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

AMENDED REPLY BRIEF OF APPELLANT

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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.

First, the State's Statement of the Case and Facts (AB-1-11)[2] should be stricken or ignored, as it wholly fails to comply with the requirement of Florida Rule of Appellate Procedure 9.210(c) that "the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified." (Emphasis added.)

On the merits, the State argues implicitly that a criminal defendant should not be able to appeal the sufficiency of the evidence underlying the conviction. That is, the State argues that the reasonableness of a defense is a question for the jury. (AB-16-17) However, on a motion for judgment of acquittal, the trial judge must first pass on the initial question whether the State has disproven, beyond a reasonable doubt, the defendant's reasonable hypothesis of innocence. If the State does not meet

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

[2]References to the Initial Brief of Appellant and to the Answer Brief of Appellee, respectively, will be designated by "IB" and "AB", followed by the appropriate page numbers, all in parentheses.

that initial burden, the case should not even go to the jury.[3] The State argues that "By its verdict, it is obvious that the jury . . . rejected the defendant's theory as unreasonable and his testimony as untruthful." (AB-17) If the State's position were sound, however, the sufficiency of evidence underlying a defendant's conviction - no matter how flimsy or unsound the proof - would be immune to appeal, and that is clearly not the rule of law.

The defense theory of accidental death was entirely reasonable, and it must be kept in mind that - assuming arguendo that Mr. Golden was asleep at home with their sons - he does not know how his wife died and so can only speculate as to the precise sequence of events. In this light, the defense theorized that Ms. Golden unwittingly drove into the lake because she either took a wrong turn or did not realize she was on the residential street which led to the lake. Given the likely trajectory of the car into the water (see diagram at IB-80), it is reasonable that Ms. Golden did not realize that the car was floating into deeper water and thought she could get out safely, removed her glasses to protect them, collected her purse,[4] and

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[3]This rule serves the worthy goals of conserving judicial resources and avoiding unnecessary trials (and appeals), although all too often elected trial judges are reluctant to grant motions for judgment of acquittal.

[4]In response to the State's criticism of the theory that Ms. Golden's cigarette case could have been in her purse all along and simply been overlooked due to the clutter, the Court need only go look at this purse in evidence to realize this was quite possibly what happened. Also, perhaps Ms. Golden went back to the dock because she realized she had left her sandals there.

only then - as the car started to sink and water started to pour in - realized she had more of a problem than it first appeared and managed to get out the car door, trying to make her way back in the direction from which the car had come, drowning in her escalating panic. It is also possible that Ms. Golden, in a suicide attempt, removed her glasses, put them into her purse (which she could have knowingly or absentmindedly had over her arm), and intentionally drove into the lake, only to have second thoughts (as do many persons making suicide attempts) and tried unsuccessfully to escape the sinking car. (The State's argument now that there was no evidence Ms. Golden was despondent conflicts with their unsuccessful attempt at trial to imply some marital problems.) The State cannot fairly say there is no evidence of suicide; since the defense attorney made no effort to pursue that theory, we do not know what evidence there might have been.

If Mr. Golden really planned this for months, and really calculated the American Express coverage, would he have actually forgotten to put her glasses on her or in the water? Would he really have forgotten and left her shoes at the scene?[5]

The bottom line on the evidence in this case is that evidence of motive alone can never convert inconclusive circumstantial evidence into proof beyond a reasonable doubt sufficient to support a conviction for first-degree murder, much

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[5]Why did not the police verify the location where the unopened pack of cigarettes had been purchased by tracing the code on the pack?

less a death sentence. The insurance representative concluded that Ms. Golden's death was accidental, and both detectives and the crime scene investigator testified that they saw no evidence of criminal agency, outside the evidence of a possible motive. If the quality of evidence presented here is sufficient, a lot of people had best rethink their financial and insurance decisions.

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 State's first argument on this point, that the trial judge's decision was based on his perceptions (AB-25), misses the point, because the trial judge's granting of a challenge for cause must be based on the Record and not merely on some perception not supported by the Record. An appellate court cannot review a perception. Here, the trial judge's granting of the challenge for cause, over defense objection, was an abuse of discretion because there was clearly an inadequate factual basis on which to excuse this juror.

Second, the State's argument that this error is rendered harmless in light of the State's remaining peremptory challenges (AB-25) has no legal support. There is no rule of law which holds that a trial judge's abuse of discretion is excusable if the prosecutor has peremptory challenges left, and there is no evidence here which juror, if any, might have been struck with the prosecutor's remaining peremptories. The State might well have preferred Ms. Brown over the next available veniremember. Hitchcock v. State, 578 So. 2d 689 (Fla. 1990), presented a directly opposite factual situation from the instant case; there, the defendant appealed denial of a challenge for cause, but this Court held the denial was harmless because the trial court had

given the defense an additional peremptory challenge, which was then used on a different juror, and the defense failed to identify which juror it would have struck in its request for a second additional peremptory challenge.

Finally, the State argues on this issue that an abuse of discretion can be harmless if there are other grounds which in hindsight might support the excusal; however, the State did not challenge Ms. Brown on her possible hardship, and Ms. Brown's testimony clarified that this was a relatively minimal concern in the overall scheme of things. There was no financial concern, as she thought her salary would continue; rather, it was just a concern for her students having a substitute teacher. (R-450) Most importantly, the trial court did not even mention this matter except as an afterthought after Ms. Brown had already been excused and left. (R-464)

Ms. Brown stated repeatedly that, if the evidence was sufficient, and in the right circumstances, she could vote to convict and for a death sentence. (R-451-53,455,456) Perhaps the strongest evidence of her ability to vote a death sentence was her testimony that, if the death penalty statute were put to a vote, she would vote in favor of it. (R-452) She expressed particular concern for child or elderly victims (R-452-53), and her final statement on the subject was "I would try to follow [the law] to the best of my ability, you know." (R-460)

Thus, the trial court abused its discretion in excusing this potential juror for cause when she had not stated unequivocally

that she would vote against the death penalty in all cases.

ISSUE III

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

A. Admission of Evidence.

The State has failed entirely to explain its position that the admission of evidence of motive prior to proof of corpus delecti is somehow different from admission of a confession or evidence of collateral crimes. (AB-25-26) Likewise, the State does not explain its conclusory statement that the evidence and argument of forgeries in the instant case do not constitute collateral crimes evidence (AB-26), when even the trial court thought it did.

Mr. Golden agrees that the reasoning of Davis v. State, 582 So. 2d 695 (Fla. 1st DCA 1991), is sound (AB-27), but it is inapplicable to this case. Davis involved an appellate argument that corpus delecti had not been established for admission of a number of confessions because the victim's body had not been discovered.[6] Buenoano v. State, 478 So. 2d 387 (Fla. 1st DCA 1985), on the other hand, presented overwhelming evidence of corpus delecti (i.e., that a criminal agency was responsible for her son's drowning) to support the admission of motive evidence, a decision further substantiated by her subsequent additional

[6]Obviously, the law does not require the State to negate all possible noncriminal explanations of a victim's death, an argument it erroneously imputes to Appellant. (AB-27)

convictions for murder for insurance proceeds.

The rule requires independent proof of substantial evidence that a crime has been committed prior to admission of evidence of motive, and that evidence clearly did not exist here.

B. Jury Instruction.

The case cited by Appellee, Ponticelli v. State, 18 Fla. L. Weekly S133 (Fla. March 4, 1993), involved a closing jury instruction, and the necessity of a jury instruction here on the evidence of motive is more closely analogous to an instruction on collateral crimes evidence or a lesser included offense. (IB-104-105).

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 critical failing of the State's argument (AB-28-30) is its neglect of the fact that there was no evidence that Mr. Golden signed his wife's signature to the insurance enrollment card without her permission. The evidence clearly established that the Goldens had a family practice of Mr. Golden signing his wife's signature to important documents. Without such evidence that these signatures were made without her permission, i.e., that they were "forgeries," there was no relevance at all to this evidence and certainly not enough to outweigh the enormous prejudice arising therefrom. The State basically admits this point by stating: "The fact that signing her name, if done without her permission, may point to another crime does not diminish the relevance of this evidence." [Emphasis added.](AB-30)

Additionally, the State neglects the fact that Mr. Golden as well as his sons had life insurance; rather, the State incorrectly implies that Mr. Golden obtained insurance on no one but his wife. (AB-30) The State neglects that it was Mr. Golden who was clearly covered under the $200,000 American Express policy, so that if he had been aware of the existence of this coverage and had planned his wife's death, he would have certainly insured payment of this amount by making her a

cardholder. The State neglects that both Mr. and Ms. Golden went to the bankruptcy attorney, so that it was clearly not some surreptitious activity or plan on his part. Finally, the State neglects the fact that it is normal practice to insure a family's breadwinner, such as Ms. Golden, more heavily than other family members, and the breadwinner is increasily becoming the woman, even in married households.

Additionally, Mr. Golden did not request a claim form for the life insurance on September 26, 1989; rather, the company was advised of the loss of the car. (R-2206-7) Mr. Golden never solicited a claim form; in fact, American Express finally tracked him down in Minnesota in February, 1990, and the claim form was filed in March, 1990.

Finally, the defense counsel objected extensively to this evidence, both pretrial and during trial, so the State's procedural bar arguments are inapplicable. (AB-31) The State has failed to meet its burden of proving that this evidence was harmless beyond a reasonable doubt, especially in the absence of any appropriate jury instructions under Section 90.404(2)(b)2, Florida Statutes.

ISSUE V

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

The State cites Millett v. State, 460 So. 2d 489 (Fla. 1st DCA 1984), where the First District Court of Appeal found the judicial comments improper but harmless (AB-33), but the court there found that the evidence against the defendant was overwhelming and stated:

> Although we apply the harmless error rule, given the overwhelming nature of the evidence presented against defendant, we must caution that another case with less evidentiary force may require reversal.

Id. at 493. [Emphasis added.]

In a unique situation such as this, where the defense counsel joined the trial judge in making damaging comments, the defendant should not be punished because that same attorney failed to object. Should he have objected to his own behavior? In this same vein, the State's suggestion that Mr. Golden should be blamed for the trial judge's choice about how to respond to him (AB-34) ignores the weighty responsibility of a trial judge and the overriding right of a defendant to be treated with impartiality before the jury.

Mr. Golden's trial was tainted with fundamental error by judicial impartiality in front of the jury and the gross ineffective assistance of counsel.

ISSUE VI

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

The premise of the State's position (AB-34) is that the view was correctly denied because the water level had risen, yet that very fact did not stop the court from allowing the State to calculate and introduce evidence as to what the water level must have been on the date of Ms. Golden's death.[7]

[7]Although Sgt. Melson testified he could see the water when he turned onto the street leading to the ramp at 6:20 a.m. (R-1646,1652)(AB-34), it was unclarified whether this was attributable to the presence of a number of other police cars with their headlights or other lighting equipment. Also, even Sgt. Melson, the crime scene investigator, testified that he never found any evidence in his investigation to indicate this was anything but an accidental death. (R-1659-63) In any event, we will never know how the scene appeared to Ms. Golden with her eyesight.

ISSUE VII

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

The State's argument that the testimony of Det. Smith as to what he was told by convenience store employees was not hearsay is unpersuasive. (AB-36 37) This Court need only look at the argument preceding this testimony (see IB-128-29) to see that the trial court misapprehended the nature of hearsay testimony, specifically that it can extend to nonverbal conduct. In any event, the officer's testimony here was clearly based upon what the store clerks told him, and that was obvious from his responses on cross-examination. (R-1858-59) The State's attempt to argue that this testimony was not offered for the truth of the matter asserted (AB-37) is transparently invalid; the clear purpose of the testimony was to prove that Ms. Golden did not buy any cigarettes that evening, i.e., she did not go back out of the house because she never got back to the house and must have already had the cigarettes in her purse when Mr. Golden pushed her off the end of the dock.

As to the State's argument that this error was not preserved, it was argued at length with the trial court, so that the court was clearly given an opportunity to address the objection.

As to the subsequent hearsay testimony by Mr. Hauth, the victim's state of mind was made an issue by the State via this testimony of co-workers, and for the State to now attempt to

claim that the defense (which follows the prosecution at trial) initiated this inquiry is clearly erroneous.[8] The State argues (AB-39) that Ms. Golden's state of mind was admissible because Mr. Golden claimed the death was accidental. However, in Kingery v. State, 523 So. 2d 1199 (Fla. 1st DCA 1988), cited by the State (AB-39), the court stated that the test for admission of hearsay statements under the state of mind exception when the defendant claimed the death was an accident was where the victim had made statements "that he feared whatever the instrument of death proved to be." Id. at 1202. That was clearly not the case with the testimony of Ms. Golden's co-workers.

The State's citation (AB-37) of Leonard v. State, 423 So. 2d 594 (Fla. 3rd DCA 1982), is not helpful to resolution of this issue, since no facts are given in that decision.

Finally, the third area of hearsay was not, as the State characterizes it, "the admission into evidence of the credit union's telephone log." (AB-40) It was the triple-hearsay testimony of the credit union manager as to the contents of a note left for his assistant by a third person (neither of whom testified at trial). Thus, neither the business record exception nor Hawthorne v. State, 399 So. 2d 1088, 1090 (Fla. 1st DCA 1981)(witness properly testified from bus company records), is

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[8]Further, for the State to argue here that the victim was happy (AB-39) and that there was marital bliss in the Golden home directly conflicts with its argument at trial; indeed, the whole purpose of this co-worker testimony was to try to imply that the Goldens had some deep-seated conflict about returning to Minnesota.

applicable here. The note testified from here was not a regularly maintained business record to meet the statutory exception at issue.

ISSUE VIII

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

While the State correctly cites the rule that the State can comment on the uncontradicted nature of the evidence or the lack of evidence,[9] the State here crossed the line of propriety by directing the jury's attention to the specific failure of the defendant to explain or produce certain evidence. (See IB-135-36) As the this Court pointed out in State v. Jones, 204 So. 2d 515 (Fla. 1967), the critical distinction is between comments on the "evidence as it existed before the jury" and comments on "the failure of the defendant to explain or contradict what had been introduced." Id. at 517. (Emphasis added.) Compare Knox v. State, 471 So. 2d 59, 60 (Fla. 4th DCA 1985)(prosecutor's remark went beyond mere comment on uncontradicted testimony and directly referred to defendant in noting absence of contradictory evidence).

Defense counsel objected to the prosecutor's clearly improper initial comment before the jury to the effect that the defense could call the witness in its own case. (R-1545;IB-135) As to the failure of defense counsel to object to all the complained of comments, Mr. Golden must emphasize the contribution these errors had to his deprivation of a fair trial.

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[9]See, e.g., White v. State, 377 So. 2d 1149 (Fla. 1980)(prosecutor may comment on uncontradicted nature of evidence).

See Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991).

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.

The State has failed to address the specific rule of Pope v. State, 569 So. 2d 1241 (Fla. 1990) (IB-142), which states that the right to jury sequestration during deliberations can be waived by counsel's failure to object "if adequate cautionary instructions were given and there is no other showing that the defendant's right to a fair trial was compromised . . . ." Id. at 1244. (Emphasis added.) This test is met here because the trial court gave no more than the standard admonition preceding the mid-deliberation separation, failed to fully poll the jury upon the reassembly, failed to admonish the jury not to deliberate while smokers were out of the room, and twice allowed the bailiff to communicate with the jury. This case meets the test of Pope for finding fundamental error.

Although it will always be a close call whether a particular case presents sufficiently egregious facts to pass the stringent test of Pope, any doubt should be resolved in the favor of a capital defendant. The rule of law established in Raines v. State, 65 So. 2d 588 (Fla. 1953), has been almost totally emasculated by Pope, and a defendant's right to a fair and impartial jury (and jury deliberations) will retain no vitality if cases presenting facts such as these are considered to be

acceptable conduct of a jury's deliberations.[10]

Responding to the State's argument that Mr. Golden's intelligence and education established a valid waiver of his right to jury sequestration (AB-45 n. 39), those factors alone do not establish that a defendant's spontaneous acquiescence with counsel is a "knowing, intelligent and voluntary" waiver of legal rights. (IB-143)

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[10]While it may be "obvious" to the State (AB-46) that the remaining jurors stopped deliberating while smokers were absent, this was based only on the bailiff's opinion and on his overhearing of one statement, and that alone does not establish the fact. Even the prosecutor expressed concern and requested admonition on this point; although the court agreed that such was necessary, the admonition never came. (IB-139-140)

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.

Mr. Golden's counsel was prohibited from completing his cross-examination of Det. Hopwood - the lead detective - to establish exactly what he considered to be evidence that Ms. Golden's death was a homicide as opposed to an accidental drowning (or suicide attempt). The Detective testified that "when you put everything together," it was evidence of foul play, but counsel was cut off before he could pin down the witness as to exactly what constituted "everything," and the trial court's ruling was an error of constitutional dimension.

The State totally neglected to address Zerquera v. State, 549 So. 2d 189 (Fla. 1989), an identical capital case in which this Court ordered a new trial, or to meet its burden of showing that the improper limitations on cross-examination (IB-145-46) were harmless. (AB-46-49)

B. Cumulative Prejudice.

The State's only response to this argument is by footnote. (AB-49 n. 42). Given the State's repetitive cry of procedural default on Mr. Golden's other claims, as well as what the State recognizes as the "paucity of physical evidence in this case" (AB-47) the Court's consideration whether this trial produced a reliable conviction and sentence becomes even more critical. The

prejudice here in even more compelling than in Jackson v. State, 575 So. 2d 181 (Fla. 1991)(IB-147-48), where this Court reversed for a new trial because of the prejudicial impact of multiple errors, even though those errors standing alone might have been harmless and even though, unlike here, there was "competent substantial evidence." Id. at 189.

ISSUE XI

THE TRIAL COURT ERRED BY IMPROPERLY EXCLUDING DEFENSE MITIGATION EVIDENCE.

The State argues (AB-49) but does not explain how the trial court's sustaining of an objection to defense mitigation testimony from Mr. Golden's son as to "[a]nything about his mother's feelings" was not an exclusion of defense mitigation. Although Mr. Golden's son may have testified about his father's doting treatment of his mother, that was distinctly different from testimony as to Ms. Golden's feelings about the defendant. Likewise, the court's finding as nonstatutory mitigation that Mr. and Ms. Golden were "best friends" did not in any way lessen the error of this exclusion, since the jury's recommendation (and thus the trial court sentence and this Court's decision) could have been diametrically different if this additional evidence had not been excluded.

Finally, the State's waiver argument that "defense counsel himself instructed the witness to limit his answer" (AB-51) is without merit; the attorney was clearly only complying with the trial court's immediately preceding ruling. (R-2908)

ISSUE XII

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

This issue should be considered in conjunction with Issue XI.B., supra.

ISSUE XIII

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

The State's argument that the aggravating circumstances here "heavily outweighed" any evidence of mitigation (AB-52) is unfounded, as the Court has before it a very tenuous - at best - circumstantial evidence case and a 47-year-old defendant who had never even been arrested. The trial court found one (1) element of statutory mitigation (no significant history of prior criminal activity) and three (3) elements of nonstatutory mitigation, including that Mr. and Ms. Golden were "best friends" for their 24 years of marriage. That simply does not yield a "heavily" unbalanced scale. Compare Waterhouse v. State, 522 So. 2d 341 (Fla. 1988)(5 aggravating circumstances), and Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), where both defendants were granted resentencings despite enormous aggravation on the basis that an omission of mitigation can never be considered harmless.

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 State confuses the appellate standard for reviewing a claim of insufficiency of the evidence, as in Issue I, supra, and that for reviewing the claim here of insufficiency of proof of an aggravating circumstance; the State argues that, since Mr. Golden was found guilty, this Court must presume that there was proof beyond a reasonable doubt of this particular aggravating circumstance. (AB-53) However, while this Court need only find under Issue I that the State disproved beyond a reasonable doubt the defendant's reasonable hypothesis of innocence, the Court must find here that there was proof beyond a reasonable doubt of the existence of each aggravating circumstance.

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.

First, it must be kept in mind that the Golden family had insurance on both Mr. Golden and the couple's two teenage sons, not just Ms. Golden. Also, it is typical for the breadwinner in a family, such as Ms. Golden, to be provided the most insurance coverage. (AB-55 n. 49) Second, listing Ms. Golden as a driver did not automatically insure her life for accidental death through his American Express card (AB-55); it was only when the Goldens' regular automobile insurance coverage subsequently lapsed that the coverage through American Express kicked into force. Third, the State again confuses proof of premeditated murder with proof that a murder was cold, calculated and premeditated. (AB-56) Finally, the State had far more reliable, convincing evidence in the cases cited by the State. (AB-56)

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.

Contrary to the State's assertion (AB-58), the Medical Examiner here did not testify that a person deprived of oxygen in this way "would be" conscious and struggling "for minutes." Rather, he testified that "There is no way for me to say exactly the time, but in an average, in the temperature of water like it was in this case, a person can lose consciousness within a few minutes." (R-2903-04). (Emphasis added.) Before losing consciousness, some people do not even know what they are doing. He did not know the water temperature in this case, just that it would have been warm. (R-2903-04)

The State's reliance on Haliburton v. State, 561 So. 2d 248 (Fla. 1990), and Lara v. State, 464 So. 2d 1173 (Fla. 1985), is misplaced. Neither case involved the simple issue whether a drowning unaggravated by a struggle can ever establish the aggravating circumstance of especially heinous, atrocious or cruel. In Haliburton, a defendant just released from prison broke into a man's home and stabbed him multiple times just to see if he could kill someone; the victim's efforts at self-defense were in vain. This Court held this was sufficient evidence to submit to the jury the issue of whether the killing was heinous, atrocious or cruel. Id. at 252. Lara, on the other hand, did not even involve this aggravating circumstance; a

defendant who had raped and murdered his girlfriend then killed her sister a week before trial to prevent her testimony. On appeal, Lara argued that the trial court had erred by not instructing the jury on all possible aggravating and mitigating circumstances, just the opposite situation from this case. Id. at 1179.

In assessing the impact of this erroneous instruction, it must be kept in mind that the prosecutor argued that this one circumstance alone outweighed all mitigation evidence (R-2926) and closed his argument with reference to this circumstance. (R-2934)

Further, this case is controlled by Omelus v State, 584 So. 2d 563 (Fla. 1991), where this instructional error was held not to be harmless based on the State's closing argument, the trial court's mitigation findings, and the close jury vote (8 to 4, as here). Applying the harmless error test of State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), this Court was unwilling to find this instructional error harmless. Here, there was even more mitigation than in Omelus. Particularly with regard to the emotional nature of this aggravator, there is too great a danger that the close jury vote 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.

The State did not address Appellant's argument (IB-165 n. 47) that this instruction was inadequate under Espinosa v.

Florida, 112 S. Ct. 2926, 120 L.Ed.2d 854 (1992); and Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L.Ed.2d 372 (1988).

Finally, this Court's recent decision in White v. State, ~~18~~ 616/21 Fla. L. Weekly S184 (Fla. Mar. 25, 1993), must be considered. There, this Court held that it was error for the trial court to have instructed the jury on an aggravating circumstance (cold, calculated and premeditated) which did not apply. Id. at S186. Since the single remaining aggravator was outweighed by three mitigators, the death sentence was vacated. Consistent with White, Mr. Golden's death sentence must be vacated.

ISSUE XVIII

THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE.

It bears noting that the trial court's conclusion that Mr. Golden had exalted his own wealth over the life of his wife of 24 years (R-3350-51) is contrary to all evidence of how Mr. Golden had lived his entire life, especially how he had treated his wife and sons.

To the extent that cases can be fairly compared by particular categories (AB-62),[11] the cases offered by the State are quite distinct. Byrd v. State, 481 So. 2d 468 (Fla. 1985), was based on three aggravating circumstances (including heinous, atrocious or cruel) and only one mitigating circumstance; the victim had been shot four times, cut four times on the head, and then strangled to death. The defendant admitted hiring two men to kill his wife so he could marry his girlfriend. Zeigler v. State, 580 So. 2d 127 (Fla. 1991), involved the murder of four victims. Buenoano v. State, 527 So. 2d 194 (Fla. 1988), involved four aggravating circumstances and no mitigation; she had killed a long series of people close to her for insurance money, leaving no doubt as to her guilt. (IB-171) Finally, in Reichmann v. State, 581 So. 2d 133 (Fla. 1991), the defendant had a prior murder conviction, had been a pimp for the victim (his

[11]To the extent that individual cases are lumped into such categories for decision, the statute's application runs into constitutional problems. See Issue XX, IB-181, and the State's argument at AB-65 n. 56.

girlfriend), and had a history of verbally abusing her.

The appropriate cases for a proportionality decision in this case are those cited at IB-172-74, in addition to White v. State, 18 Fla. L. Weekly S184.

Finally, the State's attempt to turn the evidence of mitigation, e.g., Mr. Golden's docile nature, into evidence of aggravation (AB-62), is a perversion of the truth and of the capital sentencing process. The only relevance of Mr. Golden's docile nature is that it leads one to question the validity of the aggravation.

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 Mary Leontakianakos, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050; and Mr. Andrew Golden, #365791, Florida State Prison, N Wing, Post Office Box 747, Starke, Florida, 32091, on this 7th day of May, 1993.

GWENDOLYN SPIVEY