IN THE SUPREME COURT OF FLORIDA

DONALD BRADLEY,

Appellant,

v. Case No. 93,373

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

(Continued)

PAGE

TABLE OF CITATIONS

TABLE OF CITATIONS

(Continued)

TABLE OF CITATIONS

(Continued)

TABLE OF CITATIONS

(Continued)

CASES **PAGE(S)**

TABLE OF CITATIONS

(Continued)

CASES **PAGE(S)**

CONSTITUTIONS AND STATUTES

OTHER SOURCES

IN THE SUPREME COURT OF FLORIDA

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APPENDIX TO INITIAL BRIEF OF APPELLANT

Sentencing Order

IN THE SUPREME COURT OF FLORIDA

DONALD BRADLEY,

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STATE OF FLORIDA,

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_____/

STATEMENT OF THE CASE[1]

On November 7, 1995, Jack Jones was killed in his home on Lake Asbury during a purported home invasion robbery. On September 14, 1996, the victim's wife, Linda Jones, and Donald Bradley, Brian McWhite, and Patrick White were arrested for the murder. On September 26, 1996, the Clay County Grand Jury indicted the four suspects. Donald Bradley was charged with first-degree murder, burglary with a dangerous weapon, and conspiracy to commit first-degree murder. I 7-8. Linda Jones and Donald Bradley were tried separately. The McWhite brothers pled guilty to third-degree

[1] References to the seventeen-volume record on appeal are designated by the volume number in Roman Numerals and the page number. References to the twelve-volume supplemental record are designated by "SR," followed by the volume number in Roman Numerals and the page number. All proceedings were before Clay County Circuit Judge Peter L. Dearing.

murder and were sentenced to ten and a half years in prison.[2]

On August 5, 1997, the state filed a Notice of Other Crimes, Wrongs, or Acts Evidence, giving notice it intended to introduce evidence of other crimes, including three crimes committed by Linda Jones in August and October of 1995 (making false reports of two burglaries and one sexual assault), and two crimes (malicious injury to property and attempted burglary) committed by Linda Jones, Donald Bradley, Brian McWhite, Patrick McWhite, and Michael Clark on October 31, 1995. II 276-277. On August 14, 1997, Bradley filed a Motion in Limine, objecting to the introduction of this evidence. II 286-289. After a partial hearing on August 14, 1997, the state filed a proffer of evidence relating to the collateral crimes. II 311-312. The trial court heard additional argument on August 20, 1997, and denied the motion by written order on May 12, 1998. III 478-481, paragraph 26.

On May 8, 1998, the state filed a Second Notice of Other Crimes, Wrongs, or Acts Evidence, giving notice it intended to introduce evidence of five additional crimes committed by Linda Jones (solicitation of Greg Green to kill Jack Jones, solicitation of Dwight Danahoo to kill Jack Jones, solicitation of Dwight Danahoo to beat up or kill Carrie Davis, harrassing phone calls to Carrie Davis, malicious injury of the property of Carrie Davis).

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[2] Linda Jones was tried first and convicted of first-degree murder, conspiracy to commit first-degree murder, and two counts of solicitation to commit first-degree murder. The jury recommended life, and the trial judge sentenced her to life.

III 466. On May 11, 1998, the defense filed a Motion in Limine to the state's Second Notice. III 467-470. After a hearing on May 19, 1998, the trial court excluded all the crimes except the October 31, 1995, phone calls. XI 1028-1031.

On January 30, 1998, the defense filed an Amended Motion to Suppress Physical Evidence (Telephone Records). II 363-380. On April 28, 1998, the trial court held a hearing on the defendant's motion, which was denied by written order on May 12, 1998. III 478-483, VIII 524-597.

The guilt phase of Bradley's trial was held May 18-22, 1998. Bradley's motions for judgment of acquittal were denied. XVIII 1554, XIV 1713.

On May 22, 1998, the jury returned a verdict of guilty as charged on all counts. XV 1876-1877, III 531-533.

On May 23, 1998, Bradley file a Motion for New Trial, which was denied. III 534-540, XV 1885-1886.

The penalty phase of Bradley's trial was held May 29, 1998. The state presented one witness. The defense presented twelve live witnesses and two by videotape. The jury recommended the death penalty by a 10 to 2 vote. III 566, XVII 2228-2229.

The trial court held a Spencer hearing on June 18, 1998, and heard argument regarding the appropriate sentence. XVII 2234-2293. The state and defense submitted sentencing memoranda. V 819-859. The defense submitted portions of the transcript of Linda Jones' trial, IV 575-642, V 780-818, and the trial judge incorporated by

reference the remaining portions of the Linda Jones' transcript. XVII 2237-2239-B.

On June 25, 1998, the trial court sentenced Bradley to death. The court found four aggravating factors: cold, calculated, and premeditated; heinous, atrocious, and cruel; felony murder (burglary); pecuniary gain. The court found two statutory mitigating factors: no significant history of prior criminal activity and Bradley's age of 36. The court found six nonstatutory mitigators: that Bradley overcame a chaotic childhood and dysfunctional family life to make real achievements in his adult life; was a good provider and father for his wife and his children, loves his family, and is loved by them; is a hard worker; unselfishly helped other people inside and outside of his family; showed sincere religious faith. V 861-874.

Bradley was sentenced to concurrent thirty-year prison terms on the remaining counts. V 874.

STATEMENT OF FACTS

Guilt Phase

The dispatcher received a 911 call from Linda Jones at 8:30 p.m. on November 7, 1995, reporting her husband, Jack Jones, had been beaten and was bleeding to death. Linda said three men came in, beat her husband, and robbed them. The men had clubs or a bat and also took her husband’s gun. They were dressed in black and

wore ski masks. She said she had been taped and could not get the tape off and had blood all over her. XI 1061-1076.

When Officer Yeager arrived eight minutes later, Linda Jones met him on the front porch. He saw no blood on her nor tape on her hands. She was barefoot. Inside the foyer, the walls and floor were splattered with blood. Jack Jones' body was on the floor in the den. He was on his back with his hands duct-taped above his head and his feet taped. There was blood on and around the body. XII 1288-1295.

Thomas Waugh, the lead detective, arrived around 9:00 p.m. He found no signs of forced entry. There was evidence of a struggle in the foyer area. There was duct tape on the floor in the first bedroom down the hallway and rolled-up duct tape on the floor in the master bath. A purse and jewelry lay on the floor in the master walk-in closet along with the victim’s wallet containing a $100 bill. Phones in two bedrooms were still intact. A bloody washcloth was in the sink in one of the bathrooms. XII 1306-1335. In the garage, a piece of duct tape had been stuffed inside a cinder block that was part of the wall. XII 1333-1335.

The medical examiner testified that Jack Jones died from blunt trauma. He suffered five or six severe blows to the head and eight severe blows to his back, as well as some less severe arm and leg injuries. The trunk injuries were caused by a cylindrical instrument. The head injuries could have been caused by a gun or some other object. The arm, leg, and back injuries would not have

caused unconsciousness, but any of the blows to the back of the head very likely would have rendered him unconscious immediately, and he would have died fairly quickly thereafter. None of the blows was administered after he was dead. XII 1373-1379.

Brian McWhite testified that he was 21 at the time of the homicide and working for Bradley in Bradley's landscaping business. XI 1078-1079. The night of the homicide, Donald called Brian and asked if he and his brother, Patrick, wanted to make a $100 each to help him beat up a guy. They agreed, and not long after, Donald came over in his maroon van. He told the McWhites he was doing a favor for a friend whose husband was cheating on her. She wanted her husband beat up so he would stop seeing the girl. Donald was going to pretend to be the girl's boyfriend and tell the husband to quit messing with her. XI 1084-1086.

As they left the house, they grabbed a stick of wood from the house and a pair of football gloves. The wood was about 2" in diameter on one end and 7-8" diameter on the other end. XI 1090. They stopped at WalMart, where Donald bought ski masks. Before getting to WalMart, Donald called Linda Jones on his cell phone to find out if Mr. Jones was home. Brian knew who Donald called because he heard Donald say Linda's name. Brian knew Linda did Donald's taxes but had never met her or been to her house. After the call, Donald told them Mr. Jones was not home yet. He told them Linda was going to leave the door unlocked and the front porch lights off. Patrick and Brian were to go in the front; Donald

would go in the side door because there would be gun on the kitchen counter in a bag. Mr. and Mrs. Jones would be in the living room watching TV. XI 1092-1096.

Donald called Linda two more times. Brian heard Donald say it was not like she said it was going to be because Mr. Jones was not home. Donald made the final call when they got to the house. Donald said something about tax papers, meaning Mr. Jones was home. XI 1097-1098.

Brian and Patrick went in the front door, and Donald went through the side door from the garage. Either Donald or Patrick had the stick. They also had duct tape from the van. They had on masks and gloves and were dressed in black clothing. Mr. Jones was in a chair, Mrs. Jones was on a couch. Mrs. Jones made eye contact but did not say anything. Mr. Jones looked back and saw them, asked Brian who he was, and then rushed at Brian swinging. Brian stepped back and heard Patrick say, "I got him." Then Donald hit Mr. Jones in the head with the stick. Mr. Jones lost his balance, and Donald hit him again. Mrs. Jones had walked up by then. Donald pulled the gun out and was talking to Mr. Jones. They taped Mrs. Jones but not tightly. Donald cocked the gun and pointed it at Mr. Jones' chest and head. He tried to shoot it but it would not fire. XI 1100-1105.

At one point, Brian felt like Mr. Jones had had enough. He asked Donald not to hit him anymore and asked him what he wanted. Patrick asked Donald to stop, said it was over, but Donald did not

stop. As far as he could remember, Mr. Jones got taped up after Donald stopped beating him. XI 1106. Donald told Brian to go to the room and take something. Brian took some money and jewelry from a back room. XI 1107. They had to tape Mrs. Jones' mouth twice because she took it off. At first, she asked who they were, but she seemed to be acting. When Mr. Jones was being beaten, she said "hey, stop, stop," then said nothing. She saw the whole thing and was right there beside them. XI 1108-1110. Donald was talking during the beating, at times to Mrs. Jones. Before they left, Donald cut the tape on Mrs. Jones' hands with a small knife. At Donald's instruction, Brian and Patrick tore the kitchen phone off the wall and threw it into the sink. XI 1112.

Donald drove off with the van lights off. Brian tossed the duct tape in some water on the way back to Donald's house. Donald told them if Mr. Jones died, they would be in big trouble and could not tell anyone. They drove to Donald's house and Donald cleaned the blood out of the van. Donald took their bloody clothes, put them in a garbage bag, and gave them some shorts and a T-shirt. Brian heard Donald's wife's voice but Donald told her to go back in the house. XI 1113-1116.

Donald took Brian and Patrick home. Their clothes, shoes, and the stick were burned in a burn barrel outside the McWhite house. Donald kept the gun and said he was going to stick it in some mud. XI 1129. Brian worked with Donald the next day and for another month after that. They agreed that if one of them got caught, he

would take the fall and not say anything. Donald said he would not talk because he wanted to get paid by Mrs. Jones, who was getting a lot of money from the insurance people. XI 1117-1122. Brian ultimately got caught because of a fingerprint he left after he took off his glove. XI 1122.

On cross-examination, Brian said he did not hear Donald call anyone to ask for directions. XI 1167. Donald used a flip phone not a bag phone. He did not remember Donald calling Michael Clark or telling him what Clark said. He did not remember Donald calling someone named “Sis” or calling Cindy Bradley. XI 1167-1168. He did not remember telling Detective Waugh he hit Jack Jones two or three times. He took off his glove because he got hit on the arm. He took the other glove off later because he wanted to get caught. He got scared because Donald "was hitting me and I got tripped out." XI 1167-1170. He thought Donald "was going to like start shooting everybody." He did not remember telling Detective Waugh that Valerie came into the garage and walked around while they cleaned up. He never told Waugh that Valerie washed the clothes that night. XI 1173.

Patrick McWhite testified that he was 17 at the time of the homicide and attending Orange Park High School. XII 1209-1210. When he got home on November 7, 1995, his brother asked if he wanted to make some money. Brian said they were going to "jump this guy" meaning beat him up. Donald came over, told them to grab some gloves and the stick by the back door, and they left. XII

1211-1213. They stopped at WalMart, where Donald went inside and bought ski masks. XII 1214. At one point, Donald called someone on his cell phone to get directions to the house. Patrick heard him say "Sis" a couple of times. Donald made several other calls. One call was about some tax papers, which was the code to go in the house. One was to Michael Clark to ask if he wanted to come with them. XII 1216-1220. Donald made the last call when he pulled into the driveway. XII 1221.

When they got to the house, Donald said the front door would be open and told Patrick and Brian where to go to avoid the floodlights. Donald was going through the garage to retrieve a pistol from the kitchen. XII 1220. When they got inside, they saw their reflection in a mirror. Mr. Jones did too and came towards them. He and Brian started throwing punches. Patrick stood frozen with the stick in his hands. Then Donald came in and hit Jones in the back of the head with the butt of the gun. Jones fell down, and Patrick and Donald dragged him into the other room. More blows were exchanged between Jones and Donald. Donald then started hitting Jones with the gun and kicking him. Donald took the stick from Patrick and told Patrick to find something to take. XII 1222-1224.

Patrick and Brian went down the hallway. Then Patrick went back to the front room. The lady was standing on the stair not saying anything. She was not taped at that point. Donald was hitting Mr. Jones. Donald told Patrick again to go find something,

and Patrick went back down the hallway. He went through some drawers and purses but did not find anything, then returned to the den. The lady was still standing on the step. He heard her say "stop" once. Donald was still beating the guy, who was in a ball. Donald told Patrick to shut the lady up, so he went over to her. When he touched her, she flopped to the floor. Donald threw Patrick the tape, and he taped her mouth. Patrick went back to the master bedroom where he found $13 and some jewelry. When he returned to the living room, the lady was crawling, trying to see into the room where Donald and Jones were, her feet and hands still tied. Donald told Patrick to tape the man's hands, which he did. Donald continued to hit him. Patrick went back down the hallway. When he came back, Donald was still hitting the man. Donald clicked the gun to the man's head but it did not go off. XII 1235. At one point, Brian taped the lady. Before they left, Donald cut the lady's tape. XII 1244. The man was still in a ball when they left. XII 1237. After they left, Donald said, "I think I killed him." XII 1243-1244. On the way back to Donald's house, Brian threw the duct tape in some water. XII 1229. They parked in Donald's garage and cleaned up. Valerie Bradley brought a bucket of cold water to the door. Donald and Brian changed clothes and burned the clothes they had been wearing. They cleaned the stick and took it back to the McWhite house. Patrick had not seen it since. XII 1241-1243.

On cross-examination, Patrick said Donald offered him $250. Patrick was 6'2" and weighed 250 pounds. He grabbed some old football gloves before they left so he would not hurt his hands. He told Donald they did not need the stick but took it anyway. They wore ski masks so the man would not recognize them. The plan was to beat him up, not kill him. XII 1262-1270. Donald used a flip phone not a bag phone. XII 1270-1272. Patrick may have hit the man once. XII 1273. Valerie did not come in the garage but to the door. Patrick thought she saw them. XII 1276.

Mark Cornett, an Orange Park police officer, was a family friend of the McWhites. He grew up with the boys' father, Eddy, and had a special relationship with Patrick, taking him fishing, hunting, and to football games. Cornett's department was not involved in the Jones murder and Cornett did not know anything about it except what he had read in the newspaper. XII 1196-1199. On September 14, 1996, the sheriff asked him to help with Brian's arrest. Cornett knew where Brian lived, and they arrested Brian around 5 a.m. Cornett stayed at the station until 8 a.m., then went home to bed. No one told him anything about the case. Shortly afterwards, Detective Waugh called and asked Cornett to bring Eddy McWhite to Green Cove Springs, which Cornett did. Cornett then took Eddy home. A few minutes after he dropped Eddie off, Eddie called and said Patrick had something to tell him. Eddie brought Patrick to Cornett's house, and Cornett drove Patrick to Green Cove Springs. Patrick started talking, so Cornett read

him his rights. Cornett turned Patrick over to Waugh and told them what he had said. XII 1198-1204.

Michael Clark testified that he was working for Donald in November of 1995. He got the job from Donald's sister, Cindy Bradley, who lived across the street from Clark's parents. XII 1383-1384. On November 7, 1995, which was Clark's birthday, his parents had a birthday party for him. Around 7:30 or 8:00 p.m., while he was at the party, Brian McWhite and Donald Bradley called on a cell phone. They wished him a happy birthday and asked if he wanted to come hang out with them. Donald mentioned that he was going to Lake Asbury. XII 1391-1394.

Jill Jones, the daughter of Linda and Jack Jones, testified that her father carried a gun. When he got home, he would put the gun down on an island in the kitchen. XII 1283.

Janice Cole testified she had known Linda Jones since second grade and Jack Jones since junior high. She was the maid of honor at their wedding, and the families did things together. On either November 6 or 7, 1995, Linda called Janice. She told Janice she was not getting a divorce. She already had told Janice about Jack's affair. When she called November 6 or 7, she was upset about money problems. Jack had been buying things for Carrie, including a diamond ring. Linda said Jack would be home that evening or the next to talk about the bills and finances. Linda was very upset about all she had been through. She said she could take a gun and kill Jack and get away with it because of everything

that had happened. Janice told Linda she was crazy, there was life after divorce. When she told Linda she knew a good man, Lacey Mayhan, a lawyer, Linda responded, "Oh, I thought you meant something else." Linda said she would lose $500,000 in life insurance if she got a divorce and she "wasn't going to fat and forty alone." XII 1431-1436.

Jack Jones had a life insurance policy worth $125,000 which had been established in 1992. XII 1444. He also had a company policy at Key Buick, where he was the service manager, which was worth $175,000 and had a double indemnity clause. Linda Jones was the beneficiary of both policies. XII 1449.

Ernie Zweifel testified that he lived two houses down and across the street from the Jones. Zweifel said he saw a maroon 1994 or 1995 Nissan van go by his driveway at a high rate of speed with the lights off around 8:30 p.m. the night Jack Jones was murdered. Zweifel recognized the year and model because he had been shopping for a van. The van appeared to be coming from two houses down. The windows were tinted, so he could not see inside. About twenty minutes later, the police appeared. Around 9:30 p.m. that night, Zweifel gave the police a statement about what he had seen. XIII 1453-1477.

Over defense objection, four witnesses testified about an incident that took place on October 31, 1995, one week before Jack Jones was murdered.

Brian McWhite said he, Donald Bradley, Michael Clark, and Patrick McWhite went to an apartment in Mandarin in Donald's van. They went to the door and no one answered. Then they broke some windows. Donald made some calls that night but Brian did not remember who he called. XI 1132.

Patrick McWhite said they went to Mandarin to talk to a girl. They were going to knock on the door and then go in and take whatever they wanted. Donald was going to talk to the girl. After they arrived, Donald learned from a phone call that he made outside the apartment that someone else was there. Eventually, Jack Jones left the apartment. The knocked on the door but no one answered. Donald told them to break some windows of a car that was on bricks, which they did. XII 1246-1250.

Michael Clark said they went to the apartment to steal jewelry. Donald knew jewelry was there. No one was supposed to be home. When they got there, a man and woman were there. They sat in Donald's van for forty-five minutes, and Donald made several phone calls. Michael called his mother, whose birthday it was, to say he would be late for her birthday party. After the man left, they knocked on the door but no one came. They got back in the van, and Donald placed a call. Then Brian and Patrick got out and broke some windows of the girl's car. Donald dropped them off at Brian's house. XIII 1385-1390.

Carrie Davis, 21, said she began working for Linda Jones in October 1994. She moved in with Linda and her husband in February

1995 because of difficulty at home. She had not met Jack Jones before that. She moved out in July 1995, a week after she and Jack got involved. Linda found out about the affair the day Carrie moved out and was very angry. Carrie and Jack planned to marry. They leased an apartment in both their names. Jack usually came over in the mornings around 5:30 a.m., they would have lunch together, then he would come over after work and stay until 6:30 or 7:00. He bought her a wedding set on October 13, 1995. On October 31, 1995, Jack left her apartment around 8:30 p.m. She received harassing phone calls from Linda Jones before and after he left. After he left, some adults knocked on the door. She called 911. The next day her car windows were busted and the brake lines were cut. XIII 1418-1425.

Detective Waugh testified that he and Lieutenant Redmond went to Donald Bradley's home at 8:30 a.m. on January 22, 1996, with a warrant to seize Bradley's van. Donald lived in the Loch Rane, a gated community. XIII 1481-1482. Waugh he did not call Donald before he showed up and had never talked to Donald before. XIII 1520. The family was having breakfast when they arrived. Waugh and Redmond waited while they finished eating, then spoke with Donald. Donald's wife, Valerie, was present during some of the conversation. Donald taped the conversation.[3] XIII 1488. Waugh

[3] During his testimony, Waugh referred to a transcript of the tape recording Bradley had made of the interview. XIII 1490.

told Donald he had no problem with Donald taping the conversation. XIII 1521. Waugh began by asking routine questions, such as date of birth, phone numbers, employment history. Donald said he had two cell phones, one with the number 707-6889, used by his foremen Michael Clark and Brian McWhite, the other a flip phone with the number 858-0347, which Donald used. XIII 1486-1487. Donald told Waugh he knew Linda Jones well. She had been doing his taxes for several years. He last talked to her three weeks earlier. XIII 1522.

When asked where he was on November 7, 1995, Bradley could not recall but offered to pull out records to see what his work schedule was and "go from there." XIII 1489. Waugh then told Bradley three phone calls had been made from his cell phone, number 858-0347, to Linda Jones' home the night of the murder, at 7:35, 8:06 and 8:17 p.m. Donald got up and got his calendar. There was no entry for November 7. The entry for November 6 was "Camelot Sevilla, Party by the Sea." XIII 1499.

Regarding the phone calls, Donald said he was supposed to pick up some tax papers from underneath the doormat at Linda's office that night. He did not get the papers or Linda messed up, so he called her about the papers, then came home and ran some errands. She said she forgot the papers and offered to leave them again. The 7:30 call may have been the first time he called when he realized the papers were not there. He called her again after doing errands, then came home. The only thing Linda talked about

when he called was the tax papers. XIII 1491-1498. After he got home, he gave his sister, Cynthia, the cell phone, and she left for Middleburg. He said he was not sure if he made the cell phone calls that night or if his sister made the calls. But he did call Linda's house asking about the tax papers and he ran an errand, then he watched the second half of a program by Danielle Steele. His sister was waiting for him to come back from the errand, so he could not have gone much farther than Linda's workplace and Winn-Dixie and back. XIII 1500-1501.

Before he left, Waugh told Donald that Linda Jones was lying about her involvement in her husband's death, that she was "knee-deep in the middle of this thing and she sucked other people knee-deep in" the situation. Waugh told Bradley he had several theories about what happened: Either people went in there to teach Jack a lesson and things got out of hand or somebody went in there to teach him a lesson and Linda finished him off. He did not know which was true but he knew Linda was involved. XIII 1523. Before Waugh left, he made it he thought Donald's van was involved and that Donald, too, was involved in some fashion. After he told Donald he would be looking for blood and other evidence in the van, Donald said the van had been detailed four or five times since November 7, 1995. XIII 1532-1533.

The state introduced the following summaries of phone records into evidence: All phone calls from Linda Jones' cell phone to Donald Bradley's cell phone or home phone starting October 31,

1995, until July 10, 1996; all calls from Linda Jones' cell phone on October 31st, 1995; all calls from Donald's cell phone, 858-0347, on October 31, 1995; all calls from Linda Jones' cell phone on November 7, 1995; all calls from Donald's cell phone on November 7, 1995; all calls from Donald's cell phone to Linda's Jones' home or cell phone or Gupton & Gupton, where she was employed. XIII 1504-1505, 1548-1550.

Irene Sharkey worked the security gate at Loch Rane the day Waugh interviewed Donald. Sharkey testified that Valerie Bradley called at 11:24 a.m. and asked them to admit Cindy Bradley. Cindy arrived at 11:43 a.m., left at 2:20 p.m., came back at 2:26 p.m., and left again at 2:31 p.m. Valerie also called at 12:28 p.m. and asked that Linda Jones be admitted. Jones arrived at 12:40 and left at 2:19. XIII 1539-1545.

The state rested. XIII 1553.

Officer Cornett testified that he spoke to Patrick and Brian McWhite the day they were arrested. Patrick said Donald burned the stick and a bag of bloody clothing the night of the murder. Brian told Cornett Donald demanded Pat's boots sometime after that night and burned them. XIII 1558-1559.

John Ring, from the Sheriff's Office, testified that in one bedroom of the Jones' home, the shower appeared to have been recently used. The curtain was wet, the inside shower was wet, and the mirrors were steamy. XIII 1562.

Valerie Bradley said she and Donald had been married since 1994. They had five children, his three, her one, and one together. Donald owned a landscaping and lawn maintenance business. XIII 1563-1564. On November 7, 1995, Donald went to work. He usually got home about between 6:00 and 7:00 p.m. It was not unusual for him to call on his way home to ask her to open the garage door and make sure the kids' toys were out of the way so he could back his trailer and truck into the driveway. On November 7, 1995, Cindy Bradley came by the house around 7p.m., about when Donald got home. XIII 1564-1565. Charles Shoup called around 8 p.m. Valerie answered the phone and called Donald to the phone, just as Donald was leaving. Donald Shoup he would call him later. XIII 1567-1568. Their plan that night was to watch the second part of a movie they had watched the night before, Nothing Lasts Forever. The movie started at 9:00 and lasted until 11:00 p.m. Donald left around 8:00 and was back ten to fifteen minutes before the movie started. He brought snacks and food and milk from Winn-Dixie. They watched the movie together until 11:00 p.m., then went to bed. Valerie did not see Patrick or Brian McWhite that night. XIII 1567-1570.

On cross-examination, Valerie said their only income was from her husband's business. When asked whether her husband's business income for 1994 was only $9,100, she said she and the IRS were discussing that because the IRS felt they owed $13,000. When asked if she signed the tax return, she said she signed whatever "Linda

had arranged." XIV 1576. Linda did everyone in the family's tax returns. Valerie helped get the documents together and kept the books for Donald's business. She did not know whether Donald stopped to pick up the tax papers on his way home from work or from the errand, but she knew he did not get them because she remembered complaining to him about it. XIV 1577. Valerie said she was presently under arrest, charged with accessary after the fact to first-degree murder. She had been arrested the same day as Donald. XIV 1579. She did not remember who called the front gate on January 22, 1996, to let Cindy Bradley in. She did not recall if Cindy and Linda both came over that day. XIV 1581. She had checked to see what she and Donald were doing on November 7, 1995, before Waugh came over because Waugh already had questioned Cindy and other family members and she knew he come to their house. XIV 1582-1583.

The TV schedule for November 7, 1995, was admitted into evidence, along with a stipulation that on that date, from 9:00 to 11:00 p.m., Channel 4 showed a movie, Nothing Lasts Forever, which was part two of a two-part miniseries. XIV 1587.

Charles Shoup testified that Donald was landscaping his home in November of 1995. During that time, Shoup called Donald often, usually at home and in the evenings. He did not remember if he called Donald on November 7. A page from Shoup's phone bill was admitted into evidence, showing someone placed a call from Shoup's

phone to Bradley's home phone November 7, 1995, at 7:54 p.m. The connection lasted half a minute. XIV 1588-1590.

The jury heard a videotaped deposition of Cindy Bradley taken December 19, 1997. She was 41 years old at the time and terminally ill. She ran a lawn maintenance business with Evans Howard. At the time of Jack Jones' murder, she and Linda Jones were best friends. They saw each other every day and talked on the phone several times a day. XIV 1596-1598.

During that time period, Cindy had use of a cell phone in Evans Howard's name with the number 659-9222. The phone was not working on November 7, 1995, because the bill had not been paid, so Cindy used Donald's phone that day. When shown the outgoing calls from Donald's flip phone, 858-0347, on November 7 and 8, 1995, Cindy said she placed the first call to Gupton & Gupton, where Linda Jones worked. Linda was busy, so she never spoke to her. She said the 12:42 p.m. call to Donald's house could have been placed by either her or Donald. The 6:53 p.m. call to Donald's house would have been Donald calling Valerie to get the kids' junk out of the driveway. The 6:57 p.m. call would have been Cindy calling Valerie as a joke. Cindy made the 7:35 p.m. call to Linda's home. She got the answering machine, so she dialed Linda's car phone but did not make contact. At that time, she was probably on her way to a Bible study meeting in Middleburg, and was calling Linda to meet her after the Bible study, which was near Linda's home. XIV 1607-1609. At 7:53 p.m., Cindy called Michael Clark to

say happy birthday and also spoke to her older daughter, Katisha. At 7:55 p.m., she called her home, probably calling her mom and her youngest daughter, Ginger, on her way home from the Bible study. At 8:06 p.m., she called Linda again but did not make contact. She also made the next call to Linda. XIV 1610-1612. She made the two calls to Donald's house at 8:39 p.m. and 8:50 p.m. but got his answering machine. She dropped the phone off the next day after learning Jack was killed. XIV 1614-1615.

On cross-examination, Cindy said the Bible study usually lasted from 7:00 or 7:15 p.m. to 8:00 p.m. but it may have been only twenty minutes that night because they did not have a regular meeting. She called Michael Clark not long after she got to the Bible study. XIV 1617-1618. Donald did not call and ask for directions that night. XIV 1619. Cindy was aware that Donald was trying to get the tax return from Linda's office that night and could not get it because it was not where she said she would leave it. XIV 1621. On January 22, 1996, Cindy went to Donald’s house and listened to the tape of him being questioned by the police. Linda, Valerie, Cindy, and Donald listened. Richard Gupton sat out in the car. XIV 1622-1623. Cindy had used Donald’s phone five to eight times in November. XIV 1624.

The defense introduced the record of a phone bill from Evans Howard’s cell phone for number 697-9222 from October 9, 1995, to November 8, 1995, along with a stipulation that the bill was valid.

There were no calls during that billing period after October 18, 1995. XIV 1627.

Katisha Gussman, Cindy Bradley's daughter, testified that she was at Michael Clark's parent's home on November 7, 1995, for Michael's birthday party. Her mother called and talked to Michael, then to her. Her mother spoke to Michael for ten to fifteen minutes. Katisha could not tell if the call was from a cell phone. The party started between 5:00 and 5:30 p.m. The phone call from Cindy came around 6:30 p.m. To her knowledge, Cindy did not call any other time that night. XIV 1629-1633.

Donald Bradley's mother said she had never heard Donald or anyone else in the family call Cindy "Sis." XIV 1634-1635.

Cletis Watson, a public defender investigator, said he drove from the McWhites' house on Railroad Avenue to the victim's home on Lake Asbury. He drove two routes. The second route, taking 218 to Blanding Boulevard,[4] was twenty-two miles. XIV 1637-1639.

Detective Waugh said when he talked to Patrick and Brian McWhite on September 14, one or both said after they got back to Donald's house, Valerie came out into the garage while they were cleaning up. Patrick said he hit Jones with a fist. Brian said he hit Jones a couple or three times. XIV 1640-1641.

[4] This was the route Patrick and Brian McWhite testified they took to the Jones residence the night of the homicide.

Steve Leary, the FDLE analyst who processed the crime scene, collected two pieces of tape from next to Jack Jones' body, which he sent to the crime lab to be processed for latent prints. XIV 1650-1653. Dawn Walters, an FDLE print specialist, found a latent palm print on the tape, which she was unable to match, after comparing it with prints from Jack Jones, Donald Bradley, Linda Jones, Patrick and Brian McWhite, Officer Yeager, Randolph Brunson, Richard Barrett, M. Carpenter, Steven Whitfield, and Cindy Bradley. Walters found prints on one other of the pieces of tape she was sent. On that piece, she found two fingerprints and a palmprint belonging to Brian McWhite. XIV 1698.

Steve Leary also used Luminol in the house, a spray that detects trace amounts of blood even if the blood has been cleaned up or is invisible to the eye. If blood is present, it shows a luminescent light blue color. Other things cause luminescence such as rust or metal or vegetable materials. XIV 1648-1649. Luminol revealed blood in the Jones' house where it could not be seen. Luminol detected blood on a washcloth found in the shower in the master bathroom. XIV 1654. Leary also found a pattern of stains on the foyer floor and carpet. A repetitive pattern like the heel-mark of a shoe was repeated ten or fifteen times going down the hallway. XIV 1655-1656. In the den, where the body was found, there was a crowbar-shaped pattern, about twenty-seven inches long with a curve on one end, which was about five inches wide. A similar but smaller pattern was found in the foyer. It was fifteen

inches long and was repeated twice as if laid down, picked up, and laid down again. There was a positive reaction on the driver's seat and the back of the passenger seat in the teal Buick parked in the garage. Luminol testing of Donald's van came back negative. Leary said it was harder to clean blood out of a carpet or fabric than off tile or linoleum. XIV 1555-1658.

On cross-examination, Leary said all the pieces of duct tape found in the Jones house were from the same roll, including the rolled-up ball found inside the cinder block in the garage. The heel-shaped mark could have been caused by something else. XIV 1668. Before processing the van on January 26, 1996, Lieutenant Redmond told him the van had been detailed at least five times since December of 1995. XIV 1685. Leary described Luminol as a "very useful tool." He had done it "many, many times." Waugh asked him to do the Luminol testing. XIV 1686.

Penalty Phase

The state presented one witness: Patrick McWhite. Patrick said Jack Jones was alive and asking Donald to stop while Donald was hitting him with the stick. Jones was still alive when Patrick taped his hands because he was telling Patrick to please stop. He would not give Patrick his hands because he was trying to protect his head from the blows. Donald continued to hit him after the taping. XV 1892-1894.

The trial judge told the jury Linda Jones already had been convicted of first-degree murder in her husband's death and sentenced to life in prison without possibility of parole. He told the jury the McWhites had entered pleas of guilty to third-degree murder and that their sentences would be determined by the court but would not exceed seventeen years. XV 1896.

The defense presented twelve witnesses.

Detective Waugh said he talked twice to Greg Green during his investigation. Green, a friend of Linda Jones, said Linda Jones had asked him to get a silencer for her gun because she wanted to kill Carrie, then kill herself. Green asked her why she needed a silencer if she was planning to kill herself. Green also said Linda approached him two or three times, offering him $10,000 to kill her husband. She was going to pay him with money from Jack's $250,000 life insurance policy. She told Green the murder could easily be done. She would leave the door open and he could get a couple of other guys to make three and they would wear ski masks and gloves and beat Jack to death. They could cut her, leaving a scar, and rough her up. She suggested he use a baseball bat to beat Jack to death. She also suggested he use duct tape to tape up her mouth and her hands and actually obtained a roll of duct tape from Green. Green said Linda had the whole plan figured out. She knew exactly what she wanted to do and how it was to be done. XV 1899-1901. Phone records showed Linda Jones made numerous calls to Green a couple of months before Jack's murder. XV 1902, 1909.

Detective Waugh also talked to Dwight Danahoo, Donald Bradley's uncle. Danahoo said Linda Jones asked him on two separate occasions to kill Jack and Carrie. She offered him $10,000. Phone records showed Linda Jones had made numerous phone calls to Danahoo a month or so before the murder.

Waugh told the jury Linda Jones was convicted at her trial of soliciting Green and Danahoo to kill her husband. XV 1902-1904, 1909.

The defense presented thirteen witnesses, five nonfamily members and eight family members.

Arthur Kurtz said he hired Donald Bradley as an irrigation specialist in 1988. Donald was an excellent worker and worked long, hard hours. About a year after he began working for Kurtz, Donald became involved in drugs. Kurtz did not know there was a problem until the day it came out. That same day, Kurtz went with Donald to Jacksonville Beach, where Donald entered a drug rehab program. Donald was the first employee Kurtz had done this for. The treatment worked for a while but ultimately Donald was terminated. Kurtz could not remember why but thought it was because Donald went back on cocaine. XV 1947-1958.

Elizabeth Smith said she owned a plant nursery in Jacksonville from which Donald bought plants for his landscaping business. One day while Donald was at the nursery, the mist system malfunctioned, which could have cost the nursery thousands of dollars. Donald worked with Smith to get it working again. After he got it working

halfway, he left and said he would send over a specialist, which he did. He did this just for a favor. XVI 1960-1962.

Marc Angelo, president of Schultz Construction, met Donald 1991 after his business partner asked him to let Donald bid on some small projects. Donald did a good job on the first project, so they kept giving him more and bigger projects. Eventually, Donald was doing ninety percent of their work in a very tough, competitive business. Donald did good work. Whether it was a $400 job or a $30,000 job, he would drive out of his way or stop what he was doing to take care of a small item. He treated every job as if it were the most important job. He was a man of his word. He got in the hole and worked with the irrigation guys if they were shorthanded. He bought the guys lunch and drinks, too. He did whatever it took. XVI 2023-2029. Donald also was the kind of guy you could call at 3 a.m. from Tallahassee to pick you up, and he would come, no questions asked, except to ask how he could help. When Angelo and his wife were at the hospital awaiting their first child's birth, the first thing they got was a bouquet and stuffed animal from Donald. XVI 2023-2031.

Harvey Sowers said Donald came to his Jehovah's Witness congregation five years before, and they started a Bible study. Sowers saw Donald several times a week. Donald's family attended Kingdom Hall. Donald was very serious about his study and sincere in his faith. He made numerous friends with people in the congregation. He loaned his equipment from time to time to

maintain the lawn and donated a trailer load of new plants to the assembly hall. He once spent a day and a half helping another family hook up their septic system. XVI 2040-2047.

Dr. Dean Lohse, a neurosurgeon, testified via videotape that he first started seeing Donald in 1990 for a work-related back injury. Donald had back surgery in September 1990, then went through several months of rehabilitation. In February 1991, an MRI revealed a permanent defect, meaning Donald would have life-long symptoms. Dr. Lohse saw Donald every six months after that until January 1996. Dr. Lohse gave him pain pills but he would only take half a tablet. He worked hard through his pain, harder than you would expect for his physical condition. XVI 2099-2107.

Donald Bradley's father said he and his wife had five children, Donald was the third. They divorced in June 1972, when Donald was eleven. Mr. Bradley kept the children for three years. He remarried in September 1972. His wife, Nancy, was twenty-four at the time. His oldest daughter, Pam, was seventeen. XV 1912-1915. Mr. Bradley said he made many mistakes as a parent. He ultimately abandoned his children and moved to California. XV 1915-1916. When Donald was an adult, just before his daughter Arissa was born, Donald called his father and said he wanted to have a relationship. They began by having lunch, and the relationship developed from there. They now spoke in person or on the phone every three or four days. XV 1917-1919.

Donald’s mother said she and her husband fought during the first eleven years of Donald’s life. Her ex-husband liked younger women and was unfaithful. They split up when her husband fell in love with a girl at work. After they split up, Mr. her husband and his lawyer said he would never pay alimony or child support. Mrs. Bradley had never worked, so her attorney told her to give the children to her husband, that he would change his mind soon, and they could go back to court to get custody. Mrs. Bradley took his advice and left the family home. The two oldest girls, who were 16 and 17, got jobs and took care of themselves. One weekend, after Mrs. Bradley had been away, she came home to find the three little children sitting on the stairwell with a little bag. She asked them what was wrong, and told her "Dad and Nancy doesn’t want us anymore." After the children came to live with her, Mr. Bradley never paid child support. He owed $60,000. She took him to court fourteen times but never got a dime. She struggled to raise the children, working two jobs and living in a one bedroom apartment. Eventually, she moved into her father's house. Even then, she struggled. A friend bought the kids' school clothes because she could not afford to. XV 1926-32.

As an adult, Donald treated her with love and respect. Every two weeks, he brought her things she could not afford. He often brought bags of groceries. She would not take any money for babysitting for her grandchildren, but would find money in her

pocket or purse after she got home, or $20 or $30 in her car ashtray. XV 1934-1935.

Cindy Bradley testified via videotape. The testimony was taped October 23, 1997. Cindy was 41 and had terminal cancer. Cindy said the family first lived in Switzerland, Florida, then California. Their father was "very, very strict." She first realized her father was cheating on her mother when she was five. Her parents fought about it for as long as she could remember. After they moved to California, her mother's brother, Dwight Danahoo, lived with them. He was 18 at the time. Donald and Dwight slept downstairs, where their parents ended up fighting. One time, her mother threw a ceramic lamp at her father, and they fought back and forth. Cindy and her sisters were upstairs by the stairs, but Dwight and Donald were downstairs in the middle of it. Her father would slap her mother. The kids would be "freaking out" and crying but never interfered. If they said anything, they got beat. XVI 1969-1972.

Once, her mother caught her father with another woman in their apartment. Her mother packed her bags and left on a Greyhound bus. She came back a few weeks later. They broke up for good when Cindy was fifteen and Donald eleven. Their father took them because their mother was really ill and had to have a hysterectomy. Her mother left the house at that point. Cindy was in ninth grade and her older sister, Pam, in tenth. Their father would be gone all week, then come back on the weekends and drop them off at the

laundromat to do the laundry. Cindy and Pam had to get the little kids off to school, then get to school themselves. Cindy and Pam ended up dropping out of school. XVI 1972-1976. They did not see their mother much because their father would not let her in the house. XVI 1976-1977.

When Nancy moved in, she was hateful towards them. Pam had gotten a job and gone to live with their mother already. Cindy tried to talk to her dad about Nancy, but he said his happiness meant more to him than she did, and if she did not like it, to get out.

The three little kids went to school, came home, did their homework, and cleaned the house. Nancy got home from work first and would tell the kids she hated them. When they told their dad, Nancy would say they were lying, and they would get beat for lying. Their father made them lean over a clothes hamper and grab the bottom of it while he beat them, usually with leather belts but sometimes with a "switch" he made them pick themselves. Sometimes he put their heads between his knees so they could not get away while he was beating them. They also got beat if they ate or drank anything before their dad got home. Nancy would mark the milk jug and other food items so she could tell if they had gotten into anything. XVI 1980-1982. The beatings left welt marks all over their bodies--neck, shoulders, back, stomach, all over. Sometimes their dad waited until they fell asleep, then woke them up, and beat them. They would wait all night, crying, because they knew he

was coming. They would think maybe he forgot, but he was just waiting until they went to sleep. Sometimes he beat them on "general principles," meaning he would beat all of them just to be sure he got the right one or would beat them so that if they did anything later that week, they already would have gotten beaten for it. XVI 1198-1999. Donald and Cathy got the most beatings, the worst treatment. XVI 1991.

When their father and Nancy went out, they would put the kids in their rooms, then put a piece of tissue paper in the door. If the kids left the room, the paper would fall out, and when their dad got home, they would get a beating. Her father and Nancy would be gone half the night, and the kids were not even allowed to leave their rooms to go the bathroom. The boys could open a window with a screwdriver but Cathy would get beaten for leaving the room to go to the bathroom and would get beaten for peeing in her room. XVI 1983-1984.

Their father hid dirt in the house and told them they had to find the dirt before he got home. If the dirt was still there, they would all get beat. If a single dish had spots on it, he would pull everything out of the cabinets, and they would have to wash everything in the house and scrub the walls. XVI 1997.

When Donald broke his right arm, Nancy said it was not broken. Donald could not move the broken arm, so he tried to eat left-handed. When he spilled his drink, Nancy picked up the broken arm, slammed it down on the table, and said there was nothing wrong with

it. They finally took him to the hospital after the school threatened to call HRS. One time, when Donald was not slicing the tomatoes right, Nancy started showing him how and stabbed his hand with the knife and said, "Now, do you understand how to cut tomatoes?" XVI 1985-1987. When Donald got appendicitis, their father would not take him to the doctor. He was in pain and burning up. Their father took him to their mother's house and she rushed him to the hospital. His appendix had ruptured and he could have died. XVI 1995-1996.

After Cindy left her father's house, he called reported her as a runaway because she would not babysit for him. She was in the juvenile shelter a long time because her mom could not afford an attorney. The judge said he was going to make an example of her and sent her to reform school. XVI 1988-1989. Pam tried to commit suicide several times. The first time was when she was fifteen or sixteen. XVI 1994. When Donald was about fifteen, he started hanging out with the wrong group. He would spend the night in the woods and got into trouble, "burglary and stuff like that." XVI 1993-1994.

Cindy said Donald had a good heart, that he had always been there for her and would drop whatever he was doing to help her. She had seen him upset about things that had happened in his childhood. He told her he thought his uncle, Dwight Danahoo, had molested him. He was hysterical, crying and shaking, out of his mind, thinking about it. Dwight had molested Pam and Cindy when he

lived with them. They told him it was rare for someone to molest children of both sexes, that he probably was remembering seeing Dwight molest one of them. He had anxiety attacks over it. He thought he was having a heart attack one time. A psychiatrist put him on medication. XVI 2000-2003, 2006-2009.

Donald's younger sister, Cathy Robbins, 36, said when her parents split up, she felt like neither of them wanted them. Nancy never showed them any love or affection. If they did not get the cleaning done, they did not get dinner. They were locked in their bedrooms. During the summer, Nancy put the tissue paper in the door at 7:30 every morning, and they were not allowed out until 5:30 in the afternoon. They were beaten daily for eating bread or cereal or milk because Nancy marked it. They grew up knowing they were not wanted or loved. XVI 2011-2015.

As adults, Cathy and Donald had a close relationship. Donald had bought groceries for her when she needed them, paid the electric bill, and even the rent, when she did not have the money. Her two children, aged 14 and 11, were close to Donald. Her daughter cried and had nightmares about what was going to happen to Donald. Donald was a good listener. XVI 2015-2018.

Eli Robbins, Cathy's ex-husband, said he always got along with Donald except once when he and Cathy got into a fist fight and Donald stepped in. Donald had helped them a few times when they needed financial help. He had no hesitation in allowing his

children to maintain contact with Donald if he were in prison. They both wanted to see him badly. XVI 2036-2039.

Pamela Bradley, 42, an ICU nurse, said they lived with their father after their parents split up because "we had no idea of where our mother was." Pam was the primary caretaker of the childen. When she had conflicts with Nancy, her father told her his happiness was more important than her living there, and she would have to find another place to live. XVI 2051-2053. Her father beat all of them. One summer, she and her sister spent the entire summer in their rooms because they walked on a wall their father told them not to walk on. There were many, many beatings. The last beating she got was when she was a sophomore in high school. There were so many welts on her legs, she had to wear pants to school. After their parents split up, their father would leave for days and they would not know where he was. She tried to commit suicide and spent some time in a hospital. She still went to counseling because of the emotional and physical abuse, as well as the sexual abuse by Dwight Danahoo. Eventually she went into the Army for eight years. In their adult lives, Donald had been very supportive of her. She went to him for advice. He was good at presenting both sides of an issue. He loved his brother and sisters and his wife. XVI 2051-2059.

Katisha Gussman, 22, Cindy Bradley's daughter, said she had a very close relationship with Donald. When she was 15, her father went oversees, and she turned to Donald as a father figure. He was

easy to talk to and was always there for her. When she got in trouble, he gave her advice. When she and her ex-husband could not pay the rent, Donald loaned her the money, not expecting her to pay him back. Her four-year-old son, Cody, had a good relationship with Donald. XVI 2063-2067.

Valerie Bradley said she was 23 when she married Donald in 1994. When they began dating, she had a two-year-old child by another marriage, Joey. Donald treated Joey like his own son. She and Donald had one child together, Arissa. Donald's children from another marriage, Brianna and Lacy, also lived with them for a period of time. XVI 2068-2072. Donald and Arissa had a very close relationship. The trait she admired most in Donald was his loyalalty to his family. He also was a hard worker and often was so tired when he got home, he would fall asleep on the lounge chair. He was generous with everyone. Sometimes he bought breakfast for a homeless man. XVI 2075-2077.

On cross-examination, Valerie said Donald was arrested for arrested for battery in September 1993. He had slapped her after she slapped his 11-year-old daughter. She was too young and unprepared to raise his daughters, and he did it to protect them. Four months later, he was arrested again but not for hitting her. During an argument, Valerie threw a statue. Valerie's mother heard the noise and called the police. In April 1996, Donald was arrested for kicking her in the shin after she destroyed $1100 worth of property. Cindy Bradley called the police. The officer

called Detective Waugh. In Valerie's opinion, they took him in to question him about the murder. XVI 2090-2097.

Sentencing

At the judge-only sentencing proceeding, the defense argued that under the principle of proportionality, life was the appropriate penalty since Linda Jones, who was equally culpable, had received a life sentence. In support of its proportionality argument, the defense noted the court knew a lot more than Bradley's jury knew, including what aggravators and mitigators applied to Linda Jones. XVII 2256.

The trial judge sentenced Bradley to death, finding four aggravating factors, two statutory mitigating factors, and five nonstatutory mitigating factors. V 860-863. The trial judge rejected Bradley's proportionality claim, reasoning Bradley was more culpable because he struck the blows, killing the victim in a cruel manner. V 873.

SUMMARY OF ARGUMENT

Point I. The evidence was insufficient to prove either premeditated or felony murder. As for premeditation, the evidence was entirely consistent with a beating that got out of hand. As for felony murder, there was no burglary, and thus no felony murder, because entry into the Jones' residence was with the consent of Linda Jones, a co-owner and co-occupant.

Point II. The evidence likewise was legally insufficient to support Bradley's conviction for conspiracy to commit first-degree murder. The evidence was entirely consistent with a plan merely to beat up the victim to scare him into ending his affair with Carrie Davis. Accordingly, there was insufficient evidence of a specific agreement to commit murder.

Point III. Bradley's burglary conviction must be vacated because his entry into the Jones residence was consual.

Point IV. The trial court erred in admitting evidence that Bradley vandalized Carrie Davis' car on October 31, 1995, and that Linda Jones made harassing phone calls that day, where such evidence was not relevant to any material fact in issue and served only to attack Bradley's character.

Point V. The trial court erred in allowing Steve Leary to testify about an out-of-court statement made by Detective Redmond to the effect that Bradley's van had been detailed five times since November 1995. The out-of-court statement was not admissible as a prior consistent statement to rebut a charge of recent fabrication because Redmond never testified at trial, was not subject to cross-examination, and there was no charge against him of recent fabrication.

Point VI. In the penalty phase, the trial court erred in instructing the jury on and in finding the aggravating factor of cold, calculated, and premeditated. Though the evidence showed the

crime was well-planned, the evidence failed to show the murder was planned.

Point VII. In the penalty phase, the trial court erred in instructing the jury on and in finding the aggravating factor that the homicide was committed during a burglary. There was no burglary because the perpetrators entered and remained in the residence with the consent of Linda Jones, a co-owner and co-occupant of the home at the time of entry.

Point VIII. Bradley's death sentence is disproportionate. If this Court agrees the killing was not premeditated, Bradley's death is disproportionate because the aggravators were few and the mitigation substantial. If the Court finds, however, that the killing was planned, then the death sentence is disproportionate punishment because an equally culpable codefendant, Linda Jones, received a life sentence.

ARGUMENT

Point I

THE EVIDENCE IS LEGALLY INSUFFICENT TO SUPPORT BRADLEY'S CONVICTION FOR EITHER PREMEDITATED OR FELONY MURDER BECAUSE THE EVIDENCE WAS EQUALLY CONSISTENT WITH AN INTENT TO BEAT UP THE VICTIM, NOT TO KILL HIM, AND BRADLEY COULD NOT HAVE COMMITTED THE BURGLARY UPON WHICH THE MURDER CHARGE WAS BASED BECAUSE HE WAS INVITED INTO THE HOME BY LINDA JONES.

The state prosecuted Donald Bradley on theories of both premeditated and felony murder, with burglary as the predicate felony for felony murder. The evidence was insufficient to establish either theory. The state failed to prove premeditation because the evidence was entirely consistent with a beating that got out of hand. Bradley could not have committed a burglary because he entered and remained on the premises with the consent of Linda Jones, a co-owner and co-occupant.

The Evidence Did Not Establish Premeditation

Premeditation is "a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." Asay v. State, 580 So.2d 610, 612 (Fla.), cert. denied, 502 U.S 895, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991).

Where the evidence of premeditation is circumstantial, as in the present case, a special standard of review applies:

> In a case . . . involving circumstantial evidence, a conviction cannot be sustained--no matter how strongly the evidence suggests guilt--unless the evidence is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972, 976 (Fla. 1977). A defendant's 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." State v. Law, 559 So.2d 187, 188 (Fla. 1989).

Mungin v. State, 689 So.2d 1026, 1029 (Fla. 1995), cert. denied, 118 S.Ct. 102, 139 L.Ed.2d 57 (1997). It is not enough if the facts merely create a "stong probability of guilt." Owen v. State, 432 So.2d 579, 581 (Fla. 2d DCA 1983). The circumstances, when taken together, "must be of a conclusive nature and tendency, leading on the whole to a reasonable and moral certainty that the accused . . . committed the offense charged." Id.; see also Harrison v. State, 104 So.2d 391 (Fla.1st DCA 1958); Parish v. State, 98 Fla. 877, 124 So. 444 (Fla. 1929). Evidence from which premeditation may be inferred includes "such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." Larry v. State, 104 So.2d 352, 354 (Fla. 1958).

Here, the circumstancial evidence suggested two reasonable possibilities with regard to what Bradley intended or planned: (1) Linda Jones hired Bradley to kill her husband, or (2) Linda Jones

hired Bradley merely to beat up her husband so he would end his affair with Carrie Davis. Both possibilities are supported by the evidence and neither is excluded.

The only direct evidence of what Donald Bradley intended, the testimony of Brian and Patrick McWhite, supports the hypothesis that only a beating was planned. The McWhite brothers testified the plan was to beat up Jack Jones. Bradley said he was doing it as a favor for a friend, whose husband was cheating on her. According to the McWhites, Bradley was going to pretend to be a boyfriend of the husband's girlfriend. The plan was to scare the husband into ending the affair. The McWhites' testimony that Bradley was talking to the man during the beating also supports this hypothesis.

The only evidence the state presented to show a murder was planned was Janice Cole's testimony. Cole's testimony does not negate or contradict a plan merely to beat Jack Jones, however. All Linda said to Janice was that she could kill her husband and get away with it because of what he had put her through. This sort of offhand remark about doing in one's spouse is typical of people in the throes of marital difficultiess. Linda was upset about money, upset because Jack had been buying things for Carrie. She told Janice she and Jack were planning to talk about the bills that evening or the next. Linda told her childhood friend she was frustrated about finances and afraid of being alone. She did not want to lose Jack's $500,000 in life insurance. These remarks fall

far short of proof that she and Bradley entered into an agreement to kill Jack.

The method and manner of killing also militate against premeditated murder. There was no careful plan to take a weapon to the house. Bradley did not have a weapon of any kind when he arrived at the McWhites' house. As they left, he told Patrick to grab a stick that was leaning against a wall. They wore masks and black clothing so they could not be recognized. If the plan was to kill the victim, such disguise would not have been necessary. Furthermore, if the plan was to kill Jack rather than to just hurt him, it would have been much simpler to use the victim's gun to do it. But, the evidence shows Linda Jones directed Bradley to retrieve the gun from the kitchen counter so that Jack could not get to it, not to used as a weapon. The manner in which the beating was administered als was inconsistent with a plan to kill. The McWhites testified that Bradley hit the victim repeatedly in the arms, legs, and back. The medical examiner said these injuries would not have been fatal and would not even have rendered the victim unconscious. If the plan were to kill, why hit him in the arms and legs and back? The McWhite brothers were large, well-muscled individuals, both over six feet tall. They both had worked as bouncers and Patrick was a football player. If the intent was to kill Mr. Jones, the McWhites and Bradley easily could have overpowered him, then shot him. The evidence suggests, rather, that their intent was to hurt and scare Mr. Jones, not to kill him.

The evidence is entirely consistent, then, with a beating that got out of hand. The testimony of the McWhites suggests Bradley lost control during the beating and went into some kind of frenzy. They tried but could not stop him. Brian himself was struck while trying to stop Bradley. Bradley was so out of control Brian feared he was going to shoot them all.

Other evidence supports a lack of intent to kill. According to the McWhites, when they left the Jones' residence, Bradley said he thought he may have killed the victim and if he died, they would be in trouble. If Bradley planned to kill the victim, that statement would make no sense.

The evidence also leaves open the reasonable hypothesis that Bradley did not kill Linda Jones, but that Linda Jones killed her husband after Bradley and the McWhites left. There was evidence to support this hypothesis. First, Brian and Patrick said the victim was curled up in a ball when they left. When police arrived, however, the victim was stretched out on his back with his hands over his head, indicating he moved after Bradley and the McWhites left. Blood was found in Linda's teal Buick parked in the garage, supporting the defense theory that Linda may have used a jack to kill her already injured husband after Bradley left. Also in support of this theory, Steve Leary testified that Luminol testing in the house indicated imprints in blood of a long object which was hooked at one end. There also was evidence Linda Jones had washed up before police arrived: The shower was wet and the mirror

steamed up. All of this evidence supports the alternative defense theory that Linda Jones hired Bradley to beat up her husband, then killed him herself after Bradley left.

In sum, the circumstantial evidence leaves open the reasonable hypothesis that Donald Bradley intended only to beat Jack Jones. Either the beating got out of hand, resulting in Mr. Jones' death, or Linda Jones killed Jack herself after Bradley left. The state failed to prove premeditation beyond any reaonable doubt, and the trial court erred in denying Bradley's motion for judgment of acquittal as to premeditated murder.

The Evidence Did Not Establish Burglary

There was no burglary because Donald Bradley was invited into the Jones' residence by Linda Jones. According to Brian and Patrick McWhite, Linda Jones left the front and side doors open so they could enter the house. As a co-owner and co-occupant, Linda Jones had legal authority to invite Bradley into the home. Bradley therefore cannot be guilty of burglary.

Section 810.02(1), Florida Statutes (1995), provides in relevant part:

> Burglary means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

The crime of burglary under this statute requires an unconsensual entering or remaining in a structure. There can be no

burglary, therefore, where the defendant is licensed, invited, or otherwise has a legal right to be on the premises at the time of the alleged entering or remaining.

Consent is a defense[5] to burglary, then, when the consent is given by someone with lawful authority to give it, or where the defendant had a good-faith belief the consent was given with authority to consent. Damico v. State, 153 Fla. 850, 16 So.2d 43 (1943); K.P.M. v. State, 446 So.2d 723 (Fla. 2d DCA 1984); McEver v. State, 352 So.2d 1213 (Fla. 2d DCA 1977), cert. denied, 364 So.2d 888 (Fla. 1978) and 364 So.2d 885 (Fla. 1978); Balletti v. State, 261 So.2d 510 (Fla. 3d DCA 1972).

Lawful authority to grant access to another flows not from the person's lawful access to enter herself but from the person's possessory interest in the property.[6] Compare Fotopoulos v. State, 608 So.2d 784 (Fla. 1992)(defendant had no authority to give another permission to enter his mother-in-law's home to murder his wife), cert. denied, 508 U.S. 924, 113 S.Ct. 2377, 124 L.Ed.2d 282

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[5] Consent to enter the premises is an affirmative defense to burglary. State v. Hicks, 421 So.2d 510 (Fla. 1982). Once the defendant has offered evidence to establish the defense, the burden shifts to the state to disprove the defense beyond a reasonable doubt. Coleman v. State, 592 So.2d 300 (Fla. 2d DCA 1991); Wright v. State, 442 So.2d 1058 (Fla. 1st DCA 1983), review denied, 450 So.2d 489 (Fla. 1984).

[6] The purpose of the burglary statute is to punish the possessory property rights of another in structures and conveyances. Cannon v. State, 102 Fla. 928, 136 So. 695 (1931); Cladd v. State, 398 So.2d 442 (Fla. 1981).

(1993), and Damico (corporate officer had no legal right to give consent to defendant to enter jewelry store belonging to corporation to rob store) and K.P.M. (son of owner/occupant of burglarized home had no legal authority to consent to friend's entry to steal property not belonging to him) with Balletti (conviction for breaking and entering with intent to commit petit larceny reversed where defendant entered at direction of husband-owner) and McEver (defendant could not be guilty of burglary where wife left open door of house she shared with husband so defendant could enter).

In Balletti, the residence was jointly owned by the wife and husband. Though separated, the husband retained keys to the residence. The husband and the defendant entered the residence through the front door using the husband's key, placed an electronic transmitter in the master bedroom, and dissembled the lock to the sliding glass door. Later, at the husband's direction, the defendant entered through the sliding glass door and took photographs of the wife and another man in bed. On appeal, the state contended the defendant's conviction for breaking and entering with intent to commit petit larceny should be upheld on the basis that the stealthy entry was prima facie evidence of entry with intent to commit a misdemeanor. The Third District rejected this argument on the ground that the elements of the statute had not been met since the defendant entered with the consent and at the direction of the husband-owner.

In McEver, which is remarkably similar to the present case, Betty Lou Haber left open a sliding glass door of the house she shared with her husband, so the defendant could enter and kill her husband. The plan was to make it appear as though the murder had occurred during the commission of a burglary. Although the case was decided on another legal point, the court noted:

> [W]e have considerable doubt whether the appellants could have been convicted of burglary since the only evidence on the subject indicates that the entry into the Haber home was with the consent of Mrs. Haber.

352 So.2d 1215.

Here, too, the evidence showed the entry into the Jones residence was with the consent of Linda Jones, a co-owner and co-occupant of the house. Furthermore, Linda Jones was present--in actual possession -- when Bradley entered and thus had the authority to consent to his entering and remaining in the home while she there. Bradley was invited into the home by someone with legal authority to invite him in. He thus had a legal right to be there. There was no trespass and no unconsensual entry. Under the Florida burglary statute, there was no burglary.

Bradley's Conviction Must be Reduced to Second-Degree Murder, or in the Alternative, Reversed for a New Trial

Because the evidence failed to show either premeditated or felony murder, Bradley's first-degree murder conviction must be reduced to second-degree murder.

In the alternative, however, if this Court concludes there could not have been a burglary but the evidence was sufficient to support premeditation, Bradley is entitled to a new trial under Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957)(reversing general guilty verdict for conspiracy where one of possible bases for conviction was legally inadequate because of a statutory time bar); see also Mungin (general verdict must be set aside where conviction may have rested on legally inadequate theory).

In the alternative, if the Court concludes there could have been a burglary but there was insufficient evidence of premeditation, this Court should reverse for a new trial under Stromberg v. California, 283 U.S. 359, 369-70, 51 S.Ct. 532, 536, 75 L.Ed.2d 1117 (1931)(where jury was instructed it could rely on any of two or more independent grounds, and one of those grounds was improper, general verdict must be set aside because verdict may have rested exclusively on improper ground).

Appellant acknowledges this Court held in Mungin that it was harmless error to instruct the jury on both premeditated and felony murder, where the evidence was insufficient to support premeditation. In holding the instruction error harmless, the Court construed Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), as retreating from the Stromberg rule in cases where one of the alternative theories of guilt is improper because it is based on insufficient evidence:

> While a general verdict must be set aside where the conviction may have rested on an unconstitutional ground or a legally inadequate theory, reversal is not warranted where the general verdict could have rested upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient.

689 So.2d at 1030. In so holding, the majority agreed with the United States Supreme Court that while jurors are not equipped to determine whether a theory of conviction submitted to them is contrary to law, they are equipped to analyze the evidence. Id.

As Justice Anstead pointed out in his dissent, however, this reasoning makes no sense:

> In my view, the Griffin court's distinction between "legal error" and "insufficiency of proof" is one that has absolutely no practical or meaningful difference. No matter what you call it, the trial court here erroneously submitted this case to the jury on the theory of premeditation--which was the main focus of the State's case against Mungin--and there is simply no way that we can know or conclude that the error did not contribute to the jury's verdict.

689 So.2d at 1034 (Justice Anstead, dissenting).

Accordingly, appellant asks this Court to reconsider this issue and overrule Mungin for the reasons stated in Justice Anstead's well-reasoned dissent.

Point II

THE EVIDENCE WAS INSUFFICIENT TO PROVE CONSPIRACY TO COMMIT FIRST-DEGREE MURDER.

As discussed above in Point I, the state's evidence failed to establish beyond any reasonable doubt that Linda Jones and Donald Bradley conspired to kill Jack Jones. The evidence was equally consistent with a plan merely to beat Jack up and scare him. Accordingly, Bradley's conviction for conspiracy to commit first-degree murder must be vacated.

Point III

THE EVIDENCE FAILED TO ESTABLISH A BURGLARY BECAUSE DONALD BRADLEY WAS INVITED TO ENTER THE JONES' RESIDENCE BY LINDA JONES.

As discussed above in Point I, there was no burglary under Florida's burglary statute because the entry was with Linda Jones' consent. As a co-owner and co-occupant who was present at the time of entry, Linda Jones had lawful authority to consent to Bradley's presence on the premises. Bradley's conviction for burglary must be vacated.

Point IV

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT DONALD BRADLEY VANDALIZED CARRIE DAVIS' CAR ON OCTOBER 31, 1995, WHERE SUCH EVIDENCE WAS NOT RELEVANT TO ANY MATERIAL ISSUE AND SERVED ONLY TO ATTACK BRADLEY'S CHARACTER BY SHOWING HIS PROPENSITY TO COMMIT CRIMES.

At trial, the state was permitted to introduce evidence of other crimes or bad acts committed by Donald Bradley on October 31, 1995, one week before Jack Jones was killed. Brian McWhite, Patrick McWhite, Michael Clark, and Carrie Davis all testified about the so-called "Halloween incident," in which Bradley, the McWhites, and Clark drove to Carrie Davis' apartment to retrieve a ring Mr. Jones had given Carrie. While Bradley and his cohorts waited in their vehicle for Mr. Jones to leave the apartment, Bradley and Linda Jones made phone calls to one another. Linda

Jones also made harassing phone calls to Carrie Davis. When Mr. Jones left, the four men knocked on the door, but Carrie refused to answer it. Brian and Patrick McWhite then busted the windows of Carrie's vehicle.

The trial court erred in admitting evidence of the Halloween incident because the events of that night were not relevant to any material issue in the case. Linda Jones' motive for the murder was not in dispute and thus was not a material issue in the case. Even if marginally relevant, the prejudicial value of this evidence far outweighed its probative value.

The rules relating to the admissibility of other crimes are well-established. Evidence of prior crimes or bad acts of an accused may be admissible as Williams[7] rule evidence when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, or knowledge. Section 90.404(2)(a), Fla. Stat. (1995). Evidence of other crimes or bad acts of an accused also may be admissible where such evidence is "inextricably intertwined" with the crime charged. Griffin v. State, 639 So.2d 966 (Fla. 1994), cert. denied, 514 U.S. 1005, 115 S.Ct. 1317, 131 L.Ed.2d 198 (1995). Such evidence is admissible because "it is a relevant and inseparable part of the act" in

[7] Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

issue. C. Ehrhardt, Florida Evidence, s. 404.17 (1993 ed.), quoted in Griffin.

Evidence of other crimes is not admissible, however, if introduced solely for the purpose of showing bad character or propensity. Bryan v. State, 533 So.2d 744 (Fla. 1988), cert. denied 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989). Even if relevant, evidence of other crimes or bad acts should not be admitted if its probative value is substantially outweighed by undue prejudice. Id.; s. 90.403, Fla. Stat. (1995).[8]

In the present case, the state argued below the events of October 31, 1995, were inextricably intertwined with the homicide on November 7, 1995, and that the Halloween incident was relevant to show Linda Jones' motive to kill her husband. XVII 320-331, VIII 395-451. The Halloween incident was not relevant for either of these purposes, however.

For evidence to be inextricably intertwined with the crime charged, it must be "necesary to admit the evidence to adequately describe the deed." Ehrhardt, supra, quoted in Griffin. Here, the Halloween incident had no bearing on the homicide. Each event could be described completely without any reference to the other. The purpose of the Halloween incident was to get a ring back, and

[8] "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." s. 90.403, Fla. Stat. (1995).

perhaps discourage Ms. Davis' affair with Mr. Jones. The Halloween incident took place a week before the homicide and was not relevant to it in any way. The Halloween incident plainly was not necessary to adequately describe the homicide.

Nor was the Halloween incident relevant to prove Linda Jones' motive to kill her husband. The similarities between the events of October 31 and the events of November 7 were few. Furthermore, that Linda Jones sought to recover a ring purchased with marital assets does not logically demonstrate a motive to kill. More importantly, however, even if the Halloween incident showed a motive to kill, Linda Jones' motive was not in issue in Bradley's trial. Similar fact evidence of other crimes is admissible under 90.404(2)(a) only to prove a material fact in issue, that is, a material fact that is genuinely in dispute. Thomas v. State, 599 So.2d 158, 161-63 (Fla. 1st DCA 1992), review denied, 604 So.2d 488 (Fla. 1992); see also Almeida v. State, 24 Fla. L. Weekly S336 (Fla. July 8, 1999)(error to admit gruesome photo where photo not probative of any issue in dispute); McCormick on Evidence 773 (John William Strong, ed. 4th ed. 1992)("If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial"). If there is no bona fide dispute over the material fact the similar fact evidence is offered to prove, then the probative value of such evidence necessarily has significantly less importance than its prejudicial effect, and the evidence must be excluded under section 90.403. Thomas. Here,

Linda Jones' outrage over her husband's affair was undisputed. Furthermore, the state had other evidence showing Jones' feelings about the affair, such as Janice Cole's testimony. The Halloween incident added little to this evidence but unfair prejudice.

The erroneous admission of irrelevant collateral crimes evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Peek v. State, 488 So.2d 52, 56 (Fla. 1986); see also Holland v. State, 636 So.2d 1289 (Fla. 1994); Castro v. State, 547 So.2d 111 (Fla. 1989); State v. Lee, 531 So.2d 133 (Fla. 1988).

Here, the Halloween incident was a significant part of the state's case against Bradley -- four witnesses testified about the incident. The collateral crime evidence had no other purpose than to suggest to the jury that because Bradley was involved in the October 31 incident, he also was involved in the November 7 murder. Bradley presented the testimony of his wife and sister, as well as other evidence, showing he was not and could not have been at the Jones' residence when the murder was committed. The testimony of Brian and Patrick McWhite was impeached in numerous respects. Under the circumstances, the erroneous admission of the Halloween incident cannot be treated as harmless under State v. DeGuilio, 491 So.2d 1129 (Fla. 1986).

Point V

THE TRIAL COURT ERRED IN ADMITTING AN OUT-OF-COURT STATEMENT BY DETECTIVE REDMOND TO THE EFFECT THAT BRADLEY'S VAN HAD BEEN DETAILED FIVE TIMES SINCE THE MURDER TO REBUT AN IMPLIED CHARGE OF RECENT FABRICATION WHERE REDMOND NEVER TESTIFIED AT TRIAL.

Over defense objection, the state was permitted to elicit from defense witness Steve Leary that before processing Bradley's van for blood on January 26, 1996, Leary was told by Lieutenant Redmond the van had been detailed five times since December 1995. XIV 1685. The trial court ruled the statement was admissible as a prior consistent statement offered to rebut a charge of recent fabrication. The trial court's ruling was error, however, as Detective Waugh, not Redmond, testified that Bradley told him the van had been detailed, and there was no implied charge of recent fabrication against Redmond. Even if the objected-to out-of-court statement had been made by Waugh, it would have been inadmissible, as the defense never insinuated Waugh had recently fabricated the statement about the van being detailed.

Hearsay, an out-of-court statement offered to prove the truth of the matter asserted, is inadmissible unless the statement falls within one of the exceptions to the hearsay rule. ss.90.801-.804, Fla. Stat. (1995); C. Ehrhardt, Florida Evidence, s. 801.1, p. 551 (1996 ed.). Hearsay is excluded because of its unreliability, particularly because of the lack of opportunity to cross-examine the person who made the out-of-court statement regarding the person's "perception, memory, sincerity and accuracy." Id. at 552.

A witness's prior consistent statements usually are hearsay and thus are inadmissible to corroborate the witness's testimony. Jackson v. State, 498 So.2d 906, 909-10 (Fla. 1986); Van Gallon v. State, 50 So.2d 882 (Fla. 1951); McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982). A prior consistent statement is not hearsay, however, and therefore admissible, if the person who made the statement testifies at trial, and the statement is used to rebut an express or implied charge against that person of recent fabrication. s. 90.801(2)(b), Fla. Stat. (1995). The exception applies only where the prior consistent statement was made "'prior to the existence of a fact said to indicate bias, interest, corruption, or other motive to testify.'" Jackson, 498 So.2d at 910 (quoting McElveen, 425 So.2d at 748).

In the present case, the trial judge allowed Steve Leary to testify about the out-of-court statement by Detective Redmond regarding the detailing of the van on the ground that it was admissible to rebut an implied charge of recent fabrication against Detective Waugh. Detective Waugh earlier had testified that when he seized the van on January 22, 1996, to process it for blood stains and other evidence, Bradley told him the van had been detailed probably four or five times since the murder. On cross-examination, when defense counsel asked Waugh why the statement was not on the tape of the interview, Waugh said Bradley turned the tape recorder off a few times and the statement must have been made during one of those times. Waugh said he thought he included the

statement in his police report but after reviewing the report, said the statement was not there either. XIII 1532-1535.

The trial court's ruling was clearly erroneous. Section 90.801(2)(b) provides:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> (b) consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication.

The objected-to statement clearly does not fit within 90.801(2)(b). The out-of-court statement was not a prior consistent statement at all. Redmond -- the declarant[9] -- did not testify at trial so there was no testimony by Redmond to corroborate, no Redmond to cross-examine concerning the statement, and no implied charge "against him" of recent fabrication. See 90.801(2)(b).

Furthermore, even if the out-of-court statement had been made by Detective Waugh, it would not be admissible because there was no implied charge against Waugh of recent fabrication. After Waugh testified that Bradley told him the van had been detailed since the murder, defense counsel simply asked Waugh why the statement was not on the tape of the interview. There was no charge or

[9] "A 'declarant' is a person who makes a statement." s. 90.801(1)(b).

insinuation of recent fabrication. Nor did defense counsel's cross-examination suggest any fact or event which might have given Detective Waugh a motive to falsify.

The out-of-court statement about the detailing of the van was hearsay and should not have been admitted.

Point VI

THE TRIAL COURT REVERSIBLY ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE CRIME WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

As argued supra in Points I and II, the state failed to prove beyond any reasonable doubt that Linda Jones and Donald Bradley conspired to kill Jack Jones because the evidence was equally consistent with an agreement only to beat him up. Though the evidence showed the crime was planned in advance, the evidence did not prove a killing was planned. Rather, the evidence left open the reasonable possibility that Bradley went into a frenzy and killed Jack Jones without intending to do so, or that Linda Jones killed her husband after Bradley left. The cold, calculated, and premeditated aggravator thus is inapplicable to Bradley.

Each element of an aggravating factor must be proved beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

Moreover, such proof cannot be supplied by inference from the circumstances unless the evidence is inconsistent with any reasonable hypothesis that might negate the aggravating factor. Geralds v. State, 601 So.2d 1157, 1163-64 (Fla. 1992).

Three of the four elements the state must prove to establish the cold, calculated, and premeditated aggravating circumstance (CCP) are that the murder was the product of "cool and calm reflection," that the defendant had a "prearranged design to kill before the crime began," and that the crime was committed with "premeditation over and above what is required for unaggravated first-degree murder." Jackson v. State, 648 So.2d 85, 89 (Fla. 1994). The state failed to prove any of these elements.

As this Court held in Jackson, an essential element of CCP is that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." 648 So.2d at 89. Consequently, impulsive or panic killings, or killings committed prompted by frenzy or rage, do not qualify for CCP. Crump v. State, 622 So.2d 963 (Fla. 1993); Hardy v. State, 716 So.2d 761 (Fla. 1998).

Nor does an intentional killing during the commission of another felony necessarily qualify for the CCP aggravator. Maxwell v. State, 443 So.2d 967 (Fla. 1983). That the underlying felony may have been fully planned ahead of time does not qualify the crime for the CCP aggravator if the plan did not also include the commission of the murder. Guzman v. State, 721 So.2d 1155 (Fla.

1998), cert. denied, 119 S.Ct. 1583, 143 L.Ed.2d 677 (1999); Geralds.

Regarding the "heightened premeditation" requirement, the manner of death does not establish the greater premeditation needed for the CCP factor. Even a manner of death that requires a period of time to accomplish its end does not necessarily provide the perpetrator with the needed cool and calm reflection. See Campbell v. State, 571 So.2d 415 (Fla. 1990). A beating death, for example, is not necessarily CCP. Penn v. State, 574 So.2d 1079 (Fla. 1991); King v. State, 436 So.2d 50 (Fla. 1983); Wilson v. State, 436 So.2d 912 (Fla. 1983).

Here, as argued in Point I, supra, the evidence showed Bradley and the McWhites intended only to beat up the victim, to scare him into ending his affair with Carrie Davis. The evidence suggests either that Bradley unintentionally killed Jack Jones' or that Linda Jones killed him after Bradley left. Bradley's statement after the beating -- that they would be in big trouble if he died -- supports an unintentional killing. The state's evidence failed to prove the CCP aggravator beyond any reasonable doubt, and it was error for the trial court to instruct the jury on this aggravator and error for the trial court to consider this aggravator as a reason for imposing the death sentence. Bradley is entitled to a new penalty phase proceeding.

Point VII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED DURING A BURGLARY BECAUSE THE ENTRY WAS CONSENSUAL.

As argued in Point I, supra, the theory of felony murder was legally inadequate because Bradley's entry was with the consent of a co-owner and co-occupant of the residence. The trial court therefore erred in instructing the jury on and in finding felony murder as an aggravating factor. Bradley is entitled to a new penalty phase proceeding.

Point VIII

BRADLEY'S DEATH SENTENCE IS DISPROPORTIONATE.

If this Court accepts appellant's argument in Point I supra that Bradley killed the victim unintentionally during a felony, then the death penalty is disproportionate because it is neither the most aggravated nor the least mitigated of first-degree murders. In the alternative, if this Court finds the evidence of premeditation sufficient, the death penalty is disproportionate because Linda Jones, who was equally culpable, received life. Bradley's death sentence must be vacated.

A. Bradley's Death Sentence is Disproportionate because the Killing was Unintended and There was Substantial Mitigation.

If this Court concludes Donald Bradley killed Jack Jones unintentionally as a result of a beating that got out of hand, the death sentence is disproportionate under State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

As this Court many times has stated, death is a unique punishment. Urbin v. State, 714 So.2d 411, 416 (Fla. 1998); Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Dixon. Accordingly, the death penalty must be limited to the most aggravated and least mitigated of first-degree murders. Larkins v. State, 24 Fla. L. Weekly S379 (Fla. July 8, 1999); Dixon.

The present crime is neither the most aggravated nor the least mitigated of murders. Absent the CCP aggravator, only three

aggravators properly apply, HAC, felony murder, and pecuniary gain. The felony murder aggravator, based on a technical burglary, is weak. And though the evidence is sufficient to support the pecuniary gain aggravator, there also was evidence Bradley got involved out of loyalty to his sister or to help a friend. Bradley's decision to help Linda by beating up her husband was horribly misguided and the beating itself despicable. If Jack Jones' death was unintended, however, this was not one of the most aggravated of crimes. The ultimate penalty does not fit this crime. Cf. Cooper v. State, 24 Fla. L. Weekly S383 (Fla. July 8, 1999); Urbin; Curtis v. State, 685 So.2d 1234 (Fla. 1996).

Nor does the ultimate penalty fit this offender. The trial judge found two statutory mitigators and five nonstatutory mitigators. Despite his abusive childhood and delinquent teen years, Donald was a hard-working, law-abiding citizen for twenty years prior to this murder.[10] He has three siblings who are devoted

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[10] In his sentencing order, the trial judge wrote:

> The testimony in the penalty phase clearly established that Donald Bradley's parents inappropriately disciplined him and abandoned him at an early age. He did not receive love or attention from either of his parents or his stepmother. There was no adult around consistently to set a moral example for him. His childhood was chaotic and his family dysfunctional in the classic sense. However, the evidence shows that he was able to overcome this poor start in life to the point where he could show love and affection to his wife and children, maintain

to him and a wife and five children who love him and whom he loves. Bradley is not a hardened, vicious, depraved, or irredeemable criminal. The ultimate penalty of death is not warranted for Donald Bradley. Life in prison is the appropriate punishment for Bradley.

B. Bradley's Death Sentence is Disproportionate Punishment Because the Codefendant Linda Jones, Who was the Dominant Force Behind the Planning and Execution of this Murder, Received a Life Sentence.

If this Court concludes this was a planned killing, then Donald Bradley's death sentence is disproportionate in light of Linda Jones life sentence.

Linda Jones conceived the plan and stood to receive the greatest benefit from it. Linda Jones specifically directed how the plan was to be carried out, down to the last detail. Linda Jones was present during the murder and actively participated in covering it up. Bradley may have poured on the gas, but it was Linda Jones who lit the fuse. No other factors make Bradley more deserving of death than Linda Jones. Both have insignificant criminal histories, both have loving families, both have good

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> stable employment, overcome drug addiction, and reconcile with his father. He worked long hours as an employee of other companies and, when he was injured on the job and unable to maintain his employment, he began his own business of lawn maintenance and subcontracting residential and commercial landscaping. V 866.

employment histories. The differences in their backgrounds are insignificant and do not warrant disparate punishments.

It is well settled that death is a disproportionate penalty when a coperpetrator of equal or greater culpability has received less than death. Slater v. State, 316 So.2d 539, 542 (Fla. 1975). As this Court explained in Slater, the requirement that equally culpable codefendants be treated equally is constitutionally mandated:

> We pride ourselves in a system of justice that requires equality before the law. . . . The imposition of the death sentence [on only one of two equally culpable codefendants] clearly is not equal justice under the law . . . . the imposition of the death penalty under the facts of this case would be an unconstitutional application of Furman v. Georgia, 408 U.S. 238 (1972).

Since Slater, this Court "has not hesitated to apply this standard even in collateral challenges long after the trial and direct appeals have ended." Scott v. State, 657 So.2d 1129, 1132 (Fla. 1995)(Kogan, J., concurring)(citing Scott v. Duggar, 604 So.2d 465 (Fla. 1992)); see also Puccio v. State, 701 So.2d 858 (Fla. 1997); Hazen v. State, 700 So.2d 1207 (Fla. 1997); Curtis v. State, 685 So.2d 1234 (Fla. 1996); Harmon v. State, 527 So.2d 182 (Fla. 1988).

In determining the relative culpability between two coperpetrators, the Court evaluates the codefendants' level of participation in the planning and carrying out of the crime, including such factors as who instigated the crime and who stood to

receive the most benefit from it. The Court also evaluates any other differences in the aggravating and mitigating circumstances applicable to each. The Court then determines whether the differences between the two, if any, are great enough to warrant death for one and life for the other. See, e.g., Gordon v. State, 704 So.2d 107 (Fla. 1997); Scott v. Dugger; Larzelere v. State, 676 So.2d 394 (Fla.), cert. denied, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996); Heath v. State, 648 So.2d 660 (Fla.), cert. denied, 515 U.S. 1162, 115 S.Ct. 2618, 132 L.Ed.2d 860 (1995); Witt v. State, 342 So.2d 497 (Fla.), cert. denied, 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 294 (1977); Demps v. State, 395 So.2d 501 (Fla. 1981), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981).

In Puccio, for example, this Court reversed Puccio's death sentence after concluding the trial judge's finding that Puccio played a greater role in the murder and thus was more culpable was not supported by the evidence:

> Nothing in the trial court's findings above indicates that Puccio played a greater role in the planning and killing of Kent than any of the others. In fact, he played a lesser role than others in the planning since he was not present during the initial formulation of the plan or when the group discussed ways to kill Kent on their way to Puccio's house. Puccio also played no greater role in the actual killing than either Semenec or Kaufman--it was Semenec who initiated the melee with the stab wound to the neck and Kaufman who finished it with the coup de grace with the bat.

701 So.2d at 862-63.

In Scott v. Duggar, this Court found disparate treatment unwarranted even though Scott was the actual killer. Both Robinson and Scott received death sentences at the trial level, but Robinson's case was remanded for a new penalty phase, and he received a life sentence after a life recommendation by his second jury. In post-conviction, Scott argued he was entitled to a new proportionality review because now his codefendant had received a life sentence. In reversing Scott's death sentence, the Court observed that Scott and Robinson had similar backgrounds and were equally culpable participants in the crime. The Court quoted trial judge Susan Schaeffer, who, though she had sentenced Scott to death on the jury recommendation, had written a letter to the Clemency Board after Robinson was resentenced to life, saying she now believed Scott should receive life:

> As to the crime itself, they were both involved in all aspects of it. They both participated in the robbery of the victim, his kidnapping, his beatings and, although Scott eventually ran the man down with the automobile, it was only after Robinson concocted this method of killing the victim, and, in fact was the first to try, but failed. It is clear that this is not a case where Scott was the "triggerman" and Robinson a mere unwitting accomplice along for the ride.

604 So.2d at 468-69.

In Hazen, this Court applied the Slater principle to two nontriggermen. Codefendant Buffkin had pled guilty to first-degree murder, received a life sentence, and testified against Hazen, who was convicted and received a death sentence. In reversing Hazen's

death sentence, the Court concluded Buffkin was more culpable than Hazen. The Court recognized as important factors that Buffkin was the instigator of the criminal episode and was in a position to stop the killing if he wanted to.

Applying the same analysis, the Court rejected a Slater proportionality claim in Larzelere after concluding Larzelere was more culpable than the codefendant who actually carried out the murder. Larzelere had arranged for her son to kill her husband, a dentist. They had separate trials and the son was acquitted. At Larzelere's trial, the evidence showed the son came into Dr. Larzelere's office wearing a mask, chased the victim, and shot him with a shotgun. Mrs. Larzelere was present. Mrs. Larzelere did it in order to receive several million dollars in life insurance and assets. She had asked two other men to help her have her husband killed. In deciding Mrs. Larzelere's sentence was proportionate, the Court said:

> The evidence established beyond a reasonable doubt, although [Mrs. Larzelere] was not the triggerman, she was present for the murder, actively participating in carrying out the murder which she planned in a cold and calculated manner. Her participation was not relatively minor. Rather, she instigated and was the mastermind of and was the dominant force behind the planning and execution of this murder and behind the involvement and actions of the co-participants before and after the murder. Her primary motive for the murder was financial gain, which motive was in her full control.

676 So.2d at 407 (emphasis added).

This Court has approved the death sentence in other cases where the defendant was the dominating force behind the homicide even though an accomplice or hired agent received a lesser sentence. E.g. Heath; Marek v. State, 492 So.2d 1055 (Fla. 1986); Hayes v. State, 581 So.2d 121, 127 (Fla.), cert. denied, 502 U.S. 972, 112 S.Ct. 450, 116 L.Ed.2d 468 (1991).

In Gordon, the Court found disparate treatment of codefendants justified because of significant differences in the aggravating and mitigating circumstances of each. Denise Davidson and her fiance, Cisneros, hired Gordon and McDonald to kill Davidson's husband, Dr. Louis Davidson. Mrs. Davidson made nineteen transfers of money to Gordon and McDonald before and after the murder, totalling $15,000. Gordon and McDonald met with Mrs. Davidson and Cisneros both before and after the murder.[11] Gordon and McDonald received death recommendations from the jury; Mrs. Davidson was tried separately, received a life recommendation, and was sentenced to life.

In addressing the proportionality issue, the trial court noted the "vast difference" in the aggravating and mitigating factors applicable to each. In Davidson's case, there were two aggravators (felony murder and CCP), three statutory mitigators (age, no significant prior criminal history, and acting under extreme duress or the substantial domination of another person, Cisneros), and

[11] Dr. Davidson was found in a bathtub of bloody water, blindfolded, bound, gagged, and hogtied. He had bruises and lacerations on his scalp though he died of drowning.

significant nonstatutory mitigation, including Davidson's family background, her community activities, that she was a caring parent, and her employment background. In Gordon's case, there were four aggravating factors (felony murder, CCP, HAC, and pecuniary gain), no statutory mitigators, and only minor nonstatutory mitigation (a "totally unremarkable" family background and religious devotion). This Court agreed these differences justified disparate sentences.

In the present case, the trial judge addressed the issue of disparate treatment in view of Linda Jones' life sentence by comparing the aggravating and mitigating factors in each case. The judge found three aggravators applicable to Jones (felony murder, CCP, and pecuniary gain), and four aggravators applicable to Bradley (felony murder, CCP, pecuniary gain, and HAC). The trial judge found no difference in the felony murder and CCP aggravators and weighed the pecuniary gain aggravator in Bradley's favor since Linda Jones stood to gain substantially more money from her husband's death than did Bradley. The court concluded the the HAC aggravator, however, created "a significant and persuasive difference" between the aggravating factors in the two cases. V 872.

In comparing the mitigation, the trial court found the statutory mitigators of age and no significant prior criminal history for both Bradley and Jones. The trial court found no distinction between Bradley and Jones with regard to the age mitigator but concluded Bradley's prior criminal activity was "more

significant" than Jones'. V 872. The trial court found no other relevant distinctions in their backgrounds. V 873.

In short, the trial judge concluded Bradley was more culpable because the HAC aggravator applied only to him and because he deemed Bradley's insignificant prior criminal activity less significant than Jones' insignificant prior criminal activity.

The trial judge's conclusion must be rejected because the trial judge erred in finding HAC inapplicable to Linda Jones and thus less culpable in the murder and because the differences in their backgrounds are not great enough to warrant death for one and life for the other.

In finding the HAC aggravator inapplicable to Linda Jones, the trial judge wrote:

> The [heinous, atrocious, and cruel] aggravator was not presented to the Linda Jones jury because the Court found that it could not be applied vicariously, there being no evidence that she actually struck any of the blows that caused Jack Jones' death.[12] The Defense argues that even though that aggravator was not presented to Linda Jones' jury, it should

[12]The state could not argue the HAC aggravator for Linda Jones because of a failure of proof. At Jones' trial, Greg Green testified that Linda Jones offered him $15,000 to kill her husband. Green did not testify about all the details of the plan, though. He said only that Linda Jones told him they would be in bed by 8:30 and he could come over in a ski mask and kill Mr. Jones. At Bradley's trial, in contrast, Detective Waugh testified Green told him Linda had solicited him to kill her husband two or three times and that she had the whole plan figured out: he could get a couple of other guys, wear gloves and ski masks, make it look like a home invasion robbery, and beat Jack to death with a baseball bat. Thus, Linda Jones' jury never heard that Linda Jones planned the method of killing.

> be considered by the Court as similar if not identical to Donald Bradley's case because she planned in great detail the manner in which this murder would be carried out. That argument is not persuasive to this Court because there is no evidence that she planned or instructed Donald Bradley on how the beating would actually be inflicted. Although Linda Jones planned that her husband would be beaten to death, that could have been carried out by a single blow to Mr. Jones' head, which the medical examiner testified could have rendered Mr. Jones unconscious, if not killed him.

V 872.

The trial judge's conclusion is contrary to the law and to the evidence. Although the HAC aggravator may not be applied vicariously to a principle to a murder if the principle did not have knowledge of the method of killing, HAC may be applied vicariously to a principle who directs the manner of killing or is aware of how it will be accomplished. Omelus v. State, 584 So.2d 563 (Fla. 1991).

In Omelus, this Court held the HAC factor inapplicable to Omelus, who contracted with Jones to kill Mitchell, since Omelus did not know Jones would kill Mitchell by stabbing him to death. The Court reasoned:

> Nowhere in this record is it established that Omelus knew how Jones would carry out the murder of Mitchell, and, in fact, the evidence indicates that Jones was supposed to use a gun. There is no evidence to show that Omelus directed Jones to kill Mitchell in the manner in which this murder was accomplished. Under these circumstances, where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous,

> atrocious, or cruel aggravating factor cannot be applied vicariously.

Id. at 566 (emphasis added); see also Archer v. State, 613 So.2d 446 (Fla. 1993)("a defendant who arranges for a killing but who is not present and who does not know how the murder will be accomplished cannot be subjected vicariously to the heinous, atrocious, or cruel aggravator")(emphasis added); Williams v. State, 622 So.2d 456 (Fla.)(HAC aggravator "cannot be applied vicariously, absent a showing by the State that the defendant directed or knew how the victim would be killed")(emphasis added), cert. denied, 510 U.S. 1000, 114 S.Ct. 570, 126 L.Ed.2d 470 (1993).

In the present case, Greg Green's statements to Detective Waugh showed that Linda Jones knew how her husband would be killed. Indeed, the trial court made a factual finding that Linda Jones planned every detail of the crime:

> This murder was proven by the State to be one in which the Defendant was hired by the victim's wife to kill him. She had previously solicited other men to kill her husband but they had refused. The evidence before this Court clearly established that she laid out in great detail the plan which the Defendant was to follow in committing this murder, including the plan that the Defendant and his assistants would wear ski masks and gloves, use a club of some type, enter the victim's home at a prearranged hour when the victim's wife could notify the Defendant that the victim was home, tie up both the victim and Mrs. Jones with duct tape, and burglarize the house to make it look like home invasion robbery rather than the premeditated murder that it was (emphasis added). V 863.
>
> . . . .

> Two other men had turned down Linda Jones' solicitations to have them murder her husband. Mr. Bradley accepted the offer and beat the victim to death following the plan devised by the victim's wife (emphasis added). V 864.
>
> . . . .
>
> Linda Jones planned that her husband would be beaten to death (emphasis added). V 872.

Linda Jones not only devised the method of killing -- that her husband be beaten to death with a bat or club -- she was present when it was accomplished. That Linda Jones did not direct or know how the beating would be inflicted defies common sense. By definition, a beating means repeated blows.[13] Linda Jones did not direct Bradley to kill her husband with a single blow to the head. She directed Bradley to beat him to death. She did not direct him to shoot her husband, though a gun was readily available.[14] Linda Jones consciously chose a manner of killing she knew would be painful. Furthermore, she was present when it took place, a fact the trial judge did not take into account. Linda Jones watched while Bradley beat her husband and did nothing to stop him. The method of killing was her idea, conceived long before she

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[13] "Beat" means: 1. To strike or hit repeatedly. 2. To punch by hitting or whipping; flog. 3. To pound or strike against repeatedly. 4. To shape or break by repeated blows. The American Heritage Dictionary 116 (New College ed. 1980).

[14] Patrick McWhite testified in Linda Jones' trial that Bradley went in through the garage door so he could retrieve the gun from the kitchen counter so Mr. Jones could not get to it. SR IV 749.

approached Bradley to do it for her. The evidence showed beyond any reasonable doubt that Linda Jones directed Bradley to kill her husband in the manner in which it was accomplished. The HAC aggravating factor should apply equally to Linda Jones.

There is, therefore, little or no difference in the aggravating factors applicable to each defendant, all of which relate to the present crime. If anything, the pecuniary gain and CCP aggravators apply with greater force to Linda Jones because Linda Jones stood to gain the most benefit from the murder and Linda Jones had been planning the murder for weeks or months before Bradley got involved. Overall, Jones' level of participation was equal to Bradley's. Though Bradley struck the actual blows, Jones "instigated and was the mastermind of and was the dominant force behind the planning and execution of this murder and behind the involvement and actions of the co-participants." See Larzelere, 676 So.2d at 407. This murder would not have occurred but for Linda Jones--the murder was the result of Linda Jones' motivation and actions. Though their roles were different, Linda Jones was equally culpable.

Turning to the mitigating factors applicable in each case, the differences do not justify the far greater punishment of death for Bradley. In Bradley's case, the trial court found the statutory factors of no significant history of prior criminal activity and Donald's age of 36. The trial judge found six nonstatutory mitigating factors: that Donald Bradley had overcome a chaotic and

dysfunctional childhood to make real achievements in his adult life; that he was a good provider for his wife and children and loved and was loved by them; that he was a hard worker; that he had unselfishly helped others inside and outside his family; and that he had shown sincere religious faith.

The trial judge found the same statutory mitigators for Linda Jones: her age of 48 and no significant history of prior criminal activity. Without specifically listing nonstatutory mitigation for Linda Jones, the trial judge noted that Jones' life and history were very different from Bradley's but found no serious distinction between them. Although the jury was instructed on extreme emotional disturbance in Jones' case, the trial judge did not find this factor existed.[15]

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[15] Jones did not present any medical or psychiatric testimony to support this mitigator but relied on testimony that her husband's affair with Carrie Davis had spoiled their thirty-year marriage. The cold, calculated nature of the murder, the planning in advance, and the financial motive are very hard to reconcile with a claim of extreme emotional disturbance due to infidelity, however. While Jones' original motivation may have been grounded in passion, she clearly contemplated this murder well in advance. Cf. Porter v. State, 564 So.2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). Extreme emotional disturbance also is hard to reconcile with the fact that Linda Jones was still able to function in a difficult job, run a household, plan a vacation, plan several faked crimes, and plan this murder. See Spencer v. State, 691 So.2d 1062 (Fla. 1996), cert. denied, 118 S.Ct. 213, 139 L.Ed.2d 148 (1997).

Though the trial judge found the statutory mitigator of "no significant history of prior criminal activity" for both Bradley and Jones, he nonetheless viewed Bradley's criminal history as "more significant" than that of Jones.

While Linda Jones' prior criminal activity is "different" from Bradley's, the difference does not make Bradley more deserving of death. Bradley has juvenile arrests and a 20-year-old conviction for failure to appear, which resulted in a three-year prison sentence.[16] Linda Jones committed an assortment of crimes related to her husband's affair and some acts of vandalism to her employer's property before the affair.[17] Comparing their criminal histories is like comparing apples to oranges. However one views the difference, the difference does not warrant death for one and life for the other. A 20-year-old "insignificant" criminal history does not justify disparate sentences, cf. Larkins v. State, 24 Fla.

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[16]The felony conviction occurred when Bradley was 18. He had juvenile arrests for runaway, petit larceny, truancy, trespassing, burglary, violation of furlough agreement, and auto theft. XVII 2269-2270.

[17]During the months before the murder, Jones solicited both Greg Green and Dwight Danahoo to commit the murder. Before that, she paid Green to make harassing phone calls to her husband; she filed three false police reports in August and October of 1995, falsely alleging burglaries, assaults, and a sexual battery against her; and she paid Green $50 to cut the brake lines on Carrie Davis' car. Even before her husband began the affair with Carrie Davis, Jones paid Green to vandalize her employer's wife's car; she herself vandalized Mrs. Gupton's car; and she solicited Green to damage Richard Gupton's homes in Ponte Vedra and San Jose. XVII 2268-2269, V 833-834.

L. Weekly S379, S381 n.4 (Fla. July 8, 1999)(appropriate to consider time since felony committed--20 years--and defendant's comparatively crime-free life in interim in determining whether death or life sentence is appropriate), especially since Bradley's "poor start" in life was the result of a family the trial judge deemed "dysfunctional in the classic sense." V 856.

The remaining mitigation offered in the two cases was similar. Both Jones and Bradley presented evidence they loved and were loved by their families and had good employment histories. Bradley presented more witnesses and more testimony, however. Several former employers came from other parts of the state to testify on Bradley's behalf.

In summary, Linda Jones and Donald Bradley were equally culpable participants in the murder of Jones' husband, and no other differences in their backgrounds warrants disparate punishment. Under the test of Slater, Bradley's death sentence must be reduced to life imprisonment.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand for the following relief: Point I, reverse appellant's conviction with directions the conviction be reduced to second-degree murder, or, in the alternative, remand for a new trial; Point II, reverse appellant's conviction for conspiracy to commit first-degree murder with directions the conviction be reduced to conspiracy to commit battery; Point III, vacate appellant's burglary with assault conviction; Points IV & V, reverse for a new trial; Points VI & VII, reverse for a new penalty phase proceeding; Point VIII, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

NANCY DANIELS
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to Richard B. Martell, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida 32399-1050, and a copy has been mailed to appellant, DONALD BRADLEY, #066600, Florida State Prison, Post Office Box 181, Starke, Florida 32091-0181, on this ___ day of August, 1999.

_____
Nada M. Carey

IN THE SUPREME COURT OF FLORIDA

DONALD BRADLEY,

Appellant,

v. Case No. 93,373

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX TO INITIAL BRIEF OF APPELLANT

Sentencing Order