IN THE SUPREME COURT OF FLORIDA

PHILLUP ALAN PARTIN, :

Appellant, :

vs. : Case No. SC08-2348

STATE OF FLORIDA, :

Appellee. :

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
Assistant Public Defender
Florida Bar Number 0234176

Public Defender's Office
Polk County Courthouse
P.O. Box 9000-PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

The record on appeal herein consists of 58 volumes: the 56-volume original record on appeal and two supplemental volumes. Citations in this brief to the record on appeal will be by volume and page number, with the supplemental volumes being indicated by “Supp.”

Appellant, Phillup Alan Partin, will be referred to by name, or as “Appellant.”

STATEMENT OF THE CASE

On September 17, 2003, a Pasco County Grand Jury indicted Appellant, Phillup Alan Partin, for the first-degree murder of Joshan Marie Ashbrook. (Vol. 1, pp. 9-14) The indictment alleged that on or between July 31 and August 1, 2002, Appellant inflicted "blunt head and neck trauma" to Ashbrook, as a result of which she died. (Vol. 1, p. 9)

This cause proceeded to a jury trial on October 1-5 and 9, 2007, with the Honorable William R. Webb presiding. (Vol. 49, p. 1-Vol. 56, p. 1575) The trial ended in a mistrial due to a discovery violation. (Vol. 56, pp. 1501-1560)

Appellant's new trial was held on March 10-14 and 17-18, 2008, with Judge Webb again presiding. (Vol. 39, p. 1-Vol. 48, p. 1894)

Appellant's jury was instructed on first-degree murder under theories of both premeditation and felony-murder, with aggravated child abuse as the underlying felony. (Vol. 48, pp. 1824-1827)

On March 18, 2008, Appellant's jury found him guilty of first-degree murder as charged in the indictment. (Vol. 18, p. 3030; Vol. 48, p. 1873) The verdict did not specify upon which theory it was based.

Penalty phase was held on March 19, 2008. (Vol. 26, pp. 4255-4372) After receiving evidence from the State and the

defense, the jury returned a recommendation that Appellant be sentenced to death, by a vote of 9-3. (Vol. 17, p. 2890; Vol. 26, p. 4356)

Phillup Partin appeared with counsel before the court again on August 29, 2008. (Vol. 26, pp. 4374-4413) At that hearing, the court received testimony from Partin's daughter, Patrisha, as part of the Spencer[1] hearing. (Vol. 26, pp. 4405-4410)

The main Spencer hearing was held on November 3, 2008. (Vol. 27, pp. 4414-4570)

Sentencing was held on December 1, 2008. (Vol. 27, pp. 4571-4592) In his sentencing order, which he read into the record, Judge Webb found two aggravating circumstances, both of which he accorded "great weight": the capital felony was especially heinous, atrocious, or cruel and the defendant was previously convicted of a felony involving the use of violence to the person. (Vol. 21, pp. 3551-3552, 3555; Vol. 27, pp. 4575-4579, 4586) The court discussed the following mitigating circumstances, all of which he gave "little weight" or "some weight" (Vol. 21, pp. 3552-3555; Vol. 27, pp. 4579-4588): (1) Phillup Partin has the ability to be productive and be a positive influence on others while in prison. (2) Phillup Partin is a good father and a good provider. (3) Phillup Partin

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

is a good friend, a good boyfriend, and a compassionate person. (4) Phillup Partin has maintained steady and consistent employment throughout the non-incarcerated periods. (Employment Record.) (5) Phillup Partin has diminished mental capacity, mental disorders, and brain abnormalities. (6) Phillup Partin's upbringing and childhood constitute a mitigating circumstance. (7) The non-unanimous verdict recommending the imposition of the death penalty is a mitigating circumstance.[2]

Appellant timely filed his Notice of Appeal to this Court on December 1, 2008. (Vol. 21, p. 3544)

[2] The court's written sentencing order herein contains at least two factual errors: It gives the victim's age as 15 (Vol. 21, p. 3551), when her mother Tara Ramsdell, testified that she was 16. (Vol. 41, p. 509)1 And it gives the name of the medical examiner as Dr. Noel Parma (Vol. 21, pp. 3551-3552), whereas he is identified in the trial transcript as Dr. Noel Palma. (Vol. 44, p. 1036)

STATEMENT OF THE FACTS

On August 1, 2002 between 4:15 and 4:30 a.m., Arthur White[3] was driving on Shady Hills Road in Pasco County, taking his wife and granddaughter to Tampa Airport, when he observed a dark blue or black pickup truck parked off the side of the road, "basically backed up into the woods[.]" (Vol. 43, pp. 855-863, 865) The headlights were not on, White did not notice any interior lights on in the vehicle, and did not see anybody in the vehicle. (Vol. 43, pp. 862-863) White approximated the year of the vehicle as between '94 and '98. (Vol. 43, p. 860)

Later that morning, at around 9:20, Randal Tolle and Robert Kilian, employees of the Withalachoochee [sic] River Electric Company, discovered a body beside Shady Hills Road. (Vol. 40, pp. 331-336, 354-355) The young female was wearing a light-colored shirt or sweater that was pulled all the way up to the top of her shoulder blades. (Vol. 40, p. 336, 355) There was no clothing on the lower half of her body. (Vol. 40, p. 336) Kilian touched the body to make sure that it was real, and checked her carotid artery and verified that she was dead. (Vol. 40, pp. 336, 355)

There were tire tracks leading up to the area, and Tolle believed that the person had been killed elsewhere, and dumped

[3] Arthur White's testimony was presented to Appellant's jury via a video recording. (Vol. 43, p. 855)

there. (Vol. 40, pp. 337-340) The workers cordoned off the area with cones and ribbons to preserve the evidence. (Vol. 40, p. 337-338) They called their office to notify them of the dead body, and EMS and sheriff's deputies responded to the area. (Vol. 40, pp. 336, 339-340)

On August 1, 2002, Jeff Bousquet was a detective with the major crimes unit of the Pasco County Sheriff's Office. (Vol. 40, p. 357) On that date, he responded to a wooded area off of Shady Hills Road in Pasco County, arriving on the scene at 10:20 a.m. (Vol. 40, p. 357) There he observed the body of a female lying face down about 50 feet to the east of the roadway. (Vol. 40, p. 358) She was wearing a white, striped tank top and black bra, but was nude from the waist down. (Vol. 40, pp. 358-359) She had on three necklaces, a ring on her right hand, and two pairs of earrings in her ears. (Vol. 40, p. 359) She had a large laceration under her neck, and what appeared to be defensive wounds on her hands, and there was blood. (Vol. 40, p. 359) Bousquet observed what appeared to be ligature marks on her wrists and ankles. (Vol. 40, p. 367-368) There was a hair imbedded in a defensive wound on the thumb area of the left hand of the deceased. (Vol. 40, pp. 362-364) She was pronounced dead at the scene. (Vol. 40, p. 359)

There were wide tire track impressions going in an east-west direction leading up towards where the body was, and

smaller tire tracks off the side of the roadway going in a north-south direction, the same direction as Shady Hills Road. (Vol. 40, pp. 357-358, 360, 368-369) Forensic Investigator John Bateman of the Pasco County Sheriff's Office made casts of portions of the tire track impressions using "dense stone." (Vol. 41, pp. 447-454, 465-466)

There was a partial shoe print by the body. (Vol. 40, p. 369, 371, 374-375, 378) FI Bateman made a cast of this as well. (Vol. 41, pp. 454, 461)

The body and the area surrounding it appeared to be dry. (Vol. 40, pp. 371-372, 375-376)

Noel Palma, M.D., an associate medical examiner for the Sixth Circuit, went to the scene where the body was found, arriving about 11:30 a.m. (Vol. 44, p. 1039) The body appeared to be dry, was cold to the touch, and rigor mortis was fully developed. (Vol. 44, p. 1040) Palma estimated that Ashbrook had been dead for eight to 12 hours, although it could have been as much as 24 hours. (Vol. 44, pp. 1041, 1064-1065) Palma was unable to tell whether the victim was murdered there, or killed elsewhere and dumped. (Vol. 44, pp. 1042-1043) There was "a large gaping incised wound across the anterior neck region[,]" six incised wounds on the face, as well as "a ligature mark around the neck." (Vol. 44, p. 1043) There were also "linear contusions on the wrists and on the ankles" that were consistent

with ligature marks (Vol. 44, p. 1043) There were two incised wounds on the right forearm, and five incised wounds on the fingers of the left hand (which the witness characterized as defensive wounds), as well as abrasions and contusions on the forehead, an abrasion on the right side of the face, and an abrasion on the left back region. (Vol. 44, p. 1044) The incised wounds were most likely made by "some sort of a knife." (Vol. 44, p. 1045) Dr. Palma performed an autopsy on the body of Joshann Ashbrook on August 2, 2002. (Vol. 44, p. 1051) He determined that the cause of death was "blunt head and neck trauma" and the manner of death was homicide. (Vol. 44, pp. 1052, 1060) There was an "AO dislocation, atlanto-occipital dislocation" in which the head was moved forwards or backwards causing a "dislocation of the first cervical vertebra and the skull." (Vol. 44, pp. 1052-1053) All the injuries occurred before death, and the AO dislocation most likely occurred last. (Vol. 44, pp. 1053-1056) Ashbrook had a blood ethanol level of "0.02 grams per DL," which indicated that she had consumed alcohol before her death, and nicotine "was present in the gastric[,]" which was consistent with smoking cigarettes. (Vol. 44, pp. 1058-1059)

On August 2, 2002, Arthur White met with Detectives Lisa Mazza and James Browning of the Pasco County Sheriff's Office, and pointed out to them where he had seen the pickup truck,

which was approximately eight to 10 feet from where the body was located. (Vol. 43, pp. 858, 879-883) White told the detectives that what caught his attention was that the wheels appeared shiny. (Vol. 43, p. 888) The area of Shady Hills Road in question was very dark at night, with no artificial lighting. (Vol. 43, pp. 881, 889)

Joshan Ashbrook was the girlfriend of Iris Mancero's son. (Vol. 41, pp. 477-478) Around 8:20 a.m. on July 31, 2002, Mancero received a telephone call from Ashbrook, who wanted to stop by to leave a note for Mancero's son, who was going away to Kentucky for school. (Vol. 41, pp, 478-479) Five or six minutes after the call, Ashbrook arrived in a new, burgundy, Ford F150 pickup truck. (Vol. 41, pp. 479-480) She stayed only a few minutes, then left in the truck. (Vol. 41, p. 480) Mancero did not see who was driving the pickup. (Vol. 41, pp. 480-481) The number of the phone from which Ashbrook called Mancero was (727) 534-9245. (Vol. 41, pp. 482-483, 485-486)

Detective Lisa Mazza determined that the registered owner of the telephone used by Ashbrook was Susan Salmon in North Carolina. (Vol. 41, pp. 485-486) When Mazza called the number on August 3, 2002, a male voice answered. (Vol. 41, p. 486) The male identified himself as Phillup Thompson, however, Mazza later determined that the voice belonged to Phillup Partin [Appellant]. (Vol. 41, pp. 486-488) Mazza asked him if he had

let someone use his telephone on July 31, 2002, and he said that he had. (Vol. 41, p. 487) Partin explained that he had been driving, and, when he was stopped at an intersection, a young girl had asked him for a ride, and he had agreed. (Vol. 41, p. 488) The girl asked Partin to take her to her boyfriend's residence a short distance away, but she had to call there first, and used Partin's phone to do so. (Vol. 41, p. 488) Partin drove her to the residence, and she went in, coming out a few moments later. (Vol. 41, p. 488) Partin then dropped the girl off at a Wal-Mart near the residence at approximately 9:00 a.m. (Vol. 41, p. 488) Partin told Mazza that he was driving a blue 1972 Chevy pickup truck. (Vol. 41, pp. 488-489) Mazza asked Partin where he was living so that she could go and meet with him, but he said that he was a transient who did not have an address. (Vol. 41, p. 489) Mazza asked him to come to the sheriff's office, but he was reluctant, he did not understand why this was necessary. (Vol. 41, p. 489) Mazza explained that the girl had been found dead, and they needed to speak to anybody who had seen her in the last 48 hours. (Vol. 41, p. 489) On August 6, 2002, Partin called Mazza. (Vol. 41, p. 490) He was very upset because officers had spoken to Susan Salmon in North Carolina, and he wanted to know why. (Vol. 41, p. 490) Mazza told Partin during that conversation that they had learned his real name through Susan Salmon. (Vol. 41, pp. 490-491)

Mazza explained again that was important for them to meet, because Partin was one of the last people to see the girl, but he refused, saying that he did not trust police. (Vol. 41, p. 491)

Appellant's jury viewed a recording from the video security system at Wal-Mart that was made on the morning of July 31, 2002 that showed three people exiting a maroon pickup in the parking lot, entering the store, and then leaving in the same truck. (Vol. 41, pp. 495-500) The truck pulled into the parking lot at 8:46 a.m., the people entered the store at 8:48 a.m., then exited the store at 8:54 a.m., and the truck left the parking lot at 8:55 a.m. (Vol. 41, pp. 502-504) Sharon Foshey of the Pasco County Sheriff's Office identified Phillup Partin as being depicted in a photograph made from the video recording system. (Vol. 41, pp. 504-505)

Tara Ramsdell, Joshan Ashbrook's mother, testified that her daughter was 16 years old at the time of her death. (Vol. 41, p. 509) Ramsdell last saw Joshan alive at about 2:30 in the morning on July 31, 2002, when Joshan left her home. (Vol. 41, pp. 510-511) Ramsdell reported her daughter as a runaway to the sheriff's department. (Vol. 41, p. 510) She recognized her daughter in one of the photographs made from the Wal-Mart video. (Vol. 41, p. 511)

Officers Ed Chambers of the "Florida Fishing and Wildlife Conservation" was patrolling the area of the Anclote Fishing Pier on July 31, 2002 when he issued a warning to Phillup Alan Partin at 10:45 a.m. for fishing without a license. (Vol. 41, pp. 512-514) Partin was driving a red pickup that may have had North Carolina tags. (Vol. 41, p. 515) There was a female and a small child with him. (Vol. 41, p. 515)

Susan Salmon had lived with Phillup Partin for about a year and a half, first in Fayetteville, and then in South Carolina. (Vol. 41, pp. 553-554, 571)[4] On April 18, 2000, she purchased a maroon 1996 Ford 150 pickup truck for Partin to drive; Salmon had her own vehicle. (Vol. 41, pp. 554-555, 567-568; Vol. 44, pp. 1030-1032) Some time after April of 2000, Salmon had new tires put on the vehicle. (Vol. 41, pp. 555-556, 567)

Salmon and Partin split up in July, 2002. (Vol. 41, p. 558) Salmon returned to Massachusetts, and it was her understanding that Partin and his daughter, Trisha, were going to Florida to stay with Joe Fred Kaufman. (Vol. 41, p. 558) Salmon allowed Partin to keep the truck, which he was paying for, and use it while he was in Florida. (Vol. 41, p. 559)

Salmon received a phone call from Partin in August, 2002, in which he asked to use her ex-husband's social security

[4] At Appellant's trial, Susan Salmon's videotaped depositions were played for the jury in lieu of her "live" testimony. (Vol. 41, pp. 548-549, 552)

number. (Vol. 41, p. 560) Partin would not say why he wanted it, and Salmon refused to give it to him. (Vol. 41, p. 560)

Salmon allowed Partin to use a cellphone of hers; Partin was paying the bill for it. (Vol. 41, pp. 561-562)

During a phone conversation some time after August 1, 2002, Partin told Salmon that the police were after him for killing a girl, but he said that he had nothing to do with the girl's death. (Vol. 41, pp. 562, 565) Partin told Salmon that he did not want to talk to the police because he did not trust the police. (Vol. 41, pp. 565-566)

In July, 2002, Diana Kaufman[5] and her husband, Fred, were living in a two-bedroom house in Port Richey. (Vol. 41, pp. 574-575) On July 18, 2002, Partin and his daughter arrived in a maroon Ford pickup at the Kaufmans' residence to stay in their spare bedroom. (Vol. 41, p. 580) The Kaufmans knew they were coming, and had cleaned the room prior to their arrival. (Vol. 41, p. 580) The room had a sliding glass door that gave access to the backyard. (Vol. 41, pp. 582-583)

In the early afternoon hours of July 31, 2002, Diana Kaufman walked by Partin's room and saw a female sitting on the foot of the bed playing video games. (Vol. 41, pp. 584-585) The girl had dark hair, but Kaufman did not see her face. (Vol. 41,

[5] Mrs. Kaufman is referred to in some parts of the record on appeal as "Diana" and in other parts of the record as "Diane."

p. 585) The girl was wearing a light tank top, dark shorts, and light tennis shoes. (Vol. 41, p. 585) Kaufman saw Patrisha {Appellant's daughter] in the room, but did not see Sonny [Appellant]. (Vol. 41, pp. 585-586)

Diana Kaufman went to bed between 9:00 and 9:30 that night, but did not go to sleep. (Vol. 41, p. 587) At that time, Appellant's truck was parked at the Kaufmans' house. (Vol. 42, p. 620)

Fred Kaufman usually got up from sleeping between 10:00 and 10:30 p.m. to go to his job cleaning restaurants; he had to be at the first restaurant at 11:00. (Vol. 41, pp. 583, 587) When Kaufman left for work on July 31, 2002, Appellant's pickup truck was not in the Kaufmans' driveway. (Vol. 41, p. 588) Appellant arrived back at the Kaufman residence a few minutes before 1:00 a.m. (Vol. 41, pp. 588-589)

Diana Kaufman woke up some time after 8:00 the next morning to prepare for her 10:00 doctor's appointment. (Vol. 41, p. 592; Vol. 42, pp. 626-629) As she was getting ready to go out the door, Appellant came into the family room. (Vol. 41, p. 592) Kaufman told him that she "didn't appreciate the fact that he brought somebody into [her] home and didn't have the decency to at least bring them out and introduce them to [her] and [her] husband." (Vol. 41, p. 592) Appellant responded, "[W]ell, she was weird and she didn't want to meet anybody." (Vol. 41, p.

592) Appellant's demeanor was not any different than at other times. (Vol. 41, p. 593)

The following Monday, Appellant left the Kaufman house never to return. (Vol. 41, pp. 595-596) Patrisha stayed for approximately one more week, then she too left and did not return. (Vol. 41, pp. 596-597) The furniture that Appellant had brought with him stayed in the room he had been occupying. (Vol. 41, pp. 581, 597)

On August 13, 2002, personnel from the Pasco County Sheriff's Office went to the Kaufman residence. They recovered a box full of hair cuttings from the northwest bedroom, as well as a disposable camera. (Vol. 41, pp. 519-521, 529) Adrean Noss of the Florida Department of Law Enforcement developed the negatives from the camera. (Vol. 41, p. 534)

Weeks later, Kaufman's daughter, Lacey Park, and her husband and two children moved into that spare bedroom. (Vol. 41, pp. 575, 597-598; Vol. 42, pp. 646-647)

At some point after moving into the spare bedroom of her parents' home in August, 2002, Lacey Park discovered "a big bleach stain and a beach towel and all kinds of stuff under the big Oriental rug" that was in the room. (Vol. 42, pp. 649-656) She told her parents, and the police were called immediately. (Vol. 42, pp. 650, 655)

On October 18, 2002, Forensic Investigator Susan Miller of the Pasco County Sheriff's Office went to the Kaufmans' residence with Investigator Bateman; Detective Gattuso was there as well. (Vol. 42, pp. 657-658) Miller was brought into the northwest bedroom to look at the area between the two twin beds. (Vol. 42, p. 658) There was an Oriental rug there, with a beach towel underneath. (Vol. 42, pp. 658-659, 675, 679-680) When she lifted up the beach towel, Miller found an area of discoloration on the carpeting. (Vol. 42, pp. 659-661, 675-676, 680) She conducted a phenolphthalein test on the discolored area, and it was presumptively positive for the presence of blood. (Vol. 42, pp. 661-662, 675-676) Miller also observed small spots of possible blood on the east wall and the north wall; these spots tested presumptively positive for the presence of blood. (Vol. 42, pp. 664-670)

On August 1, 2002, Appellant applied for work at Vortex Heating and Air in New Port Richey between 8:00 and 9:00 a.m., and was hired the next day. (Vol. 42, pp. 692-697) On his first day on the job, August 5, 2002, he drove with the owner's son, William Hanna, to a job site in Hernando County. (Vol. 42, pp. 685-688, 690, 698) At the job site, Appellant appeared "flustered" and "aggravated," and he was talking on his cellphone "the whole time mostly[.]" (Vol. 42, p. 688) Appellant was supposed to be at the job site all day, but he

left after about an hour or an hour and a half; someone came and picked him up in an SUV, and he never returned to the job site. (Vol. 42, pp. 688-690, 699)

Appellant's daughter, Patrisha, who was 12 years old at the time of Appellant's trial, remembered coming with her dad to Florida to live at "Joe Fred's" home. (Vol. 42, pp. 711-712) She also remembered meeting a girl named Joanna, and going with her and Appellant to Wal-Mart. (Vol. 42, p. 712-714) After Wal-Mart, they went swimming. (Vol. 42, p. 716) After swimming, the three of them returned to Fred's house. (Vol. 42, pp. 717-719) After watching TV, Joanna left with Appellant. (Vol. 42, p. 719) Patrisha did not remember if her dad came back to the house after leaving with Joanna. (Vol. 42, p. 720) Sometime after that, her dad and Fred took Patrisha to Wauchula to live with Jean Edenfield, with whom Patrisha's two sisters also were living. (Vol. 42, pp. 714, 720-721, 726) Her dad told Patrisha that he loved her, and that whenever he got a chance, he would come back to see her again, but he never did. (Vol. 42, p. 721)

At trial, Patrisha testified that she did not remember whether Joanna ever met Fred [Kaufman], however, in her deposition, Patrisha stated that Fred never met Joanna. (Vol. 42, pp. 722-723)

Jean Prestridge, who was using the name Jean Edenfield in 2002, testified that around 2:00 p.m. on August 10, 2002,

Appellant and his daughter arrived at her house in a dark green SUV driven by a man named Fred. (Vol. 42, pp. 743-745) There were some T-shirts and jeans that looked like clothing for a man in the back of the SUV. (Vol. 42, pp. 751-752) Appellant greeted Jean, and said that they needed to "walk and talk." (Vol. 42, p. 746) Appellant told her that he was going to be leaving, and asked her if she would keep Patrisha, and not let anybody have her but Fred or Diane. (Vol. 42, pp. 746-747) When Appellant was talking to Patrisha, he was "[v]ery upset and crying[.]" (Vol. 42, pp. 747-748) Appellant asked Jean if she had any money he could borrow, commenting that "a million wouldn't be enough." (Vol. 42, pp. 748-749)[6] She withdrew some money from her bank, and gave Appellant $200. (Vol. 42, p. 749) Appellant also asked to borrow some towels, and Jean gave him three of them. (Vol. 42, p. 751) Patrisha stayed with Jean for five days and was thereafter placed in foster care. (Vol. 42, pp. 755, 758)

On August 14, 2002, Detective Stephen Foshey of the Pasco Sheriff's Office met with Patrisha Partin and showed her a photograph of Joshann Ashbrook, whom Patrisha was able to identify. (Vol. 42, pp. 774-775)

[6] In a statement to Detective Foshey, the witness indicated that Appellant had said that "even $50,000 would not help [him]." (Vol. 42, p. 757)

On September 14, 2002, Brown's Wrecker Service towed an abandoned 1996 Ford pickup truck with a North Carolina tag from Wal-Mart in Plant City to Brown's secured impound lot. (Vol. 42, pp. 759-772)

On October 20, 2002, Detective Foshey went to Brown's Wrecker Service to view the maroon pickup truck that had been towed from Wal-Mart. (Vol. 42, pp. 775-785) He documented the makes and sizes of all four tires, which appeared to be worn. (Vol. 42, pp. 780-782)

Paul Mancini of Mancini Automotive examined a photograph of the pickup truck in question (State's Exhibit 44), and compared it with a video of the truck pulling into Wal-Mart, as well as other photos of the truck, and concluded that the tires on the vehicle in State's Exhibit 44 were different from the tires on the vehicle when the video and the other pictures were made; the tires in the latter depictions were "worn out" and "very old." (Vol. 42, pp. 786-799)

Various items from Joshann Ashbrook and from the Kaufman residence were examined for DNA. (Vol. 43, pp. 907-927) The DNA profile taken from a piece of the east wall in the bedroom of the Kaufman residence matched the DNA profile of Joshann Ashbrook "at all 13 STR[7] loci[.]" (Vol. 43, p. 913) The DNA

[7] "STR" stands for the "short tandem repeats" method of DNA testing. (Vol. 43, p. 906)

profile obtained from swabs taken from the north wall matched the DNA profile of Joshann Ashbrook at "10 of the 13 STR loci[.]" (Vol. 43, p. 916) The DNA profile from one cutting from the carpet matched the DNA profile of Ashbrook. (Vol. 43, pp. 969-971) Another cutting from the carpet was presumptively positive for the presence of blood, but a DNA profile could not be developed from this piece, which had an odor of bleach; bleach can destroy DNA. (Vol. 43, pp. 971-973) The DNA profile from a hair found in the left hand of Joshann Ashbrook matched the DNA profile of Phillup Partin. (Vol. 43, pp. 924-927, 973-975, 992-993) No semen or sperm was identified on swabs or microscope slides from Joshann Ashbrook. (Vol. 43, pp. 927-929)[8]

On November 7, 2002, Appellant purchased a Jeep Cherokee from Freeway Auto Sales in Billingham [sic], Washington, using the name "Fred Kaufman." (Vol. 44, pp. 1022-1029)

On October 28, 2003, Brian Gardner, who, at the time was a detective with the Pasco County Sheriff's Office, went with Detective Jim Medley to Fayetteville, North Carolina to look for the suspect in this case, Phillup Partin. (Vol. 44, pp. 1074-1075) They found him driving a blue Cherokee SUV with Washington State tags, and arrested him. (Vol. 44, pp. 1076-

[8] At trial, the former testimony of one of the State's DNA witnesses, Suzanna Ulery, was read to Phillup Partin's jury in lieu of her "live" testimony, over defense objections. (Vol. 43, pp. 964-985)

1077) Appellant spontaneously stated that he had a firearm at the house of a buddy, Mr. Suggs, and that the gun was in the top drawer of a workbench in Suggs' garage. (Vol. 44, pp. 1078-1080) Gardner went to Suggs' garage and found the weapon, a .9 millimeter, right where Appellant said it would be. (Vol. 44, p. 1080)[9] Gardner went to the room at the Roadside Inn in which Appellant had been residing and found there, among other things, Fred Kaufman's social security card. (Vol. 44, pp. 1081-1083)[10]

Dale Young knew Appellant when he lived with Susan Salmon in Fayetteville. (Vol. 44, p. 1085) At that time, Appellant drove a burgundy color '96 Ford pickup. (Vol. 44, p. 1085) When Appellant was back in Fayetteville in October, 2003, he was operating a different vehicle: a blue Jeep Cherokee with Washington State tags. (Vol. 44, p. 1086)

Young recalled receiving a phone call from Appellant when he (Young) was in Colorado. (Vol. 44, pp. 1086-1088) Appellant said that he would not be back in Fayetteville because he was going to jail. (Vol. 44, p. 1088) When Young asked if Appellant wanted Young to come down and bring Appellant bail, Partin

[9] Testimony regarding the gun was admitted over defense objection and a pretrial motion in limine and motion to suppress. (Vol. 13, pp. 2277-2278; Vol. 44, p. 1079)

[10] Testimony regarding the card and a copy of the card were admitted over defense objection and a pretrial motion in limine. (Vol. 44, pp. 1081-1083)

replied, no, “they’re probably going to kill me for this.” (Vol. 44, p. 1088)

Robert Scott Gattuso was a detective with the major crimes unit of the Pasco County Sheriff’s Office when, on August 1, 2002, he responded to the east side of the roadway off Shady Hills Road arriving there about 10:00 a.m. (Vol. 44, pp. 1098-1099, 1176) He observed the body of the woman, wearing a top and bra, nude from the waist down. (Vol. 44, p. 1099) She had a severe laceration by the left thumb area, and a hair was embedded in the cut. (Vol. 44, pp. 1100-1101) The hair was collected at the scene to preserve it as evidence. (Vol. 44, p. 1101) Gattuso also observed two sets of tire tracks: one running east and west, which led to the body, and another closer to the roadway, running north and south. (Vol. 44, p. 1100) The area was dry. (Vol. 44, p. 1176)

After Phillup Partin became a person of interest, Gattuso had three telephone conversations with him that were recorded, on August 27, September 4, and September 15, 2002. (Vol. 44, pp. 1101-1104) At the time of the conversations, Gattuso had never met Phillup Partin, and did not recognize the voice of the individual with whom he was speaking. (Vol. 44, pp. 1101-1102) However, Gattuso later listened to a tape-recorded video interview between Detective Medley and Partin that was made after Partin was arrested, and Gattuso testified that he

recognized the voice as the voice he had heard during the three telephone conversations. (Vol. 44, p. 1102) Gattuso did not tell Partin that he was being recorded, and did not think he knew. (Vol. 44, pp. 1174-1175) The tape recordings were admitted into evidence and played for the jury over defense objections and pretrial motions in limine. (Vol. 44, pp. 1095-1096, 1104-1107, 1108-1116, 1117-1149, 1149-1175) The first conversation began with a discussion concerning Appellant's daughter, whom he described as his "weak point." (Vol. 44, pp. 1108-1109) Gattuso then stated that he and Appellant needed to sit down and talk, which Appellant said would have to be on his terms. (Vol. 44, pp. 1109-1112) Appellant acknowledged that he had firearms, which he knew he was not supposed to have, but said they were "secured[.]" (Vol. 44, p. 1111) Appellant said that he met the girl when he gave her a ride to deliver a letter to someone's house; she used his cellphone to call before going there. (Vol. 44, pp. 1113-1116)

With regard to the September 4 conversation, Appellant first asked how his daughter was, and if she was in school. (Vol. 44, p. 1117) Gattuso responded that he did not know if she was in school, whereupon Appellant said, "She needs to be in school." (Vol. 44, p. 1117) Appellant also asked about his daughter's important documents and clothing. (Vol. 44, pp. 1118-1120) He said that he quit calling Fred [Kaufamn] about a week

before, because he knew that law enforcement had a monitor on his phone. (Vol. 44, p. 1118) Appellant said that the girl told him her name was Jo, and that he had not dropped her off by the Wal-Mart, as he had told Detective Mazza. (Vol. 44, pp. 1121-1122) Rather, Appellant, his daughter, and the girl had bought some fishing equipment at Wal-Mart and gone fishing at a pier, where Appellant received a ticket for fishing without a license. (Vol. 44, pp. 1122-1125) After that, they went swimming in the Gulf, then returned to Joe Fred's, where the girl "horsed around and played the Nintendo a little bit." (Vol. 44, pp. 1125-1126, 1128) The girl then took a shower and dressed, and Appellant took her back to near where he had originally picked her up and dropped her off, at around sunset. (Vol. 44, pp. 1126, 1132) Appellant then just "hung out at the [Kaufman] house for the rest of the day." (Vol. 44, pp. 1126-1127) The next day, he went to look for a job. (Vol. 44, p. 1127) Appellant disagreed with Diane Kaufman's account of seeing that Appellant's truck was gone late at night, and seeing him return early in the morning; he said he was at the house all night. (Vol. 44, pp. 1134-1136) He said that he had "nothing to do with" the murder. (Vol. 44, p. 1141) Gattuso again spoke of the need to "get together" with Appellant, and Partin indicated that he would call Gattuso on his cellphone. (Vol. 44, pp. 1141-1146) Appellant said that he did not know the girl was 16; she said

she was 20 or 21. (Vol. 44, p. 1147) If he knew she was 16, he would never have had her around him. (Vol. 44, pp. 1146-1147)

During the September 15, 2002 conversation, Appellant said that Diane Kaufman was mistaken regarding what night he had been away from the Kaufman residence; it was not July 31, but one or two nights later, when he went to Wal-Mart. (Vol. 44, pp. 1149-1153) He suggested that Gattuso could verify his story through the Wal-Mart surveillance video. (Vol. 44, pp. 1151-1153) Appellant and Gattuso also discussed Susan Salmon's truck, which Appellant had been driving previously. (Vol. 44, pp. 1153-1159) Appellant acknowledged again that the girl had been in the truck. (Vol. 44, p. 1155) He denied doing anything sexual with her. (Vol. 44, p. 1167) The girl was wearing Appellant's shorts went she was sitting on the bed at the Kaufman residence. (Vol. 44, p. 1169) The conversation concluded with a discussion regarding Partin's desire to talk to his daughter on the telephone. (Vol. 44, pp. 1172-1175)

In late October, 2003, Detective James Medley of the Pasco County Sheriff's Office asked another detective, Brian Gardner, to give a tape-recording device to Fred Kaufman so that he could audio-record any calls from Phillup Partin. (Vol. 45, pp. 1228-1229)[11] A tape recording of a call Kaufman received from Partin

[11] Medley testified that Gardner took the device to Kaufman on October 27, however, on the recording of a call from Partin,

was admitted into evidence and published to Partin's jury over defense objections and a pretrial motion in limine. (Vol. 45, pp. 1232-1266) During this conversation, Appellant discussed the jeep and said that he had sold it; he wanted Kaufman to send the title to the purchaser. (Vol. 45, pp. 1236-1242) Appellant said that he had been "everywheres," including Florida, and that he was then on the east coast, and had a job. (Vol. 45, pp. 1240-1241, 1261-1262) He also mentioned that he had been in a fight. (Vol. 45, pp. 1238, 1243, 1259-1261) At one point near the end of the conversation, Kaufman said, ". . .they're saying she was killed in my room, man, dude." (Vol. 45, p. 1264) Appellant responded, "Dude, man, I can't talk to you." (Vol. 45, p. 1264) At another point in the conversation, Appellant said that he was scared and referred to himself as "a walking, talking dead man." (Vol. 45, pp. 1242-1243)

After the tape was played, Appellant renewed his motion in limine because the tape was "overly prejudicial hearsay," and moved for a mistrial because the tape indicated "prior bad acts" on the part of Appellant, and "the general tone of the tape." (Vol. 45, p. 1266) Motions denied. (Vol. 45, p. 1266)

Detective Medley conducted an interview with Appellant on October 28, 2003 at the Cumberland Sheriff's Office in

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Gardner says that the date is October 26. (Vol. 45, pp. 1229, 1235)

Fayetteville, North Carolina after his arrest. (Vol. 45, pp. 1267-1268) Medley read Appellant his Miranda[12] rights, and Appellant agreed to speak with him. (Vol. 45, p. 1267) The interview was recorded, and the video was played to Appellant's jury over defense objections, as per a pretrial motion in limine and motion to suppress. (Vol. 45, pp. 1268-1345) Medley told Appellant that he wanted to bring closure to Fred [Kaufman] and to the family of the victim by telling them what happened. (Vol. 45, pp. 1274, 1277, 1294, 1299) Medley said that all the physical evidence pointed toward Appellant, and that is why Medley had a warrant for his arrest. (Vol. 45, p. 1277) Appellant said that he really did not know who Joshann was, and repeatedly stated that he did not know what happened. (Vol. 45, pp. 1278-1279, 1281, 1287-1288, 1292-1293, 1295, 1316-1318, 1320, 1327, 1328-1329) He did not remember Joshann Ashbrook being in the bedroom [at Fred Kaufman's house] with him. (Vol. 45, p. 1335) At one point, Appellant asked if the State of Florida was going to try to kill him, which the detective could not answer. (Vol. 45, pp. 1293-1294) Later, Appellant stated that if [as the detective had indicated], the evidence was directed at him, then the State of Florida was going to kill him. (Vol. 45, p. 1330)

[12] Miranda v. Arizona, 384 U.S. 436 (1966).

Appellant also discussed his childhood a bit, mentioning that his stepfather was career military, served two tours of duty in Vietnam, used drugs. (Vol. 45, p. 1311) The girls in the family got whatever they wanted, but Appellant had to work for everything; he would rake leaves, shovel snow, collect bottles and cans for the deposit, and had a newspaper route. (Vol. 45, pp. 1311-1313) He also referred to the fact that his mother "kidnapped" him one night. (Vol. 45, p. 1311)

The State also played for Partin's jury, over objection, another tape, this one of a telephone call Partin made to an unidentified person from the Cumberland County Jail in Fayetteville. (Vol. 45, pp. 1339-1346)

On June 17, 2005, Medley went to the Pasco County Detention Center to obtain handwriting exemplars from Partin pursuant to a court order, for the purpose of comparing the signature of Fred Kaufman on the Billingham [sic] auto work order with the known sample of Partin. (Vol. 45, pp. 1346-1348) Partin "was yelling profanity," and refused to provide the exemplars. (Vol. 45, p. 1348)

The State's final witness in its case-in-chief was John Dykstra, owner of Captain's Cleaning Crew, which cleaned restaurants. (Vol. 45, p. 1356) Fred Kaufman worked with him. (Vol. 45, p. 1357) Dykstra saw Kaufman a little before midnight on July 31, 2002. (Vol. 45, p. 1357) The crew cleaned a

Carrabba's Restaurant in Palm Harbor, then went to clean Bennigan's at Tyrone Square Mall in St. Petersburg. (Vol. 45, pp. 1357-1358) Kaufman left early from Bennigan's, around 5:50 a.m.; the others 8finished their duties around 7:00. (Vol. 45, pp. 1359-1360)

After the State rested its case, defense counsel moved for a judgment of acquittal, which was denied. (Vol. 45, pp. 1366-1374)

Defense Case

At approximately 8:00 on the morning of August 1, 2002, there was torrential rain about a mile or mile and one-half from where the body was found. (Vol. 46, pp. 1375-1386)

When law enforcement personnel went to the Kaufman residence on October 18, 2002, they processed only the spare bedroom, because that was the only area they "were allowed to process by the homeowner." (Vol. 46, p. 1458)

According to Donna May Dykstra, co-owner with her husband of the Captain's Cleaning Crew, Diane Kaufman told her that she [Diane], her husband, Fred Kaufman, and the victim, Joshann Ashbrook, were playing cards at a table together. (Vol. 46, p. 1505)

At the end of the day on March 14, 2008, and the beginning of the day on March 17, 2008, there was discussion and testimony regarding a threat that Fred Kaufman allegedly made to John

Dykstra on March 14, and a statement that Kaufman allegedly made to Dykstra's son on the same date. (Vol. 46, pp. 1520-1522, 1531-1549, 1557-1559, 1563-1567) According to Dykstra, Kaufman walked by him, pointed at him, and said, "You're dead." (Vol. 46, p. 1535) Dykstra's son testified that Kaufman said to him that his parents should have stayed out of it. (Vol. 46, p. 1538) Jonathan Bateman testified that Kaufman shook his finger at Dykstra, but Bateman did not hear what was said. (Vol. 46, pp. 1539-1542) Kaufman testified that he pointed his finger at Dykstra and said, "You're the man." (Vol. 46, pp. 1565-1566) He denied telling Dykstra, Junior that his parents made a mistake by coming and testifying. (Vol. 46, p. 1566)[13] The court ruled that the defense could ask Kaufman about these alleged statements before the jury, but would not be allowed to call any rebuttal witnesses if Kaufman denied making the statements. (Vol. 46, p. 1558)

On July 31, 2002, Sonny Partin and his daughter had been living at Fred Kaufman's residence in the spare or second bedroom for about three or four weeks. (Vol. 46, pp. 1569-1570) On that date, Kaufman did not come into contact with Joshann Ashbrook. (Vol. 46, p. 1572) That night, he left for work about

[13] Dykstra, his son, and Fred Kaufman all testified as to this matter outside the presence of the jury.

11:15, and left his last job (cleaning Bennigan's at Tyrone) between 4:30 and 5:00 a.m. (Vol. 46, pp. 1573-1579)

When the detectives came to the Kaufman residence on August 13, 2002, "[t]hey had free rein of the house." (Vol. 47, pp. 1596-1597) The Oriental rug that was in the house had been rolled up in the garage and had just recently been laid down; Kaufman had not placed it there. (Vol. 46, pp. 1582; Vol. 47, pp. 1597-1598)

Fred Kaufman had been convicted of a felony 11 times. (Vol. 46, p. 1584)

Phillup Partin did not testify at his trial. (Vol. 47, pp. 1609-1612)

State's Rebuttal

When Detective Brian Gardner spoke with Donna Dykstra and her husband at the Pasco County Sheriff's Office on May 6, 2003, Dykstra never told him that Diane Kaufman said that she and Fred played cards with the victim, Joshann Ashbrook. (Vol. 47, p. 1624) Gardner did not recall that he specifically asked Dykstra whether Mrs. Kaufman saw the victim. (Vol. 47, p. 1626)[14]

Penalty Phase

[14] In addition to Gardner's testimony, the State presented brief testimony from three other witnesses in its case in rebuttal: Lacey Park, John Bateman, and Scott Gattuso. (Vol. 47, pp. 1628-1645)

State’s Case

On October 7, 1987, two units of the Miami-Dade Police Department responded to an efficiency apartment in the City of North Miami after the landlord became concerned because his tenant had not answered the door, and his mail had been accumulating in the mailbox. (Vol. 26, pp. 4275-4276) There was a foul odor coming from inside the apartment when the police arrived. (Vol. 26, p. 4376) When Detective Daniel Borrego entered the apartment, he saw a body lying on the bed. (Vol. 26, pp. 4276-4277) There was a telephone cord wrapped around his neck, and he was “pretty severely decomposed[.]” (Vol. 26, pp. 4277-4278) He was identified as Gary Thorne, and he was about 45 years old, approximately 5’4” tall, and 101 pounds. (Vol. 26, p. 4277) The apartment was “very messy like it had been ransacked[.]” (Vol. 26, p. 4278)

The police ascertained that Thorne owned a 1973 Buick Regal that was not at the premises. (vol. 26, pp. 4278-4279) The next day, they located the vehicle around 9:30 p.m. parked in front of a public beach and set up surveillance. (Vol. 26, pp. 4279-4280) An individual later identified as Phillup Partin came from the beach and unlocked the trunk and began putting things in and taking things out of the trunk. (Vol. 26, p. 4280) Partin was detained and taken to the Miami-Dade Police Department Homicide Bureau, where he was advised of his Miranda

rights, and agreed to talk to Borrego. (Vol. 26, pp. 4280-4281) Partin was curious as to why he was being detained. (Vol. 26, p. 4282) Borrego explained that he was under arrest because "he was in possession of a car that belonged to an individual that was killed." (Vol. 26, p. 4282) When Barrego asked Partin when and where he met Thorne, Partin, who was 22 years old at the time, explained that he had been hustling gay men for nine or 10 months, and that he met Thorne at a gay bar, the Cactus Lounge. (Vol. 26, pp. 4284-4285, 4296) The two later ended up at Thorne's apartment, where Thorne twice touched Partin in a way he did not like--once on the shoulder and once on the leg. (Vol. 26, pp. 4287-4289) Each time, Partin removed Thorne's hand and told him not to do that. (Vol. 26, pp. 4287-4289) When Partin stood up as if to leave, Thorne "placed his arms around himas like kind of like in a hugging and went to kiss him," at which point Partin "pushed him off, grabbed him, spun him around and started choking him." (Vol. 26, p. 4290) Thorne feel on the bed, and Partin fell on top of him. (Vol. 26, pp. 4290-4291) Thorne was moaning and groaning, and the more he did so, the more pressure Partin applied, telling Thorne not to make noises, to be quiet. (Vol. 26, 4291) Partin released the hold several times when Thorne stopped moaning or groaning, but as soon as he did, Thorne "would either start trying to say something or scream and he continued choking him, and he said this went on

for a little while." (Vol. 26, p. 4291) Partin subsequently grabbed the telephone cord from the wall, wrapped it around Thorne's neck several times, and strangled him. (Vol. 26, p. 4291) Partin thereafter washed up, and threw things around to make it look as though someone had broken into the apartment. (Vol. 26, p. 4292) He took several items: a black canvas bag, an electric razor, some clothing, two safe deposit box keys, and Thorne's car keys, and left in his car. (Vol. 26, p. 4292) Partin was very cooperative with Barrego. (Vol. 26, p. 4297)

Appellant was indicted by a Miami grand jury for first-degree murder, armed robbery, and burglary. (Vol. 26, p. 4293) As a result of a plea agreement, Appellant was convicted of second-degree murder, as well as the other two charges. (Vol. 26, pp. 4293-4294)

Defense Case

Defense counsel played for Appellant's penalty phase jury the videotaped deposition of Susan Salmon. (Vol. 26, pp. 4300-4313) She first met Sonny Partin in 2000, and they moved in together. (Vol. 26, p. 4302) Partin was a "great father" to his daughter, Trish. (Vol. 26, pp 4302-4303) He was very caring, "very in to her schooling and making sure she took care of herself." (Vol. 26, p. 4302) Partin was "very fair with her and tried to teach her[.]" (Vol. 26, p. 4302) The three of them lived in Fayetteville, North Carolina for about a year, where

Trish did very well in school. (Vol. 26, p. 4303) Sometimes, they would go to the beach or go for rides. (Vol. 26, pp. 4303-4304)

Partin worked full time at Maxim Air Club, and mowed lawns on the side; he provided well for the family. (Vol. 26, p. 4303)

Salmon had two dogs, which Partin treated "great[;]" there were never any problems. (Vol. 26, p. 4304) When they lived in South Carolina, Partin found a dog named Dutches that was very sick, and took her to the vet and nursed her back to health. (Vol. 26, pp. 4305-4306)

When Salmon and Partin lived together, they had arguments, but Partin was never physically violent against her, never harmed her physically. (Vol. 26, p. 4306) Nor did Partin harm his daughter physically. Except that he would discipline her by spanking her with his hand. (Vol. 26, pp. 4306-4307) Trisha seemed happy to be living with her father. (Vol. 26, p. 4307)

From time to time, Salmon traveled to Florida with Partin and Patrisha; most of these visits were for Trish to see her sisters. (Vol. 26, pp. 4307-4308)

Salmon's opinion was that Trisha was the most important person in Partin's life; he was very protective of her. (Vol. 26, p. 4308)

After Salmon and Partin went their separate ways, they still maintained a friendship. (Vol. 26, p. 4308)

When Salmon and Partin lived together, she knew that he had been in jail, but he told her that he had been in a bar fight and "somebody got killed." (Vol. 26, p. 4309) She learned later that there was a different story. (Vol. 26, pp. 4309-4310) She would have never lived with him if she knew that he was convicted of murdering someone as described in the newspaper. (Vol. 26, p. 4310)

Salmon corresponded with Partin for about the first year after he was incarcerated in the Pasco County Detention Center, but no longer had any contact with him at the time of her deposition (August 24, 2007). (Vol. 26, pp. 4301, 4311)

The defense also played for Appellant's jury a brief excerpt from a videotaped statement by Partin's daughter, in which she identified a drawing as depicting a hand sign that she and her dad used when they said "I love you to each other." (Vol. 26, pp. 4337-4338)

Appellant's jury recommended that he be sentenced to death, by vote of nine to three. (Vol. 17, p. 2890; Vol. 26, p. 4356)

The court ordered counsel for the State and for the defense to submit written sentencing memoranda, and ordered a presentence investigation over defense objection. (Vol. 26, pp. 4361-4362, 4364-4368)

Hearing of August 29, 2008

Phillup Partin introduced the testimony of his daughter, Patrisha, as part of his Spencer hearing presentation. (Vol. 26, pp. 4405-4410) She was living in Bowling Green, attending junior high school, and was a cheerleader. (Vol. 26, p. 4406) She demonstrated a signal that her dad made to her at his first trial which meant, "I love you." (Vol. 26, pp. 4406-4407)

Spencer hearing--November 3, 2008

Valerie McClain, Ph.D., was a psychologist who reviewed a number of documents pertaining to this case, and interviewed Phillup Partin on several occasions, and administered various tests to him. (Vol. 27, pp. 4420-4471) The history she obtained from Partin included a head injury due to a motor vehicle accident in 1983, some substance abuse, as well as issues relating to physical abuse by his biological father, resulting in "emotional estrangement or detachment and leaving him very vulnerable." (Vol. 27, p. 4426-4427, 4463-4467) The Ray Auditory Verbal Learning Test that she administered on February 23, 2006 suggested "potentially some head trauma." (Vol. 27, pp. 4427-4429) After meeting with Partin in February, 2008, McClain diagnosed him with "polysubstance dependence, cognitive disorder and major depressive disorder recurrent." (Vol. 27, pp. 4432-4433) Brain damage can lead to "lack of emotional

regulation[,]" anger, and impulsivity. (Vol. 27, p. 4435) The State-Trait Anger Inventory that McClain administered to Partin showed "very consistent findings with problems with anger expression in terms of his ability to regulate that information or regulate those impulses[.]" (Vol. 27, pp. 4435-4436) Treatment was available for the conditions that McClain had diagnosed. (Vol. 27, p. 4440) When McClain met with Partin in 2008, he had been receiving Depakote and Paxil at the Land O' Lakes Detention Center, and he was less guarded than when they had met in 2006; the interaction between McClain and Partin was better and "less stressful." (Vol. 27, p. 4441)

Vicki Gray had known Sonny Partin for about 12 years, and they had lived together as roommates for a few months in Fayetteville, North Carolina in 2003, sharing expenses. (Vol. 27, pp. 4472-4476, 4478-4479, 4481) At some point before that, Partin did not have custody of his daughter, and he "quit going to the bars" and took parenting classes in order to gain custody. (Vol. 27, pp. 4475-4476) He was very happy when he did acquire custody of his daughter; she was "the light of his life[,]" and "[h]e was a good dad." (Vol. 27, p. 4477)

Dr. Hyman Eisenstein, a psychologist, reviewed various documents pertaining to this case, interviewed several people, including Phillup Partin himself, and administered tests to Partin. (Vol. 27, pp. 4492-4559) His early childhood diagnosis

of Partin was that, “as a young child he had attention deficit disorder, hyperactivity disorder and oppositional defiant disorder.” (vol. 27, p. 4494) His current diagnosis of Partin was “Bipolar I Disorder” and “intermittent explosive disorder.” (Vol. 27, p. 4494)

At his first meetings with Partin in January and May of 2007, Eisenstein found him to be agitated, hostile, angry, confrontational, belligerent, swearing, mistrusting, with racing thoughts. He was minimally cooperative and very difficult to work with. He described trouble sleeping, was in a lot of pain, and was medicated with Vistaril. (Vol. 27, p. 4495) When Eisenstein saw Partin again in April, 2008, “[h]e presented with severe depression, anxiety, still had trouble sleeping, but his cooperation improved significantly, he continued to be agitated.” (Vol. 27, p. 4496) At that point, Partin was taking Prozac and Sinequine. (Vol. 27, p. 4496) When Eisenstein next met Partin, in August, 2008, he found him to be cooperative, pleasant, less agitated, forthcoming, relaxed, trusting, much more responsible and respectful. (Vol. 27, p. 4496) He had been taking Depakote and Paxil at that time. (Vol. 27, pp. 4496-4497)

The tests that Eisenstein administered indicated that the right side of Partin’s brain functioned much better than the left side. (Vol. 27, pp. 4500-4507) This was consistent with head trauma, and Partin had provided Eisenstein with a history

of several different head traumas. (Vol. 27, pp. 4507-4508, 4516-4517) A PET scan and MRI that were performed on Partin were normal, but these results did not mean that there was no brain injury. (Vol. 27, pp. 4518-4520, 4553-4556) A CT (computerized tomography) scan was not normal; it indicated "possible structural abnormalities in the orbital and left anterior temporal regions." (Vol. 27, pp. 4524-4525, 4553-4555)

Eisenstein spoke with Partin's biological father, Lester Viekko, on the telephone. (Vol. 27, p. 4509) Viekko was a decorated Vietnam War veteran who was on 100% disability for post-traumatic stress disorder. (Vol. 27, p. 4509) He admitted that he physically and emotionally abused his son and alienated him. (Vol. 27, pp. 4509-4510) His son was "mad at the world." (Vol. 27, p. 4510) Phillup Partin himself confirmed that Viekko "beat him up, there was shovings, slamming his head into the wall, and cigarette burns, and he stated he took it." (Vol. 27, p. 4521)

Michael Partin raised Phillup from the age of 12 and adopted him after marrying his mother. (Vol. 27, p. 4512) Michael Partin was career military, a disciplinarian who would punish Phillup by spanking him or grounding him for days and weeks at a time. (Vol. 27, pp. 4512-4513)

Phillup Partin's aunt, Evelyn Jensen, stated in her deposition that Lester Viekko was an alcoholic, very abusive in

nature, and that Partin had witnessed violence in the home as a young boy. (Vol. 27, p. 4515) "She referred to Phillup as a Dr. Jekyll and Mr. Hyde, with a split personality. (Vol. 27, p. 4515)

Partin had a history of drinking beer and tequila from as early as 10 years of age, and his drinking escalated at age 17 into "very serious alcohol usage." (Vol. 27, p. 4518) Partin had also used various medications to manage pain after rupturing a disk in an accident at work. (Vol. 27, pp. 4517-4518)

Partin skipped school, especially in ninth grade, and was "kicked out' or withdrew from school. (Vol. 27, pp. 4515, 4522)

At age 17, Partin was placed in a foster home in Maryland. (Vol. 27, p. 4522)

The Florida Department of Corrections records that Eisenstein reviewed included the results of a Minnesota Multi-Phasic Personality Inventory that was conducted in 1989. This test showed that Partin was "unpredictable in thoughts, affect in behavior, there was impulsivity, low frustration tolerance, he was angry, suspicious, moody, insecure, punitive and aggressive." (Vol. 27, p. 4523) He was also "alienated and he had difficulty with the law, self-defeating and self-destructive. A report of thought disorder, violent, physically abusive, distrustful, and overly sensitive." (Vol. 27, p. 4523)

The MMPI strongly suggested the possibility of a psychotic disorder. (Vol. 27, pp. 4523-4524)

Phillup Partin’s behavioral problems were manageable with medication. (Vol. 27, pp. 4557-4558)

SUMMARY OF THE ARGUMENT

Appellant's jury was allowed to consider a large amount of evidence of collateral crimes, wrongs, and bad acts by Phillup Partin that was not relevant, but served only to show propensity or bad character. This evidence was unduly prejudicial, and Partin is entitled to a new trial or a resentencing.

The trial court abused his discretion in finding Suzanna Ulery, a State witness and DNA analyst, unavailable to testify and allowing her former testimony to be read to Phillup Partin's jury at guilt phase in lieu of her "live" testimony. Ulery was pregnant, not infirm. Although her doctor recommended that she not fly to Florida from her home in California, she could have traveled by other means (car, train, bus, etc.), or the trial could have been continued until after she gave birth.

The trial court abused his discretion when he refused the jury's request for a copy of the indictment herein, or to have the indictment read to them.

Phillup Partin's cause was submitted to his penalty phase jury upon improper instructions. The trial court should have granted the defense request to tell the jury that they were never required to recommend a sentence of death. The jury also should have been instructed that their recommendation would be given great weight. And the instruction given to the jury on the prior violent felony aggravator was erroneous.

Phillup Partin's case is not among the most aggravated and least mitigated, and so his sentence of death should not be allowed to stand. Of the two aggravators found, the prior violent felony occurred some 23 years ago, and the State did not show that Partin has a significant history of violence since that episode. In addition, when one considers the 9-3 death recommendation herein, one must remember that the jury did not hear the full case for mitigation. The trial court, but not the jury, heard powerful evidence regarding the abuse Partin suffered as a youth and his mental health issues.

Pursuant to Ring v. Arizona, 122 S.Ct. 2428 (2002), Florida's scheme of capital punishment violates principles of due process of law and the right to trial by jury, and Phillup Partin's sentence of death imposed under such a scheme cannot be permitted to stand.

ARGUMENT

ISSUE I

APPELLANT WAS PREJUDICED WHEN HIS JURY RECEIVED A LARGE AMOUNT OF IRRELEVANT EVIDENCE THAT SERVED NO PURPOSE OTHER THAN TO CAST HIM IN A BAD LIGHT.

Defense counsel filed a number of motions in limine that were designed to prevent Phillup Partin's jury from hearing irrelevant evidence of alleged collateral crimes and bad acts, and lodged objections during trial. However, despite the best efforts of counsel, much of this evidence came in.

For example, Partin's Motion in Limine IV sought to keep out portions of recordings of telephone conversations between law enforcement and Partin on the grounds that they were "hearsay, improper character evidence, improper impeachment, irrelevant statements" and "more prejudicial than probative under Section 90.403" of the Florida Statutes. (Vol. 10, pp. 1734-1742) Defense counsel objected again at trial. (Vol. 44, pp. 1105-1107) On the tape of the first conversation between Scott Gattuso and Phillup Partin, the jurors heard Partin say (Vol. 44, p. 1111):

> Listen to me, you'll fucking be unarmed. I'm telling you right now, I'm unarmed. Okay, I know you've already inquired as to if I got firearms. I'll tell you straight up, yes, I got some, I know I'm not supposed to have any, but do I have any with me? No, I don't, they've all been secured and took care of. I am totally and utterly unarmed. Okay, and I'm fucking—fuck the bullshit, man, I'll tell you straight up. So you're going

> to have to come unarmed, and you're going to have to show me you're unarmed.[15]

The fact that Partin had firearms was totally irrelevant; the homicide in this case did not involve use of a firearm. Particularly prejudicial was the statement that he "was not supposed to have any" firearms. Some of the jurors may have inferred that he was not supposed to possess firearms because he was a convicted felon.

Partin's Motion in Limine VI addressed the contents of the videotaped interview that law enforcement conducted with Partin on October 23, 2003 after his arrest. (Vol. 10, pp. 1745-1754)[16] Partin's jurors heard him say (Vol. 45, pp. 1284-1285):

> When--when the cops are coming after me--because, I mean, if I would have had my fucking gun in the Jeep--because I've gone through this scenario a million times in my head, you know, what's--what are you going to do, Sonny, if the police throw down?
>
> And--and I--I thought, well, you know, I keep my gun because there for--for a long time up until a couple weeks ago when I went camping with Lee, I mean, my gun went with me every fucking place I went. All right.
>
> I answered the fucking door of the motel with a gun right there, you know, because I didn't know, you know, if you all was going to be on the other side of the door.
>
> I went through the scenario a million fucking times. You know, am I going to fucking haul ass? Am I going to shoot it out? Am I going to fight? What?

---

[15] In this portion of the conversation, Partin was setting conditions for meeting with Gattuso.

[16] The defense renewed its objections to this tape at trial. (Vol. 45, pp. 1268-1269, 1337-1338)

More completely irrelevant discussion about guns. If anything, this was even more prejudicial than the previously-discussed tape, because Partin was contemplating shooting it out with the police.

Motion in Limine VII related to the tape of a telephone call Partin made when he was incarcerated in the Cumberland County Detention Facility in North Carolina. (Vol. 12, pp. 2115-2116) Specifically, Partin sought to exclude a statement to the effect that "if he had the opportunity to escape that he would and it would take the Sheriff's office longer to find him." (Vol. 12, p. 2115) Partin renewed his objections at trial. (Vol. 45, pp. 1340, 1345-1346) On the tape, after saying "they say I'm a real risk[,]" Partin said (Vol. 45, p. 1344):

> Well, fuck it, I'll tell you what, if I get a chance, fuck these son-a-bitches, it took 'em a year and a half to get me, it'll take them longer next time.

One must first wonder if this portion of the tape was correctly reported and transcribed, as there is no specific mention of the word "escape." Perhaps this is a matter that must be resolved at the trial court level. At any rate, the suggestion certainly is there that Partin would escape if he got the chance. This irrelevancy not only infected the guilt phase, but had ramifications for penalty phase as well. Partin's jury certainly would have been less likely to vote for a life

sentence if they were concerned that he might escape from prison.

Motion in Limine IX sought to exclude testimony from Partin's former girlfriend that Partin requested her ex-husband's social security number. (Vol. 13, pp. 2274-2275) Susan Salmon testified that she received a phone call from Partin in August, 2002, in which he asked to use her ex-husband's social security number. (Vol. 41, p. 560) Partin would not say why he wanted it, and Salmon refused to give it to him. (Vol. 41, p. 560) This testimony was irrelevant to any issue in this case. It suggested that Partin wanted the social security number of another for some fraudulent or otherwise nefarious purpose.

Motion in Limine X was filed to exclude testimony regarding police retrieval of two firearms belonging to Partin, one in Florida and the other in North Carolina. (Vol. 13, pp. 2277-2278) The motion was granted as to the Florida gun, but denied as to the North Carolina gun. (Vol. 13, p. 2279) Pasco County Deputy Brian Gardner testified that, after he was arrested in North Carolina, Partin "spontaneously" stated that he had a gun at a friend's house. Gardner went to the friend's house and found the .9 millimeter weapon where Partin said it would be.

(Vol. 44, pp. 1078-1080)[17] More testimony about guns. Again, no relevance whatsoever.

Motion in Limine XII sought to exclude from the tape of the telephone call between Partin and Fred Kaufman Partin's statements about having been in a "physical altercation" which had nothing to do with this case. (Vol. 13, pp. 2283-2285)[18] The following exchange took place on the tape (Vol. 45, p. 1238--"PP" is Phillup Partin and "FK" is Fred Kaufman):

> PP: Uh. . .I've. . .I've. . .had the police all up in my face one night a couple weeks ago. No shit man, I mean I got into a fucking fight.
> FK: With the police?
> PP: Uuh?
> FK: With the police?
> PP: No. . .no, not with the police, but uh, I got into a fight. . .inaudible. . .uh, but. . .it. . .it. . .this wat this whole situation happened, they didn't even ask me for my fucking name.

Later on the tape, Partin provides further details on what appears to be the same incident (Vol. 45, pp. 1243, 1259-1260):

> PP: It's just the way that fucking shit happens. Shit went down and this dude was beating up on. . .he was drunk and shit, don't get me wrong, I mean he was six foot something, and he was drunk, and out at the ocean. He was beating up on his old lady and another girl beat up three other dudes. You know, and. . .I mean man he was fucking whaling on this one fucking girl. And so I just said, you mother fucker, you want to fuck with somebody, why don't you fuck with me, so he did. And I mean he never hit me, but a bunch of

[17] This came in over a renewed objection at trial. (Vol. 44, p. 1079)

[18] The tape was admitted at trial over renewed and further objections by defense counsel. (Vol. 45, pp. 1233-1234, 1266)

> shit fucking happened. And when the police got there, no shit, man, this dude's head was split wide fucking out. And you know what they did they took a statement from everybody else, talked to me took, and you know, took everybody else's name and address and all that shit. Talked to me, 'cause I told 'em, I was just walking by, you know.
>
> FK: Uh-huh.
>
> PP: And he fucking patted me on the back, no shit, man.
>
> FK: Heh heh heh, fucking. . .
>
> PP: I mean this Dade [sic] was fucking crazy man. They found dope in his pocket. He was zooming all over the fucking dunes and. . .and all over the beach in his truck, and went up in the dunes, and got his truck stuck up in the dunes. And the dunes is off limits, period.
>
> FK: Uhm.
>
> PP: You know, so they impounded his truck. And then he's sitting there with fucking handcuffs on, right, and fucking gets up when the police are talking to me, he gets up and runs to the ocean like he was wanting to kill himself, you know.
>
> FK: Huh.
>
> PP: And I told him. . .inaudible. . .they wore that mother fucker's ass out, shit.
>
> FK: Heh heh heh.
>
> PP: They wore his ass out, 'cause they had to get in the water to get him, you know.

The altercation about which Partin spoke had no relevance to any issue in this case. It served only to portray him as a violent person, particularly in light of the ambiguity regarding how the man's head got split wide out. (Was this done by Partin, the police, or someone else? It is unclear.)

Finally, Partin objected to testimony that Fred Kaufman's social security card was found in his room at the Roadside Inn in Fayetteville, North Carolina after Partin was arrested. (Vol. 44, pp. 1081-1083)

In order to be admissible, evidence must be relevant. § 90.402, Fla. Stat. (2008); Gore v. State, 719 So.2d 1197 (Fla. 1998). "Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. (2008). The objected-to evidence discussed above failed the test of relevance; it did not tend to prove or disprove any material fact in this case. Where, as here, the sole relevance of evidence of other crimes, wrongs, or acts by the defendant is to establish the propensity or bad character of the defendant, such evidence is inadmissible. Valley v. State, 860 So.2d 464 (Fla. 4th DCA 2003); see also Gore, 719 So.2d at 1200 (because the sole relevance of collateral crimes "could only be to demonstrate Gore's bad character, it was inadmissible. [Citation omitted.]" Furthermore, even "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice[.]" § 90.403, Fla. Stat. (2008); Gore, 719 So.2d at 1199. The evidence wrongly admitted at Partin's trial suggested that he had committed or contemplated several collateral crimes, including fraud, illegal possession of firearms, battery, and that he was a violent person who was willing to shoot it out with the police if necessary. "The improper admission of collateral crimes evidence is 'presumed harmful' because the jury might consider the bad character thus demonstrated as evidence of guilt of the crime charged.

[Citation omitted.]" Gore, 719 So.2d at 1199. See also, Acevedo v. State, 787 So.2d 127, 130 (Fla. 3d DCA 2001) (improperly admitted evidence of other crimes, wrongs, or acts "is presumed harmful and is inherently prejudicial to a criminal defendant's right to a fair trial. {Citation omitted.]" The error in admitting the improper evidence cannot be considered harmless here, as the case against Phillup Partin was entirely circumstantial; he did not confess and there were no eyewitnesses. See harmless error analysis this Court conducted in Gore, 719 So.2d at 1202-1203. Partin would also note that an error that is harmless as to guilt may be harmful as to penalty. Gonzalez v. State, 700 So.2d 1217 (Fla. 1997); Burns v. State, 609 So.2d 600 (Fla. 1992). Much of the evidence discussed above would certainly give the average juror pause when contemplating whether Partin's life should be spared.

Phillup Partin's conviction and sentence were obtained in violation of the due process, right to trial by jury, and cruel and unusual punishment clauses of the state and federal constitutions. Amends. VI, VIII, XIV, U.S. Const., Art. I, §§ 9, 16, 17, 22, Fla. Const. He must receive a new trial or resentencing.

Standard of review: "The standard of review of a trial court's evidentiary rulings is abuse of discretion. [Citation omitted.] The trial court's discretion is limited, however, by

the rules of evidence, [citation omitted] and by the principles of stare decisis. [Citation omitted.]. . . .A trial court also abuses its discretion if its ruling is based on an 'erroneous view of the law or on a clearly erroneous assessment of the evidence.' [Citation omitted.]" McDuffie v. State, 970 So.2d 312, 326 (Fla. 2007).

ISSUE II

THE COURT BELOW ERRED IN GRANTING THE STATE'S MOTION TO ADMIT THE FORMER TESTIMONY OF SUZANNA ULERY.

On February 29, 2008, the State filed a motion to admit the former testimony of one of its DNA witnesses, Suzanna Ulery, on the grounds that she was four months pregnant, and could not fly from San Diego, where she resided, to attend Phullup Partin's trial. (Vol. 14, pp. 2389-2391) The record contains a prescription dated 2/27/08 from a doctor in California for Suzanna Ulery that says: "Patient is unable to travel (no flying) until after 8/24/08 due to medical condition." (vol. 33, p. 5628) The record also contains a letter from the witness (whose married name was Suzanna Ryan) to the prosecutor stating that she was unable to fly due to her pregnancy, and therefore could not testify at Phillup partin's trial. (Vol. 33, p. 5630) These documents were admitted at the hearing on the State's motion, which took place on March 4, 2008 before the Honorable

William Webb. (Vol. 26, pp. 4211-4253) The State argued that Ulery was a "very material" and necessary witness (Vol. 26, p. 4223), and that her former testimony (that is, the testimony that she gave at Partin's first trial, which was mistried, should be admitted under section 90.804(2) of the "Florida Rules of Evidence," because she was unable to testify at the new trial. (Vol. 26, pp. 4214-4224) The defense, on the other hand, argued that the witness was not unavailable; although she might not be able to fly, she could travel to court by other means. (Vol. 26, pp. 4226-4240) Or the State could continue the trial in order to have her "live" testimony when she became available. (Vol. 26, pp. 4226-4240) The court ultimately ruled that the witness was unavailable, and granted the State's motion. (Vol. 14, p. 2419, Vol. 26, pp. 4246-4248)

Ulery's former testimony was read at Partin's trial over renewed defense objections. (Vol. 43, pp. 964-985) Ulery testified that she examined two cuttings from the carpeting [that had been in Fred Kaufman's house] and could not get a DNA profile from one, but the DNA profile from the other cutting matched that of Joshann Ashbrook. (Vol. 43, p. 971) She also compared the DNA profile of Phillup Partin with a hair found on Joshann Ashbrook's left hand, and found a match "at every location." (Vol. 43, p. 974) Ulery provided population genetic frequency statistics for these matches. (Vol. 43, pp. 971-975)

Clearly, Ulery's former testimony was "hearsay:" it was "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. (2008). Hearsay is inadmissible, except as provided by statute. § 90.802, Fla. Stat. (2008). When hearsay is improperly admitted, the accused is denied his constitutional right to confront the witnesses against him pursuant to the Sixth Amendment. Crawford v. Washington, 541 U.S. 36 (2004). The State did not argue below that Ulery's former testimony was not hearsay, but sought to justify its admission under section 90.804(2)(a), which permits the use of former testimony where the witness is unavailable as an exception to the hearsay rule. Section 90.804(1) provides a definition for "unavailability of a witness." The pertinent part of the definition here is that the declarant "[i]s unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity[,]" § 90.804(1)(d). As the State was the party that wanted to use the former testimony, the State bore the burden of showing Ulery's unavailability. Magna v. State, 350 So.2d 1088 (Fla. 4th DCA 1977). The State also was required to show that it exercised due diligence in trying to secure the appearance of the witness. Essex v. State, 958 So.2d 431 (Fla. 4th DCA 2007). See also, McClain v. State, 411 So.2d

316 (Fla. 3d DCA 1982) (proponent of former testimony must establish what steps it took to secure appearance of witness). The State did not show that it took any steps to secure Ulery's appearance. Clearly, Ulery was not actually unable to appear at Partin's trial or testify due to any illness or infirmity. She was pregnant, not sick. And she could have traveled to Florida by means other than airplane, but apparently preferred not to do so. Mere inconvenience does not equal unavailability. The State and its witnesses should not be let off the hook so easily when a capital trial is at hand and a man's life is at stake.

"A trial court's determination on the issue of availability will not be disturbed unless an abuse of discretion clearly appears. [Citation omitted.]" Reynolds v. State, 934 So.2d 1128, 1142 (Fla. 2006). In this case, the court below abused his discretion in ascertaining that Ulery was not available to testify.

Phillup Partin was deprived of his rights under the confrontation, due process, right to trial by jury, and cruel and unusual punishment clauses of the state and federal constitutions. Amends. VI, VIII, XIV, U.S. Const., Art. I, §§ 9, 16, 17, 22, Fla. Const. He must receive a new trial.

ISSUE III

THE COURT BELOW ERRED IN REFUSING THE REQUEST OF APPELLANT'S JURY TO HAVE A COPY OF THE INDICTMENT IN THE JURY ROOM WITH THEM DURING DELIBERATIONS, OR TO HAVE THE INDICTMENT READ TO THEM.

Florida Rule of Criminal Procedure 3.400 is entitled: "Materials to the Jury Room." It provides, in pertinent part:

> **(a) Discretionary Materials.** The court may permit the jury, upon retiring for deliberation, to take to the jury room:
>
> (1) a copy of the charges against the defendant[.]

During guilt phase deliberations, after having deliberated for two hours, Appellant's jury propounded the following question in writing: "Can we have a copy of the Indictment?" (Vol. 48, pp. 1858, 1864-1865) The State took the position that, once the jury began deliberating, the court could not "use its discretion and provide them with a copy of the indictment." (Vol. 48, p. 1858) Defense counsel wanted a copy of the indictment to go to the jurors. (Vol. 48, p. 1859) Ultimately, the court informed the jurors that he was unable to comply with their request. (Vol. 48, p. 1866)

The jurors then propounded the following written question: "Can the Indictment be read to us?" (Vol. 48, p. 1867) After consulting with counsel, the court again informed the jury that he was unable to comply with their request. (Vol. 48, pp. 1867-1871)

In Donaldson v. State, 356 So.2d 351 (Fla. 1st DCA 1978), which was cited by defense counsel below (Vol. 48, p. 1862), the court found no abuse of discretion in the trial court's denial of the defendant's request that the jury be permitted to take the indictment to the jury room during deliberations. The opinion noted that Florida Rule of Criminal Procedure 3.400 "is permissive and not mandatory." Id. at 353. However, the Donaldson opinion does not indicate that it was the jury that wanted a copy of the indictment. In the instant case, the jury was obviously very concerned about something having to do with the charging document, as they requested it twice. It seems likely that the jury wanted to see if the allegations were consistent with the proof, that is, whether the allegata and the probata coincided. We will never know for certain. But we can say for certain that, whatever the jury's concerns, they were never put to rest, because the court refused to provide them with the indictment, or to read it to them, an abuse of discretion under the circumstances of this capital case.

As indicated above, the standard of review is abuse of discretion. The court's ruling deprived Phillup Partin of his rights to trial by jury, due process of law, and not to be subjected to cruel and/or unusual punishment. Amends. VI, VIII, XIV, U.S. Const., Art. I, §§ 9, 16, 17, 22, Fla. Const. He must receive a new trial.

ISSUE IV

APPELLANT'S PENALTY PHASE JURY WAS GIVEN IMPROPER INSTRUCTIONS TO USE IN RETURNING ITS RECOMMENDATION.

On October 29, 2009, this Court approved significant revisions in how penalty phase juries in capital cases are to be instructed. In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So.3d 17 (Fla. 2009). These revised instructions are, obviously, the latest word from this Court on what proper instructions to a jury at penalty phase should look like. Unfortunately, the charge given to Phillup Partin's jury fell short of the mark.

The defense proposed three special jury instructions to be given at penalty phase, which the court below denied. (Vol. 17, pp. 2891-2893) The first of these would have informed the jury: "You are never required to recommend a sentence of death." Franqui v. State, 804 So.2d 1185 (Fla. 2001) and Brooks v. State, 762 So.2d 879, 902 (Fla. 2000) were cited in support of the proposed instruction. (Vol. 17, p. 2891) This language would have served a similar purpose to language added by the Court in the amended standard jury instructions for capital cases, which tells the jury: "you are neither compelled nor required to recommend a sentence of death" even where the

aggravating circumstances outweigh the mitigating circumstances. In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So.3d at 22, 35. The Court noted that the amendment is consistent with state and federal law, citing Cox v. State, 819 So.2d 705 (Fla. 2002) and Gregg v. Georgia, 428 U.S. 153 (1976).[19] In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So.3d at 22. In making this change, the Court noted a finding in *The Florida Death Penalty Assessment Report* issued by the American Bar Association that "over 36 percent of interviewed Florida capital jurors incorrectly believed that they were *required* to sentence the defendant to death if they found the defendant's conduct to be 'heinous, vile, or depraved' beyond a reasonable doubt[.]" Id. at 19, 22. In Phillup Partin's case, the jury was instructed that it could consider in aggravation whether the crime was "especially heinous, atrocious or cruel," language comparable to "heinous, vile, or depraved." (Vol. 26, p. 4341) In the absence of the instruction proposed by defense counsel, the nine jurors who voted for death may have incorrectly believed that this vote was

[19] The Court observed that the approved language was "less stringent" than proposed language, which would have provided: "Regardless of your findings with respect to aggravating and mitigating circumstances you are *never* required to recommend a sentence of death." In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So.3d at 22.

required if they found HAC. The proposed instruction would have eliminated this problem and should have been given.

The Court also approved an amendment to the instructions that will inform capital jurors as to the weight that their recommendation receive, citing Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Id. at 21. Jurors should be charged: "Although the recommendation of the jury as to the penalty is advisory in nature and not binding, the jury recommendation must be given great weight and deference by the Court in determining which punishment to impose." Id. at 28-29.[20] Ironically, it was the State that proposed that Phillup Partin's jury be instructed on the "great weight" that would be given to the advisory sentence, citing Taylor v. State, 937 So.2d 590 (Fla. 2006). (Vol. 26, pp. 4329-4330; Vol. 48, pp. 1887-1890) Although defense counsel conceded that such an instruction was "a better clearer statement of the law as it exists" than the then-existing standard instructions, he did not want the instruction to be given, apparently concerned that he would be waiving his argument under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002) that the jury instructions as a whole were improper if he agreed to the proposal. (Vol. 26, pp. 4331-4333; Vol. 48, pp.

[20] In accordance with Muhammad v. State, 782 So.2d 343 (Fla. 2001), this instruction is only to be given where, as here, mitigation has been presented to the jury. In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So.3d at 21, 28.

1888-1890) Therefore, Appellant's jury received no guidance as to the weight its recommendation would be given. (Vol. 26, pp. 4340-4344) This was not in conformity with the way a capital jury should be instructed, as expressed by this Court in In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2. Nor did the instructions comply with the principles expressed in Caldwell v. Mississippi, 472 U.S. 320 (1985) (jury's role in sentencing process should not be minimized).[21]

Finally, according to the transcript of Phillup Partin's penalty phase, the jury was not properly instructed on one of the two aggravating circumstances. The transcript shows the following instruction (Vol. 26, pp. 4340-4341):

> The aggravating circumstance [sic] that you any consider are limited to any of the following that are established by the evidence.
> Number one, the defendant has been previously convicted of a felony involving the use of abuse of violence to some person.

The proper instruction would have been: "The defendant has been previously convicted of another capital offense or of a felony involving the [use] [threat] of violence to some person." Fla. Std. Jury Instr. (Crim.) 7.11 (2008). There was no objection to the instruction as given. Of course, we cannot know if the

[21] Defense counsel requested that the words "advisory" and "recommend" be taken out of the jury instructions, because these words take "responsibility away from the jurors[,]" but this request was denied. (Vol. 48, pp. 1885-1886)

instruction was correctly reported and transcribed; this matter may have to be resolved at the trial court level.

"Where [as here] an instruction is confusing or misleading, prejudicial error occurs where the jury might reasonably have been misled and the instruction caused them to arrive at a conclusion that it otherwise would not have reached. [Citation omitted.]" Tinker v. State, 784 So.2d 1198, 1200 (Fla. 2d DCA 2001). The instructions as given did not remedy the "significant capital juror confusion" that exists in Florida as identified in the ABA's report. In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2 at 19. This Court cannot have confidence in the reliability of a jury sentencing recommendation arrived at by a jury so instructed. Phillup Partin was deprived of his rights to trial by jury, due process of law, and not to be subjected to cruel and/or unusual punishment. Amends. VI, VIII, XIV, U.S. Const., Art. I, §§ 9, 16, 17, 22, Fla. Const. He must receive a new penalty trial.

Standard of review: The appellate court reviews the giving or withholding of a requested jury instruction under an abuse of discretion standard. Brown v. State, 11 So.3d 428 (Fla. 2d DCA 2009). However, where, as here, the jury is fundamentally misled by the charge it received, this should be considered a matter of law, subject to review de novo. Knarich v. State, 932

So.2d 257 (Fla. 2d DCA 2005); State v. Dempsey, 916 So.2d 856 (Fla. 2d DCA 2005).

ISSUE V

THIS CASE IS NOT ONE OF THE MOST AGGRAVATED AND LEAST MITIGATED TO COME BEFORE THIS COURT, AND SO THE SENTENCE OF DEATH MUST BE VACATED.

"The Eighth Amendment to the United States Constitution and this Court's proportionality review require that the death penalty 'be reserved only for those cases that are the most aggravated and least mitigated.' [Citation omitted.]" Williams v. State, 37 So.3d 187, 205 (Fla. 2010). Phillup Partin's is not such a case.

Although the court below found two significant aggravating circumstances--HAC and prior violent felony--the weight of the later aggravator is tempered somewhat by its remoteness in time, having occurred in 1987, some 23 years ago. The State did not show that Partin has a significant history of violent behavior since that incident.

Moreover, the jury's death recommendation must be considered in the context of the jury not having received all available mitigating evidence. The court heard substantially more at the Spencer hearing regarding Partin's abusive childhood and mental health issues that the jury did not hear. For

example, Dr. McClain's diagnosis of "polysubstance dependence, cognitive disorder and major depressive disorder recurrent," Dr. Eisenstein's diagnosis of "Bipolar I Disorder" and "intermittent explosive disorder," the possibility of brain damage, and the fact that Partin's behavioral issues can be controlled through medication, all significant matters for a sentenced to consider. Yet, despite having received only a very minimal presentation in mitigation, three jurors nonetheless believed that Partin's life is worth sparing. Had the jury been presented with the full case in mitigation, the vote might have gone a different way. At any rate, the death recommendation cannot be considered legitimately to reflect the conscience of the community as to what Phillup Partin's fate should be under these circumstances.[22]

For these reasons, Partin's sentence of death must be vacated in favor of a sentence of life. Amends. VI, VIII, XIV, U.S. Const., Art. I, §§ 9, 16, 17, 22, Fla. Const.

[22] In addition, the vote might have been different if Partin's jury had been properly instructed. Please see Issue IV herein.

ISSUE VI

PHILLUP PARTIN IS ENTITLED TO A LIFE SENTENCE BECAUSE THE FLORIDA DEATH PENALTY STATUTE VIOLATED HIS DUE PROCESS RIGHT AND HIS RIGHT TO A JURY TRIAL WHICH REQUIRE THAT A DEATH-QUALIFYING AGGRAVATING CIR-CUMSTANCE BE FOUND BY THE JURY BEYOND A REASONABLE DOUBT.

Phillup Partin's issue presents a question of law, and so the standard of review is de novo. State v. Glatzmayer, 789 So.2d 297 (Fla. 2001); State v. Dempsey, 916 So.2d 856 (Fla. 2d DCA 2005); Knarich v. State, 932 So.2d 257 (Fla. 2d DCA 2005).

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2355 (2000) and Jones v. United States, 526 So.2d 227, 243 n. 6 (1999), the United States Supreme Court held that any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Basing its decision both on the traditional role of the jury under the Sixth Amendment and principles of due process, the Apprendi Court observed:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened, it necessarily follows that the defendant should not-at the moment the state is put to proof of those circumstances-be deprived of protections that have until that point unquestionably attached.

530 S.Ct. at 2359. The Apprendi Court held that the same rule applies to state proceedings pursuant to the Fourteenth Amendment. 530 S.Ct. at 2355. These essential protections include (1) notice of the State's intent to establish facts that will enhance the defendant's sentence; and (2) a jury's determination that the State has established these facts beyond a reasonable doubt.

In Jones, 526 U.S. at 250-251, the Court distinguished capital cases arising from Florida.[23] In Apprendi, 530 S.Ct. at 2366, the Court noted that it had previously

> rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona, 497 U.S. 639, 647-649. . .(1990)[.]

Thus, it appeared that the principles of Jones and Apprendi did not apply to state capital sentencing procedures. See Mills v. Moore, 786 So.2d 532,536-38 (Fla.), cert. denied, 532 U.S. 1015 (2001). In Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002), however, the United States Supreme Court overruled Walton v. Arizona, 497 U.S. 639 (1990) and held that the Sixth and Fourteenth Amendments to the United States Constitution

[23] Those cases were Spaziano v. Florida, 468 U.S. 447 (1984) and Hildwin v. Florida, 490 U.S. 638 (1989).

require the jury to decide whether a death qualifying aggravating factor has been proven beyond a reasonable doubt.

A defendant convicted of first-degree murder may not be sentenced to death without an additional finding. At least one aggravator must be found as a sentencing factor. Like the hate crimes statute in Apprendi, Florida's capital sentencing scheme exposes a defendant to enhanced punishment—death rather than life in prison—when a murder is committed "under certain circumstances but not others." Apprendi, 120 S.Ct. at 2359. This Court has emphasized that "[t]he aggravating circumstances in Florida law 'actually define those crimes. . .to which the death penalty is applicable. . ." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943 (1974).

Phillup Partin was sentenced to death pursuant to section 921.141, Florida Statutes (2008), which does not require a jury finding that any specific aggravating factor exists. Section 921.141(2) governs the advisory sentence rendered by the jury in this case and provides as follows:

> (2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

On its face, this statute does not require any express finding by the jury that a death qualifying aggravating circumstance has been proven. Moreover, this Court has never interpreted this statute to require the jury to make findings that specific aggravating circumstances have been proven. See Randolph v. State, 562 So.2d 331, 339 (Fla.), cert. denied, 498 U.S. 992 (1990); Hildwin v. Florida, 490 U.S. 638, 639 (1989). Consequently, the statute plainly violates the Sixth and Fourteenth Amendment requirements of Jones, Apprendi, and Ring, and is unconstitutional on its face.

Phillup Partin's case illustrates how section 921.141 violates the requirement that the jury must find a death qualifying aggravating circumstance. Pursuant to section 921.141, the jury was instructed to consider two aggravating circumstances (Vol. 26, pp. 4340-4341): 1) the defendant had "been previously convicted of a felony involving the use of abuse of violence [sic] to some person[;]" 2) the crime was especially heinous, atrocious, or cruel. The judge instructed the jury that it was their duty to render to the court an advisory sentence based upon their determination as to whether sufficient aggravating circumstances existed to justify imposition of the death penalty, and whether sufficient

mitigating circumstances existed to outweigh any aggravating circumstances found to exist. (Vol. 26, pp. 4340) The jurors were further instructed that, if they found sufficient aggravating circumstances existed, it would then be their duty to determine whether mitigating circumstances existed that outweighed the aggravating circumstances (Vol. 26, p. 4341), and that, if one or more aggravating circumstances was established, the jury

> should consider all the evidence tending to establish one or more mitigating circumstances, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

(Vol. 26, pp. 4342-4343)

The jurors were instructed that it was not necessary that the advisory sentence of the jury be unanimous. (Vol. 26, p. 4343) They were never instructed that all must agree that at least one specific death-qualifying aggravating circumstance existed—and that it must be the same circumstance. Thus, the sentencing jury was not required to make any specific findings regarding the existence of particular aggravators, but only to make a recommendation as to the ultimate question of punishment.

The jury ultimately returned an advisory sentence recommending by a vote of nine to three that the court impose the death penalty. The advisory sentence did not contain a

finding as to which specific aggravating circumstance(s) was (were) found to exist. (Vol. 17, p. 2890; Vol. 26, p. 4356)

It is likely in any case that some of the jurors will find certain aggravators which other jurors reject. What this means is that a Florida judge is free to find and weigh aggravating circumstances that were rejected by a majority, or even all of the jurors. The sole limitation on the judge's ability to find and weigh aggravating circumstances is appellate review under the standard that the finding must be supported by competent substantial evidence. Willacy v. State, 696 So.2d 693, 695 (Fla. 1997).

An additional problem with the absence of any jury findings with respect to the aggravating circumstances is the potential for skewing this Court's proportionality analysis in favor of death. An integral part of this Court's review of all death sentences is proportionality review. Tillman v. State, 591 So.2d 167 (Fla. 1991). This Court knows which aggravators were found by the judge, but does not know which aggravators and mitigators were found by the jury. Therefore, the Court could allow aggravating factors rejected by the jury to influence proportionality review. Such a possibility cannot be reconciled with the Eighth and Fourteenth Amendment requirement of reliability in capital sentencing.

Appellant raised the Ring issue in the court below in his "Memorandum of Law and Argument Concerning the Unconstitutionality of Florida's Death Penalty Under Ring v. Arizona" (Vol. 9, pp. 1526-1548) and his "Motion to Declare Florida's Capital Sentencing Statute Unconstitutional Under Ring v. Arizona" (Vol. 9, pp. 1549-1552), which motion the court denied on October 6, 2006 (Vol. 9, p. 1558), and Appellant raised the issue again at penalty phase. (Vol. 26, pp. 4318-4323, 4330-4333)

Even if the issue had not been presented to the trial court, the flaws in Florida's capital sentencing scheme discussed above constitute fundamental error which may be raised for the first time on appeal. In Trushin v. State, 425 So.2d 1126, 1129-30 (Fla. 1983), this Court ruled that the facial constitutional validity of the statute under which the defendant was convicted can be raised for the first time on appeal because the arguments surrounding the statute's validity raised fundamental error. In State v. Johnson, 616 So.2d 1, 3-4 (Fla. 1993), this Court ruled that the facial constitutional validity of amendments to the habitual offender statute was a matter of fundamental error which could be raised for the first time on appeal because the amendments involved fundamental liberty due process.

In Maddox v. State, 760 So.2d 89, 95-98 (Fla. 2000), this Court ruled that defendants who did not have the benefit of Florida Rule of Criminal Procedure 3.800(b), as amended in 1999 to allow defendants to raise sentencing errors in the trial court after their notices of appeal were filed, were entitled to argue fundamental sentencing errors for the first time on appeal. To qualify as fundamental error, the sentencing error must be apparent from the record, and the error must be serious; such as a sentencing error which affected the length of the sentence. Id. at 99-100. Defendants appealing death sentences do not have the benefit of Rule 3.800(b) to correct sentencing errors because capital cases are excluded from the rule. Amendments to Florida Rules of Criminal Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So.2d 1015, 1026 (1999).

The facial constitutionality of the death penalty statute, section 921.141, Florida Statutes, is a matter of fundamental error. The error is apparent from the record, and it is certainly serious because it concerns the due process and right to jury trial requirements for the imposition of the death penalty. Imposition of the death penalty goes far beyond the liberty interests involved in sentencing enhancement statutes.

Moreover, the use of a facially invalid death penalty statute to impose a death sentence could never be harmless

error. A death sentence is always and necessarily adversely affected by reliance upon an unconstitutional death penalty statute, especially when the statute violates the defendant's right to have a jury decide essential facts. See Sullivan v. Louisiana, 508 U.S. 275, 279-282 (1993) (violation of right to jury trial on essential facts is always harmful structural error).

Thus, Florida's death penalty statute is unconstitutional on its face because it violates the due process and right to jury trial requirements that all facts necessary to enhance a sentence be found by the jury to have been proven beyond a reasonable doubt, as set forth in Jones, Apprendi, and Ring. This issue constitutes fundamental error, and can never be harmless. This Court must reverse Phillup Partin's death sentence and remand for a life sentence.

Partin recognizes that in King v. Moore, 831 So.2d 143 (Fla. 2002) and Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) and subsequent cases this Court rejected arguments similar to those raised herein, but asks the Court to revisit these important issues, and raises them here to preserve them for possible further review in another forum.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Phillup Alan Partin, prays this Honorable Court to (1) reverse his conviction and sentence and remand this cause to the trial court with directions to grant Appellant a new trial, or, (2) vacate his death sentence and remand for imposition of a life sentence, or (3) reverse his death sentence and remand for a new penalty trial. In addition, Appellant requests such other and further relief as this Court deems appropriate.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Attorney General's Office, Concourse Center #4, 3507 E. Frontage Rd.—Suite 200, Tampa, FL 33607-7013, (813) 287-7900, on this 3rd day of September, 2010.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

Robert F. Moeller
Assistant Public Defender
Florida Bar Number 0234176
P.O. Box 9000-PD
Bartow, FL 33831