Fla. R.Crim. P., to obtain an enlargement of time. Under that rule, a trial court had the discretion to grant an extension of time “for good cause” if a party requested such an extension before the expiration of the period originally prescribed or could do so after the expiration of time if the failure to act was the result of “excusable neglect.” *See id.* at 1197-98. Because the trial court found that the State had failed to allege “a good faith delay, excusable neglect, or any other circumstances” which would justify the filing of the notice more than 45 days after the arraignment, the Fourth DCA held that the judge’s decision was not improper. *See id.* at 1200.

Norman McKenzie, the defendant in the instant case, was arraigned on February 15, 2007 – before either of the defendants in *Jackson* or *Varnadore* were arraigned and almost 10 years prior to the enactment of section 782.04(1)(b) and Rule 181. At that time, the State’s failure to provide a defendant with written notice of its intent to seek the death penalty within 45 days of arraignment did not preclude the State from seeking the death penalty. *See* Rule 3.202(a), Fla. R.Crim. Pro. (1995). Any penalty for failure to provide such notice within 45 days only came into effect when the Legislature enacted section 782.04(1)(b), Fla. Stat., in 2016. Nevertheless, the State provided the defendant with notice of its intent to seek the death penalty on March 2, 2007 – 15 days after he was arraigned. At the time the defendant was charged and throughout the pendency of his case, no penalty existed if the State did not also provide the defendant with a list of aggravating factors it believed it could prove beyond a reasonable doubt at trial.

Under the holding of *Jackson*, the State in this case was not required in any way to file a list of aggravating factors in this case since the charges and arraignment both predate the enactment of section 782.04(1)(b) and the Legislature did not explicitly make the amendment retroactive. Nevertheless, the State did so on August 28, 2017 with regard to four aggravating factors (in

addition to the defendant being on notice of them since they were relied on during the original trial in 2007) and essentially notified the defendant on January 23, 2019, of its intent to present evidence of a fifth aggravating factor – HAC – during the retrial of the penalty phase. Since the State is not technically required to provide a list of aggravating factors at all, it therefore is not required to show good cause to amend any notice that it voluntarily chooses to provide. To preclude the State from amending its list of aggravating factors would improperly impose a penalty that did not exist at the time the charges were filed. *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So.3d 873, 878 (Fla. 2010) (stating that a law cannot be applied retroactively when it imposes a new penalty). Accordingly, this Court should deny the Defendant’s motion to strike the State’s motion to amend its notice of aggravating factors.

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by electronic mail or e-service delivery to JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, on this 13th day of March, 2019.

Respectfully submitted,

R.J. LARIZZA
STATE ATTORNEY

By: s/K. MARK JOHNSON
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0378320
4010 Lewis Speedway, Suite 2022, Bldg. A
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(904) 209-1620
ESERVICESTJOHNS@SAO7.ORG

IN THE CIRCUIT COURT OF THE 7th JUDICIAL CIRCUIT
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA -vs- NORMAN BLAKE MCKENZIE

CASE #: 06001864CFMA
Judge: HOWARD M. MALTZ
Division: 56
Charges: Ct 1 FIRST DEGREE MURDER (FILED)
Ct 2 FIRST DEGREE MURDER (FILED)

ACKNOWLEDGMENT

I ACKNOWLEDGE THAT:

(1) I am required to keep my current telephone number and mailing address known to my attorney and the clerk of this court at all times.

(2) Continuation requested by _____.

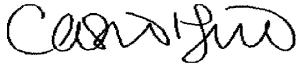
Requirements:

(3) I am personally to appear in court for:

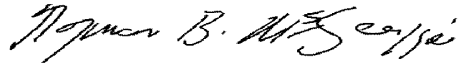
<u>Event</u>	<u>Judge</u>	<u>Courtroom</u>	<u>Date</u>	
FELONY JURY SELECTION	MALTZ, HOWARD M.	Courtroom 328	05/20/2019	9:00 am

FAILURE TO COMPLY WITH ANY OF THE ABOVE REQUIREMENTS MAY RESULT IN A CAPIAS FOR MY ARREST AND INCARCERATION WITHOUT BOND UNTIL TRIAL.

WITNESS my hand this 14TH day of March, 2019.



By: DEPUTY CLERK



DEFENDANT

NORMAN BLAKE MCKENZIE
314 NW 12TH AVE APT 5
GAINESVILLE, FL 32601



ATTORNEY FOR DEFENDANT

JUNIOR ALPHONSO BARRETT
101 SUNNYTOWN ROAD
SUITE 310
CASSELBERRY, FL 32707

CC: Bond Depositor

NOTICE REGARDING THE AMERICAN WITH DISABILITIES ACT OF 1990

In accordance with the Americans With Disabilities Act, If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please see the enclosed notice as amended per the Seventh Judicial Circuit Administrative Order #W-2010-096 for instructions or view on our website at www.clk.co.st-johns.fl.us/misc/adanotice/pdf.

Filed for record 03/14/2019 04:07 PM Clerk of Court St. Johns County, FL

Hearing Notes

DATE: March 14, 2019
CIRCUIT JUDGE: MALTZ
STATE ATTORNEY: JOHNSON
DEFENSE ATTORNEY: BARRETT
CLERK: GELL
BAILIFF: STOKES
COURT REPORTER: ANDREA GORMAN

STATE VS.: MCKENZIE, NORMAN BLAKE
CASE #: 06001864CFMA

CHARGE #: FIRST DEGREE MURDER X2

COURT COMES TO ORDER @331

DEFENDANT PRESENT WITH ATTORNEY @333

COURT ADDRESSES BOTH PARTIES @333

DEFENSE ADDRESSES THE COURT @333

DEFENDANT ADDRESSES THE COURT @338

STATE ADDRESSES THE COURT @340

STATE DOES NOT OBJECT TO THE MOTION TO CONTINUE @341

COURT GRANTS MOTION TO CONTINUE @345

CASE CONTINUED TO MAY 20TH AT 9AM

STATE MEMORANDUM OF LAW IN OPPOSITION OF DEFENDANTS
MOTION TO STRIKE STATES AMENDED NOTICE OF AGGRAVATING
FACTORS

DEFENSE ARGUMENT @347

STATE ARGUMENT @349

DEFENSE ADDITIONAL ARGUMENT @359

STATES ADDITIONAL ARGUMENT @404

COURT TAKEN MATTER UNDER ADVISEMENT @405

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

_____ /

ORDER RESCHEDULING PENALTY PHASE TRIAL

This matter is before this Court for resentencing on Counts I and II (First Degree Murder), pursuant to this Court's Order Granting Defendant's Successive Motion to Vacate Death Sentence, pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, 577 U.S. ____; 136 S.Ct. 616 (2016). *See also Mosley v. State*, 209 So.3d 1248, 1283 (Fla. 2016); *Asay v. State*, 210 So.3d 1 (Fla. 2016) (establishing the retroactivity of *Hurst* rulings to Defendants whose death sentences became final after the issuance of the opinion in *Ring v. Arizona*, 536 U.S. 584 (2002)).

This matter was scheduled for a penalty phase for March 25, 2019; however, the Court granted the Defendant's Motion to Continue.

Accordingly, it is ORDERED AND ADJUDGED that

1. This matter shall be rescheduled for a penalty phase jury trial to commence with jury selection on May 20, 2019 at 9:00 a.m. Immediately upon completion of jury selection, the penalty phase trial will begin.

2. The parties have indicated they will be ready for the penalty phase trial at that time,

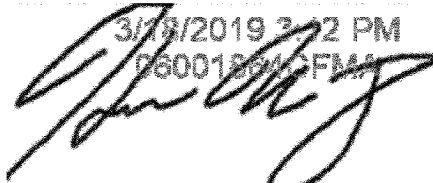
and that it should take no longer than one week to conduct the penalty phase trial, including jury selection.

3. The Clerk of Court is ordered to separately issue a sufficient number of juror summons to assure 60 prospective jurors are available for voir dire on May 20, 2019.

4. Voir dire in this case will take place in courtroom 264. Once voir dire is completed the trial will commence in courtroom 328.

5. Copies of any motions filed prior to the scheduled penalty phase shall be delivered to the judge's chambers and the parties will be notified of the hearing date and time.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 18 day of March, 2019.


3/18/2019 3:12 PM
06001864CFMA
e-Signed 3/18/2019 3:12 PM 06001864CFMA

CIRCUIT JUDGE

Conformed copies to:
Mark Johnson, Asst. State Attorney
Junior Barrett, Esq., Defense counsel
Jury Coordinator, St. Johns County Clerk of Court
Court Reporter; Stenographers@circuit7.org

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA

v.

NORMAN BLAKE MCKENZIE,
Defendant.

**ORDER DENYING DEFENDANT'S MOTION TO STRIKE STATE'S
AMENDED NOTICE OF AGGRAVATING FACTORS AS UNTIMELY
AND GRANTING STATE'S MOTION TO AMEND NOTICE OF
AGGRAVATING FACTORS**

This cause is before this Court pursuant to Defendant's Motion to Strike State's Amended Notice of Aggravating Factors as Untimely [DIN 448] and the State's Motion to Amend Notice of Aggravating Factors [DIN 438].¹ The Court has considered the motions, the State's memorandum in opposition to the Defendant's motion, and the arguments of counsel. Being fully advised in the premises, this Court finds as follows:

¹ References to the Clerk of Court's Docket Identification Number is identified as "DIN" followed by the applicable Docket Identification Number.

The State seeks to amend its list of aggravating factors to include an additional aggravating factor, to which the Defendant objects. The Defendant's objection is based on Fla. Stat. §782.04(1)(b) (2016) which provides in pertinent part:

If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause.

This provision was added to Fla. Stat. §782.04 by the Legislature in 2016. The 2016 amendments to §782.04 went into effect upon the Governor's signature on March 7, 2016. Ch. 2016-13, Laws of Fla. Rule 3.181, Fla. R. Crim. P., which is also relied upon by Defendant and contains the same requirements as the portion of §782.04(1)(b) discussed above, went into effect on September 15, 2016. *In re Amendments to the Florida Rules of Criminal Procedure*, 200 So.3d 758 (Fla. 2016).

The Defendant argues that Fla. Stat. §782.04(1)(b) and Rule 3.181 apply to his case, and thus, the State must demonstrate good cause in order to add an aggravating factor for consideration by the jury. The State argues these provisions do not apply to this case.

In order to resolve this issue it is necessary to look at the pertinent history of this case. On October 17, 2006, the Defendant was indicted on two counts of First Degree Murder. [DIN 7] On February 6, 2007, the Defendant was arrested on the

capias arising from that Indictment. [DIN 12] The Defendant was arraigned on that Indictment on February 15, 2007. [DIN 19] On March 2, 2007, the State filed a Notice of Intent to Seek Death Penalty. [DIN 24] That notice did not contain a list of aggravating factors the State intended to rely upon, since there was no such requirement at that time. On August 21, 2007, the Defendant was found guilty of the two First Degree Murder charges. [DIN 103, 104] At the penalty phase that followed, the State elicited evidence to establish four aggravating factors: (1) the Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the Defendant was engaged in the commission of, or attempted commission of, a robbery; (3) the capital felony was committed for pecuniary gain; and (4) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. At the conclusion of the penalty phase, the jury recommended Defendant be sentenced to death by a vote of 10-2. [DIN 116, 117] On October 19, 2007, the presiding judge agreed with the jury's sentencing recommendation and sentenced the Defendant to death. [DIN 135] In her sentencing order, the judge found the State established the aforementioned four aggravating factors. *Id.*

In *Hurst v. Fla.*, 577 U.S. ____; 136 S.Ct. 616; 193 L.Ed.2d 504 (2016), the United States Supreme Court found Florida's death penalty statutory scheme

unconstitutional in that it provided for the judge, rather than the jury, to determine the existence of aggravating factors. In response, the Legislature passed Ch. 2016-13, Laws of Fla., which contains the provision in §782.04(1)(b) relied on by Defendant, and amended Fla. Stat. §921.141 requiring at least 10 jurors determine that a defendant should be sentenced to death, in order for the jury's recommendation to be imposition of the death penalty. Subsequent to the enactment of Ch. 2016-13, Laws of Fla., in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), the Florida Supreme Court found that the provision in Fla. Stat. §921.141 (2016), requiring less than a unanimous death penalty recommendation by a jury before a death sentence could be imposed was unconstitutional. In response, the Legislature passed Ch. 2017-1, Laws of Fla., which requires a unanimous finding by a jury that death is the appropriate sentence before a defendant can receive a death sentence. In *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016), the Florida Supreme Court explained that the rulings in *Hurst v. Fla.*, *supra.*, would only apply retroactively to those defendants whose death sentences became final after the United States Supreme Court's decision in *Ring v. Az.*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).² Because this Defendant's death sentence became final after *Ring*, his death sentence

² The Florida Supreme Court later explained that any *Hurst v. Fla.* error, where the judge, not the jury, made the findings regarding aggravating circumstances, would be subject to a harmless error analysis, and if a jury unanimously recommended a death sentence, any such error would be deemed harmless. *See Davis v. State*, 207 So.3d 142, 173-76 (Fla. 2016). Thus, a defendant whose death sentence became final after *Ring*, which was based upon a unanimous death recommendation by a jury, would not be entitled to a new penalty phase. *Id.* Such is not the case here, since the Defendant was sentenced to death based on a jury death recommendation of 10-2.

was based on aggravating factors determined by the judge, not the jury, and the jury's death sentence recommendation was less than unanimous, on June 19, 2017, this Court granted the Defendant's motion to vacate his sentence, and ordered that a new penalty phase would be convened. [DIN 333] On August 28, 2017, the State filed its Renewed Notice of Intent to Seek Death Penalty and List of Aggravating Factors. [DIN 346] The State listed the same four aggravating factors it relied on previously. *Id.* On August 23, 2018, this Court entered an Order scheduling the penalty phase to commence on March 25, 2019. [DIN 368] On January 23, 2019, the State filed its Motion to Amend Notice of Aggravating Factors, seeking to add the aggravating factor that the capital felony was especially heinous, atrocious, or cruel. [DIN 438] It is the addition of this proposed aggravating factor to which the Defendant objects. On March 25, 2019, the Court heard the arguments of counsel on this issue. On that same date, for unrelated reasons, this Court continued the penalty phase to May 20, 2019. [DIN 466]

This Court finds two cases from Florida's First District Court of Appeal persuasive on the issue. In *Jackson v. State*, 256 So.3d 975 (Fla. 1st DCA 2018), the Defendant was indicted for First Degree Murder on March 9, 2007. Five days later the State gave notice of its intent to seek the death penalty. That notice did not contain a list of aggravating factors, since none was statutorily required at that time. Over three years later, in response to the trial court's order granting the defendant's

Motion for Statement of Aggravating Circumstances, the State filed its list of aggravating factors. The defendant was convicted and sentenced to death in 2010. However, in 2012 the Florida Supreme Court reversed the defendant's conviction and ordered a new trial. On remand, the defendant moved to strike the State's proposed aggravated factors, asserting the 2016 amendment to 782.04(1)(b) requiring notice of aggravating factors be provided within 45 days of arraignment was applicable, and because the State failed to do so, it should not be able to present those aggravating factors. The trial court rejected the defendant's request. The First District Court of Appeal denied the defendant's petition for writ of prohibition stating "the 2016 amendment to section 782.04(1), Fla. Stat, requiring that the State provide notice of aggravating factors within *45 days of arraignment* (in addition to its notice of intent to seek the death penalty) does not apply retroactively to an arraignment that occurred in 2007." *Id.* at 976 (emphasis in original).

Additionally, in *Varnadore v. State*, __ So.3d. __, 44 Fla. L. Weekly D235 (Fla. 1st DCA 2019), the Defendant was arraigned on March 29, 2012, on an indictment that charged, among other things, two counts of First Degree Murder.³ On that same day, the State filed a notice of intent to seek the death penalty. The State did not provide a list of proposed aggravating factors at that time, since it was

³ The facts in *Varnadore* are not reported in the appellate decision, but are obtained from the trial court's Order Denying Defendant's Motion to Preclude Death Qualification. (Fla. 4th Jud. Cir., Duval County, Case No.: 16-2012-CF-501, August 6, 2018).

not required to do so. On August 1, 2018, after the enactment of Fla. Stat. §782.04(1)(b), the defendant moved to preclude the State from death qualifying the jury and seeking the death penalty, asserting that since the State did not provide a list of aggravating factors within 45 days of the arraignment, it was barred from seeking the death penalty. Two days after the defendant filed the aforementioned motion, the State filed an Amended Notice of Intent to Seek the Death Penalty and Notice of Aggravating Factors. The trial court denied the defendant's motion. The defendant sought a writ of prohibition or certiorari, which was rejected by the First District Court of Appeal citing *Jackson, supra.*, for the proposition "that the 2016 amendment to section 782.04(1), Florida Statutes, does not apply when the arraignment occurred prior to the date of the statutory amendment."

The Defendant's reliance on *Chantiloupe v. State*, 248 So.3d 1191 (Fla. 4th DCA 2018), in support of his argument is misplaced. The defendant in *Chantiloupe* was indicted for, among other charges, First Degree Murder. The defendant was arraigned on August 18, 2017, after the enactment of §782.04(1)(b) and Rule 3.181. Not until 59 days after arraignment did the State file its notice of intent to seek the death penalty and listed its aggravating factors. The defense filed a motion to preclude the State from seeking the death penalty. The trial court granted the defendant's motion which was affirmed by the appellate court. In doing so, the court emphasized that the arraignment date was "a critical [factor] to the resolution" of the

case since the arraignment occurred after §782.041(1)(b) and Rule 3.181 were enacted and promulgated. *Id.* at 1193.

The defendants in *Jackson* and *Varnadore* were arraigned *before* the enactment and promulgation of §782.041(1)(b) and Rule 3.181, and thus, those provisions were determined to not apply. The defendant in *Chantiloupe* was arraigned *after* the enactment and promulgation of those provisions which were determined to apply. The timing of the arraignment is critical to determination of the applicability of §782.041(1)(b) and Rule 3.181.

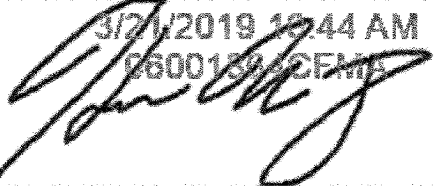
As discussed above, the Defendant in the instant case was arraigned on the Indictment on February 15, 2007, over nine years prior to the enactment of Fla. Stat. §782.04(1)(b) and Rule 3.181. That Indictment was never amended and the Defendant's conviction for two counts of First Degree Murder was based on that Indictment. Since the arraignment occurred prior to the enactment of Fla. Stat. §782.04(1)(b) and Rule 3.181, the State was not required to provide notice of its aggravating factors within 45 days of that Indictment and need not show good cause in order to amend its list of aggravating factors.

Therefore, it is ORDERED and ADJUDGED that:

1. The Defendant's Motion to Strike State's Amended Notice of Aggravating Factors as Untimely is DENIED.

2. The State's Motion to Amend Notice of Aggravating Factors is
GRANTED.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 21 day
of March, 2019.


3/21/2019 10:44 AM
06001864CFMA
e-Signed 3/21/2019 10:44 AM 06001864CFMA
CIRCUIT JUDGE

Copies to:
Mark Johnson, Asst. State Attorney
Junior Barrett, Esq.

Filing # 87044293 E-Filed 03/27/2019 01:10:22 PM

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE /

SUPPLEMENTAL DISCOVERY/WITNESS LIST

In compliance with Rule 3.220(b)(1)(i), FRCP, the State hereby furnished the names and addresses of every witness known to the State Attorney to have information which may be relevant to the offense(s) charges, or to any defense with respect thereto:

(A) Witnesses

1. Category A Witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or co-defendant pursuant to Rule 3.220 (b)(1)(A)(i)(3), F.R.Cr.P.

Other Category A witnesses:

Updated address: Julie D. Aubrey, 188 Apple Hollow Lane, Rabun Gap, GA 30568.

2. Category B Witnesses pursuant to Rule 3.220(v)(1)(A)(ii), F.R.Cr.P.
3. Category C Witnesses pursuant to Rule 3.220(b)(1)(A)(iii). F.R. Cr.P

(B) Tangible papers or objects which the State intends to use at hearing or trial:

1. Any and all tangible evidence specifically listed in copies of written documents provided to Defense Counsel during Discovery.

The State demands compliance with Rule 3.220(d).

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail or delivery to: JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, on March 27, 2019.

s/MARK JOHNSON
ASSISTANT STATE ATTORNEY
BAR NO.: 0378320
2446 DOBBS ROAD
ST AUGUSTINE, FL 32086
(904) 209-1300
ESERVICESTJOHNS@SAO7.ORG

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**ORDER GRANTING DEFENDANT'S MOTION TO CONTINUE AND
RESCHEDULING PENALTY PHASE TRIAL**

This matter is before this Court for resentencing on Counts I and II (First Degree Murder), pursuant to this Court's Order Granting Defendant's Successive Motion to Vacate Death Sentence, pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, 577 U.S. ____; 136 S.Ct. 616 (2016). *See also Mosley v. State*, 209 So.3d 1248, 1283 (Fla. 2016); *Asay v. State*, 210 So.3d 1 (Fla. 2016) (establishing the retroactivity of *Hurst* rulings to Defendants whose death sentences became final after the issuance of the opinion in *Ring v. Arizona*, 536 U.S. 584 (2002)).

This matter was scheduled for a penalty phase for March 25, 2019; however, the Court granted the Defendant's Motion to Continue and the penalty phase was scheduled for May 20, 2019. Defense counsel has indicated to the Court that its expert mitigation witness cannot be ready for the penalty phase by May 20, 2019. The defense has moved to continue the May 20, 2019 penalty phase.

Accordingly, it is ORDERED AND ADJUDGED that

1. The Defendant's Motion to Continue is GRANTED.
2. This matter shall be rescheduled for a penalty phase jury trial to commence with

Filed for record 05/07/2019 12:49 PM Clerk of Court St. Johns County, FL

jury selection on August 26, 2019 at 9:00 a.m. Immediately upon completion of jury selection, the penalty phase trial will begin.

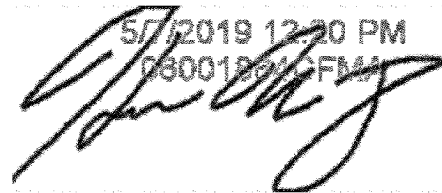
3. The parties have indicated they will be ready for the penalty phase trial at that time, and that it should take no longer than one week to conduct the penalty phase trial, including jury selection.

4. The Clerk of Court is ordered to separately issue a sufficient number of juror summonses to assure at least 60 prospective jurors are available for voir dire on August 26, 2019.

5. Voir dire in this case will take place in courtroom 264. Once voir dire is completed the trial will commence in courtroom 328.

6. Copies of any motions filed prior to the scheduled penalty phase shall be delivered to the judge's chambers and the parties will be notified of the hearing date and time.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 07 day of May, 2019.

A handwritten signature in black ink is written over a digital timestamp. The timestamp is in a light blue, sans-serif font and reads "5/7/2019 12:20 PM" followed by "06001864CFMA" on the next line.

e-Signed 5/7/2019 12:20 PM 06001864CFMA
CIRCUIT JUDGE

Conformed copies to:
Mark Johnson, Asst. State Attorney
Junior Barrett, Esq., Defense counsel
Jury Coordinator, St. Johns County Clerk of Court
Court Reporter; Stenographers@circuit7.org

Filing # 89332460 E-Filed 05/10/2019 03:15:20 PM

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE /

SUPPLEMENTAL DISCOVERY/WITNESS LIST

In compliance with Rule 3.220(b)(1)(i), FRCP, the State hereby furnished the names and addresses of every witness known to the State Attorney to have information which may be relevant to the offense(s) charges, or to any defense with respect thereto:

(A) Witnesses

1. Category A Witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or co-defendant pursuant to Rule 3.220 (b)(1)(A)(i)(3), F.R.Cr.P.

Samantha Otter, St. Johns County Sheriff's Office, 4015 Lewis Speedway, St. Augustine, FL 32084.

Other Category A witnesses:

2. Category B Witnesses pursuant to Rule 3.220(v)(1)(A)(ii), F.R.Cr.P.
3. Category C Witnesses pursuant to Rule 3.220(b)(1)(A)(iii). F.R. Cr.P

(B) Tangible papers or objects which the State intends to use at hearing or trial:

1. Any and all tangible evidence specifically listed in copies of written documents provided to Defense Counsel during Discovery.
2. Department of Corrections certified disciplinary records of Norman McKenzie, DC#648711 UNREDACTED (35 pages).
3. SJSO Offense Report Narrative written by Samantha Otter dated 5/7/19 (1 page).
4. SJSO Offense Report Narrative written by Samantha Otter dated 5/8/19 (2 pages).

The State demands compliance with Rule 3.220(d).

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail or delivery to: JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, on May 10, 2019.

s/K. MARK JOHNSON
ASSISTANT STATE ATTORNEY
BAR NO.: 0378320
2446 DOBBS ROAD
ST AUGUSTINE, FL 32086
(904) 209-1300
ESERVICESTJOHNS@SAO7.ORG

Filing # 93610778 E-Filed 08/02/2019 05:00:43 PM

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

**AMENDED NOTICE OF INTENT TO PRESENT EXPERT
TESTIMONY OF MENTAL MITIGATION**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned attorney, and pursuant to Florida Rule of Criminal Procedure 3.202(b) and hereby gives notice of his intent to present expert testimony of mental mitigation during penalty phase of this case. In compliance with, the Defendant intends to present evidence of the following mental mitigation through the testimony of Dr. Stephen Bloomfield, PhD, Ed.D and Dr. Susan Skolly-Danziger, Pharm, MS, DABAT:

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
2. The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
3. That Defendant and his siblings suffered child abuse at the hands of his father.
4. That the Defendant's childhood was chaotic.
5. That Defendant and his sibling experienced a lack of adequate supervision after the divorce of his parents.
6. That Defendant witnesses his mother's constant abuse of drugs and alcohol.
7. That Defendant started huffing from spray cans at the age of 12.

8. That Defendant had an early and chronic abuse and dependency on alcohol and drugs.

9. That Defendant's introduction into the prison system at a young age has damaged him mentally

10. That Defendant had a cocaine dependency relapse starting in July of 2006 up to and after the crimes at bar.

11. That Defendant had a 7 days plus of consistent and voluminous use of cocaine use and abuse from July to October of 2006.

12. That Defendant would not be eligible for parole.

13. Dr. Stephen Bloomfield, PhD, Ed.D. is located at 3725 Dupont St. Ct. S, Jacksonville, Florida 32217.

14. Dr. Susan Skolly-Danziger is located at 2300 Maitland Center Pkwy., Maitland, FL 32751.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail/email/hand delivery to the Office of the State Attorney, eservicestjohns@sao7.org, this the 2nd day of August 2019.

/s/ Junior Barrett

Junior A. Barrett
Florida Bar No. 785687
Assistant Regional Counsel
Office of Regional Criminal Conflict &
Civil Regional Counsel, 5th District
101 Sunnyside Road, Suite 310
Casselberry, FL 32707
(407) 389-5140
jbarrett@rc5state.com
tcollins@rc5state.com

Filing # 93632740 E-Filed 08/05/2019 09:47:01 AM

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL
CIRCUIT IN AND FOR ST JOHNS COUNTY, FLORIDA

CASE NO: 552006CF001864A

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE
Defendant.

**AMENDED NOTICE OF INTENT TO PRESENT EXPERT
TESTIMONY OF MENTAL MITIGATION**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned attorney, and pursuant to Florida Rule of Criminal Procedure 3.202(b) and hereby gives notice of his intent to present expert testimony of mental mitigation during penalty phase of this case. In compliance with, the Defendant intends to present evidence of the following mental mitigation through the testimony of Dr. Stephen Bloomfield, PhD, Ed.D and Dr. Susan Skolly-Danziger, Pharm, MS, DABAT:

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
2. The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
3. That Defendant and his siblings suffered child abuse at the hands of his father.
4. That the Defendant's childhood was chaotic.
5. That Defendant and his sibling experienced a lack of adequate supervision after the divorce of his parents.
6. That Defendant witnesses his mother's constant abuse of drugs and alcohol.

7. That Defendant started huffing from spray cans at the age of 12.
8. That Defendant had an early and chronic abuse and dependency on alcohol and drugs.
9. That Defendant's introduction into the prison system at a young age has damaged him mentally
10. That Defendant had a cocaine dependency relapse starting in July of 2006 up to and after the crimes at bar.
11. That Defendant had a 7 days plus of consistent and voluminous use of cocaine use and abuse from July to October of 2006.
12. That Defendant would not be eligible for parole.
13. Dr. Stephen Bloomfield, PhD, Ed.D. is located at 3725 Dupont St. Ct. S, Jacksonville, Florida 32217.
14. Dr. Susan Skolly-Danziger is located at 2300 Maitland Center Pkwy., Maitland, FL 32751.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-servicecc delivery to the Office of the State Attorney, eserviceccjohns@sao7.org on this 15th day of February, 2019.

/S/ JUNIOR BARRETT

Junior Barrett, ESQUIRE
FL. Bar No. 785687
Assistant Regional Counsel
Office of Regional Criminal Conflict &
Civil Regional Counsel, 5th District
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(407) 389-5140
tcollins@rc5state.com

Filing # 94037156 E-Filed 08/12/2019 04:25:04 PM

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE /

SUPPLEMENTAL DISCOVERY/WITNESS LIST

In compliance with Rule 3.220(b)(1)(i), FRCP, the State hereby furnished the names and addresses of every witness known to the State Attorney to have information which may be relevant to the offense(s) charges, or to any defense with respect thereto:

(A) Witnesses

1. Category A Witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or co-defendant pursuant to Rule 3.220 (b)(1)(A)(i)(3), F.R.Cr.P.

Other Category A witnesses:

Deputy Sheriff Dale Strickland, Citrus County Sheriff's Office, 1 Dr. Martin Luther King, Jr. Avenue, Inverness, FL 34450-4968.

2. Category B Witnesses pursuant to Rule 3.220(v)(1)(A)(ii), F.R.Cr.P.
3. Category C Witnesses pursuant to Rule 3.220(b)(1)(A)(iii). F.R. Cr.P

(B) Tangible papers or objects which the State intends to use at hearing or trial:

1. Any and all tangible evidence specifically listed in copies of written documents provided to Defense Counsel during Discovery.

The State demands compliance with Rule 3.220(d).

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail or delivery to: JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, on August 12, 2019.

s/K. MARK JOHNSON
ASSISTANT STATE ATTORNEY
BAR NO.: 0378320
2446 DOBBS ROAD
ST AUGUSTINE, FL 32086
(904) 209-1300
ESERVICESTJOHNS@SAO7.ORG

Filing # 94052015 E-Filed 08/13/2019 06:00:58 AM

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-01864

STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE
DEFENDANT.

**STATE'S MOTION IN LIMINE REGARDING DISPUTED REDACTIONS
OF DEFENDANT'S INTERVIEW ON OCTOBER 5, 2006**

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and files this Motion in Limine requesting this Court to resolve a disagreement between the State and the defense regarding the admissibility of certain statements made by the defendant during an interview that was conducted on October 5, 2006, at the Citrus Co. Sheriff's Office. In anticipation of a hearing on this motion, the State sets forth the following relevant circumstances:

1. On October 5, 2006, the defendant was arrested in Citrus County following several carjackings and a high-speed chase that also involved Alachua, Marion, and Levy counties.

2. That morning, the bodies of Randy Peacock and Charles Johnston were found at their residence. Charles Johnston had been hacked to death with a hatchet, and Randy Peacock had been beaten and stabbed to death with a large kitchen knife. The defendant was developed immediately as a suspect in those murders, which had been committed the prior evening. He was later charged with both murders, which are the subject of the instant case.

3. In the days leading up to those murders, the defendant also committed a series of violent crimes in Alachua County. He robbed several businesses and, in a separate incident, broke into a home armed with a firearm, held a female resident hostage for a period of time before forcing her into a vehicle and driving her around Alachua County. He eventually released the victim in neighboring Putnam County. In this latter case, the defendant was charged, among other things,

with Burglary While Armed With a Firearm and Kidnapping to Facilitate a Felony While Armed. The information charging the defendant with Kidnapping identified “sexual battery or murder” as the felonies intended to be facilitated by the abduction.

4. The defendant was later convicted of several of the robberies and one of carjackings. With regard to the Alachua County burglary and kidnapping, the defendant was convicted as charged on both of those crimes.

5. Following his arrest on October 5, 2006, the defendant agreed to participate in a video-recorded interview during which he confessed to the robberies, the carjackings, the burglary and kidnapping, and the murders of Randy Peacock and Charles Johnston.¹

6. During the upcoming penalty phase trial, the State intends to admit and publish to the jury relevant portions of this interview, including all the defendant’s admissions to these crimes, to prove the “prior violent felony” aggravating circumstance.

7. The State and defense have discussed which portions of the October 5, 2005 interview should be redacted.² With the exception of essentially 16 lines of dialogue during the interview, the parties are in agreement regarding the appropriate redactions.

8. The statements in dispute are related to the Alachua County kidnapping conviction. The State has included with this motion the relevant transcript of the defendant’s admissions as they relate to this crime. It is attached hereto as Exhibit A. The discussion concerning this crime extends for approximately 16 pages of the full transcript, which the State provides for context. However, the portion in dispute is specifically located on page 101, lines 3-19.

¹ The defendant also confessed to a murder in South Georgia during that same timeframe, but charges related to that case were eventually abandoned following his indictment for the murders in St. Johns County. All statements related to that homicide will be redacted.

² The State also intends to publish a second interview of the defendant that took place at the St. Johns Co. Sheriff’s Office on February 15, 2007. The State and defense are in complete agreement concerning the redactions to that interview.

9. The State believes that these statements are relevant to show the exact nature of the kidnapping, which was that it was committed with the intention to facilitate a sexual battery. The defendant was thus charged and convicted accordingly. A copy of the Amended Information and the Judgment and Sentence are attached hereto as Exhibits B and C, respectively. The kidnapping conviction constitutes a prior violent felony, which is one of the aggravating circumstances that will be at issue during the trial.

10. The defendant disagrees and counters that the statements are, in their opinion, overly prejudicial.

WHEREFORE, the State hereby request that this Honorable Court schedule this motion for a hearing at the earliest practicable time so that each party may set forth its arguments concerning the admissibility of the above-described statements and obtain a ruling from the Court prior to trial.

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, on August 12, 2019.

Respectfully submitted,

R.J. LARIZZA
STATE ATTORNEY

By: s/K. MARK JOHNSON
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0378320
4010 Lewis Speedway, Suite 2022, Bldg. A
St. Augustine, FL 32084
(904) 209-1620
ESERVICESTJOHNS@SAO7.ORG

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-01864

STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE
DEFENDANT.

STATE'S MOTION IN LIMINE REGARDING DISPUTED REDACTIONS
OF DEFENDANT'S INTERVIEW ON OCTOBER 5, 2006

EXHIBIT A

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TAPED INTERVIEW OF BLAKE MCKENZIE
BY DETECTIVE TIM ROLLINS AND SPECIAL AGENT JENNINGS

DATE: Thursday, October 5, 2006
PLACE TAKEN: CITRUS COUNTY SHERIFF'S OFFICE
TIME: 8:30 p.m.

TRANSCRIBED BY: LAURA DWYER PIERLE, RPR

ST. AUGUSTINE COURT REPORTERS
1510 NORTH PONCE DE LEON BOULEVARD, SUITE A
ST. AUGUSTINE, FLORIDA 32095
904-825-0570

REDACTIONS

COPY

1 ~~SPECIAL AGENT JENNINGS: Except for the guns.~~
2 ~~MR. MCKINZIE: Yeah, the guns are sold to the~~
3 ~~black dudes.~~
4 ~~SPECIAL AGENT JENNINGS: All right. When you~~
5 ~~left there --~~
6 ~~MR. MCKINZIE: Left where?~~
7 ~~SPECIAL AGENT JENNINGS: Dixon's house.~~
8 ~~MR. MCKINZIE: I went and got gas.~~
9 ~~SPECIAL AGENT JENNINGS: Got gas.~~
10 ~~MR. MCKENZIE: Bought a pack of cigarettes,~~
11 ~~two lights and --~~
12 ~~SPECIAL AGENT JENNINGS: Okay.~~
13 ~~MR. MCKINZIE: All right. And I left.~~
14 ~~SPECIAL AGENT JENNINGS: Okay. Where did you~~
15 ~~go?~~
16 ~~MR. MCKENZIE: Straight to Gainesville to buy~~
17 ~~dope.~~
18 ~~SPECIAL AGENT JENNINGS: After you bought~~
19 ~~dope tell me about where you went then.~~
20 ~~MR. MCKINZIE: Runner's house.~~
21 ~~SPECIAL AGENT JENNINGS: Okay. When you left~~
22 ~~Runner's house --~~
23 ~~MR. MCKENZIE: No. Wait a minute.~~
24 ~~SPECIAL AGENT JENNINGS: Tell me about~~
25 ~~getting to the woman's house where you left the~~

1 credit cards.

2 MR. MCKINZIE: Did I leave them that same
3 day?

4 SPECIAL AGENT JENNINGS: Uh huh.

5 MR. MCKINZIE: That same. Okay. Man, you
6 could image the paranoia that was setting in. I
7 was getting high.

8 SPECIAL AGENT JENNINGS: How could you even
9 find this house?

10 MR. MCKINZIE: Dude, I didn't find it. I
11 stumbled on it.

12 SPECIAL AGENT JENNINGS: Okay. You were just
13 riding?

14 MR. MCKENZIE: No, it's not -- no, I ain't
15 just riding. I am running.

16 SPECIAL AGENT JENNINGS: Okay.

17 MR. MCKINZIE: From nothing. From nothing.
18 That's how I got caught.

19 SPECIAL AGENT JENNINGS: Well, do you
20 remember what you told the woman?

21 MR. MCKINZIE: I was running from nothing.

22 SPECIAL AGENT JENNINGS: Do you remember what
23 you told the woman when you came in?

24 MR. MCKINZIE: I said -- man, I think I was
25 kind of honest with her, dude.

1 SPECIAL AGENT JENNINGS: That's what she
2 said.

3 MR. MCKINZIE: You know, I think I was kind
4 of honest with her.

5 SPECIAL AGENT JENNINGS: Do you remember
6 saying anything to her about asking her if she was
7 a believer?

8 MR. MCKINZIE: Yeah. We talked a lot about
9 God, dude.

10 SPECIAL AGENT JENNINGS: Okay. You remember
11 praying together?

12 MR. MCKINZIE: Yes.

13 SPECIAL AGENT JENNINGS: She was concerned
14 about your hand.

15 MR. MCKENZIE: Yes.

16 SPECIAL AGENT JENNINGS: She told me you hand
17 was really messed up, it looked really bad.

18 MR. MCKINZIE: This is the result of it. I
19 think I got bit by a brown recluse.

20 SPECIAL AGENT JENNINGS: That's what that
21 looks like.

22 MR. MCKENZIE: That's what I think.

23 SPECIAL AGENT JENNINGS: What -- what took
24 place at the house with her?

25 MR. MCKINZIE: I sat there and done drugs,

1 right.

2 SPECIAL AGENT JENNINGS: Uh huh.

3 MR. MCKENZIE: And I almost was going to have
4 sex with her, dude. And I stopped. I said, no,
5 don't do that. Don't do that.

6 SPECIAL AGENT JENNINGS: You pulled your
7 Johnson out?

8 MR. MCKENZIE: Right. And then I stopped
9 her. I told her to touch it.

10 SPECIAL AGENT JENNINGS: You asked her to
11 touch it or did she reach over to touch it?

12 MR. MCKENZIE: No. Obviously, man, she is a
13 good woman.

14 SPECIAL AGENT JENNINGS: Okay.

15 MR. MCKENZIE: You know, I asked her to.

16 SPECIAL AGENT JENNINGS: You know I have to
17 ask.

18 MR. MCKENZIE: I asked. Yeah. I asked her
19 to. And she did immediately.

20 SPECIAL AGENT JENNINGS: Uh huh.

21 MR. MCKENZIE: You know.

22 SPECIAL AGENT JENNINGS: She was afraid.

23 MR. MCKENZIE: Obviously she didn't want to
24 be hurt, too.

25 SPECIAL AGENT JENNINGS: Right. What gun did

1 you have then?

2 MR. MCKENZIE: Both of them.

3 SPECIAL AGENT JENNINGS: Okay. You still had

4 those?

5 MR. MCKENZIE: Yeah.

6 SPECIAL AGENT JENNINGS: Okay.

7 MR. MCKENZIE: I just did it that day, right.

8 ~~SPECIAL AGENT JENNINGS: Right. But I didn't~~

9 ~~know if you met up with Runner.~~

10 ~~MR. MCKENZIE: You know what I think her son~~

11 ~~is the one who found me first...~~

12 ~~SPECIAL AGENT JENNINGS: Her~~

13 ~~MR. MCKENZIE: Her son. Does she have a son?~~

14 ~~SPECIAL AGENT JENNINGS: Uh uh.~~

15 ~~MR. MCKENZIE: I know this.~~

16 SPECIAL AGENT JENNINGS: Where did you park?

17 Did you pull inside the garage?

18 MR. MCKENZIE: I pulled right inside the

19 garage and shut the door. Walked in the house

20 weapon drawn.

21 SPECIAL AGENT JENNINGS: And she was, what,

22 in the back?

23 MR. MCKENZIE: I said hello. And she said

24 hello. She was back there playing scrabble online

25 on the computer.

1 SPECIAL AGENT JENNINGS: Right.

2 MR. MCKENZIE: And I had said how are you.

3 She, well -- I was in my role, you know, man. She
4 came out.

5 SPECIAL AGENT JENNINGS: You asked her about,
6 you know, if she was a believer. You all even
7 prayed together.

8 MR. MCKENZIE: I was like, man, listen I love
9 the Lord, dude. I really do. I am a firm
10 believer.

11 SPECIAL AGENT JENNINGS: You even -- you even
12 talked scriptures to her about the Old Testament,
13 right?

14 MR. MCKENZIE: You wouldn't believe how I
15 know the bible, man.

16 SPECIAL AGENT JENNINGS: That's what she told
17 me.

18 MR. MCKENZIE: I know the bible intimately,
19 not like a sick thing like God told me to do all
20 this. None of that, man. I don't want you to
21 think I am fucking insane or something.

22 ~~DETECTIVE ROLLINS: No.~~

23 ~~MR. MCKENZIE: I am addicted to cocaine,~~
24 ~~period. And when you write this up, man,~~
25 ~~please~~

1 ~~SPECIAL AGENT JENNINGS: I put it already~~
2 ~~down in my notes.~~

3 ~~MR. MCKENZIE: Make good and damn sure. --~~

4 ~~SPECIAL AGENT JENNINGS: All of this happened~~
5 ~~because of your addiction to cocaine.~~

6 ~~MR. MCKENZIE: That's not major enough man.~~
7 ~~No one can feel it.~~

8 ~~SPECIAL AGENT JENNINGS: I know that. I will~~
9 ~~make sure.~~

10 ~~DETECTIVE ROLLINS: Look here you want to~~
11 ~~write it down in your own words how your addiction~~
12 ~~is.~~

13 ~~MR. MCKENZIE: It would take me a period of~~
14 ~~time to compose, you know, a statement, man. I~~
15 ~~mean, a serious period of time. I am a great~~
16 ~~writer, bro. Really great writer. I have written~~
17 ~~some incredible thesis on the bible. Poetry. I~~
18 ~~have written books, dude.~~

19 ~~DETECTIVE ROLLINS: Do you remember --~~

20 ~~MR. MCKENZIE: But to me sitting down and~~
21 ~~tell you -- how can I imply, how can pass onto~~
22 ~~someone going to read this thing.~~

23 ~~SPECIAL AGENT JENNINGS: I am a very good~~
24 ~~report writer. So I will get it -- I will make~~
25 ~~sure it's spelled out like you want. Okay.~~

1 ~~MR. McKENZIE: I am telling you this, man. I~~
2 ~~know I am going to die, too. I know that I am~~
3 ~~going to die.~~

4 ~~SPECIAL AGENT JENNINGS: Tell me something.~~

5 ~~MR. McKENZIE: I know I am going to die. But~~
6 ~~I want you to know that shit, man, wasn't 'cause~~
7 ~~of me, man.~~

8 ~~SPECIAL AGENT JENNINGS: It's because of that~~
9 ~~addiction.~~

10 ~~MR. McKENZIE: But there is something else~~
11 ~~to, man. There is something else in there, too.~~
12 ~~Because I punch fucking dog when I was four years~~
13 ~~old. Any psychologist will tell you that's~~
14 ~~fucking makings of a serial killer, man.~~

15 ~~SPECIAL AGENT JENNINGS: Tell me something.~~

16 ~~MR. McKENZIE: You know that.~~

17 ~~DETECTIVE ROLLINS: It's not good, I mean.~~

18 ~~MR. McKENZIE: That's the makings of a serial~~
19 ~~killer, man.~~

20 ~~SPECIAL AGENT JENNINGS: Blake.~~

21 ~~MR. McKENZIE: Those are signs of a murderer.~~

22 ~~SPECIAL AGENT JENNINGS: Well, let's wait~~
23 ~~until we are talking about all that.~~

24 ~~MR. McKENZIE: You have ability to do a~~
25 ~~murder.~~

1 immediately.

2 SPECIAL AGENT JENNINGS: Huh.

3 MR. McKENZIE: Did she call the cops

4 immediately?

5 SPECIAL AGENT JENNINGS: Shortly thereafter.

6 MR. McKENZIE: I called her husband, man.

7 SPECIAL AGENT JENNINGS: Yes, you did.

8 Somebody did. I assumed it was you.

9 MR. McKENZIE: I did.

10 SPECIAL AGENT JENNINGS: Okay.

11 MR. McKENZIE: I called her husband, and

12 said, sir, your wife is fine. You need to go get

13 her. I told him where she was. I think I lied to

14 him, though.

15 SPECIAL AGENT JENNINGS: You said Cafe Risque

16 parking lot or something like that.

17 MR. McKENZIE: Yeah. I lied to him.

18 SPECIAL AGENT JENNINGS: Okay.

19 MR. McKENZIE: But I wanted him to know she's

20 fine. He wanted to ask me, who are you? I said,

21 listen you, man, is your wife not missing. He is

22 like, yes.

23 SPECIAL AGENT JENNINGS: You called him on

24 your phone or her phone?

25 MR. McKENZIE: Her phone.

1 SPECIAL AGENT JENNINGS: Where's her phone
2 now?

3 MR. MCKENZIE: Somewhere. Junked it out the
4 window, you know, went through another paranoia
5 state. I kept that phone for probably a day, day
6 and a half.

7 SPECIAL AGENT JENNINGS: But you kept it off.

8 MR. MCKENZIE: Yeah. I mean, then I got
9 paranoid.

10 SPECIAL AGENT JENNINGS: You remember --

11 MR. MCKENZIE: I wound up taking the battery,
12 and Sims chip out.

13 SPECIAL AGENT JENNINGS: Do you remember
14 leaving your drink or anything like that in the
15 garage?

16 MR. MCKENZIE: It's possible.

17 SPECIAL AGENT JENNINGS: Do you remember if
18 you were drinking a bottle, can, cup?

19 MR. MCKENZIE: Bottle of water.

20 SPECIAL AGENT JENNINGS: There was a cup
21 there, was that yours?

22 MR. MCKENZIE: Dude, if I had a bottle of
23 water it was for shooting dope, man. That's the
24 only reason I had water.

25 SPECIAL AGENT JENNINGS: Okay.

1 MR. MCKENZIE: And I had --

2 SPECIAL AGENT JENNINGS: There was a cup
3 there of some kind.

4 MR. MCKENZIE: You know what I bought, I
5 bought a quarter ounce of power that day.

6 SPECIAL AGENT JENNINGS: Yeah, she said that
7 you were doing dope right there in front of her.

8 MR. MCKENZIE: Yeah. I took a shot.

9 SPECIAL AGENT JENNINGS: Then you run around
10 in her car; is that correct?

11 MR. MCKENZIE: Yeah.

12 SPECIAL AGENT JENNINGS: At some point you
13 decided to go back and get yours --

14 MR. MCKENZIE: Right. Yeah.

15 SPECIAL AGENT JENNINGS: You go back to the
16 house.

17 MR. MCKENZIE: I am fighting inside of me,
18 man, you know, wanting to hurt this woman.

19 SPECIAL AGENT JENNINGS: She said that you
20 were real kind to her, that ya'll talked a good
21 bit.

22 MR. MCKENZIE: Dude, I wanted -- there was a
23 side of me, man -- dude, I fought this little kid
24 that punched this dog in the mouth all my life. I
25 am telling you I have, man. I fought that little

1 ~~son of bitch all my life. I know this sounds kind~~
2 ~~of insane to you, but there is~~ dude, I have the
3 ~~capacity to be so ruthless. That's how I did so~~
4 ~~well in prison, because that's all they understand~~
5 ~~in there. You know, some kid gets raped in my~~
6 ~~door, man, I knocked off five people that day when~~
7 ~~they raped this little boy, you know. And they~~
8 ~~know I did it, but they don't know I did it. I am~~
9 ~~talking about the inmates.~~

10 DETECTIVE ROLLINS: Uh huh.

11 MR. MCKINZIE: You know. I can ruthlessly
12 crawl up through the floor and silently take
13 somebody out, man.

14 SPECIAL AGENT JENNINGS: Blake.

15 MR. MCKINZIE: Sober and then and then

16 SPECIAL AGENT JENNINGS: When you -- when you
17 went back to the house did you pull her car back
18 into the garage next to yours?

19 MR. MCKINZIE: Yeah.

20 SPECIAL AGENT JENNINGS: And then put hers in
21 yours?

22 MR. MCKINZIE: You know that.

23 SPECIAL AGENT JENNINGS: I wasn't there.

24 MR. MCKINZIE: You know that.

25 SPECIAL AGENT JENNINGS: I am making sure.

1 MR. MCKENZIE: Everything that happened in
2 the order you are saying happened is what
3 happened.

4 SPECIAL AGENT JENNINGS: Okay. After you --

5 MR. MCKENZIE: Do you might need me to say
6 these things out of my mouth so you can under oath
7 this guy said this right.

8 SPECIAL AGENT JENNINGS: Yes.

9 MR. MCKENZIE: When we pulled out, I got of
10 there. I may miss a few details, if I do you can
11 rehash it. All right. I got out of my truck, she
12 got in it with me. And then we left, and I drove
13 around like a mad man things.

14 SPECIAL AGENT JENNINGS: Do you remember
15 asking her something about your tattoos, if she
16 saw your tattoos?

17 MR. MCKENZIE: Yeah.

18 SPECIAL AGENT JENNINGS: Okay.

19 MR. MCKENZIE: And she said I wear glasses.
20 I can't see. And then she went to put her glasses
21 on. I said, look, don't do that.

22 SPECIAL AGENT JENNINGS: Okay.

23 MR. MCKENZIE: I didn't want her too, you
24 know.

25 SPECIAL AGENT JENNINGS: Right.

1 MR. MCKINZIE: Because we --

2 SPECIAL AGENT JENNINGS: Right. When you
3 dropped her out where did you go?

4 MR. MCKINZIE: I did robberies with nothing
5 on, man.

6 SPECIAL AGENT JENNINGS: Where did you go
7 when you left there?

8 MR. MCKINZIE: With her?

9 SPECIAL AGENT JENNINGS: No, after you
10 dropped her off.

11 MR. MCKINZIE: I took her a lot of places.

12 SPECIAL AGENT JENNINGS: She told me.

13 MR. MCKINZIE: A lot of places. I even took
14 her over to somebody's house. Somebody I know. I
15 took her over there. Thinking I kidnapped her.

16 SPECIAL AGENT JENNINGS: You had a couple of
17 conversations with your mom while she was riding
18 with you, didn't you?

19 MR. MCKINZIE: Probably.

20 SPECIAL AGENT JENNINGS: And she kept saying
21 you weren't ever going to see your baby again.
22 Who were talking about when you said that?

23 MR. MCKINZIE: Me, I'm the baby.

24 SPECIAL AGENT JENNINGS: So she were never
25 going to see you, again?

1 MR. MCKINZIE: Yeah.

2 SPECIAL AGENT JENNINGS: Okay. What did you
3 do after you put her out?

4 MR. MCKINZIE: I went guy --

5 SPECIAL AGENT JENNINGS: When did you go over
6 to St. Johns County, yesterday?

7 MR. MCKINZIE: I didn't go.

8 SPECIAL AGENT JENNINGS: You said earlier
9 that you had started over there to go -- to go see
10 your mom?

11 MR. MCKINZIE: Right. Let me see.

12 SPECIAL AGENT JENNINGS: You decided to go to
13 Randy's instead.

14 DETECTIVE ROLLINS: Didn't you go by -- he
15 did go by see his mom, didn't you?

16 SPECIAL AGENT JENNINGS: Did you go by drop
17 some stuff off at your mom's?

18 MR. MCKINZIE: Here is what happened, man.

19 ~~You guys can not -- I ask one question, please.~~

20 ~~You guys don't answer question honestly, then I am~~
21 ~~not going to answer questions. All right.~~

22 ~~SPECIAL AGENT JENNINGS: Fair enough.~~

23 ~~MR. MCKINZIE: Okay. How long have I been~~
24 ~~being followed?~~

25 ~~SPECIAL AGENT JENNINGS: I haven't been~~

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-01864

STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE
DEFENDANT.

_____ /

STATE'S MOTION IN LIMINE REGARDING DISPUTED REDACTIONS
OF DEFENDANT'S INTERVIEW ON OCTOBER 5, 2006

EXHIBIT B

②

Page two

State of Florida vs. Norman Blake McKenzie

Case No.: 01-2006-CF-005261-A


COUNT III: And WILLIAM P. CERVONE, STATE ATTORNEY for the Eighth Judicial Circuit, prosecuting for the State of Florida, under oath, further alleges, by information that NORMAN BLAKE MCKENZIE, in Alachua County, Florida, on or about September 28, 2006, did unlawfully expose or exhibit his sexual organs in public or on the private premises of another or so near thereto as to be seen from such private premises, in a vulgar or indecent manner, or be naked in a place not provided or set aside for that purpose, contrary to Section 800.03, Florida Statutes. [M1]

COUNT IV: And WILLIAM P. CERVONE, STATE ATTORNEY for the Eighth Judicial Circuit, prosecuting for the State of Florida, under oath, further alleges, by information that NORMAN BLAKE MCKENZIE, in Alachua County, Florida, Not Defined September 28, 2006, having been convicted of a felony in the courts of this state or of a crime against the United States of America which is designated as a felony or convicted of an offense in another state, territory or country punishable by imprisonment for a term exceeding one year, did own or have in his care, custody, possession or control, a certain firearm, and during the commission of the offense actually possessed a firearm, contrary to Section 790.23 (1) and 775.087(2), Florida Statutes. (L5)

STATE OF FLORIDA
COUNTY OF ALACHUA

Personally appeared before me the undersigned JAMES M. COLAW Assistant State Attorney, Eighth Judicial Circuit of Florida, who, being first duly sworn, says that the allegations set forth in the foregoing INFORMATION are based upon facts that have been sworn to as true, and which if true, would constitute the offense therein charged, and is filed in good faith, and does hereby certify that he/she has received testimony under oath from the material witness or witnesses for the offense.

WILLIAM P. CERVONE
STATE ATTORNEY



JAMES M. COLAW
Assistant State Attorney
Florida Bar No.: 0157309

The foregoing instrument was acknowledged before me this 1st day of February, 2007 by JAMES M. COLAW, Assistant State Attorney, who is personally known to me and who did take an oath.


NOTARY PUBLIC

DEBORA L. SPIVEY
MY COMMISSION # DD 342806
EXPIRES: August 23, 2008
Bonded Thru Budget Notary Services

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-01864

STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE
DEFENDANT.

STATE'S MOTION IN LIMINE REGARDING DISPUTED REDACTIONS
OF DEFENDANT'S INTERVIEW ON OCTOBER 5, 2006

EXHIBIT C

IN THE CIRCUIT COURT OF
THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

☐ Community Control Violator
☐ Probation Violator

STATE OF FLORIDA
vs

NORMAN BLAKE MCKENZIE
Defendant

Case: 01-2006-CF-005261-A
Division: F3

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JUDGMENT

The defendant, NORMAN BLAKE MCKENZIE, being personally before this court represented by John O Floyd, the attorney of record, and the state represented by JAMES COLAW and having

- ☐ been tried and found guilty by jury/court of the following crime(s)
☐ entered a plea of guilty to the following crime(s)
☒ entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Statute Number(s)	Degree of Crime
<u>I</u>	<u>Burglary while Armed with a Firearm and with an Assault Battery (10-20-Life)</u>	<u>810.02 & 775.087</u>	<u>1st</u>
<u>II</u>	<u>Kidnapping with a Firearm (10-20-Life)</u>	<u>787.01 & 775.087</u>	<u>L</u>
<u>IV</u>	<u>Possession of Firearm by Convicted Felon (10-20-Life)</u>	<u>790.23 & 775.087</u>	<u>2E</u>

☒ and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

☒ and having been convicted or found guilty of, or having entered a plea of nolo contendere or guilty, regardless of adjudication, to attempts or offenses relating to sexual battery (Ch. 794), lewd and lascivious conduct (Ch. 800), or murder (F.S. 782.04), aggravated battery (F.S. 784.045), car jacking (F.S. 812.133), or home invasion robbery (F.S. 812.135), or any other offense specified in Section 943.325, the Defendant shall be required to submit to blood specimens.

☐ and good cause being shown, IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

DONE AND ORDERED in Open Court in Gainesville, Alachua County, Florida this 10th day of May, 2007



PETER A SIEG
Judge of the Circuit Court

Filed in Open Court May 10, 2007 by Clerk D.C.

I HEREBY CERTIFY THAT A COPY OF THIS Judgment was furnished by U.S. Mail and/or hand delivery at the addresses of record to counsel for the state and defense/defendant pro se this _____ day of _____, 20____.

BY Deputy Clerk: _____



J. K. "Jess" Ivey, Esq., - Circuit and County Court Clerk, Alachua County, Florida, certifies this is a true copy of the document of record for this office, which may have been redacted as required by law. Witness my hand and seal on December 6, 2018
J. K. "Jess" Ivey, Esq. - Clerk of the Circuit Court
By Jess Ivey
Deputy Clerk

8

IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT
AND FOR ALACHUA COUNTY, FLORIDA

STATE OF FLORIDA











VS.

NORMAN BLAKE MCKENZIE

Case: 01-2006-CF-005261-A
Division: F3

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FINGERPRINTS OF DEFENDANT

Right Thumb	Right Index	Right Middle	Right Ring	Right Little
				
Left Thumb	Left Index	Left Middle	Left Ring	Left Little
				

Fingerprints taken by:

NAME CLARE NOBIS AMN
TITLE _____ DEPUTY SHERIFF 125



J. K. "Jess" Irby, Esq. - Circuit and County Court Clerk, Alachua County, Florida, certifies this is a true copy of the document of record for this office, which may have been redacted as required by law. Witness my hand and seal on December 6, 2018
J. K. "Jess" Irby, Esq. - Clerk of the Circuit Court
By [Signature]
Deputy Clerk

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant NORMAN BLAKE MCKENZIE, and that they were placed thereon by the defendant in my presence in Open Court this 10th day of May, 2007



[Signature]
PETER K SUEG
JUDGE OF THE CIRCUIT COURT

Filed in Open Court May 10th, 2007 by [Signature] D.C.

[Handwritten mark]

☐ Probation Violator
☐ Community Control Violator

☐ Resentence

Defendant: NORMAN BLAKE MCKENZIE

Case: 01-2006-CF-005261-A
Division: F3

SENTENCE
(As to Count 001)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, John O Floyd, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown.

(Check one if applicable)

- ☐ and the court having on (date) _____ deferred imposition of sentence until this date
- ☐ and the court having previously entered a judgment in this case on (date) _____ now resentsences the defendant
- ☐ and the court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control

It is the sentence of the court that:

- ☐ The defendant pay a fine of \$ _____, pursuant to section 775.083, Florida Statutes, plus \$ _____, as the 6% surcharge required by section 980.25, Florida Statutes.
- ☒ The defendant is hereby committed to the custody of the Department of Corrections.
- ☐ The defendant is hereby committed to the custody of the Alachua County Department of Corrections.
- ☐ The defendant is sentenced as a youthful offender in accordance with section 959.04, Florida Statutes.

To be imprisoned (check one; unmarked sections are inapplicable)

- ☐ For a term of natural life.
- ☒ For a term of LIFU

☐ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence complete the appropriate paragraph

- ☐ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.
- ☐ However, after serving a period of _____ imprisonment in _____ the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentence, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

- ☒ Jail Credit - It is further ordered that the defendant shall be allowed a total of 74 days as credit for time incarcerated before imposition of this sentence.

Consecutive/Concurrent as to Other Counts - It is further ordered that the sentence imposed for this count shall run (check one)

- ☐ consecutive to
- ☐ concurrent with the sentence set forth in count _____ of this case.

Defendant: NORMAN MCKENZIE Case Number: 01-204-CF-5261-A
SPECIAL PROVISIONS
(As to Count 1)

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

- ☒ Firearm - It is further ordered that the ^{10 years} ~~3-year~~ minimum imprisonment provision of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.
- ☐ Drug Trafficking - It is further ordered that the _____ mandatory minimum imprisonment provision of section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.
- ☐ Controlled Substance Within 1,000 Feet of School - It is further ordered that the 3-year minimum imprisonment provision of section 893.13(1)(a)1, Florida Statutes, is hereby imposed for the sentence specified in this count.
- ☐ Habitual Felony Offender - The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provision of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.
- ☐ Habitual Violent Felony Offender - The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of ____ year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.
- ☐ Law Enforcement Protection Act - It is further ordered that the defendant shall serve a minimum of ____ years before release in accordance with section 775.0823, Florida Statutes.
- ☐ Capital Offense - It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes.
- ☐ Short-Barreled Rifle, Shotgun, Machine Gun - It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentences specified in this count.
- ☐ Continuing Criminal Enterprise - It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count.
- ☐ Taking a Law Enforcement Officer's Firearm - It is further ordered that the 3-year mandatory minimum imprisonment provision of section 775.0875(1), Florida Statutes, is hereby imposed for the sentence specified in this count.
- ☐ Prison Credit - It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.
- ☐ Sexual Predatory - It is further ordered that the Defendant be designated sexual predator pursuant to 775.21, Florida Statutes. Factual findings consistent with this provision is by separate order.
- ☐ Sexual Offender - It is further ordered that the Defendant be declared a sexual offender as defined in 943.0435, 944.606, and 944.607, Florida Statutes.

☐ Probation Violator
☐ Community Control Violator

☐ Resentence

Defendant: NORMAN BLAKE MCKENZIE

Case: 01-2006-CF-005261-A
Division: F3

SENTENCE
(As to Count 002)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, John O Floyd, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown,

(Check one if applicable)

- ☐ and the court having on (date) _____ deferred imposition of sentence until this date
- ☐ and the court having previously entered a judgment in this case on (date) _____ now resentsences the defendant
- ☐ and the court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control

It is the sentence of the court that:

- ☐ The defendant pay a fine of \$ _____, pursuant to section 775.083, Florida Statutes, plus \$ _____, as the 6% surcharge required by section 980.25, Florida Statutes.
- ☒ The defendant is hereby committed to the custody of the Department of Corrections.
- ☐ The defendant is hereby committed to the custody of the Alachua County Department of Corrections.
- ☐ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To be imprisoned (check one; unmarked sections are inapplicable)

- ☐ For a term of natural life.
- ☒ For a term of Life

☐ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence complete the appropriate paragraph

- ☐ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.
- ☐ However, after serving a period of _____ imprisonment in _____ the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentence, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

- ☒ Jail Credit - It is further ordered that the defendant shall be allowed a total of 74 days as credit for time incarcerated before imposition of this sentence.

Consecutive/Concurrent as to Other Counts - It is further ordered that the sentence imposed for this count shall run (check one)

- ☐ consecutive to
- ☒ concurrent with the sentence set forth in count I of this case.

Defendant: NORMAN McKENZIE Case Number: 01-2006-CF-5261-A
SPECIAL PROVISIONS
(As to Count 2)

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

- ☒ Firearm - It is further ordered that the 10 years ~~3-year~~ minimum imprisonment provision of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.
- ☐ Drug Trafficking - It is further ordered that the _____ mandatory minimum imprisonment provision of section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.
- ☐ Controlled Substance Within 1,000 Feet of School - It is further ordered that the 3-year minimum imprisonment provision of section 893.13(1)(e)1, Florida Statutes, is hereby imposed for the sentence specified in this count.
- ☐ Habitual Felony Offender - The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provision of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.
- ☐ Habitual Violent Felony Offender - The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of ____ year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.
- ☐ Law Enforcement Protection Act - It is further ordered that the defendant shall serve a minimum of ____ years before release in accordance with section 775.0823, Florida Statutes.
- ☐ Capital Offense - It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes.
- ☐ Short-Barreled Rifle, Shotgun, Machine Gun - It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentences specified in this count.
- ☐ Continuing Criminal Enterprise - It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count.
- ☐ Taking a Law Enforcement Officer's Firearm - It is further ordered that the 3-year mandatory minimum imprisonment provision of section 775.0875(1), Florida Statutes, is hereby imposed for the sentence specified in this count.
- ☐ Prison Credit - It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.
- ☐ Sexual Predatory - It is further ordered that the Defendant be designated sexual predator pursuant to 775.21, Florida Statutes. Factual findings consistent with this provision is by separate order.
- ☐ Sexual Offender - It is further ordered that the Defendant be declared a sexual offender as defined in 943.0435, 944.606, and 944.607, Florida Statutes.

☐ Probation Violator
☐ Community Control Violator

☐ Resentence

Defendant: NORMAN BLAKE MCKENZIE

Case: 01-2006-CF-005261-A
Division: F3

SENTENCE
(As to Count 004)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, John O Floyd, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown,

(Check one if applicable)

- ☐ and the court having on (date) _____ deferred imposition of sentence until this date
- ☐ and the court having previously entered a judgment in this case on (date) _____ now resentsences the defendant
- ☐ and the court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control

It is the sentence of the court that:

- ☐ The defendant pay a fine of \$ _____, pursuant to section 775.083, Florida Statutes, plus \$ _____, as the 6% surcharge required by section 900.25, Florida Statutes.
- ☒ The defendant is hereby committed to the custody of the Department of Corrections.
- ☐ The defendant is hereby committed to the custody of the Alachua County Department of Corrections.
- ☐ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To be imprisoned (check one; unmarked sections are inapplicable)

- ☐ For a term of natural life.
- ☒ For a term of 15 years

☐ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence complete the appropriate paragraph

- ☐ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.
- ☐ However, after serving a period of _____ imprisonment in _____ the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentence, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

- ☒ Jail Credit - It is further ordered that the defendant shall be allowed a total of 74 days as credit for time incarcerated before imposition of this sentence.

Consecutive/Concurrent as to Other Counts - It is further ordered that the sentence imposed for this count shall run (check one)

- ☐ consecutive to
- ☒ Concurrent with the sentence set forth in count I of this case.

Defendant: Norman McKenzie Case Number: 01-2006-CF-5261-A
SPECIAL PROVISIONS
(As to Count 4)

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

- ☒ Firearm - It is further ordered that the 3-year minimum imprisonment provision of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.
- ☐ Drug Trafficking - It is further ordered that the _____ mandatory minimum imprisonment provision of section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.
- ☐ Controlled Substance Within 1,000 Feet of School - It is further ordered that the 3-year minimum imprisonment provision of section 893.13(1)(e)1, Florida Statutes, is hereby imposed for the sentence specified in this count.
- ☐ Habitual Felony Offender - The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provision of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.
- ☐ Habitual Violent Felony Offender - The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of ____ year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.
- ☐ Law Enforcement Protection Act - It is further ordered that the defendant shall serve a minimum of ____ years before release in accordance with section 775.0823, Florida Statutes.
- ☐ Capital Offense - It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes.
- ☐ Short-Barreled Rifle, Shotgun, Machine Gun - It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentences specified in this count.
- ☐ Continuing Criminal Enterprise - It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count.
- ☐ Taking a Law Enforcement Officer's Firearm - It is further ordered that the 3-year mandatory minimum imprisonment provision of section 775.0875(1), Florida Statutes, is hereby imposed for the sentence specified in this count.
- ☐ Prison Credit - It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.
- ☐ Sexual Predatory - It is further ordered that the Defendant be designated sexual predator pursuant to 775.21, Florida Statutes. Factual findings consistent with this provision is by separate order.
- ☐ Sexual Offender - It is further ordered that the Defendant be declared a sexual offender as defined in 943.0435, 944.606, and 944.607, Florida Statutes.

Defendant: NORMAN BLAKE MCKENZIE

Case: 01-2006-CF-005261-A

OTHER PROVISIONS

☐ Retention of Jurisdiction - The court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983).

Consecutive/Concurrent as to Other Convictions - It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run

(check one)

- ☐ consecutive to
☒ concurrent with

(check one) the following:

- ☒ any active sentence being served.
☐ specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of Alachua County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to the assistance of counsel in taking the appeal at the expense of the state on showing of indigence.

In imposing the above sentence, the Court further orders: _____

In imposing the above sentence, the Court further recommends: _____

If a bail bond is in effect and has not been forfeited, the bond is hereby cancelled and the surety is discharged from liability on such bond. If the bond is a blanket bond covering multiple cases, the surety is discharged from this case only and the bond shall

DONE AND ORDERED in Open Court in Gainesville, Alachua County, Florida this 10th day of May, 2007

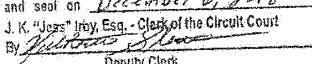

PETER K. SIEG
Judge of the Circuit Court

Filed in Open Court May 10, 2007 by  D.C.

I HEREBY CERTIFY THAT A COPY OF THIS Judgment was furnished by U.S. Mail and/or hand delivery at the addresses of record to counsel for the state and defense/defendant pro se this _____ day of _____, 20____.

BY Deputy Clerk: _____



J. K. "Jess" Irby, Esq. - Circuit and County Court Clerk, Alachua County, Florida, certifies this is a true copy of the document of record for this office, which may have been redacted as required by law. Witness my hand and seal on December 6, 2018
J. K. "Jess" Irby, Esq. - Clerk of the Circuit Court
By 
Deputy Clerk

IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

STATE OF FLORIDA

vs

NORMAN BLAKE MCKENZIE

Case: 01-2006-CF-005261-A

Division: F3

ORDER ESTABLISHING MONETARY SUMS

The defendant shall pay the following sums if checked:

☒ COSTS - MANDATORY

\$ 3.00	Assessment Center	Laws of Florida 94-444
3.00	Ct. Cost Clearing Trust Fund	F.S. 938.01
50.00	Crimes Compensation Trust Fund	F.S. 938.03
2.00	Local Law Enf. Training	F.S. 938.15 & A.C. Ord. 04-10
65.00	Ct. Facilities, Legal Aid, Law Library	F.S. 938.185, Ala. Co. Ord. 05-08
3.00	Teen Court	F.S. 938.19 & Ala. Co. Ord. 05-08
<u>126.00</u>		

☐ FELONY COSTS - MANDATORY

\$ 200.00 Additional Costs, Felony F.S. 938.05(1)(a)

☐ MISDEMEANOR/CRIMINAL TRAFFIC COSTS - MANDATORY

\$ 50.00 Additional Costs, Misdemeanor F.S. 938.05(1)(b)

☐ DUI ADDITIONAL COSTS - MISDEMEANOR - MANDATORY

\$ 135.00	DUI Court Cost	F.S. 938.07
15.00	Local Substance Abuse Program cost	F.S. 938.13 & A.C. Ord. 04-10
<u>15.00</u>	State Court Facilities surcharge	F.S. 318.18(13)(a) & Ord. 04-10
165.00		

☐ DUI ADDITIONAL COSTS - FELONY - MANDATORY

\$ 135.00	DUI Court Cost	F.S. 938.07
<u>15.00</u>	State Court Facilities surcharge	F.S. 318.18(13)(a) & Ord. 04-10
150.00	(Does not include MM Substance Abuse Program cost per F.S. 938.13)	

- ☐ \$ _____ Reimbursement (Sex Crimes), F.S. 943.325(10)(a).
☐ \$ _____ Forensic Physical Examination (Sex Crimes), F.S. 960.28.
☒ \$ 40.00 Public Defender Application Fee, F.S. 27.52(1)(b).
☐ \$ 201.00 Violent Crimes Surcharge, F.S. 938.08.
☐ \$ 151.00 Rape Crisis Trust Fund, F.S. 938.085.
☐ \$ 101.00 Additional Court Cost Certain Crimes Against Minors, F.S. 938.10.

☐ PREVIOUSLY ORDERED MONETARY SUMS REDUCED TO CIVIL JUDGMENT.

☐ PAY PREVIOUSLY ORDERED MONETARY SUMS.

RESTITUTION

☐ The Court reserves jurisdiction to establish restitution at hearing, after notice, within 60 days.

A hearing is scheduled for _____ at _____ AM/PM.

☐ \$ _____ See attached Civil Restitution Lien Order, which is incorporated herein by reference.

[Number of Liens _____]

FINES

- ☐ \$ _____ Total Fine _____ pursuant to F.S. 775.083; + 5% surcharge _____ pursuant to F.S. 938.04.
☐ \$ _____ Total Fine _____ (Result of Injury/death) pursuant to F.S. 775.0835(1); + 5% surcharge _____ pursuant to F.S. 938.04.
☐ \$ _____ Total DUI fine _____ pursuant to F.S. 318.193(2)(a)-(b); + 5% surcharge _____ pursuant to F.S. 938.04. (min. 1st \$250, 2nd \$500, 3rd \$1000)
☐ \$ _____ Total DUI fine _____ pursuant to F.S. 318.193(4), .20 percent or higher BAL or passenger under 18. + 5% surcharge _____ pursuant to F.S. 938.04. (min. 1st \$500, 2nd \$1,000, 3rd \$2000)
☐ \$ 20.00 Crime Stopper pursuant to F.S. 938.06, Fine required.
☐ \$ _____ Crimes Prevention BOCC Fund 775.083(2), F.S. (\$20.00 misdemeanor; \$50.00 felony). Fine required.
☐ \$ _____ County Alcohol & Drug Abuse Trust Fund pursuant to F.S. 938.21 or 938.23 and County Ordinance 04.10 (Fine required)
☐ \$ _____ Trafficking pursuant to F.S. 893.135. (min. amount determined by subsection charged)
☐ Driver's License Suspension/Revocation (Drug Offenses) pursuant to F.S. 322.055 _____ Months
☐ Driver's License Suspension/Revocation (DUI), pursuant to F.S. 322.28 _____ Months



NORMAN BLAKE MCKENZIE

01-2006-CF-005281-A

Page 2

DISCRETIONARY COSTS

- ☒ \$ 50.00 Public Defender costs and fees _____ total hours expended, as ordered in the attached Order Awarding Attorney's Fees and Costs of Defense which is incorporated herein by reference, F.S. 938.29.
- ☐ \$ _____ Costs of Investigation and Prosecution, which is incorporated herein by reference, or as may be determined at hearing, after notice, within 60 days, F.S. 938.27. See attached Order.
- ☐ \$ 100.00 Florida Crimes Lab (FDLE Lab) pursuant to F.S. 938.25. (may assess fine required, F.S. 893.13)
- ☐ \$ _____ Medical Costs in County Jail pursuant to F.S. 951.032.
- ☐ \$ 50.00 Misdemeanor Probation Clerk's fee pursuant to F.S. 949.09(1)(b).
- ☐ \$ _____ State Attorney Worthless Check Fees pursuant to F.S. 832.08(5)(a)(b)(c) (if requested).

TOTAL SUMS ORDERED SHALL BE PAID AS FOLLOWS:

- ☐ Through defendant's probation officer in equal monthly installments in an amount sufficient to pay the total sum in full three months before the end of the probationary period.
- ☐ Through the Clerk of Court in full on or before the compliance court date given to defendant by separate notice with \$25.00 fee pursuant to F.S. 28.24(26)(c).
- ☒ Civil judgment(s) shall be entered for the ordered sums.

The foregoing costs are in addition to any costs of supervision the court may have ordered in separate order of probation.

DONE AND ORDERED in Open Court in Gainesville, Alachua County, Florida this 10th day of May, 2007


PETER A. SIEG
Judge of the Circuit Court

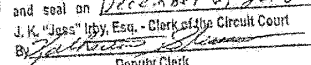
Filed in Open Court May 10, 2007 by  D.C.

Copies to: State Attorney, Defense Counsel, Probation and Parole

Attachments (if applicable): Order Awarding Costs of Investigation and Prosecution; Order Awarding Attorney's Fees and Costs of Defense; Civil Restitution Lien Order

12-21-2006 Felony Monetary Obligations



J. K. "Jess" Irby, Esq., Circuit and County Court Clerk, Alachua County, Florida, certifies this is a true copy of the document of record for this office, which may have been redacted as required by law. Witness my hand and seal on December 6, 2018
J. K. "Jess" Irby, Esq., Clerk of the Circuit Court
By 
Deputy Clerk

Filing # 94336846 E-Filed 08/17/2019 02:00:02 PM

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO.: CF06-01864

STATE OF FLORIDA

VS.

**NORMAN BLAKE MCKENZIE
DEFENDANT.**

**STATE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE THAT THE DEFENDANT
WOULD NOT BE ELIGIBLE FOR PAROLE IF SENTENCED TO LIFE
IMPRISONMENT AS A MITIGATING CIRCUMSTANCE**

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and files this Motion in Limine to Exclude Evidence That the Defendant Would Not Be Eligible for Parole if Sentenced to Life Imprisonment as a Mitigating Circumstance. In support of this motion, the State sets forth the following grounds:

1. On August 2, 2019, the defendant filed an Amended Notice of Intent to Present Expert Testimony of Mental Mitigation.
2. In Paragraph 12 of that notice, it appears that the defendant states that he intends to present, as a mitigating circumstance, evidence that he would not be eligible for parole if the jury returns a verdict in favor of life imprisonment rather than the death penalty.
3. The fact that the defendant would not be eligible for parole is not a statutorily enumerated mitigating circumstance under Florida Statutes § 921.141(7).
4. In several cases, the Florida Supreme Court has upheld a trial court's decision to exclude testimony regarding the unlikelihood that a defendant would be granted parole if given a sentence of life, rather than death. In light of these cases, which are outlined below, the State objects to the defense presenting any evidence that the defendant will be ineligible for parole if the jury does not return a verdict in favor of the death penalty on several grounds. First it is wholly irrelevant to

the issue of mitigating circumstances. Second, it presents a significant danger of misleading the jury. Third, the standard jury instructions sufficiently inform the jury of the nature and significance of a life sentence should it be imposed.

5. In *Merck v. State*, 975 So.2d 1054 (Fla. 2008), the defendant was convicted of first-degree murder, which occurred in 1991. Given the timeframe of the crime, the defendant would have been eligible for parole after 25 years if he had been given a life sentence. Because of that, the defense sought to call as a witness a Regional Administrator for the Florida Parole Commission to testify as to the unlikelihood of the defendant actually being paroled. *Id.* at 1060. The State objected, arguing that such testimony would be “wildly speculative” and irrelevant because the State would not be eliciting evidence or making any argument that the defendant would be considered for parole if given a life sentence. *Id.* The Court agreed and held that exclusion of such testimony was proper. *Id.*

6. The Court in *Merck* found precedent for its decision in *Jackson v. State*, 530 So.2d 269 (Fla. 1988), *King v. Dugger*, 555 So.2d 355 (Fla. 1990), and *Lucas v. State*, 568 So.2d 18 (Fla. 1990). In all three of these prior decisions, the Florida Supreme Court held that evidence concerning the possibility of parole was properly excluded from the penalty phases of those trials.

7. In *Jackson*, the defense sought to present as a mitigating circumstance that the parole commission’s philosophy at that time was to deny parole to defendants convicted of capital offenses. The Court found that such evidence was irrelevant to the issue of the defendant’s character and could be misleading given the fact that it was likely that none of the members of the parole commission at that time would still be serving at the time the defendant would become eligible for parole. *Jackson*, 530 So.2d at 274.

8. The defense in *King* attempted to introduce testimony by the executive director of the Florida Parole and Probation Commission that a life sentence included a 25-year minimum mandatory

sentence. Noting that mitigation properly includes only evidence of a “defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death,” the Court held that testimony pertaining to a minimum mandatory sentence was irrelevant. *King*, 555 So.2d at 359 (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) and *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 2327, 2333 (1988)). Moreover, it found that the standard jury instruction on the possible sentences for first-degree murder adequately informed the jury of the minimum mandatory portion of a life sentence. *Id.*

9. In *Lucas*, the defendant raised a number of issues on appeal, one of which involved a complaint that the trial court erred in disallowing the defendant to present evidence that he would not be paroled if given a life sentence. In a footnote, the Florida Supreme Court commented that the issue merited little discussion, while holding that the exclusion of such evidence was not improper. *Lucas*, 568 So.2d at 20 n.2.

10. In the instant case, the defense intends to offer testimony that the Defendant would not be eligible for parole if he is given a sentence of life without the possibility of parole, rather than a sentence of death. The defense’s purpose of presenting such evidence is precisely the same as if they were presenting evidence that it is unlikely that a parole-eligible defendant serving a life sentence will successfully obtain his release at some point in the future. In both circumstances, the defense is attempting to do nothing more than set the jury’s mind at ease that the defendant is not likely to get out of prison if they recommend a sentence of life.

11. Mitigation deals exclusively with the character of the defendant and the circumstances of the offense, not the character of the legal system to prevent the defendant from being released from incarceration. Like testimony that a defendant is not likely to obtain his release on parole, evidence that he is ineligible for parole is completely irrelevant to the issue of mitigation.

12. Lastly, both the preliminary and final instructions that the Court will be giving during the course of the trial specifically inform the jury that if they do not unanimously render a verdict in favor of the death penalty, then he will be sentenced to life imprisonment without the possibility of parole. *See Fla. Stand. Jury Instr. In Crim. Cases* §§ 7.10 and 7.11 (2018). These instructions adequately inform the jury of the nature, extent, and significance of a life sentence if it is recommended and imposed. However, as explained above, such evidence does not constitute a mitigating circumstance and should not be allowed.

WHEREFORE, the State hereby moves this Honorable Court to prohibit the defense from offering, during the trial's penalty phase, any testimony, evidence, or argument that the defendant is not eligible for parole if sentenced to life as a mitigating circumstance.

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, on August 17, 2019.

Respectfully submitted,

R.J. LARIZZA
STATE ATTORNEY

By: s/K. MARK JOHNSON
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0378320
4010 Lewis Speedway, Suite 2022, Bldg. A
St. Augustine, FL 32084
(904) 209-1620
ESERVICESTJOHNS@SAO7.ORG

Filing # 94457352 E-Filed 08/20/2019 02:20:02 PM

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

**NORMAN BLAKE MCKENZIE,
DEFENDANT.**

**STATE'S UNOPPOSED MOTION TO PRESENT
VIDEO-CONFERENCE TESTIMONY**

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and requests this Honorable Court to grant the State's Unopposed Motion to Present Video-Conference Testimony. In support thereof, the State sets forth the following grounds:

1. During the penalty phase of the trial in the above-styled cause, the State intends to present the testimony of Julio Cesar Saldanha.

2. In September of 2006, Mr. Saldanha was a detective with the Alachua Co. Sheriff's Office. The purpose of his testimony will be to present the facts and circumstances involved in a kidnapping that the defendant committed during that timeframe. The defendant was convicted of this kidnapping, and the State intends to present the circumstances of the crime to prove the "prior violent felony" aggravating circumstance. Accordingly, Mr. Saldanha is a material witness in the upcoming trial.

3. Shortly after Mr. Saldanha's involvement in this investigation, he moved to Tallahassee, Florida to work as a Special Agent with the Florida Department of Law Enforcement. He has since retired but continues to live in the state capital.

4. Mr. Saldanha has advised the State that, due to recent negative developments in his health condition, he is unable to travel to St. Augustine for the trial.

5. He further advised that he would be able to testify via a video conferencing system, such as Skype or Zoom, if permitted.

6. The State has contacted Junior Barrett, counsel for the defendant, and he has indicated that he has NO OBJECTION to Mr. Saldanha's testimony be presented in this fashion.

WHEREFORE, the State of Florida respectfully requests this Honorable Court to grant the State's Unopposed Motion to Present Video-Conference Testimony for the reasons set forth above.

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, on August 20, 2019.

R.J. LARIZZA
STATE ATTORNEY

By: s/K. MARK JOHNSON
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0378320
4010 Lewis Speedway, Suite 2022, Bldg. A
St. Augustine, FL 32084
(904) 209-1620
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL
CIRCUIT IN AND FOR ST JOHNS COUNTY, FLORIDA

CASE NO: 2006CF001864A

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE
Defendant.

**SECOND AMENDED NOTICE OF INTENT TO PRESENT EXPERT TESTIMONY
OF MENTAL MITIGATION**

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned attorney, and pursuant to Florida Rule of Criminal Procedure 3.202(b) and hereby gives notice of his intent to present expert testimony of mental mitigation during penalty phase of this case. In compliance with, the Defendant intends to present evidence of the following mental mitigation through the testimony of Dr. Stephen Bloomfield, PhD, Ed.D and Dr. Susan Skolly-Danziger, PharmD, MS, DABAT:

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
2. The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
3. That Defendant and his siblings suffered child abuse at the hands of his father.
4. That the Defendant's childhood was chaotic.
5. That Defendant and his sibling experienced a lack of adequate supervision after the divorce of his parents.
6. That Defendant witnesses his mother's constant abuse of drugs and alcohol.

7. That Defendant started huffing from spray cans at the age of 12.
8. That Defendant had an early and chronic abuse and dependency on alcohol and drugs.
9. That Defendant's introduction into the prison system at a young age has damaged him mentally
10. That Defendant had a cocaine dependency relapse starting in July of 2006 up to and after the crimes at bar.
11. That Defendant had a 7 days plus of consistent and voluminous use of cocaine use and abuse from July to October of 2006.
12. That Defendant would not be eligible for parole.
14. That Defendant cooperated with law enforcement at the time of his arrest.
15. That Defendant admitted to the murders.
16. Dr. Stephen Bloomfield, PhD, Ed.D. is located at 3725 Dupont St. Ct. S, Jacksonville, Florida 32217.
17. Dr. Susan Skolly-Danziger is located at 2300 Maitland Center Pkwy., Maitland, FL 32751.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-services delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 20th day of August, 2019.

/S/ JUNIOR BARRETT

Junior Barrett, ESQUIRE
FL. Bar No. 785687
Assistant Regional Counsel
Office of Regional Criminal Conflict &
Civil Regional Counsel, 5th District
101 Sunnyside Road, Suite 310
Casselberry, FL 32707
(407) 389-5140
tcollins@rc5state.com

Filing # 94502804 E-Filed 08/21/2019 08:38:18 AM

IN THE CIRCUIT OF THE SEVENTH JUDICIAL
CIRCUIT IN AND FOR ST JOHNS COUNTY, FL

STATE OF FLORIDA,
Plaintiff

CASE NO.:2006-001864CFMA

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

_____ /

DEFENSE SUPPLEMENTAL WITNESS LIST FOR PENALTY PHASE

COMES NOW the Defendant, Norman Blake McKenzie, by and through the undersigned attorney, and hereby add the following witnesses to the names of witnesses who may be called during the penalty phase in the above captioned cause.

Tammy Kimball, 75 Hotel Circle NE, Albuquerque, NM 87123
Olivia Roper,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished by eservice delivery to the Office of the State Attorney, eservicestjohns@sao7.org this August 21, 2019.

/s/ JUNIOR BARRETT

JUNIOR BARRETT

FLBN: 785687

Assistant Regional Counsel

Office of Criminal Conflict &

Civil Regional Counsel, 5th District

101 Sunnyside Road, Ste. 310

Casselberry, Florida 32707

(407) 389-5140

(407) 386-5139

jbarrett@rc5state.com

tcollins@rc5state.com

Hearing Notes

DATE: August 23, 2019
CIRCUIT JUDGE: MALTZ
STATE ATTORNEY: JOHNSON/DUNTON
DEFENSE ATTORNEY: BARRETT
CLERK: GELL
BAILIFF: STOKES
COURT REPORTER: RHONDA BOUNDS

STATE VS.: MCKENZIE, NORMAN BLAKE
CASE #: 06001864CFMA

CHARGE #: FIRST DEGREE MURDER (X2)

STATES MOTION IN LIMINE REGARDING DISPUTED REDACTIONS OF
DEFENDANTS INTERVIEW OF OCTOBER 5 2006- WILL BE TAKEN UP
MONDAY MORNING

STATES MOTION IN LIMINE TO EXCLUDE EVIDENCE THAT THE
DEFENDANT WOULD NOT BE ELIGIBALE FOR PAROLE IF SENTENCED
TO LIFE IMPRISONMENT AS A MITIGATING CIRCUMSTANCE – WILL BE
TAKEN UP MONDAY MORNING

STATES UNOPPOSED MOTION TO PRESENT VIDEOCONFERENCE
TESTIMONY

DEFENDANT NOT PRESENT AND MR BARRETT APPEARS
TELEPHONICALLY @833

JURY SELECTION SET TO START MONDAY MORNING

COURT AND PARTIES DISCUSS SCHEDULING FOR WEDNESDAY @837

COURT AND PARTIES DISCUSS VOIR DIRE @840

IN RECESS UNTIL MONDAY FOR JURY SELECTION @841

Filing # 94653336 E-Filed 08/23/2019 08:56:56 AM

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL
CIRCUIT IN AND FOR ST JOHNS COUNTY, FLORIDA

CASE NO: 552006CF001864A

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE
Defendant.

**MOTION FOR PROPER PROCEDURE FOR POST-CHALLENGE
QUESTIONING OF PROSPECTIVE JURORS**

COMES NOW, the Defendant, NORMAN BLAKE MACKENZIE, by and through he undersigned attorney and moves this Honorable Court to adopt the following procedure for post-challenge questioning of prospective jurors pursuant to Article I, Sec. 16 of the Florida Constitution and pursuant to the 4th, 5th, 6th, and 14th Amendments to the U.S. Constitution, and as grounds would show:

1. "Article I, section 16, of the Florida Constitution and the Sixth Amendment to the United States Constitution, individually and collectively, guarantee an accused the right to a jury trial in a criminal case." Dougherty v. State, 813 So. 2d 217, 223 (Fla. 2d DCA 2002)., and implicit in that right is the right to a fair and impartial judge and jury which is free from bias.
2. Further, the defendant has the constitutional right to inquire in depth, concerning every juror's true feelings about how an individual juror feels about a case despite a general answer that the juror would be fair and impartial and would follow the law.
3. "A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind despite assurances that they could be fair and impartial and would follow the law, if they are not "impartial and indifferent" as required by the sixth amendment.." Morgan v. Illinois, 504 U.S. 719 (1992); Busby v. State, 894 So. 2d 88, 95 (Fla. 2004), as revised on denial of reh'g (Feb. 3, 2005); Juede v. State, 837 So. 2d 1114 (Fla. 4th DCA 2003).

4. When a juror is challenged for cause the attorneys and the trial judge often try to “rehabilitate” the juror to once again make that juror acceptable.
5. “Rehabilitation” is improper if the goal is to get a juror to change or set aside his already expressed biased attitude.
6. A juror becomes subject to “rehabilitation” when he has stated something on the record that would otherwise disqualify that juror. Typically, this is when the court or counsel asks the so-called “magic question”.
7. The “magic question” is the practice of asking prospective jurors who have been challenged for cause if they will set aside their personal beliefs and decide the case based solely on the evidence and the court’s instructions of law.
8. The answer to that question is almost always “yes” especially when asked by a judge to a juror trying to cooperate and please the judge while trying to sound fair.
9. “Impartiality is not a technical conception. It is a state of mind.” United States v. Wood, 299 U.S. 123, 145 (1936). “Determination of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.” Wainwright v. Witt, 469 U.S. 412, 424 (1985).
10. The Florida Supreme Court added:

“It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias of prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?”.

Overton v. State, 801 So. 2d 877, 892 (Fla. 2001) citing Price v. State, 538 So. 2d 486 (Fla. 3d DCA 1989).
11. The “magic question” is therefore determinative of nothing other than possibly a prospective juror’s willingness to please the judge and should not be determinative of whether or not a juror should be excused. See, Price v. State.
12. Instead of relying on leading questions to try to get a juror to conform to the court’s instructions “... the trial court must look at all of the evidence before it.” to determine

if a cause challenge is proper. Denson v. State, 609 So. 2d 627, 628 (Fla. 4th DCA 1992).

13. In order to prevent the due process violations that would be caused by asking leading questions of prospective jurors who have been challenged for cause, Mr. McKenzie respectfully submits that the Court adopt the following approach in her trial.
 - a. After a challenge for cause is made, if the Court believes there is an ambiguity or inconsistency in the prospective juror's answer, the parties will have a hearing outside the presence of the jurors with the judge to clarify the issue.
 - b. After clarification of the issue concerning the cause challenge the Court will ask **non-leading questions** that do not call for a self-assessment of the prospective juror's capacity to "follow the law" or to "be fair." Mr. McKenzie submits that since the Judge is required to be neutral, asking open, non-leading questions do not give a juror the appearance that the court holds one position over another as it may appear when the judge asks leading questions to clarify a particular issue.
 - c. These questions should focus only on the juror's "willingness to perform her duties in a fair and impartial manner," and should not be "tailored to rehabilitate her as a qualified juror." (cite omitted).
 - d. Lastly, Mr. McKenzie submits that any questioning for the purpose of clarification on a challenge for cause be outside the presence of the other jurors so as not to convey a particular point of view because when a court "lectures" or instructs a prospective juror about the duty to "follow the law" and "be fair" in front of the rest of the panel, "these 'lectures' . . . sen[d] a strong message that the court [does] not approve of those who volunteer that they [are] biased." (citation omitted). Knowing the court would not want to do that, Mr. McKenzie, again asks that follow-up questioning on cause challenges be done outside the presence of the other jurors.
14. Mr. McKenzie makes this request pursuant to his constitutional rights to due process, effective assistance of counsel, and his right to equal protection under the law pursuant

to Article I, Sec. 16 of the Florida Constitution and pursuant to the 4th, 5th, 6th, and 14th Amendments to the US Constitution.

WHEREFORE based on the authority cited, the Defendant, respectfully asks this Court to establish the procedure outlined above to help insure that the process for selecting his jury will be protected under the rights due him.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 23rd day of August, 2019.

/S/ KENNETH HAMBURG
Kenneth Hamburg, ESQUIRE
FL. Bar No. 69008
Assistant Regional Counsel
Office of Criminal Conflict &
Civil Regional Counsel, 5th District
101 Sunnyside Road, Suite 310
Casselberry, FL 32707
(407) 389-5140
khamburg@rc5state.com

Hearing Notes

DATE: August 26, 2019

CIRCUIT JUDGE: H MATLZ

STATE ATTORNEY: M JOHNSON/J DUNTON

DEFENSE ATTORNEY: J BARRETT/KENNETH HAMBURG

CLERK: A KING/C GELL

BAILIFF: STOKES

COURT REPORTER: MARY GRAYBOSCH

STATE VS.: MCKENZIE, NORMAN BLAKE

CASE #: 06001864CFMA

JURY SELECTION

HOUSEKEEPING MATTERS:

- INQUIRY IN REGARDS TO SEQUESTRATION OF THE JURY

MOTION(S):

- STATE'S MOTION IN LIMINE REGARDING DISPUTED REDACTIONS OF DEFENDANT'S INTERVIEW OF OCTOBER 5, 2006

ARGUMENT BY STATE @8:40AM (JOHNSON)

ARGUMENT BY DEFENSE @8:43AM (BARRETT)

STATE RESPONSE @8:46AM (JOHNSON)

COURT'S RULING- (GRANTED) SHOULD BE REDACTED

- STATE'S MOTION IN LIMINE TO EXCLUDE EVIDENCE THAT THE DEFENDANT WOULD NOT BE ELIGIBLE FOR PAROLE IF SENTENCED TO LIFE IMPRISONMENT AS A MITIGATING CIRCUMSTANCE

ARGUMENT BY STATE @8:49AM (JOHNSON)

ARGUMENT BY DEFENSE @8:51AM (HAMBURG)

COURT'S RULING: GRANTED

- MOTION FOR PROPER PROCEDURE FOR POST-CHALLENGE QUESTIONING OF PROSPECTIVE JURORS (DEFENSE)

ARGUMENT BY DEFENSE @8:54AM (HAMBURG)
ARGUMENT BY STATE @8:56AM (JOHNSON)

COURT'S RULING-DENIED

JURY PANEL SEATED @9:56AM

JURY PANEL SWORN (VOIR DIRE) @10:04AM

COURT GIVES INITIAL INSTRUCTIONS TO JURY PANEL @10:07AM

COURT INQUIRY OF JURY PANEL @10:13AM

COURT INFORMS PANEL OF THE CASE @10:54AM

STATE READS LIST OF WITNESSES @10:55AM (JOHNSON)

DEFENSE READS LIST OF WITNESSES @10:58AM (BARRETT)

- COURT READS INDICTMENT @10:59AM
- SCHEDULING

MORNING BREAK @11:10AM (15 MIN)

HOUSEKEEPING MATTERS @11:11AM

DISMISSING JUROR #8, #15, #27, #45, #54, #18 (DEFENSE FOR CAUSE)
DENIED AT THIS TIME/ #41 (DEFENSE FOR CAUSE) DENIED AT THIS
TIME

COURT IN RECESS UNTIL 11:25AM

***** CLERK CHANGE- C GELL *****

COURT COMES TO ORDER @1123

PROSPECTIVE JURORS BROUGHT BACK IN AND SEATED @1126

COURT INFORMS PROSPECTIVE JURORS OF PENALTIES ATTACHED TO
THESE CHARGES @1130

COURT QUESTIONS EACH PROSPECTIVE JUROR ABOUT THEIR
FEELINGS/OPINIONS ABOUT THE DEATH PENALTY @1136

COURT BREAKS FOR LUNCH- TO RETURN AT 130 @1215

COURT AND PARTIES DISCUSS JURORS @1216

COURT IN RECESS, TO RETURN AT 130 #1226

#23, #38, #51, #12, #16, #22, #36, #37, #39, #41 (ALL FOR CAUSE) -TO BE
EXCUSED AFTER LUNCH

COURT BACK IN SESSION @129

PROSPECTIVE JURORS BACK IN AND SEATED @140

STATES QUESTIONS PROSPECTIVE JURORS @141

PROSPECTIVE JURORS OUT FOR BREAK- FEW STAYED BEHIND FOR
FURTHER QUESTIONING @258

COURT IN RECESS FOR 5 MINUTES @314

COURT COMES TO ORDER @317

PROSPECTIVE JURORS BACK IN AND SEATED @323

DEFENSE QUESTIONS PROSPECTIVE JUROR @324

SIDE BAR @337

DEFENSE QUESTIONING CONTINUED @339

PROSPECTIVE JURORS OUT FOR SELECTION PROCESS @357

COURT AND PARTIES DISCUSS SELECTION @408

JURORS SELECTED AND REMAINING EXCUSED @451

JURORS SWORN @452

JURORS TO RETURN TOMORROW AT 845

COURT IN RECESS UNTIL TOMORROW AT 845 @457

TRIAL

TRIAL EXHIBITS CONTROL LIST

MCKENZIE, NORMAN BLAKE
 (Defendant's Name)

CASE NO: 06001864CFMA

CONTROL LIST OF: STATE

Date	Item	I.D. #	Evidence #	Location*
08/27/2019	IN LIFE PHOTO OF VICTIMS	QQ	39	PREVATT
08/27/2019	KNIFE	S	19	BURRESS
08/27/2019	HATCHET	T	20	BURRESS
08/27/2019	CRIME SCENE PHOTOS (CD & PRINT OUT)	RR1-RR2	40A-40B	BURRESS
08/27/2019	CONTENTS OF JOHNSTONS WALLET	V	22	BURRESS
08/27/2019	CONTENTS OF PEACOCKS WALLET	U	21	BURRESS
08/27/2019	CONSTITUTIONAL RIGHTS	C	3	BURRESS
08/27/2019	REDACTED INTERVIEW WITH DEFENDANT (VIDEO)	SS	41	BURRESS
08/27/2019	AUTOPSY PHOTOS OF JOHNSTON (CD & PRINT OUT)	DDD1-DDD2	42A-42B	BULIC
08/27/2019	DEFENDANTS LATENT FINGERPRINT	TT	43	OTTER
08/27/2019	J/S 84-3709CF	UU	44	OTTER
08/27/2019	J/S 90-19206CF	VV	45	OTTER
08/27/2019	J/S 06-5259CF	AAA	46	OTTER
08/27/2019	J/S 06-5261CF	BBB	47	OTTER
08/27/2019	J/S 07-532CF	YY	48	OTTER
08/27/2019	J/S 07-585CF	ZZ	49	OTTER
08/27/2019	J/S 07-586CF	XX	50	OTTER
08/27/2019	J/S 06-4213CF	CCC	51	OTTER
08/28/2019	CONSTITUTIONAL RIGHTS	C	3	ROLLINS
08/28/2019	DVD INTERVIEW 10/05/06	EEE	52	ROLLINS

*For Evidence Custodian Use Only

06-278175
CR#

YOUR CONSTITUTIONAL RIGHTS

NAME NORMAN BLAKE MCKENZIE
(first) (last)
CHARGE: MURDER
PLACE: SJSO INVESTIGATIONS
DATE: 02-06-07
TIME: 1352 HOURS

You have the following rights under the United States Constitution: NBM

You do not have to make a statement or say anything. NBM

Anything you say can be used against you in court. NBM

CHOOSE THE APPROPRIATE ADULT/JUVENILE PARAGRAPH BELOW:

<input checked="" type="checkbox"/> ADULT	You have the right to talk to a lawyer for advice before you <u>NBM</u> make a statement or before any questions are asked of you, <u>NBM</u> and to have a lawyer with you during any questioning. <u>NBM</u>
<input type="checkbox"/> JUVENILE	You have the right to talk to a lawyer for advice before you make a statement or before any questions are asked of you, and to have a lawyer or your parents or legal guardian with you during any questioning.

If you cannot afford to hire a lawyer, one will be appointed for you before any questioning if you wish.

If you do answer questions, you have the right to stop answering questions at any time and consult with a lawyer.

Det. J. Roll # 3140
Witness

Det. Tim R # 3036
2nd Witness if available

Norman B McKenzie
Signature 02-06-07

CASE NUMBER: 06-1864-CF-56

STATE'S EXHIBIT C for IDENTIFICATION

FILED IN EVIDENCE AS #: 3

Date: AUGUST 20, 2007

[Signature] CHERYL STRICKLAND
CLERK OF COURT
By: _____, D.C.



SJSO07EVP005626

Offense #:

06-278175

Exhibit #: 158

Recovered: 7/17/2007

Article Type: DOCUMENTS

Make:

Serial #:

Model:

OAN#:

Description: CONSTITUTIONAL RIGHTS FORM(N MCKENZIE)
10-05-06

AVISO DE DERECHOS
(YOUR CONSTITUTIONAL RIGHTS)

EVIDENCE

DET. T. BARRÉS # 3031
CLR # 06-278175
HOMICIDE
PKC #

ES OJA LA FRASE QUE LE COMBIENE
CONSTITUTIONAL RIGHTS

ADVERTENCIA	Si usted desea, usted tiene el derecho de llamar a un abogado antes de contestar cualquier pregunta, y de contestar las preguntas con un abogado presente.
Q	Si usted desea, usted tiene el derecho de dejar de contestar cualquier pregunta en cualquier momento para tener al abogado, o para pedirle que le haga algunas preguntas.
	Si usted desea, usted tiene el derecho de dejar de contestar cualquier pregunta en cualquier momento para tener al abogado, o para pedirle que le haga algunas preguntas.

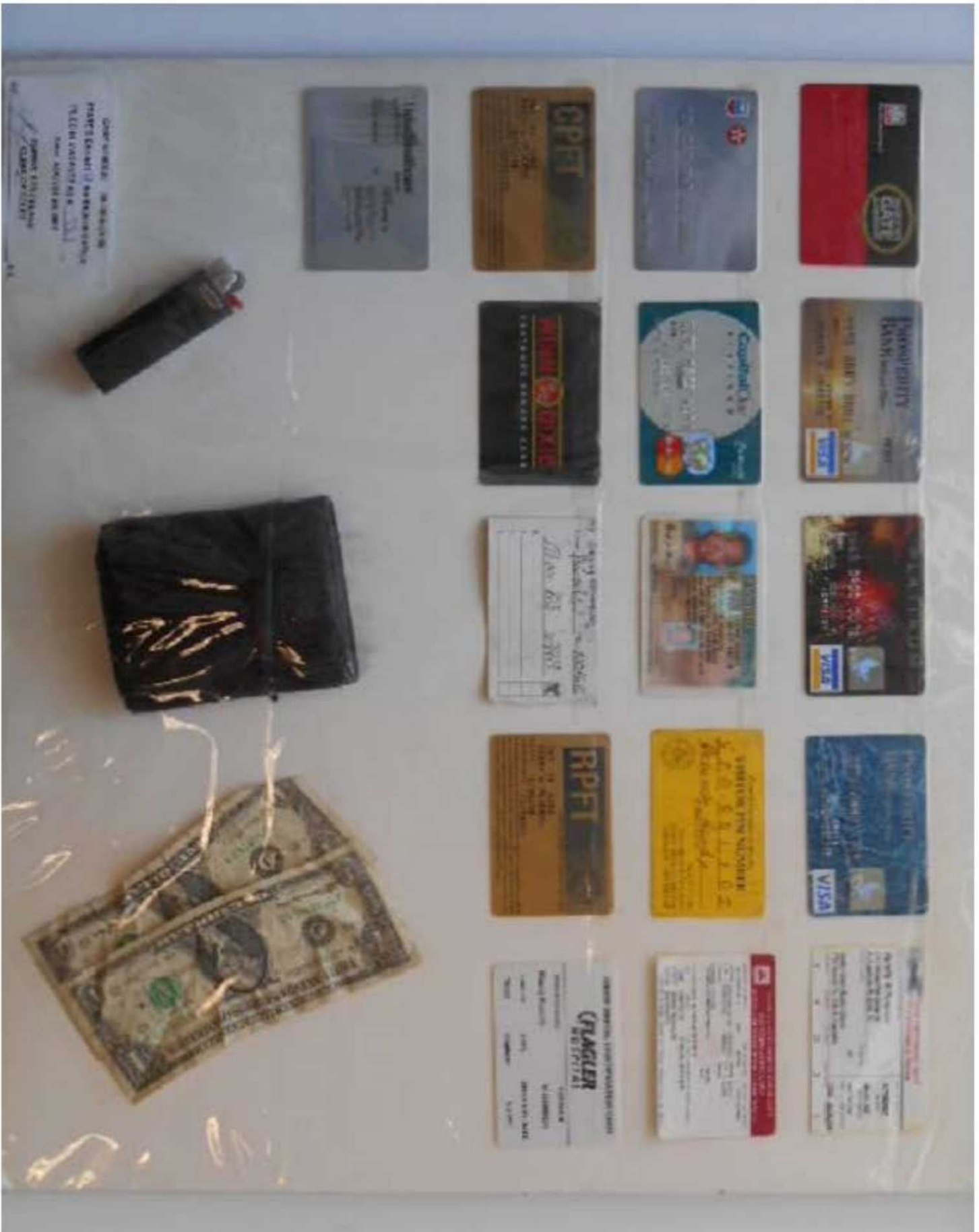
Si usted desea, usted tiene el derecho de dejar de contestar cualquier pregunta en cualquier momento para tener al abogado, o para pedirle que le haga algunas preguntas.

Firma (Signature)

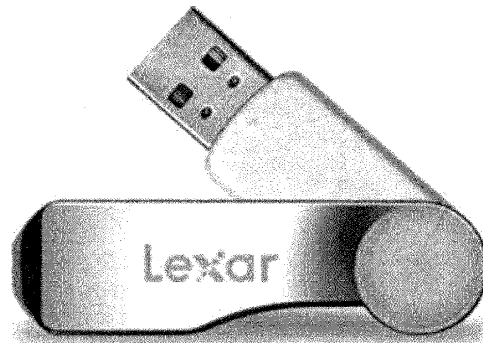
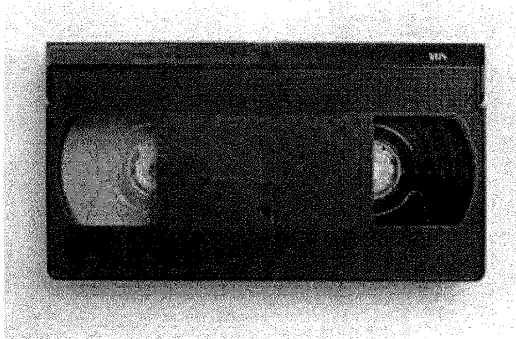
Testigo (Witness)









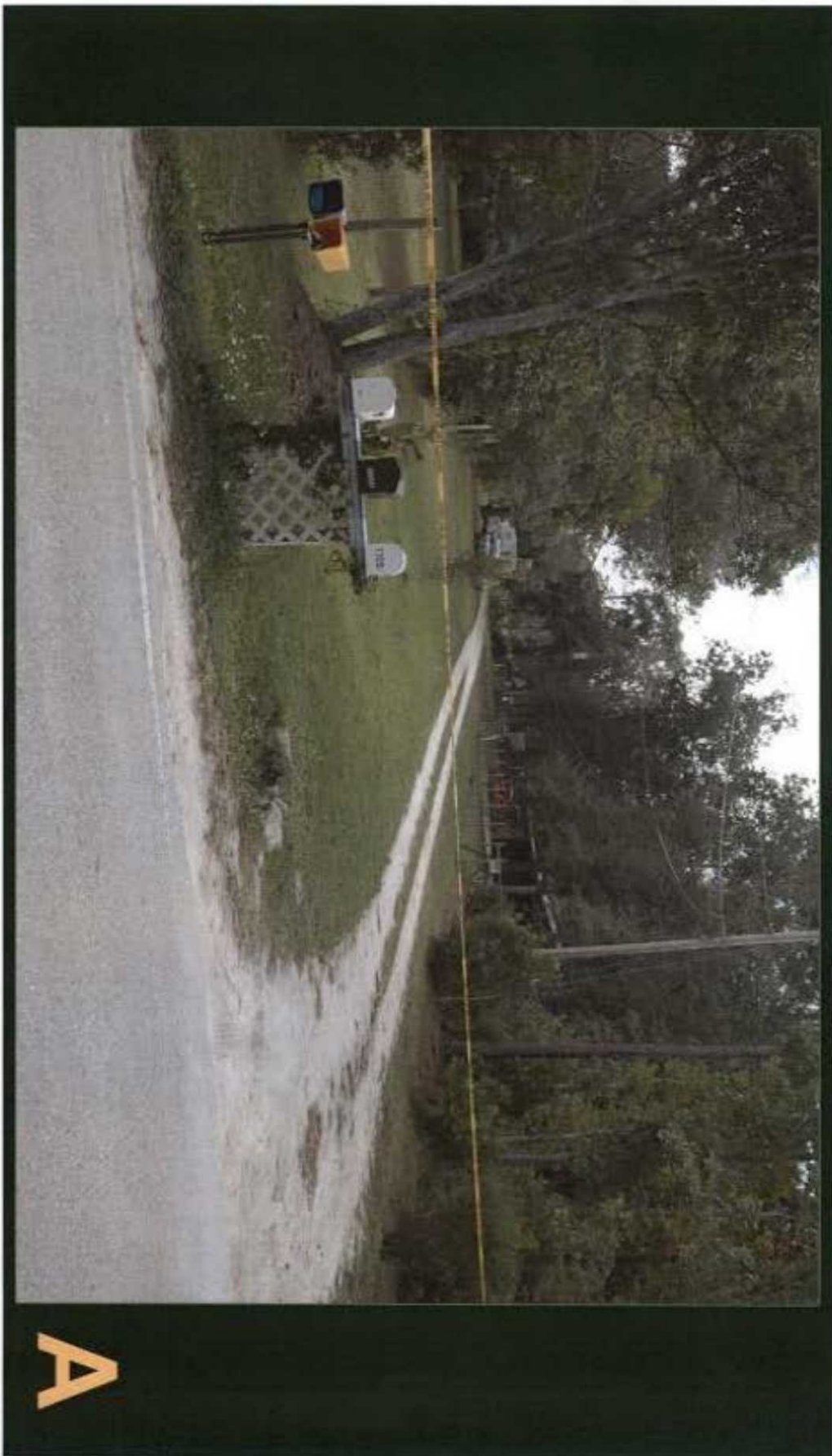


**THIS ITEM(S) IS ON ONE
OF THE ABOVE DEVICES**

**ST. JOHNS COUNTY CLERK OF COURT CRIMINAL DIVISION
EVIDENCE**

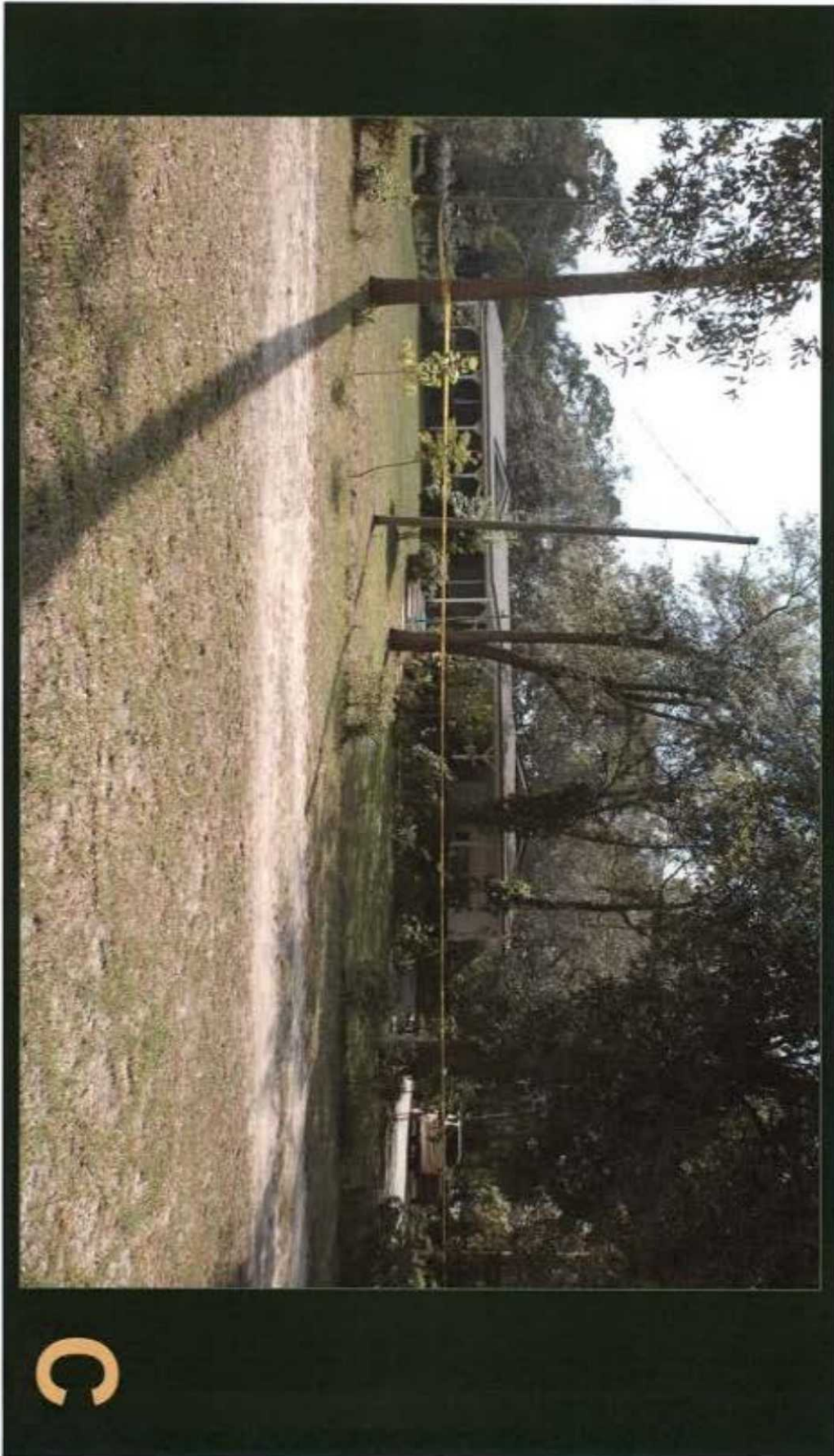


Cmdr. Timothy Burres
St. Johns Co. Sheriff's Office



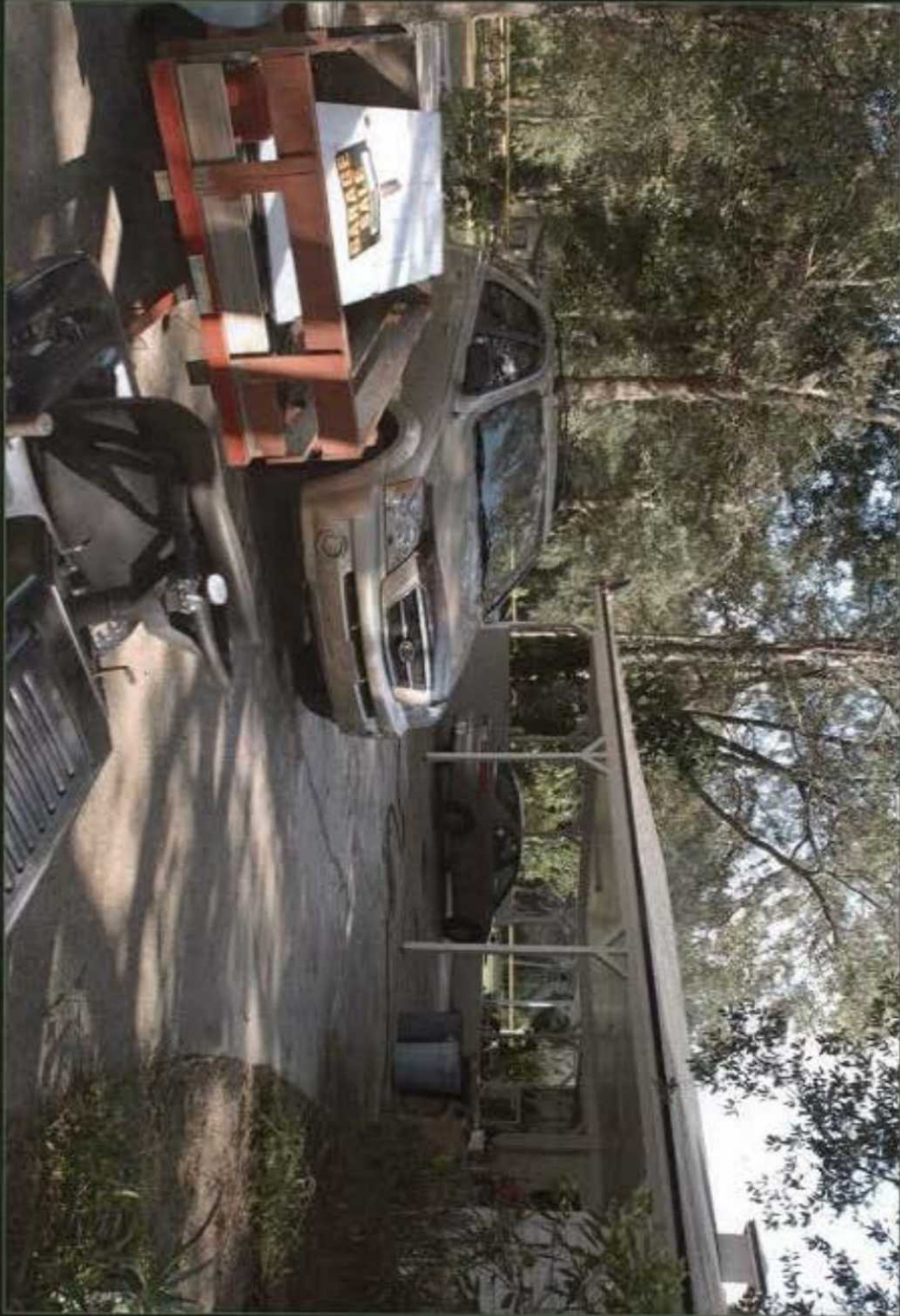


B











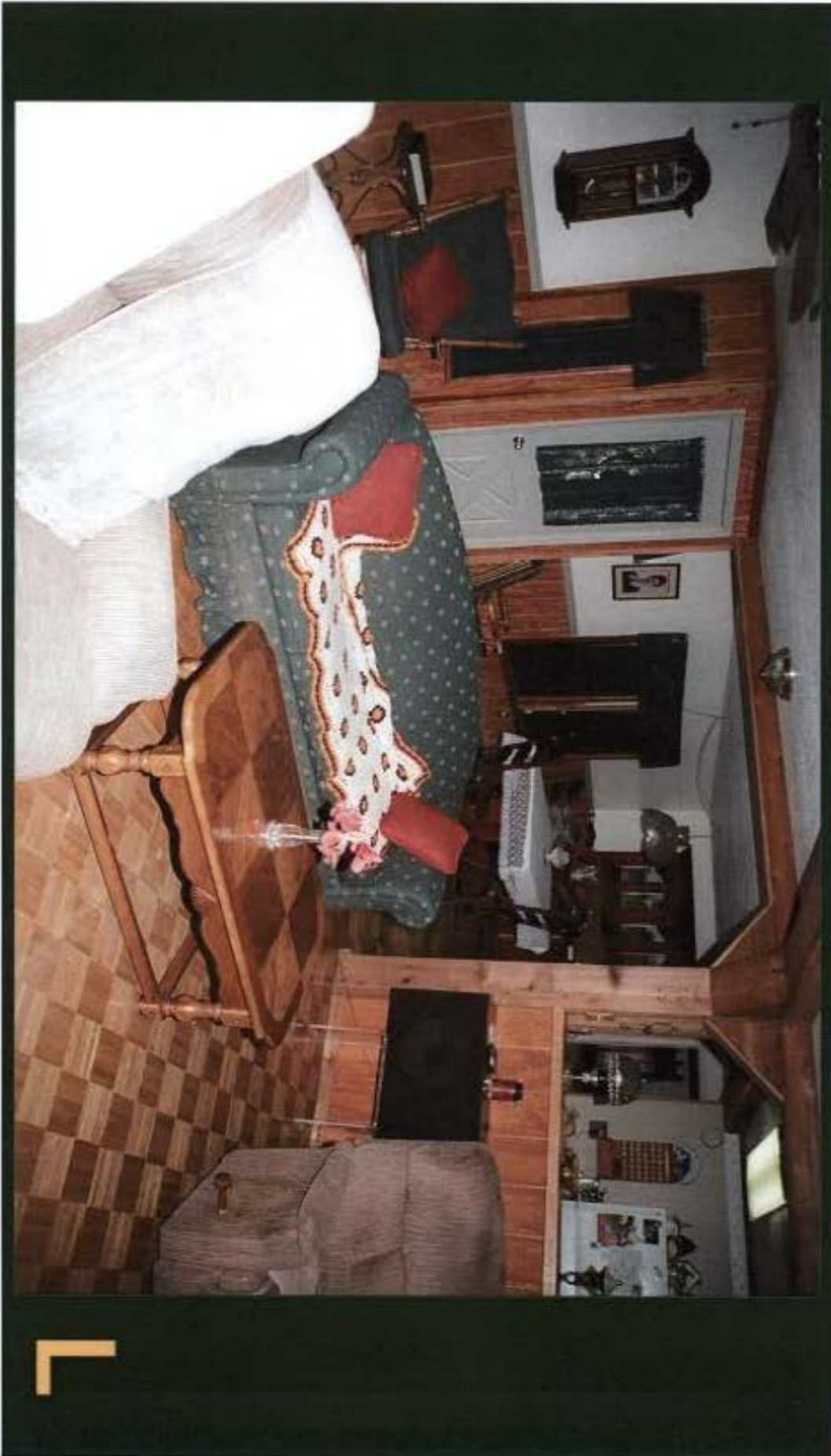


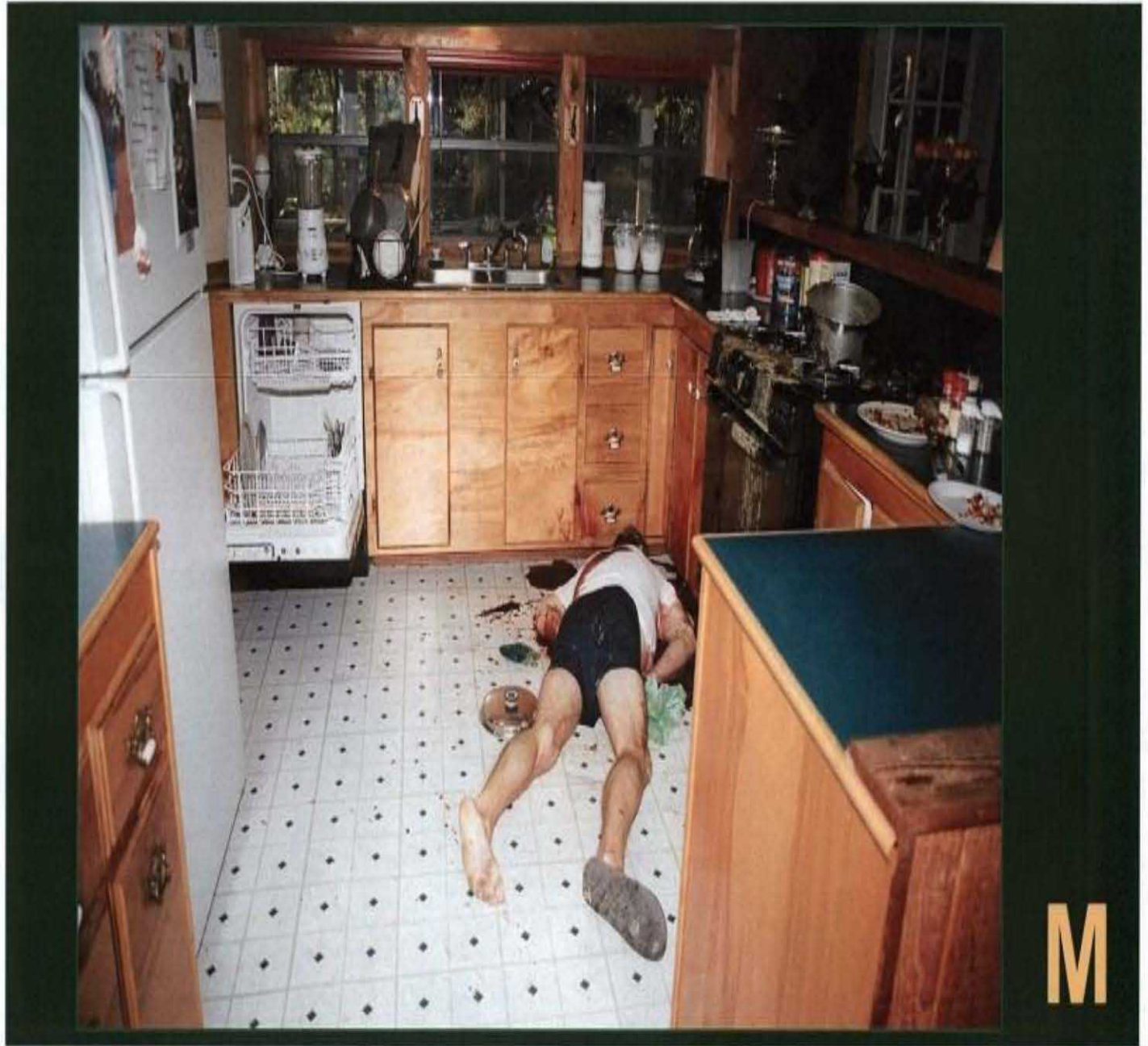
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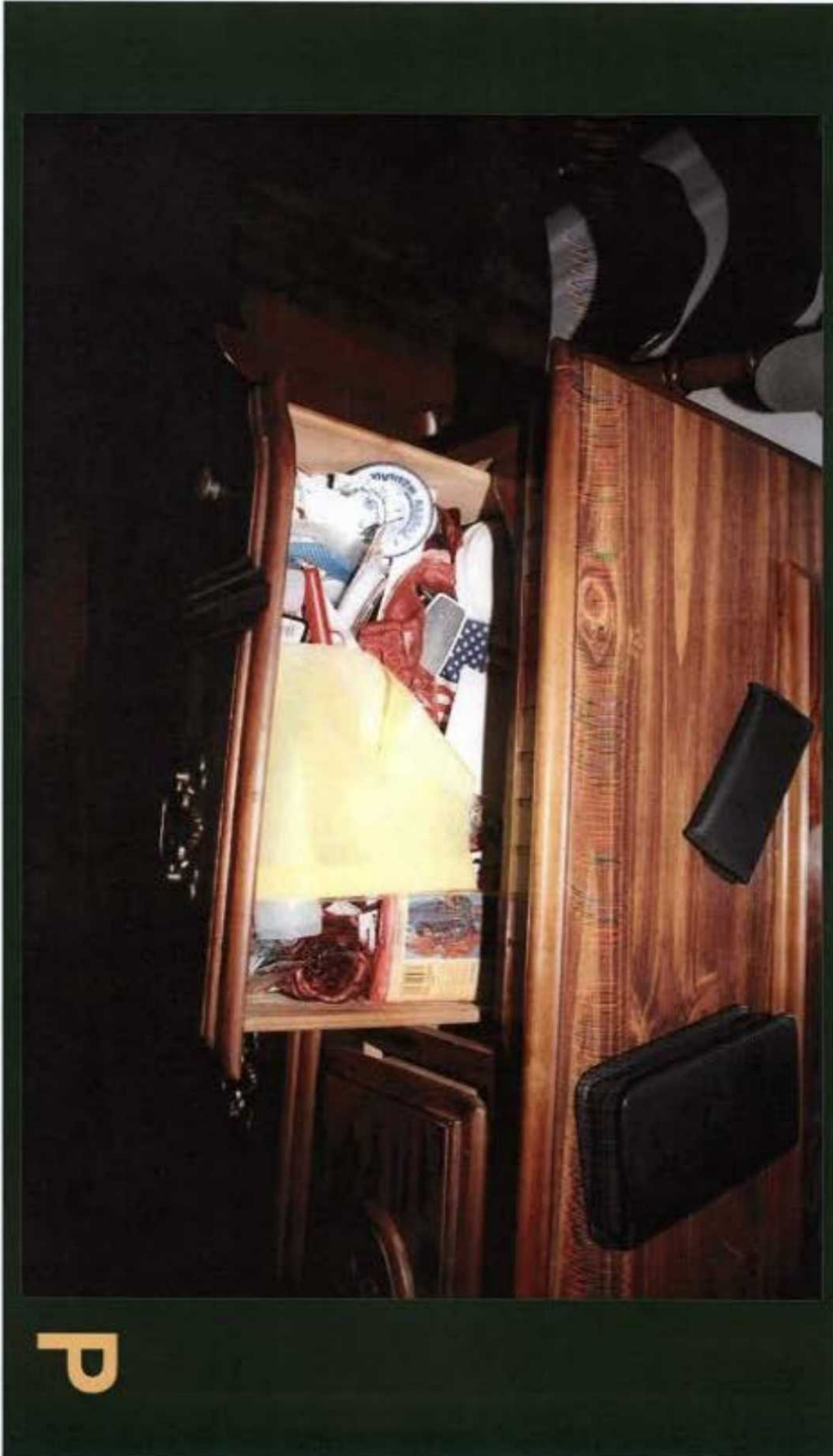




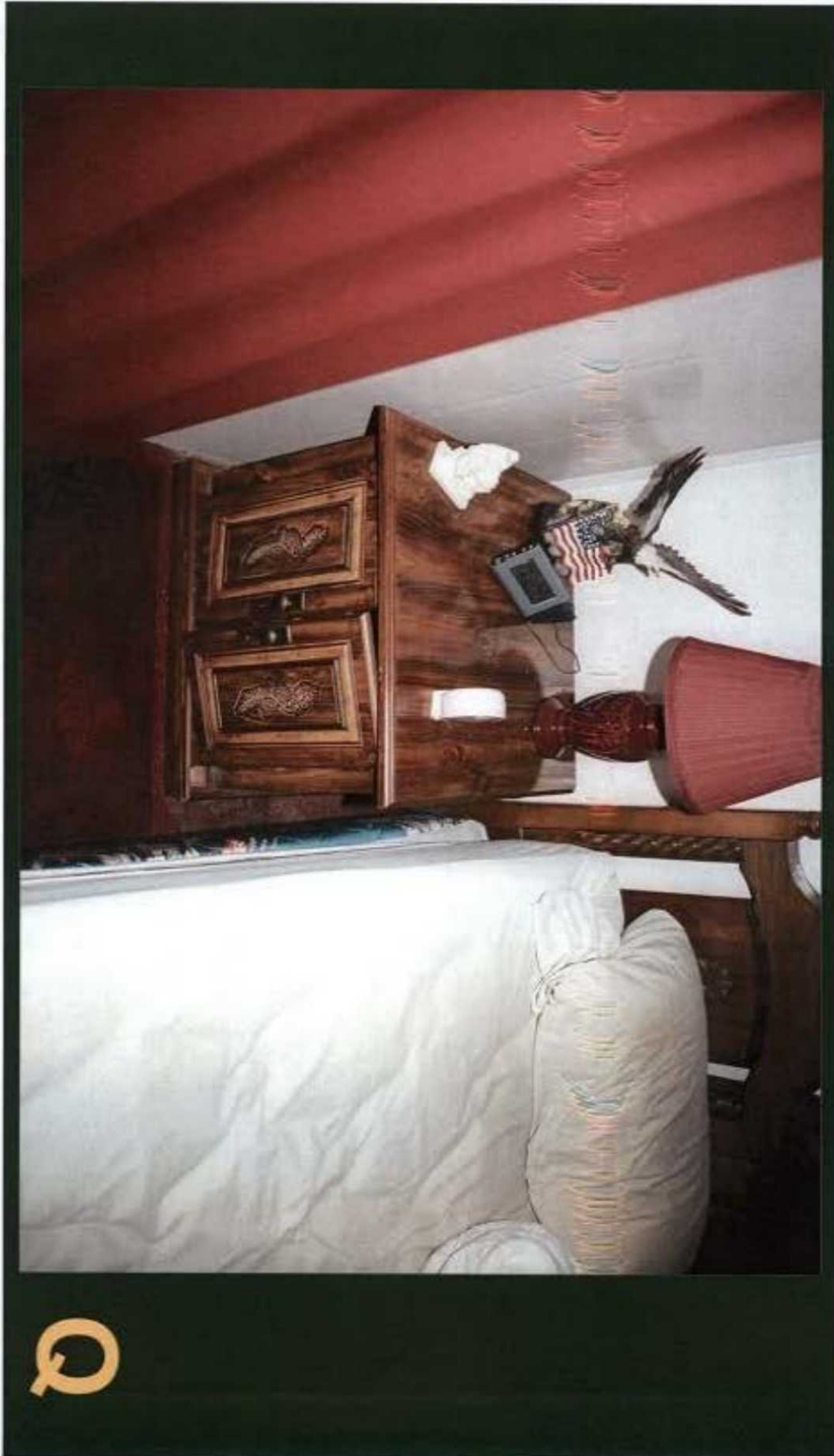








P



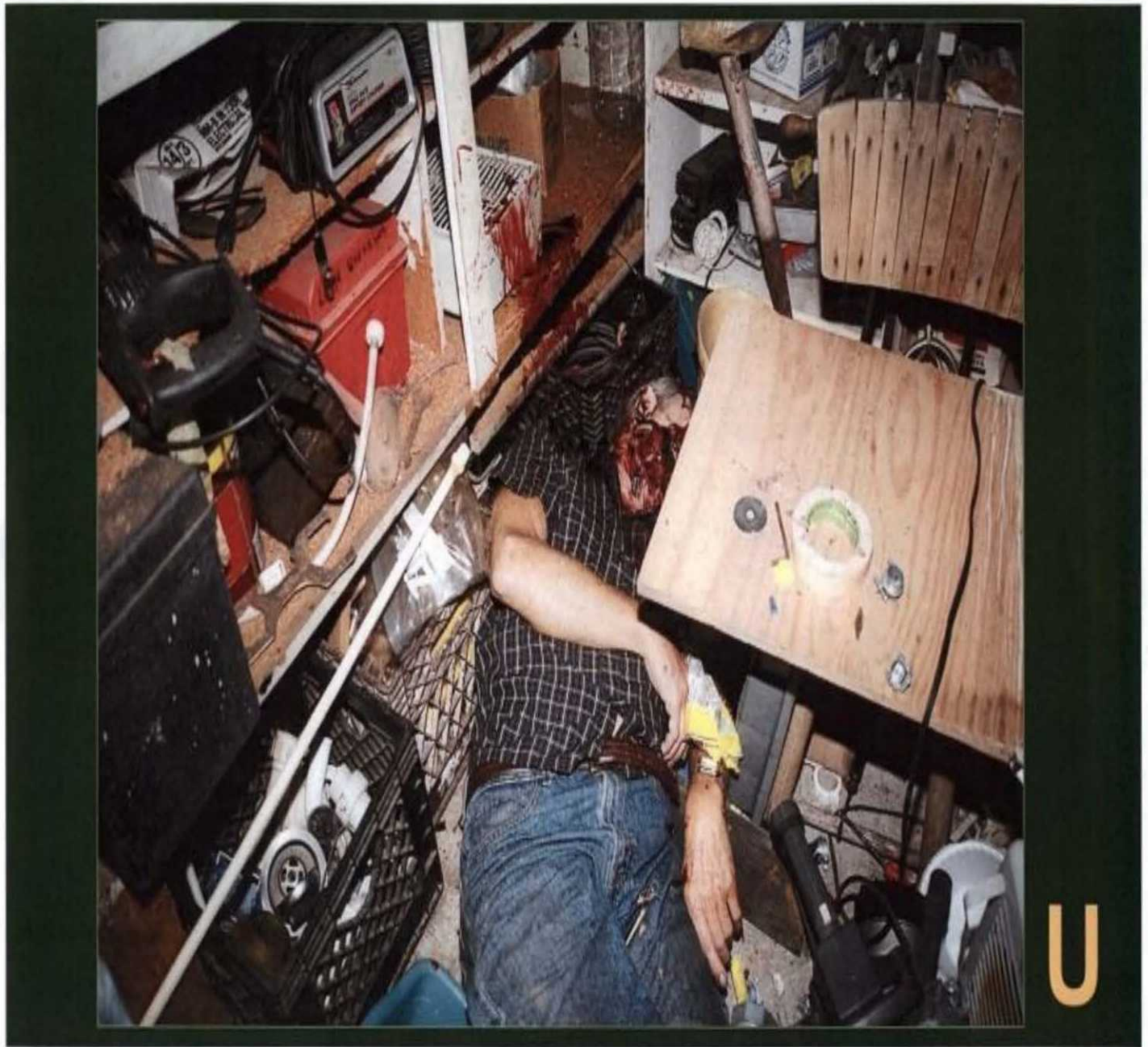


R



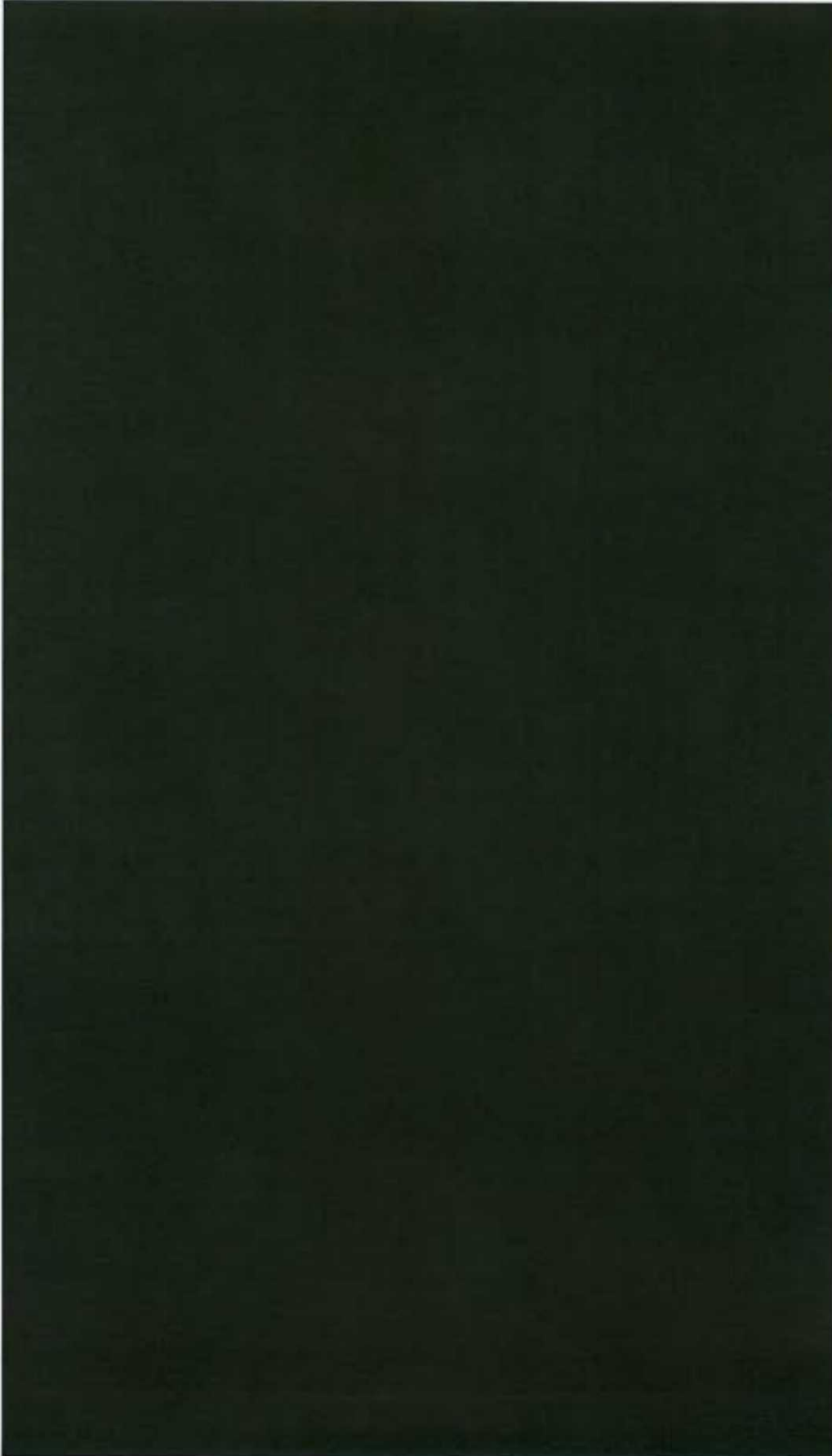


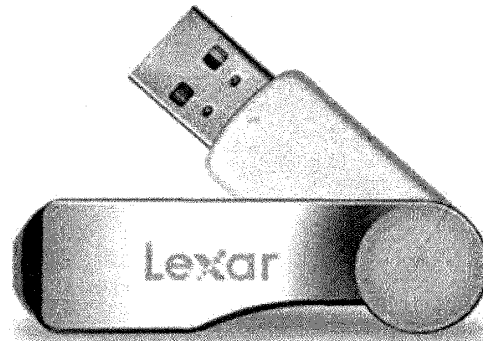
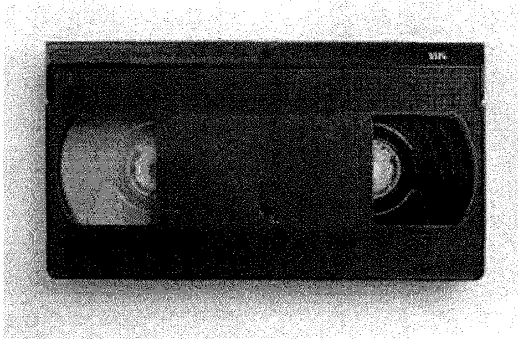
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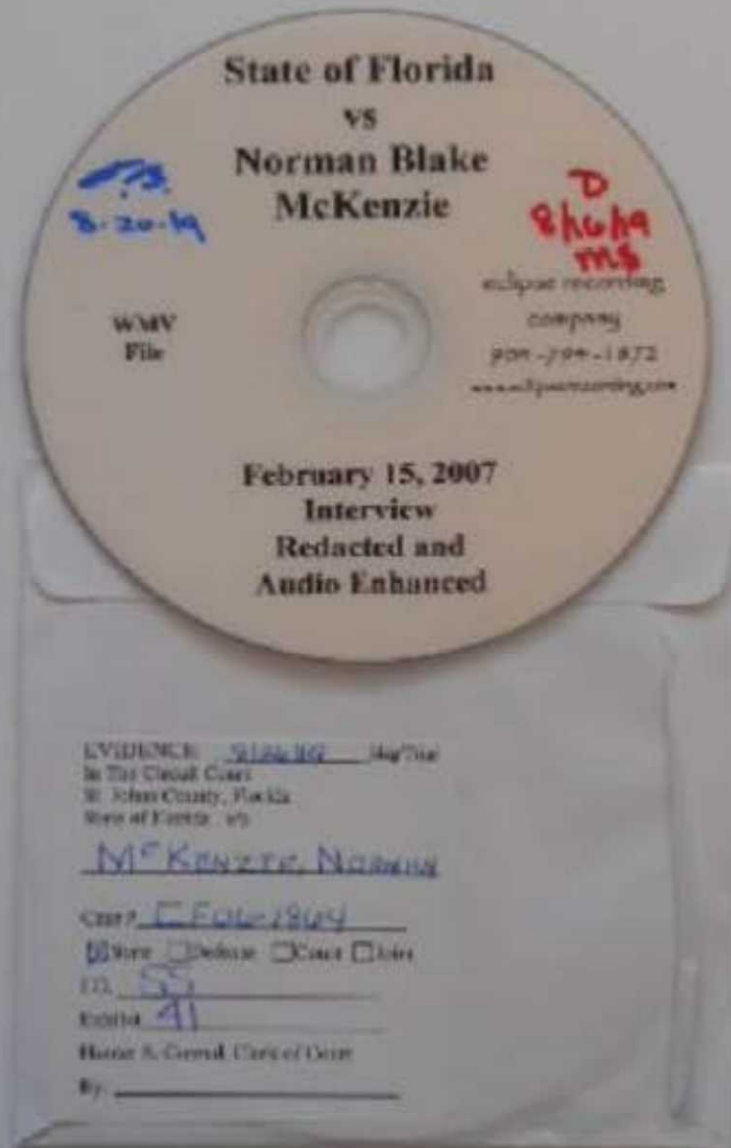
V





**THIS ITEM(S) IS ON ONE
OF THE ABOVE DEVICES**

**ST. JOHNS COUNTY CLERK OF COURT CRIMINAL DIVISION
EVIDENCE**





State v. Norman McKenzie
Dr. Predrag Bulic
District 23 Chief Medical Examiner

Charles Johnston
Autopsy
ME #06-23-455







C



D

Randy Peacock
Autopsy
ME #06-23-456



E



F



G



H



I



J



K



T



M



N

Norman McKenzie

1/4

Norman J. McKenzie

06 OFF 278175

Murder

05/01/19

S. OTR #10311

Major case prints for

Norman McKenzie

RT

RT

RM

RM

RR

RR

RL

RL

LT

LT

LL

LR

LR

LM

LM

LT

Norman McKenzie

214

De OFF 278175

Murder

05/07/19

S. O Her #10371

Major case prints for
Norman McKenzie

Norman B. McKenzie



R. Palm

Norman McKenzie Norman B. McKenzie

3/4

060FF278175

Murder

05/07/19

S. Offer #10371

Major case prints for
Norman McKenzie



L Palm

4/4

Norman McKenzie ~~Norman B. McKenzie~~
Norman B. McKenzie

DL0FF278175

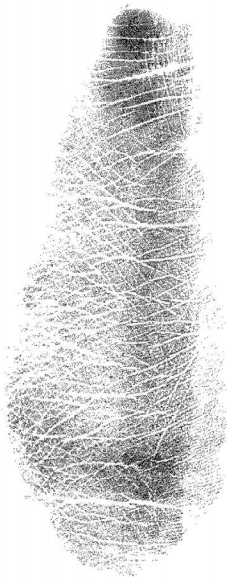
Murder

05/07/19

S. Otter #10571

Major case prints for

Norman McKenzie



L writers

R. writers

☐ PROBATION VIOLATOR
(Check if Applicable)

STATE OF FLORIDA

84-391537

Norman Blake McKenzie
Defendant

IN THE CIRCUIT COURT, SEVENTEENTH
JL. CL. CIRCUIT, IN AND FOR BROWARD
COUNTY, FLORIDA
DIVISION PK
CASE NUMBER 84-391537CF
ST. ATTY. Maria Sachs
CT. RPTR Lisa Wilson

JUDGMENT

The Defendant, Norman Blake McKenzie, being personally before this
Court represented by Maria Sachs, Esq., his attorney of record, and having:

(Check Applicable Provision)
☐ Been tried and found guilty of the following crime(s)
☒ Entered a plea of guilty to the following crime(s)
☐ Entered a plea of nolo contendere to the following crime(s)

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
<u>I</u>	<u>Kidnapping</u>	<u>782.01</u>	<u>1F</u>	
<u>II</u>	<u>Robbery</u>	<u>812.13(1)+(2)(a)</u>	<u>1F</u>	

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

The Defendant is hereby ordered to pay the sum of fifteen dollars (\$15.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of two dollars (\$2.00) as a court cost pursuant to F.S. 843.25(4).

(Check if Applicable) ☐ The Defendant is ordered to pay an additional sum of two dollars (\$2.00) pursuant to F.S. 943.25(8). (This provision is optional; not applicable unless checked).

☐ The Defendant is further ordered to pay a fine in the sum of \$ _____ pursuant to F.S. 775.0835.

(This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s)).

☐ The Court hereby imposes additional court costs in the sum of \$ _____

☐ The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order.)

☐ The Court hereby defers imposition of sentence until _____ (date)

Sentence Deferred Until Later Date (Check if Applicable)
The Defendant in Open Court was advised of his right to appeal from this judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking and appeal at the expense of the State upon showing of indigence.

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
6. L. Thumb	7. L. Index	8. L. Middle	9. L. Ring	10. L. Little

Fingerprints taken by:

Russell Vinard Court Deputy
Name and Title

DONE AND ORDERED in Open Court at Broward County, Florida this 8 day of November
AD. 19 84 HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, Norman Blake McKenzie and that they were placed thereon by said Defendant in my presence in Open Court this date.

RECORDED IN THE OFFICIAL RECORDS BOOK
OF BROWARD COUNTY, FLORIDA
F. T. JOHNSON
COUNTY ADMINISTRATOR

Harry B. Hinkle
JUDGE

NOV 16 AM 9:51

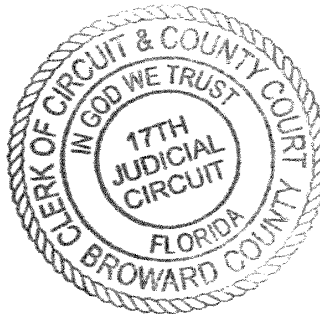
REC 12134 PG 643

BROWARD COUNTY, FLORIDA

I certify this document to be a true
and correct copy of the original.
WITNESS MY HAND AND SEAL
on FEB 05 2019

CLERK OF COUNTY & CIRCUIT COURT

BY *[Signature]* D.C.



EVIDENCE: 8/26/19 Hrg/Trial
In The Circuit Court
St. Johns County, Florida
State of Florida v/s

MCKENZIE, NORMAN

Case # EF06-1864

☒ State ☐ Defense ☐ Court ☐ Joint

I.D. UU

Exhibit _____

Hunter S. Conrad, Clerk of Court

By: _____

2K18444P0063

<input checked="" type="checkbox"/> 17th Judicial Circuit in and for Broward County <input type="checkbox"/> In the County Court in and for Broward County		CLOCK IN M/W
DIVISION: <input checked="" type="checkbox"/> CRIMINAL <input type="checkbox"/> TRAFFIC <input type="checkbox"/> OTHER	91214674 JUDGMENT DIV.: _____ FF	
THE STATE OF FLORIDA VS. BLAKE MCKENZIE		CASE NUMBER 90-19206CF10
PLAINTIFF DEFENDANT		











<input type="checkbox"/> PROBATION VIOLATOR (Check if Applicable)		ST. ATTY. DAVID FRANKEL CT. RPTR. KATHLEEN SCHWAB
The Defendant, BLAKE MCKENZIE, being personally before this Court represented by MARIA SCHNEIDER, his attorney of record, and having:		
(Check Applicable Provision)	<input type="checkbox"/> Been tried and found guilty of the following crime(s) <input checked="" type="checkbox"/> Entered a plea of guilty to the following crime(s) <input type="checkbox"/> Entered a plea of not guilty to the following crime(s)	
COUNT	CRIME	OFFENSE ST. TUTE NUMBER(S)
1	STRONG ARM ROBBERY	812.13(1)
		2F
and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s)		

The Defendant is hereby ordered to pay the sum of \$200.00 pursuant to F.S. 940.20 (Crimes Comp. Trust Fund). The Defendant is further ordered to pay the sum of \$ _____ pursuant to F.S. 943.28(4). (Check if Applicable) <input type="checkbox"/> The Defendant is further ordered to pay a fine in the sum of \$ _____ pursuant to F.S. 775.0835. (This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s).)		
<input type="checkbox"/> The Court hereby imposes additional court costs in the sum of \$ _____		
Imposition of Sentence Stayed and Withheld (Check if Applicable)	<input type="checkbox"/> The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order.)	
Sentence Deferred Until Later Date (Check if Applicable)	<input type="checkbox"/> The Court hereby defers imposition of sentence until _____ (date)	
(WAIVE) <input type="checkbox"/> Pay \$200 Trust Fund pursuant to F.S. 27.3485		
The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigence.		
COUNT(S)	DAYS BROWARD COUNTY	
JAIL W/CREDIT FOR	DAYS TIMES SERVED	

BK18444FC0064

DIVISION <input checked="" type="radio"/> CRIMINAL <input type="radio"/> TRAFFIC <input type="radio"/> OTHER	<input type="radio"/> ADJUDICATION WITHHELD <input checked="" type="radio"/> ADJUDICATED GUILTY	CASE NUMBER 90-19206CF10 <i>W</i>
--	--	---

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
				
6. L. Thumb	7. L. Index	8. L. Middle	9. L. Ring	10. L. Little
				

Fingerprints taken by:
D. J. Hight Court Deputy
Name and Title

DONE AND ORDERED in Open Court at Broward County, Florida this 28TH day of MAY 28 1991 MAY
A.D., 19 91. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant
BLAKE MCKENZIE, and that they were placed thereon by said
Defendant in my presence in Open Court this date.

[Signature]
JUDGE

BROWARD COUNTY, FLORIDA
I certify this document to be a true
and correct copy of the original.
WITNESS MY HAND AND SEAL
on AUG 16 2007
HOWARD C. FORMAN
CLERK OF COUNTY & CIRCUIT COURT
BY *[Signature]* D.C.

RECORDED IN THE OFFICIAL RECORDS BOOK
OF BROWARD COUNTY, FLORIDA
L. A. HESTER
COUNTY ADMINISTRATOR

Page 2 of 2

EVIDENCE: 8/26/19 Hrg/Trial
In The Circuit Court
St. Johns County, Florida
State of Florida v/s

MCKENZIE, NORMAN

Case # LF012-1864
☒ State ☐ Defense ☐ Court ☐ Joint

I.D. VV

Exhibit _____

Hunter S. Conrad, Clerk of Court

By: _____

IN THE CIRCUIT COURT OF
THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

☐ Community Control Violator
☐ Probation Violator

STATE OF FLORIDA
vs

NORMAN BLAKE MCKENZIE
Defendant

RECORDED IN OFFICIAL RECORDS
INSTRUMENT # 2339954 1 PG
2007 MAY 22 12:36 PM BK 3604 PG 502
J. K. "BUDDY" IRBY
CLERK OF CIRCUIT COURT
ALACHUA COUNTY, FLORIDA
CLERK10 Receipt#331235

Case: 01-2006-CF-005259-A
Division: F3

g
st

JUDGMENT

The defendant, NORMAN BLAKE MCKENZIE, being personally before this court represented by John O Floyd, the attorney of record, and the state represented by JAMES COLAW and having

- ☐ been tried and found guilty by jury/court of the following crime(s)
☐ entered a plea of guilty to the following crime(s)
☒ entered a plea of nolo contendere to the following crime(s)



Count	Crime	Offense Statute Number(s)	Degree of Crime
I	Attempted Robbery	777.04 & 812.13	2F

☒ and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

☒ and having been convicted or found guilty of, or having entered a plea of nolo contendere or guilty, regardless of adjudication, to attempts or offenses relating to sexual battery (Ch. 794), lewd and lascivious conduct (Ch. 800), or murder (F.S. 782.04), aggravated battery (F.S. 784.045), car jacking (F.S. 812.133), or home invasion robbery (F.S. 812.135), or any other offense specified in Section 843.325, the Defendant shall be required to submit to blood specimens.

☐ and good cause being shown, IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

DONE AND ORDERED in Open Court in Gainesville, Alachua County, Florida this 10th day of May, 2007



HC
PETER K. SUEG
Judge of the Circuit Court

Filed in Open Court May 10, 2007 by *C. Lu* D.C.

I HEREBY CERTIFY THAT A COPY OF THIS Judgment was furnished by U.S. Mail and/or hand delivery at the addresses of record to counsel for the state and defense/defendant pro se this 17 day of May, 2007

BY Deputy Clerk

[Signature]



J. K. "Jesse" Irby, Esq. - Circuit and County Court Clerk, Alachua County, Florida, certifies this is a true copy of the document of record for this office, which may have been redacted as required by law. Witness my hand and seal on February 22, 2019
J. K. "Jesse" Irby, Esq. - Clerk of the Circuit Court
[Signature]
Deputy Clerk

[Handwritten mark]

sc
(1) X

IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT
AND FOR ALACHUA COUNTY, FLORIDA











STATE OF FLORIDA

vs.

NORMAN BLAKE MCKENZIE

Case: 01-2006-CF-005259-A
Division: F3

FINGERPRINTS OF DEFENDANT

Right Thumb	Right Index	Right Middle	Right Ring	Right Little
				
Left Thumb	Left Index	Left Middle	Left Ring	Left Little
				

Fingerprints taken by:

NAME CLARE NOBLE CMN
TITLE DEPUTY SHERIFF 125

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant NORMAN BLAKE MCKENZIE, and that they were placed thereon by the defendant in my presence in Open Court this 10th day of May, 2007



PETER K SIBO

Clerk, Alachua

Filed in Open Court May 10th, 2007 by



copy of the
document of record for this office, which may have
been redacted as required by law. Witness my hand
and seal on February 22, 2019
J. K. "Jase" Juby, Esq. - Clerk of the Circuit Court
By J. K. "Jase" Juby
Deputy Clerk

EVIDENCE: 8/26/19 Hrg/Trial
In The Circuit Court
St. Johns County, Florida
State of Florida v/s

MCKENZIE, NORMAN

Case # 06-1864
☐ State ☐ Defense ☐ Court ☐ Joint

I.D. AAA

Exhibit _____

Hunter S. Conrad, Clerk of Court

By: _____

IN THE CIRCUIT COURT OF
THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

☐ Community Control Violator
☐ Probation Violator

STATE OF FLORIDA
vs

NORMAN BLAKE MCKENZIE
Defendant

RECORDED IN OFFICIAL RECORDS
INSTRUMENT # 2339953 1 PG
2007 MAY 22 12:36 PM BK 3604 PG 501
J. K. "BUDDY" IRBY
CLERK OF CIRCUIT COURT
ALACHUA COUNTY, FLORIDA
CLERK10 Receipt#331235

Case: 01-2006-CF-005261-A
Division: F3

JUDGMENT

The defendant, NORMAN BLAKE MCKENZIE, being personally before this court represented by John O Floyd, the attorney of record, and the state represented by JAMES COLAW and having

- ☐ been tried and found guilty by jury/court of the following crime(s)
☐ entered a plea of guilty to the following crime(s)
☒ entered a plea of nolo contendere to the following crime(s)



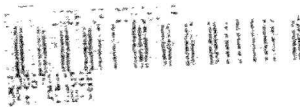
Court	Crime	Offense Statute Number(s)	Degree of Crime
	II Kidnapping with a firearm	787.01 & 775.087	L

☒ and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

☒ and having been convicted or found guilty of, or having entered a plea of nolo contendere or guilty, regardless of adjudication, to attempts or offenses relating to sexual battery (Ch. 784), lewd and lascivious conduct (Ch. 800), or murder (F.S. 782.04), aggravated battery (F.S. 784.045), car jacking (F.S. 812.133), or home invasion robbery (F.S. 812.135), or any other offense specified in Section 943.325, the Defendant shall be required to submit to blood specimens.

☐ and good cause being shown, IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

DONE AND ORDERED in Open Court in Gainesville, Alachua County, Florida this 10th day of May, 2007



PETER A SIEG
Judge of the Circuit Court

Filed in Open Court May 10, 2007 by Cla D.C.

I HEREBY CERTIFY THAT A COPY OF THIS Judgment was furnished by U.S. Mail and/or hand delivery at the addresses of record to counsel for the state and defense/defendant pro se this 17 day of May, 2007

BY Deputy Clerk: [Signature]



J. K. "Jas" Irby, Esq. - Circuit and County Court Clerk, Alachua County, Florida, certifies this is a true copy of the document of record for this office, which may have been redacted as required by law. Witness my hand and seal on February 22, 2019
J. K. "Jas" Irby, Esq. - Clerk of the Circuit Court
By [Signature]
Deputy Clerk

54 ①

IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT
AND FOR ALACHUA COUNTY, FLORIDA

STATE OF FLORIDA











vs.

NORMAN BLAKE MCKENZIE

Case: 01-2006-CF-005261-A
Division: F3

g

FINGERPRINTS OF DEFENDANT

Right Thumb	Right Index	Right Middle	Right Ring	Right Little
				
Left Thumb	Left Index	Left Middle	Left Ring	Left Little
				

Fingerprints taken by:

NAME

CLARE NOBIS AMN

TITLE

DEPUTY SHERIFF

125

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant NORMAN BLAKE MCKENZIE, and that they were placed thereon by the defendant in my presence in Open Court this 10th day of May, 2007



PETER K SIEG

JUDGE OF THE CIRCUIT COURT

J. K. "Jess" Irby, Esq., Circuit and County Court Clerk, Alachua County, Florida, certifies this is a true copy of the document of record for this office, which may have been redacted as required by law. Witness, my hand and seal on February 22, 2019

J. K. "Jess" Irby, Esq., Clerk of the Circuit Court
By [Signature]
Deputy Clerk

Filed in Open Court May 10th, 2007 by [Signature]



EVIDENCE: 8/26/19 Hrg/Trial

In The Circuit Court
St. Johns County, Florida
State of Florida v/s

MCKENZIE, NORMAN

Case # LF0601864

☒ State ☐ Defense ☐ Court ☐ Joint

I.D. BBB

Exhibit _____

Hunter S. Conrad, Clerk of Court

By: _____

IN THE CIRCUIT COURT OF
THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

☐ Community Control Violator
☐ Probation Violator

STATE OF FLORIDA
vs

NORMAN BLAKE MCKENZIE
Defendant

Case: 01-2007-CF-000532-A
Division: F3

ay

JUDGMENT

The defendant, NORMAN BLAKE MCKENZIE, being personally before this court represented by John O Floyd, the attorney of record, and the state represented by JAMES COLAW and having

- ☐ been tried and found guilty by jury/by court of the following crime(s)
☐ entered a plea of guilty to the following crime(s)
☒ entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Statute Number(s)	Degree of Crime
I	Robbery	812.13 e	1st

☒ and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

☒ and having been convicted or found guilty of, or having entered a plea of nolo contendere or guilty, regardless of adjudication, to attempts or offenses relating to sexual battery (Ch. 794), lewd and lascivious conduct (Ch. 800), or murder (F.S. 782.04), aggravated battery (F.S. 784.045), car jacking (F.S. 812.133), or home invasion robbery (F.S. 812.135), or any other offense specified in Section 943.325, the Defendant shall be required to submit to blood specimens.

☐ and good cause being shown, IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

DONE AND ORDERED In Open Court in Gainesville, Alachua County, Florida this 10th day of May, 2007



PETER KWIEG
Judge of the Circuit Court

Filed in Open Court May 10, 2007 by
D.C.

I HEREBY CERTIFY THAT A COPY OF THIS Judgment was furnished by U.S. Mail and/or hand delivery at the addresses of record to counsel for the state and defense/defendant pro se this _____ day of _____, 20__.

BY Deputy Clerk: _____



J. K. "Jess" Irby, Esq. - Circuit and County Court Clerk, Alachua County, Florida, certifies this is a true copy of the document of record for this office, which may have been redacted as required by law. Witness my hand and seal on December 6, 2018
J. K. "Jess" Irby, Esq. - Clerk of the Circuit Court
By
Deputy Clerk

6

IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT
AND FOR ALACHUA COUNTY, FLORIDA

STATE OF FLORIDA











vs.

NORMAN BLAKE MCKENZIE

Case: 01-2007-CF-000532-A
Division: F3

cy

FINGERPRINTS OF DEFENDANT

Right Thumb	Right Index	Right Middle	Right Ring	Right Little
				
Left Thumb	Left Index	Left Middle	Left Ring	Left Little
				

Fingerprints taken by:

NAME CLARE NOBLE CMN

TITLE DEPUTY SHERIFF 125



J. K. "Jess" Irby, Esq. - Circuit and County Court Clerk, Alachua County, Florida, certifies this is a true copy of the document of record for this office, which may have been redacted as required by law. Witness my hand and seal on December 6, 2018

J. K. "Jess" Irby, Esq. - Clerk of the Circuit Court
By [Signature]
Deputy Clerk

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant NORMAN BLAKE MCKENZIE, and that they were placed thereon by the defendant in my presence in Open Court this 10th day of May, 2007



[Signature]
PETER K SIEG
JUDGE OF THE CIRCUIT COURT

Filed in Open Court May 10th, 2007 by C. Lu D.C.

[Handwritten mark]

EVIDENCE: 8/26/19 Hrg/Trial
In The County Court
St. Johns County, Florida
State of Florida v/s
MCKENZIE, NORMAN
Case # CF06-1864
☒ State ☐ Defense ☐ Court ☐ Joint
I.D. 44
Exhibit _____
Hunter S. Conrad, Clerk of Court
By: _____

IN THE CIRCUIT COURT OF
THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

☐ Community Control Violator
☐ Probation Violator

STATE OF FLORIDA
vs

NORMAN BLAKE MCKENZIE
Defendant

RECORDED IN OFFICIAL RECORDS
INSTRUMENT # 2339950 1 PG
2007 MAY 22 12:36 PM BK 3604 PG 498
J. K. "BUDDY" IRBY
CLERK OF CIRCUIT COURT
ALACHUA COUNTY, FLORIDA
CLERK10 Receipt#331235

Case: 01-2007-CF-000585-A
Division: F3

g/jt

JUDGMENT

The defendant, NORMAN BLAKE MCKENZIE, being personally before this court represented by John O Floyd, the attorney of record, and the state represented by JAMES COLAW and having

☐ been tried and found guilty by jury of the following crime(s)
☐ entered a plea of guilty to the following crime(s)
☒ entered a plea of nolo contendere to the following crime(s)



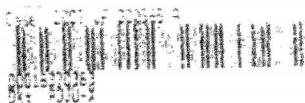
Count	Crime	Offense Statute Number(s)	Degree of Crime
-	Robbery	812.13	1PBL

☒ and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

☒ and having been convicted or found guilty of, or having entered a plea of nolo contendere or guilty, regardless of adjudication, to attempts or offenses relating to sexual battery (Ch. 794), lewd and lascivious conduct (Ch. 800), or murder (F.S. 782.04), aggravated battery (F.S. 784.046), car jacking (F.S. 812.133), or home invasion robbery (F.S. 812.135), or any other offense specified in Section 943.325, the Defendant shall be required to submit to blood specimens.

☐ and good cause being shown, IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

DONE AND ORDERED in Open Court in Gainesville, Alachua County, Florida this 10th day of May, 2007



[Signature]
PETER K SIEG
Judge of the Circuit Court

Filed in Open Court May 10, 2007 by *C. Lee* D.C.

I HEREBY CERTIFY THAT A COPY OF THIS Judgment was furnished by U.S. Mail and/or hand delivery at the addresses of record to counsel for the state and defense/defendant pro se this 17 day of May 2007

BY Deputy Clerk

[Signature]
J. K. "Jesse" Irby, Esq. - Circuit and County Court Clerk, Alachua County, Florida, certifies this is a true copy of the document of record for this office, which may have been redacted as required by law. Witness my hand and seal on February 22, 2007
J. K. "Jesse" Irby, Esq. - Clerk of the Circuit Court
By *[Signature]*
Deputy Clerk



[Signature]
(11) X

IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT
AND FOR ALACHUA COUNTY, FLORIDA

STATE OF FLORIDA











vs.

NORMAN BLAKE MCKENZIE

Case: 01-2007-CF-000585-A
Division: F3

g

FINGERPRINTS OF DEFENDANT

Right Thumb	Right Index	Right Middle	Right Ring	Right Little
				
Left Thumb	Left Index	Left Middle	Left Ring	Left Little
				

Fingerprints taken by:

NAME CLARE NOBUE ANN

TITLE _____ DEPUTY SHERIFF 125

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant NORMAN BLAKE MCKENZIE, and that they were placed thereon by the defendant in my presence in Open Court this 10th day of May, 2007



PETER K. JEG

JUDGE OF THE CIRCUIT COURT
County, Florida, certifies this is a true copy of the document of record for this office, which may have been redacted as required by law. Witness my hand and seal on February 22, 2019
J. K. "Jack" Fry, Esq. - Clerk of the Circuit Court
By [Signature]
Deputy Clerk

Filed in Open Court May 10th, 2007 by C. ku



[Handwritten mark]

EVIDENCE: 8/26/19 ~~He~~ Trial

In The Circuit Court
St. Johns County, Florida
State of Florida v/s

MCKENZIE, NORMAN

Case # CF061864

☒ State ☐ Defense ☐ Court ☐ Joint

I.D. 22

Exhibit _____

Hunter S. Conrad, Clerk of Court

By: _____

IN THE CIRCUIT COURT OF
THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

☐ Community Control Violator
☐ Probation Violator

STATE OF FLORIDA
vs

NORMAN BLAKE MCKENZIE
Defendant


Case: 01-2007-CF-000586-A
Division: F3

cy

JUDGMENT

The defendant, NORMAN BLAKE MCKENZIE, being personally before this court represented by John O Floyd, the attorney of record, and the state represented by JAMES COLAW and having

- ☐ been tried and found guilty by jury/court of the following crime(s)
☐ entered a plea of guilty to the following crime(s)
☒ entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Statute Number(s)	Degree of Crime
<u>I</u>	<u>Robbery</u>	<u>812.13 F</u>	<u>1PBL</u>
			

☒ and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

☒ and having been convicted or found guilty of, or having entered a plea of nolo contendere or guilty, regardless of adjudication, to attempts or offenses relating to sexual battery (Ch. 794), lewd and lascivious conduct (Ch. 800), or murder (F.S. 782.04), aggravated battery (F.S. 784.045), car jacking (F.S. 812.133), or home invasion robbery (F.S. 812.135), or any other offense specified in Section 943.325, the Defendant shall be required to submit to blood specimens.

☐ and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

DONE AND ORDERED in Open Court in Gainesville, Alachua County, Florida this 10th day of May, 2007





PETER K SIEG
Judge of the Circuit Court

Filed in Open Court May 10, 2007 by C. Lu D.C.

I HEREBY CERTIFY THAT A COPY OF THIS Judgment was furnished by U.S. Mail and/or hand delivery at the addresses of record to counsel for the state and defense/defendant pro se this _____ day of _____, 20____.

BY Deputy Clerk: _____



J. K. "Jess" Irby, Esq. - Circuit and County Court Clerk, Alachua County, Florida, certifies this is a true copy of the document of record for this office, which may have been redacted as required by law. Witness my hand and seal on December 6, 2018
J. K. "Jess" Irby, Esq. - Clerk of the Circuit Court

Deputy Clerk

⑥

IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT
AND FOR ALACHUA COUNTY, FLORIDA











STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE

Case: 01-2007-CF-000586-A
Division: F3

FINGERPRINTS OF DEFENDANT

Right Thumb	Right Index	Right Middle	Right Ring	Right Little
				
Left Thumb	Left Index	Left Middle	Left Ring	Left Little
				

Fingerprints taken by:

NAME

TITLE

DEPUTY SHERIFF

125



J. K. "Jess" Irby, Esq. - Circuit and County Court Clerk, Alachua County, Florida, certifies this is a true copy of the document of record for this office, which may have been redacted as required by law. Witness my hand and seal on December 6, 2018

J. K. "Jess" Irby, Esq. - Clerk of the Circuit Court

By [Signature]
Deputy Clerk

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant NORMAN BLAKE MCKENZIE, and that they were placed thereon by the defendant in my presence in Open Court this 10th day of May, 2007



PETER K SIEG

JUDGE OF THE CIRCUIT COURT

Filed in Open Court May 10th, 2007 by [Signature] D.C.

EVIDENCE: 8126119 ~~Hrg~~ Trial

In The Circuit Court
St. Johns County, Florida
State of Florida v/s

MCKENZIE, NORMAN

Case # CF06-1864

☒ State ☐ Defense ☐ Court ☐ Joint

I.D. XX

Exhibit _____

Hunter S. Conrad, Clerk of Court

By: _____

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, FLORIDA

____ Probation/Community Control Violator ____ Retrial ____ Resentence

STATE OF FLORIDA

Case Number: 42-2006-CF-004213-AXXX-XX

vs.

NORMAN BLAKE MCKENZIE

JUDGMENT

The Defendant, NORMAN BLAKE MCKENZIE, being personally before this Court represented by JERRY WAYNE BURFORD, the attorney of record, and the State represented by ANTHONY MICHAEL TATTI, and said Defendant having entered a plea of guilty to the following crime(s):

OBTS Number(s): 4201110368

Count	Crime	Offense Statute Number	Degree
1	CARJACKING WHILE ARMED	812.133(2a)	FLIFE

X and no cause being shown why the Defendant should not be adjudicated guilty, it is ordered that the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

EVIDENCE: 8126119 Hrg/Trial
In The Circuit Court
St. Johns County, Florida
State of Florida v/s

MCKENZIE, NORMAN

Case # CF06-1864

☒ State ☐ Defense ☐ Court ☐ Joint

I.D. CCC

Exhibit _____

Hunter S. Conrad, Clerk of Court

By: _____

Certified A True Copy
of this page document
this 10th day of May 2004
DAVID R. ELLSPERMANN
Clerk of Court
BY Shawell DC

Computer 25

State of Florida


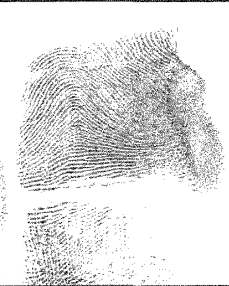
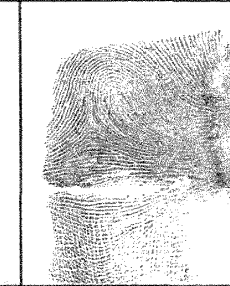

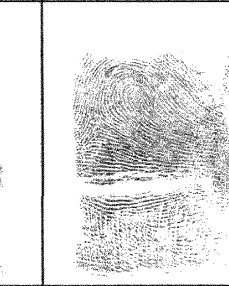


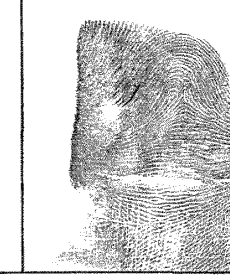
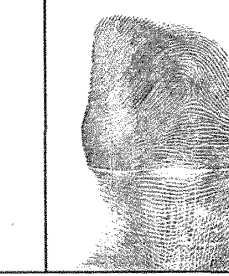

vs. NORMAN B. MCKENZIE
Printed name

Case Number 00-4213-CFA

Norman B. McKenzie
Defendant's Signature

Date of Birth 07-08-64

FINGERPRINTS OF DEFENDANT

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	7. Left Index	8. Left Middle	9. Left Ring	10. Left Little
				

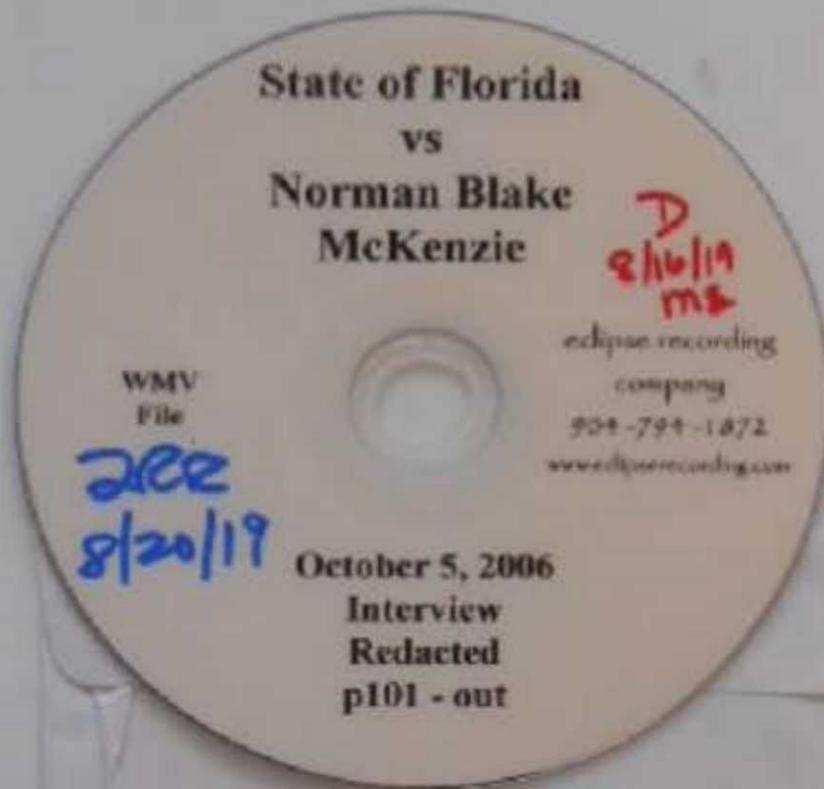
Fingerprints taken by DEP. CLARENCE L. HARRIS JR.
Name

DEPUTY
Title

NORMAN BLAKE MCKENZIE
I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant,
my presence in open court this date.

DONE AND ORDERED in open court in Marion County, Florida this 10th day of
March, 2007.

[Signature]
Judge



EVIDENCE TRIAL 8/22/19
In The Circuit Court
St. Johns County, Florida
State of Florida vs. McKenzie, Norman
By: [Signature] Deputy Clerk

EX-1009
McKenzie, Norman
State
[X] State [] Defense [] Court
I.D. EEE
Exhibit 52
These Clery Act, Clerk of Court
By: [Signature] Deputy Clerk

Jury Trial Notes

DATE: August 27, 2019
CIRCUIT JUDGE: MALTZ
STATE ATTORNEY: JOHNSON/DUNTON
DEFENSE ATTORNEY: BARRETT/HAMBURG
CLERK: GELL
BAILIFF: STOKES
COURT REPORTER: MARY GRAYBOSCH

STATE VS.: MCKENZIE, NORMAN BLAKE
CASE #: 06001864CFMA

CHARGE #: FIRST DEGREE MURDER (X2)

COURT COMES TO ORDER @853

DEFENDANT AND PARTIES PRESENT @858

HOUSEKEEPING MATTERS @902

JURY BACK IN AND SEATED @904

COURT READS PRELIMINARY INSTRUCTIONS @907

STATES OPENING STATEMENT @916

DEFENSE OPENING STATEMENT @936

STATES CALLS FIRST WITNESS, PERRY PREVATT, SWORN @955

DIRECT @955

WITNESS EXCUSED @1017

MID MORNING BREAK- RETURN AT 1040 @1018

COURT COMES TO ORDER @1045

JURORS BACK IN AND SEATED @1047

STATE CALLS SECOND WITNESS, JULIE AUBREY, SWORN @1048
DIRECT @1047
WITNESS EXCUSED @1057

STATE CALLS THIRD WITNESS. COMMANDER TIMOTHY BURRESS
(SJSO), SWORN @1058
DIRECT @1058

JURY OUT FOR SHORT BREAK @1129

JURY BACK IN AND SEATED @1132

STILL ON DIRECT (VIDEO INTERVIEW PUBLISHED- HALF) @1132

JURY OUT FOR LUNCH- RETURN AT 120 @1200

COURT IN RECESS FOR LUNCH- COMMANDER STILL ON STAND WHEN
LUNCH IS OVER @1201

COURT COMES TO ORDER @121

JURY BACK IN AND SEATED @126

REMAINING HALF OF VIDEO PUBLISHED @127

CROSS, COMMANDER BURRESS @ 204
WITNESS EXCUSED @215

STATE CALLS FOURTH WITNESS, DR. PREDRAG BULIC, SWORN @216
DIRECT @216
CROSS @257
REDIRECT @259
WITNESS EXCUSED @301

MIDAFTERNOON BREAK – RETURN AT 315 #301

COURT IN RECESS UNTIL 315 @303

COURT COMES TO ORDER @320

JURY BACK IN AND SEATED @321

STATE CALLS FIFTH WITNESS, SAMANTHA OTTER (SJSO), SWORN

@322

DIRECT @322

CROSS @339

WITNESS EXCUSED @339

STATES CALLS SIXTH WITNESS, CLARICE POLCZYNSKI, SWORN @3399

DIRECT @340

CROSS @346

WITNESS EXCUSED @349

STATE CALLS SEVENTH WITNESS, AMANDA HUGHES, SWORN @349

DIRECT @349

CROSS @356

WITNESS EXCUSED @356

STATES CALLS EIGHTH WITNESS, CHANTEL WILSON, SWORN @357

DIRECT @357

CROSS @407

WITNESS EXCUSED @407

STATE CALLS NINTH WITNESS, CHARLES MAGUIRE, SWORN @408

DIRECT @408

WITNESS EXCUSED @414

STATE CALLS TENTH WITNESS, LARRY VAN, SWORN @415

DIRECT @415

WITNESS EXCUSED @421

STATE CALLS ELEVENTH WITNESS, MARQUETTE FREDRICK, SWORN

@422

DIRECT @422

WITNESS EXCUSED @429

JURORS BREAK FOR THE DAY @430

HOUSEKEEPING MATTERS @431

COURT IN RECESS UNTIL TOMORROW AT 845 @435

*For Evidence Custodian Use Only

Free Checking

01 1010103003168 034 30 0 10 SAFEKEPT Replacement Statement 003

NORMAN B MCKENZIE
 P.O. BOX 25
 ST AUGUSTINE FL 32085

PB

Free Checking

6/16/2006 thru 7/18/2006

Account number: 1010103003168
 Account owner(s): NORMAN B MCKENZIE

Account Summary

Opening balance 6/16 \$1,503.48
 Deposits and other credits 4,502.08 +
 Checks 2,247.07 -
 Other withdrawals and service fees 1,850.93 -
 Closing balance 7/18 \$1,907.56

Deposits and Other Credits

Date	Amount	Description	
6/16	700.00	COUNTER DEPOSIT	000001432972275
6/20	25.00	COUNTER DEPOSIT	000001433622642
6/30	1,803.55	AUTOMATED CREDIT JOHNSON-GRAHAM-M ADP #1 CO. ID. 1593201363 060630 PPD	420061792491726
7/13	70.00	COUNTER DEPOSIT	000001132980991
7/14	1,803.53	AUTOMATED CREDIT JOHNSON-GRAHAM-M ADP #1 CO. ID. 1593201363 060714 PPD	420061938202104
7/17	100.00	COUNTER DEPOSIT	000001439457324
Total	\$4,502.08		

Checks

Number	Amount	Date	Number	Amount	Date	Number	Amount	Date	
0000	69.71	6/21	1016	188.01	6/20	1019	694.74	7/07	1332885093 1139428002 143686802
1015*	694.74	6/20	1018*	599.87	6/21	Total	\$2,247.07		1332662866 1433698071

*Indicates a break in check number sequence

Free Checking

02 1010103003168 034 30 0 10 SAFEKEPT Replacement Statement 003

Other Withdrawals and Service Fees

Date	Amount	Description			
6/16	33.73	PURCHASE LIL' CHAMP 6231 GAINESVILLE FL 3015I102581	06/16		200606160641000
6/19	3.10	PURCHASE EXXONMOBIL POS GAINESVI FL 3015I871481	06/18		200606180840030
6/19	12.94	PURCHASE WARD'S SUPERMARKET GAINESVILLE FL 4010I080456	06/16		200606161504250
6/19	20.01	PURCHASE EXXONMOBIL75 0422 4828534245054 SAINT AU FL 4010V223780	06/15		200606152005000
6/20	207.51	AUTOMATED DEBIT PROGRESSIVE INS. INS PREM CO. ID. 9038153571 060620 TEL MISC POL #14293293-0			420061707809268
6/22	0.00	INQUIRY 6301 NEWBERRY ROAD 3015-001153			200606211852230
6/22	20.00	WITHDRAWAL NEWBERRY ROAD OFFICE 06/21 6301 NEWBERRY ROA GAINESVILLE FL 3015W001152			200606211851540
7/03	5.00	PURCHASE C-N-A FOOD MARAT 5899 07/02 GAINESVILLE FL 3015I160235			200607021355550
7/03	5.11	PURCHASE LIL' CHAMP 6231 07/02 GAINESVILLE FL 3015I335197			200607020651000
7/03	13.55	PURCHASE PUBLIX 125 SW 34TH ST 07/02 GAINESVILLE FL 3015I425763			200607021151070
7/03	64.00	PURCHASE EXXONMOBIL POS 07/01 GAINESVI FL 3015I780471			200607010949360
7/03	400.00	WITHDRAWAL NEWBERRY ROAD OFFICE 07/01 6301 NEWBERRY ROA GAINESVILLE FL 3015W002761			200607010727480
7/03	600.00	WITHDRAWAL NEWBERRY ROAD OFFICE 06/30 6301 NEWBERRY ROA GAINESVILLE FL 3015W002718			200606302009470
7/13	30.01	PURCHASE GATE 1207 07/13 ST. AUGUSTIN FL 3015I994822			200607130554140
7/14	50.00	PURCHASE GATE 1207 07/14 ST. AUGUSTIN FL 3015I616362			200607140558450
7/14	300.00	COUNTER WITHDRAWAL			000001133186203
7/17	20.00	PURCHASE CHEVRON/LIL CHAMP STORE 07/15 GREEN COVE S FL 3015I247858			200607150634350
7/17	32.96	PURCHASE SUNSHINE # 127 6984 07/15 WALDO FL 3015I182683			200607151609250
7/18	3.00	SERVICE FEE			000000000000001
7/18	30.01	PURCHASE EXXONMOBIL POS 07/17 GAINESVI FL 3015I118834			200607172139130
Total	\$1,850.93				

Free Checking

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Service Fees

Description	Quantity	Amount	Total
ATM MINI STATEMENT	3	1.00	3.00

Total Fee(s) \$3.00

Average balance \$1,104.21
 Minimum balance \$378.86

Daily Balance Summary

Dates	Amount	Dates	Amount	Dates	Amount
06/16	2,169.75	06/22	378.86	07/13	440.00
06/19	2,133.70	06/30	2,182.41	07/14	1,893.53
06/20	1,068.44	07/03	1,094.75	07/17	1,940.57
06/21	398.86	07/07	400.01	07/18	1,907.56

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Customer Service Information

	Phone number	Address
Checking & Savings Accounts, Check Card & ATM Card	800-WACHOVIA 800-922-4684	WACHOVIA BANK, NATIONAL ASSOCIATION NC8502 P O BOX 563966 CHARLOTTE NC 28262-3966
TDD (For the Hearing Impaired) En español para cuentas corrientes y de ahorros	800-388-2234 800-326-8977	
Bank By Mail (Deposits Only)		WACHOVIA BANK, NATIONAL ASSOCIATION FL8044 P O BOX 522817 MIAMI FL 33152-2817
Consumer Loan Accounts	800-347-1131	WACHOVIA BANK, NATIONAL ASSOCIATION VA0343 P O BOX 13327 ROANOKE VA 24040-0343

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NORMAN B MCKENZIE
 P.O. BOX 25
 ST AUGUSTINE FL 32085

PB

Free Checking

7/19/2006 thru 8/16/2006

Account number: 1010103003168
 Account owner(s): NORMAN B MCKENZIE

Account Summary

Opening balance 7/19 \$1,907.56
 Deposits and other credits 4,057.09 +
 Checks 2,694.61 -
 Other withdrawals and service fees 2,768.45 -
 Closing balance 8/16 \$501.59

Deposits and Other Credits

Date	Amount	Description	
7/28	1,803.54	AUTOMATED CREDIT JOHNSON-GRAHAM-M ADP #1 CO. ID. 1593201363 060728 PPD	420062072058238
7/31	50.00	COUNTER DEPOSIT	000007230926635
8/04	50.00	COUNTER DEPOSIT	000001231591528
8/15	1,803.55	AUTOMATED CREDIT JOHNSON-GRAHAM-M ADP #1 CO. ID. 1593201363 060815 PPD	420062265685654
8/16	350.00	COUNTER DEPOSIT	000001436960264
Total	\$4,057.09		

Checks

Number	Amount	Date	Number	Amount	Date	Number	Amount	Date
1020	694.74	7/19	1025*	1,400.00	7/28			
1021	599.87	7/24	Total	\$2,694.61				

*Indicates a break in check number sequence

Other Withdrawals and Service Fees

Date	Amount	Description	
7/19	207.51	AUTOMATED DEBIT PROGRESSIVE INS. INS PREM CO. ID. 9038153571 060719 TEL MISC POL #14293293-0	420061992149960
7/20	9.49	PURCHASE 0125 125 SW 34TH ST GAINESVILLE FL 30151227053	200607192028490
7/20	10.87	PURCHASE EXXONMOBIL POS GAINESVI FL 30151718461	200607191629120

Other Withdrawals and Service Fees continued on next page.

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Other Withdrawals and Service Fees continued

Date	Amount	Description			
7/21	8.50	PURCHASE MCDONALD'S F4902 GAINESVILLE FL 3015I221897	07/20		200607201153000
7/21	13.87	PURCHASE PUBLIX 1302 N MAIN STRE GAINESVILLE FL 3015I625348	07/20		200607202116400
7/24	5.46	PURCHASE HESS 09547 GREEN COVE S FL 3015I281855	07/21		200607212008000
7/24	30.01	PURCHASE SPRINT FOOD STOR ST AUGUSTINE FL 3015I353441	07/23		200607232337000
7/24	30.01	PURCHASE EXXONMOBIL POS GAINESVI FL 3015I418625	07/21		200607211221300
7/25	11.13	PURCHASE MCDONALD'S F4902 GAINESVILLE FL 3015I612361	07/24		200607241147000
7/26	0.00	INQUIRY *THE OAKS MALL #1	3015-067363		200607251241330
7/26	62.00	WITHDRAWAL CAPITAL CITY BA 4000 N MAIN ST GAINESVILLE FL 3015P427534	07/25		200607252047100
7/27	4.12	PURCHASE MCDONALD'S F3987 GAINESVILLE FL 3015I697232	07/26		200607262036000
7/27	5.32	PURCHASE MCDONALD'S F3987 GAINESVILLE FL 3015I403559	07/26		200607262020000
7/27	20.00	PURCHASE EXXONMOBIL POS GAINESVI FL 3015I546936	07/27		200607270650510
7/28	0.00	INQUIRY 3505 SW ARCHER RD	3015-002095		200607281400210
7/28	1.00	PURCHASE FIRST COAST ENERGY GAINESVILLE FL 3015I379520	07/28		200607280214000
7/28	7.73	PURCHASE EXXONMOBIL POS GAINESVI FL 3015I906044	07/28		200607280042490
7/28	40.00	WITHDRAWAL SW GAINESVILLE 3505 SW ARCHER RD GAINESVILLE FL 3015W002097	07/28		200607281402020
7/28	102.50	WITHDRAWAL COMPASBNK 2814 SW 34TH. STR GAINESVILLE FL 3015P397532	07/27		200607272324450
7/28	200.00	WITHDRAWAL SW GAINESVILLE OFFICE 3505 SW ARCHER RO GAINESVILLE FL 3015W003255	07/28		200607280920430
7/28	201.75	WITHDRAWAL ARCHER ROAD SHELL 3330 SW ARCHER RO GAINESVILLE FL 3015N600608	07/28		200607280200020
7/31	3.70	PURCHASE CHEVRON/LIL CHAMP STORE GAINESVILLE FL 3015I401592	07/28		200607281334080
7/31	30.00	PURCHASE FIRST COAST ENERGY GAINESVILLE FL 3015I966538	07/28		200607281348000
8/01	6.42	PURCHASE LIL' CHAMP 6231 GAINESVILLE FL 3015I145516	07/31		200607312226000

Other Withdrawals and Service Fees continued on next page.

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Other Withdrawals and Service Fees continued

Date	Amount	Description			
8/01	30.00	PURCHASE EXXONMOBIL POS GAINESVI FL 3015I454589	07/31		200607312219050
8/03	3.54	PURCHASE KASH N KARRY #1786 GAINESVILLE FL 3015I926286	08/02		200608021959000
8/04	0.00	INQUIRY 3505 SW ARCHER ROAD	3015-005234		200608032043200
8/04	20.00	WITHDRAWAL SW GAINESVILLE OFFICE 3505 SW ARCHER RO GAINESVILLE FL 3015W005235	08/03		200608032043440
8/07	2.85	PURCHASE SUNSHINE # 127 WALDO FL 3015I200807	08/04		200608041924480
8/07	4.96	PURCHASE CHEVRON/LIL CHAMP #1138 GAINESVILLE FL 3015I947383	08/05		200608051342160
8/07	33.71	PURCHASE KANGAROO EXPRESS GAINESVILLE FL 3015I116889	08/04		200608041904430
8/10	0.00	INQUIRY 3505 SW ARCHER ROAD	3015-006870		200608100642460
8/16	12.00	SERVICE FEE			00000000000001
8/16	1,650.00	COUNTER WITHDRAWAL			000001136999749
Total	\$2,768.45				

Service Fees

Description	Quantity	Amount	Total
ATM NON-WACHOVIA WITHDRAWALS	3	2.00	6.00
ATM NON-WACHOVIA INQUIRY	1	2.00	2.00
ACCOUNT INQ PERSON TO PERSON	2	0.00	0.00
ACCOUNT INQ PERSON TO PERSON	2	2.00	4.00

Total Fee(s) \$12.00

Average balance \$300.38
 Minimum balance \$10.04

Daily Balance Summary

Dates	Amount	Dates	Amount	Dates	Amount
07/19	1,005.31	07/27	194.66	08/07	10.04
07/20	984.95	07/28	45.22	08/10	10.04
07/21	962.58	07/31	61.52	08/15	1,813.59
07/24	297.23	08/01	25.10	08/16	501.59
07/25	286.10	08/03	21.56		
07/26	224.10	08/04	51.56		

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Customer Service Information

	Phone number	Address
Checking & Savings Accounts, Check Card & ATM Card	800-WACHOVIA 800-922-4684	WACHOVIA BANK, NATIONAL ASSOCIATION NC8502 P O BOX 563966 CHARLOTTE NC 28262-3966
TDD (For the Hearing Impaired) En español para cuentas corrientes y de ahorros	800-388-2234 800-326-8977	
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NORMAN B MCKENZIE
 P.O. BOX 25
 ST AUGUSTINE FL 32085

PB

Free Checking

8/17/2006 thru 9/15/2006

Account number: 1010103003168
 Account owner(s): NORMAN B MCKENZIE

Account Summary

Opening balance 8/17 \$501.59
 Deposits and other credits 4,044.07 +
 Checks 506.10 -
 Other withdrawals and service fees 3,455.58 -
 Closing balance 9/15 \$583.98

Deposits and Other Credits

Date	Amount	Description	
8/21	392.00	COUNTER DEPOSIT	000001137351382
8/28	10.00	COUNTER DEPOSIT	000001138128104
8/28	100.00	COUNTER DEPOSIT	000001138211394
8/28	230.00	COUNTER DEPOSIT	000001231958041
8/29	105.00	OVERDRAFT PROTECTION TRANSFER FROM 049 4313040382619237	000000000000000
8/30	1,803.53	AUTOMATED CREDIT JOHNSON-GRAHAM-M ADP #1 CO. ID. 1593201363 060830 PPD	420062409536068
9/15	1,403.54	AUTOMATED CREDIT JOHNSON-GRAHAM-M ADP #1 CO. ID. 1593201363 060915 PPD	420062562451261
Total	\$4,044.07		

Checks

Number	Amount	Date	Number	Amount	Date	Number	Amount	Date
1030	450.00	8/17	1031	56.10	8/29	Total	\$506.10	1437332092 0352750370

Other Withdrawals and Service Fees

Date	Amount	Description	
8/21	50.00	COUNTER WITHDRAWAL	000001231762735
8/21	50.00	COUNTER WITHDRAWAL	000001332799529
8/23	101.50	WITHDRAWAL FAST TRACK FOODS 3960-A SW ARCHER GAINESVILLE FL 4028N403420	200608221738090

Other Withdrawals and Service Fees continued on next page.

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Other Withdrawals and Service Fees continued

Date	Amount	Description	
8/23	240.00	WITHDRAWAL UNIVERSITY AVENUE 08/22 3501 W UNIVERSITY GAINESVILLE FL 4028W002266	200608221839000
8/24	25.00	PURCHASE EXXONMOBIL75 0454 08/22 4828534245054 GAINESVI FL 4028V203780	200608220028000
8/24	30.00	OVERDRAFT/UNAVAILABLE FUNDS FEE 1 TRANSACTION(S) AT \$30.00 EACH	000000000000001
8/25	30.00	NSF FEE FOR ITEM 000000001031, \$56.10	000000156795320
8/28	0.00	INQUIRY 6301 NEWBERRY ROAD 4028-002021	200608261122050
8/28	0.00	INQUIRY 3505 SW ARCHER ROAD 4028-001565	200608261411540
8/28	1.37	PURCHASE CHEVRON 00207985 08/27 4828534245054 GAINESVILLE FL 4028V204618	200608271923000
8/28	15.00	COUNTER WITHDRAWAL	000001138261742
8/28	20.00	WITHDRAWAL NEWBERRY ROAD OFFICE 08/26 6301 NEWBERRY ROA GAINESVILLE FL 4028W002022	200608261122430
8/28	30.00	NSF FEE FOR ITEM 000000001033, \$72.00 AUTOMATED CHECK MBNA/IBS CHECK PYMT	420062364427734
8/28	100.00	WITHDRAWAL SW GAINESVILLE OFFICE 08/26 3505 SW ARCHER RO GAINESVILLE FL 4028W001523	200608261245270
8/28	120.00	WITHDRAWAL SW GAINESVILLE OFFICE 08/26 3505 SW ARCHER RO GAINESVILLE FL 4028W001566	200608261412250
8/29	3.44	PURCHASE GATE 1207 08/28 4828534245054 ST. AUGUSTIN FL 4028V230742	200608281502000
8/29	5.00	MISCELLANEOUS FEE OVERDRAFT PROTECTION TRANSFER	000000000000000
8/29	10.00	PURCHASE GATE 1207 08/28 4828534245054 ST. AUGUSTIN FL 4028V290742	200608281502000
8/30	500.00	WITHDRAWAL SW GAINESVILLE OFFICE 08/30 3505 SW ARCHER RO GAINESVILLE FL 4028W002565	200608300024500
8/31	300.00	WITHDRAWAL SW GAINESVILLE OFFICE 08/31 3505 SW ARCHER RO GAINESVILLE FL 4028W002861	200608310223470
9/01	15.00	PURCHASE CHEVRON 00207985 08/31 4828534245054 GAINESVILLE FL 4028V264618	200608310922000
9/01	400.00	WITHDRAWAL SW GAINESVILLE OFFICE 09/01 3505 SW ARCHER RO GAINESVILLE FL 4028W003200	200609010403080
9/05	0.00	INQUIRY 3505 SW ARCHER ROAD 4028-004687	200609042207430
9/05	0.00	INQUIRY 2814 SW 34TH STREET 4028-010096	200609031116300
9/05	3.81	PURCHASE CVS 3255 3404 SW ARCHER 09/02 GAINESVILLE FL 4028I250713	200609021034230

Other Withdrawals and Service Fees continued on next page.

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Other Withdrawals and Service Fees continued

Date	Amount	Description	
9/05	5.20	PURCHASE PUBLIX 5801 SW 75TH ST 09/03 GAINESVILLE FL 4028I314216	200609030736090
9/05	20.01	PURCHASE SHELL OIL 5752257 09/01 4828534245054 GAINESVILLE FL 4028V270003	200609012226000
9/05	35.00	PURCHASE HANDY WAY #2643 09/03 4828534245054 PALATKA FL 4028V290041	200609030553000
9/05	40.00	WITHDRAWAL SW GAINESVILLE OFFICE 09/01 3505 SW ARCHER RO GAINESVILLE FL 4028W003690	200609012149580
9/05	74.28	PURCHASE EXTENDEDSTAY #381 09/02 4828534245054 GAINESVILLE FL 4028V282777	200609021441000
9/05	81.61	PURCHASE EXTENDEDSTAY #381 09/01 4828534245054 GAINESVILLE FL 4028V202777	200609011659000
9/05	82.50	WITHDRAWAL COMPASSBNK 09/03 2814 SW 34TH STRE GAINESVILLE FL 4028P010097	200609031116580
9/05	100.00	WITHDRAWAL SW GAINESVILLE OFFICE 09/02 3505 SW ARCHER RO GAINESVILLE FL 4028W003781	200609020950120
9/05	100.00	PURCHASE SPRINT *WIRELESS S 09/01 4828534245054 800-639-6111 CO 4028Z250002	200609011305000
9/05	120.00	WITHDRAWAL SW GAINESVILLE OFFICE 09/01 3505 SW ARCHER RO GAINESVILLE FL 4028W003651	200609012026160
9/05	120.00	OVERDRAFT/UNAVAILABLE FUNDS FEE 4 TRANSACTION(S) AT \$30.00 EACH	000000000000004
9/05	138.11	PURCHASE SPRINT PCS #4131 08/31 4828534245054 PELHAM AL 4028V225642	200608311205000
9/14	0.00	INQUIRY 2350 STATE ROAD 4028-001675	200609141526400
9/15	14.00	SERVICE FEE	000000000000001
9/15	71.75	WITHDRAWAL ARCHER ROAD SHELL 09/15 3330 SW ARCHER RO GAINESVILLE FL 4028N601269	200609150622280
9/15	81.00	WITHDRAWAL PUBLIX 09/15 5801 SW 75TH ST GAINESVILLE FL 4028N004287	200609150353290
9/15	122.00	WITHDRAWAL KWIK STOP #1 09/15 2109 SW 13TH ST. GAINESVILLE FL 4028N701850	200609151151360
9/15	200.00	WITHDRAWAL GATE STORE #1207 09/15 2350 STATE ROAD ST AUGUSTINE FL 4028W001720	200609150020180
Total	\$3,455.58		

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Service Fees

Description	Quantity	Amount	Total
ATM NON-WACHOVIA WITHDRAWALS	5	2.00	10.00
ATM NON-WACHOVIA INQUIRY	1	2.00	2.00
ACCOUNT INQ PERSON TO PERSON	2	0.00	0.00
ACCOUNT INQ PERSON TO PERSON	1	2.00	2.00

Total Fee(s) \$14.00

Average balance \$84.13
 Minimum balance \$330.81 -

Daily Balance Summary

Dates	Amount	Dates	Amount	Dates	Amount
08/17	51.59	08/28	29.28 -	09/05	330.81 -
08/21	343.59	08/29	1.18	09/14	330.81 -
08/23	2.09	08/30	1,304.71	09/15	583.98
08/24	52.91 -	08/31	1,004.71		
08/25	82.91 -	09/01	589.71		

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Customer Service Information

	Phone number	Address
Checking & Savings Accounts, Check Card & ATM Card	800-WACHOVIA 800-922-4684	WACHOVIA BANK, NATIONAL ASSOCIATION NC8502 P O BOX 563966 CHARLOTTE NC 28262-3966
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3. Tell us the dollar amount of the suspected error.

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WACHOVIA BANK, N.A. IS MEMBER FDIC

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NORMAN B MCKENZIE
P.O. BOX 25
ST AUGUSTINE FL 32085

PB

Free Checking

9/16/2006 thru 10/17/2006

Account number: 1010103003168
Account owner(s): NORMAN B MCKENZIE

Account Summary

Opening balance 9/16 \$583.98
Deposits and other credits 887.87 +
Other withdrawals and service fees 1,467.51 -
Closing balance 10/17 \$4.34

Deposits and Other Credits

Date	Amount	Description	
9/29	887.87	AUTOMATED CREDIT JOHNSON-GRAHAM-M ADP #1 CO. ID. 1593201363 060929 PPD	420062705958632
Total	\$887.87		

Other Withdrawals and Service Fees

Date	Amount	Description	
9/18	0.00	INQUIRY 3505 SW ARCHER ROAD 4028-008202	200609160306280
9/18	0.00	INQUIRY 3505 SW ARCHER RD 4028-001660	200609171658000
9/18	8.50	PURCHASE MCDONALD'S F7111 09/16 4828534245054 ALACHUA FL 4028V297200	200609161357000
9/18	24.72	PURCHASE TEXACO 00304501 09/15 4828534245054 GAINESVILLE FL 4028V214620	200609151941000
9/18	37.00	PURCHASE GATE 1207 09/15 4828534245054 ST. AUGUSTIN FL 4028V250742	200609151553000
9/18	40.07	PURCHASE KANGAROO 6146 09/15 4828534245054 GAINESVILLE FL 4028V295786	200609151140000
9/18	56.00	PURCHASE ECONO LODGE 09/16 4828534245054 GAINESVILLE FL 4028V230720	200609162221000
9/18	120.00	OVERDRAFT/UNAVAILABLE FUNDS FEE 4 TRANSACTION(S) AT \$30.00 EACH	000000000000004
9/18	122.25	WITHDRAWAL TRM ATM CORP 09/15 3525 SW 34TH ST GAINESVILLE FL 4028N000813	200609151838350
9/18	202.25	WITHDRAWAL TRM ATM CORP 09/15 3525 SW 34TH ST GAINESVILLE FL 4028N000829	200609152001530
9/18	240.00	WITHDRAWAL SW GAINESVILLE OFFICE 09/16 3505 SW ARCHER RO GAINESVILLE FL 4028W008203	200609160307090

Other Withdrawals and Service Fees continued on next page.

Free Checking

02 1010103003168 034 30 0 10 SAFEKEPT Replacement Statement 003

Other Withdrawals and Service Fees continued

Date	Amount	Description	
9/19	3.05	PURCHASE EXXONMOBIL POS GAINESVL FL 40281271920	09/18 200609181448260
9/19	35.00	OVERDRAFT/UNAVAILABLE FUNDS FEE 1 TRANSACTION(S) AT \$35.00 EACH	000000000000001
9/20	2.01	PURCHASE SHELL OIL 5752455 4828534245054 GAINESVILLE FL 4028V230008	09/18 200609182053000
9/20	3.19	PURCHASE MCDONALD'S F4902 4828534245054 GAINESVILLE FL 4028V267200	09/18 200609182241000
9/20	35.00	NSF FEE FOR ITEM 009639086201, AUTOMATED DEBIT GEICO GEICO PYMT	\$231.00 420062624141096
9/20	70.00	OVERDRAFT/UNAVAILABLE FUNDS FEE 2 TRANSACTION(S) AT \$35.00 EACH	000000000000002
9/26	35.00	NSF FEE FOR ITEM 009639086201, AUTOMATED DEBIT GEICO RDP GEICO	\$231.00 420062654223744
10/02	34.47	PURCHASE HANDY WAY #2006 4828534245054 HAWTHORNE FL 4028V240040	09/30 200609301235000
10/02	395.00	COUNTER WITHDRAWAL	000001132849795
10/17	4.00	SERVICE FEE	000000000000001
Total	\$1,467.51		

Service Fees

Description	Quantity	Amount	Total
ATM NON-WACHOVIA WITHDRAWALS	2	2.00	4.00
Total Fee(s)			\$4.00
Average balance			\$56.16 -
Minimum balance			\$450.06 -

Daily Balance Summary

Dates	Amount	Dates	Amount	Dates	Amount
09/18	266.81 -	09/26	450.06 -	10/17	4.34
09/19	304.86 -	09/29	437.81		
09/20	415.06 -	10/02	8.34		

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03 1010103003168 034 30 0 10 SAFEKEPT Replacement Statement 003

Customer Service Information

	Phone number	Address
Checking & Savings Accounts, Check Card & ATM Card	800-WACHOVIA 800-922-4684	WACHOVIA BANK, NATIONAL ASSOCIATION NC8502 P O BOX 563966 CHARLOTTE NC 28262-3966
TDD (For the Hearing Impaired) En español para cuentas corrientes y de ahorros	800-388-2234 800-326-8977	
Bank By Mail (Deposits Only)		WACHOVIA BANK, NATIONAL ASSOCIATION FL8044 P O BOX 522817 MIAMI FL 33152-2817
Consumer Loan Accounts	800-347-1131	WACHOVIA BANK, NATIONAL ASSOCIATION VA0343 P O BOX 13327 ROANOKE VA 24040-0343

In Case of Errors or Questions About Your Electronic Transfers: Telephone us at 800-WACHOVIA, 800-922-4684, or write to us at WACHOVIA BANK, NATIONAL ASSOCIATION, NC8502, P O BOX 563966, CHARLOTTE NC 28262-3966, as soon as you can, if you think your statement or receipt is wrong or if you need more information about a transfer on the statement or receipt. We must hear from you no later than 60 days after we sent you the FIRST statement on which the error or problem appeared.

1. Tell us your name and account number (if any).
2. Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe there is an error or why you need more information.
3. Tell us the dollar amount of the suspected error.

We will investigate your complaint and will correct any error promptly. If we take more than 10 business days to do this, we will credit your account for the amount you think is in error. You will have use of the money during the time it takes us to complete our investigation.

WACHOVIA BANK, N.A. IS MEMBER FDIC

Free Checking

01 1010103003168 034 30 0 10 SAFEKEPT Replacement Statement 003

NORMAN B MCKENZIE
P.O. BOX 25
ST AUGUSTINE FL 32085

PB

Free Checking

10/18/2006 thru 11/15/2006

Account number: 1010103003168
Account owner(s): NORMAN B MCKENZIE

Account Summary

Opening balance 10/18 \$4.34
Closing balance 11/15 \$4.34

Wachovia Online Statements Now Available.
Sign up for free Online Statements today to view, print and save up
to 16 months of your bank
statements. To sign up for Online Statements, simply log in to
Online Banking at wachovia.com
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today at wachovia.com/enroll or by calling 800-950-2296.

Free Checking

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1. Tell us your name and account number (if any).
2. Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe there is an error or why you need more information.
3. Tell us the dollar amount of the suspected error.

We will investigate your complaint and will correct any error promptly. If we take more than 10 business days to do this, we will credit your account for the amount you think is in error. You will have use of the money during the time it takes us to complete our investigation.

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EVIDENCE: 5/20/19 Noted
In The Circuit Court
St. Johns County, Florida
State of Florida vs.

Mckenzie, Norman

Case # 06-1864CF

☐ State ☒ Defense ☐ Court ☐ Joint

I.D. E

EVIDENCE S

Hunter S. Conrad, Clerk of Court

By: [Signature]

When was Mr. McKenzie
convicted?

Is this a repeat of
sentencing?

Was his mother contacted

by FDLE between

9/28/~~2019~~²⁰⁰⁶ + 10/4-5/2006?

Jury Trial Notes

DATE: August 28, 2019
CIRCUIT JUDGE: MALTZ
STATE ATTORNEY: JOHNSON/DUNTON
DEFENSE ATTORNEY: BARRETT/HAMBURG
CLERK: GELL
BAILIFF: STOKES
COURT REPORTER: MARY GRAYBOSCH

STATE VS.: MCKENZIE, NORMAN BLAKE
CASE #: 06001864CFMA

CHARGE #: FIRST DEGREE MURDER (X2)

COURT COMES TO ORDER @855

HOUSEKEEPING MATTERS @856

COURT QUESTIONS DEFENDANT ON IF HE WOULD LIKE TO TESTIFY-
NO DECISION YET @902

JURY BACK IN AND SEATED @907

STATE CALLS TWELFTH WITNESS, CAESAR SALDANHA VIA SKYPE
(WITNESS IN TALLAHASSEE FL), SWORN BY NOTARY PRESENT WITH
WITNESS @908

DIRECT @909

WITNESS EXCUSED @917

STATE CALLS THIRTEENTH WITNESS, DEPUTY TIM ROLLINS, SWORN
@918

DIRECT @918

DVD PUBLISHED @922

CROSS @1017

WITNESS EXCUSED @1019

MID MORNING BREAK- 10 MINUTES @1019

COURT IN RECESS UNTIL 1030 @1020

COURT COMES TO ORDER @1030

JURY BACK IN AND SEATED @1031

STATES CALLS KATHY WITTMANN, VICTIM IMPACT STATEMENT
REGARDING RANDY PEACOCK, SWORN @1033

STATE CALLS DAVID BROOKS, VICTIM IMPACT STATEMENT
REGARDING RANDY PEACOCK, SWORN @1039

STATE CALLS VICTIM ADVOCATE TO READ VICTIM IMPACT
STATEMENT FROM CHERYL JOHNSON, DAUGHTER OF CHARLES
JOHNSTON @1047

STATE RESTS @1049

JURY OUT FOR LUNCH UNTIL 1PM @1050

COURT IN RECESS UNTIL 1PM @1051

COURT COMES TO ORDER @107

JURY BACK IN AND SEATED @110

DEFENSE CALLS FIRST WITNESS, TAMMY KIMBELL, SWORN @111
DIRECT @111
CROSS @119
REDIRECT @120
WITNESS EXCUSED @120

DEFENSE CALLS SECOND WITNESS, DR. STEPHEN BLOOMFIELD,
SWORN @122
DIRECT @122
CROSS @145
REDIRECT @204
WITNESS EXCUSED @207

SIDE BAR @207

MID AFTERNOON BREAK- RETURN AT 230 @210

WRITTEN QUESTIONS HANDED TO COURT- MADE PART OF THE
COURT FILE- @211

COURT QUESTIONS DEFENDANT REGARDING WHETHER HE WOULD
LIKE TO TESTIFY- DEFENDANT WISHES TO NOT TESTIFY @214

COURT IN RECESS UNTIL 230 @216

COURT COMES TO ORDER @234

JURY BACK IN AND SEATED @238

DEFENSE CALLS THIRD WITNESS, DR. SUSAN SKOLLY-DANZIGER,
SWORN @239

DIRECT @239

CROSS @337

REDIRECT @350

WITNESS IS EXCUSED @350

DEFENSE RESTS @351

COURT STATES HE IS UNABLE TO ANSWER JURORS QUESTIONS AT
THIS TIME @352

COURT ADDRESSES SCHEDULING MATTERS WITH JURORS @352

JURY BREAKS FOR THE DAY- TO RETURN AT 845 TOMORROW @355

COURT IN RECESS FOR A FEW MINUTES @357

COURT COMES TO ORDER @406

COURT AND PARTIES REVIEW JURY INSTRUCTIONS @407

COURT IN RECESS UNTIL TOMORROW- PARTIES TO RETURN
TOMORROW 830 @443

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

**NORMAN BLAKE MCKENZIE,
DEFENDANT.**

JURY INSTRUCTIONS
FOR PENALTY PROCEEDING

Members of the jury, you have heard all the evidence and the argument of counsel. It is now your duty to make a decision as to the appropriate sentence that should be imposed upon the defendant for the crime of First Degree Murder. There are two possible punishments: (1) life imprisonment without the possibility of parole, or (2) death.

In making your decision, you must first unanimously determine whether the aggravating factors alleged by the State have been proven beyond a reasonable doubt. An aggravating factor is a circumstance that increases the gravity of a crime or the harm to a victim. No facts other than proven aggravating factors may be considered in support of a death sentence.

COUNT I – FIRST DEGREE MURDER OF RANDY PEACOCK

The aggravating factors alleged by the State as to Court I are:

1. NORMAN BLAKE MCKENZIE was previously convicted of another capital felony or a felony involving the use or threat of violence to another person.
 - a. The crime of First Degree Murder is a capital felony.

- b. The crimes of Robbery, Carjacking, and Kidnapping are all felonies involving the use or threat of violence to another person.
- 2. The First Degree Murder was committed while NORMAN BLAKE McKENZIE was engaged in the commission of a Robbery.
- 3. The First Degree Murder was committed for financial gain.
- 4. The First Degree Murder was especially heinous, atrocious or cruel.

“Heinous” means extremely wicked or shockingly evil.

“Atrocious” means outrageously wicked and vile.

“Cruel” means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

The kind of crime intended to be included as especially heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to RANDY PEACOCK.

- 5. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.

“Cold” means the murder was the product of calm and cool reflection.

“Calculated” means having a careful plan or prearranged design to commit murder.

A killing is “premeditated” if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating factor to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

A “pretense of moral or legal justification” is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditated nature of the murder.

Pursuant to Florida law, the aggravating factors of *the murder was committed during the course of a Robbery* and *the murder was committed for financial gain* are considered to merge because they are considered to be a single aspect of the offense. If you unanimously determine that the aggravating factors of *the murder was committed during the course of a Robbery* and *the murder was committed for financial gain* have both been proven beyond a reasonable doubt, your findings should indicate that both aggravating factors exist, but you must consider them as only one aggravating factor.

You have heard evidence about the impact of this murder on the family, friends, and community of RANDY PEACOCK. This evidence was presented to show the victim’s uniqueness as an individual and the resultant loss by RANDY PEACOCK’s death. However, you may not consider this evidence as an aggravating factor.

COUNT II – FIRST DEGREE MURDER OF CHARLES JOHNSTON

The aggravating factors alleged by the State as to Court II are:

1. NORMAN BLAKE McKENZIE was previously convicted of another capital felony or a felony involving the use or threat of violence to another person.
 - a. The crime of First Degree Murder is a capital felony.
 - b. The crimes of Robbery, Carjacking, and Kidnapping are all felonies involving the use or threat of violence to another person.
2. The First Degree Murder was committed while NORMAN BLAKE McKENZIE was engaged in the commission of a Robbery.

3. The First Degree Murder was committed for financial gain.
4. The First Degree Murder was especially heinous, atrocious or cruel.

“Heinous” means extremely wicked or shockingly evil.

“Atrocious” means outrageously wicked and vile.

“Cruel” means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

The kind of crime intended to be included as especially heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to CHARLES JOHNSTON.

5. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.

“Cold” means the murder was the product of calm and cool reflection.

“Calculated” means having a careful plan or prearranged design to commit murder.

A killing is “premeditated” if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating factor to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

A “pretense of moral or legal justification” is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditated nature of the murder.

Pursuant to Florida law, the aggravating factors of *the murder was committed during the course of a Robbery* and *the murder was committed for financial gain* are considered to merge because they are considered to be a single aspect of the offense. If you unanimously determine that the aggravating factors of *the murder was committed during the course of a Robbery* and *the murder was committed for financial gain* have both been proven beyond a reasonable doubt, your findings should indicate that both aggravating factors exist, but you must consider them as only one aggravating factor.

You have heard evidence about the impact of this murder on the family, friends, and community of CHARLES JOHNSTON. This evidence was presented to show the victim’s uniqueness as an individual and the resultant loss by CHARLES JOHNSTON’s death. However, you may not consider this evidence as an aggravating factor.

As explained before the presentation of evidence, the State has the burden to prove an aggravating factor beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to disregard an aggravating factor if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating factor exists, or if, having a conviction, it is one which is not stable but one which waivers and vacillates, then the aggravating factor has not been proved beyond a reasonable doubt and you must not consider it in providing a verdict.

A reasonable doubt as to the existence of an aggravating factor may arise from the evidence, a conflict in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating factor, you must find that it does not exist. However, if you have no reasonable doubt, you should find the aggravating factor does exist.

A finding that an aggravating factor exists must be unanimous, that is, all of you must agree that each presented aggravating factor exists. You will be provided a form to make this finding as to each alleged aggravating factor and you should

indicate whether or not you find each aggravating factor has been proven beyond a reasonable doubt.

If you do not unanimously find that at least one aggravating factor was proven by the State beyond a reasonable doubt, then the defendant is not eligible for the death penalty, and your verdict must be for a sentence of life imprisonment without the possibility for parole. At such point, your deliberations are complete.

If, however, you unanimously find that one or more aggravating factors have been proven beyond a reasonable doubt, then the defendant is eligible for the death penalty, and you must make additional findings to determine whether the appropriate sentence to be imposed is life imprisonment without the possibility of parole or death.

If you do unanimously find the existence of at least one aggravating factor and that the aggravating factors are sufficient to impose a sentence of death, the next step in the process is for you to determine whether any mitigating circumstances exist. A mitigating circumstance is anything that supports a sentence of life imprisonment without the possibility of parole, and can be anything which might indicate that the death penalty is not appropriate. It is not limited to the facts surrounding the crime. A mitigating circumstance may include any aspect of the defendant's character, background, or life or any circumstance of the offense that may reasonably indicate that the death penalty is not an appropriate sentence in this case.

It is the defendant's burden to prove that one or more mitigating circumstances exist. Mitigating circumstances do not need to be proven beyond a reasonable doubt. Instead, the defendant need only establish a mitigating circumstance by the greater weight of the evidence, which means evidence that more likely than not tends to establish the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you must consider it established and give that evidence such weight as you determine it should receive in reaching your verdict about the appropriate sentence to be imposed. Any juror persuaded as to the existence of a mitigating circumstance must consider it in this case.

Among the mitigating circumstances you may consider are:

1. The First Degree Murder was committed while NORMAN BLAKE MCKENZIE was under the influence of extreme mental or emotional disturbance.

2. The capacity of NORMAN BLAKE McKENZIE to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
3. The existence of any other factors in NORMAN BLAKE McKENZIE character, background, or life or the circumstances of the offense that would mitigate against the imposition of the death penalty, including the following:
 - a. NORMAN BLAKE McKENZIE's childhood was chaotic.
 - b. NORMAN BLAKE McKENZIE and his siblings experienced a lack of adequate supervision after the divorce of his parents.
 - c. NORMAN BLAKE McKENZIE started huffing from spray cans at the age of 11 years old.
 - d. NORMAN BLAKE McKENZIE had an early and chronic abuse and dependency on alcohol and drugs.
 - e. NORMAN BLAKE McKENZIE had a cocaine dependency relapse starting in July 2006 up to and after the crimes at bar.
 - f. NORMAN BLAKE McKENZIE consistently used a voluminous amount of cocaine from July to October of 2006.
 - g. NORMAN BLAKE McKENZIE cooperated with law enforcement at the time of his arrest.
 - h. NORMAN BLAKE McKENZIE admitted to the murders of Randy Peacock and Charles Johnston.
 - i. NORMAN BLAKE McKENZIE has artistic ability.
 - j. NORMAN BLAKE McKENZIE was an assistant superintendent for EMJ that built Cobblestone Village in St. Augustine.

Your decision regarding the appropriate sentence should be based upon proven aggravating factors and established mitigating circumstances that have been presented to you during these proceedings.

The next step in the process is for each of you to determine whether the aggravating factors that you have unanimously found to exist outweigh the mitigating circumstances that you have individually found to exist. The process of weighing aggravating factors and mitigating circumstances is not a mechanical or mathematical process. In other words, you should not merely total the number of aggravating factors and compare that number to the total number of mitigating circumstances. The law contemplates that different factors or circumstances may be given different weight or values by different jurors. Therefore, in your decision-making process, each individual juror must decide what weight is to be given to a particular factor or circumstance. Regardless of the results of each juror's individual weighing process—even if you find that the sufficient aggravators outweigh the mitigators—the law neither compels nor requires you to determine that the defendant should be sentenced to death.

Once each juror has weighed the proven factors, he or she must determine the appropriate punishment for the defendant. The jury's decision regarding the appropriate sentence must be unanimous if death is to be imposed. To repeat what I have said, if your verdict is that the defendant should be sentenced to death, your finding that each aggravating factor exists must be unanimous, your finding that the aggravating factors are sufficient to impose death must be unanimous, your finding that the aggravating factors found to exist outweigh the established mitigating circumstances must be unanimous, and your decision to impose a sentence of death must be unanimous.

You will be provided a form to reflect your findings and decision regarding the appropriate sentence. If your vote on the appropriate sentence is less than unanimous, the defendant will be sentenced to life in prison without the possibility of parole.

The fact that the jury can make its decision on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you vote, you should carefully consider and weigh the evidence, realizing that

a human life is at stake, and bring your best judgment to bear in reaching your verdict.

When considering aggravating factors and mitigating circumstances, it is up to you to decide which evidence is reliable. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in making your decision as to what sentence should be imposed. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?
2. Did the witness seem to have an accurate memory?
3. Was the witness honest and straightforward in answering the attorneys' questions?
4. Did the witness have some interest in how the case should be decided?
5. Did the witness's testimony agree with the other testimony and other evidence in the case?
9. Has the witness been convicted of a felony?

The fact that a witness is employed in law enforcement does not mean that his or her testimony deserves more or less consideration than that of any other witness.

Expert witnesses are like other witnesses with one exception—the law permits an expert witness to give an opinion. However, an expert's opinion is only reliable when given on a subject about which you believe that person to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about his or her testimony.

You may rely upon your own conclusion about the credibility of any witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

The defendant exercised a fundamental right by choosing not to be a witness in this case. You must not be influenced in any way by his decision. No juror should ever be concerned that the defendant did or did not take the witness stand to give testimony in the case.

These are some general rules that apply to your discussions. You must follow these rules in order to make a lawful decision.

1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your decisions will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make wise and legal decisions in this matter.
2. Your decisions must be based only upon the evidence that you have heard from the testimony of the witnesses, have seen in the form of the exhibits in evidence, and these instructions.
3. Your decisions must not be based upon the fact that you feel sorry for anyone or are angry at anyone.
4. Remember, the lawyers are not on trial. Your feelings about them should not influence your decisions.
5. The jury is not to discuss any questions that a juror wrote that were not asked by the Court, and must not hold that against either party.
6. Your decisions should not be influenced by feelings of prejudice or racial or ethnic bias. Your decisions must be based on the evidence and the law contained in these instructions.

In just a few moments you will be taken to the jury room by the bailiff. When you have reached decisions in conformity with these instructions, the appropriate forms should be signed and dated by your foreperson.

During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You are not to communicate with any person outside the jury about this case, and you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, Twitter, e-mail, text message, or any other means.

Many of you may have cell phones, tablets, laptops, or other electronic devices here in the courtroom. The rules do not allow you to bring your phones or any of those types of electronic devices into the jury room. Kindly leave those devices on your seats where they will be guarded by the bailiff while you deliberate.

Do not contact anyone to assist you during deliberations. These communications rules apply until I discharge you at the end of the case. If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff.

During guilt and penalty phases of this trial, items were received into evidence as exhibits. You may examine whatever exhibits you think will help you in your deliberations. These exhibits will be sent into the jury room with you when you begin to deliberate.

I cannot participate in your deliberations in any way. Please disregard anything I may have said or done that made you think I preferred one decision over another. If you need to communicate with me, send a note through the bailiff, signed by the foreperson. If you have questions, I will talk with the attorneys before I answer, so it may take some time. You may continue your deliberations while you wait for my answer. I will answer any questions, if I can, in writing or orally here in open court.

In closing, let me remind you that it is important that you follow the law spelled out in these instructions. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For more than two centuries we have lived by the constitution and the law. No juror has the right to violate rules we all share.

was the defendant ever clean while on
the outside

How long was ~~Norm~~ McKenzie incarcerated
and what for?

Were the jurors supposed
to see the defendant's
artwork which was
entered as evidence?

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

**NORMAN BLAKE MCKENZIE,
DEFENDANT.**

VERDICT AS TO SENTENCE
COUNT I – FIRST DEGREE MURDER OF RANDY PEACOCK

We, the jury, find as follows as to the Defendant, NORMAN BLAKE MCKENZIE, in this case:

A. Aggravating Factors as to Count I:

We, the jury, unanimously find that the State has proven the following Aggravating Factors beyond a reasonable doubt as to the Defendant, NORMAN BLAKE MCKENZIE, in this case:

1. NORMAN BLAKE MCKENZIE was previously convicted of a capital felony or a felony involving the use or threat of violence to a person.

YES ☒ NO ☐

2. The First Degree Murder was committed while NORMAN BLAKE MCKENZIE was engaged in the commission of a Robbery.

YES ☒ NO ☐

3. The First Degree Murder was committed for financial gain.

YES ☒ NO ☐

State v. Norman Blake McKenzie, #2006-1864-CF
Verdict as to Sentence
Page 1 of 7

4. The First Degree Murder was especially heinous, atrocious, or cruel.

YES ☒ NO ☐

5. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.

YES ☒ NO ☐

If you answer YES to at least one of the aggravating factors listed above, please proceed to Section B. If you answered NO to every aggravating factor listed above, do not proceed to Section B; the Defendant, NORMAN BLAKE MCKENZIE, is not eligible for the death penalty and will be sentenced to life in prison without the possibility of parole. Please sign and date the verdict form and return it to the courtroom.

B. Sufficiency of the Aggravating Factors as to Count I:

Reviewing the aggravating factors that we unanimously found to be proven beyond a reasonable doubt in Section A above, we, the jury, also unanimously find that the aggravating factors are sufficient to warrant a possible sentence of death.

YES ☒ NO ☐

If you answer YES to Section B, please proceed to Section C. If you answer NO to Section B, do not proceed to Section C; the Defendant, NORMAN BLAKE MCKENZIE will be sentenced to life in prison without the possibility of parole. Please sign and date the verdict form and return it to the courtroom.

C. Mitigating Circumstances:

One or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence.

YES ☒ NO ☐

State v. Norman Blake McKenzie, #2006-1864-CF
Verdict as to Sentence
Page 2 of 7

Please proceed to Section D, regardless of your findings in Section C.

D. Eligibility for the Death Penalty for Count I.

We, the jury, unanimously find that the aggravating factors that were proven beyond a reasonable doubt in Section A above outweigh the mitigating circumstances established in Section C above as to Count I (First Degree Murder).

YES ✓ NO

If you answered YES to Section D, please proceed to Section E. If you answered NO to Section D, do not proceed; the Defendant, NORMAN BLAKE MCKENZIE will be sentenced to life in prison without the possibility of parole. Please sign and date the verdict form and return it to the courtroom.

E. Jury Verdict as to Death Penalty

Having unanimously found that at least one aggravating factor has been established beyond a reasonable doubt in Section A above; that the aggravating factors are sufficient to warrant a sentence of death in Section B above; and that the aggravating factors outweigh the mitigating circumstances in Section D above; we, the jury, unanimously find that the Defendant, NORMAN BLAKE MCKENZIE, should be sentenced to death.

YES ✓ NO

If your vote to impose death is less than unanimous, the trial court shall impose a sentence of life without the possibility of parole.

Dated this 29 day of August, 2019, in St. Augustine, St. Johns County, Florida.

Michelle P. Beaty
FOREPERSON

State v. Norman Blake McKenzie, #2006-1864-CF
Verdict as to Sentence
Page 3 of 7

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

**NORMAN BLAKE MCKENZIE,
DEFENDANT.**

VERDICT AS TO SENTENCE
COUNT II – FIRST DEGREE MURDER OF CHARLES JOHNSTON

We, the jury, find as follows as to the Defendant, NORMAN BLAKE MCKENZIE, in this case:

A. Aggravating Factors as to Count II:

We, the jury, unanimously find that the State has proven the following Aggravating Factors beyond a reasonable doubt as to the Defendant, NORMAN BLAKE MCKENZIE, in this case:

1. NORMAN BLAKE MCKENZIE was previously convicted of a capital felony or a felony involving the use or threat of violence to a person.

YES ☒ NO ☐

2. The First Degree Murder was committed while NORMAN BLAKE MCKENZIE was engaged in the commission of a Robbery.

YES ☒ NO ☐

State v. Norman Blake McKenzie, #2006-1864-CF
Verdict as to Sentence
Page 4 of 7

Filed for record 08/29/2019 03:18 PM Clerk of Court St. Johns County, FL

3. The First Degree Murder was committed for financial gain.

YES ☒ NO ☐

4. The First Degree Murder was especially heinous, atrocious, or cruel.

YES ☒ NO ☐

5. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.

YES ☒ NO ☐

If you answer YES to at least one of the aggravating factors listed above, please proceed to Section B. If you answered NO to every aggravating factor listed above, do not proceed to Section B; the Defendant, NORMAN BLAKE MCKENZIE, is not eligible for the death penalty and will be sentenced to life in prison without the possibility of parole. Please sign and date the verdict form and return it to the courtroom.

B. Sufficiency of the Aggravating Factors as to Count II:

Reviewing the aggravating factors that we unanimously found to be proven beyond a reasonable doubt in Section A above, we, the jury, also unanimously find that the aggravating factors are sufficient to warrant a possible sentence of death.

YES ☒ NO ☐

If you answer YES to Section B, please proceed to Section C. If you answer NO to Section B, do not proceed to Section C; the Defendant, NORMAN BLAKE MCKENZIE will be sentenced to life in prison without the possibility of parole. Please sign and date the verdict form and return it to the courtroom.

C. Mitigating Circumstances:

One or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence.

YES ☒ NO ☐

Please proceed to Section D, regardless of your findings in Section C.

D. Eligibility for the Death Penalty for Count II.

We, the jury, unanimously find that the aggravating factors that were proven beyond a reasonable doubt in Section A above outweigh the mitigating circumstances established in Section C above as to Count I (First Degree Murder).

YES ☒ NO ☐

If you answered YES to Section D, please proceed to Section E. If you answered NO to Section D, do not proceed; the Defendant, NORMAN BLAKE MCKENZIE will be sentenced to life in prison without the possibility of parole. Please sign and date the verdict form and return it to the courtroom.

E. Jury Verdict as to Death Penalty

Having unanimously found that at least one aggravating factor has been established beyond a reasonable doubt in Section A above; that the aggravating factors are sufficient to warrant a sentence of death in Section B above; and that the aggravating factors outweigh the mitigating circumstances in Section D above; we, the jury, unanimously find that the Defendant, NORMAN BLAKE MCKENZIE, should be sentenced to death.

YES ☒ NO ☐

If your vote to impose death is less than unanimous, the trial court shall impose a sentence of life without the possibility of parole.

Dated this 29 day of August, 2019, in St. Augustine, St. Johns County,
Florida.

Michele P. Beaty
FOREPERSON

**IN THE CIRCUIT COURT OF THE 7th JUDICIAL CIRCUIT
ST. JOHNS COUNTY, FLORIDA**

STATE OF FLORIDA -vs- NORMAN BLAKE MCKENZIE

CASE #: 06001864CFMA

Judge: HOWARD M. MALTZ

Division: 56

Charges: Ct 1 FIRST DEGREE MURDER (FILED)
Ct 2 FIRST DEGREE MURDER (FILED)

ACKNOWLEDGMENT

I ACKNOWLEDGE THAT:

(1) I am required to keep my current telephone number and mailing address known to my attorney and the clerk of this court at all times.

(2) Continuation requested by _____.

Requirements:

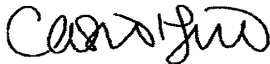
DEFENDANT TO BE RETURNED TO DOC- TRANSPORT ORDER TO BE ORDERED- PSI
ORDERED

(3) I am personally to appear in court for:

Event	Judge	Courtroom	Date
FELONY HEARING	MALTZ, HOWARD M.	Courtroom 328	11/22/2019 9:00 am

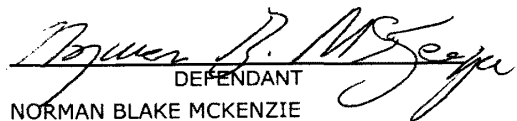
FAILURE TO COMPLY WITH ANY OF THE ABOVE REQUIREMENTS MAY RESULT IN A CAPIAS FOR MY ARREST AND INCARCERATION WITHOUT BOND UNTIL TRIAL.

WITNESS my hand this 29TH day of August, 2019.

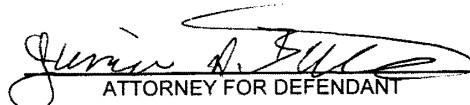


By: DEPUTY CLERK

CC: Bond Deposit


DEFENDANT

NORMAN BLAKE MCKENZIE
314 NW 12TH AVE APT 5
GAINESVILLE, FL 32601


ATTORNEY FOR DEFENDANT

JUNIOR ALPHONSO BARRETT
101 SUNNYTOWN ROAD
SUITE 310
CASSELBERRY, FL 32707

Vist our website at www.stjohnsclerk.com for case information.

Filed for record 08/29/2019 03:29 PM Clerk of Court St. Johns County, FL

**NOTIFICATION RE: PRE-SENTENCE
INVESTIGATION**

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

**STATE OF FLORIDA
VS.
MCKENZIE, NORMAN BLAKE**

CASE: **06001864CFMA**

PAGE: 1 of 1

CHARGE(S):

Count/ Phase	Statute Number	Charge	Initial Charge Stat Pros Final Action Court Action Taken
[1]	782.04 1a1	FIRST DEGREE MURDER	ARREST
[1]	782.04 1a	FIRST DEGREE MURDER	FILED
[1]	782.04 1a	FIRST DEGREE MURDER	ADJUDICATED GUILTY

On , MCKENZIE, NORMAN BLAKE age 55, the defendant, entered a plea of NOT GUILTY to:
Count 1 782.04 1a FIRST DEGREE MURDER.

[2]	782.04 1a1	FIRST DEGREE MURDER	ARREST
[2]	782.04 1a	FIRST DEGREE MURDER	FILED
[2]	782.04 1a	FIRST DEGREE MURDER	ADJUDICATED GUILTY

On , MCKENZIE, NORMAN BLAKE age 55, the defendant, entered a plea of NOT GUILTY to:
Count 2 782.04 1a FIRST DEGREE MURDER.

The Honorable HOWARD M. MALTZ, Circuit Judge, has Ordered a Pre-Sentence Investigation.

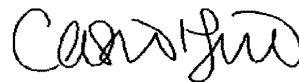
Attached, herewith, is a copy of the Information pertaining to the above named defendant.

Dated: 8/29/2019

HUNTER S. CONRAD
CLERK OF THE CIRCUIT COURT

Sentencing: 11/22/19

BY:



DEPUTY CLERK

Attachment: Information

Filed for record 08/29/2019 03:31 PM Clerk of Court St. Johns County, FL

STATE OF FLORIDA

VS.

NORMAN BLAKE MCKENZIE
W/M DOB: 07/08/1964

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA
CASE NO: CF06-01864
DIVISION: 56
CR #: SJSO 06-278175

FILED 10/17/06
CHERYL STRICKLAND
CLERK CIRCUIT COURT
ST. JOHNS COUNTY
BY: Sandy W. Dismore
DEPUTY CLERK

INDICTMENT

The 2006 Spring Term Grand Jury, in and for St. Johns County, Florida, empanelled and sworn to inquire and true presentment make, hereby, in the name of and by the authority of the State of Florida, brings this prosecution and makes the following charge or charges in TWO counts:

CHARGES: 1) FIRST DEGREE MURDER
2) FIRST DEGREE MURDER

COUNT I: In that NORMAN BLAKE MCKENZIE, on or about October 4, 2006, in the County of St. Johns and State of Florida, did unlawfully from a premeditated design to effect the death of a human being, kill and murder RANDY WAYNE PEACOCK, a human being by striking him with a hatchet and stabbing him with a knife, contrary to Florida Statute 782.04(1)(a). (CAPITAL FELONY)

COUNT II: In that NORMAN BLAKE MCKENZIE, on or about October 4, 2006, in the County of St. Johns and State of Florida, did unlawfully from a premeditated design to effect the death of a human being, kill and murder CHARLES FRANK JOHNSTON, a human being by striking him with a hatchet, contrary to Florida Statute 782.04(1)(a). (CAPITAL FELONY)

A TRUE BILL

Joanette L. P. O'Leary
FOREPERSON OF THE GRAND JURY

I, the undersigned State Attorney or Assistant State Attorney, as authorized and required by law, have advised the Grand Jury returning this Indictment.

Christopher France
CHRISTOPHER FRANCE
ASSISTANT STATE ATTORNEY
FLORIDA BAR NO.: 0069190

This Indictment presented by the aforesaid Grand Jury in open court, this 17 day of October, 2006, and on the 17 day of October, 2006, at the hour of 12:45, was filed by me.

Rebecca F.
CLERK OF THE COURT

PAPER NO. 3 CASE NO. 06001864CF

Jury Trial Notes

DATE: August 29, 2019
CIRCUIT JUDGE: MALTZ
STATE ATTORNEY: JOHNSON/DUNTON
DEFENSE ATTORNEY: BARRETT/HAMBURG
CLERK: GELL
BAILIFF: STOKES
COURT REPORTER: MARY GRAYBOSCH

STATE VS.: MCKENZIE, NORMAN BLAKE
CASE #: 06001864CFMA

CHARGE #: FIRST DEGREE MURDER (X2)

COURT COMES TO ORDER @850

DEFENDANT ADDRESSES THE COURT REGARDING WIFE WANTING TO TESTIFY @851

COURT CLEARS FOR FURTHER DISCUSSION @853

COURT QUESTIONS DEFENSE ON WHETHER IT WOULD APPROPRIATE FOR MITIGATION PURPOSES @854

DEFENSE SPEAKS ON SUBJECT @858

COURT ADDRESSES BOTH DEFENSE AND DEFENDANT- WILL LEAVE DECISION UP TO DEFENSE COUNSEL ON WHAT THEY BELIEVE IS BEST @915

DEFENDANT EXPRESSES HIS WISH TO REPRESENT HIMSELF @916

DEFENSE BRINGS IN CLAUDIA GOECKE (DEFENDANTS WIFE) FOR FURTHER DISCUSSION ON IF SHE WILL BE TAKING THE STAND- SHE EXPRESSES SHE WANTS TO BUT DEFENSE WILL NOT CALL HER @925

STATE RETURNS BACK IN THE COURTROOM @930

COURT READS QUESTION FROM JUROR @930

COURT IN RECESS FOR FEW MINUTES @ 932

JURY IN AND SEATED @937

STATE CALLS REBUTTAL WITNESS, DR. WILLIAM MEADOWS, SWORN @939

DIRECT @939

CROSS @1021

WITNESS EXCUSED @1054

STATE RESTS THEIR REBUTTAL CASE @1055

JURY OUT FOR BREAK FOR 20 MINUTES- TO RETURN AT 1115 @1055

COURT READS JURY QUESTIONS @1056

COURT IN RECESS UNTIL 1115 @1057

COURT COMES TO ORDER @1118

JURY BACK IN AND SEATED @1119

STATES CLOSING ARGUMENT @1121

JURY OUT FOR SHORT BREAK @1231

COURT IN RECESS FOR A FEW MINUTES @1232

COURT COMES TO ORDER @1236

JURY BACK IN AND SEATED @1242

DEFENSE CLOSING ARGUMENT @1243

COURT READS JURY INSTRUCTIONS @115

ALT JURORS HAVE BEEN EXCUSED @147

JURORS OUT TO DELIBERATE @150

COURT IN RECESS UNTIL KNOCK @155

JURORS KNOCK WITH VERDICT @305

COURT COMES TO ORDER @308

JURY BACK IN AND SEATED @312

CLERK PUBLISHES VERDICT @317

COURT READS ONE FINAL INSTRUCTION @319

JURORS EXCUSED @322

COURT IN RECESS @330

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

_____ /

ORDER SCHEDULING SPENCER HEARING

This matter is before the Court following the completion of the Penalty Phase portion of the trial in this case. Accordingly, the Court finds as follows:

A Penalty Phase in this case began on August 26, 2019. On August 29, 2019, the Jury rendered its Penalty Phase verdict, unanimously determining that a sentence of death was appropriate for each count of First Degree Murder.

Fla. Stat. § 921.141(2)(c) (2017) provides in part that “[i]f a unanimous jury determines that the defendant should be sentenced to death, the jury’s recommendation to the court shall be a sentence of death.” § 921.141(3) (2017) further provides

(a) If the jury has recommended a sentence of:

* * * *

2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life

imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury.

In *Spencer v. State*, 615 So.2d 688, 690-91 (Fla. 1993) the Florida Supreme Court set forth the following procedure after a death recommendation by a jury at the Penalty Phase:

We contemplated that the following procedure be used in sentencing phase proceedings. First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order.

It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed. Capital proceedings are sensitive and emotional proceedings in which the trial judge plays an extremely critical role.

See also, Phillips v. State, 705 So.2d 1320, 1323-24 (Fla. 1998)(Anstead, J. concurring).

Therefore, it is ORDERED and ADJUDGED that

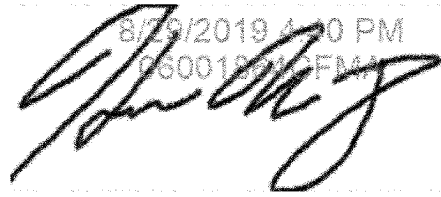
1. A *Spencer* hearing is scheduled for November 22, 2019 at 9:00 a.m. in Courtroom 328 of the Richard O. Watson Judicial Center, 4010 Lewis Speedway, St. Augustine, Florida 32084. The matter is scheduled for 2.5 hours based on the representation of the parties regarding the amount of time needed for this hearing.

2. At the aforementioned hearing the Court will follow the procedure set forth in *Spencer, supra.*; however, the State will not be permitted to present evidence regarding additional aggravating circumstances, in light of the decision in *Hurst v. Florida*, 577 U.S. ____, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016).

3. No later than December 6, 2019 counsel for both parties shall submit a sentencing memorandum to the Court. In addition to electronically filing the memoranda with the Clerk of Court, paper copies shall be submitted to the undersigned judge. The State's memorandum shall include all facts it contends support each aggravating factor the jury unanimously found to exist. The Defendant's memorandum shall include all mitigating circumstances he asserts is supported by the evidence and identify all evidence supporting the same.

4. If either party is unable to attend the aforementioned hearing it shall submit a Notice of Conflict and Request for Rescheduling to the Court within seven (7) of the entry of this Order, setting forth the reason(s) for the conflict and all dates they are unavailable during the next 90 days.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 29 day
of August, 2019.


8/29/2019 4:40 PM
06001864CFMA
e-Signed 8/29/2019 4:40 PM 06001864CFMA
CIRCUIT JUDGE

Copies to:

K. Mark Johnson, Asst. State Attorney
Jennifer L. Dunton, Asst. State Attorney
Junior A. Barrett, Esq.
Kenneth M. Hamburg, Esq.

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

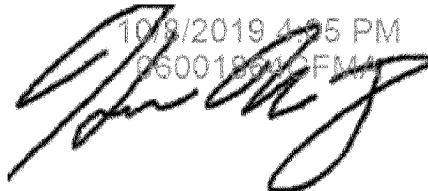
ORDER TO TRANSPORT

THIS CAUSE having come before this Court and being fully advised in the premises, it is,

ORDERED:

That authorities with the DEPARTMENT OF CORRECTIONS shall deliver custody of the Defendant, **NORMAN BLAKE MCKENZIE; DC#: 648711; W/M; DOB: 07/08/1964;** to the Sheriff of St. Johns County, and further that the Sheriff of St. Johns County shall keep said Defendant in close custody and have the Defendant present before the undersigned in courtroom 328, of the Richard O. Watson Judicial Center, St. Augustine, Florida, on **November 22, 2019 at 9:00 a.m.**, for the purpose of a SPENCER HEARING, until such time that the above-styled case has been concluded, and the Defendant returned to the custody of the DEPARTMENT OF CORRECTIONS.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 08 day of October, 2019.



e-Signed 10/8/2019 4:05 PM 06001864CFMA

CIRCUIT JUDGE

Copies to:
Office of the State Attorney
St. Johns County Sheriff's Office, Transportation

Filing # 99039485 E-Filed 11/18/2019 02:17:39 PM

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL
CIRCUIT IN AND FOR ST JOHNS COUNTY, FLORIDA

CASE NO: 2006CF001864A

STATE OF FLORIDA,
Plaintiff,

vs.

NORMAN BLAKE MCKENZIE
Defendant.

_____ /

MOTION TO PERMIT HEARING TESTIMONY VIA SKYPE

COMES NOW, the Defendant, Norman Blake McKenzie, by and through the undersigned counsel and moves this Honorable Court to allow the testimony of Claudia Goecke, Defendant's wife, at his **Spencer** hearing via Skype. In support thereof, Defendant proffers the following:

1. Defendant is scheduled for a **Spencer** hearing on November 22, 2019, at which time Defendant intends to call witnesses to present additional mitigation to this Honorable Court.
2. One of the witnesses Defendant intends to call is Claudia Goecke, Defendant's wife, who lives in Marburg, Germany.
3. Ms. Goecke, is going through medical treatment for cancer, having recently had surgery, and will not be able to travel to St. Augustine to testify in person as she and Defendant would have preferred.
4. Ms. Goecke met Defendant while he has been on death row waiting to be executed and would be able to testify about the man she has met and knows thus presenting a view of Defendant since he has been off drugs and been a permanent member of the Department of Corrections prison population.
5. Using Skype, as the procedure for conducting the testimony will allow Ms. Goecke to be administered an oath. It would further allow the witness to be seen during her testimony thus allowing this Honorable Court to observe her demeanor during testimony and any cross-examination.

6. Assistant State Attorney, Mark Johnson, was contacted and has no objection to this motion.

WHEREFORE, the Defendant, Norman Blake McKenzie, moves this Honorable Court to allow Claudia Goecke, Defendant's wife to testify via skype at his **Spencer** hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 18th day of November, 2019.

/S/ JUNIOR BARRETT

JUNIOR BARRETT, ESQUIRE

FL. Bar No. 785687

Assistant Regional Counsel

Office of Criminal Conflict &

Civil Regional Counsel, 5th District

101 Sunnyside Road, Suite 310

Casselberry, FL 32707

(407) 389-5140

jbarrett@rc5state.com

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR ST JOHNS COUNTY FLORIDA

STATE OF FLORIDA,
Plaintiff

CASE NO.: 2006CF001864

vs.

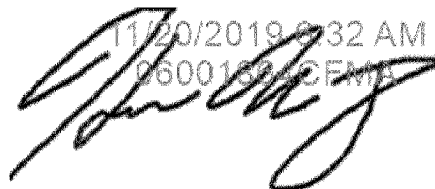
NORMAN BLAKE MCKENZIE,
Defendant.

ORDER ON MOTION TO PERMIT HEARING TESTIMONY VIA SKYPE

THIS CAUSE having come before the Court upon the Defendant's Motion to Permit Hearing Testimony Via Skype and the Court having noted no objection from Assistant State Attorney Mark Johnson, and having considered said Motion, it is hereby:

ORDER AND ADJUDGED that said Motion is **GRANTED** and witness Claudia Goecke is permitted to testify via skype.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 20 day of November, 2019.



e-Signed 11/20/2019 6:32 AM 06001864CFMA
CIRCUIT JUDGE

Copies to:
K. Mark Johnson, Asst. State Attorney
Junior Barrett, Esq. - counsel for Defendant

Filed for record 11/20/2019 08:27 AM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

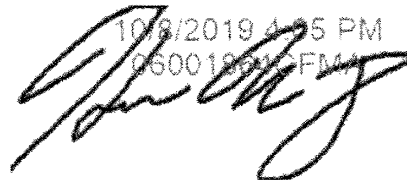
ORDER TO TRANSPORT

THIS CAUSE having come before this Court and being fully advised in the premises, it is,

ORDERED:


That authorities with the DEPARTMENT OF CORRECTIONS shall deliver custody of the Defendant, **NORMAN BLAKE MCKENZIE; DC#: 648711; W/M; DOB: 07/08/1964;** to the Sheriff of St. Johns County, and further that the Sheriff of St. Johns County shall keep said Defendant in close custody and have the Defendant present before the undersigned in courtroom 328, of the Richard O. Watson Judicial Center, St. Augustine, Florida, on **November 22, 2019 at 9:00 a.m.**, for the purpose of a SPENCER HEARING, until such time that the above-styled case has been concluded, and the Defendant returned to the custody of the DEPARTMENT OF CORRECTIONS.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 08 day of October, 2019.

10/8/2019 4:05 PM
06001864CFMA


e-Signed 10/8/2019 4:05 PM 06001864CFMA
CIRCUIT JUDGE

Copies to:
Office of the State Attorney
St. Johns County Sheriff's Office, Transportation

THEREBY CERTIFY THAT THIS DOCUMENT
IS A TRUE AND CORRECT COPY AS APPEARS
ON RECORD IN ST. JOHNS COUNTY, FLORIDA
WITH MY HAND AND OFFICIAL SEAL
THIS 8th DAY OF October 2019
CLERK OF THE CIRCUIT COURT AND COMPTROLLER
BY 



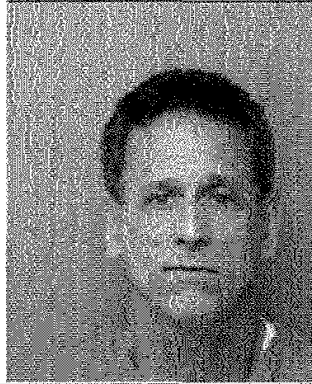
Filed for record 11/21/2019 12:47 PM Clerk of Court St. Johns County, FL



ST. JOHNS COUNTY SHERIFF'S OFFICE
MCKENZIE, NORMAN BLAKE
Booking Information



☐ High Profile ☐ Suicidal ☐ Escape Risk ☒ Hold For: BORROWED @ DOC



Booking #: SJSO19JBN005229 **MNI:** SJSO99MNI055145 **Cell:** SJSO* BKG*003*001

Address: UNION CORRECTIONS RAIFORD, FL 32083

Phone: NONE **DOB:** 07/08/1964 **BIRTHPLACE:** WINTER HAVEN, POLK, FLORIDA

CITIZENSHIP: UNITED STATES

FBI POB: FL **MARITAL STATUS:** Married

RACE: W **SEX:** M **HGT:** 6'02" **WGT:** 227 **HAIR:** Bro **EYES:** Bro **SSN:** [REDACTED]

FBI: [REDACTED] **SID:** [REDACTED] **DL:** M252622642480 **STATE:** FL

Inmate Phone PIN::

Occupation: INMATE

Employer: DEPARTMENT OF
CORRECTIONS

Phone:

Booked: 11/20/19 11:21

Booked By: BROMBERG, MELISSA

Released:

Searched By: BRANAUM, JOHN L

Photo By: BRANAUM, JOHN L

Print By:

- I have been advised any property valued over \$100 is to be released or mailed at my own expense within five (5) days.
- I understand that my phone/canteen passcode are confidential and created by me. I will not share this number with anyone. I am fully responsible for all usage and monetary obligations associated with the passcode. SJSO is not responsible for loss of funds to my account.

Inmate Signature

Officer Signature

Witness Signature



807

8/20/2007

Your Honor,

I am writing to you on behalf of our family regarding the horrific murder of my uncle, Charles Frank Johnston. Uncle Charles was loved by all of us. He had more friends than I could ever imagine having. He was full of humor and made us all laugh and enjoy life such as to not take life so seriously but to take one day at a time.

He had taken on the responsibility to trace our ancestors back to Scotland and France. For several decades he worked on our family tree. A wealth of knowledge and experience is now gone.

Uncle Charles was big hearted and generous, perhaps to a fault as we now well know. What a senseless and ghastly act to do to another individual, to steal from us the life of our uncle and brother. Uncle Charles left grieving his children but also a sister, two brother and many others. We have all experienced sadness and grief over this event. We have experienced anger towards Norman Blake McKenzie that was unnecessarily put upon us to deal with and will take a lifetime to come to grips with.

To Mr. McKenzie, I hope that you feel the guilt over your actions to the full extent that one could feel guilt. I hope that you will have time to sit and do nothing but think of what you have done, betrayed an acquaintance, stolen an innocent life and caused a family to suffer the grief, pain and heartbreak as you have done to us. I too hope you will remember what you did, every day, as the rest of us will. One last thing is that I pray that before your last hour comes that you will find forgiveness from Jesus Christ for the acts you have committed. He will hold you accountable for your actions.

We ask, Your Honor, that justice be delivered according to the maximum sentence the law allows. May no mercy be allowed as no mercy was given.

Thank you for your attention to our concerns.

Laura E. Parker

**Victim Impact Statement
(Randy Wayne Peacock, Deceased)**

I knew them simply as Uncle Randy and Uncle Charlie. Living in California, I do not get to see my family all the time, but whenever I would visit for holidays and special occasions, they were often in attendance. They were kind and happy people, a joy to have around. My nieces and nephews seemed to especially adore them.

There is a noticeable absence whenever I visit now; I almost expected to see them last Thanksgiving, Christmas, and at my parents' retirement party. I get extremely sad and angry every time I drive by their home on the way to visit my brother. I learned to accept death many years ago when my dearest friend died from disease. This loss is much harder to accept, because Randy and Charlie were vindictively taken away from us.

I could spare some sympathy if there were some question about MacKenzie's guilt or if he even expressed any remorse for his crime. I am especially sickened by the gruesome nature in which MacKenzie slaughtered my beloved family members and that his apparent only concern is whether or not he receives the death penalty. Randy and Charlie, who both never harmed a living thing, did not have a say in what happened to them. I believe MacKenzie deserves the same mercy he showed them.

Jerry Luke
20 Aug 2007

How I met Mr. McKenzie, our exchange and later relationship

Claudia Cornelia Goecke

The first time Mr. McKenzie and I got in touch with each other was in January 2016. It happened very accidentally: Due to former stays in Africa and my experience (living under a dictatorship with the death penalty) I had got involved in Human Rights Activities, and translated reports and news stories about the death penalty around the world, for a German organization. I was updating and working on the organization's webpage when I saw his art-work one day (a former friend of Mr. McKenzie had displayed it). I did not know who was behind that art-work but out of all the art I had seen before, those creations had something deeply special which did not let me go. Thus I wanted simply to send him my admiration. A longer exchange or deeper correspondence was not my goal or intention. On the contrary: I was, for several reasons, more than skeptical about getting in touch with an inmate and I was also in a very difficult situation in my life.

I wrote to him and a loose exchange started, which would continue for far longer than expected and grow to a closer friendship and serious relationship later. It is very hard to describe for people from outside, how you can get to know someone by letters. During this first year we only had letters to communicate – no phone-calls, and not even a photo from each other for 6 months. As it all started due to art work, the correspondence was very loose in the beginning; we talked about art, photography, which I have a passion for, animals, nature, interests like sports, literature etc.

Despite my doubts, the exchange got more intense over time and we would exchange and talk about everything in life: Family, how we grew up, about interests, friends, how we see life, about what we regret or don't regret, what is right and wrong, religion and our beliefs about God, history, architecture, places we had seen, where we had lived and worked. It was a challenging and intellectually demanding exchange for me, as Mr. McKenzie – my fiancé by now – is not only highly intelligent but has an immense knowledge of many subjects. In fact, I could not believe, someone on death row could tell me more about German history than I knew myself.

It was not always easy to understand everything about the other person by writing letters as both of us had lived a complex life, as well as being from different worlds, cultures and backgrounds. Even my own friends and family had struggled to follow me and the life I lived as I changed countries several times and studied, worked and lived in different continents of this world. Beside this I have a long and complex medical history and serious health problems, which is usually too challenging for others. It did feel completely upside down that the person who would finally understand my situation would be someone who is thousands of miles away and incarcerated.

***** As only the impact he had on my life is immense and more complex to understand you will find a deeper explanation about that at the end of this document (pages 9 to 11)**

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Back to the first months of our exchange: I don't know how Mr. McKenzie was "before", as I got to know him years after he was sentenced to death, but the person I met was (still is) a highly intelligent, very gifted and talented person, who thinks and reflects deeply about life and those around him, and deeply, deeply cares. His stepfather died during the first summer we got to know each other and that was first time I experienced him being very downcast.

Already during the first months, when I did not know him well, I could tell by his letters that all he was saying and writing was completely authentic. In fact, it took me some time to get used to the frank manner he had, always unadorned and straight-talking. It was also surprising me that a male person would express himself that deeply and emotionally once he truly starts trusting.

He has definitely a very complex way of capturing things and also a very complex and uncommon way of thinking. His mind works fast and he realized very late, that others usually cannot think as fast as him and thus struggle to follow and need far longer to understand or visualize situations. He is a very vivid person with deep emotions and feelings. In fact I think that his emotions and sensitivity are far deeper than average.

I certainly knew that Mr. McKenzie was at the UCI (due to his address), and on death row, but did not know anything more or in detail. I was aware that everyone can look up cases in the Internet, but as the art was the reason for contacting him and I wanted to know the person behind that rather than anything else, I was not keen to look up any further information at that point of time. In addition, I was happy to have an uncensored view, and did not see myself in the role of a judge; anyone on death row gets judged enough already in my view. Certainly I was aware about the seriousness of the situation. But I remember that I was very surprised because, very early on, it was him who brought up the topic of what happened. At that time we were not as close as we are now and our correspondence was still limited to letters, so he did not go into details then. But he never hid anything or tried to make himself look better in any way. I could already tell by then, from the way he wrote, that there is deep, deep pain and shame inside him about what happened that one day (night) and I don't think that it will ever let him go or rest. I doubt there will be one night he will not be conscious of what happened. But as much as he regrets what happened he is aware that no words can change it or make undue what has happened.

I did hesitate, in the beginning, to allow a deeper exchange to grow. One reason was my own difficult situation -- I had just returned a few months ago from West Africa and had not settled back at that time (I was searching for a job and still adapting to life back in Germany) and I had serious health issues and thus did not see myself capable of "supporting" someone in such a critical situation like he was. Not emotionally, also not financially. Those worries were soon taken away, as it turned out that he became a far bigger support emotionally than the other way around -- at least that's how it felt to me. He never wanted any money. On the contrary- whenever I sent a few Euros for stamps or food, he got upset as he knew I was in need myself, and wanted me to care for myself. The

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person I met and got to know, and the way he acted towards me and treated me, were simply selfless. If it came to visits or other things – the only thing he was concerned about was my well-being. Usually inmates long for visits and personal touch, but he was always only worried about me: if my health is good enough, if I would have enough money and be safe (for example with respect to accommodation).

He would never complain about his situation in prison – cell, food – nothing. Never wanting any one to feel bad or down for him. He did and does suffer from not being free (and blames himself for that) when it comes to family, especially in situations when he knows his loved ones need his help and support (outside). I never heard him saying: “I would love to be there, see this, I miss this or that”, never complaining of not being free, but it hurts him that he is not able to help. It is the only time he would talk about that. I did learn about the situation inside there (like the temperature inside the cells), when he told me more about his art-work, for example, that the humidity and temperature during summer do not allow him to create because the heat and humidity make it impossible to apply colors on paper during that season). Or he would explain that he could not correspond (write) due to a short food-poisoning.

It is probably surprising for people from outside who might see a “rough” person, that he is highly sensitive. He notices every slightest mood change, any little thing that is going on. Family means everything for him. This was not easy for me to understand in the beginning, as he is not in touch with many of his family members, and also because his father and his stepfather have passed away already. Plus it was a harsh life he lived while he was growing up, but he always talks with love, including about his childhood, as difficult as it was.

We sure did, and still do, have arguments and conflicts sometimes. There are things we see differently and he is not a person I would describe as a simple or easy character. Highly challenging on an intellectual level (he sees and thinks about everything from every side and in an unusual way and has a strong opinion). But at the same time he was never a person who would hide anything, nor hide if he had made a mistake – quite the opposite in fact. And if he was mistaken, he is sincerely sorry (which I can feel – for that I know him far too well) rather than just saying so.

It took us quite a while to understand each other’s lives and backgrounds, as we grew up in completely different worlds (Whereas I had grown up in a very privileged way, economically safe with both parents being doctors and able to allow my brother and me to study, he had a quite big family without any stability, moved in and out due to separation of his parents and almost all he did and learnt in life was self-taught). And it took me a while to understand the extreme life conditions he had experienced: On one hand there were a lot of exceptional things he had experienced, worked on and achieved – on the other hand he had a very harsh life from very young age. He has discovered a lot of beauty in his life (e.g. music – singing in a band, nature – fishing, surfing, working in different fields such as the construction industry) but also drugs, violence, early incarceration and a broken family. In the beginning I struggled a lot to understand these “2 worlds” he lived in and how he could have a “normal” (and in fact a very good) life on one hand (e.g. his years before coming to death row when he was in a stable relationship and successfully working

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within the construction industry/ architecture) but at the same time having a severe drug addiction, suffering from PTSD etc.

The more I understood about him and his life, the more tragic it felt what happened and what lead to the fact of him being on death row -not only for the victims and their family but also where his own life went which could have been a really great one. A person so gifted, talented, hardworking, intelligent, but unable to use all this in the right way. If I would send him a snapshot from town here, he could explain to me, just by seeing some few parts of the road or some stones, what a historical building was made of, what time and area it came from, what the construction mistakes would be. His passion and eye for detail did not surprise me too much, as I knew his art, and no one is capable of creating in that way without looking into every aspect and detail. But I did not know the extent of his knowledge – he could tell me, in what kind of room I would sit, which walls would be the ones the house is based on, where the electricity goes, by just seeing half of a sofa, 2 meters of the wall behind and a power outlet.

We talked lots about professions and work we had and I always thought my life had been very diverse. But as hard as I tried, I was unable to follow all he had done. It was a relief to me, when I once was able to visit his mother and we would drive around and she could show me some of his construction projects like Malls he was responsible for. We sure have people in Germany who design and create houses, electricians, architects – but I rarely met a person who had not studied but rather taught himself on his own. The only thing he did not learn directly on the job or did not teach himself which I remember was “CAD” (a designer program Architects use).

My family (my parents don't speak much English) received whole letters written in German -self-taught in his cell. A lot of grammar mistakes and other mistakes but German is a very complex language that others need years for and they have to study it, whereas he just “used” his mind and memorized words. There was no topic or subject we could not talk about – I often thought he had too much talent and too much mind, but did not know how to use it properly.

The last thing he ever wanted or looked for was pity. Not about his situation now, nor in the past. It was obvious from the beginning, when he talked about what happened, that he took full responsibility. We did talk about almost everything in life (well – that's impossible by letters, but we tried our best to exchange about everything). Hurtful episodes, childhood – life – it was not always easy for each other to digest the other's life. It felt a bit weird in the beginning, to tell a person who is facing death and incarceration about my “little” problems. But in fact, it was always more important for him than his own situation. He never would want anyone to suffer because of him. One typical example is the upcoming trial and when it comes to childhood (traumas) and his own family. It's a huge inner conflict as he would never want personal things to be revealed about his family – whether of his mother or his father, even though his father has already passed away.

His immense love and commitment for his family always astonished me. We had long discussions about topics like “forgiveness”, love and family. Still it was difficult to

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understand for me, how you could adore and love that deeply, for example, a brother who put hot spoons in your skin when you were young or parent who brought male friends at home who would rape his sister and brother.

Values run deep in him and even though it might sound like a contradiction, because there was a lot of violence in his life, he is highly sensitive. There have been several times when I have been more than astonished about what I have read. Protecting others seemed to be something which was instinctive in him since he was very young and it is still there (just to give a very little example – when I was looking for a flat, he could not sleep if I would choose one on the bottom with door to the street). When I told him about the mediations I was prescribed, he would be upset for weeks. He is a highly emotional, vivid and active person and we realized we have both faced emotional struggles since we were young, though in completely different ways.

We realized we both suffer from some forms of PTSD and OCD, but in different ways. It is probably easier for someone to understand if they have developed a similar disorder. But both disorders affected us in completely different ways. So I soon learnt that he constantly needs to clean every centimeter of his cell and avoids every hand shake if possible. It was more difficult for me to understand his PTSD, even though I have one myself. But mine is mostly stress-related and in certain circumstances could trigger a new episode of severe depression whereas his one seems to lead to automatic physical reactions as well. I remember once when a new nurse was at UCI and woke him up unexpectedly. Within 2 seconds he turned around, fully awake, and moved 3 meters. The nurse could not believe what was going on. It was embarrassing and he apologized, explained to her that she would need to talk to him first – not even loud, but if someone approaches unexpectedly, especially while sleeping, there is this automatic self-defense reaction.

Some of what he described reminded me of a part of my life that I spent in Africa. At home in Germany, if I were to feel a person tap on my shoulder whilst I was walking in the street, I would probably turn around and expect a friend behind me who wants to greet me. In contrast, if whilst walking on the street in Africa I was to feel something or someone approaching from behind, I was always in full alert, always ready to defend myself or run. Thus I understand the concept of automatic reactions due to a certain environment, but what I experienced never lasted lifelong in comparison to his one.

It was later, when my fiancé shared some episodes of his life and experience with violence during his upbringing in the outside world, as well as during former years of incarceration. And even though I have seen and heard a lot in my life (due to several stays in West Africa /The Gambia, I got involved in Human Rights works, the Death Penalty and Prison conditions far before I met my fiancé) and heard before about the general prison conditions in USA, it was unimaginable to read what he described. After getting that inside view of prison life, it was no surprise to me anymore, that you must suffer from the physical and emotional damage, brutality, violence and cruelty during incarceration and that it causes damages which might last life-long. I do defend the opinion that “violence is never the way nor an answer or solution”, but when looking into the inside conditions of those prisons, there is almost no way to survive and to not die if you do not defend yourself. There is

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probably no need to question the sense of those prison-systems (to bring people because of their violent behavior to a place which is just more violent and deeply inhumane).

Drugs were a topic in our exchange my fiancé would often talk about (and deeply regret – but I guess that is not necessary to tell). I do think that addiction (not only his own ones but also within his family) and violence determined his life from a very young age.

I experienced him as a very gentle, concerned and empathic man. He can react very emotionally and also roughly (verbally), especially if he gets scared, hurt or upset. Example: If I would discover a lump in my breast and need doctors to examine them but would run into bad doctors, he would easily get upset and angry (emotional). Similarly if it comes to dishonesty (including in the prison – as much as he is used to inmates and knows it is not a sane environment and he cannot expect integrity, he still gets upset when people are trying to fake each other, lie, abuse others, hurt others who are weaker or abuse or manipulate people outside, like pen pals).

His mother once said to me: “He was the one in the family (and even outside the family) who could have reached anything in life – and I don’t say that because I am his mother. He would do things (like work) others need a school or education for but he would just teach himself. Whatever task you would give him, he would solve it.” And I agree with her, although my problem is similar to his mother’s because it sounds like I say that because I am close to him. As for his mother: I can say with 100 percent security, she is not defending her son and she is more than critical when it comes to Norman (and his life). She also said, that very often it seems that artists (or creative people) have something self-destructive inside them (referring to his talent and gifts on one side but his previous problems with addiction and drugs on the other hand). I do not agree with that – at least not fully, but I understand what she is trying to say. I am also not a psychologist (nor do I want to be one), but in my view, severe addiction and deep childhood experience change the personality. What happened and lead to his death sentence was out of control, far away from reality and from the person he is without drugs.

There is a lot we argued about – so I do hope my view does not seem like one from a naïve person in love. On the contrary: I struggled to understand and follow his life. These “two” worlds he lived in were very hard to understand – on one side the harsh life he had grown up with, drugs, previous incarceration, on the other side a lot of beauty and amazing things he experienced due to his passion, interests (whether surfing, forest /swamp land, playing with his brothers even though there was violence and rivalry) and him able to always find a way to walk into a new job (I wish I could go through all the hundreds of letters I have in order to better recount and ‘prove’ all of this, but we exchanged far too much for that).

His upbringing was harsh but he was naïve (and innocent) on the other hand. I remember a story he wrote me once about his sister who had been raped by a visitor/friend of his own mother. He did not even understand what was going on. The sister ran to him (he was laying in bed), searching for protection and trying to hide behind him under the sheets. He knew something extremely bad happened, but he did not even know the facts of life

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(sexually) by that time. I hate violence and violence is never the answer, but his reactions when young (and also when in prison later) were at least understandable as there was nothing that could stop the terrible and dangerous things around him except him becoming violent himself. I think the first story I remember from him, when he got violent was when his sister got raped and he knocked the man down, so he would never dare to return ever again.

While very young, he stole food. Everyone was hungry. In fact, first what he did was always joining friends at their home to eat at their place, very aware of his selfish behavior and not at all proud of it, but food was always what was in his mind. Later, but while still a very young boy, he started to steal food, and his brother and sister encouraged him even to steal more, because he was the best in family at obtaining food.

He never told me any of this to invite pity. On the contrary. We had our own crises in our relationship, our own struggle and he just wanted me to get to know the person I started to feel so close to. Sometimes an argument resulted in him talking about things that he would not usually mention. Especially with regards to family. Once, I had conflicts within my own family and we talked about forgiveness – I saw myself unable to “forgive”. That was when he opened up and said: “What do you think? You think my family is perfect?” and gave me examples of what was in his own family.

There are hundreds of pages of letters, full of beauty and love, when he describes life, including how he grew up. Incredible episodes of his life (for example how early he was able to build or repair motorcycles – just by observing his father). Lot of boys and men have a fascination for technology but rarely do they know so much about it. He did not even understand his own intelligence and that he learns things so quickly. He wondered for example that his brother, who worked for his father (who had a motorbike-business once), could not do what he was able to do. For decades he did not understand that he is far quicker and a lot more capable than others. It took me quite a time myself to understand all this. There is probably no need to say that it is a tragedy that he was not able to use all his gifts, talents and intelligence (he also would never call himself intelligent – but an idiot and bad man because of what happened).

He would also never put himself in a “good” light. It is important for me to say that, because whatever this all is about and leads to, he would never want me to use up my valuable time to write something because of a trial or a situation he takes responsibility for. In fact, I think, I am the biggest reason that he is even giving the trial a chance, allowing “mitigating factors” to be presented, as it is a lot of pain for everyone to go through. But he knows how much I need him in my life and that I could not cope with losing him.

As I said, I had my own doubts about getting in closer contact with an inmate, but he had his worries too. In fact, when we got closer, he suggested we wait for the Supreme Court decision, to find out whether executions were to be carried out again, because he did not want to bring me into such a life. But we were far too close to each other already and he became so important for me and my survival, that there was no way I could step back. We were serious about each other already. When I visited him, he took me aside and told me I

should seriously consider getting out, finding a person in the free world who could be out there with me, rather than me being in that situation with him, which he has no control over and cannot change. And he told me that, when he loved me already. People can say I am naïve and believe in something which does not exist, but I have seen a lot of people and worlds in my life and my doubts regarding inmates are in many ways based on the fact, that I see a lot of manipulation – I do not trust easily and have become a suspicious person myself. Men – either there or in the free world – often try to have women or love in life (also the other way around – I hope I don't sound discriminative!). So, I would claim, that I know if someone means it sincerely or not.

He is a challenging personality in my view. Challenging in the sense of: Very diverse, too intelligent, too gifted. Over-sensitive on one side (I doubt he would show this to others, nor let anyone approach easily), rough to the outside. An extreme life he lived and went through, but having deep feelings and sensitivities on the other side. And even though he might not show or share his sensitivity with everyone, I do think his art (also some of his writing and poetry) is a way he expresses himself and shows big part of his inside.

I do love art and creativity in general. But his art had something "more" which I could not understand or express the first time I saw it. The pieces he did (with the most basic material) were in complete harmony. There are great artists in the world, but not all show or draw beauty. Not everyone HAS an eye for beauty. And whoever is creative him/herself, knows: You cannot create something beautiful without having true passion (heart and soul) for that. It did not surprise me, when I learnt that all pieces were created for his loved ones – closest family or closest friends. He is not even inspired, if it is not a gift for someone. It's not created for success, not for money, and also not "out of boredom". Some pieces are related to the Bible which did not surprise me either, as we had deep talks about the belief. Again: He is not a person who "tries" to be good or look good – not at all. It was me, bringing up that subject and I could not believe, I had met someone with whom I could talk that deeply about the Bible, who does not even work for the church. In fact, his knowledge and deep understanding overwhelmed me. I knew prayers and reading the bible are in his daily routine, but not how deeply he studied the bible.

What matters most in Mr. Mc Kenzie's life is definitely family and his closest loved ones, as I have already mentioned. As difficult as it was and is within his family, the love he feels is incredible and truthful. Until his early twenties, he still believed and hoped that his parents would be all together and happy again, even though they had already divorced. Even though nothing was easy within his family, he deeply adores his parents and mother, and is always deeply thankful and grateful for his stepfather, whose death (in Summer 2016) affected him a lot.

He does, and always will, try to do the best he can when it comes to me and the relationship. Always encouraging me to socialize –with either male or female friends – always wanting me to enjoy life. He would never give me the feeling that he is sad that he cannot be with me outside "here" (although of course we would both prefer to be together in the free world). After visiting him several times and getting to know other women of inmates I realized how often inmates are jealous and how possessive they can be. My

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fiancé would never want I stop socializing. All he would worry is my safety and that I am fine.

Due to his broad interests and unstoppable will to understand life – even in another culture – there is nothing we cannot share. Whether animals, pets, nature, sports, or music, I think I have learnt far more from him than the other way around. And there is not one little thing he would not follow or understand. He cares about the slightest issues, even trivialities. When he realized I did not have a job when we started corresponding (we were not in a relationship at that time) he offered immediately for me to try to sell his art. He even offered to create pieces without his name for me to sell it in my own name (which I would never want, but I know he wanted to help in any way he could). All I am trying to say is: Within his means he always would give all he can. He knows I love writing and literature, thus we shared not only letters but our own written poetry (from both sides), even started to create stories together. Whatever I would tell him I love or like to do, he would do. If I would tell him, my mother loves sunflowers, I would have a drawing of sunflowers for her next birthday. When I would mention that we need to construct a doghouse for the garden I would have a blueprint with explanations the next week in my mail box.

When he realized that I would love to write (a novel or book), he even started to write me stories about his own life that he had never talked about and say: Maybe you can use it. He would disclose things he would never do usually. He never asked for anything in return. He never wanted to have anything but me in his life and even if I would be happier another way, he would prefer whatever is best for me. In every letter he writes to me, he is grateful for everything.

As I said, him coming into my life and being in my life, despite of all the difficult circumstances and what happened, was and is enriching in many ways and he had a big impact on my life no one had before and which I want to try to explain more in depth:

***** The impact Mr. McKenzie had on my life**

To understand fully the impact my fiancé had on my life, I do need to tell first a bit about my own background. Looking at it “from the outside” I had lived an incredible life, successful and with a privileged upbringing. By the age of 12 I was attending a professional Tennis academy abroad, as I played professionally. After finishing High school I went to New Zealand and then studied at one of the best Business Schools in Germany, went abroad several more times (to do my B.A. in Ireland, another Masters in California), and worked in different cities in Germany until getting my Diploma in International Business Management. I spent another 4 years abroad (lived and worked in Spain, worked and lived several months in Africa) which all sounds very extraordinary.

What people rarely knew or could see (especially in the beginning) was that I suffered from severe anxiety disorders, PTSD and severe episodes of depression. Through decades I went from one doctor to the next, was given so many different medications that it would fill 2 pages to describe, went from wrong diagnoses and mistreatment, from one disaster to

the next. Months of being in hospital would pass by and the more I went to medics, therapists and hospitals, the worse it seemed to become. Tragic, as over time this made me less and less able to work and to continue with a “normal” life. Desperation followed and more harsh strokes of life worsened it all.

Besides Anti-depressants (especially during winter as I suffer if not having sun /day light) I received a lot of other medications, including tranquilizers which would affect me so badly that I hardly could walk. The side-effects were terrible but I was not aware that I was on a sure path to becoming addicted to something which would damage me badly.

Maybe it was coincidence of destiny that my fiancé had experience with people receiving psychotropic drugs. I never experienced him more upset than when he realized what I was going through and prescribed. By the time we met I was, due to unemployment combined with my bad condition health wise, deeply desperate. The side effects of the medications worsened and I could not even walk properly. I did not want to socialize anymore and even to buy a milk from the supermarket became a serious problem.

It is hard to describe how my fiancé was able to get me out of that – across a great distance and by letters only (in the beginning). Especially because my life had led all medics, family and friends to desperation as no one seemed to be able to help me. He had an unstoppable will to understand me and my life and I guess all that together combined with his knowledge, experience, high level of intelligence and deep, deep love (as a friend first) enabled him to understand what no others from outside, including experts, had been able to over decades, and brought me to a big break-through in my life that no one had expected.

As all that is very complex, I can only summarize in short what developed through months of intense exchange, him never giving up and absolutely willing that I LIVE, pushing me to get rid of the prescribed drugs which had already damaged me badly. As all anxiety disorders, depressions, and PTSD have their roots on an emotional (inside) level, I am sure that his emotional support (by being able to talk about all including his own hurtful experience) was one factor that helped me to get out of the situation. His sensitivity is another big reason, as he would notice every little change in my well-being even if I did not express it. Everyone suffering from anxiety disorders and depressions also knows how badly the mind goes in circles, but rarely can you share that with others as it usually is too much for anyone outside to take (for example self-destructive thoughts, suicidal thoughts).

We started to “exercise” together (like distance-coaching), he set up a plan for me to start slowly gaining back physical strength and somehow by all the comfort he gave me, the support, knowing I was not alone in going through all that, I started to sleep without needing any drugs the medics had prescribed me. I started to be able to compete again, joined the local Tennis team and stabilized more and more over time. I was able to start working again and strangely started to laugh and smile again. This sounds like something normal, but people who know how severe depression is can imagine how much that means. It was painful for him to know what was behind that person he met (he thought in the beginning, like others do, that all was fine in my life), but he never gave up, no matter how desperate I was.

Mr. McKenzie – Our exchange /relationship page 11

I cannot claim I am healed as no “cure” exists for that type of health problem. There is only a way to live with it, to see the very first signs of a new episode starting, and take care of your own life-balance (enough sport, outside activities etc.).

It seems ridiculous that a person on death row could reach what no one else was ever able to before. I guess it is easy to imagine that it is not easy to be together with someone on death row. Usually it causes much incomprehension by others (Friends etc.) and people not understanding why I would not go for someone else who can live with me in the outside world.

Mr. McKenzie “warned” me already to not disclose our relationship to others and also my family to not do so, knowing they are well known in town (due to their former clinic and great reputation – we live in a small town, so almost everyone knows my family) and not wanting any gossip and negative comments. But my family has great respect for Mr. McKenzie and is deeply thankful for all he did for me and the impact he had on my life. They sure had experienced me also in previous relationships and the times I was together with Academics, very wealthy men, but even in the “best” surroundings, I was never stable, always accompanied by suicidal thoughts and other forms of depression and anxiety disorders and insomnia.

Also other people (like friends) would see the positive changes, very often I heard “ah – you are better!” or “you look so much better” (in the sense of healthier), but it was rare that people would know why or could relate it to a person living thousands of miles away.

And somehow he always finds a way to “pick me up” and to bring happiness in my life. Being there when I am down, pushing me when necessary, and most of all understanding me in a way that no others were ever able to, even those who had studied, had a great career or were highly successful.

My parents could never visit Mr. McKenzie (they sold their clinic 9 years ago due to their age, but by doing so got involved into a huge business criminality, were betrayed and lost everything and thus cannot afford travelling). But they did exchange some letters with him and were always touched and could not believe he takes on such a big part of their life (and issues) while facing such a difficult situation himself. He would never talk about his judicial situations but would follow every step of my parents’ ones, always encouraging them. And as I said, as parents, they are deeply thankful for him being in my life and able to make such a crucial change no one had believed in anymore after so many decades.

Marburg (Germany), 7 January 2019

Claudia Cornelia Goecke

Additional note: You can see some of his art work at the following webpage I set up:

<https://art-by-blake.jimdofree.com/>

„Free“

Anonymous from Death Row, Florida

BY NORMAN B. MCKENZIE

It is not hard to conceive how freedom can mean so much to someone held under such depriving conditions. So much so that captivity of a pet becomes abhorrent. The desire to connect with something, anything, but refusing to hold that something against its will. Preferring to live alone rather than subject another life to confinement. I exist within these walls. Two meters by three meters. I am regularly visited by all sorts of critters. Frogs, toads, crickets, beetles, ants, a snake once and spiders. Most men capture these critters and build lovely little homes for them. No matter the beauty of the home, it is still merely a box, a cage. Depriving the critter of freedom.

This is the story of Charlotte. She is a beautiful spider. A Granddaddy longlegs. I awoke one morning to find a new occupant in my cell. This was nearly three years ago. I named her Charlotte, after the story I loved as a child, “Charlotte’s Web”. When Charlotte first appeared in my cell, she was too small for me to determine gender. I refused to catch her and put her in a lovely box. I watched her intently, busy as she created her web. Upon completion she moved to the center of her new home and waited. As the days passed I grew anxious as I watched her body slowly decrease in size. I knew she was hungry, yet she refused to leave and find better hunting grounds. I decided if nothing would fly into her web, I would feed her myself. The smallest of insects I would catch and toss them into her web. The first was a small common-house-fly. I watched her rush to it and quickly wrap it into a web such as a cocoon. She fed upon it until it was a mere husk, then delicately tossed the husk out of her web and repaired the damage to her home. She returned to the center of her web and splayed out her tiny legs. Miraculously her tiny body took on the weight of the fly. I felt she was satiated and happy with her choice of deciding where to make her home.

Time passed and I watched her grow. She became a beautiful spider that I eventually could identify as a female. At times, during the winter mostly, food would become scarceness. In one such period I feared she would leave me, because I could not provide for her. It was a long cold winter with no insects to be found to feed her by. I watched her little body slowly melt away with each passing day. I just knew one day I would wake up and she would be gone. I had come to care so much about this little spider that I agonized over her starvation. So much so that I added her into my daily prayers, begging that God provide me with food to give to Charlotte. Strangely enough a cricket appeared. It was the coldest of days, unheard of for a cricket to be out in such weather. A very large cricket too! Bigger, by far, than any insect I had ever given to Charlotte. I feared it would harm her if I tossed it into her web. Immediately Charlotte was upon it. A mighty struggle ensued. Charlotte’s long legs prevailed and she quickly wrapped the cricket up in a cocoon. She fed upon the cricket longer than I ever saw her feed. Three days! I watched her shrunken body fill out as life and energy returned to her. Yet still she continued to feed. I grew worried that she might harm herself by how big she was getting! Finally she tossed the husk of the cricket out of her web, repaired the damage and returned to the center to rest. I was proud to see how big her tiny body was. The days passed without any movement from her.

Then one day I awoke to find there were two spiders in her web. I quickly got my glasses and stood up on my foot locker to get a closer look. No, it wasn’t two spiders. Charlotte had shed her exoskeleton! She was now even larger. Her long beautiful legs had visible markings on them now. I was very impressed.

I carefully removed her shedding from her web. So attached to Charlotte I had become, her shedding was like holding the first tooth a child loses. I simply could not throw it away. I decided to mount her shedding, so proud of her I was. Meticulously I placed her shedding on a piece of clean white paper. Then carefully covered it with a single piece of clear tape. So proud of it, I mailed it to someone very dear to me as a gift.



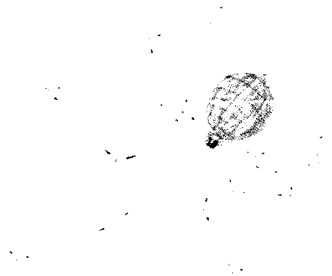
Then one day the guards came to my cell and told me to pack all of my belongings, I was being transferred to outside court. What to do!? What to do!? I couldn't catch Charlotte and give her to one of my neighbors. I knew they would put her in a box, I said my goodbyes and left her there in her web. I was gone for seven days. When I returned I was placed back in the same cell. I quickly looked up in the corner... but Charlotte was gone. Her web was even gone.

I asked my neighbor if anyone had been in this cell. The guards had sent in trustee inmates to sweep and mop the cell floor. They swept Charlotte away as well. I didn't want to think of how it must have been for Charlotte. To be callously swept away. Surely it traumatized her greatly. My only hope was that she died fast and didn't suffer. I settled back into my cell of deprivation. My eyes unconsciously finding their way to the corner in the ceiling where Charlotte used to live.

Two weeks after I returned I woke up to a usual day. I stood at the sink brushing my teeth. I was looking in the mirror above the sink and I noticed something in the reflection. I quickly turned to see a spider in the same corner where Charlotte once lived. I rushed over to the corner and leaped up on the top of the foot locker. I squinted to see. To see, to see, to see! My glasses, where are my glasses? I found my glasses and returned to the foot locker. I looked up in the corner and to my amazement there was Charlotte! And she was healthy, all eight legs, calmly rebuilding her web. Charlotte had returned to live with me. I can only imagine her journey. Somehow she survived. I knew it was her because I knew every detail of her markings on her legs. Charlotte had passed every cell on this wing to return to this specific cell, to return to live her life with me.

No one would believe this, but it's absolutely true. Three years she and I have lived together.

Charlotte is free. As I write this page to you, Charlotte sleeps in her web.
Free.



PLAGUE OF DEATH

by: Anonymous, Florida

By Norman B. McKenzie

There is a window outside my cell. It faces the West. In the evening hours of each day the last sun rays beam inside my cell shining upon the bars casting an equaled measured line of shadows upon the back wall of my cell. It is said 'Do not watch a clock, because you will never see it move.'

Here, on THE ROW, times stands still for no-one. You can literally see the shadows of bars slide forebodingly, across the wall.

There is a maniacal passion about each day. It is a brash, boastful, facade you see on the face of every MAN here. With the passage of time their demeanor becomes even more animated. The laughter is just an octave too loud, imperceptibly forced. As if to live each day to the fullest, because the march of shadows never cease. Time is the enemy here. Every man faces it. The marching of incessant time means only one thing: appeals are running out. With each seasonal change comes one more denial from the courts. Laughter becomes a little more strained. Attention spans get a little more shorter. It is as if a ~~plaguing~~ disease has come. Men begin to distance themselves for fear of contamination. The Plague of Death be upon you. Everyone can see it.

PLAGUING

Appeals have run out. The laughter fades away. Time is reduced to hours. Then minutes. Then seconds. Then none. The purest form of reality to be seen is when a man looks you in the eyes and tells you his appeals are over. He is done. Life is hanging by a thread. Every time the electronic locking device "clicks" on the Row, that inmate who is "done" awaits the inevitable, the sound of chains echoing down the Row. It happens unknowingly. Guards show up at your door. They tell you "It is time". Time? No. It is not time. There is no more time. Time has run out. It will never ever be "Time" again. When a man says "I am done", there is no facade. It is raw, it is pure nakedness. It is without hope. It is the Plague of Death.

I befriended a man when I came to Death Row. We talked about life. We talked about cars. We discussed philosophical points of views. We talked about Space and its mysterious beyond. We talked about love and the frivolity of hate. We talked about politics and the state of man. We talked about history, and we talked about God. I looked forward to these talks with the faceless voice. I ritualistically prepared for them when I awoke each day.

Then one day, a day like any other day, I heard the sound of chains. The silence was loud, but I did not know why. Several guards walked and passed my cell. The sound of their shoes, echoing loudly upon the concrete floor, stopped a few cells beyond mine. "It is time", were the words I heard. Time? Time for what, I wondered? I heard the sliding of a door opening, chains being moved about, then shoes moving once again. As my friend passed by the front of my cell he paused in his steps. Surrounded by Guards, "Take good care of yourself", he said as he looked me in the eyes. There was finality in his words. I did not understand. Was it a coded message? Was he secretly trying to tell me something? The escort of the guards led him away down the row, and he was gone. That was it. Over. I never ever saw him again. He was executed. It devastated me. He never spoke of death. Never spoke about his appeals. He knew he was done. It never occurred to me he was done. He had the Plague of Death. It shut me down. It boxed me in. I closed myself off to friendship on the Row.

There is no greater reality than the reality of Death Row. The sound of chains echoes in the silent mind of every man here on the Row. The shadows march across the wall of every cell on Death Row. Every occupant of every cell sees the shadows move. Time moves in the eyes of each and every man here. Nowhere else is the movement of time more aware of than right here on the Row. Each passing day brings each man closer to saying the words "I am done." A short time later they hear the words "It is time."

There is no cure. There is no escape. The Plague of Death awaits us all. Time marches on, until time runs out.

IN THE CIRCUIT COURT OF THE 7th JUDICIAL CIRCUIT
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA -vs- NORMAN BLAKE MCKENZIE

CASE #: 06001864CFMA
Judge: HOWARD M. MALTZ
Division: 56
Charges: Ct 1 FIRST DEGREE MURDER (FILED)
Ct 2 FIRST DEGREE MURDER (FILED)

A C K N O W L E D G M E N T

I ACKNOWLEDGE THAT:

(1) I am required to keep my current telephone number and mailing address known to my attorney and the clerk of this court at all times.

(2) Continuation requested by _____.

Requirements:

(3) I am personally to appear in court for:

<u>Event</u>	<u>Judge</u>	<u>Courtroom</u>	<u>Date</u>	
FELONY SENTENCING	MALTZ, HOWARD M.	Courtroom 328	02/14/2020	1:30 pm

FAILURE TO COMPLY WITH ANY OF THE ABOVE REQUIREMENTS MAY RESULT IN A CAPIAS FOR MY ARREST AND INCARCERATION WITHOUT BOND UNTIL TRIAL.

WITNESS my hand this 22ND day of November, 2019.

By: ABEL, DEPUTY CLERK

CC: Bond Deposit



DEFENDANT

NORMAN BLAKE MCKENZIE
314 NW 12TH AVE APT 5
GAINESVILLE, FL 32601



ATTORNEY FOR DEFENDANT

JUNIOR ALPHONSO BARRETT
101 SUNNYTOWN ROAD
SUITE 310
CASSELBERRY, FL 32707

Vist our website at www.stjohnsclerk.com for case information.

Filed for record 11/22/2019 10:40 AM Clerk of Court St. Johns County, FL

Hearing Notes

DATE: November 22, 2019
CIRCUIT JUDGE: MALTZ
STATE ATTORNEY: DUNTON/JOHNSON
DEFENSE ATTORNEY: BARRETT/HAMBURG
CLERK: GELL
BAILIFF: STOKES
COURT REPORTER: SAMMARO

STATE VS.: MCKENZIE, NORMAN BLAKE
CASE #: 06001864CFMA

CHARGE #: FIRST DEGREE MURDER (X2)

SPENCER HEARING

COURT COMES TO ORDER @900

DEFENDANT PRESENT WITH COUNSEL @902

JURY UNANIMOUSLY FOUND DEFENDANT SHOULD BE SENTENCED
TO DEATH DURING PREVIOUS PENALTY PHASE @903

HOUSEKEEPING MATTERS @903

DEFENDANT EXPRESSES HIS OBJECTIONS TO PSI @904

DEFENSE STATES WITNESS TO TESTIFY VIA SKYPE WILL NO
LONGER BE AVAILABLE @907

DEFENSE CALLS FIRST WITNESS, NORMAN MCKENZIE, and SWORN
@909

DIRECT @909

CROSS @935

COURT QUESTIONS DEFENDANT @1000

WITNESS EXCUSED @1008

DEFENSE CALLS DR. SKOLLY- DANZIGER, SWORN @1008

DIRECT @1008

CROSS @1023

REDIRECT @1030

COURT QUESTIONS WITNESS @1031

WITNESS EXCUSED @1033

DEFENSE AND STATE RESERVE ARGUMENTS FOR SENTENCING
HEARING @1033

SENTENCING SET FOR 02/14 AT 130

DEFENDANT CAN RETURN TO DOC @1037

COURT IN RECESS @1037

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: CF06-1864

v.

DIVISION: 56

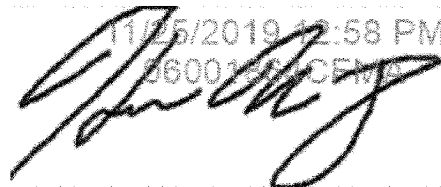
NORMAN BLAKE MCKENZIE,
Defendant.

_____ /

ORDER SCHEDULING SENTENCING

PLEASE TAKE NOTICE that on the 14th day of February, 2020, at 1:30 p.m., sentencing will be held in the above-styled case before the undersigned judge, in courtroom 328, of the Richard O. Watson Judicial Center, 4010 Lewis Speedway, St. Augustine, Florida.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 25 day of November, 2019.

A handwritten signature in black ink is written over a digital timestamp and case number. The timestamp reads "11/25/2019 12:58 PM" and the case number reads "06001864CFMA".

e-Signed 11/25/2019 12:58 PM 06001864CFMA
CIRCUIT JUDGE

Copies to:

K. Mark Johnson, Asst. State Attorney

Jennifer L. Dunton, Asst. State Attorney

Junior A. Barrett, Esq.

Kenneth M. Hamburg, Esq.

Court Reporters; stenographers@circuit7.org

Filed for record 11/25/2019 01:08 PM Clerk of Court St. Johns County, FL

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

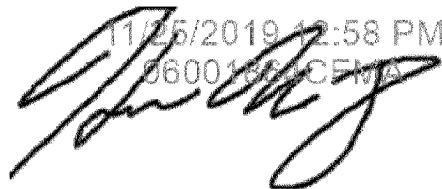
ORDER TO TRANSPORT

THIS CAUSE having come before this Court and being fully advised in the premises, it is,

ORDERED:

That authorities with the DEPARTMENT OF CORRECTIONS shall deliver custody of the Defendant, **NORMAN BLAKE MCKENZIE; DC#: 648711; W/M; DOB: 07/08/1964;** to the Sheriff of St. Johns County, and further that the Sheriff of St. Johns County shall keep said Defendant in close custody and have the Defendant present before the undersigned in courtroom 328, of the Richard O. Watson Judicial Center, St. Augustine, Florida, on **February 14, 2020 at 1:30 p.m.**, for the purpose of SENTENCING, until such time that the above-styled case has been concluded, and the Defendant returned to the custody of the DEPARTMENT OF CORRECTIONS.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 25 day of November, 2019.



11/25/2019 12:58 PM
06001864CFMA

e-Signed 11/25/2019 12:58 PM 06001864CFMA

CIRCUIT JUDGE

Copies to:
Junior A. Barrett, Esq.
Office of the State Attorney
St. Johns County Sheriff's Office, Transportation

Filed for record 11/25/2019 01:08 PM Clerk of Court St. Johns County, FL

Filing # 99934333 E-Filed 12/06/2019 02:50:01 PM

**IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA**

CASE NO: CF06-01864

STATE OF FLORIDA

VS.

**NORMAN BLAKE MCKENZIE,
DEFENDANT.**

STATE'S SENTENCING MEMORANDUM

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and, pursuant to Paragraph 3 of the Court's Order Scheduling *Spencer* Hearing, files this sentencing memorandum setting forth the facts, legal authority and argument in support of the imposition of the death as unanimously recommended by the jury in the trial of this cause as follows:

PROCEDURAL HISTORY

On October 17, 2006, the defendant was indicted by a St. Johns County Grand Jury for the First Degree Murder of Randy Wayne Peacock and the First Degree Murder of Charles Frank Johnston. On March 2, 2007, the State filed a notice of intent to seek the death penalty. Trial for the guilt phase commenced with voir dire on August 20, 2007. The following day, a St. Johns County jury found the defendant guilty as charged on both counts.

*State v. Norman B. McKenzie, Case #CF06-01864
State's Sentencing Memorandum
Page 1 of 35*

The trial then proceeded to the penalty phase, and on August 23, 2007 the jury recommended that the defendant be sentenced to death by a vote of 10-2. On October 19, 2007, the trial court concurred and sentenced the defendant to death.

Following the Florida Supreme Court's decisions in *Hurst v. State*, 202 So.3d 40, 57 (Fla. 2016); *Mosely v. State*, 209 So.3d 1248, 1283 (Fla. 2016); and *Asay v. State*, 210 So.3d 1 (Fla. 2016), this Court, on June 19, 2017, entered an order vacating the defendant's death sentences because the original death recommendation was less than unanimous. The court then re-docketed the case for a potential penalty phase in the event the State chose to continue seeking the death penalty.

On August 28, 2017, the State filed a Renewed Notice of Intent to Seek the Death Penalty and List of Aggravating Factors. On January 23, 2019, the State provided notice of its intent to amend its list of aggravating factors. In total, the aggravating factors the State listed were as follows:

1. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
2. The capital felony was committed while the defendant was engaged in the commission of, or attempted commission of, a robbery.
3. The capital felony was committed for pecuniary gain.
4. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
5. The capital felony was especially heinous, atrocious, or cruel.

State v. Norman B. McKenzie, Case #CF06-01864
State's Sentencing Memorandum
Page 2 of 35

Jury selection for the penalty phase retrial began on August 26, 2019. Following the selection of a jury and the presentation of evidence by both the State and the defense, the jury returned with a verdict on August 29, 2019. In that verdict, the jury unanimously found that (1) the State had proven all five of the listed aggravating factors beyond a reasonable doubt, (2) the aggravating factors were sufficient to warrant a death sentence, (3) one or more mitigating circumstances were established by the greater weight of the evidence, (4) the aggravating factors outweighed the mitigating circumstances, and (5) the defendant should be sentenced to death.

A *Spencer* hearing was held on November 22, 2019, during which time the defense presented testimony from the defendant and an expert witness as well as a written statement from the defendant's overseas spouse. The State presented two additional written victim impact statements. At that time, the Court scheduled sentencing to take place on February 14, 2020.

Pursuant to Florida Statutes § 921.141(3)2, the Court must now consider the evidence presented during the trial and the subsequent *Spencer* hearing and determine, in accordance with the law, whether the appropriate sentence is one of life in prison without the possibility of parole or the death penalty. For the reasons

set forth below, the State contends that the defendant's brutal murders of Randy Peacock and Charles Johnston warrant sentences of death for each victim.

AGGRAVATING FACTORS – COUNTS I & II

At the penalty phase trial, the State asserted five (5) aggravating factors for both Counts I and II. The jury was instructed, as required by Florida Statute § 921.141(2) (2017), that in order to find the existence of an aggravating factor it must unanimously determine that the aggravating factor had been proven beyond a reasonable doubt. The evidence presented at trial that supported each of the aggravating factors is outlined and discussed below. Since the same aggravating factors have been alleged with regard to both the murder of Randy Peacock and the murder of Charles Johnston and the evidence supporting each is either similar or occurred during the same intermingled course of events, the State will address these factors as they relate to both victims together.

1. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. Section 921.141(6)(b), Florida Statutes.

The bases for this aggravating factor are the defendant's convictions for the contemporaneous murders of Charles Johnston (as it relates to the defendant's conviction for the murder of Randy Peacock in Count I) and Randy Peacock (as it

relates to the defendant's conviction for the murder of Charles Johnston in Count II), and his prior convictions for the following nine violent felonies:

<i>Kidnapping and Robbery</i>	<i>State v. Norman B. McKenzie</i> , Case No. 1984-3907-CF, Broward Co., FL, Nov. 8, 1984
<i>Robbery</i>	<i>State v. Norman B. McKenzie</i> , Case No. 1990-19206-CF, Broward Co., FL, May 28, 1991
<i>Robbery</i>	<i>State v. Norman B. McKenzie</i> , Case No. 2007-586-CF, Alachua Co., FL, May 17, 2007
<i>Robbery</i>	<i>State v. Norman B. McKenzie</i> , Case No. 2007-532-CF, Alachua Co., FL, May 17, 2007
<i>Robbery</i>	<i>State v. Norman B. McKenzie</i> , Case No. 2007-585-CF, Alachua Co., FL, May 17, 2007
<i>Attempted Robbery</i>	<i>State v. Norman B. McKenzie</i> , Case No. 2006-5259-CF, Alachua Co., FL, May 17, 2007
<i>Kidnapping with a Firearm</i>	<i>State v. Norman B. McKenzie</i> , Case No. 2006-CF-005261, Alachua Co., FL, May 17, 2007
<i>Carjacking with a Firearm</i>	<i>State v. Norman B. McKenzie</i> , Case No. 2006-4213-CF, Marion Co., FL, Mar. 6, 2007

Certified copies of these prior judgments were entered into the evidence by the State, who also presented testimony from fingerprint expert Samantha Otter that the fingerprints attached to the judgments matched standards from the defendant. The State also presented live testimony from six victims and one detective concerning the circumstances of all of the offenses dating from 1990 to 2007. Each of them described the violence, terror and, in one victim's case, the extensive and

permanent physical injuries inflicted by the defendant during those crimes. Finally, the State admitted into evidence a recorded interview in which the defendant not only confessed to the murder of Randy Peacock and Charles Johnston, but also recounted in extensive detail his actions in committing virtually all of these crimes. His description of these events substantially matched the accounts given by the victims.

As for the defendant's conviction for the murders of Randy Peacock and Charles Johnston, it is well-established that contemporaneous convictions for capital or violent felonies on different victims may be considered. *Bevel v. State*, 983 So.3d 505 (Fla. 2008); *Francis v. State*, 808 So.2d 110 (Fla. 2002); *Pardo v. State*, 563 So.2d 77 (Fla. 1990); *King v. State*, 390 So.2d 315 (Fla. 1980). Additionally, Kidnapping, Robbery, Attempted Robbery and Carjacking have all been considered felonies involving the use or threat of violence. *See e.g., Lugo v. State*, 845 So.2d 74, 111 (Fla. 2003) (recognizing prior conviction for kidnapping as a prior violent felony); *Johnson v. State*, 442 So.2d 193, 197 (Fla. 1984) (holding that robbery and attempted robbery were violent felonies); *Cannon v. State*, 180 So.3d 1023, 1033 (Fla. 2015) (recognizing carjacking as a violent felony).

The evidence of these convictions were presented to the penalty phase jury, and they unanimously agreed that this aggravating factor, as it applies to the murder

of both victims, had been proven beyond a reasonable doubt. *Verdict as to Sentence, Count I – First Degree Murder of Randy Peacock (Question A.1)*, Aug. 29, 2019 (R.502); *Verdict as to Sentence, Count II – First Degree Murder of Charles Johnston (Question A.1)*, Aug. 29, 2019 (R.503). The Florida Supreme Court has observed that the “prior violent felony” aggravating factor is one of the “most weighty in Florida’s sentencing calculus.” *Sireci v. Moore*, 825 So.2d 882, 887 (Fla. 2001). The State submits that this is particularly the case here, where the defendant has not only previously committed many of the most violent non-lethal felonies, but also murdered two innocent human beings in this case. Accordingly, the Court should give this aggravating factor GREAT WEIGHT.

2. The first degree murders of Randy Peacock and Charles Johnston were committed while the defendant was engaged in the commission of, or an attempt to commit a robbery. Section 921.141(6)(d), Florida Statutes.

The evidence supporting this aggravating factor (as it relates to both murders) is derived, in short, from the defendant’s own words. During the penalty phase, the State admitted into evidence two video recorded interviews of the defendant on October 5, 2006, and February 15, 2007. The defendant’s statements during these interviews clearly show that he was engaged in the commission of a robbery when he murdered Randy Peacock and Charles Johnston.

In his interview on February 15, 2007, the defendant told Det. Timothy Burress that he went to the victims' home for the purpose of stealing their money because he was running low on drugs. Similarly, he told Det. Timothy Rollins on October 5, 2006, that he went to the victims' home intending to kill Randy Peacock and Charles Johnston and steal their money.

Additionally, the evidence introduced at trial established that after brutally killing Randy Peacock and Charles Johnston, the defendant took their wallets, money and credit cards, and also stole Randy Peacock's car. Upon arrest, the defendant was found in possession of Randy Peacock's wallet, which contained credit cards in both victims' names. Charles Johnston's wallet was found in Randy Peacock's abandoned car.

The defendant's original description of the events during his two interviews clearly demonstrate that he killed Randy Peacock during the course of a robbery. His claim at the *Spencer* hearing that he killed the victims in a sudden fit of anger following a disagreement over money owed to him is inconsistent with his repeated assertions that drug addiction drove him to commit the murders, is irreconcilable with his previous statements, and defies common sense.

The penalty phase jury in this case unanimously found beyond a reasonable doubt that the defendant committed the murder of Randy Peacock and Charles

Johnston while he was engaged in the commission of a robbery. *Verdict as to Sentence, Count I – First Degree Murder of Randy Peacock (Question A.2)* (R.502); *Verdict as to Sentence, Count II – First Degree Murder of Charles Johnston (Question A.2)* (R.503). The Court should give this aggravating factor GREAT WEIGHT.

3. The first degree murders of Randy Peacock and Charles Johnston were committed for pecuniary gain. Section 921.141(6)(f), Florida Statutes.

This aggravating factor is supported by the same evidence that proved that the defendant murdered Randy Peacock during the commission of a robbery. This factor has been held to apply where the “murder is an integral step in obtaining some sought-after specific gain.” *Henyard v. State*, 689 So.2d 239, 253 (Fla. 1996) (citing *Hardwick v. State*, 521 So.2d 1071, 1076 (Fla. 1988)); *see Bowles v. State*, 804 So.2d 1173, 1179-80 (Fla. 2002) (holding that defendant’s statement that he expected to find money at victim’s home was sufficient evidence that the murder was committed for pecuniary gain despite defendant’s later claim that he found no money and that the property that he did take was simply an afterthought). The defendant’s statements clearly demonstrate that he murdered Randy Peacock in order to steal money from him to continue fueling his consumption of drugs.

The jury also found this aggravating factor to have been proven beyond a reasonable doubt. *Verdict as to Sentence, Count I – First Degree Murder of Randy Peacock (Question A.3) (R.502); Verdict as to Sentence, Count II – First Degree Murder of Charles Johnston (Question A.3) (R.503).* Case law, however, dictates that when a murder occurs during the course of a robbery, the felony-murder and pecuniary-gain aggravating factors cannot be considered separately. *Francis*, 808 So.2d at 136-37. Therefore, the Court’s consideration of this aggravating factor must merge with its deliberation on the felony-murder factor.

4. The first degree murders of Randy Peacock and Charles Johnston were especially heinous, atrocious, or cruel. Section 921.141(6)(h), Florida Statutes.

The Florida Supreme Court has held that the heinous, atrocious or cruel (HAC) aggravating factor applies “only in tortuous murders – those that evince extreme and outrageous depravity as exemplified by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.” *Cheshire v. State*, 568 So.2d 908, 912 (Fla. 1990). Additionally, the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim. *Nelson v. State*, 748 So.2d 237, 245 (Fla. 1999); *Knight v. State*, 746 So.2d 423, 438-39 (Fla. 1998); *Zakrzewski v. State*, 717 So.2d 488, 492 (Fla. 1998); *Hartley v. State*, 686 So.2d 1316, 1323 (Fla. 1996); *Richardson v. State*, 604 So.2d 1107, 1109 (Fla.1992).

A predicate component of the HAC aggravator is that the victim was conscious and aware of his or her impending death or the circumstances that contributed to the death. *Zakrzewski*, 717 So.2d at 493 (citations omitted).

Furthermore, HAC focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than on the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death. Thus, if a victim is killed in a torturous manner, a defendant need not have the intent or desire to inflict torture, because the very torturous manner of the victim's death is evidence of a defendant's indifference. *Barnhill v. State*, 834 So.2d 836, 849-50 (Fla. 2002). Therefore, the focus should be on the victim's perceptions of the circumstances as opposed to those of the perpetrator. *Lynch v. State*, 841 So.2d 362, 369 (Fla. 2003).

During both of the defendant's recorded interviews, the defendant described in explicit detail his murder of Randy Peacock and Charles Johnston. After waiting for several hours for a neighbor to leave, the defendant asked Charles Johnston for a hammer and a piece of wood, which he told Charles Johnston he needed to knock a dent out of his car. Charles Johnston found and gave the defendant a hatchet to use as a hammer and walked into a backyard shed to look for a piece of wood. With hatchet in hand, the defendant entered the shed behind Charles Johnston and struck

him once in the head with the blade edge of the hatchet. Charles Johnston then fell into some shelves before collapsing to the shed floor.

After attacking Charles Johnston, the defendant walked into the house where Randy Peacock was cooking soup on the stove in the kitchen. He struck Randy with the hammer side of the hatchet once in the back of the head, which caused Randy to fall into the pot in which he was cooking. However, Randy did not fall down. Rather, he stood there at the stove with his elbows and arms in the scalding hot soup. The defendant stated that he then struck Randy once or twice more in the head again. He then pulled Randy away from the stove, and Randy fell to the floor. At that point, the defendant mistakenly thought Randy was dead or dying based on the sound of Randy's breath. The defendant then indifferently stated, "So, I didn't have to . . . freak out about it anymore, fuck him."

The defendant said he then left the house and went back to the shed to steal Charles Johnston's watch. Upon his return, he found Charles Johnston struggling to get up. During his interview, the defendant said that not only was Charles Johnston conscious and still alive at that point, but also that he might have survived if the defendant had called an ambulance. Rather than doing so, the defendant then struck Charles Johnston in the face with the blade end of the hatchet three more times, killing him. In describing his initial failed effort to kill Charles Johnston during the

first attack, the defendant told detectives, “Man, you wouldn’t believe how hard it is to kill somebody.”

The defendant then left the hatchet in the shed and walked back to the house. Upon re-entering the kitchen area, he surprisingly found Randy on his feet, struggling to get up. The defendant stated that he could see that Randy was blind from the previous blows he had inflicted to Randy’s head. Because he had left the hatchet in the shed after killing Charles Johnston, the defendant grabbed a long butcher knife out of a dish drainer. He then stabbed Randy multiple times in the neck, chest, abdomen and back in an effort to cut his jugular vein and stab him in the heart. At that point, a struggle ensued. Despite the multiple stabbings, the defendant stated, “[Randy] wouldn’t go down. He wouldn’t go down.” He then described thrusting the knife at an angle far into Randy’s abdomen and then “jigg[ing] it around” his heart that the entire blade of the knife was inside Randy’s body. The defendant stated that Randy then attempted to grab the knife, but could only grab his hand because the knife was all the way in him. Randy’s grip was so tight that the defendant had to struggle to get his hand off of him. As it relates to his efforts to kill Randy Peacock, the defendant said, “That shit ain’t as easy as it sounds, man.” When asked if Randy knew he was fighting him, the defendant responded, “I think he was trying to live. . . . I do think he was aware that he needed to live.”

Dr. Predrag Bulic, the Chief Medical Examiner, testified at trial that Randy Peacock suffered three (3) or four (4) blunt force injuries to the back of the head. He also testified that the visual center is located in the back of the brain, so the defendant's statement that Randy Peacock appeared to be blind after being struck in the back of the head was consistent with these injuries. Both of Randy Peacock's arms endured extraordinarily painful second and third degree burns to both arms, consistent with coming into contact with an extremely hot liquid. Dr. Bulic also found that Randy had also sustained six (6) stab wounds, one (1) to the right side of the neck, two (2) to the upper abdomen, two (2) to the lower chest, and one (1) to the back. The wounds to Randy Peacock's neck and upper abdomen were not lethal. Dr. Bulic concluded that the lower chest stab wounds, which went between the ribs and struck the liver, were potentially survivable if Randy Peacock had been taken to the hospital within 30 minutes. Even the most lethal of the stab wounds – the back wound which penetrated all the way through Randy Peacock's right lung, and fractured one of his front ribs – also did not result in an instantaneous death. Importantly though, while Dr. Bulic stated that while Randy Peacock would have initially lost consciousness from the blows to the back of his head, it was his opinion, based on the defendant's statements, that Randy Peacock survived this initial attack and was conscious at the time he was being repeatedly stabbed by the defendant.

Moreover, after regaining consciousness, Dr. Bulic testified that Randy Peacock would have felt the severe pain from the burn wounds to his arms as well as all the stab wounds inflicted by the defendant. The fact that the defendant used more than one type of weapon to inflict numerous injuries to different parts of Randy Peacock's body corroborate the defendant's account that the victim was conscious during the stabbing and aware enough to struggle for his own life.

Dr. Bulic also testified that Charles Johnston suffered four (4) chop injuries to the head. Dr. Bulic opined that with the information from the defendant that Charles Johnston regained consciousness after the initial attack and was trying to get up off the shed floor, Charles Johnston would have been experiencing significant pain prior to the defendant striking the additional fatal blows with the hatchet.

The HAC aggravating factor can apply in cases in which the victim was beaten or stabbed multiple times to death if the victim was alive and conscious when the wounds were inflicted. *Guardado v. State*, 965 So.2d 108, 115-17 (Fla. 2007). Furthermore, the Florida Supreme Court has upheld a trial court's HAC finding where a victim, who initially had been rendered unconscious, regained consciousness prior to being attacked again and murdered. *See Overton v. State*, 801 So.2d 877, 901 (Fla. 2001) (upholding HAC where victim had been knocked unconscious but regained consciousness before the defendant disabled the victim

and then strangled him to death); *Scott v. State*, 494 So.2d 1134 (Fla. 1986) (upholding HAC where victim was beat unconscious, then driven to a deserted area where he regained consciousness before being beat again and run over by a car).

The evidence presented at trial shows that Randy Peacock and Charles Johnston endured torturous deaths at the hands of the defendant, who was utterly indifferent to their suffering. The jury in this case unanimously agreed and found beyond a reasonable doubt that the defendant's murders of both Randy Peacock and Charles Johnston were especially heinous, atrocious or cruel. *Verdict as to Sentence, Count I – First Degree Murder of Randy Peacock (Question A.4)* (R.502); *Verdict at to Sentence, Count II – First Degree Murder of Charles Johnston (Question A.4)* (R.503). The Florida Supreme Court has also recognized this aggravating factor as one of "the most weighty in Florida's sentencing calculus." *Sereci*, 825 So.2d at 887. Based on all the above, the Court should find that this aggravating factor applies and give it GREAT WEIGHT.

5. The first degree murders of Randy Peacock and Charles Johnston were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Section 921.141(6)(i), Florida Statutes.

In *Jackson v. State*, 648 So.2d 85, 89 (Fla. 1994), the Florida Supreme Court set forth four elements that the State must satisfy in order to establish the "cold, calculated and premeditated" (CCP) aggravating factor: (1) the killing was the

product of cool and calm reflection and not an act prompted by emotional frenzy, panic or fit of rage (“cold”); (2) the defendant must have had a careful plan or prearranged design to commit murder before the killing (“calculated”); (3) the defendant exhibited heightened premeditation (“premeditated”); and (4) the defendant had no pretense of moral or legal justification. The evidence presented at trial proved each of the elements beyond a reasonable doubt.

a. *Cold: The murders were the product of cool and calm reflection.*

First, the State has established that the murders of Randy Peacock and Charles Johnston were the product of cool and calm reflection, rather than an act prompted by emotional frenzy, panic or fit of rage. The evidence in this case clearly shows that the defendant went to the victims’ home with the intent to rob and kill them. He told detectives in his interviews that he wanted money to buy more drugs, that he had committed several other robberies in the preceding days, and had concluded that “everything was just over with in my mind.” After arriving at the home, the defendant remained there for several hours while a neighbor helped Charles Johnston fix the brakes on his car. During that time, the defendant contemplated how to murder the two men and “get it over with pretty quick.” He waited until the neighbor left and Randy Peacock was inside the house, leaving him alone outside with Charles Johnston.

Based on his own statements at the time of his interviews, the defendant was not provoked into a fit of rage or some sort of emotional frenzy or panic. He calmly asked Charles Johnston for a “good size hammer” and a piece of wood to knock out a dent in the door of his vehicle. Charles Johnston gave the defendant a single-blade hatchet, the flat end of which could be used as a hammer, then proceeded into a shed to look for a piece of wood. The defendant coolly and calmly followed him in. When Charles Johnston walked to the back corner of the shed with his back turned to the door, the defendant struck him once with the blade edge of the hatchet. According to the defendant, there was no fight; he completely blindsided Charles Johnston. Upon being struck, Charles Johnston fell into some shelves before landing on the floor of the shed.

After attacking Charles Johnston, the defendant left the shed and walked to the house. Hatchet in hand, he quietly entered the home and crept up behind Randy Peacock, who was standing at the kitchen stove cooking soup. The defendant then struck Randy Peacock once in the back of the head with the hammer end of the hatchet, causing Randy Peacock to fall arms-first into the scalding hot pot of soup. When Randy Peacock did not immediately fall down, the defendant hit him two or three more times with the hatchet. Eventually, Randy Peacock collapsed to the floor.

Like Charles Johnston, Randy Peacock was completely surprised by the defendant's attack.

After striking Randy Peacock several times in the head, the defendant returned to the shed to steal Charles Johnston's watch. When he arrived, he noticed Charles Johnston trying to get up. The defendant later observed that, at that point, Charles Johnston might have lived if he had called for an ambulance. Realizing that Charles Johnston had survived the initial attack, the defendant then struck him three more times in the face with the blade side of the hatchet, chopping through his skull and into his brain. Attesting to his relentless determination to kill Charles Johnson, the defendant told detectives during one of his interviews, "Man, you wouldn't believe how hard it is to kill somebody." The defendant then stole Charles Johnston's wallet from his right rear pants pocket, laid the hatchet on a bucket in the shed, and returned to the house.

When the defendant re-entered the home, he surprisingly found Randy Peacock on his feet, struggling to stand up. Despite noticing that Randy Peacock had been blinded by the initial blows to his head, the defendant then grabbed a large butcher knife and began stabbing Randy Peacock over and over in the neck, chest, abdomen and back. During this subsequent knife attack, Randy Peacock did not die easily and struggled against the defendant before finally succumbing to his

numerous injuries. Like Charles Johnston, the defendant observed the following about his efforts in killing Randy Peacock: “That shit ain’t as easy as it sounds, man.”

- b. *Calculated: The defendant had a careful plan or prearranged design to commit the murders.*

Second, the State has proved beyond a reasonable doubt that the murders of Randy Peacock and Charles Johnston were “calculated,” this is, that the defendant had a careful plan or a prearranged design to murder Randy Peacock and Charles Johnston before he did so. The calculated element applies in cases where the defendant plans his actions, has time to coldly and calmly decide to kill, arms himself in advance, and kills execution-style. *Wright v. State*, 19 So.3d 277, 299 (Fla. 2009).

Again, the evidence established that the defendant went to the victims’ home with the intent to rob and kill them. He knew the victims, having done work for them in the past. He waited for hours until the opportunity was right and contemplated how to quickly murder the two men. When the neighbor left and Randy Peacock was in the house, the defendant was finally alone with Charles Johnston, his first victim. It is then that the defendant carried out his prearranged plan by asking for his weapon, a hammer, under the guise of needing to knock out a dent in his vehicle. When Charles Johnston entered the shed at the request of the defendant to find a piece of wood, the defendant followed him in and carried out his

plan. Once he believed Charles Johnston was dead, he then turned his sights on Randy Peacock, who was alone inside the house. Once he had ensured that both men were dead, even to the point of returning and attacking them a second time, he stole their wallets and car, completing his plan to rob and kill them.

c. *Premeditation: The defendant exhibited heightened premeditation.*

The State has proven beyond a reasonable doubt that the defendant exhibited heightened premeditation in carrying out the killings of Randy Peacock and Charles Johnston. Heightened premeditation is demonstrated by a substantial period of reflection. Additionally, “this element exists where a defendant has the opportunity to leave the crime scene with the victims alive but, instead, commits the murders.” *Wright*, 19 So.3d at 300.

The evidence in this case established that the defendant was at the victims’ home for hours before he committed the murders. He waited for the opportune moment before carrying out his plan. In total, he struck Charles Johnston with the hatchet four separate times. He struck him once, and Charles Johnston fell to the shed floor. The defendant then walked to the house, which is some distance from the shed. Once inside the house, he struck Randy Peacock three or four times in the head with the hatchet. He then left the house and returned to the shed where he found Charles Johnston still alive. In that moment, the defendant recognized that

Charles Johnston could have survived if he had stopped and sought medical attention. However, the defendant then struck Charles Johnston in the face three more times with the hatchet, killing him. He then left the hatchet in the shed and returned to the house where he saw Randy Peacock standing up on his feet. The defendant then grabbed a butcher knife and stabbed Randy Peacock six times in the neck, chest, abdomen and back, killing him. This evidence clearly shows a lengthy, methodical and difficult series of events that provided the defendant with an extensive period of time to contemplate committing the murders, designing a plan to effectively carry them out, and then accomplishing that plan despite the difficulties he faced in doing so. There can be no question that the defendant committed the murders of Randy Peacock and Charles Johnston after a substantial period of reflection and thought.

d. *The defendant had no pretense of moral or legal justification.*

Finally, the State has proven beyond a reasonable doubt that the defendant committed these murders without any pretense of moral or legal justification. “[A] pretense of moral or legal justification is any colorable claim based on at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense to the homicide.” *Walls v. State*, 641 So.2d 381, 388 (Fla. 1994). It hardly needs to be

said that there is not one scintilla of evidence that even remotely suggests that the defendant in this case had any pretense of moral or legal justification in killing Randy Peacock and Charles Johnston. The proof is overwhelmingly to the contrary. First, the defendant himself admitted that he went to their house for the specific purpose to commit the illegal act of robbery and murder. Second, the evidence shows that the defendant calmly interacted with both of the victims for hours. No argument ever ensued between them and the victims had no reason to suspect that the defendant was there to kill them.

The jury in this case unanimously found beyond a reasonable doubt that the defendant's murder of Randy Peacock was cold, calculated and premeditated. *Verdict as to Sentence, Count I – First Degree Murder of Randy Peacock (Question A.5) (R.502); Verdict as to Sentence, Count II – First Degree Murder of Charles Johnston (Question A.5) (R.503)*. The Florida Supreme Court has also classified CCP as one of the most serious aggravating factors set out in the statutory scheme. *Suggs v. State*, 923 So.2d 419, 436 (Fla. 2005) (citing *Larkins v. State*, 739 So.2d 90, 95 (Fla. 1999)). Based on the evidence presented at trial and the jury unanimous finding, the Court should find that this aggravating factor exists and give it GREAT WEIGHT.

MITIGATING CIRCUMSTANCES

Following the presentation of evidence during the penalty phase, the defendant requested, and the Court gave, jury instructions pertaining to the following statutory mitigating circumstances, pursuant to Florida Statutes § 921.141(7)(b) and (f):

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

The defendant also presented evidence and argument that the following non-statutory mitigating circumstances should be considered as “other factors in the defendant’s background that [should] mitigate against imposition of the death penalty under Florida Statutes § 921.141(7)(h):

3. The defendant’s childhood was chaotic.
4. The defendant and his siblings experienced a lack of supervision after the divorce of his parents.
5. The defendant started huffing from spray cans at the age of 11 years old.
6. The defendant has an early and chronic abuse and dependency on alcohol and drugs.
7. The defendant had a cocaine dependency relapse starting in July 2006 up to and after the crimes at bar.

8. The defendant consistently used a voluminous amount of cocaine from July to October of 2006.
9. The defendant cooperated with law enforcement at the time of his arrest.
10. The defendant admitted to the murders of Randy Peacock and Charles Johnston.
11. The defendant has artistic ability.
12. The defendant was an assistant superintendent for EMJ that built Cobblestone Village in St. Augustine.

The verdict form returned after deliberations indicated that one or more individual jurors found that at least one of these mitigating circumstances had been established by the greater weight of the evidence. However, it did not indicate which or how many mitigating circumstances were found to have been established or the number of jurors that agreed with that finding.

The State asserts that the mitigating circumstances offered by the defendant in this case should not be given great weight. To the extent that the Court finds that mitigation does exist and assigns it some level of weight, the State further argues that such mitigation does not outweigh the aggravating factors that have been proven beyond a reasonable doubt in the murders of Randy Peacock and Charles Johnston. Because some of the mitigating circumstances offered by the defendant are related or are supported by similar evidence, the State will, in those circumstances, combine its response to these claims.

- 1. The First Degree Murders were committed while the defendant was under the influence of extreme mental or emotional disturbance.**
- 2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.**

During the trial, the defense presented the testimony of Dr. Stephen Bloomfield to support its claim to these mitigating circumstances. Dr. Bloomfield testified that numerous psychological tests performed by him and Dr. Eric Mings showed that the defendant did not suffer from any mental illness or any intellectual disability.¹ Dr. Bloomfield testified that it was his opinion that the defendant was under the influence of extreme mental or emotional disturbance and that his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired for one reason, and one reason only: the defendant's drug use prior to or at the time of the murders.

Although there is no proof other than the defendant's own word, the State does not necessarily take issue with the defendant's claim that he was under the influence of drugs at the time he murdered Randy Peacock and Charles Johnston. However, several aspects of the defendant's own statements demonstrate that he was clearly aware that what he was doing was wrong and that he was capable of forming and

¹ This was corroborated by Dr. William Meadows, who also administered psychological testing and found that the defendant did not suffer from any mental illness.

executing a very sophisticated plan to carry out the murders. Again, the defendant remained at the victims' house for hours, waiting for a neighbor to leave. During that time, he contemplated how he was going to quickly kill the victims. He then obtained a weapon and waited to attack each victim individually. After his first attack on Charles Johnston, which resulted in Charles Johnston crashing into shelves and onto the shed floor, the defendant became concerned that a deaf woman who lived on the property could feel the vibrations from the noise. For this reason, the defendant said that he needed to take measures to prevent that from happening again when he killed Randy Peacock. Moreover, his statements to law enforcement in which he recognized the atrocity of the murders and realized, at one point, that one of both of the victims could have survived his initial attack demonstrate that he appreciated the criminality of his conduct and was capable of abandoning his plan at any time.

According to the defendant, he had recently stopped himself from going further in committing a violent crime. In his October 5, 2006 interview, he described the incident in which he had kidnapped Karen Coffey in Alachua County a few days before. This crime was the subject of one of the defendant's prior violent felony convictions. In that interview, the defendant told detectives that he was "fighting inside . . . , wanting to hurt this woman." However, the defendant eventually released

Mrs. Coffey unharmed. Notably, the defendant repeatedly claimed that he had never committed a single crime when he wasn't under the influence of drugs.

By his own statements, the defendant admitted that he was capable of appreciating the criminality of his conduct and conforming his conduct to the requirements of the law *even when he was under the influence of drugs*. However, he, and he alone, decided when he would do so and when he would not. The defendant's victims were simply at his mercy. In light of the above, the Court should find that these mitigating circumstances have not been established by the greater weight of the evidence.

Even if the Court does find that one or both of these mitigating circumstances have been established, it should not assign them any more than MINIMAL WEIGHT. The defendant essentially admitted that any drugs under which the defendant may have been under the influence were *voluntarily* consumed by him. He was not forced to use the drugs any more than he was forced to rob and murder Randy Peacock and Charles Johnston. Moreover, as explained by Dr. Meadows during his testimony at trial, psychological testing of the defendant showed that the defendant was not using drugs to self-medicate any kind of mental illness or mood disorder. Rather, he consumed drugs because it fulfilled his hedonistic, thrill-seeking personality. It is entirely proper to ascribe these mitigators a small amount

of weight because the defendant was the cause of his own emotional distress and substantially impaired capacity. *See Poole v. State*, 151 So.3d 402, 416 (Fla. 2014).

3. The defendant's childhood was chaotic.

4. The defendant and his siblings experienced a lack of adequate supervision after the divorce of his parents.

The basis for these mitigating circumstances was the testimony of Dr. Bloomfield, who characterized the defendant's childhood as "chaotic" and without adequate supervision. Ironically, the defendant himself described his childhood as "great" or "happy" to both Dr. Bloomfield and Dr. Meadows. Both doctors reported that the defendant denied any physical or sexual abuse.

Dr. Bloomfield also testified that, despite any difficulties the defendant faced growing up, he was a resilient individual and did not become psychologically impaired as a result. In fact, Dr. Bloomfield stated that, during his evaluation, he gave the defendant a psychological test called the Trauma Stress Inventory ("TSI"). The TSI measures signs and symptoms of posttraumatic stress and acute stress disorder. Dr. Bloomfield gave this test to the defendant because the defendant described trauma that he experienced as a child. Upon the defendant's completion of the TSI, Dr. Bloomfield reported that the defendant scored the lowest of anyone he had ever tested, meaning that the defendant did not suffer from any anxiety or stress from any alleged trauma.

Notwithstanding the above, the State does not take issue with the claim that the defendant experienced a chaotic childhood or that, following the divorce of his parents, he and his siblings were inadequately supervised. However, the defendant was 42 years of age at time he murdered Randy Peacock and Charles Johnston, not an immature, neglected adolescent. The evidence at trial also showed that he was professionally successful, having worked for a number of years as a supervisor for a construction company that built shopping centers. This demonstrates that, notwithstanding his difficult childhood, the defendant had, like many other individuals, overcome those challenges and proven to others that he had the maturity and intellect to not only govern his own behavior, but also manage and oversee the work of other men. To the extent that the Court finds that these mitigating circumstances have been established, it should be given MINIMAL or SLIGHT WEIGHT.

- 5. The defendant started huffing from spray cans at the age of 11 years old.**
- 6. The defendant has an early and chronic abuse and dependency on alcohol and drugs.**
- 7. The defendant had a cocaine dependency relapse starting in July 2006 up to and after the crimes at bar.**
- 8. The defendant consistently used a voluminous amount of cocaine from July to October of 2006.**

As indicated previously, the State does not challenge the defendant's claim that he used drugs as an adolescent or during the time leading up to the murders of Randy Peacock and Charles Johnston. Likewise, the State agrees that the defendant had a dependency on cocaine or other controlled substances.

Following Dr. Bloomfield's testimony, Dr. William Meadows testified at trial that he administered the Millon Clinical Multiaxial Inventory ("MCMI"), which confirmed that the defendant had a significant substance abuse problem. However, in addition to diagnosing a drug problem, the MCMI can also determine the profile of the person in terms of what drives the substance abuse problem. Dr. Meadows explained that there are two main reasons why people develop a dependency on drugs. First, people often use drugs or alcohol to self-medicate a mental illness or mood disorder. The second reason involves individuals who enjoy pleasure and tend to be thrill or sensation seekers. Such individuals use drugs because it makes them feel good or accentuates their personalities. Dr. Meadows concluded that, based on his administration of the MCMI test, the defendant clearly fell into the latter category. To the extent that the Court agrees that the defendant's drug use and dependency constitute mitigating circumstances as outlined above, the State asserts that they should be given MINIMAL WEIGHT.

9. The defendant cooperated with law enforcement at the time of his arrest.

Other than turning over Randy Peacock's wallet to the arresting officer and then eventually confessing to the murders (the latter of which the defense has raised as a separate mitigating circumstance) the State is unaware of any evidence at trial that supports the defendant's claim that he was cooperative with law enforcement at the time of his arrest. Evidence was presented at trial that once efforts were made to locate and take the defendant into custody in Alachua County, he committed several carjackings and then engaged police in a dangerous high speed chase through multiple counties in an effort to avoid capture before finally crashing his car in Citrus County and being arrested. To the extent that the Court finds that that this mitigating circumstance has been established, it should be given MINIMAL WEIGHT.

10. The defendant admitted to the murders of Randy Peacock and Charles Johnston.

During the trial, the State admitted into evidence two interviews, which took place on October 5, 2005 and February 15, 2007. In those interviews, the defendant admitted in gruesome detail to the murders of Randy Peacock and Charles Johnston. The State agrees that this mitigating circumstance was established by a greater weight of the evidence. Out of all the mitigating circumstances asserted by the defense, it is reasonable to conclude that the defendant's confession merits slightly

more weight than any of the others. Accordingly, it should be afforded MODERATE WEIGHT. However, the defendant's admissions are still significantly outweighed by even one of the aggravating factors unanimously found by the jury in this case, much more so when compared to the aggravating factors as a whole.

11. The defendant has artistic ability.

The State does not dispute that the defendant has artistic ability. At trial, several paintings and drawings purportedly created by the defendant were submitted as evidence. The State agrees that these works showed the defendant to be a talented artist. Nevertheless, the defendant's artistic ability should not be given any more than SLIGHT WEIGHT as a mitigating circumstance. In fact, the Florida Supreme Court has, on several occasions, discounted this proposed mitigator and described it in other cases as "minor" and "not compelling." *See Evans v. State*, 808 So.2d 92, 108 (Fla. 2001); *Bogle v. State*, 655 So.2d 1103, 1109 (Fla. 1995); *Freeman v. State*, 563 So.2d 73 (Fla. 1990). It bears further pointing out that the fact that the defendant has such an exceptional talent only demonstrates another opportunity the defendant had to put his skills to good use and be a productive member of society, but chose not to do so. In terms of comparable weight, the defendant's ability to *create* a beautiful *inanimate* object cannot even begin to compare to his actions in *destroying* two *living, breathing* human beings in such a brutal and callous fashion. Any art he

is able to bring into this world for others to appreciate cannot in any way replace the two innocent victims he took from it, to the heartache of all who knew and loved them.

12. The defendant was an assistant superintendent for EMJ that built Cobblestone Village in St. Augustine.

The State does not take issue with the defendant's employment or the projects that he worked on as a mitigating circumstance. However, the State argues that this should be given SLIGHT WEIGHT.

CONCLUSION

In conclusion, the mitigating circumstances that were presented in this case are insubstantial when weighed against any of the five (5) aggravating factors that the jury unanimously found to have been established beyond a reasonable doubt. In a capital case, the death penalty is appropriate even if one aggravating factor is found and outweighs the mitigating circumstances found to have been established. *Foster v. State*, 369 So.2d 928 (Fla. 1979). The aggravating factors in this case should be given great weight. The mitigating circumstances are so insubstantial that even if the State only proved one of the aggravating factors presented, that factor (any one chosen) would substantially outweigh the mitigation presented. The "prior violent felony," HAC, and CCP aggravators are three of the most serious set out in the death penalty statute. The jury unanimously found that the State has proven all three of

these aggravating factors beyond a reasonable doubt, and each of them alone justifies a sentence of death in this case.

The jury in this case returned a unanimous verdict in favor of the death penalty for the deaths of both Randy Peacock and Charles Johnston. The law requires the Court to give the jury's verdict great weight in its determination of a proper, legal penalty for the violent and brutal murders of these victims. Respectfully, the State submits to the Court that the death penalty is an appropriate, lawful and justified sentence and requests this Court to sentence Norman Blake McKenzie to death.

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail or e-service delivery to JUNIOR BARRETT, OFFICE OF CRIMINAL CONFLICT, 101 SUNNYTOWN ROAD, SUITE 310, CASSELBERRY, FL 32707, on this 6th day of December, 2019.

Respectfully submitted,

R.J. LARIZZA
STATE ATTORNEY

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IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND
FOR ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.

CASE NO: 2006-CF-001864-A

NORMAN MCKENZIE,
Defendant.

DEFENDANT'S SENTENCING MEMORANDUM

Norman Blake McKenzie was indicted for two counts of First Degree Murder on October 17, 2006. On October 4, 2006, Randy Peacock and Charles Johnston were discovered deceased at their home. On March 2, 2007, the State of Florida filed a Notice of Intent to Seek the Death Penalty. On August 21, 2007, the Defendant was found guilty of both counts of First Degree Murder by a jury. On August 23, 2007, the same jury recommended by a 10 to 2 vote that the court impose a death sentence. On October 19, 2007 the court imposed a sentence of death for each count of First Degree Murder. On June 19, 2017, the court vacated the Defendant's Death Sentences and ordered a new penalty phase pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). On August 28, 2017, the State filed its Renewed Notice of Intent to Seek the Death Penalty. On August 29, 2019, a jury unanimously found that the Defendant should be sentenced to death for the murders of Randy Peacock and Charles Johnston.

The ultimate punishment a society can impose on its citizens is the sentence of death. Death is different both in its degree and its finality. "It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice, and it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

Florida's courts have long held that the imposition of the death penalty should be reserved for those crimes that fall within the category of both the most aggravated and the least mitigated of murders. *Floyd v. State*, 913 So. 2d 564 (Fla. 2005), *Crook v. State*, 908 So. 2d 350 (Fla. 2005). As such, it is the duty of the trial court to ensure that the case at bar falls within both of those

categories. The trial court is charged with analyzing all the mitigating and aggravating factors found to exist and then weighing each factor.

In the statute and case law, the legislature and courts have acknowledged that jurors, as lay persons, may be more subject to inflamed emotions. *State v. Dixon*, 283 So. 2d 1 (Fla. 1973). Accordingly, the law requires that the trial judge must perform an independent, deliberative analysis, bringing to bear his or her experience and knowledge of the law as a neutral and detached magistrate, who is fully informed of the matter before the court, to make a final judgment based upon a full review of the facts and the body of law as a whole.

This Memorandum includes an analysis of the aggravating circumstances presented and argued by the prosecution, as well as an analysis of the mitigation presented on behalf of Mr. McKenzie.

Prior to any discussion of the aggravators and mitigators that may apply to this case, Defendant, through the undersigned attorney, renews all previous Motions and Objections filed and/or argued through all stages of this case to include pretrial hearing, during trial, and sentencing.

AGGRAVATING CIRCUMSTANCES

The jury in this case was instructed as to five aggravating circumstances:

1. Norman Blake McKenzie was previously convicted of a capital felony or a felony involving the use or threat of violence to a person.

The State did present evidence of eight prior felonies that involved the use or threat of violence to a person. Two of the prior felonies were from 1984 and 1990 in Broward County. The remaining six convictions the State introduced occurred contemporaneously with these murders. The evidence presented showed the Defendant committed several crimes during a short time around these murders. Because six of these priors were committed contemporaneously with the murders while the Defendant was under the influence of extreme mental or emotional disturbance as discussed with mitigating circumstances below, these priors should not be given great weight. Viewing them in light with the two prior felonies from 1984 and 1990, the Court should give moderate weight to this aggravator.

2. The First Degree Murder was committed while Norman Blake McKenzie was engaged in the commission of a Robbery.

The State presented evidence that the Defendant took money, credit cards, and a vehicle from the victims. However, the interviews of the Defendant and the Defendant's own testimony show that any taking occurred after the death of the victims. The taking was secondary to the homicide, and the deaths did not occur as a result of a Robbery. This aggravator was not proven beyond a reasonable doubt and should be given no weight.

3. The First Degree Murder was committed for financial gain.

As discussed above, any financial gain the Defendant received was secondary to the murders and not a reason why he committed them. If the Court finds this aggravator was proven, it should be given no weight because it merges with the Robbery aggravator.

4. The First Degree Murder was especially heinous, atrocious, or cruel.

The State did introduce evidence that supports the finding of this aggravator. Evidence of the multiple hatchet and stab wounds to each victim supports this. This aggravator has consistently been given great weight in similar cases. However, the evidence in this case showed that the victims may have been immediately unconscious after being struck with the hatchet. Any subsequent injuries inflicted would not have been felt by the victims. Because the victims would have been unconscious when the Defendant struck them the first time, this aggravator should be given slight weight.

5. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.

To find the CCP aggravator, the deaths of Mr. Peacock and Mr. Johnston must involve a "calm, cool reflection." *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994). It cannot be an act prompted by emotional frenzy, panic, or a fit of rage. *Pomeranz v. State*, 703 So. 2d 465, 471 (Fla. 1997). It must be the result of the Defendant's careful plan or prearranged design to commit the murder as well as heightened premeditation defined as deliberate ruthlessness. *See Buzia v. State*, 826 So. 2d 1203, 1214 (Fla. 2006).

The evidence showed that the Defendant went to the victims' residence to discuss money owed to him for a renovation project he was working on for them. During this discussion, the Defendant became angry and committed the murders. The Defendant did not take a weapon with

him to the victims' residence. During the days leading up to the murders, the Defendant was intravenously using cocaine constantly. The Defendant's severe drug use at the time caused him to be under the influence of drugs for several days and not sleep during this time.

The Defendant's actions and statements show that he did not intend to kill the victims when he went to their residence. The manner of the deaths show that the Defendant did not plan to kill the victims but showed that he became angry about a dispute over money.

This aggravator was not proven beyond a reasonable doubt and should be given no weight.

ANALYSIS OF MITIGATING CIRCUMSTANCES

The standard of proof required to find mitigating circumstances is different than that required to find the existence of an aggravating circumstance. An aggravating circumstance requires proof beyond and to the exclusion of any reasonable doubt. Proof of a mitigating circumstance requires a reasonable quantum of competent evidence. *Man v. State*, 714 So. 2d 391 (Fla. 1998), *Nyberg v. State*, 574 So. 2d 1059 (Fla. 1990).

Any mitigating circumstance can be considered in support of a life sentence without the possibility of parole, and if offered to the trial court, it must be considered. *See Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982), *Lucas v. State*, 568 So. 2d 18, 24 (Fla. 1990) (provides that a defendant shares a burden of identifying for the trial court and for the jury each applicable mitigating circumstance, particularly where the defendant refers to what is commonly described as the Section 921.141(6)(h), Fla. Stat. (2013) "catch all factor."), *Campbell v. State*, 571 So. 2d 415, 419-420 (Fla. 1990) (receded from on other grounds in *Trease v. State*, 768 So. 2d 1050 (Fla. 2000)) (establishes a requirement that the trial court's sentencing order discuss mitigating circumstance proposed by the Defendant, be it statutory or non-statutory, so as to provide a foundation for the trial court's determination of whether the evidence supports the circumstance.

Both *Blanco v. State*, 706 So. 2d 7, 10 (Fla. 1997) and *Cave v. State*, 727 So. 2d 227, 230 (Fla. 1998) formulate a three-part standard of review for the trial court's assessment of each statutory and non-statutory mitigating circumstance, as follows:

1. The First Degree Murder was committed while Norman Blake McKenzie was under the influence of extreme mental or emotional disturbance.

Dr. Bloomfield testified that the Defendant was under extreme mental or emotional disturbance due to his substance abuse. Dr. Bloomfield testified that he reviewed records from the Defendant, interviewed the Defendant, and reviewed the Defendant's interviews with law enforcement, and from this, he opined that the Defendant's extreme substance abuse caused him to be under the influence of extreme mental or emotional disturbance. Dr. Skolly-Danziger testified that after reviewing the Defendant's interviews with law enforcement, interviewing other witnesses, and interviewing the Defendant that he was acting in an altered reality and under emotional stress because of his extreme drug use at the time of the offense. The Defendant testified that on the day of the murders, he had been using drugs and had no sleep for 8 to 9 days. This was consistent with the account he gave investigators in his interviews. Dr. Bloomfield testified that the combination of lack of sleep and a drug binge like this would fit with paranoid behaviors the Defendant said he was exhibiting at the time of the murders.

This mitigator should be given great weight.

2. The capacity of Norman Blake McKenzie to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Dr. Skolly-Danziger testified that the Defendant's nearly lifelong addiction to cocaine substantially impaired his ability to conform his conduct to the requirements of law. She testified that he was out of control because of his addiction and lack of tools to combat the addiction. Because of the illness of his drug addiction, Defendant had no control over his actions at the time of the offense. Dr. Bloomfield also testified that the Defendant's drug use substantially impaired his ability to conform his conduct to the requirements of law. The Defendant testified that he had never committed a crime in a sober state of mind.

This mitigator should be given great weight.

3. Norman Blake McKenzie's childhood was chaotic.

The Defendant first smoked marijuana at the age of five. His parents divorced when he was eight. To help his mother, he stole food for the family after the divorce. While the Defendant stated to experts that his childhood was great, these types of things are not normal and show that he had a chaotic childhood. His perception of his childhood and resiliency to overcome the chaos show who he is, but nonetheless, the Defendant had a chaotic childhood.

This mitigator should be given great weight.

4. Norman Blake McKenzie and his siblings experienced a lack of adequate supervision after the divorce of his parents.

As discussed above, after his parents' divorce, the Defendant had to steal food for his family. Additionally, as discussed below, the Defendant became an early chronic user of drugs and alcohol. These things show an extreme lack of adequate supervision as a child.

This mitigator should be given moderate weight.

5. Norman Blake McKenzie started huffing from spray cans at the age of 11 years old.

The Defendant began huffing from spray cans with friends when he was 11 years old. Dr. Skolly-Danziger testified about the effects of brain development associated with early drug use, especially huffing. Any type of regular drug use at that age affects brain development. In adolescence and to the age of 25, an individual's brain is in crucial stages of development. At this time, different parts of the brain are growing and solidifying its communication system. Early and chronic drug use is detrimental to this process. The earlier the drug use, the more devastating the effects on the brain are. The drug use also causes permanent effects to the development of the brain.

This mitigator should be given moderate weight.

6. Norman Blake McKenzie had an early and chronic abuse and dependency on alcohol and drugs.

As discussed above, Dr. Skolly-Danziger testified that early and chronic abuse and dependency on alcohol and drugs have devastating effects on brain development, especially during the adolescent years. The Defendant first smoked marijuana at the age of 5, used inhalants at 11, began using marijuana daily at 12, began snorting cocaine at 14, began regular alcohol drinking at 14, used Quaaludes as a teenager, began using crack cocaine around the age of 16, and intravenously shot methamphetamine at 16. This cocktail of drug use in adolescence has detrimental, irreversible effects on an individual's brain.

This mitigator should be given moderate weight.

7. Norman Blake McKenzie had a cocaine dependency relapse starting in July 2006 up to and after the crimes at bar.

Defendant's interviews and testimony showed that he relapsed on cocaine in July 2006 and used it frequently from then until the murders and after. He stated that he would use cocaine intravenously daily. At times, he even passed out with a needle in his arm. When he woke up, he would shoot cocaine from the same needle that was hanging out of his arm.

Tammy Kimball testified that she knew the Defendant around the time of the murders. He appeared clean cut and had a good job. However, he constantly used cocaine with her. Around the day of the murders, the Defendant picked her up in Gainesville. He was obviously high at the time and asked her if she wanted to get away with him and go get high. When she went to get her stuff to go with him, he left her at her house.

Defendant's cocaine use at this time was so heavy that he became paranoid that government agents were tracking him, and he was no longer in total control of his actions. Because he had never had treatment to control his drug use, this relapse caused him to spiral out of control and commit these murders as well as the other crimes he committed during this time.

This mitigator should be given moderate weight.

8. Norman Blake McKenzie consistently used a voluminous amount of cocaine from July to October of 2006.

As discussed above, the Defendant relapsed in July 2006 and used a voluminous amount of cocaine until October 2006 when these murders were committed. The relapse led to constant use, paranoia, and lack of sleep especially around the two weeks the murders were committed. Both Drs. Bloomfield and Skolly-Danziger testified that the amount and frequency of the Defendant's drug use at this time would have caused extreme paranoia as he described.

This mitigator should be given moderate weight.

9. Norman Blake McKenzie cooperated with law enforcement at the time of his arrest.

When he was arrested, the Defendant cooperated with investigators. He did not try to deny he committed any of the offenses and was forthcoming with details about what happened. Aside from the murders, the Defendant cooperated with law enforcement about other crimes he

committed in Alachua and Marion Counties. He was forthcoming with details of the incidents and did not deny he committed the crimes.

This mitigator should be given slight weight.

10. Norman Blake McKenzie admitted to the murders of Randy Peacock and Charles Johnston.

Along with cooperating about the above crimes, the Defendant admitted he committed these murders. He gave law enforcement the details of what happened, and at no time did he deny that he committed the murders. Additionally, the Defendant testified that he committed the murders. He testified that Randy Peacock and Charles Johnston were good men, and he showed remorse that he put himself in the situation.

This mitigator should be given moderate weight.

11. Norman Blake McKenzie has artistic ability.

While in prison, the Defendant became an artist. He has created many pieces of art that show great artistic ability. Dr. Bloomfield testified that he has seen artist from many inmates in a prison setting. Typically, inmates' art is black and white and eerie or scary. In contrast, the Defendant's art is bright and colorful. His art shows his resiliency and ability to overcome adversity in his life.

This mitigator should be given moderate weight.

12. Norman Blake McKenzie was an assistant superintendent for EMJ that built Cobblestone Village in St. Augustine.

The Defendant worked for EMJ and oversaw building several buildings in Cobblestone Village in St. Augustine. Additionally, he worked for Johnson, Graham, and Malone out of Jacksonville prior to the murders. For both companies, he oversaw several construction projects. While at Johnson, Graham, and Malone, he donated several columns to a charter school in St. Augustine and installed them as well.

This mitigator should be given slight weight.

13. Norman Blake McKenzie impacted the life of Claudia Goecke in a positive way while in prison.

While not presented to the jury, the Court received a written statement from Claudia Goecke about how the Defendant has impacted her life. Ms. Goecke stated that the Defendant helped her to overcome extreme health and mental struggles after they began writing letters to each other. Despite his prior death sentence, he still encouraged her to live. Ms. Goecke credits the Defendant with saving her life through his words and thoughts he sent in letters to her.

This mitigator should be given slight weight.

14. A prior jury did not unanimously find that Norman Blake McKenzie should be sentenced to death.

The Defendant's original Penalty Phase took place in 2007. At that time, a jury found by a vote of 10-2 that Defendant should be sentenced to death for both counts of First Degree Murder. Because that jury did not unanimously recommend the Defendant should be sentenced to death, the Defendant received a new penalty phase trial. This court should consider that a prior jury heard evidence of the same aggravators and almost no mitigation yet did not unanimously find the Defendant should be sentenced to death. Because of the prior jury verdict, this court should sentence the Defendant to life in prison without the possibility of parole.

This mitigator should be given great weight.

**WEIGHING THE AGGRAVATING FACTORS AND
MITIGATING CIRCUMSTANCES**

The Death Penalty is reserved for the most aggravated and least mitigated murders. Aside from the prior violent felony aggravator, all the State's aggravators were part of the murder and used in securing a conviction. None of the aggravators made this murder worse than many other murders Florida courts have handled. The mitigation presented by Mr. McKenzie was compelling and substantial. This Court is not compelled or obligated in any way to sentence the Defendant to death. Even if this Court believed this to be one of the most aggravated and least mitigated murders, the Court still has no obligation to impose a death sentence.

CONCLUSION

There is no compelling reason to sentence the Defendant to death. The Defendant will not pose a threat to anyone while incarcerated for the remainder of his life. He has redeeming qualities

that will be put to good use while serving a life sentence without the possibility of parole. These redeeming qualities include the art he has created since committing these murders. Additionally, his impact on Claudia Goecke's life and his own resilience throughout his entire, chaotic life show redeeming qualities that give compelling reasons for a life sentence without the possibility of parole. The Defendant reserves the right to make any additional oral arguments at the time of Sentencing.

WHEREFORE, Defendant moves this Honorable Court to exercise an independent judgment and sentence Defendant to life in prison without the possibility of parole as is required by the total circumstances of this case after deliberate analysis bringing to bear the knowledge of law as a neutral and detached magistrate who is fully informed of the matter before the court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on this 6th day of December, 2019.

/S/ KENNETH HAMBURG
Kenneth Hamburg, ESQUIRE
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TO: JUDGE HOWARD H. MALTZ
DIVISION 56
4010 LEWIS SPEEDWAY
RM 344
ST. AUGUSTINE
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FROM: CLAUDIA CORNEIA GOECHE
WILHELM-ROSER-STR. 36 A
35037 MARGUNG
GERMANY

RE: MY STATEMENT / TRIAL (HEARING)
OF MY HUSBAND, MR. NORMAN BLAKE MCKENZIE

Starke, Florida
26 January 2020

Dear Judge Maltz,

I am writing to you as I had no chance to come personally and attend my husband's trial (hearing) again due to lack of means and serious health problems (I was hospitalized until beginning of January).

I can only hope you believe my words as I really wanted to be there and do my best to give a more complete picture of my husband but all went its own way.

I was told that at the hearing my statement was handed in to you. Actually, that statement was compiled as a summary only and I hoped that based on that a more in-depth talk / discussion / interrogation would follow. I was originally planned to testify by my husband's lawyers but for some reason they changed their mind (strategy?) later - so it was truly difficult for me to follow (and react). That statement was written months ago and its original purpose was to give the own legal team a summary.

At court, I had said let more and then happy to answer any questions.

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I am not a legal expert - in fact I don't even know if I am allowed to write this letter to you. If not, I just hope and pray it won't be put on my husband. And because we both (my husband and me) regret badly for not standing up and talking ourselves at the trial, I would regret it not at least once listening to myself. It must make no sense that I didn't ask the lawyers for advice about writing this letter. But it was always difficult to cooperate and communicate no distance as bad as I feel to admit.

However, these are all not the reason I am writing to you but rather a few explanations that I really couldn't do differently.

I do hope, if this letter is readen, it will be readen fully as it's not because of my husband "only" but matters to everyone involved - in my eyes.

It would be impossible to explain / tell all I would like to and I am very aware it's too late now. But it matters to me that it is said and known - regardless of the outcome of the trial.

I hope I am able to express it right. As you know, I only could attend the last day of the trial. And sure, the verdict hurt me - which wife it wouldn't. But apart from that what hurt me most - including my own values, sense for justice and truth was the conclusion my husband had done all in a calculated, planned manner and on top

- 2 -

not shown any remorse or regrets.

I can't talk nor want to about the past and any I can't know. That was (is) also not my purpose. But I know myself and I would say that I also know my husband and his personality with all good and bad sides. At least I know him enough to know his feelings and emotions.

It is more than difficult being a wife with a person on deathrow and nothing easy to face including the past which will always remain. I was aware of that and could also not be close to any person in my husband's situation who would ignore the own past. The pain, memories - losses - guilt remain forever and it's what we both have to live with.

I do love my husband. I really do as hard as it is for anyone to understand.

But I am grown up and raised with values. My whole family - mother, father, brother are doctors (medical) and greatly recognized. What I try to say is: I am grown up in a surrounding where NOTHING but nothing matters more than life.

My husband is responsible for taking the most valuable in this world. Two innocent lives. And nothing will make it undo or give it back - not even an execution. Still he is loved and needed because he made a huge difference to others in life - it's why my whole family stands up for him. He can't do any but he better in the new and that he did and does - unfortunately for others and it's

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nothing which helps the loved ones of the victims.

Nevertheless he saved a life in his way - I hoped psychological experts would be able to explain more about it (I was phone-interviewed by Dr. Bloomfield but don't know what he presented about my own history and I felt not understood by the legal experts. I think only psychological professionals or psychiatrist could explain what it means to suffer from and live with a severe anxiety, and stress disorder and serious episodes of depression. Dr. Bloomfield knew I met my husband when I was in one of those heavy episodes and it makes a whole family desperate. It was finally my husband who made me come back to life.

My parents have never met my husband. Still they love him because they witnessed first hand the impact he had upon me.

And I think its obvious that it is nothing romantic or easy for parents to have a daughter marrying a person on deathrow.

But and that is the reason I am writing to you - I - and also not my parents - could love a person who doesn't care about what he did.

I can accept the past, forgive in my way but I could never ever live with my husband, be close to him or love him as he had no consciousness and wouldn't regret deeply what happened at his very worst moments of life save my family and the first he did was making sure we know all.

If others believe or not - I know he feels terrible about all

And it shocked me to hear the opposite - and not only because it could matter for his verdict. Not at all.

I am his wife yes and I would lie if not admitting I hope for his life (which is egoistic because I need him).

But I faced the victims family and it was always the hardest to know how much pain my own husband created and caused.

And especially when thinking about them I can't see that what got presented brought more peace or justice as it must be devastating to think he wouldn't care or regret. I understand the prosecutors job. And I understand the defense jobs. The own defense didn't want we talk. I understand their fears that my husband and me by taking a drama maybe had rushed the verdict. We were both aware of that. But if others believe or not - all we wanted was a straight and truthful picture. To give

And how my husband feels about all Ally's mattered deeply to me. And I regret deeply I couldn't tell it - it might not have changed the verdict but at least had maybe brought more peace to everyone involved ~~frontiers it wanted to set him in a certain way~~.

No one can ever know the complete truth. (But all I mention is not about facts but a persons inside. And I reject doubt anyone from outside can know my husbands inside better than a person constantly

close - especially after he stopped taking drugs as his addiction changed his whole personality and was leading him rather than himself having control.

So, if others believe or not - I know he feels terrible about all and always will. And its in fact my own values I am defending by saying so.

And even though I am his wife, I could never ignore the pain over the losses others suffered because of him. I am always for justice but doubt that what was presented brought justice or more peace - especially for the victim's family members. It must be devastating to think he was aware of his doings and most of all wouldn't regret.

I understand the prosecutors job but hoped for a truthful picture - which doesn't make any worse than it is already.

My husband and me both regret for not taking a stand ourselves so that ~~that~~ was what we wanted. We were aware of the risks but however it had went, at least we could have done best to say what we hoped for and give a more complete picture.

My husband caught H.I.V. and Hepatitis by injecting drugs as a teenager. He was aware of that later - and thus I doubt it was searching for excitement. I simply think his addiction was so severe he couldn't go against it and had needed professional help. And a person fully aware of his doing wouldn't - 6 - risk his own life and that is

These are just a few points which could let of confusion to me. I can't prove any of my own thoughts and about what I know from my husband. But same way (and other way around) no one can.

And to be honest, all I hoped is a fair trial and getting as close to the truth as possible.

It is terrible enough what happened. And I hope noone thinks I try to justify any or minimize any my husband is responsible for.

But I also don't see any reason why a picture is given which makes it worse than it was.

And I swear to God that my husband feels remorse - and has to live with this huge burden (he put himself on) forever.

And I hope if noone believes him that at least someone would believe me and my own values as I would describe myself as "innocent" - apart from wrong parking and overspeeding twice I never did any wrong in life. And society deserves justice (and protection). I truly don't want or would never demand anything else.

But it is also not only about my husband. Once he is dead, he doesn't even know.

But "we" - people like me.

Thank you for your listening - I hope I didn't do any wrong here.

- 7 - Claudia Amelia Goetze

14. Ordnungs- oder Künstlername/
Religiöser Name oder pseudonym



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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA

vs.

NORMAN BLAKE MCKENZIE,
Defendant.

_____ /

SENTENCING ORDER

This matter is before this Court for resentencing on two counts of First Degree Murder. After considering the evidence adduced at the recent penalty phase, the jury's verdicts, the evidence presented at the *Spencer*¹ hearing, the arguments of counsel, the memoranda submitted by the parties, and the applicable law, the Court finds as follows:

I. PROCEDURAL HISTORY

On October 17, 2006, a St. Johns County Grand Jury indicted the Defendant on two counts of First Degree Murder for the October 4, 2006 murders of Randy Peacock (Count I) and Charles Johnston (Count II). [DIN 7]² At the conclusion of the guilt portion of the trial, on August 21, 2007, a jury found the Defendant guilty

¹*Spencer v. State*, 615 So.2d 688 (Fla. 1993).

² References to the Clerk's docket are identified by Docket Identification Number ("DIN") followed the applicable entry number. *E.g.* [DIN 1].

of both counts of First Degree Murder. [DIN 103,104] The same jury returned for a penalty phase and on August 23, 2007, recommended by a vote of 10 to 2, that the Defendant be sentenced to death for each count. On October 19, 2007, the presiding judge followed the jury's sentencing recommendation and sentenced the Defendant to death for each count of First Degree Murder.

The Florida Supreme Court subsequently affirmed the Defendant's convictions and death sentences. *McKenzie v. State*, 29 So.3d 272 (Fla. 2010), *cert. denied* 562 U.S. 854 (2010). The Defendant subsequently moved for post-conviction relief pursuant to Rules 3.850 and 3.851, Fla. R. Crim. P. [DIN 253], which was denied on March 8, 2012 [DIN 268]. The Florida Supreme Court affirmed the denial of the Defendant's motion for post-conviction relief. *McKenzie v. State*, 153 So.3d 867 (Fla. 2014).

In 2016, the United States Supreme Court held Florida's capital sentencing scheme unconstitutional because the judge, rather than a jury, made the necessary findings of fact regarding the existence of aggravating factors to impose a death sentence. *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616, 621 (2016). Thereafter, the Florida Supreme Court held that before a judge may consider imposing a death sentence, the jury "must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt." *Hurst v. State*, 202 So.3d 40, 57 (Fla. 2016). In addition, the Florida Supreme Court determined a jury must

unanimously find the aggravating factors are sufficient to impose a death sentence and outweigh the mitigating circumstances, and a jury's determination that death is the appropriate sentence must be unanimous. *Id.* The Florida Supreme Court subsequently held that the *Hurst* rulings apply retroactively only to those defendants whose death sentences became final after the issuance of the opinion in *Ring v. Arizona*, 536 U.S. 584 (2002). *See Asay v. State*, 210 So.3d 1 (Fla. 2016) *cert. denied* __ U.S. __, 138 S.Ct. 41 (2017); *Mosely v. State*, 209 So.3d 1248, 1283 (Fla. 2016).

The Defendant's 2007 death sentences previously rendered in this case became final after the decision in *Ring*. Therefore, on January 9, 2017, the Defendant filed his First Successive Motion to Vacate Judgment of Conviction and Sentences [DIN 320], based in part on the *Hurst* decisions. Accordingly, on June 19, 2017, this Court entered an order vacating the Defendant's death sentences. [DIN 333] The State did not appeal that order. This case was subsequently scheduled for a new penalty phase for a jury to determine the appropriate sentences for the First Degree Murder convictions.

The new penalty phase was commenced on August 26, 2019. The penalty phase was conducted in accordance with Fla. Stat. §921.141(2019). On August 29, 2019, the jury returned its penalty phase verdicts unanimously finding the

Defendant should be sentenced to death for the First Degree Murders of Randy Peacock and Charles Johnston.

A *Spencer* hearing took place on November 22, 2019. The parties submitted their Sentencing Memoranda to the Court on December 6, 2019. [DIN 525, 526]

Following the *Spencer* hearing and shortly before the imposition of today's sentencing, the Florida Supreme Court rendered its opinion in *State v. Poole*, ___So.3d___, 45 Fla. L. Weekly S41a (Fla. Jan. 23, 2020), in which it partially receded from *Hurst v. State, supra*. In *Poole*, our Supreme Court concluded the United States and Florida Constitutions are not offended by imposition of a death sentence following a non-unanimous jury verdict that death is the appropriate sentence. The Court in *Poole* confirmed that portion of *Hurst v. State*, requiring a unanimous jury finding, beyond a reasonable doubt, of the existence of statutory aggravating factors. Because the jury in the original penalty phase in this case did not expressly and unanimously determine, beyond a reasonable doubt, the existence of all the statutory aggravating factors found by the original trial judge to exist, this resentencing is appropriate.

II. FACTS

The evidence established that on October 5, 2006, Flagler Hospital employees Perry Privette and Julie Aubrey became concerned when Randy Peacock, a respiratory therapist at the hospital, didn't report to work. Privette and

Aubrey drove to the home Peacock shared with Charles Johnston. Upon their arrival, they noticed Peacock's vehicle wasn't there. Privette and Aubrey checked the exterior of the home and eventually entered the home where they found Peacock's body on the kitchen floor in a pool of blood. Privette and Aubrey immediately left the residence and called the St. Johns County Sheriff's Office ("SJSO"). When deputies from SJSO arrived, they secured the scene and subsequently located Charles Johnston's body in a shed on the property. Law enforcement found a bloody hatchet inside the shed where Johnston's body was found. A large knife was found in the sink in the kitchen where Peacock's body was found. Deputies observed a gold SUV in the driveway that was registered to the Defendant and immediately began efforts to locate him.

The Defendant subsequently had an encounter that same day with Citrus County deputies and was taken into custody. Randy Peacock's wallet was recovered from one the Defendant's pockets and Charles Johnston's wallet was located in a vehicle the Defendant operated prior to his capture. The Defendant spoke with SJSO deputies on two separate occasions during which he confessed to the murders of Peacock and Johnston.

The Defendant told deputies he went to the victims' residence on October 4, 2006, looking for money. When he first arrived, only Peacock and his neighbor were present; however, Johnston later arrived at the residence. At some point

Peacock went into the house. The Defendant asked Johnston for a hammer and a piece of wood, telling Johnston he wanted the items so he could knock dents out of his SUV. Johnston was unable to locate a hammer so he gave the Defendant a hatchet to use. The Defendant and Johnston walked to the shed to locate a piece of wood where the Defendant struck Johnston in the head with the blade side of the hatchet. Johnston fell to the floor. The Defendant went back to the residence where Peacock was in the kitchen cooking. The Defendant proceeded to strike Peacock in the head multiple times with the hammer side of the hatchet. Peacock fell to the floor.

The Defendant returned to the shed where he observed Johnston was still alive. The Defendant then struck Johnston again in the head with the blade side of the hatchet. The Defendant took Johnston's wallet and left the hatchet in the shed. The Defendant then returned to the kitchen in the house where he found Peacock was still alive. The Defendant grabbed a large kitchen knife and stabbed Peacock multiple times. The Defendant then put the knife in the kitchen sink, took Peacock's wallet and car keys, and left the area in Peacock's car. The Defendant was captured the following day in Citrus County after fleeing from police.

The autopsy of Randy Peacock revealed the cause of his death was the stab wounds inflicted by the Defendant, with a contributory cause of blunt-force trauma to the head. The autopsy also revealed Peacock suffered multiple burns, consistent

with the Defendant's statement to deputies that after he struck Peacock in the head with the hatchet, Peacock's arms fell into the pot on the stovetop before he fell to the floor. The stab wounds Peacock suffered were consistent with the knife found in the kitchen sink and the blunt-force trauma to Peacock's head was consistent with having been struck with the hammer side of the hatchet, as the Defendant described to deputies. The autopsy of Charles Johnston revealed his cause of death was extensive head trauma due to four "chop" wounds. Johnston's head trauma was consistent with having been struck multiple times with the blade side of the Hatchet, as described by Defendant to deputies.

As explained above, the jury in the first trial found the Defendant guilty of two counts of First Degree Murder, which was affirmed by the Florida Supreme Court. A different jury was empaneled for the recent resentencing penalty phase. At the conclusion of the recent penalty phase, the jury unanimously found the appropriate sentences for Counts I and II is death.

Fla. Stat. §921.141(3)(a)2 provides that "[i]f the jury has recommended a sentence of Death, the Court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death." Thus, the Court will discuss its findings regarding its consideration of each aggravating

factor found by the jury and all mitigating circumstances, as they pertain to Counts I and II, the weight to be assigned to each, and the sentence for each.

III. COUNT I (FIRST DEGREE MURDER OF RANDY PEACOCK)

A. AGGRAVATING FACTORS

At the recent penalty phase, the State relied on five aggravating factors for Count I, for which it had given the defense notice.³ Pursuant to the directives of the United States Supreme Court in *Hurst v. Florida*, *supra.*, and Fla. Stat. §921.141(2), the jury was instructed that in order to find the existence of an aggravating factor it must unanimously determine the aggravating factor has been proven beyond a reasonable doubt. At the conclusion of the recent penalty phase, the jury unanimously found the State had proven each of the five aggravating factors asserted for Count I beyond a reasonable doubt. The aggravating factors unanimously found by the jury to exist beyond a reasonable doubt have been considered by this Court and are discussed below.

³ At the original penalty phase, the State relied on four aggravating factors which the Court found to exist: (1) the Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the Defendant was engaged in the commission of, or attempted commission of, a robbery; (3) the capital felony was committed for pecuniary gain; and (4) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Prior to the recent penalty phase, the State gave notice to the defense that it intended to rely on an additional aggravating factor: that the capital felony was especially heinous, atrocious, or cruel. [DIN 438]. The defense moved to preclude the State from proceeding on this additional aggravating factor. [DIN 448] The Court denied the Defendant's motion and allowed the State to proceed on the five alleged aggravating factors. [DIN 467]

- i. *The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. Fla. Stat. § 921.141 (6)(b)*

Part of the basis for this aggravating factor, as it pertains to Count I, is the Defendant's contemporaneous conviction for the murder of Charles Johnston (Count II). It is well-established that contemporaneous convictions for capital or violent felonies on different victims may be considered. *Bevel v. State*, 983 So.2d 505 (Fla. 2008); *King v. State*, 390 So.2d 315 (Fla. 1980); *Pardo v. State*, 563 So.2d 77 (Fla. 1990); *Stein v. State*, 632 So.2d 1361 (Fla. 1994); *Francis v. State*, 808 So.2d 110 (Fla. 2002).

In addition to the contemporaneous murder conviction, it was also established during the recent penalty phase that the Defendant had previously been convicted of nine prior violent felonies:

State of Florida v. Norman McKenzie, Case No.: 1984-3709CF (Broward County, Florida); November 8, 1984

Kidnapping and Robbery

State of Florida v. Norman McKenzie, Case No.: 1990-19206CF10 (Broward County, Florida); May 28, 1991

Robbery

State of Florida v. Norman McKenzie, Case No.: 01-2006-CF005259-A (Alachua County, Florida); May 10, 2007

Attempted Robbery

State of Florida v. Norman McKenzie, Case No.: 01-2006-CF-005261-A (Alachua County, Florida); May 10, 2007

Kidnapping with a Firearm

State of Florida v. Norman McKenzie, Case No.: 01-2007-CF-00532-A
(Alachua County, Florida); May 10, 2007
Robbery

State of Florida v. Norman McKenzie, Case No.: 01-2007-CF-000585-A
(Alachua County, Florida); May 10, 2007
Robbery

State of Florida v. Norman McKenzie, Case No.: 01-2007-CF-000586-A
(Alachua County, Florida); May 10, 2007
Robbery

State of Florida v. Norman McKenzie, Case No.: 42-2006-CF-004213-A
(Marion County, Florida); March 6, 2007
Carjacking while Armed

In addition to the Judgment and Sentences received into evidence from these prior violent felonies, during the recent penalty phase, testimony was received from the victims of many of these prior violent felonies, including Charles McGuire who was the victim from the 1991 Broward County robbery conviction; Clarice Polczynski, Amanda Hughes, Chantel Wilson and Marquette Frederick, who were the victims from the 2007 Alachua County robbery and attempted robbery convictions; Larry Van who was the victim from the 2007 Marion County carjacking conviction; and Ceasar Saldana who was an investigating detective from the 2007 Alachua County kidnapping conviction.

The jury unanimously found this aggravating factor had been proven beyond a reasonable doubt. (Question A.1 in the Jury's Verdict As To Sentence On Count I) This Court agrees with the jury's finding regarding this aggravating factor.

The Florida Supreme Court has explained that the “prior violent felony” aggravating factor is one of the “most weighty in Florida’s sentencing calculus.” *Sireci v. Moore*, 825 So.2d 882, 887 (Fla. 2001). This is particularly the case here, where the Defendant not only killed Randy Peacock, but also murdered Charles Johnston, and had previously been convicted of nine other violent felonies. This Court gives this aggravating factor VERY GREAT WEIGHT.

- ii. *The capital felony was committed while the defendant was engaged, . . . , in the commission of . . . robbery. Fla. Stat. §921.141(6)(d)*

During the recent penalty phase the State introduced the Defendant’s two recorded statements made to SJSO detectives. During his initial statement made the day after the murders, the Defendant told detectives he went to the victims’ residence in order to steal money from the victims so he could get more drugs. After attacking the victims, the Defendant took their wallets, money and credit cards. The Defendant also took Randy Peacock’s SUV. When arrested in Citrus County the day after the murders, the Defendant was found in possession of Randy Peacock’s wallet, and Charles Johnston’s wallet was found in a vehicle the Defendant had operated that day.

Although the State did not charge the Defendant with robbery, it was proved beyond a reasonable doubt during the recent penalty phase that the murder of Randy Peacock was committed while Defendant was engaged in the commission of a robbery. *See* Fla. Stat. §812.13(1).

The jury unanimously found this aggravating factor had been proven beyond a reasonable doubt. (Question A.2 in the Jury's Verdict As To Sentence On Count I) This Court agrees with the jury's finding regarding this aggravating factor. This Court gives this aggravating factor GREAT WEIGHT.

iii. *The capital felony was committed for pecuniary gain. Fla. Stat. §921.141(6)(f)*

As discussed above, the State proved beyond a reasonable doubt during the recent penalty phase that the Defendant went to the victims' residence to steal money from them. Likewise, as discussed above, the Defendant took the victims' wallets, money and credit cards, as well as Randy Peacock's SUV.

The jury unanimously found this aggravating factor had been proven beyond a reasonable doubt. (Question A.3 in the Jury's Verdict As To Sentence On Count I) This Court agrees with the jury's finding regarding this aggravating factor. However, the Court recognizes that this aggravating factor merges with the preceding aggravating factor that the murder was committed while the Defendant was engaged in the commission of a robbery. *See Griffin v. State*, 820 So.2d 906, 915 (Fla. 2002). Accordingly, during the recent penalty phase, the jury was instructed

Pursuant to Florida law, the aggravating factors of *the murder was committed during the course of a Robbery* and *the murder was committed for financial gain* are considered to merge because they are considered to be a single aspect of the offense. If you unanimously determine that the aggravating factors of *the murder was committed*

during the course of a Robbery and the murder was committed for financial gain have both been proven beyond a reasonable doubt, your findings should indicate that both aggravating factors exist, but you must consider them as only one aggravating factor.

Likewise, although this Court finds this aggravating factor was established, because it merges with the aggravating factor that the murder was committed during the commission of a robbery, these two aggravating factors will be considered as one and no added weight is given to this aggravating factor.

iv. *The capital felony was especially heinous, atrocious, or cruel. Fla. Stat. §921.141(6)(h)*

The Florida Supreme Court has held this aggravating circumstance would apply “only in torturous murders—those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.” *Chesire v. State*, 568 So.2d 908, 912 (Fla. 1990); *Robertson v. State*, 611 So.2d 1228, 1232 (Fla. 1993); *Rogers v. State*, 783 So.2d 989, 994 (Fla. 2001); *Barnhill v. State*, 834 So.2d 836, 849-50 (Fla. 2002). For this aggravating factor to apply, the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim. *Nelson v. State*, 748 So.2d 237, 245 (Fla. 1999). The Florida Supreme Court has stated this aggravating factor “focuses on the means and manner in which the death was inflicted and the immediate circumstances surrounding the death, where a victim experiences the torturous anxiety and fear of impending death; thus, the trial court

[and jury] considers the victim's perceptions of the circumstances as opposed to those of the perpetrator." *Allred v. State*, 55 So.3d 1267 (Fla. 2010). Together with a prior violent felony conviction, the Florida Supreme Court has expressed the heinous, atrocious, or cruel aggravating factor as "the most weighty in Florida's sentencing calculus." *Sireci, supra*.

According to the Defendant, in his statement to detectives, he came up behind Randy Peacock and struck him in the head with the blunt side of the hatchet. During the recent penalty phase, testimony was received from Dr. Predrag Bulic, chief medical examiner for St. Johns County.⁴ Dr. Bulic testified that Mr. Peacock suffered three to four blunt force injuries to the back of his head, consistent with the blunt side of the hatchet. Dr. Bulic testified these blows to Mr. Peacock's head would have been painful if he was conscious. According to the Defendant in his statement to detectives, Mr. Peacock was conscious after these blows, since he struggled with Mr. Peacock when he returned to the residence after attacking Mr. Johnston in the shed.

According to the Defendant, in his statement to detectives, after he struck Mr. Peacock in the head, Mr. Peacock fell into what he was cooking on the stovetop. Dr. Bulic testified that Mr. Peacock's autopsy revealed burns to his

⁴ The autopsy of Randy Peacock was performed by Dr. Steiner, who is deceased. Dr. Bulic reviewed the autopsy reports and photographs from Dr. Steiner's autopsy of Mr. Peacock and rendered his opinions regarding Mr. Peacock's injuries.

hands and arms, consistent with the Defendant's statement about Mr. Peacock falling into the pot on the stovetop. Dr. Bulic testified that Mr. Johnston would have been in extraordinary severe pain from those burns.

After the Defendant's initial attack of Mr. Peacock, he left him to go out to the shed to encounter Mr. Johnston again. While gone, Mr. Peacock remained in the kitchen suffering from the blows to his head and burns to his body. The Defendant then returned to the kitchen where, according to the Defendant's statement to detectives, he found Mr. Peacock upright and conscious. Because the Defendant no longer had the hatchet which he had left in the shed, he grabbed a large knife and repeatedly stabbed Mr. Peacock. Dr. Bulic described the six stab wounds to Mr. Peacock. Dr. Bulic explained how the stab wounds would have been very painful to Mr. Peacock, and while not immediately fatal, because he did not receive immediate emergency medical care, Mr. Peacock died shortly thereafter from the stab wounds.

Despite the earlier hatchet attack, according to the Defendant, Mr. Peacock was conscious and alive when the Defendant returned to the residence and inflicted multiple stab wounds to Mr. Peacock. The Defendant described to detectives how Mr. Peacock was fighting for his life while Defendant was stabbing him to death.

At the recent *Spencer* hearing, Defendant testified Mr. Peacock was "not conscious to the world around him," when the Defendant returned to the residence

after the initial blows to Mr. Peacock with the hatchet. The Court finds Defendant's statements to detectives shortly after the murder, explaining how Mr. Peacock was conscious and fighting for his life at that point, more credible than Defendant's recent testimony given 13 years later.

The Florida Supreme Court has found the heinous, atrocious, or cruel (HAC) aggravating factor to apply in numerous circumstances where a victim suffered numerous stab wounds while conscious and alive. *See e.g. Matthews v. State*, 124 So.3d 811 (Fla. 2013); *Aguirre-Jarquin v. State*, 9 So.3d 593 (Fla. 2009); *Simmons v. State*, 934 So.2d 1100 (Fla. 2006); *Schoenwetter v. State*, 931 So.2d 857 (Fla. 2006); *Perez v. State*, 919 So.2d 347 (Fla. 2006); *Cox v. State*, 819 So.2d 705 (Fla. 2002); *Francis v. State*, 808 So.2d 110, 134-35 (Fla. 2002); *Pittman v. State*, 646 So.2d 167, 172-73 (Fla. 1994); *Davis v. State*, 620 So.2d 152, 153 (Fla. 1993).

The murder of Randy Peacock, in which he initially received multiple blunt force blows to his head and burns, but remained alive while the Defendant left to kill Mr. Johnston, only to have the Defendant return and repeatedly stab Mr. Peacock while he was conscious and fighting for his life, was particularly torturous supporting this aggravating factor.

The jury unanimously found this aggravating factor had been proven beyond a reasonable doubt. (Question A.4 in the Jury's Verdict As To Sentence On Count

I) This Court agrees with the jury's finding regarding this aggravating factor. Considering the facts and circumstances supporting this aggravating factor, as elicited during the recent penalty phase, this Court gives this aggravating factor GREAT WEIGHT.

- v. *The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Fla. Stat. §921.141(6)(i)*

The Florida Supreme in *Baker v. State*, 71 So. 3d 802 (Fla. 2011) explained the cold, calculated, and premeditated aggravating factor (CCP) as follows:

Whether the CCP aggravator applies in a given case is subject to a four-part test: (1) The killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) there must have been no pretense of moral or legal justification.

Id. at 818-19 (citing *Lynch v. State*, 841 So.2d 362, 371 (Fla.2003)).

The CCP aggravating factor has been described by the Florida Supreme Court as “one of the weightiest aggravators in Florida’s statutory sentencing scheme.” *McKenzie*, 29 So. 3d at 287; citing *Morton v. State*, 995 So.2d 233, 243 (Fla. 2008).

In the instant case, the killings were the product of cool and calm reflection, rather than an act prompted by emotional frenzy, panic, or a fit of rage. Shortly after the murders, the Defendant told detectives that he went to the victims’

residence with the intent to rob and kill them. During that interview, the Defendant told detectives he went to the residence to steal money and was telling himself "I don't have to do my parents." He told detectives he wanted to get the killing over quickly which is why he asked Mr. Johnston for a large hammer and a piece of wood under the guise that he was going to use it to repair dents in his vehicle.⁵ In response to that request, Mr. Johnston handed Defendant the hatchet that would be used to kill him and attack Mr. Peacock. The Defendant then coolly and calmly followed Mr. Johnston to the shed, where Mr. Johnston was looking for a piece of wood, when the Defendant struck Mr. Johnston in the head with the hatchet. The Defendant told detectives that after he struck Mr. Johnston in the head with the hatchet, Mr. Johnston fell to the ground. Defendant told detectives this concerned him because he was afraid a deaf woman who lived nearby might feel a vibration. The Defendant then coolly and calmly walked to the residence where he came up behind Mr. Peacock and struck him multiple times in the head with the hatchet. The Defendant then calmly returned to the shed where he observed Mr. Johnston still alive and proceeded to strike him again with the blade

⁵ Defendant testified at the recent *Spencer* hearing that he didn't go to the victims' residence to steal their money, but he went to get money they owed him for work he previously did on the victims' residence. Additionally, Defendant testified that he asked Mr. Johnston for a hammer with the intent to actually repair the dents in his vehicle. Defendant acknowledged during his recent *Spencer* hearing testimony that he gave a different account of his intentions when he spoke with detectives shortly after the murders. The Court finds the Defendant's statements made to detectives shortly after the murders, regarding his intention to rob and kill the victims, is much more credible than the testimony he gave at the recent *Spencer* hearing 13 years after the murders.

side of the hatchet. The Defendant then calmly returned to the kitchen of the residence where he found Mr. Peacock alive and proceeded to stab him multiple times. Defendant explained to detectives that he stabbed Mr. Peacock in certain parts of his body to assure Mr. Peacock would die from the wounds.⁶ Defendant also told detectives that when he returned to the house to stab Mr. Peacock, he was careful to make sure Mr. Peacock was placed on the ground, rather than letting him fall to the ground, so the deaf neighbor wouldn't feel any vibration. After stabbing Mr. Peacock, Defendant rinsed off the knife and placed it in the sink. After killing the victims, the Defendant went through the residence looking for Mr. Peacock's wallet. He stole the victims' wallet, money and credit cards, and took Mr. Peacock's vehicle.

From the time the Defendant first arrived at the residence, when only Mr. Peacock and a neighbor were present, until he killed the victims, a few hours had passed. The Defendant made sure to wait until the neighbor left and Mr. Johnston arrived, before he executed his calculated plan to kill the victims and steal their belongings. Additionally, heightened premeditation was demonstrated by the substantial amount of time the Defendant reflected on his plan while present at the

⁶ Defendant testified at the recent *Spencer* hearing that the reason he stabbed Mr. Peacock upon his return to the residence was because he knew, due to the earlier blows he inflicted with the hatchet, that Mr. Peacock would be rendered a "vegetable" and he didn't want Mr. Peacock to live that way. Defendant never gave this explanation to detectives 13 years earlier when he confessed to the murders.

residence and waiting for the opportune time to execute that plan. Lastly, there clearly was no pretense of moral or legal justification for the killings.

The jury unanimously determined that the State established this aggravating factor beyond a reasonable doubt. (Question A.5 in the Jury's Verdict As To Sentence On Count I) This Court agrees with the jury's finding regarding this aggravating factor. Considering the facts and circumstances supporting this aggravating factor as elicited during the trial in this case, this Court gives this aggravating factor GREAT WEIGHT.

vi. *Conclusion – Aggravating Factors*

Following the jury's unanimous determination of the existence of the aforementioned aggravating factors beyond a reasonable doubt, the jury was asked whether the aggravating factors are sufficient to warrant a possible sentence of death. The jury unanimously found the aggravating factors are sufficient to warrant a death sentence. (Section B in the Jury's Verdict As To Sentence On Count I) This Court has likewise considered the aggravating factors unanimously found by the jury to exist and agrees with the jury's finding, determining the aggravating factors are sufficient to warrant a death sentence. Thus, the Court will next consider the mitigating circumstances.

B. MITIGATING CIRCUMSTANCES

During the recent penalty phase, the jury considered physical evidence introduced by the defense and heard testimony from Tammy Kimbell, a former friend of the Defendant; Dr. Stephen Bloomfield, a psychologist; and Dr. Susan Skolly-Danzinger, an expert in toxicology and pharmacology. In rebuttal, the State presented the testimony of Dr. William Meadows, a psychologist.⁷ The jury was instructed on the mitigating circumstances and that mitigating circumstances need only be established by the greater weight of the evidence. The jury stated in its verdict that one or more of the individual jurors found that one or more mitigating circumstance was established by a greater weight of the evidence.⁸ (Section C in the Jury's Verdict As To Sentence On Count I)

Additionally, the Court considered further evidence of mitigating circumstances during the *Spencer* hearing. At the *Spencer* hearing, the Court heard testimony from the Defendant and Dr. Skolly-Danzinger. The Court also received a letter from Claudia Goeke.⁹

⁷ The State also introduced victim impact testimony during the recent penalty phase, and submitted additional victim impact letters at the *Spencer* hearing. The Court is not considering the victim impact evidence in its analysis of the aggravating factors and mitigating circumstances.

⁸ The verdict forms for the penalty phase did not require the jurors to list the specific mitigating circumstances found or to provide the jury's vote as to the existence of mitigating circumstances, as set forth by the Florida Supreme Court. *In re: Standard Criminal Jury Instructions in Capital Cases*, 244 So.3d 172 (Fla. 2018).

⁹ The Defendant refers to Ms. Goeke as his spouse. In her letter dated January 7, 2019, Ms. Goeke refers to herself as the Defendant's fiancé.

The mitigating circumstances set forth by the Defendant, as instructed by the Court during the recent penalty phase of the trial, as well as those set forth during the *Spencer* hearing and in Defendant's Sentencing Memorandum, are discussed below.

- i. *The First Degree Murder was committed while Defendant was under the influence of extreme mental or emotional disturbance.*

The fact a defendant was intoxicated or under the influence of narcotics can support the establishment of this mitigating circumstance. *Hollsworth v. State*, 522 So.2d 348, 354 (Fla. 1988). During the recent penalty phase Tammy Kimball testified regarding the Defendant's extensive drug use around the time of the murders. Dr. Bloomfield testified regarding the Defendant's long-standing substance abuse and opined that due to the Defendant's extensive drug use at the time of the incident, he believes Defendant was under the influence of extreme mental or emotional disturbance at that time. During the recent penalty phase and *Spencer* hearing, Dr. Skolly-Danzinger likewise testified regarding the Defendant's long-standing drug abuse and its effects on the human body. Dr. Skolly-Danzinger also opined that Defendant was under the influence of extreme mental or emotional disturbance at the time of the murders. The Defendant's statements to detectives shortly after the crime describing his drug addiction and his activities to get money for drugs, including the murders in this case and the string of robberies in the days leading up to the murders, corroborated the opinions of Drs. Bloomfield and

Skolly-Danzinger. The State's rebuttal witness Dr. Meadows opined that he does not believe the Defendant was under the influence of extreme mental or emotional disturbance at the time of the murders.

This Court finds that the greater weight of the evidence established the Defendant was under the influence of extreme mental or emotional disturbance at the time of the murders due to his significant drug use. The Court gives this mitigating circumstance MODERATE WEIGHT.

- ii. *The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.*

Evidence that a defendant was "strung out" on drugs at the time of a murder can support the establishment of this mitigating circumstance. *Williams v. State*, 37 So.3d 187, 204-05 (Fla. 2010). As discussed above, Ms. Kimball testified regarding the Defendant's excessive drug use around the time of the murders. Drs. Bloomfield and Skolly-Danzinger both further opined that the Defendant's ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired due to his drug use. Dr. Skolly-Danzinger opined that particularly with cocaine addiction, of which Defendant suffered, users lose control and seek the drug out regardless of the consequences. The State's rebuttal witness Dr. Meadows opined the Defendant's ability to

appreciate the criminality of his conduct and to conform his conduct to the requirements of law was not substantially impaired.

During the recent *Spencer* hearing, the Court received testimony from the Defendant and Dr. Skolly-Danzinger on how the Defendant's drug use and addiction adversely affected his behavior at the time of the murders. The Defendant testified that prior to the murders he had been on a drug binge for eight to nine days without sleep.

This Court finds that the greater weight of the evidence established the Defendant's ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired. However, the Court notes that while the Defendant may have been impaired, he appreciated that killing Randy Peacock and Charles Johnston was wrong, as demonstrated in his statements to detectives and his attempts to avoid capture the day after the murders. The Court gives this mitigating circumstance SLIGHT WEIGHT.

iii. Defendant's childhood was chaotic.

Dr. Bloomfield opined the Defendant had a rather chaotic childhood which included first using marijuana at age five, beginning to use harder drugs at age ten, and his parents divorcing when he was age eight. Dr. Skolly-Danzinger testified regarding the Defendant's early childhood drug use, including inhalants by age 11, and having no boundaries growing up. The State's rebuttal witness Dr. Meadows

rejected the claim that the Defendant had a chaotic childhood. Dr. Meadows indicated the Defendant described to him a happy childhood with great parents and no reports of physical or sexual abuse.

This Court finds the greater weight of the evidence established this mitigating circumstance that the Defendant had a chaotic childhood. The Court gives this mitigating circumstance SLIGHT WEIGHT.

- iv. Defendant and his siblings experienced a lack of adequate supervision after the divorce of his parents.*

Both Drs. Bloomfield and Skolly-Danzinger testified that Defendant experienced a lack of supervision and a lack of boundaries after the divorce of his parents at age eight. After his parents divorced, Defendant would steal food for his family and became a chronic drug user at a young age. This Court finds that the greater weight of the evidence established this mitigating circumstance that the Defendant and his siblings experienced lack of adequate supervision after the divorce of his parents. The Court gives this mitigating circumstance VERY SLIGHT WEIGHT.

- v. Defendant started huffing from spray cans at the age of 11 years old.*

Drs. Bloomfield and Skolly-Danzinger testified the Defendant told them he began “huffing” inhalants at the young age of 11. These mitigation experts testified regarding the detrimental effects this has on the human body, including

brain development. This was part of the Defendant's long-standing drug abuse. This Court finds that the greater weight of the evidence established this mitigating circumstance. The Court gives this mitigating circumstance SLIGHT WEIGHT.

- vi. *Defendant had an early and chronic abuse and dependency on alcohol and drugs.*

Drs. Bloomfield and Skolly-Danzinger testified at the recent penalty phase that the Defendant began using and abusing drugs at a very early age. According to the Defendant's statements to these mitigation experts, he began using marijuana at age five, methamphetamine at age 10, and inhalants or "huffing" at age 11. Defendant told these experts that drug use became a daily thing for him beginning at age 12. The Defendant testified at the recent *Spencer* hearing that his drug use progressed to injecting drugs around age 16. The defense mitigation experts testified regarding the detrimental effects this early and chronic drug use would have on brain development. The State's rebuttal expert testified that he doubted the veracity of the Defendant's very early drug use.

This Court finds that the greater weight of the evidence established this mitigating circumstance that Defendant had early and chronic abuse and dependency on alcohol and drugs. The Court gives this mitigating circumstance SLIGHT WEIGHT.

- vii. *Defendant had a cocaine dependency relapse starting in July 2006 up to and after the crimes at bar.*

According to the Defendant in his statement to detectives, he was addicted to cocaine and had a relapse in 2006. This was corroborated by the Defendant's mitigation experts and the State's rebuttal witness who all testified the Defendant suffered from a substance abuse disorder. Tammy Kimball's testimony likewise corroborates this mitigating circumstance by her testimony regarding the Defendant's cocaine use around the time of the murders. Defendant testified at the recent *Spencer* hearing that his relapse began in July 2006.

This Court finds that the greater weight of the evidence established this mitigating circumstance that Defendant had a cocaine dependency relapse starting in July 2006 up to and after the murders. The Court gives this mitigating circumstance SLIGHT WEIGHT.

viii. Defendant consistently used a voluminous amount of cocaine from July to October of 2006.

As discussed above, according to the Defendant's mitigation experts and Tammy Kimball, the Defendant was consistently using a significant amount of cocaine after his relapse in 2006 up to the time of the murders and his arrest. The Defendant would ingest cocaine in different ways including intravenously. The Defendant testified at the recent *Spencer* hearing that around the time of the murders he was spending approximately \$1000 a day to support his drug addiction, and leading up the day of the murders he had been on a drug binge for eight or nine days without sleep.

This Court finds that the greater weight of the evidence established this mitigating circumstance. The Court gives this mitigating circumstance SLIGHT WEIGHT.

- ix. Defendant cooperated with law enforcement at the time of his arrest.*

Hours after he was taken into custody, the Defendant gave a statement to SJSO Detective Tim Rollins and Georgia investigator Jennings. The Defendant freely spoke with these investigators and described the murders of Mr. Peacock and Mr. Johnston. A few months later, the Defendant gave another statement to Detective Rollins and SJSO Detective Timothy Burres. Again, the Defendant freely spoke with these detectives and described the murders. While the Defendant cooperated with these investigators, the Court also notes that the day after the murders, when law enforcement officers sought to capture the Defendant, he led Citrus County deputies on a vehicular pursuit, and after crashing the vehicle he was operating, fled into a nearby body of water before being captured by police.

This Court finds that the greater weight of the evidence established this mitigating circumstance that the Defendant cooperated with law enforcement at the time of his arrest. The Court gives this mitigating circumstance SLIGHT WEIGHT.

- x. Defendant admitted to the murders of Randy Peacock and Charles Johnston.*

As discussed above, the Defendant freely admitted to detectives, on two occasions, that he murdered Mr. Peacock and Mr. Johnston. The Defendant's admissions to police were instrumental in securing his own convictions. At the recent *Spencer* hearing, the Defendant again admitted committing the murders and expressed remorse for killing Randy Peacock and Charles Johnston. This Court finds that the greater weight of the evidence established this mitigating circumstance. The Court gives this mitigating circumstance MODERATE WEIGHT.

xi. Defendant has artistic ability.

During the recent penalty phase the defense admitted into evidence drawings or paintings created by Defendant since he has been in prison. During closing argument, defense counsel displayed the Defendant's art work to the jury. This Court finds Defendant's art work impressive and he clearly possesses artistic ability. This Court finds that the greater weight of the evidence established this mitigating circumstance. The Court gives this mitigating circumstance SLIGHT WEIGHT.

xii. Defendant was an assistant superintendent for EMJ that built Cobblestone Village in St. Augustine.

During the recent penalty phase, it was established the Defendant worked as a construction assistant superintendent for EMJ prior to committing the murders. The Defendant played a key role in the construction of the Cobblestone Village

shopping center in St. Augustine. At the recent *Spencer* hearing, Defendant testified that he worked in the construction industry since age 15. The Defendant progressed from a construction worker to a project supervisor. In addition to being a project supervisor for EMJ on the Cobblestone Village project, Defendant also worked with Johnson, Graham and Malone Construction, and worked on numerous projects in North Florida. While working in the construction industry, Defendant also volunteered to help build the Able Charter School for special needs children.

The Defendant was obviously good at his occupation; however, his drug abuse and criminal activity caused him to be unable to continue. This Court finds that the greater weight of the evidence established this mitigating circumstance. The Court gives this mitigating circumstance SLIGHT WEIGHT.

xiii. Defendant impacted the life of Claudia Goeke in a positive way while in prison.

During the recent *Spencer* hearing, the Court received a letter from Claudia Goeke, who Defendant refers to as his spouse. Ms. Goeke described her relationship with Defendant and how he helped her overcome physical and mental struggles. Ms. Goeke credits Defendant with saving her life.

The Court finds the greater weight of the evidence supports this mitigating circumstance. The Court gives this mitigating circumstance SLIGHT WEIGHT.

xiv. A prior jury did not unanimously find that Defendant should be sentenced to death

Defendant raised this proposed mitigating circumstance for the first time in his Sentencing Memorandum. As discussed above, in 2007 a jury recommended Defendant be sentenced to death by a vote of 10-2. The death penalties subsequently imposed in 2007 were vacated for the reasons set forth above.

The Florida Supreme Court has repeatedly explained that mitigating circumstances are limited to a defendant's character or record or the circumstances of the crime. *Campbell v. State*, 679 So.2d 720, 725 (Fla. 1996); *Johnson v. State*, 660 So.2d 637, 646 (Fla. 1995). The prior jury's 2007 10-2 death penalty recommendation is not relevant to this Defendant's character or record or circumstances of the murders; therefore, it is not considered a mitigating circumstance and is afforded NO WEIGHT.

C. WEIGHING AGGRAVATING FACTORS AND MITIGATING CIRCUMSTANCES

At the conclusion of the recent penalty phase trial, the jury unanimously found that the aggravating factors that were proven beyond a reasonable doubt outweighed the mitigating circumstances, thus making the Defendant eligible for a death sentence for Count I. (Section D of the Jury's Verdict As To Sentence on Count I)

Following the recent penalty phase trial and *Spencer* hearing, this Court independently considered and weighed the aggravating factors unanimously determined by the jury to exist beyond a reasonable doubt and the mitigating

circumstances established by the greater weight of the evidence. This Court has assigned the weight it feels each of the established aggravating factors and mitigating circumstances is due. This Court finds that the aggravating factors in this case far outweigh the mitigating circumstances; therefore, as the jury determined, the Court likewise determines the Defendant is eligible for a sentence of death for Count I of the Indictment.

D. SENTENCE COUNT I

Fla. Stat. §921.141(3)(a)2 provides that “[i]f the jury has recommended a sentence of Death, the Court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death.” This Court recognizes it is not bound by the jury’s verdict that death is the appropriate sentence, and may impose a life sentence if it feels that is appropriate. Not every person found guilty of first degree murder should receive a death sentence. A death sentence must be “reserved for only the most aggravated and the least mitigated first degree murders.” *Urbain v. State*, 714 So.2d 411,416 (Fla. 1998). This is such a case.

After carefully and independently considering those aggravating factors determined by the jury to exist, and all the mitigating circumstances, this Court agrees with the jury’s unanimous finding that the Defendant should be sentenced to

death for Count I. Based on the authority vested in this Court, it is the sentence of this Court on Count I of the Indictment, for the First Degree Murder of Randy Peacock, that the Defendant Norman Blake McKenzie is adjudicated guilty of said offense and sentenced to Death in a manner prescribed by law.

IV. COUNT II (FIRST DEGREE MURDER OF CHARLES JOHNSTON)

This Court has separately considered the evidence presented at the recent penalty phase, the *Spencer* hearing, the arguments of counsel, and the memoranda of the parties, to determine the appropriate sentence for the Defendant's conviction on Count II of the Indictment for the murder of Charles Johnston, as follows.

A. AGGRAVATING FACTORS

At the recent penalty phase, the State likewise relied on five aggravating factors for Count II. At the conclusion of the recent penalty phase, the jury unanimously found the State had proven each of the five aggravating factors asserted for Count II beyond a reasonable doubt. The aggravating factors unanimously found by the jury to exist beyond a reasonable doubt have been considered by the Court and are discussed below.

- i. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. Fla. Stat. § 921.141 (6)(b)*

Part of the basis for this aggravating factor, as it pertains to Count II, is the Defendant's contemporaneous conviction for the murder of Randy Peacock (Count

I). As discussed above, contemporaneous convictions for capital or violent felonies on different victims may be considered.

In addition to the contemporaneous conviction for the murder of Randy Peacock, as detailed above, it was also established during the recent penalty phase that Defendant had previously been convicted of nine prior violent felonies:

State of Florida v. Norman McKenzie, Case No.: 1984-3709CF (Broward County, Florida); November 8, 1984
Kidnapping and Robbery

State of Florida v. Norman McKenzie, Case No.: 1990-19206CF10 (Broward County, Florida); May 28, 1991
Robbery

State of Florida v. Norman McKenzie, Case No.: 01-2006-CF005259-A (Alachua County, Florida); May 10, 2007
Attempted Robbery

State of Florida v. Norman McKenzie, Case No.: 01-2006-CF-005261-A (Alachua County, Florida); May 10, 2007
Kidnapping with a Firearm

State of Florida v. Norman McKenzie, Case No.: 01-2007-CF-00532-A (Alachua County, Florida); May 10, 2007
Robbery

State of Florida v. Norman McKenzie, Case No.: 01-2007-CF-000585-A (Alachua County, Florida); May 10, 2007
Robbery

State of Florida v. Norman McKenzie, Case No.: 01-2007-CF-000586-A (Alachua County, Florida); May 10, 2007
Robbery

State of Florida v. Norman McKenzie, Case No.: 42-2006-CF-004213-A (Marion County, Florida); March 6, 2007

Carjacking while Armed

Again, in addition to the Judgment and Sentences received into evidence from these prior violent felonies, during the recent penalty phase, testimony was received from the victims of many of these prior violent felonies and the investigating detective from the 2007 kidnapping conviction.

With regard to Count II, the jury unanimously found this aggravating factor had been proven beyond a reasonable doubt. (Question A.1 in the Jury's Verdict As To Sentence On Count II) This Court agrees with the jury's finding regarding this aggravating factor.

As discussed above, the Florida Supreme Court has explained that the "prior violent felony" aggravating factor is one of the "most weighty in Florida's sentencing calculus." *Sireci, supra*. This is particularly the case here, where the Defendant not only killed Charles Johnston, but also murdered Randy Peacock, and had previously been convicted of nine other violent felonies. This Court gives this aggravating factor VERY GREAT WEIGHT.

- ii. *The capital felony was committed while the defendant was engaged, . . . , in the commission of . . . robbery. Fla. Stat. §921.141(6)(d)*

Again, during the recent penalty phase the State introduced the Defendant's two recorded statements made to SJSO detectives. During his initial statement made the day after the murders, the Defendant told detectives he went to the victims' residence in order to steal money from the victims so he could get more

drugs. After attacking the victims, the Defendant took their wallets, money, credit cards, and Randy Peacock's SUV. When arrested in Citrus County the day after the murders, the Defendant was found in possession of Randy Peacock's wallet, and Charles Johnston's wallet was found in a vehicle the Defendant had operated that day.

Although the State did not charge the Defendant with robbery, it was proved beyond a reasonable doubt during the recent penalty phase that the murder of Charles Johnston was committed while Defendant was engaged in the commission of a robbery. *See Fla. Stat. §812.13(1).*

The jury unanimously found this aggravating factor had been proven beyond a reasonable doubt. (Question A.2 in the Jury's Verdict As To Sentence On Count II) This Court agrees with the jury's finding regarding this aggravating factor. This Court gives this aggravating factor GREAT WEIGHT.

iii. The capital felony was committed for pecuniary gain. Fla. Stat. §921.141(6)(f)

As discussed above, the State proved beyond a reasonable doubt during the recent penalty phase that the Defendant went to the victims' residence to steal money from them. Likewise, as discussed above, the Defendant took the victims' wallets, money and credit cards, as well as Randy Peacock's SUV.

The jury unanimously found this aggravating factor had been proven beyond a reasonable doubt. (Question A.3 in the Jury's Verdict As To Sentence On Count

II) This Court agrees with the jury's finding regarding this aggravating factor. However, the Court recognizes that this aggravating factor merges with the preceding aggravating factor that the murder was committed while the Defendant was engaged in the commission of a robbery. *Griffin, supra.*

Although this Court finds this aggravating factor was established, because it merges with the aggravating factor that the murder was committed during the course of a robbery, these two aggravating factors will be considered as one and no added weight is given to this aggravating factor.

iv. The capital felony was especially heinous, atrocious, or cruel. Fla. Stat. §921.141(6)(h)

As explained above, this aggravating circumstance would apply “only in torturous murders—those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.” *Chesire, supra.; Robertson, supra.; Rogers, supra.* For this aggravating factor to apply, the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim. *Nelson, supra.* This aggravating factor “focuses on the means and manner in which the death was inflicted and the immediate circumstances surrounding the death, where a victim experiences the torturous anxiety and fear of impending death; thus, the trial court [and jury] considers the victim's perceptions of the circumstances as opposed to those of the perpetrator.” *Allred, supra.* Together with a prior violent felony

conviction, the Florida Supreme Court has expressed the heinous, atrocious, or cruel aggravating factor as “the most weighty in Florida’s sentencing calculus.” *Sireci, supra*.

According to the Defendant, in his statement to detectives, he asked Charles Johnston for a hammer and piece of wood under the guise that he desired to bang out some dents in his SUV. The Defendant told the detectives he was hoping to get a large hammer to facilitate the killings.¹⁰ Mr. Johnston was not able to locate a hammer to give Defendant, but gave him a hatchet since it had a blunt hammer-like side. The Defendant then followed Mr. Johnston to a shed behind the residence, as Mr. Johnston was trying to find a piece of wood for the Defendant to use. When they got to the shed, the Defendant told detectives he struck Mr. Johnston one or two times with the blade side of the hatchet and Mr. Johnston fell to the ground. According to the Defendant, Mr. Johnston was still alive after the initial hatchet attack in the shed. The Defendant then left the shed, leaving Mr. Johnston alive on the floor, and went to the residence where he attacked Mr. Peacock. After the initial attack of Mr. Peacock, the Defendant returned to the shed with the hatchet to steal Mr. Johnston’s watch. The Defendant told detectives when he returned to the shed he noticed Mr. Johnston was still alive and trying to

¹⁰ As discussed above, at the recent *Spencer* hearing, the Defendant testified he sought the hammer with the intent to actually repair the dents to his vehicle. The Court finds the Defendant’s statements made to detectives shortly after the murders much more credible than the version provided in his testimony 13 years later.

get up from the floor, so he struck him again with the blade side of the hatchet in the front of his head and took Mr. Johnston's wallet. The Defendant told detectives he believed Mr. Johnston might have survived the hatchet attack had he called an ambulance for him, which he did not do. Defendant then left the hatchet in the shed and returned to the residence where he proceeded to stab Mr. Peacock to death.

During the recent penalty phase, Dr. Predrag Bulic also testified about the injuries and cause of death to Mr. Johnston.¹¹ Dr. Bulic testified that Mr. Johnston suffered four "chop" wounds to his head, consistent with being attacked by the hatchet recovered by police, which resulted in a fractured and crushed skull and extensive brain hemorrhaging. Dr. Bulic testified that if Mr. Johnston was not immediately knocked out he would have suffered extensive pain. Because the Defendant told detectives that Mr. Johnston was alive after the first attack in the shed, and was trying to get up when Defendant returned to the shed, the evidence has established Mr. Johnston was conscious, and therefore, in significant pain after the initial hatchet attack. Likewise, Mr. Johnston would have experienced great emotional strain, fear and terror after being attacked by Defendant with a hatchet, only to have to confront his attacker again minutes later.

¹¹ As with the autopsy of Randy Peacock, Charles Johnston's autopsy was also performed by Dr. Steiner, who is deceased. Dr. Bulic reviewed the autopsy reports and photographs from Dr. Steiner's autopsy of Mr. Johnston and rendered his opinions regarding Mr. Johnston's injuries.

The jury unanimously found this aggravating factor had been proven beyond a reasonable doubt. (Question A.4 in the Jury's Verdict As To Sentence On Count II) This Court agrees with the jury's finding regarding this aggravating factor. Considering the facts and circumstances supporting this aggravating factor, as elicited during the recent penalty phase, this Court gives this aggravating factor GREAT WEIGHT.

- v. *The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Fla. Stat. §921.141(6)(i)*

As discussed above, the cold, calculated, and premeditated aggravating factor (CCP) has been explained as follows:

Whether the CCP aggravator applies in a given case is subject to a four-part test: (1) The killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) there must have been no pretense of moral or legal justification.

Baker, 71 So.3d at 818-19.

The CCP aggravating factor has been described by the Florida Supreme Court as "one of the weightiest aggravators in Florida's statutory sentencing scheme." *McKenzie*, 29 So.3d at 287.

As detailed above, in the instant case, the killings were the product of Defendant's cool and calm reflection, rather than an act prompted by emotional

frenzy, panic, or a fit of rage. After his arrest, the Defendant told detectives that he went to the victims' residence with the intent to rob and kill them. Defendant told detectives he wanted to get the killing over quickly so he asked Mr. Johnston for a large hammer and a piece of wood under the guise that he was going to use it to repair dents in his vehicle. In response to that request, Mr. Johnston handed Defendant the hatchet that would soon be used to kill Mr. Johnston and attack Mr. Peacock. The Defendant then coolly and calmly followed Mr. Johnston to the shed, where Mr. Johnston was looking for a piece of wood, when the Defendant struck Mr. Johnston in the head with the hatchet. The Defendant told detectives that after he struck Mr. Johnston in the head with the hatchet, Mr. Johnston fell to the ground, which concerned him because he was afraid a deaf woman who lived nearby might feel a vibration. The Defendant then coolly and calmly walked to the residence where he came up behind Mr. Peacock and struck him multiple times in the head with the hatchet. The Defendant then calmly returned to the shed where he observed Mr. Johnston still alive and proceeded to strike him again with the blade side of the hatchet. The Defendant then calmly returned to the kitchen of the residence where he found Mr. Peacock alive and proceeded to stab him multiple times. Defendant also told detectives that when he returned to the house to stab Mr. Peacock, he was careful to make sure Mr. Peacock was placed on the ground, rather than letting him fall to the ground, so the deaf neighbor wouldn't

feel any vibration. After stabbing Mr. Peacock, Defendant rinsed off the knife and placed it in the sink. After killing the victims, the Defendant went through the residence looking for Mr. Peacock's wallet. He stole the victims' wallet, money and credit cards, and took Mr. Peacock's vehicle.

From the time the Defendant first arrived at the residence, when only Mr. Peacock and a neighbor were present, until he killed the victims, a few hours had passed. The Defendant made sure to wait until the neighbor left and Mr. Johnston arrived, before he executed his calculated plan to kill the victims and steal their belongings. Additionally, heightened premeditation was demonstrated by the substantial amount of time the Defendant reflected on his plan while present at the residence and waiting for the opportune time to execute his plan. Lastly, there clearly was no pretense of moral or legal justification for the killings.

The jury unanimously determined that the State established this aggravating factor beyond a reasonable doubt. (Question A.5 in the Jury's Verdict As To Sentence On Count II) This Court agrees with the jury's finding regarding this aggravating factor. Considering the facts and circumstances supporting this aggravating factor as elicited during the trial in this case, this Court gives this aggravating factor GREAT WEIGHT.

vi. Conclusion – Aggravating Factors

Following the jury's unanimous determination of the existence of the aforementioned aggravating factors beyond a reasonable doubt, the jury was asked whether the aggravating factors are sufficient to warrant a possible sentence of death on Count II. The jury unanimously found the aggravating factors are sufficient to warrant a death sentence. (Section B in the Jury's Verdict As To Sentence On Count II) This Court has likewise considered the aggravating factors unanimously found by the jury to exist and agrees with the jury's finding, determining the aggravating factors are sufficient to warrant a death sentence on Count II. Thus, the Court will next consider the existence of mitigating circumstances.

B. MITIGATING CIRCUMSTANCES

As discussed above, during the recent penalty phase, the jury considered physical evidence introduced by the defense and heard testimony from Tammy Kimbell, Dr. Bloomfield, and Dr. Skolly-Danzinger. In rebuttal, the State presented the testimony of Dr. Meadows. The jury was instructed on the mitigating circumstances and that mitigating circumstances need only be established by the greater weight of the evidence. The jury stated in its verdict that one or more of the individual jurors found that one or more mitigating circumstance was established by a greater weight of the evidence. (Section C in the Jury's Verdict As To Sentence On Count II)

Additionally, the Court considered further evidence of mitigating circumstances during the recent *Spencer* hearing. At the *Spencer* hearing, the Court heard testimony from the Defendant and Dr. Skolly-Danzinger.

The mitigating circumstances set forth by the Defendant, as instructed by the Court during the recent penalty phase of the trial, as well as those set forth during the *Spencer* hearing and in Defendant's Sentencing Memorandum, are the same as those discussed above as they pertain to Count I; however, because they are also being considered by this Court to determine the appropriate sentence for Count II, they are discussed again below.

- i. *The First Degree Murder was committed while Defendant was under the influence of extreme mental or emotional disturbance.*

As discussed above, during the recent penalty phase Tammy Kimball testified regarding the Defendant's extensive drug use around the time of the murders. Dr. Bloomfield testified regarding the Defendant's long-standing substance abuse and opined that due to the Defendant's extensive drug use at the time of the incident, he believes Defendant was under the influence of extreme mental or emotional disturbance at that time. Dr. Skolly-Danzinger testified at the penalty phase and *Spencer* hearing regarding the Defendant's long-standing drug abuse, its effects on the human body, and that Defendant was under the influence of extreme mental or emotional disturbance at the time of the murders. The Defendant's statements to detectives shortly after the crime, describing his drug

addiction and his activities to get money for drugs, including the murders in this case and the string of robberies in the days leading up to the murders, corroborated the opinions of Drs. Bloomfield and Skolly-Danzinger. The State's rebuttal witness Dr. Meadows opined that he does not believe the Defendant was under the influence of extreme mental or emotional disturbance at the time of the murders.

This Court finds that the greater weight of the evidence established the Defendant was under the influence of extreme mental or emotional disturbance at the time of the murders due to his significant drug use. The Court gives this mitigating circumstance MODERATE WEIGHT.

- ii. *The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.*

As discussed above, Ms. Kimball testified at the penalty phase trial regarding the Defendant's excessive drug use around the time of the murders. Drs. Bloomfield and Skolly-Danzinger both further opined the Defendant's ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired due to his drug use. Dr. Skolly-Danzinger opined that particularly with cocaine addiction, of which Defendant suffered, users lose control and seek the drug out regardless of the consequences. The State's rebuttal witness Dr. Meadows opined the Defendant's ability to appreciate the criminality of his conduct and to conform his conduct to the

requirements of law was not substantially impaired. At the *Spencer* hearing, the Defendant described his drug use, which included a eight to nine day drug binge without sleep immediately prior to the murders.

This Court finds that the greater weight of the evidence established the Defendant's ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired. However, the Court notes that while the Defendant may have been impaired, he appreciated that killing Mr. Peacock and Mr. Johnston was wrong, as demonstrated in his statements to detectives and his attempts to avoid capture the day after the murders. The Court gives this mitigating circumstance SLIGHT WEIGHT.

iii. Defendant's childhood was chaotic.

As previously discussed, Dr. Bloomfield opined that Defendant had a rather chaotic childhood, which included first using marijuana at age five, beginning to use harder drugs at age 10, and his parents divorcing when he was age eight. Dr. Skolly-Danzinger testified about the Defendant's early childhood drug use, including inhalants by age 11, and having no boundaries growing up. The State's rebuttal witness Dr. Meadows rejected the claim that the Defendant had a chaotic childhood. Dr. Meadows indicated the Defendant described to him a happy childhood.

This Court finds that the greater weight of the evidence established this mitigating circumstance that the Defendant had a chaotic childhood. The Court gives this mitigating circumstance SLIGHT WEIGHT.

- vi. *Defendant and his siblings experienced a lack of adequate supervision after the divorce of his parents.*

Drs. Bloomfield and Skolly-Danzinger testified that Defendant experienced a lack of supervision and a lack of boundaries after the divorce of his parents at age eight. After his parents divorced, Defendant stole food for his family and became an early chronic user of drugs. This Court finds that the greater weight of the evidence established this mitigating circumstance that the Defendant and his siblings experienced lack of adequate supervision after the divorce of his parents. The Court gives this mitigating circumstance VERY SLIGHT WEIGHT.

- v. *Defendant started huffing from spray cans at the age of 11 years old.*

As discussed above, the Defendant's mitigation experts testified the Defendant told them he began "huffing" inhalants at the young age of 11. These mitigation experts testified regarding the detrimental effects this has on the human body, including brain development. This was part of the Defendant's long-standing drug abuse. This Court finds that the greater weight of the evidence established this mitigating circumstance. The Court gives this mitigating circumstance SLIGHT WEIGHT.

- vi. *Defendant had an early and chronic abuse and dependency on alcohol and drugs.*

As discussed above, the Defendant's mitigation experts testified at the recent penalty phase the Defendant began using and abusing drugs at a very early age. According to the Defendant's statements to the mitigation experts, he began using marijuana at age five, methamphetamine at age 10, and inhalants at age 11. Defendant told the experts that drug use became a daily thing for him beginning at age 12. Defendant testified at the recent *Spencer* hearing that he began injecting drugs around age 16. The defense experts testified regarding the adverse effects this early and chronic drug use has on brain development. The State's rebuttal expert testified that he doubted the veracity of the Defendant's very early drug use.

This Court finds that the greater weight of the evidence established this mitigating circumstance that Defendant had early and chronic abuse and dependency on alcohol and drugs. The Court gives this mitigating circumstance SLIGHT WEIGHT.

- vii. *Defendant had a cocaine dependency relapse starting in July 2006 up to and after the crimes at bar.*

According to the Defendant in his statement to detectives, he was addicted to cocaine and had a relapse in 2006. The Defendant testified to this as well at the recent *Spencer* hearing. This was corroborated by the Defendant's mitigation experts and the State's rebuttal witness who all testified the Defendant suffered

from a substance abuse disorder. Tammy Kimball's testimony likewise corroborates this mitigating circumstance by her testimony regarding the Defendant's cocaine use around the time of the murders.

This Court finds that the greater weight of the evidence established this mitigating circumstance that Defendant had a cocaine dependency relapse starting in July 2006 up to and after the murders. The Court gives this mitigating circumstance SLIGHT WEIGHT.

viii. Defendant consistently used a voluminous amount of cocaine from July to October of 2006.

As discussed above, according to the Defendant's mitigation experts and Tammy Kimball, the Defendant was consistently using a significant amount of cocaine after his relapse in 2006 up to the time of the murders and his arrest. The Defendant would ingest cocaine in different ways including intravenously. The Defendant testified at the recent *Spencer* hearing that around the time of the murders he was spending approximately \$1000 a day to support his drug addiction, and leading up the day of the murders he had been on a drug binge for eight or nine days without sleep.

This Court finds that the greater weight of the evidence established this mitigating circumstance. The Court gives this mitigating circumstance SLIGHT WEIGHT.

- ix. *Defendant cooperated with law enforcement at the time of his arrest.*

Hours after his arrest, the Defendant gave a statement to detectives where he freely spoke and described the murders of Mr. Peacock and Mr. Johnston. A few months later, Defendant gave another statement to detectives where he again freely spoke about the murders. While the Defendant cooperated with investigators, the Court also notes that the day after the murders, when law enforcement officers sought to capture the Defendant, he led Citrus County deputies on a vehicular pursuit, and after crashing the vehicle he was operating, fled into a nearby body of water before being captured by police.

This Court finds that the greater weight of the evidence established this mitigating circumstance that the Defendant cooperated with law enforcement at the time of his arrest. The Court gives this mitigating circumstance SLIGHT WEIGHT.

- x. *Defendant admitted to the murders of Randy Peacock and Charles Johnston.*

As discussed above, the Defendant freely admitted to detectives, on two occasions, that he murdered Mr. Peacock and Mr. Johnston. The Defendant's admissions to police were instrumental in securing his own convictions. During the recent *Spencer* hearing, the Defendant again admitted to committing the murders and expressed remorse.

This Court finds that the greater weight of the evidence established this mitigating circumstance. The Court gives this mitigating circumstance MODERATE WEIGHT.

xi. Defendant has artistic ability.

During the recent penalty phase the defense admitted into evidence and displayed art work created by Defendant since he has been in prison. This Court finds the art work impressive and the Defendant clearly possesses artistic ability.

This Court finds that the greater weight of the evidence established this mitigating circumstance. The Court gives this mitigating circumstance SLIGHT WEIGHT.

xii. Defendant was an assistant superintendent for EMJ that built Cobblestone Village in St. Augustine.

During the recent penalty phase it was established the Defendant worked as a construction assistant superintendent working for EMJ prior to committing the murders. The Defendant played a key role in the construction of the Cobblestone Village shopping center in St. Augustine. At the recent *Spencer* hearing, Defendant testified that he worked in the construction industry since age 15. The Defendant progressed from a construction worker to a project supervisor. In addition to being a project supervisor for EMJ on the Cobblestone Village project, Defendant also worked with Johnson, Graham and Malone Construction, and worked on numerous projects in North Florida. While working in the construction

industry, Defendant also volunteered to help build the Able Charter School for special needs children. The Defendant was obviously good at his occupation; however, his drug abuse and criminal activity caused him to be unable to continue. This Court finds that the greater weight of the evidence established this mitigating circumstance. The Court gives this mitigating circumstance SLIGHT WEIGHT.

xiii. Defendant impacted the life of Claudia Goeke in a positive way while in prison.

During the recent *Spencer* hearing, the Court received a letter from Claudia Goeke. Ms. Goeke described her relationship with Defendant and how he helped her overcome physical and mental struggles. Ms. Goeke credits Defendant with saving her life.

The Court finds the greater weight of the evidence supports this mitigating circumstance. The Court gives this mitigating circumstance SLIGHT WEIGHT.

xiv. A prior jury did not unanimously find that Defendant should be sentenced to death

Defendant raises this proposed mitigating circumstance for the first time in his Sentencing Memorandum. As discussed above, in 2007 a jury recommended Defendant be sentenced to death by a vote of 10-2. The death penalties subsequently imposed in 2007, were vacated for the reasons set forth above.

Mitigating circumstances are limited to a defendant's character or record or the circumstances of the crime. *Campbell, supra*; *Johnson, supra*. The prior jury's

2007 10-2 death penalty recommendation is not relevant to this Defendant's character or record or circumstances of the murders; therefore, it is not considered a mitigating circumstance and is afforded NO WEIGHT.

C. WEIGHING AGGRAVATING FACTORS AND MITIGATING CIRCUMSTANCES

At the conclusion of the penalty phase, the jury unanimously found that the aggravating factors that were proven beyond a reasonable doubt outweighed the mitigating circumstances, thus making the Defendant eligible for a death sentence for Count II. (Section D of the Jury's Verdict As To Sentence on Count II)

Following the recent penalty phase and *Spencer* hearing, this Court independently considered and weighed the aggravating factors unanimously determined by the jury to exist beyond a reasonable doubt and the mitigating circumstances established by the greater weight of the evidence. The Court assigned the weight it feels each of the established aggravating factors and mitigating circumstances are due.

The Court finds that the aggravating factors in this case far outweigh the mitigating circumstances; therefore, as the jury determined, the Court likewise determines the Defendant is eligible for a sentence of death for Count II of the Indictment.

D. SENTENCE COUNT II

“If the jury has recommended a sentence of Death, the Court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death.” Fla. Stat. §921.141(3)(a)2. This Court recognizes it is not bound by the jury’s verdict that death is the appropriate sentence, and may impose a life sentence if it feels that is appropriate. Not every person found guilty of first degree murder should receive a death sentence. A death sentence must be “reserved for only the most aggravated and the least mitigated first degree murders.” *Urbini, supra*. This is such a case.

After carefully and independently considering those aggravating factors determined by the jury to exist, and all the mitigating circumstances, this Court agrees with the jury’s unanimous finding that the Defendant should be sentenced to death for Count II. Based on the authority vested in this Court, it is the sentence of this Court that on Count II of the Indictment, for the First Degree Murder of Charles Johnston, the Defendant Norman Blake McKenzie is adjudicated guilty of said offense and sentenced to Death in a manner prescribed by law.

V. CONCLUSION

A. The sentences imposed by the Court herein shall run concurrent with each other.

B. All statutory fees and costs are imposed.

C. NORMAN BLAKE MCKENZIE, is hereby committed to the custody of the Florida Department of Corrections where he shall be held until such time he is put to death in accordance with Florida law for Counts I and II.

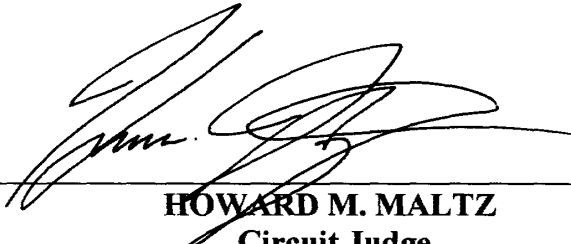
D. The Sheriff of St. Johns County, Florida, is hereby ORDERED to deliver NORMAN BLAKE MCKENZIE to the Florida Department of Corrections at the facility designated by the Florida Department of Corrections, together with a copy of the judgment and sentence, and all other documents specified by Florida law.

E. NORMAN BLAKE MCKENZIE is advised of his right to appeal this sentence to the Florida Supreme Court by filing a Notice of Appeal within 30 days of this date with the Clerk of Court. NORMAN BLAKE MCKENZIE is further advised that he has the right to be represented by counsel on his appeal. The Court appoints the Office of Regional Conflict Counsel for the Fifth District to represent the Defendant on Appeal.

ORDERED and ADJUDGED in open court this 14th day of February, 2020, at the Richard O. Watson Judicial Center, 4010 Lewis Speedway, St. Augustine, St. Johns County, Florida.

I, Howard M. Maltz, Circuit Judge of the Seventh Judicial Circuit of Florida, certify that the original sentencing order has been contemporaneously filed with

the Clerk of the Circuit Court for St. Johns County, Florida, at the time of pronouncement of sentence.



HOWARD M. MALTZ
Circuit Judge

Copies to:

Junior Barrett, Esq. – Defense counsel
Kenneth M. Hamburg, Esq. – Defense counsel
K. Mark Johnson, Assistant State Attorney
Jennifer L. Dunton, Assistant State Attorney
St. Johns County Sheriff's Office

Hearing Notes

DATE: February 14, 2020
CIRCUIT JUDGE: HOWARD M MALTZ
STATE ATTORNEY: DUNTON/JOHNSON
DEFENSE ATTORNEY: BARRETT/HAMBURG
CLERK: SCHULTZ/GARBUTT
BAILIFF: STOKES
COURT REPORTER: KAREN HOWARD

STATE VS.: MCKENZIE, NORMAN BLAKE
CASE #: 06001864CFMA

CHARGE #:

SENTENCING

COURT IN SESSION @ 1:30PM

HOUSEKEEPING MATTERS
REVIEW OF CASE HISTORY BY THE COURT
REVIEW OF JURY VERDICT

SENTENCING
COUNT I – DEATH
COUNT II – DEATH
BOTH COUNTS TO RUN CONCURRENT











COURT IN RECESS @ 1:45PM

THE STATE OF FLORIDA

VS

MCKENZIE, NORMAN BLAKE

CASE #: 06001864CFMA

RIGHT THUMB	RIGHT INDEX	RIGHT MIDDLE	RIGHT RING	RIGHT LITTLE
				
LEFT THUMB	LEFT INDEX	LEFT MIDDLE	LEFT RING	LEFT LITTLE
				

FINGERPRINTS TAKEN BY: S. STOKES, ^{11/3221}Badge 3221 DEPUTY SHERIFF I HEREBY
CERTIFY that the above and foregoing are the fingerprints of the defendant,
MCKENZIE, NORMAN BLAKE, and that they are placed by the defendant in my
presence in open court this date.

DONE AND ORDERED in open court in St. Johns County, Florida this Friday, February
14, 2020.



HOWARD M. MALTZ , Circuit Judge

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CF06-1864
DIVISION: 56

STATE OF FLORIDA

vs.

NORMAN BLAKE MCKENZIE,
Defendant.


ORDER TO TRANSPORT

THIS CAUSE having come before this Court and being fully advised in the premises, it is,

ORDERED:


That authorities with the DEPARTMENT OF CORRECTIONS shall deliver custody of the Defendant, **NORMAN BLAKE MCKENZIE; DC#: 648711; W/M; DOB: 07/08/1964;** to the Sheriff of St. Johns County, and further that the Sheriff of St. Johns County shall keep said Defendant in close custody and have the Defendant present before the undersigned in courtroom 328, of the Richard O. Watson Judicial Center, St. Augustine, Florida, on **February 14, 2020 at 1:30 p.m.**, for the purpose of SENTENCING, until such time that the above-styled case has been concluded, and the Defendant returned to the custody of the DEPARTMENT OF CORRECTIONS.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 25 day of November, 2019.

11/25/2019 12:58 PM
06001864CFMA


e-Signed 11/25/2019 12:58 PM 06001864CFMA
CIRCUIT JUDGE

Copies to:
Junior A. Barrett, Esq.
Office of the State Attorney
St. Johns County Sheriff's Office, Transportation

I HEREBY CERTIFY THAT THIS DOCUMENT
IS A TRUE AND CORRECT COPY AS APPEARS
ON RECORD IN ST. JOHNS COUNTY, FLORIDA
WITNESSED BY MY HAND AND OFFICIAL SEAL
THIS 25th DAY OF NOV 2019
CLERK OF THE CIRCUIT COURT AND COMPTROLLER
BY 



Filed for record 11/25/2019 01:08 PM Clerk of Court St. Johns County, FL

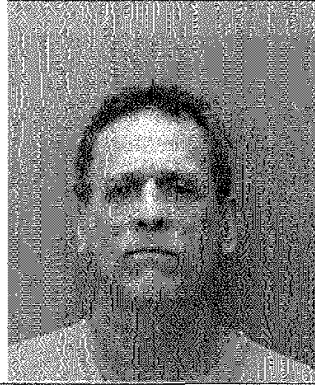
Filed for record 02/14/2020 02:12 PM Clerk of Court St. Johns County, FL



ST. JOHNS COUNTY SHERIFF'S OFFICE
MCKENZIE, NORMAN BLAKE
Booking Information



☐ High Profile ☐ Suicidal ☐ Escape Risk ☒ Hold For: BORROWED FROM DOC



Booking #: SJSO20JBN000679 **MNI:** SJSO99MNI055145 **Cell:** SJSO*18*4B*L

Address: UNION CORRECTIONS RAIFORD, FL 32083

Phone: NONE **DOB:** 07/08/1964 **BIRTHPLACE:** WINTER HAVEN, POLK, FLORIDA

CITIZENSHIP: UNITED STATES

FBI POB: FL **MARITAL STATUS:** Married

RACE: W **SEX:** M **HGT:** 6'02" **WGT:** 227 **HAIR:** Bro **EYES:** Bro **SSN:** [REDACTED]

FBI: [REDACTED] **SID:** [REDACTED] **DL:** M252622642480 **STATE:** FL

Inmate Phone PIN::

Occupation: INMATE

Employer: DEPARTMENT OF
CORRECTIONS

Phone:

Booked: 2/13/20 12:30

Booked By: PUTZ, DANIELLE M

Released:

Searched By: BRANAUM, JOHN L

Photo By: BRANAUM, JOHN L

Print By:

- I have been advised any property valued over \$100 is to be released or mailed at my own expense within five (5) days.
- I understand that my phone/canteen passcode are confidential and created by me. I will not share this number with anyone. I am fully responsible for all usage and monetary obligations associated with the passcode. SJSO is not responsible for loss of funds to my account.

Inmate Signature

Officer Signature

Witness Signature



ST. JOHNS COUNTY SHERIFF'S OFFICE
MCKENZIE, NORMAN BLAKE
Case/Charge Report



SJSO20JBN000679 SJSO99MNI055145 SJSO*18*4B*L

Court Case Number: CF06-1864

Arrest Information:

Arrest: Offense: OBTS:
Agency: ST. JOHNS COUNTY SHERIFF'S OFFICE Officer: No:

Bond Information:

Court: Bond: \$0.00

Comments:

02/13/20 BORROWED FROM DOC- SENTENCED TO DEATH ROW
HERE ON TRANSPORT ORDER

Sentence Information:

☐ Gain Time ☐ Work Time ☐ Disability Time ☐ Part Time ☐ DOC
Start: - Length: -
CTS: - Credit: - Worked: -
End: - Served: -

Charges:

Counts: 1 Statute: 782.04.1a1 Bond:\$0.00 Charge Code:HOMICIDE
Status: DOC LIFE Charge Description:MURDER FIRST DEGREE
PREMEDITATED
Comments: FIRST DEGREE MURDER

DEATH ROW

Counts: 1 Statute: 782.04.1a1 Bond:\$0.00 Charge Code:HOMICIDE
Status: DOC LIFE Charge Description:MURDER FIRST DEGREE
PREMEDITATED
Comments: FIRST DEGREE MURDER

DEATH ROW

Inmate Signature

Witness Signature

Officer Signature

Court Verification Form

CASE NUMBER: 06001864CFMA

DEFENDANT NAME: MCKENZIE, NORMAN BLAKE

Type of Order:

Modify Sentence ☐

Change Sentence ☐

Reduce Sentence ☐

Release ☐

Other ☒ Please Explain SENTENCING ORDER

ORDERS E-FILED

DATE

ORDER

02/14/2020

SENTENCING ORDER

☒ **VERIFIED AS LEGITIMATE**

☐ **NOT LEGITIMATE***

Date: February 17, 2020

Signature:



Judge/Designee Name: Judge Maltz

Please print name

=====

FOR CLERK'S USE

Transmitted to Local Detention Facility ☐

Transmitted to Department of Corrections ☒

February 17, 2020

Date



Deputy Clerk

*Upon receipt of a "not legitimate" court verification order form, the clerk of Court is directed to immediately notify the Chief Judge. Copy provided to DOC/Local Detention Facility.

Filed: 02/17/2020 8:15 AM Clerk of Court, St. Johns County

Page 1 of 1

Filing # 103492516 E-Filed 02/18/2020 03:16:01 PM

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND
FOR ST JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.

CASE NO: 06001864CFMA

NORMAN MCKENZIE,
Defendant.
_____ /

NOTICE OF APPEAL

NOTICE IS GIVEN that Defendant/Appellant, **NORMAN MCKENZIE**, appeals to the Florida Supreme Court the Final Order of Judgment and Sentence on February 14, 2020.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that the foregoing has been delivered by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org and the Attorney General's Office, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118, crimappdab@myfloridalegal.com on February 18, 2020.

/s/ Junior Barrett

JUNIOR BARRETT, ESQUIRE

Fla. Bar No.: 785687

Assistant Regional Counsel

Office of Regional Criminal Conflict &

Civil Regional Counsel, 5th District

101 Sunnyside Road, Suite 310

Casselberry, FL 32707

(407) 389-5140

rccappeals@rc5state.com

Filing # 103492516 E-Filed 02/18/2020 03:16:01 PM

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND
FOR ST JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO: 06001864CFMA

vs.

NORMAN MCKENZIE,
Defendant.

/

STATEMENT OF JUDICIAL ACTS TO BE REVIEWED

COMES NOW the Defendant/Appellant, NORMAN MCKENZIE, by and through the undersigned attorney, to state the following acts of the lower tribunal which are in error and upon which he shall rely for appeal:

1. Order Denying Defendant's Death Penalty Motions Heard on November 28, 2018.
2. Order Denying Defendant's Motion to Strike Amended Notice of Aggravating Factors as Untimely filed on February 20, 2019 and heard on March 14, 2019.
3. Orders Denying Request for Redaction of Defendant's Interview, Striking Defendant's mitigation that Defendant is not eligible for parole, and Defendant's Motion for Proper Procedure for Post Challenge questioning of Prospective Jurors.
4. Any and all additional rulings of the court which were adverse to the Defendant/Appellant.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that the foregoing has been delivered by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on February 18, 2020.

/s/ Junior Barrett

JUNIOR BARRETT, ESQUIRE

Fla. Bar No.: 785687

Assistant Regional Counsel

Office of Regional Criminal Conflict &

Civil Regional Counsel, 5th District

101 Sunnytown Road, Suite 310

Casselberry, FL 32707

(407) 389-5140

rccappeals@rc5state.com

Filing # 103492516 E-Filed 02/18/2020 03:16:01 PM

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND
FOR ST JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO: 06001864CFMA

vs.

NORMAN MCKENZIE,
Defendant.

_____ /

DIRECTIONS TO THE CLERK

The Clerk of the above-styled Court is directed to prepare the Record on Appeal in the above-styled cause pursuant to Florida Rule of Appellate Procedure 9.200(a)(1), including the transcripts specified in the Designation to the Court Reporter.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that the foregoing has been delivered by e-service delivery to the Office of the State Attorney, eservicestjohns@sao7.org on February 18, 2020.

/s/ Junior Barrett

JUNIOR BARRETT, ESQUIRE

Fla. Bar No.: 785687

Assistant Regional Counsel

Office of Regional Criminal Conflict &

Civil Regional Counsel, 5th District

101 Sunnyside Road, Suite 310

Casselberry, FL 32707

(407) 389-5140

rccappeals@rc5state.com

Filing # 103492516 E-Filed 02/18/2020 03:16:01 PM

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND
FOR ST JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO: 06001864CFMA

vs.

NORMAN MCKENZIE,
Defendant.

DESIGNATION TO COURT REPORTER

TO COURT REPORTER:

Court Reporting Services
1769 East Moody Blvd.
Bunnell, Fl. 32110
stenographers@circuit7.org

or

Volusia Reporting
432 South Beach Street
Daytona Beach, Fl. 32114
appeals@volusiareporting.com

Defendant, Appellant, **NORMAN MCKENZIE**, files this Designation to Reporter and directs the office of the court reporter to transcribe an original and two (2) copies of the following portions of the hearing and/or other proceedings to be used in this appeal:

1. The Defendant's Hearings on Death Penalty Motions on November 28, 2018; Hearing on Motion to Strike Amended Notice of Aggravating Factors as Untimely on March 14, 2019; Hearings on Redaction, Mitigation and Jury Post Challenging Motion on August 26, 2019; Trial (including Jury Selection) on August 26, 2019 - August 29, 2019; Spencer Hearing November 22, 2019 and Sentencing February 14, 2020, which transpired before the Honorable Howard Maltz.
2. The court reporter is directed to file the original and three copies with the clerk of the lower tribunal. The Clerk is directed to mail one (1) copy to each of the following:
 - A. Defendant, Appellant, Office of the Criminal Conflict and Civil Regional Counsel, 101 Sunnyside Road, Suite 310, Casselberry, FL 32707, rccappeals@rc5state.com.
 - B. Plaintiff, Appellee, the State of Florida, Office of the Attorney General,

444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118,
crimappdab@myfloridalegal.com.

I, counsel for Defendant/Appellant, certify that satisfactory financial arrangements have been made with the court reporter for the preparation of the transcript, in that the Defendant/Appellant has been declared indigent.

Dated February 18, 2020.

/s/ Junior Barrett
JUNIOR BARRETT, ESQUIRE
Fla. Bar No.: 785687
Assistant Regional Counsel
Office of Regional Criminal Conflict &
Civil Regional Counsel, 5th District
101 Sunnyside Road, Suite 310
Casselberry, FL 32707
(407) 389-5140
rccappeals@rc5state.com

II. REPORTER'S ACKNOWLEDGMENT

1. The foregoing designation was served on _____, 2020 and received on _____, 2020.
2. Satisfactory arrangements have () have not () been made for payment of the transcript cost. These financial arrangements were completed on _____, 2020.
3. Number of trial or hearing days _____.
4. Estimated number of transcript pages _____.
5. Transcript will be completed on _____ or an extension of time is needed until _____.

DATE: _____
Official Court Reporter

II. REPORTER'S ACKNOWLEDGMENT

1. The foregoing designation was served on _____, 2020 and received on _____, 2020.
2. Satisfactory arrangements have () have not () been made for payment of the transcript cost. These financial arrangements were completed on _____, 2020.
3. Number of trial or hearing days _____.
4. Estimated number of transcript pages _____.
5. Transcript will be completed on _____ or an extension of time is needed until _____.

DATE: _____
Official Court Reporter

Filing # 103492516 E-Filed 02/18/2020 03:16:01 PM

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND
FOR ST JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO: 06001864CFMA

vs.

NORMAN MCKENZIE,
Defendant.

MOTION FOR TRANSCRIPTION OF PROCEEDINGS

COMES NOW the Defendant/Appellant, **NORMAN MCKENZIE**, by and through the undersigned attorney, and moves this Honorable Court to enter its Order directing the Court Reporter to transcribe the following proceedings in the above-styled cause:

1. The Defendant's Hearings on Death Penalty Motions on November 28, 2018; Hearing on Motion to Strike Amended Notice of Aggravating Factors as Untimely on March 14, 2019; Hearings on Redaction, Mitigation, and Jury Post Challenging Motion on August 26, 2019; Trial (including Jury Selection) on August 26, 2019 - August 29, 2019; Spencer Hearing on November 22, 2019 and Sentencing on February 14, 2020, which transpired before the Honorable Howard Maltz.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that the foregoing has been delivered by e-service delivery to the Court Reporter, stenographers@circuit7.org and appeals@volusiareporting.com, Office of the State Attorney, eservicestjohns@sao7.org on February 18, 2020.

/s/ Junior Barrett

JUNIOR BARRETT, ESQUIRE

Fla. Bar No.: 785687

Assistant Regional Counsel

Office of Regional Criminal Conflict &

Civil Regional Counsel, 5th District

101 Sunnyside Road, Suite 310

Casselberry, FL 32707

(407) 389-5140

rccappeals@rc5state.com

Filing # 103492516 E-Filed 02/18/2020 03:16:01 PM

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND
FOR ST JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.

CASE NO: 06001864CFMA

NORMAN MCKENZIE,
Defendant.

**MOTION TO PROCEED WITHOUT PAYMENT OF COSTS, DECLARING
DEFENDANT INSOLVENT FOR PURPOSES OF APPEAL**

COMES NOW, the Appellant, by and through the undersigned attorney, and in support of his motion states as follows:

1. The Office of Criminal Conflict and Civil Regional Counsel was appointed to represent the Defendant due to his/her indigent status on or about June 22, 2017.
2. Appellant is appealing the Final Order of Judgment and Sentence on February 14, 2020 and remains indigent.

WHEREFORE, the undersigned respectfully requests the Court enter an Order allowing the Appellant to Proceed without Payment of Costs, declaring Appellant Insolvent for Purposes of Appeal and appointing the Office of Criminal Conflict and Civil Regional Counsel.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that the foregoing has been delivered by e-servicel delivery to the Court Reporter, stenographers2ircuit7.org and appeals@volusiareporting.com, Office of the State Attorney, eservicestjohns@sao7.org on February 18, 2020.

/s/ Junior Barrett

JUNIOR BARRETT, ESQUIRE

Fla. Bar No.: 785687

Assistant Regional Counsel

Office of Regional Criminal Conflict &

Civil Regional Counsel, 5th District

101 Sunnyside Road, Suite 310

Casselberry, FL 32707

(407) 389-5140

rccappeals@rc5state.com

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO: 06001864CFMA

vs.

NORMAN MCKENZIE,
Defendant.

_____ /

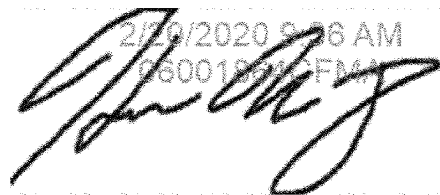
ORDER FOR TRANSCRIPTION OF PROCEEDINGS

THIS CAUSE having come on to be heard before me, and the Court being fully advised in the premises, it is

ORDERED AND ADJUDGED that the Defendant/Appellant's Motion for Transcription of Proceedings be and the same is hereby GRANTED and the following hearings are to be released to the Court Reporter and/or the Regional Counsel's Office for transcription purposes and the Court Reporter is directed to transcribe them for the Record on Appeal.

1. The Defendant's Hearings on Death Penalty Motions on November 28, 2018; Hearing on Motion to Strike Amended Notice of Aggravating Factors as Untimely on March 14, 2019; Hearings on Redaction, Mitigation, and Jury Post Challenging on Motion August 26, 2019; Trial (including Jury Selection) on August 26, 2019 - August 29, 2019; Spencer Hearing on November 22, 2019 and Sentencing on February 14, 2020, which transpired before the Honorable Howard Maltz.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 20 day of February, 2020.

A handwritten signature in black ink is written over a digital timestamp. The timestamp is in a light gray font and reads "2/20/2020 9:36 AM" followed by "06001864CFMA" on the next line.

e-Signed 2/20/2020 9:36 AM 06001864CFMA
CIRCUIT JUDGE

Copies to:

Court Reporter; stenographers@circuit7.org; appeals@volusiareporting.com
Office of the State Attorney; eservicestjohns@sao7.org

Regional Counsel; rccappeals@rc5state.com

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND
FOR ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.

CASE NO: CF06-1864

NORMAN BLAKE MCKENZIE,
Defendant.

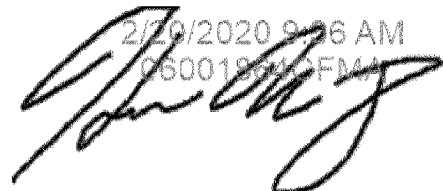
**ORDER TO PROCEED WITHOUT PAYMENT OF COSTS, DECLARING
DEFENDANT INSOLVENT FOR PURPOSES OF APPEAL**

THIS CAUSE, having come on to be considered on the Defendant/Appellant's Motion to Proceed Without Payment of Costs, Declaring Defendant Insolvent for Purposes of Appeal, and it appearing that this Defendant/Appellant is an insolvent person, it is, upon consideration thereof,

ORDERED AND ADJUDGED:

1. Defendant/Appellant is hereby adjudged to be an insolvent person for the purposes of appeal.
2. The Regional Counsel's Office is hereby appointed for the purposes of appeal.
3. The Court Reporter is hereby directed to transcribe the proceedings in said cause as designated by Defendant/Appellant's Counsel unless otherwise ordered by this Court or the Appellate Court.
4. The cost of transcribing said proceedings and appeal of said Defendant/Appellant shall be borne by the Office of Criminal Conflict and Civil Regional Counsel.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 20 day of February, 2020.



e-Signed 2/20/2020 9:36 AM 06001864CFMA
CIRCUIT JUDGE

cc: Regional Counsel's Office, rccappeals@rc5state.com
Court Reporter; stenographers@circuit7.org; appeals@volusiareporting.com
Office of the State Attorney; eservicestjohns@sao7.org

Filing # 103608293 E-Filed 02/20/2020 10:10:06 AM

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND
FOR ST JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO: 06001864CFMA

vs.

NORMAN MCKENZIE,
Defendant.

_____ /

AMENDED DESIGNATION TO COURT REPORTER

TO COURT REPORTER:

**Volusia Reporting
432 South Beach Street
Daytona Beach, FL 32114
appeals@volusiareporting .com**

Defendant, Appellant, **NORMAN MCKENZIE**, files this Designation to Reporter and directs the office of the court reporter to transcribe an original and two (2) copies of the following portions of the hearing and/or other proceedings to be used in this appeal:

1. The Defendant's Hearings on Death Penalty Motions on November 28, 2018; Hearing on Motion to Strike Amended Notice of Aggravating Factors as Untimely on March 14, 2019; Hearings on Redaction, Mitigation and Jury Post Challenging Motion on August 26, 2019; Trial (including Jury Selection) on August 26, 2019 - August 29, 2019; Spencer Hearing November 22, 2019 and Sentencing February 14, 2020, which transpired before the Honorable Howard Maltz.
2. The court reporter is directed to file the original and three copies with the clerk of the lower tribunal. The Clerk is directed to mail one (1) copy to each of the following:
 - A. Defendant, Appellant, Office of the Criminal Conflict and Civil Regional Counsel, 101 Sunnyside Road, Suite 310, Casselberry, FL 32707, rccappeals@rc5state.com.
 - B. Plaintiff, Appellee, the State of Florida, Office of the Attorney General,

444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118,
crimappdab@myfloridalegal.com.

I, counsel for Defendant/Appellant, certify that satisfactory financial arrangements have been made with the court reporter for the preparation of the transcript, in that the Defendant/Appellant has been declared indigent.

Dated February 20, 2020.

/s/ Junior Barrett
JUNIOR BARRETT, ESQUIRE
Fla. Bar No.: 785687
Assistant Regional Counsel
Office of Regional Criminal Conflict &
Civil Regional Counsel, 5th District
101 Sunnyside Road, Suite 310
Casselberry, FL 32707
(407) 389-5140
rccappeals@rc5state.com

II. REPORTER'S ACKNOWLEDGMENT

1. The foregoing designation was served on _____, 2020 and received on _____, 2020.
2. Satisfactory arrangements have () have not () been made for payment of the transcript cost. These financial arrangements were completed on _____, 2020.
3. Number of trial or hearing days _____.
4. Estimated number of transcript pages _____.
5. Transcript will be completed on _____ or an extension of time is needed until _____.

DATE: _____
Official Court Reporter

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

NORMAN BLAKE MCKENZIE,
Appellant,

CASE NO.: SC20-243
L.T. Case No.: CF06-1864

v.

STATE OF FLORIDA
Appellee.

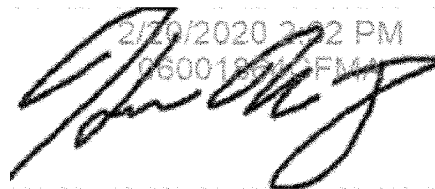
ORDER SCHEDULING STATUS CONFERENCE

PLEASE TAKE NOTICE that on the 9th day of April, 2020, at 1:30 p.m., a hearing will be held on the following:

**STATUS CONFERENCE ON THE RECORD PREPARATION
OF APPELLANT'S APPEAL**

before the undersigned judge, in courtroom 328, of the Richard O. Watson Judicial Center, 4010 Lewis Speedway, St. Augustine, Florida. Those **required to attend** are: Clerk of Court (or designee) and appropriate court reporters. All attendees shall be prepared to discuss the status of the record on appeal.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 20 day of February, 2020.



e-Signed 2/20/2020 2:32 PM 06001864CFMA

CIRCUIT JUDGE

Filed for record 02/20/2020 03:12 PM Clerk of Court St. Johns County, FL

Copies to:

Office of the Attorney General; crimappdab@myfloridalegal.com

Mark Johnson, Asst. State Attorney

Jennifer L. Dunton, Asst. State Attorney

Junior A. Barrett, Esq.

Clerk of Court

Volusia Reporting Company; appeals@volusiareporting.com

Court Reporter; stenographers@circuit7.org



REQUESTS FOR ACCOMMODATIONS BY PERSONS WITH DISABILITIES If you are a person with a disability who needs an accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact Court Administration, 101 N. Alabama Ave., Ste. D-305, DeLand, FL 32724 (386) 257-6096, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the appearance is less than 7 days; if you are hearing or voice impaired, call 711. Hearing or voice impaired, please call 1-800-955-8770.

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SOLICITUD DE ADAPTACIONES PARA PERSONAS CON DISCAPACIDADES

Si usted es una persona con discapacidad que necesita una adaptación para poder participar en este procedimiento, usted tiene el derecho a que se le proporcione cierta asistencia, sin incurrir en gastos. Comuníquese con la Oficina de Administración Judicial (Court Administration), 101 N. Alabama Ave., Ste. D-305, DeLand, FL 32724, (386) 257-6096, con no menos de 7 días de antelación de su cita de comparecencia ante el juez, o de inmediato al recibir esta notificación si la cita de comparecencia está dentro de un plazo menos de 7 días; si usted tiene una discapacidad del habla o del oído, llame al 711.

ESTOS NUMEROS TELEFONICOS NO SON PARA OBTENER INFORMACION JUDICIAL

Filing # 103641421 E-Filed 02/20/2020 02:50:58 PM

State of Florida vs. Norman Blake McKenzie
County: St. Johns
Case No.: CF06-1864
Date of Proceedings: November 28, 2018, March 14, 2019, February 14, 2020

COURT REPORTER'S ACKNOWLEDGMENT

The foregoing **Designation** was received on February 18, 2020.

An Order To Proceed Without Payment Of Costs, Declaring Defendant Insolvent For Purposes Of Appeal was received on February 20, 2020.

Number of trial or hearing days: 3.

The transcript will be completed within 30 days of service of the foregoing Designation, and will be filed with the Clerk on or before March 21, 2020.

Completion and filing of this Reporter's Acknowledgment constitutes submission to the jurisdiction of the Court for all purposes in connection with these appellate proceedings.

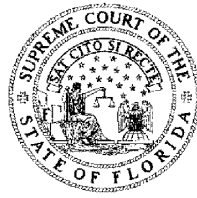
The undersigned Court Reporter certifies the foregoing is true and correct, and that a copy has been furnished by e-filing or e-mail on this 20th day of February, 2020.

Date: February 20, 2020

s/ANDREA GORMAN, RPR
Andrea Gorman, RPR
Court Reporters, 7th Judicial Circuit
1769 East Moody Blvd., Bldg. 1
Bunnell, FL 32110

cc:

Office of the Attorney General, crimappdab@myfloridalegal.com
Regional Counsel's Office, rc5state.com
Brandon Patty, Clerk of Court, Appeals Clerk, micampbell@sjccoc.us
Florida Supreme Court, <https://www.myflcourtaccess.com>



Supreme Court of Florida

Office of the Clerk
500 South Duval Street
Tallahassee, Florida 32399-1927

JOHN A. TOMASINO
CLERK
MARK CLAYTON
CHIEF DEPUTY CLERK
JULIA BREEDING
STAFF ATTORNEY

PHONE NUMBER: (850) 488-0125
www.floridasupremecourt.org

ACKNOWLEDGMENT OF NEW CASE

February 20, 2020

RE: NORMAN BLAKE vs. STATE OF FLORIDA
MCKENZIE

CASE NUMBER: SC20-243
Lower Tribunal Case Number(s): 552006CF001864XXAXMX
Lower Tribunal Filing Date: 2/18/2020

The Florida Supreme Court has received the following documents reflecting a filing date of 2/19/2020.

Notice of Appeal

The Florida Supreme Court's case number must be utilized on all pleadings and correspondence filed in this cause.

kc
cc:
DORIS MEACHAM
JUNIOR A. BARRETT
HON. BRANDON PATTY, CLERK
KENNETH MARK JOHNSON
COURT REPORTERS, 7TH JUDICIAL CIRCUIT
HON. RAUL ANTONIO ZAMBRANO, CHIEF JUDGE
HON. HOWARD MASON MALTZ, JUDGE

Filed for record 02/24/2020 08:46 AM Clerk of Court St. Johns County, FL

Supreme Court of Florida

THURSDAY, FEBRUARY 20, 2020

CASE NO.: SC20-243

Lower Tribunal No(s).:
552006CF001864XXAXMX

NORMAN BLAKE MCKENZIE vs. STATE OF FLORIDA

Appellant(s)

Appellee(s)

We have received a notice of appeal in the above-captioned case, which is an appeal from a first-degree murder conviction with a sentence of death.

Pursuant to Florida Rule of Appellate Procedure 9.142(a)(1), the Honorable Raul A. Zambrano, Chief Judge of the Seventh Judicial Circuit Court of Florida, is hereby appointed to monitor the preparation of the complete record in the circuit court for timely filing in this Court.

The transcripts should be filed with the trial court clerk within eighty days from the filing of the notice of appeal in this Court. As the time for filing the transcript has already been extended, the Court does not anticipate that any further extensions of time will be necessary.

The trial court clerk shall have twenty days after the filing of the transcript(s) in which to file the record on appeal with this Court. The complete record in a death penalty appeal shall include all items required by rule 9.200 and by any order issued by the supreme court. In any appeal following the initial direct appeal, the record transmitted shall begin with the most recent mandate issued by the supreme court, or the most recent filing not already transmitted in a prior record in the event the preceding appeal was disposed of without a mandate, and shall exclude any materials already transmitted to the supreme court as the record in any prior appeal. The supreme court shall take judicial notice of the appellate records in all prior appeals and writ proceedings involving a challenge to the same judgment of conviction and sentence of death. Appellate records subject to judicial notice under this subdivision shall not be duplicated in the record transmitted for

Filed for record 02/24/2020 08:46 AM Clerk of Court St. Johns County, FL

CASE NO.: SC20-243

Page Two

the appeal under review. In preparing the record, please have a master index in volume one with an individual index for each remaining volume.

The trial court clerk is further directed to provide copies of all exhibits which can be copied, including photographs, video tapes, CDs and DVDs (if any) to counsel, along with the transmission of the record on appeal. The original exhibits (if any) shall be kept at the trial court unless this Court orders otherwise. The copies provided to counsel for the parties and to this Court shall be properly bound, indexed and paginated pursuant to Florida Rule of Appellate Procedure 9.200(d). A master index of the all exhibits should be included in the record on appeal.

Pursuant to Florida Rule of Judicial Administration 2.215(i), the circuit judge assigned to the case shall take such action as may be necessary to ensure that a complete record on appeal is properly prepared and filed. Judge Howard M. Maltz is directed to hold a status conference **within sixty days from the date of this order** which shall be attended by the Clerk of Court (or the clerk's designee), all appropriate court reporters, counsel, and such other persons Judge Maltz may deem necessary. Judge Maltz may enter such orders as necessary for the timely completion and filing of the record on appeal with this Court. The time and place of the status conference shall be set by Judge Maltz for the purpose of ensuring that the record on appeal is complete. Judge Maltz shall file with this Court, **within twenty days from the date of the status conference**, a report detailing the current status of the record preparation. The record on appeal shall be timely filed with this Court unless there are substantial reasons requiring delay. The trial court is reminded that only this Court can extend the deadline for filing the record on appeal.

Pursuant to Florida Rule of Appellate Procedure 9.200(e), the burden to ensure that the record on appeal is prepared and transmitted in accordance with the Florida Rules of Appellate Procedure shall be on the appellant. Counsel for the appellant is hereby directed to file Status Reports with this Court **every thirty days** regarding the progress of the completion of the record on appeal.

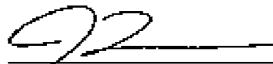
The failure to timely file a record on appeal substantially affects this Court's ability to timely process its death cases and will not be tolerated.

CASE NO.: SC20-243

Page Three

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



kc

Served:

DORIS MEACHAM
JUNIOR A. BARRETT
HON. BRANDON PATTY, CLERK
KENNETH MARK JOHNSON
COURT REPORTERS, 7TH JUDICIAL CIRCUIT
HON. RAUL ANTONIO ZAMBRANO, CHIEF JUDGE
HON. HOWARD MASON MALTZ, JUDGE

Filing # 103773344 E-Filed 02/24/2020 11:48:15 AM

1 IN THE CIRCUIT COURT, SEVENTH
2 JUDICIAL CIRCUIT, IN AND FOR
3 ST. JOHNS COUNTY, FLORIDA

4 CASE NO.: CF06-1864

5 STATE OF FLORIDA

6 versus

SENTENCING

7 NORMAN BLAKE MCKENZIE,

8 Defendant.

9 _____/

10
11 TRANSCRIPT OF PROCEEDINGS

12 PAGES 1 THROUGH 14

13
14 DATE TAKEN: February 14, 2020

15 TIME: 1:30 p.m - 1:45 p.m.

16 PLACE: Richard O. Watson Judicial Center
17 4010 Lewis Speedway
St. Augustine, FL 32084

18 BEFORE: The Honorable Howard M. Maltz
19 Circuit Judge

20 This cause came on to be heard at the time and place
21 aforesaid, when and where the following proceedings were
22 **stenographically reported** by:

23
24 Karen F. Howard, RPR, FPR
Court Reporters, Seventh Judicial Circuit
25 Richard O. Watson Judicial Center
St. Augustine, FL (904) 827-5622

APPEAL TRANSCRIPT

2

A P P E A R A N C E S

K. MARK JOHNSON, ESQUIRE
JENNIFER L. DUNTON, ESQUIRE
Assistant State Attorneys
2446 Dobbs Road
St. Augustine, Florida 32086

Appearing for State of Florida

JUNIOR A. BARRETT, ESQUIRE
KENNETH M. HAMBURG, ESQUIRE
Assistant Conflict Regional Counsel
101 Sunnyside Road, Suite 310
Casselberry, Florida 32707

Appearing for Defendant

NORMAN BLAKE MCKENZIE, Defendant

COURT REPORTERS, SEVENTH JUDICIAL CIRCUIT

APPEAL TRANSCRIPT

3

PROCEEDINGS

THE COURT: Good afternoon, everybody. Y'all can be seated. Welcome.

We are here this afternoon for the imposition of sentence in the case of State of Florida vs. Norman Blake McKenzie. This is Case No. CF06-1864.

And let the record reflect Mr. McKenzie's present with his counsel, Mr. Hamburg and Mr. Barrett. Good afternoon. The State's present, with Mr. Johnson and Ms. Dunton present on behalf of the State.

So before we proceed, let me ask counsel for the parties, is there any good cause as to why sentencing cannot proceed today?

Defense?

MR. BARRETT: No, Your Honor.

THE COURT: State?

MR. JOHNSON: No, Your Honor.

THE COURT: Okay. I thought it would be helpful, before I impose sentence in this case, to go over the procedural history of this case, which is a very long procedural history of this case; but, nonetheless, I do think it would be of everybody's benefit to go through that.

This case started in 2006 with an indictment by a St. Johns County grand jury, in October of 2006, of

COURT REPORTERS, SEVENTH JUDICIAL CIRCUIT

APPEAL TRANSCRIPT

4

1 the defendant, Mr. McKenzie, for the murders of Randy
2 Peacock in Count 1 and Charles Johnston in Count 2.

3 The trial in this case commenced in August of
4 2007. At that time the jury found the defendant
5 guilty of both counts of first-degree murder.

6 A penalty phase was conducted shortly thereafter
7 with the same jury. That jury, by a 10-to-2
8 recommendation, recommended a sentence of death for
9 each count of the indictment.

10 In October of 2007, the judge at that time
11 followed the jury's recommendation and sentenced the
12 defendant to death for each count for which he was
13 convicted -- each count of first-degree murder for
14 which he was convicted.

15 In 2010, the Florida Supreme Court affirmed the
16 defendant's conviction and death sentences. The
17 United States Supreme Court denied certiorari review
18 of that conviction and sentence. The defendant
19 subsequently moved for post-conviction relief under
20 the Florida Rules of Criminal Procedure, which was
21 denied by the trial court in 2012.

22 In 2014, the Florida Supreme Court affirmed that
23 denial of the defendant's post-conviction motion.

24 Then in 2016 -- I told y'all it was a long
25 history.

COURT REPORTERS, SEVENTH JUDICIAL CIRCUIT

APPEAL TRANSCRIPT

5

1 In 2016, the United States Supreme Court, in
2 Hurst vs. Florida, found Florida's then capital
3 sentencing scheme unconstitutional because a jury did
4 not determine the existence of aggravating factors
5 beyond a reasonable doubt by a unanimous vote.

6 Later that same year, the Florida Supreme Court,
7 in Hurst vs. State, went beyond the decision of the
8 U.S. Supreme Court's Hurst decision, and at that time
9 the Florida Supreme Court held that a jury must
10 unanimously determine if the aggravating factors are
11 sufficient for imposition of a death sentence, that
12 the aggravating factors outweigh the mitigating
13 circumstances, and there must be a unanimous jury
14 verdict that death is the appropriate sentence. That
15 was also in 2016.

16 Again in that same year, 2016, the Florida
17 Supreme Court held that its Hurst ruling, or Hurst
18 decision, applies retroactively only to death
19 sentences which became final after the United States
20 Supreme Court's 2002 decision in Ring vs. Arizona.
21 The Florida legislature followed by amending Florida
22 Statute Section 921.141 in accordance with the Florida
23 Supreme Court's Hurst decision.

24 Accordingly, in this case, in 2017, the
25 defendant, through counsel, filed his first successive

COURT REPORTERS, SEVENTH JUDICIAL CIRCUIT

APPEAL TRANSCRIPT

6

1 motion to vacate conviction and sentence. Thus, on
2 June 19 of 2017, this Court vacated the defendant's
3 death sentences in accordance with the Florida Supreme
4 Court's decision in Hurst vs. State. Accordingly,
5 these resentencing proceedings commenced in this case.

6 In August of 2019, a new penalty phase was
7 conducted in this case, which culminated by the jury
8 concluding unanimously that death is the appropriate
9 sentence for each count of first-degree murder for
10 which the defendant had previously been convicted.
11 This Court subsequently conducted a Spencer hearing
12 and received memoranda from the parties as well.

13 I do want to mention also that just recently, on
14 January 23rd of 2020, the Florida Supreme Court
15 rendered its decision in State vs. Poole -- that's
16 Poole with an E at the end -- in which it receded from
17 much of its earlier opinion in Hurst vs. State, but
18 that decision will not affect today's proceedings.

19 So that does bring us up to date for today's
20 sentencing. So let me talk a little bit about what
21 happened before and this Court's analysis of what
22 happened following that -- the jury and then following
23 the penalty phase.

24 At the recent penalty phase, the jury found
25 unanimously and beyond a reasonable doubt the

COURT REPORTERS, SEVENTH JUDICIAL CIRCUIT

APPEAL TRANSCRIPT

7

1 existence of five aggravating factors. In determining
2 the appropriate sentence, I have considered each of
3 those aggravating factors determined by the jury to
4 exist, and I assigned the weight that I felt is proper
5 and due for each of those aggravating factors. I
6 considered them separately for each count, or each of
7 the murders. I will go through those aggravating
8 factors one by one and state the weight that I have
9 assigned to each of those aggravating factors for each
10 of the counts.

11 The first aggravating factor found by the jury to
12 exist and that the Court considered was that the
13 defendant had previously been convicted of another
14 capital felony or felony involving the use or threat
15 of violence to persons. This defendant was convicted
16 of two counts of first-degree murder on two separate
17 victims: Randy Peacock and Charles Johnston. As to
18 each count, the contemporaneous murder conviction for
19 the other count counts as a prior capital felony
20 conviction for purposes of this aggravating factor.

21 In addition, the evidence at the penalty phase
22 showed that this defendant had been convicted of nine
23 other prior felonies. Accordingly, I have assigned
24 very great weight to this aggravating factor for each
25 count of the indictment.

COURT REPORTERS, SEVENTH JUDICIAL CIRCUIT

APPEAL TRANSCRIPT

8

1 The second, or next, aggravating factor found by
2 the jury to exist was that each of these murders was
3 committed while the defendant was engaged in the
4 commission of a robbery. I concur with the jury's
5 finding that the murders were committed while the
6 defendant was engaged in the commission of a robbery,
7 and I am assigning great weight to that aggravating
8 factor for the purposes of each count.

9 The next, or third, aggravating factor found by
10 the jury to exist is that each murder was committed
11 for pecuniary gain. Because that aggravating factor
12 merges with the preceding aggravating factor that I
13 just discussed, that the murder was committed
14 during -- or occurred during the commission of a
15 robbery, I've assigned no weight to that aggravating
16 factor.

17 The fourth aggravating factor found to exist was
18 that each murder was especially heinous, atrocious, or
19 cruel. I have considered this aggravating factor
20 with -- and the circumstances of each of the murders
21 separately -- as well as the victim's perceptions and
22 circumstances -- separately for each count. Each of
23 these murders -- as I state in greater detail -- much
24 greater detail in my written order that'll be filed
25 contemporaneous with these proceedings today, each of

COURT REPORTERS, SEVENTH JUDICIAL CIRCUIT

APPEAL TRANSCRIPT

9

1 these murders inflicted a high degree of pain and
2 torturous anxiety on each of these victims. This was
3 demonstrated not only by the testimony of the medical
4 examiner during the penalty phase, but the defendant's
5 own words to the detectives shortly after the murders,
6 during the two statements that he had given to law
7 enforcement, describing how each victim survived the
8 initial attacks on them, only to have their attacker,
9 the defendant, return and attack them again while they
10 fought for their lives. Accordingly, I assigned to
11 this aggravating factor great weight for each of the
12 murders of each of the counts.

13 The fifth and final aggravating factor found to
14 exist was that the murders were committed in a cold,
15 calculated, and premeditated manner without any
16 pretense of moral or legal justification. Again, as
17 set forth in great detail in my order, this
18 aggravating factor applies, and I have -- or am
19 affording this aggravating factor great weight as it
20 pertains to each of the murders.

21 The jury, at the conclusion of the penalty phase,
22 unanimously concluded that, for each of the murders,
23 the aggravating factors found to exist are sufficient
24 to warrant a death sentence. I do concur with the
25 jury's finding with regards to each count, that the

COURT REPORTERS, SEVENTH JUDICIAL CIRCUIT

APPEAL TRANSCRIPT

10

1 aggravating factors found by the jury to exist are
2 sufficient to warrant a death sentence.

3 Accordingly, the jury was instructed to consider
4 mitigating circumstances. And, likewise, this Court
5 has considered mitigating circumstances as well. The
6 jury, at the conclusion of the penalty phase,
7 concluded that one or more jurors found one or more
8 mitigating circumstances to exist by the greater
9 weight of the evidence. I have applied that same
10 greater weight of the evidence standard, obviously, to
11 the mitigating circumstances.

12 I have considered all the mitigating
13 circumstances set forth by the defense during the
14 penalty phase, during the Spencer hearing, and in the
15 defendant's memorandum. I have found, as is spelled
16 out in my written order, that all of the mitigating
17 circumstances set forth were established, and I
18 assigned them the weight that I feel they are due, as
19 set forth in my order, with one exception. The one
20 exception is, in the defendant's memorandum, it's
21 asserted for the first time that it should be
22 considered as a mitigating circumstance that the jury
23 did not unanimously recommend a death sentence during
24 the first penalty phase way back. Instead, it was a
25 10-to-2 death recommendation back then. This is not

COURT REPORTERS, SEVENTH JUDICIAL CIRCUIT

APPEAL TRANSCRIPT

11

1 mitigation, and I've afforded that no weight in my
2 consideration.

3 The jury concluded, again, at the end of the
4 penalty phase, that the aggravating factors outweighed
5 the mitigating circumstances, making the defendant
6 eligible for death on each count. Likewise, I find
7 that the aggravating factors found by the jury to
8 exist outweigh the mitigating circumstances, but I
9 will emphasize that I find that they far outweigh the
10 mitigating circumstances, making this defendant
11 eligible for death.

12 As I discussed earlier, the jury, in the recent
13 penalty phase, unanimously found that death is the
14 appropriate sentence for each count, or each of the
15 murders. The fact that the jury found death to be the
16 appropriate sentence does not bind this Court in any
17 way. This Court may, nevertheless, impose life
18 sentences for each count, or each murder, if it feels
19 that is appropriate.

20 I will say this: There is no more serious or
21 solemn responsibility for this Court than to determine
22 whether someone should live or die for their crimes.
23 In making this most difficult decision, I am guided,
24 in part, by what our Supreme Court has said on many
25 occasions, which is death sentences must be reserved

COURT REPORTERS, SEVENTH JUDICIAL CIRCUIT

APPEAL TRANSCRIPT

12

1 for the most aggravated and least mitigated murders.
2 This is such a case. Therefore, I will sentence the
3 defendant as follows.

4 So, Mr. McKenzie, if you'll please stand and
5 receive this Court's sentence.

6 So, accordingly, I sentence you as follows,
7 Mr. McKenzie:

8 As to Count 1 of the indictment, for the
9 first-degree murder of Randy Peacock, you are
10 sentenced to death in a manner prescribed by law.

11 As to Count 2 of the indictment, for the murder
12 of Charles Johnston, you are sentenced to death in a
13 manner prescribed by law.

14 These sentences shall run concurrent. All
15 statutory fees and costs are assessed.

16 You are, Mr. McKenzie, entitled to appeal this
17 sentence. If you choose to do so, you would have to
18 do so within 30 days. That appeal would be direct to
19 the Florida Supreme Court. I will appoint the Office
20 of Regional Conflict Counsel to represent Mr. McKenzie
21 for purposes of appeal.

22 I am at this point now submitting to the clerk
23 the original sentencing order. I have copies for the
24 defense, defense counsel, and I have a copy for the
25 defendant. The defendant's copy is the one with the

COURT REPORTERS, SEVENTH JUDICIAL CIRCUIT

APPEAL TRANSCRIPT

13

1 rubber band and not the staple, due to the rules that
2 I am required to follow. I have a copy for the State
3 Attorney's Office, obviously, as well. That is my
4 written order.

5 Mr. McKenzie, as I indicated, you do have 30 days
6 to appeal this sentence, and may God have mercy on
7 your soul.

8 Thank you, folks. And that will conclude this
9 afternoon's proceedings in this case, and we'll be in
10 recess till 2:30.

11 Thank you, everybody.

12 (Proceedings concluded at 1:45 p.m.)
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COURT REPORTERS, SEVENTH JUDICIAL CIRCUIT

APPEAL TRANSCRIPT

14

CERTIFICATE OF REPORTER

STATE OF FLORIDA)
)
COUNTY OF ST. JOHNS)

I, Karen F. Howard, Registered Professional Reporter,
Florida Professional Reporter, Seventh Judicial Circuit of
Florida, do HEREBY CERTIFY that I was authorized to and did
stenographically report the foregoing proceedings, and that
the foregoing transcript is a true and correct record of my
stenographic notes.

Signed this 24th day of February, 2020, at
St. Augustine, St. Johns, County, Florida.

s/KAREN F. HOWARD, RPR, FPR
Karen F. Howard, RPR, FPR
Seventh Judicial Circuit of Florida

COURT REPORTERS, SEVENTH JUDICIAL CIRCUIT

In Re: State of Florida vs. Norman McKenzie

Supreme Court No.: SC20-0243

Case No(s): 06001864CFMA

Date(s) of Proceeding(s): ***November 28, 2018; March 14, 2019***
August 26, 2019; August 27, 2019; August 28, 2019; August 29, 2019;
November 22, 2019; ***February 14, 2020***

COURT REPORTER'S ACKNOWLEDGEMENT

*****REPORTER'S NOTE*****

Court Reporting Services reported the proceedings on November 28, 2018, March 14, 2019 and February 14, 2020 and will file a Court Reporter's Acknowledgment for those proceedings.

- 1.) The foregoing **DESIGNATION** was received on **February 18, 2020**.
The foregoing **AMENDED DESIGNATION** was received on **February 20, 2020**.
- 2.) Satisfactory arrangements have been made for payment of the transcript cost(s).
These financial arrangements were completed on **February 20, 2020**.
- 3.) Number of hearing day(s):
Number of jury selection day(s): 1 (stenographically reported)
Number of trial day(s): 4 (stenographically reported)
- 4.) The transcript will be completed within **80** days of service of the foregoing **Amended Designation** and will be filed with the Clerk on or before **May 10, 2020**.
- 5.) The Court Reporter requests an extension of time of _____ days for financial arrangements to be completed by requesting entity and / or upon receipt of required documentation as follows:
 1. **Order of Indigency** _____
 2. **Criminal Conflict & Civil Regional Counsel's** payment approval _____

Upon receipt date of completed financial arrangements, the preparation of the transcript will commence and be filed accordingly within 30 days with the Clerk of Court.
- 6.) Completion and filing of this Reporter's Acknowledgement constitutes submission to the jurisdiction of the Court for all purposes in connection with these appellate proceedings.
- 7.) The undersigned Court Reporter certifies the foregoing is true and correct and that a copy has been furnished by e-filing, mail or hand delivery on this **24th day of February**

Filed for record 02/26/2020 04:37 PM Clerk of Court St. Johns County, FL

2020.

S/Paulita E. Kuldig, RPR, FAPR, FPR
Court Reporter
Volusia Reporting Company
432 South Beach Street
Daytona Beach, Florida 32114
T 386.255.2150 F 386.258.1171
Email: appeals@volusiareporting.com

Filing # 104600080 E-Filed 03/10/2020 08:42:17 AM

1 IN THE CIRCUIT COURT, SEVENTH
2 JUDICIAL CIRCUIT, IN AND FOR
3 ST. JOHNS COUNTY, FLORIDA

4 CASE NO.: 06-001864-CFMA

5 STATE OF FLORIDA

6 versus

HEARING

7 NORMAN MCKENZIE,

8 Defendant.

9 _____/

10

11 TRANSCRIPT OF PROCEEDINGS

12 PAGES 1 THROUGH 36

13

14 DATE TAKEN: November 28, 2018

15 TIME: 9:08 a.m - 9:40 a.m.

16 PLACE: Richard O. Watson Judicial Center
17 4010 Lewis Speedway
St. Augustine, FL 32084

18 BEFORE: The Honorable Howard M. Maltz
19 Circuit Judge

20 This cause came on to be heard at the time and place
21 aforesaid, when and where the following proceedings were
22 **stenographically reported** by:

23

24 Rhonda Bounds, RPR
Court Reporters, Seventh Judicial Circuit
25 Kim C. Hammond Justice Center
Bunnell, FL (386) 313-4571

APPEAL TRANSCRIPT

2

A P P E A R A N C E S

K. MARK JOHNSON, ESQUIRE
Assistant State Attorney
2446 Dobbs Road
St. Augustine, Florida 32086

Appearing for State of Florida

JUNIOR A. BARRETT, ESQUIRE
Assistant Conflict Regional Counsel
- and -
KENNETH HAMBURG, ESQUIRE
Assistant Conflict Regional Counsel
101 Sunnyside Road, Suite 310
Casselberry, Florida 32707

Appearing for Defendant

NORMAN MCKENZIE, Defendant

COURT REPORTERS, SEVENTH JUDICIAL CIRCUIT

APPEAL TRANSCRIPT

3

PROCEEDINGS

MR. JOHNSON: If we can call Norman McKenzie,
Case No. 06-1864-CF. It's set for a number of death
penalty motions.

THE COURT: We are set for a bunch of motions.
Can we get that done relatively quick, do you think?

I know there was an e-mail that I just got a copy
of this morning that a lot of those things -- matters
had been stipulated to. There are a whole plethora of
motions filed. This type of case will do that.

And let the record reflect that Mr. McKenzie is
present.

Just for record purposes, Mr. McKenzie's
conviction for first-degree murder was affirmed on
appeal. However, his sentence of death has been
vacated as a result of the United States Supreme
Court's decision in Hurst. So we are scheduled the
beginning of next year for a penalty phase trial. The
State is still seeking the death penalty on the murder
count.

So we are set today for a variety of motions.

Are you-all ready to proceed on those motions
this morning?

MR. JOHNSON: Yes, Your Honor.

MR. BARRETT: Yes, Judge.

COURT REPORTERS, SEVENTH JUDICIAL CIRCUIT

APPEAL TRANSCRIPT

4

1 For the record, Junior Barrett with Office of
2 Regional Counsel. Also present is my co-counsel
3 Kenneth Hamburg.

4 And as the Court just noted, Mr. McKenzie is
5 present in the courtroom.

6 We did get the e-mail that the State sent to both
7 myself and the Court's JA. I would ask that -- it's
8 important the e-mail be a part of the record because
9 it will cut down on the need to make argument
10 that's -- on the motions since they're -- some of the
11 motions that the State and I -- from the e-mail --
12 seems to have agreed on, at least in part.

13 THE COURT: Okay. We'll make that part of the
14 record. I've not yet written on mine. So I'll give
15 that to the clerk --

16 MR. BARRETT: Sure.

17 THE COURT: -- and -- when I'm done with it.

18 MR. BARRETT: Sure.

19 THE COURT: And we will make that part of the
20 permanent court file in Mr. McKenzie's case.

21 Let's go through these motions. Do you-all have
22 a preference in what order?

23 MR. BARRETT: Judge, it may be easier -- again,
24 the State -- as part of the e-mail, which the Court
25 has indicated the Court hasn't gone through yet -- has

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1 done an outline. It's different than what I had. But
2 I can use the State outline.

3 THE COURT: Okay.

4 MR. BARRETT: And for the most part, we would be
5 relying on the arguments in the motion.

6 THE COURT: Right.

7 MR. BARRETT: But there may be some special ones
8 that the State may have some contentions on that we
9 can just address briefly.

10 Again, we're relying on the arguments in the
11 motion, so...

12 THE COURT: And I'm familiar with --

13 MR. BARRETT: Okay.

14 THE COURT: -- most of these motions, in that
15 they are standard motions.

16 MR. BARRETT: Sure.

17 THE COURT: And I don't know -- fortunately or
18 unfortunately, I've handled a number of these cases in
19 the last couple of years, so...

20 MR. BARRETT: Some of the difference would be,
21 obviously, because of the changes in the statute and
22 the changes in the requirement for a finding of death.
23 So there are some changes.

24 THE COURT: Well, I've now tried two of them
25 since the statute's changed --

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1 MR. BARRETT: Right.

2 THE COURT: -- so I'm familiar with all these --
3 all the standard -- for lack of a better term,
4 standard motions.

5 All right. Let's proceed.

6 MR. BARRETT: All right. Judge, just going,
7 again, using the State's e-mail outline.

8 THE COURT: Uh-huh.

9 MR. BARRETT: On the discovery motions, I guess
10 one of the ones we're mainly to address has to do with
11 the Motion For Discovery Of Prosecutorial
12 Investigation Of Prospective Jurors.

13 As the Court is aware -- obviously the State have
14 more access --

15 MR. JOHNSON: I'm trying -- I'm trying to --

16 MR. BARRETT: -- background check, essentially.

17 THE COURT: Okay. Because you're on the last
18 motion in the State's e-mail.

19 MR. BARRETT: Actually, it's -- it's the first
20 one on --

21 THE COURT: Is there a different e-mail?

22 MR. JOHNSON: You're here. And he's expecting to
23 start here.

24 MR. BARRETT: Oh. That one the State didn't
25 really have a problem with, which is that he be

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1 dressed out and the restraint issue. That's why I ask
2 that.

3 THE COURT: Well, let's go -- well, let's go
4 through these in the order, so we can just put on the
5 record --

6 MR. BARRETT: Okay. Okay.

7 THE COURT: -- what we've got.

8 MR. BARRETT: Sure.

9 THE COURT: So I'll -- I'll go ahead.

10 MR. BARRETT: Sure.

11 THE COURT: The first one was the State's Motion
12 To Permit The Accused To Appear Without Restraints at
13 all -- In All Proceedings. The State's position was
14 to defer to the Court and security staff.

15 I'm going to tell you my position on this --

16 MR. BARRETT: Yes, sir.

17 THE COURT: -- so we're real clear on it.

18 He will be in restraints for all proceedings that
19 are not in the presence of the jury. When he is in
20 the presence of the jury, he will not have visible
21 restraints. There may be certain devices that the
22 courtroom security personnel will place on him that
23 will not be visible to the jury.

24 But I can assure you that all steps will be taken
25 so there will be no visible restraints to the jury

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1 when the jury is present in the courtroom. But he
2 will be restrained at all other times.

3 MR. BARRETT: Okay.

4 THE COURT: Okay. So that is my motion. That's
5 my standard position on every one of these cases. And
6 it's for anybody in custody. It doesn't matter if
7 it's a death penalty case or not.

8 All right. Let's go to the next one: Motion For
9 Disclosure Of Penalty Phase Evidence.

10 According to the State's e-mail, the State's
11 position is no objection to the extent it comports
12 with the rules of discovery and Florida law. So
13 there's no objection to it.

14 I guess the one question as I was going through
15 this, and this comes up all the time -- the State's
16 not obligated to go out there and find penalty phase
17 evidence --

18 MR. BARRETT: Correct.

19 THE COURT: -- that it doesn't know or -- know of
20 or have possession of. Obviously, anything it has
21 possession of which might mitigate against the
22 sentence in the case, the State would have a Brady
23 obligation to disclose.

24 MR. BARRETT: And by "State," obviously we're
25 referring not just to the State Attorney's Office but

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1 state agencies as well, which would -- on the case law
2 would include --

3 THE COURT: As well as the law enforcement
4 agencies --

5 MR. BARRETT: Correct.

6 THE COURT: -- that are involved in the case.
7 Right.

8 MR. BARRETT: Correct.

9 THE COURT: Motion To Compel Disclosure Of
10 Mitigating Circumstances. It's really the same thing.

11 MR. BARRETT: Yes, Judge.

12 THE COURT: Okay. So my ruling, consistent with
13 what you-all agreed upon, would be the same.

14 Motion For Discovery Of Prosecutorial
15 Investigations Of Prospective Jurors.

16 What specifically were you looking for here?

17 MR. BARRETT: Judge, this ties in to another one
18 of the motions that we filed, which is we would like
19 to get, if possible, in advance of jury selection the
20 list of prospective jurors so we can do -- to the
21 extent we can -- check -- background check, things
22 like that.

23 Obviously, the State have more access to tools to
24 do search, records, and other databases that the
25 State -- those are the kind of things we're asking

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1 for.

2 Generally, in -- and what we get is, basically,
3 prior to the jury selection, are just at the start of
4 bringing in the jury, we'll get from the State, okay,
5 this person has this conviction, this person has this
6 information.

7 What we're basically asking for is that much in
8 advance of time, again --

9 THE COURT: How far -- how far in advance?

10 MR. BARRETT: And that would depend. I don't
11 know how the Court's procedure is in terms of giving
12 us information about potential jurors in advance.

13 So, obviously, just like any other rule, if the
14 State is not aware of it, they can't provide it.

15 THE COURT: Uh-huh.

16 MR. BARRETT: But, basically, what we're asking
17 for, if the State -- if we get the list of jurors in
18 advance, far enough in advance for us to do a check,
19 and the State becomes aware of it, for us not to be
20 the day of trial, the State's, oh, by the way, here,
21 this, this. So, obviously --

22 THE COURT: Okay. If the State gets it in
23 advance -- and I don't know if you do or not -- but if
24 the State gets it in advance, do turn it over to the
25 Defense.

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1 Keep in mind that we don't know until Monday
2 who's even showing up. That's not to say we'll -- we
3 send out a bunch of summons. But there's about a
4 30-something percent return rate on those summons,
5 unfortunately.

6 MR. BARRETT: Judge, what I would ask is -- and,
7 obviously, if we send out the summons, we have an idea
8 as to the names of individuals.

9 THE COURT: Uh-huh.

10 MR. BARRETT: We would ask that we get that list
11 in advance also.

12 THE COURT: Okay.

13 MR. BARRETT: Because whether they show or not,
14 we can at least do some kind of a background check
15 ourself so that the ones that do show cuts down on us
16 having to try to figure out who's who in terms of
17 information. The more in advance we get the list of
18 potential jurors, the more we're better prepared to
19 address certain issues, hopefully narrow down
20 questions we may want to ask and follow up on.

21 THE COURT: What's the State's position on all
22 that?

23 MR. JOHNSON: Well, I want to be clear about what
24 we're talking about.

25 MR. BARRETT: Okay.

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1 MR. JOHNSON: I do not have an objection to them
2 getting a copy of the venire.

3 MR. BARRETT: Yeah.

4 MR. JOHNSON: We get a copy of that. And we
5 do -- we do do a check. I don't have a problem with
6 them getting the same. What's good for the goose is
7 good for the gander.

8 THE COURT: Right.

9 MR. JOHNSON: What I do and I believe we have an
10 obligation to do is actually do the criminal
11 background checks for the Defense and --

12 THE COURT: I don't think he's asking for that.

13 MR. JOHNSON: Actually he is.

14 MR. BARRETT: To the extent that we can -- like,
15 we have access to general information about criminal
16 background. We have access to a database that will
17 provide us with Florida criminal history. We don't
18 have access to a database that will provide us the
19 criminal history outside of Florida.

20 What we're asking, if the State does those kind
21 of inquiry beyond Florida that they provide that to
22 us. Obviously, Florida --

23 THE COURT: There's certain things that they
24 can't -- there's certain things they can't disclose to
25 you by FBI rules with regards to people's criminal

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1 history, so...

2 MR. JOHNSON: And we don't even use those
3 databases to do a background check on jurors. I don't
4 think that's even appropriate. There are databases
5 that we use, our own.

6 THE COURT: Uh-huh.

7 MR. JOHNSON: But we do not use NCIC. I think
8 that would actually violate that contract if we did
9 NCIC checks on all of our jurors.

10 THE COURT: So any checks you do -- let's say you
11 use Benchmark, for example, to do the checks --

12 MR. JOHNSON: Right.

13 THE COURT: -- which is our clerk's system, do
14 you have any problem turning over the results of that?

15 MR. JOHNSON: Not necessarily.

16 THE COURT: Okay. So we'll do that. We'll order
17 that.

18 We can get you a list of the venire. But at some
19 point prior to jury selection --

20 Does the State typically get it in advance?

21 MR. JOHNSON: Yes, sir.

22 THE COURT: You do. Okay. So if you can turn
23 that over.

24 What I would order -- and if you-all will make a
25 note of this because I'm going to have you prepare

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1 orders -- that the addresses do not get disclosed to
2 the Defense and that the Defense lawyers --

3 Pay close attention. You're not paying
4 attention.

5 -- that the Defense lawyers do not disclose it to
6 the defendant.

7 MR. BARRETT: Okay.

8 THE COURT: I do not want -- I'm not saying
9 Mr. McKenzie would do anything evil with it. But it
10 has happened in other places in the state, where there
11 has been juror intimidation in advance of trial, so...

12 You know, that's not to say that on the day of
13 jury selection, once we know who we've got --

14 MR. BARRETT: Right.

15 THE COURT: -- y'all can ask Mr. McKenzie if he
16 knows of these people and what he thinks of them.

17 But in advance of the day of voir dire, I don't
18 want that information being disclosed to the
19 defendant.

20 MR. BARRETT: Yes, Judge.

21 THE COURT: What's next?

22 MR. BARRETT: The juror questionnaire. I know
23 the State has --

24 THE COURT: We're not using a questionnaire.

25 MR. BARRETT: Excuse me?

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1 THE COURT: We're not going to be using a
2 questionnaire.

3 MR. BARRETT: The Court doesn't use it?

4 THE COURT: No. I'll tell you, this is -- this
5 is the only -- I use a questionnaire when they come
6 in. That is very basic information. I'll give you a
7 copy of it.

8 MR. BARRETT: So not even for the issue of the
9 death penalty the Court doesn't use --

10 THE COURT: There will not be a questionnaire
11 used. I've experimented with them. It doesn't work.
12 It slows things down. It takes long enough to pick a
13 jury in a death penalty case.

14 Every juror will have this on their seat. Every
15 prospective juror will have that on their seat.

16 And I'm handing them my standard questionnaire
17 right now. And that is just basic biographical
18 information that I use in every single criminal and
19 civil case. So that's yours to keep.

20 I will death qualify the jury. You-all can
21 follow up with any questions you want. But I will ask
22 them the death penalty questions.

23 I know Mr. Johnson's now picked at least two
24 death penalty cases with me; so he knows the process
25 and he'll be glad to share with --

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1 MR. BARRETT: Judge, I'm not sure what that means
2 because, obviously, our questions also goes towards --
3 well, we don't call it death qualifying. Obviously
4 our position is life qualifying.

5 But our questions will also goes towards position
6 on the death penalty. So when the Court says you'll
7 ask the death penalty questions --

8 THE COURT: Well, I'm going to ask them the
9 questions. But, of course, during your voir dire you
10 can follow up with any of that.

11 Now, if there are jurors who during my
12 questioning say there's no way they'd ever impose a
13 death penalty --

14 MR. BARRETT: Right.

15 THE COURT: -- regardless of the circumstances or
16 there are jurors that say they would always impose the
17 death penalty --

18 MR. BARRETT: Yes.

19 THE COURT: -- regardless of the circumstances,
20 during breaks we'll address whether we're going to
21 strike them for cause right out of the box. And I'll
22 address anything on that with you-all at the time.

23 But I'll ask them the Witherspoon questions.

24 MR. BARRETT: Okay.

25 THE COURT: But you-all are more than welcome and

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1 we'll have an opportunity to follow up and ask them
2 how you want to ask them within the bounds of the law
3 and appropriate question.

4 MR. BARRETT: Does the Court do individual voir
5 dire on the issue of death?

6 THE COURT: I will ask them the questions
7 individually, but it will not be individual
8 sequestered voir dire. It will be in the presence of
9 all of the jurors.

10 That's one of your other motions.

11 MR. BARRETT: Yes.

12 THE COURT: The only individual sequestered voir
13 dire that I intend to do is I will ask during my
14 questioning whether any of them know anything about
15 this case. I'm going to ask them to tell me --
16 without telling me what they know, I'm going to ask
17 them the source of their information. And then I'm
18 going to ask them whether they have formed any fixed
19 opinions about the issues in the case as a result of
20 what they've heard.

21 If there are those who said that they have heard
22 about this case, if anybody requests it, then I will
23 allow individual sequestered voir dire of those
24 particular prospective jurors who have indicated that.

25 But we are not going to be doing individual

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1 sequestered voir dire of their position on the death
2 penalty.

3 MR. BARRETT: Okay. I guess the next one that
4 the State clearly has issues with goes to the victim
5 impact statement.

6 THE COURT: Uh-huh.

7 MR. BARRETT: Obviously I wasn't around for the
8 previous trial. I don't --

9 MR. JOHNSON: Hold on. You skipped over --

10 MR. BARRETT: We skipped something that --

11 MR. JOHNSON: -- Motion For Proper Procedure For
12 Post-Challenge Questioning Of Prospective Jurors.

13 THE COURT: Oh, okay. I see.

14 Yeah, I think from what I -- I did read through
15 your motions. I think what you're asking is after
16 we're done with voir dire, and we're exercising
17 challenges with whoever is left at that point, that if
18 there's some vague -- vagueness or you weren't sure
19 that you should -- you could be able to ask more
20 questions.

21 Is that what you're asking?

22 MR. BARRETT: Yes, Judge.

23 THE COURT: Why would you want to do that?

24 I mean, you're going to have an opportunity to
25 ask the jurors questions. If you don't ask them the

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1 right questions and they're still vague, that's on
2 you.

3 That motion's denied.

4 MR. BARRETT: Okay.

5 MR. JOHNSON: I think the next one we've already
6 addressed on the list.

7 MR. BARRETT: List, yes.

8 MR. JOHNSON: Then we go to --

9 THE COURT: Right.

10 MR. JOHNSON: -- Motion in Limine Regarding
11 Reference To Non-Enumerated Mitigating Factors Or
12 Circumstances.

13 THE COURT: And I think in the body of your
14 motion, you -- you refer to it as non-enumerated -- or
15 you refer to non-statutory.

16 MR. BARRETT: Right.

17 THE COURT: You kind of used the terms
18 interchangeably. But I don't think they're
19 interchangeable terms.

20 MR. BARRETT: Judge, I'm pretty sure that is --
21 that mitigation that's not listed in the --

22 THE COURT: Statute.

23 MR. BARRETT: -- statute is still statutory
24 mitigation --

25 THE COURT: I agree with that.

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1 MR. BARRETT: -- because of the catchall.

2 THE COURT: I agree.

3 MR. BARRETT: And so that's the -- okay. So
4 that's the issue of saying --

5 THE COURT: It may be a -- it may not be
6 enumerated --

7 MR. BARRETT: Right.

8 THE COURT: -- in the statute, such as lack of
9 capacity to appreciate the criminality of conduct -- I
10 mean, I'm throwing one out as an example -- or age of
11 the defendant. Those are some of the ones that are
12 enumerated --

13 MR. BARRETT: Right.

14 THE COURT: -- and not in the catchall.

15 MR. BARRETT: Right.

16 THE COURT: I know sometimes prosecutors will
17 refer to them as non-enumerated.

18 MR. BARRETT: Right.

19 THE COURT: The jury is going to be instructed on
20 mitigating circumstances, whether they're enumerated
21 or not enumerated in the statute; so it's somewhat of
22 a non-issue, but...

23 MR. BARRETT: Well, it's not, Judge, because,
24 again, the State referring to it as non-enumerated can
25 give the impression that they're less important than

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1 the ones that's actually listed in the statute. And
2 so we're trying to get away from any language --
3 trying to differentiate between the one that's
4 statutorily listed and the ones that's not statutorily
5 listed. So we're asking that the term not be used,
6 neither by the State or --

7 THE COURT: Which one, non-statutory or
8 non-enumerated?

9 MR. BARRETT: Non-enumerated.

10 THE COURT: What's the State's position on that?

11 MR. JOHNSON: Judge, we've done a couple of
12 trials with this, where we've avoided the use of the
13 term.

14 THE COURT: Right.

15 MR. JOHNSON: I think what I just -- and I don't
16 have a problem with that. But I just want to be clear
17 is that, you know, I think we understand these words
18 and they're -- we frequently use them. I don't
19 necessarily think jurors who've never even been part
20 of a death penalty case understand sometimes what
21 we're talking about.

22 So I -- what I want to be clear of, if somebody
23 slips and uses a term, that suddenly there's, you
24 know, oh, it's a mistrial, I don't think it rises to
25 that level.

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1 I'll do my best to avoid using the terms. I
2 don't have a problem with that. But given the fact
3 that we so commonly use them, I don't necessarily
4 think it's overly prejudicial to use them.

5 I just want to kind of be clear what the game --
6 the rules of the game are here.

7 THE COURT: Okay. So here's what we're going to
8 do. I'm going to grant that motion. I would agree
9 with Mr. Johnson that if somebody slips up and uses
10 the word "non-enumerated" that -- clearly, that's not
11 going to be grounds for a mistrial.

12 MR. BARRETT: I guess it would depend on how many
13 slips we have.

14 THE COURT: Well --

15 MR. BARRETT: I agree, you know, so...

16 Obviously, to preserve that issue, if it's used
17 consistently, then we would make a motion at that
18 time.

19 THE COURT: I'm confident there won't be a
20 problem, having tried cases with Mr. Johnson now.

21 MR. BARRETT: Okay.

22 THE COURT: You never know. Somebody else could
23 end up trying the case for the State, but...

24 All right. The next one is Motion To Prohibit
25 Any Reference To The Jury's Second Phase Decision As

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1 Advisory Or Recommended.

2 MR. BARRETT: State is not objecting.

3 THE COURT: State does not object.

4 And the jury instructions have been changed to
5 correct that language throughout the jury instructions
6 for penalty phase.

7 All right. Let's go on to the next ones. Motion
8 To Exclude Victim Impact Evidence.

9 State's position -- obviously, State --
10 You don't want any victim impact evidence?

11 MR. BARRETT: No, Judge. I think if the
12 victim --

13 THE COURT: Even though the Florida Statutes say
14 you can have victim impact?

15 MR. BARRETT: I understand that, Judge. The
16 statute at one point also said you only needed ten.
17 So there's been changes. The fact that the statute
18 says it is part of our --

19 THE COURT: The statute says 12 now.

20 MR. BARRETT: Now. But that's what I'm saying --

21 THE COURT: But still --

22 MR. BARRETT: -- it changes.

23 THE COURT: Okay.

24 MR. BARRETT: That's evolved. So we will need to
25 preserve those issue.

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1 And I guess the -- I see victim impact just like
2 in a sentence and in front of the Court on any other
3 cases. Yeah, the victim gets to speak to the judge
4 and talk about it.

5 But since it's not a aggravator, there is really
6 no need for the victim to speak to the jury about the
7 person as a human being. It is not an aggravator.
8 Even though we may say to the jury, this is not an
9 aggravator, we're talking about individuals, as the
10 State mentioned previous, that don't really understand
11 the intricacies of the legal system. And whether or
12 not the jury will hear that and take as a
13 non-statutory aggravator is one of the things I'm
14 trying to avoid.

15 THE COURT: Well, they're told specifically --

16 MR. BARRETT: Yes, Judge.

17 THE COURT: -- at the time and they're told in
18 the final instructions that they can't consider that
19 as an aggravator.

20 MR. BARRETT: Judge, how many times have the
21 courts have done trials where we told jurors things
22 and then comes back and they basically ignore our --
23 from what they say to us and do, we can tell that the
24 juries didn't follow the --

25 THE COURT: Yeah, but you haven't tried too many

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1 in St. Johns County. But in St. Johns County they
2 tend to listen to what I tell them.

3 MR. BARRETT: Judge, there's no way we would know
4 that because we -- unless the Court polls the jury as
5 to whether or not they treated it that way, there's no
6 way of really knowing what the juror --

7 THE COURT: Let me tell you what I'm going to do
8 on victim impact evidence.

9 MR. BARRETT: Okay.

10 THE COURT: And I'll make this real clear. And
11 this is going to solve a lot of these.

12 The person who's going to -- who's going to
13 provide the victim impact testimony will do a written
14 victim impact statement. They'll provide it to the
15 Defense a day or two, however many -- couple of days
16 prior to the trial.

17 MR. BARRETT: Okay.

18 THE COURT: You'll have an opportunity to go
19 through it, identify those items that you believe to
20 be objectionable --

21 MR. BARRETT: Sure.

22 THE COURT: -- outside the presence of the jury.
23 Prior to that person taking the witness stand, we can
24 address that. If it's objectionable, it will be
25 redacted out.

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1 They will read their victim impact statement.
2 And I will instruct the jury in advance of the reading
3 of victim impact statements that it doesn't -- the
4 jury shall not consider it as an aggravating
5 circumstance.

6 I'll give them the standard instruction on victim
7 impact. I'll do that during the closing instructions
8 as well.

9 That's my position on victim impact. So it
10 answers most of your questions on your motions.

11 So your first one to exclude victim impact
12 evidence, the Legislature has spoken. The United
13 States Supreme Court has spoken on this issue. So I'm
14 going to overrule that motion -- or deny that motion.

15 Motion To Allow The Evidence Before The Judge
16 Alone. That also is contrary to that which the
17 Florida Legislature and the United States Supreme
18 Court has said. So I will deny that motion.

19 Motion To Produce Victim Impact Statement To
20 Require Victim Impact Witness To Read Statement.
21 State agreed to that, and I am going to order that in
22 advance.

23 Motion To Limit Victim Impact Statement To One
24 Witness.

25 What's the State's position on this? I know we

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1 get this every single time.

2 MR. JOHNSON: Yeah, we do. And I'm opposed to it
3 as to one witness. Quite frankly, right now we don't
4 know how many people are going to want to speak.

5 THE COURT: Uh-huh.

6 MR. JOHNSON: I mean, it may be only one person
7 that wants to speak. I don't know. We have two
8 victims in this particular case. We agree to limit it
9 to five.

10 There's a -- there's a case on point on this, the
11 Depravene (phonetic) case, where they agreed to five.
12 And that's with regard to two victims. And in that
13 statement opinion the court basically said that even
14 with one victim, four victim impact statements were
15 permitted at one point in time. And three were
16 consistently permitted as to one victim.

17 So we will agree to limit it to five, based on
18 the Depravene case, because there's two victims in
19 this particular case --

20 And if for whatever reason we get with the
21 victims' next of kin and we decide there's not that
22 many people that want to speak, then it may be less.
23 But we'll agree to keep it at five.

24 THE COURT: Okay. I'm going to defer ruling on
25 this.

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1 MR. BARRETT: Yes, Judge.

2 THE COURT: What I want to do is address this
3 immediately prior to the penalty phase. When I say
4 "immediately," maybe a day or two ahead of time we'll
5 have a hearing on it. That way, the State knows what
6 they intend to do.

7 If the State intends to only call one witness for
8 every victim, then it's a -- it's a bit of a
9 non-issue.

10 MR. BARRETT: Right.

11 THE COURT: So I'll defer at this point on that.
12 The last, Motion To Exclude Evidence Or Argument
13 Designed To Create Sympathy For The Deceased.

14 The law is real clear on what type of victim
15 impact evidence is permissible, how it's impacted
16 these folks lives. So my ruling on that is going to
17 be -- much like the State said -- agree to follow the
18 case law. So, again, we'll follow the case law on
19 that as to what is and isn't permissible.

20 And we're going to address the victim impact
21 prior to that person reading it to the jury. So that
22 way, I can defer and rule on it as we need to at that
23 point.

24 All right. Let's go on to the next three
25 motions. We can handle that pretty quickly. Motion

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1 For Special Verdict Form Containing Findings Of Fact
2 By The Jury. Motion For Findings Of Fact By The Jury.
3 And a Motion For Interrogatory Penalty Phase Verdict.

4 The Florida Supreme Court in May set forth -- May
5 of this year -- set forth a new verdict form in death
6 penalty cases. That is what will be used. I am not
7 going to deviate from that which the Florida Supreme
8 Court says shall be used unless there is a compelling
9 reason to do so. And I don't see a compelling reason
10 here.

11 If you haven't seen that form of verdict, it's in
12 the standard instructions. And we used it in the
13 death penalty case that I just tried -- finished
14 trying in July. Sentencing on that is Friday. But
15 you can go in and find that verdict form --

16 MR. BARRETT: Yes, Your Honor.

17 THE COURT: -- if you'd like to find that verdict
18 form.

19 Let's go through -- the rest are the
20 constitutional motions. Probably can get through
21 pretty of those -- pretty much those without a lot of
22 argument. I think you said your argument's --

23 MR. BARRETT: Yes, Judge, within the --

24 THE COURT: -- in the motions.

25 MR. BARRETT: -- the motions themselves.

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1 THE COURT: Motion to --

2 MR. BARRETT: And, obviously, as to the specific
3 aggravators, we have to wait for the State to present,
4 so...

5 THE COURT: Correct. We don't know exactly what
6 the testimony --

7 MR. BARRETT: Right. Right.

8 THE COURT: -- is going to be.

9 MR. BARRETT: Right.

10 THE COURT: Let's go through them one by one, and
11 we can wrap up.

12 Motion To Declare 921.141(1) Unconstitutional And
13 To Bar The State's Use Of Hearsay Evidence At The
14 Penalty Phase.

15 I will deny that motion. The law is very clear
16 on that. Florida's current death penalty scheme has
17 been reviewed by the United States Supreme Court, the
18 Florida State -- the Florida Supreme Court, both very
19 recently, and have been found to be constitutional,
20 with the exception of the Hurst decisions and -- the
21 two Hurst decisions, the one from the Florida Supreme
22 Court and the one from the U.S. Supreme Court. So
23 that's denied.

24 Motion To Declare Florida's Capital Sentencing
25 Scheme Unconstitutional As Violative Of The Eighth

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1 Amendment, which is cruel and unusual punishment.

2 That will be denied.

3 Motion To Declare 921.141 and 921.141(6)(d),
4 felony murder aggravator, Unconstitutional.

5 If the State moves forward on that aggravator, I
6 will deny that motion.

7 Motion To Declare 921.141 and/or 921.141(6)(b)
8 Unconstitutional, prior violent felony aggravator. If
9 applicable in this case, from a pure statutory
10 standpoint, I'll deny that motion.

11 Motion To Declare 921.141 Unconstitutional
12 Because It Expands Rather Than Narrows The Class Of
13 Defendants Eligible For The Death Penalty. That will
14 be denied.

15 Motion To Declare 921.114 Unconstitutional For
16 Lack Of Appellate Review. I think it means lack of
17 adequate appellate review.

18 MR. BARRETT: Yes.

19 THE COURT: There's obviously appellate review.
20 That will be denied.

21 Motion To Declare 921.141 Unconstitutional For
22 Failure To Provide Jury Adequate Guidance. That will
23 be denied. The jury instructions are incredibly
24 detailed for penalty phase.

25 Motion To Declare 921.141 Unconstitutional Based

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1 On Violation Of Due Process And Violation Of
2 Separation Of Powers. That will be denied.

3 Motion To Bar Execution By Lethal Injection.
4 It's a little premature at this point in that we don't
5 have a jury verdict and there's been no sentence
6 imposed.

7 MR. BARRETT: Yeah, but there are deadlines to
8 file motions, Judge. It may be premature in terms of
9 the Court's ruling. But it's clearly not premature in
10 terms of filing.

11 And, obviously, I'm going to ask permission to
12 supplement my motions with -- what I intended to do
13 is -- I had pulled some of those cases where the
14 execution by lethal injection were botched. There
15 were at least a couple in Florida, other places.
16 Rather than taking up the Court's time, I'm stating
17 these cases. And I'll send a copy to the State. I
18 just wanted to provide as part of my record, that's
19 part of the argument for this, and as well as the
20 cruel and unusual punishment issue.

21 The list that I was going to state on the record
22 to the Court, just to provide it as part of the court
23 record.

24 THE COURT: I will deny it without prejudice.

25 MR. BARRETT: Okay.

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1 THE COURT: You can substitute. You can -- you
2 can supplement it.

3 MR. BARRETT: Okay.

4 THE COURT: And then in the event there's a jury
5 verdict of --

6 MR. BARRETT: Address it again.

7 THE COURT: -- death being the appropriate
8 sentence and a death sentence is imposed -- I have no
9 idea what's going to happen --

10 MR. BARRETT: Right.

11 THE COURT: -- then you, obviously, can re-file
12 that motion at any level in the proceedings.

13 Motion For Imposition Of A Life Sentence.

14 MR. BARRETT: Judge, the argument basically is
15 that -- I understand that at the time of his previous
16 trial the State didn't need all 12.

17 But our position is that a jury closer to time in
18 terms of when the incident itself occurred heard all
19 the testimony, and even though there wasn't a
20 requirement of 12, clearly, the jury made a
21 determination that at least not all 12 agreed to the
22 death penalty.

23 And it's our argument that, essentially, that
24 is -- to allow the State to seek the death penalty is
25 basically ex post facto. And, again, argument within

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1 the motion addresses all those issues.

2 THE COURT: Okay. That motion will be denied.

3 If you-all can work on some proposed orders on
4 that and submit them to the Court --

5 MR. BARRETT: Okay.

6 THE COURT: -- that will be great.

7 And let me -- well, I'm going to keep the
8 e-mail -- the e-mail.

9 MR. BARRETT: Sure.

10 THE COURT: If you can give the clerk a copy of
11 the e-mail, if you have a clean copy, that will be
12 great. If not, you can just submit it to the clerk.

13 MR. BARRETT: All right. If the Court want, I
14 can just file it as part of the court record.

15 THE COURT: Absolutely. That's fine.

16 MR. BARRETT: We can just file it.

17 THE COURT: Absolutely.

18 MR. BARRETT: That's fine. I'll get it done.
19 I'll file it as part of the record.

20 THE COURT: Do we have any further court dates?

21 MR. BARRETT: No, Judge. The only thing I would
22 ask -- and I know Mr. McKenzie would like to be
23 returned.

24 THE COURT: Want to be returned? Okay.

25 Yeah, we're not set for trial till March. So

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1 I don't --

2 MR. BARRETT: Till March. Yes, Judge.

3 THE COURT: -- I don't see any reason not to
4 return Mr. McKenzie.

5 You want to go back to state prison?

6 THE DEFENDANT: Absolutely, sir.

7 THE COURT: Okay. All right. So we can --

8 Deputy Gambill, can we make a note of that?

9 THE BAILIFF: Yes, sir.

10 THE COURT: Okay. So we'll have him returned as
11 soon as they can do a run over there.

12 Thank you, everybody.

13 MR. BARRETT: Thank you, Judge.

14 THE COURT: If anything else gets filed or you
15 need some hearing time, let me know.

16 MR. BARRETT: Yes.

17 THE COURT: I know we have roughly four months
18 until trial so -- maybe even a little more than that.
19 So just let me know.

20 MR. BARRETT: Yes, Judge.

21 THE COURT: Okay. Thank you.

22 (The proceedings concluded as to this defendant
23 at 9:40 a.m.)
24
25

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
)
COUNTY OF FLAGLER)

I, Rhonda Bounds, Registered Professional Reporter,
Seventh Judicial Circuit of Florida, do HEREBY CERTIFY that
I was authorized to and did **stenographically report** the
foregoing proceedings, and that the foregoing transcript is
a true and correct record of my **stenographic notes**.

Signed this 9th day of March, 2020, at Bunnell,
Flagler County, Florida.

s/RHONDA BOUNDS, RPR
Rhonda Bounds, RPR
Seventh Judicial Circuit of
Florida

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MASTER TRIAL INDEX

DATE OF PROCEEDING

(REMINDER: Start each day's master trial index
on new page.)

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Filing # 105057886 E-Filed 03/18/2020 09:37:20 AM

APPEAL TRANSCRIPT

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: 06-001864-CFMA

STATE OF FLORIDA

versus

HEARING

NORMAN MCKENZIE,

Defendant.

/

TRANSCRIPT OF PROCEEDINGS

PAGES 1 THROUGH 37

DATE TAKEN: March 14, 2019

TIME: 3:31 p.m. - 4:05 p.m.

PLACE: Richard O. Watson Judicial Center
4010 Lewis Speedway
St. Augustine, FL 32084

BEFORE: The Honorable Howard M. Maltz
Circuit Judge

This cause came on to be heard at the time and place
aforesaid, when and where the following proceedings were
stenographically reported by:

Andrea Gorman, RPR
Court Reporters, Seventh Judicial Circuit
Kim C. Hammond Justice Center
Bunnell, FL (386) 313-4572

APPEAL TRANSCRIPT

A P P E A R A N C E S

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NORMAN MCKENZIE, Defendant

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APPEAL TRANSCRIPT

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THE BAILIFF: Court will come to order.

THE COURT: You-all can be seated.

MR. JOHNSON: Good afternoon, Judge.

THE COURT: We do need Mr. McKenzie.

MR. BARRETT: I think he should be here, Judge.

THE BAILIFF: They're bringing him out, Your
Honor.

THE COURT: Okay.

(The defendant entered the courtroom.)

THE COURT: All right. Let the record reflect
Mr. McKenzie is here.

Good afternoon, Mr. McKenzie.

THE DEFENDANT: Good afternoon, sir. How are you
doing?

THE COURT: Good.

This is Case 06-1864-CF. This matter is back
before the Court for a penalty phase that is scheduled
to commence on March the 25th. But I did receive a
motion from the Defense, and I was told it was going
to be coming, on March 11. It's a Motion To Continue
Penalty Phase. And I have read the motion.

But, Mr. Barrett, I'll hear you on the motion.

MR. BARRETT: Yes, Judge. We hired Dr. Mings as
our mitigation psychologist in this case. In fact,

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1 he's involved with three other cases that I have. I
2 know he had made a visit to Mr. McKenzie. He and I
3 talk about other visits. I know he and Mr. McKenzie
4 had talked about it.

5 I knew he had a medical issue, but I didn't know
6 what the extent of it was. I mean, I've known people
7 with cancer who still work, including judges who work
8 right up and through.

9 I realized how bad things were when two Sundays
10 ago I received a call from Dr. Mings. He had just
11 went up to see Mr. McKenzie at the jail, and I guess
12 it didn't go too well. And so I received, like, five
13 or six phone calls over the weekend from him.

14 So I made arrangement, and, along with
15 co-counsel, we came up to see Mr. McKenzie to talk to
16 him about the meeting. And talking to him, we learned
17 some questions and issues he had about Dr. Ming's
18 state of mind and other problems. And so I addressed
19 it with my boss, Mr. Deen, the regional counsel. And
20 I addressed it with Dr. Mings.

21 And then on -- I don't know if I put it in the
22 motion. But Dr. Mings sent a letter -- I do have a
23 copy of the letter. I did not attach it because --
24 since I didn't want it to be part of the --

25 THE COURT: Since it had medical information.

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1 MR. BARRETT: But I do have the letter.

2 Dr. Mings sent a letter to Mr. Deen basically
3 saying that he thought he could handle his cases. But
4 things have gotten real bad with him. He's going
5 through some treatments, not chemo, but some other
6 kind of treatment, and some other additional problems.

7 I didn't even know that -- again, when he came up
8 to see Mr. McKenzie, he couldn't drive. His wife
9 drove him up here. So that's the extent of it.

10 So having learned all those things, and in the
11 letter my boss basically said, listen, you-all need to
12 get replacement for this right away. And, in fact, he
13 called the (indiscernible), which I guess is up this
14 way, Jacksonville, about recommendations to replace
15 Dr. Mings.

16 We got from them Dr. Stephen Bloomfield. I then
17 contacted Dr. Bloomfield. This may have been after I
18 did the motion. But I did contact him to see if he
19 would be available to help us in that case. He said
20 he would be available; however, he says he has a case
21 that's going in April. The earliest time he would be
22 available would be in May.

23 I then -- we did the due process in my office.
24 Got the approval from my boss, and finally sent him
25 some stuff. I spoke to him by email today, knowing

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1 that he is available. So we have hired -- and I just
2 relayed that to Mr. McKenzie -- someone to replace
3 Dr. Mings.

4 One other concern I have, having talked to
5 Dr. Mings, is I don't know whether or not, because of
6 his situation, the work he has done how reliable it
7 is.

8 And as the Court may -- should be aware,
9 initially in this case Mr. McKenzie chose to represent
10 himself.

11 THE COURT: Originally. Right. Uh-huh.

12 MR. BARRETT: And so -- yes. And so, really, no
13 mitigation was developed in this case.

14 I know that CCRC, the collateral group, had hired
15 some doctor from California who did a 60-page memo. I
16 know from talking to Mr. McKenzie, he has some
17 objections and concerns of parts of it. But at least
18 doctor spoke to people, and also did a 60-page report.
19 So we need to make sure that we at least have a expert
20 to review that to develop mitigation, including,
21 obviously, speaking to Mr. McKenzie.

22 We, finally, through our mitigation expert, made
23 contact with his mom and his stepmom, who were
24 reluctant, and we've talked about them not testifying
25 to this. But we've talked to them to get information.

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1 So we were doing all the work we can. But we
2 certainly need a mental health expert.

3 And as the Court is aware, I think the -- maybe
4 (indiscernible) and I'm almost certain the Florida Bar
5 also kind of recommend that each death penalty case
6 include a mental health expert.

7 THE COURT: Right.

8 MR. BARRETT: And I've been doing it for a while,
9 but I'm not an expert. And I clearly couldn't explain
10 to a jury all those issues. And so we certainly
11 need -- I think if we didn't go forward with a mental
12 expert, this case would end up coming back.

13 And so we have taken every step we know how to
14 get a replacement doctor on board. But we just need
15 the time to get that doctor up to speed. And one of
16 the first questions I asked him in terms of
17 availability, and I gave him the date. And his
18 earliest availability, again, would be in May.

19 THE COURT: Okay. And I'm familiar with
20 Dr. Bloomfield. He's testified in this court a number
21 of times --

22 MR. BARRETT: Okay.

23 THE COURT: -- including a death penalty case two
24 weeks ago, three weeks ago, whenever it is that I
25 last --

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1 MR. BARRETT: Actually, he mentioned it to me
2 when we were talking about the case. He just got out
3 of -- that's up here in front of this Court.

4 THE COURT: Right. Right.

5 Mr. McKenzie, did you want to weigh in on this at
6 all? Do you have any issues with any of this?

7 THE DEFENDANT: Well, sir, I think Mr. Barrett
8 expressed it exactly how I would. You know, I mean, I
9 don't want to be unkind about Mr. Mings, you know, not
10 at all. But in my opinion, I don't that he was, you
11 know, quite ready to deal with this type of a ordeal
12 that's about to take place scheduled for March. He
13 wasn't -- he wasn't ready, nowhere near ready, you
14 know.

15 And -- and I'm thankful that he expressed that to
16 Mr. Barrett.

17 THE COURT: Uh-huh.

18 THE BAILIFF: He didn't even make me aware that
19 he was going to do it, but I'm thankful that he did.

20 THE COURT: Okay. I'm not familiar with
21 Dr. Mings one way or another, other than what's been
22 represented.

23 MR. BARRETT: I've used him before in a case up
24 here, and that was, like, four or five years ago.
25 It's been a while.

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1 MR. JOHNSON: Yeah, it was the Kentrell Johnson
2 case. He testified.

3 THE COURT: Okay.

4 MR. BARRETT: And we've used him over the past --
5 for a while. He's well known more in the Orange
6 County area.

7 THE COURT: Okay.

8 MR. BARRETT: And that's one of the reasons why
9 we had chose him because, you know, we've worked
10 together before.

11 But under the circumstances of what he's telling
12 me -- and I've tried to make it clear to him -- I
13 mean, I understand. Illness is illness. You have no
14 control over --

15 THE COURT: Right.

16 MR. BARRETT: -- that. But we need someone who's
17 in a position to do everything, because, again, it's
18 all about the client, and we need someone who is
19 ready.

20 THE COURT: Understood, especially considering
21 the gravity of what's at issue.

22 MR. BARRETT: Yes. Yes.

23 THE COURT: Mr. Johnson, what's your position on
24 all this?

25 MR. JOHNSON: Well, the only thing I would add,

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1 Judge, is when -- Mr. Barrett made me aware of this I
2 think last Friday. We had some depositions that were
3 scheduled in the case, and that's when I sent the
4 email to your judicial assistant.

5 THE COURT: Uh-huh.

6 MR. JOHNSON: Dr. Meadows is the doctor that we
7 hired to conduct an independent evaluation. He was
8 scheduled to conduct an evaluation on Monday.

9 And so given the fact that Dr. Meadows -- now
10 with Dr. Mings out of the equation, we don't really
11 know -- I mean, we know what their notice stated. But
12 we also recognized the fact that could change with a
13 new doctor.

14 THE COURT: Uh-huh.

15 MR. JOHNSON: So based on Dr. Meadows'
16 recommendation, you know, we cancelled that
17 evaluation, so we'll have to reschedule that. And
18 kind of the way it works is that we're going to wait
19 to hear from the Defense on what Dr. Bloomfield has to
20 say and what his findings are. And we'll reschedule
21 that so, you know, we have -- you know, so Dr. Meadows
22 knows what he's dealing with when he goes to conduct
23 his own evaluation.

24 THE COURT: Okay. What's your position on the
25 motion for a continuance?

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1 MR. JOHNSON: I don't object, Judge. If we
2 pushed this thing, I don't think there's any question
3 it will come back, so...

4 THE COURT: As Mr. Johnson knows, I tend to push
5 cases pretty hard to not continue them. But we're --

6 MR. JOHNSON: We were ready to go, so...

7 THE COURT: When you're talking about a death
8 penalty case, it's a whole different ball game. The
9 Supreme Court has even said death is different, and it
10 is different.

11 Considering the gravity of the case at issue, I
12 don't see that I have any choice but to continue the
13 case. So let's talk about when we're going to
14 continue it to.

15 MR. BARRETT: Yes, sir.

16 THE COURT: I know Dr. Bloomfield said he was
17 going to be ready in May.

18 MR. BARRETT: He could be ready in May.

19 THE COURT: I don't know what the State's
20 position is.

21 MR. BARRETT: Right.

22 THE COURT: Logistically, the Court -- I try to
23 segment these and bring in special panels for them.
24 And we will have a special panel coming on the 25th,
25 but...

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1 MR. JOHNSON: That actually works perfectly with
2 our schedule. I've got a trial in Putnam. It's a
3 date certain in April. And that's been continued a
4 number of times, and it's not going to get continued
5 again. So May would actually work perfectly with my
6 schedule. It'd be the soonest date, and it will come,
7 you know, right after the trial I have to do over
8 there with Judge McGillin next month.

9 THE COURT: Okay. So we're talking about 60 days
10 out. That should give the clerk enough time to issue
11 a new series of summonses for a separate panel.

12 Are we still talking about a week? Is everybody
13 confident we can get this done in a week?

14 MR. BARRETT: Yes.

15 MR. JOHNSON: Yes, sir. I think I've got 15
16 witnesses.

17 THE COURT: Uh-huh.

18 MR. JOHNSON: So you're talking, you know, a
19 couple days for our part, so... Of course, I don't
20 know what they have.

21 MR. BARRETT: And since -- I mean, guilt is not
22 an issue, besides the fact that he did confess to it.
23 So I don't see the Defense spending a lot of time on
24 those issues. Any questions that we would ask would
25 go straight to aggravators and mitigators, not to --

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1 THE COURT: Yeah, obviously the --

2 MR. BARRETT: -- whether or not he's guilty
3 because --

4 THE COURT: Obviously the Defense's case is the
5 pure mitigation --

6 MR. BARRETT: Right. Exactly.

7 THE COURT: -- and countering any aggravation.

8 MR. BARRETT: Exactly. So that should be fine.

9 MR. JOHNSON: The original trial on this case,
10 Judge, was only -- for the State -- was seven
11 witnesses. And, you know, obviously, we're dealing
12 with a little bit of a different thing. You want the
13 jury to have some idea of what the case is about.

14 THE COURT: Right.

15 MR. JOHNSON: But we're not necessarily going to
16 be retrying the case. But there wasn't a whole lot
17 that the State presented even in the first -- the
18 first trial, so...

19 THE COURT: The one I did a few weeks ago, it was
20 a push to get it done in a week. But every case is
21 different. Every cross-examination is different.
22 Every case has its own dynamics.

23 So if you-all are confident we can get it done in
24 a week -- let me look at the calendar for --

25 MR. BARRETT: The only caveat I have, Judge, is

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1 that I will be out of the country the last week in
2 April. Come back -- and then -- so the 29th to like
3 the first week in May.

4 THE COURT: It would not be early May.

5 MR. BARRETT: Okay.

6 THE COURT: That's not our trial term.

7 MR. BARRETT: Okay. That's the only caveat.

8 THE COURT: Bear with me for a moment.

9 MR. BARRETT: And I know my co-counsel -- he is
10 out the first week in June.

11 THE COURT: Oh, really? Okay.

12 We are looking at May 20. That's a Monday.

13 MR. BARRETT: Okay. That should give us plenty
14 of time.

15 THE COURT: With the jury selection, can we get
16 this done in a week?

17 MR. BARRETT: I don't see any reason why we
18 shouldn't be able to.

19 MR. JOHNSON: I believe so, Judge.

20 THE COURT: Okay.

21 MR. JOHNSON: I mean, obviously, jury selection
22 is always a wild card.

23 THE COURT: Right.

24 MR. JOHNSON: Usually -- I think your practice is
25 you panel for a day and a half. And usually our --

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1 THE COURT: Well, I don't really hope for a day
2 and a half.

3 MR. JOHNSON: I know.

4 THE COURT: But it tends to take a day and a
5 half.

6 MR. JOHNSON: Right. But usually your second
7 panel comes in like 1:00 or 1:30 on the second day.

8 THE COURT: I would only order up one panel. I
9 don't see where we couldn't get a jury selected with
10 one panel. Now, when I say "one panel" --

11 MR. BARRETT: How many people?

12 THE COURT: -- I'm talking about 60 people. And
13 the case -- because the case is so old -- and I'm
14 going off of history from the one I just did a few
15 weeks ago, which was a case that was very old. Same
16 thing, it was a redo of a penalty phase, post-Hurst,
17 that -- but for a few people that lived in the
18 neighborhood where it happened, no one had heard
19 anything about it.

20 And then, of course, you lose a handful of people
21 on death qualifying and a handful of people on
22 conflicts. But we didn't have any problem getting a
23 jury with a panel of 60.

24 What do you-all -- what are your --

25 MR. JOHNSON: I think out -- when we did Sean

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1 Bush, it was -- we got it on the first panel.

2 THE COURT: We got it on the first panel, so...

3 MR. JOHNSON: And that was a little bit more
4 recent in time.

5 THE COURT: Right. That had some publicity.

6 MR. JOHNSON: And, usually, you get people with
7 conflicts the longer you say your trial may last. And
8 here, if we're telling them a week, it shouldn't --

9 THE COURT: It's usually not that bad by way of
10 conflicts.

11 So I'm only going to summon enough people for a
12 panel of 60. I think we send out roughly 300
13 summonses. And it's sad to say that you only get
14 about 65, 70 people out of 300 summonses. But that's
15 the reality. And people get excused for whatever
16 reason.

17 But I'm not going to summon a second panel. If
18 we go into a second panel, we're not going to be able
19 to finish this in a week. So we'll keep our fingers
20 crossed on that.

21 So May 20th for jury selection at 9:00. And then
22 as soon as we're done picking a jury, we'll get
23 started with the trial.

24 MR. BARRETT: Are you going to status it before
25 then or just leave it as --

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1 THE COURT: Do you-all anticipate filing --

2 MR. BARRETT: I don't -- I don't anticipate
3 filing anything. I do -- I know we do have just one
4 motion.

5 THE COURT: Really? Well, we'll take --

6 MR. BARRETT: But that's a quick one.

7 THE COURT: We're going to take that up in just a
8 moment, that one motion.

9 But if you-all file anything as we approach
10 trial, send it to my office.

11 MR. BARRETT: Okay.

12 THE COURT: And then I'll try to find some time
13 for you to get it heard.

14 MR. JOHNSON: I can't think of anything offhand.

15 THE COURT: Do you want to keep Mr. McKenzie
16 here --

17 MR. BARRETT: Yes, Judge.

18 THE COURT: -- in the interim?

19 MR. BARRETT: Yes, Judge.

20 THE COURT: Okay. All right. So May 20. I'll
21 get a new trial order out on that.

22 And then the only motion I see pending is the
23 Defendant's Motion To Strike The State's Amended
24 Notice Of Aggravating Factors as untimely. And then
25 the State did a memorandum, which it filed at

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1 6:02 this morning.

2 MR. JOHNSON: Actually, Judge, it was after
3 midnight last night, but I guess you didn't get it
4 till 6:00.

5 THE COURT: It was e-filed -- e-filed at 6:02
6 a.m. That's what it says, so...

7 And I got it sometime this morning.

8 MR. JOHNSON: Yes, sir.

9 THE COURT: So I have not had a chance to read
10 it. But I'm sure you will tell me whatever is in
11 there.

12 MR. JOHNSON: Yes, sir.

13 THE COURT: All right. Are you ready to argue
14 that, Mr. Barrett?

15 MR. BARRETT: Judge, the argument is in the
16 motion itself.

17 THE COURT: Right.

18 MR. BARRETT: The statute says that the only way
19 it can be is for good cause shown. And as argued in
20 the motion, the -- the interviews that Mr. McKenzie
21 did -- and he actually did three. One was in a police
22 vehicle. And then there was one done at a station.
23 And then the last one was done, I think, in October of
24 the same year while he was in jail. That was the
25 third interview.

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1 But all of those information were obviously in
2 the State's possession prior to their filing the new
3 Notice Of Intent.

4 And, also, from going through the transcript --
5 and I think I have also in my motion the transcript --
6 from the transcript that I looked at of the trial, the
7 State attorney who tried that case was also aware of
8 the interviews and the case and what Mr. McKenzie said
9 in terms of how the incident occurred, the murders
10 occurred.

11 So none of this is new information to the State.
12 And, so, since it's not new information, then it's our
13 position that that would not be good cause shown to
14 amend.

15 THE COURT: And the statute you're referring to
16 is 782.04(1)(b) --

17 MR. BARRETT: Correct.

18 THE COURT: -- as well as Rule 3.181 of the Rules
19 of Criminal Procedure, which repeats what's in the
20 statute.

21 MR. BARRETT: Yes, Judge.

22 THE COURT: Mr. Johnson?

23 MR. JOHNSON: Yes, sir. Defense's argument
24 assumes that 784.04(1)(b) [verbatim] and Rule 3.81
25 [verbatim] applies to this particular case.

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1 As you know, the 782.04(1)(b) was promulgated --
2 enacted by amendment of the death penalty statute in
3 2016. And Rule 3.81 was also promulgated by the
4 Supreme Court shortly thereafter.

5 This case was filed in 2006. The defendant was
6 arraigned in February of 2007, and was actually tried
7 a few -- later that year. At that time -- the rule in
8 existence at that point in terms of the State filing a
9 notice of its intent to seek the death penalty was
10 Rule 3.202. It did not necessarily require the State
11 to file a notice of intent to seek the death penalty
12 within the 45 days.

13 The rule basically provided an incentive for the
14 State to do that within that time frame. And the
15 thing that the State would get in return is they would
16 get an opportunity for a mental health expert to
17 conduct an independent evaluation of the defendant if
18 they were going to present mental mitigation evidence
19 at trial.

20 Even if the State did not file within the 45
21 days, they could still file at a later time, and they
22 would just simply lose, potentially, the opportunity
23 to conduct that independent evaluation. And the rule
24 was very clear that failure to file within the 45 days
25 did not preclude the State from seeking the death

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1 penalty.

2 And at that time there was no requirement
3 whatsoever that the State file a list of aggravating
4 circumstances. And that's the way the law remained
5 throughout the original pendency of Mr. McKenzie's
6 case.

7 THE COURT: Uh-huh.

8 MR. JOHNSON: He was -- he was tried, he was
9 found guilty, and he was sentenced all in 2007. It
10 was not until 2017, after Hurst and after the
11 amendment of the statute and 3.81 was enacted that Mr.
12 McKenzie's sentence was overturned and is back before
13 the Court.

14 So it assumes the application of that statute and
15 that rule. And I provided to the Court the -- the
16 statute that was passed, 782.04(1)(b) -- in my
17 memorandum I lay out, essentially, the statute never
18 made clear that the legislature intended for that
19 statute to apply retroactively, which would be what
20 the Defense is trying to argue in terms of its
21 application in this particular case, that it is
22 somehow retroactive to the defendant's case.

23 And the -- and in order for the statute to be
24 retroactive, the legislature has to clearly
25 indicate -- when it passes the statute -- that it was

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1 not retroactive. And I cited a number of cases within
2 the motion --

3 THE COURT: Let me -- let me ask you a question.

4 MR. JOHNSON: Yes, sir.

5 THE COURT: Don't procedural changes apply
6 retroactively whereas substantive changes cannot?

7 And wasn't -- and didn't the Fifth DCA address
8 this -- I think it might have been Perry --
9 specifically dealing with the death penalty scheme,
10 when -- it might have been the State that was wanting
11 it to apply retroactively. I think somebody was
12 saying, well, you can't -- you can't take all these
13 new death penalty statutes and apply it to me because
14 my crime took place before all these statutes went
15 into place. And then I think the Fifth came in and
16 said, yeah, they apply retroactively.

17 And then Perry eventually went to the Supreme
18 Court --

19 MR. JOHNSON: Right.

20 THE COURT: -- on a different issue.

21 MR. JOHNSON: Well, I know that's been the
22 argument that attorneys have made about this.

23 But the -- in this particular case, the
24 legislature is the one that passed the statute. And
25 usually the legislature -- their -- they have -- their

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1 umbrella is substantive rules, whereas the Supreme
2 Court has control over procedural rules.

3 And in this particular case, the legislature --
4 they superseded the original rule --

5 THE COURT: Uh-huh.

6 MR. JOHNSON: -- and passed this rule -- this
7 rule, which, essentially, I would argue, makes it a
8 substantive rule.

9 Be that as it may, it's not that I'm just simply
10 making an argument based on some of these cases about
11 retroactivity.

12 There's two cases that I provided to the Court in
13 the packet which supports the argument that we're
14 making. The first one is Jackson versus State, which
15 is found at 256 So.3d 975. It's a First District
16 Court of Appeals case that was -- that was decided
17 last year.

18 In that particular case -- similar to
19 Mr. McKenzie -- he, the defendant, Jackson, was
20 indicted for first-degree murder in 2007. In March of
21 2007, almost exactly the same time frame that
22 Mr. McKenzie was indicted. And -- but the state did
23 not file its notice to seek the -- they actually did
24 file their notice to seek the death penalty a few days
25 later. But they did not file their list of

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1 aggravating circumstances -- which is what is at issue
2 here -- until three years later.

3 He was found -- he was convicted. He was
4 sentenced. His sentence was overturned, just like
5 Mr. McKenzie. And in that particular case, the state
6 argued that because -- they argued that the rules
7 should apply, that the state has to file their notice
8 of aggravating circumstances, and because they didn't
9 do that within 45 days of arraignment, then they
10 should be precluded from seeking the death penalty.

11 And the First District Court of Appeals held that
12 the 2016 amendment under section 78.204(1)(b),
13 requiring a notice, did not apply where the
14 arraignment occurred in 2007, which is exactly the
15 case here.

16 I also cited Varnadore versus State, which I
17 would concede is probably not quite as persuasive as
18 Jackson. It's found at 2019 Westlaw 178116. And the
19 reason I say that is because it is a per curiam denial
20 of a defendant's petition for writ of prohibition.
21 But it -- and that's a case out of Jacksonville. It's
22 actually -- that case is actually still pending today.

23 THE COURT: Okay.

24 MR. JOHNSON: And that was a case from 2012,
25 where the defense filed -- he was -- that defendant

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1 was arraigned in 2012, in March, and he was arraigned
2 shortly thereafter. The same day of his arraignment
3 the state filed a Notice Of Intent To Seek The Death
4 Penalty. And then about a year and a half later, the
5 defense filed a motion for statement of aggravating
6 circumstances. Now, this was before the law changed
7 requiring it.

8 And as you know, a lot of courts -- you know, the
9 cases said that the courts had the discretion to
10 require that, and the court required it. But the
11 state didn't file that for another five years --

12 THE COURT: Uh-huh.

13 MR. JOHNSON: -- after the law changed.

14 And so the defense in that case sought to
15 preclude the state from seeking the death penalty.
16 And when the judge denied the motion, they took --

17 THE COURT: The state never filed a list of
18 aggravating circumstances until the case came back on
19 the Hurst -- the post-Hurst remand.

20 MR. JOHNSON: That's right. And when the defense
21 filed their motion to preclude the state from seeking
22 the death penalty, three days later they filed their
23 list. And so the judge denied the defense's motion to
24 preclude. The defense sought a writ of prohibition to
25 the First DCA. And the First DCA denied the writ

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1 based on Jackson.

2 THE COURT: I haven't read this, obviously. You
3 just gave it to me, but...

4 MR. BARRETT: Judge, I would -- I would argue
5 that --

6 THE COURT: Yeah, let -- he's not done.

7 MR. BARRETT: I'm sorry.

8 THE COURT: Let me -- let me ask him a question.
9 I'll give you chance to respond.

10 I haven't read the order, obviously, in
11 Varnadore, the trial court order.

12 But was the State seeking to argue -- when they
13 were re-doing the penalty phase post-Hurst, was the
14 State seeking to argue any aggravating factors that it
15 had not argued in the original trial?

16 MR. JOHNSON: I don't -- well, in --

17 THE COURT: I don't know if you can tell from the
18 order.

19 MR. JOHNSON: In Varnadore, they never -- they
20 haven't even tried the case. They've never tried the
21 case.

22 THE COURT: Okay.

23 MR. JOHNSON: It's been pending --

24 THE COURT: It's a 2012 case.

25 MR. JOHNSON: -- since 2012.

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1 THE COURT: I see. I see. It wasn't --

2 MR. JOHNSON: Now, in the Jackson case, I'm not
3 aware because the case doesn't exactly make that
4 history clear.

5 THE COURT: Okay. Do you have the original
6 statute that would have been in effect in '07? Do you
7 have a copy of that?

8 MR. JOHNSON: I don't. I did provide the Court a
9 copy of the House Bill for 782.04.

10 THE COURT: It's 2016 here, but I guess it was
11 2017 when it maybe took effect. Maybe 2016. I don't
12 remember.

13 MR. JOHNSON: I believe the governor signed it --
14 and I had that listed -- in May of '16.

15 THE COURT: I guess it was '16, because we tried
16 the Bush case in --

17 MR. JOHNSON: Yes, sir.

18 THE COURT: -- the summer of '16.

19 MR. JOHNSON: And that -- March the 7th of 2016.

20 THE COURT: Okay. Or was it '16 or '17 we tried
21 the Bush case? I can't even keep them straight.

22 All right. Was there anything further?

23 MR. JOHNSON: Not really in terms of argument. I
24 mean, the bottom line is is that under the previous
25 statute, which I think -- which I believe governs this

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1 particular situation, the State is not even required
2 to list its aggravating circumstances. We have chosen
3 to do so. And we've also -- in determining from the
4 evidence that there was additional aggravating factors
5 that we believe we can prove beyond a reasonable
6 doubt, it's our intentions to add that to the list of
7 aggravating circumstances, so...

8 THE COURT: I know there are a number of cases in
9 other scenarios where the courts have said that the
10 legislative amendments were procedural in nature and
11 they applied retroactively. A couple I can think of
12 was the legislative change of the expert witness
13 standard to the Daubert standard, which now does --
14 that isn't there anymore.

15 MR. JOHNSON: Right.

16 THE COURT: But I believe that a number of the
17 courts statewide said that that legislative change was
18 procedural in nature and therefore was retroactive to
19 cases that are were pending prior to the amendment.

20 Isn't that also the same -- I guess there are
21 cases on this -- with regards to the amendment of the
22 stand your ground statute that shifted the burden to
23 the state from the defense?

24 I think the courts have said that's applying
25 retroactively to cases that were pending prior to the

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1 statutory --

2 MR. JOHNSON: I know that a lot of those have --
3 those have been arguments that have been made, Your
4 Honor. A lot of times what is substantive, what is
5 procedural sometimes can be a bit confusing.

6 All I can say here is that in at least one
7 appellate case, the Jackson case, where the court
8 dealt with this issue foursquare, the appellate court
9 said that the amendment -- that that requirement does
10 not apply where the arraignment took place prior to
11 the effective date of the statute.

12 THE COURT: Okay. Thank you.

13 All right. Mr. Barrett?

14 MR. BARRETT: Judge, the only additional thing I
15 would like to point out, I would suggest that the
16 situation I'm arguing here is different from Jackson.
17 I'm not talking about whether or not the State timely
18 filed the Notice Of Intent. And, granted, we file
19 motions to try and challenge whether or not they can
20 file it at this time.

21 THE COURT: Right.

22 MR. BARRETT: And I agree with the State, that
23 the previous -- all it did is basically -- wouldn't
24 allow them to have their own expert evaluate.

25 But what I'm saying, we're talking about an

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1 amendment. My argument is -- Jackson is talking about
2 just to file another notice itself.

3 What I'm saying to the Court is that the State
4 filed a notice in this case. Okay. At the time they
5 filed the notice, all the information that they're
6 using to do the amended was available to them at that
7 time. What I'm arguing is that to amend the notice
8 needs to be done -- needs a good faith reason -- a
9 good cause reason -- excuse me --

10 THE COURT: But back --

11 MR. BARRETT: -- to amend it, obviously.

12 THE COURT: -- back in '07 they didn't even need
13 to give you notice of aggravating circumstances.

14 MR. BARRETT: Back then, Judge, also -- again, as
15 the State argued -- presented, it would just prevent
16 them from --

17 THE COURT: If they did do it.

18 MR. BARRETT: -- being able to.

19 But the changes are a lot different. It goes
20 beyond just preventing them from having their expert
21 if they don't file a notice.

22 If the case had just originated today and the
23 time passed before they filed a notice, it would have
24 prevented them from seeking.

25 So I'm not arguing -- I'm not arguing the

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1 question about should they filed a notice on a case
2 that arraignment was years ago. What I'm saying --
3 arguing is that to amend the notice that they filed
4 after the case came back under Hurst -- to amend that
5 notice, they need to show good cause. Basically says
6 what has changed from the time you looked at this case
7 and made a decision that you still wanted to seek the
8 death penalty.

9 THE COURT: If the 2016 statute applies.

10 MR. BARRETT: Right.

11 THE COURT: You're arguing the 2016 statute
12 applies. They're arguing it doesn't apply
13 retroactive.

14 MR. BARRETT: Right. I'm arguing it does, and
15 that the notice -- again, from the motion that --
16 Jackson doesn't apply in this case, because I'm
17 talking about an amended notice, not the notice
18 itself, at least at this point, so...

19 Jackson talks about them being able to file a
20 notice seeking the death penalty. I'm saying, okay,
21 even if the Court says fine, you can file the notice
22 to seek the death penalty, but if you want to amend
23 the notice at some time in the future, you need to
24 show good cause.

25 Why should you be allowed to -- to amend it? And

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1 I'm saying there is no good cause because all the
2 information was available to them at the time it was
3 originally filed.

4 THE COURT: Are you aware of any decisions, other
5 than Jackson, from any of the other DCAs in the state?

6 MR. BARRETT: Not addressing this, because --

7 THE COURT: Addressing this statute.

8 MR. BARRETT: To be honest, Judge, this is the
9 second time I've actually seen this. In fact, the
10 other case is in Orange County that is pending. And
11 I've also filed a notice. In fact, in that case I
12 think they filed amendment like two or three times.

13 THE COURT: Uh-huh.

14 MR. BARRETT: So, no, I'm not aware of any,
15 because I've never had to deal with this issue
16 normally.

17 You know, the State generally files basically the
18 same aggravators that they usually file. Or if they
19 are going to change it, having reviewed the file over,
20 when they file the new notice with the listing, they
21 put all the aggravators that they intend to go forward
22 on. And that -- so, no.

23 THE COURT: I know that you argue Jackson is
24 distinguishable --

25 MR. BARRETT: Yes.

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1 THE COURT: -- from the instant case.

2 But would you agree with me that there being no
3 other decisions from other DCAs that Jackson would be
4 binding on this Court?

5 MR. BARRETT: No, Judge, because, again, Jackson
6 is talking about the filing of a notice. I'm arguing
7 that filing of an amendment to the notice takes it out
8 of Jackson.

9 And I'm -- I'm not just saying whether or not
10 they could file the notice. I'm saying once you have
11 made the decision that this is -- these are the
12 aggravators that you intend to go forward on, then you
13 shouldn't be allowed to -- a month, two months -- if
14 this case took two years to go forward -- you
15 shouldn't be allowed to then amend that notice years
16 down the road with all the information that was
17 available to you at the time. You had that
18 information that would have allowed you to do that.

19 So that's what I'm saying, Jackson -- it was not
20 the controlling because I'm talking about amending the
21 notice itself.

22 THE COURT: I understand what you're saying.

23 Do you know if anybody is seeking review of
24 Jackson at the Florida Supreme Court? Do you have any
25 idea one way or another?

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1 MR. BARRETT: No, Judge.

2 THE COURT: Okay.

3 MR. BARRETT: Not to my knowledge.

4 THE COURT: All right. Mr. Johnson --

5 MR. JOHNSON: Couple of things, Judge.

6 THE COURT: -- you sound like you want to say
7 something.

8 MR. JOHNSON: Yeah, a couple of things.

9 Number one -- and Mr. Barrett is incorrect about
10 Jackson. It did not just involve a notice of intent
11 to seek death. It -- it involved the notice to list
12 the aggravating circumstances. So he's not correct
13 about that.

14 And I wanted to say this, too, just because I
15 believe I'm obligated to: There is one case,
16 Chantiloupe. Now, it does not -- it does not disagree
17 with my position. It is --

18 THE COURT: Chantiloupe?

19 MR. JOHNSON: I'll spell it.

20 C-h-a-n-t-i-l-o-u-p-e versus State. It's found at
21 248 So.3d 1191. I cite it in my memorandum.

22 THE COURT: 1191, is that what you said?

23 MR. JOHNSON: 1191, yes, sir.

24 It was case from 2017, so it postdates the -- the
25 amendment to the statute and the new rule.

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1 In that particular case, the state didn't file
2 their notice of intent to seek death and the list of
3 aggravators until 56 days after arraignment. Defense
4 filed their motion.

5 They had a hearing. The state came in and gave
6 its reasons why they were -- they did not comply with
7 the statute. The judge granted defense's motion to
8 preclude the death penalty.

9 The state took that up on appeal. And the court
10 said that the judge was within his discretion in order
11 to -- to grant the defense's motion.

12 But what's important about the Chantiloupe
13 decision is the court emphasized in that case that the
14 arraignment date was a critical factor in deciding the
15 case. And so what -- that case is distinguishable
16 because that case the defendant was charged and
17 arraigned after the effective date of the statute.
18 The court recognized that the answer might have been
19 different if the arraignment had taken place prior to,
20 so...

21 THE COURT: All right. Thank you, everybody.

22 I will take it under advertisement and dissect
23 these materials that I received. And we will leave
24 this set for May 20. We'll get a trial order out.

25 MR. BARRETT: Thank you, Judge.

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1 THE COURT: And if anything else gets filed let
2 me know and we'll get --

3 MR. BARRETT: And he's to remain in --

4 THE COURT: Yeah, we're going to have him stay
5 here.

6 MR. BARRETT: Thank you, Judge.

7 MR. JOHNSON: Thank you, Judge.

8 (The proceedings concluded at 4:05 p.m.)
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CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF FLAGLER)

I, Rhonda Bounds, Registered Professional Reporter, do
HEREBY CERTIFY that I transcribed the notes of Andrea
Gorman of the proceedings taken before The Honorable Howard
M. Maltz, Circuit Judge, and that the foregoing transcript
is a true transcript of said notes to the best of my
ability.

Signed this 17th day of March, 2020, at Bunnell,
Flagler County, Florida.

s/RHONDA BOUNDS, RPR
Rhonda Bounds, RPR
Seventh Judicial Circuit of Florida

Court Reporters, Seventh Judicial Circuit

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,
Appellee/Plaintiff,

Case No.: CF06-1864

Supreme Court Case No: SC20-243

v.

NORMAN BLAKE MCKENZIE,
Appellant/Defendant.

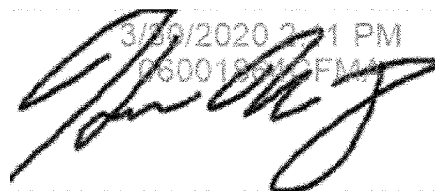
ORDER RESCHEDULING STATUS CONFERENCE

As a result of the current COVID-19 Emergency, and Florida Supreme Court Administrative Orders AOSC 20-13 and AOSC 20-17, this Court finds it necessary to reschedule the status conference currently scheduled for April 9, 2020 at 1:30 p.m.

Accordingly, it is ORDERED AND ADJUDGED that:

1. The status conference scheduled pursuant to the Florida Supreme Court's Order dated February 20, 2020, is rescheduled for May 8, 2020 at 1:30 p.m.
2. Those required to attend are the Clerk of Court (or designee from the appeal division) and appropriate court reporters. All attendees shall be prepared to discuss the status of the record on appeal.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 30 day of March, 2020.



e-Signed 3/30/2020 2:11 PM 06001864CFMA

CIRCUIT JUDGE

Filed for record 03/31/2020 02:44 PM Clerk of Court St. Johns County, FL

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Hon. John A. Tomasino, Clerk, Florida Supreme Court

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REQUESTS FOR ACCOMMODATIONS BY PERSONS WITH DISABILITIES If you are a person with a disability who needs an accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact Court Administration, 101 N. Alabama Ave., Ste. D-305, DeLand, FL 32724 (386) 257-6096, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the appearance is less than 7 days; if you are hearing or voice impaired, call 711. Hearing or voice impaired, please call 1-800-955-8770.

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SOLICITUD DE ADAPTACIONES PARA PERSONAS CON DISCAPACIDADES

Si usted es una persona con discapacidad que necesita una adaptación para poder participar en este procedimiento, usted tiene el derecho a que se le proporcione cierta asistencia, sin incurrir en gastos. Comuníquese con la Oficina de Administración Judicial (Court Administration), 101 N. Alabama Ave., Ste. D-305, DeLand, FL 32724, (386) 257-6096, con no menos de 7 días de antelación de su cita de comparecencia ante el juez, o de inmediato al recibir esta notificación si la cita de comparecencia está dentro de un plazo menos de 7 días; si usted tiene una discapacidad del habla o del oído, llame al 711.

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IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA,
Appellee/Plaintiff,

Case No.: CF06-1864

Supreme Court Case No: SC20-243

v.

NORMAN BLAKE MCKENZIE,
Appellant/Defendant.

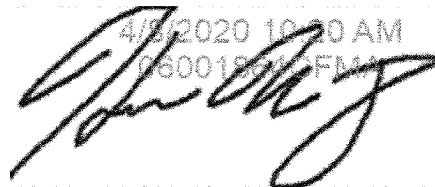
AMENDED ORDER RESCHEDULING STATUS CONFERENCE

As a result of the current COVID-19 Emergency, and Florida Supreme Court Administrative Orders AOSC20-13, AOSC20-17, and AOSC20-23 this Court finds it necessary to reschedule the status conference currently scheduled for May 8, 2020 at 1:30 p.m.

Accordingly, it is ORDERED AND ADJUDGED that:

1. The status conference scheduled pursuant to the Florida Supreme Court's Order dated February 20, 2020, is rescheduled for June 4, 2020 at 1:30 p.m.
2. Those required to attend are the Clerk of Court (or designee from the appeal division) and appropriate court reporters. All attendees shall be prepared to discuss the status of the record on appeal.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 08 day of April, 2020.



e-Signed 4/8/2020 10:20 AM 06001864CFMA

CIRCUIT JUDGE

Filed for record 04/08/2020 10:37 AM Clerk of Court St. Johns County, FL

Copies to:

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Hon. John A. Tomasino, Clerk, Florida Supreme Court

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REQUESTS FOR ACCOMMODATIONS BY PERSONS WITH DISABILITIES If you are a person with a disability who needs an accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact Court Administration, 101 N. Alabama Ave., Ste. D-305, DeLand, FL 32724 (386) 257-6096, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the appearance is less than 7 days; if you are hearing or voice impaired, call 711. Hearing or voice impaired, please call 1-800-955-8770.

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SOLICITUD DE ADAPTACIONES PARA PERSONAS CON DISCAPACIDADES

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1 IN THE CIRCUIT COURT OF THE
2 SEVENTH JUDICIAL CIRCUIT, IN
3 AND FOR ST. JOHNS COUNTY, FLORIDA
4 CASE NO.: 06001864CFMA
5 STATE OF FLORIDA
6 vs. APPEAL TRANSCRIPT
7 NORMAN MCKENZIE,
8 Defendant.
9 * * * * *
10 TRANSCRIPT OF SPENCER HEARING
11 BEFORE THE HONORABLE HOWARD M. MALTZ,
12 CIRCUIT COURT JUDGE
13 * * * * *
14 DATE TAKEN: NOVEMBER 22, 2019
15 TIME: COMMENCED AT 10:00 A.M.
16 CONCLUDED AT 11:36 A.M.
17 PLACE: RICHARD O. WATSON JUSTICE CENTER
18 4010 LEWIS SPEEDWAY
19 ST. AUGUSTINE, FLORIDA
20 STENOGRAPHICALLY
21 REPORTED BY: CHRISTIE SAMMARO, RMR, CRR
22 COURT REPORTER and NOTARY PUBLIC
23 * * * * *
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1 P R O C E E D I N G S

2 THEREUPON,

3 THE COURT: Good morning, everybody. We're
4 here this morning for a Spencer hearing in State of
5 Florida versus Norman McKenzie. This is case
6 CF06-1864. This was scheduled by order following
7 the jury's verdict.

8 Just by way of some procedural history in this
9 case, just so the record's clear -- and you all
10 know this, obviously -- in 2006 the defendant,
11 Mr. McKenzie, who is present this morning with his
12 counsel, was indicted for two counts of first
13 degree murder for Randy Peacock and Charles
14 Johnston. In 2007, the defendant was found guilty
15 of the two murders. The jury, at that time,
16 recommended a death penalty by a vote of ten to
17 two. Death sentence was imposed.

18 Following the Hurst decisions and Asay
19 decision and its progeny, the defendant's two death
20 sentences were set aside, a new penalty phase was
21 scheduled.

22 On August 29th of this year, at the conclusion
23 of the new penalty phase, the jury, for that
24 proceeding, unanimously found that death was the
25 appropriate sentence for each of the two first

1 degree murder counts. So we are here today on the
2 Spencer hearing.

3 Are all parties prepared and ready to go for
4 this Spencer hearing?

5 MR. JOHNSON: Yes, Your Honor.

6 THE COURT: Defense?

7 MR. BARRETT: Yes, Your Honor.

8 THE COURT: Okay. So, some housekeeping
9 matters before we proceed.

10 I did receive a presentence investigation from
11 the Florida Department of Corrections. Hopefully
12 you all received it as well. Did you all? Did the
13 Defense?

14 MR. BARRETT: Yes, Judge, I did. And, in
15 fact, I sent a copy to Mr. McKenzie, so he's also
16 had the opportunity to --

17 THE COURT: Okay. State receive it?

18 MR. JOHNSON: Yes, Your Honor.

19 THE COURT: So let me ask the Defense first.
20 Are there any exceptions or objections to the
21 content of the presentence investigation?

22 MR. BARRETT: No, Your Honor.

23 THE COURT: Okay. Mr. McKenzie, did you get a
24 chance to look at this?

25 THE DEFENDANT: Yes.

1 THE COURT: Do you have any exceptions or
2 objections to --

3 THE DEFENDANT: I think it's a joke, Your
4 Honor.

5 THE COURT: Well, other than that, the content
6 of it, do you have any --

7 THE DEFENDANT: I mean, there's things inside
8 of there that allude to the answer and
9 justification of the question based upon the
10 inmate's statements. There should be nothing in a
11 PSI that involves anything I say. Anything that
12 should be in that PSI should be done by an
13 investigator thoroughly. No way should anything I
14 say in a PSI be in there.

15 THE COURT: Okay. Are there any things, such
16 as your prior record, that you take exception with,
17 your education, your employment, your financial
18 status, your family history, your marital history,
19 military history, physical health, mental health,
20 residential history, substance abuse history, any
21 of those things that you take any issue with?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: Okay. Tell me what you take issue
24 with in that.

25 THE DEFENDANT: I take issue with the things

1 in there that they say that "according to the
2 defendant."

3 THE COURT: Can you be a little more specific?
4 Like as it pertains to your criminal history or
5 your residential history or --

6 THE DEFENDANT: I don't have a copy of it,
7 Your Honor, but -- basically that PSI, all it is,
8 is a copy of a PSI that was created in 1984.

9 THE COURT: 1984?

10 THE DEFENDANT: Yeah. That's it.

11 No one's done any legwork, no one's went
12 anywhere, no one's done anything to find out
13 anything about me. All they've done is rely upon
14 the PSI that was done based on a charge that I had
15 back in 1984.

16 THE COURT: Okay.

17 THE DEFENDANT: There's -- I mean, there's
18 nothing in there about my education, about my work,
19 about -- it says in here --

20 THE COURT: Let's do this then. I'm going to
21 give you an opportunity to speak, and I understand
22 that you're objecting to the PSI as a whole. Would
23 that be accurate, Mr. McKenzie?

24 THE DEFENDANT: Well, I'm objecting to
25 anything that I had to say --

1 THE COURT: Okay.

2 THE DEFENDANT: -- and that they're saying
3 that based upon, you know, what the -- he says,
4 this is what we're putting in there. How can that
5 even be in a PSI if I said it?

6 THE COURT: Okay. So you're objecting to the
7 things that it says that you said?

8 THE DEFENDANT: Yeah. I mean --

9 THE COURT: Okay. I'll make note of that.
10 Anything else from the Defense? Any other
11 exceptions or objections?

12 MR. BARRETT: No, Judge. I've dealt with the
13 PSI for a very, very long time.

14 THE COURT: Uh-huh.

15 MR. BARRETT: As a practice, my office never
16 comments to probation on a PSI.

17 THE COURT: Okay.

18 MR. BARRETT: We withhold the statements for
19 the Court.

20 THE COURT: For these proceedings.

21 MR. BARRETT: It is also common practice for
22 them to rely on police reports and the things in
23 the report, so there's nothing unusual.

24 THE COURT: Understood. State have any
25 exceptions or objections to the PSI?

1 MR. JOHNSON: No, Your Honor.

2 THE COURT: Okay. All right. And in my order
3 scheduling this hearing I did direct the parties to
4 submit their memorandums following this hearing, on
5 December 6. We talked about that last time. I
6 want to make sure that schedule still works for
7 everybody.

8 Mr. Barrett or anybody from the defense team?

9 MR. HAMBURG: It should, Judge. We're working
10 on our end.

11 THE COURT: Okay. The State?

12 MR. JOHNSON: No problem, Judge.

13 THE COURT: Okay. Very well. And the Defense
14 had filed a motion to allow some testimony by way
15 of Skype. I granted that order.

16 MR. BARRETT: Yes, sir.

17 THE COURT: Hopefully you know how to do that
18 because I don't --

19 MR. BARRETT: Yeah.

20 THE COURT: -- so.

21 MR. HAMBURG: And that witness, Judge,
22 actually, we've been in contact with her this
23 morning, and she's having medical issues and we're
24 not going to be able to do that, so we're going to
25 submit something else on that witness's behalf. So

1 we won't even be doing that.

2 THE COURT: Okay.

3 MR. BARRETT: And just so the Court knows, in
4 anticipation of this being a possibility, because
5 we did know she had some health issues, I did send,
6 and the State has received copies of what we intend
7 to submit on -- which is a statement that she would
8 have wanted to present to this Court and that we've
9 discussed with Mr. McKenzie --

10 THE COURT: And you have that present --

11 MR. BARRETT: Yes, Judge.

12 THE COURT: -- so when we get there?

13 All right. Anything else from a housekeeping
14 standpoint that we need to take up before we get
15 into any evidence, testimony or argument?

16 MR. JOHNSON: I don't believe so, Judge.

17 MR. BARRETT: No, Your Honor.

18 THE COURT: Okay. Is Defense ready to
19 proceed? Do you have some other witnesses today?

20 MR. BARRETT: We have just one witness, Judge.

21 THE COURT: Okay.

22 MR. BARRETT: Dr. Scully will testify.

23 THE COURT: It was Dr. Scully-Danziger, if I
24 recall, last -- from the earlier proceedings.

25 Okay. Dr. Scully-Danziger, if you'll be so

1 kind as to take the witness stand.

2 MR. BARRETT: Judge, if we may, I wasn't sure
3 whether or not Mr. McKenzie would be testifying.
4 He just informed us that he is going to testify, so
5 we would ask to take Mr. McKenzie's testimony
6 before we do.

7 THE COURT: Is the State going to call any
8 witnesses or have any testimony?

9 MR. JOHNSON: I just have a couple of victim
10 impact statements, Judge, that I'll just give to
11 the Court at the appropriate time.

12 THE COURT: Okay. So you're not going to read
13 them in; you're just going to hand them to the
14 Court?

15 MR. JOHNSON: Yes, Your Honor.

16 THE COURT: Have you shown them to the Defense
17 already?

18 MR. JOHNSON: I have, Your Honor.

19 THE COURT: Okay. Does the Defense have any
20 objection to the content of the victim impact
21 statements from the standpoint of any legal
22 objections?

23 MR. BARRETT: No, Judge, just other than
24 objections that was made in motions previously.

25 THE COURT: Okay. Very well.

1 All right. So let's start with the Defense.
2 Did you want to call the defendant first or
3 Ms. Scully -- or Dr. Scully --
4 MR. BARRETT: We're going to call Mr. McKenzie
5 first.
6 THE COURT: Okay. Mr. McKenzie, you want to
7 take the witness stand right here? And --
8 THE DEFENDANT: I'm sorry for the clothes.
9 THE COURT: You don't have clothes that fit
10 today, I guess?
11 THE DEFENDANT: Yeah. Where am I going,
12 around here?
13 THE COURT: Right over here's fine. If you'll
14 raise your right hand, please.
15 Do you solemnly swear or affirm that any
16 testimony you give today will be the truth, the
17 whole truth, and nothing but the truth?
18 THE WITNESS: I do.
19 THE COURT: Thank you. You can be seated.
20 All right. Mr. Barrett, you may inquire.
21 MR. BARRETT: Thank you, Judge.
22 NORMAN B. MCKENZIE,
23 having been first duly sworn, was examined
24 and testified upon his oath as follows:
25 DIRECT EXAMINATION

1 BY MR. BARRETT:

2 Q Good morning, Mr. McKenzie.

3 A Good morning.

4 Q For the record, your full name?

5 A Norman Blake McKenzie.

6 Q And how old are you right now?

7 A 55.

8 Q And at least on this case, how long have you

9 been in the Department of Corrections?

10 A In the Department of Corrections, I believe it

11 was November 22nd, 2007. I was arrested on October 6th,

12 2006, for this charge.

13 Q And you recently got married; correct?

14 A Yes.

15 Q And what's your wife's name?

16 A Claudia Cornelia Goecke.

17 Q And we kind of briefly talked about her

18 wanting to testify on your behalf, but she has some

19 health issues that prevented that; is that correct?

20 A Yes. She was just recently diagnosed with

21 cancer and she's going through treatment right now.

22 Q You've sat through the trial and you've heard

23 the testimony of witnesses and you've also heard the

24 testimony of Dr. Meadows in regards to your addiction?

25 A Yes.

1 Q I'm not going to go through all of the factors
2 in your addiction because we have also heard from
3 doctors talk about it, but you started using drugs very
4 early; correct?

5 A Yes.

6 Q Okay. And, just generally, what kind of drugs
7 have you actually used?

8 A I mean, my first use of drugs was something I
9 found. I found it in a forest. But, I mean, I really
10 don't even count that as a drug use, but it was a drug
11 and I did use it.

12 But there were years that went by after that
13 that I didn't use any other drugs. And I guess you
14 could say that I basically started using drugs on a
15 daily basis probably around the age of nine, maybe not
16 daily, but certainly by the age of 10 and 11 I was using
17 drugs every day.

18 Q Now, at some point -- we know you have spent a
19 lot of time in the Department of Corrections?

20 A Yes.

21 Q And in the interviews that we saw, there was
22 some discussion about crimes you have committed and how
23 they are connected to the drugs.

24 A Yes.

25 Q Can you just talk to us just kind of briefly

1 about that?

2 A I never committed a crime in my life in a
3 sober state of mind.

4 Q So all the offenses that you have done in the
5 Department of Corrections, it was a drug --

6 A Absolutely.

7 Q We have also heard testimony about this
8 crime --

9 A Yes.

10 Q -- and about your not having gotten any kind
11 of a treatment -- drug treatment.

12 Were there programs in DOC during the time you
13 were there that addressed the drug issue?

14 A Well, you know, I mean, the programs that are
15 available in the Department of Corrections looks really
16 good on paper, but -- theoretically -- I mean,
17 theoretically they're great. But, in practicality, the
18 way they happen in prison systems, it's -- it's not --
19 it's not anything like a civilian would understand.

20 Q Okay. And since we are all civilians and none
21 of us have actually spent time in prison, though we have
22 visited quite a few times, could you just give us an
23 idea, when you say a civilian wouldn't understand, what
24 type of program --

25 A Well, I mean, I don't really want to be, you

1 know, vulgar, or anything like that, but there's no
2 other way to say it, you know. If there's two guys who
3 are involved in a romantic relationship and one lives in
4 one dorm and one lives in another dorm, what they'll do
5 is they'll go to these meetings that are supposed to be
6 for drug, you know, addiction and stuff. And so what
7 you have is people having sex at your, you know, AA
8 meeting and your NA meeting.

9 And so it's not -- and you can't protest it.
10 You can't sit there and say, my God, what are you doing,
11 because if you do, you're going to wind up with a knife
12 in you that night.

13 So it's not like -- yeah, there are programs
14 available. There are. And there are -- there are
15 psychological programs available to help you, but it's a
16 joke. It's -- it's not a --

17 Q There was also some talk, at least in the
18 testimony, about stigmas attached to some of these
19 programs.

20 A Yeah.

21 Q Is there stigmas attached --

22 A Because if you go there, people are assuming
23 that you're going there to have sex with another man,
24 you know.

25 Q Did you actually go through any of these

1 programs?

2 A I tried, yeah. Sure.

3 Q And --

4 A At one point in time in the state of Florida
5 it was required for you to go to one of these programs
6 in order to get your full allotment of gain time. If
7 you didn't go to these places, then you only got a
8 certain amount of gain time, not your full allotment.

9 So there were times that I did go, but simply
10 because I needed all that gain time in order to get out
11 of prison as quickly as possible. But once the State
12 stopped that requirement in order to get that gain time,
13 I stopped going, you know.

14 Q Did you learn or gain anything from the
15 program? Was there anything in it that helped you with
16 your addiction?

17 A There was -- there was no leadership -- like
18 I've been to NA meetings on the street right here in
19 this town. You know, right off of Old Moultrie there's
20 a couple places I've been to.

21 But there's never, ever, ever any kind of
22 organized meeting that takes place in -- and I'm not
23 saying that at all prisons. I've never been to anything
24 but level five institutions. I've never been to a
25 lesser institution. They've always been level fives.

1 So I can't say about what happens at lesser
2 security type institutions. I can only testify about
3 where I've been and the types of facilities I've been
4 in, and they are not the kind of places where you go in
5 and sit down and have a meeting where you say, hi, my
6 name's Blake and I have a drug problem. It's just not
7 happening.

8 Q We heard, again, from experts that testified
9 on both sides that you had discussions with them, and
10 part of it involved you telling them that prior to these
11 crimes, these offenses, you were -- actually had a very
12 good job?

13 A Yeah. I mean, I've always worked all my life.
14 I've never been one to not have a job. I always worked.

15 Q What type of job were you doing prior to these
16 offenses?

17 A I worked for a firm out of Jacksonville,
18 Florida, called Johnson-Graham-Malone. And, ironically,
19 I was hired by Johnson-Graham-Malone because I refused
20 to continue working for a firm that I was working for
21 here in St. Augustine.

22 I was building Palencia. And there's, like,
23 nine buildings that are four stories tall, with garages
24 underneath of them, in the front part of Palencia.
25 They're condominiums.

1 I was building those buildings. I found one
2 of the guys who were working on my jobsite with drugs.
3 He tried to hide them in my jobsite trailer.

4 I didn't say anything to him or, you know,
5 call the police, but I told him, listen, here's your
6 drugs. Get off my jobsite. You're fired.

7 Well, the guy who owns the company, he merely
8 moved him to another jobsite, and then I lost my
9 authority on that jobsite.

10 So I wound up telling -- looking for a
11 different job, and I got a job with
12 Johnson-Graham-Malone that same day when I found out my
13 authority had been negated on the jobsite.

14 And Mike Graham came down to Jacksonville and
15 interviewed me that day right there off of State
16 Road 16, and he -- he said, you know, yeah, what's it
17 going to take for me to hire you? And I handed him one
18 of my direct deposit slips and I said, you've got to
19 beat that. And he says, I'll beat it by \$1,000. And I
20 said, that's good enough for me.

21 And I said, I just need 24 hours to give you
22 an answer or not, and so he said, yeah, take it.

23 And I went and called my parole officer and I
24 asked him if I could travel, and he agreed to allow me
25 to travel.

1 And Mike Graham gave me my first project as a
2 superintendent in Gainesville, Florida, 51 acres,
3 \$75 million project, and I built it and --

4 Q As part of your job, I think there was some
5 testimony about blueprints, something related to
6 blueprints?

7 A I mean, any -- if you're a superintendent or,
8 you know -- or any kind of guy that runs anything on a
9 jobsite, you're going to know how to read blueprints.
10 For me to sit here and say that I know how to read
11 blueprints, that's not really saying much in the world
12 of construction. Everybody reads blueprints.

13 Q Okay. But you were -- that's part of what you
14 did --

15 A Sure. Absolutely --

16 Q -- with that job?

17 A -- you know, I mean, yeah.

18 Q There was also some testimony about donations
19 of voluntary stuff you've done. Could you tell us --

20 A Well, there's -- one of my jobs that I had to
21 do working for Johnson-Graham-Malone, I had to deal with
22 the investors. And I think one of the investors, you
23 know, they had invested, like, \$45 million in the
24 project, and everybody else -- there were like 15 other
25 investors after that, and they had invested things going

1 all the way down to probably \$1 million into the
2 project.

3 And so when these investors would come, it
4 would be my job to, you know, walk them through the
5 jobsite and see if there was anything that they liked or
6 didn't like about how the project was proceeding.

7 And one of the guys who came, he was one of
8 the highest investors, he didn't like the columns that
9 were being put in. And so he wanted them taken down,
10 and he wanted me to set up mock columns in order for him
11 to choose from that he could like other than that. All
12 right?

13 So I took all the columns down off of the 19
14 buildings that were there, and we put them back in the
15 boneyard. When Mike Graham showed up on the jobsite
16 later on that week --

17 Q You talk even faster than I do. Could you
18 just slow down a little bit?

19 A All right. When Mike Graham -- this is a lot
20 of stuff. All right? So I'm trying to, you know, be
21 frugal with time here. Okay?

22 And Mike Graham came on the job, and I took
23 him back to the boneyard -- and each of these columns
24 cost \$1,000 each. All right? These are load-bearing
25 columns, and they're -- they come with capitals and

1 bases and everything. All right? So they're not
2 anything to sneeze at.

3 And I said to Mike, I said, Mike, listen, I'm
4 with a girl that I've been with for about nine years and
5 she has three sons. And one of them has a bit of a
6 learning curve problem and he's going to Sebastian
7 Middle School, and she wants to hold him back in school
8 because he's having problems -- you know, not
9 academically, but adjusting with the children. And so
10 she thinks that the child -- if she held him back in one
11 grade, that he would be in an intellectual level with
12 the children of that age rather than the children his
13 own age, you know.

14 And -- but we also had another option. There
15 was a school being built here in town called ABLE
16 Charter School, and we had a chance to get Joel in that
17 school. But the problem was, is that the school wasn't
18 built yet. And the only way it was going to be built is
19 that the parents of the children who were going to be
20 going to this school had to participate in building the
21 school.

22 And so I wound up doing all the trim work, I
23 hung the doors, I did all their, you know, little caps,
24 like, for the outlets and stuff like that. And I
25 donated 15 columns.

1 I got the columns from Mike Graham. I didn't
2 steal them or anything. I asked Mike Graham about it.
3 I explained to him the whole situation just like I did
4 to you guys, and he said, yeah, man, I think it's an
5 admirable thing that you want to do that. Yeah, you're
6 more than welcome to the columns.

7 So I took the columns. Now they're on the
8 building right now here in St. Augustine.

9 I didn't install them. I don't want to imply
10 that I did.

11 BY MR. BARRETT:

12 Q But you were involved with those columns being
13 donated?

14 A Yeah. All I did for the building is I hung
15 the doors, I hung the trim, and I did all the -- it was
16 simple stuff, like outlets and switches and stuff like
17 that, but ...

18 I didn't have a lot of time to donate to the
19 building. I probably put in 50 hours.

20 Q How long did you work for that company, the
21 second company?

22 A Oh, Johnson-Graham-Malone?

23 Q Yes.

24 A Probably about two and a half years.

25 Q Why only two and a half years? What happened?

1 A I got arrested for this charge.

2 Q Did you at any point get fired from that

3 company?

4 A I got let go on that project with the promise

5 that I would be called back when phase II began.

6 Q Were there any situations in any of the jobs

7 that you had where you may have been let go because of

8 some kind of a drug issue?

9 A Yeah, that was the reason why I got let go.

10 Q Okay. So you had -- up to that point did you

11 stop using drugs and --

12 A Never.

13 Q Okay. So you were always, constantly using

14 drugs?

15 A Yes.

16 Q Why were you still using drugs?

17 A I'd love to know the answer to that.

18 Q Was it because you just enjoyed the thrill or

19 was it just --

20 A No, it has nothing to do with the thrill. I

21 mean, I -- I'm -- no one has fun taking a \$42,000 Nissan

22 Titan and running it into a bridge and totaling out a

23 brand-new truck.

24 Q And that was a vehicle that you had owned?

25 A Yes.

1 Q And when that vehicle crashed, you were on
2 drugs at the time?

3 A Absolutely. And I was so on drugs that I
4 refused any -- I mean, I hit an oak tree at 60 miles an
5 hour, asleep at the wheel, with a seat belt on, head-on.
6 My truck came to a stop, dead stop, 60 miles an hour
7 impact, and I crawled out of the truck. The truck was
8 totaled. The insurance company totaled it.

9 And the police showed up and I refused any
10 kind of medical treatment and was able to -- the only
11 thing the cop was really interested in is he walked over
12 to the driver's side door, he opened it up and he looked
13 to see if the seat belt was hanging.

14 So if you have an impact in a car and you're
15 not wearing your seat belt, it's not going to hang.
16 It's going to be normal, just like it is when you get in
17 it. But if you were wearing your seat belt at the time
18 upon impact, they're going to know that you had your
19 seat belt on. That's all he was interested in is did I
20 have my seat belt on.

21 Q What kind of drugs were you using? Do you
22 remember?

23 A Mainly -- mainly cocaine and -- I mean, I
24 think I had marijuana with me, but I didn't use it, you
25 know. I didn't use it. I mean ...

1 Q Now, let's fast-forward to around the time of
2 this incident. Again, you've seen the videotape. There
3 was some discussion about when you started using
4 constantly around that time frame. Do you recall?

5 A Yeah, I started using probably the second week
6 of July.

7 Q And, again, cocaine mainly?

8 A Yeah. I mean, I'm not trying to say that I
9 didn't do other drugs. I'm sure that I probably did
10 meth a few times. I'm sure that I probably smoked
11 marijuana. I think I did ecstasy a couple of times.
12 It's not really that -- if you brought it in the house,
13 I did it.

14 Q How much drugs were you using?

15 A I think probably -- it's not -- it's not hard
16 to say about \$1,000 a day, easy. But you have to
17 understand that when I say I was doing \$1,000 a day, I
18 probably gave a lot -- a bit of it away too.

19 You know, I mean, I'm not sitting here trying
20 to say that I'm some super human person that can do that
21 amount of drugs, you know.

22 Q Are you saying you were spending that kind of
23 money --

24 A Absolutely.

25 Q -- daily?

1 A I was spending that kind of money every day
2 and -- but I'm not saying that I was doing that kind of
3 drugs. There were a lot of people around me and there
4 were a lot of hangers-on and I gave a lot of stuff away.

5 Q Now, during the murders itself, going straight
6 to the day of the murders, were you using drugs?

7 A The day of the murders?

8 Q Yeah.

9 A Absolutely.

10 Q Okay. Before you went over to these
11 gentlemen's home, were you using drugs?

12 A Yes.

13 Q Roughly, about how much, do you recall?

14 A I think that I had probably been on drugs for,
15 I don't know, eight or nine days, with no sleep.

16 Q I think there was also some discussion about
17 you falling asleep at some point with a needle?

18 A Yeah. I mean, that -- I mean, that -- that --
19 but that -- that took place at -- I couldn't even tell
20 you when that took -- that took place in Gainesville. I
21 fell asleep at the Extended Stay hotel and -- with a --
22 I was -- I remember trying to shoot the shot, and I fell
23 asleep with the needle in my arm and woke up probably 15
24 hours later with the needle still there and then I shot
25 it --

1 Q Okay.

2 A -- you know.

3 Q And, again, you saw the videos. Was that the
4 first time you saw those videos that was played at the
5 trial?

6 A Yes. When we were here in this trial, that's
7 the first time I ever saw those videos.

8 Q What was your reaction to seeing yourself in
9 those videos?

10 A It's -- you know, it's -- there's a -- a gamut
11 of feelings, you know. I mean, I -- I don't like seeing
12 myself like that. I don't like that person, you know.
13 It's sad. It's really, really sad. It's really sad
14 what happened and it's really sad that -- that I don't
15 have a better answer to you for why I'm on drugs, you
16 know.

17 Q I know during your first trial -- I don't
18 think you -- you didn't testify in your first trial;
19 correct? I know you represented yourself.

20 A No, I didn't testify at the first trial. I
21 represented myself.

22 Q If you had the opportunity to, is there
23 anything you would like to say to the family of both of
24 these gentlemen?

25 A My God, man, I wish that they would know me as

1 a human being and know me personally, and they would
2 know that the guy that happened -- that did that stuff,
3 you know, it wasn't a man. It wasn't -- it wasn't me.
4 I mean, it was me. I'm not saying that. All right?

5 But I would never, never have done nothing
6 like that in a -- in a sober state of mind. I would
7 have never hurt those guys.

8 They were good guys. I mean, we -- we
9 disagreed on things. Okay? We did. And -- but they
10 were good guys, man. They were perfect guys, you know.

11 Q Is there anything you would like to say to the
12 Court as a final word?

13 A I mean, I'm just -- I don't know what to say,
14 you know. I mean, there's -- I'm actually a Republican.
15 You know? It's hard for me, you know, to sit here
16 and -- and -- and -- and face this kind of stuff because
17 I know how I feel about it. You know?

18 I'm a rare person on death row. Rare. I
19 mean, there's guys that don't even want to talk to me
20 because they know how I feel. You know? I can't sit
21 here and tell these people to want something for me that
22 I hardly not even want for my damn self, you know. I'm
23 sorry. All right?

24 But I just -- I wish it would have never
25 happened. I do. Those -- they were good people. They

1 were. And --

2 Q Do you believe you have changed since that
3 person was on that video?

4 A You know, my wife asked me, you know, if I got
5 out, would I do drugs. Do you know how many times I've
6 said when I got out I'm not going to do drugs? But I
7 did drugs. You know? I did drugs. And it -- it's a
8 crazy, crazy thing, you know, to know that I'm doing so
9 good in life and -- I mean, I was driving down
10 University Boulevard in Gainesville, and I pulled up to
11 a red light, and a guy in a car next to me, we nodded at
12 each other. And the next time I -- we were still at the
13 red light. The next time I looked over at him, he was
14 holding a bag of dope. You know? And I hold up my cell
15 phone and said, "number."

16 And that's how it began. It's not like I went
17 and, you know, I'm going to go find drugs, you know. I
18 don't know, maybe I just look like a guy who does drugs.

19 The crazy thing is, though, when I was around
20 the people who were doing drugs, they thought I was a
21 cop. They'd say you're in too good of shape to be a
22 drug addict, you know.

23 But they had no idea that I had just spent 12
24 years in prison. And the crazy thing is that I didn't
25 do drugs in prison. I don't do drugs now. You know?

1 I don't -- I don't understand -- I don't
2 understand it. I don't know why it is, you know. I
3 don't know why.

4 I mean, I started injecting drugs when I was
5 16 years old, I think, and the moment that I -- and I
6 remember the guy who was there. They were men, they
7 were in their mid 20s, you know, and we were playing
8 cricket, shooting darts and stuff, and they made some
9 meth -- bathtub meth. I even contributed to, you know,
10 financing it. It was only like 30 bucks. It took five
11 of us to come up with 30 bucks together.

12 But they went out and bought all of the stuff
13 that needed it, you know. I could sit here and tell you
14 everything it was to make it, but it's neither here nor
15 there. But I remember when it was made.

16 And they were all shooting right away, and he
17 said to me, he says, man, you know, this ain't the kind
18 of drug you snort, you know. He said, and I'm not going
19 to tell you you can't do it because I wouldn't have
20 wanted anybody to tell me that when I was younger, you
21 know. He said, but if you want to do it, you can do it,
22 you know.

23 And I did it. And it changed my life. I've
24 never, ever, ever been able to have control over not
25 doing it ever again. Never. You know, I mean, it's --

1 something happened and I can't -- I left Texas shortly
2 after that and came to Florida, and next thing you know,
3 I'm back into this cocaine -- this is years and years
4 ago, back when there was really no regulation on the
5 amount of cocaine coming into the United States. And
6 I'm in the heat of it. I'm living in Fort Lauderdale,
7 South Florida, and I lived right on the canal where it
8 comes into. And I was just involved in it deeply,
9 deeply, deeply.

10 And I worked. I mean, I worked for my
11 family's company. It's not like, you know, I was
12 nothing but, you know -- but, I mean, I -- it was -- I
13 was a dichotomy, you know? I was. And I just couldn't
14 get out of it.

15 And maybe there's some truth to what his
16 psychologist said, you know. Maybe there's a part of me
17 that didn't want to get out of it. All right? But all
18 I know is that I didn't -- I didn't ever, ever -- I got
19 arrested, I think -- and it was in 1984. All right?
20 And excluding the charge that happened out in Texas --
21 because I think the charge that happened out in Texas
22 was -- I know this is going to sound stupid, but it was
23 like an admirable charge. You know? I mean, it was a
24 charge that needed -- that dude needed to have something
25 done to him for beating up a 14-year-old kid and he was

1 a 27-year-old man. All right?

2 So that's -- I don't count that charge in my
3 life. All right? Because it wasn't a charge based upon
4 me being on drugs and, you know -- but when I came here
5 to Florida and I got arrested for the crime of -- I
6 think I invaded somebody's house, you know, and I hurt
7 them. I hurt them, you know. And I tied them up. And
8 it was all on drugs, man. It was all on drugs.

9 And from that -- I remember I went before
10 Judge Hinckley, and Judge Hinckley put me -- actually,
11 I'm sorry, that was the second charge. I was on
12 probation for stealing \$75,000 in oriental rugs. And I
13 was 17 years old. I turned 18 in the county jail
14 waiting for prosecution. And -- but who the hell, at 17
15 years old, steals \$75,000 in oriental rugs?

16 Q Was that also part of -- because of your
17 addiction --

18 A Yeah, of course.

19 Q Thank you.

20 A Of course. Everything about -- everything --
21 every crime that I've ever been arrested for is due to
22 my addiction. Every bit of it.

23 Q Thank you.

24 A I've never, ever done a crime in a sober state
25 of mind.

1 MR. BARRETT: Okay. State?

2 THE COURT: State have any questions?

3 MR. JOHNSON: Yes, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. JOHNSON:

6 Q Good morning, Mr. McKenzie.

7 A Hi, sir.

8 Q Let's talk a little bit about your drug use.
9 You said today you've never committed a crime while you
10 were sober; is that right?

11 A No.

12 Q And you attribute all the crimes you've
13 committed in the past to being on drugs; right?

14 A Yes, sir.

15 Q Let's talk a little bit about your work
16 history. How long did you -- you say there was two
17 different companies that you worked for, construction
18 companies. What were the names of them again?

19 A Well, I mean, I worked for a company called
20 EMJ when I first came to St. Augustine in 2002. All
21 right? And I -- I was a superintendent on a project. I
22 was given the building of Pier 1 Imports. And I built
23 Pier 1 Imports.

24 And then after I was developing Pier 1
25 Imports, the superintendent and the project manager

1 liked me so much that they gave me other buildings. And
2 I wound up building 28 buildings of Cobblestone Village.
3 Cicis Pizza, it's no longer there, but that was the last
4 building I built for them.

5 Q And you're talking about the Pier 1 Imports
6 over here at Cobblestone?

7 A Yes, sir.

8 Q And you said that they actually gave you the
9 responsibility to build 28 other buildings?

10 A Yes, sir.

11 Q Where were those located?

12 A There. Bealls Outlet, Ross Dress for Less,
13 Petco.

14 Q So basically all of Cobblestone?

15 A Basically, yes.

16 Q And you built that? You did that?

17 A Yes.

18 Q They gave -- these people gave you the
19 responsibility to do that?

20 A Yes, sir.

21 Q How much money were you making at the time?

22 A At that time there, I think I started out at
23 \$43,000 a year, and by the time the project was ended I
24 think I was making \$63,000 a year.

25 Q How long did you do that job?

1 A I did that job for six months, went to jail,
2 got out, did it -- and finished it.

3 Q Okay. And how long did you work for that
4 company?

5 A Basically two years.

6 Q Two years. And where did you go from there?

7 A I -- the -- my parole officer wouldn't let --
8 they wanted me to go to Panama City to build a project
9 in Panama City, but my parole officer wouldn't let me
10 leave. Wouldn't let me travel.

11 I'm not saying he was doing a bad thing. He
12 was probably actually doing a good thing because he
13 could see in me that there was something that didn't
14 need to be free, you know.

15 And he refused to allow me to travel, so I had
16 to take a job locally. And I got a job with a
17 contracting firm here, and they were building Palencia,
18 and he made me superintendent of that project, and I
19 started building the front part of Palencia.

20 Q And how long -- and that was the Johnson and
21 whatever?

22 A No, no. No, sir. No, sir. That was -- God,
23 we have a problem with this man's name. I can't -- I
24 can't remember his name to save my life. It's --

25 Q That's okay. How long did you work for that

1 company?

2 A I worked for him for about four months.

3 Q And how much money did you make doing -- being
4 a superintendent?

5 A He was paying me \$16 an hour.

6 Q Well, how much money would you make on a
7 yearly basis, on average?

8 A Probably, without bonuses, about \$70,000 a
9 year.

10 Q Okay. And where did you go from that -- what
11 did you do for that company?

12 A For the one here locally?

13 Q Yeah.

14 A I was a superintendent on the project. I made
15 sure -- I had about 50 guys working for me and I put
16 them to work every day doing exactly what I wanted them
17 to do.

18 Q And where did you go from there?

19 A I left that job after I found drugs on the
20 jobsite and I got hired by Johnson-Graham-Malone. Mike
21 Graham hired me personally and gave me a project in
22 Gainesville.

23 Q And what did you do over there?

24 A I was on the project from inception,
25 meaning -- well, I'm sorry, I can't say from inception.

1 I was on the project from the time that it was turned
2 over to be built, meaning that I'm the one who brought
3 the surveyors in, and we surveyed a virgin forest that
4 had never been logged before.

5 And there was a hill in there that I found and
6 I was concerned that it might be an Indian burial mound,
7 so I had to call an architect and have -- or an
8 archeologist come in and survey the hill to make sure
9 that it wasn't an Indian burial mound because that would
10 stop the project completely. And -- but I was involved
11 in it from inception.

12 Q So from the -- when you first started in the
13 construction business up until, say, when you got
14 arrested for these charges, how long had you worked
15 doing that type of work?

16 A Well, that was the first time that I had ever
17 been hired in that capacity. When I went to go get a
18 job, actually, my father --

19 Q Hold on, Mr. McKenzie. You're not answering
20 my questions.

21 A I'm sorry.

22 Q Just tell me from the time you started in the
23 construction business to the time that you got arrested,
24 how long did you work in that field?

25 A I started in construction when I was 15 years

1 old.

2 Q Okay. So pretty much your -- you know, most
3 of your adult life and your late teens; correct?

4 A Yeah. But before that, I was in the industry
5 of motorcycles.

6 Q Okay. And -- well, let's talk about the
7 construction business. Based on your testimony today,
8 you were given -- you weren't just sort of a hired hand
9 just sort of doing menial work. You were given
10 supervisory authority and positions within those
11 companies; correct?

12 A Yes, sir. Yes, sir. Yes, sir.

13 Q You had a lot of important responsibilities;
14 right?

15 A I take umbrage with the word "given."

16 Q And you're building buildings; correct?

17 A Yes.

18 Q And you have to build them safe; correct?

19 A Yes. Absolutely.

20 Q So they don't fall down and kill people;
21 correct?

22 A They have to have a code.

23 Q And so you were trusted with this type of
24 responsibility; right?

25 A I know that work.

1 Q Okay. And you did well at that work, didn't
2 you?

3 A I did excellent with that work.

4 Q And you're saying during all that time you
5 were doing drugs?

6 A Yes.

7 Q Okay. Now, you were in a relationship during
8 that same period of time; correct?

9 A Yes, I was.

10 Q And I think you had mentioned that this woman
11 had a child?

12 A Three.

13 Q Three children?

14 A Yes.

15 Q How long were you in that relationship with
16 her?

17 A I met her on October 22nd -- I got out of
18 prison on October 1st. I met her on October 22nd of
19 2002. I met her 22 days after I got out of prison.

20 Q Okay. Well, that didn't answer my question.
21 How long were you in a relationship with her?

22 A All the way until May 17th, 2009.

23 Q Okay. So seven years?

24 A Yes.

25 Q Okay. And you lived together?

1 A Yes.

2 Q And isn't it true that during that period of
3 time you knew not to use drugs around her and her
4 children; correct?

5 A Yes, sir, that's exactly right.

6 Q So there were periods of time when you
7 would -- you would not use drugs; right?

8 A Yes, there was.

9 Q You knew that it was not a good thing to do;
10 right?

11 A Yes.

12 Q So you had some level of control over your
13 drug use; correct?

14 A Somewhat, yes.

15 Q Now, let's talk about your -- the times that
16 you were in prison. You talked a little bit about when
17 you were -- there were these drug programs and you -- I
18 think you referred to them as a joke; is that right?

19 A Yeah. Maybe it's a bad choice of words, but,
20 yeah.

21 Q Why do you think it's a bad choice of words?

22 A I mean, because it's really not a joke. I
23 mean, you've got people that are having sex in a place
24 that people are trying to, you know, go to for help. So
25 it's not a joke.

1 Q Are you saying that the people that were
2 running these programs, the teachers, the counselors,
3 whatever, they were the ones that were having sex with
4 people?

5 A Those people aren't there. I mean, the people
6 who are making these programs available, what do you
7 think, they're there overseeing it?

8 Q So you're saying that there were no drug
9 programs; is that right?

10 A No, there was --

11 Q Effectively that's what you're saying?

12 A There was a semblance. I mean, when they
13 called for -- that night when they said, all right,
14 everybody going to NA, line up at the door.

15 Q Okay. And was there a place where there would
16 be a counselor or a teacher or whatever --

17 A No.

18 Q -- that would be running the drug program?

19 A No. These are run by inmates. No, there's no
20 counsel. There's no free person in there, you know,
21 making sure everything runs the way it's supposed to
22 run.

23 Q So you're effectively saying there was no drug
24 program; is that right?

25 A Well, there was a drug program, yeah. I mean,

1 that's what -- you know -- and there was funded --

2 Q That doesn't sound like much of a drug
3 program, does it?

4 A It's not a drug program at all.

5 Q Nobody's talking about how to get off drugs,
6 how to stay off drugs, anything like that?

7 A There -- there is no meetings. There were
8 people doing their own thing. There were even people in
9 there gambling.

10 Q So what about the time -- you said that you --
11 there were times when you would go to these programs to
12 get your gain time.

13 A Yes.

14 Q I mean, was there -- are you saying that
15 throughout the entire time, all the years that you were
16 in -- you were in prison a long time; correct?

17 A Yes, I was.

18 Q There was one stretch that you were in prison
19 for, like, 15 years; right?

20 A That's not -- 12.

21 Q 12 years?

22 A Yeah.

23 Q Okay. Because you got gain time; right?

24 A Yeah.

25 Q And it was because you were going to these

1 drug programs; right?

2 A Right. No, no, no, no, no. Not then.
3 Because by then the State had stopped making it
4 mandatory.

5 Q That's right. So initially you were going to
6 the drug programs; right?

7 A Yes.

8 Q But the only reason that you were going to the
9 drug programs is so you could get the maximum gain time;
10 wasn't that right?

11 A Exactly.

12 Q That's the only -- you weren't even -- you
13 weren't interested in getting help, were you?

14 A No, no, no. You don't understand. There was
15 no help available.

16 Q I see. Because throughout that entire 12-year
17 period, or however long it was, that --

18 A No, no, no.

19 Q -- people were having sex in these classes?

20 A Wait. No, no, sir. You're messing up -- in
21 1984, '85, '86, '87, '88 I was incarcerated. All right?
22 I was incarcerated in level five institutions that are
23 maximum security units that are the most violent prisons
24 in the state of Florida. Okay?

25 And those places there, I was required to go

1 to NA in order to get gain time to get out of prison.
2 If you didn't go -- if you went and got all your gain
3 time, you'd get 20 days a month. If you didn't, you'd
4 only get 16 days a month.

5 So I went to these places for four days a
6 month. Okay? And I went every week to them.

7 But there was no help in there. There was no
8 counselor in there. There was nobody controlling
9 things. You didn't go in there and have coffee and
10 doughnuts and sit around and tell your stories.

11 Q What was going on?

12 A There was mayhem going on.

13 Q Okay. Well, just tell us. I mean, that's not
14 very specific. Tell us specifically what was going on.

15 A Well, I mean, like I said, you know, people
16 went there to see their lovers. All right?

17 Q My question, though, is -- and you -- when I
18 said throughout this entire 12-year period, and you
19 said, no, that's not what was going on, are you
20 saying -- is your testimony today that these programs in
21 these prisons, that every time that they would have a
22 class, or whatever, that they were never giving any kind
23 of drug program offering?

24 A Back then it wasn't, sir. Back then it
25 wasn't. Back then it wasn't, not at all. All right?

1 And I know that there are great programs
2 involved in lesser security prisons, but in the maximum
3 security prisons there's no care because 90 percent of
4 the people in these maximum security prisons are never
5 getting out of prison.

6 Q Let me ask you this. Then why make the effort
7 of telling the Court and everybody here that you only
8 went to get the gain time? I mean, if there was no
9 program going on at all, then what difference does any
10 of this make?

11 A Because that's the only way I could get the
12 gain time.

13 Q Okay. So you were going to these programs
14 only to get the gain time. And when they stopped giving
15 you the gain time, then you stopped going to the
16 programs; right?

17 A Absolutely. Because I didn't want to be
18 there. I didn't want to be involved in that crowd of
19 people.

20 Q Now, you talked about your drug use and how
21 terrible your drug use was. You said that you were --
22 if I remember correctly, you were using -- you were
23 buying \$1,000 worth of drugs every day; is that right?

24 A Uh-huh.

25 Q At any point in your career did you ever --

1 were you making \$365,000 a year?

2 A No. Absolutely not --

3 Q No?

4 A -- sir. I remember you said this in my trial,

5 you know, but what do you think, these are the only

6 crimes I committed?

7 Q Okay. So you were committing crimes to feed

8 your drug habit?

9 A Absolutely.

10 Q Okay. So \$1,000 a day?

11 A Yeah.

12 Q \$1,000 a day you were -- you were purchasing

13 \$1,000 a day?

14 A Yes.

15 Q Were you using any of the money that you made

16 in your job?

17 A No, not really. Because I had a family to

18 support, and, you know, I lived in a gated community and

19 I -- you know, my truck payment was \$750 a month. I had

20 insurance. I had GEICO insurance. You know, I had cell

21 phone bills. I had light bills, cable bills, insurance,

22 dental. Everything you could think of, I supported.

23 I -- I -- I gave that to my family.

24 Q Were you -- did you go to work every day?

25 A Every day.

1 Q Every day. How many days a week did you work?

2 A I worked five days a week. I didn't work on
3 Saturdays and Sundays. I demanded that I have those
4 off.

5 Q And hours -- I mean, construction work, you
6 work long hours; right?

7 A Yes, I did. I did -- some -- some weeks I put
8 in 115 hours a week -- I mean 115 hours a week.

9 Q And then when you would get done with your
10 job, you'd go home to your --

11 A No.

12 Q -- significant other and her --

13 A No.

14 Q No?

15 A No. The way it -- the way we had it set up is
16 that I had a home in Gainesville as well as a home here
17 in St. Augustine. My per diem check paid for my home in
18 Gainesville.

19 And on one weekend Carol Ann would come to me
20 in Gainesville and on the opposite weekend I would go to
21 her in St. Augustine.

22 Q Okay. But you would see her; right?

23 A Absolutely. Yeah. But, I mean, only on the
24 weekends. We didn't spend the week together.

25 Q You cared about her enough to do this

1 construction project at the school where her son went;
2 right?

3 A I think that she was probably the singlemost,
4 finest woman I've ever met in my life. In fact, I'd
5 like to say that she's the first woman I ever dated.
6 All the other girls I was with before that were just
7 that, young girls. She's the first woman. She
8 taught -- she's the first woman that I ever knew in my
9 life.

10 Q Do you admit that you killed Randy Peacock and
11 Charles Johnston?

12 A Yes, sir, I do.

13 Q And you saw the evidence that was presented at
14 trial, how they were murdered with an ax. Do you admit
15 that you --

16 A Yes, sir.

17 Q -- killed them in that manner?

18 A Yes, sir, I do.

19 Q You heard your confession to those crimes on
20 the interviews that you gave back then; correct?

21 A Yes, sir.

22 Q Those interviews that you gave, in terms of
23 how you committed those murders, those statements were
24 true?

25 A I think that everything was basically true.

1 You know, there was a few things that, you know, weren't
2 involved in the statement, you know. Like what happened
3 that day that led up to it.

4 Q You went there that day specifically to rob
5 them of money, didn't you?

6 A No.

7 Q No?

8 A No.

9 Q That's what you said in your interview.

10 A I know that. But that's not what -- that's
11 not exactly the truth.

12 You know, I did go there for money. All
13 right? I did. But I didn't go there to rob them and
14 kill them for money. That's not how it happened, sir.

15 I was -- see, we haven't even got into how I
16 came into their life.

17 Q Well -- and what I want to ask you, though, is
18 about this particular day. You killed them because you
19 wanted their money?

20 A No. I did not kill them because I wanted
21 their money.

22 Q Why did you kill them?

23 A I wanted my money.

24 Q That they had?

25 A Yes.

1 Q They wouldn't give it to you?

2 A No. That's what -- that's what happened. An
3 argument ensued, and it got ugly, and I got violent.

4 I didn't go there with the intent to kill
5 these people. There is no first degree in this. That's
6 the only thing I've ever argued. I did not go there
7 with a plan to kill these people.

8 Q Do you remember in your interview --

9 A I understand what I said in the interview, but
10 I'm telling you here right now that that's not what I
11 had planned.

12 Q Okay.

13 A And what I said in that interview was all
14 based upon me having HIV and hepatitis C. Because I
15 thought I was dying.

16 Q And in this particular crime you, at least,
17 attempted to kill Charles Johnston first; correct?

18 A I don't remember who it was first.

19 Q Okay. But it was one of them; right?

20 A Sure it was, because two men died.

21 Q Right. And then you go in there and you --

22 A If you want to take me and drag me through all
23 the quagmire of what happened that day, we already know
24 what happened. I did some really terrible things.

25 Q Today you only want to talk about your drug

1 use; right?

2 A No, I don't want to talk --

3 Q You don't want to talk about the crime.

4 A Listen, I know what your job is, sir. Your

5 job is to sit here and make me look like a man who

6 committed first degree murder, all right, and --

7 Q Did you not --

8 A -- didn't care about it or anything.

9 Q Did you not commit --

10 A Yes, I did. But I didn't do it in the first

11 degree.

12 Q Okay.

13 A I didn't.

14 Q Okay. But let's talk about it. You want to

15 talk about your drug use. Let's talk about the crime.

16 So let's talk about --

17 A I'm going to tell you right now -- excuse me.

18 I walked into their house. All right? I walked into

19 their house and I wound up there for about four or five

20 hours. We had drinks and everything. We discussed the

21 money that they owed me for the project that I was

22 working for them over off of County Road 209 in Green

23 Cove Springs.

24 There was some discrepancies about the money

25 that I invested and the money that they owed me. Okay?

1 I felt like they owed me \$25,000 and the money that I've
2 invested, up to \$11,000 of my money into it. Okay?
3 They didn't see that. They didn't want to do that. All
4 right?

5 It got ugly. We wound up -- and I sat there
6 and I got angry in my mind, and next thing you know, I
7 hurt Charles. Okay? And then after I hurt Charles, I
8 remember walking around the carport and up the front
9 porch and up the front sidewalk and going inside. And I
10 don't know why it happened like that, sir. I hit this
11 guy and --

12 Q Where were you when you did that?

13 A Huh?

14 Q Where were you when you did that?

15 A Where? What do you mean?

16 Q When you hit him the first time, where were
17 you?

18 A Randy or Charles?

19 Q Whoever it was you attacked first.

20 A Charles.

21 Q Where were you?

22 A You know where I was. I was in the shed.

23 Q You were in the shed?

24 A Yes.

25 Q So you were having this argument about the

1 money in the shed?

2 A No, no, no, no. The argument had already took
3 place.

4 Q Okay. So this didn't just happen in the
5 middle of an argument?

6 A No.

7 Q You had an argument and then you went to the
8 shed?

9 A My anger was like -- already gone ballistic at
10 that point.

11 And you have to understand another thing. All
12 right? I was shooting drugs there.

13 Q Okay. So you go to the shed and you get the
14 hatchet, don't you?

15 A No, I don't get the hatchet. He give me the
16 hatchet.

17 Q Okay. You asked him for a hatchet; right?

18 A No, I didn't ask him for a hatchet. I asked
19 him for a hammer.

20 Q I see. And he didn't have a hammer?

21 A The reason why I asked him for a hammer, it
22 wasn't to try to kill this man. All right? I didn't
23 have the plan to kill this man.

24 He -- what happened was that I went and bought
25 drugs on the streets in Gainesville, and a guy who -- I

1 was robbing him. I was robbing the drug dealer. And he
2 took my car door on the driver's side, the rear
3 passenger car door, and he opened it all the way and
4 folded it around into the front, until it was against
5 the door. And then after that, I couldn't open the damn
6 thing or close it.

7 So when I was at Randy and Charles' house, I
8 was going to use that opportunity to try to fix the
9 door, you know, and so that the damn thing would be
10 operable again.

11 I didn't ask for this weapon in order to use
12 it as a weapon. I asked for it to actually do this.

13 But the crazy thing is, is that when -- it's
14 all about the damn comment, man. A snide comment. A
15 snide comment made.

16 And, you know, I mean, listen, I've got
17 people's families in here and I don't want to sit here
18 and berate these men. I'm telling you they were good
19 men. I was not in the right state of mind.

20 Q We've already gone down that road so --

21 A I wasn't in the right state of mind. He said
22 something, I didn't like it, and I hit him.

23 Q So -- okay. So you have this big argument and
24 then suddenly you're wanting to fix the car?

25 A No, it wasn't a sudden thing, man.

1 Q Okay. So after that, you decided you wanted
2 to fix the car?

3 A You've got to remember five hours have went
4 by. Five hours. This just didn't happen in a matter of
5 minutes. Five -- I've been there, we've been drinking
6 Scotch. All right? We've had -- we've ate, we've
7 snacked. Okay?

8 It's not something that, you know -- you make
9 it sound like I went there with a plan.

10 Q Well, I'm trying to understand, Mr. McKenzie,
11 because you just said a few moments ago this happened
12 all of a sudden --

13 A No, no, no. I'm talking about that --

14 Q -- and you did this in the heat of this
15 argument?

16 A No. We had an argument. All right? And I
17 went and did some drugs. Okay? I went and did some
18 drugs, and then things just kind of got stupid in my
19 head, man. I didn't -- I didn't -- I was upset.

20 I was basically pissed off because how is it
21 going to be that I invest \$11,000 of my money into this
22 home over in Green Cove Springs and I'm not going to
23 recoup that? This is what I learned during the five
24 hours that I was there.

25 Now, I mean, I think eventually I would have

1 recouped it. I'm not saying they were going to rip me
2 off. All right? But they kind of felt like that more
3 work needed to be done to justify that kind of draw on
4 that job. All right?

5 And perhaps they were correct. But I had done
6 work, nevertheless, on that job. You know? I had. And
7 I had invested my own money in that job.

8 Q So you killed Randy Peacock and Charles
9 Johnston because you were mad?

10 A I got mad. I got angry. I lost control. Not
11 because -- I didn't go there with the intent to kill
12 these men. They were my friend. I didn't go -- I had
13 been to their house many, many, many times. Many times.
14 I met them in 2002 or 2003.

15 Q The reality is the drugs had nothing to do
16 with it?

17 A The drugs had something to do with it, man,
18 because I told you here before I've never, ever
19 committed a crime in a sober state of mind in my life.

20 Q So you attack Charles first --

21 A Yes.

22 Q -- with a hatchet?

23 A Get your job on, bro.

24 Q And then you left and then you went and tried
25 to kill Randy Peacock in the kitchen; correct?

1 A I don't know why you say "try." He died.

2 Q Right. But you had to go back --

3 A You want to go and make it seem --

4 Q -- right?

5 A You want it to be the worst it can possibly

6 be, so let's do it, you know.

7 Yeah, I hit him in the head. He fell into the

8 chicken cook pot. All right? I went out and I went and

9 got Charles Johnston's wallet off of him.

10 I came back into the room and Randy was

11 getting up. All right? And then in that -- I felt so,

12 so bad about it because I knew that Randy wasn't alive.

13 I knew he wasn't alive.

14 You want the people to think that he was

15 alive, but Randy wasn't alive. His head was caved in.

16 Caved in.

17 Q Mr. McKenzie --

18 A If he would have -- listen. If he's up on his

19 feet and moving, I don't know how the hell he did it. I

20 don't. But that man was not alive. His body -- he --

21 maybe it was just the will of the man himself to be

22 something more than just laying there. I don't know.

23 But I'm telling you the guy was not alive.

24 Q He was on his --

25 A He --

1 Q He was on his feet?

2 A He was on -- I don't -- when I say "alive," I
3 mean, he would have never been conscious of the world
4 around him ever again in life.

5 Q But in your interview you said he was trying
6 to leave?

7 A Yes, he was. I'm not -- I'm not denying that.
8 That was the will of the spirit of his body. He was --
9 he was a strong, powerful man.

10 Q And you had to make sure that he was dead,
11 didn't you?

12 A I didn't have to. I felt bad for it.

13 Q So you got a knife; isn't that correct?

14 A Yes.

15 Q And then you begin to stab him, didn't you?

16 A Why?

17 Q Over and over?

18 A Why? Why?

19 Q You tell me.

20 A Okay. Really you want to hear why I stabbed
21 him? Because I knew he would never have a quality of
22 life. He wouldn't. He would be a vegetable.

23 Q And that was because of you?

24 A Yes, it was because of me.

25 Q And so you had to make sure he was dead?

1 A Yeah, man. I didn't want to see that man like
2 that. And I know it sounds stupid, but that's the truth
3 of the matter.

4 MR. JOHNSON: No further questions.

5 THE COURT: Mr. Barrett, any further
6 questions?

7 MR. BARRETT: No, Your Honor.

8 THE WITNESS: Please.

9 THE COURT: Mr. McKenzie, let me ask you a
10 couple of things. You talked about the drug
11 treatment in prison.

12 THE WITNESS: Yes, sir.

13 THE COURT: You described it. That's not
14 while you've been in prison for these charges.
15 You're talking about from when you were in prison
16 before; is that correct?

17 THE WITNESS: Yes, sir, Your Honor. I'm
18 talking -- when I was talking about what occurred
19 in those meetings, all happened in the '80s.

20 THE COURT: Okay.

21 THE WITNESS: All right? I never attended any
22 meetings at all during the '90s because all
23 programs are wiped out in the '90s. Funding for
24 such programs are wiped out. There was nothing
25 like that.

1 And I've always been in a level five
2 institution. I was in Martin three times, Your
3 Honor. Have you ever heard of Martin?

4 THE COURT: Uh-huh.

5 THE WITNESS: Do you know what it's like? I'm
6 sure you've heard about it. I spent three times in
7 Martin. I've never been in protective custody.
8 Never.

9 I've been transferred to violent institutions
10 because I'm white and I fight. They've sent me
11 there because the media is getting attention
12 because there's not enough white people in the
13 compound. So they send somebody like me, who is
14 known not to lay down, who will stand up. So they
15 send guys like me there.

16 That's how I got -- it's called institutional
17 need. I've had that happen to me five times. Five
18 times I've been sent to locations for institutional
19 needs because I'm a white guy who won't lay down.

20 It's violence. Violence. And for -- for --
21 for -- I don't know how the heck it happened, sir.
22 It was my psychologist, Dr. Bloomfield. You know?
23 This man sat here and said that I suffer no PTSD.
24 You know?

25 Do you -- I don't know how that's possible.

1 How -- I mean, I lived in a dorm where there were
2 20 men being raped in the middle of the night, and
3 I endured that. I'm not saying it happened to me.
4 Okay? There were a couple of attempts on me
5 personally, but I was always able to overcome it
6 because of my ability to fight.

7 But come on. If a woman can have a car crash
8 at a red light and suffer PTSD, how can I not
9 suffer PTSD and I've sat there and watched men get
10 raped for 15 years? It just don't make no sense,
11 Your Honor, that -- and I wanted to -- I wanted to
12 tell Dr. Bloomfield after, you know, words that --
13 when he was asking me questions, like he would say
14 what would you think if you were standing at a
15 grocery store and you saw a guy slap a girl? All
16 right? My answer, first of all, was thought of in
17 terms of a convict. And I hate that term. All
18 right?

19 In prison, men say they're either inmates or
20 convicts. I've always said I'm neither one of
21 them. You know, a judge sentenced me to prison.
22 That's what I'm here for. I'm not here for you and
23 your cause and none of that stuff, you know. So --
24 but there's this stupid code, or whatever, you
25 know.

1 And -- but -- and I thought about how it would
2 be if I saw a guy slap a girl in a Publix. Your
3 Honor, I would probably kill him if I saw that. To
4 hurt a girl? I mean, I would -- I would
5 probably -- I don't know if I -- I would react so
6 bad that when I left him laying on the ground, I
7 wouldn't know if he was alive or dead.

8 So I don't know how my psychologist that we
9 hired, you know, could say that I didn't suffer any
10 problems, that I was perfectly normal. And he said
11 that he thought that I was trying to manipulate the
12 answers.

13 And I wasn't, Your Honor. I gave him my
14 heartfelt answers on every one of them because I
15 felt like if there's anybody going to save my life,
16 it was going to be Dr. Bloomfield. So I was
17 completely honest with him in everything.

18 And when I got back to death row after the
19 trial was over, I sat and thought about your
20 witness and how his examination of me was. And for
21 the first time in my life I asked myself, did I
22 really do drugs for the choice of it --

23 MR. BARRETT: Judge, if I may?

24 THE WITNESS: -- just to have fun?

25 MR. BARRETT: I'm not sure if this is proper

1 or improper evidentiary, but --

2 THE COURT: I only asked him about when the
3 treatment was.

4 MR. BARRETT: And that's going to be the
5 response. And I would ask that Mr. McKenzie just
6 respond just to the questions.

7 THE WITNESS: Well, Your Honor, I'm more than
8 willing to answer anything you want to ask me --

9 THE COURT: Okay. Let me ask you --

10 THE WITNESS: -- regardless of what he says.

11 THE COURT: Okay. Let me ask you a final
12 question.

13 It's my job in this case to decide whether you
14 should spend the rest of your life in prison for
15 these crimes or whether you should die for these
16 crimes.

17 THE WITNESS: Yes, sir.

18 THE COURT: So is there anything else you want
19 to tell me before I ultimately -- it's not going to
20 be today -- but before I ultimately make that
21 decision?

22 THE WITNESS: No, sir. I mean, I can only
23 tell you the same thing I told Judge Wendy Berger,
24 all right, and that's this. I'm sorry that I have
25 to put you into this situation to where you have to

1 judge me like that. I'm sorry that I did this to
2 you. I really am.

3 And no matter what you decide, no matter if
4 you sentence me to death, I don't hold it against
5 you because I put myself in this situation. And
6 that's how I really feel, and that's from my heart.

7 So, you know, don't feel bad about whatever
8 you do, you know. Whatever you decide, then that's
9 your decision.

10 THE COURT: Okay. Anything else you want to
11 say?

12 THE WITNESS: No, sir. I'm good.

13 THE COURT: Mr. Barrett, anything else you
14 wanted to explore?

15 THE WITNESS: Yes, there is something I want
16 to say.

17 THE COURT: Go ahead.

18 THE WITNESS: There is. For the people in
19 the -- that are related to these two guys, I'm so
20 sorry.

21 And here's the real thing. Here's the real
22 thing. All right? It's so hard for me to cry.
23 It's so hard for -- I've been through so much in
24 life, all right, that you would never, never, never
25 in your wildest dreams, even if you were a combat

1 veteran in Vietnam, you would still never endure
2 the things that I've endured in life in prison.
3 Never. Never in a million years.

4 But I want you to know as hard as I am, I'm so
5 sorry for what happened. I truly, truly am.

6 Randy Peacock and Charles Johnston were good
7 men. Good men. Good men. And I'm sorry that it
8 happened. I really am. And I -- I will not ask
9 you to forgive me for it because I'm the one that
10 done it, but I want you to know that I am sorry.
11 And they didn't deserve this. They didn't. They
12 didn't. Not at all.

13 And I want you to know had I been a sober man
14 and not on drugs, that would have never happened.
15 Never in a million years. Never.

16 And you can hate me and you can come and pull
17 the switch in the execution chamber and I wouldn't
18 judge you at all about it. Not at all. Because I
19 deserve that.

20 But I am sorry. And I really, truly am sorry.

21 And I hope to God that you can let the hatred
22 that you have in your heart towards me go because
23 I'm not worth that kind of hatred. I'm not. I
24 don't want you to hate me like that. Not because
25 of me and my own feelings, but because of you. I

1 want you to have a better life than that, than to
2 hate somebody that much.

3 I'm sorry. I really am. I truly am. That's
4 all I've got to say, sir.

5 THE COURT: Okay. Thank you.

6 MR. BARRETT: No other questions.

7 THE COURT: Okay. Thank you. Mr. McKenzie,
8 you can go ahead and take a seat.

9 MR. BARRETT: Judge, we'd call Dr. Scully.

10 THE COURT: Doctor, if you'll take the witness
11 stand.

12 I'm going to place you under oath again. I
13 know you were placed under oath during our earlier
14 proceedings at the trial, but I'm going to go ahead
15 and do it again.

16 Do you solemnly swear or affirm that any
17 testimony you give in this cause will be the truth,
18 the whole truth, and nothing but the truth, so help
19 you God?

20 THE WITNESS: Yes, I do, Your Honor. Thank
21 you.

22 SUSAN M. SKOLLY-DANZIGER, PHARMD,
23 having been first duly sworn, was examined
24 and testified upon her oath as follows:

25 DIRECT EXAMINATION

1 BY MR. BARRETT:

2 Q Doctor, please introduce yourself for the
3 record.

4 A Yes. Susan M. Skolly-Danziger, and that's
5 S-k-o-l-l-y hyphen D-a-n-z-i-g-e-r. Thank you.

6 Q And, briefly, what do you do for a living?
7 What's your profession?

8 A I do two things. I'm a consultant pharmacist
9 at a long-term acute care hospital called Promise
10 Hospital of the Villages and I'm an expert witness. I
11 do work in pharmacy, pharmacology and toxicology.

12 Q I'm going to skip the other parts of the CV.
13 The judge has heard it and it's also part of the record,
14 which I'm sure that the Court will review in making its
15 final decision.

16 So I'm going straight to: You were given a
17 copy of Dr. Meadows' trial testimony -- well, penalty
18 phase testimony; correct?

19 A Correct.

20 Q And you've had the opportunity to review that;
21 correct?

22 A Yes, I have.

23 Q Okay. I just want to talk to you because we
24 had you testify on the issue of addiction --

25 A Correct.

1 Q -- and there was some things that Dr. Meadows
2 testified to which I'm sure the Court will also consider
3 as part of its decision in this case, so I just want to
4 talk to you about some of these things.

5 We talked about drug addiction, and I believe
6 your testimony was that it is a disease. Dr. Meadows
7 says it's not.

8 Why is it a disease?

9 A It's a disease -- it's a chronic and
10 relapsing -- it's a medical disease. The reason why
11 it's a medical disease, it's because it makes changes in
12 the brain. There's organic changes in the brain which
13 affect the cells, the tissues. And unless there's a
14 long period of time -- most of these changes are
15 permanent because the relapsing component is really the
16 hallmark of the disease.

17 There's often queuing and conditioning of the
18 individual involved or the person that relapses to drug
19 use, and that, I think, is a big consideration.

20 So it's a medical disease like diabetes is
21 where a person who has diabetes can't will themselves to
22 be better, a person with heart disease cannot will
23 themselves to be better.

24 And in this particular illness too, a person
25 who's addicted, with all the willpower in the world,

1 cannot will themselves to be better unless they go through
2 rehab and training and understands the tools that they
3 need in order for them to prevent themselves from
4 relapsing.

5 So, yes, it's a medical illness because of the
6 changes in the brain, in the brain chemistry, in the
7 neurocircuitry in the brain.

8 Q When you say "go through training," what type
9 of training are we talking about?

10 A So, training so that one can understand the
11 triggers that will send them back to relapse. To
12 understand how to avoid the problems in their life that
13 will set them back so -- and then if there are these
14 triggers, what to do to prevent the relapse.

15 So they do need psychological training, and
16 then there are some possible drug targets that have been
17 used to prevent relapse.

18 Q At the level that we are today, presently, is
19 there a cure for this addiction? Do we have a cure?

20 A There is no cure for addiction.

21 Q So would you say that treatment, for the most
22 part, is managing the disease as you would diabetes or
23 those kind of diseases?

24 A So it's understanding the illness,
25 understanding the weaknesses, understanding the triggers

1 and targets, so then having good insight, I think, is
2 the real main concern, that somebody understands and
3 that they know that they have these weaknesses, they
4 understand that they're vulnerabilities. So I think
5 that is the main component of education.

6 Q Now, is there any kind of a special licensing
7 that is required for treatment of addiction?

8 A For medical treatment of addiction there's
9 what's called an exemption license that a physician
10 requires. So nurse practitioners can obtain this now
11 too within the last couple of years. But, yes, in order
12 to medically treat addiction, somebody has to have an
13 exemption license.

14 Q What do you mean by "medically treat"?

15 A So for medical treatment of opioid addictions
16 there's methadone, there's Suboxone.

17 So in order for a physician to prescribe these
18 medications, they have to have an exemption license,
19 undergo courses in order to prescribe these medications.
20 So, therefore, it's called an exemption license.

21 Q So are you saying that as part of the
22 treatment for this addiction -- for addiction, drug
23 addiction, sometimes other medication's used?

24 A Yes. Some of the medications used require
25 exemption licenses, yes.

1 Q I know you've worked with, obviously, other
2 individuals in prison. Have you actually been involved
3 with any of the prison drug programs themselves?

4 A Yes. There are some prison drug programs
5 which use -- it's an IV drug that's often used in
6 alcohol detox, and it's an IV form of naltrexone that's
7 given. It's given -- it's given injection. It's given
8 once a month. It prevents the relapsing. It's an
9 opioid blocker, and that prevents the queuing and the
10 relapsing.

11 It's a very expensive drug. It's given -- in
12 Orange County there was an experimental program to use
13 this in patients who had problems with relapse and
14 addiction and queuing and problems with -- when they
15 went back into their communities after being let out, it
16 would help them with the problems with their seeing
17 triggers and not having the cravings, the drug cravings.

18 Q Before we talk about the cravings, when you
19 said Orange County, are you talking about Orange County
20 Jail itself?

21 A Orange County Jail; correct.

22 Q Okay. Do you know how long this program has
23 been in place?

24 A It was an experimental program for, I think, a
25 six-month period that was -- that was sponsored by

1 Alkamese [phonetic], was the company that has the
2 medication.

3 Q So is that program still in existence?

4 A I don't know if it's still in existence, but I
5 know it's -- around the country the company has given
6 some grants for people who are being -- in prison and
7 also released.

8 Q Do you know whether or not these kind of
9 programs existed in the '80s?

10 A No, they did not exist in the '80s.

11 Q Would you -- would it be safe to say that the
12 recognition and the treatment of drug addiction have
13 grown a lot since the 1980s?

14 A Yes, absolutely. It's grown a lot in the
15 recognition that there is -- it's a difficult problem to
16 treat. It's grown a lot in the fact that there are many
17 people who are addicted. And now there's much more
18 funding for treatment of addictions.

19 Q Now, you mentioned something about craving. I
20 mean, I can think of situations where individuals have a
21 craving for a certain type of food or -- how does this
22 craving relate to drug addiction?

23 A Well, I think it's the same thing. I mean, I
24 passed Dunkin' Donuts today, and certainly there's
25 probably people who shouldn't be eating doughnuts and

1 they pass a place like Dunkin' Donuts and they feel like
2 they need to go in and get a dozen.

3 So it is similar in that, that somebody with a
4 drug addiction has a need, a trigger, and feels like
5 they have to use. They certainly -- they are queued by
6 an environment, they're queued by a neighborhood, and
7 feel an impulse to use a drug, and this is because of
8 chemical changes in their brain.

9 I guess you can say that I can hold my breath
10 and there's -- I will feel a sudden impulse that I need
11 to breathe. And I think it's very similar that an
12 addict, they might be able to say I can't use or I
13 shouldn't be using, but they have that same feeling
14 inside of a trigger that they need to use a drug, and
15 they're very driven by that same impulse where if I held
16 my breath, I need to breathe, but that same feeling that
17 they have this incredible urge to use, and they have to
18 be trained not to use a drug. It's a terrible urge for
19 most drug users.

20 Q Now, you've heard today that Mr. McKenzie was
21 working in a job, he had a job, he was making a
22 reasonable amount of money, he had a home, he had a
23 vehicle.

24 Is there such a thing -- I know there's a
25 thing called functional alcoholic. Is that -- also

1 applies to people who are addicted to drugs?

2 A It does. My understanding of Mr. McKenzie was
3 the -- he -- he was not using all the time, that he
4 could manage to stop in some periods, but then he had
5 extreme triggers which brought him back to drug use.

6 Q What do you mean by extreme triggers?

7 A Well, as he explained it himself, the time in
8 the car where he's sitting by the red light and then
9 looks at another individual who then nods his head and
10 then holds up a bag of drugs, then that's the reflex
11 that Mr. McKenzie has to start using drugs again. And
12 it's incredibly strong in somebody who's been a drug
13 user for many years of his life, and then drives him
14 back to drug use.

15 So that's the reflex or the queue or the
16 conditioning that we say where he impulsively needs to
17 use drugs again. So that's where he starts bingeing and
18 using drugs at a very high level.

19 Q Is there any kind of a brain function involved
20 in that, in the trigger and in the brain, that would
21 cause him to -- seeing that individual, the signals, and
22 then getting back into drugs? Is there any kind of a
23 brain function that would be involved in that?

24 A Right. That's the impaired brain circuitry
25 wherein he feels that he must use drugs again and --

1 which involves a dopamine circuit --

2 Q Does --

3 A -- of reward.

4 Q I'm sorry. Go ahead.

5 A Yeah, it's a -- what's called a dopamine
6 circuit of reward that is impaired in any drug user.

7 Q Does the fact that someone may have stopped
8 using drugs for a while means that they're cured or that
9 they don't have a drug addiction?

10 A No, not at all. People can stop using drugs
11 for even a decade or so, and then, because of some
12 queuing in a particular environment, begin using again.

13 So, no, there is -- there's no real cure.
14 Again, it's, one, being aware of their triggers and
15 their surroundings.

16 Q Do we have kind of the chicken and the egg
17 scenario where someone uses the drugs to control some
18 kind of a craving, and then the craving sometimes leads
19 to the use of the drug? Do we have that kind of a
20 scenario in a drug addiction situation?

21 A Well, that can be a binge use scenario, so,
22 yes.

23 Q Part of what Dr. Meadows talked about is he
24 says that people use drugs because they want to get
25 high. Is that accurate?

1 A In the beginning, it is a -- it is a voluntary
2 choice to use a drug, and, yes, people can decide to use
3 a drug to get high. But for most drug users, they use
4 because they don't want to feel the lows. They don't
5 want to feel the pain of not using.

6 So most drug users use to avoid hitting the
7 bottom and hitting the low, and especially with a
8 cocaine user, hitting a flat or dulled affect or a
9 burnout and being very depressed. So that's why they
10 keep using, to avoid hitting the bottom, not so much to
11 get the high.

12 Q Does the fact that someone may be able to
13 function at work or decide not to use drugs around
14 family members, does that fact mean that the individual
15 is in control of the drug addiction?

16 A So maybe for a short period of time they can
17 control their drug use, but often it's the triggers that
18 pull them back to drug use, which are very strong, and
19 if they don't have the tools to keep them away from drug
20 use, that will dictate their drug use.

21 Q Do you have any doubt -- based upon your
22 discussion with Mr. McKenzie, with his family members
23 you've talked to, with everything you've reviewed, do
24 you have any doubt in your mind that Mr. McKenzie was
25 addicted to drugs?

1 A I have no doubt that he was addicted.

2 Q Do you have -- does the fact that around the
3 time of this incident that he was using a lot of drugs,
4 do you have any doubt that those things affected his
5 behavior, his brain functioning at the time of this
6 crime?

7 A Well, when you look at the definition of
8 addiction, it's the use of a drug in spite of the harm
9 it causes, in spite of the harm, physical harms, harm in
10 one's social life, harm in one's financial life and
11 aspects.

12 So, yes, he was truly addicted, and this did
13 impair his thinking, his decision making, you know, at
14 or around that time, as you mentioned.

15 Q Would the fact that -- and I don't know if you
16 did watch the video -- that at one point in the video
17 Mr. McKenzie pulled something out of his mouth and
18 handed it to the police. Does the fact that even at
19 that point he was still using drugs, does that play in
20 any way in your assessment of his addiction problem?

21 A I mean, he -- he was -- he was willing to
22 take -- that was a -- I believe it was an eight-ball, an
23 eighth of an ounce of cocaine, which is quite a large
24 amount. So he was willing to take that much of a drug
25 to impair himself and do something -- I think he was

1 swimming, which was a bizarre event.

2 So it just shows me that he was not in control
3 of his thoughts. So, making bizarre decisions.

4 MR. BARRETT: Thank you.

5 THE COURT: Any questions from the State?

6 MR. JOHNSON: Yes, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. JOHNSON:

9 Q Good morning, Doctor.

10 A Good morning.

11 Q Tell me your involvement with -- or knowledge
12 of drug programs in the Department of -- Florida
13 Department of Corrections during the '90s and since
14 then.

15 A I don't know very much about it. That's not
16 what I have great understanding in.

17 Q Okay. You testified about some level of
18 knowledge of some of the programs that were currently
19 provided. Do you not have any knowledge of any drug
20 programs that the Department of Corrections provided
21 prior to that?

22 A What I testified about in this case were just
23 the drug programs that Mr. McKenzie had started. I
24 don't know specifically anything about them, about how
25 they're run, how many hours, who teaches them, what the

1 contents of the course are. So, no, I can't answer that
2 question.

3 Q Well, let's talk about the programs
4 Mr. McKenzie told you that he was involved in when he
5 was incarcerated.

6 A Okay. And I don't have my notes in front of
7 me, but I do recall that he was enrolled for an AA
8 course and an NA course and he took several hours of
9 those courses on one particular day, and that was the
10 extent of his involvement.

11 Q Did he tell you what was involved in going to
12 those courses?

13 A No.

14 Q Did you ask him?

15 A Not -- no. I just know that they -- he did
16 not continue the courses. That they went over several
17 weeks and he was involved only for a couple of hours.

18 Q Did you ask him why he stopped?

19 A I did.

20 Q And what did he tell you?

21 A You know, he told me that there were several
22 reasons why he stopped. Part of it was the stigma of
23 being involved in a drug course being in a prison
24 system. He said that that sets an inmate out. It -- it
25 makes them stand out and -- when they enter a course

1 like that and puts them in a different classification
2 where they are vulnerable.

3 So, therefore, he told me that he didn't want
4 to be in a population with other people taking those
5 courses and he didn't -- that was one reason.

6 And the other reason is he said that he felt
7 like he was different. He was -- he was somebody who
8 didn't get any value out of them. He was not like the
9 other people when he sat in those classes and took these
10 courses, that he wasn't like the others when he -- when
11 he sat down and he saw what other people and their drug
12 issues were like. So he said I didn't think I was
13 getting value.

14 Q So basically he was more concerned about what
15 people thought of him for going to these classes versus
16 actually getting help?

17 A He thought about -- from -- and this is my
18 opinion. He thought about his survival in the system.

19 Q So I want to talk to you about the addiction.
20 Does drug addiction cause people to commit murder?

21 A No. I mean, that in and of itself?

22 Q There are a lot of people who are addicted to
23 drugs that do not murder other people; correct?

24 A Yes.

25 Q In fact, the vast majority of people who are

1 addicted to drugs do not murder people; correct?

2 A That's correct.

3 Q And you talked about how -- I think you spent
4 some time saying that Mr. McKenzie's drug addiction
5 impaired his decision making abilities. Isn't it true
6 that there are certain decisions that we make in life
7 where the consequences are not so severe; correct?

8 A There's consequences that are menial. Some
9 are -- some are insignificant. Some are -- impact our
10 life, like who we marry, yes.

11 Q For example, you know, you could go up to a
12 red light and kind of roll through a red light, and, you
13 know, know that there's -- you could get pulled over or
14 not get pulled over, get in an accident, not get in an
15 accident. You take that chance. You know, you're
16 making decisions on whether or not to take that chance;
17 right?

18 A Yes. In my neighborhood, we get ticketed.

19 Q Right. And so you might -- if you were taking
20 drugs, you might be -- that might impair your decision
21 making, your ability to recognize the risks that are
22 involved; right?

23 A Yes.

24 Q And then there are some decisions where you
25 know what the consequences of those decisions are;

1 right?

2 A Yes. And it certainly depends what drug, how
3 much, and your underlying condition at the time. So
4 there's a lot of factors that might also interfere with
5 your decision making.

6 Q Such as a decision on whether or not to murder
7 two people; right?

8 A Yeah. And I'm sure there's a lot of other
9 things that are involved with a decision to murder two
10 people.

11 Q Right. And a person who may be under the
12 influence of drugs can still understand the consequences
13 of that decision; correct?

14 A There's a lot of things that would go into
15 whether they understand these consequences other than
16 the drug, but the drug would be something that might
17 impair their understanding, their decision making, their
18 mindset.

19 Q And you're not testifying today that
20 Mr. McKenzie did not know what he was doing?

21 A No, I'm not.

22 Q Okay. And so an addicted person in a
23 situation would understand the consequence of the
24 decision that he was making; correct?

25 A I think that there's a lot of factors one

1 would have to consider, and the amount of drug, the type
2 of drug could impair somebody's decision making.

3 So just as a general answer -- and I guess
4 what you're asking me is a hypothetical, not necessarily
5 with regard to Mr. McKenzie. That's the way I'm looking
6 at this.

7 Q Is it fair to say that you don't really know
8 the level to which he was impaired at the time he
9 committed these murders?

10 A Yes, it is fair to say.

11 Q Okay. And so he -- what you know about
12 whether or not he was impaired or not, the only evidence
13 you have of that for you to rely on comes from him and
14 him alone; is that correct?

15 A That is correct.

16 Q And if he lied to you, then that would pull
17 the rug out from underneath all of your conclusions;
18 correct?

19 A I mean, if he's not telling the truth, then I
20 would have to reconsider my response.

21 MR. JOHNSON: Nothing further.

22 THE COURT: Anything further, Mr. Barrett?

23 MR. BARRETT: Just briefly, Judge.

24 THE COURT: Okay.

25 REDIRECT EXAMINATION

1 BY MR. BARRETT:

2 Q As part of your review and decision making as
3 to Mr. McKenzie, you not only just relied on what he
4 told you, you also spoke to family members; correct?

5 A I did; correct.

6 Q Who also gave you a history of his drug use;
7 is that correct?

8 A Yes.

9 Q And that would include his mom, I believe?

10 A Yes, I spoke to his mother.

11 Q You also relied on reports as well, correct,
12 that were submitted to you?

13 A I did, yes.

14 Q So you weren't just going based on what he
15 said to you; you were going based upon the totality of
16 the information you received; correct?

17 A Correct.

18 Q Also, in terms of whether or not -- the State
19 asked the vast majority of addicted people do not commit
20 murder. We're talking about in this case cause versus
21 effect; correct? We're not saying it caused it, but
22 your testimony is basically that he was under the
23 influence of the drugs at the time of the offense and it
24 affected his behavior?

25 A That is correct.

1 Q Okay. So you're not saying it caused him to
2 do the murder, but that in terms of the brain activity,
3 because the drugs affected his brain and it is a
4 permanent thing and it's a long-term effect, that this
5 affected his actions at the time of the murder?

6 A Yes, actions and behaviors, his thinking
7 pattern; correct.

8 MR. BARRETT: Thank you. No other questions,
9 Judge.

10 THE COURT: Anything further from the State?

11 MR. JOHNSON: No, sir.

12 THE COURT: Let me ask you a question real
13 quick.

14 THE WITNESS: Yes.

15 THE COURT: You spoke about some of the modern
16 treatments for drug addiction, or therapies, at
17 least. And you spoke of -- I think it was
18 naltrexone? Is that the right pronunciation?

19 THE WITNESS: Yes. There's naltrexone, which
20 can be taken orally and given intra -- it's
21 given -- it's an IM injection.

22 THE COURT: That would be Vivitrol? Is that
23 the same thing?

24 THE WITNESS: Vivitrol; correct.

25 THE COURT: And you said that that helps to

1 possibly prevent desires and relapse; would that be
2 accurate?

3 THE WITNESS: Yes. Desires and cravings;
4 correct.

5 THE COURT: Okay. And that would only be,
6 based upon my understanding, effective with regards
7 to opiate addiction and alcohol addiction; is that
8 accurate?

9 THE WITNESS: It's been studied some for
10 cocaine, but its only approval right now is for
11 alcohol and for opioid addictions; correct.

12 THE COURT: Is there any literature or any
13 studies or any approval from the FDA that allows
14 its use or recommends its use for cocaine
15 addiction?

16 THE WITNESS: Not at this time.

17 THE COURT: All right. And do you know if --
18 do you know whether or not the Florida Department
19 of Corrections has a program in which naltrexone or
20 Vivitrol is used for inmates?

21 THE WITNESS: There was -- there was a small
22 pilot program in which the Department -- oh.
23 Department of Corrections? No. It was the jail
24 system.

25 THE COURT: That was the -- that was a county

1 jail?

2 THE WITNESS: County jail; correct.

3 THE COURT: So nothing in the Florida

4 Department of Corrections?

5 THE WITNESS: No. Not at this time.

6 THE COURT: Okay. Anybody want to follow up

7 on that area?

8 MR. BARRETT: No, Judge.

9 THE COURT: Okay. Thank you, Doctor. You are

10 excused.

11 THE WITNESS: Thank you very much.

12 THE COURT: Have a good day.

13 Does anybody need a break?

14 MR. BARRETT: We're almost done, Judge.

15 THE COURT: Okay.

16 MR. BARRETT: All we're doing at this point,

17 Judge, is just submissions to the Court.

18 THE COURT: Okay.

19 MR. BARRETT: And we are going to reserve

20 arguments for the memo, which is due --

21 THE COURT: Okay. What did you want to

22 submit? That's the written statement of the --

23 MR. BARRETT: The typed statement of his wife.

24 THE COURT: Of the wife? Okay.

25 MR. BARRETT: Right. Which I've shown to the

1 State.

2 There's also two things that Mr. McKenzie
3 wanted us to submit. These are two stories that
4 he's written.

5 THE COURT: Stories? Is that what you said?

6 MR. BARRETT: Yes. While he was in the
7 Department of Corrections. One is titled Plague of
8 Death. It talks generally about death row and the
9 situation where an individual basically is about to
10 be executed.

11 COURT REPORTER: I'm sorry, Judge. The "what"
12 of death?

13 MR. BARRETT: Death -- a situation where --

14 COURT REPORTER: No, no. The title of it.

15 MR. BARRETT: Oh, I'm sorry.

16 THE COURT: Plague of death? Is that what
17 you --

18 COURT REPORTER: Plague?

19 MR. BARRETT: Plague of Death.

20 THE COURT: Plague of Death. Okay. I
21 misunderstood as well.

22 MR. BARRETT: My accent will throw everyone
23 off.

24 And the other one is entitled Anonymous From
25 Death Row, Florida.

1 THE DEFENDANT: No. It's entitled Free.

2 MR. BARRETT: Free, and then written by
3 Anonymous From Death Row, Florida.

4 THE COURT: It's written by Anonymous, but
5 you're saying it's written by the defendant.

6 THE DEFENDANT: When I published the stories,
7 Your Honor, we were going to go with Anonymous, but
8 then my wife talked me into using my real name. So
9 what you have there is like the first copy of it,
10 but I wrote my name up under the Anonymous part.

11 THE COURT: Okay.

12 MR. BARRETT: And just to identify it for the
13 record, as it is written it does have Anonymous
14 From Death Row and it also has his handwritten
15 name.

16 THE DEFENDANT: Yes.

17 THE COURT: Okay. So what we'll do is we'll
18 make them exhibits. Make the wife's statement --
19 can you state her name for the record, please? I
20 know you mentioned earlier.

21 MR. BARRETT: Oh, I'm sorry. Her name is
22 Claudia, C-l-a-u-d-i-a, and her last name is
23 G-o-e-c-k-e.

24 THE COURT: So that will be Defendant's -- do
25 you want to make it one composite?

1 MR. BARRETT: That's fine, Judge.

2 THE COURT: Okay. It will be a defendant's
3 composite exhibit.

4 (Defendant Composite Exhibit No. 1 was
5 received and marked in evidence.)

6 If the clerk can get me copies of that at the
7 clerk's convenience.

8 THE CLERK: Yes, sir.

9 THE COURT: Any other submissions?

10 MR. BARRETT: No, Judge. I think that's all
11 the things we have.

12 THE COURT: Let's go to the State. The State
13 indicated, I think, you just want to submit some
14 additional victim impact statements.

15 MR. JOHNSON: Yes. May I approach?

16 THE COURT: Sure.

17 MR. JOHNSON: I have two additional victim
18 impact statements. These were actually admitted
19 into evidence in the previous trial, but I want to
20 make sure the Court had copies of these. One is --

21 THE COURT: When you say "the previous," the
22 one in '07 or the one we just did --

23 MR. JOHNSON: The one in '07, Your Honor.

24 THE COURT: Okay.

25 MR. JOHNSON: And one is written by Jerry Luke

1 dated August the 20th, 2007, and one is from Laura
2 Parker. These, I think, are nieces and nephews of
3 the victims. Her letter is written August 20th of
4 2007.

5 THE COURT: So we'll make that a composite
6 State exhibit.

7 (State's Composite Exhibit No. 1 was received
8 and marked in evidence.)

9 THE COURT: And then the same thing. If the
10 clerk could make a copy at its earliest
11 convenience.

12 Does the State have anything else it wants to
13 submit?

14 MR. JOHNSON: No, Your Honor.

15 THE COURT: I know Mr. Barrett alluded to
16 this, that you didn't want to make arguments today;
17 you wanted to submit them in writing. Is that
18 correct?

19 MR. BARRETT: Yes, Judge. Whatever argument
20 as to what occurred today, we'll just submit it as
21 part of the memorandum.

22 THE COURT: Did the State want the same thing?

23 MR. JOHNSON: Yes, sir.

24 THE COURT: Okay. So let's talk about a
25 sentencing date. I tried to set something

1 yesterday for January and Ms. Dunton --
2 MS. DUNTON: We're both in that.
3 THE COURT: That other trial?
4 MS. DUNTON: The first, probably, week to ten
5 days of January.
6 THE COURT: Okay. Let's look at February.
7 Everybody get your calendars out. How's the
8 afternoon --
9 MR. BARRETT: I have a resentencing in Flagler
10 the end of February.
11 THE COURT: It's a resentencing?
12 MR. BARRETT: In Flagler County, yes, Judge.
13 THE COURT: Is it a penalty phase trial or is
14 it --
15 MR. BARRETT: Yes. Death penalty
16 resentencing.
17 THE COURT: Okay. So let's --
18 MR. BARRETT: It's the end of February.
19 THE COURT: That's the end. Okay. How's the
20 afternoon of February 14?
21 MR. BARRETT: That should be good.
22 THE COURT: State?
23 MR. BARRETT: Let me double-check.
24 MR. JOHNSON: That's a -- that's your docket
25 call day; is that right?

1 THE COURT: No. That's a Friday, I believe.
2 Right?

3 MR. JOHNSON: Friday? Before your -- the
4 following week is your trial week; right?

5 THE COURT: The following week is my trial
6 week; correct.

7 MR. JOHNSON: I don't have anything on my
8 calendar right now, Judge, so I think that will be
9 okay.

10 THE COURT: Okay. So we'll set sentencing for
11 February 14 at 1:30. We can send Mr. McKenzie back
12 to prison and then we'll bring him back shortly
13 before that, a couple days before. And for the
14 sentencing hearing, obviously, he needs to be here
15 for that. Okay.

16 All right. With that, anybody have anything
17 else to add before we recess?

18 MR. JOHNSON: No, Your Honor.

19 MR. BARRETT: Not from the Defense.

20 THE COURT: We'll be in recess until
21 February 14th at 1:30 on this matter. Thank you,
22 everybody.

23 (The proceedings were concluded at 11:36 a.m.)
24
25

1 REPORTER'S CERTIFICATE

2

3 STATE OF FLORIDA)

4 COUNTY OF VOLUSIA)

5

6 I, CHRISTIE SAMMARO, RMR, CRR, certify that I
7 was authorized to and did stenographically report
8 the foregoing proceedings and that the transcript is
9 a true record of my stenographic notes.

10 I further certify that I am not a relative,
11 employee, attorney, or counsel of any of the parties,
12 nor am I a relative or employee of any of the parties'
13 attorneys or counsel connected with the action, nor am I
14 financially interested in the action.

15

16 Dated this 17th day of April 2020.

17

18 s/Christie Sammaro
19 Christie Sammaro, RMR, CRR
20 Court Reporter
21 Volusia Reporting Company
22 432 South Beach Street
23 Daytona Beach, Florida 32114
24
25

CERTIFICATE OF CLERK

STATE OF FLORIDA
COUNTY OF ST. JOHNS

I, **BRANDON PATTY**, Clerk of the Circuit Court for the County of St. Johns, State of Florida, do hereby certify that the foregoing pages of 1- 1157 inclusive contain a correct copy of the record in the case of:

NORMAN MCKENZIE
Appellant

VS

STATE OF FLORIDA
Appellee


S.C. Case No: SC20-243
L.T. Case No: 06001864CFMA

and a true and correct recital and copy of all such papers and proceedings in said cause as appears from the records and files of my office that have been directed to be included in said record by the directions furnished to me. Pages 969 – 982, 985 – 1058, 1063 - 1157 inclusive, embraces the transcribed notes of the reporter as made at court proceedings, certified to be by her.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 21st day of May 2020.



BRANDON PATTY
CLERK CIRCUIT COURT

By 
Matthew Campbell, Deputy Clerk

**CIRCUIT COURT,
7th JUDICIAL CIRCUIT,
ST. JOHNS COUNTY, FLORIDA**