

IN THE SUPREME COURT OF FLORIDA

ROGER STEWART HARRIS,

Appellant,

v.

CASE NO. SC00-1598

STATE OF FLORIDA,

Appellee.

\_\_\_\_\_ /

ON APPEAL FROM THE CIRCUIT  
COURT OF THE THIRD JUDICIAL  
CIRCUIT, IN AND FOR COLUMBIA  
COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

On Monday, December 7, 1998, the body of Donna Harris was discovered in her van, which had been parked in a truck stop parking lot for several days. (E.g., XIV 861;<sup>1</sup> XV 932, 934). Roger Harris, the victim's husband, reported her missing on Friday, December 4, 1998 (XIV 852) and, after the body was discovered, quickly became a suspect in her murder. (E.g., XVI 1036 et seq.). On January 22, 1999, Harris was indicted for conspiracy to commit first-degree murder and for first-degree murder. (I 1).

The following evidence was presented at trial: The medical examiner testified that he conducted an autopsy on the victim's body on December 8, 1998. (XIII 682). The body was in an advanced state of decomposition, and there was a wound to the back of the head. (XIII 683). He stated that state's exhibit 8, a nail punch found on the floor of the van, could have caused the wound. (XIII 693-94). The cause of death was the wound to the back of the head that destroyed the lower half of the victim's brain. (XIII 694). Jennifer Palmer testified that Harris moved her into his home in late June 1998 to care for his two young sons and that she and Harris began a sexual

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<sup>1</sup> "XIV 861" refers to page 861 of volume XIV of the record on appeal. There are 22 volumes of record--I through VII (pages 1 through 1260) and VIII through XXII (pages 1 through 1549) -- as well as eight volumes of supplemental record--I through VIII (pages 1 through 45).

relationship. (XIII 709-11). The victim threw her out of the house, but Palmer and Harris continued their affair while she continued to babysit the children. (XIII 713-15). When the victim learned of the affair she fired Palmer, who continued to see Harris, and Harris told Palmer he would leave his wife and marry her. (XIII 716). In October 1998, however, Harris said he would not divorce his wife. (XIII 717). Palmer stopped seeing Harris for a week, but then resumed the relationship. (XIII 718-19). Harris told her that he would kill his wife and began planning how to do that. (XIII 720-27).

During the weekend of November 28, 1998, Harris told her he was working on a “project” (XIII 730-31) and, on December 2, 1998, again talked with Palmer about killing the victim. (XIII 728-29). After 10:00 p.m. on December 3, 1998, Harris called her and told her that he “did it” and needed her help. (XIII 734). At the Harris home, Palmer found Harris cleaning things. (XIII 734). Harris loaded numerous bags in her car and told her to get rid of them. (XIII 736-37). He said that the gun he made was in one of the bags and that the contents should be disposed of in water. (XIII 737-38).

Harris drove his wife’s van to the truck stop with Palmer following in her car, and Palmer then drove Harris back to his home. (XIII 743). During the return trip, Harris told her he would report the victim as missing on the following day. (XIII 744). When Palmer asked about the gun, Harris touched a bag in her car, said that he had made it, and then stated that he had left part of the weapon in the van. (XIII 744).

Palmer then described how she disposed of the things Harris had put in her car at several locations in Columbia County. (XIII 746-51).

Palmer saw Harris on Saturday, December 5, and, on Monday, December 7, he told her he had cleaned out his wife's bank account and brought Palmer \$170 in cash. (XIII 752; XIV 762-63). Later that morning, she went to the Columbia County Sheriff's office at a deputy's request. (XIV 765). Palmer initially denied knowing anything about the murder, but, when confronted with the fact that the deputies knew she was lying, confessed. (XIV 766). She then accompanied law enforcement officers while they recovered items that she had disposed of pursuant to Harris' directions. (XIV 766-67, 770-73; XV 990-1008).

Numerous other witnesses testified. Deputy Randy Roberts described the retrieval of items that Palmer had dumped around the county and identified a number of these items that were introduced into evidence. (XV 990-1008). Deputy Donnie Brown testified about how Harris was developed as a suspect and identified evidence seized from the Harris home, as well as the victim's bank records. (XVI 1033-64). Palmer's friend Shannon Harding told the jury what Palmer had told her and that she suggested places to Palmer to dump the bags given to Palmer by Harris. (XVII 1116-38). A neighbor testified that he heard a shot, from a large caliber weapon, from the direction of the Harris home around 9:30 p.m. on December 3, 1998. (XIV 832-83).

Several technical personnel from the Florida Department of Law Enforcement (FDLE) also testified. Shawn Yao described inspecting the van at the scene, processing the van and Harris' car after they were impounded, and identified evidence removed from these vehicles. (XV 947-54). David Williams, an FDLE firearms expert identified evidence that had been sent to him and described how those pieces of evidence could be assembled into the weapon that killed the victim. (XVII 1197-1226). The jury convicted Harris of both counts as charged. (XIX 1375-77; VI 1067).

At the penalty phase the state rested on the evidence presented during the guilt phase. (XX 1419). Harris presented testimony from his mother, sister, niece, and two co-workers, as well as numerous exhibits. (XX 1421-43). The jury recommended that Harris be sentenced to death. (XX 1491; VI 1139). Following the Spencer<sup>2</sup> hearing on June 9, 2000, the trial court sentenced Harris to death on June 23, 2000, finding that the pecuniary gain and cold, calculated, and premeditated (CCP) aggravators outweighed the nonstatutory mitigation established by Harris. (XXII 1533 et seq.; VII 1228-38).

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<sup>2</sup> Spencer v. State, 615 So.2d 688 (Fla. 1993).

## SUMMARY OF ARGUMENT

### ISSUE I

The state did not improperly bolster the testimony of its witness by introducing her prior consistent statements. Harris implied that those statements were recently fabricated. The prior statements, thus, were admissible.

### ISSUE II

The weapon that Harris made and used to kill his wife was disassembled. The various pieces were introduced into evidence and a firearms expert testified as to how they could have been put together. The replica used by the state was merely a demonstrative aid, the display of which was permissible and not unduly prejudicial.

### ISSUE III

The photographs introduced by the state were relevant, and Harris has shown no abuse of discretion regarding their admission.

### ISSUE IV

The facts support the trial court's finding this murder to have been committed for pecuniary gain.

### ISSUE V

The trial court did not err in finding this murder was committed in a cold,

calculated, and premeditated (CCP) manner.

#### ISSUE VI

The trial court fully considered the proposed mitigating evidence and properly weighed the aggravators and mitigators. When compared to other cases, the death sentence in this case is proportionate.

#### ISSUE VII

The jury was not misled about the significance of its sentencing recommendation.

#### ISSUE VIII

Allowing a majority of the jury to make a sentencing recommendation is constitutional.

#### ISSUE IX

Florida's death penalty statute is constitutional.

## ARGUMENT

### ISSUE I

WHETHER THE TRIAL COURT  
ERRED IN ALLOWING ONE WITNESS  
TO TESTIFY  
A B O U T  
A N O T H E R  
W I T N E S S '   
P R I O R  
STATEMENTS.

Harris argues that the trial court erred in allowing Shannon Harding to testify about statements Jennifer Palmer made to her because Palmer's prior statements were inadmissible hearsay. There is no merit to this claim.

Harding testified that she and Palmer had been friends for years and that they spent a lot of time together from June through early December 1998. (XVII 1119). When the prosecutor asked Harding if Palmer told her about Harris leaving his wife, defense counsel objected that anything Palmer told Harding was inadmissible as a prior consistent statement. (XVII 1120). The prosecutor responded that the cross-examination of Palmer was "an attack of recent fabrication against" her, and, therefore, Palmer's statements to Harding were not hearsay. (XVII 1121).

The trial court overruled the objection. (XVII 1121). Thereafter, Harding

testified about Palmer's statements, including that: Harris' plan changed from leaving his wife to killing her (XVII 1121-25); Palmer never said she was angry with Harris or that she had given him any ultimatum about leaving his wife (XVII 1123); details of Harris' plan to kill the victim became more specific over time (XVII 1125); Palmer visited late on the evening of December 3, 1998 and told her that Harris "finally did it" (XVII 1129-31); and Palmer also told her that Harris gave her money after murder. (XVII 1135).

Subsection 90.801(2)(b), Florida Statutes (1999), provides:

(2) A statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement and the statement is:

\* \* \*

(b) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication.

Harris recognizes this exception to the hearsay rule, but argues that the cross-examination of Palmer did not imply that her testimony was the result of improper influence, motive, or recent fabrication. The transcript of Palmer's cross-examination, however does not support his argument.

Defense counsel's first question to Palmer established that she did not tell him the whole truth in her August 1999 deposition. (XIII 779-81). His second question established that she did not tell deputies Picklo and Brown everything in the statement she gave them. (XIII 781). Thereafter, counsel questioned Palmer about her plea agreement and asked if her sentencing was "still hanging over [her] head." (XIII 784). Counsel also asked Palmer if she "would like to do everything [she could] to minimize [her] sentence," i.e., she wanted "to go to jail for the shortest time possible." (XIII 784). Additionally, counsel asked Palmer if she felt that "the better your testimony is, the better deal you may get" when sentenced and "Is it not true that you feel like in your mind the better job you do testifying, the better deal you will get"? (XIII 785). Counsel continued questioning Palmer as follows:

Q You also told Mr. Dekle that the plan, so to speak, to kill Ms. Harris happened in mid October, correct?

A Yes, sir.

Q And you're saying that's the truth today, correct?

A Yes, sir.

Q Because you have taken that oath, right?

A Yes, sir.

Q The same oath you took in August in my office, correct?

A Yes, sir.

Q That you didn't honor at that time, did you?

(XIII 786).

The trial court sustained the state's objection to the last question (XIII 786), but the cross-examination of Palmer strongly suggested that her trial testimony was motivated by her desire to obtain the most favorable sentence that she could. Thus, Palmer's cross-examination questioned her motive sufficiently to remove her statements to Harding from the category of hearsay. Cf. Foster v. State, 778 So.2d 906, 916 (Fla. 2000) (counsel's cross-examination implied that the witness' "testimony was motivated by his deal with the State," and prior statement was admissible to show that his trial testimony was consistent with his pre-plea statement); Chandler v. State, 702 So.2d 186, 197-99 (Fla. 1997) (witness' prior statements were consistent with her trial testimony and were made before she had a reason to fabricate her trial testimony); Shellito v. State, 701 So.2d 837, 841 (Fla. 1997) (same); Rodriquez v. State, 609 So.2d 493, 499-500 (Fla. 1992) (references to plea agreements during cross-examination "were sufficient to create an inference of improper motive to fabricate" so that prior consistent statements were admissible); Kelley v. State, 486 So.2d 578,

582 (Fla. 1986) (cross-examination of witness left the jury “with an impression of [his] improper motive to fabricate”).

The admission of evidence is within a trial court’s discretion and will not be disturbed unless an abuse of discretion is demonstrated. Carpenter v. State, 785 So.2d 1182, 1201 (Fla. 2001); Ray v. State, 755 So.2d 604, 610 (Fla. 2000); Kelley, 486 So.2d at 583; see also Stephens v. State, 787 So.2d 747, 759 (Fla. 2001) (trial court should be given “wide discretion” regarding admissibility of evidence). In the instant case Palmer’s cross-examination strongly suggested to the jury that her direct testimony was improperly motivated, and Palmer testified and was cross-examined. The requirements of subsection 90.801(2)(b) were met, removing Palmer’s statements to Harding from the realm of hearsay. Moreover, Palmer made all of the statements Harding testified to prior to her arrest and, thus, prior to the time any improper motive might have arisen.

## ISSUE II

### WHETHER THE COURT ERRED BY ALLOWING THE STATE TO USE A REPLICA OF THE MURDER WEAPON

Harris claims that the trial court erred in overruling his objection to the state’s display of a replica of the murder weapon during the firearms expert’s testimony.

There is no merit to this claim.

Harris assembled the murder weapon from several pieces of brass pipe and copper tubing, connected with brass and copper fittings and springs. When armed with a .357 magnum cartridge, this homemade weapon propelled a nail punch into the victim's skull, killing her. Several witnesses testified to collecting the various bits and pieces of what turned out to be the murder weapon: Shawn Yao, an FDLE crime scene analyst, testified that he processed the van after it was impounded and found state's exhibit 8, the nail punch, underneath the seats on which the victim's body was located. (XV 949). Yao also processed Harris' car and found state's exhibit 79, a piece of pipe with a rod through it, in the trunk. (XV 952-55). Deputy Randy Roberts identified items the dive team retrieved from Watertown Lake and introduced as state's exhibits 81 (a threaded brass fitting that fit onto number 83), 83 (a metal pipe with a .357 shell casing in the end of it), and 88 (two springs connected by a piece of metal) (XV 998-1002) and a pair of vice-grip pliers (number 87) recovered off Range Road. (XV 996-97). Ward Schwoob, another FDLE crime scene analyst, testified that he found state's exhibit 101, a primer cap, in the victim's van. (XVII 1190-92).

David Williams, an FDLE firearms expert testified that he received state's exhibits 8, 79, 81, 83, 87, 88, and 101 as well as number 89 (a six-inch pipe threaded at both ends). (XVII 1197 et seq.). He found gunpowder and lead residue inside

number 89 and lead residue on the open end of number 83 (XVII 1199-1201) and stated that, in his expert opinion, the vice-grip pliers (number 87) made the marks on the outside of exhibit 83: “Noticing the damage to the teeth and based on my training and experience, this is the only pair of pliers that in my estimation could have left these marks and matched up that well.” (XVII 1203-06). Williams testified that the pieces he examined fit together (XVII 1206-09) and that he laid them out in the manner they could have been assembled and photographed that assemblage. (XVII 1211). The state introduced that photograph as exhibit 102, and Williams testified how the pictured pieces combined to become a weapon. (XVII 1211-14).

Following this testimony, the state showed Williams a plastic replica of the assembled pieces and asked if those pieces could have been put together in the manner depicted by the replica. (XVII 1215). Williams agreed that the replica was a possible combination of the pieces that he examined. (XVII 1215).

Demonstrative aids may be used at trial if certain foundation requirements are met: (1) the aid must be helpful to the trier of fact; (2) the witness must be an expert; (3) the expert’s opinion must be applied to evidence offered at trial; and (4) the aid must not present a substantial danger of unfair prejudice outweighing probative value. Pierce v. State, 718 So.2d 806, 809 (Fla. 4<sup>th</sup> DCA 1997). The demonstrative aid must be an accurate and reasonable reproduction of the object involved. Alston v. Shiver,

105 So.2d 785 (Fla. 1958) (ax handle); Pierce (computer animation reconstructing a vehicular accident); Taylor v. State, 640 So.2d 1127 (Fla. 1<sup>st</sup> DCA 1994) (using a young woman who was physically similar to the victim and dressed as she was as a surrogate victim in the courtroom to demonstrate the attack); Brown v. State, 550 So.2d 527 (Fla. 1<sup>st</sup> DCA 1989) (prosecutor used styrofoam head and knife similar to the one broken in the attack on the victim to illustrate the victim's wounds). Allowing the use of demonstrative aids is within the trial court's discretion. Brown.

The state's display of the replica in this case was permissible under the above-cited cases. Williams was an expert in firearms. The state's exhibits had not been assembled; so Williams' photograph of them placed in proximity to each other was the only evidence of what Harris' homemade weapon looked like. The replica was the same size as the component exhibits and thus, could only serve to provide a better visual perspective of the weapon's appearance.<sup>3</sup> Finally, the replica's display was short and was not overly prejudicial.

The defense knew in good time that the state would seek to display the replica

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<sup>3</sup> Thus, this demonstrative aid was far different from the ax handle in Alston, which was not the same size as the weapon used on the victim, and the outrageous display put on in Taylor. Taylor is further distinguished by the use of clay heads to describe the injuries, the prosecutor's banging the hammer used to murder the victims on a table during closing argument, and the prosecutor's speculation that the three-year-old victim begged Taylor not to hurt her mommy anymore.

and objected that displaying the replica would be overly prejudicial. (XVI 1089-90). Counsel requested a special instruction concerning it if the court were inclined to allow the state to display the replica. (XVI 1090-91). The prosecutor explained that he constructed the replica based on what Williams told him and the pieces of evidence submitted to Williams and that he would welcome a cautionary instruction. (XVI 1090-91).

Thereafter, during a proffer before he testified, Williams stated that the pieces of evidence he received could have been assembled as shown in the replica. (XVII 1186). After the proffer, the prosecutor argued that the replica was only a demonstrative aid to illustrate Williams' testimony, while the defense argued that introducing models is prohibited in products liability cases. (XVII 1186). The court held that the replica was no more prejudicial than the parts that were in evidence, that the proposed instruction would be given, and that the replica itself would not be given to the jury with the evidentiary exhibits. (XVII 1188-89).

Prior to display of the replica, the court instructed the jury as follows:

Members of the jury, an item is about to be shown to you. It is not evidence in this case. It should not be considered as evidence. It is merely a demonstrative aid which you can consider in weighing and evaluating the positive and direct evidence which you have received.

(XVII 1214-15).

Harris has shown no abuse of discretion in the trial court's allowing the state to display its replica of the weapon. The various pieces were not assembled, and, therefore, the expert's identifying the replica as a possible way of how those pieces could have been put together to function as a weapon could only have assisted the jury in visualizing the evidence. Anything that the state wishes to present to the jury is inherently prejudicial. This replica's assistance, however, was not outweighed by any prejudice that might have flowed from it.

This claim, therefore, has no merit and should be denied.

### ISSUE III

#### WHETHER THE COURT ERRED IN ADMITTING PHOTOGRAPHS OF THE VICTIM.

Harris argues that the trial court erred in allowing the state to introduce photographs of the victim during its case. There is no merit to this claim.

This Court has addressed the admissibility of photographs many times and in Henderson v. State, 463 So.2d 196, 200 (Fla. 1986), stated: "Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevance. Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." Relevance, not necessity, is the test for admitting photographic

evidence. Brooks v. State, 787 So.2d 765 (Fla. 2001); Pope v. State, 679 So.2d 710 (Fla. 1996). Thus, photographs are admissible if they assist the medical examiner in explaining the nature of wounds and the manner in which they were inflicted. Brooks; Pope; Bush v. State, 461 So.2d 936 (Fla. 1984). They are also admissible to “show the manner of death, the location of wounds, and identity of the victim.” Larkins v. State, 655 So.2d 95, 98 (Fla. 1995). The fact that photographs are gruesome does not mean that they are inadmissible. Rose v. State, 787 So.2d 786 (Fla. 2001); Kearse v. State, 770 So.2d 1119 (Fla. 2000); Preston v. State, 607 So.2d 404 (Fla. 1992). The admission of photographs is within the trial court’s discretion, and a trial court’s ruling will not be reversed absent a clear abuse of discretion. Rose; Brooks. Applying these principles to this case, it is obvious that no error, and especially no reversible error, occurred.

The state introduced nine photographs (state’s exhibits 2, 3, 4, 6, 63, 64, 65, 68, and 103) of the victim’s body and parts thereof, as well as a short videotape (state’s exhibit 35) of the van where it was found in the truck stop parking lot. During the medical examiner’s testimony, the state had the examiner identify exhibits 2, 3, 4 and 6, photographs of the victim’s head and skull showing the wound that killed her. (XIII 685-86). Defense counsel objected to numbers 3 and 4 as duplicative of each other and to numbers 2 and 3 as “highly inflammatory.” (XII 686). The prosecutor argued

that number 3 showed the exterior of the skull, while number 4 showed the interior, and defense counsel withdrew the objection. (XIII 687). The prosecutor argued that number 2 showed the angular nature of the wound and that number 6 showed the path of the projectile and the chipped portion of the skull's interior where the projectile struck the interior of the skull across from the entry point. (XIII 687). Counsel objected that some of the photographs also showed maggots. (XIII 687). The trial court, however, held that the four photographs were necessary to show the cause and manner of death and allowed their admission. (XIII 687-88). Thereafter, the medical examiner used the four photographs in explaining the wound. (XIII 688-93).

Robert Johnson, a deputy with the Columbia County Sheriff's Office, made a videotape of the van in the truck stop parking lot and also took still photographs there. (XIV 865). Defense counsel objected to playing the videotape to the jury because it was gruesome. (XIV 866). The prosecutor noted that the most gruesome portions of the videotape had been redacted as the parties agreed would be done and argued that the probative value outweighed any prejudice and that a defendant cannot be shielded from his handiwork. (XIV 866). The prosecutor argued further that the tape of the van's interior showed the position of the victim and her clothes which was important to the jury's understanding how the homicide occurred. (XIV 867). After the judge cleared the courtroom and watched the tape, he allowed it to be published

to the jury. (XIV 867-69).

Counsel also objected to still photographs of the victim inside the van (state's exhibits 63, 64, 65, and 68).<sup>4</sup> Photographs 63, 64, and 65 show the victim's body inside the van from three different view points (XIV 874-76), while number 68 is a view of the cargo area of the van showing a child's seat and the victim's purse with her leg visible at the edge of the photographs. (XIV 874). The prosecutor argued that the photographs were relevant and probative of the body's position when found. (XIV 870). The court looked at these photographs and held that they were not duplicative and, thus, there was no improper cumulative effect and no evidence of bad faith on the part of the state. (XIV 870-71). Johnson then used the photograph to illustrate his testimony describing the interior of the van. (XIV 872-76).

The final photograph depicting part of the victim's body is state's exhibit 103. This photograph shows the victim's skull with state's exhibit 8, the nail punch, inserted into the hole in the skull. David Williams, an FDLE firearms expert, testified that he took that photograph which pictorially illustrated his demonstration to the jury that the nail punch fit the hole in the skull. (XVII 1216-18). Defense counsel objected to number 103 as cumulative, and the prosecutor argued that the photograph was

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<sup>4</sup> Counsel also objected to number 41. (XIV 870). He withdrew that objection, however, when that photograph of the van's keys in its ignition was offered. (XIV 873).

necessary to the record for any reviewing court. (XVII 1218). The court admitted the photograph. (XVII 1219).

The photographs of the victim introduced by the state were relevant to the witnesses' testimony and not unduly prejudicial. Harris has shown no abuse of discretion in the trial court's allowing their admission. No reversible error occurred regarding these photographs, and this claim should be denied.

#### ISSUE IV

#### WHETHER THE TRIAL COURT ERRED REGARDING THE PECUNIARY GAIN AGGRAVATOR

Harris argues that the trial court erred in instructing his jury on the pecuniary gain aggravator and in finding that this aggravator had been established. There is no merit to this claim.

To establish the pecuniary gain aggravator, "the State must prove beyond a reasonable doubt that the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain." Rogers v. State, 783 So.2d 990, 993 (Fla. 2001); Walker v. State, 707 So.2d 300 (Fla. 1997). It is not for this Court, however, "to reweigh the evidence to determine whether the State proved each aggravating

circumstance beyond a reasonable doubt” because “that is the trial court’s job.” Rogers, 783 So.2d at 993. Instead, this Court should “review the record and determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports these findings.” Id. Applying these principles to the instant case, it is obvious that the trial court committed no reversible error.

The court made the following findings in support of the pecuniary gain aggravator:

1. The capital felony was committed for pecuniary gain.

The Court finds that although financial gain was not the primary motive for the killing, and although the financial gain was not extraordinarily large, the Defendant did intend to, and did in fact, profit financially from the murder of his wife. The Court finds the following to be evidence of the Defendant’s intent to profit:

- a. The Defendant was trying to get the land owned jointly by himself and his wife into his hands alone. Two months before the murder, he had the property transferred into his name alone on the pretense that it would lower the payments on the property. Refinancing of the property could lower the payments without taking his wife’s name off the title to the land. Since the two were married, his wife still had an interest in the land, and the only way to insure that her interest in the property would be extinguished would be to have her predecease the Defendant.

- b. The Defendant was the beneficiary of life insurance

policies on his wife. Under the authority of *Chaky v. State*, 651 So.2d 1169, 20 Fla.L.Weekly S107 (Fla. 1995), this aspect of the case, standing alone, would not support a finding of financial gain as a motive. It can, however, be considered with the other factors as an indication of pecuniary motive. When considered with the other factors, it does support a finding of financial gain as a motive.

c. The Defendant emptied his wife's checking account four days after the murder. His excuse for so doing was to "keep the kidnapers" from looting her account. The fact that he did not empty his own account, to which his wife had access, belies this assertion. This scenario is very similar to the circumstances in *Gore v. State*, 599 So.2d 978 (Fla. 1992), and *Finney v. State*, 660 So.2d 674, 681, 20 Fla.L.Weekly S401 (Fla. 1995), cert. denied, 516 U.S. 1096, 116 S.Ct. 823, 133 L.Ed.2d 766 (1996), where the Defendant pawned items of the victim's shortly after her murder.

d. The fact that the contents of his wife's purse had been dumped on the floor [of the van], supports the finding that the murder was committed for pecuniary gain.

e. The Defendant did not want a divorce because his wife would gain custody of the children. If she gained custody of the children, he would have to pay child support. This fact, standing alone, would be insufficient to find financial gain, but taken with the other facts set forth above, supports a finding of financial gain.

The Court finds that the pecuniary gain aggravator does exist and was proven beyond a reasonable doubt. The Court gives this aggravator moderate weight in the weighing process. *Finney v. State*, 660 So.2d 674, 681, 10 Fla.L.Weekly S401 (Fla. 1995), cert denied, 516 U.S. 1096, 116 S.Ct. 823, 133 L.Ed.2d 766 (1996); *Clark v. State*, 609

So.2d 513, 515 (Fla. 1992). *Peterka v. State*, 540 So.2d 59 (Fla. 1994), cert. Denied, 513 U.S. 1129, 115 S.Ct. 940, 130 L.Ed.2d 884 (1995); *Gore v. State*, 599 So.2d 978, 984 (Fla. 1992); *Hardwick v. State*, 521 So.2d 1071, 1076 (Fla.), cert. Denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988); *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987); *Simmons v. State*, 419 So.2d 316 (Fla. 1982); *Peek v. State*, 395 So.2d 492, 499 (Fla. 1980), cert denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981).

(VII 1228-30). The record supports these findings.

Jennifer Palmer testified that, after the murder, Harris told her he had cleaned out the victim's bank account and that he gave her \$170 in cash. (XIV 762-63). Shannon Harding confirmed that Palmer told her Harris gave Palmer cash after the murder. (XVII 1135). Deputy Donnie Brown testified about the victim's bank records and identified a \$450 check that Harris wrote to himself on his wife's account, dated December 7. (XVI 1063). Brown also identified two deeds found during the investigation. The first was a quitclaim deed from Harris and his wife to Deas-Bullard Properties, and the second was a contract for deed from Deas-Bullard to Harris alone. (XVI 1064-66). Palmer also testified that Harris told her he did not want to divorce the victim because she had threatened to take the children out of state. (XIII 717). The victim's father testified that she had some small insurance policies with Harris as the beneficiary (XVI 1083) and that her personal ATM card, which she kept in her

purse, was found in the house after her death.<sup>5</sup> (XVI 1084-85).

Harris complains that the state's evidence was insufficient to establish the pecuniary gain aggravator and that the trial court could only find it had been established by drawing improper inferences. However, this was a family with limited financial resources. A divorce, with its consequent division of assets, would have further diminished those resources. Harris did not intend to share those resources, just as he did not intend to share the couple's children. As the trial court found, the victim's death left Harris in sole possession of the couple's home, gave him the proceeds of any insurance on the victim, and relieved him of the necessity of having to pay support for his children. This is sufficient to support finding a pecuniary motive for the murder. E.g., Thomas v. State, 693 So.2d 951 (Fla. 1997) (killing wife to avoid a payment pursuant to a settlement agreement established the pecuniary gain aggravator); Walker, 707 So.2d at 317 (killing girlfriend to avoid paying support for his child established pecuniary gain aggravator). The court also properly relied on Harris' stripping his wife's bank account. As the court pointed out, Harris' explanation of

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<sup>5</sup>Harris' claim that the small amount of money found in the van shows that nothing of pecuniary value was taken from the victim's purse ignores the testimony about the ATM card. Even if the court should not have relied on the state of the purse and its contents, any error would be harmless because the other reasons the court found to show pecuniary gain are supported by the record.

why he did so applies equally to his own account, i.e., the “kidnappers” would have had access to his account as well as the victim’s, and is unbelievable.

The record adequately supports finding the pecuniary gain aggravator, and this Court should affirm the existence of that aggravator.

#### ISSUE V

WHETHER THE TRIAL COURT PROPERLY FOUND THAT THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATOR WAS ESTABLISHED.

Harris argues that the trial court erred in finding the cold, calculated, and premeditated (CCP) aggravator applicable to this murder because it was not “cold” and because he had a pretense of moral and legal justification. There is no merit to this claim.

To establish CCP, the state must demonstrate that the murder “was the product of cool and calm reflection,” “that the defendant had a careful plan or prearranged design” to effect the murder, “heightened premeditation” existed, and there was “no pretense of moral or legal justification.” Bradley v. State, 787 So.2d 732, 744 (Fla. 2001); Foster v. State, 778 So.2d 906, 921 (Fla. 2000). The trial court carefully considered the facts of this case under these standards and made the following findings:

3. The Murder was cold, calculated, and premeditated, without any pretense of legal or moral justification.

“Cold, calculated, premeditated murder can be indicated by the circumstances showing such facts as [1] advance procurement of a weapon, [2] lack of resistance or provocation, and [3] the appearance of a killing carried out as a matter of course.” *Bell v. State*, 699 So.2d 674, 677 (Fla. 1997), cert. Denied, 522 U.S. 1123, 118 S.Ct. 1067, 140 L.Ed.2d 127 (1998).

The Court finds the following to be evidence of cold, calculated premeditation:

a. Procurement of the weapon in advance.

The Defendant did not just procure a weapon in advance; he manufactured a weapon to kill his wife. This weapon was designed to create maximum destruction, and it was designed to be used at close quarters upon an unsuspecting victim. The Defendant not only planned the murder over a period of weeks, he considered and discarded at least two methods of execution before finally deciding upon the chosen method of murder. A tremendous amount of thought and preparation went into the choosing of the method, the manufacture of the weapon, and the time and place for carrying out of the murder of his unsuspecting wife.

b. Lack of resistance or provocation.

The Defendant shot his wife in the back of the head while she was in the back seat of the family van. Given the position of her body, which was facing the rear of the van away from her husband, it is obvious that she was expecting a sexual encounter with her husband at the time

he killed her. There were no signs of struggle. She was totally trusting in her husband and was doing nothing to offend him, but was trying to engage in an activity which was designed to be pleasing. There was no resistance or provocation.

c. The appearance of a killing carried out as a matter of course.

The Defendant killed his wife in a compromising position so that she could not see the weapon that was being placed to her head. It was necessary for the Defendant to do this so that he would have both hands free to hold the weapon level and to then pull the firing mechanism. The Defendant then rifled her purse, looted her checking account, and gave some of the money to his girlfriend. All these actions give the appearance of a killing as a matter of course.

Having determined that the killing was cold, calculated, and premeditated, the Court must next determine whether the murder was without any pretense of legal or moral justification. The Defendant proffers as a pretense of legal or moral justification that the Defendant did not want to lose his children. The Defendant's stated reason of not wanting to lose his children is highly suspect in light of the testimony regarding his multiple plans to kill his wife so that he could be with his girlfriend. If the Defendant had had any real concern for his children he would have considered the impact that losing their mother at such young ages would have on them. The only concern of the Defendant that has been demonstrated by the record in this case is his concern for himself and his personal desires. The Court finds that "there is no construction of the facts that would support even a fragmentary claim of excuse or justification, or of a defense to homicide, because the victim here was prostrate and helpless when [the defendant]...kill[ed] her." *Jennings v. State*, 718 So.2d 144, 153, 23 Fla.L.Weekly S459 (Fla. 1998). See also *Walls v. State*, 641 So.2d 381 (Fla. 1994), cert. denied, —U.S.—, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995).

“A pretense of legal or moral justification is ‘any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide.’ See *Walls v. State*, 641 So.2d 381, 388 (Fla. 1994) (footnote omitted). This is the same definition applied by the Court in *Banda v. State*, 536 So.2d 221, 225 (Fla. 1998) cited by the Defendant. The Defendant contends that his fear of losing his children meets this definition of a pretense of legal or moral justification. However, this Court finds that, viewing the evidence in the light most favorable to the defendant, it still does not constitute a pretense of excuse, justification, or defense to homicide. See *Hill v. State*, 688 So.2d 901, 907 (Fla.), cert. denied, --U.S.--, 118 S.Ct. 265, 139 L.Ed 191 (1997) (‘In this case, the trial judge properly rejected the proposition that by killing persons in order to prevent them from performing legal abortions, Hill acted under a pretense of moral justification.’). See also, *Dougan v. State*, 595 So.2d 1, 6 (Fla. 1992) (‘One of [the rules by which every civilized society must live] must be that no one may take the life of another indiscriminately, regardless of what that person may perceive as justification.’).” See also, *Nelson v. State*, 748 So.2d 237, 24[4] Fla.L.Weekly S250, (Fla. 1999).

The Nelson court went on to say that “[t]he law is settled that in order to find cold, calculated, premeditation, it must be established that (1) the murder was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage,(2) [the defendant had a careful plan or prearranged design to commit murder before the killing, (3)] the defendant exhibited heightened premeditation, and (4) the defendant had no pretense of legal or moral justification. See *Jackson v. State*, 648 So.2d 85, 89 (Fla. 1994).” *Nelson v. State*, 748 So.2d 237, Fla.L.Weekly S250, (Fla. 1999). The Court finds that all

four of these factors exist in this case. *Nelson v. State*, 748 So.2d 237, Fla.L.Weekly S250, (Fla. 1999); *Jennings v. State*, 718 So.2d 144, 23 Fla.L.Weekly S459 (Fla. 1998); *Bell v. State*, 699 So.2d 674, 22 Fla.L.Weekly S485 (Fla. 1997), cert. denied, U.S.--, 118 S.Ct. 1067, 140 L.Ed.2d 191 (1997); *Jackson v. State*, 648 So.2d 85, 89 (Fla. 1994); *Dougan v. State*, 595 So.2d 1 (Fla. 1992); *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988); *Swafford v. State*, 533 So.2d 270 (Fla. 1988), cert. denied, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989).

The court finds that the murder was cold, calculated and premeditated, without any pretense of legal or moral justification. This aggravating factor was proven beyond a reasonable doubt and is given substantial weight.

(VII 1230-33). These findings are supported by the record. Harris planned for months to kill the victim, constructed a lethal weapon that he used to kill her, and tried to dispose of the evidence.

Harris claims that the murder was the “tragic result of an unhappy marriage” and that his mind was so clouded that this homicide was not “cold.” (Initial brief at 66-77). This was an execution-style murder, however, i.e., a single shot to the back of the head. By its very nature, an execution-style slaying is cold. *Fennie v. State*, 648 So.2d 95, 99 (Fla. 1994). The evidence showed that Harris knew exactly what he was doing when he planned and then carried out the killing of his wife so that he could keep both his paramour and his children.

There is also no merit to Harris' claim that his fear of losing his children gave him a pretense of moral or legal justification for killing his wife. The cases that he relies on to support this argument are factually distinguishable. For example, in both Christian v. State, 550 So.2d 450 (Fla. 1989), and Banda v. State, 536 So.2d 221 (Fla. 1988), this Court found colorable claims of self-defense that provided a pretense of justification. Harris presented nothing relating to self-defense. In Blanco v. State, 452 So.2d 520 (Fla. 1984), this Court agreed that Blanco was surprised when the victim tried to take the gun from him and that the quick shots that killed the victim did not show the heightened premeditation needed for CCP. Cannady v. State, 620 So.2d 165 (Fla. 1993), is also distinguishable. In his confession Cannady claimed that he did not intend to kill his wife and accidentally shot her after consuming fourteen beers. No such evidence exists in this case.

In contrast to the cases Harris relies on, this Court has agreed that protecting the "unborn" did not establish a pretense of moral or legal justification for killing abortion providers, Hill v. State, 688 So.2d 901 (Fla. 1996); a "hot-blooded crime of passion" did not justify killing one's ex-girlfriend, Cummings-El v. State, 684 So.2d. 729 (Fla. 1996); delusions that people were talking about him did not justify cold-blooded murder, Cruse v. State, 588 So.2d 983 (Fla. 1991); stabbing a fellow inmate where the victim had not threatened the defendant provided no pretense of

justification, Williamson v. State, 510 So.2d 1370 (Fla. 1992). The instant case is more similar to these latter cases than to the former ones. Society should not recognize cold-blooded murder as a morally or legally justifiable method of settling custody disagreements.

CCP is one of the “most serious aggravators.” Larkins v. State, 739 So.2d 90, 95 (Fla. 1999); Sexton v. State, 775 So.2d 923, 934 (Fla. 2000). The trial court correctly assessed the facts supporting CCP and applied the correct rule of law. Rogers v. State, 783 So.2d 980, 993 (Fla. 2001). This Court, therefore, should affirm that court’s finding that CCP had been established. Id.; cf. Walker v. State, 707 So.2d 300, 317 (Fla. 1997) (defendant lured the victim, his girlfriend, to a secluded place and enlisted the assistance of his brothers to kill her and their child); Cummings-El, 684 So.2d at 731 (defendant threatened ex-girlfriend for several weeks before killing her).

## ISSUE VI

### WHETHER HARRIS’ DEATH S E N T E N C E I S PROPORTIONATE.

Harris argues that his death sentence is disproportionate because the trial court improperly found that the pecuniary gain and CCP aggravators had been established and because the trial court erred in rejecting some of his proposed mitigators. There

is no merit to this claim.

As explained in issues IV and V, supra, the aggravators are supported by the record, and the trial court did not err in finding that they had been established. Moreover, the trial court correctly considered the proposed mitigating evidence. The court found as follows regarding the mitigators.

## B. MITIGATING FACTORS

### 1. Statutory Mitigators

- a. No significant history of prior criminal activity

The record shows that Roger Harris has no prior criminal history. The Court finds that this mitigating factor exists and gives it moderate weight.

- b. Extreme mental or emotional disturbance.

After 17 years of service in the United States Air Force, Roger Harris was deemed unfit for continued military service based upon a diagnosis of anxiety disorder and depression.

Roger Harris' mother, Ima Gene Harris, says she and her father have unstable mental histories and that she suffers from anxiety attacks and panic disorder.

The jury had the medical records of Roger Harris from the United States Airforce before it in

evidence during the guilt and penalty phases of the trial.

This court finds that anxiety disorder, depression, panic attacks and irritable bowel syndrome do not amount to extreme mental or emotional disturbance under the facts of this case. Roger Harris' ability to function in society, to excel at his job to the extent of getting recommended for a promotion, and to conduct his activities in such a manner as not to arouse concern for his mental health on the part of those around him all indicate that he was not under the influence of any extreme mental or emotional disturbance. Anxiety and depression are commonplace in the modern world, and they are problems with which many people cope. Based on the evidence produced, the Court finds that at the time of the murder the defendant was not under the influence of extreme mental or emotional disturbance.

c. Extreme duress or the substantial domination of another person.

The Court finds that Roger Harris devised three separate murder plots to kill his wife. In each of these murder plots, and in the ultimate murder, Roger Harris, not Jennifer Palmer was the dominant partner. The evidence does not support a finding that Robert Harris was under duress. This mitigating factor does not exist.

2. Non-Statutory Mitigating Circumstances, Section 921.141(6)(h)

a Robert Harris was a loving son to his mother.

The Court finds that this mitigating factor exists and gives it very little weight.

b. Roger Harris was a loving brother to his sister.

The Court finds that this mitigating factor exists and gives it very little weight.

c. Roger Harris provided financial and emotional assistance to his sister.

The evidence has shown that Roger Harris' sister's husband abandoned her early in the marriage. Mr. Harris assisted her and her youngest child after she was abandoned by her husband. The Court finds that this mitigating factor exists and gives it little weight.

d. Roger Harris acted as a surrogate father for his niece.

Roger Harris' niece testified that he was her surrogate father after she was abandoned by her biological father. The Court finds that this mitigating factor does exist and gives it little weight.

e. Roger Harris does good deeds for others.

Ms. Taylor, a co-employee, testified that Roger Harris gave her money to maintain her electrical services and to feed her children. In addition, Mr. Harris made contributions to the Air Force Aid Society. The Court finds that this mitigating factor exists and gives it very little weight.

f. Roger Harris' work record.

Ron Ley's testimony was that Roger Harris was a superior worker who went above and beyond the call of duty. Roger Harris was such a superior worker that he was recommended for promotion by Mr. Ley, and the recommendation was accepted by Roger Harris' employer. The ability to work and earn a living is a mitigating factor. The Court finds that this mitigating factor exists and gives it little weight.

g. Roger Harris' ability to work under supervision and adverse conditions.

The Court finds that this mitigating factor is supported by Roger Harris' military records, as well as the testimony of Mr. Ley. Mr. Ley stated that he and Roger Harris were in competition for a job and Roger Harris lost. Mr. Ley testified that even after this occurred, Roger Harris was very supportive and worked under his supervision to such an extent that Mr. Ley recommended him to a position in the management trainee program. The Court finds that this factor exists and accords it little weight.

h. Roger Harris' ability to form caring and loving relationships.

The Court finds that, although this mitigating factor is partially supported by the testimony of his mother, sister and niece, it is contradicted by Roger Harris' treatment of his wife both before and at the time of the ultimate murder. The Court finds that this is not a mitigating factor and gives it no weight.

i. Roger Harris exhibited appropriate cordial behavior at trial.

The Court's observation of the defendant's conduct at trial indicated that the defendant's conduct was appropriate and cordial. The Court finds that this mitigating factor exists and gives it little weight.

j. Roger Harris was a loving father.

Although there was testimony that Roger Harris had a close caring and loving relationship with his children, this father could not have designed a plan and killed the loving mother of his children if he had loved his children. The Court finds that this is not a mitigating factor and has not considered it as such.

k. Roger Harris did not flee after the crime.

While Roger Harris may not have fled his home, the abandoning of his wife's body for several days as he looted her checking account and misled police was certainly evasive. The Court finds that this is not a mitigating factor and has not considered it as such.

l. Roger Harris had a sweet and loving character.

Although Roger Harris' mother and sister testified that he had a sweet and loving character, Roger Harris' treatment of his wife prior to, and at the time of her murder, along with the fact that has left his young children motherless, belies this assertion. Roger Harris' treatment of those

closest to him cannot be considered sweet or loving by any stretch of the imagination. The Court finds that this is not a mitigating factor and has not considered it as such.

m. Roger Harris was a good material provider for his family.

This mitigating factor is supported by the testimony of Roger Harris' mother. The Court finds that this mitigating factor exists and gives it little weight.

n. History of conflict within the family.

This mitigating factor has not been supported by the evidence. The Court finds that this mitigating factor does not exist and has not been considered as such.

o. Roger Harris' Military record.

Roger Harris did serve honorably in the armed forces for 17 years. The Court finds that this mitigating factor exists and gives it little weight.

p. Roger Harris was decorated during his military service.

The Court reviewed the records in evidence of Roger Harris' military recognition and awards. The Court finds that Roger Harris does have a good military record, which includes an award for being an expert with small arms. The weight to be accorded to this mitigating factor would be more, but for the fact that he put his military training to use in building the weapon with which he killed

his wife. Therefore, the court finds this factor exists and gives it little weight.

The Defendant offered no other evidence as to any other mitigating factors and the Court finds that there are no other mitigating factors.

(VII 1233-37).

This Court has consistently held that deciding whether a mitigator has been established is within the trial court's discretion. Rose v. State, 787 So.2d 786 (Fla. 2000); Blackwood v. State, 777 So.2d 399 (Fla. 2000); San Martin v. State, 705 So.2d 1337 (Fla. 1997); Banks v. State, 700 So.2d 363 (Fla. 1997). A trial court may reject proposed mitigation if the court finds that the record does not support it. Bryant v. State, 785 So.2d 422 (Fla. 2001); Banks; Consalvo v. State, 697 So.2d 805 (Fla. 1996). The standards for reviewing a trial court's findings as to mitigation are:

(1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; (2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; and (3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.

Rogers v. State, 783 So.2d 980, 995 (Fla. 2001); see also James v. State, 695 So.2d 1229, 1237 (Fla. 1997) (a trial court's deciding that a mitigator does not exist will stand

“absent a palpable abuse of discretion”). Reversal of a trial court’s findings regarding mitigation “is not warranted simply because an appellant draws a different conclusion.” Bryant, 785 So.2d at 435 (quoting Sireci v. State, 587 So.2d 450, 453 (Fla. 1991)); Blackwood, 777 So.2d at 409. Applying these principles to the instant case, it is obvious that no reversible error occurred in the trial court’s consideration of the proposed mitigators.

Harris complains that the court did not find the statutory mitigator of extreme mental or emotional disturbance. The record, however, supports the trial court’s finding this proposed mitigator had not been established. At the penalty phase the defense introduced numerous exhibits relating to Harris’ military service, including a military review board’s medical and psychiatric evaluation finding him unfit for service and a disability notification ruling raising his level of disability from ten percent to thirty percent. (XX 1443).<sup>6</sup> During closing argument, defense counsel urged the jury to study these documents and to find that the statutory mental mitigators had been established. (XX 1470 72).

As the trial court found, however, any mental or emotional problems that Harris had did not prevent him from functioning in society and excelling at his job. The

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<sup>6</sup> These documents are also attached to the defense sentencing memorandum (VI 1198-1205) and were argued to the trial court at the Spencer hearing. (XXI 1505 et seq.).

record supports the court's factual finding that a statutory mitigator had not been established, and that finding should be affirmed. E.g., Bryant, 785 So.2d at 434-35; Rose, 787 So.2d at 802-03; San Martin, 705 So.2d at 1347-49.

As Harris points out, the trial court only considered his mental and emotional difficulties in connection with the statutory mental mitigators. The failure to consider this as nonstatutory mitigation is, at the most, harmless error. As noted earlier, the defense introduced exhibits from Harris' military service regarding mental mitigation and argued that the jury should find the statutory mitigators. If the jury chose not to do that, however, counsel argued that the material should be considered as nonstatutory mitigation. (XX 1478). Thereafter, the court instructed the jury on both statutory mental mitigators. (XX 1483-84). Even as nonstatutory mitigation, Harris' mental and emotional problems would not have been weighty mitigation due to his ability to function in society and excel at his job. Any error, therefore, was harmless. See Bryant, 785 So.2d at 436; Blackwood, 777 So.2d at 410.

Harris also disagrees with the trial court's rejection of the history of conflict within the family. The record supports the court's finding that this proposed mitigator had not been established. There is no evidence that any "conflict" was more than the victim's being upset about Harris' affair with Palmer, which included moving her into the marital home. No "conflict," such as exists in other cases, was demonstrated.

E.g., Way v. State, 760 So.2d 903 (Fla. 2000) (defendant sexually abused his step-daughters); Cummings-El v. State, 684 So.2d 729 (Fla. 1996) (defendant threatened ex-girlfriend with a gun and beat her before finally breaking into her home and stabbing her to death).

Harris has shown no abuse of discretion in the trial court's rejecting this proposed mitigator.

The same is true for the rejection of Harris' alleged ability to form loving and caring relationships, especially with his children, and his "sweet and loving character." The court acknowledged that Harris had such relationships with his mother, sister, and niece. However, the record supports the court's conclusion that Harris did not have such good relationships with his wife and children, his closest relatives. As the court pointed out, he killed his wife and orphaned the children he allegedly loved so much. No abuse of discretion has been shown in the trial court's rejection of these proposed mitigators. See Banks, 700 So.2d at 368; Consalvo, 697 So.2d at 818. Even if error occurred, it would be harmless because, given the facts of this case, these proposed mitigators would be entitled to little weight. See Beasley v. State, 774 So.2d 649, 673 (Fla. 2000).

No reversible error regarding the trial court's findings in mitigation has been shown, and those findings should be affirmed.

Harris' death sentence is also proportionate. The cases he relies on (initial brief at 82-83) are factually distinguishable. In Amoros v. State, 531 So.2d 1256 (Fla. 1988), and Garron v. State, 528 So.2d 353 (Fla. 1988), this Court held that no valid aggravators had been established. Death, therefore, could not by law be the appropriate sentence in those cases. In Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986), this Court found the death sentence disproportionate where Wilson shot his father and stabbed his cousin during a "heated domestic confrontation." This domestic-type situation was mentioned in Garron and relied on in Blakey v. State, 561 So.2d 560 (Fla. 1990), when Blakey and his wife started an argument that culminated in his beating her to death with a hammer, and Ross v. State, 474 So.2d 1170 (Fla. 1985), where an alcoholic defendant came home drunk, got into an argument with his wife, hit her in the head with a hammer, and then beat and kicked her to death.

In contrast to the cases Harris relies on, alcohol played no part in this murder and there was no evidence of any history of violence between Harris and his wife. Moreover, there is no "domestic dispute" exception that precludes imposition of the death penalty. Way, 760 So.2d at 921; Zakrezewski v. State, 717 So.2d 488, 493 (Fla. 1998); Pooler v. State, 704 So.2d 678, 685 (Fla. 1997); Spencer v. State, 691 So.2d 1062, 1065 (Fla. 1996).

Instead of the cases Harris relies on, others are more appropriate for a

proportionality comparison. For example, in Blackwood, 777 So.2d at 412-413, this Court found the death sentence proportionate for Blackwood's killing his former girlfriend, where only a single aggravator was weighed against the statutory mitigator of no significant prior criminal history and eight nonstatutory mitigators. In Zakrezewski, 717 So.2d at 494, this Court held that the death sentence for killing his wife was proportionate based on the prior violent felony and CCP aggravators being weighed against both statutory mental health mitigators. This Court held death to be the appropriate sentence in Spencer, 691 So.2d at 1065-66, for the killing of his wife because the heinous, atrocious, or cruel and prior violent felony aggravators outweighed the two statutory mental health mitigators and several nonstatutory mitigators. Similarly, this Court found the death penalty proportionate in Pope v. State, 679 So.2d 710, 716 (Fla. 1996), for the defendant's killing his former girlfriend because the pecuniary gain and prior violent felony aggravators outweighed the two statutory mental health mitigators and three nonstatutory mitigators.

Aggravation similar to that in Blackwood, Zakrezewski, Spencer, and Pope was established in this case. The record supports the trial court's finding that a single statutory mitigator had been demonstrated and that the nonstatutory mitigators were not especially weighty. When placed beside truly comparable cases, it is obvious that Harris' death sentence is both proportionate and appropriate. That sentence,

therefore, should be affirmed.

## ISSUE VII

### WHETHER CALDWELL ERROR OCCURRED

Harris argues that the standard penalty-phase jury instructions violate Caldwell v. Mississippi, 472 U.S. 320 (1985), by misinforming the jurors as to their responsibility in the sentencing process. As Harris admits (initial brief at 87), this claim has been decided adversely to his position.

Subsection 921.141(2), Florida Statutes, provides that the jury's sentencing recommendation is advisory. This Court has consistently held that the standard instructions do not violate Caldwell. E.g., Arbelaez v. State, 775 So.2d 909 (Fla. 2000); Alston v. State, 723 So.2d 148 (Fla. 1998); Archer v. State, 673 So.2d 17 (Fla. 1996). Harris' argument adds nothing that has not been considered previously by this Court. Therefore, this claim should be denied.

## ISSUE VIII

### WHETHER A MAJORITY-VOTE SENTENCING RECOMMENDATION IS PROPER.

In this claim Harris argues that allowing the jury to recommend a sentence by a majority, rather than a unanimous, vote is unconstitutional. As he admits, however (initial brief at 88), this issue has been decided adversely to Harris' position. E.g.,

Sexton v. State, 775 So.2d 923 (Fla. 2000); Jones v. State, 569 So.2d 1234 (Fla. 1990). The current argument adds nothing to prior arguments that were found meritless. Therefore, this claim should be denied.

## ISSUE IX

### WHETHER FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL.

Harris makes numerous constitutional challenges to Florida's death penalty statute. All of these claims have been rejected previously. E.g., Farina v. State, 26 Fla.L.Weekly, S527 (Fla. August 16, 2001); Stephens v. State, 787 So.2d 747 (Fla. 2001); Brown v. State, 721 So.2d 274 (Fla. 1998); Pope v. State, 679 So.2d 710 (Fla. 1996); Hunter v. State, 660 So.2d 244 (Fla. 1995). Harris attempts to revive these meritless claims by citing Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000). That case, however, provides no basis for relief. Apprendi announced the general rule that "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." 530 U.S. at \_\_\_, 120 S.Ct. at 2362-63. However, the Court specifically stated that Apprendi does not apply to capital sentencing procedures that have been declared constitutional. 530 U.S. at \_\_\_, 120 S.Ct. at 2366. Because Florida's sentencing procedure has been declared constitutional, this Court recently held that

Appendi does not affect capital sentencing in this state. Mills v. Moore, 786 So.2d 532 (Fla. 2001).

Appendi is concerned with what a state must prove to obtain a conviction, not the penalty imposed for that conviction. It does not affect prior precedent with respect to capital sentencing procedures. Therefore, this issue should be denied.

CONCLUSION

For the foregoing reasons the State of Florida asks this Court to affirm Harris' convictions and death sentence.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to James E. Taylor, Jr., 126 E. Jefferson Street, Orlando, Florida 32801, this 8<sup>th</sup> day of October 2001.

BARBARA J. YATES  
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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