IN THE SUPREME COURT OF FLORIDA

ANDREW LEE GOLDEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. 78,982

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT (AMENDED)

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PRELIMINARY STATEMENT

This is the direct appeal from a capital conviction and sentence of death. It was the first capital trial before the Honorable Robert Pyle, Circuit Judge for Polk County.

Appellant, ANDREW LEE GOLDEN, will be referred to herein as "Mr. Golden" or "Appellant." Appellee, STATE OF FLORIDA, will be referred to herein as "State" or "prosecution."

The Record on Appeal herein consists of 17 volumes of pleadings and transcript which are consecutively numbered in the upper right-hand corner, except that Volumes XVI-XVII are numbered in the bottom right-hand corner. The pleadings begin at the end of Volume XV and are otherwise contained in Volumes XVI-XVII.

Since the primary issue on appeal is insufficiency of the evidence (Issue I), and in order to reduce the length of this brief, many facts relevant to that issue are included in that argument rather than being repeated in the Statement of the Case

and Facts. The State has indicated it will not object to this organization.

STATEMENT OF THE CASE AND FACTS

A. Procedural History

On September 13, 1989, at 3:36 a.m., the body of Ms. Ardelle Golden was found floating in Lake Hartridge in Winter Haven, Polk County, Florida. (R-2978)

On April 5, 1990, her husband, Mr. Andrew Lee Golden, was indicted for premeditated murder. (R-2966)

Mr. Golden was arrested in April, 1990, in Minnesota; on advice from a public defender, he refused to waive extradition. When he subsequently retained his Florida trial counsel, he followed counsel's advice, dropped the extradition challenge, and returned to Florida in September, 1990. (R-2672-73)

Mr. Golden pled not guilty (R-2969), and the defense twice filed a Motion to Dismiss under Florida Rule of Criminal Procedure 3.190(c)(4). (R-3008-17, 3028, 3166-91) The defense argued the motion at length, before two different judges. (R-3013-16, 3032-47, 3106-8, 3212) The State both times filed a Traverse (R-3018-20, 3192-97), which the defense moved to strike on the basis it did not raise any disputed material facts. (R-3021-31) The Motion to Dismiss was denied. (R-3047, 3293)

Bond was originally set on October 9, 1990, at $50,000. (R-2987, 3005). However, after Mr. Golden was unable to make that bond (R-2990-91, 2995, 3077), reassigned Judge Robert Pyle (R-3073, 3095) reduced the bond on March 20, 1990, to $25,000 based on the weakness of the State's case:

> the nexus, if any exists, which might in anywise expose the Defendant to criminal

> liability for the death of Mrs. Golden, appears frail at best. . . . there appears a dearth of evidence showing that the death was the product of any criminal agency.

(R-3099-3100) Mr. Golden was free on bond from April, 1991, until trial began in October, 1991. (R-3199) On July 9, 1991, over State objection, the Court modified the conditions of release to allow Mr. Golden to leave a relative's home and to move into a rented home with his sons until trial. (R-3199-3203)

After the State expressed concern on April 3, 1991, that no death penalty motions had been filed (R-3111), the defense filed a number of "standard motions" on May 3, 1991. (R-3121, 3128-65) The State objected that the motions were untimely, but the court set a hearing that very afternoon despite the judge's apparent displeasure that he had "no choice". (R-3122-25)

Prior to trial, the State offered to allow Mr. Golden to plead no contest to second-degree murder in exchange for a sentence of 40 years, but the offer was refused. (R-3113-14)

Mr. Golden had a pending civil suit against the City of Winter Haven for his wife's death, and the court granted the State's motion in limine without defense objection to prohibit any mention of that case. (R-34-36, 3294, 3298)

The State filed two (2) Notices of Intent to introduce Williams rule evidence to establish motive. (R-3053-54, 3061-62) The defense objected vigorously that collateral crime evidence of motive should not be admitted prior to proof of corpus delicti, i.e., that a criminal agency was responsible for the death, and also argued that the prejudicial effect of this evidence

outweighed any probative value. The court expressed its doubts as to relevance and ruled some of the evidence admissible and some inadmissible. (R-3221, 3275, 3293) No cautionary instruction was given or requested before this evidence was introduced at trial.

Throughout pretrial and trial proceedings, the defense moved the court for a jury view of the scene. The defense argued a view was critical for the jury to understand the ramp condition at night, arguing that Ms. Golden could have accidentally driven into the lake given the absence of lighting or any warning that a driver is approaching a boat ramp rather than merely travelling through a residential area. Although the State initially agreed to a view and the court indicated its agreement, the State then changed its position and argued vehemently against a view. Defense counsel was evidently stunned when the court finally succumbed to the State's persuasion and denied the view. (R-2688-96; see also 40-51, 90-102, 105, 1415, 1417-18, 2059-60, 2378, 3114, 3290-91, 3295-96)

Trial commenced on October 7, 1991. (R-30) The defense moved for a one-day continuance because Mr. Golden had been medicated by a doctor who recommended rest, since the medication would make Mr. Golden sleepy and dizzy. The request was denied. (R-30-4)

During voir dire, a venire member who had "mixed feelings" about the death penalty but who believed in it in "certain cases," who would vote to keep the death penalty in Florida, and

who agreed with the prosecutor's question that she would vote for death if he proved three aggravating circumstances was struck for cause, over defense objection and without any opportunity for rehabilitation. (R-448-63)

The jury was sworn on October 15, 1991. (R-1422) The defense moved for judgment of acquittal and presented lengthy argument at the close of the State's case (R-2491-2521), and again at the close of evidence; the motions were denied. (R-2732-34) After the State rested (R-2491) and the motion for judgment of acquittal was denied (R-2521), Mr. Golden testified at great length.[1] His testimony was punctuated by (a) repeated admonitions by the trial court and even defense counsel as to his attitude toward the prosecution, as well as (b) repeated cross-examination as to alleged instances of dishonesty in financial matters.

Evidence concluded on October 24, 1991. The court gave the defense requested jury instruction on circumstantial evidence. (R-2859-60) No instruction was requested (R-2865) or given on the Williams rule or motive evidence.

The jury retired on Thursday afternoon at 3:30 p.m. and were sent home for the evening at 6:00 p.m. (R-2868-69) On October 25, 1991, at 3:12 p.m., the jury returned a verdict of guilty of first-degree murder. (R-2876, 3299) The defense oral motion for judgment of acquittal notwithstanding the verdict was denied. (R-

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[1]Mr. Golden's direct examination was interrupted twice by crying. (R-2558, 2560)

2880)

The penalty phase was held the following Monday, October 28, 1991. (R-2883) The court indicated this was the first capital case over which he had presided. (R-2893) The jury returned an advisory recommendation of death by a vote of eight to four. (R-3300) The sentencing hearing was held on November 8, 1991. The State and defense filed sentencing memoranda. (R-3301-06, 3310, 3318, 3329-30)

On November 15, 1991, the court sentenced Mr. Golden to death. (R-3336-37)[2]

A Notice of Appeal was timely filed November 20, 1991. (R-3308) Mr. Golden was declared indigent for purposes of appeal, and defense counsel's request to be appointed for purposes of the appeal was denied. (R-3338, 3357) Undersigned counsel was subsequently appointed to represent Mr. Golden in this appeal.

B. Factual History[3]

On September 12, 1989, Andrew Golden was 45 years old and had never been arrested. He and Ardelle ("Ardie") Golden had been happily married for 24 years, and their life revolved around their sons, Darin (age 16) and Christopher (age 13). The boys were outstanding students and were very active in sports. (R-

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[2]No motion for new trial was filed.

[3]Since the primary issue on appeal is insufficiency of the evidence, many facts relevant to that issue are included in Issue I of the Argument to avoid repetition.

1534-35, 1548, 1552, 1558, 1571) Mr. Golden had completed two master's programs at the University of Minnesota and worked on his doctorate. He was 5'9" and weighed approximately 155 pounds; Ms. Golden was 5'5", weighed 170 pounds, and was physically very strong. (R-1732, 2522-24, 2573, 2590-93)

Mr. and Ms. Golden were "best friends" and went out together three to four nights a week. (R-1537, 1546, 1552-53, 1560) Darin testified that he hoped to have as good a marriage as his parents:

> They were -- they were friends. And it was kind of embarrassing sometimes, because we would be in the supermarket and they would -- they would like lean over and kiss each other right in the middle, and I'm like throwing up, just like what are you guys doing?

(R-1570)

Until 1982, when the Goldens moved to Winter Haven, Florida, they had lived their entire life in Minnesota. (R-1540-41, 1570) Mr. Golden had accepted a job at the University of Tampa. Upon arrival, however, Ms. Golden did not like Tampa, so he accepted a job at Traviss Vocational-Technical School in Lakeland. In 1987, he left his teaching position and tried to start his own business writing training materials for companies. This endeavor required some travel around the state and never met with much success. Mr. Golden also spent half his time single handedly remodeling some apartments they had bought in Winter Haven. After some renovations, they refinanced the apartments for $65,000, paid off the initial $30,000 mortgage, and used the $35,000 difference for living expenses and for more remodeling costs. (R-1577, 2524-29)

Ms. Golden had been employed at Presbyterian Nursing Center in Lakeland since June, 1986. (R-2004-6, 2094) Chip Golden testified his father mainly took care of household matters while his mother took care of paying bills and household business (R-1551), but Darin thought his mother took care of the household. (R-1576-77)

Between 1988 and the summer of 1989, the Golden's financial condition deteriorated. By early 1989, the $35,000 was gone, and the family resorted to cash advances from credit cards for income to supplement Ms. Golden's small salary. Mr. Golden testified he kept receiving unsolicited requests for credit cards, and they needed the money for bills, and it just became too easy. By late spring of 1989, the Goldens were considering returning to Minnesota where all their family lived and where Ms. Golden's mother was recently widowed and left to run a farm. (R-2529-31)

The family had three cars, Darin's for school and work, Ms. Golden's Ford LTD for work, and Mr. Golden's van. However, his van had become unreliable due to repeated mechanical problems. As a result, Mr. Golden had rented a Ford Tempo on July 3, 1989. (R-2026-27) On July 24, 1989, he switched to a Pontiac Grand Am. (R-2028) The car was still being rented on September 12-13, 1989, the date of Ms. Golden's death. (R-2030) The rental was charged to Mr. Golden's American Express card. (R-2029) Mr. Golden was insured with Allstate; that coverage expired on July 23, 1989, but the rental company did not learn until after the accident. (R-2032-33) The total rental cost from July 3 to

September 13 was $1,107.40. (R-2036-37)

During the summer of 1989, Mr. and Ms. Golden jointly consulted with a bankruptcy attorney. They took a three-week trip to Minnesota to look at employment opportunities and to make a decision about relocation. (R-1561-62) The younger son wanted to return, and Mr. Golden felt employment oportunities were better in Minnesota, while the older son wanted to finish his senior year of high school in Winter Haven; Ms. Golden was happy with her job and so was not eager to leave it. They were all torn between wanting to go but not wanting to leave; it was a tough decision. Although the Goldens initially decided to move back to Minnesota, they changed their minds upon returning to Florida, primarily so the older son could graduate high school there. Darin was also taking college courses during his senior year, and they did not want to interfere with that. (R-1561-63, 1574-75, 2532-38)

The Goldens' recreational time was spent with their sons. Darin was a point guard on the varsity basketball team. Chip, who was 13, kept them the busiest, as he was heavily involved in sports and gifted academically. Mr. Golden testified:

> And that was our life; our children and each other. We were private people. You know, we were -- we fulfilled each other's needs.

(R-2540-41)

All testimony indicated Mr. Golden had never been anything but a gentle person and had never been known to be violent. Ms. Golden's brother was called to testify briefly for the State and

was then excused so that he might stay and visit with Mr. Golden and his sons. (R-2057)

Mr. Golden testified that, on September 12, 1989, he arrived home about 6:00 p.m. to find his wife taking her customary brief nap on the couch after work; her Ford LTD was in the carport ("Ardie's spot").

> She would take a nap and rest herself on the couch, and that was kind of a given. Everybody left her alone. I mean, that was necessary because I, you know, wanted to make sure that she got her rest and things of that nature.
>
> Then after she rested, if she chose to eat we would. I always wanted to do something with her, whether it was generally go to K Mart, go out and eat a salad, some excuse to be together. It was important. And that's -- it's been that way all of our life, you know.

(R-2540) Mr. Golden parked the rental car in the drive behind her car; while Ms. Golden finished her nap, he got the laundry off the line.

Mr. and Ms. Golden ate something and then went for a ride; as was customary "since '65" when they were together, he drove. He did not remember what time they left, but Darin had already gone to his girlfriend's. (R-1537, 1544-45, 1547, 2540-43) Chip did not recall what time they left, probably around 6:00 or so. Mr. Golden said it had to be later than that due to her nap. They took the rental car, since it was parked behind the LTD and Mr. Golden's van was not working. (R-1536-37, 1544, 1566) They followed their nightly ritual. They checked the apartments, got the mail, watered the plants there, walked around, and made sure

everything was okay there. (R-2544, 2583) They had living quarters (telephone, clothes, and everything) at the apartments, and sometimes they would stay there. They received mail at both homes. They had an option to buy, but the landlord died, and they never followed through. (R-2553) They used both addresses, depending on from where the mail was sent. (R-2632)

They drove to the high school just to see if Darin's car was there; he remembered it was ten o'clockish, because it was so late for what looked like a junior high team to be practicing. They drove by Darin's girlfriend's house, but his car was not there either. They were not concerned but were just riding around. They went to Lake Cannon Park near their home, but the blind mosquitoes were so bad they left and went to Lake Hartridge instead. (R-2544-45)

Darin testified that he probably arrived home between 9:00 and 9:30 p.m.; Chip was already asleep on the couch. He went to his room to do homework and probably went to bed between 10:00 and 10:30 p.m. He did not hear anything until morning. (R-1558-60)

Mr. Golden testified they parked underneath the tree by the abandoned building. He sat on the dock approximately a fourth of the way out, 10 to 12 feet out. They could hear people talking and laughing at the Havendale Drive-in. They talked a while and were happy. He took off his shoes and jumped in the water. He had on short pants. He had never been in there before and did not realize it had rocks, which hurt his feet. His wife did not

want to come in, so he waded out. He stated he did not go swimming, that it was less than knee deep where he jumped in. (R-2546-47, 2575)

He wiped his feet with his socks and put on his shoes. Basketball season was coming, and he had coached many years. He decided he would jog a little to the Boys Club to get in shape, so she drove and was waiting when he got there. He did not see her pass him on the way, so maybe she went another route from him. He then drove them home. (R-2647-49)

Chip was asleep on the couch, with the television still on. He noticed the clock had two hands up "like this," so it was either 11:05 or 10:55 or 12:00; he was not sure. He covered Chip with an afghan; Darin's car was in the yard, and his room was dark, so Mr. Golden assumed Darin was asleep. (R-2549-50)

He went to get undressed and grab a shower. Ardie came in and asked if he remembered seeing her cigarette case. "It was a dumb little cigarette case worth two bucks or less, but it was so important to her, and you couldn't convince her otherwise." He tried to convince her to wait but she did not want to. She said she did not need him to go with her. She asked if he needed anything else; he could not remember but thought he said something about checking to see if they needed milk. (R-2550-51, 2636-38) He remembered hanging his clothes on the shower curtain and going to bed. The next thing he knew it was morning.

He did not think that much about it at the time because it was not uncommon for her to go out at night. However, it was

their pattern for him to go to bed early and for her to stay up late; 2:00 a.m. was not uncommon. (R-1579) She often had reports to write, and Darin would stay up with her doing his homework. (R-2551)

Mr. Golden testified his wife would drive to the store at night if she wanted something but she did not particularly want to drive to work at night. (R-2543-44) It was a 30-minute drive to her job. (R-2540) Darin testified his mother did not have any problem going out on her own at night and often did for groceries or other errands; she was independent. (R-1580-81) There was nothing unusual about his father going to bed while his mother was out on a nighttime errand. (R-1582) Several coworkers testified they had not known Ms. Golden to drive at night. (R-2006, 2015-16, 2104)

Ms. Golden wore her glasses all the time and whenever driving. The exception was when she was in bed or the shower or putting something in her eyes. (R-1538, 1547, 1568-69, 2050-51)

Dr. Brad Salomon, an optometrist, testified Ms. Golden was examined in 1984 by his partner. Her vision, without glasses, was 20/400, and she was extremely nearsighted. Without her glasses, she would be able to see approximately 10 inches away from her face; usually a nearsighted person sees a little worse at night. A person with 20/400 vision would consider their glasses very important and would do something to protect them in a situation where they might lose them. (R-1861-67)

Darin testified that, although the other family members

swam, she did not, but "could kind of swim"; however, she usually only went in to a depth that fell between her knees and waist. He said she did not like being in water and was afraid of water "to a point." (R-1541-42) She took her glasses off when swimming because one time in the ocean a wave knocked her glasses off and she lost them. (R-1546-47) "I think she had just become more cautious with her glasses, especially since she had developed Sjogern's disease with her eyes." (R-2574)

Mr. Golden testified she had taken swimming lessons at the pool in Winter Haven about three years before the accident; he had seen her at least dog paddle there. (R-2575) He had never seen her actually swim aside from the dog paddling. (R-2575, 2608-9, 2651, 2656, 2662)

Alvin Pilotte lived across the street from the Lake Hartridge boat ramp; his house was on the water on the opposite side of the ramp from the dock. (R-1524-26) He testified he arrived home that night around 12:10 or 12:15 a.m. and immediately went to bed. He did not see or hear anything, although his dog woke him up two or three times barking. (R-1529, 1531) Two other vehicles had previously ended up in the lake at that boat ramp, a pick-up truck which went in forward, and a station wagon towing a boat which rolled in backwards; the water was partially up on the windows of both. (R-1527-28)

Darin woke up around 4:30 a.m. to finish his homework. (R-1563) He did not see anything unusual or any indication anyone had been up late the night before. (R-1572)

When Mr. Golden awoke around 5:30 a.m. the next morning, he asked Darin, who was doing homework at the kitchen table, "Where's your mom?" (R-1556, 1573) Darin said his father "looked concerned, a little confused." (R-1573) When it became apparent that she was not home, Mr. Golden became distraught and wanted to immediately notify the police. However, Darin calmed his father and said he would go out and look for her (R-1557, 1573-74), that perhaps she had decided to sleep at the apartments since her eyes had been bothering her. Darin thought he left the house around 6:15 or 6:30 a.m. because it was starting to get light out. (R-1564-65) Darin returned approximately 20 to 25 minutes later to say that he had not found his mother and was going to drive over to the school to report that he would be late that morning. (R-1564-65, 1568)

Mr. Golden then called the police to report his wife missing. He testified that he did not know if he went into shock, but "things started getting fuzzy after that." When the officers told him they found his wife, "I don't know if I sat down or fell down, but my legs gave out."

Rick Heiman was a rookie police officer with the Winter Haven Police Department. He testified that a road becomes the Lake Hartridge boat ramp; he did not recall if there were signs indicating the boat ramp. (R-1513) There was a sign saying the boat dock was condemned. (R-1495, 1514) Officer Heiman went to the boat ramp on routine patrol. At 3:36 a.m., he found Ms. Golden's body floating in the lake eight to ten feet from the

shore. (R-1495, 1503, 1508) There was just enough wave action to make the body move very slowly back and forth. (R-1510-11)

Officer Heiman testified he did not see any evidence of anything other than an automobile accident. (R-1518)[4] The photo marked Exhibit 5 was taken less than 50 feet up the ramp from the water and reflects that you cannot see where the road ends and the water begins because of the drop in the road. (R-1511) He did not recall exactly if the moon -- which was not full -- had already set in the Western sky at 3:36 a.m.; he was unsure if he saw the body from his headlights "or from what little bit of light there was." (R-1515)[5]

Sergeant Ricky Bowman, a homicide investigator and a dive team member, was qualified as an accident reconstruction expert. (R-1748, 1763-64) He was called about 3:40 a.m. and went to the ramp. He testified that when he arrived the body was "six inches to a foot from the shore." (R-1735-40, 1757) She could have drifted in. (R-1758) No one asked his opinion or considered how the car got in the water. (R-1763-64) He saw nothing contrary to it being an accident. (R-1764)

Sergeant Bowman testified there are "a lot of variables on a car going into the water. . . . Anything is possible." (R-1759) He testified water would slow a car down faster than brakes. (R-

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[4]Much of his testimony, as well as that of other State witnesses, was elicited through leading questions, almost without objection.

[5]At the close of Heiman's testimony, the State objected to defense reference to weather data as a discovery violation; the defense attorney agreed to refrain. (R-1521-23)

1748) On an impact of about 20 m.p.h., one could "possibly end up with maybe some bruises with the seat belt." The driver would be expected to hit the wheel, even if they were restrained, "to a certain degree. It depends on your speed, but yes." (R-1749-50) Sometimes a person has an accident but shows no injury. (R-1767) He did not think the car would have rolled forward once it stopped. (R-1761, 1767)

Sergeant Bowman and Officer Brett Hulverson went into the water after it was light out. (R-1739, 1742) There were "some little currents" in the water; sometimes they were sufficient in open water to push a person along." (R-1744) Some papers and stuff had floated off. (R-1744) Officer Hulverson found the purse behind the car and to the right. (R-1771, 1775) The car did not move even when they sat on it. (R-1750) The door would have been hard to open until some water came in to equalize the pressure. (R-1762)

There is a street light at the corner where you turn onto the road leading to the ramp (Exhibit 10). When you come down the road, there are no reflectors or indicators that water is ahead. (R-1754) Sergeant Bowman testified there are no signs indicating you are approaching a ramp. (R-1754)

Sergeant Carlos Melson was in charge of crime scene identification and had training in traffic homicide reconstruction. (R-1594-95) However, he had been out of accident investigation for a while (and could not recall how many feet are in a mile). (R-1652) He arrived at the scene at about 6:20 a.m.;

the body had already been removed. (R-1596-97)

Sergeant Melson did not "possess any evidence to indicate that foul play was involved in this case" or that Ms. Golden's death was not an accident. He did not observe anything or receive any evidence to indicate that anyone but Ms. Golden was present when the car accidentally went in the lake. (R-1659-60, 1663, 1679) There were no skid marks on the ramp. (R-1684) He videotaped from the end of the dock as the divers went in and the car was brought out of the lake. (R-1597, 1600, 1603) The videotape, State Exhibit 1,[6] was played for the jury. (R-1601)

To his knowledge, there were no lights or reflectors or any indication that a driver coming down this road is coming to water. (R-1675) One cannot see the shoreline from 180 feet away. (R-1650) It is not unusual to work cases in Winter Haven where cars have gone in the water. (R-1674-76)

The dock was 62 feet long, with 47 feet over the water. (R-1603) The ramp was 45 feet wide. (R-1637-38) The rear of the car was 32 feet from the edge of the water at the center of the ramp. (R-1639-40) He did not measure the distance from the corner where you turn toward the ramp to the water. (R-1648)

Dr. Alexander Melamud, Polk County Associate Medical Examiner, testified the cause of death was drowning. (R-1686) His Autopsy Protocol and the Certificate of Death state, "The manner of death is classified as accidental." (R-2978, 2981) He

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[6]All references are to State exhibits since the defense did not introduce any physical evidence.

further testified that "most of the time" drowning is "accidental", but "seldom" suicide, "very seldom" homicide, or it could also be a natural death while in water. (R-1719) Ms. Golden tested negative for any drug abuse. (R-1701) She had been in the water at least half an hour. (R-1731-33)

Sergeant Melson's report of September 13, 1989, related that, during the autopsy, Dr. Melamud stated that her bruised forehead and scraped knees were "consistent with injuries that could have been caused as a result of an automobile accident." (R-2983) Dr. Melamud denied at trial having said this. (R-1709-10) However, he had not received any additional evidence to cause him to believe death was other than by accident. (R-1730) Sergeant Melson then testified at trial that he did inquire about the bruise during the autopsy, and subsequent to the autopsy, he still had no evidence to dispute the death was accidental. (R-1659-62)

Dr. Melamud testified that the one antemortem injury, a 1/2-inch by 1/32-inch scrape on the back of Ms. Golden's neck, could have been caused by the shoulder strap from the car seat belt: "It could be anything." (R-1706, 1730) It was not trauma as if someone hit her and would not have caused unconsciousness. "It could have been up to two days old." (R-1696, 1730) He looked and saw no evidence of a struggle. (R-1731-32) A person being held under water would normally struggle so that both persons would have been injured, depending on how they are being held. (R-1733-34)

Ms. Golden's purse was found approximately 22 to 23 feet from the water's edge and behind the car, in the washed out area. (R-1639-40) Although Sergeant Melson testified the purse was found before the car was removed (R-1604), the videotape does not reflect this. He drew a diagram (Exhibit 64-65) reflecting the water depths as measured April 2, 1990; these depths were "just a few inches higher" than on September 13, 1989, and the location of the car, purse and body. (R-1642-43) On September 13, 1989, the depth at the point indicated by the first arrow would have been 3 feet 4 inches, at the purse 6 feet 7 inches, at the rear tires of the car 5 feet 7 inches, and slightly in front of the car 6 feet 9 inches. (R-1643-44) His diagram indicates a deeper area behind the car, which was a washed-out area due to boat motors at the ramp. (R-1664-65)

Sergeant Melson testified he measured the water depth at certain points on September 13 and again later. The water level had changed later but "appeared" to be higher by just a few inches. (R-1614) A number of photos of the scene and aerial photos were introduced, some taken September 13, 1989, and the rest taken in May, 1990, after the arrest. (R-1614-33)

Ms. Golden's flip-flops were collected by Maxine Floyd, who was not called as a witness, prior to Sergeant Melson's arrival on the scene. (R-1611) He did not find any footprints. (R-1681) They are reflected in a photograph (Exhibit 3).

The car was a 1989 Pontiac Grand Am. It was found with the driver's door open; the driver's window was all the way down, and

the passenger window was halfway down. The passenger door was locked. The video reflects the car had power windows. (Exhibit 1; see also Exhibits 15-16) The headlights and ignition were in the "on" position, and the automatic transmission was in drive. (R-1620, 1678) No one checked the position of the driver's seat. No fingerprints were found, probably due to the elements. (R-1634)

The car was tested, but the defense agreed there were no mechanical problems. (R-1635) A mechanic testified[7] that a car with automatic transmission would be very hard to push if in gear and would not run very long once the engine was under water. He had no expertise regarding a car driving into water, floating, and eventually sinking. (R-2110-12)

The contents of the purse were emptied and then inventoried. The purse has four compartments but was not inventoried by compartment. One compartment has a torn lining behind which something could get misplaced. (R-1668-69)

The purse contained an unopened full pack of True cigarettes and a blue cigarette case containing an opened True pack with one cigarette remaining. (R-1606-7, 1671) A pair of prescription sunglasses were in a case (Exhibit 94). (R-1607) The purse also contained a pair of prescription eyeglasses, which Sergeant Melson testified were also in a case. (R-1609-10) However, he could not explain why there was no photograph of the case along

[7]There was no defense objection on voir dire as to expertise.

with the other contents. (R-1611, 1672-73) He testified the eyeglasses and their case were given to Detective Hopwood. (R-1611, 1674) He could not recall the color of the case. (R-1672) He recalled these glasses were in a case because he listed the items in his notes, but the list only says "glasses, prescription sunglasses and case". (R-1673)

Detective Colburn recalled that one set of Ms. Golden's glasses was in a case "and the other set was by itself, just in the purse." (R-1817, 1809) He was not there when the crime scene technician went through it, but when he looked in it one pair of glasses were not in a case. (R-1817-18) Detective Hopwood did not see the purse until they got to the police station; he testified there were two glass cases. (R-1913)

Robert Colburn had been a detective less than a year and a patrol officer prior to that. (R-1778-79) However, he was senior to Detective Hopwood, to whom the investigation was reassigned when Colburn resigned November 10, 1989. (R-1783) Jay Hopwood had been a detective only four to five months. This was the first homicide case for both of them. (R-1813, 1954) Detective Colburn was called at about 5:00 a.m. and went to the scene sometime later; the body had been removed. (R-1780-82) He was told it was found 11 feet 1 inch off the shoreline. (R-1827)

Det. Colburn admitted that, other than inconsistent statements, he had no evidence that Ms. Golden's death occurred other than by accident. (R-1824) Through leading redirect, he agreed with the prosecutor that the shoes away from the body and

the glasses and cigarette case in the purse were "suspicious." (R-1839-40) After repeated testimony that signatures were "forged," Det. Hopwood agreed he had no evidence of forgery. (R-1978-80) He agreed there was "no evidence of any violent death and no evidence of foul play as far as injuries to Ms. Golden." (R-1988-90)

Det. Colburn testified he saw the flip-flops when he first went to the scene. They were along the shoreline by the grassy area next to the dock. (R-1808) The eel grass at the shoreline can be seen in Exhibits 2 and 3. (R-1747) Det. Hopwood described the dock as "very shaky." (R-1895) He testified there is a current in every lake. (R-1826)

The Goldens lived maybe 1/2 to 3/4 mile outside the city limits of Winter Haven, which is outside their jurisdiction. (R-1891, 1969) Det. Hopwood could not recall if signs indicated this. (R-1971) The Goldens' apartments were inside city limits. (R-1974)

At 6:45 a.m., Det. Colburn and Hopwood drove the four to seven minutes to the Golden residence to respond to a missing person report. (R-1785-86, 1788, 1891) Exhibit 66 is a map of Polk County with a No. 1 identifying Lake Hartridge and a No. 2 identifying Lake Cannon. (R-1787) A No. 3 identifies the area where the apartments are, and a No. 4 identifies the vicinity of the Golden home. (R-1939-40) Exhibit 22 has a "G" on the Golden residence. (R-1905) Lake Cannon is just a few blocks from the Golden home. (R-1627) Exhibit 30 shows the Goldens' apartments.

(R-1629) Exhibit 7 reflects the Boys' Club as "BC" and the "ramp". (R-1899)

There is usually traffic on Havendale Boulevard, even at midnight or 1:00 a.m. (R-1919) Leaving the boat ramp, there are two routes which can be taken to Havendale Boulevard; at the corner, one can turn on 20th Street or take another side road. (R-1971-72)

The defense moved at this point to exclude any evidence of statements by Mr. Golden on the basis that corpus delicti had not been proven, but the court did not agree that Mr. Golden's statements were to be treated the same as confessions. Referring to the State, the court stated that "They've still got a long way to go" to prove corpus delicti. (R-1790-94)

Det. Colburn took no notes during his discussion with the Goldens. (R-1814) Det. Hopwood testified he took some notes during his initial investigation.[8] (R-1959-60) He testified Mr. Golden freely talked to them at this time. (R-1894) Det. Colburn testified from his report (reviewed and signed six days later) that Mr. Golden told them his wife left at approximately midnight to get some cigarettes. (R-1795, 1797, 1842) Det. Colburn had no independent recollection of the facts. (R-1798, 1814-15, 1830-35) Mr. Golden seemed appropriately concerned. (R-1961) A Ford LTD was in the carport with nothing behind it. (R-1962-63) Chip Golden awoke while the detectives were there and testified his father "was kind of shaken up, I could tell. He was worried."

[8]The defense never saw these notes.

(R-1553)

Their report indicated that Mr. Golden told them he and his wife had driven around looking for Darin, then went to Lake Cannon Park to talk and visit, but the mosquitoes were too bad, so they then went to Lake Hartridge. (R-1799-1800) They did this sort of thing four or five times a week. He said they went out on the dock; he wanted to make out or make love with her but she did not. He went swimming and asked her to come in. He knew she did not swim, but she came in to her ankles or waded in. (R-1800) He said she was afraid of water because she could not swim. He got out and jogged to the Boys' Club, where she met him. They got home just before midnight. They could not find her cigarette case, and he told her not to worry about it. He got in the shower, and she left to find her cigarette case and buy more cigarettes. He went to bed and did not awake until morning. (R-1801-3; 1894-1904)

The detectives radioed the Captain at the scene and were told the purse with Ms. Golden's identification had been found. Det. Colburn took Mr. Golden by himself away from Chip and told him. Mr. Golden started crying. When Chip asked, Mr. Golden told him. Darin drove up shortly, and Det. Colburn went out and told him. Mr. Golden told them his wife had a problem with dry eyes and could not see without her glasses. (R-1803-5) Darin testified his father and brother "were both sitting down on the couch in a state of shock, and they really didn't have to tell me what happened. I pretty much knew." (R-1568)

Mr. Golden's response to the news was no different than others Det. Colburn had observed when they learned someone close had died. (R-1823, 1964) They called Mr. Golden's brother-in-law to come to his house. (R-1904) Det. Hopwood testified he did not specifically recall telling Mr. Golden that his wife had drowned; they said her body was found in the lake, but he had learned that she had drowned at the autopsy that day. (R-1918, 1978)

They returned to the scene, waited for the wrecker, and inventoried the car. (R-1806) The car was almost right in the middle of the ramp's width. (R-1911)

The detectives both returned to talk to Mr. Golden early that afternoon. He was still upset, "consistent with what you would expect from someone who has just been told that their wife had died that morning." (R-1832) He advised them that his wife had two pairs of glasses, one light-colored and one dark-colored. He did not react when told the cigarette case was in the purse. Det. Colburn asked Mr. Golden if he had any insurance. At first Mr. Golden said no, but then said he thought she had one where she worked but health insurance. Mr. Golden made comments along the lines of "y'all just can't leave us alone, you just keep opening up these sores and won't let them heal." (R-1810-13, 1912-15)

Det. Colburn testified Mr. Golden indicated his wife was "borderline mentally retarded, slow to catch onto things." (R-1821, 1828-29) The prosecutor interrupted to object that if Mr. Golden could not control himself he would move to have him put in

a holding cell. He said Mr. Golden had just made a disgusted sound at the testimony loud enough that half the jurors looked at him. Neither the court nor counsel heard anything, but the defense attorney indicated he would talk to Mr. Golden about it. (R-1821-22)[9]

Mr. Golden testified he felt guilty for not going with his wife that evening and that he had attempted suicide more than once. (R-2559, 2563) He had sought help at a hospice before leaving Florida and was told he could not run away from his wife's death. (R-2563) After another suicide attempt failed, he was hospitalized (in November or December in a psychiatric ward in Minnesota) for a week and then on medication and outpatient counseling three times a week. (R-2563-64) He testified that it was his plan to see that his boys were taken care of financially and to commit suicide so he could join his wife. (R-2557-59)

He and his sister found some paperwork but did not know what they had. He called and asked for claim forms, but the questions were painful so he turned it all over to an attorney in Lakeland, Richard May, to find out if there was anything in it and set up a trust fund for his boys. (R-2560-61)

Over a defense hearsay objection, Detective Kirk Smith testified that he went to five convenience stores, all in that area of Winter Haven, on September 14, 1989, after 10:45 p.m.

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[9]The prosecutor gave this issue special attention in Mr. Golden's cross-examination.

They assumed Ms. Golden went to a convenience store. He showed Ms. Golden's driver's license photograph, but no one recalled[10] her coming in or buying True cigarettes. They did not check the unopened pack for markings to indicate where they were purchased. (R-1853-59, 1994-95)

On September 15, 1989, the night of the viewing, Ms. Sylvia Brooks, Assistant Administrator of Presbyterian Nursing Center, took a claim form to Mr. Golden at the funeral home and had him sign it. She completed the form and sent it in. (R-2079-81) Mr. Golden was "extremely upset" that night and did "not really" pay any attention to what she was doing. (R-2082) She thought she explained they were insurance papers, but he did not seem "overly concerned;" he was not paying much attention. (R-2082-83)

Mr. Golden testified that he remembered Ms. Brooks coming to the viewing, although he had thought it was the funeral. He did not know his wife had a policy at work. She told him to sign a paper an shw would take care of everything; he did not know what he signed. (R-2561) Ms. Brooks did not recall contacting him again about it to remind him she was processing the claim. (R-2083) She called him sometime after October 2 and told him the check was in the mail. (R-2084)

On September 20, 1989, Det. Hopwood talked to Mr. Golden alone. Mr. Golden told him again he did not have any life insurance on his wife and said they had some minor financial

[10]In overruling the hearsay objection, the court said, "They could have shaken their head no." (R-1845)

problems. (R-1915-17)

On September 26, Det. Hopwood received telephone advice from Ms. Golden's employer, Presbyterian Nursing Center, that she had an insurance policy through them. (R-1918) On October 3, he received a call from Citicorp Insurance regarding another policy on Ms. Golden. (R-1920)

The only recorded conversation with Mr. Golden was on October 3, 1989, when Mr. Golden came to the police department. (R-1921-22) The tape, Exhibit 99, was played for the jury;[11] the record reflects that Mr. Golden was "obviously emotional." (R-1923-37; 378-79) Mr. Golden explained a number of things (always speaking of his wife in the present tense):[12] e.g., his wife was intelligent but just slow to catch on (R-1925-26); he took care of her for 24-25 years, buying her cigarettes, keeping gas in her car: "She ain't supposed to do that kind of junk." (R-1926-27); she smoked two to three packs a day, depending on whether it was a long day (R-1927); she got flustered easily (R-1927-28); that "stupid little cigarette case" was one of her "little idiosyncracies"; he told her to just get some more cigarettes and forget the case (R-1928-29); they got home at "11:00, I think it was 5 after 11, because I remember looking at the clock but I remember those two hands were up there, OK. I don't remember exactly." (R-1928); he tried to get her to make love on the dock

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[11]The voices in the background are unrelated. (R-1945)

[12]This statement cannot be adequately summarized; the transcript needs to be read along with the tape.

and then to just "stand at the edge of the water and kissy-face and stuff, you know;" he did not want her to get in deep. She had never been in water over her knees except for the swimming lessons she took one year. (R-1929-30)

The life insurance from work and insurance on the car was discussed. (R-1930-31) Mr. Golden was never asked to explain the Citicorp policy about which they had received a call. Mr. Golden stated he did not have insurance on the apartments which would cover her death. (R-1931-32)

Mr. Golden stated that, when they got home, he just went in, hung up his clothes, checked on the boys, and went to bed (R-1933); when Detective Colburn asked if it was after midnight when she left again, Mr. Golden said "or before." (R-1933) He said Darin woke him up in the morning, and he could not find his wife.

> Yeah, he said he woke up early, my oldest boy had woke up early because he had to do some homework. And I know that she wasn't there, and I thought maybe she went in Chip's room, because I knew Chip was on the couch. She wasn't there.
>
> MR. COLBURN: So the reason for not reporting it is because you didn't know she wasn't there until you woke up in the morning, your boy came and woke you up?
>
> MR. GOLDEN: No. At that time, and I got kind of shook up. I said, where in the heck is she? And I figured maybe she fell asleep over at the apartments because she -- her eyes had been giving her trouble. And I said, well, she could have called. And then she didn't want to wake us up, and it makes sense.
>
> And I said, I'm going to call the police and see what's going on, if they've heard anything. And Darin, my oldest son, said,

> well, wait a minute, let me go driving around and see if I can find her, so.

(R-1933) Mr. Golden and Det. Colburn puzzled together over Colburn's question why her glasses "were folded up inside her purse." (R-1933-35)

> The only thing I can think -- I didn't mean to interrupt you, but she -- * * * one time in the ocean, and this is again, she was only -- not even knee deep, but about ankle deep in water, and a wave came up and knocked her swim suit down, the top of it, and knocked her glasses off. Maybe she just thought she would lose her glasses again. I don't know. Would that make sense?

(R-1934-35) As to why he jogged to the Boys' Club:

> I was wet and I wanted to dry off. I don't know. We had -- I was just kind of wanting to mess around with my wife, and I just guess I wanted to get rid of some energy.

(R-1936) He stated the car rental company had sent some papers to sign. He "was kind of surprised" about the life insurance at work. He had gone Friday to hire an estate attorney "to take everything, liquidate whatever he can, put it in my sons' name." (R-1936-37)

A subpoena was issued to Mr. Golden's sons, and they were interviewed in late October; the family moved to Minnesota on November 1, 1989. (R-1946, 1984-85)

In December, 1989, Det. Hopwood went to Minnesota; Mr. Golden told him he had lied about the insurance "to protect he and his sons" and then discussed the policies. (R-1946-47) Mr. Golden testified that Det. Hopwood came to Minnesota in December, after he had been hospitalized. He felt Det. Hopwood had a "cop

mentality." He admitted he had lied about the insurance, explaining that he did not want anyone saying her death had been a suicide and that was what they were trying to say, and that he wanted to ensure some money would be there to care for his sons so that he could kill himself to be with his wife. (R-2564-66)

> I realize now that lying about the insurance doesn't make sense, but it did at the time. And that's my only apology.

(R-2578)[13]

In April, 1990, Det. Hopwood went to arrest Mr. Golden in Minnesota. (R-1948, 2673)

Mr. Golden testified Mike Boen, the Minnesota officer who executed the arrest warrant, "was a pretty nice guy." His attitude about the charges were summarized as:

> It's not really a joke; it's just ridiculous. I just -- it's just too farfetched to realize or imagine where in the hell did they come up with something this stupid? I just -- excuse my language.

(R-2566) Responding to the question whether he killed his wife, he said, "No, sir. Stupid. And people know it." (R-2570) He testified that, sitting between Det. Hopwood and State Attorney's Investigator Spate in the back seat of the police car, Hopwood said "[Y]ou're going back to Florida, then you're going to die." (R-2567) When the Minnesota judge (also "a nice guy") asked if he wished to return to Florida, he said no, "I would just as soon die in Minnesota." (R-2567)

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[13]At the conclusion here of Mr. Golden's direct examination, the prosecutor asked that Mr. Golden and defense counsel be instructed not to discuss his testimony. (R-2579)

Ms. Golden's brother from Minnesota testified she had worn glasses since childhood. (R-2050-51) They have a mentally retarded brother. (R-2052) As adults, they had lived near each other in Minnesota. (R-2052) He last saw her a month before her death; she seemed her normal self and appeared happy. (R-2051, 2054-56) State objections to scope of cross-examination were sustained. (R-2044-2055) Her brother was excused so that he could spend time with Mr. Golden before returning to Minnesota. (R-2057)

Several coworkers of Ms. Golden's testified that she left for three weeks in July to go to Minnesota with her family; she had turned in her resignation to move there, but they then decided to stay in Florida. (R-2011, 2014-15, 2023, 2090-97) Over defense objections to hearsay, the coworkers testified Ms. Golden did not want to move to Minnesota. (R-2007-9, 2019, 2023, 2089-93) Ms. Carlyle never observed "any feelings of sadness or unhappiness with her marriage situation." (R-2011) Ms. Johnson testified "she was not a happy person with her personal life, but she did not actively speak to me about her marriage." Ms. Golden had talked to her about her husband not working and was very concerned about finances. (R-2020-21)

Ms. Golden was automatically enrolled through her employer with Florida Combined Life Insurance Company for $14,000 group term life benefits and $14,000 accidental death benefits. (R-1869-72) No record indicated Mr. Golden knew of these policies. (R-1879-80) Claims are normally prepared by the employer for the

beneficiary. (R-1879) Mr. Golden signed the claim form (Exhibit 54) dated September 15, 1989. (R-1872) He was paid $14,000 in group term benefits by check dated October 3, 1989. (R-1873-74) He was never paid the other $14,000 for accidental death benefits because he never responded to the company's three letters requesting a copy of the autopsy and police report. (R-1874-76) Ms. Golden also had an annuity through her employer with UNUM valued at $1,304.74 at the time of her death. (R-2099-2101)

A records custodian (R-2153) who had not reviewed the whole file (R-2154) testified that an application for $50,000 group term life insurance from the Life Insurance Company of North America (Exhibit 38) was completed for coverage on Ms. Golden and dated April 10, 1989; the preprinted address was the Goldens' home address, but it listed the address of the apartments, 204 Eighth Street Southeast, Winter Haven, as the return address. (R-2114-17)

A policy for $50,000 was issued; a letter (Exhibit 79) was sent to Ms. Golden advising her of the policy and inviting her to increase coverage to $75,000. (R-2118-19) An application selecting this increased coverage (Exhibit 40) was signed Ardelle Golden. (R-2119) On July 12, 1989, a letter (Exhibit 41) was mailed to Ms. Golden at the apartment address advising her of the increased coverage, which was effective May 1, 1989. (R-2120)[14]

[14]The defense argued one form was a discovery violation, to which the State responded that, if he had deposed more than six witnesses, he would have been aware of the form, which the State had also just discovered; the court also found no prejudice and overruled the renewed defense objection to relevance. (R-2122-34)

(The defense objected to all documents subsequently admitted on the grounds the motive evidence was not relevant until the corpus delicti had been proven.)

The insurance company records indicated Mr. Golden called on September 18, 1989, and requested a claim form from Citicorp on this policy; it indicates Ms. Golden died on September 12, 1989, as a result of an accident, "car went in lake". The forms were sent September 20. (R-2146) An inquiry was received on September 26, 1989, indicating the caller did not remember if he had called to notify them of the death. (R-2139-41) The claim forms (Exhibits 51 and 52) were dated September 30, 1989, and signed by Mr. Golden, the designated beneficiary; he gave his home address and did not list any other insurance. (R-2142-44) A letter dated October 2, 1989, was received from Mr. Golden complaining of the company's painful questions. (R-2148-49) Mr. Golden was written on October 5, advising that additional information must be obtained. (R-2149) On October 18, the company decided it must rule out suicide and foul play. (R-2157) A letter dated October 25, 1989, was received from attorney Richard May advising he was handling the claim. (R-2151) Citicorp had paid nothing and had denied this claim due to a provision that, if death was within two years and information on medical history was inaccurate, the coverage would be declined. (R-2161-62)

The Washington National Division of Alin Corporation handles accidental death insurance for AAA membership. (R-2164) A records custodian (R-2164) testified that an insurance

solicitation was sent to AAA members offering $1,000 life insurance at no cost as well as additional coverage. An application for a "wings and wheel" insurance policy (Exhibit 55) on Ms. Golden (Exhibit 37) as a member was filled out and dated March 23, 1989. (R-2165-68) The Goldens home address was listed. (R-2167) The policy provided $12,500 insurance for death due to auto accident, but $25,000 if a seat belt was used. (R-2170) A rider increased coverage to $50,000, but no copy of this was introduced. (R-2179)

A claim form (Exhibit 43) dated September 27, 1989, was signed by Mr. Golden. (R-2170) It indicated that the cause of death was drowning and that Ms. Golden always wore her seat belt. (R-2171-72) Another form for this same claim did not complete the section requesting information on other insurance. (R-2174) A letter (Exhibit 45) from Mr. Golden complaining of the painful questions was received with the claim forms. (R-2175-76) A letter from Richard May dated October 25, 1989, was received indicating he was handling the claim for Mr. Golden. (R-2177)

Mr. Golden was paid $5,000 based in part on the statement in the police report that the death was an accidental drowning. (R-2179, 2185-86) The insurance representative did not have records of AAA membership and so did not know if Mr. Golden was an AAA member. (R-2182) The file indicated that Mr. Golden did not have this insurance on himself, but she had no idea from her own investigation if he did or not.

Mr. Golden was adamant that he was an AAA member. (R-2627)

American Express provided a credit card enhancement policy for death and vehicle damage; the policy activated automatically when Mr. Golden, a cardholder, used their card to rent the car and declined the insurance coverage offered by the agency. (R-2192-93) The company normally will not pay any benefits if the car is rented for more than four weeks. (R-2204) The policy says the cardholder (Mr. Golden) is covered for $200,000, but the company does not mean that. (R-2194-95, 2205)

A monthly billing to cardholders had included a document (Exhibit 89) explaining membership benefits; it specifically states only the cardholder is covered for $200,000. (R-2211) There was no evidence Mr. Golden had read the card member agreement or this update material. (R-2218)

The company received telephone notice (Exhibit 88) of the accident on September 26, 1989, and sent out claim forms. (R-2206-7) The company received no claim on the life insurance and so attempted to call Mr. Golden on October 31, 1989; November 1, 1989; and November 9, 1989. The representative tracked Mr. Golden down in Minnesota and talked with him on February 12, 1990. (R-2200-1)

A claim by Mr. Golden on the death benefit coverage was dated March 5, 1990. (R-2196) The form did not answer whether there was other insurance. (R-2197)

The claim representative had decided the death was by accidental drowning. (R-2208-9) Although nothing had yet been paid, she testified the company would "probably" pay $200,000 to

someone, depending on whether Mr. Golden was convicted. (R-2209)

Mr. Golden paid the American Express bill of $1,715.77 on October 13, 1989. From April to October 1989, aside from cash advances, this card was only used for a motel room and the car rental. (R-2212-13)

As to the American Express policy, Mr. Golden testified:

> ...the thing that bothers me is that my American Express card states flatly that I am the only insured person for $200,000, and somehow they said that she was insured for it. I never -- it's in my policy. I mean, how can they say that, you know? And then come to find out, there ws a gal up here from American Express and she said, no, that she is covered; it don't say that she is, but she is. Well, I never knew that. I never applied for that. I applied for -- Enterprise told me to apply for a claim for the car, but I never applied for insurance for Ardie. And then six months later, she called me and said how come you haven't? I didn't know she had it, you know. I thought it just covered me.
>
> The policy says, I know know if you saw it, the policy says for the cardholder only. Why would I assume it was for anybody else? My wife tried to use that card one time to get some shoes at the mall for one of the boys, and they said that she can't use it; only me. I mean, who else is the cardholder but me, you know?

(R-2577-78)

Mr. Golden's bank accounts automatically carried $1,000 basic life insurance on all family members. (R-2220-21) As part of a bank customer solicitation program, insurance information had been mailed by CNA Insurance to the Goldens, and family coverage had been selected, giving each member of the family an additional $20,000 life insurance. Only 50% of that, or $10,000,

was payable for the death of an individual family member on each of the two policies. (R-2221, 2234, 2245-46) The enrollment cards (Exhibit 42) were signed by both Andrew Golden and Ardelle Golden on December 5 and 15, 1988; they contained the preprinted home address of the Goldens. (R-2220, 2222, 2225) Exhibit 84 evidences a mailing to their registered agent on the 5th day of an unidentified month in 1988 with the return address of the apartments. (R-2223)

A claim form (Exhibit 61) dated October 2, 1989, on the two policies was signed by Mr. Golden; an authorization to investigate was dated September 27, 1989. (R-2225, 2227) The date of death was indicated as "September 12, 1989 - midnight +." (R-2238) The space asking about other insurance had a dash through it. (R-2228) There was some difficulty locating Mr. Golden until he wrote the company on January 24, 1990, with his Minnesota address. (R-2230, 2242) Mr. Golden's attorney had been in touch with their claim department. (R-2241) No benefits had been paid. (R-2231) The beneficiary listed on both cards, i.e., both policies, was Darin Golden. (R-2231)

James Outland, Florida Department of Law Enforcement, testified as an expert in questioned documents. (R-2289-92) He analyzed Exhibits 37 and 38 by comparison to known writing samples of Mr. and Ms. Golden. (R-2294-95, 2299) Exhibit 190 was a photographic enlargement of the two questioned signatures at the top and known signatures of both Goldens at the bottom. (R-2298) His opinion was that Ms. Golden did not sign either of the

questioned signatures at the top, which corresponded to the group term life insurance form (Exhibit 38) or the activation form (Exhibit 40). He further opined there was a strong probability Mr. Golden signed both. (R-2303-4) He had the same opinion as to Exhibit 37. (R-2305) As to Exhibit 42, there was no evidence Ms. Golden executed the handwriting and signature; there were some similarities with Mr. Golden's writing, but he could not be sure. (R-2305) Particularly with regard to the Wings and Wheels policy, he concluded Ms. Golden did not sign that and most likely Mr. Golden did. (R-2309)

Mr. Outland also examined 23 of Ms. Golden's paycheck endorsements and concluded that she did not sign her name on any of them and whoever signed Mr. Golden's name had also signed hers. (R-3210-11)

Credit life insurance on a loan with Commercial Credit paid off that debt and paid Mr. Golden $1,341.88. (R-2386, 2390-91) Commercial Credit encourages consumers to buy credit life insurance as the company makes a profit on it. It was possible Mr. Golden did not even know he would get any money back. (R-2395-97) The State questioned the company representative as to factual untruths on the loan application. (R-2398-2400)

An investigator for the State Attorney's Office testified he assisted in the investigation of "the case in which Mr. Golden is charged with first-degree murder.[15] The State introduced the

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[15]There was no defense objection (or clarification) to this erronous implication that there were other charges pending.

bankruptcy petition (Exhibit 191) Mr. Golden filed on October 16, 1989. American Express was not among the creditors listed on Exhibit 192. (R-2321-24) The defense objection to introduction of evidence of Mr. Golden's bankruptcy was renewed and denied. (R-2277-87)

Mr. Golden testified he found the name of the bankruptcy attorney, Malka Isaac, in the yellow pages. (R-2561) When he filled out the papers, he was not aware of the monetary value of any insurance. (R-2576) The bankruptcy attorney told them:

> [T]he American Express bill is every thirty days, and if I can -- I can't quote him, but the words were something to this nature: you cannot charge anything in a bankruptcy situation that you have owed on less than ninety days. . . . Yeah, the 90 days sticks in my mind.

(R-2533)

Lengthy testimony was introduced to document that the Goldens' financial problems starting in 1988 had pushed them to the brink of bankruptcy by 1989. (R-2249-55, 2326-36, 2337-46, 2347-60, 2362-71, 2381-86, 2386-2400, 2400-05, 2405-13, 2413-28, 2429-43, 2443-48, 2449-2477) Over defense objections to relevance, the stream of witnesses ended their testimony by summing up how much money they lost due to Mr. Golden's bankruptcy. (R-2258, 2335, 2343-44, 2353, 2368, 2383-5, 2404, 2411, 2416, 2442, 2447, 2452, 2468)

Mid-Florida Schools Federal Credit Union had several accounts with the Goldens, including Mr. Golden's son. (R-2449-50) Mr. Golden had made an appointment on the 11th to come to

the bank on September 13 but their records, a phone message, indicated that "member" phoned on September 13 and advised that his wife had died, so he could not keep appointment. (R-2463-65) He could not say that Mr. Golden personally called. Hearsay objections were denied.

The van was having mechanical problems, so the bank was either going to repossess it or try to sell it for him. (R-2465) Mr. Golden called on the 14th and apologized for not making it. He came to the bank on the 15th. The representative thought Mr. Golden seemed more concerned about the account than his wife; they did not discuss it much. Mr. Golden mentioned moving to Minnesota. (R-2468) Mr. Golden left the van at the bank, so the representative assumed Mr. Golden's son was with him. (R-2472)

Andrew Golden testified at length. (R-2522-2687) He was 47 at the time of trial and was employed as Evaluation Administrator for the Lakeland Branch of Tampa College. As to the credit union, he testified:

> Q. Were you extremely upset on that day?
>
> A. Yes, sir.
>
> Q. How do you explain, Mr. Golden, your recollection to telephone the credit union and cancel an appointment about bringing in a van on that day?
>
> A. You know, that one got to me, too, yesterday when that fellow said that. And I went home last night and asked my son that. I said, Darin, I don't remember this. Did I do it? He said, Dad, we took the car over there September 12th, and that was it.
>
> That's what we did after school. I remember that now. Got the car -- the van over there,

left it out in the parking lot because they closed up, and that's why Ardie was home when I got home.

Q. Is it your testimony then that the records ----

A. So it was sitting in their parking lot on the day of the accident. I'm sorry.

Q. Is it your testimony that the records are incorrect when they say: Member phoned, apologized for not making appointment -- wait a minute. That's the 14th. Member phoned, left message with me -- for me with Heather that he could not make appointment due to death of his spouse last night at approximately 3:00 a.m.

A. Yeah.

Q. Will phone back tomorrow.

A. That part threw me off because when that fellow Smith, when he was sitting up here, I didn't recollect his face. And the reason was I never talked to him. I talked to Sandi-somebody. And I just remember coming back from talking to her after the second funeral up north and asking her if we could keep the two cars. I don't remember this phone thing, but Darin said maybe he did the phoning. I don't know. That's my oldest son.

Q. Do you recall making a second phone call on September the 14th, the day after your wife was found, apologizing then for not making the appointment that you called the day before to cancel, and telling them on the 14th my wife has insurance that will help me pay that loan?

A. That's stupid. I would never -- why would I tell somebody that over the phone. And I never met this fellow Mr. Smith. Sandi is the only person I remember talking to. And she's a lady; this is a guy.

Q. Let me ask it ----

A. If you would bring her in here, that

would help.

(R-2619-21)

On cross-examination, Mr. Golden's credibility was a recurrent theme; for example:

> Q. Do you have problems selectively with your memory, Mr. Golden?
>
> A. If you mean am I a liar, no more than you are, sir.
>
> Q. Are you telling this jury the truth?
>
> A. To the best of my knowledge.
>
> Q. Is it your practice to tell the truth Mr. Golden?
>
> A. To the best of my knowledge I can tell the truth. I am an accommodating person. That means I try to keep things happy. You know, like if I'm -- oh, having a bad day and then they say, how did your day go, I'll go oh, OK, you know. I mean they want to hear OK, so that's what I said. It's not that it's really meant to lie as such.

(R-2584-85) Over defense objections to Williams rule evidence, the prosecutor focused extensively on alleged forgeries and untruths in credit paperwork and the bankruptcy. (R-2598-2604, 2623-24, 2631, 2649-51, 2656, 2662)

Mr. Golden testified about the insurance, not because he cared what the police thought, but several people had suggested suicide and he did not want people to think she did not love them anymore than that. (R-2616-19)

Mr. Golden started out very polite with the prosecutor, but their relationship rapidly deteriorated as the prosecutor became increasingly caustic and pressing. (See, e.g., R-2585-86) Mr.

Golden testified he thought his wife was the smartest woman in the world. He did not know which convenience store was the closest, probably five minutes away. They usually went to Albertson's since it opened. (R-2580-82) Mr. Golden became upset when he felt the prosecutor was impugning her character or intelligence. (R-2588)

There was lengthy cross-examination as to whether Ms. Golden had smoked during their time out that evening. Mr. Golden did not specifically remember her smoking.

> This is two and a half years ago. How am I supposed to remember that detail? I just vaguely remember what we did that night.

(R-2586) The prosecutor asked how she could have smoked if she had left her cigarette case at the apartments; Mr. Golden said they did not know where she had left it, they just thought of where they had been that evening trying to figure where it could have been left, and the apartment was one place they had been.

> [W]e didn't have the opportunity like you did to analyze things for two years. All we know is we traced the steps where she went, where we started from -- what would you think?

(R-2589)

Mr. Golden denied telling the detectives that he went swimming:

> I never told the police, Mr. Aquero, that I went swimming. I went out knee-high or less in the water ten foot out on the ramp, whatever it was, with a stony bottom. And that's what I told them. Where they got swimming, only they can answer that.

(R-2611) He did not jog to dry off:

> I was wet, though, because my legs were wet. My clothes weren't wet, you know. So I dried off my feet, so I could put on my shoes with my socks. That's all I remember, so. I don't know how much you splash when you jump in, but I wasn't totally wet, so.

(R-2614-15) He did not remember telling the police that he was wet and wanted to dry off, "but I'm sure if that's what it was, that's what I said."

> I'm sure my socks didn't dry me all off. And if my pants were damp, it wasn't more than the hem, ...however much I splashed. Mr. Aquero, I just don't know. If you want me to make up a story, I'll try. But I can't. I just don't know.

Mr. Golden insisted the insurance was decided upon jointly. He did not recall if he or she signed it, but if he did it was with her okay. "I didn't hide behind my wife's back and sign no stupid insurance." They signed each other's names all the time. He did not know if the insurance was good because his wife paid the bills and he never saw them. The company would not tell him without him filing a claim, so he sent it in and turned it over to the attorney. He omitted the information on other insurance because he thought it might interfere with the insurance, and he wanted that to take care of his boys so he could kill himself. (R-2626-31, 2677-78)

Mike Boen, a Minnesota detective, testified on rebuttal that Mr. Golden never asked his assistance waiving extradition. He had become a sort of friend and go-between helping the boys for Mr. Golden. He took Mr. Golden to attend Darin's graduation.

The jury retired on Thursday afternoon at 3:30 p.m. and

immediately asked for an easel and paper and how late they would be kept. (R-2865-66) Upon agreement, the bailiff was allowed to tell the jury that, if they did not have a verdict by 6:00 p.m., they could go home for the evening. (R-2868) At 6:00 p.m., the jury was given "the standard admonition" prohibiting discussions, media exposure, or visits to the scene, and was sent home for the evening. (R-2868-69)

On Friday morning, the State pointed out that the jurors had been told nothing about smokers leaving during deliberations, and the bailiff advised "they have been real good about that, because I heard them say, 'No more talking.' when they're taking smokers out." The court indicated that matter would be addressed (R-2872), but the subsequent instruction said nothing about suspending deliberations -- it only advised that smokers would be accommodated as necessary by the bailiff. (R-2873) The jury retired at 8:39 a.m. (R-2873)

At 9:04 a.m., the jury's request for the videotape and audiotape was granted. Again, the parties agreed to let the bailiff advise the jurors that they would have to request the video equipment again if they wished a repeat playing because the equipment was also needed elsewhere. (R-2873-74)

The jury returned at 3:12 p.m. with a verdict of guilty of first-degree murder. (R-2876, 3299) An oral defense motion for judgement of acquittal notwithstanding the verdict was denied. (R-2880)

The penalty phase was held the following Monday, October 28,

1991. (R-2883) The judge indicated this was his first capital trial. (R-2893)

The State presented testimony from only Dr. Melamud, the Medical Examiner, to the effect that Ms. Golden could have lost consciousness "within a few minutes." (R-2903) Similarly, in the warm September water, the possibility of rescue would have been limited after a few minutes. (R-2904) He also indicated that a person who is afraid of water may engage in disoriented self-defeating efforts to save themselves. They may even struggle with a would-be rescuer: "they don't know what they are doing. They think this is the way to rescue their life." (R-2903) There were no injuries or other evidence to indicate Ms. Golden lost consciousness prior to going in the water. (R-2903-4) There was no evidence of a struggle. (R-2905) A person being held under water would normally struggle so that both persons would have been injured, depending on how they are being held. (R-1733-34)

The defense presented testimony from Darin Golden, the older son, that he could not have asked for a better father and that his father would always help him in school and sports. (R-2906)

> [H]e would help me, support me through it, him and Mom both. And -- well, I was having trouble with the school when I was a junior or so. It was getting hard, I was taking all the hard classes, and I wanted to step down and just take an easier class or anything. And he said, no, he said, no, you've got to keep doing it; And he was helping me. He said, no, you have to keep working. And I did, and now that I'm through it, through high school, it definitely paid off. I remember when we went to -- we went to a family reunion, it -- it was about two years ago, two or three years ago, and, I mean,

> everybody was there, people I had never met, his cousins and stuff, and he was in his glory.
>
> He was -- he was very much a family person... he loved showing us off; my brother, my mom and me. And I don't know, I never had a conflict at all. We -- in which -- in which he wasn't thinking for my best interest." (R-2907)

He "never" saw his father engage in any violent or dangerous behavior; his father taught him that "violence was never the best way out." (R-2908) The trial court sustained the State's objection to any testimony "about his mother's feelings." (R-2908) His father did not engage in selfish behavior. Whenever his mother had a problem, his father came to her aid. When she broke her arm a few years earlier,

> he was a wreck. Just always he would call her, are you OK, how's your arm. He was -- no matter what happened, he, to my knowledge, thought of her first or my brother and I.

(R-2909) Darin testified he was convinced his father "had nothing to do with" his mother's death, and there was "no way" he would have supported him if he had. He "definitely" still loved his father and did not "by any means" wish to see his father die. (R-2909-10)

The younger son, Chip, testified he loved his father and they got along great living together pending trial. (R-2911)

> [T]here is basically no question about what happened that night. I mean, if you know our family, you know how much everyone loved each other and everything. I mean, there is no possible way. And, I mean, we didn't discuss it, what happened as much as everyone basically knew that ----.

(R-2912) He had never seen his father behave violently or dangerously: "He is very gentle, I guess is the word." (R-2912)

Chip testified that, in the months after his mother's death in September, 1989, his father

> was very sad. I mean, it's beyond that, he was -- he didn't really know what to do without my mother. He wanted to be with her.

(R-2913) His father never mentioned getting any money as a result of his mother's death and never mentioned any insurance. (R-2913-14)

Ms. Jean Bennett, Mr. Golden's sister, testified he "was always the peacemaker." On several occasions, she sent her oldest son to live with Mr. Golden for a semester out of fear her husband would abuse the child. That son had just graduated from law school -- for which he credited Mr. Golden -- and would have attended but for the bar exam. (R-2915) Also, Mr. Golden had helped their younger brother, David. (R-2916) She had never seen Mr. Golden exhibit violent or dangerous behavior; he did not even spank his children. She testified "you have to remember we loved Ardie, too." Her brother never sought material things for himself; "it was sports and school. You know, that was their life. That was both of their lives." (R-2917)

David Golden, age 36, testified Mr. Golden was "more of a father-brother to me." (R-2918,2921) When he was young and his mother worked, "Andy is the one that took care of the rest of my brothers and sisters, too." (R-2918) He had only lived with his mother without Andy there "probably three or four years of my

life."

> I got kicked out of school because I was a wild kid. So where do I go? I go back to Andy, and he puts me back in school. And Andy's a fine person. I used to get in fights, because you went to a new school, you've got to fight your way to make something out of yourself, that's what I used to think. And he would correct me on that. I mean, you know, if anybody needed their butt busted, it should have been me because I was a wild kid. And so he would straighten it back out, and I would go back to stay with my mother.

(R-2918) When he was old enough, he quit school and joined the military. Shortly, when his young wife left him with their small son to raise, he returned to the Golden home, where they cared for him and his son. David testified his brother got him into auto mechanics school where he got a three-year degree. He is now remarried with a good job and a second son.

> And, basically, I owe my life to this man ... And if he was a violent person, I would probably have bruises on my butt to prove it, but I don't. He's never paddled me. His boys are spoiled rotten. That's probably why he's in the shape he's in, is because if his boys want a car, by gosh, he'll give it to them.
>
> And his wife, there was nobody -- there was no more love between two people than them two people. I mean, I can't believe I was never asked a question on these things, because I lived with these people. These people raised me and I was old enough to see there was a love there that no man could separate. No man whatsoever could separate them people. And like I said, she was like a mother to me. And if he had anything to do with it, I wouldn't have -- I wouldn't be here today.

(R-2919-20) David testified that, three years earlier, he had moved his family from Missouri to live near the Goldens; he saw

them three or four times a week. (R-2920)

The most important thing in Mr. Golden's life was his wife and family. He did not consider Mr. Golden to be a person who sought material gain or considered money important. He never saw the Goldens arguing in any violent or dangerous manner. (R-2921)

The defense rested. (R-2922-23)

In its penalty argument, the State argued that

> [T]his is not about emotionalism. This is not about these poor boys who are sitting out here ... their feelings and what is going to happen to them has no place in your deliberations at this point.

(R-2924) He argued that individual jurors could assign different weights to the same aggravating circumstance or could reach the same conclusion for different reasons. (R-2925) He specifically argued there was "not any question" that the "[t]hree aggravating factors far outweigh whether Mr. Golden was a nice guy ... [because] ... you're only going to be read two mitigating factors." (R-2925) The prosecutor then stated that it was not simply a counting process where "three beats two" but an individual weighing process. He argued that, aside from the lack of criminal history, "The only other mitigating factor is a catchall that says any other aspect of the Defendant's character or the nature of the offense." However:

> Do we take nice guys who haven't committed other criminal offenses in their life and exclude them from the electric chair? That's not what the law says.

(R-2926) He argued that the question was whether the defense could "put enough on the mitigating side of the scale to make it

weigh more" than the aggravating side. (R-2927) He argued the "especially heinous, atrocious and cruel" death of Ms. Golden outweighed his being a "nice guy to other people." (R-2928) "So take all three of those together and you put on the other side Mr. Golden being a nice guy." (R-2929) He argued the jury should not be swayed by irrelevant arguments about electrocutions or justice only requiring life in prison or the law somehow favoring life. (R-2930-31, 2932-33) He again argued the jury should not make the decision on an emotional basis. (R-2932) He advised such arguments "are to play on your sympathies" and keep the jury from doing its job. (R-2933) He argued the consequences of their decision were "on his head, not on yours." (R-2923-24)

> Let me close with this: If at any time when you're back in that jury room, you find yourself feeling sympathy for Mr. Golden, get out a piece of paper and write down "cold, calculated, and premeditated, heinous, atrocious, and cruel, and financial gain."
>
> Remember that heinous, atrocious, and cruel has to do with Ardelle Golden gasping for breath. That's all I have.

(R-2934)

The defense basically reargued the evidence as to inocence. (R-2939-51)

The court instructed the jury that they must decide "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (R-2953) The jury was instructed as to three aggravating circumstances (that the homicide was committed for pecuniary gain, was especially

heinous, atrocious, or cruel, and was committed in a cold, calculated, and premeditated manner without any pretense or moral or legal justification) and two mitigating circumstances (Andrew Lee Golden has no significant history of prior criminal activity and "any other aspect of the Defendant's character or record and any other circumstance of the offense". (R-2955) Both the preliminary and final instructions indicated that mitigating circumstances must outweigh aggravating circumstances to render a life recommendation. (R-2901, 2953)

The jury left the courtroom at 11:22 a.m. (R-2958) After requesting the evidence, the jury returned at 1:37 p.m. with an advisory recommendation of death by a vote of 8 to 4. (R-2658-59; 3300) The jury was polled and discharged. (R-2959-62) Counsel filed sentencing memoranda prior to the sentencing hearing of November 8, 1991. (R-2963, 3301-06, 3310, 3318, 3329-30)

On November 15, 1991, the court sentenced Mr. Golden to death. (R-3336-37) The Judgment and Sentence reflect the court's finding of two (2) aggravating circumstances (that the capital felony was committed for pecuniary gain and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification). (R-3345-46) Even though the jury had been instructed on it, the court expressly rejected a finding that the murder was especially heinous, atrocious or cruel. (R-3347) As to mitigation, the State agreed and the court found that Mr. Golden had no significant history of prior criminal activity. (R-3348) Additionally, the court found three (3)

nonstatutory mitigating circumstances:

1. The Defendant assumed the obligation to help raise his younger brother and was otherwise a "nice guy".

2. Mr. Golden had been married to the victim for some twenty-four years, with whom, according to his oldest son, Golden was "best friends."

3. Mr. Golden was in some respects a role model for his children, involving himself in and encouraging their school and sports activities.

(R-3350) The court concluded:

> The cold, calculated and premeditated murder of his wife of twenty-four years and the exaltation of his own material wealth over the very life of his wife sets this murder apart from others. The Court further concludes that, albeit there are both statutory and non-statutory mitigating circumstances, they are heavily out weighed by the aggravating circumstances. The appropriate penalty for the murder of Ardelle Golden is death.

(R-3350-51)

SUMMARY OF ARGUMENT

ISSUE I: The State failed to prove that Ms. Golden's death was the result of a crime as opposed to an accident or suicide. Proof of motive in the form of potential insurance benefits can not replace that essential element of homicide.

ISSUE II: The trial court erred in excusing a juror for cause, over objection, after she had indicated she could follow the law in spite of "mixed feelings" about the death penalty; there was no basis to believe her views would "substantially impair her performance."

ISSUE III: The court erred by admitting evidence of motive and collateral crimes prior to substantial, independent proof that a criminal agency was responsible for Ms. Golden's death. There was an unacceptable risk that the jury convicted Mr. Golden because his wife was insured rather than because the State proved his guilt by more than a mere suspicion. This was especially true when the jury received no instruction on the relevance of evidence of motive or collateral crimes.

ISSUE IV: The court erred by admitting repeated allegations of criminal conduct in connection with financial matters, when the evidence was not probative of guilt, was directed at Mr. Golden's character rather than proof of murder, and the prejudicial impact clearly outweighed any minimal probative value. The prejudice was compounded by the court's failure to give any instruction preceding this evidence or following the

close of evidence.

ISSUE V: Fundamental error was committed when the trial court chastised Mr. Golden in the presence of the jury. The prejudice was increased exponentially when the defense attorney joined in and made Mr. Golden apologize to the prosecutor. Together with the prosecutor's ongoing caustic behavior, the three conveyed to the jury a very unfavorable opinion of Mr. Golden, depriving him of a fair trial.

ISSUE VI: The trial court abused its discretion when it denied the defense request for a jury view. The defense theory of an accidental death hinged on the jury being able to understand what the scene looked like in the dark, and no amount of photographs could satisfy that need.

ISSUE VII: The trial court committed prejudical error in admitting, over defense objection, repeated instances of hearsay, ruling that nonverbal communications did not constitute hearsay.

ISSUE VIII: Fundamental error was committed by the prosecutor's repeated comments on Appellant's right to remain silent, as the prosecutor made six separate references in argument and examination to the defense's failure to call witnesses or present evidence.

ISSUE IX: The trial court's failure to sequester the jury was fundamental error. Even though the defense acquiesced, Mr. Golden did not make a knowing, intelligent and voluntary waiver, and there were other circumstances (lack of adequate admonitions and bailiff communications with jury) which caused fundamental

prejudice to Mr. Golden.

ISSUE X: The trial court erred by improper limitations on defense cross-examination. The cumulative effect of those errors, as well as those raised in Issues V, VIII and IX, deprived Appellant of a fair trial.

ISSUE XI: Appellant's death sentence must be vacated because the trial court improperly excluded defense mitigation evidence that Ms. Golden considered Mr. Golden a good husband and was happily married to him.

ISSUE XII: Appellant's death sentence must be vacated because of the prosecutor's improper and prejudicial penalty argument advising the jury that mitigation evidence was invalid and minimizing their responsibility in deciding on sentence.

ISSUE XIII: Appellant's death sentence must be vacated because the trial court erred in not finding as nonstatutory mitigation that Mr. Golden was nonviolent, as he presented a "reasonable quantum of competent, uncontroverted evidence" on this point.

ISSUE XIV: Appellant's death sentence must be vacated because there was insufficient evidence of the aggravating circumstance of pecuniary gain.

ISSUE XV: Appellant's death sentence must be vacated because there was insufficient evidence of the aggravating circumstance of cold, calculated and premeditated.

ISSUE XVI: Appellant's death sentence must be vacated because the trial court improperly allowed the jury to consider

the aggravating circumstance of especially heinous, atrocious or cruel when this factor was not found by the trial court to have been proven beyond a reasonable doubt. Because the prosecutor especially argued this factor, as well as its recognized emotional nature, Appellant's death sentence is likely due in large part to this factor.

ISSUE XVII: Appellant's death sentence must be vacated because the aggravating circumstances were improperly based upon the same facts, as set out in Issues XIV and XV, supra.

ISSUE XVIII: The death sentence is disproportionate in this case.

ISSUE XIX: Appellant's death sentence must be vacated because the trial court improperly instructed the jury that mitigating circumstances must outweigh aggravating circumstances to recommend a life sentence.

ISSUE XX: Appellant's death sentence is unconstitutional because the failure of Section 921.141 to assign weights to individual aggravating and mitigating circumstances, and because failure to require special verdicts as to penalty, results in an arbitrary and capricious application of death sentences.

ARGUMENT[16]

The evidence presented in this case being in the nature of wholly circumstantial leads to the very real possibility not only that an innocent man may be sentenced to death, but that a man could be sentenced to death for an offense that never occurred.

(R-3332)

[16]All emphasis in Argument, except for citations within quotes, is supplied unless otherwise indicated.

ISSUE I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AS THE EVIDENCE WAS LEGALLY INSUFFICIENT TO PROVE THE DEATH OF APPELLANT'S WIFE WAS THE PRODUCT OF A CRIMINAL AGENCY.

Appellant contends that the trial court erred in denying his motions for judgment of acquittal and motion for judgment notwithstanding the verdict, as the circumstantial evidence was insufficient to prove beyond a reasonable doubt the quintessential element that his wife's death was the result of a criminal agency (as opposed to a car accident or suicide). The defense stipulated to the elements that a death had occurred and that the decedent was Ms. Golden. (R-78, 3215, 3297)

Two primary aspects of this case must be emphasized at the outset: First, there was no physical evidence that Ms. Golden's death was a homicide, i.e., the result of a criminal act, as opposed to an automobile accident or suicide.[17] Evidence of motive -- standing alone -- cannot supplant proof of the essential element that a death was caused by a criminal agency. Otherwise, every time an insured dies, the beneficiary could end up with a death sentence. Second, in the overwhelming majority of murder convictions, including those cases discussed herein where the convictions have been reversed on the basis of insufficient evidence, the defendant's presence at the scene is established by admission or evidence, and the main question is

[17]See, e.g., R-1486, 2018-19, 3089.

whether the death was intentional or accidental.

On the contrary, this case stands apart by the fact that there is no evidence to dispute the testimony of Mr. Golden -- a 46-year-old man with no prior record (R-3004) -- that he was asleep at home with his teenage sons at the time of his wife's death. That is, there is not even any evidence Mr. Golden was present at the time of death.

In this situation, it must be kept in the foreground that Mr. Golden does not know how his wife died. Constitutionally, he cannot be required to explain how the death occurred. Even though his attorney[18] presented two potential scenarios of an accidental death at trial, the bottom line is that Mr. Golden was not present at the time of his wife's death and so can only theorize as to how her death occurred.

The State argued at trial that the evidence disproved the defense attorney's argument that the car was driven into the lake accidentally. Putting aside for a moment the deficiencies in the State's position, and assuming arguendo that the evidence proved beyond a reasonable doubt that the car was driven into the lake intentionally, it gains the State nothing, because it fails to disprove suicide, i.e., that the car was driven into the lake

---

[18]Even though this record does not explain why the defense attorney chose to argue accident, as opposed to accident or suicide, it should be noted that insurance policies generally contain a clear exclusion for suicide. Compare Buenoano v. Singletary, 963 F.2d 1433 (11th Cir. 1992)(remanded for evidentiary hearing on question whether attorney ineffective due to conflict of interest based on conflict of interest.)

intentionally by Ms. Golden.[19] Absent disproof of that reasonable hypothesis, Mr. Golden's conviction cannot stand. Lee v. State, 96 Fla. 59, 117 So. 699 (1928).

A. Trial Court Standard

The defense moved to dismiss the charge herein and argued the motion a second time when the new trial judge was substituted. The trial judge -- who was new to the bench and overseeing his first capital trial (R-62, 1425, 2923) -- expressed his own initial disbelief of the evidence in his order reducing bond: (R-3099)

> the nexus, if any exists, which might in anywise expose the Defendant to criminal liability for the death of Mrs. Golden appears frail at best. . . . there appears a dearth of evidence showing that the death was the product of any criminal agency.

Later, however, upon his denial of the renewed motion for judgment of acquittal, the trial judge stated:

> THE COURT: Thank you, Counselor. The motion seemed to hang on the Defense assertion that there was no criminal agency or there's no evidence from which the criminal agency could be inferred. Recounting just a few things, Counselor, the lady could not see more than 10 inches without her glasses, according to the evidence, and her glasses were folded up and in the case and in her purse. Her flops were, as I recall, neatly placed together on the shore.
>
> MR. SMITH: Excuse me, Your Honor. Neatly placed together on the shore; they were in the water. One was upside down, and one was

[19]If it had been driven in intentionally by Mr. Golden, he would have had injuries consistent with an automobile accident.

-- they weren't on the shore.

THE COURT: At the shore, I'm sorry. She had just been to the lake. She went to get her cigarettes -- went back to get her cigarettes. And to suggest she didn't know the water was there where she had just been wading, according to the Defendant's statement, it's hardly likely she didn't know the lake was there.

There are so many factors to suggest otherwise, the Court cannot simply arbitrarily say that it was an accidental death. To accept the Defendant's assertion that Mr. Golden is a person who can bring about the death of another and there is no smoking gun, so to speak, or direct evidence of criminal agency, that the murder is then immune from prosecution, this Court can't buy that.

The self -- excuse me. The first-degree murder instruction that has been requested, and it's a standard instruction, reads as follows: Before you can find the Defendant guilty of first-degree premeditated murder, the State must prove the following three elements beyond a reasonable doubt: Number one, the person alleged to have been killed is dead. Number two, the death was caused by the criminal act or agency of the Defendant. And, number three, there was a premeditated killing of the person alleged to have been killed.

The second element, Counselor, is the death was caused by the criminal act or agency of the Defendant, suggesting that it is a jury issue. I believe it is, and I think I would be in error to withdraw from the jury's consideration the facts of this case. I'm going to deny the motion. (R-2519-21)

Thus, the trial court did not appear to have a clear understanding of the standard for a trial court's decision on a motion for judgment of acquittal. The correct standard is not whether the State has presented a consistent theory of guilt but

whether the State proved that the death was, in fact, a homicide, and disproved any reasonable hypothesis of innocence. Davis v. State, 90 So.2d 629, 631 (Fla. 1956). Also, just because there is a jury instruction on an issue in no way relieves the trial court of its responsibility.

> [I]t is for the court to determine, as a threshold matter, whether the state has been able to produce competent, substantial evidence to contradict the defendant's story. If the state fails in this initial burden, then it is the court's duty to grant a judgment of acquittal to the defendant . . ..

Fowler v. State, 492 So.2d 1344, 1347 (Fla. 1st DCA 1986). In State v. Law, 559 So.2d 187 (Fla. 1989), this Court clarified the standard which must be applied by a trial court in deciding a motion for judgment of acquittal. This Court concluded:

> A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt.

Id., at 188.

Finally, even after conviction, the trial judge indicated that he "did not know what happened out there" and "you have to rationalize on either side" of the case. (R-2890-91)

B. Appellate Standard

It is elementary that one accused of a crime is presumed innocent until proven guilty beyond and to the exclusion of a reasonable doubt. Davis v. State, 90 So.2d 629, 631 (Fla. 1956). Where the State fails to prove a defendant's guilt beyond a

reasonable doubt, the evidence is legally insufficient. Id. The legal sufficiency of the evidence to support a conviction is a matter of law for the court. Id.

When the State relies upon circumstantial evidence, the evidence must not only be consistent with the defendant's guilt, it must also be inconsistent with any reasonable hypothesis of innocence. See, e.g., McArthur v. State, 351 So.2d 972 (Fla. 1977); Jaramillo v. State, 417 So.2d 257 (Fla. 1982). As the court emphasized in Fowler, 492 So.2d at 1346:

> It has long been held in Florida that 'where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence in inconsistent with any reasonable hypothesis of innocence'. McArthur v. State, 351 So.2d at 976, n. 12 (emphasis supplied). This means, as stated in Mayo, "Evidence which leaves one with 'nothing stronger than a suspicion' that the defendant committed the crime is not sufficient to sustain a conviction." 71 So.2d at 904. (Emphasis in original)

A clear analysis of this issue is aided by a distinction between those cases where the defendant's presence at the time of death is established and those cases where a homicide is established by the victim's condition or manner of death.

1. Presence established. When the defendant's presence at the time of death is established, the primary question is whether the death was a homicide. In these cases, it is only logical to expect that the defendant have an explanation of what happened and that the State need only disprove that version of events. By stark contrast, however, are those cases such as this where the

defendant's presence is not established and so the defendant cannot logically or constitutionally be expected to explain how the death occurred, i.e., whether it was accidental, suicidal, by natural causes, or by some third party. See Lee v. State, 96 Fla. 59, 117 So. 699 (1928).

In McArthur, the defendant's presence was admitted, and the only question for the jury was whether the shooting was accidental or premeditated. 351 So.2d 972. The evidence could not disprove that it was an accident or discount all the evidence supporting that conclusion. In McArthur, this Court wrote:

> In applying the standard, the version of events related by the defense must be believed if the circumstances do not show that version to be false.
>
> The jury could reasonably have concluded, and obviously did conclude, that it was more likely that the appellant murdered her husband than she did not. Yet, "even though the circumstantial evidence is sufficient to suggest the probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence".

Id. at 976 n.12, 978. See also Fowler, 492 So.2d 1344 (first-degree murder conviction reversed because evidence failed to exclude reasonable hypothesis of innocence that shooting was in self-defense).

The defendant's presence at the scene was also admitted in Mayo v. State, 71 So.2d 899 (Fla. 1954). As in this case, the State had presented a speculative theory, arguing the defendant had put blanks into a deputy's gun and then provoked him into the first shot. Reversing the conviction for first-degree murder of

the officer, this Court cited similar cases and held:

> Circumstantial evidence is never sufficient to support a conviction where, after there is assumed all to be proved which the evidence tends to prove, another hypothesis still may be true, because it is the actual exclusion of each other hypothesis which clothes mere circumstances with the force of proof. Thus evidence leaving uncertain which of several hypotheses may be true, or establishing only a probability favoring one hypothesis rather than another, cannot be equal to proof of guilt, no matter how strong the probability may be.

Id. at 904. As here, the State's case was based on inference, speculation and innuendo which would "tax the mind of the most credulous". Id.

At trial, the prosecutor relied almost exclusively on Buenoano v. State, 478 So.2d 387 (Fla. 1st DCA 1985), as an "almost identical" case. (R-3225-26) He argued repeatedly that Buenoano was on Death Row for drowning her son, which of course was clearly untrue.[20] (R-3093-94, 3225) Further, analysis shows that case to be dramatically different:

(a) Buenoano's presence at the time of death was admitted.

(b) The most powerful evidence was that Buenoano poisoned or attempted to poison four other related men in a 10-year period of time, all to collect insurance benefits; and she had actually collected large sums of money. Buenoano v. State, 527 So.2d 194, 196 (Fla. 1988).

(c) Physical evidence at the scene directly disproved her

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[20]The State also misread or misrepresented other facts of Buenoano to the trial court. Compare Buenoano, 478 So.2d at 388 with R-3249.

accounting of events.

(d) She had a bad relationship with the victim, one of her sons.

(e) She made confessions to third parties.

(f) Finally, she did not receive a death sentence in that case but in a subsequent conviction for poisoning of her husband based on the presence of four aggravating circumstances and no mitigating circumstances. Buenoano v. State, 527 So.2d at 198-99.

Thus, for all these reasons, the State's reliance on Buenoano, which obviously affected the trial court's rulings, was misplaced.

2. Homicide established. On the other hand, when it is clearly established that a death is a homicide, the main question is the identification of the killer.

In Cox v. State, 555 So.2d 352 (Fla. 1989), this Court wasted very little time in reversing the conviction and instructing the trial court to enter an order of acquittal. Although the death was clearly a homicide, the State failed to produce any direct evidence of Cox's involvement or presence at the scene. Even though a hair, O-type blood, and a boot print found in the victim's car were connected to Cox, the connection was not conclusive, and this Court held that that evidence "could have created only a suspicion, rather than proving beyond a reasonable doubt" that Cox killed the victim. Id. at 353. A final relevant comparison is that the evidence "cast doubt on

Cox' alibi", id., whereas here there was no evidence as to the time of death and thus absolutely nothing to dispute Mr. Golden's testimony that he was home asleep at the time his wife drowned. See also Scott v. State, 581 So.2d 887 (Fla. 1991)(capital defendant discharged, in part, due to insufficient evidence); Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990)(first-degree murder conviction reduced to second-degree because evidence failed to exclude reasonable hypothesis of innocence, in spite of substantial physical evidence).

Likewise, the defendant in Jamarillo v. State, 417 So.2d 257, claimed that he was not even present at the time of the death (which was established to have been a homicide). Since there was no evidence the defendant's fingerprints had not been placed in the murder victim's home on a previous occasion, as he testified, the State had not disproved his reasonable hypothesis of innocence. Even though he had been sentenced to death, just as in Cox, id., this Court discharged the defendant. Jaramillo, 417 So.2d at 258.

Another interesting case was Biggs v. State, 513 So.2d 1382 (Fla. 3d DCA 1987), in which the Third District Court of Appeal reversed a murder conviction where it was clearly established both that the death was a homicide and that the defendant was present. There, the defendant and a friend had gone fishing, and the friend left the defendant's view momentarily. The defendant testified he heard two thumps and then found the victim battered and bleeding and called for help. The State put great weight on

the fact that the defendant did not mention seeing a boat of unidentified men near the victim until after his arrest; however, this Court found that evidence insufficient and reversed. (A noteworthy parallel to this case is that Biggs was crying at the scene, and the officers here testified that Mr. Golden's behavior upon being told of his wife's death was consistent with that of an innocent man.)

The case most closely analogous to this case is Davis v. State, 90 So.2d 629 (Fla. 1956). Just as here, there was neither evidence that the defendant was present at the time of death nor that the death was the product of a criminal agency. The defendant testified he had gone fishing in the morning with his wife; he took a nap and last saw her cooking on the bank. When he awoke and could not find her, he sought help, and her drowned body was found when it surfaced between 2:00 and 2:30 that afternoon. Even though there was evidence in Davis that the defendant had previously threatened and abused his wife, this Court reversed the conviction because the evidence did not disprove his testimony. This Court wrote:

> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict.

Id. at 631-32. In Davis, the medical examiner had opined that the time of death was approximately noon, when the defendant was with deputies searching for his wife. By comparison, this case

presents even weaker evidence. There is not even a hint that Mr. Golden was anything but gentle with his wife for 24 years, plus there is no evidence as to the approximate time of death. Thus, the State failed in any way to disprove that Mr. Golden was at home asleep at the time of the drowning.

Long ago, this Court held:

> If the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be.

Gustine v. State, 86 Fla. 24, 27, 97 So. 207 (1923). Accord Fowler v. State, at 1347-1348 ("Evidence that leaves room for two or more inferences of fact, at least one of which is consistent with the defendant's innocence, is not legally sufficient to make a case for the jury."). See also Hall v. State, 90 Fla. 719, 107 So. 246 (1925).

Another closely analogous case is Lee v. State, 96 Fla. 59, 117 So. 699, 702 (1928), where this Court set out the nature of proof necessary in a case such as this, i.e., where there is no proof of the defendant's presence or that a criminal agency caused the death:

> [I]n homicide cases the corpus delicti cannot be said to be proven until it is fully and satisfactorily proven that such death was not caused by natural causes, accident, or by the act of the deceased. In homicide cases, when proof of the corpus delicti rests upon circumstances, and not upon direct proof, it must be established by the most convincing, satisfactory, and unequivocal proof compatible with the nature of the case, excluding all uncertainty or doubt.

This Court concluded in Lee that there was "grave doubt whether the corpus delicti" was established. Id. Just as here, the decedent drowned, but there was no evidence the defendant was present at the time and no evidence of any foul play or a struggle (except a recently broken tooth). Just as here, there was evidence of motive (the defendant there had threatened the victim three or four days earlier). However, this Court had little difficulty finding that the evidence in Lee:

> Penetrates far into the realm of speculation and improbability. It would require a most generous and elastic stretch of the imagination to conceive of the possibility.

Id. The Court concluded succinctly:

> It is not sufficient that the facts create a strong suspicion or probability of guilt, or are consistent therewith; the facts must be inconsistent with innocence.

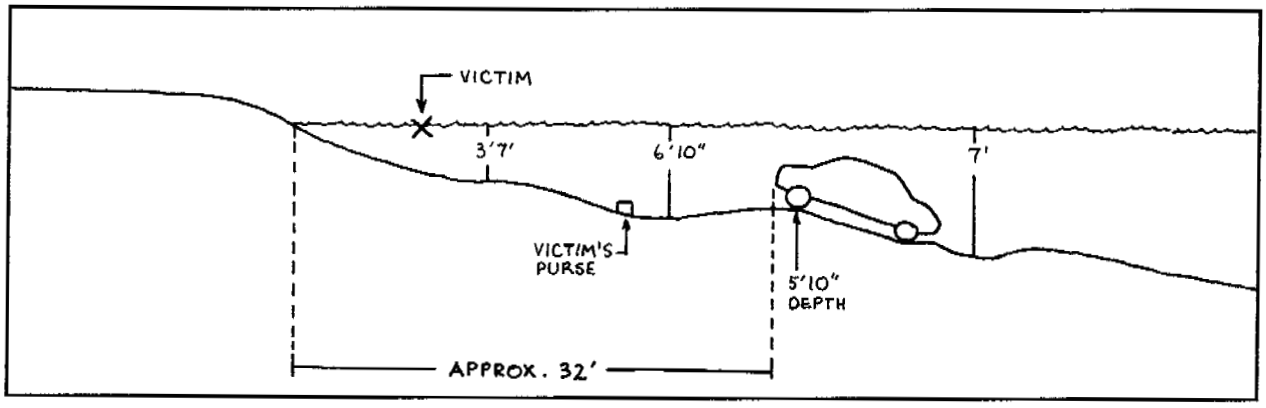
Id.

Although the State in the present case may have raised a "suspicion", Lee v. State, id., that is not sufficient. It was the duty of the State to establish beyond a reasonable doubt that Mr. Golden was guilty of killing his wife -- and that she did not die accidentally or suicidally. By failing to prove that his wife's death was caused criminally, that he caused her death, or that he was even present at the time of death, the State failed to prove his guilt beyond a reasonable doubt.

C. State's Theory

The State's theory, advanced only briefly during closing

argument (R-2801), was that Ms. Golden took off her glasses and walked to the end of an almost condemned, uneven dock in the middle of the night to make out with her husband of 24 years, where he unceremoniously pushed her into the water (which was fortuitously deep enough), threw her purse out in the lake, and then drove the car in the lake, swam out, and ran home. Reproduced below is the side view diagram prepared by Sergeant Melson showing the water depths in relation to the car's resting place. It should be remembered that these depths are calculated from measurements taken April 2, 1990. Also, if Sergeant Melson really measured the depth on September 13, 1989, why did he measure again and calculate the change? Why did he testify the water "appeared" shallower on September 13th than when he measured it in April, 1990?



First, the prosecutor himself admitted:

> Now, what physical evidence is the State ever going to be able to produce that Mr. Golden pushed that woman off that dock? Nothing.

(R-2802) Second, he argued that Mr. Golden's credibility was

critical:

> This man is a consummate liar. And that is the fallacy on which the entire defense is based.

(R-2795; see also R-2794, 2812) Finally, for the following reasons, the State's theory is inconsistent with the evidence:

1. The State's evidence showed that Ms. Golden wore her glasses everywhere except to bed or in the water; without them, she could not see 10 inches in the daytime and even less at night. Why on earth would she have taken them off to walk out on a rickety dock late at night? The State's argument showed its internal inconsistency:

> What about her glasses? Well, she was out there making out with him, if that's even true, I submit to you that would be a reasonable time for her to have her glasses off.... (R-2802)

2. The prosecutor argued that Ms. Golden was "terrified" of water. Putting aside for a moment the fact that there was no evidentiary basis for that characterization,[21] if that were so, why would she have voluntarily been at the end of a 62-foot dock, virtually blind without her glasses, to make out with her husband of 24 years?

3. There was no evidence of a struggle, which is consistent with the conclusion that he did not hold her under the water. This is also supported by her greater weight (i.e., she might have won in a struggle), by all the evidence that he was totally

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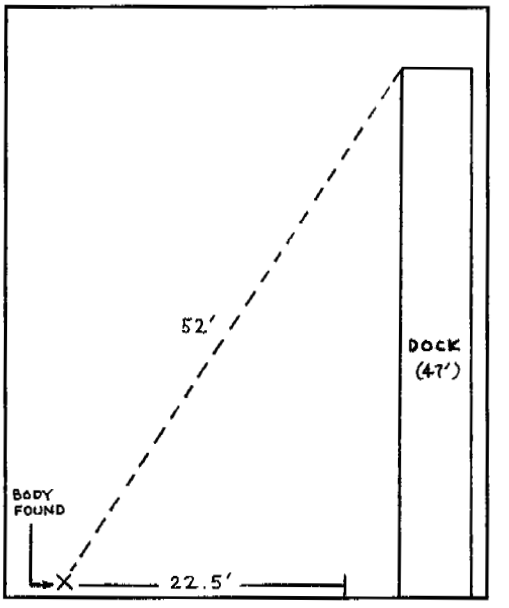
[21]Darin Golden, on testifying about her swimming, stated she was afraid of water "to a point".

nonviolent, by the Medical Examiner's testimony that a drowning person will often panic and be disoriented, hurting even a would-be rescuer, and by the height of the dock out of the water. (See Exhibit 12)

4. The prosecutor argued there was no current, not even enough to move the flip-flops. (R-2799, 2804) If that were true, how did her body get over to the center of the ramp approximately 52 feet away from where he says she was pushed in? (The chart to the right demonstrates the calculation of this distance based on the State's evidence.)



5. Why would Mr. Golden pick a location immediately adjacent to a residence? How could he have known if someone was home who might see? His unrebutted testimony was that the patrons at a nearby drive-in could be heard from the dock; likewise, he could not risk the neighbors or drive-in patrons hearing his wife if she screamed or hearing the car going into the lake.

6. Would he have risked his sons waking up to ask, "Where's Mom?" when he ran home wet?

7. Why would he have waited until he had had the rental car ten weeks, well over the normal four-week coverage period of that insurance?

8. Why would he not have applied for this alleged[22] $200,000 coverage if that was the main motive for killing her? He did not have any reservation about filing claims for other coverage, but he did not file a claim for the potential $200,000 until the company asked him about it in March, six months after the death. He also never applied for the extra $14,000 accidental death benefit through her employer and CNA Insurance had "difficulty" locating him, just like American Express.

9. If he carefully planned this for months, why would he have thrown her purse into the water instead of leaving it in the car? (If he had thrown it in, it could have been run over when he drove in the car.) Why would he have left her flip-flops sitting on the shore if, indeed, they were ever left there?

10. Most importantly, if he pushed her off the end of the dock and then drove the car in, the wake from the car would have washed her body even further from the ramp, probably under or past the dock so that it would never have ended up where it did.

D. Defense theory

The two potential scenarios of accidental death presented by defense counsel were:

1. Stop and roll. Emphasizing all the while that he did not know how it happened (R-2837), the defense attorney in opening argument suggested that the car rolled along the bottom

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[22]No payment on this policy had been made as of trial. See the further discussion of this insurance, infra.

of the lake until the point where the front wheels were in the washout area, that Ms. Golden saw she could walk out and so removed her glasses to protect them[23] and opened the door to get out. However, when her foot left the brake, the car rolled into the hole, pulling her down where she drowned and her purse sank. Her body then surfaced and washed shoreward. (R-3247-48)

2. Plane and sink. The defense attorney also posited a scenario where the car planed out when it the water and then sunk at a forward angle. All things considered, this is clearly the most logical, consistent explanation of Ms. Golden's death.[24] Common sense and basic physics document that a car driving into the water will float initially due to air inside and the resistance of the water surface when the car hits. Then, the heavier front end will sink much faster than the trunk where air is trapped, pulling the car down at a forward angle. The side view diagramed by Sergeant Melson (Exhibit 64)[25] and reproduced

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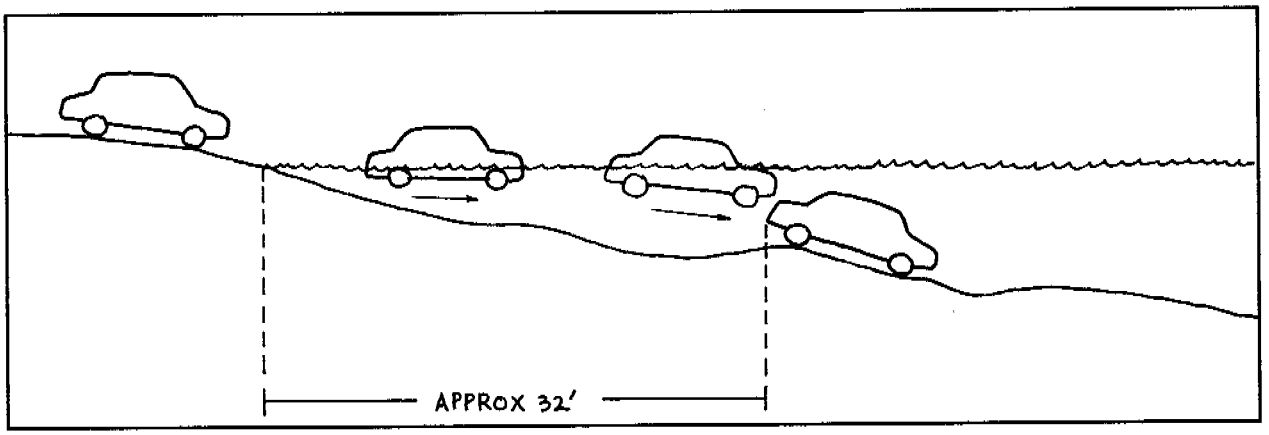
[23]Mr. Golden and Chip Golden testified she had previously lost her glasses when hit by a wave at the ocean so it was typical of her to protect them when in water. (R-1546-47)

[24]There was no testimony as to the probable path of a car driving into the lake, how that path would vary with different speeds, or how quickly or slowly the car would have sunk. Curiously, the State's accident reconstructionist was not asked any questions relevant to this. Also, the defense attorney indicated an intention shortly before trial to hire an accident reconstructionist, but the State indicated it would be in violation of discovery rules, and no further mention was made of it.

[25]It should be noted that the crime scene investigator, Sergeant Melson's, directions on this diagram are directly contradictory and are both wrong. The video and testimony clearly document that the direction the dock and the car pointed into the water was roughly North-northeast.

supra is set out again here, at the same scale, only with the probable path followed by the Golden car:



Even when we know that a particular death was accidental, we cannot always perfectly understand how it occurred; that is, just because it was an accident does not mean all the pieces will make perfect sense or have a perfect fit.

C. Evidentiary analysis

1. Cause of death. The Medical Examiner testified the cause of death was drowning. Although the autopsy lists the "manner of death" as "accidental", he testified a drowning could not be classified as homicidal, suicidal or accidental absent extenuating circumstances. He testified there was no evidence of foul play, no evidence of a struggle, and no evidence the death here was the result of anything but a single-car, single-occupant accident. He testified at trial that the bruised forehead and scraped knees were postmortem, but Sergeant Melson maintained that he was told at the autopsy that these injuries were consistent with an automobile accident. One scrape measuring

1/2-inch by 1/32-inch on the back of her neck could have been caused by "anything", could have been several days old, and had no significance. All other marks were antemortem and of no significance.

2. Criminal agency. The detectives both testified there was no direct evidence Ms. Golden died as a result of the criminal act of another.

3. Time of death. The State presented no testimony as to Ms. Golden's approximate time of death or how long it might have been before her body resurfaced.

4. Location of car, body, and purse. Ms. Golden's body was first seen at 3:36 a.m. floating approximately 8-10 feet from the water's edge, directly off the center of the ramp, headed toward shore. The back of the car was 32 feet directly off the center of the ramp. The purse was found 9-10 feet behind the car in the wash-out area. The State's aerial view diagram included in Exhibit 64 demonstrates the relative location of these items. Thus, the body and purse were in line between the center of the ramp and the car, just as though Ms. Golden had attempted to make it back to shore and drowned. The aerial view diagrammed by Sergeant Melson (Exhibit 64) shows that the body was headed into shore (plus see Exhibit 4, photograph of deceased). This photo (Exhibit 4) shows her body several feet from the ramp. By the time Sergeant Bowman, the homicide investigator, arrived (no time of arrival was given), Ms. Golden's body had moved to within 6 inches to 1 foot of the edge of the ramp.

It is obvious not only from that movement (directly in line between the car and ramp), but also from the significant water movement shown in the videotape and the evidence of the washing up of her T-shirt, that there was a "whole lot of movement goin' on" out there, contrary to the State's argument that there was no movement. (Remember also Bowman' testimony as to current and the absence of testimony as to other possible intervening factors such as changes in wind and boats passing by.) Thus, the State wanted to argue the calmness of the water when it suited their theory about the flip-flops while inherently relying on the water's movement of the body for their "end of dock" theory.[26]

5. Visibility. There was much attorney talk,[27] but no evidence, as to the position of the moon in relation to a driver approaching the ramp or the overall lighting conditions of the ramp at midnight or later. It is apparent from the videotape that a driver heading down the ramp is heading roughly North-

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[26]The defense attorney speculated that Ms. Golden's forehead bruise and knee scrapes could have been caused if she floated over and banged into the dock and then floated back to where she was found. This was unnecessary given Sergeant Melson's testimony that these injuries were consistent with an automobile accident, and the prosecution very effectively mocked this defense argument by describing it as the "whirlpool" theory. (R-2799). These injuries could also have come from floating near the edge of the ramp where there were stones or broken concrete.

[27]The defense attorney argued the U.S. Weather Service reported that (R-1415):

> this whole area on the night of the 12th was partly cloudy, scattered clouds, and the moon was 45 degrees off the horizon going in the western sky, 78 degrees south of true west at the time, at 11:59 p.m.

northeast, which would have placed a descending full moon over and to the rear of the driver's left shoulder, casting no reflection on the water for the driver to see. According to Officer Heiman, the water was not visible even 50 feet away from the water's edge due to the drop of the ramp. See Exhibit 50. (R-1511)

6. Wind/current. Likewise, there was evidence of "little currents . . . sufficient to move a person along" (R-1744) but no evidence as to whether a boat passed through the lake or wind picked up or how those could have increased the movement of the body and the flip-flops in the water. There was no testimony how a 170-pound body would have floated and moved differently than a pair of flip-flops.

7. Speed of car/no skid marks. There was no testimony from the State's accident reconstructionist as to how fast the car was likely going when it hit the water. While a speed of 60 m.p.h. would have probably excluded an accidental death, a speed of 30 m.p.h. would have likewise probably excluded an intentional death (homicide or suicide) because a driver who wanted to be certain the car went far enough to ensure death would probably go faster than that. At the same time, a speed significantly greater than 30 m.p.h. would have caused significant physical injury to the driver via the seat belt and head and chest injuries. The lack of skid marks indicates either that the driver did not see the water in time to brake or drove into the lake intentionally.

8. Injuries to Mr. Golden. It only makes sense that -- if

Mr. Golden had driven the car into the lake -- he would have certainly sustained some head or facial injury. There were none, of course.

9. Driver's view of water. The evidence was that a driver could not see the water's edge even from 50 feet away. Due to this and other factors, a driver could easily not realize she was going into a lake.[28]

10. Presence at scene. There was no direct proof Mr. Golden was present at the time of death.

12. Dock. There was no evidence as to the depth of the water at the end of the dock to substantiate the State's theory she drowned after Mr. Golden pushed her off the end. (Presumably the State theorized the end of the dock to maximize the impression of water depth.) The testimony showed there was a hole directly out from the boat ramp due to the action of boat motors during launching, but there was no testing done in the area adjacent to the dock, and the dock was at least 25 feet to the side of the center of that hole. If the water at the end of the dock was less than five (5) feet deep, Ms. Golden (at 5 feet 5 inches tall) would have just stood up and asked her husband "What did you do that for?"

Also, given that it was an old dock, it is quite possible sand had accumulated, and even blown up from boat motors, to make the depth more shallow under the dock. Thus, the "end of dock"

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[28]The trial court's denial of a jury view is addressed in Issue VI, infra. The defense attorney's failure to present such evidence cannot be raised in this proceeding.

theory presented by the State fails the initial test that it must be supported by competent, substantial evidence. It is neither internally consistent nor consistent with the evidence.

12. Eyeglasses in purse. Why were Ms. Golden's glasses in her purse? That's one of the two strangest factors in this case. It was undisputed that her glasses were found in her purse and that the prescription sunglasses were in their case. Although Sgt. Melson testified the eyeglasses were also in a case, Detective Colburn testified they were not. In this regard, it is relevant to note that:

(a) even though all contents of the purse were photographed, there is no photo of this glass case;

(b) many of the contents were not inventoried (including Dexatrim tablets and a prescription), and nothing was catalogued which would indicate in which of the four compartments it was found;

(c) although Sgt. Melson testified the case was probably returned to Ms. Golden's brother for the funeral, the brother was curiously not even asked if this were true;

(d) the officers were probably not conducting as thorough an investigation as they might have had they not initially concluded the death was accidental and had both detectives not been novices;

(e) in Mr. Golden's taped statement of October 3, 1992, Det. Colburn twice (and only) referred to these glasses as being found "folded up in her purse";

(f) The purse (Exhibit 95) is so incredibly cluttered that it could easily lead to confusion. There are at least two explanations[29] why the glasses were in the purse, both of which are consistent with innocence, that are at least as credible as the prosecutor's speculation that Mr. Golden threw the purse into the lake. One is the defense attorney's argument that, realizing that she had accidentally driven into the water and reacting habitually to remove her glasses in the water, she put them into her purse to protect them while she tried to get out. This is consistent regardless of whether the car rolled forward into the lake as she tried to exit or planed out over the water and then sank.

The other explanation consistent with innocence is suicide, that is, that Ms. Golden took off her glasses so she could not see, mashed the gas pedal and flew into the lake, and then reflexively got out of the car (with the purse intentionally or unintentionally on her arm), and drowned.

13. Ms. Golden's flip-flops. The other big mystery is this: why were her flip-flops at the edge of the water? The photograph made that morning shows Ms. Golden's shoes in the edge of the lake water, amongst eel grass which had been washed in with the tide or current. (See Exhibit 3) They were not sitting on shore as though Ms. Golden had neatly placed them there.

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[29]There is also some indication that these glasses may not have been her current pair, but an old pair (R-2991), so maybe she did have on her glasses and they are still at the bottom of the lake somewhere. Speculative, perhaps, but no more so than the State's theory.

Nevertheless, the State pretended they were and relied heavily on the shoes as evidence that Mr. Golden had drowned his wife when they were at the ramp earlier.[30] Interestingly, the State did not call as a witness the officer who actually found the shoes. (R-1611) Although the written record is unclear, the photographs reflect that the dock was close to the ramp on the East side and the shoes were found by the edge of the ramp, between it and the dock, in the edge of the water. The State argued the shoes could not possibly have come off Ms. Golden's feet and floated to that location as in an accidental death, implying they could only have gotten there if she took them off to wade or walk out on the dock and Mr. Golden drowned her and forgot the shoes were there. However, no testimony was presented on this point, and it is common knowledge that very light objects will drift faster than a very heavy object, such as her body. Under the State's theory, if her body actually moved 52 or so feet from the end of the dock to the middle of the ramp, certainly the shoes could have floated off her feet and into shore. Also, when a body drowns, it sinks before resurfacing at some point, so it is also possible the buoyant flip-flops came off when the body sank and were then washed into shore.

14. Familiarity with area. Mr. and Ms. Golden had gone to Lake Hartridge that night together with him driving. He parked adjacent to the abandoned fire station across from the residence.

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[30]The judge's mistake on this fact is also clear in this above-quoted denial of the motion for judgment of acquittal.

When they left, he jogged to the Boys' Club; she drove the car and was waiting on him at the Boys' Club. The Goldens arrived home about 11:00 p.m. (to midnight). There was no evidence that she had ever been to that ramp previously.

The State argued that, since she had just been at the ramp, there was no way she could have returned to this street within minutes and not remembered where the ramp was. However, there is no evidence it was not an hour or more later if she went to their apartments on the Southeast side of town and stopped to buy cigarettes. The State also introduced some coworkers' testimony that, to their knowledge, Ms. Golden did not drive to work or office functions at night, but Mr. Golden and his sons testified it was not at all uncommon for her to go out alone at night.

The defense argued that, if she had returned to this street from the opposite direction of that in which she left, she could have been disoriented and not realized this was the same street which ended in a boat ramp. (It is also common experience that a passenger, Ms. Golden probably did not pay as close attention as the driver to the route to the ramp.) The aerial photographs in particular reflect this was an otherwise residential area. The defense attorney argued that, once a driver turns the corner onto this road,[31] there are no lights, no reflectors, and no warning that one is approaching a boat ramp, and that the ramp is steep enough that a driver's headlights would not strike the water

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[31]He argued it was 150 yards from the corner to the water. (R-3236)

until they were almost in the water. Further, he argued that street lights across the lake could create the illusion that the street continues.

15. Cigarettes. Ms. Golden had an unopened pack of True cigarettes and a cigarette case containing an opened pack with one cigarette remaining, all in her purse. The obvious inference (R-3038) is that she went to a store and bought a new pack before going in the lake. The testimony of Officer Smith that he canvassed five nearby stores open that time of night and the clerks did not recall her buying the pack is not conclusive. Those were not the only stores open; the clerks might have been mistaken; or a different clerk might have been on duty.

A second explanation offered by defense counsel was that she might have had the unopened pack all the time but either did not realize it because the purse was so cluttered or because it had fallen through the hole in the purse's lining. (Again, the purse's contents were dumped out before cataloguing rather than being catalogued by compartment.)

16. Inconsistent statements. Although there were some minor alleged inconsistencies in Mr. Golden's statements, they were not inculpatory and thus prove nothing aside from the question of inconsistency or witness memory. Compare Smith v. State, 568 So.2d at 966 (defendant told number of wholly inconsistent versions of wife's disappearance). Since the detectives took no notes, it was only their recollection as to which statements were made at which time. The statements also

reflected a very depressed man who wished to be left alone.

17. Rental car. Mr. Golden had had a rental car for over two months because his van had mechanical problems and was, in fact, turned back to the bank with that explanation. The older son used his own car daily, and Ms. Golden used her LTD to go to work every day. Thus, Mr. Golden needed the rental car for reliable transportation. While the rental might not have been a wise financial investment, that was certainly consistent with the Goldens' otherwise poor financial behavior.

18. Knowledge of insurance.

(a) Mr. Golden had no knowledge of his wife's insurance at work until her coworker came to the viewing on September 15 and had him sign a claim form. He never even applied for the additional $14,000 accidental death insurance, although the company sent him three letters.

(b) When Mr. Golden rented the car, he used his new American Express gold card. Since he had Allstate car insurance, he provided that coverage information to the rental agency so as not to pay for additional insurance through the agency. That option triggered coverage through American Express. However, the American Express literature (Exhibit 89) which came with one of the monthly statements (there was no evidence it was even read by Mr. Golden) clearly stated that only the cardholder is covered for $200,000 in the event of accidental death and that other drivers or passengers are covered for $20,000. The literature also provided that this coverage was only good for the initial

four-week rental period.

Mr. Golden had the car involved in this case from July 3 until September 13, 1989. Thus, even if he had read the literature, it would have told him his wife only had $20,000 coverage, and only then if her death was within four weeks of the initial rental on July 3. If he indeed was carefully planning to retire from his wife's death, he would have guaranteed the $200,000 coverage by getting her an American Express card and killing her within four weeks.

The insurance representative testified she had decided the death was the result of a car accident. Although she testified that the company would "sometimes" pay the $200,000 in spite of failure to meet these cardholder and rental period requirements, nothing had been paid by the time of trial -- two years after the death.

Further, Mr. Golden's ignorance of this coverage is supported by the fact that he did not even file a claim for the life insurance until the insurance company tracked him down six (6) months later and told him of the coverage. (He filed a claim for the damage to the car at the request of the rental agency shortly after the death.) The fact that he applied for some other life insurance coverage within the weeks following the death further supports the conclusion that he did not even know of this coverage.

(c) Mr. Golden did not solicit the other insurance coverage but rather applied for insurance after receiving solicitations in

the mail. The same is true of the increase in his wife's coverage on one policy. Certainly, this expenditure may not make sense in the hindsight of their financial problems, but it was consistent again with their poor handling of money.

(d) Mr. Golden had to be tracked down by CNA Insurance as well as American Express.

(e) Mr. Golden testified he used their apartment address on the two forms with the one insurance company because he had an office there and just used the address of wherever he happened to be working when he mailed something. Although suspicious, if this were really a plan, why did he not use that address for all the insurance and not just the two forms? There was no evidence that he was the only one who got mail there. His unrebutted testimony was that he and his wife went there every afternoon to check on things, including the mail.

(f) Mr. Golden also obtained insurance at the same time on himself and his sons, although not as much.

(g) As of trial, the only insurance which had paid anything was the one through Ms. Golden's employer for $14,000 and a $5,000 payment on one policy for the money through the bank.

19. Lying about insurance. Mr. Golden testified that he initially lied about insurance because he was afraid his wife's death would be ruled a suicide, for which the insurance would not pay, and he did not want it said that she committed suicide. This is just as consistent with innocence as with guilt. (The record also reflects that he just wanted to be left alone by the

law enforcement officers.)

20. Bankruptcy. Mr. and Mrs. Golden had been to a bankruptcy attorney together prior to her death. Thus, it was planned by them even before her death. His testimony that he did not list the American Express debt because it was his understanding from that attorney that he could not list very recent debts was unrebutted and was consistent with the fact that the American Express debt was the only recent credit card debt that was proven. It is also very noteworthy that he did not exclude the Discover card, on which the Cigna/CNA policy was charged. His testimony that he did not list the expectation of receiving insurance money on the bankruptcy petition was consistent with the fact that he did not know whether he would receive any, except possibly from the employer. He testified he turned all this over to an insurance attorney. It is also consistent with him being in terrible grief and just "going through all the motions" so he could leave Winter Haven. At worst, to the extent it indicates a fraudulent intent with the bankruptcy, it may prove a willingness to fudge in financial matters but does not amount to proof of murder.[32]

Likewise, there was no direct evidence there was any "intent" behind the use of two attorneys, other than the need to hire a specialist in the two matters, and none that the two

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[32]Just as in Fowler v. State, where the theft could have been after the shooting instead of a robbery, so any bankruptcy and insurance dishonesty here could have been an unrelated, after-the-death effort to maximize his sons' financial future.

attorneys were not fully aware of the other's existence. Mr. Golden did not remember if he discussed one legal matter with the other attorney.

D. Motive

The State may have proven a motive,[33] but that is clearly insufficient to establish commission of a crime or, in a homicide case, to prove corpus delicti. The prosecutor argued that the motive plus the circumstantial evidence disproved that the death was an accident. Additionally, the State sought to substitute proof of a crime with attacks on Mr. Golden's credibility.[34] However, although the evidence of possible motive might arguably create even a strong suspicion, it cannot convert otherwise ambiguous circumstantial evidence into proof beyond a reasonable doubt that Mr. Golden murdered his wife of 24 years, especially when it was established by overwhelming evidence, and the judge found as mitigation, that they were "best friends".

The most telling evidence from a reality standpoint is this: it was overwhelming and uncontradicted that Mr. Golden loved his wife and she loved him, that they were best friends, that they

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[33]The prosecutor's argument that, by his calculations, the potential insurance of $353,000 was "[C]ertainly enough motive in itself" (R-3085) to kill one's spouse, was mostly a reflection of his own values.

[34]It is obvious even from the written record that Mr. Golden's better side was overcome on cross-examination by his animosity toward the prosecutor. See, e.g., R-2592. Again, this is wholly consistent with an innocent man who has tragically lost his wife and resents the manner in which the State has destroyed his life and home.

had been happily married 24 years, and that he strained himself financially to care for his family. She was the center of his life. There was absolutely no evidence he harbored any ill will toward her or ever even considered harming her. Given those facts, it is totally inconceivable - regardless of contradictory statements or motive - that he actually planned and carried out a plan to drown her. Even a good husband like this may "flip out" and hurt or even shoot a spouse, but they do not plan cold-blooded deaths such as the prosecutor here argued.

This Court's oft-quoted standard bears repetition here:

> It is not sufficient that the facts create a strong probability of and be consistent with guilt. They must be inconsistent with innocence.

Hall v. State, 90 Fla. 719, 720, 107 So. 246, 247 (1925).

ISSUE II

THE TRIAL COURT'S EXCUSAL FOR CAUSE OF PROSPECTIVE JUROR WAS IMPROPER IN THE ABSENCE OF RESPONSES THAT CLEARLY ESTABLISHED THE JUROR'S OPPOSITION TO THE DEATH PENALTY TO SUCH AN EXTENT THAT THE JUROR COULD NOT FOLLOW THE LAW.

The trial court granted the State's challenge for cause to a venireperson, Ms. Juanita Brown. (R-462-63) In excusing Ms. Brown, the trial judge stated that,"she could not under any circumstances, as [I] perceive it vote for the death penalty." (R-462)

In fact, although Ms. Brown stated she had "mixed feelings" about the death penalty (R-451, 456), she thought she would vote "yes" if she had to vote tomorrow to continue the death penalty in Florida. (R-452). Further, when presented by the prosecutor with a hypothetical situation where the jury had found Mr. Golden guilty of first-degree murder and had proven three aggravating factors and nothing in mitigation, Ms. Brown stated that she could vote for the death penalty. (R-455) However, she emphasized that the aggravating factors would have to be proven beyond a reasonable doubt:

> MR. AGUERO [Prosecutor]: If that were the case, could you personally vote that Mr. Golden be put to death?
>
> * * *
>
> MS. BROWN: [I]f you said . . . beyond a reasonable doubt that these three aggravating things happened, then yes.

(R-455) Later, Ms. Brown stated that she would not feel that imposing the death penalty would be a problem if the aggravating

factors were "presented in a way where it's really, really clear and there's really a lot of strong evidence against him." (R-456)

Finally, Ms. Brown stated that she could follow the law in this case. Her responses clearly indicated that, regardless of her personal feelings, she would follow the judge's instructions. (R-460)

The State then challenged Ms. Brown for cause on the ground that her views on the death penalty would prevent or substantially impair her ability to follow the law. Although the defense raised an objection, the trial judge granted the motion. (R-463)

The standard for review of a claim that a juror was improperly removed for cause is set forth in Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L.Ed.2d 841 (1985). The party seeking to exclude a juror for cause must demonstrate through questioning that the juror lacks impartiality. The judge must then determine "whether the juror's views would prevent or substantially impair the performance of his duties in accordance with his instructions and his oath." Trotter v. State, 576 So.2d 691, 694 (Fla. 1990). See also Lusk v. State, 466 So.2d 1038, 1041 (Fla. 1984)(stating the test as whether the juror "can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court.").

There is no support in the record for the trial court's

finding that Ms. Brown's views on the death penalty would have substantially impaired her performance as a juror. Likewise, there is no indication that her views were so fixed in opposition to the death penalty that she could not render an impartial verdict based solely upon the evidence and instructions. The fact that she may have initially stated that she had mixed views about the death penalty does not eliminate the necessity to consider the record as a whole. Considering the entire colloquy, the trial court abused its discretion in removing Ms. Brown for cause.

This error denied Appellant's rights under Article I, Sections 9 and 16, of the Florida Constitution, and under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

ISSUE III

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF MOTIVE AND COLLATERAL CRIMES PRIOR TO SUBSTANTIAL PROOF OF CORPUS DELICTI AND ERRED BY NOT GIVING ANY JURY INSTRUCTION ON MOTIVE.

A. Admission of Evidence.

The defense attorney argued repeatedly, and entered a standing objection, that it was error for the court to admit evidence of motive prior to proving that any crime had been committed. (R-108-110, 2599-2600, 3092-95, 3105-8, 3221-57) He specifically argued the State had failed to present any evidence of the essential element of a homicide that the death was caused by the criminal agency of another. This rule also applies to the admission in this case of evidence of collateral crimes[35] prior to proof of the corpus delicti. The trial court indicated its concern on this matter but denied the motion, stating:

> THE COURT: I might say, Counselor, prior to the Buenoano, or however the name is pronounced, case, I would have been 100 percent in line with your assertions. The Davis case that's been cited today would have some bearing on it as well.

(R-3095,3233)

> The *Davis v. State* case seems to control. Where the evidence allows a reasonable inference the alleged victim could be dead -- with the emphasis on could -- be dead by the criminal agency.

(R-3249) The following colloquy was especially relevant:

> THE COURT: Well, if I read the Buenoano case correctly -- I think that's the one you were referring to -- I think that's a fact for the

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[35]See Issue IV, infra.

jury to consider.

MR. AGUERO: Yes, sir.

THE COURT: I would not have agreed to that prior to this Buenoano case, but that seems to pin that point down.

(R-3253)

The court's reliance on Buenoano and Davis[36] was erroneous. In Buenoano v. State, 527 So.2d 194, 197 (Fla. 1988), this Court stated:

> The State must establish that the specific crime charged has actually been committed. However, the state is not required to prove the corpus delicti beyond a reasonable doubt before a confession or evidence of collateral crimes is admitted. Circumstantial evidence is all that is required to establish a preliminary showing of the necessary elements of the crime. *State v. Allen*, 335 So.2d 823 (Fla. 1976).

This last-quoted line of Buenoano could be read to imply a much more relaxed standard for admission of evidence of ancillary matters (such as confessions, motive, or collateral crimes). However, a review of precedent on this subject clarifies the issue.

First, this rule has a solid history. It was established by this Court in Holland v. State, 39 Fla. 178, 22 So. 298 (1897), and reaffirmed in Frazier v. State, 107 So.2d 16 (Fla. 1958).

Second, the evidentiary underpinnings of this rule, which were thoroughly analyzed in Sciortino v. State, 115 So.2d 93

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[36]Davis v. State, 582 So.2d 695 (Fla. 1st DCA 1991)(applying primarily Allen and Farinas to determine admissibility of confessions).

(Fla. 2d DCA 1959), were clearly summarized when quoted by this Court in State v. Allen, 335 So.2d 823, 824 (Fla. 1976):

> The rule of law announced in *Sciortino* is to the effect that before a confession is admitted the state has the burden of proving by substantial evidence that a crime was committed, and that such proof may be in the form of circumstantial evidence.

Finally, that rule was reiterated in this Court's 1976 Allen opinion, authored by former Justice Arthur England:

> This rule obviously does not require the state to prove a defendant's guilt beyond a reasonable doubt before his or her confession may be admitted. Indeed, as this Court has stated before, it is preferable that the occurrence of a crime be established before any evidence is admitted to show the identity of the guilty party, even though it is often difficult to segregate the two. The State has a burden to bring forth "substantial evidence" tending to show the commission of the charged crime. This standard does not require the proof to be uncontradicted or overwhelming, but it must at least show the existence of each element of the crime. [Footnotes omitted]

Id., at 825.

In Farinas v. State, 569 So.2d 425 (Fla. 1990), this Court addressed this same issue in a considerably more detail than in Buenoano:

> The state bears the burden of proving the *corpus delicti* before a defendant's confession may be admitted into evidence. "This Latin phrase means literally 'the body of the crime.' It is regularly used in appellate decisions to mean the legal elements necessary to show that a crime was committed." *State v. Allen* 335 so.2d 823, 824 n. 2 (Fla. 1976). As this Court has previously recognized, "[a] person's confession to a crime is not sufficient evidence of a criminal act where no

> independent direct or circumstantial evidence exists to substantiate the occurrence of a crime." *Id.* at 825.
>
> Although there must be independent proof of the *corpus delicti* to admit a confession, "'it is enough if the evidence tends to show that the crime was committed.' [*Frazier v. State*, 107 so.2d 16, 26 (Fla. 1958)]. Proof beyond a reasonable doubt is not mandatory." *Bassett v. State*, 449 So.2d 803, 807 (Fla. 1984). For first-degree murder, for example, the necessary elements to establish *corpus delicti* are: "(1) the fact of death, (2) the criminal agency of another person as the cause thereof, and (3) the identity of the victim." *Bassett*, 449 So.2d at 807.

Farinas, 569 So.2d at 430. Accord Thomas v. State, 531 So.2d 708, 711 (Fla. 1988)("To warrant trial, corpus delicti need not be proven beyond a reasonable doubt, but merely by evidence tending to show that a crime has been committed.").

In light of this history, the above reference in Buenoano to "circumstantial evidence" is clarified to mean that the "substantial evidence" which must be introduced prior to admission of evidence of motive (or collateral crimes or confessions) need not include direct evidence but may consist entirely of circumstantial evidence. Thus, the Buenoano statement related to the nature of the proof as opposed to the quantity.[37]

To summarize the rule of these cases: the State must first present substantial evidence, independent of the evidence of motive or collateral crimes sought to be admitted, as to each

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[37]The trial court was provided only Buenoano and Davis by the State and only Allen by the defense.

element of the crime on trial.

There are two solid reasons for this rule. First, as the defense attorney pointed out, it is in the interest of sound judicial economy not to complete a trial when most of the testimony relates to motive, only to decide at the end that no crime has been proven. It is more practical and far less expensive and burdensome for the system and all participants if the State is required to present "substantial evidence" of the corpus delicti prior to delving into the murky water of motive evidence.

A far more fundamental consideration is also involved. Given the highly inflammatory nature of evidence of collateral crimes, motive, or a confession, there is too great a risk that a jury will allow proof of those ancillary - indeed unnecessary - matters to substitute for fundamental proof that a crime was committed. This is especially true in this case, where the trial court gave no instruction whatsoever on the evidence of motive or collateral crimes.[38]

Thus, the trial judge erred by admitting evidence of motive - as well as evidence of collateral crimes - without first requiring the State to present "substantial evidence" that Ms. Golden's death was caused by a criminal act and not an automobile accident or suicide. Indeed, aside from suspicious which were equally explainable by accidental or suicidal death, no independent evidence of criminal agency was ever introduced. The

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[38]See Issue IV, infra.

prosecutor's effort to circumvent this rule, or "bootstrap" his case, by arguing that the motive evidence was part of his proof of the essential element of criminal agency (R-1724, 3108, 3242, 3245) is directly contrary to what the law requires.[39]

B. Jury Instruction.

Although the defense attorney did not request one, Appellant would argue that it was fundamental error not to give the jury some guidance - via an instruction - as to the relevance of motive evidence, and especially the fact that evidence of motive standing alone cannot supplant proof of the crime charged. Compare Rojas v. State, 552 So.2d 914 (Fla. 1989)(reversable error to wholly omit reference to justifiable or excusable homicide form manslaughter instruction); Alejo v. State, 483 So.2d 117 (Fla. 2d DCA 1986)(fundamental error to omit justifiable or excusable homicide definition from inital manslaughter instruction); State v. Jones, 377 So.2d 1163 (fundamental error not to instruct on elements or underlying felony of robbery in prosecution for felony murder). Without such an instruction, there was an impermissible risk that the jury did just that, i.e., convict Mr. Golden based on the evidence of motive. This is analogous to the mandatory

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[39]"MR. AGUERO: Judge, Mr. Smith, this is at least the third time that this argument has been made in open court. I have challenged Mr. Smith on the two prior occasions to find some case to support his position that the State has to prove corpus delicti before motive evidence can come in because that is somehow analogous to confessions. There isn't any such case because that's not the law." (R-3225)(Emphasis added)

requirement of a jury instruction on Williams rule evidence discussed in Issue IV, infra. In this case, there was no instruction given to the jury as to motive or collateral crime evidence, creating an unacceptable risk that this man was convicted on suspicion and general evidence of bad character rather than proof he committed a crime.

The trial court's admission of the evidence of motive and collateral crimes, without independent proof of substantial evidence of homicide, as well as the court's failure to give an instruction on this evidence, denied Mr. Golden's right to due process and a fair trial under Article I, Sections 9 and 16, of the Florida Constitution, and under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

ISSUE IV

THE TRIAL COURT ERRED IN ADMITTING WILLIAMS RULE EVIDENCE WHEN THE PREJUDICE OUTWEIGHED THE PROBATIVE VALUE, ESPECIALLY IN THE ABSENCE OF ANY JURY INSTRUCTION.

The State filed two Notices of Intent to introduce Williams rule evidence. (R-3053-54, 3061-62) At the pretrial hearing on August 23, 1991 (R-3271-75), the defense argued both that evidence of motive could not be presented prior to proof of corpus delicti (Issue III, infra) and that the Williams rule evidence was impermissible and prejudicial. (R-3221-75) He argued that the true purpose and effect of the evidence would not be to prove motive but rather to prove bad character or propensity and that any relevance was "substantially outweighed" by prejudice and confusion. (R-3229) The State argued, "It's not a classic Williams Rule notice. There isn't any classic Williams Rule evidence here." (R-3228)

The court questioned the relevancy of several items listed in the notice, directed the State to specify those which it intended to prove, and excluded one item. (R-3237-40, 3254) The State abandoned other items. (R-3257-59)

As to the State's allegation Mr. Golden had forged his wife's name on some insurance applications, the defense agreed that proving he signed her name was relevant to motive but argued the State intended to go beyond motive and prove Mr. Golden was guilty of the crime of forgery. (R-3265) The State argued it could prove forgery, and the court expressed concern as to the "Williams Rule overtones of 'forgeries.'" (R-3266-68) Then, the

signature evidence was ruled admissible with the following limitations:

> THE COURT: Right. I don't have any problems with that. My concern, again, I guess, it has Williams rule overtones of "forgeries."
>
> MR. SMITH: Judge, I never got a chance to say it, but my whole point here is the State has made unequivocal statements of criminal violation: Forgeries. If I sign my wife's name with her permission, that's not a forgery. What I submit to the Court is that they're going to present all this stuff without presenting one shred of evidence the even if it is his signature that Ms. Golden didn't authorize it.
>
> MR. AGUERO: I don't care. That's what I'm trying to tell you. I'll stand up and tell the jury this isn't the issue. All we're using this for is the signature.
>
> THE COURT: All right. As long as they're not painting Mr. Golden with a brush of criminality in doing so.
>
> * * *
>
> MR. AGUERO: I will advise the Court that I do not intend to in any way indicate that the signatures somehow mean that he should be guilty of another crime, merely that he is the person who wrote these signatures. And that the expert in reaching his opinion as to who signed the insurance applications used those documents to form his opinion.
>
> THE COURT: With that qualification I would preliminarily rule that that would be admissible for that purpose. That presupposes that you can connect it up and show that that was in fact the defendant who signed the decedent's signature.

(R-3268, 3271) (The defense attorney then objected that it was irrelevant without proof it was a forgery, i.e., without Ms. Golden's authorization.)

Nevertheless, the State inexplicably raised the issue on voir dire, posing questions whether married veniremembers signed their spouses' names, which people "really, legally are probably not permitted to do". (R-1242) When veniremembers - some of whom became trial jurors - said they and their spouses signed each other's names, the prosecutor said, "There's a whole of (sic) lot of information to prosecute people with." A veniremember responded that she was "going to take the Fifth" and she knew "that legality." (R-1243)

Rather than object, the defense attorney tried to make light of the prosecutor's tactics by characterizing it as "really kind of a joke" and clarifying the law on forgery:

> MR. SMITH: So it's not a forgery under Florida law unless it's done without the consent and permission of the person whose signature is there.
>
> Now, all of you had indicated that you either had in the past or your spouse had in the past or you just didn't do that, and I think Ms. Herrington said she just didn't do that.
>
> MS. HERRINGTON: Right.
>
> MR. SMITH: But it's a common thing and it's not a crime, and I don't want y'all to misconceive the purpose of that question. It's not ----
>
> MR. AGUERO: Judge, I object to counsel continuously instructing the jury on the law. The Court can instruct the jury on what the law is if it becomes necessary to tell them a forgery, it's ----
>
> MR. SMITH: Your honor, the only reason I brought that out is because Mr. Aguero made a comment that he was getting evidence for crimes, and since he's a State attorney, he felt -- I'm just clarifying for the jury.

> THE COURT: I think the position is well taken, Counselor. I understand where you're going with it, but I sustain the objection.

(R-1281-82)

Then, during opening statement, the State argued:

> Mr. Golden signed his wife's name. You can call that anything you choose to in this trial. He is not charged with forgery, he's charged with first-degree murder.

(R-1461) The State then repeatedly examined witnesses (e.g., R-1978-80), including Mr. Golden (R-2631), about "forgery," and finally argued it in closing (R-2817, 2823); the defense objections and efforts to cure this error were repeatedly overruled. (e.g., R-2279-86)

As to the bankruptcy, the State erroneously argued that Mr. Golden had filed claims on all insurance prior to filing the bankruptcy petition, when in fact the claim for the American Express life insurance policy was not filed until six months later. (R-3260) The court repeatedly stated the bankruptcy matter was not relevant and asked how it bore on the homicide: "He would have benefitted equally [from the bankruptcy] had there been no death." (R-3261) The judge opined that this evidence "would seem to me to be stretching the Williams Rule out of shape." (R-3260, 3263, 3265) Nevertheless, extensive testimony was introduced at trial as to Mr. Golden's bankruptcy and the loss to a long parade of creditor witnesses, as well as cross-examination of Mr. Golden. (R-2623-24, 2649-51) Although the State argued repeatedly that Mr. Golden had acquired $200,000 which was discharged, the total cash and credit charges supported

by testimony at most totalled $75,000.

The State also presented Williams rule evidence that Mr. Golden had lied on loan applications. (See, e.g., R-2598-2604, 2649-50, 2627, 2656, 2662) Additionally, an investigator's testimony also improperly and erroneously suggested Mr. Golden might have other cases pending against him. (R-2321-22)

No instruction was requested or given before the introduction of this evidence or during jury instructions at the close of the guilt phase.

Section 90.404(2)(b)2., Florida Statutes (1991), provides that:

> When the evidence is admitted, the court shall if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

Evidence of collateral crimes or acts is admissible if it is relevant to a fact in issue. Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L.Ed.2d 86 (1959); compare Buenoano v. State, 527 So.2d 194 (Fla. 1988); but see Elkin v. State, 531 So.2d 219, 220 (Fla. 3d DCA 1988)(no nexus between instant charge of first-degree murder of husband and drowning of previous husband who had double indemnity insurance). Thus, the State's evidence that Mr. Golden signed his wife's name to some, though not all, insurance applications could have been relevant to the issue of motive. However, the

State's proof that he routinely signed her name to her paycheck drains the evidence of his signatures on insurance papers of virtually any probative value.

Collateral crime evidence is inadmissible where its sole relevancy is to prove the defendant's bad character or propensity. Williams, id.; State v. Lee, 531 So.2d 133, 135 (Fla. 1988). Here, there was no evidence that Mr. Golden's signing of his wife's name was forgery because there was every reason (given the paychecks) to believe she did authorize it. Plus, there was absolutely nothing permissible added to the State's case by the repeated characterizations of this as "forgery".

The rationale for the Williams rule is that such evidence

> would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged. But the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character and propensity of the defendant to commit the crime charged, it must be excluded.

Jackson v. State, 451 So.2d 458, 461 (Fla. 1984)(quoting *Paul v. State*, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976), *cert. denied*, 348 So.2d 953 (Fla. 1977)).

See also Castro v. State, 547 So.2d 111, 115 (Fla. 1989).

Given the trial court's clear opinion in the pretrial hearing that such evidence would be improper, as well as his clear admonition to the State, the record is devoid of any reason why the trial court suddenly allowed this evidence to be put before the jury. The prejudicial impact was overwhelming.

> [A] Williams rule error is presumed to infect the entire proceeding with unfair prejudice.

Castro v. State, id.; Peek v. State, 448 So.2d 52, 56 (Fla. 1986); Straight v. State, 397 So.2d 903 (Fla. 1981), cert. denied, 454 U.S. 1022, 102 S. Ct. 556, 70 L.Ed.2d 418 (1981). This was especially so given that the State repeatedly alluded to dishonesty on Mr. Golden's cross-examination and argued in closing that his defense should be rejected because he was a "consummate liar." (R-2584, 2794, 2795, 2809, 2812)

The State cannot meet its burden of proving beyond a reasonable doubt that these errors did not contribute to the guilty verdict. State v. DiGuilio, 491 So.2d 1135 (Fla. 1986); Ciccarelli v. State, 531 So.2d 129, 132 (Fla. 1988). In Castro, this Court found the admission of a single instance of erroneous testimony harmless in light of the defendant's three separate confessions. Castro, 547 So.2d at 115. (The court did find, however, that the error required that the death sentence be vacated. Id. at 115-116.) By contrast, the absence of any direct or conclusive evidence in the instant case requires that the conviction be reversed for a new trial. Compare Henry v. State, 574 So.2d 73 (Fla. 1991)(reversing capital conviction due to erroneous admission of irrelevant evidence of another crime where it could not be proven beyond a reasonable doubt said evidence said was harmless).

The prejudice here was aggravated by the court's failure to adhere to the mandate of Section 90.404(2)(b)2, Florida Statutes (1991), by the giving of appropriate jury instructions. This is

especially true given the potential for prejudice inherent in Williams rule evidence.

For these reasons, Mr. Golden's conviction is in violation of Article I, Sections 9 and 16, of the Florida Constitution, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

ISSUE V

THE TRIAL COURT AND DEFENSE COUNSEL COMMITTED FUNDAMENTAL ERROR BY REPEATEDLY CHASTISING APPELLANT IN FRONT OF THE JURY.

A. Trial Court

On a number of occasions during Mr. Golden's direct examination, cross-examination, and redirect examination, the trial court and defense counsel[40] chastised and admonished Mr. Golden -- mostly in the jury's presence -- regarding his behavior primarily toward the prosecutor.[41] The court then gave the first venire panel a "thumbnail sketch": "this case is about a lady who was drowned in an automobile." (R-134) However, upon State objection, the court gave a curative instruction: "I may have been somewhat inaccurate . . . This case involves a car in a lake, a woman drowned in the lake." (R-144)

The court told the venire panel the first day of trial, and the newly sworn jury, that "This is a little bit of an unusual case." (R-115; 1446) On Mr. Golden's direct examination, the following transpired:

> MR. AGUERO: Excuse me. May I object to the leading nature of counsel's questions?
>
> A. Yes, I went back home.
>
> THE COURT: Sustained.
>
> Excuse me, Mr. Golden. Mr. Golden, when an objection is made, stop until the objection

---

[40]The prosecutor could fairly be said to be provoking Mr. Golden. (See, e.g., R-2582, 2584, 2588, 2590, 2592, 2640, 2672)

[41]There was no time (or apparently inclination) for objection to these spontaneous admonishments.

is ruled on.

THE WITNESS: Oh, I'm sorry.

THE COURT: All right, sir. You may proceed.[42]

(R-2535; see also R-2559) Then:

MR. AGUERO: I object to what this witness' sister told him --

MR. SMITH: I agree. And --

MR. AGUERO: -- and I move to strike it and the jury be instructed in that regard.

THE COURT: Very well. The objection is sustained, and the jury is instructed to disregard anything the Defendant's sister may have told him. And, Mr. Golden, please respond to the question as nearly as possible.

THE WITNESS: Yes, sir.

(R-2575-76) On cross-examination:

A. I know --

MR. SMITH: Excuse me, Your Honor.

THE DEFENDANT: I know that wasn't --

THE COURT: Mr. Golden, stop.

THE DEFENDANT: I'm sorry.

MR. SMITH: That's misleading and confusing. There has been no testimony that her cigarette case was at the boat dock prior to them going out that evening.

MR. AGUERO: Judge, the question is of the witness. If he gets confused, then he gets confused. The question, though, was very clear.

---

[42]See R-2421, where the court interrupted defense counsel to limit his witness' testimony.

THE DEFENDANT: The question was that did she --

MR. SMITH: Excuse me, Mr. Golden.

THE DEFENDANT: I'm sorry.

THE COURT: I'll overrule the objection, Counselor. I think the question was clear.

(R-2587) Further:

Q. You didn't think that was important in accepting employment as a teacher at that time?

A. Watch my mouth. No sir.

THE COURT: Let me stop you, gentlemen. There is entirely too much sarcasm on both sides of the inquiry. Please ask the questions more directly, Mr. Aguero.

MR. AGUERO: I apologize.

THE COURT: And answer the questions without sarcasm, sir.

THE DEFENDANT: Thank you, Judge.

(R-2592) (See also R-2635, 2648)

Finally, in giving the jury instructions, the trial court improperly emphasized the verdict form for first-degree murder by reading it in full and then reading only a very abbreviated form of the other verdicts. (R-2862-63)

The damning effect of these actions on the jury cannot be doubted. Regardless of the propriety of the witness' correction, there is no excuse for so chastising and demeaning a capital defendant before the jury, and these actions surely compounded the State's attacks on Mr. Golden's credibility. (See, e.g., R-2794, 2795, 2809, 2812)

The importance of judicial impartiality, particularly in a capital case, was emphasized in Quercia v. United States, 289 U.S. 466, 470, 53 S. Ct. 698, 77 L.Ed.2d 1321 (1933):

> The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling."

See Hubbard v. State, 37 Fla. 156, 20 So. 235 (1896). The accused in a criminal case has the right to a fair trial, an essential element of which is an impartial judge, if not in actuality then at least in appearance. Here, "the cloak of impartiality which the judge should wear [was] destroyed." Baker v. United States, 357 F.2d 11, 14 (5th Cir. 1966). In Hamilton v. State, 109 So.2d 422, 424-425 (Fla. 3d DCA 1959), the court wrote:

> The dominant position occupied by a judge in the trial of a cause before a jury is such that his remarks or comments, especially as they relate to the proceedings before him, overshadow those of the litigants, witnesses and other court officers. [Where such comment expresses or tends to express the judge's view as to the weight of the evidence, the credibility of a witness, or the guilt of an accused, it thereby destroys the impartiality of the trial to which the litigant or accused is entitled.]

In Hamilton, the trial judge had asked the decedent's wife, in the presence of the jury, "Do you still live where you lived at the time your husband was murdered?" Id., at 423. Although the judge's comment was unintentional, the first-degree murder conviction was reversed on the basis of plain error. See also Kellum v. State, 104 So.2d 99, 104 (Fla. 3d DCA 1958).

Judicial comments to a defendant in front of the jury, standing alone, can be grounds for reversal.

> It matters not, however, what the circumstances may be, or what the trial Judge's opinion is as to the defendant's demeanor on the witness stand, or as to defendant's guilt, he should be careful that he say or do nothing in the presence of the jury which would indicate what his opinion may be.

Seward v. State, 59 So.2d 529, 532 (Fla. 1952)(reversing conviction for assault with intent to commit murder because of judicial comments to defendant). See also Raulerson v. State, 102 So.2d 281, 286 (Fla. 1958)(reversing death sentence). Thus it is a well-settled rule in Florida that:

> [G]reat care should always be observed by the judge to avoid the use of any remark in the hearing of the jury that is capable, directly or indirectly, expressly, inferentially, or by innuendo, of conveying any intimation as to what view he takes of the case, or that intimates his opinion as to the weight, character, or credibility of any evidence adduced.

State v. Ah Tong, 7 Nev. 148; 1 Thomp. Trials, Section 219, and citations, quoted with approval in Lester v. State, 37 Fla. 382, 20 So. 232, 234 (1986); accord Roberts v. State, 94 Fla. 149, 113 So. 726 (1927); Leavine v. State, 109 Fla. 447, 147 So. 897 (1933); Parise v. State, 320 So.2d 444 (Fla. 3d DCA 1975); Huhn v. State, 511 So.2d 583 (Fla. 4th DCA 1987).

B. Defense Counsel

This damage was compounded by the defense attorney's "joining the fray" and rebuking his own client in front of both

the judge and jury. On the first day of trial, when the prosecutor asked that Mr. Golden be told not to discuss the case with his sons unless his attorney was present, Mr. Golden's retained counsel told the court: "I think it needs to be explained to him [by the court]". (R-77; see also R-137) The defense attorney even interrupted the State's cross-examination of Mr. Golden to approach the witness stand and direct Mr. Golden to issue an apology to the prosecutor:

> MR. SMITH: Excuse me, Your Honor. May I have a moment?
>
> THE DEFENDANT: I'm sorry, Your Honor. I can't make it any more clear.
>
> (Mr. Smith approached the witness and there was a discussion off the record.)
>
> THE DEFENDANT: Mr. Aguero, I'm going to apologize to you. I want you to know that there's one man here against forty-some-odd witnesses over six days, and I despise you. I understand you're doing your job. And so it's really tough for you doing that. But I do apologize. And I'll try; if you will quit, I'll try.

(R-2602)

Defense counsel again lost his patience in his own redirect examination of Mr. Golden:

> REDIRECT EXAMINATION
>
> BY MR. SMITH:
>
> Q. Mr. Golden --
>
> A. Boy, it's done.
>
> Q. -- you have spent the last part of a good 2 hours 45 minutes talking to Mr. Aguero about this case.

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Would you say that your behavior and your attitude were polite and courteous?

A. No, sir. I apologize.

Q. You want to tell the jury why you have this attitude?

A. Yes, sir. I -- I had enough problems losing my wife, I had enough problems feeling the guilt that I feel, that I probably will carry it with me to my death. The pent-up frustrations that someone can do what Mr. Aguero and his passel of people have done. One man stood here for six days, and you had to witness it. He would not allow something good to be said, and he would object if something good was said. This is in my mind. I became so frustrated that it's a natural occurrence. I became a mirror image of Mr. Aguero. And --

* * *

Q. He asked you that question, and you said no.

A. Oh, thank you.

Q. What I'm asking you is, did you hear any witnesses say that they had evidence that you went home by yourself that night?

A. No, sir, you know that.

Q. Mr. Golden, don't answer the question by saying what I know or what I don't know.

A. I'm sorry.

Q. Answer the jury's question -- answer the question to the jury as best you can. OK?

A. OK.

At one point during cross-examination, the court removed the jury to chastise Mr. Golden at length, and defense counsel could not resist doing the same. Even though these actions of defense counsel were outside the jury's presence, they could not have helped but prejudice the judge. (R-2604-7) This was ineffective assistance of counsel, without any possible justification that it was "strategy". See McKinney v. State, 579 So.2d 80, 85 (Fla. 1991)(Overton, J., dissenting).

Mr. Golden was thus deprived of an impartial judge, a fair trial, and the effective assistance of counsel under Article I, Sections 9 and 16, of the Florida Constitution, and under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

ISSUE VI

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO VIEW THE CRIME SCENE.

The defense repeatedly requested a view of the scene, indicating it was critical to the defense. (R-40-51, 90-102, 105, 1415, 1417-18, 2059-60, 2378, 2687-99, 3114, 3290-91, 3295-96) In fact, the defense indicated that "my whole case will rise and fall as far as the issue of the jury viewing the scene." (R-2060) The trial court's denial of a view was an abuse of discretion for the following reasons.

Foremost, the jury view was essential to the defendant's theory that his wife's death was accidental because it occurred at night on an unlit, unmarked road, when it would have been more difficult for Ms. Golden to see. The State argued that the defense could have videotaped the scene and that, therefore, no view was merited. (R-96) The defense responded that it was ridiculous to take the jury out there in the daytime, since that would not sufficiently replicate the circumstances under which Ms. Golden died. (R-97) Nor would photographs provide the same impact. (R-44) Since the photographs and videotape of the scene introduced at trial were taken during daylight hours, they could not possibly have accurately conveyed to the jury the scene at the time of the incident. The street in question is in a residential neighborhood, unlit except for a lone street lamp on the corner at least 180 feet from the water. Viewing the darkened street at night would have allowed the jury to more

clearly understand the reasonable possibility that a person with extreme nearsightedness and night vision problems could drive into the lake by accident.

The State also argued that the videotape taken the day Ms. Golden's body was found was the best evidence of what the scene looked like at the time. (R-2691) The videotape, however, like the photographs that were entered into evidence, was taken from the perspective of the person operating the camera during the daylight hours, not from the victim on the night in question. Different camera operators would have different views of what was considered evidence and how it impacted the scene. Neither a videotape nor a set of photographs can completely convey the physical characteristics of a visit to the actual scene. Thus, there is no substitute for a juror's impressions of the entire site, formulated only by a personal visit.

The error of the court's denial is further emphasized by the court's admission of the photographs of the scene. Some photographs of the site taken as late as eight or nine months after the incident were nevertheless admitted into evidence, and the jury was allowed to view them. Thus, the court admitted the State's photographs taken when the water level was higher but denied the defense request for a view on the same basis. This unprincipled treatment of similar evidence in denying a jury view of the physical scene was an abuse of discretion.

Second, the State argued against the view on the basis that the water level had risen 22 inches to the extent that 12 to 14

inches of water then covered the boat ramp, thus indicating substantial changes in the scene. (R-2690) However, the water level was irrelevant. The defense theory of accidental drowning rested on the fact that the victim could not see well at night and was driving at an unknown speed down an unlit road that suddenly and without warning became a lake. In other words, motorists at night may not see the water until they are almost in it. Thus, the fact that the water may have been eight feet further up the boat ramp at the time of trial (see R-42) does not alter the relevant fact that the actual appearance of the area leading to the lake had not substantially changed. The relevant view of a driver had not changed. On this very point, defense counsel indicated that any change in water level would damage the defense, not the State.

Third, the State argued that weather data indicated that, on the night of the incident, the moon was almost full, the sky was clear, and the winds were calm (R-41), thereby implying that the decedent could easily have seen the lake while driving toward it. On the other hand, the defense argued that, according to the National Weather Service, it was partly cloudy with scattered clouds at 11:59 PM that evening. (R-1415) Given these disparate arguments (there was no evidence entered), it is possible that the moon was obscured by clouds or had set so that there would have been no reflection on the water, thus compounding the problem of an unlit street.

The purpose of a jury view is to assist the jury in

analyzing and applying the evidence. Dempsey-Vanderbilt Hotel, Inc. v. Huisman, 153 Fla. 800, 15 So.2d 903 (Fla. 1943). The jury's view of the premises cannot be treated, in the strict sense, as evidence. Orme v. Burr, 157 Fla. 378, 25 So.2d 870 (Fla. 1946). The necessity for such a view is to be determined by the trial court. Atlantic Coastline Railroad Co. v. Whitney, 65 Fla. 72, 61 So. 179 (1913). However, the refusal of the trial court to permit a jury view will be reversed only where abuse of discretion is shown. Stanley v. Powers, 125 Fla. 328, 61 So. 179 (1936). A reversal is merited where injury resulted to the defendant. Whitney, 65 Fla. at 73.

In denying the motion, the trial court here stated that Taylor v. State, 139 Fla. 542, 190 So. 691 (1939), was controlling. In that case, the testimony of several witnesses to an alleged homicide sharply conflicted with one another. The defense contended that, if the jury could visit the premises of the homicide and observe where the different witnesses were physically standing at the time the homicide occurred (and thus determine whose vision was obstructed), the jury would then be better able to discern whose testimony should be given greater weight. Id. at 550. This court in Taylor upheld denial of the motion because the premises did not appear to be in the same condition as during the alleged homicide and because such a view would only confuse rather than clarify the evidence. Id. at 551. See also Bundy v. State, 471 So.2d 9, 20 (Fla. 1985)(holding no abuse of discretion where trial judge denied defendant's motion

to view portion of roadway, given the fact that the road had been widened and four-laned between the crime and trial, changing distance evaluations and traffic patterns).

The facts in Taylor distinguish it from the instant case. In Taylor, the homicide occurred in a house, where furniture was overturned and broken. In the interim, between the time of the incident and trial, furniture could be replaced or repaired, or the house altered in some substantial way. In other words, the incident occurred in physical surroundings that over time were likely to visibly change on a daily, or even hourly basis. In the present case, the incident occurred in surroundings that were less likely to be subject to rapid, noticeable change. Water levels in the lake may rise or fall slightly, trees and shrubbery may grow and die, but such change is subtle and gradual, occurring over a longer period of time. For the same reason, this case is unlike Bundy where the entire roadway had been altered.

The case that should instead be controlling here is Stanley v. Powers, 125 Fla. 322, 169 So. 861 (1936), the predecessor to Taylor. Stanley involved a suit for damages for injuries sustained in an automobile accident. This Court in Stanley ruled that the trial court had abused its discretion in denying defendant's motion to view the scene, since skid marks from the accident were in substantially the same condition as when made, ordinary wear and tear excepted, even though 18 months had passed. Since the skid marks were a critical issue, the court

believed that, "[i]t would have been very enlightening to reconcile physical with verbal testimony, to determine whether the photographs were spurious or bona fide . . ." Id. at 328.

Likewise, in this case, it would have been enlightening for a jury to physically view the scene for themselves rather than to rely on photographs or a videotape which could not adequately convey the scene from Ms. Golden's nighttime point of view. The relevant factors (the road itself, the lack of lighting, warning signs, and reflectors) had not substantially changed by the time of trial, and a view would have assisted the jury in analyzing and applying the evidence taken at trial.

Not only that, this view was critical to the defense. By denying the view, the court deprived Mr. Golden of his right to fully present his defense and his right to a fair trial and due process of law, all in violation of Article I, Sections 9 and 16, Florida Constitution, and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

ISSUE VII

THE TRIAL COURT ERRED BY THE REPEATED ADMISSION OF HEARSAY TESTIMONY.

On several occasions during trial, over defense objections, the court erroneously permitted the introduction of inadmissible hearsay statements. First, Detective Kirk Smith testified that he went to five convenience stores in that area of Winter Haven on September 14, 1989, after 10:45 p.m. Detective Smith showed Ms. Golden's driver's license photograph at the five stores, but no one recalled her coming in or buying cigarettes. The police failed to check the unopened pack for markings to indicate where it was purchased. (R-1853-59) The State introduced the evidence to raise an inference that Ms. Golden never bought any additional cigarettes but already had them at the time she and her husband went to the lake. (However, the State assumed she would only have gone to a convenience store near her home to buy the cigarettes.)

Detective Smith's testimony was hearsay, based on what some potential unknown clerk might have told him. The discussion between both attorneys and the court was as follows:

> MR. AGUERO: I'll ask the question . . . Detective, did you take a picture around to various convenience stores and attempt to determine if any person could identify Mrs. Golden?
>
> And he'll say: Yes, I did.
>
> And I'll say: Did any person identify Mrs. Golden?
>
> And he'll say: No.

MR. SMITH: But that indicates he's getting into the hearsay testimony of an unknown person . . .

THE COURT: Which is zilch, though. I fail to see how that would be hearsay, Counselor. The bottom line is that he asked and nobody identified her.

* * *

MR. AGUERO: . . . [T]he way I'm going to argue it is that . . . .[t]hey couldn't find any person that recognized her. Mr. Smith is free to argue that we missed somebody, asked the wrong person, went to the wrong store . . . That doesn't make it hearsay, to ask the detective.

MR. SMITH: Of course, it does. If the question is . . . did you sell cigarettes to this lady, and the response is, I don't recognize her . . . I don't remember selling her any, . . . that's a response.

MR. AGUERO: . . . I'm only going to ask him could he find anybody that could identify her . . . ..

MR. SMITH: That necessarily requires a response from these people. In order for him to form the answer, no, I couldn't, implies that he asked people and they gave him a response, a verbal response.

THE COURT: That's not necessarily true. They could have shaken their head no.[43] I don't think that qualifies as hearsay, and I'm looking at the definition of hearsay while we're talking, and that's not hearsay.

(R-1843-46) The court also made similar statements with respect

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[43]The judge's novel interpretation of the definition of hearsay could potentially lead to some interesting changes in trial tactics: witnesses could respond to questions via winking, eyebrow raises, foot-tapping, holding up fingers (one for "yes", two for "no") or, barring this, dispensing with verbal exchanges altogether and both sides instead engaging in a lively round of "charades."

to nonverbal responses as exclusions to the hearsay rule in relation to Ms. Carlyle's subsequent testimony. (R-2208) The trial court's statement that nonverbal conduct or negative communications were not hearsay was clearly erroneous. Section 90.801(1)(a)2, Florida Statutes (1991), defines hearsay to include "Nonverbal conduct of a person if it is intended by him as an assertion." See also Ehrhardt, Evidence Sections 340, 342. It matters not whether the assertion is a positive or negative response, only that it is communicative.

Second, several of Ms. Golden's coworkers testified over objection to statements she had made. Ms. Carlyle continually referred to statements Ms. Golden allegedly made to her prior to death, for example:

> Q [by prosecutor]: Did Ms. Golden ever discuss with you her personal feelings about submitting her resignation, how she felt about it?
>
> A: She didn't want to leave.

(R-2007).

> Q: What did she tell you about her husband's not working?
>
> A: She was very frustrated. She was very concerned about finances.

(R-2021; see also R-2006-7).

The defense argued these comments were made months before the death and so were not relevant or admissible as "existing conditions of physical or emotional feelings." The court indicated it would allow testimony as to feelings but not specific statements, which was exactly the testimony then

introduced. (R-2007-8)

Additionally, hearsay statements by Ms. Golden's supervisor, Mr. Hauth, were admitted over defense objections. For example:

> She was very emphatic to me that she did not desire to return to Minnesota, that she wanted to stay in the Lakeland-Winter Haven area.

(R-2089)

> Again, she broke down and cried and said I still do not want to go back to Minnesota.

(R-2090)

> She made a statement to me at one time, sir, that if Andy went back to Minnesota, that she may desire to stay in the area until such time that he became settled in Minnesota, that she would remain in the area.

(R-2102; see also R-2088)

Mr. Hauth's testimony regarding Ms. Golden's statements allegedly made to him are inadmissible hearsay, offered to prove the truth of the matters asserted, i.e., that Mr. Golden wanted to return to Minnesota, that she did not want to, and that she was unhappy.[44] Similarly, the testimony from several coworkers about Ms. Golden not driving at night was all based on hearsay. (R-2016, 2018-20, 2023)

It is quite obvious that this co-worker testimony was offered to prove the truth of the matters asserted, i.e., primarily that Ms. Golden did not want to go to Minnesota and was unhappy with her husband, at least on this basis. The erroneous

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[44]Mr. Hauth did state that her responses were not interpreted (by him) to mean that she was in any way unhappy with her marriage. (R-2103)

admission of this testimony was not harmless error in a murder prosecution of the decedent's husband.

The state of mind exception to the hearsay exclusion permits admission of hearsay statements which "Prove the declarant's state of mind . . . at that time or at any other time when such state is an issue in the action." Section 90.803(3)(a)1, Fla. Stat. (1991). It is acknowledged that, in some cases, the state of mind of the victim is an issue. For example, in Peede v. State, 474 So.2d 808 (Fla. 1985), the trial court admitted testimony of the murder victim's daughter that her mother told her that she was scared of defendant. This Court held such testimony admissible in order to establish kidnapping. Cf. Selver v. State, 568 So.2d 1331 (Fla. 4th DCA 1990). However, since Ms. Golden's state of mind was not an issue in this case, this testimony had no relevance. See also Kelley v. State, 543 So.2d 286 (Fla 1st DCA 1989)(manslaughter conviction reversed due to erroneous admission of statements of victim to third party under "state of mind" exception); accord Bailey v. State, 419 So.2d 721 (Fla. 1st DCA 1982); compare Bedford v. State, 589 So.2d 245 (Fla. 1991)(approving statement as to "then existing state of mind, emotion" where made within one to two weeks prior to homicide).

Third, the State introduced over objection the triple-hearsay testimony of a credit union manager who testified as to the contents of a note left for his assistant by a third person (neither of whom was at trial) regarding an alleged conversation

on September 13, 1992, between Mr. Golden and the third person concerning the cancellation of his appointment due to the death of Ms. Golden the night before. The State claimed that the note was not offered to prove the truth of the matter asserted, i.e., that Mrs. Golden had died, but was "merely offered to prove that he called them on that date and told them that." (R-2464)

However, the hearsay was not Mr. Golden's statement but the statement of the third party taking the message. Thus, the only relevance of this out-of-court statement was to prove the truth of the matters asserted by the subordinate, i.e., that Mr. Golden called to cancel his appointment. The note was inadmissible hearsay since the person testifying did not have first-hand knowledge of either the alleged conversation or whether Mr. Golden personally called the credit union that day, which became a big issue. The admission of such evidence was harmful because of the implication that, only hours after the death of his wife, Mr. Golden was calm and cool enough to be thinking about his appointment at the credit union (which is exactly what the prosecutor argued). This triple-hearsay was also quite unreliable to prove that Appellant, as opposed to his son, had called that day. The trial court abused its discretion in admitting such testimony.

These errors were not harmless. Admission of such extremely damaging testimony made Mr. Golden look like a liar when he testified to the contrary. Compare Harris v. State, 544 So.2d 322 (Fla. 4th DCA 1989) These errors deprived Mr. Golden of his

right to a fair trial and due process of law under Article I, Sections 9 and 16, of the Florida Consititution, and under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

ISSUE VIII

THE PROSECUTOR'S COMMENTS ON APPELLANT'S RIGHT TO REMAIN SILENT WERE REVERSIBLE ERROR UNDER THE STATE AND FEDERAL CONSTITUTIONS.

The prosecutor repeatedly commented on the failure of Mr. Golden to produce evidence and witnesses as a basis to reject his defense. The State called as its witness Mr. Golden's 15-year-old son. During defense counsel's cross-examination of the son, the following occurred:

> MR. SMITH: Tell the jury what kind of relationship your parents had.
>
> MR. AGUERO: I object, Your Honor. It's beyond the scope of the direct examination. Mr. Smith can call this witness if he wishes. (Emphasis added)

(R-1545) Then, on direct examination of a State witness, the prosecutor implied there was no reason the defense could not bring in a witness to Ms. Golden's signature:

> Q. As far as you know, is there any reason why Ms. Cave is physically disabled at this time, unable to attend Court?
>
> A. No, sir.

(R-2428) Finally, this theme was repeated during closing argument.

> The defense attempts to put more of a burden on the State than that which the law requires in this fashion: The defense says you didn't see any photographs of this boat ramp from up at the top of the hill. Well, excuse me. Mr. Smith got an opportunity to put on a case. Nobody stopped him from putting in a picture. 194 exhibits were marked in this trial and about 180 of them were introduced, all by the State.
>
> There is no rule of law that says Mr. Smith

> is forbidden from introducing evidence. Nobody stopped him from taking a videocamera out there if he thought that was important.

(R-2797)

> But did Mr. Smith [defense counsel] call an expert in here that disagreed with him? Nope.
>
> You can't depend on the speculation of Mr. Smith for your verdict. You've got to depend on the evidence, the hard cold facts.

(R-2816)

> How about this: He says he went and did all this stuff to get this trust set up. Well, where is his lawyer and where is his trust agreement?
>
> The defense got to put on a case. Nobody stopped them from calling witnesses. Nobody told them that they couldn't bring an agreement if it existed -- because it doesn't, except in Mr. Golden's mind now two years later when he's on trial for first degree murder. Oh, well, that's what I did. I went and got this agreement. There's no corroboration for that. There's no corroboration for anything Mr. Golden says.

(R-2819)

It is the duty of the trial judge to carefully control and zealously protect the rights of the accused so that a fair and impartial trial is received, and to protect the accused from improper and harmful statements or conduct by a witness or prosecuting attorney during the course of the trial. Kirk v. State, 227 So.2d 40 (Fla. 4th DCA 1969). It is the duty of a prosecuting attorney to refrain from making improper remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled. Id. A

prosecuting attorney has a right to comment upon the defendant's failure to produce evidence or call a witness only when the defendant makes it appear that a potential witness could exonerate him or that someone else is the actual perpetrator. Id. at 320.

The Fourth District Court of Appeal explained in a 1983 opinion that any reference by the prosecuting attorney to the criminal defendant's right to call a witness or not impinges upon two related constitutional rights:

> The first is the defendant's right to remain silent, which places a concomitant obligation on the state not to comment on the defendant's exercise of that right.

Romero v. State, 435 So.2d 318, 319 (Fla. 4th DCA 1983). Citing Gilbert v. State, 362 So.2d 405 (Fla. 1st DCA 1978), the court declared that in this context such a comment is prejudicial error.

> The second constitutional right affected is the presumption of innocence, again to be considered together with the state's obligation to come forward with evidence sufficient to prove the defendant guilty beyond a reasonable doubt.

Romero v. State, 435 So.2d at 319. A comment that implies to the jury that the defendant has the burden of proof on any aspect of the case will constitute reversible error. E.g., Dixon v. State, 430 So.2d 949 (Fla. 3d DCA 1983).

In Jackson v. State, 575 So.2d 181 (Fla. 1991), where the prosecutor had engaged in very similar though less extensive comments, this Court affirmed these principles. Id. at 188. The

Court noted that such comment is permissible where the defendant has presented a defense which is dependent upon a witness not equally available to the State, i.e., someone in a familial relationship. However, that was not the case with Jackson, where no defense was raised, so that the comment was error. Nevertheless, the error was held harmless beyond a reasonable doubt because the evidence against Jackson was so strong. (The death sentence was vacated.)

The prosecutor's comments here were a blatant violation of the Appellant's right to remain silent and to not call witnesses or present a defense. They implied to the jury that Mr. Golden had the burden of proving some aspect of the case, specifically through the testimony of various witnesses who were equally available to the parties. These comments were harmful error under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The cumulative effect of these multiple errors denied Mr. Golden a fair trial. Jackson v. State, 575 So.2d at 189, and cases cited therein.

This error violated Appellant's rights to due process and a fair trial under Article I, Sections 9 and 16, of the Florida Constitution, and under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

ISSUE IX

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY FAILING TO SEQUESTER THE JURY DURING AN OVERNIGHT BREAK IN DELIBERATIONS, ALLOWING THE BAILIFF TO COMMUNICATE WITH THE JURY, AND FAILING TO ADEQUATELY ADMONISH JURORS.

Appellant's counsel agreed to waive the jury's sequestration during deliberations, stating that sequestering the jury "would be an insult to them and to the system". (R-2379) When the prosecutor requested Appellant's acknowledgement of this choice, Mr. Golden acceded to his attorney's advice. (R-2702) There was no specific inquiry otherwise as to Mr. Golden's understanding on this issue.

After the jury retired at 3:30 p.m., the bailiff indicated the jury had "two questions right off the bat." The bailiff advised the court and counsel that the jurors wanted to know how late they would be kept that night and if they could have an easel and paper. The court asked counsel if it was agreeable to let the bailiff advise the jury they would be kept "no later than 6:00," and no objection was raised. The jury returned at 6:00 p.m.; before they were sent home for the evening, the court gave them "the standard admonition." (R-2865-69)

The following morning, the prosecutor expressed concern that the jurors had not been told that they should suspend deliberations while the smokers were out of the jury room. The bailiff advised: "I want you to know they have been real good about that, because I heard them say, 'No more talking,' when they're taking smokers out." (R-2872) The court indicated it

would address that subject; however, the jurors were simply asked as a group if they had abided by the admonition the previous evening; they were advised only that, if the smokers needed a break, they should knock on the door for the bailiff to accommodate them. No instruction was given that deliberations should be suspended during smokers' breaks. (R-2873)

Deliberations recommenced that morning at 8:30 a.m. Shortly thereafter, with the parties present, the court announced that the jury had requested the videotape and audiotape. The defense stated it had no objection since this was evidence, but there was a logistical problem in that the video equipment was also needed for another proceeding. The defense attorney obviously had no objection since he suggested that "Harry [the bailiff] needs to tell them it's just a logistics thing. . . . If they need to review it again, then they can get it again." (R-2873-75) The proceedings were otherwise uneventful until the guilty verdict was returned at 3:12 p.m. (R-2376)

Rule 3.370, Florida Rules of Criminal Procedure, gives the trial court discretion to allow jurors to separate after final submission of the cause and before retiring to deliberate. Livingston v. State, 458 So.2d 235, 237 (Fla. 1984). However, Rule 3.370 does not specifically contemplate such a separation in the midst of deliberations. Id.

The right of a defendant to have the jury deliberate free from distractions and outside influences is a paramount right, to be closely guarded. Durano v. State, 262 So.2d 733 (Fla. 3d DCA

1972). A number of other states have held that such a separation, especially in capital cases and where the defendant objects, is prejudicial error. See Livingston, 458 So.2d at 238 (citing to decisions from 10 other states).

There is simply no way to insulate jurors who are allowed to go to their homes overnight from external influences to which they are subjected. Jurors can be improperly influenced by conversations, reading material, or television, even if they obey the court's admonitions against exposure to media and conversations about the case. As the Washington Supreme Court noted:

> [J]urors are especially sensitive to prejudicial influence during deliberations. While still hearing evidence, it is probably easier for jurors to keep an open mind. Moreover, the impact of potentially prejudicial influences will be dissipated by subsequent evidence, the arguments, and instructions. But when the jurors have heard all the evidence, and have been focused onto the issues before them by the arguments of the parties and instructions, the potential for prejudice increases substantially.
>
> . . . A chance remark by a juror's spouse or a program watched on television during the juror's 12 hours at home would have more immediacy than the evidence. There is a very real possibility that the juror's recollection of the evidence or perception of it might be distorted by such influences received subsequent to the conclusion of the evidence.
>
> . . . The juror himself may well be unaware of the subtle influences which affect his decision. For this reason, admonition and instruction of the jury is probably ineffective in ameliorating the prejudicial effects of separation during the deliberations.

State v. Smalls, 99 Wash.2d 755, 765, 665 P.2d 384, 390-91 (1983)(cited in Livingston, 458 So.2d at 238-239. See also Raines v. State, 65 So.2d 588 (Fla. 1953)(failure to sequester jury over night was fundamental error without objection or showing of prejudice). Nevertheless, in Engle v. State, 438 So.2d 803 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S. Ct. 1430, 78 L.Ed.2d 753 (1984), this Court held that the failure to sequester was not denial of due process on fair trial where defense counsel agreed and the jury was admonished. Accord Brookings v. State, 495 So.2d 135 (Fla. 1986).

The Florida Supreme Court has subsequently held that, where counsel affirmatively consents to separation, the issue will be considered waived if adequate cautionary instructions are given and there is no other showing that the defendant's right to a fair trial was compromised. Pope v. State, 569 So.2d 1241 (Fla. 1990). The Court declared in Pope that this holding takes into account

> the fact that there may be occasions when for tactical or other reasons defense counsel may prefer that the jury be allowed to separate without allowing such decisions to deprive the defendant of his right to a fair trial.

Id. at 1244. Appellant argues, first, that the facts here meet the criteria of Engle and Pope by virtue of the trial court's failure to give more than "the standard admonition" upon separation, failure to fully poll the jury upon reassembly the next morning, failure to admonish the jury not to deliberate while smokers were absent, and the allowance twice of bailiff

communications with the jury.

These bailiff communications in themselves were contrary to Rule 3.410, Florida Rules of Criminal Procedure, and Section 918.07, Florida Statutes (1989). Compare McKinney v. State, 579 So.2d 80, 83 (Fla. 1991)(harmlessness of ex parte bailiff communications established by court corrective action and nonprejudicial nature of communications; death sentence vacated on other grounds). Even though defense counsel agreed to these communications, they nevertheless served to create an environment -- along with the lack of sequestration or proper admonishment -- ripe for deprivation of fundamental rights and, therefore, unacceptable in a capital trial.

As a second alternative, Appellant argues that the trial court's failure to ensure that his personal waiver of the right to sequestration was knowing, intelligent and voluntary was a denial of due process and denied him a fair trial. Appellant would cite as support the analogous requirement that a defendant in a capital case must personally make a valid waiver of the right to have the jury instructed on necessarily included lesser offenses to murder. Mack v. State, 537 So.2d 109 (Fla. 1989). This waiver must be personal and must be made knowingly, intelligently and voluntarily. Harris v. State, 438 So.2d 787, 795-96 (Fla. 1983)(waiver acceptable in light of meticulous care with which the trial court insured defendant's understanding of waiver of lesser included offenses).

In sum, Appellant maintains that the waiver of the right to

jury sequestration is too fundamental to allow that it be made, perhaps recklessly or ignorantly, by counsel, as it is the defendant who must suffer the consequences.

Appellant argues that the combination of these errors was fundamental error in violation of his rights under Article I, Sections 9 and 16, of the Florida Consititution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Alternatively, Appellant would argue that this issue can only be resolved after full exposition at an evidentiary hearing to determine whether there was any showing that Appellant's rights were compromised because of communications between the bailiff and jury.

ISSUE X

THE TRIAL COURT'S LIMITATION OF DEFENSE CROSS-EXAMINATION AND OTHER ERRORS COMBINED TO DENY APPELLANT A FAIR TRIAL AND DUE PROCESS OF LAW.

A. Limitation on Cross-examination.

The trial court twice limited Mr. Golden's cross-examination of witnesses, once when questioning Detective Hopwood as to what evidence he had that this case was a homicide and not an accidental death (R-1991), and once when questioning Ms. Golden's brother.[45] (R-2055) Because the attempted cross-examination was proper, the court's limitation was error.

A criminal defendant has a state and federal constitutional right to cross-examine witnesses called by the State.

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. . . . defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and reliability, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing of want or prejudice would cure it.'"

---

[45]The court indicated in advance it would allow cross-examination of this witness "within very narrow confines." (R-2047-48)

Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L.Ed.2d 347 (1974).

Likewise, the jury here could have been heavily influenced by a testimonial admission of Detective Hopwood that there was no evidence, other than that related to motive, which turned this case into a homicide investigation. Similarly, on cross-examination of Ms. Golden's brother, the defense was entitled "to delve into the witness' story to test the witness' perceptions and memory." Id.

In Zerquera v. State, 549 So.2d 189 (Fla. 1989), this Court remanded the defendant's first-degree murder conviction for retrial due to limitations on cross-examination of a detective and another witness. The Court held that the limitations on cross-examination as being outside the scope of direct examination, exactly like here, was improper:

> "'[W]hen the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts . . . or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief....'"
>
> *Coxwell v. State*, 361 So.2d 148, 151 (Fla. 1978)(quoting *Coco v. State*, 62 So.2d 892, 895 (Fla. 1953)(quoting 58 Am.Jur. *Witnesses* Section 632 at 352 (1948))(footnote omitted). *See also Blair v. State*, 406 So.2d 1103 (Fla. 1981); *Ross v. State*, 386 So.2d 1191 (Fla.

1980).

Zerquera, at 192.

Denial of this crucial cross-examination deprived Mr. Golden of his rights under Article I, Sections 9 and 16, of the Florida Constitution, and under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The conviction herein must be reversed, because the State cannot prove beyond a reasonable doubt that "there is no reasonable probability" that the exclusion of this evidence contributed to the verdict of guilt. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986).

B. Cumulative Prejudice.

The cumulative effects of the erroneous limitation on cross-examination discussed above, as well as the crippling prejudice caused by the combined effect of the errors raised in Issues V, VIII and IX, supra, denied Mr. Golden his fundamental right to due process of law and a fair trial. In Jackson v. State, 575 So.2d 181, 189 (Fla. 1991), this Court stated:

> Because we find multiple errors, we must consider whether even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.
>
> *Seaboard Air Line Rail Road Company v. Ford*, 92 So.2d 160, 165 (Fla. 1956)(on rehearing); *see also, e.g., Alvord v. Dugger*, 541 So.2d 598, 601 (Fla. 1989)(harmless error analysis reviewing the errors "both individually and

> collectively"), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1834, 108 L.Ed.2d 963 (1990); *Jackson v. State*, 498 So.2d 906, 910 (Fla. 1986)("the combined prejudicial effect of these errors effectively denied appellant his constitutionally guaranteed right to a fair trial").

See also Panzavecchia v. Florida, 658 F.2d 337 (5th Cir. 1981) (conviction reversed due to cumulative effect of errors).

These errors deprived Mr. Golden of his fundamental right to a fair trial and due process of law under Article I, Sections 9 and 16, of the Florida Constitution, and under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

ISSUE XI

THE TRIAL COURT ERRED BY IMPROPERLY EXCLUDING DEFENSE MITIGATION EVIDENCE.

The trial court improperly excluded defense mitigation evidence. In penalty testimony from Darin Golden, Mr. Golden's older son, the following transpired on direct examination by defense counsel:

> Q. Would you tell the jury from your perspective the relationship between your father and your mother as far as their attitude toward each other?
>
> MR. AGUERO: Judge, I have an objection. Anything with regard to Mr. Golden's character is admissible in this proceeding. Anything about his mother's feelings is not part of this proceeding.
>
> THE COURT: Sustained, Counselor.

(R-2908) Note that a defense objection on the very same grounds during the guilt phase was overruled and the evidence for the State allowed. (See Issue VII, supra) The State also argued Ms. Golden's feelings in its penalty argument. (See Issue XII, infra)

This evidence was highly relevant to bolster the weight of nonstatutory mitigation, was itself relevant to support a finding of additional nonstatutory mitigation that Mr. Golden had been a model husband for 24 years, and was also relevant to support the defense argument that there were no marital problems as motive. For example, if Ms. Golden's feelings or attitude reflected that he was a loving husband, it could have at the least bolstered the weight of the judge's finding as nonstatutory mitigation that Mr. and Ms. Golden were "best friends" and could have even served as

the basis for an additional element of nonstatutory mitigation.

Mr. Golden's death sentence must be vacated unless the State can prove beyond a reasonable doubt that this error did not contribute to his death sentence. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

The exclusion of this evidence was clearly error under Article I, Sections 2, 9, 16 and 17, of the Florida Constitution, and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 51 L.Ed.2d 973 (1978); Payne v. Tennessee, 501 U.S. _____, 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991); Campbell v. State, 571, So.2d 415 (Fla. 1991); Nibert v. State, 574 So.2d 1059 (Fla. 1990).

ISSUE XII

APPELLANT'S DEATH SENTENCE MUST BE VACATED DUE TO THE PROSECUTOR'S IMPROPER AND PREJUDICIAL PENALTY ARGUMENT.

The prosecutor committed reversible error by making improper and prejudicial penalty arguments.

A. Exclusion of Mitigation Evidence.

The prosecutor repeatedly told the jury that defense evidence should be rejected and was not mitigation. He argued that the nonstatutory mitigation, indeed all the defense mitigation, was "just one factor," i.e., that Mr. Golden was "a nice guy:"

> Three aggravating factors far outweigh whether Mr. Golden was a nice guy to his kids and his family over the course of his life, because that's basically what you have here.

(R-2925)

> Do we take nice guys who haven't committed other criminal offenses in their life and exclude them from the electric chair? That's not what that law says.

(R-2926)

> So take all three of those together and you put on the other side Mr. Golden being a nice guy.

(R-2929)

> This whole business about Mr. Golden's character, you can consider that and you can put it on this side of the scale if you wish. You don't have to. You can say that doesn't mean a hill of beans when we're talking about the death penalty to me, I don't see what somebody's past

> life has to do with what he did for the five or six months before he killed this woman, I don't see how that's anything in mitigation, and you can not weigh it at all. That is up to you individually as a juror.

(R-2931; see also R-2928) He told them sympathy and emotion were improper considerations. (R-2924, 2930, 2932, 2933, 2934). He told them to reject various defense arguments as inapplicable. (R-2929-2933) Finally, he argued that the aggravating circumstance of cold, calculated and premeditated was proven by nothing more than the guilty verdict and that that alone justified a death sentence. (R-2927)

B. Minimizing Juror Responsibility.

The prosecutor also committed error by minimizing the jurors' sense of responsibility. Although he gave lip service to the decision not being a "counting process," he repeatedly argued that it was just that, simultaneously treating all the mitigation as one factor. (See, e.g., R-2925-25) Then, he wound up his argument with (R-2933-34):

> That man killed himself when he drowned his wife. It doesn't have anything to do with you or the Judge or me or anybody else. He made that decision, and the consequences are on his head, not on yours.

These arguments were erroneous because Mr. Golden had, at a minimum, the very strong statutory mitigator of no prior criminal history, as well as three nonstatutory mitigating factors. The law allows the presentation of very broad mitigating evidence. The prosecutor's argument also that the "law says" a death

sentence is appropriate was legally unsound.

These improper arguments deprived Mr. Golden of his rights under Article I, Sections 2, 9, 16 and 17 of the Florida Constitution, and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Lockett v. Ohio, 438 U.S. 586; Caldwell v. Mississippi, 472 U.S. 320, ___ S. Ct. ___, ___ L.Ed.2d ___ (1985); Campbell v. State, 571 So.2d 415; Nibert v. State, 574 So.2d 1059; Mann v. Dugger, 844 F.2d 1446 (11th Cir. en banc 1988).

ISSUE XIII

THE TRIAL COURT ERRED IN NOT FINDING AS NONSTATUTORY MITIGATION THAT MR. GOLDEN WAS NONVIOLENT.

The uncontradicted evidence was that Mr. Golden was, all his life, a nonviolent person both in belief and behavior. This is recognized as a valid nonstatutory mitigating circumstance. Bedford v. State, 589 So.2d 245, 253 (Fla. 1991). Nevertheless, the trial court made no mention of it in its written findings.

The trial court's failure to find and weigh this nonstatutory mitigation was reversible error. In Nibert v. State, 574 So.2d 1059 (Fla. 1990), this Court held that:

> [W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved.

Id. at 1061. See also Campbell v. State, 571 So.2d 415 (Fla. 1990); Lockett v. Ohio, 438 U.S. 586.

Since Mr. Golden presented "a reasonable quantum of competent, uncontroverted evidence" that he was a nonviolent person, the trial court's failure to find and weigh that circumstance requires that his death sentence be vacated. Nibert, at 1063.

These errors denied Appellant his rights under Article I, Sections 2, 9, 16 and 17, of the Florida Constitution, and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

ISSUE XIV

APPELLANT'S DEATH SENTENCE MUST BE VACATED BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN.

The Judgment and Sentence (R-3345-46) reflects that the first of two aggravating circumstances was that the murder was committed for pecuniary gain. Section 921.141(5)(f), Fla. Stat. (1989). This aggravating circumstance was based upon factual conclusions which, for the reasons given below, were not proven beyond a reasonable doubt:

a. "Defendant forged his wife's signature." There was absolutely no evidence that those insurance forms which were "probably" signed by Mr. Golden were signed without his wife's authorization. See Issue I, supra. The evidence on this point rose, at best, to an implication. Further, any such implication was rebutted by the State's proof that Mr. Golden had also endorsed his wife's name to 23 of her paychecks, which clearly goes to show that she knew he signed her name all the time to business/financial documents and that such was simply a routine family practice for the Goldens.

b. "Obvious effort to keep [policies] secret." Likewise, whether Mr. Golden engaged in an effort to keep some of the insurance policies secret was never raised above the level of speculation. If that were the case, why didn't he use the second address on all insurance matters? Why did he and his wife both go to the bankruptcy attorney? There was also uncontroverted proof his wife had equal access to the mail delivered to the

apartment address; the unrebutted testimony of Mr. Golden was that they went there together as a daily routine. He also gave a reasonable explanation that that address was not given on all the insurance documents because he only used it when he was working in his office there.

c. "Had not been gainfully employed for approximately two years." Mr. Golden had single-handedly remodeled the apartments, which resulted in a net income to the family of $35,000 (difference between original mortgage and subsequent mortgage); the family had used this money for living expenses and materials for further improvements to the apartments. Although he may not have had an employer, that does not mean he was not employed in a manner which brought gain to his family. There was no evidence he was sitting on his sofa or was unindustrious. Likewise, although his effort to start his own business was unsuccessful, the fact that he tried to better himself and his family in this manner, or the fact of his poor economic success, should not be turned into a negative (nonstatutory aggravating) factor against him.

d. "Repossession of [two operable vehicles] imminent." The court's finding that Mr. Golden rented a third vehicle even though repossession of his two operable vehicles was imminent implied that a third car was unneeded or an unwise financial decision such that this rental reasonably support the conclusion that it was part of a "plan." However, the uncontradicted evidence was that the family needed three reliable vehicles.

Also, the uncontradicted testimony was that Mr. Golden and his sons still had both those vehicles at the time of trial; thus, they were never repossessed. Finally, serious financial difficulties or unwise financial choices abound in our economic climate and, as such, do not inexorably point to a criminal scheme.

e. American Express exclusion from bankruptcy. The court reached the "unavoidable conclusion" that this exclusion was an effort by Mr. Golden to ensure receipt of the $200,000 insurance. However, Mr. Golden's testimony that he and his wife had been advised by the bankruptcy attorney that they could not claim any very recent debts, he thought within the preceding 90 days, explained why this debt and none other was excluded from the bankruptcy. Similarly, if this were a scheme, why was the Discover card listed on the bankruptcy when it had been used to make payments on the CNA/Cigna insurance? Why did he wait until the car had been rented more than four weeks? Why didn't he get his wife her own American Express card to insure her coverage for $200,000?

f. "Anticipated" insurance receipts. Perhaps the best evidence on this point was the conclusion of the insurance representative that the death was accidental. There was no evidence from which a reasonable person could conclude that Mr. Golden had any way of knowing the American Express policy would pay $200,000 for his wife's death as a driver; indeed, probably the best evidence is that it had paid nothing as of trial. At

the risk of being repetitious, the American Express insurance representative agreed that the written materials stated expressly that only the cardholder (Mr. Golden) was covered for $200,000 and all others for $20,000, and also that the coverage was only good for four weeks. How was Mr. Golden to know that the company "sometimes" overlooks these exclusions and pays the full amount anyway? Thus, the trial court's conclusion that Mr. Golden "anticipated receiving" $383,000 in insurance was, at best, $180,000 high. As of trial, two years after Ms. Golden's death, the total sum which had actually been paid by insurance companies was slightly over $20,000. He had not even filed one claim and had been sought out by the insurers to file two other claims.

g. Disclosure to attorneys. The trial court found that "Interestingly, Mr. Golden had neither disclosed" his bankruptcy to his insurance attorney nor his insurance claims to the bankruptcy attorney. There is absolutely no evidence in this record - other than assumption or suspicion - to support this conclusion. Mr. Golden testified he could not remember if he had discussed the insurance with the bankruptcy attorney, or vice versa.

Thus, this aggravating circumstance, i.e., that the murder was committed for pecuniary gain, is invalid for absence of proof beyond a reasonable doubt. The State's failure to prove this aggravating circumstance beyond a reasonable doubt requires that it be stricken and the death sentence be vacated. See, e.g., McKinney v. State, 579 So.2d 80 (Fla. 1981); Herzog v. State, 439

So.2d 1372 (Fla. 1983); Hamilton v. State, 547 So.2d 630, 633 (Fla. 1989); Atkins v. State, 452 So.2d 529, 532 (Fla. 1984).

Imposition of a death sentence on this evidence violates Mr. Golden's right to due process under Article I, Sections 2, 9, 16 and 17, of the Florida Constitution, and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

ISSUE XV

APPELLANT'S DEATH SENTENCE MUST BE VACATED BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED.

The second aggravating circumstance found by the trial court was that the murder was cold, calculated and premeditated. (R-3345-46) Section 921.141(5)(i), Fla. Stat. (1989). This circumstance was likewise not established because the following facts set out by the court were not proven beyond a reasonable doubt:

a. Rental of car he did not need and could not afford. Again, all the evidence supported that Mr. Golden needed this car. Darin had a car, and Ms. Golden had a car. Mr. Golden's van was not reliable, and Mr. Golden could not work without transportation. The rental may have been a luxury or an unwise expenditure, but it was not criminal.

b. Automatic $200,000 insurance on Ms. Golden. First, the rental did not provide automatic coverage through the Gold Card; that only became effective because Mr. Golden opted not to buy extra insurance through the rental company but to rely instead on the coverage provided by Allstate for his family; the American Express coverage took over when the Allstate coverage lapsed.

Second, the $200,000 coverage on Ms. Golden was not automatic but only occurred because the company decided to overlook the cardholder requirement and the four-week rental period limitation as it "sometimes" does.

Third, as of trial, this "coverage" was empty words, because nothing had been paid by the company.

c. American Express exclusion from bankruptcy. The court reached the "unavoidable conclusion" that this exclusion was an effort by Mr. Golden to ensure receipt of the $200,000 insurance. However, Mr. Golden's testimony that he and his wife had been advised by the bankruptcy attorney that they could not claim any very recent debts, he thought within the preceding 90 days, explained why this debt and none other was excluded from the bankruptcy. Similarly, if this were a scheme, why was the Discover card listed on the bankruptcy when it had been used to make payments on the CNA/Cigna insurance? Why did he wait until the car had been rented more than four weeks? Why didn't he get his wife her own American Express card to insure her coverage for $200,000?

d. Forgery. There was no proof Mr. Golden was not authorized to sign his wife's name. In fact, the evidence that Mr. Golden routinely signed her name to her paychecks evidenced a clear pattern of authorization which disputes forgery.

e. Apartment address. Again, the unrebutted evidence was that this address was not used consistently, as it would in a scheme, and that Ms. Golden had equal access to the mail at that address.

f. Attempt to make death appear accidental. The trial court's reference to alleged attempts to make the death look like an accident is quite troubling, as the court basically turned the

generally insufficient evidence of a crime into aggravation; the court basically assumed that the fact that it looked like an accident was somehow further proof that it was anything but. There was no direct proof, only speculation, Mr. Golden did anything to "make it look like an accident."

In addition, although the trial court did not mention this as a factual basis for this aggravating circumstance, there is an inherent contradiction between the finding of this factor and the trial court's simultaneous finding of nonstatutory mitigation that Mr. and Ms. Golden were "best friends."

For these reasons, this aggravating circumstance was certainly unfounded, and the death sentence must be vacated. Compare Henry v. State, 574 So.2d 73, 75 (Fla. 1991). See also, McKinney v. State, 579 So.2d at 80; Herzog v. State, 439 So.2d 1372; Hamilton v. State, 547 So.2d 630; Atkins v. State, 452 So.2d 529.

Imposition of a death sentence on this evidence violates Mr. Golden's right to due process under Article I, Sections 2, 9, 16 and 17, of the Florida Constitution, and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

ISSUE XVI

APPELLANT'S DEATH SENTENCE IS UNRELIABLE BECAUSE THE TRIAL COURT IMPROPERLY ALLOWED THE JURY TO CONSIDER THE INAPPLICABLE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The trial court erred in instructing the jury on the aggravating circumstance that the murder was especially heinous, atrocious or cruel under Section 921.141(5)(h), Fla. Stat. (1989), because there was unsufficient evidence to support a finding of same. The defense argued strongly that this aggravating circumstance was inapplicable (R-2887-91), while the prosecution argued the applicability of this aggravator as analogous to strangulation. (R-2886) When the trial court indicated the factors on which this aggravator might be found, its tenuous basis was obvious:

> THE COURT: I think this is one of the problems with a case that is couched predominantly in circumstantial evidence. That I don't know what happened out there. I can theorize, as you can and the State can, but the jury is the one -- the jury has made the determination that he has -- that he drowned her. Now, specifically how he did it has not been disclosed to the Court.
>
> It has been disclosed to the Court the lady was terrified[46] of the water. And I think under those circumstances, to either push her off the dock and watch her drown, knowing how terrified she is of water, or to hold her under water, as the case may be, probably -- it is a circumstance from which the jury may infer a conscienceless or pitiless or torturous act.

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[46]See n. 13 above regarding the lack of evidence on this point.

> MR. SMITH: Judge, may I comment on that last comment by the Court?
>
> THE COURT: Sure.
>
> MR. SMITH: Under the Court's latest statement, the facts are that this woman voluntarily, according to the State, walked upon this dock, took her glasses off at midnight, and stood there next to the water. She could have tripped, fallen. If she was that terrified of the water, why would she get up on a dock with no glasses on where she couldn't see?
>
> I submit to the Court that the circumstances that the State suggest happened are inconsistent with her being terrified of the water at the time. So, therefore, that reason would not be -- would not justify a heinous, cruel, or unusual.
>
> THE COURT: Counselor, you have to rationalize on either side, and I think it's the jury's prerogative to do that rationalizing, rather than the Court's.

(R-2890-91)

The prosecution then argued the presence of this aggravator during penalty argument (R-2927-28):

> Conscienceless and pitiless. How much does that weigh against being a nice guy to other people? We're not talking about other people here; we're talking about Ardelle Golden.

He argued this factor outweighed the mitigation that Mr. Golden had no prior record, indeed all mitigation evidence. (R-2926) Then, in closing, he emphasized this factor (R-2934):

> Let me close with this: If at any time when you're back in that jury room, you find yourself feeling sympathy for Mr. Golden, get out a piece of paper and write down "cold, calculated, and premeditated, heinous, atrocious, and cruel, and financial gain." Remember that heinous, atrocious, and cruel has to do with Ardelle Golden gasping for

breath. (Emphasis added)

The jury was then instructed on this aggravating circumstance. (R-2954)[47] After a jury recommendation of death by a vote of 8 to 4 (R-2959), the court imposed the death penalty but rejected the applicability of this aggravating circumstance: "While probably true, this contention has not been proven beyond a reasonable doubt." (R-3347)

This case is identical in this regard to Omelus v. State, 584 So.2d 564 (Fla. 1991), where this instructional error was not harmless due to the State's closing argument, the trial court's mitigation findings, and the jury vote of 8 to 4. Applying the harmless error test of State v. DiGuilio, 491 So.2d 1129, this Court was unwilling in Omelus to say that this instructional error was harmless beyond a reasonable doubt. Omelus, at 566-67. The same factors are present here except that there were more mitigating circumstances found here than in Omelus. Particularly with regard to the emotional nature of this aggravator, there is too great a danger the jury vote of 8 to 4 for death would have been in favor of life had this factor not been included, especially in light of the very strong mitigation. Just as in Omelus, the death sentence here must be vacated for this error. Id. at 567. See also, Jones v. State, 569 So.2d 1234, 1240 (Fla. 1990).

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[47]Appellant would also argue that this jury instruction was inadequate under Espinosa v. Florida, ___ U.S. ___, 112 S. Ct. 2926, 120 L.Ed.2d 854 (1992); Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L.Ed.2d 372 (1988).

This was error under Article I, Sections 2, 9, 16 and 17, of the Florida Constitution, and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

ISSUE XVII

APPELLANT'S DEATH SENTENCE MUST BE VACATED BECAUSE OF THE TRIAL COURT'S IMPROPER DOUBLING OF AGGRAVATING CIRCUMSTANCES.

It is error for a trial court to improperly double aggravating circumstances by using the same facts to support more than one aggravator. Provence v. State, 337 So.2d 783 (Fla. 1976); cert. denied, 431 U.S. 969, 97 S. Ct. 2929, 53 L.Ed.2d 1065 (1977). This rule was fashioned in Provence, where the trial court had used the same facts, a robbery-murder, to support the finding of two aggravators: felony-murder and pecuniary gain. Sections 921.141(5)(d),(f), Fla. Stat. (1991). Compare Castro v. State, 597 So.2d 259 (Fla. 1992)(trial court should give limiting instruction that two factors based on same facts can only be considered as one aggravator).

In the present case, the trial court's sentencing order reflects the use of identical facts to support both aggravating circumstances, i.e., that the murder was committed for pecuniary gain and that the murder was committed in a cold, calculated and premeditated manner. Sections 921.141(5)(f),(i), Fla. Stat. (1989). The analyses in Issues XIV and XV, supra, explain this factual duplication.

The proper relief, then, is the striking of one of these aggravators and the vacation of Mr. Golden's death sentence, as it is ever more clearly disproportionate with only one (1) aggravating circumstance to be weighed against at least four (4) mitigating circumstances. As was stated in Nibert v. State, 574

So.2d at 1063:

> [T]his Court has affirmed death sentences supported by one aggravating circumstance only in cases involving "either nothing or very little in mitigation."

(Quoting Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989)).

This Court was faced with the identical situation in McKinney v. State, 579 So.2d 80 (Fla. 1991), and resolved it by vacation of the death sentence:

> In light of the existence of only one valid aggravating circumstance, as well as the statutory and nonstatutory mitigating evidence present here, the sentence of death is disproportional when compared with other capital cases where this Court has vacated the death sentence and imposed life imprisonment. *See Lloyd*, 524 So.2d at 403 (and cases cited therein).

McKinney, at 85.

This error violates Mr. Golden's rights under Article I, Sections 2, 9, 16 and 17, of the Florida Constitution and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

ISSUE XVIII

THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE.

A. Background

In every death penalty case, this Court "engage[s] in a proportionality review . . . to ensure rationality and consistency in the imposition of the death penalty." Sullivan v. State, 441 So.2d 609, 613 (Fla. 1983). In conducting its proportionality review, this Court has repeatedly struck down the death penalty in cases where, as here, the defendant had no significant prior criminal history and there was significant other mitigation.

In Songer v. State, 544 So.2d 1010, 1011 (Fla. 1986), this Court announced, "[L]ong ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders," citing State v. Dixon, 283 So.2d 1 (Fla. 1973). "[T]o secure that goal and to protect against arbitrary imposition of the death penalty, we view each case in light of others to make sure the ultimate punishment is appropriate." Id. A brief review of death penalty cases demonstrates the disproportionality of Mr. Golden's sentence.

B. Trial Court

First, it should be noted that the State offered Mr. Golden a plea to second-degree murder with a 40-year sentence. After trial and conviction, the trial court found four mitigating factors, one statutory and three nonstatutory: (1) Mr. Golden

had no prior criminal record; (2) Mr. Golden was a good role model for his children; (3) Mr. Golden assumed the responsibility of raising his younger brother; and (4) Mr. Golden and his wife were best friends. The court found two aggravating factors: (1) the crime was committed for pecuniary gain; and (2) the homicide was committed in a cold, calculated, and premeditated manner. (R-3344)

C. Aggravation

Contrary to the State's argument, this case is not remotely comparable to the death sentence imposed in either Rutherford v. State, 545 So.2d 853 (Fla. 1989), or Buenoano v. State, 527 So.2d 194 (Fla. 1988). The prosecutor relied on both of these cases to support his argument for the death sentence. In Rutherford, the court found that the defendant committed murder for pecuniary gain and in a cold, calculated, and premeditated manner. However, Rutherford is clearly distinguishable from the facts in the present case. There, the defendant brutalized a 63-year-old woman, beating her about the face and head, breaking her arm, puncturing her skull, then drowning her in the bathtub, after which he tried to cash a $2,000 check on which he had forged her signature. Three witnesses testified that, on separate occasions, Rutherford told them he planned to "get some money from a woman by forcing her to write him a check . . . [H]e would then kill her by hitting her in the head and drowning her in the bathtub . . ." Id. at 855. A fourth witness testified that

Rutherford told him later that day that he had killed "the old lady." It was obvious from the testimony of witnesses that Rutherford had apparently planned for weeks in advance to commit this crime, and had just as clearly killed the victim, following his preannounced plan to the letter.

In Buenoano v. State, 527 So.2d 194 (Fla. 1988), the defendant was sentenced to death for first-degree murder in the poisoning deaths of her first husband and her common-law husband, and attempted murder of her fiance, in order to collect insurance. In all these cases, there was direct physical evidence of arsenic poisoning. She had previously been convicted and received a life sentence for the drowning of her son.[48] There was clear evidence of calculation on her part, beginning in 1971 when she poisoned her first husband, until 1982, when her fiance became ill and discovered she was giving him arsenic. Buenoano was the beneficiary under all four victims' insurance policies. There was no challenge to the 4 aggravators (and no mitigators). It can fairly be said that Buenoano stands in a class of its own; it is certainly not comparable to this case.

Unlike the above two cases, where evidence of a murder scheme was clearly established by conclusive evidence, there was insufficient evidence presented by the State here of a calculated plan by Mr. Golden to kill his wife. To the contrary, the two aggravating factors found by the trial court are outweighed by

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[48]Note the prosecution repeatedly argued that Buenoano received a death sentence for drowning her son.

the four mitigating factors. The entire picture of mitigation and aggravation is that of a case which does not warrant the death penalty.

D. Mitigation

This Court has generally accepted the lack of prior criminal record as an especially compelling mitigating factor in finding the death penalty inappropriate. Where the defendant has led a fairly peaceful, productive life, with no convictions for prior, unrelated violent crimes, the Court has been reluctant to affirm the death penalty, even in cases where aggravating factors are present. Blakely v. State, 561 So.2d 560 (Fla. 1990)(death sentence disproportionate because lack of prior criminal history outweighed two aggravating circumstances of heinous, atrocious, or cruel; and cold, calculated, and premeditated in domestic dispute); Lloyd v. State, 524 So.2d 396 (Fla. 1988)(death sentence disproportionate where aggravating circumstance of murder committed in course of attempted robbery outweighed by defendant's lack of significant prior criminal history); Peavy v. State, 442 So.2d 200 (Fla. 1983)(death penalty case remanded for resentencing where court found three aggravating factors -- heinous, atrocious, and cruel; previous conviction of violent felony; and felony-murder -- and two mitigating factors -- defendant's age and lack of significant prior criminal history); McKinney v. State, 579 So.2d 80 (Fla. 1981)(death sentence vacated upon finding only one aggravating circumstance and

several mitigating circumstances, including lack of prior criminal history); Klokoc v. State, 589 So.2d 219 (Fla. 1991)(death sentence vacated upon finding of only one aggravating factor -- cold, calculated, and premeditated -- which failed to outweigh several mitigating factors, including no significant history of prior criminal activity). See also Blakely, 561 So.2d at 561 n. 2. This lack of prior criminal record is particularly significant given that Mr. Golden's age was 46 at the time of his wife's death.

As previously stated, the mitigation testimony - that the sons could not have asked for a better father, that Mr. Golden was very much a family person, that no one ever saw Mr. Golden engage in any violent or dangerous behavior (in fact, he never even spanked his children), and that Mr. Golden taught his sons that violence was never the best way out - certainly attests to Mr. Golden's normally peaceful, gentle nature and should be a strong mitigator.

Testimony was offered to show that, as a boy, Mr. Golden helped his mother by taking care of his younger brothers and sisters while she worked. His brother testified that he owed his life to Mr. Golden, who helped him get into school and obtain a degree.

There was uncontroverted testimony by the sons that their father loved their mother and was always there for her when she needed him, from Mr. Golden's brother that he (Mr. Golden) loved his wife very deeply, and that she and the boys were the most

important things in his life. No one ever saw the Goldens arguing in a violent or dangerous manner.

In Proffitt v. State, 510 So.2d 896 (Fla. 1987), defendant burglarized a house and fatally stabbed the occupant who was sleeping in bed; the trial court found 2 aggravators, 1 statutory mitigator, and several nonstatutory mitigators, which is very similar to the circumstances present in this case. On appeal, this Court stressed that not only was there no aggravating factor of prior convictions, but also Proffitt's lack of any significant history of prior criminal activity or violent behavior was a mitigating circumstance. Unrefuted testimony from co-workers described Proffitt as nonviolent and happily married.

By contrast, in Herzog v. State, 439 So.2d 1372 (Fla. 1983), the defendant believed his girlfriend had taken some of his drugs or money. He induced her to take quaaludes, watched as his roommate gagged her, assisted another roommate in attempting to smother her, dragged her into another room, and strangled her to death, after which the defendant and an accomplice wrapped her in a garbage bag, drenched her corpse with gasoline, and set it afire. The trial court in that case found 4 aggravating factors and no mitigating factors. Nevertheless, this Court (striking 3 aggravating factors) vacated the death sentence even though the defendant had at least two prior convictions. Id. at 1381.

Conversely, in many murder cases where the Court has found the death penalty appropriate, the defendants typically had prior, unrelated convictions of violent felonies. See, e.g.,

Lemon v. State, 456 So.2d 885 (Fla. 1984); Williams v. State, 437 So.2d 133 (Fla. 1983); King v. State, 436 So.2d 50 (Fla. 1983); Harvard v. State, 414 So.2d 1032 (Fla. 1982).

Here, Mr. Golden, at age 46, had never been arrested for anything in his life. This is very strong mitigation by itself. The trial court's weighing of the aggravating and mitigating circumstances is not supported by "sufficient competent evidence." Campbell v. State, 571 So.2d 415 (Fla. 1991).

In sum, Mr. Golden's death sentence must be vacated because it has been applied in a disproportionate fashion with similar cases, in violation of Article I, Sections 2, 9, 16 and 17, of the Florida Constitution and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

ISSUE XIX

APPELLANT'S DEATH SENTENCE MUST BE VACATED BECAUSE THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY THAT MITIGATING CIRCUMSTANCES MUST OUTWEIGH AGGRAVATING CIRCUMSTANCES IN ORDER TO RECOMMEND A SENTENCE OF LIFE.

The trial court erred in refusing to instruct the jury that the State had to prove that the aggravating circumstances outweighed the mitigating circumstances, thereby requiring Mr. Golden to prove that death was not the appropriate punishment, in violation of Article 1, Section 9, 16 and 17 of the Florida Constitution,[49] and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In the State's closing penalty argument, even though the prosecutor gave lip service to the decision not being a "counting process," he told the jurors that death was appropriate because there were 3 aggravating circumstances "on this side of the scale" and only the fact that Mr. Golden was "a nice guy" on the other side.

The trial court then instructed the jury at the beginning of the guilt phase and twice in the penalty phase that:

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R-117, 2901, 2953) The State also emphasized this during voir dire. (e.g., R-289, 324-36, 342). This was error because the eight jurors who recommended death may have done so because the

[49]See Walls v. State, 580 So.2d 131 (Fla. 1991).

mitigating and aggravating were balanced rather than because the aggravation actually outweighed the mitigation.

The State's position was interesting. The prosecution initially indicated its agreement with this argument and even proposed that the jury be instructed that "the State has the burden to show that the aggravating circumstances outweigh anything in mitigation." (R-3287-88) The stated reason was a disagreement with rulings of this Court and a belief that this argument would ultimately prevail in federal court. (R-3288) The trial court told the State "for whatever it may be worth the Court agrees with you." (R-3289) However, the State subsequently changed its position and specifically requested the instruction that was given. (R-52-54)

To be consistent with the state and federal constitutions, any capital sentencing scheme must ensure that the decision to impose a death sentence is a reliable and nonarbitrary one. Furman v. Georgia, 408 U.S. 238 (1972). See also Beck v. Alabama, 447 U.S. 625 (1980); Mills v. Maryland, 486 U.S. 367 (1988). The Florida capital sentencing scheme, to the extent it requires the accused to prove that life is the appropriate penalty, runs afoul of these fundamental constitutional precepts. Here, the jury was told that death is the appropriate punishment even if it finds that the mitigating and aggravating circumstances are equally compelling. Put another way, the Florida capital sentencing scheme, which requires that mitigating factors outweigh aggravating factors, does not provide a

sufficient margin of error to be reliable.

Neither Blyestone v. Pennsylvania, 110 U.S. 1078 (1990), nor Boyde v. California, 110 U.S. 1190 (1990), are to the contrary. Both alleged that a capital statutory sentencing scheme where a death sentence was required if the aggravating circumstances outweighed the mitigating circumstances precluded the individualized sentencing required by Lockett v. Ohio, 438 U.S. 586 (1978), and its progeny. The Supreme Court rejected these claims because there was no limitation on the sentencer's ability to consider any relevant evidence in mitigation. Unlike Blyestone and Boyde, Mr. Golden is not alleging that the sentencing scheme is his case precluded an individualized sentencing determination. Rather he alleges that, by placing the burden of proof on him to prove that life was the appropriate penalty by showing that the mitigating circumstances outweighed the aggravating circumstances, he has been denied a reliable, nonarbitrary sentencing determination.

In this regard, it would seem self-evident that, if due process requires proof by the State beyond a reasonable doubt before a defendant can be sentenced for petty theft, reversing this basic scheme and placing the burden on Mr. Golden to show that death is not the proper sanction is constitutionally improper. Such a claim was not at issue in Blyestone or Boyde because, in those cases, the burden of proof regarding any weighing of aggravating and mitigating circumstances remained on the State.

This claim is much like the one found meritorious in McKoy v. North Carolina, 110 S.Ct. 1227 (1990), where Justice Kennedy found the jury instruction at issue constitutionally insufficient because it could give rise to an unreliable and arbitrary sentencing determination. McKoy, 110 S. Ct. at 1240 (Kennedy, J., concurring).

Even though Section 921.141(3), Florida Statutes (1991), provides for this weighing scheme, the United States Supreme Court has not viewed Florida's sentencing process in accordance with this statute or the jury instruction given here. In Parker v. Dugger, 498 U.S. ___, 111 S. Ct. 731, 112 L.Ed.2d 812, 824 (1991), the Supreme Court stated:

> As noted, Florida is a weighing state; the death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances.

The Court cited two decisions of this Court as support for that interpretation of Florida's weighing scheme. McCampbell v. State, 421 So.2d 1972, 1075 (Fla. 1982); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981). Is it likely the Court simply misread Section 921.141(3), or is it more likely the Court was overlaying this Section with a constitutional interpretation? See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988), cert. denied, 486 U.S. 1026, 108 S. Ct. 2005, 100 L.Ed.2d 236 (1988)(instruction that "death is presumed to be the proper sentence" unconstitutional).

In sum, Mr. Golden's death sentence should be vacated because the State can not prove beyond a reasonable doubt that

this error did not contribute to the 8-to-4 jury recommendation of death. State v. DiGuilio, 491 So.2d 1129.

ISSUE XX

THE FLORIDA CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL.

A. Failure to Assign Weights to Aggravating and Mitigating Circumstances.

The United States Supreme Court has upheld the constitutionality of Florida's capital punishment statute based on a finding that it was not applied in an arbitrary and capricious fashion and that it, therefore, resulted in a fair and consistent application of the death penalty. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972); Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L.Ed.2d 913 (1976). However, doubt has arisen as to the consistency with which the aggravating and mitigating circumstances are weighed even when applied to the same factual situation. This disparate outcome is particularly evident when, on identical facts, one jury recommends life and this Court vacates the death sentence while another jury recommends death, which the trial court and this Court refuse to overturn. Even more specifically, the statute is invalid to the extent that individual jurors can assign different weights to each aggravating and mitigating circumstance, so that there is no majority as to the basis on which a death sentence is recommended.[50] Compare Grossman v. State, 525 So.2d 833, 846 (1988)(Shaw, J., concurring specially).

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[50]Here, the prosecutor argued that each juror could individually assign different weights to the same circumstance. (R-2925-26, 2955)

B. Failure to Require Special Penalty Verdict.

The trial court erred by failing to require a special verdict as to penalty. Capital sentencing schemes have been upheld only when there are statutory procedures designed to eliminate arbitrariness. If this is the case, how can we properly allow a jury to return a general verdict as to penalty and then allow the court to enter an uninformed, unguided sentence which could easily be -- and probably often is -- in conflict with the jury's findings as to applicable circumstances? See Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987); and Cabana v. Bullock, 474 U.S. 376 (1986). See also Haliburton v. State, 561 So.2d 248, 252 (Fla. 1990)("[D]eath penalty review would be easier and more complete with the information contained in such a special verdict.")(Barkett, J., concurring specially). In Schad v. Arizona, ___ U.S. ___, ___ S. Ct. ___, 115 L.Ed.2d 555 (1991), the U. S. Supreme Court held by a bare 5-to-4 majority that a special verdict was not required as to guilt due to the unique historical treatment of felony murder and premeditated murder as the same. However, that analysis does not apply to aggravating and mitigating circumstances used to impose a death sentence.

C. Section 921.141 is Unconstitutional.

Appellant filed a motion challenging the constitutionality of Section 921.141, Florida Statutes (1989), on a number of bases. (R-3138-43) Appellant incorporates by reference the

arguments set forth in that motion for purposes of this appeal.

These errors violated Mr. Golden's rights under Article I, Sections 2, 9, 16 and 17, of the Florida Constitution, and under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Appellant must be discharged based on the insufficiency of the evidence. Alternatively, Appellant is entitled to have a new trial or, at the minimum, to have his death sentence vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Assistant Attorney General Robert Krauss, 2002 North Lois Avenue, Westwood Center, Suite 700, Tampa, Florida, 33607; and to Mr. Andrew Golden, #365791, Florida State Prison, N Wing, Post Office Box 747, Starke, Florida, 32091, on this 16th day of December, 1992.

GWENDOLYN SPIVEY