IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-2355

TAI A. PHAM

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

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STATEMENT OF THE CASE AND FACTS

Lana Pham is the oldest child of the victim Phi ("Amy") Pham and the stepdaughter of the Appellant, Tai Pham.[1] (V8, R843-44, 846, 1282). In October 2005, Lana, her mother, and two younger sisters lived in an apartment in Altamonte Springs. Appellant never lived in this apartment and had not lived with the family for two years. (V8, R846, 871, 905). On the evening of October 22, Phi went to dinner with her boyfriend, Christopher Higgins, while Lana's younger sisters spent the night at friends' homes. (V8, R848, 924).

Later that night, Appellant called Lana and asked if she was alone. She indicated yes. A short time later, Lana said, "I just felt my hair being pulled down towards the floor." (V8, R852, 881). She looked up and saw Pham "with two knives in his hand," which she described as "butcher knives." The knives were not from her home. (V8, R884, 906). She had no idea how Pham had gotten into the apartment. (V8, R851, 852, 881-82).

Pham dragged Lana to her room. He tied her hands and feet with shoelaces and strips he cut from her pillowcase. Pham

[1] Tai Pham will be referred to as "Pham" or Appellant. The victim, Phi Pham, will be referred to as "Phi or Amy" and Lana Pham will be referred to as "Lana."

turned on[2] the apartment phone and put it underneath Lana's mattress. (V8, R853, 854). He hid the knives underneath a cushion on Lana's bed. (V8, R886, 894). Pham spoke to Lana in English and Vietnamese. He was "praying to me ... he was ... saying ... take care of my little sisters while him and my mom was (sic) gone." (V8, R855, 856, 888). Pham and Lana were in her room for an hour prior to her mother's arrival. (V8, R856, 891).

When Phi entered the apartment, she yelled out Lana's name. Lana tried to respond but "I couldn't." (V8, R857). Pham grabbed the knives from under the cushion and hid behind Lana's closed bedroom door. (V8, R894). When Phi opened the door, Lana screamed, "watch out." Appellant jumped out, raised the knife, and struck Phi in the throat. (V8, R857-58, 859). Appellant and Phi moved into the hallway. Lana was able to "hop" to the phone and call 911.[3] Phi's boyfriend Christopher Higgins entered the apartment. (V8, R860). He and Pham fought in the kitchen while Phi lay in the hallway. (V8, R860, 899). Higgins fought Appellant for the knife. Lana entered the kitchen, grabbed a pot, and hit Appellant several times on the knee. (V8, R864-65, 902). After Higgins forced Pham to drop the knife, Lana picked it up. Pham told Lana to go help her mother. (V8, R901, 903,

[2] It is unclear whether the witness meant the phone was turned *on* or *off*.

[3] Lana made two phone calls to 911. (V8, R863). A portion of a 911 call was published to the jury. (V8, R994-996).

909). Higgins screamed for help while Lana ran to the neighbor's. (V8, R865).

After Lana returned to her apartment, she saw her mother lying on the floor "with blood gushing out of her throat." She tried to speak to Lana and gestured toward the door. Phi could not talk because "there was a hole in her throat." (V8, R866).

When police arrived, Higgins and Pham were fighting in the kitchen while Lana tended to her mother. (V8, R868-69). Lana was scared and shocked, "I didn't think this was really happening." (V8, R869). Lana told police her "mother was dead and that Tai did it." (V8, R871).

Pham was very strict and physically punished the children when they misbehaved. At times, Pham used objects to hit Lana, including a PVC pipe. (V8, R872). Pham did not like anyone in the apartment when Phi was not home. (V8, R879). He tried to raise them in a very traditional Vietnamese way. (V8, R872). Lana did not know if Pham knew her mother was dating Higgins. (V8, R875).

Christopher Higgins was dating Phi Pham in October 2005. He knew her as "Amy" and had been dating her for two months. (V8, R922-23). He had previously met Amy's three daughters but did not know Pham. (V8, R923-24, 952). Two weeks prior to October 22, Higgins received a threatening phone call from Pham. Pham told him he would kill him. (V8, R952-53).

On the evening of October 22, Higgins and Amy had dinner with Amy's former co-worker. At 11:00 p.m., they headed for Amy's apartment. Amy drove her van while Higgins followed her on his motorcycle. (V8, R924-25). When they arrived, Amy went to her apartment while Higgins parked his motorcycle in the breezeway of the apartment complex. (V8, R927, 956). When Higgins removed his helmet, he heard a woman screaming. He went up the apartment stairs and realized the screaming was coming from Amy's apartment. (V8, R928, 957). Higgins pushed open the door and saw Lana down the hallway kneeling over Amy. "Something pink" was around Lana's hands. Lana was "crying hysterical." (V8, R930, 931). Higgins started to set his helmet down but saw Pham coming at him. Pham "was in full swing." (V8, R931, 959). Pham struck Higgins in the left side of his face with a butcher knife, injuring his ear.[4] Higgins swung his helmet at Pham's face and shoulders. (V8, R932-33; 978-79). He fought Pham for the knife, and attempted to put it to Pham's throat. (V8, R933, 936, 963, 968, 977). They struggled from room to room while Pham attempted to shake off Higgins. Pham bit Higgins on his finger and cut him on his left forearm. (V8, R933, 936, 937, 938). Higgins saw Lana talking on the phone. "She was very upset. You could barely understand anything." Lana entered the kitchen and

[4] As a result of this injury, Higgins lost control of the left side of his face. (V9, R949-50).

grabbed a pot to hit Pham. Pham told Lana to “check on her mom.” (V8, R939, 972). Pham opened a kitchen drawer, pulled out a meat cleaver, and struck Higgins twice on the head. (V8, R940, 963, 978). Pham cut Higgins on his right wrist with the butcher knife. (V8, R974-75). Higgins continued to struggle with Pham until police arrived. (V8, R976). Pham had the butcher knife in his hand when law enforcement arrived. (V8, R944, 974).

On October 22, 2005, Field Training Officer Allen Greene, Altamonte Springs police, responded to Phi Pham’s apartment. (V9, R1009-10). He heard “high pitch screaming” from a second floor apartment. (V9, R1010, 1012). When Greene and Officer Jason Darnell approached the apartment, he saw “a young female standing in the middle of the living room ... her hands appeared to be tied with some type of strap ... she was screaming ... holding ... kind of awkwardly the top end of a knife screaming into the kitchen.” (v9, R1011, 1013). Lana was screaming, “He killed my mother.” Greene directed Lana to drop the knife. (V9, R1014). He entered the apartment and saw a body lying in the hallway. “There was blood all around.” (V9, R115, 116). Greene heard the commotion in the kitchen and saw Pham and Higgins fighting. They were both covered with blood. (V9, R1015, 1017, 1018). Pham and Higgins were ordered to the ground. Lana continued to scream, pointing at Pham, “he killed her mother.” (V9, R1020, 1031). Police secured two knives. (V9, R1022).

Higgins told Greene he was trying to help “Miss Pham” when he was stabbed in the side of his head by Pham. (V9, R1034, 1036). When Higgins said this, Pham told Greene, “No, I was just trying to help.” (V9, R1033).

Deanna Teminsky, senior crime scene analyst, responded to the crime scene. (V9, R1047, 1109). The living room, dining room, kitchen, and hallway were all stained with blood. Phi was lying deceased in the hallway. There were signs “of a very strong struggle.” She took several photographs of the rooms and swabbed several areas to test for blood. (V9, R1049, 1116, 1118, 1120). Teminsky observed an aluminum, dented pot with blood stains on its surface. (V9, R1059). She collected several items of evidence including two knives, a meat cleaver, pieces of torn cloth, a shoelace, and the bloodstained pot. (V9, R1062, 1092, 1093, 1094, 1101, 1102). The knives, meat cleaver, and motorcycle helmet were submitted to the Florida Department of Law Enforcement (“FDLE”). (V9, R1125). Articles of Pham’s and Higgins’ clothing were sent to the lab for testing. (V9, R1130).

Teminsky attended the autopsy of Phi Pham. (V9, R1069). She observed several sharp force injuries to the base of Phi’s throat as well as injuries to her chin, elbow, arm, and abdomen. (V9, R1071). She collected Phi’s torn, bloodstained, gray tank top. (V9, R1079, 1084).

Dr. Predrag Bulic, medical examiner, reviewed the autopsy file of Phi Pham. The autopsy was performed on October 25, 2005, by Dr. Thomas Parsons.[5] (V9, R1161, 1164, 1167, 1190). Phi had a shallow, non life-threatening incised wound under the right side of her chin. (V9, R1170). A second knife injury, more than five centimeters in length, was inflicted to the base of Phi's neck, slightly to the right side. The blade went "through the body was front to back, right to left, meaning there was an angle, and also slightly downward." (V9, R1170, 1171). A contusion on one end of this stab wound indicated the thrust of the knife had to be "of considerable strength ... the entire blade went into the body, and there's also exit through the fourth rib on the back and through the skin on the back." (V9, R1174, 1176). Phi's lung collapsed causing hemorrhaging within the chest cavity. (V9, R1176-77). A third stab wound over five centimeters long was inflicted above Phi's left breast. (V9, R1177). The knife entered through Phi's left chest wall, crossed the median line to the right side of her chest, piercing the right upper lobe of the lung. (V9, R1178). A fourth stab wound, six centimeters in length, was inflicted below Phi's left armpit. The knife entered the left side of her body, hit the sixth rib on the left, went through the lower lobe of the left lung, and entered the left

[5] Dr. Parsons had relocated to Texas. (V9, R1165).

ventricle of the heart into the right atrium of the heart. (V9, R1178). A fifth incised wound was inflicted on the underside of Phi's left arm, near her armpit. (V9, R1179). A six wound, a stab wound, penetrated the abdominal cavity, perforated the stomach, small bowel, and adrenal gland. This caused abdominal hemorrhage, spillage of the bowel and stomach contents, and a hematoma around the left kidney. (V9, R1179). A seventh "defensive" wound was a shallow incision inflicted to the back of Phi's right hand. (V9, R1179). Wound number eight was seven point six centimeters, a gaping wound on the opposite side of Phi's left elbow. This wound cut through vascular structures, nerves, muscle, and tendon. "A quite deep wound." (V9, R1180). A ninth wound was a shallow incised wound on Phi's left forearm. (V9, R1181). Dr. Bulic concluded the cause of death for Phi Pham was multiple sharp force injuries or multiple stab injuries. (V9, R1188).

Pham moved for a judgment of acquittal on all counts, which the court denied. (V9, R1195-96; V10, 1205-07).

Tai Pham testified on his own behalf. (V10, R1227). On October 22, 2005, he worked for twelve hours at his job at an electronics store. (V10, R1227-28). Sometime during the day, his daughter Zena called him. Based on his conversation with her, Pham decided to talk to Phi Pham after work. (V10, R1228, 1229,

1231). The Phams had been separated for two years. (V10, R1282-83).

Pham planned to go to Phi's apartment for four reasons: to give her money, discuss her purchase of condoms for their daughters, ensure Kimmie and Zena did not spend the night at friends' homes, and give Phi mail he had been receiving from their old address. (V10, R1237, 1265).

Pham usually brought money to Phi on Mondays. (V10, R1258). He was "no longer on probation, that's why I went over there, and my wife, that was an injunction that was over already, that's why." (V10, R1264). He had been in Phi's apartment many times. (V10, R1258). Phi knew Pham did not let his daughters spend the night at friends' houses. They were only allowed to stay overnight at their cousins' homes. (V10, R1259). Pham said he and Phi had argued alot prior to her murder. He did not approve of Phi frequently leaving the children home alone. He did not want the Department of Children and Families ("DCF") "to touch my kids ever again." (V10, R1266).

When he left work on October 22, he called Phi's apartment and spoke with Lana. (V10, R1230, 1263). Upon arriving at 10:00 p.m., Lana let him in. (V10, R1232, 1270). Lana was on the computer while he watched television in the living room. (V10, R1233). Lana was on "MySpace," a personal website which included pictures that Lana had taken of herself. Pham told her to remove

the picture of herself “showing her butt” from her MySpace page or “get out.” Lana “get [sic] upset about it.” (V10, R1234, 1269). A few minutes later, two of Lana’s friends knocked at the door. He told Lana they could not come in, “let them get tired, they go home.” Lana “was very pissy” that her friends were not allowed in. (V10, R1270). Pham instructed Lana to get off the computer and go to her room. (V10, R1234, 1270).

Lana went to her room while Pham stayed in the living room. He waited thirty minutes then went to talk to Lana. (V10, R1235). Pham told Lana he wanted her to go to his car with him to get some items he was planning to give to Phi. Lana refused. He thought “she was up to something.” So he asked her, “You want me to tie you up?” Lana, said, “Yes, go ahead and tie me up.” He tied her hands with shoe strings, “really loose.” He used scissors from the kitchen to cut strips from the pillow case to bind her legs “so she couldn’t hop around.” He said “It was a very stupid thing I did.” (V10, R1240-41, 1261). Pham was “just trying to scare her, make sure she’s not going anywhere.” He did not want Lana to go to anyone else’s house. Lana “begged” him to cut the strips from her legs so he did so. (V10, R1240).

As Pham shut Lana’s door, Phi Pham and Christopher Higgins rushed into the apartment. (V10, R1241, 1272). Pham asked where his two younger daughters were and “Who the hell is that?”, regarding Higgins. He told Higgins to “get the f - - - out of

here, boy." (V10, R1242, 1273). Pham said did not have any knives on him. (V10, R1243). Higgins came at him with a knife which he had grabbed from the kitchen counter. (V10, R1244, 1273). Higgins did not say anything. Pham said, "He was just trying to be a hero with my wife." (V10, R1244). Pham got "real pissed off" and fought with Higgins in the hallway. (V10, R1275). He "flipped" Higgins, ran into the kitchen, and grabbed a butcher knife, the "meat clever." (V10, R1245-46, 1250). This was the only knife he held. (V10, R1246, 1277). Higgins came at Pham with a knife so Pham "wacked him." (V10, R1250). All of Pham's fingers were cut "to the bone." (V10, R1250-51, 1283). Pham and Higgins fought into the kitchen area. (V10, R1254). He bit Higgins on the finger "really hard." Higgins would not let go of him. He held a knife to Pham's throat. (V10, R1255). Pham tried to drag Higgins to the carpet area so he could "flip him." He did not stab Higgins. (V10, R1285). Higgins' injury to his ear was possibly caused by a "bang" on the stove or a sharp object. (V10, R1285). Lana was running "back and forth screaming" while yelling into the phone. (V10, R1269, 1282). She tried to hit Pham with the pot because she was "really upset with me." (V10, R1268, 1269). He did not recall being hit with the pot, only "trying to defend himself" as was Higgins. (V10, R1269). When the police arrived, they were both ordered to the ground. (V10, R1255, 1275).

Pham did not know what happened to Phi or how she was stabbed. He did not stab his wife, “absolutely not.” (V10, R1252, 1253, 1278, 1283). The only way she could have been stabbed was while he fought with Higgins over control of the knife. (V10, R1279).

Pham’s body “was completely soaked with blood.” After his clothing was cut off by medical personal, he was transported to the hospital. (V10, R1256-57).

On March 7, 2008, Pham was found guilty on all counts charged within the indictment. (V11, R1528-29).

On May 20, 2008, this case proceeded to the penalty phase with respect to the capital conviction.

The State called Dr. Predrag Bulic, medical examiner. (V12, R56). Dr. Bulic said Phi Pham maintained a period of consciousness during the time she was repeatedly stabbed. (V12, R57). Depending on the sequence in which the injuries were inflicted, she could have been alive for two to ten minutes. (V12, R58, 62). There were no injuries to her head that would have rendered her unconscious. (V12, R58). Stabbing injuries are “extremely painful.” The stab wound to Phi Pham’s abdomen would have caused “increased pain,” “a burning sensation,” due to gastric spillage from the intestines and stomach into the abdomen. (V12, R59, 63). An injury to her left arm caused the nerves to be severed creating a loss of movement below the

elbow. (V12, R59). Although the wounds were inflicted "within seconds," Dr. Bulic could not say in what order they occurred. (V12, R60). However, Phi Pham was conscious when she made a motion to her daughter, Lana, to get out of the apartment. (V12, R66).

Bernadette Hanlon, the adoptive mother of Lana, Kimmie, and Zena Pham, read a statement to the court. (V12, R70-74).

Christopher Higgins read a statement to the court. (V12, R75).

Pham called Theynga Pham, his older sister.[6] (V12, R77). The Phams were born in South Vietnam. Their father was a soldier in the army in Special Forces. (V12, R78). When their father was imprisoned, the family lost their land. (V12, R82). The family tried to escape Vietnam several times. (V12, R84). Several family members, including Tai Pham, were imprisoned when they were caught trying to escape. (V12, R85). Pham was forced to do day labor. He was eight years old at the time. (V12, R86). Eventually, she, Pham, and a cousin escaped to Malaysia, leaving the family behind. (V12, R88, 90).

After recuperating in a hospital, Theynga and Tai Pham spent some time in a refugee camp. (V12, R93, 94). The camp was like a prison. She was only able to see Pham occasionally. (V12,

[6] Theynga Pham's testimony was translated by interpreter Nina Nguyen. (V12, R76).

R95). A few years later, they were relocated to an orphanage in Illinois. (V12, 96, 98). She and Pham were sent to live with separate foster families. (V12, R101-02).

Theynga married and moved to Florida. Pham came to live with her and worked for her husband. (V12, R103-04). Pham married Phi and considered Lana his own child. (V12, R108-09). Pham and Phi had two more daughters. (V12, R109). Theynga said she and Phi were very close, just like "sister(s)." (V12, R107). Theynga said many Vietnamese people that relocated to the United States suffered through terrible experiences. However, Pham murdering Phi was "not right." (V12, R116).

Quincy Nguyen is Pham's niece. (V12, R120-21). She often played with Pham's children and had family outings together. (V12, R121-22). Pham was a "really good father"[7] and took care of her as if she was his own child. (V12, R123, 131).

Chanh Nguyen is Pham's former boss. Pham worked for Nguyen for ten years and was an excellent employee. (V12, R133-34). On occasion, Pham's children came to work with him. Pham was a very caring father and loving husband. (V12, R135, 136).

Xuan Nguyen is Pham's brother-in-law. (V12, R145, 150). Pham lived with Nguyen and his wife while Nguyen taught him how to do electronic repairs. (V12, R151). Pham worked with Nguyen

[7] During proffered testimony, Nguyen said she was aware that Pham had been accused of beating Lana. (V12, R126).

for a year before going to work for Nguyen's friend, Chanh Nguyen. (V12, R152). Pham's family and Xuan Nguyen's family often socialized. (V12, R152).

Tom Diamond employed Pham for three months in 2005. (V12, R161, 162, 163). Pham was a conscientious, hard-working, "topnotch" employee who had no trouble working with the general public. (V12, R164, 167, 169). Pham only had a problem with one employee, the female secretary at Diamond's electronic business. (V12, R169). Pham talked about his children often enough to indicate he was concerned about them. (V12, R165).

Detective Bill Nuzzi, Altamonte Springs police, located several pieces of mail directed to Phi Pham in the trunk of Pham's car subsequent to Phi's murder. (V12, R175-76, 177, 180). Some of the mail dated back to nine months prior to Phi's murder. (V12, R181). Most of the mail found in the trunk of Pham's car belonged to Pham. (V12, R184).

Joanie Wimer, investigative technician, assisted in examining Pham's car on April 7, 2008. (V12, R185-86, 188). Wimer, with Deanna Teminsky as a witness, counted money found in Pham's wallet located in the trunk. There was one thousand and one dollars. (V12, R191, 193; V13, R205).[8]

[8] On day two of the penalty phase, alternate juror Valenti submitted a letter to the trial judge, which stated several jurors had talked amongst each other about the case. (V13, R218-21). Pham moved for a mistrial. (V13, R221). Initially, the

Thuog Foshee married a United States serviceman and left Vietnam in 1969. They lived in the Philippines for three years and moved to the United States in 1972. In 1976, she visited refugee camps in the Philippines and Thailand. (V13, R261-62, 263). Refugees told her the camps in Malaysia were considered to be the worst. (V13, 263).

Vietnamese parents are very strict with their children. Relocated Vietnamese people try to maintain their culture. (V13, R268). Most Vietnamese in the United States have done well. (V13, R269). Foshee has been active in assisting over ten thousand relocated Vietnamese individuals in Central Florida. (V13, R273, 277, 278). In her experience, Vietnamese "Boat People" are law-abiding citizens. (V13, R274). Of all the people she assisted, she does not know any who have committed violent crimes. (V13, R279).

The defense published a Canadian videotape depicting refugees fleeing Southeast Asia. (V13, R284-296, Def. Exh. 7).

Dr. Deborah Day, psychologist, met with Pham in jail on October 26, 2005. (V13, R298, 300). Pham was despondent and depressed. There were concerns that he was suicidal. (V13, R300-01). Pham was unable to effectively communicate with Dr. Day. He

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court reserved ruling. (V13, R256). The court questioned jurors, gave counsel the opportunity to do so, and found no basis on which the verdict or the penalty phase proceedings were rendered unfair. The motion for mistrial was denied. (V14, R504).

only spoke about his concerns for his children. (V13, R301). When she met with Pham the next month, his emotional state had improved. Although still depressed, he was not suicidal. Another inmate provided Pham with emotional support. (V13, R302-03).

Dr. Day next met with Pham on July 2, 2006. Pham was "experiencing a major depressive disorder." (V13, R303). Pham told her he was born in Malaysia and had many siblings. He came to the United States with his sister as "Boat People." He said Phi was pregnant with a child when he met her that he considered his own. They married and had two more children. (V13, R304-05).

Dr. Day met with Pham again on January 14, 2007. (V13, R306). Pham was "manic" and unable to communicate any relevant history at all. He was paranoid, suspicious, and angry. (V13, R307). Subsequent to this meeting, Pham underwent competency evaluations by psychiatrists Dr. Jeffrey Danziger and Dr. Ralph Ballentine. Attempts were made to administer psychotrophic medications to stabilize Pham's mood and "deteriorating state." Pham "stored" his medication, so there were concerns about a suicide attempt. He was placed in the Florida State psychiatric hospital and medicated. (V13, R308). Upon returning to the Seminole County jail, Pham continued to be medicated. (V13, R309).

Dr. Day said Pham would not communicate with Dr. Danziger. Danziger found Pham had significant mental health issues and

opined that Pham had a major depressive disorder. (V13, R309, 310). Dr. Danziger's and Dr. Ballentine's reports expressed concerns with Pham's competency. (V13, R309-10). Pham also refused to communicate with Dr. William Riebsame. (V13, R309-10).

Dr. Day spoke with Pham's sister. (v13, R311-12). She relayed their life circumstances in Vietnam in the 1970's. Their parents lost all of their belongings. There were eight children. Their father was imprisoned for a while, but upon his release he remained in hiding. The family experienced a lot of trauma. (V13, R312-13). Pham's father was imprisoned again in 1975. (V13, R314). When Pham was nine years old, he and his sister were imprisoned during an escape attempt. Pham remained in prison for one year. (V13, R315). Eventually, Pham, his sister, and two older cousins escaped in a boat, arriving in Malaysia. (V13, R316, 318). Pham and his sister relocated to the United States through the Catholic Social Services System. (V13, R321). Due to Pham's traumatized life, "his view of relationships is very unhealthy and out of sync with normal developmental milestones with young adults." (V13, R324).

Dr. Day said Dr. Ballentine's diagnosis was consistent with her diagnosis. Pham suffered from a major depressive disorder as well as a bipolar spectrum disorder. (V13, R325). However, there

was no historical information that supported a bipolar disorder diagnosis. (V13, R326).

Dr. Day concluded that in October 2005, Pham was experiencing a major depressive disorder, personality disorder NOS, and was under significant stress and duress at the time of Phi Pham's murder. (V13, R330, 348, 355). His capacity to appreciate the criminality of his conduct was impaired. (V13, R350, 370).

Pham did not tell Dr. Day that he did not murder his wife. She was aware that Pham claimed Christopher Higgins attacked him. (V13, R351). Pham's stress level and personality disorder caused him to take Phi Pham's life. (V13, R377). Pham has shown positive improvement in jail. He is compliant with taking his medication and interacts better with others. (V13, R336).

Dr. William Riebsame, forensic psychologist, administered a competency examination to Pham in July 2007. (V13, R380-81, 383). Riebsame's interaction with Pham was very brief. Pham was belligerent and uncooperative. He had been hiding his medication and there were concerns of a suicide attempt. (V13, R384-85). After fifteen minutes, Pham "covered his head with his sheets, rolled over in the cot, and the evaluation, per se, was finished." (V13, R385). Riebsame reported to the court that Pham appeared competent but suggested hospitalization at the State psychiatric facility. (V13, R385, 441). Pham was hospitalized

from September 7, 2007, to October 30, 2007, when it was determined he was competent. (V13, R387, 442). Typically, an incompetent person is hospitalized for three to six months. (v13, R388).

Dr. Riebsame evaluated Pham again in April 2008. (V13, R390). He reviewed previous psychological evaluations administered to Pham by Dr. Jean Richardson in 2002, Dr. Daniel Tressler in 2005, Dr. Jeffrey Danziger, Dr. Ballentine, and the 2007 evaluation conducted at Florida State Hospital. (V13, R398). He reviewed records from DCF, Altamonte Springs Police Department, and various depositions and court proceedings. (V13, R399, 442).

Dr. Riebsame interviewed Pham on two occasions. Pham was cooperative through both meetings. (V14, R404, 440). Riebsame administered intelligence and personality testing. Pham's IQ was in the average range, approximately 100. This was the same result reached by Dr. Tressler in 2005. (V14, R404). Riebsame administered the Millon Clinical Multiaxial Inventory, and the Personality Assessment Inventory. (V14, R406, 452). Dr. Riebsame concluded Pham suffers from a mood disorder which varies in its intensity. He suffers from periods of depression. However, medication has stabilized Pham's mood. (V14, R407). Because Pham maintained stable employment for a long period of time, Riebsame opined that he was not suffering from a "severe mood disorder."

(V14, R409-10, 411). Pham experienced a severe mood disorder subsequent to Phi's murder. Killing a spouse in front of one's own child, facing lengthy incarceration, and separation from one's children are events that could trigger a major depressive disorder. (V14, R410).

Pham has a pattern of not dealing well with females. He becomes angry and behaves aggressively. (V14, R414, 447-48). His cultural background could have influenced this type of behavior. (V14, R447-48).

There was no evidence that Pham suffered from a psychotic disorder. (V14, R434, 468). He acted in a "controlled fashion" before killing his wife. Because he consistently denied murdering Phi, Dr. Riebsame concluded Pham was able to appreciate the criminality of his conduct. (V14, R436). Pham experienced an emotional disturbance at the time of the murder but it was not "extreme." (V14, R439, 468). No expert who examined Pham found that he absolutely met the criteria for bipolar disorder. (V14, R469). Dr. Riebsame did not find that Pham exaggerated or minimized any mental health problems. (V14, R480).

On May 22, 2008, the jury returned a recommended sentence of death by a vote of ten to two. (V14, R577). A *Spencer*[9] Hearing

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

was conducted on August 18, 2008. (V18, R1100-1272). On November 14, 2008, the court followed the jury's advisory sentence and imposed a sentence of death on Tai Pham for the first degree murder of Phi Pham. (V3, R568; V18, R1293).

In aggravation, the court found the following: (1) Previously convicted of another capital felony or of a felony involving the use or threat of violence to the person-given great weight; (2) Capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or attempt to commit, or flight, after committing or attempting to commit, any: robbery, sexual battery; aggravated child abuse, abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb-given moderate weight; (3) Capital felony was especially heinous, atrocious, or cruel-given great weight; (4) Capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification-no evidence of any moral or legal justification was presented and argued. (V3, R558-562).

The following statutory or non-statutory mitigating circumstances were considered: (1) Capital felony was committed while the Defendant was under the influence of extreme mental or

emotional disturbance-the court did not find “extreme” mental or emotional disturbance-given moderate weight as a non-statutory mitigator; (2) Capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired-given moderate weight as a non-statutory mitigator; (3)Existence of any other factor in the Defendant’s background-given great weight; (4)Defendant had stable employment history-given some weight; (5) Defendant was a good father and caring husband-not established; (6)Defendant cared for his sister’s children for two weeks while their parents recuperated from a car accident-not a mitigating circumstance. (V3, R563-567).

On November 14, 2008, Appellant was sentenced to death for the murder of Phi Pham. (V3, R568; V18, R1293). Notice of appeal was duly given on December 10, 2008. (V3, R576-77). On February 24, 2009, the record was certified as complete and transmitted. Pham’s initial brief was filed on or about September 29, 2009.

SUMMARY OF THE ARGUMENT

The closing argument, when considered in context, was in no way improper. In any event, the complained-of argument had no effect on the verdict and, for that reason, is not a basis for relief.

The “juror misconduct claim” is not a basis for relief -- the trial court conducted a proper inquiry, and the court’s findings in denying a mistrial are supported by competent substantial evidence. There was no abuse of discretion.

The claim concerning the prior violent felony aggravator overlooks the fact that that aggravating circumstance is not only supported by the prior assault on a law enforcement officer conviction, but also by the contemporaneous conviction for the attempted murder of Christopher Higgins. This claim has no legal basis.

The *Ring v. Arizona* claim is foreclosed by settled Florida law to the extent that that claim is preserved.

The heinous, atrocious or cruel aggravating circumstance was properly found to apply to this stabbing-murder. There is no “intent” element associated with this aggravator.

The cold, calculated and premeditated aggravating circumstance was properly applied to the facts of this case, which more than establish the necessary elements of this aggravator.

Pham’s sentence of death is proportional to the sentence imposed in other, comparable, cases. There is no error. Likewise, the evidence is more than sufficient to support the underlying first-degree murder conviction.

ARGUMENT

I. THE CLOSING ARGUMENT CLAIM[10]

On pages 38-41 of his brief, Pham argues that he is entitled to a new trial based upon "improper comments" during the prosecution's closing argument. The law is well-settled that "[w]ide latitude is permitted in arguing to a jury. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). It is within the judge's discretion to control the comments made to a jury, and we will not interfere unless an abuse of discretion is shown. *Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990); *Breedlove*, 413 So. 2d at 8." *Moore v. State*, 701 So. 2d 545, 551 (Fla. 1997). A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. *Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999); *Thomas v. State*, 748 So. 2d 970, 980 (Fla. 1999) (ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion); *Hamilton v State*, 703 So. 2d 1038, 1041 (Fla. 1997) (noting that a ruling on a motion for mistrial is within the trial court's discretion); *United States v. Puentes*, 50 F.3d 1567, 1577 (11th Cir. 1995) (stating that a district court's ruling on a motion for mistrial is reviewed for abuse of

[10] Appellant mistakenly attributes the first line of the alleged improper closing argument to "THE COURT," not the prosecutor, as was the case. (IB, page 38).

discretion); *United States v. Honer*, 225 F.3d 549, 555 (5th Cir. 2000) (reviewing the denial of motion for mistrial for abuse of discretion).

Pham has identified two discrete portions of the guilt stage closing argument as improper. The first, which is set out on page 38 of his brief, is a partial quotation that is taken out of context. In its entirety, the pertinent portion of the argument reads as follows:

> MR. STONE: But I just do want to quickly address the Defendant's testimony.
>
> And, you know, in a nutshell, the way that you can describe the Defendant's testimony is a desperate man telling a desperate story. That's exactly what it is.
>
> I won't spend more than a few moments on the Defendant's testimony because that's all it deserves, if that much, but there are a few points that I do want to make. And some of the things that he said are just nonsensical, that just don't make sense.
>
> MR. CAUDILL: Objection, Your Honor. May we approach?
> Improper argument.
>
> THE COURT: Yes.
>
> (Whereupon, a discussion was had out of the hearing of the jury.)
>
> MR. CAUDILL: Improper argument, demeaning the defense and testimony of the Defendant, start using words like nonsensical.
>
> MR. STONE: That's not --
>
> THE COURT: Overruled.

(Whereupon, the proceedings resumed in open court as follows:)

MR. STONE: There's some points that just don't make sense. Nonsensical, nonsense.

First of all, does it make sense when the Defendant says that Lana was talking back with him and giving him a hard time and then all of a sudden Lana just magically agrees to be bound by the hands and legs? Does that make sense? The kid's giving him a hard time. You think she's gonna then say, okay, yes, you can bind me by the hands and the feet. That doesn't make sense. But of course that didn't happen.

The Defendant says that Chris Higgins immediately pulled the knife on him, as if this was some type of planned attack by Christopher Higgins.

Well, Christopher Higgins had no idea the Defendant was in that apartment.

Do you think that Christopher Higgins would have gone back to that apartment if he knew that the Defendant was there? But once again, that didn't happen. That's just fiction.

The Defendant told us that he didn't know how Phi got stabbed to death.

Well, to believe the Defendant's story, you would have to believe that Phi Pham suffered these grievous and fatal stab wounds while the Defendant and Chris Higgins were fighting, including the stab wound that went into her chest and out her back. That is unbelievable, that is incredible, and that's why just those three things right there tell you why you should instantly reject the Defendant's testimony as the story of a desperate man telling a desperate story, and that's exactly what it is.

(V11, R1414-1416).

When that argument is considered in context, and in light of the conflicting evidence (which included the defendant’s

testimony) there is simply no error. The version of events that Pham described during his testimony makes no sense at all, is not consistent with any of the other evidence, and, under these facts, nothing the prosecutor said was improper. Instead, it was a fair, and eminently accurate, description of the evidence before the jury.

Pham relies on *Henry* to support his position, but that case is factually different. In that case, the prosecutor described the defendant's "version of events (**which was not contradicted by any state witness**) as the '"most ridiculous defense"' he, the prosecutor, had ever heard . . ." *Henry v. State*, 743 So. 2d 52, 53 (Fla. 5th DCA 1999). (emphasis added). In this case, there was contradictory evidence, and the prosecution was entitled to comment on the quality and believability of that evidence. To the extent that Pham relies on *Ruiz v. State*, 743 So. 2d 1 (Fla. 1999), none of the offensive arguments at issue in that case are present here. The most that can be said for the argument in this case is that, similar to *Craig*, while the prosecutor's language might have been harsh, it did not cross the line into the realm of improper argument. *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987) ("It was for the jury to decide what evidence and testimony was worthy of belief and the prosecutor was merely submitting his view of the evidence to them for consideration. There was no impropriety.").

Finally, assuming *arguendo* that there was some error in the state's argument, there is still no basis for relief. In *Anderson*, this Court held (with respect to the "*National Inquirer* defense" argument):

> However, although we agree that the comment was improper, Anderson is not entitled to relief. In order to require a new trial based on improper prosecutorial comments, the prosecutor's comments must
>
> > **either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.**
>
> *Spencer v. State*, 645 So. 2d 377, 383 (Fla. 1994). The improper comment in this case does not approach the level of improper comments in cases where we have granted relief. *See, e.g., Brooks v. State*, 762 So. 2d 879, 905 (Fla. 2000); *Ruiz*, 743 So. 2d at 5.

Anderson v. State, 863 So. 2d 169, 187 (Fla. 2003). (emphasis added). The complained-of comment falls far short of being the sort of comment that requires relief.[11] Simply put, under these facts, the comment at issue had no effect on the verdict.

The second part of the state's closing argument about which Pham complains reads as follows:

[11] The comment at issue here is in no way comparable to the statements at issue in *Izquierdo*, which the district court described as "fundamentally wrong." *Izquierdo v. State*, 724 So. 2d 124, 125 (Fla. 3d DCA 1998).

MR. STONE: You know, Mr. Pham testified, the Defense chose to present a case in this case, they chose to present evidence, and still they have not provided an explanation as --

MR. CAUDILL: Objection, Your Honor. May we approach?

(Whereupon, a discussion was had out of the hearing of the jury.)

MR. CAUDILL: That's burden shifting.

MR. STONE: No, it's not. I'm commenting on their case. Their case did not explain how this body got right there, and that's what I'm saying right now. I can comment on his testimony.

THE COURT: Sustain the objection. Certainly you can comment on his testimony, they're not required to present anything.

MR. STONE: Okay. I'll rephrase it.

MR. CAUDILL: Ask for a mistrial.

THE COURT: Motion for mistrial denied.

(Whereupon, the proceedings resumed in open court as follows:)

MR. STONE: Let me be a little more specific. Mr. Pham still has not been able to explain to you how this body got there, how Phi Pham's body got there. This is in evidence, it will go back with you, it will go back to the jury room. He just has not -- He cannot explain it, and he didn't explain it.

But yet, on the other hand, it's perfectly explainable if you consider the State's case in chief.

You heard the evidence, and I commented on it quite extensively during the main part of my closing, so I'm not gonna go over all that again. But from the State's case you got an explanation as to how this body got there.

Mr. Pham provided no explanation whatsoever. Consider that, please.

Now, a main part of Mr. Caudill's argument is, and I'm gonna show this photo again, is, well, this couldn't have been where the stabbing took place because if it were, there would have been blood gushing all over the place. It would have been on the walls and it would have been on the floor and it would have been all over the place, so we that this couldn't have been where she was stabbed, so she had to have been stabbed somewhere else.

Well, Mr. Caudill bases that explanation upon common sense. Oh, it's common sense that when you're stabbed here and there, there's gonna be blood gushing all over the place.

Well, I would submit to you that's not common sense. That's something that's within the realm of scientific testimony. It's not common sense to say that when you get stabbed, blood starts gushing all over the place. These are very -- They're severely deep wounds, but they're relatively narrow wounds. Undoubtedly there was a tremendous amount of internal bleeding, and blood did come out on her, but there's nothing to suggest that if you get these type of wounds, it's gonna be blood gushing all over the place.

So, I would submit it's not a matter of common sense, and if you agree with that proposition, then there goes Mr. Caudill's argument about the location of the body having been stabbed in a different location, or the body having -- or Phi having been stabbed in a different location. It's not common sense.

Mr. Caudill points out, well, Mr. Pham got up there on the witness stand, and when Mr. Pham testified, he could have said that Higgins did it but he didn't. So consequently you got to kind of use that fact, the fact that he could have said Higgins did it and didn't, that has to be used by you in a way to support the Defendant's testimony.

> Well, the reason why the Defendant didn't say that is because he knew how absurd and ridiculous that would have been in your eyes. That's the reason why he didn't say that.
>
> Mr. Caudill says that the evidence is consistent with Phi and Chris coming into the apartment together.
>
> Well, you've heard all the evidence in this case. I challenge you, and I do that in a very friendly way, I challenge you to sift through all the evidence in this case and see where there's evidence to show that Phi and Chris came in together, that he was right behind her together at the same time.

(V11, R1464-67).

Whether Pham's objection was properly sustained is debatable, and it appears, from the context of the subsequent closing argument, that the objection was premature -- there was no subsequent objection to the state's argument. In any event, the objection was sustained, the motion for mistrial denied, and there was no further objection to the subsequent argument. The denial of Pham's motion for mistrial was not an abuse of discretion, and there is no basis for relief.

As the complained-of argument reads, Pham's objection cut off the argument before the prosecutor could finish his sentence, and before any improper argument was made. On the face of the record, the only statement was that ". . . they have not provided an explanation as --." (V11, R1464). In context, that argument was not improper, but rather was a fair comment on the inconsistency in Pham's testimony and the inability of that

testimony to account for the location of the victim's body. Rather than being improper, that is an entirely proper argument based on the evidence and the inferences from it. There is no basis for relief.[12]

II. THE "JUROR MISCONDUCT" CLAIM

On pages 42-48 of his brief, Pham argues that he is entitled to a new penalty phase based upon what he says was juror misconduct. Florida law is settled regarding inquiry into matters related to jury deliberations:

> In *State v. Hamilton*, 574 So. 2d 124 (Fla. 1991), we adopted the test used by the Fifth Circuit in *Rodriguez Y. Paz v. United States*, 473 F.2d 662, 663-64 (5th Cir.), *cert. denied*, 414 U.S. 820, 94 S.Ct. 115, 38 L.Ed.2d 52 (1973), and *United States v. Howard*, 506 F.2d 865, 869 (5th Cir.1975), which limits the trial court's inquiry in jury misconduct cases to
>
> > objective demonstration of extrinsic factual matter disclosed in the jury room. Having determined the precise quality of the jury breach, if any, the [trial] court must then determine whether there was a reasonable possibility that the breach was prejudicial to the defendant.... Though a judge lacks even the insight of a psychiatrist, he must reach a judgment concerning the subjective effects of objective facts without benefit of couch-interview introspections. In this determination, prejudice will be assumed in the form of a rebuttable presumption, and the burden is on the Government to

[12] The argument after the objection, which was what the prosecutor would have said had Pham not interrupted the argument, was not objected to. Any complaint as to that argument is, of course, waived.

> demonstrate the harmlessness of any breach to the defendant.

Hamilton, 574 So. 2d at 129 (*quoting United States v. Howard,* 506 F.2d at 869 (alteration in original)). [FN3] In applying this test, courts must take into account Florida's *Evidence Code* which forbids any judicial inquiry into the emotions, mental processes, or mistaken beliefs of jurors. § 90.607(2)(b), *Fla. Stat*. (1993). In relevant part, this section states as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment.

Notwithstanding this evidentiary rule, [FN4] we have permitted jurors to testify about "'overt acts which might have prejudicially affected the jury in reaching their own verdict.'" *Hamilton,* 574 So. 2d at 128 (*quoting Law Revision Council Note* (1976), 6C *Fla. Stat. Ann*. 57 (1979) (alteration in original)).

> [FN3.] We first announced this rule in *McAllister Hotel, Inc. v. Porte*, where we said:
>
> > [T]he law does not permit a juror to avoid his verdict for any reason which essentially inheres in the verdict itself, as that he "did not assent to the verdict; that he misunderstood the instructions of the Court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow-jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast."
>
> 123 So. 2d 339, 344 (Fla. 1959) (*quoting Wright v. Illinois & Mississippi Telegraph Co.*, 20 Iowa 195, 210 (1866)).
>
> [FN4] Numerous public policy reasons have been advanced for this rule: (1)

> "litigation will be extended needlessly if the motives of jurors are subject to challenge," *Maler,* 579 So. 2d at 99; (2) "'preventing litigants or the public from invading the privacy of the jury room,'" *id*. (*quoting Velsor v. Allstate Ins. Co.,* 329 So.2d 391, 393 (Fla. 2d DCA), cert. dismissed, 336 So. 2d 1179 (Fla. 1976)); (3) shielding jurors from harassment by lawyers; and (4) finality of verdicts.

In *Maler*, we reaffirmed our holding in *Hamilton* but acknowledged that in light of the strong public policy against going behind a verdict to determine if juror misconduct has occurred, "an inquiry is never permissible unless the moving party has made sworn factual allegations that, if true, would require a trial court to order a new trial using the standard adopted in Hamilton." *Id.* at 100. In *Maler*, we stated:

> Similarly, any receipt by jurors of prejudicial nonrecord information constitutes an overt act. Accordingly, it is subject to judicial inquiry even though that inquiry may not be expanded to ask jurors whether they actually relied upon the nonrecord information in reaching their verdict. *Hamilton*. As Judge Hubbart correctly suggested in the opinion under review, the case law on this topic allows inquiry only into objective acts committed by or in the presence of the jury or a juror that might have compromised the integrity of the fact-finding process. *Maler*, 559 So. 2d at 1162 (*citing Russ* [*v. State*, 95 So. 2d 594 (Fla. 1957)]; *Marks* [*v. State Road Dept.,* 69 So. 2d 771 (Fla. 1954)]; *accord Hamilton.*
>
> *Id*. at 101. [FN5]
>
> FN5. Judge Hubbart, writing for the Third District in *Maler*, explained:
>
> In each of these cases, the integrity of the fact-finding process was compromised by some objective occurrence so as to

> "taint" the jury's deliberations, *viz*: third party contact or conversations about the case with or in the presence of a juror, *Russ; Marks*; total abandonment of any deliberative process as when the jury decides the case by quotient, lot or chance, *Marks;* a disqualifying act of a juror which brings the latter's fairness into serious question, as when the juror lies about a material matter during jury selection, *Sconyers* [*v. State*, 513 So. 2d 1113 (Fla. 2nd DCA 1987)], or expresses vile racial, religious or ethnic slurs about a party or witness, [*United States v. Heller* [785 F.2d 1524 (11th Cir. 1986)]; or jury exposure to alleged facts about the case which were never introduced in evidence, as when a juror gives personal testimony in the jury room about the case, Russ, or visits a relevant scene in the case and reports his findings to the jury, [*United States v. Posner* [644 F.Supp. 885 (S.D. Fla. 1986)]. Moreover, these cases all center around some type of objective act or occurrence that was relatively easy to ascertain-as opposed to probing, as here, into the gossamer mental processes, agreements, conclusions, and reasoning of the jury.
>
> *Maler v. Baptist Hospital*, 559 So. 2d 1157, 1162 (Fla. 3d DCA 1989), *approved*, 579 So. 2d 97 (Fla. 1991).

Powell v. Allstate Ins. Co., 652 So. 2d 354, 356-357 (Fla. 1995). Moreover,

> Testimony from the jurors revealed that certain jurors had remarked on the credibility of witnesses immediately after they testified; **however, there is no evidence that the jury discussed matters outside the record or that discussions concerning the ultimate verdict were held prior to the jury being excused to formally deliberate.**

Estate of Stuckey v. Brown, 688 So. 2d 438, 439 (Fla. 1st DCA 1997). (emphasis added).

In this case, after the court received a letter from an alternate juror, that juror and two others were interviewed by the court and counsel. The jurors all testified that the comments at issue were not made during the course of deliberations, but rather were "under the breath" comments. (V13, R223, 241, 246).[13] There is no testimony at all that any juror had decided to not consider either aggravating or mitigating circumstances. (V13, R248). No "deliberations" took place prematurely, and there is no evidence at all that any juror pre-judged the case in any way. (V13, R248). In denying the motion for mistrial as to the penalty phase, the trial court said:

> The Court made inquiry of the three jurors that were Mr. Valenti and the other two jurors that were identified, I questioned them, gave both counsel an opportunity to question them, offered to bring in every individual juror that is on this jury for individual inquiry, both counsel indicated that that was not necessary,[14] and based on the testimony that was presented both orally by Mr. Valenti and Miss Appleman and Mr. Perkins, and specific inquiry in response to the Court's inquiries and the inquiries of counsel, in conjunction with the letter that Mr. Valenti furnished the Court, finds no basis to find

[13] These events took place during the penalty phase, and made reference to Pham's "sad story" in coming to this country from Viet Nam. (V13, R223, 241, 246).

[14] Pham cannot complain that the rest of the jurors should have been interviewed when he turned down the chance to do so.

> that while there may have been a lack of compliance with the Court's instructions, that that in any way inured to the verdict, and that he penalty phase in progress cannot be fair.

(V14, R504-5). Those findings are supported by competent substantial evidence, and are not an abuse of discretion in light of the evidence presented. There is no basis for relief under settled Florida law.

To the extent that Pham says that the "comments" attributed to unidentified jurors represented a rejection of mitigation predicated on his early life in, and escape from, Southeast Asia, that argument overstates the mitigation that was presented. It is true that Pham escaped from Viet Nam following the communist takeover, and it is true that he endured great hardship in doing so. It appears that the Vietnamese culture is more strict with regard to the upbringing of children than is American culture (or at least this is what Pham says). However, there is absolutely no evidence at all that the "cultural mores in Vietnam" condone or approve of murdering one's spouse. *See, Initial Brief*, at 47. The mitigation evidence is discussed at length later in this brief -- at this point it is sufficient to note that Pham did not present a mitigation case that was based on the "cultural mores" of Vietnamese society. Because that is so, Pham's claim is based on a non-issue, in addition to having

no legal support in the first place. There is no basis for requiring a new penalty phase proceeding.

III. THE PRIOR VIOLENT FELONY AGGRAVATOR CLAIM

On pages 49-51 of his brief, Pham argues that the conviction for battery on a law enforcement officer should not have been used to support the prior violent felony aggravating circumstance. Whether an aggravating circumstance exists is a factual finding reviewed under the competent substantial evidence standard. When reviewing aggravating factors on appeal, this Court, in *Alston v. State,* 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," *quoting Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997), *cert. denied,* 522 U.S. 970 (1997). Pham is not entitled to relief for the reasons set out below.

The primary support for the prior violent felony aggravator was the contemporaneous conviction for the attempted murder of Christopher Higgins, a fact that is not mentioned at all in Pham's brief. (V3, R559). In fact, while the state did introduce

evidence about the battery on a law enforcement officer conviction at the *Spencer* hearing, that conviction was not discussed at all in the State's sentencing memorandum. (V3, R538). Florida law is well-settled that contemporaneous convictions, like the conviction for the attempted murder of Christopher Higgins, establish the prior violent felony aggravator. *See, LeCroy v. State*, 533 So. 2d 750 (Fla. 1988); *King v. State*, 390 So. 2d 315 (Fla. 1980). Because that is the law (and because Pham has not challenged this aspect of Florida law), there is no basis for further consideration of this issue. The prior violent felony aggravator is established by virtue of the attempted murder conviction, regardless of whether the battery on a law enforcement officer conviction is considered or not. Pham has not challenged the Higgins conviction, and has waived any challenge to its application in aggravation. This issue, when all of the facts are considered, has no factual basis.

To the extent that discussion of the second conviction supporting the prior violent felony aggravator is even necessary, Florida law is clear that the details of the prior conviction are admissible. *Dufour v. State*, 495 So. 2d 154 (Fla. 1986). And, under the facts of Pham's battery, there is no colorable claim that that offense was anything other than a crime of violence. *See, Simmons v. State*, 934 So. 2d 1100, 1121

(Fla. 2006). To the extent that Pham raises a claim based on *Ring v. Arizona*, no such objection was raised at the time of the *Spencer* hearing, and any claim is waived now. (V18, R8-14). It is true that Pham raised a *Ring*-based claim (of sorts) in his sentencing memorandum (V3, R526), but that claim does not appear to be the same claim contained in his brief (which completely ignores the contemporaneous conviction). The *Ring* claim contained in Pham's brief is not preserved for review.

Likewise, Pham's claim that it was improper for the sentencing court to consider an aggravator that was not submitted to the jury was not preserved by objection at trial. Because this claim was not preserved, this Court should not consider it. Even putting aside the failure to preserve this claim, it is not a basis for relief because it is foreclosed by long-settled law. *Hoffman v. State*, 474 So. 2d 1178 (Fla. 1985); *Engle v. State*, 438 So. 2d 803 (Fla. 1983).

Finally, to the extent that further discussion is even necessary, even assuming some legal basis for Pham's argument, there is no basis for relief because the prior violent felony aggravator is supported by the attempted murder conviction that Pham has left out of his brief. There is no basis for relief of any sort.

IV. THE *RING V. ARIZONA* CLAIM

On pages 52-74 of his brief, Pham sets out a lengthy argument which purports to challenge Florida's capital sentencing statute based on *Ring v. Arizona*. While Pham says that this claim was repeatedly raised pre-trial, citing to multiple pages of the record, the true facts are that the *Ring* claim raised in the trial court consisted of two motions which totaled nine (9) pages. (V1, R118-122, 125-128).[15] The trial court properly denied those motions under prevailing law. (V15, R937).

To the extent that Pham has preserved a basic *Ring v. Arizona* claim, this Court has repeatedly rejected such claims when, as here, there is a contemporaneous felony conviction:[16]

> We deny Hojan's claims asserting errors under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).[17] Hojan's case also involved convictions for multiple contemporaneous crimes. This Court has held that such facts-found unanimously by a jury-satisfy the requirements of *Ring. See, e.g., Rodgers v. State*, 948

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[15] None of the other record citations found on page 59 of Pham's brief have anything at all to do with *Ring*. The motions filed by Pham appear to be form motions -- the newest case cited in the motion beginning on R118 is from 2004; the motion found at R125 cites no cases at all.

[16] Pham was convicted of the attempted murder of Christopher Higgins as well as for armed burglary.

[17] No claim based on *Apprendi* is preserved -- that case was not cited in Pham's motion, and no such argument was advanced below.

> So. 2d 655, 673 (Fla .2006); *Smith v. State*, 866 So. 2d 51, 68 (Fla. 2004); *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003). Accordingly, we deny Hojan's *Ring* claims.
>
> Further, Hojan's *Apprendi* claims have also been previously rejected by this Court. First, this Court has rejected claims that the State is required to provide notice of the aggravating factors it intends to prove in the penalty phase. *See, e.g., Kormondy v. State,* 845 So. 2d 41, 54 (Fla. 2003); *Lynch v. State*, 841 So. 2d 362, 378 (Fla. 2003). Second, this Court has also rejected the claim that the jury must report its findings. *See, e.g., Walker v. State*, 957 So. 2d 560, 569 (Fla. 2007); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003). Third, this Court has rejected the claim that a nonunanimous jury sentencing recommendation is unconstitutional. *See, e.g., Parker v. State*, 904 So. 2d 370, 383 (Fla. 2005); *Hodges v. State*, 885 So. 2d 338, 359 n. 9 (Fla. 2004). Fourth, this Court has rejected burden-shifting claims that argue Florida's capital sentencing statute or jury instructions unconstitutionally place the burden on the defendant to prove that sufficient mitigating circumstances exist to outweigh the aggravators. *See, e.g., Griffin v. State*, 866 So. 2d 1, 14 (Fla. 2003); *Sweet v. Moore,* 822 So. 2d 1269, 1274 (Fla. 2002). Finally, this Court has also rejected claims that telling a jury that it only recommends a sentence of life or death, while the final decision on the sentence is up to the judge unconstitutionally dilutes the jury's responsibility. *See, e.g., Sochor v. State*, 619 So. 2d 285, 291 (Fla. 1993). Accordingly, we deny Hojan's *Apprendi* claims as well.

Hojan v. State, 3 So. 3d 1204, 1209 at n. 2 (Fla. 2009). *Accord, Aguirre-Jarquin v. State*, 9 So. 3d 593, 601 at n. 8 (Fla. 2009); *Hayward v. State*, 2009 WL 2612524, 22 (Fla. 2009); *Eaglin v. State,* 2009 WL 1544264, 11 (Fla. 2009); *Frances v. State*, 970 So. 2d 806, 822-23 (Fla. 2007) (rejecting *Ring* argument in light of prior violent felony aggravator based on

contemporaneous convictions for murder and robbery). The *Ring* claim, to the limited extent that it is preserved, is meritless under prevailing law.

To the extent that further discussion of this claim is necessary, it is axiomatic that this Court's pronouncements about the proper construction of Florida law are binding. In an effort to create a claim where none exists, Pham has ignored the following language from *Mills*:

> The plain language of section 775.082(1) is clear that the maximum penalty available for a person convicted of a capital felony is death. When section 775.082(1) is read *in pari materia* with section 921.141, *Florida Statutes*, there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death. [footnote omitted] Both sections 775.082 and 921.141 clearly refer to a "capital felony." *Black's Law Dictionary* defines "capital" as "punishable by execution; involving the death penalty." *Black's Law Dictionary* 200 (7th ed. 1999). Merriam Webster's Collegiate Dictionary defines "capital" as "punishable by death ... involving execution." *Merriam Webster's Collegiate Dictionary* 169 (10th ed.1998). Therefore, a "capital felony" is by definition a felony that may be punishable by death. The maximum possible penalty described in the capital sentencing scheme is clearly death.

Mills v. Moore, 786 So. 2d 532, 538 (Fla. 2001). Whatever can be said about the viability of *Mills*, there is no doubt that that part of the decision remains controlling law in Florida.

Finally, to the extent that Pham has attempted to raise other challenges to Florida's sentencing scheme, those claims (which include, for example, a claim that at least two

aggravating circumstances must be found) are not preserved for review because they were not raised in the trial court. *Farina v. State*, 937 So. 2d 612, 628-629 (Fla. 2006); *Archer v. State*, 934 So. 2d 1187, 1206 (Fla. 2006); *Davis v. State*, 928 So. 2d 1089, 1134 (Fla. 2005); *Wright v. State/Crosby*, 857 So. 2d 861, 876 (Fla. 2003); *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995); *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982).

V. THE HEINOUSNESS AGGRAVATOR

On pages 75-82 of his brief, Pham argues that the sentencing court erred in finding the applicability of the heinous, atrocious or cruel aggravating circumstance.[18] Whether an aggravating circumstance exists is a factual finding reviewed under the competent substantial evidence test. When reviewing aggravating factors on appeal, this Court in *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the

[18] Pham's exact language refers to the murder having been "committed in a heinous, atrocious and cruel manner without any pretense of moral or legal justification." The heinousness aggravator has no "justification" component.

right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," *quoting Willacy v. State,* 696 So. 2d 693, 695 (Fla. 1997), *cert. denied*, 522 U.S. 970 (1997).

In finding that the murder of Phi Pham was especially heinous, atrocious or cruel, the trial court said:

> **The capital felony was especially heinous, atrocious, or cruel. F.S. 921.141 (5)(h)**
>
> Per Dr. Bulic, the medical examiner, the victim Phi Pham was stabbed at least six times. Phi's daughter Lana witnesses the first stab wound to her throat. Given the nature of her wounds, the victim would have suffered a great deal of pain. One of the wounds was inflicted with such force that it pierced her entire body and exited her back. Dr. Bulic also described a shallow incision to the palm of her right hand consistent with a defensive wound. Such a wound was consistent with the victim having grabbed the blade of the knife.
>
> Lana Pham testified that she left her apartment and ran to a neighbor's apartment. Upon returning home she went to her mother who was lying on the floor with blood gushing from her throat. She stated that her mother tried to speak, but could not, and instead gestured toward the door.
>
> Dr. Bulic testified that Phi Pham was conscious during the attack and that it would have taken up to five minutes for death to ensue. The victim's defensive wound to the hand and testimony of Lana Pham support his opinion that the victim was conscious, and lived for some minutes after the attack.
>
> In determining whether this aggravating factor has been proven, this Court considered the means and manner by which Tai Pham caused the victim's death as well as the immediate circumstances surrounding her death. The following evidence supports a finding that the murder was especially heinous, atrocious or cruel:

> 1. The Defendant inflicted at least six stab wounds to the chest, abdomen, arm, and base of victim's neck. Butler v. State, 842, So. 2d 817 (Fla. 2003).
>
> 2. Phi Pham was conscious during the attack, and struggled for her life as evidenced by the defensive wound to the palm of her right hand. *Cox v. State*, 819 So. 2d 705 (Fla. 2002).
>
> 3. The victim's death was not immediate, and she remained alive for several minutes after the attack.
>
> 4. The stab wounds inflicted resulted in a high degree of pain to the victim.
>
> 5. The initial stab wound occurred in front of the victim's daughter Lana, and the remaining wounds occurred in the hallway just outside her bedroom door. *Butler v. State*, 842 So. 2d 817 at 837 (Fla. 2003).
>
> 6. While the victim lay helpless and dying in the hallway, she could hear the vicious attack by the Defendant on her boyfriend, Christopher Higgins, just a few feet from the dining room and kitchen area.
>
> The Court finds this aggravating circumstance has been proven beyond a reasonable doubt and is given great weight by the Court.

(V3, R561-62). Those findings are in accord with settled Florida law, and there is no colorable argument that this murder was anything but heinous, atrocious or cruel.

This Court has repeatedly upheld the heinousness aggravator in stabbing-murder cases. *Aguirre-Jarquin v. State*, 9 So. 3d 593, 609 (Fla. 2009); *Francis v. State*, 808 So. 2d 110, 135

(Fla. 2001); *Cummings-El v. State*, 684 So. 2d 729 (Fla. 1995); *State v. Breedlove*, 655 So. 2d 74 (Fla. 1995); *Breedlove v. State*, 413 So. 2d 1 (Fla. 1982). Pham has offered no legally valid argument to support his claim that this aggravating factor is inapplicable.

To the extent that Pham says that the heinousness aggravator is inapplicable because he did not intend to torture his victim, there is no legal basis for that claim. This Court has explicitly rejected any notion that there is an "intent element" attached to the heinousness aggravator:

> In *Lynch v. State*, 841 So. 2d 362 (Fla. 2003), we held that "[i]n determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator." *Id.* at 369 (emphasis supplied); *see also Farina v. State*, 801 So. 2d 44, 53 (Fla. 2001) ("[The HAC] aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's."); *Guzman v. State*, 721 So. 2d 1155, 1160 (Fla. 1998) ("**The intention of the killer to inflict pain on the victim is not a necessary element of the aggravator**.") Based on the above, Reynolds' contention lacks merit.

Reynolds v. State, 934 So. 2d 1128, 1155 (Fla. 2006). (emphasis added).[19] This claim is not a basis for relief.[20]

[19] At least since *Guzman* in 1998, the "intent element" argument has been a legally invalid claim.

[20] Alternatively and secondarily, any error associated with finding the heinousness aggravator is harmless beyond a reasonable doubt given the remaining aggravating circumstances and the minimal mitigation present in this case.

VI. THE COLDNESS AGGRAVATOR

On pages 83-88 of his brief, Pham says that the sentencing court should not have found that his murder of Phi Pham was cold, calculated and premeditated. Whether an aggravating circumstance exists is a factual finding reviewed under the competent substantial evidence test. When reviewing aggravating factors on appeal, this Court in *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," *quoting Willacy v. State,* 696 So. 2d 693, 695 (Fla. 1997), *cert. denied*, 522 U.S. 970 (1997).

In the sentencing order, the court made the following findings as to the coldness aggravating factor:

> **The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. F.S. 921.141 (5)(i)**
>
> To support a finding of this aggravator, the State must prove: 1) the murder was the product of cool and calm reflection, and not an act prompted by emotional frenzy, panic, or a fit of rage, 2) the

Defendant had a careful plan or prearranged design to commit murder before the killing, 30 the Defendant exhibited heightened premeditation, and 4) the Defendant had no pretense of moral or legal justification.

The trial evidence which demonstrated cool, calm reflection, heightened premeditation, and a careful or prearranged design by the Defendant to commit the murder included the following facts:

> 1. The Defendant called Lana to ascertain she was alone in the apartment.
>
> 2. Lana' Pham's testimony that the Defendant brought two knives in a bag with him to the apartment, and that the knife used in the attack was not from her home.
>
> 3. The Defendant bound and tied Lana Pham to prevent her from escaping or warning anyone of the situation.
>
> 4. The Defendant waited for an hour for the victim to return home before he killed her.
>
> 5. While awaiting the victim's return home, the Defendant told Lana to "take care of her sisters when he and her mom were gone."
>
> 6. Upon hearing the victim enter the apartment, the Defendant immediately attacked and stabbed her without provocation.

This evidence will not, and should not be viewed different by this Court because the homicide stems from a domestic situation. *Pooler v. State*, 704 So. 2d 1375 (Fla. 1997).

No other aggravating factors enumerated by statute are applicable to this case, and no other factors were considering in aggravation.

(V3, R562-63).

Pham's challenge to this aggravator is solely that the evidence does not support the findings made by the circuit court -- he seems to agree that the coldness aggravator would apply if the evidence was as the Court found. The problem for Pham's argument is that there is no deficiency or factual inaccuracy in the findings of the sentencing court. Viewing the evidence, and the reasonable inferences from it, in the light most favorable to the State, it is clear that the seven enumerated findings made by the sentencing court are well-established by the evidence. *See,* V8, R851-875. Because that is so, there is simply no basis in fact for Pham's claims.

According to Pham, there is a pretense of justification for the "death of Pallis Paulk"[21] because of parenting disagreements "brought about by deep-rooted cultural differences," there is no showing that the Vietnamese culture approves, authorizes or condones one parent killing the other because of disagreement over how children should be raised. *See, Hill v. State*, 668 So. 2d 901 (Fla. 1996); *Dougan v. State*, 595 So. 2d 1 (Fla. 1992).

To the extent that further discussion is necessary, there is clear evidence of advance planning of the murder, as demonstrated by Pham's bringing two knives to the scene with him; by his actions in securing his daughter so that she could

[21] Ms. Paulk was the victim in another case. See *Jackson v. State*, 34 Fla. L. Weekly S541 (Fla. Sept. 24, 2009).

not warn her mother; by his actions in praying with his daughter and telling her to care for her sisters when he and their mother were gone; and by his actions in hiding and springing his attack on the victim from a concealed location when she returned home. *See, Walker v. State,* 957 So. 2d 560, 581-83 (Fla. 2007); *Anderson v. State,* 863 So.2d 169, 176-177 (Fla.2003); *Lynch v. State,* 841 So. 2d 362, 372-373 (Fla. 2003); *Preston v. State*, 444 So. 2d 939 (Fla. 1984); *Cruse v. State*, 588 So. 2d 983 (Fla. 1991); *Jackson v. State*, 498 So. 2d 408 (Fla. 1986). This murder was not an "unfortunate event brought about by deep-rooted cultural differences" as Pham would have this Court believe -- the murder of Phi Pham was cold, calculated and premeditated without any pretense of moral or legal justification. The coldness aggravator was properly applied here, and death is the proper sentence.[22]

VII. THE DEATH SENTENCE IS PROPORTIONAL

On pages 89-94, Pham argues that his death sentence, which is supported by four aggravating factors (including two of the weightiest aggravators), is disproportionate. In his brief, Pham relies on various cases for the proposition that his death

[22] Alternatively and secondarily, any error associated with finding the heinousness aggravator is harmless beyond a reasonable doubt given the remaining aggravating circumstances and the minimal mitigation present in this case.

sentence is not proportionate. With the exception of *Fitzpatrick v. State,* 527 So. 2d 809 (Fla. 1988), all of those cases involve only two aggravating factors instead of the four aggravators present here. And, in *Fitzpatrick*, the heinousness and coldness aggravators were not present, and there was substantial mental mitigation that does not exist in this case.

Rather than being similar to the cases set out in Pham's brief, this case is most similar to *Buzia*, where this Court held:

> In his fifth claim, Buzia challenges the weight assigned to the aggravating circumstances and argues that the death penalty is not appropriate. The weight to be given aggravating factors is within the discretion of the trial court, and it is subject to the abuse of discretion standard. *Sexton v. State*, 775 So. 2d 923, 934 (Fla. 2000). "[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court." *Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990) (*quoting Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)). We affirm the weight accorded an aggravator if based on competent, substantial evidence. *Sexton*, 775 So. 2d at 934. Here, the trial court assigned great weight the prior violent felony, avoid-arrest, HAC, and CCP aggravators. As discussed above, competent, substantial evidence supports the court's finding of these aggravators. We find no abuse of discretion.
>
> We are nevertheless obligated to review each death sentence for proportionality. *Anderson v. State*, 841 So. 2d 390, 407 (Fla.), *cert. denied*, 540 U.S. 956, 124 S.Ct. 408, 157 L.Ed.2d 292 (2003). In this case, the jury recommended death by a vote of eight to four, and the trial court so sentenced Buzia. The court found and assigned great weight to four aggravating circumstances - prior violent felony, avoid-arrest, HAC, and CCP. We have held that both the HAC and CCP aggravators are "two of the most serious

aggravators set out in the statutory sentencing scheme." *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999). Furthermore, we have upheld death sentences where the prior violent felony aggravator was the only one present. *See, e.g., LaMarca v. State,* 785 So. 2d 1209, 1217 (Fla. 2001); *Ferrell v. State,* 680 So. 2d 390, 391 (Fla. 1996).

The court assigned little weight to two factors under the statutory catchall provision, section 921.141(6)(h), *Florida Statutes* (2003), specifically Buzia's interaction with the community and his work record. The court also found several nonstatutory mitigators and afforded the weight indicated: influence of a mental or emotional disturbance, not extreme in nature (substantial weight); capacity to appreciate the criminality of one's conduct or to conform his conduct to the requirements of law was impaired, but not substantially (substantial weight); gainful employment (little weight); appropriate courtroom behavior (little weight); cooperation with law enforcement (little weight); difficult childhood (little weight); and remorse (little weight). The court determined that the aggravating circumstances outweighed the mitigation and sentenced Buzia to death.

We find that the sentence is proportional in relation to other death sentences we have upheld. [FN8] *See, e.g., Lynch*, 841 So.2d at 377 (finding death sentence proportionate where three aggravators were found applicable to each murder - including prior violent felony, CCP, and HAC - and little weight was given one statutory mitigator and eight nonstatutory mitigators were accorded moderate or little weight); *Way,* 760 So.2d at 920-21 (finding the death penalty proportional where four aggravators were found-prior violent felony, murder committed during the commission of a felony, HAC, and CCP - and two statutory mitigators and seven nonstatutory mitigators were found); *Cave v. State*, 727 So. 2d 227, 229 (Fla. 1998) (affirming death sentence where four aggravators were found - murder in the course of a felony (robbery-kidnapping), CCP, HAC, and avoid-arrest-and one statutory and eight nonstatutory mitigators were found).

> [FN8.]Buzia cites various cases based on the assumption that only one aggravator in this case has merit. Because competent substantial evidence supports the trial court's finding of four aggravating circumstances, and because it properly assigned great weight to those aggravators, these cases do not apply.

Buzia v. State, 926 So. 2d 1203, 1216-1217 (Fla. 2006). Against the mitigation offered in this case, any of the four aggravating factors would be sufficient, standing alone, to support Pham's sentence of death. *See, Butler v. State,* 842 So. 2d 817, 833 (Fla. 2003) ("The trial court found one aggravating circumstance, heinous, atrocious or cruel (HAC), and several mitigating circumstances, including under extreme mental or emotional disturbance."); *Hudson v. State*, 992 So. 2d 96, 119 (Fla. 2008). This case is more heavily aggravated, and far less mitigated, than *Butler*. If death was the proper sentence in that case, and this Court held that it was, death is surely proper in this case, as well.

SUFFICIENCY OF THE EVIDENCE

Pham does not challenge the sufficiency of the evidence to support his murder conviction. However,

> This Court is obligated to review the record of a death penalty case to determine whether the evidence is sufficient to support the murder conviction. *See Fla. R.App. P.* 9.140(i); *Davis v. State*, 859 So. 2d 465, 480 (Fla. 2003).

Winkles v. State, 894 So. 2d 842, 847 (Fla. 2005); *Aguirre-Jarquin v. State*, 9 So. 3d 593, 609 (Fla. 2009). In this case, through the testimony of Lana Pham, the evidence established that Pham entered the victim's residence surreptitiously while armed with two (2) butcher knives, restrained Lana Pham, waited until the victim, Phi Pham, returned home, at which time he hid, and, when the opportunity was right, stabbed Phi Pham in the throat. See pp. 1 - 8, above. These facts are sufficient to establish first degree murder under either a premeditation or felony-murder theory.

CONCLUSION

Pham's conviction and sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Michael S. Becker**, Assistant Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118on this _____ day of December, 2009.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL