IN THE SUPREME COURT OF FLORIDA

ROGER STEWART HARRIS,	)	
	)	
	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC00-1598
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
___________________________	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR COLUMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES E. TAYLOR, JR.
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Appellant,)
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STATE OF FLORIDA,)
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PRELIMINARY STATEMENT

The original record on appeal comprises twenty-two consecutively numbered volumes. (I-XXII) The pages of volumes one through seven are numbered consecutively (pages 1-1260) and include various pleadings and orders filed in the case. The pages of volumes eight through twenty-two are numbered consecutively (pages 1-1549) and include the transcripts of the jury trial and post-trial hearings. Counsel will refer to the original record on appeal using volume number with reference to the appropriate pages.

The supplemental record on appeal comprises eight consecutively numbered volumes (I-VIII) containing consecutively numbered pages (1-45). These volumes

include various pretrial hearings. Counsel will refer to the supplemental record using the symbol (SR) with reference to the appropriate volume and page number.

STATEMENT OF THE CASE

On January 22, 1999, a Columbia County grand jury indicted Roger Stewart Harris, the appellant, with the premeditated murder of Donna Harris. The grand jury also charged Harris as well as his co-defendant, Jennifer Palmer, with conspiracy to commit first-degree murder. The state also charged Jennifer Palmer with accessory after the fact. (I 1-2) Although the public defender was originally appointed to represent Harris, he subsequently retained private counsel. (I 27)

This cause proceeded to a jury trial on April 17, 2000. (VIII 1-XVIII 1269) During the course of the state's case-in-chief, the trial court admitted numerous gruesome photographs and a videotape of the crime scene over defense objection. (XIII 685-88; XIV 866-72; XVIII 1248-49; State's #4, 17-18, 35-39, 41, 63-65, 68)

In an attempt to bolster the testimony of Jennifer Palmer, the state's star witness, the state called Shannon Harding, Palmer's best friend, to testify regarding statements Palmer made that were consistent with Palmer's trial testimony. (XVII 1120-39) Harding's testimony was allowed over appellant's hearsay objections. (XIII 685-88; XIV 866-72; XVIII 1248-49; State's Exhibits ## 4, 17-18, 35-39, 41, 63-65, 68)

Over defense objection, a firearms expert who testified for the state used a plastic replica of the alleged murder weapon. (XVI 1089-92; XVII 1112-13, 1214-

15)

The trial court denied appellant's motion for judgment of acquittal made at the conclusion of the state's case-in-chief. (XVIII 1249-50) Following deliberations, the jury returned with a verdict finding appellant guilty as charged on both counts. (VI 1067)

On May 12, 2000, the trial court convened a penalty phase. (XX 1386-1495) The state presented no additional evidence. Appellant presented the testimony of three family members and two co-workers. (XX 1421-42) Appellant also introduced nineteen items of documentary evidence without any accompanying testimony. (XX 1443-44, Defense Exhibits ## 1-19; VI 1113) Following deliberations, the jury returned with a slim recommendation (7-5) that the state of Florida execute Roger Harris. (VI 1139-40; XX 1491) Appellant's motion for new trial filed on May 5, 2000 was apparently never ruled on by the trial court. (VI 1098-99)

Prior to the Spencer[2] hearing, appellant retained new counsel. (VI 1143-44) The state submitted a sentencing memorandum (VI 1145-54), as did appellant's new lawyers. (VI 1186-96; VII 1197-1218) The trial court convened a Spencer hearing on June 9, 2000. (XXI 1496-1526)

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

On June 23, the trial court sentenced Roger Harris to 30 years in prison on the conspiracy to commit murder count. (VII 1223-26; XX 1547) The trial court sentenced Roger Harris to death for murder in the first degree. The trial court found two aggravating factors (heightened premeditation and pecuniary gain). The trial court found in mitigation that Harris had no significant prior criminal history. The trial court also found eleven nonstatutory mitigating factors but gave each of them little weight. (VII 1228-38; XX 1527-49)

Appellant filed a timely notice of appeal on October 14, 2000. (VII 1242) This brief follows.

STATEMENT OF THE FACTS

Jennifer Palmer married Stanley Palmer in September, 1996. Stanley worked at the Veteran's Administration Domiciliary where Donna Harris, the victim, also worked. Jennifer met Donna's husband, Roger Harris, the appellant, at a Christmas party in 1996. (XIII 704-7) The couples became friendly as a result. Roger Harris, a Wal-Mart mechanic by trade, sometimes worked on the Palmers' cars. (XIII 706-8)

In June, 1998, Jennifer Palmer and her husband separated. (XIII 707) Jennifer was not working at the time. In late June, at appellant's suggestion, she moved in with the Harrises to babysit their children, while the couple worked. (XIII 709-11)

Roger and Donna Harris were also having marital difficulties. Over the July 4th weekend, Donna and the children moved out of the home. (XIII 711) Roger and Jennifer had already become sexually involved.[3] With Donna out of the house, Roger and Jennifer's affair reached a new level.[4]

Donna and the children returned home a few days later. Donna forced

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[3] Palmer testified that she and appellant had engaged in fellatio. (XIII 711-12)

[4] They engaged in sexual intercourse for the first time. (XIII 711-12)

Jennifer Palmer to move out of the Harris home. (XIII 713) However, Jennifer continued to watch the Harris children when their parents worked. Additionally, she and Roger continued their affair. (XIII 713-15) A few weeks later, Donna discovered the affair and terminated Jennifer's babysitting duties. (XIII 715-16) Nevertheless, Roger and Jennifer's affair continued. Roger promised to marry Jennifer after he left his own wife. (XIII 716)

In the middle of October, 1998, Roger told Jennifer that he had decided not to divorce Donna. Donna had threatened to take the children to Kentucky so that he would never see them again. Roger told Jennifer that he was attempting to get psychiatric help for Donna. (XIII 717-20) Consequently, Roger and Jennifer interrupted their affair and did not see each other for one week. (XIII 718-19) Subsequently, when Roger resumed seeing Jennifer, he indicated that Donna had not changed. (XIII 719)

According to Palmer's testimony, Roger then began discussing ways to kill his wife. He asked Jennifer to research the deadliness of copperhead snakes.[5] (XIII 720-21) At appellant's request, Jennifer, with the help of her best friend, Shannon Harding, timed how long it would take to drive from various spots in

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[5] Jennifer did not have time to go to the library to complete the research because she was working double shifts. (XIII 720-21)

Columbia County purportedly to drop off Donna's body at another locale. (XIII 721) Jennifer claimed that Roger intended to make the killing look like a suicide. (XIII 723-28)

On November 28, 1998, Roger called Jennifer and told her he was working on a "special project" for his wife.[6] Jennifer went over to the house to see the project, but the couple had sex instead. (XIII 730-31)

The couple made one aborted attempt of their plan. Palmer picked up Roger at the Taco Bell in McClenney where they left his car. She then dropped him off near some woods close to the Harris home. Palmer returned an hour later and picked up Roger. Roger told Jennifer that his son was sleeping on the couch and he could not carry out the deed. (XIII 723-28)

On Wednesday, December 2, 1998, Jennifer Palmer met Harris at the Waffle House near the interstate. (XIII 728-29, 731) Harris instructed Palmer to wait for his call that evening. Later that night, Harris called and told Palmer, "Not tonight. I will call you tomorrow." (XIII 731-732) The next day, Harris called Palmer and gave her further instructions. Pursuant to those instructions, she worked her usual

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[6] The "special project" is an apparent reference to the homemade gun that the state contends appellant used to shoot his wife. Jennifer never did actually see the gun itself. (XIII 737-38)

shift at R.J.Gator's[7] which ended at 9:00 p.m. After her shift ended, Palmer changed clothes and sat at the bar where she drank three or four beers. She tried to call Roger's home several times without success. (XIII 732-734) Shortly after 10:00 p.m., Harris called Palmer on the pay phone at R.J.Gator's. He told her, "I did it. I am washing my hands and I need you here." (XIII 732-34)

Palmer went the back way to the Harris home where she found Roger wearing camouflage pants and boots with a red sweater. Palmer noticed the large size of the boots which Harris claimed would make footprints that would divert suspicion from him. (XIII 734-35) Roger was outside spraying items and wiping them off. (XIII 734-35) Palmer could not tell what he was cleaning up. (XIII 734-35) Harris gave Palmer a black bag and instructed her that it needed to be thrown away. He also gave her a white bag explaining that the contents needed to be thrown into water. (XIII 736-37) Harris later explained that the white bag contained a gun that he had manufactured himself by welding pieces together. (XIII 737-38) Harris also gave Palmer some pill bottles and instructed her to flush them. (XIII 738) He also handed her a pair of pliers and suggested that they could be traced. He told her to get rid of them somewhere. (XIII 738)

About 30 minutes after arriving at the Harris home, Palmer left at

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[7] A local bar.

approximately 10:45 p.m. Palmer had Matthew, the Harris' youngest son in the car seat of her automobile. The Harris' older son remained at the home where he was sleeping. (XIII 738-40) Palmer followed Harris while he drove to the truck stop. (XIII 740-43) Harris abandoned the van and joined Palmer in her car. (XIII 742-44) Upon entering Palmer's car, Harris observed that her car smelled like gunpowder and that she needed to use air freshener to eliminate the odor. (XIII 743) Palmer asked Harris if there were a gun in the car. He told Palmer that he used a gun that he had made by hand. (XIII 744) During the drive, Harris suddenly remembered that he had inadvertently left the firing pin in the van. Despite Palmer's urgings, Harris did not want to return to the van, fearing that someone had already found the body. (XIII 744-45) On the trip back to the house, Harris undressed to his underwear. (XIII 744-45) He left his clothes and shoes in Palmer's car for her to dispose. (XIII 745)

Once they returned home, Harris kissed Palmer and said, "It is finally over." (XIII 745) He took Matthew into the house while Palmer left to get rid of evidence. (XIII 745-46) Palmer dumped the black bag at the Pond View Trailer Park off Old Country Club Road. She denied knowing the contents of the bag saying that it felt

soft but heavy at the same time, like sheets or other cloth.[8] (XIII 746) Palmer then went to the Watertown Lake where she dumped the contents of the white bag into the water. A bullet and a small piece of wire landed on the dock. Palmer efficiently picked them up and threw them into the lake. (XIII 747) Palmer then drove down a dirt road toward the firing range and threw the bag containing the pliers out her car window. (XIII 747-48) Palmer emptied the pill bottles into some standing water before throwing the empty bottles into the woods down a trail. (XIII 748) She then loaded Harris' clothes and shoes into a bag which she left in her car. (XIII 748) She drove to the Triangle Motel where she told Shannon Harding, her best friend, that Harris "did it." (XIII 748-49) Ignoring Harding's Taco Bell suggestion, Palmer later dumped the bag containing the clothes in the dumpster at Lakeview Apartments. (XIII 749-50) Palmer then returned to her home.[9] (XIII 749-50)

On the following Monday, Harris told Palmer that he had drained his wife's accounts. (XIV 762) Harris explained that his wife was still missing and that, by

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[8] Despite Palmer's assistance, police never recovered the contents of the black bag. (XIII 746)

[9] The next day Palmer discovered that she had not disposed of all the evidence for which she was responsible. She discovered another Wal-Mart bag containing duct tape in her backseat as well as a bottle of pills in her shoe. She dumped that evidence in the trash at Taco Bell. (XIII 751-52)

emptying her bank accounts, whoever had her or wherever she went, she would not have any money to do anything.[10] (XIV 762-63) Harris then offered Palmer money so that she could get a license tag for her automobile. She accepted his offer. Harris came over to Palmer's home and gave her $170.00. (XIV 762-3) While there, Harris told Palmer, "If anything happens, I am not going to admit anything." (XIV 763) He also asked Palmer if she knew her "rights". Palmer assured Harris that she did. (XIV 763-64)

Harris reported his wife missing to the police on Friday. He told police that his wife had gone to Wal-Mart the night before to return a jack and had never returned. Harris called her place of employment where she had not shown up either. Harris described the clothing that she wore and the vehicle that she was driving. She had left the house around 10:15 p.m. the night before. Harris was visibly upset while talking to Deputy Bulthuis. He was shaking and complained of dizziness. Deputy Bulthuis reassured Harris and attempted to comfort him. (XIV 851-56)

When Roger Harris picked up his son at school on Monday, December 7th, he met with the school principal. Harris explained that his wife had disappeared the

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[10] Harris readily admitted to police when questioned at a later date that he had withdrawn $450.00 from his wife's account to which he also had access. (XVI 1054-55)

previous Thursday night. He appeared to be nervous, worried, almost frightened. The principal suggested that Donna might have left town due to marital difficulties. Roger explained that their marital troubles were behind them.[11] (XV 919-28) At Roger's request, his in-laws' names were removed from the list of people authorized to pick up his son at school.[12]

On December 7, 1998, police found Donna Harris' body inside her van. (XIV 861) The van was parked in one of the parking spaces on the north side of the Country Station formerly known as the L & G Truck Stop. (XIV 863) Through the windows, Deputy Johnson could see an overweight white female lying in the third set of seats in the rear of the van. She appeared to have a wound to the back of her head. (XIV 863-64) A subsequent autopsy performed on Donna Harris showed the body to be in an acquired stage of decomposition. (XIII 682-3) The cause of death was determined to be a projectile wound in the back of the skull which resulted in the destruction of almost the entire lower half of the brain. (XIII 688-95) The victim's shorts and underwear had been pulled down and off one leg. (XIII 682-3, XIV 874-75) Police found no semen in the victim's vagina. (XV 966-

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[11] Principal Felder acknowledged that the school system occasionally got caught up in custody disputes between parents. (XV 928-29)

[12] Harris explained that he suspected that his in-laws might be harboring his wife. (XV 923-26)

68) The crime lab was unsuccessful in its attempt to obtain a DNA analysis result. (XV 968-69)

Inside the van, police found Donna's purse and other personal effects including credit cards, cash, a pill bottle, and her keys. (XIV 864-65, 872-73) They seized a finishing nail punch and a bolt with a sharpened end. (State's #8; XV 949) Lab reports indicated the presence of human blood on the bolt and nail punch. (XV 965) They also found a brand new 2½ ton hydraulic jack still in the box. (XV 916-18)

When Detective Brown asked permission to search the Harris home, Roger Harris cooperated completely. Police collected a necklace and two sets of earrings from the kitchen. (XVI 1053-54) In the bedroom closet, they seized a man's gold wedding band from a shelf.[13] (XVI 1054) Police seized numerous items from the Harris home and workshop. The tools seized were common ones that would ordinarily be found in an automobile mechanic's home.[14] (XV 912-15) Police also searched the trunk of appellant's Ford Mustang where they seized a piece of pipe with a rod through it (State's #79) and a hack saw. (XV 952-55)

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[13] Harris did not know whose ring it was.

[14] These included tools, duct tape, and bolts (which were not the same type found in the victim's van). (XV 908-15)

While interviewing Donna's co-workers, detectives spotted Roger Harris on the road. (XVI 1033-36) Detective Brown and his partner followed Harris who drove to Jennifer Palmer's residence. (XVI 1036-37) Harris got out of his car and went into Palmer's home where he stayed for approximately ten minutes. Police then followed Harris in a circuitous route that eventually led to his home. (XVI 1037-39)

Using a cell phone, Detective Brown called the residence and spoke to Roger Harris. Detective Brown identified himself and asked Harris about his marital problems. (XVI 1040-42) Harris told Detective Brown that he and Donna had recently worked out their problems. Harris began to cry on the phone. Harris admitted that he and Jennifer Palmer had had an affair several months back. It had recently ended. Harris stated that he had last contacted Jennifer Palmer on Tuesday, December 1, 1998. (XVI 1041-42) After ending the first phone call, Detective Brown phoned Harris again approximately ten minutes later. When he asked once again, Harris admitted that he had seen Jennifer in Wal-Mart on the morning of Friday, December 4, 1998. (XVI 1043)

At Detective Brown's request, Harris agreed to meet with them. Detective Brown arrived at Harris' house fifteen minutes later. Detective Brown asked Harris to account for his whereabouts on December 3rd. He explained he ate dinner with

his family at home that night. Donna told appellant that she had bought him a jack at Wal-Mart. He explained that he already had one and that she needed to return it. (XVI 1044-46) After putting the children to bed at approximately 8:45 p.m., appellant had his second drink of the night before lying down on the couch where he fell asleep. Shortly before 10:00 p.m., he woke up and went into the bathroom. At approximately 10:30 p.m., Donna knocked on the bathroom door and told appellant that she was going to Wal-Mart to return the jack. After she left, appellant fell asleep on the couch once again. When he woke up later that morning, he went into the bedroom and noticed that his wife had not returned. Her van was still missing. (XVI 1049-50) Harris commented that it was unusual for his wife not to come home. (XVI 1050) The only time she had not spent the night at home was when they were separated for a short time. (XVI 1050-51)

Police brought Jennifer Palmer to the criminal investigation department and asked her when she last saw Roger Harris. When she claimed that she last saw Harris on December 1, 1998, detectives confronted her with the disclosure that they had followed Harris to her residence that morning. (XVI 1055-57) Palmer then claimed that she would tell the truth and gave a statement to Detective Brown. (XVI 1057-58) She detailed the plot to kill Donna Harris and her involvement.

Jennifer Palmer took police to Pondview Mobile Home Park on Country

Club Road. Pursuant to her instructions, they looked in the dumpster but found no relevant evidence. (XV 990-91) She also took police to Lakeview Apartments where police recovered a pair of size eleven boots, a pair of gloves, and a pair of red sweat pants from the dumpster at the apartment complex. (XV 991-95) Palmer then took police to an area on Range Road next to Watertown Lake where they recovered a pair of pliers and some vice-grips along with two bottles of pills. (XV 995-98) Palmer then took police to Watertown Lake and indicated where she had thrown some items into the lake. A dive team subsequently recovered two short springs connected with a piece of metal twisted on the end, a brass fitting with a .357 shell casing inside, another brass fitting with interior threads, additional .357 cartridges, one .357 bullet, and a bronze-type metal pipe approximately six inches long with duct tape on it.[15] (XV 998-1008) Palmer also took police to the Taco Bell to search the dumpster, but it had already been emptied. (XV 1010-11)

PENALTY PHASE

The state presented no additional evidence in aggravation at the penalty phase. (XX 1419) Additionally, both parties stipulated that Roger Harris had no significant history of prior criminal activity. (XX 1419-20) In fact, Harris

[15] The items were examined for latent fingerprints, but found no identifiable prints. (XV 983-86) Appellant's fingerprints were the only standards provided to the examiner. (XV 987-88)

apparently had no arrests nor criminal activity of any kind in his past.

Roger Harris was the youngest of four children born to Imogene Harris and her husband who remain married after 49 years. (XX 1421-22) The Harris home in Macon, Georgia, stayed full of children. (XX 1422-23) Growing up, Roger was precious. His mother described him as one of the sweetest children she had. He never caused her any trouble. (XX 1422) Roger got along with everybody. "Everybody was just crazy about him." He never had any problems, fights, or confrontations with any of the neighborhood children. (XX 1429)

Roger got along especially well with the elderly women in the neighborhood. Ms. Howard, an elderly neighbor, was sickly. Roger would cut her grass, fix her plumbing, and do anything she needed. He helped Ms. Evans in a similar way. (XX 1423) Ms. Johnson owned a neighborhood store and had trouble with her eyesight. Roger would put up stock for her, sweep up, whatever needed to be done. He did all that work without any pay whatsoever. (XX 1423)

As a young man, Roger joined the Air Force but stayed in contact with his family. They got regular phone calls and letters. He would come home to visit on weekends.[16] (XX 1423-24)

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[16] Appellant was stationed nearby at Robins Air Force Base in Warner Robins, Georgia and Moody Air Force Base in Valdosta. (XX 1424)

Roger’s only sister, Valerie, was closer to him than she was to her two older brothers. Valerie divorced her husband after six years. The oldest of her two girls from that marriage had a lot of medical problems. Roger was always there for Valerie and her children. He stepped in as a father figure. He provided considerable financial support in addition to ferrying the children to school and to the doctor. “I mean, he was their father.” (XX 1429) While pregnant with her second child, Valerie needed blood. Roger was the one that was there to donate his own blood. (XX 1430-31) After the birth of the child, Roger was the one who picked up Valerie and brought her home from the hospital. (XX 1430) Valerie’s husband showed no interest. (XX 1431) Valerie would not have made it without Roger’s help. (XX 1430)

Sharon Frost, Roger’s twenty-three-year-old niece, described how her Uncle Roger acted as her father.[17] Roger was always there when Sharon needed him. He would pick her up from kindergarten when he was home on leave. (XX 1433) Sharon also discussed certain things with Roger that she did not feel comfortable talking about with her mother. (XX 1433) Roger was especially helpful getting Sharon through a period of teen angst during her early adolescence. (XX 1434)

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[17] Sharon had not seen her biological father in almost twenty years. (XX 1432)

When Sharon married in August, 1998, her Uncle Roger gave her away at the wedding. Sharon choose Roger over her other two uncles because he was so supportive when she was growing up. (XX 1434-35)

After he married, Roger brought Matthew and Joseph, his two boys, to Macon for family gatherings and holidays. He was crazy about his boys. He could not go anywhere without the oldest one. If Roger ever left the room without his youngest, the child would scream for his daddy. He was always "super good" with children. (XX 1430) At daybreak, Roger would dress his two sons and walk with them to the store to buy the ingredients for breakfast.[18] (XX 1424-25) Appellant provided financial support for his children to the best of his ability. (XX 1425)

Prior to his arrest, Roger Harris worked at Wal-Mart Tire Lube Express. Prior to his promotion, Ronald Ley, appellant's supervisor, had been in competition with Harris for the supervisory position. Despite that fact, Ley observed no change in Roger's attitude after Ley became Roger's boss. Appellant remained supportive, helpful, resourceful, dependable, and loyal. (XX 1436-38) Ley described Roger as an employee who went "above and beyond" the call of duty. (XX 1438) Ley thought so much of Roger as an employee that he

[18] Appellant's mother described the walk as a fun excursion, as she had plenty of supplies on hand. (XX 1425)

recommended Roger for the management trainee program, a path that would have resulted in a management position even higher that Ley's . Based on his record and the recommendation, Roger was accepted into the program. (XX 1438-39)

Linda Taylor, a coworker at Wal-Mart, testified about Roger's generosity. Even though they did not socialize outside of the work place, Roger provided invaluable help to Taylor, a single mother of three children. Roger offered to pay Taylor's electric bill one time. He also gave her grocery money so that she could feed her children. Roger had no expectation of Taylor paying him back. (XX 1440-41) Roger also frequently helped Taylor when her car would not start after work. (XX 1441-42)

Additionally, without elaboration or testimony, the defense introduced numerous items into evidence that reflected appellant's substantial and exemplary military service. The evidence included several awards and plaques[19] including a non-commissioned officer appointment, a Strategic Air Command Certificate of Appreciation, an Air Force Aid Society Certificate of Appreciation, an Air Force commendation medal, a Joint Service Achievement Medal, a diploma from non-commissioned officer's leadership school, three certificates of training, and an

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[19] An Outstanding Leadership plaque (Defense #4), a Job Well Done plaque (Defense #5), and a Strategic Intelligence Wing plaque (Defense #6).

honorary discharge. (VI 1113; XX 1443; Defense Exhibits #1-16) Also without any elaboration or testimony, defense counsel introduced appellant's military record, his military review board medical and psychological examination, and a disability notification rating. (VI 1113, XX 1443-44; Defense Exhibits #16-19)

SPENCER HEARING[20]

After the penalty phase, appellant retained new counsel who represented him at the Spencer hearing and at sentencing. (VI 1143-44) New counsel was unable to accomplish certain goals due to insufficient time.[21] However, appellant's new lawyers amplified and added to the mitigating evidence.

Specifically, the new lawyers pointed out that Roger Harris was a seventeen-year veteran of the United States Air Force who was eventually disqualified from that service because of his psychological deficits. Appellant's attachments to his sentencing memorandum included the report of Dr. Stanley Crawford, a staff psychiatrist with the United States Air Force.[22] (VII 1197-1202) Dr. Crawford diagnosed depression and anxiety disorder, not otherwise specified.

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

[21] Specifically, counsel mentioned that time prevented the retention of a mental health expert for a full examination and report. (VI 1190)

[22] This report had been introduced into evidence at the penalty phase without further amplification.

Dr. Crawford also suspected that Harris possibly suffered from post traumatic stress disorder, although he did not have the formal symptoms. (VII 1202) Dr. Crawford concluded:

> Psychiatric profile has changed to S4. The patient is not worldwide qualified. He did have the onset of these psychiatric symptoms in the line of duty. Military impairment is marked. Social and industrial impairment is definite to considerable. ...I would recommend this case be referred on through MEB\PEB channels and would have to recommend retirement based on the psychiatric diagnoses.

(VII 1202)

Appellant's mother submitted an affidavit made under oath. Appellant's family had a history of severe mental health problems. Appellant's maternal grandfather was not stable. Additionally, his mother suffered from mental problems. She was treated by a psychiatrist and took tranquilizers for many years. She used tranquilizers on a daily basis during her pregnancy with the appellant, especially during the first trimester. She received shock therapy on multiple occasions as part of her psychiatric care.[23] One of appellant's maternal uncles suffered from depression and eventually committed suicide some twenty years ago. Appellant's oldest brother had been diagnosed as manic-depressive, had been

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[23] Appellant's mother knew only that she suffered from some type of anxiety attack or panic disorder. (VII 1204)

institutionalized, and had received shock treatment. (VII 1204-5)

When Roger was approximately sixteen, he suffered a serious head injury and disappeared for several days. He was eventually found wandering by the side of the road. After the injury, Roger developed a stuttering problem.[24] (VII 1204)

Appellant also introduced a mental status evaluation prepared by Dr. Umesh Mhatre.[25] Dr. Mhatre examined Roger Harris on October 26, 1995. Dr. Mhatre concluded that:

> This patient definitely has symptoms of possible manic depression with mood swings. This condition may be gradually evolving, and future examination may be needed to see if this condition has not reached a full blown status. His anxiety and depression might be early symptoms of manic depression, but diagnostically it is difficult to differentiate at this point.

(VII 1208) Subsequently, on July 28, 1996, progress notes from appellant's medical record at the VA clinic reveal a diagnosis of bi-polar II disorder as well as intermittent explosive disorder. (VII 1211; XXI 1509) Medication was prescribed.

Additional medical records introduced at the Spencer hearing revealed that

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[24] None of the aforementioned family history was heard by the trial jury that recommended (7-5) that Roger be executed. Appellant's mother explained that she had never been asked any questions regarding this type of family history until appellant's new lawyers approached her prior to sentencing. (VII 1204-5)

[25] This evidence was also **not** considered by appellant's jury.

on June 30, 1998, a mere five months before the murder, there was a request for a psychiatric evaluation for anxiety and depression. (VII 1213-14) Appellant was seen by a doctor at that time. On September 28, 1998, approximately sixty days before Donna's death, appellant's VA progress notes indicate yet another psychiatric consult. (VII 1214)

SUMMARY OF THE ARGUMENTS

Appellant maintains that three evidentiary errors require a new trial in his case. The trial court erroneously allowed, over timely and specific objection, testimony concerning prior consistent statements that Jennifer Palmer, the key state witness, made to her best friend, Shannon Harding. Defense counsel engaged in reasonable cross-examination of Jennifer Palmer. There was no allegation of recent fabrication or improper motive that would allow the objectionable hearsay. At the very least, the prior consistent statements were made after (not before) Palmer's motive to fabricate arose. She was angry that appellant refused to leave his wife so that he could marry Palmer. The prior consistent statements improperly bolstered Palmer's testimony which was the key to convicting Roger Harris of this murder.

The trial court also allowed over objection the state's firearm expert to display a model that he used to demonstrate how appellant might have manufactured a firearm out of the parts recovered from various locations in Columbia County with the assistance of Jennifer Palmer. The state built the replica based on mere speculation. Demonstrative aids may be used during trial as an aid to the jury in understanding a material fact or issue. However, the demonstrative evidence must be an accurate and reasonable reproduction of the object involved. The state had absolutely no evidence regarding the alleged construction of the

murder weapon. Any slight probative value was outweighed by the ample prejudice.

Appellant also contends that the introduction of gruesome photographs, some of which depicted maggot activity, improperly tipped the scales in favor of guilt. The only issue at trial was who killed Donna Harris. The gruesome photographs and video of the decomposed body were not relevant to any material fact of issue.

Appellant contends that the evidence did not justify instructing the jury that the murder was committed for pecuniary gain. The state introduced no evidence that documented any life insurance policies. Appellant had access to his wife's checking account while she was alive. He did not need to kill her to withdraw that money. There was no evidence whatsoever that appellant killed his wife to avoid paying child support. Instead, the evidence proved that appellant was deathly afraid of losing his children in a custody battle. The jury should not have been instructed on this particular aggravating factor. The trial court also erred in finding this particular factor. Appellant also challenges the sufficiency of the evidence to support the trial court's finding that the murder was committed in a cold, calculated, and premeditated manner.

In addressing the mitigating evidence, the trial court overlooked

uncontroverted, substantial mitigation. The trial court also abused its discretion in finding that each of the numerous nonstatutory mitigating factors was entitled only "little weight."

Only one valid aggravating factor even arguably exists. This Court has routinely found the death penalty disproportionate in cases with a single aggravator and substantial mitigation. Appellant was a decorated veteran with an exemplary military record. He had absolutely no prior criminal history. His mental problems escalated during the months prior to the commission of the murder. The jury never heard about appellant's spiraling mental decline. That decline is documented by medical records. Appellant's crime is not the most aggravated nor the least mitigated. Life in prison without possibility of parole is the appropriate sentence.

At the penalty phase, the trial court erred in refusing to modify the jury instructions as defense counsel requested. The standard jury instructions denigrate the jury's role by diminishing the importance of their verdict. Additionally, appellant attacks the validity of Florida's death sentencing scheme based on a variety of deficiencies. Appellant also questions the validity of the statute in allowing the imposition of the death sentence based on a simple bare majority.

ARGUMENTS

Appellant discusses below the reasons which, he respectfully submits, compel the reversal of his convictions and sentences. Each issue is predicated on the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 16, 17, & 22 of the Florida Constitution, and such other authority as set forth.

POINT I

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTION TO BOLSTER THE TESTIMONY OF THEIR STAR WITNESS BY INTRODUCING PRIOR CONSISTENT STATEMENTS.[26]

The undisputed star witness for the state of Florida in this case was Jennifer Palmer, appellant's girlfriend and indicted co-conspirator. Without Jennifer Palmer, the state had no case at all. When police initially questioned Palmer, she lied to them about the last time she had any contact with Roger Harris. When the police confronted her with the fact that she was lying, Palmer then told police her entire story.[27] She led police to the recovery of evidence at various spots in Columbia

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[26] A trial judge is afforded broad discretion with respect to the admissibility of evidence. The admission or exclusion of evidence will not be reversed without a showing of an abuse of discretion. San Martin v. State, 717 So.2d 462 (Fla. 1998).

[27] Palmer's story remained substantially consistent throughout the proceedings.

County. (XIV 765-67, 800-801)

Palmer testified that she and Roger were engaged in an extramarital affair and wanted to marry each other. (XIII 716) Palmer testified that Harris hatched a scheme to kill his wife so that he could marry Jennifer and still keep his children. (XIII 716-21) Palmer told the jury about the planning that ultimately led up to the murder of Donna Harris. Palmer detailed her involvement in the planning stage as well as her participation in the disposal of the body and certain items of physical evidence. Palmer minimized her own role in the scheme claiming that she did not think that Harris would "really do it." (XIII 721)

On cross-examination, defense counsel engaged in general impeachment of Palmer. She admitted to a discrepancy in her testimony during the deposition about exactly when her sexual relationship with Roger Harris began. (XIV 780) Palmer also conceded that in her initial statement to the police she omitted that she dumped evidence at the Taco Bell. (XIV 781) Defense counsel also pointed out that Palmer had already reached an agreement with the state regarding her charges when she testified before the grand jury.[28] (XIV 785) Palmer admitted that she hoped that her testimony on behalf of the state would help shorten her sentence.

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[28] Palmer agreed to plead guilty but her sentence was not specified. She faced a maximum of sixty years.

(XIV 784-85)

Palmer also admitted on cross-examination that she became upset with Roger when he repeatedly delayed leaving his wife. She felt as if he were stringing her along. (XIV 788-91, 804) She loved him, wanted to marry him, and did not appreciate his continuous delays in carrying out his promise. (XIV 791) Palmer further denied that any of the evidence that she disposed of would have connected her to the homicide. (XIV 795) Palmer did admit that she wanted Donna Harris out of the way by whatever means necessary. (XIV 795-96, 805)

The objectionable testimony that improperly bolstered Palmer's testimony came from Shannon Harding, Palmer's very good friend. (XVII 1116-19) As friends sometimes do, Jennifer confided in Shannon that she was having an affair with Roger Harris. (XVII 1119) When the state attempted to elicit statements that Palmer made to Shannon, defense counsel voiced a hearsay objection. (XVII 1120) The state argued that they should be allowed to introduce Jennifer Palmer's prior consistent statements made to Shannon Harding.

> MR. DEKLE (prosecutor): [prior consistent statements] by Jennifer Palmer in that she has testified to these various facts and Mr. Payne [Defense counsel] has assaulted her as having made this up to get out of a murder rap. It is an attack of recent fabrication against the witness. Then statements were made by that witness prior to

> the time when the witness would have a motive to fabricate, which are consistent with the witness' testimony are admissible in evidence a little bit later on in some of the statements that Ms. Palmer said would be co-conspirator hearsay, but at this point is simply prior consistent statements. Under that theory, the statement is relevant and material and admissible and is not hearsay.
>
> THE COURT: All right. I will allow it.

(XVII 1121) Shannon Harding then testified that Jennifer Palmer had told her that Roger Harris was going to leave his wife, but that he did not want to get a divorce, because he was afraid he would not get custody of his children. (XVII 1121-22) The prosecutor then asked:

> Q. Now, during the months of this conversation or since this conversation up until December of '98, did the subject of the defendant Roger Harris doing something to get rid of his wife come up?
>
> A. Yes, sir.
>
> Q. And during these specific discussions, did - - what was the first thing said about the resolution of problems with the kids?
>
> MR. PAYNE (Defense counsel): Same objection, Your Honor.
>
> THE COURT: Same ruling.

(XVII 1122) Shannon Harding then testified:

> He told her he wanted to get rid of his wife.

(XVII 1123) Shannon Harding then proceeded to testify regarding conversations between Jennifer Palmer and Donna Harris about Jennifer's affair with Roger Harris. (XVII 1223-24) The prosecutor subsequently asked:

> Q. Now, was there ever a time after the defendant telling Jennifer Palmer that he was going to get rid of his wife that what exactly that meant was explained to you?
>
> A. Yes, sir.
>
> Q. And what does "get rid of" mean to you?
>
> MR. PAYNE: Same objection, Your Honor.
>
> THE COURT: Same ruling.
>
> THE WITNESS: He was going to kill her.

(XVII 1124-25) Harding then went on to explain that Palmer had discussed the plan to kill Donna Harris with Harding on several occasions. (XVII 1125) Harding explained that she helped Palmer time driving distances because Palmer "told me that he wanted her to time it...". (XVII 1126) Harding also testified that she heard Jennifer Palmer talking on a pay phone about a "dark place" somewhere in Columbia County. (XVII 1126) When asked, Harding suggested the race track which Jennifer then repeated into the phone. (XVII 1126-27) The prosecutor then

asked:

> Q. Did Jennifer tell you who she was talking to?
>
> A. Yes, sir.
>
> Q. Who was that?
>
> MR. PAYNE: Same objection.
>
> THE COURT: Same ruling.
>
> THE WITNESS: Roger.

(XVII 1127) The trial court then allowed Harding to testify regarding numerous hearsay statements made by Jennifer Palmer which were consistent with and bolstered Palmer's testimony.[29] The trial court eventually noted a standing objection to all hearsay after yet another objection from defense counsel.[30] (XVII 1138)

When a witness testifies at a trial, neither that witness nor any other person may testify to prior statements by the witness which are consistent with the in-

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[29] Among other items of hearsay, Harding testified that Jennifer told her that (1) appellant instructed Jennifer to take her glowing hubcaps off of her car; (2) that appellant's plan to kill his wife was thwarted by the presence of one of his sleeping children; (3) that appellant had finally carried out the murder; and (4) that appellant told Jennifer it would not be a good idea for Harding to meet him. (XVII 1127-39)

[30] The prosecutor agreed that this was acceptable.

court testimony of the witness. <u>Chandler v. State</u>, 702 So.2d 186 (Fla. 1997) A witness' testimony may not be corroborated by his prior consistent statements. <u>Rodriguez v. State</u>, 609 So.2d 493, 500 (Fla. 1992).

The prosecutor argued and the trial court allowed the testimony on the theory that defense counsel had made a charge of recent fabrication during cross-examination of Jennifer Palmer. (XVII 1121) Section 90.801 (2)(b), Florida Statutes (2000), provides:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing 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.

<u>Defense Counsel Made No Charge of Recent Fabrication or Improper Influence.</u>

The trial court's admission of the objectionable testimony was error. Defense counsel made no charge, either express or implied, of improper influence, motive, or recent fabrication. The cross-examination pointed out general inconsistencies between Palmer's testimony at trial and her pretrial deposition.

Otherwise, defense counsel simply engaged in a thorough and proper cross-examination.

There could be no charge of recent fabrication. Jennifer Palmer's story never changed. She initially lied to police only about the last time she saw Roger Harris. Confronted with that lie, she came clean and spilled her guts. Her testimony remained substantially consistent through her testimony to the grand jury, pretrial deposition, and at trial. On cross-examination, defense counsel attempted to show the jury that Jennifer Palmer had been lying all along.

> There must be an initial attempt on cross-examination to demonstrate the improper influence, motive or recent fabrication and, once such an attempt has successfully occurred, then prior consistent statements are admissible on the redirect examination or through subsequent witnesses to show the consistency of the witness' trial testimony....
>
> ***
>
> A reasonable interpretation of the victim's cross-examination does not indicate either expressly or implicitly, a charge of recent fabrication, improper influence or motive to falsify. Her testimony did not indicate that she was changing her story at trial; nor did the impeachment attempts establish any fact which indicated that her trial testimony was improperly influenced or that she had a motive to falsify. **A witness' credibility is always an issue at trial, and a general attack**

on that credibility does not satisfy the hearsay exception rule.

Jenkins v. State, 547 So.2d 1017, 1020-21 (Fla. 1st DCA 1989). See also Turtle v. State, 600 So.2d 1214 (Fla. 1st DCA 1992). An allegation at trial that the testimony has been fabricated is not sufficient to provide for the admissibility of prior consistent statements. Hebel v. State, 765 So.2d 143, 146 (Fla. 2d DCA 2000). If cross-examination results in the introduction of prior consistent statements, then almost **any** cross-examination will allow such an admission. Surely, this is not the intent of Florida's evidence code.

Any Motive to Testify Falsely Existed Prior to the Time that the Consistent Statements Were Made.

Aside from pointing out general inconsistencies and attacks on Palmer's credibility, defense counsel did suggest that Palmer's motive in testifying against Harris was influenced by her anger at him. Specifically, Palmer admitted on cross-examination that she became very upset with Roger, when he repeatedly delayed leaving his wife. She felt as if he were stringing her along. (XIV 788-91, 804) Palmer loved Harris, wanted to marry him, and did not appreciate his refusal to carry out his promise. (XIV 791) In early August, Jennifer and Roger talked about divorcing his wife and marrying Jennifer. When Roger decided to stay with his

wife and attempt to repair his ailing marriage, Jennifer Palmer was sad and upset.[31] Jennifer went back to her own faltering marriage when her husband returned from the military. (XIV 786-87)

In early November, Roger told Jennifer that he would leave his wife, by November 15th. (XIV 789-90) When Roger failed to make good on his promise once again, Jennifer was very unhappy and angry. (XIV 790-91) The "consistent" statements that Shannon Harding testified about were uttered by Jennifer Palmer during this time period and afterwards. At most, defense counsel suggested that Palmer was lying in her trial testimony because of her anger at Roger Harris for his refusal to make good on his promise to leave his wife. This motive arose as early as August, 1998. The subsequent statements to Shannon Harding would therefore not be admissible under Section 90.801(2)(b), since the statements were not made prior to Palmer's motive to fabricate arose.[32] Chandler v. State, 702 So.2d 186 (Fla. 1997); see also, Jackson v. State, 498 So.2d 906 (Fla. 1996) (Prior consistent statements inadmissible where cross-examination established that motive to lie

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[31] During this time period Jennifer might have sent Roger some unflattering emails. (XIV 788-89)

[32] In fact, Jennifer Palmer might be compared to Matty Walker, the vixen in the movie *Body Heat* (1981), who duped Ned Racine, an FSU law grad, into taking the fall for her. She had an elaborate plan that stretched back even as far as arranging to meet Racine.

existed before the prior statement was made).

Hebel v. State, 765 So.2d 143 (Fla. 2d DCA 2000) involved a sexual battery prosecution where the defense claimed that the victim invented the charges because she feared that the defendant might be awarded custody of their children. The appellate court found error in the admission of the testimony of witnesses concerning out-of-court statements made by the victim concerning a collateral crime. The court wrote:

> To be admissible under section 90.801(2)(b), an otherwise inadmissible prior hearsay statement must be consistent with the statement being examined at trial and must rebut the charge that the witness recently fabricated that statement...[The defense theory was that the victim] had fabricated the charge from the outset, not that she had "recently" fabricated them...

Hebel v. State, 765 So.2d at 146. This error cannot be deemed harmless where Palmer was the key prosecution witness and the state improperly bolstered her testimony.

POINT II

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION AND ALLOWING THE STATE'S FIREARM EXPERT TO USE A PLASTIC REPLICA OF THE ALLEGED MURDER WEAPON WHERE THE DEMONSTRATIVE EVIDENCE WAS NOT AN ACCURATE AND REASONABLE REPRODUCTION OF THE FIREARM WHICH NO ONE EVER SAW.[33]

The state collected certain items of evidence recovered from the victim's van, appellant's home, and other items recovered hither and yon from various spots around Columbia County with the assistance of Jennifer Palmer. The state then presented the selected items of evidence to David Williams, a firearms expert. The items included a six-inch piece of pipe threaded on both ends (State's #91), a copper fitting (State's #81), a piece of copper tubing with what appeared to be a cartridge casing in it (State's #87), a spring (State's #88), what appeared to be a primer (State's #101), a bolt with a finishing nail punch (State's #8), a pair of vice-grip pliers (State's #87), another piece of pipe (State's #89), a number of .357 magnum cartridges (State's #82), a brass connector (State's #83), and a bolt that had been sharpened to a point on one end (part of State's composite #8) (XVII

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[33] The use of demonstrative exhibit is a matter within the trial court's discretion. Brown v. State, 550 So.2d 527, 528-29 (Fla. 1st DCA 1989).

1197-1210) The pipe (State's #89) contained particles of gun powder. (XVII 1199) The fired casing contained in the pipe (State's #83) was missing the primer. It had been punched out. (XVII 1201-3) Williams found marks on the outside of the copper fitting (State's #81) which **could have** been made by the pair of vice-grip pliers. Williams also noticed some damage to the teeth of the plyers and small pieces of copper. Testing led Williams to conclude that the pair of vice-grip pliers did leave the markings on the copper fitting. (XVII 1203-6) That same copper fitting fit the threads on the six-inch piece of pipe (State's #91). The copper fitting (State's #81) showed a strong reaction for lead residues. (XVII 1206-8) Williams' examination of the sharpened bolt (part of State's #8) led to his conclusion that it made the impression on the primer (State's #101). (XVII 1208-10)

Williams laid out all of the aforementioned pieces and components in a manner such that they **could have** been assembled to build a firearm. (XVII 1211) Williams used a laser pointer to show the jury how the items **could** have been used to manufacture a gun. (XVII 1211) Williams admitted that he was missing some of the necessary items.[34] Additionally, he described the assembly in generalities

[34] Williams testified that the pieces could be assembled in "some manner."

without specification.[35] (XVII 1212-14) Williams subsequently used a plastic replica that the prosecutor[36] had manufactured to demonstrate during his testimony. Williams admitted that he did not have all of the necessary components and did not know what other additional items were used. (XVII 1215) He testified that it was **possible** that the replica could have fired a .357 magnum cartridge.[37] (XVII 1215) Additionally, he demonstrated how the projectile could have made the irregular hole found in the victim's skull. (XVII 1215-18)

The day before Williams testified the lawyers discussed the issue in chambers. Defense counsel was concerned that the rebuilt replica gun was not supported by the evidence in the record. Defense counsel thought the replica was "some degree speculative on that being the nature and type of what was used. If

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[35] Specifically, a sabot (similar to a shotgun wadding) would be necessary to make the firearm operable, i.e., capable of firing a projectile. Police found no evidence of a sabot which should have followed the fired projectile in close proximity. (XVII 1213, 1231-34, 1239)

[36] The prosecutor explained that he had assembled the replica based on the expert's description and "the pieces that I saw". (XVI 1090)

[37] In closing argument, the prosecutor acknowledged that Palmer was somewhat ignorant about the murder weapon. She thought the gun was welded, but that could not fit with the state's theory of how the gun was manufactured. ["almost everything she said about the gun, the evidence agrees with, the hard tangible physical evidence that was examined by...Dave Williams where that gun was put back together and she was just kind of a little bit messed up by she thought it was welded. She didn't know how it was made...".] (IXX 1310)

the Court is going to let in, again, we think the prejudicial impact is horrendous." (XVI 1089-90) All agreed that the replica itself should not be admitted in evidence and should only be used to illustrate testimony with a special instruction. (XVI 1090-92; XVII 1112-13) After Williams testified and identified the various pieces and parts presented to him, the trial court read the following instruction prior to the witness' use of the replica:

> 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.
>
> You may display the aid.
>
> MR. PAYNE (Defense counsel): Subject to previous objections, Your Honor.
>
> THE COURT: Noted.

(XVII 1214-15) The prosecutor then showed the witness the plastic replica and asked:

> Q. ...[I]f this is a manner which those components could have been put together to fire that .357 Magnum cartridge?
>
> A. Yes, sir, **it is possible.**
>
> Q. You didn't have all of the components; Is that

> correct?
>
> A. That's correct.
>
> Q. So you don't know what additional things were placed on it; Is that correct?
>
> A. No, sir, **I don't know**.

(XVII 1215)

Demonstrative aids and exhibits may be used during trial as an aid to the jury in understanding a material fact or issue. Padovano, Florida Civil Practice, §20.3 (1999 Ed.). However, the demonstrative evidence must be an accurate and reasonable reproduction of the object involved. Alston v. Shiver, 105 So.2d 785 (Fla. 1958).

Appellant contends on appeal that the state's use of the plastic replica of the alleged firearm constitutes reversible error. This is a case where the state failed to present evidence that established any information about this alleged, manufactured firearm that the state contended was the murder weapon. **No one ever saw the gun.** Jennifer Palmer's hearsay testimony was the only evidence that such a firearm even existed. She testified that Harris invited her over to see a "special project" that he was working on for his wife. When she went over to see the project at his invitation, the couple had sex instead. She never laid eyes on the gun. (XIII 737-

38) Additionally, Palmer testified that appellant handed her bags of evidence to throw away, including the gun he made by **welding** together.[38] (XIII 737-38) The only other testimony about the gun was Palmer's claim that when she picked up Harris after dumping the body, Harris told her that he had made his own gun. The smell of gunpowder was from that alleged firearm.[39] (XIII 744)

In Alston v. Shiver, 105 So.2d 785, 791 (Fla. 1958) This Court found the introduction of a replica axe handle that was longer than the one allegedly used in the beating should not have been admitted for that very reason. This Court concluded:

> Demonstrative evidence is admissible only when it is relevant to the issues in the case. Such evidence is generally more effective than a description given by a witness, for it enables the jury, or the court to see and thereby better understand the question or issue involved. For this reason it is essential, in every case where demonstrative evidence is offered that the object or thing offered for the jury to see be first shown to be the object in issue and that it is in substantially the same condition as at the pertinent time, or that

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[38] Welding the gun did not fit the State's theory of manufacture so the prosecutor explained in closing that Palmer was confused. **She did not know how the gun was made**. (IXX 1310)

[39] Williams had his own theory of how the firearm might have been constructed with the pieces of the puzzle supplied to him. (XVII 1211; State's #102)

> it is such a reasonably exact reproduction or replica of the object involved that when viewed by the jury it causes them to see substantially the same object as the original.

The plastic replica was erroneously used as demonstrative evidence in appellant's case.[40] No one ever saw the murder weapon. The state was merely speculating on the theory and method they used in constructing the replica. The theory arose from an examination of **some of the evidence** recovered at the direction of Jennifer Palmer. The firearms expert admitted that he was missing certain pieces.[41] He also admitted that the theory of construction was simply that, a hypothesis based, at least in part, on pure speculation. The jury should not be deciding matters of life and death based on speculation. At the very least, any slight probative value was outweighed by the substantial, unfair prejudice. §90.403, Fla.Stat. (2000).

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[40] Although the replica was not admitted into evidence, it was prominently displayed to the jury during the expert's testimony.

[41] Williams testified that the bolt would be fitted into "some kind of guide and the spring would be used--I don't have--that portion of this is not available. I was not furnished with any other parts...but there would be a guide...This piece would have been, **in some manner**, placed in this pipe or close to it." (XVII 1212)

POINT III

THE TRIAL COURT ERRED BY ADMITTING INFLAMMATORY PHOTOGRAPHS WHICH WERE NOT RELEVANT TO ANY CONTESTED ISSUE.[42]

Several times during the trial, appellant objected to the introduction of several gruesome photographs that depicted the victim in an advanced stage of decomposition. The trial court allowed the state to introduce over objection numerous photographs as well as a videotape of the crime scene. The admission of this evidence denied Roger Harris due process of law guaranteed by Article I, Sections 2,9,12,16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The photographs had no relevance to any issue in the case. Any possible relevance of this evidence is outweighed by its prejudice. §90.403, Fla. Stat. (1998).

The test for the admissibility of a photo of the murder victim is relevance, not necessity. Ruiz v. State, 743 So. 2d 1, 8 (Fla. 1999). The determination of the admissibility of such photos is within the sound discretion of the trial court and will not disturbed on appeal in the absence of abuse. Id. In Ruiz, this Court found error in the penalty phase admission of a two by three feet blow-up of a photo

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[42] The admission of evidence is subject to an abuse of discretion standard of review. See Martin v. State, 717 So.2d 462 (Fla. 1998)

showing the bloody and disfigured head and upper torso of the victim. Because the prosecutor provided no relevant basis for submitting the blow-up in the penalty phase, this Court concluded that it was offered simply to inflame the jury. Id.

This Court has outlined the standard for the admission of potentially prejudicial photos.

> To be relevant, a photo of the deceased victim must be probative of an issue that is in dispute. In the present case, the medical examiner testified that the photo was relevant to show the trajectory of the bullet and nature of the injuries. Neither of these points, however, was in dispute. Admission of the inflammatory photo thus was gratuitous.

Almeida v. State, 748 So.2d 922, 929-30 (Fla. 1999). (Emphasis in original.) (Footnote omitted.) In a footnote, this Court quoted McCormick on Evidence, 773 (John Williams Strong ed., 4th Ed. 1992):

> There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. (Footnote omitted.)

Almeida v. State, 748 So.2d at 929 (n.17).

The primary issue in appellant's trial was the identity of the murderer. Appellant unsuccessfully argued to the jury that he was innocent and that his jilted

girlfriend (the state's star witness) was lying about his involvement. Appellant contended that the evidence did not prove his involvement beyond a reasonable doubt. (IXX 1273-1303, 1332-53)

Since the only real issue at trial was the identity of the true culprit, the state did not need to introduce photographs that showed maggots devouring the corpse. (XIII 685-88) When defense counsel first objected to the gruesome photographs, the prosecutor reminded the court that the jury had been warned about the gruesome evidence during voir dire. (XIII 685-88) Defense counsel tried to cooperate and did not object wholesale to all of the gruesome photographs. Defense counsel specifically wanted the state to choose between two of the first four photographs proffered by the state during the medical examiner's testimony. The photographs showed, in excruciating detail and repetitiveness, the wound in the victim's skull. Defense counsel pointed out that both photographs are "full of maggots which is highly inflammatory." (XIII 687) The trial court overruled the objection and allowed all four photographs into evidence. One photograph even depicted the interior of the skull through the wound. (XIII 687; State's Exhibit #4)

Subsequently additional photographs as well as a video of the crime scene

were introduced over defense's timely objection. (XIV 866-72; XVIII 1248-49)[43] Defense counsel pointed out that the prejudicial impact outweighed any probative value where the video revealed a "...gruesome crime scene...showing the body that's four days old and been out locked in a car with flies flying all over everywhere. I think the state has agreed to excise the maggots, but the prejudicial impact of it far outweighs the probative value." (XIV 866) The videotape which had been sanitized to a "marked extent" was introduced and played to the jury over defense objection. (XIV 866-69; State's #35) During the publication of the video, the state prompted the witness to point out the decomposition fluid from the body that had collected around the rear wheels of the van. (XIV 869) Immediately after viewing the videotape, the state introduced eleven additional photographs of the crime scene. (XIV 869-72; State's #17-18, 36-39, 41, 63-65,68) Later a witness used a photograph over renewed objection to show how the alleged projectile fit into the large hole in the victim's skull. (XVII 1213-19; State's #103)

Defense counsel was correct. Any probative value was outweighed by the extreme prejudicial effect. Section 90.403, Fla. Stat. (2000). The prosecutor's assertion that the defendant should not be "shielded from his handiwork" (XIV

[43] The state apparently had second thoughts about one of the photographs depicting the body in the van. They withdrew state's exhibit number 67 without any further attempt to admit it. (XVIII 1248-49)

866), is something of a reversal on the fundamental presumption of innocence:

> [A] trial is conducted not only to determine that an atrocious crime has occurred, but to determine whether the accused committed the crime. <u>Two often the former obscures the later.</u>

<u>Johnson v. State</u>, 476 So.2d 1195, 1209 (MIS. 1985). (Emphasis Supplied.)

Likewise, the prosecutor's reminder that the jurors gave their assurances during voir dire that they could view gruesome photographs without distress, fails to alleviate appellant's justified concern. Great care should be taken prior to waiving ghastly pictures in front of lay jurors who will never have seen anything similar before in their lives. The idea of a trial is not that jurors should regurgitate at the evidence, but that they should make a reasoned, informed decision as to guilt. In this case, it is clear that Roger Harris was:

> denied a fair trial when the court allowed a gruesome, color photograph of the deceased's massive head wound to go to the jury. ...In this case, the photograph which was admitted could serve no purpose other than to inflame and prejudice the jury in the grossest manner.

<u>People v. Garlick</u>, 360 N.E. 2d 1121, 1126-27 (1977).

POINT IV

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY OVER OBJECTION AND IN FINDING THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN WHERE THE EVIDENCE WAS COMPLETELY INSUFFICIENT TO SUPPORT EITHER THE INSTRUCTION OR THE FINDING OF THE FACTOR.[44]

At the commencement of the penalty phase, defense counsel vehemently objected to any argument or instruction that the murder was committed for pecuniary gain.[45] From the beginning to the end of the penalty phase, defense counsel objected to any consideration of the pecuniary gain circumstance. Defense counsel cogently pointed out that the evidence simply did not support the circumstance which applies "only where the murder is an integral step in obtaining some sought after specific gain...". (XX 1394) The trial court overruled appellant's timely and specific objections at every stage of the trial. (XX 1393-98, 1418, 1487-88) The trial court subsequently instructed the jury that they could

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[44] This Court's task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding. Willacy v. State, 696 So.2d 693, 695 (Fla. 1997). The standard of review for jury instructions is an abuse of discretion standard. Bozeman v. State, 714 So.2d 570 (Fla. 1st DCA 1998).

[45] § 921.141 (5)(f), Fla. Stat. (2000).

consider in aggravation that the murder was committed for pecuniary gain. (XX 1482) Additionally, the prosecutor argued to the jury that the state had proved that the murder was committed for pecuniary gain. (XX 1450-51, 1460) The prosecutor did concede that, given the evidence, this factor was "not all that heavy...". (XX 1460)

In order for this particular aggravating factor to apply, the state must prove that the murder was necessary to obtain some specific gain. Hardwick v. State, 521 So.2d 1071 (Fla. 1988). It applies "only where the murder is an integral step in obtaining some sought after specific gain." Hardwick v. State, 521 So. 2d at 1076. The link between the murder and the money must be direct and certain, as for example, it usually is in the typical robbery-murder. See, e.g., Lawrence v. State, 614 So.2d 1092 (Fla. 1993). Of course, the state can use circumstantial evidence to prove an aggravating factor with the caveat that such proof must not only show that the aggravator applies, but also that the evidence refutes any reasonable explanation seeking to negate the factor. Chaky v. State, 651 So.2d 1169 (Fla. 1995).

In its sentencing order, the trial court concluded that the murder was committed for pecuniary gain and used that aggravating factor as one of two in support of the death sentence. In his sentencing order, the trial court conceded that

the aggravating factor was not paramount:

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 kidnappers" 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, 559 So.2d 978 (Fla. 1992), and Finney v. State, 660 So.2d 674, 681, 20 Fla. L. Weekly S 401 (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.

(VII 1228-29) (Emphasis added.) The Court concluded that the state proved the factor beyond a reasonable doubt and gave it moderate weight in sentencing Harris to death. (VII 1230)

The state's theory in this case revolved around appellant's extramarital affair with Jennifer Palmer, the convicted co-conspirator and star witness for the state. Jennifer Palmer's testimony portrayed a man who did not love his wife anymore.

He wanted out of a loveless marriage so that he could be with his paramour. Murder was chosen over divorce so that he could keep his children whom he loved.[46] That was the essence of Jennifer Palmer's testimony in the state's theory of the case.

However, the state knew its case for death was weak. They had only one arguably valid aggravator (CCP). They needed another aggravating factor to bolster their position. After failing to convince the trial court that appellant's gun was a "destructive device" within the purview of Section 921.141(5)(d), Florida Statutes, the state attempted to "piggy-back" onto the pecuniary gain circumstance. (XX 1398-1409) Both the trial court and the prosecutor recognized that the evidentiary application of the pecuniary gain circumstance was weak. The trial court conceded that "financial gain was not the primary motive for the killing, and ...the financial gain was not extraordinarily large, ...". (VII 1228) Similarly, the prosecutor conceded to the jury that pecuniary gain was not the "primary motivation" and was "not very heavy". (XX 1451) The trial court attempts to pyramid inference upon inference in concluding that the murder was committed for, at least in part, pecuniary gain. This Court must examine each of the factors that

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[46] Roger told Jennifer that his wife had threatened to take his children to Kentucky and he would never see them again. (XIII 716) Appellant's first wife had disappeared for three years with his daughter. (VII 1198)

the trial court considered in arriving at his flawed conclusion.

Real Property Title

The trial court points to the Harris' transfer of jointly owned property[47] into appellant's name alone and, in the process, refinancing the property which resulted in lower mortgage payments.[48] The trial court then concludes that, since the two were married, appellant's 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 appellant. (VII 1229)

This conclusion defies logic. If the trial court's reasoning were correct, the first step of the process (transferring the property to appellant's name alone) would be completely unnecessary. As the court states, Donna Harris still had an interest in the land as Roger's wife. The trial court may not draw even "logical inferences" to support a finding of a particular aggravating circumstance where the state has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983).

Life Insurance Proceeds

The trial court recognized that "...this aspect of the case, standing alone,

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[47] The only evidence that the property was in both names was blatant hearsay from the victims mother. "That's what I was told by her, that it was in both of their names when they bought it, yes, sir." (XVI 1081)

[48] Once again established through hearsay. (XVI 1081)

would not support a finding of financial gain as a motive." (VII 1229) The trial court acknowledged that he was forced to so conclude based upon this Court's holding in Chaky v. State,[49] 651 So.2d 1169 (Fla. 1995). Chaky had a life insurance policy on his wife in the amount of $185,000. He had routinely increased both his wife's and his own life insurance polices over the years, most recently three or four months prior to talking about killing his wife. His own life insurance policy was twice the amount of his wife's. This Court pointed to the circumstantial nature of the evidence and concluded that one **could** surmise that Chaky killed his wife to obtain the insurance proceeds. However, this Court concluded that the evidence was insufficient to support that hypothesis beyond a reasonable doubt. Fifty percent of all employees with the university maintained similar policies. Additionally, the amount of insurance Chaky maintained on his own life was only half of the amount of life insurance he maintained on himself.

The record in appellant's case is absolute devoid of any evidence establishing with any particularity the existence of life insurance policies on either Roger or Donna Harris. Once again, the only evidence of life insurance policies came through hearsay testimony of the victim's father:

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[49] Also from Columbia County.

> Q. Did Mrs. Harris have insurance, life insurance?
> A. The small amount through her checking account. She had a small amount with the union and I don't know exactly, but an account through her state employment was all that I am aware of.
>
> Q. Who was the beneficiary on those accounts?
>
> A. **I believe Roger is.**

(XVI 1083)(Emphasis added.) On cross-examination, defense counsel clarified:

> Q. Mr. Jordon, isn't it also your understanding that within probably the year before Donna's death, that some of the life insurance insuring her life had been canceled?
>
> A. That's what I have been told. I ain't 100 percent sure because I never seen nothing.
>
> Q. Several things you talked to us about this afternoon are things based on what somebody has told you?
>
> A. Right.

(XVI 1085-86) **The state failed to produce any documentation of any life insurance policies in effect at the time of Donna Harris' death**. The state failed to prove that Roger was the beneficiary of any policies that **might** have existed. The finding of this aggravating factor cannot be based on such flimsy evidence and wild speculation.

Withdrawal from Joint Checking Account

Four days after the murder, appellant emptied the checking account in his wife's name purportedly to keep her kidnappers from looting the account. The trial court pointed out that appellant did not empty his own account and erroneously concluded that this supported the conclusion that the murder was committed for financial gain. (VII 1229)

Once again, the trial court uses a single circumstance to draw one conclusion to the exclusion of all others. Of paramount importance in the consideration of this evidence is the fact that Roger and Donna Harris had joint access to each other's checking accounts. This was not the first time that Roger Harris had withdrawn money or written checks on his wife's account to which his name was also attached. The victim's father conceded that both Donna and Roger were authorized to write checks on each other's accounts. (XVI 1086; VI 1159) They had separate accounts to allow better budgeting. (XVI 1082)

This circumstantial evidence is more consistent with the conclusion that Roger Harris was attempting to bolster the theory that his wife had been kidnapped and that the money was at risk. Donna Harris was already dead. The money was not going anywhere. The state failed to offer any evidence, must less prove beyond a reasonable doubt, that Roger Harris killed his wife in order to access the money in her checking account. He had access to that same money while she was

still alive.

The trial court's reliance on cases involving the defendant pawning their victims' belongings shortly after the murder is clearly misplaced. Those cases involve defendants killing and robbing victims they barely knew. The subsequent pawn of valuable items supported the circumstance. Appellant's facts contemplate an entirely different scenario.

Spilled Contents of Purse

Without further explanation, the trial court concluded that the fact that the contents of Donna's purse had been dumped on the floor of the van leads to the conclusion that the murder was committed for pecuniary gain. (VII 1229) Once again, the trial court uses a small circumstance gleaned from the evidence and draws an unwarranted conclusion. The state failed to prove that any money was missing from the purse. In fact, the purse's contents that remained in the van included cash totaling at least $20.00. (XIV 873) The position of the purse and its contents is just as consistent with her assailant knocking the purse over in his haste to leave the scene.

Avoidance of Child Support

The state did present evidence that appellant did not want a divorce because he was afraid of losing his children. However, he was afraid of losing his children

because he loved them deeply. The state never presented **<u>any</u>** evidence whatsoever that potential child support payments played any role in any decision Roger Harris made. Roger had previously suffered when his first wife absconded from the jurisdiction for three years following their divorce. (VII 1198) Donna had threatened that Roger would never see the children again if he divorced him. (XIII 717-20)

The trial court's conclusion suffers from a lack of internal logic as well. If appellant had not been arrested, he would still be responsible for financial support of his children. He gains nothing financially through the death of his wife. To accept the trial court's conclusion would result in the application of the pecuniary gain factor in every capital murder case where a spouse kills a fellow spouse with children in the home. This is not a case where there is any direct evidence or even a hint that appellant's motive related to pecuniary gain. <u>See</u>, <u>e.g.</u>, <u>Riechmann v. State</u>, 581 So.2d 133, 137 (Fla. 1991)[A fellow inmate testified that while incarcerated pending trial, Riechmann was pleased with the prospect of becoming rich from the proceeds of the insurance policies and the victim's will.]

Aggravating circumstances cannot be based on speculation and inference. The trial court may not draw even "logical inferences" to support a finding of a particular aggravating circumstance where the state has not met its burden of proof.

Clark v. State, 443 So.2d 973, 976 (Fla. 1983). In this case, the pecuniary factor is refuted not only by a reasonable hypothesis, but also by direct evidence that the sole motivating factor behind the crime was to avoid separation from his two children.

POINT V

THE TRIAL COURT ERRED IN CONCLUDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION.[50]

In finding this particular aggravating factor, the trial court wrote:

> "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

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[50] For the appropriate standard of review, see Point IV, n. 41.

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 of 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.

(VII 1230-31)

In Jackson v. State, 648 So.2d 85, 89 (Fla. 1994), this Court held:

> [I]n order to find the CCP aggravating factor under our case law, the jury must determine that the

> killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold)...; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated)...; and that the defendant exhibited heightened premeditation (premeditated)...; and that the defendant had no pretense of moral or legal justification.

[Citations omitted.]

Appellant submits that the trial court erred in finding this particular aggravating factor. Specifically, appellant contends that the killing of Donna Harris was the tragic result of an unhappy marriage. A mentally unstable husband's obsession with the potential loss of his beloved sons exploded one tragic night.

Appellant's marriage had deteriorated. He was in love with another woman and wanted out of his loveless marriage. As such, his actions did not meet the requisite "cold" prong of CCP. This specifically excludes this aggravating factor. Jackson v. State, 648 So.2d 85, 89 (Fla. 1994).

At first glance, a lay person might conclude that the murder was "calculated". Accepting the state's theory, the advanced planning and construction of a homemade gun would seemingly support this particular prong. However, appellant's mind was clouded by his seemingly justified fear that a divorce would lead to the loss of his children. Appellant's first wife had

absconded from the jurisdiction with his daughter who remained missing for three years. (VII 1198) Donna had also threatened Appellant with the loss of his children. (XIII 717-20) appellant reportedly told his wife that he would "kill her before she took my boys away." (XIII 720) Furthermore, additional evidence at the Spencer hearing revealed appellant's family's history of mental illness. Military records and more recent documents from the VA clinic documented Roger Harris' deteriorating mental condition.[51] This evidence directly refutes the finding of this particular aggravating circumstance.

Although the trial court dismissed it, appellant also had a pretense of moral or legal justification. In Banda v. State, 536 So.2d 221, 225(Fla. 1988), this Court defined a pretense of moral or legal justification as "any claim of justification or excuse that, although insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." Although Donna's threats to abscond the state with Roger's two sons does not legally justify her murder, it does provide a **pretense** of justification which rebuts the otherwise cold and calculated nature of the offense as required by Banda. Id. It also negates

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[51] On January 7, 1999, the Department of Veterans Affairs increased Appellant's disability rating from 10% to 30% due to his continued decline into anxiety and depression. (V 980; Defense Exhibit #19) A mere 60 days prior to the murder, Appellant had a documented psychiatric consultation. (VII 1213-14)

the "cold" element of the CCP factor required by Jackson v. State, 648 So.2d at 89, because the killing was not the product of cool and calm reflection. Instead it was an act prompted by emotional frenzy, panic, anger and a deteriorating mental state. In Cannady v. State, 620 So.2d 170 (Fla. 1993), this Court found that the CCP factor did not apply when the defendant murdered the man he believed had raped his wife two months earlier, because the murder was not cold, although it may have been calculated.

This Court has also disapproved the finding of this aggravating factor in other cases where there was at least a pretense of moral or legal justification. In Blanco v. State, 452 So.2d 520 (Fla. 1984), the victim confronted and struggled with the defendant during a burglary. In Christian v. State, 550 So.2d 450 (Fla. 1989), this Court concluded the evidence did not support CCP in a prison murder where the victim knocked the defendant unconscious and, for three weeks after the attack, made death threats until the defendant surprised and killed the victim. In contrast, this Court approved a finding of CCP in a prison murder where the defendant thought the victim would stab his friend over a debt, even though the victim had not threatened such action prior to the murder. Williamson v. State, 511 So.2d 289 (Fla. 1987).

In Hill v. State, 688 So.2d 908 (Fla. 1996), this Court refused to recognize an

anti-abortionist's murder of an abortionist (to protect innocent, unborn life) as being within the purview of a "pretense of moral or legal justification". In light of Hill, this aggravating factor may not sufficiently narrow the class of death-eligible defendants sufficiently to meet constitutional muster, thereby rendering Florida's death sentencing scheme unconstitutional (arbitrary and capricious). State v. Dixon, 283 So.2d 1 (Fla. 1973); Proffitt v. Florida, 428 U.S. 242 (1976).

POINT VI

THE DEATH SENTENCE IS DISPROPORTIONATE IN LIGHT OF THE FACTS SURROUNDING THE MURDER AND THE SUBSTANTIAL MITIGATION WEIGHED AGAINST THE VALID AGGRAVATION.[52]

The law of Florida reserves the death penalty for only the most aggravated and least mitigated of first-degree murders. Urbin v. State, 714 So.2d 411, 416 (Fla. 1998); Almeida v. State, 748 So.2d 922, 933 (Fla. 1999); Cooper v. State, 739 So.2d 82, 85 (Fla. 1999). "Thus, our inquiry when conducting proportionality review is two-pronged: we compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated and (2) the least mitigated of murders". Cooper, 739 So.2d at 82.; Almeida, 748 So.2d at 933. (Emphasis in opinions.)

Proportionality review is a "unique and highly serious function of this Court", which arises from a variety of sources in the Florida Constitution, and "rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties." See, Tillman v. State, 591 So.2d 167, 169 (Fla. 1991); Sinclair v. State,

[52] Proportionality review by this Court is a necessary prong in Florida's death sentencing scheme. By its very nature, de novo review is the standard. Kramer v. State, 619 So.2d 274 (Fla. 1993).

657 So.2d 113, 114 (Fla. 1995); Urbin v. State, 714 So.2d at 416; Knight v. State, 721 So.2d 287, 299-300 (Fla. 1998); Woods v. State, 733 So.2d 980, 990 (Fla. 1999).

The trial court found only two aggravating factors: (1) heightened premeditation (CCP) and (2) pecuniary gain. (VII 1228-33) The trial court conceded in its sentencing order that the pecuniary gain aggravating factor was "not extraordinarily large" and subsequently afforded the factor only "moderate weight". (VII 1228, 1230) In contrast, the trial court gave substantial weight to the heightened premeditation factor. (VII 1233)

As outlined in the previous two points, the evidence does not support the trial court's finding of either aggravating factor. As such, the death sentence is unable to stand where there are no valid aggravating circumstances. Banda v. State, 536 So.2d 221,225 (Fla. 1988). Even if this Court finds that one valid aggravating factor does exist, the death penalty is still unwarranted under the facts of this case.[53] See Almeida v. State, 748 So.2d 922, 933 (Fla. 1999)("As a general rule, 'death is not indicated in a single aggravator case where there is substantial mitigation.'")

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[53] Appellant points out that the state's position on the heightened premeditation aggravating factor is **much** stronger than their misguided contention that this murder was committed for pecuniary gain.

There was substantial mitigation accepted and found by the trial court.

A. 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 factory 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, Imogene 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 Air 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. Therefore, this mitigating factor does not exist.

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 Roger Harris under (sic) duress. This mitigating factor does not exist.

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

a. Roger 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 he 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)

The trial court improperly rejected valid mitigation.

Although appellant accepts the trial court's rejection of certain evidence in mitigation, the trial court clearly erred in rejecting several valid, uncontroverted mitigating circumstances.[54] Specifically, the trial court rejected the statutory

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[54] Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court. Whether a mitigating circumstance has been established by the evidence is a question of fact and subject to the competent substantial evidence standard. Blanco v.State, 706 So.2d 7 (Fla. 1997).

mitigating factor relating to extreme mental or emotional disturbance.[55] (VII 1233) In doing so, the trial court recognized that Harris was deemed unfit for continued military service based upon a diagnosis of anxiety disorder and depression. The court concluded that appellant's mental problems did not amount to an **extreme** mental or emotional disturbance. Although the trial court rejected this **statutory** mental mitigator, the trial court certainly should have found and weighed appellant's mental problems as a **nonstatutory** mitigating factor. The trial court clearly should have considered appellant's mental problems (which resulted in the finding that he was unfit for continued military service after 17 exemplary years) as valid mitigation. The trial court's rejection of this uncontroverted mitigating circumstance was clearly error. Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1999).[56]

Likewise, the trial court erred in rejecting as mitigation the history of conflict within the Harris family. (VII 1236) The trial court erroneously concluded the factor was not supported by the evidence. To the contrary, Jennifer Palmer's

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[55] §921.141(6)(b), Fla. Stat. (2000)

[56] For the same reasons, the trial court erred in failing to find appellant's troubled family tree as mitigation. Appellant offered uncontroverted evidence at the Spencer hearing that his mother, his brother, grandfather, and his uncle all suffered from substantial mental illnesses resulting in shock treatment, medication, and suicide. (VII 1204-5)

testimony established that Donna Harris took the children and moved out of the house because the couple was having marital difficulties. (XIII 711) Palmer's testimony also established that appellant attempted to get psychological counseling for his wife. (XIII 717-18) The state's own case established the marital strife in the Harris home. This uncontroverted evidence in mitigation was erroneously over looked by the trial court. Nibert, supra.

The trial court also erred in rejecting appellant's ability to form caring and loving relationships.[57] (VII 1235) Similarly, the trial court should have found in mitigation that Roger had a close, caring, and loving relationship with his children. (VII 1235-36) Although appellant's murder of the mother's children may lessen the weight to be given this mitigating factor, appellant's love for his children was uncontested and absolute. For similar reasons, the trial court should have found appellant's sweet and loving character as described by his mother and sister to be valid mitigation.[58] (VII 1236)

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[57] Appellant's treatment of his wife both before and at the time of the murder did not in any way contradict appellant's ability to form loving relationships with his mother, sister, and niece.

[58] Appellant recognizes that the weight assigned to a mitigating circumstance is within the trial court's discretion. Campbell v. State, 571 So.2d 415 (Fla. 1990). Appellant also contends that the trial court erred in giving moderate weight only to the statutory mitigating factor that Harris had no significant criminal history. The trial court's action in giving, at the most, little weight to the nonstatutory mitigating

Appellant's Crime was not the Most Aggravated and Least Mitigated in the Realm of First-Degree Murders.

In deciding whether Roger Harris is one of the few in the state that should die for his crime, this Court is left with only one arguably valid aggravating circumstance (CCP). Donna Harris was clearly **not** killed for any pecuniary gain. Against this single aggravating factor, this Court must appropriately[59] weigh the substantial mitigation in this case, much of which was never heard by the jury that recommended, by the slimmest of margins, that Harris should die.

Initially, appellant wants to emphasize the weighty statutory mitigating factor present in this case. Roger Harris had no significant criminal history. In fact, Roger Harris had apparently never been arrested in his life. This is extremely unusual in a capital case. Most capital defendants have extensive felony records, usually violent ones. Many if not most commit contemporaneous crimes which

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factors constitutes an abuse of discretion. Appellant suggests that the trial court was merely parroting the prosecutor's sentence memorandum which, perhaps coincidently, reaches precisely the same conclusions as the trial court. (VI 1153)

[59] Unlike the trial court who, without explanation, gave only moderate weight to appellant's lack of criminal history and only little weight to all other mitigating factors.

eliminate the application of this mitigating factor.[60] Roger Harris' record was spotless.[61]

Almost as important as appellant's lack of criminal history is the fact that he served this country in the United States Air Force for seventeen years. He was a decorated veteran. Even the prosecutor conceded that, "Defendant does indeed have an exemplary military record." (VI 1151) Ultimately, appellant was disqualified from further military service because of his deteriorating psychological condition. He was found unfit for duty and was given a disability rating thereby forcing retirement.[62] Although unfortunate, appellant's forced military retirement due to his disability is not surprising. Although not presented in any fashion to the jury, appellant had a familial pattern of mental illness. That genetic marker started as far back as his maternal grandfather. Appellant's mother had been treated with tranquilizers for many years, including the period when she was pregnant with Roger. She also had received shock therapy to treat her disorder. Appellant's

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[60] This Court has called this statutory mitigator "important." Hess v. State, 26 Fla. L.Weekly S337, 342 (Fla. S.Ct. May 17, 2001)

[61] Defense counsel contended that appellant's lily-white past lifted this circumstance to a "super statutory" mitigating factor. (XXI 1506)

[62] This was indeed unfortunate, since appellant thrived in the military and wanted to continue his career.

uncle committed suicide because of his depression. Appellant's brother had been diagnosed as manic depressive and had also received shock treatment.

Roger Harris had suffered a traumatic head injury (also not heard by the jury) as a teenager. After his honorable discharge from the air force, Roger was diagnosed with symptoms of possible manic depression with mood swings. The psychiatrist suggested that the mental illness may be gradually evolving and that further examination was necessary. In 1996, the VA clinic diagnosed appellant as suffering from bi-polar II disorder.[63] At that time, the doctors prescribed the psychotropic medication of Depakote. Additionally, appellant had another psychiatric consult a mere sixty days before the crime.

Additional mitigation also exists. Roger was a loving son to his mother, a loving brother to his sister, a surrogate father to his niece, he did good deeds for others, he had an exemplary work record and lead an exemplary life until he began a sordid affair with Jennifer Palmer. His justified fear of losing his beloved sons in a divorce, combined with his deteriorating psychological state led to the tragic day when Donna Harris died.

This case is most outstanding for the lack of aggravation (a single aggravator of CCP) and the substantial mitigation, much of which was not heard by the jury

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[63] Also information not heard by the penalty phase jury.

that recommended the death penalty by the slimmest of margins. Additionally, appellant's case is analogous to the cases from this Court involving a domestic confrontation where the death sentence is found to be disproportionate. See, e.g., Blakely v. State, 561 So.2d 560 (Fla. 1990)[death sentence disproportionate where husband killed wife and had committed no prior similar crimes]; Ross v. State, 474 So.2d 1170 (Fla. 1985)[death sentence disproportionate where husband bludgeoned the wife to death with a hammer despite jury recommendation of death and presence of HAC]; Amoros v. State, 531 So.2d 1256, 1261 (Fla. 1988)[life, not death, is "proportionately correct" for shooting death of former girlfriend's lover despite jury recommendation of death]; Garron v. State, 528 So.2d 353, 361 (Fla. 1988)[death penalty not proportionally warranted for shooting death of wife and stepdaughter despite jury recommendation of death]; and Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986)[death disproportionate for shooting death of father and stabbing death of cousin even though jury recommended death and murder was heinous, atrocious, or cruel and defendant had prior violent felony conviction]. Appellant's crime was not the most aggravated nor the least mitigated for crimes in the realm of all first-degree murders.

POINT VII

THE JURY WAS MISLED AS TO THE SIGNIFICANCE OF ITS VERDICT IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMENDMENTS VIII & XIV, AS HELD, IN CALDWELL V. MISSISSIPPI[64] AND THE FLORIDA CONSTITUTION ARTICLE I, SECTION 17, WHERE DEFENSE COUNSEL SPECIFICALLY OBJECTED TO THE LANGUAGE OF THE STANDARD JURY INSTRUCTIONS.[65]

At the beginning of the penalty phase, appellant objected to the standard jury instructions:

> As far as a general objection to the instructions, Judge, this goes to a general objection to the standard instructions, is we would suggest that the general instructions, and I keep mentioning advisory sentence, multiple occasions in them, and I think there's a thing in there that says that the final decision of sentencing will be up to the judge. And we would just object to any language of that nature in there, as it tends to downplay the meaning, where the term is used, the role of the jury in the capital sentencing phase.

(XX 1390-91) Defense counsel renewed his objection "about the advisory sentence being throughout" the instructions prior to the reading of the instructions

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[64] Caldwell v. Mississippi, 472 U.S. 320 (1985).

[65] The denial of requested jury instructions is subject to an abuse of discretion standard. Bozeman v. State, 714 So.2d 570 (Fla. 1st DCA 1998)

to the jury. (XX 1446) The trial court overruled appellant's objections and read the standard jury instructions which used the terms "advise" and "recommend" throughout. The trial court also told the jury that the "final decision as to what punishment shall be imposed is the responsibility of the judge." (XX 1481-86) The trial court never informed the jury that their "recommendation" was entitled to great weight.

The instructions given in this case violate Caldwell v. Mississippi, 472 U.S. 320 (1985) and the Eighth and Fourteenth Amendments to the United States Constitution. This instruction is incomplete, misleading and misstates Florida law. Contrary to the instruction, the sentence is not solely the trial judge's responsibility because the jury in Florida is a co-sentencer.[66] Espinosa v. Florida, 505 U.S. 1079 (1992). The instruction failed to advise the jury of the importance of its recommendation. The instruction failed to mention the requirement that the sentencing judge give the recommendation great weight. Finally, the instruction failed to mention the special significance of a life recommendation under Tedder v. State, 322 So.2d 908 (Fla. 1975).

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[66] "In Espinosa we determined that the Florida capital jury is in an important respect, a co-sentencer with the judge." Lambrix v.Singletary, 520 U.S. 518, 528 (1997). In Lambrix, the United States Supreme Court acknowledged their erroneous belief in earlier decisions that the judge in Florida was the sentencer.

In Caldwell, the Supreme Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

> [An] uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell, 472 U.S. at 333. Although a Florida jury's role is to recommend a sentence, not impose sentence, the importance of the jury's recommendation has established the jury as co-sentencer in the Florida death penalty sentencing scheme. See, Espinosa . The reasoning of Caldwell is applicable. See,also, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted, Dugger v. Adams, 485 U.S. 933, 108 S.Ct. 1106, 99 L.Ed.2d 267, reversed, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1988). A recommendation of life affords the capital defendant greater protections than one of death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the jury's decision is critical, and any diminution of its importance violates Caldwell. Adams; Mann v. Dugger, 817 F.2d 1471, 1489-1490 (11th Cir.), on rehearing, 844 F.2d 1446 (11th Cir. 1988), cert. den., 489 U.S. 1071, 109 S.Ct. 1353, 103 L.Ed.2d 821 (1989).

Harris sought to ameliorate the trial court's erroneous instruction by requesting a modification of the standard instructions. Appellant realizes that this Court has ruled unfavorably to this position in the past. E.g., Archer v. State, 673 So.2d 17 (Fla. 1996); Combs v. State, 525 So.2d 853 (Fla. 1988); Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987). However, he asks this Court to reconsider this ruling in light of Espinosa in which the jury's role was clarified and recognized to be that of a co-sentencer. Appellant urges this Court to reverse his sentence and remand his case for a new penalty phase trial before a new jury.

POINT VIII

ROGER HARRIS' DEATH SENTENCE WHICH IS GROUNDED ON A BARE MAJORITY OF THE JURY'S VOTE (7-5) IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.[67]

The Eighth and Fourteenth Amendments require a heightened degree of reliability when a death sentence is imposed. Lockett v. Ohio, 438 U.S. 586, 604 (1978). A jury's recommendation of life or death is a crucial element in the sentencing process and must be given great weight. Grossman v. State, 525 So.2d 833, 839 n.1, 845 (Fla. 1988). In the overwhelming majority of capital cases in Florida, the jury's recommendation determines the sentence ultimately imposed. See Sochor v. Florida, 504 U.S. 527 (1992) (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part).

Appellant recognizes that this Court has previously rejected arguments challenging the imposition of death sentences based on bare-majority jury recommendations. See, e.g., Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990). However, Appellant maintains that allowing a bare majority of the jury to determine

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[67] Strict scrutiny is called for in the examination of statutes that impair fundamental rights explicitly guaranteed by federal or state constitutions. T.M. v. State, 26 Fla. L.Weekly S266 (Fla. S.Ct. April 26, 2000)

Harris' fate violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 2, 9, 16, 17, 21, and 22, of the Florida Constitution.

In addressing the number of jurors[68] in noncapital cases, the United States Supreme Court noted that no state provided for fewer than twelve jurors in capital cases, "a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." Williams v. Florida, 399 U.S. 78, 103 (1970). In a concurring opinion, Justice Blackmun agreed that a substantial majority (9-3) verdict in non-capital cases did not violate the due process clause, noted, however, that a 7-5 standard would cause him great difficulty. Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring).

Roger Harris' jury recommended **by the slimmest of margins**, that Harris be electrocuted in Florida's electric chair. **One single solitary vote** ultimately made the difference in whether Roger Harris lives or dies. Such a result makes Florida's death penalty scheme arbitrary and capricious in violation of Furman v.

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[68] Counsel recognizes that the cited cases wrestle with the appropriate number of jurors to determine guilt/innocence rather than penalty. Appellant cites them as persuasive authority by analogy.

Georgia, 428 U.S. 238 (1972).

Florida's scheme further violates constitutional guarantees due to its failure to require unanimity or even a substantial majority in order to find that a particular aggravating circumstance exists, or that any aggravating circumstance exists. Unless a capital jury finds that the State has proven at least one aggravating circumstance beyond a reasonable doubt, a death sentence is not legally permissible. Thompson v. State, 565 So.2d 1311, 1318 (Fla. 1990). Florida's procedure currently allows a death recommendation even where five of the twelve jurors find that the State proved no aggravating factors beyond a reasonable doubt, as long as the other seven jurors conclude otherwise.

Additional constitutional infirmity is noted when one realizes that the seven jurors voting for death could each find a different aggravating factor.[69] Such a realization makes it abundantly clear that Florida's death sentencing scheme is rife with constitutional infirmity. Roger Harris' death sentence, which is based on a bare majority (7-5) vote of the jury, is unconstitutional. This Court should vacate Appellant's death sentence and remand for imposition of a life sentence without possibility of parole. Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§ 2, 9,

[69] This is particularly troubling in Appellant's case where the jury inappropriately considered an aggravating factor not supported by the evidence and where only one valid aggravator existed.

16, 17, 21, and 22, Fla. Const.

POINT IX

FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE U.S. CONSTITUTION, AMENDMENTS VIII AND XIV, BECAUSE IT DOES NOT REQUIRE NOTICE OF AGGRAVATING CIRCUMSTANCES, DOES NOT REQUIRE SPECIFIC JURY FINDINGS REGARDING THE SENTENCING FACTORS, PERMITS A NON-UNANIMOUS RECOMMENDATION OF DEATH, IMPROPERLY SHIFTS THE BURDEN OF PROOF AND PERSUASION TO THE DEFENSE, AND FAILS ADEQUATELY TO GUIDE THE JURY'S DISCRETION, THEREBY PRECLUDING ADEQUATE APPELLATE REVIEW.[70]

The U.S. Supreme Court recently held that held that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Apprendi v. New Jersey, ___ U.S. ___, 120 S. Ct. 2348, 2355 (2000) [quoting Jones v. United States, 526 U.S. 227, 252-53 (1999)]. Grounding its decision both in the traditional role of the jury under the Sixth Amendment and principles of due process, the Court made clear that:

> "[i]f a defendant faces punishment beyond that

[70] Facial validity of a statute is subject to fundamental error analysis on appeal. Trushin v. State, 425 So.2d 1126 (Fla. 1982)

> provided by statute when an offense is committed under certain circumstances but not others . . . it necessarily follows that the defendant should not — at the moment the state is put to proof of those circumstances — be deprived of protections that have, until that point unquestionably attached."

Id. at 2359. These essential protections include (1) notice of the government's intent to establish facts that will enhance the defendant's sentence, (2) determination by a jury that (3) such facts have been established by the government beyond a reasonable doubt. Id. at 2362-63; Jones, 526 U.S. at 231.

While the majorities in Apprendi and Jones attempted to distinguish capital sentencing schemes, the distinction is not logically tenable, as the dissenters in Jones noted:

> If it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death.

Jones, 526 U.S. at 272 (Kennedy, J., dissenting; see also Apprendi, 120 S.Ct. at 2388 ("If the Court does not intend to overrule Walton,[71] one would be hard pressed to tell from the [majority] opinion.") (O'Connor, J., dissenting). As Justice Kennedy anticipated, the majority's ruling compels a reexamination of the Court's

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[71] Walton v. Arizona, 497 U.S. 639 (1990).

capital jurisprudence regarding the roles of judge and jury. Jones, 526 U.S. 272..

Florida's capital sentencing scheme, like the hate crimes statute at issue in Apprendi, exposes a defendant to enhanced punishment — death rather than life imprisonment — when a murder is committed "under certain circumstances but not others." Id. at 2359. Indeed, this Court has emphasized that "[t]he aggravating circumstances" in Florida law "actually define those crimes . . . to which the death penalty is applicable . . ." State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). While this Court properly recognized in Dixon that individual aggravating circumstances must be proved beyond a reasonable doubt, it has thus far failed to apply other due process requirements, as outlined in Apprendi, to the capital sentencing context. Thus, under Florida law (1) the state is not required to provide notice of the aggravating circumstances it intends to establish at the penalty phase; (2) the jury is not required to make any specific findings regarding the existence of aggravating circumstances, or even of a defendant's eligibility for the death penalty; (3) there is no requirement of jury unanimity for finding individual aggravating circumstances or for making a recommendation of death; and (4) the state is not required to prove the appropriateness of the death penalty beyond a reasonable doubt.

1) Notice. Under Florida law, in contravention of basic due process principles, the state is not required to provide notice of the aggravating

circumstances it intends to prove at the penalty phase. See, e.g., Vining v. State, 637 So. 2d 921, 927 (Fla. 1994). In other contexts, however, this Court has properly recognized that punishment-related facts must be charged, presented to a jury, and proved beyond a reasonable doubt, in a separate punishment determination proceeding. See, State v. Harbaugh, 754 So. 2d 691 (Fla. 2000) (felony DUI); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984) (sentencing enhancement for use of a firearm).

2) Specific Jury Findings. Although the sentencing jury is instructed to determine whether individual aggravating circumstances have been established beyond a reasonable doubt, it is not required to make any specific findings regarding the existence of particular aggravators, only to make a recommendation as to the ultimate question of punishment. The jury is thus a "black box"that renders a life or death decision without disclosing its reasoning. Apprendi logically compels the conclusion that a sentencing jury must make findings regarding the existence of individual aggravating circumstances. Two of the four aggravating circumstances at issue in this case (HAC and CCP), like the biased motive factor in Apprendi, involve "[t]he defendant's intent in committing a crime," a consideration that "is perhaps as close as one might hope to come to a core criminal offense 'element,'" requiring a jury's determination. See, Apprendi, 120 S.

Ct. at 2364.

Even if Apprendi did not compel jury findings regarding every aggravator, its logic would appear, at a minimum, to require a jury finding of death eligibility. Again, as the dissenters in Jones and Apprendi noted, the defendant could not be sentenced to death under the Arizona statute at issue in Walton, "unless the trial judge found at least one of the enumerated aggravating factors." Jones, 526 U.S. at 272 (dissenting opinion); accord Apprendi, 120 S.Ct. at 2388 (O'Connor, J., dissenting). Precisely the same is true in Florida. See § 921.141 (2)(b) (1997).

The Jones majority attempted to distinguish Hildwin v. Florida, 490 U.S. 638, 640 (1989), on the ground that a Florida jury **implicitly** finds the existence of the necessary aggravating circumstances when it recommends a sentence of death. 526 U.S. at 250-51. This, however, leaves no record of which aggravators the jury did or did not find. Moreover, if the jury recommends life, there is no jury finding implicit or otherwise regarding the existence of **any** aggravating circumstance. Consequently, in an override case, the defendant's sentence is increased from life to death based **solely** upon judicial findings of fact, in violation of the defendant's due process and jury trial rights.

Hildwin does not, moreover, address the Eighth Amendment concerns raised by the absence of any mechanism for determining which aggravating and mitigating

circumstances the jury relied upon in sentencing. See Combs v. State, 525 So. 2d 853, 859 (1988) (Shaw, J., specially concurring) (lack of jury findings, combined with Tedder deference, raises serious arbitrariness problem); cf. Parker v. Dugger, 498 U.S. 308, 321 (1991) (emphasizing importance of adequate appellate review to individualized sentencing). The failure to require specific jury findings impermissibly undermines the reliability of the sentencing process and the adequacy of appellate review.

3) Jury Unanimity. The Supreme Court has never specifically addressed whether a unanimous verdict is required in a capital case. However, it has never upheld a verdict of less than nine to three, even in a non-capital case. See Johnson v. Louisiana, 406 U.S. 356 (1972) (upholding 9:3 verdicts in serious felonies); Apodaca v. Oregon,406 U.S. 404 (1972) (upholding verdicts of 10:2 and 11:1 in non-capital felonies); Burch v. Louisiana, 441 U.S. 130 (1979) (six person jury must be unanimous). The Court took pains to note that Apodaca was a non-capital case. See Burch, 441 U.S. at 136.

Florida law requires unanimity at the guilt/innocence stage of a capital case. See, e.g., Williams v. State, 438 So. 2d 781 (Fla. 1983); Jones v. State, 92 So. 2d 261 (Fla. 1956). But it does not require unanimity either to find individual aggravating circumstances or to render a recommendation of death, which is

nonetheless entitled to great weight under Tedder. Given that aggravating circumstances are essential elements that must be instructed and proved beyond a reasonable doubt, a non-unanimous death verdict. violates due process and the protection against cruel and/or unusual punishment guaranteed by the United States and Florida Constitutions.

4) Burden and Standard of Proof. Apprendi reaffirmed that the due process prohibition on burden-shifting enunciated in Mullaney v. Wilbur, 421 U.S. 684 (1975), and the reasonable doubt standard apply to the determination of sentence enhancements. 120 S.Ct. at 2362, 2359, 2364. Florida's capital sentencing statute violates these constitutional requirements by placing the burden on the **defendant** to prove that "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." § 921.141(2)(b), (3)(b), Fla. Stat. (1993); see also Dixon, 283 So. 2d at 9. The plain meaning of this language requires imposition of a death sentence if the aggravating and mitigating evidence is in equipoise. This impermissibly relieves the state of its burden to prove, beyond a reasonable doubt, that death is the appropriate sentence.

The burden-shifting instruction also "vitiates the individualized sentencing determination required by the Eighth Amendment." See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir.), cert. denied, 486 U.S. 1026 (1988) (instruction that

advised jury that "death is presumed to be the proper sentence unless [aggravating factors] are overridden by one or more . . . mitigating circumstances" violated Eighth Amendment).

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests the following relief:

As to Point I, II, III vacate appellant's convictions and sentences and remand for a new trial;

As to Points IV, V, VI, VIII, and IX, vacate appellant's death sentence and remand for the imposition of life in prison without the possibility of parole;

As to Point VII, vacate the death sentence and remand for a new penalty phase or, in the alternative, for imposition of a sentence of life in prison without possibility of parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail: The Honorable Robert A. Butterworth, Attorney General, Criminal Division, The Capital, Tallahassee, FL 32399 this 5th day of July, 2001.

____
JAMES E. TAYLOR, JR.

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

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JAMES E. TAYLOR, JR.