

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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SHERIFF KEN MASCARA, in his Official Capacity as  
Sheriff of St. Lucie County, Florida and  
CHRISTOPHER NEWMAN,  
*Petitioners,*

v.

VIOLA BRYANT, as Personal Representative of the  
Estate of GREGORY VAUGHN HILL, JR.,  
*Respondents.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

This case involves the shooting death of Gregory Hill which occurred during a police response to a loud music call, in St. Lucie County, Florida. An intoxicated Hill who was on probation confronted Deputies with a gun in his hand when he opened his garage door in response to their knocking. Hill's probation status did not permit him to possess a firearm or consume alcohol. In a pre-trial ruling, over Plaintiff's objection, the Trial Court, after considering Federal Rules of Evidence 401, 403 and 404(b), agreed to admit the Defendants' evidence of Hill's probationary status to explain his actions in response to the Deputies, with the use of a limiting instruction. However, during Plaintiff's case, Plaintiff introduced evidence that Hill was not on probation and suggested he had a right to possess a gun, facts the Defendants were entitled to rebut.

The Eleventh Circuit panel reversed the judgment in favor of the Defendants and remanded for a new trial.

The questions presented are:

Whether this Court should adopt a more flexible standard of admissibility of evidence than what is required by Huddleston v. U.S., 485 U.S. 681 (1988) under Rules 403 and 404(b), regarding the determination of prejudice in civil police liability cases, which often involve Plaintiffs who are on probation, have criminal histories, warrants, or possess evidence of a crime that is unknown to the officer but helps explain their response to law enforcement officers performing their duties?

Did the Eleventh Circuit panel disregard the appropriate standards of review and the appropriate application of the harmless error rule, making themselves impregnable citadels of technicality in this case, resulting in a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

**RELATED PROCEEDINGS**

Bryant v. Sheriff and Newman, 562016CA000029 (OC)(Circuit Court, 19<sup>th</sup> Judicial Circuit, in and for St. Lucie County, Florida—case prior to removal);

Bryant v. Sheriff and Newman, 2:16cv14072 (S.D. Fla. May 31, 2018);

Newman v. Bryant, 17-12547-A (11<sup>th</sup> Cir. January 24, 2018)(qualified immunity appeal);

Bryant v. Sheriff and Newman, 18-13902-E (11<sup>th</sup> Cir. March 17, 2020)(reversal and remand for new trial).

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## **OPINIONS AND ORDERS BELOW**

The panel opinion below is an unpublished opinion that can be found at 800 Fed.Appx. 881 (11th Cir. 2020). (Pet. App. 1). The per curiam denial of the petition for rehearing and rehearing en banc is not published. (Pet. App. 50). The trial court's order denying Plaintiff's motion for new trial can be found at 2018 WL 3862650. (Pet. App. 17). The district court's opinion regarding Defendants' motions for summary judgment is unpublished but can be found at 2017 WL 2119559 (S.D. Fla. May 16, 2017). The Eleventh Circuit's opinion regarding Defendant Newman's qualified immunity appeal is unpublished but can be found at 723 Fed.Appx. 793 (11th Cir. 2018).

## **JURISDICTION**

The Eleventh Circuit entered judgment on March 17, 2020 (Pet. App. 16) and denied the petition for rehearing and rehearing en banc on May 12, 2020. (Pet. App. 50). By Order of this Court dated March 19, 2020, due to the pandemic, this petition's filing date is October 9, 2020. The Court has jurisdiction under Title 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This Title 42 U.S.C. § 1983 case involves the Fourth Amendment to the United States Constitution as well as Title 28 U.S.C. § 2111.

The Fourth Amendment to the United States Constitution reads as follows:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 42 U.S.C. § 1983 reads in pertinent part as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Title 28 U.S.C. § 2111 reads as follows:

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

### **STATEMENT OF THE CASE<sup>1</sup>**

#### **A. Basis for Federal Jurisdiction in the Court of First Instance**

The District Court had jurisdiction pursuant to Title 28 U.S.C. §§ 1331, 1343 and 1367. The Circuit Court had jurisdiction pursuant to Title 28 U.S.C. § 1291.

#### **B. The Underlying Events**

This case involves the shooting death of Gregory Hill by Deputy Sheriff Newman, on January 14, 2014 in St. Lucie County Florida. The decedent, Gregory Hill, suddenly and without warning confronted Deputy Newman and Deputy Lopez with a hand gun during their response to a loud and vulgar music call at Hill's home which was located across the street from an elementary school during afternoon pick up time where children and parents were present. Hill, who was highly intoxicated, was playing loud vulgar music in the garage of the home. After failing to gain Hill's

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<sup>1</sup> As the judgment below was entered in favor of the Defendants on all claims after a jury trial, the facts are to be viewed in the light most favorable to the Defendants as the prevailing parties. See Gill as Next Friend of K.C.R. v. Judd, 941 F.3d 504, 518 (11th Cir. 2019).

attention by knocking on the front door of the home, the fully uniformed Deputies approached the garage door, where the music was emanating from, and knocked on the garage door to ask the occupant to turn the music down. Mr. Hill lifted the garage door with one hand, while holding a hand gun in his other hand. Disregarding orders to drop the gun, Hill suddenly began to close the garage door, while simultaneously raising the hand gun in the direction of Deputy Lopez who was only a few feet away. As a result Deputy Newman, who feared for his life, and that of his partner, fired his weapon four times at Hill as the garage door shut. All four rounds passed through the garage door. The final round struck Mr. Hill in the head killing him. Mr. Hill's hand gun was found in the large back pocket of his shorts after the shooting, as if he was trying to hide it. Mr. Hill was on probation at the time of the incident and as a result was not permitted to have a firearm or to be intoxicated. Civil litigation by Hill's mother, Viola Bryant, followed.

### **C. The Civil Trial**

Prior to trial, Plaintiff filed a bench memorandum seeking to have the fact that Hill was on probation excluded as evidence in the case as being irrelevant since the deputies were unaware of it, that its probative value was substantially outweighed by the danger of unfair prejudice as it would mislead the jury, that it constituted improper character evidence and would have required an explanation to the jury as to the differences between felonies, misdemeanors, withholds of adjudication, and other criminal law concepts. The Defendants countered by arguing that

the fact that Hill was on probation at the time of the incident was relevant to help explain Hill's actions at the time of the shooting and to add credibility to the deputies' description of what prompted the use of deadly force, and not to show that Hill was a bad man. The trial court issued its preliminary ruling, pre-trial, agreeing with the Defendants and specifically finding that the probation evidence, to be offered by the Defendants, was relevant and would be limited to the fact that Hill was on probation at the time of the incident, without reference to the nature of the underlying crime or conviction if any, for the purposes of providing an explanation for Hill's physical reaction to the presence of the Deputies responding to such a minor call. That response included rapidly shutting the garage door, while simultaneously raising the gun, and then quickly hiding it in his rear pocket, while being shot, which were seemingly impossible physical tasks and an over reaction, to the mere sight of the Deputies, given the nature of the call. The Trial Court also determined that a limiting instruction in that regard would be given to the jury.

During the trial, however, it was the Plaintiff who took a different approach and first introduced evidence during her case in chief regarding Hill's probationary status, with testimony from Plaintiff's expert as well as from Hill's fiancée who falsely claimed that Hill was not on probation at the time. (Pet. App. 53-54, 59). Plaintiff's attorney also suggested that Hill had a right to possess a gun in his home. (Pet. App. 71). The Trial Court gave a limiting instruction regarding this evidence as follows:



Ladies and gentlemen, as you have heard, Mr. Hill was on probation. This evidence is only admissible to the extent you think it is relevant to Mr. Hill's actions on the date of the subject incident. It is not to be considered for any other purpose.

The Defendants rebutted Plaintiff's false claims, and offered the evidence for the original purpose of explaining Hill's actions, during their case in chief, through the testimony of probation supervisor, Niles Graben. (Pet. App. 60-66).

The evidence established at trial that Hill's blood alcohol level was as high as .390 and he was known to have a gun which he kept in his garage. Plaintiff's expert suggested that the gun found in Hill's back pocket may have been planted there. Hill's young daughter Destiny testified that she was across the street at her elementary school sitting in the busy student pick up area at the time of the shooting and could see that her father's hands were empty. Other witnesses closer to the scene testified that they were unable to see Hill's hands at all. The jury clearly rejected Destiny's testimony, and concluded that Hill had a gun in his hand. Hill's fiancée Terrica Davis testified she had broken off their engagement on the day of the shooting as she was frustrated about Hill's inability to contribute to their household and had left him a letter ending their relationship the night before which was found in their bedroom.

During closing arguments, Defendants' counsel argued to the jury that as Hill was on probation and was prohibited from possessing a firearm or drinking

alcohol, he had a motive for quickly getting both himself and his gun out of the sight of law enforcement. This supported the Defendants' theory as to how and why the gun was found in Hill's back pocket, rather than in or near his hand, particularly to rebut Plaintiff's expert's suggestion that the gun was planted there.

The Jury determined that Deputy Newman did not use excessive force in the shooting death of Mr. Hill, and returned a defense verdict on the 42 U.S.C. § 1983 claim brought against Deputy Newman. The jury returned a verdict in favor of Hill's mother, on her state law negligence claim against the Sheriff of St. Lucie County, awarding \$4.00 in damages, and concluding that Mr. Hill was intoxicated and 99% at fault for his own harm, thus resulting in no award of damages under Florida law, pursuant to the alcohol defense raised by the Defendants.<sup>2</sup> As a result of this verdict, the case received extensive media attention, including a documentary on Amazon Prime, and negative press that a Black man's life does not matter or is only worth \$4.00.

Plaintiff filed a Motion for New Trial raising, among other issues, the fact that it was an abuse of discretion for the trial court to admit evidence that Hill was on probation. In response, the Defendants argued that the evidence of Hill's probation was admissible to explain

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<sup>2</sup> The negligence claim could not have involved the intentional use of excessive force as Florida law does not recognize a claim for the negligent use of excessive force, which is the intentional tort of battery.

Hill's reaction to the Deputies' presence and pointed out that it was the Plaintiff who first broached the topic of Hill's probationary status on her side of the case. The motion was denied and final judgment was entered in favor of the Defendants on all of the Plaintiff's claims.

#### **D. The Appeal and the Eleventh Circuit Panel's Opinion**

Plaintiff's appeal followed. After hearing oral argument, the Eleventh Circuit panel issued an unpublished opinion which reversed the judgment and remanded for a new trial concluding that the evidence that Hill was on probation was irrelevant because it did not relate to a disputed material fact and could not inform the jury on the reasons for Hill's behavior. The Eleventh Circuit panel also found that the trial court abused its discretion in admitting the fact that Hill was on probation, despite the limiting instruction given by the Trial Court, and that it was not harmless error.

**REASONS FOR GRANTING THE WRIT****I. THIS COURT SHOULD ADOPT A MORE FLEXIBLE STANDARD OF ADMISSIBILITY OF EVIDENCE THAN WHAT IS REQUIRED BY HUDDLESTON V. U.S. UNDER RULES 403 AND 404(B), REGARDING THE DETERMINATION OF PREJUDICE IN CIVIL POLICE LIABILITY CASES, WHICH OFTEN INVOLVE PLAINTIFFS WHO ARE ON PROBATION, HAVE CRIMINAL HISTORIES, WARRANTS, OR POSSESS EVIDENCE OF A CRIME THAT IS UNKNOWN TO THE OFFICER BUT HELPS EXPLAIN THEIR RESPONSE TO LAW ENFORCEMENT, AND WHERE LOSS OF LIBERTY IS NOT AT ISSUE**

The Federal Rules of Evidence apply to both criminal and civil cases. See Huddleston v. United States, 485 U.S. 681, 685 (1988)(discussing Rule 404(b) specifically). However, precedential guidance in regard to Rule 404(b) and its interplay with Rules 401 and 403 is virtually non-existent in the civil context. This Court has previously had to weigh in to ameliorate confusion in regard to another Rule of Evidence. See Green v. Bock Laundry, 490 U.S. 504 (1989) (analyzing the application of Federal Rule of Evidence 609(a)(1) in the context of a civil case).

Civil police liability cases often involve Plaintiffs who are on probation, have criminal histories, warrants, or otherwise possess evidence of a crime that is unknown to the responding officer but which explains the individual's response to law enforcement officers performing their duties. As the number of civil

rights cases being filed against law enforcement officers continues to rise<sup>3</sup>, it is an appropriate time for this Court to adopt a less restrictive standard favoring the admissibility of this type of evidence in § 1983 police civil rights cases.

By looking at the legislative history and Congressional Reports behind Rule 404(b) which noted a greater emphasis on admissibility than a concern for potential prejudice, this Court set forth four considerations for the admissibility of Rule 404(b) evidence in the criminal case of Huddleston v. United States, supra at 691-92. In declining petitioner's invitation to require a more rigid framework for its admissibility due to his concern about prejudice, the Court stated:

We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative

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<sup>3</sup> Civil rights-related filings in the federal courts began to climb soon after the Civil Rights Act of 1964 was signed into law, jumping from 709 cases in 1964 to 1,123 cases by 1965. In 2013, a total of 35,307 civil rights cases were filed in federal court, 50 times the number of cases filed in 1964, and a 27 percent jump over the last two decades. <https://www.uscourts.gov/news/2014/06/09/over-two-decades-civil-rights-cases-rise-27-percent>.

value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, 8 see Advisory Committee's Notes on Fed.Rule Evid. 404(b), 28 U.S.C. App., p. 691; S.Rep. No. 93-1277, at 25; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted. See United States v. Ingraham, 832 F.2d 229, 235 (CA1 1987).

The current precedent is overwhelmingly set forth in criminal cases, which involve the loss of liberty. This Court should use a less restrictive approach in the application of Rule 404(b) in the context of civil cases, specifically regarding whether the evidence is more prejudicial than probative in accordance with the Huddleston case. This is particularly appropriate in civil cases involving law enforcement officers, to promote uniformity, avoid application of a stricter standard more appropriately applied against the government in a criminal prosecution where someone's liberty is at stake, and to honor Congressional intent of more liberality in the admissibility of evidence. See Huddleston, supra; United States v. Cohen, 888 F.3d 770, 776 (11th Cir. 1989)(court noted that normal risk of prejudice is absent where criminal defendant was offering Rule 404(b) evidence against the government's witness). It is also apparent that police liability cases will, more often than not, involve interaction with Plaintiffs who are suspected of unlawful behavior, and who may have previously had contact with the criminal justice system so as to impact their response to law

enforcement, even during relatively minor interactions. It should be the rule that such evidence, if relevant to explain the actions of the Plaintiff which relate to the reasonableness of an officer's perception or the credibility of the officer's testimony regarding the event, is presumed to be admissible, and not unfairly prejudicial and where necessary, a limiting instruction should be given.<sup>4</sup>

A review of a few other police liability cases is warranted. In the section 1983 excessive force case of Greene v. Distelhorst, 116 F.3d 1480 (6th Cir. 1997), Greene appealed to the Sixth Circuit following a trial which resulted in a jury verdict in favor of the defendant officers. Greene attacked the evidentiary rulings by claiming prejudice. The Sixth Circuit found that "evidence of Greene's conduct leading to his arrest...and the convictions stemming from that arrest were admissible to provide the jury with a full account of the events giving rise to Greene's present claims and

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<sup>4</sup> As this Court has stated, an excessive force claim against a law enforcement officer must be analyzed under the Fourth Amendment and its reasonableness standard. Graham v. Connor, 490 U.S. 386, 395 (1989). The reasonableness inquiry involves a determination of whether the officer's actions are objectively reasonable in light of the facts confronting the officer, regardless of the officer's underlying intent or motivation. Graham, 490 U.S. at 397. Reasonableness depends on all circumstances relevant to an officer's decision to use force, including the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officer or others, and whether the suspect actively resisted arrest or attempted to evade arrest by flight and must account for the fact that police officers are sometimes forced to make split-second judgments under circumstances that are tense and rapidly evolving. Graham, 490 U.S. at 397.

to demonstrate Green's motive to run, hide and resist arrest." Greene, supra at \*3. Additionally they held that his "drug abuse conviction was based on the marijuana found in Greene's possession at the time of the arrest and was admissible for the purpose of demonstrating Greene's motive to flee and resist arrest and the officers' motive to maintain pursuit."

The Seventh Circuit, has likewise stated, when dealing with a § 1983 case involving the police shooting of a suicidal man: "evidence unknown to officers at the time force was used is also admissible to add credibility to an officer's claim that a suspect acted in the manner described by the officer." See Est. of Escobedo v. Martin, 702 F.3d 388, 400 (7th Cir. 2012).

The Eighth Circuit as well has opined in a § 1983 excessive force case involving a police shooting of the driver of a vehicle involved in an investigatory traffic stop: "it was incumbent upon the jury to consider [the defendant officer's] actions in relation to all the circumstances of the situation that confronted him. We therefore believe the evidence of alcohol consumption [by the vehicle's occupants] is relevant to the jury's assessment of that situation..." See Turner v. White, 980 F.2d 1180, 1182-1183 (8th Cir. 1992).

The Ninth Circuit has also stated: "In a case. . . where what the officer perceived just prior to the use of force is in dispute, evidence that may support one version of events over another is relevant and admissible." Boyd v. City and Cnty. of San Francisco, 576 F.3d 938, 948-949 (9th Cir. 2009). In Boyd, the Ninth Circuit approved a trial court's ruling allowing evidence that the decedent had been on drugs at the



time of a police shooting because the evidence “was highly probative of the decedent’s conduct, particularly in light of [the decedent’s] alleged erratic behavior...” Id. at 949; see also Mendoza v. Gates, 19 Fed. Appx. 514, 518-19 (9th Cir. 2001)(district court did not abuse its discretion under Rule 404(b) because Olsen did not seek to admit evidence of the prior conviction “in order to show action in conformity therewith.” Rather, Olsen sought to admit the evidence of the prior conviction to show that Mendoza was on probation, and, therefore that he had some motive to run from the police, other than, for example, the motive to run from “the gun Olsen was pointing at Jose Mendoza,” as asserted by the Mendozas. This use of the prior conviction is permissible.).

Finally, even the Eleventh Circuit, notwithstanding the panel opinion in this case, has followed suit. In Knight through Kerr v. Miami-Dade County, 856 F.3d 795 (11th Cir. 2017), the Plaintiffs brought federal and state claims arising out of an incident which involved a police chase that ultimately culminated in a police shooting. Two of the passengers of the car were killed and the other was injured. Id. at 803-805. Prior to trial, the Plaintiffs in Knight moved to exclude evidence of the driver’s previous felony convictions. The trial court permitted the driver’s most recent conviction because the court found “it was material to the defense theory that his earlier conviction and his probation status caused him to initiate, and refuse to cease flight when confronted by the officers.” Id. at 815-816. In evaluating the propriety of the trial court’s ruling, the Eleventh Circuit first noted Rule 404(b)’s exception regarding evidence of a crime, wrong or other act when

the evidence is used to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Id. at 816. In ratifying the trial court's decision to allow evidence of the driver's probation status, the Eleventh Circuit concluded that the evidence was plainly admissible under Rule 404(b) to establish the driver's motive in fleeing since if he had simply pulled over, "he would have been caught associating with other people on probation, which might have jeopardized his probationary status." Id. at 816-817.

The panel opinion here cannot reasonably be reconciled with these cases in terms of the application of the prejudice factor announced in this Court's opinion in Huddleston. As a result, there is too great of a risk that a reviewing court in the context of a civil case like this will become an impregnable citadel of technicality which this Court cautioned against in McDonough and Shinseki, see infra.

In addition, opinions from other circuits, in dealing with § 1983 excessive force cases, show both a lack of uniformity in their application of this Court's directives in Huddleston and a lack of precedential guidance on this matter in the context of civil litigation.

For example, in dealing with the admissibility of a plaintiff's subsequent domestic abuse arrest, and permitting its admission in a section 1983 false arrest and excessive force case, the First Circuit, in Udemba v. Nicoli, 237 F.3d 8, 15 (1st Cir. 2001) ultimately interpreted the text of Rule 404(b) as suggesting a bifurcated two-step analysis. It found that any errors were harmless noting the considerable discretion

enjoyed by the trial court in evidentiary matters. Id. at 14, 18. The Fourth Circuit, however, in a similar §1983 excessive force case, looked to a criminal case in its circuit for guidance and utilized a four part test that differs from Huddleston to assess admissibility of prior act evidence. See e.g. Smith v. Baltimore Police Department, 840 F.3d 193, 201 (4th Cir. 2016) (bystander's prior arrests).

In consideration of Congressional intent which favors the admissibility of evidence, the calculus of prejudice should be less stringent where loss of liberty is not a factor. See U.S. v. Cohen, *supra*. This case presents this Court with an opportunity to adopt such a standard.

## **II. THE ELEVENTH CIRCUIT PANEL'S DECISION IS WRONG**

### **A. The Eleventh Circuit panel failed to give due deference to the trial court's findings in regard to the admissibility of Hill's probationary status and failed to view the evidence in the light most favorable to the Defendants as the prevailing parties**

What this Court has described as a "hallmark of abuse-of-discretion review," with respect to evidentiary questions in general and Rule 403 in particular, a district court virtually always is in the better position to assess the admissibility of the evidence in the context of the particular case before it. Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 384 128 S. Ct. 1140, 1146, 170 L.Ed.2d 1 (2008); see also General Electric Co. v. Joiner, 522 U.S. 136, 143, 118 S. Ct. 512,

517, 139 L.Ed.2d 508 (1997)(citing Koon v. United States, 518 U.S. 81, 88-89, 116 S. Ct. 2035, 2046-2047, 135 L.Ed.2d 392 (1996)). “Deference is particularly appropriate where,” as here, “a new trial is denied and the jury’s verdict is left undisturbed.” Walter Int’l Prods., Inc. v. Salinas, 650 F.3d 1402, 1407 (11th Cir. 2011)(quotation marks omitted). Moreover, the appellate court in this instance should view the evidence in a light most favorable to the prevailing party. Gill as Next Friend of K.C.R. v. Judd, 941 F.3d 504, 518 (11th Cir. 2019).

The district court below appropriately listened to the evidence in this case and, utilizing its considerable discretion, permitted the Defendants to introduce evidence of Hill’s probation status since it helped explain Hill’s actions on the day of the subject incident and added credibility to the deputies’ description of the subject incident. The trial court noted in its denial of Plaintiff’s motion for new trial: “Because of the dispute regarding whether Mr. Hill had the gun in his hand when he answered the door, Mr. Hill’s probationary status was relevant in order to add credibility to Defendant Newman’s version of the events. The Court notes that this case is not unlike the case of Knight v. Miami-Dade Cnty., 856 F.3d 795 (11th Cir. 2017). . . . In Mr. Hill’s case, evidence of Mr. Hill’s probationary status was probative of his motive to close the garage door and put the gun in his back pocket, in order to avoid jeopardizing his probationary status. Evidence of Mr. Hill’s probationary status was probative of the defense theory of the case—that Mr. Hill answered the garage door with a gun in his hand and then placed it in his back pocket.” (Pet. App. 33).

Further, in its application of Rule 403, the trial court noted “when weighing the probative value and the danger of unfair prejudice, the Court finds that the probative value of Mr. Hill’s probationary status was not substantially outweighed by a danger of unfair prejudice” as a limiting instruction had been given to the jury.

The Eleventh Circuit panel rejected the district court’s reasoning that Hill’s probationary status may have motivated him to attempt to hide his gun in his back pocket, by stating that there was “a problem with this reasoning. Hill’s probationary status could not inform his motivation to conceal the weapon in the scenario described by the officers. No reasonable person would wish to be seen pointing a gun at police officers, regardless of their probationary status. Thus, this evidence made neither party’s account of the shooting more or less probable.” (Pet. App. 10-11). However, no one contended that Hill was ever seen “pointing” a gun at either of the officers. Rather, it reasonably appeared to Deputy Newman that Hill started raising the gun, which was in Hill’s right hand, in the direction of Deputy Lopez as he was manually lowering the garage door with his left hand. In addition, there is no evidence to support the conclusion that probationers engaged in illegal activities would respond to the presence of police officers in the same manner as a person engaged in lawful activities inside of their home, such as possessing a gun or consuming alcohol.

Further, the panel failed to view the evidence in the light most favorable to the Defendants, who were the prevailing parties. See Gill, supra. This evidence

included Hill's high blood alcohol level, that he was known to keep a gun in his garage, and that he would have been able to put the gun into his rear pocket prior to the last shot striking his head, as demonstrated during trial where the gun easily fit into the large rear pocket of Hill's shorts. Most notably, the Eleventh Circuit panel's conclusion that Hill's daughter had an unobstructed view of her father is not supported by the record and was clearly not viewed in a light most favorable to the Defendants who were the prevailing parties. Hill's young daughter's testimony that she could see that her father's hand was empty, was rebutted by other witnesses, many of whom were physically closer to the scene than she was as well as evidence that school traffic would have impeded her view, as she was sitting on a bench in the busy school pick up area across the street from Hill's house. The jury heard her testimony and weighed it appropriately.

**B. The Eleventh Circuit panel disregarded the appropriate application of the Rules of Evidence in its determination that the trial court erred in admitting Hill's probationary status**

The Eleventh Circuit panel concluded that Hill's probationary status was "prejudicial and not relevant to any disputed fact" and that "[b]ecause Mr. Hill's probationary status was only relevant to prove a fact to which both parties agreed, its probative value was highly limited." (Pet. App. 8, 11-12). Clearly the panel's opinion here ignores the interplay among Federal Rules of Evidence 401, 403 and 404 and is not in line with the reasoning behind Rule 401 as set forth by this Court in

Old Chief v. United States, 519 U.S. 172 (1997). Moreover, the panel's opinion was factually inaccurate and otherwise failed to follow its own precedent as set forth in the Knight opinion by requiring more than motive which too narrowly applied the test of relevancy by holding that the probation evidence had to be relevant to a *disputed fact* and improperly interpreted Rule 404(b) as an exclusionary rule as opposed to a rule of inclusion. In addition, the record established that although there was general agreement that Hill raised and then lowered the garage door (the undisputed fact), Hill also, and simultaneously, put his gun in the rear pocket of his shorts to hide it (the disputed fact). As demonstrated during trial, the rear pocket of Hill's shorts was extremely large, while the pistol was small and easily fit in the pocket.

Old Chief, supra, involved a criminal defendant who was being prosecuted for a federal crime which made it illegal for a convicted felon to possess a firearm. Old Chief agreed to stipulate to the fact that he was a convicted felon but the government refused and introduced evidence which included both the name and nature of his prior felony conviction. Old Chief was convicted and the Ninth Circuit affirmed. This Court, in rejecting the petitioner's argument that the name of his prior offense was irrelevant in his prosecution, instead found it was relevant, but was unfairly prejudicial and therefore properly excluded under Rule 403. In discussing the reasoning behind the application of the Rules of Evidence, this Court referred to advisory committee notes to Rule 401 which stated:

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute.

Old Chief, 519 U.S. at 179.

This Court and the Eleventh Circuit have repeatedly stated that the Federal Rules of Evidence favor admission of any evidence tending to prove or disprove a fact in issue. Huddleston, *supra*; United States v. Finestone, 816 F.2d 583 (11th Cir. 1987); Young v. Ill. Cent. Gulf R.R. Co., 618 F.2d 332 (5th Cir. 1980)(if evidence has any probative value at all, its admission is favored); *see also* United States v. Brown, 441 F.3d 1330, 1362 (11th Cir.2006) (“Consequently, in “reviewing issues under Rule 403, we look at the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its prejudicial impact.”). “[B]ecause it permits a trial court to exclude concededly probative evidence, Rule 403 is an extraordinary remedy which should be used sparingly.” United States v. King, 713 F.2d 627, 631 (11th Cir. 1983) (quotations omitted); *See also* Stepanovich v. City of Naples, 728 Fed. App’x 891, 900 (11th Cir. 2018).

The Eleventh Circuit panel’s narrow focus on Hill closing the garage door as the only critical fact and its related reasoning for finding Hill’s probation status as



not relevant to the proceedings was error. The focus is broader—whether Hill’s probationary status was relevant to a material issue. Here, the jury was tasked with deciding the reasonableness of Deputy Newman’s use of force and whether he reasonably feared for his life or the life of his fellow deputy. See Graham, 490 U.S. at 395; Garczynski v. Bradshaw, 573 F.3d 1158, 1167 (11th Cir. 2009). The Defendants offered evidence of Hill’s probation as to that material issue to lend credence to Deputy Newman’s version of events in regard to his decision to use deadly force, and to explain Hill’s actions in closing the garage door rapidly at the sight of deputies and why Hill would act quickly to hide his gun by putting it in his pocket, which appeared to be an impossible task under the circumstances.

The district court below found, consistent with the Eleventh Circuit’s opinion in Knight v. Miami Dade County, supra that the evidence of Hill’s probationary status was relevant to the defense’s theory of the case and that it was not overly prejudicial, especially considering the Court’s limiting instruction regarding the purpose for which the information was being admitted. Just as the Eleventh Circuit Court stated in Knight: “evidence of Blackwood’s prior conviction was relevant to offer a reason for his flight, see Fed. R. Evid. 404(b). No more ‘nexus’ is required.” Knight, 856 F.3d at 817, and the Defendants here needed no further showing of a nexus for Hill’s probationary status to be properly admissible.<sup>5</sup>

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<sup>5</sup> In fact, Plaintiff below *conceded the probativeness of Hill’s probationary status*. In her briefs she states several times: “[i]f

One central question in this case went to the heart of the reasonableness of the use of deadly force upon Hill: after the shooting the only gun found on or near Hill *was located in his back pocket*. From the trial's beginning, Plaintiff's counsel suggested that Hill himself could not have put the gun in his pocket once he sustained the gun shot to his head which would have rendered him incapable of significant motor function. Plaintiff's counsel also pointed out the fact that the gun found in Hill's back pocket did not have any blood or brain matter on it. Plaintiff's expert Roy Bedard spent a significant amount of time testifying that it was likely the gun was placed there by someone other than Hill. As a result the Defendants countered this theory by showing the jury that Hill was known to own a gun and kept it in a file cabinet in his garage. The Defendants showed the jury a photograph of the scene in Hill's garage, which included a file cabinet, with an open drawer. Furthermore, the Defendants submitted evidence to the jury showing how Hill could have quickly placed the gun in his large rear pocket, and would be motivated to do so because he was on probation, prior to the final gunshot striking him in the head. Plaintiff's gun planting theory increased the probative value of Hill's probationary status and his motive to quickly get the gun out of sight and into his back pocket after unexpectedly being faced with

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anything, evidence of Mr. Hill's probationary status would, as the trial court stated, be "probative of. . .the theory. . .that Mr. Hill answered the garage door with a gun in his hand and then placed it in his pocket." Despite Plaintiff's assertion to the contrary, this *was* the Defendants' theory of the case as correctly noted by the trial court.

uniformed deputies when he knew he was not supposed to be intoxicated or in possession of a firearm<sup>6</sup>.

**C. The Eleventh Circuit panel disregarded the appropriate application of the harmless error standard by improperly presuming that admission of Hill's probationary status resulted in substantial prejudice to Plaintiff**

The Eleventh Circuit panel improperly based its finding of substantial prejudice in this case by way of presuming that the jury was lead to believe that Hill had previously been convicted of a crime, and that the limiting instruction did not sufficiently mitigate the prejudice which it presumed resulted from the admission of this evidence. This was error as no such evidence was introduced, and no such argument was made. Furthermore, the panel's erroneous presumption that "Hill's probationary status could not inform his motivation to conceal the weapon in the scenario described by the officers" and that "[n]o reasonable person would wish to be seen pointing a gun at police officers, regardless of their probationary status" defies this Court's precedent concerning probationers as well as common sense regarding the reaction of law abiding citizens as opposed to those who are on probation. Further it is the exact type of

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<sup>6</sup> The motivation for the rapidness of this movement likewise explained how the gun was found free of spatter from blood or brain matter as it would have already been located behind Hill as he was being shot.

presumption, and substitution of judgment, that the harmless error rule intended to avoid.

This Court has rejected the notion expressed by the panel that probationers necessarily would react to the sight of law enforcement in the same manner as those not on probation. U.S. v. Knights, 534 U.S. 112, 122 S. Ct. 587, 151 L.Ed.2d 497 (2001). In an analysis of the Fourth Amendment in the context of a search of a probationer's apartment this Court specifically noted that "probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration...." Knights, 534 U.S. at 120, 122 S. Ct. at 592, 151 L.Ed.2d 497; see also Illinois v. Wardlow, 528 U.S. 119 (2000), where this Court applied common sense judgments about human behavior when resolving a question regarding the existence of reasonable suspicion. It is apparent from the record that the Eleventh Circuit panel's opinion is a result oriented opinion that is not supported by the record or the appropriate application of the harmless error rule. The panel made presumptions that ignore human behavior and common sense and that are not supported by the record which contains substantial evidence against Hill's theory of the case.

The appellate court is supposed to apply the harmless error standard in evaluating whether specific trial errors warrant a new trial. See Title 28 U.S.C. § 2111; see also Fed. R. Civ. P. 61. Erroneous evidentiary determinations that do not affect the

substantial rights of a party must be disregarded. 28 U.S.C. § 2111; Fed. R. Civ. P. 61; Fed. R. Evid. 103(a). This Court has stated that the federal harmless-error statute, 28 U.S.C. § 2111 seeks to prevent appellate courts from becoming “impregnable citadels of technicality”, and expresses a congressional preference for determining harmless error without the use of presumptions insofar as those presumptions may lead courts to find an error harmful, when, in fact, in the particular case before the court, it is not. McDonough v. Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S. Ct. 845, 78 L.Ed.2d 663 (1984); Shinseki v. Sanders, 556 U.S. 396, 129 S. Ct. 1696, 173 L.Ed.2d 532 (2009).

As this Court has noted in McDonough, 464 U.S. at 553:

We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered “citadels of technicality.” Kotteakos v. United States, 328 U.S. 750, 759, 66 S.Ct. 1239, 1245, 90 L.Ed. 1557 (1946), quoting Kavanagh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power, 11 A.B.A.J. 217, 222 (1925). The harmless error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for “error” and ignore errors that do not affect the essential fairness of the trial. See Kotteakos, 328 U.S., 759–760, 66 S.Ct., 1245–1246.

It is important to note that it was Plaintiff's counsel **who first** brought Hill's probation status before the jury with his examination of Plaintiff's law enforcement expert (Roy Bedard) who testified that Hill's probation status had no significance in the case. (Pet. App. 53-54). Plaintiff's counsel then brought to the jury's attention Hill's probation several more times: with Hill's fiancée, Terrica Davis who testified (falsely) that Hill was not on probation at the time of the shooting, with lead detective Sgt. Edgar LeBeau, and again with both Deputies Newman and Lopez. (Pet. App. 56, 59, 67, 71-72). Plaintiff's counsel also suggested that Hill had a right to possess a gun in his home. (Pet. App. 71).

Because the jury heard multiple times about Hill's probationary status on Plaintiff's side of the case, including the false testimony by Hill's fiancée that he was not on probation on the subject date, the Defendants were essentially forced to rebut this testimony and again revisit the probation issue. Abiding by the trial court's ruling, the Defendants called probation supervisor Niles Graben who testified only that Hill was still on probation at the time of the shooting as he still had unpaid court costs and that his probation prohibited him from drinking alcohol and possessing a firearm. (Pet. App. 60-66). Defendants' counsel never portrayed Hill as a "bad man" to the jury and her references to the probation issue during closing arguments concerned Hill's motive for why he would have quickly lowered the garage door and immediately placed the gun in his back pocket, which again was to support the defense's theory on how and why the gun

was found in Hill's back pocket, rather than in or near his hand.

Moreover, contrary to the panel's opinion, the admission of Hill's probationary status was harmless in light of the strength of the other evidence against Hill. This included Hill's high blood alcohol level, that he was known to keep a gun in his garage, and that he would have been able to put the gun into his rear pocket prior to the last shot striking his head, as demonstrated during trial where the gun easily fit into the large rear pocket of Hill's shorts. Further, it was error for the panel to give so much weight to Hill's daughter's testimony in this case. As previously stated, the testimony of Hill's elementary school aged daughter, that her father's hand was empty, was rebutted by substantial evidence and reasonably rejected by the jury.

As a result, the Eleventh Circuit panel should not have reversed and remanded this case for a new trial. See e.g. United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 84 L.Ed.2d 1 (1985)(argument of prosecutor, although error, did not constitute plain error, nor did the challenged argument seriously affect the fairness of the trial, accordingly, the judgment of the Court of Appeals, ordering a new trial based on the prosecutor's argument, is reversed.); United States v. Green, 873 F.3d 846 (11th Cir. 2017) (District court's error in admitting judgment showing defendant's prior state conviction was harmless, in light of ample, independent evidence of defendant's guilt, and court's cautionary instruction as to jury's use of prior bad acts evidence); United States v. Beck, 625 F.3d 410 (7th Cir. 2010)

(admission of testimony of defendant's probation officer raising inference that defendant was on probation and that he had been previously convicted of a crime was harmless error in light of the strength of the other evidence against defendant).

As this Court has stated, the trial court who was present to hear all of the evidence was in the best position to determine the appropriateness of the introduction of Hill's probation status and accordingly properly denied Plaintiff's motion for new trial. See Sprint/United Mgmt. Co., 128 S. Ct. at 1146.

### **CONCLUSION**

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and opinion of the Eleventh Circuit Court of Appeals.



Respectfully submitted this 9th day of October,  
2020.

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