No. 20-502

In the
Supreme Court of the United States

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.,
Respondent.

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

BRIEF IN OPPOSITION

JOHN M. PHILLIPS
Counsel of Record
PHILLIPS & HUNT
212 North Laura Street
Jacksonville, FL 32201
(904) 444-4444
(904) 508-0683 (facsimile)
jmp@floridajustice.com

Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The Petitioners presented the following questions:

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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Rules

Other Authorities

INTRODUCTION

The Eleventh Circuit Court of Appeals reviewed and reversed the underlying decision of the trial judge which overruled and denied all of Respondent's repeated requests to disallow evidence of Respondent's deceased son's alleged probation, which was entirely unknown to officers responding to her son's home as a mere result of a loud music complaint.

Federal Rule of Evidence 404(b) provides that evidence of "other crimes, wrongs, or acts" is not admissible to prove a person's character, but may be admissible for other purposes, such as proof of knowledge. As noted by the Eleventh Circuit, "Rule 404(b)(2) provides that such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." However, "Evidence that is admissible under Rule 404(b)(2) must still "possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of [R]ule 403." Judges Martin, Lagoa and Grant unanimously held, "Evidence of Mr. Hill's probationary status was not relevant to any issue other than Hill's character. It therefore had no permissible probative value."

The Eleventh Circuit added, "(T)here are circumstances in which criminal history evidence not known to law enforcement officers at the time force was used may still be admissible under Rule 404(b) to lend support to the officers' factual claims. For example, in Knight ex rel. Kerr v. Miami-Dade County, 856 F.3d 795 (11th Cir. 2017), this Court affirmed the admission

of evidence that three victims of a police shooting were on probation at the time of the shooting." The court reviewed Knight, its own case and held, "No such circumstances were present here. Unlike in Knight, there was no material fact in dispute that Mr. Hill's probationary status helped resolve."

Petitioners seek a departure from the Rule and case precedent, exclusively in civil rights cases, in order to introduce evidence of probation unknown and irrelevant to a police shooting merely because it "may explain" the shooting victim's response to law enforcement. Petitioners cite no precedent while asking the Supreme Court to essentially create new law. This request should be denied.

Petitioners next ask, did the Eleventh Circuit make "themselves impregnable citadels of technicality" in the underlying case? Petitioners apparently seek to invoke words from Kotteakos v. United States, 328 U.S. 750, 758 (1946), which are sometimes invoked to accuse appellate courts of overstepping, which, in this case, is precisely what the unanimous court said the district court did at the trial level. The Eleventh Circuit engaged in a reasoned analysis, concluding, "The District Court abused its discretion in admitting evidence of Mr. Hill's probationary status at trial, and this error resulted in prejudice to Ms. Bryant's case against Deputy Newman and Sheriff Mascara. Because this error independently warrants reversal, we need not reach Ms. Bryant's other arguments." This request should be denied.

COUNTER-STATEMENT OF THE CASE

Of course the trial court certainly was able to "hear all of the evidence" as cited by Petitioners. However, the record was well kept and the trial testimony was fully reviewed by the Eleventh Circuit Court of Appeals, as noted during the oral argument and in its opinion. Respondent rebuts the entirety of the narrative from trial as expressed in the Petition for Writ of Certiorari.

A. Petitioners Mischaracterized Destiny Hill's Testimony.

There is a substantial attempt to discredit or isolate the testimony of Destiny Hill, the most clear and consistent eyewitness to the matter. At the time police pulled up to her house, Miss Hill was sitting across the street at school. She was sitting "on the first bench," "closest to the house." (R-240-pg. 107/lines 21 – pg. 108/line 1). She heard no police commands. (R-240-pg. 108/lines 12-13). She saw her dad's hands and he was not holding a gun. (R-240-pg.109/lines 2-5). She saw the garage door briefly raise up. Her dad put the garage door down and then police shot. (R-240-pg. 117/lines 14-24).

Her testimony was buttressed by many others. Her school's principal, Juanita Wright, testified she did not hear police give any commands (R-238-pg. 230/line 6), she did not see Mr. Hill with a gun in his hand (R-238-pg. 231/line 2) and only saw the door raise "slightly" (R-238-pg. 230/line 16). Another teacher, Donna Hellums, said she, "saw the garage door go up and start coming back down and I heard some pops." (R-238-pg. 238/lines

9-10). She did not see Mr. Hill, much less Mr. Hill holding up a gun during that time. (R-238-pg. 240/lines 5-7). Ms. Mcguire, another teacher, testified all she saw, "a garage door open and I saw legs, and that was it." (R-239-pg. 39/lines 17-18). And, she said, "I only saw like maybe right before the knee or something. I didn't see like a torso." (R-239-pg. 54/lines 19-20). She heard officer's "forceful bang" on the door (R-239-pg. 51/lines 19-20, 22), but does not recall any commands by the officers. (R-239-pg. 43/line 1). David Morales, another teacher, said he briefly believes he saw a man standing behind the garage door. (R-239-pg. 65/line 3). He saw his legs, and then the garage door went down. (R-239-pg. 69/lines 21-25). He never saw a firearm possessed by the person inside the garage. (R-239-pg. 67/ lines 12-14). Mr. Morales doesn't remember hearing any commands. (R-239-pg. 65/ lines 23-25).

Stefanie Mills Scheutz was the parent who actually called police over what Petitioners repeatedly referred to as "loud and vulgar music." In fact, the song was one she regularly listened to by the artist, Drake, but it certainly had curse words in the version playing that day. (R-239-pg. 10/lines, 15, 19, 22-23). Ms. Scheutz wasn't sure if she heard the "f word" a single time. (R-239-pg. 19/lines 14-15). Although typically reserved for emergencies and not sensitivity to utterances within recordings of Canadian rap artists, she called "911." (R-239-pg. 11/line 9). Police arrived while she waited for her children to load into her car. She was facing the house as the subject incident occurred. She described, "the garage door was opened, and then it was very quickly closed which I never saw -- at that time I never saw anyone inside the garage." (R-239-pg. 13/lines 1-2).

She "saw the police officer jump back and shoot into the garage." (R-239-pg. 13/lines 9-10). Ms. Scheutz told Petitioners' counsel the shooting officer appeared "startled." (R-239-pg. 32/lines 13-21). She recalls hearing no officer commands.

Meanwhile, the non-shooting deputy, Edward Lopez, stood feet away from former deputy Newman. He noted loud music wasn't an arrestable offense, the officers were in no way aware of the owner or occupant of the house, or any criminal history or probation status thereof. Deputy Lopez did not fire. He only heard former deputy Newman yell, "hey" as Mr. Hill "started to bring the garage door down really quick." (R-239-pg. 209, lines 2-3, 9). He admitted he was trained not to fire at something if you cannot see it, which was only one of the reasons he didn't fire. (R-239-pg. 211/ lines 3-7).

As such, the wealth of witnesses supported this occurring in a matter of instances exhibiting a lack of commands and containing a series of vast inconsistencies in contrast to the evidence presented by former deputy Newman and his employer. Compare that with the testimony of the shooting officer, former Deputy Christopher Newman. Upon allegedly seeing Mr. Hill with a gun in his hand in his own home, Newman admitted he couldn't shoot him. (R-241-pg. 143/lines 1-4). As such, he indicates he gave a host of commands "As loud as I could possibly imagine." (R-241-pg. 148/line 4). At trial, Newman said, "I know I said, "gun, gun, drop the gun" and I believe I said "drop the gun" again." We timed it and it took 2.7 seconds for him merely to say, one time, "Gun, gun, drop the gun,

drop the gun." (R-241-pg. 197/lines 9-13). As we had been through this before, Newman said, "The entirety of (his commands)." (R-241-pg. 197/line 16).

Newman was asked at trial, "You never said Sheriff's Office?" and he said, "Only when I was knocking on the doors." (R-241-pg.196/lines 9-10). After being presented with his deposition testimony, where he indicated his command was, "Sheriff's Office, gun, gun, drop the gun," he admitted "it would take more time than gun, gun, drop the gun." (R-241-pg. 198, lines 23-25). Of course, no one heard any of these commands and the timing is entirely inconsistent with any other rendition of the facts.

Mr. Hill allegedly raised his gun fast while the door lowered. (R-241-pg. 156/line 14- pg. 157/line 5). Newman fired in quick succession, "I fired my first round and it was like you got to fire your volley instead of one. I went one, and two, three, four." (R-241-pg. 153/lines 22-23). The shots were "Fractions of a second apart." (R-241-pg. 208/lines 5-6). Newman "lost sight of the gun before (he) fired," agreeing, "Yes, as I decided to fire, I was losing sight of the gun (behind the garage door)." (R-241-pg. 201/ lines 11-14). Newman also said, "So, the last point I saw the gun it was coming up" and he fired the volley of four shots. (R-241-pg. 200/lines 12-20). Based on all of the medical testimony, scientific testimony and factual testimony, there is simply no evidence Mr. Hill had time or capacity to place the subject firearm back to where it was found, just barely sticking out of his pocket. Recreation or "demonstration" literally was impossible.

B. Petitioners Mischaracterized Probation Testimony.

Essentially, Petitioners accused the mother of Greg Hill's children of perjury, saying, "Terrica Davis who testified (falsely) that Hill was not on probation at the time of the shooting." Here is that actual exchange:

> *Q*. Do you know for a fact if Mr. Hill was on probation on January 14, 2014?
> *A*. Yes.
> *Q*. Was he?
> *A*. No.
> *Q*. Was there a probation order?
> *A*. Yes. (R-240-pg. 73/lines 14-20).

Ms. Davis went on to elaborate that Mr. Hill would have been more familiar with the probation order, he had paid off the money and was completing all of his classes the last weeks of his life. (R-240-pg. 72/line 21-pg. 73/line 5).

Niles Graben was not Mr. Hill's probation officer, but reviewed his file and worked for the Florida Department of Corrections, Probation and Parole Services. He testified Mr. Hill's probation was terminated because of his death and not before, "January 21, 2014, with a nunc pro tunc date back to January 16, 2014." (R-240-pg. 129/lines 18-20). Mr. Hill was killed on January 14, 2014. As such, Petitioners' elicited testimony that Mr. Hill was in violation of that probation by being (1) intoxicated and (2) in possession of the firearm.

On rebuttal, Mr. Graben admitted Mr. Hill had a special condition to his probation, "As a special

condition, your probation automatically will terminate upon successfully completing one year of supervision." (R-240-pg. 131/lines 22-24). This order was signed January 9, 2013, nunc pro tunc to January 3rd, 2013 and records reflect Mr. Hill visited his probation officer "on January 3, 2014, at approximately 12:30 p.m." (R-240-pg. 133/line 3). However, no records of any outstanding payments or conditions were part of Mr. Hill's file or discussed with the jury. At least one member of St. Lucie County Sheriff's Office who investigated this matter, Sergeant Edgar Lebeau, testified he wasn't sure when Mr. Hill's probation terminated. (R-240-pg. 171/lines 16, 24).

Introducing probation status in police involved cases was perhaps best stated by Respondent's law enforcement expert in this exchange:

> *Q*. A gun was found in Mr. Hill's possession, and we all agree to that. We expect there is going to be evidence to show that Mr. Hill was on some sort of probation. What significance does that have related to this case?
> *A*. No significance.
> *Q*. Why not?
> *A*. I think the fact that he was on probation, if he was on probation, has to be calculated from the perspective of the officers on the scene. What is it that they knew they were responding to at the event, not what they found out later. Often, this can poison the review. If we bring in data not available to the officer at the time and allow it in the calculus of the decision-making, it corrupts our understanding of what the law enforcement

> officers did. In this case, my understanding is that they didn't know that he was on probation, and should not be alarmed by the fact that the he had a gun because you could have a gun in your house.

(R-239-pg. 149/line 12- pg. 150/line 5).

The Order setting probation was clear. A special provision was added which stated, "As a special condition, your probation will automatically terminate upon successfully completing one (1) year of supervision." It was signed January 9, 2013, nunc pro tunc back to January 3, 2013.

Whether or not there was some remaining payment or condition, probation status was unknown to the officers, irrelevant, prejudicial and in no way warranted introduction as it was introduced as the Eleventh Circuit held.

C. Petitioners Mischaracterized Testimony about Hill's Alleged Gun.

The central argument by Petitioners correlates the relevance of probation with the firearm found in Mr. Hill's back pocket, "as if he was trying to hide it." And Petitioners stated, Hill "had a motive for quickly getting both himself and his gun out of the sight of law enforcement." It's a flawed premise factually and legally.

Petitioners repeatedly claimed the firearm found in Mr. Hill's pocket was indisputably his. Petitioners' named DNA expert, Earl Ritzline, said he merely found a low level, partial, and a mixture of three individuals,

which simply could have been transferred from Mr. Hill's pocket. This is despite Mr. Hill being shot twice in the exact vicinity of where he allegedly brandished the gun in what was quite a bloody aftermath. Roy Bedard, respondent's expert testified, "I would find it highly unusual that it would have been clean (of blood or DNA) if he would have been shot while holding it." (R-239-pg. 141/lines 13-14).

As for the repeated mischaracterization of a "demonstration," it literally consisted of a law enforcement officer and his attorney easily putting the subject gun in and out of a pair of shorts. In fact, that "demonstration" went so poorly, Petitioners' counsel and her client couldn't keep the gun in the proper position in the shorts. At one point, he was told to, "Hold it like that for a second" with the gun sticking out like it did in the photos. (R-240-pg. 163/line 16). And again, the Petitioners' lawyer and her client visibly could not recreate the placement of the gun and explained, question, "Which, again, is hard to do, gravity is operating against you?" and Answer, "Yes." (R-240-pg. 163/line 24-pg. 164/line 1).

Not only was the demonstration visibly flawed, but it was done by two sober people, who were not shot, who were not trying to simultaneously put a garage door down and otherwise exhibited nothing of the facts here. Nothing about the "demonstration" was scientific or reliable and it has entirely been mischaracterized in the Petition for Writ of Certiorari.

As summarized during rebuttal:

> *Q*. What happened when you dropped the gun into the pocket? Is it fair to say you couldn't see the gun anymore?
> *A*. Yes, in this demonstration.
> *Q*. Because gravity took it down to the bottom?
> *A*. Yes.
> *Q*. Was gravity in effect on January 14, 2014?
> *A*. Yes, it was.
> *Q*. In fact, to be able to have that gun so that you recreated where it was in the photo, you held it, didn't you? You held on to the gun so that it could peek out of the pocket?
> *A*. Yes.

(R-240-pg. 177/lines 11-22).

It was also a surprise. As Respondent's expert, Mr. Bedard, noted at trial, he didn't even know the gun was in evidence as, "it wasn't provided in discovery." (R-239-pg. 177/lines 2-3). And, Bedard said, "It is typical to purge evidence when the criminal case is completed." (R-239-pg. 177/lines 10-11). While Mr. Bedard may not have needed it as he isn't a "forensic person," Respondent would have sought additional experts had it been properly disclosed.

Indeed, the firearm was at all times possessed by Petitioners, but never appeared on any disclosure or exhibit list. At no time prior to filing a motion to bring the handgun into the courthouse was the gun ever disclosed in discovery. Respondent repeatedly preserved this issue and it ultimately resulted in a rudimentary "demonstration", which potentially

spoliated evidence by rubbing the gun and shorts together repeatedly. The Eleventh Circuit panel was highly critical of this Rule 26 violation by Petitioners during oral argument, but did not address it in the ultimate opinion based on the reversal and remand of the case for a new trial based on the probation issue.

Petitioners also repeatedly mischaracterized Hill's gun ownership, saying Hill was "known to have a gun which he kept in the garage" and "Hill known to keep gun in garage and in open file cabinet." When asked, Monique Davis, the mother of two of Hill's children, longtime fiancé and co-occupant of the family home said:

> *Q.* Talking about a firearm, had you ever seen a firearm in the house before?
> *A.* No.
> *Q.* Did you know Mr. Hill had one?
> *A.* No.
> *Q.* Do you like guns?
> *A.* No.

(R-240-pg. 72/lines 7-13).

His children also never knew of their father to have a gun "at all." (R-240-pg. 118/ lines 7-8). It is true Andrew Brown stated at trial, "Did I ever know -- did I ever know him to have a gun? Yes." And further, he said he would have typically kept it in a file cabinet. (R-241-pg. 123/lines 7-11). However, Brown also was asked, "Did you see the black item in the pocket in the photo? That is identified as a gun. Did you see him with a gun at any point that day?" He said, "No. No.

No." (R-241-pg. 126/lines 12-15). Full and fair disclosure of facts are important.

D. Petitioners Mischaracterized Testimony about Hill's Incapacitation.

Petitioners' counsel asked Respondent's expert Mr. Bedard if he had an opinion about whether Mr. Hill could have placed his gun in his back pocket after brandishing it as alleged. Bedard pointed out, "From the statements of the officers that the shot was fired when the weapon was coming up, the officer indicated he could see the weapon when he first fired the first shot, and rapidly fired it. That means the head shot was within a half second of the first shot. I'm not sure which one hit him in the head first. I don't think you have the where-with-all to tuck your weapon in a back pocket when you are hit in the head." (R-239-pg. 181/line 25-pg. 182/line 6).

Only one person in the entirety of trial answered this question medically and scientifically- Dr. Liam Robert Anderson, Respondent's forensic pathologist. The stipulated third shot caused "massive brain injury and essentially cut off all neurological function." (R-240-pg. 25/lines 9-10). The other two shots were on the right side of Hill's body, in the very vicinity where he allegedly raised the blood-free gun. Further, based on trajectory, Mr. Hill was "bending forward," likely to lower the garage door, not bending backwards to put a gun in his sagging shorts, which also matched the finding of brain matter on the garage door. (R-240-pg. 34/lines 10-12). Further, Dr. Anderson indicated that it would be forensically "highly unlikely that (Mr. Hill's arm) was anywhere near this position" for Mr. Hill to

be extending in a way to raise a firearm. (R-240-pg. 36/lines 19-24).

Most importantly this is the only testimony whatsoever about this issue:

> *Q.* With regard to the wound to Mr. Hill's head, would he be capable of any motor function after sustaining that shot?
> *A.* In my opinion, no.
> *Q.* Why?
> *A.* Because it interrupted all of the nerve traction, destroyed the connection of the upper brain and the lower portion of the body, cutting the spinal cord completely, but it is higher up, so you even destroy more motor function. You may have some after the other two, but not after the head wound.

(R-240-pg. 36/lines 7-15).

Petitioners brought in the medical examiner, Linda Rush O'Neil, who did the autopsy. She described the shots to Mr. Hill's right side as severing "major vessels which the person was bleeding from," which would have caused death "within minutes from blood loss," which describes the large amount of blood all over the scene, Mr. Hill's hands and floor (in contrast to none on the subject firearm). (R-241-pg. 63/lines 7-10). As for the head shot, O'Neil agreed with Anderson, "The projectile to the head would have immediately rendered a person unconscious." (R-241-pg. 63/ lines 18-19).

O'Neil agreed Mr. Hill's level of intoxication would have caused him to be "severely impaired" mentally and "not capable of acting normally." (R-241-pg.

74/lines 18-19 and pg. 75/lines 3-5). Despite all of this, Petitioners want this Court to assume normal thought and movement, so as to justify probation being remotely relevant and not excessively prejudicial.

As a reminder, Petitioners fundamentally condition their position on the fact Mr. Hill "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." There simply is no evidence to support this, but Petitioners need this falsehood to be true to support their position about probation being remotely relevant.

Petitioners need this court to believe its lawyer and her client were able to slowly place a firearm into a large pocket in court that Mr. Hill could have done the same while raising and lowering a garage door, while being shot three times, while raising a gun at an officer to justify his shooting, while severely intoxicated, while getting shot in the brain immediately incapacitating him, but yet to then put the blood-free gun only in the edge of his shorts so that it defies gravity and is visible upon his death. Those were not in any way the terms of the "demonstration."

REASONS THE PETITION SHOULD BE DENIED

I. The Petition Does Not Meet the Standard of Rule 10 Governing Review on Writ of Certiorari

Under Supreme Court Rule 10, "a petition for a writ of certiorari will be granted only for compelling reasons." Petitioners have indicated no such reason to legally justify its Petition. No United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter. In fact, what Petitioners expressly seek is a new, "more flexible standard of admissibility" that has ever been required. This is not a vehicle for proper review.

Secondly, the Eleventh Circuit Court of Appeals has not "decided an important federal question in a way that conflicts with a decision by a state court of last resort." Additionally, the Eleventh Circuit Court of Appeals did not "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

II. This Petition Presents an Improper Vehicle to Warrant Supreme Court Involvement

An important basis of this Petition appears to be buried in a footnote. Without any context, the Petitioners cite the alleged rising "number of civil rights cases being filed against law enforcement officers" to warrant now "as an appropriate time for the court to adopt a less restrictive standard favoring the

admissibility of this type of evidence in 1983 police civil rights cases." This is a legislative question.

Petitioners also cite hope for a new rule, not one arising out of conflict or by any departure by the Eleventh Circuit. Petitioners stated, "It should be the rule that such evidence, if relevant to explain the actions of the Plaintiff which related to the reasonableness of an officer's perception or credibility of the officer's testimony regarding the event, is presumed to be admissible, and not unfairly prejudicial…" This Petition is based on raw hope, not legal conflict or merit.

That propriety of the argument aside, the Court should not adopt a more flexible standard of admissibility of evidence than what is required by Huddleston v. U.S., 485 U.S. 681 (1988) as the current standard already has provisions to protect against unfair prejudice. The standard identified by the court is as follows:

> 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 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 (1st Cir. 1987).

This Court has explained the dangers of admitting evidence that results in unfair prejudice. Old Chief v. United States, 519 U.S. 172, 180–81 (1997). It said "unfair prejudice," speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶403[03] (1996) (discussing the meaning of "unfair prejudice" under Rule 403). The Committee Notes to Rule 403 explain, "Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860. Id. This Court goes further by stating, "Such improper grounds certainly include the one that Old Chief points to here: generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily). As then-Judge Breyer put it, "Although ... 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict

anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance." United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982). Id.

The Court in Old Chief goes further by warning that certain evidence can lead a jury into bad character reasoning. Old Chief v. United States, 519 U.S. 172, 173 (1997), "In dealing with the specific problem raised by § 922(g)(1) and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice whenever the official record would be arresting enough to lure a juror into a sequence of bad character reasoning. Id.

The evidence admitted in Hill violates Huddleston in two ways (1) the probation status is not relevant and (2) admittance of Mr. Hill's probation status is unfairly prejudicial. When assessing the relevancy of this matter one must assess the reasonableness of the officer's actions at the time of the shooting. In determining objective reasonableness under circumstances for purposes of excessive force and arrest claims, "under the circumstances" refers only to circumstances known and information available to officer at time of action; when jury measures objective reasonableness of officer's action, it must stand in his shoes and judge reasonableness of actions based upon information possessed and judgment officer exercised in responding to that situation. U.S. Const. amend. IV. Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1988)

The fact that Mr. Hill was on probation had no relevancy to the material issues of the case. Mr. Hill's

probation status had no probative value as to why he closed the door at the time of the officer's arrival. It also is not relevant to whether Mr. Hill was holding the gun at the time of the incident. It is important to note, the officers had no knowledge of Mr. Hill's probation status upon their arrival at his home. The officers were not informed of Mr. Hill's probationary status until days after the shooting. As such, it was unfairly prejudicial to introduce Mr. Hill's probationary status to the jury because the officers were not privy to that information at the time of the fatal shooting.

The analysis of Knight through Kerr v. Miami Dade County also fails. In it, the witness testimony was a major issue. There were conflicting statements as to whether the car in question was fleeing the scene before or after the shooting. Thus, the admittance of the defendant's probationary status was used to provide motive or clarity to the reason for fleeing. Additionally, there was a question of a witness changing her story at trial and thus her prior grand theft was material, relevant and necessary. In the instant matter, the probationary status does not shed light on any issue in question. Mr. Hill's probationary status did not add knowledge about the ability of time and space to provide a particular result. Specifically, he was committing no crime and was being investigated for no crime. Probation did not speak to his ability to place the gun in his pocket during the incident in question. It was, to the contrary, brought in to explain part of some paradox of motive and thus created a domino effect of allowing in irrelevant and/or prejudicial evidence of moral turpitude or conduct to

label him as less than noble citizen, even though he may not have even been on probation at the time.

III. The Eleventh Circuit's Standard of Review Was Legally Appropriate.

The Eleventh Circuit applied the appropriate standard of review and appropriate application of the harmless error rule. The court in Pratt identifies when an error is harmful. Pratt v. State, 1 So. 3d 1169 (Fla. 4th DCA 2009). Erroneous admission of collateral crimes evidence is presumptively harmful; the error may be found harmless only if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error. Id.

Defense counsel did not have to "portray" Mr. Hill as a bad man because introducing evidence of probation status allowed the jury to infer he was a bad man. The Eleventh Circuit relied on United States v. Avarello, 592 F.2d 1339, 1346 (5th Cir. 1979)(holding, in the context of criminal prosecution, that "the danger inherent in evidence of prior convictions is that juries may convict a defendant because he is a 'bad man' rather than because evidence of the crime of which he is charged has proved him guilty"). Because of this danger, such evidence is inherently prejudicial. United States v. Beechum, 582 F.2d 898, 910 (5th Cir. 1978) (noting the "inherent prejudice" of evidence of prior criminal convictions)

The Hill case is also similar to Chapman v. California. Chapman v. California, 386 U.S. 18 (1967) Chapman held:

> Comment on failure of defendants to testify was not harmless error where state prosecutor's argument and trial judge's instruction to jury continuously and repeatedly impressed jury that from refusal of defendants to testify, to all intents and purposes, the inferences from facts in evidence had to be drawn in state's favor, and where state failed to demonstrate beyond reasonable doubt that such comments and instructions did not contribute to defendants' convictions. Id.

In the instant matter, the probationary status of Mr. Hill was introduced over stringent objection. This goes beyond harmless error because the Petitioners' gave the jury the impression that Mr. Hill violated his probation in two ways by being intoxicated and possessing a gun. Admitting these facts into the record essentially portrays Mr. Hill as a "bad man". This coupled with the officers' testimony that Mr. Hill was holding a gun resulted in inferences that were in the defendants' favor contributing to the verdict of $4. Therefore, the admittance of Mr. Hill's probationary status was not harmless error and the Eleventh Circuit fairly and accurately analyzed these issues.

CONCLUSION

During oral argument, Judges Martin, Lagoa and Grant focused in on two issues: probation and Petitioners' conceded complete failure under Rule 26 to disclose possession of the alleged firearm until right before trial. Because the probation introduction was reversable error, the court reversed and remanded without needing to reach a conclusion on the Rule 26

violation. Yet, Petitioners seek to address only probation and reinstate the verdict, which would completely erase the trial court and Petitioners' other errors.

At oral argument, Judge Britt C. Grant's first words recognized, "the problem is we are looking after a jury verdict. The jurors heard all of this evidence… and made the conclusion based on all of that evidence that he did, it appears, have the gun in his hand." Thus, she recognized the very concern expressed by Petitioners. She also then asked why introduction of probation wasn't harmless error. We cited in briefs and at oral argument why Graham v. Conner, 490 U.S. 386 (1989), Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1988), Escabido v. Martin, 728 F.3d 388 (7th Cir. 2012) all stand together to and are distinguished from Knight through Kurr v. Miami-Dade County, 856 F.3d 795 (11th Cir. 2017). They all stand consistent with the ruling here. As the opinion expresses, the Eleventh Circuit Court was unanimously convinced that the evidence was, indeed, harmful and not harmless.

Federal Rule of Evidence 404(b) provides that evidence of "other crimes, wrongs, or acts" is not admissible to prove a person's character, but may be admissible for other purposes, such as proof of knowledge. As noted by the Eleventh Circuit, "Rule 404(b)(2) provides that such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." And further, "Evidence that is admissible under Rule 404(b)(2) must still "possess probative

value that is not substantially outweighed by its undue prejudice and must meet the other requirements of [R]ule 403." Judges Martin, Lagoa and Grant unanimously held, "Evidence of Mr. Hill's probationary status was not relevant to any issue other than Hill's character. It therefore had no permissible probative value."

The Eleventh Circuit added, "(T)here are circumstances in which criminal history evidence not known to law enforcement officers at the time force was used may still be admissible under Rule 404(b) to lend support to the officers' factual claims. For example, in Knight ex rel. Kerr v. Miami-Dade County, 856 F.3d 795 (11th Cir. 2017), this Court affirmed the admission of evidence that three victims of a police shooting were on probation at the time of the shooting." The court reviewed Knight, its own case and held, "No such circumstances were present here. Unlike in Knight, there was no material fact in dispute that Mr. Hill's probationary status helped resolve."

Petitioners seek a departure from the Rule and case precedent, exclusively in civil rights cases, in order to introduce evidence of probation unknown and irrelevant to a police shooting merely because it "may explain" the shooting victim's response to law enforcement. Petitioners cite no precedent while asking the Supreme Court to essentially create new law. This request should be denied.

Petitioners next ask, did the Eleventh Circuit make "themselves impregnable citadels of technicality" in the underlying case? Petitioners apparently seek to invoke words from Kotteakos v. United States, 328 U.S. 750,

758 (1946), which is sometimes invoked to accuse appellate courts of overstepping, which, in this case, is precisely what the unanimous court said the district court did at the trial level. However, the Eleventh Circuit engaged in a reasoned analysis, concluding, "The District Court abused its discretion in admitting evidence of Mr. Hill's probationary status at trial, and this error resulted in prejudice to Ms. Bryant's case against Deputy Newman and Sheriff Mascara. Because this error independently warrants reversal, we need not reach Ms. Bryant's other arguments."

During oral argument, Judge Martin called the introduction of probation as the, "worst of all possible worlds because the jury didn't know the nature of probation" and speculated the jury could concern itself with whether, "maybe Hill had done something horrible.. or violent." Judge Britt C. Grant asked if there were any other reasons which would have made probation relevant. They studied these very issues. They also declined to hear this case en banc. This Petition seems to just present a poor vehicle to try and restore an unjust verdict based on only one of the reasons it was unjust.

The decision of the Eleventh Circuit Court of Appeal is due to be affirmed and this Petition due to be denied.

Respectfully submitted this **16th** day of November, 2020

JOHN M. PHILLIPS
Counsel of Record
PHILLIPS & HUNT
212 North Laura Street
Jacksonville, FL 32201
(904) 444-4444
(904) 508-0683 (facsimile)
jmp@floridajustice.com

Counsel for Respondent