IN THE SUPREME COURT OF FLORIDA

TAI PHAM,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC08-2355
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES CITED:

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STATEMENT OF THE CASE

On November 8, 2005, the grand jury in and for Seminole County, Florida returned an indictment charging Appellant with one count of first degree premeditated murder in violation of Section 782.04(1)(a), Florida Statutes (2005), one count of attempted first degree premeditated murder in violation of Sections 777.04(1)(4)(b), 782.04(1)(a)1, 775.087(1), Florida Statutes (2005), one count of armed kidnapping in violation of Sections 787.01(1)(a)(2) and 775.087(1), Florida Statutes (2005) and one count of armed burglary of a dwelling in violation of Sections 810.02(1)(b) and (2)(b) and 810.07, Florida Statutes (2005). (R21-23) On November 22, 2005, the state filed its notice of intent to seek the death penalty. (R26) Appellant filed numerous motions attacking the constitutionality of various aspects of Florida's capital punishment statutes including a

motion to declare it unconstitutional pursuant to ***Ring v. Arizona***, 536 US 584 (2002). (R118-122) On January 15, 2008, a hearing on the death penalty motions was conducted before the Honorable Marlene Alva, Circuit Court Judge. (Vol. XVII, 913-983) Relying on prior decisions from the Florida Supreme Court, Judge Alva denied the motions. (R259-263)

On August 29, 2007, Judge Alva entered an order adjudging Appellant incompetent to proceed and committing him to the Department of Children and Families. (R234-237; Vol. XVI, 902) On December 6, 2007, Judge Alva entered an order adjudging Appellant to be competent to proceed. (R246-247)

Appellant proceeded to jury trial on March 3-7, 2008 with the Honorable Marlene Alva, Circuit Court Judge presiding. (Vols. IV-XI) During closing arguments, Appellant objected to the State's characterization of Appellant's testimony as "nonsense." (Vol. XI, 14-15) Further, Appellant moved for a mistrial when the State improperly shifted the burden of proof to the defense. (Vol. XI, 1464-1465) Although the trial court sustained the objection to the latter comment, the motion for mistrial was denied. (Vol. XI, 1464) Following deliberations, the jury returned verdicts finding Appellant guilty as charged on all counts. (Vol. XI, 1528-1529; R453-457)

On May 20-22, 2008, the penalty phase was conducted before Judge Alva. (Vols. XII-XIV) During the course of the penalty phase, one of the alternate jurors gave a letter

to the bailiff indicating that several jurors either had or were currently rejecting the cultural mitigators which were being presented. The letter implied that the jurors were clearly discussing the case in direct contravention to the Court's instructions. (Vol. XIII, 219-259) Defense counsel moved for a mistrial. (R221) The Court then conducted inquiries of three of the jurors who indicated that there were comments made concerning people who come to America having to live by American standards and American laws and that while it is terrible to hear these sad stories there are a lot of people who have tough luck. (Vol. XIII, 223, 241, 246) The Court reserved ruling but gave a cautionary instruction to the jurors. (Vol. XIII, 258-259) The penalty phase continued and following the presentation of the evidence, the Court revisited the issue of juror misconduct occasioned by the alternate juror's letter. (Vol. XIV, 493-505) The Court denied the motion for mistrial but found that there was lack of compliance with the Court's instructions. (Vol. XIV, 504-505) Defense counsel then objected to the State eliciting evidence of lack of remorse on the part of the Appellant but the Court overruled the objection on the grounds that it was too late and the defense itself brought up remorse. (Vol. XIV, 506-508) Following deliberations, the jury returned an advisory verdict recommending the death penalty by a vote of 10 to 2. (Vol. XIV, 577; R 501) On May 30, 2008, Appellant filed a motion for a new sentencing hearing and for interviews of the jurors. (R507) At a hearing on the motion conducted June 18, 2008, Judge Alva denied

the motion finding no misconduct and noting that counsel had been given the opportunity to question the other jurors and declined. (Vol. XVII, 1077-1099) On August 18, 2008, Judge Alva conducted a ***Spencer***[1] hearing where counsel for the State and defense presented additional evidence. (Vol. XVIII, 1100-1272)

On November 14, 2008, Appellant again appeared before Judge Alva for sentencing. (Vol. XVIII, 1273-1296) After reciting her findings of fact, Judge Alva adjudicated Appellant guilty and sentenced him to death for the first degree murder conviction and concurrent life terms for the remaining counts with all counts running concurrently. (Vol. XVIII, 1293-1294; R 558-568, 569-573)

Appellant filed a timely notice of appeal on December 10, 2008. (R576-577) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R591-592)

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[1] ***Spencer v. State***, 615 So.2d 288 (Fla. 1993)

STATEMENT OF THE FACTS

Tai Pham (Appellant) and Phi Pham (Amy) were married but had been separated for two years. (Vol. VIII, 871;Vol. X, 1230) Amy had one daughter, Lana and Amy and Appellant had two daughters, Zena and Kimmie. (Vol. VIII, 843, 1230) Amy and Appellant are both from Viet Nam and Appellant was trying to raise the children in a traditional Vietnamese manner. (Vol. VIII, 855, 872) Appellant was very strict with the children and if they did wrong, he would punish them including spanking. (Vol. VIII, 872) When Amy and Appellant separated, the children lived with Amy. (Vol. VIII, 843, 846) Amy was not as strict with the children as Appellant. (Vol. VIII, 873) Appellant did not approve of the way the children dressed and did not approve when the girls would spend the night at other people's houses. (Vol. VIII, 873) Appellant continued to be concerned about the children even after he and his wife separated. (Vol. VIII, 873)

On October 22, 2005, a Saturday, Appellant worked at Crystal Electronics from 9:00 A.M. until approximately 8:30 P.M. (Vol. X, 1227-1228) During the day Appellant called and spoke with his daughter Zena. Zena told her father that Amy had purchased condoms for both Zena and Lana. (Vol. X, 1229, 1237) Based upon that conversation, Appellant made plans to speak with his wife after work. (Vol. X, 1229) On his way home from work, Appellant called his wife's apartment to speak to Zena and Kimmie but instead talked only to Lana. (Vol. X, 1230) Lana told Appellant that she

was home alone and that her younger sisters were spending the night at a friend's house and her mother had gone out. (Vol. VIII 874, 1230) Prior to her mother arriving at home, Lana had had a boy over which she knows that Appellant would not have permitted. (Vol. VIII, 879) After speaking with Lana, Appellant drove home but realized what Lana had told him and instead drove to his wife's apartment. (Vol. X, 1230) Appellant testified that he went to his wife's apartment to give her money for the children, to talk to his wife about the condoms that she had purchased for Zena and Lana, to make sure that Zena and Kimmie came home, and to give his wife mail that had come for her. (Vol. X, 1287) Appellant testified that he arrived at his wife's apartment around 10:00 P.M., knocked on the door and Lana answered and let him in. (Vol. X, 1232-1233) Lana, however, testified that she did not let Appellant in the apartment and doesn't know how he got in. (Vol. VIII, 852) Lana first realized Appellant was present when she felt her hair being pulled down towards the floor and looked over and saw Appellant with two knives in his hand. (Vol. VIII, 852) Lana testified that Appellant dragged her to her room, closed the door, tied her up using shoe laces and cut up pillow cases and then waited until Amy returned. (Vol. VIII, 853) Once Appellant got Lana to her room, Lana testified that Appellant put the knives under the cushion of the bed and did not threaten her with the knives. (Vol. VIII, 886) Appellant testified that he was watching television in the living room while Lana was on the computer and he noticed that she was on My

Space and had posted a picture of herself showing her rear end. (Vol. X, 1233-1234) According to Appellant Lana got upset when he told her to take the picture off the internet. (Vol. X, 1234) At some point two friends knocked on the door but Appellant sent them away which also made Lana angry. (Vol. X, 1234) Lana felt that Appellant had ruined her evening and following a discussion, Appellant told Lana to get off the internet and go to her room which she did. (Vol. X, 1234-1235) About a half an hour later, Appellant went into Lana's room where she was watching television. (Vol. X, 1235) Appellant testified that he wanted Lana to come down to the car to help him get some things but Lana refused and because Appellant felt that Lana was up to something he asked her if he should tie her up and Lana said yes so he tied her hands very loosely with some shoe strings and ripped a pillow case and tied her legs loosely. (Vol. X, 1239) Lana denied that Appellant ever said he needed to go down to the car to get things for her mother. (Vol. VIII, 892) While waiting for her mother to come home, Lana testified that Appellant prayed and told Lana to take care of her little sisters when he and her mother were gone. (Vol. VIII, 855) Appellant further told Lana to behave well and set a good example for her sisters. (Vol. VIII, 856)

Christopher Higgins, a construction worker, had been dating Amy for two months. (Vol. VIII, 922) On the evening of October 22, 2005, Higgins and Amy met some of her co-workers for dinner at a former co-worker's house. (Vol. VIII, 924) Amy drove her

van and Higgins followed her on his motorcycle. (Vol. VIII, 925) They left the party about 11:00 P.M. and stopped at Higgins's house so he could change clothing and then they continued to Amy's apartment. (Vol. VIII, 925-926) When they got to the apartment complex, Amy parked and went up to the apartment while Higgins was parking his motorcycle in the breeze way and locking it. (Vol. VIII, 927) As Higgins removed his helmet, he heard someone screaming and thought it was a woman arguing but he could not tell where it was coming from. (Vol. VIII, 928) Higgins finished securing his motorcycle and started upstairs and as he approached Amy's apartment he could tell the screaming was coming from there. (Vol. VIII, 928)

Lana was still in her room when she heard the door close and her mother calling her name as she approached her room. (Vol. VIII, 857) When Amy got to Lana's room, she opened the door and Appellant who was hiding behind a closet jumped out as Lana screamed "watch out." (Vol. VIII, 857) Appellant had a knife and Lana saw him stab her mother once in the throat which occurred in Lana's bedroom. (Vol. VIII, 858) Appellant and Amy then moved to another area while Lana tried to find a telephone to call 911. (Vol. VIII, 860) Although Lana's hands and feet were still tied it was not tight so she was able to get loose and reach the phone and called the police. (Vol. VIII, 860) When Higgins stepped into the apartment, he saw Lana over the top of her mother down the hallway. (Vol. VIII, 930) Amy was lying on the floor and Lana was crying

hysterically. (Vol. VIII, 930) Lana had something pink around her wrists but Higgins saw nothing in Lana's hands. (Vol. VIII, 930) Higgins testified that he turned to his left to put his motorcycle helmet down and saw something move out of the corner of his eye so he turned around and saw Appellant coming right towards him in full swing so he ducked to try to move out of the way. (Vol. VIII, 931-932) Appellant struck Higgins in the left side of his face and Higgins realized that he had just been stabbed with a knife. (Vol. VIII, 932) Higgins still had his helmet in his hands so he started swinging at Appellant with it and made a connection. (Vol. VIII, 932) Higgins saw that Appellant had a butcher knife in his hand so Higgins got behind Appellant to try to control him and tried pulling the knife up to Appellant's throat. (Vol. VIII, 933) The two struggled and Appellant bit Higgins's finger. (Vol. VIII, 933) The struggle started in the dining room then moved to the living room and ultimately ended up in the kitchen. (Vol. VIII, 937-938) During the struggle, Higgins grabbed the blade of the knife with his left hand causing it to be cut and was also cut on the left forearm. (Vol. VIII, 936)

According to Appellant, as he was starting to go down to his car to get the money for Amy, Amy and Higgins entered the apartment. (Vol. X, 1241) Appellant asked his wife where Zena and Kimmie were and also asked "who the hell Higgins was." (Vol. X, 1242) Appellant pointed at Higgins and told him to "get the fuck out." (Vol. X, 1242) Appellant had no knife in his hand at the time. (Vol. X, 1243) According to Appellant,

Higgins did not leave but instead came towards him with a helmet in one hand and the knife which he picked up from the counter in the other. (Vol. X, 1244) Appellant got angry, jumped up, grabbed both of Higgins's arms and tried to flip him over. (Vol. X, 1245) Appellant let go of Higgins and ran to the kitchen where he picked a meat cleaver which was the only knife he ever held. (Vol. X, 1245-1246) Higgins followed Appellant into the kitchen and tried to stab at him so Appellant wacked him with his cleaver once and then let go and grabbed at Higgins's knife with both hands cutting his fingers. (Vol. X, 1250) Appellant testified that he never stabbed his wife. (Vol. X, 1252)

Higgins testified that while he and Appellant were struggling, Lana was with her mother but then went to get a phone to call 911. (Vol. VIII, 939) At some point Lana got a pot from the pantry and hit Appellant in the knee very hard. (Vol. VIII, 865, 939) All the while, Higgins kept yelling hoping that the 911 operator would hear and have the police respond quicker. (Vol. VIII, 940, 865) Although Lana testified that she saw Appellant actually stab her mother, she admitted that in a prior deposition she said she had never seen Appellant actually stab her mother. (Vol. VIII, 896) Lana also testified that when Appellant first made contact with Amy, Higgins was not in the apartment but in deposition she said that Chris was in the living room because she saw his helmet there. (Vol. VIII, 896) While Appellant and Higgins were fighting, Appellant kept telling Lana

to go and help her mother. (Vol. VIII, 901) In a deposition, Lana said that Appellant dropped the knife in his hand when the police arrived although at trial she testified that she actually took the knife from Appellant's hand while he was fighting with Chris. (Vol. VIII, 904) According to Higgins, Appellant still had the butcher knife in his left hand when the police arrived. (Vol. VIII, 944)

Higgins had never met Appellant until that night but he had received a telephone call from him approximately two weeks prior when Appellant told Higgins to stay away from his children. (Vol. VIII, 953) Higgins asked who it was and Appellant gave his name and said he would kill Higgins and then hung up. (Vol. VIII, 953) Higgins admitted that he did not take the phone threat from Appellant seriously. (Vol. VIII, 969) Eventually Higgins went to the hospital and was treated for cuts on his wrists, arms and head. (Vol. VIII, 944-945, 949, 950, 951) Lana testified that when the police arrived, they pointed a gun at her because she had one Appellant's knives in her hand and was standing over her mother. (Vol. VIII, 867) She told the police that her mother was dead and that Appellant had killed her. (Vol. VIII, 871)

Officer Allen Greene of the Altamonte Springs Police Department responded to the 911 call at the River Oaks Apartments in Altamonte Springs, Seminole County, Florida. (Vol. IX, 1008-1009) Upon arrival, Greene could hear a disturbance on the second floor and could hear a high-pitched voice but could not understand what was being said. (Vol.

IX, 1010) As Greene started going upstairs another unit of officers responded. (Vol. IX, 1011) As Greene approached apartment 288 he saw a female in the breezeway at the top of the stairs on the telephone. (Vol. IX, 1012) Arriving at apartment 288, the door was open and Greene could see a young female in the middle of the living room just inside the doorway. (Vol. IX, 1013) The woman's hands appeared to be tied with a strip and she was facing the kitchen and screaming. (Vol. IX, 1013) The woman was hysterical and holding the top end of a knife. (Vol. IX, 1013) The young girl screamed he killed my mother. (Vol. IX, 1014) Greene drew his firearm and pointed it at the woman and ordered her to drop the knife and after several commands she did. (Vol. IX, 1014) This woman was eventually identified as Lana Turner Pham. (Vol. IX, 1014) Once Lana dropped the knife, Greene entered the apartment and observed a body lying in the hallway motionless. (Vol. IX, 1015-1016) Greene could also hear commotion in the kitchen and saw two figures engaged in a struggle. (Vol. IX, 1016-1017) Greene ignored Lana, went toward the two individuals in the kitchen and observed that they were two males who were crunched over each other on top of the counter and were covered in blood. (Vol. IX, 1018) These individuals were identified as Christopher Higgins and Appellant. (Vol. IX, 1018) Lana continued to scream "he killed my mother," and pointed at Appellant said "my step-father." (Vol. IX, 1020) Once the apartment was secured, an officer retrieved a digital camera from the police car and took photos of the scene. (Vol. IX,

1021) Upon Greene's arrival, Amy Pham was already dead. (Vol. IX, 1028) Both Higgins and Appellant were taken to the hospital. (Vol. IX, 1033) Higgins is approximately six feet tall while Appellant is five feet four inches tall. (Vol. IX, 1030) Deanna Teminsky, a crime scene analyst with the Altamonte Springs Police Department responded to the scene of a possible homicide. (Vol. IX, 1047-1049) Teminsky observed several blood-stained areas including the living room, the dining room, the kitchen, and the hall. (Vol. IX, 1049) There was a body of a dead female lying in the hallway. (Vol. IX, 1049) No blood stains were found in either bathroom nor in the master bedroom. (Vol. IX, 1117) There was also no blood found in any of the bedrooms. (Vol. IX, 1139) From the middle bedroom which was Lana's bedroom, Teminsky recovered a black used condom and a life style condom wrapper. (Vol. IX, 1144)

An autopsy was conducted by Doctor Thomas Parsons on October 25, 2005. (Vol. IX, 1165-1167) There were 10 discrete wounds found on the body of the victim. Wound #1 was under the chin to the right side and was not life threatening and was just a shallow incision. (Vol. IX, 1170) Wound #2 was on the right at the base of the neck and was the length of 5.2 centimeters from front to back. (Vol. IX, 1170) The wound had a contusion which was caused by the hilt of the knife hitting the skin. (Vol. IX, 1174) The entire blade went through the body and exited the back. (Vol. IX, 1176) The exit wound

on the back was the wound #10. (Vol. IX, 1181) Wound #3 was a little bit above the left breast and was very similar to wound #2 in length. (Vol. IX, 1177) This wound went through the left chest cavity crossed into the right side and pierced the right upper lobe of the lung. (Vol. IX, 1178) Wound #4 was below the left arm pit and was 6 centimeters in length. (Vol. IX, 1178) This wound hit the first rib on the left and then the sixth rib on the left and went through the lower lobe of the left lung and entered the left ventricle of the heart and then into the right atrium of the heart. (Vol. IX, 1178) Wound #5 was an excised wound on the arm under the left armpit. (Vol. IX, 1179) Wound #6 was a stab wound to the abdomen to the left above the belly button. (Vol. IX, 1179) The knife entered the abdominal cavity and perforated the stomach, duodenum, and adrenal glands causing abdominal hemorrhaging. (Vol. IX, 1179) Wound #7 was a defensive wound on the back of the right hand. (Vol. IX, 1180) Wound #8 was located on the left arm opposite the elbow and was a 7.6 centimeter gaping wound severing the muscle tendon. (Vol. IX, 1180) The last wound was a shallow incised wound just below wound #8. (Vol. IX, 1181) The cause of death of the victim was multiple sharp force injuries. (Vol. IX, 1188)

PENALTY PHASE FACTS

Predrag Bulic, the medical examiner for Volusia and Seminole Counties testified that assuming all the wounds to the victim were inflicted within a relatively short period of time the victim would have retained consciousness for a period of time and depending on the sequence of injuries she could have lived one to two minutes or five to ten minutes. (Vol. XII, 56-58) Dr. Bulic testified that stabbing injuries are extremely painful. (Vol. XII, 59) Dr. Bulic does believe that all the wounds were inflicted within seconds but could not offer any opinion on the sequence of the wounds so therefore could not quantify the level of pain suffered by the victim. (Vol. XII, 60) Although the victim may have lived between two and ten minutes Dr. Bulic also could not say that she was conscious for the whole time. (Vol. XII, 62) Due to the tremendous loss of blood, it is quite possible that the victim loss consciousness and she could not feel anything if she was unconscious. (Vol. XII, 62-63) The wound which pierced the heart caused the chest cavity to fill with blood quite rapidly. (Vol. XII, 64-65)

Theynga Pham is Appellant's older sister. There were nine children born to their parents in Vietnam. (Vol. XII, 77-78) Their father was a soldier for the South Vietnamese. (Vol. XII, 78) Appellant was born in 1972 during the Vietnam war and they lived in South Vietnam when the south fell to the communists. (Vol. XII, 80) Because their father was in the army, if the children wanted to continue to go to school the

family had to follow and adopt communism so the family planned to escape. (Vol. XII, 81) Appellant's father went to prison and the family lost all the land that they had. (Vol. XII, 82) Although their father escaped from prison, he went into hiding and was never with the family for an extended period of time. (Vol. XII, 82) In 1975 when the communists came into Saigon, many people died and there were dead bodies throughout the city. (Vol. XII, 83) A couple of times the family tried to escape only to have the boat they were on shot at. (Vol. XII, 84) Often when they would try to escape they were caught and once Appellant and his two sisters were put into prison where they spent over a year. (Vol. XII, 85) Appellant was only eight years old when he was imprisoned at hard labor. (Vol. XII, 86) One day the communists just simply released Appellant to the streets. (Vol. XII, 86) The family tried to escape again but just Appellant, his sister and an older cousin made it out. (Vol. XII, 87) Appellant's sister did not know what happened to the rest of the family but found out years later that they were captured. (Vol. XII, 88) On the boat on which they escaped, there was no food, no drink and no bathroom. (Vol. XII, 89) Appellant spent about two weeks on the boat before landing in Malaysia at a refugee camp run by the United Nations. (Vol. XII, 90) The refugees were treated very badly by the guards and they had to buy food on the sly. (Vol. XII, 91) If the guards caught you, you were punished and this happened to Appellant on one occasion. (Vol. XII, 91) At the refugee camp, Appellant and his sister lived separately

and his sister found out later that Appellant had been taken to the hospital. (Vol. XII, 92-93) While in the camp, Theynga saw Appellant on occasion and he would cry and ask for his parents. (Vol. XII, 95) Appellant and his sister stayed in the camp for two years before they were able to catch a flight to the United States. (Vol. XII, 96) At the time, Appellant was only ten years old and spoke only Vietnamese. (Vol. XII, 97) Upon arriving in the United States, Appellant and his sister were placed in an orphanage and were not allowed to contact their family in Vietnam. (Vol. XII, 98) In the orphanage, Appellant's sister would see Appellant only at meal times. (Vol. XII, 100) Both attended school at the orphanage and at some point Appellant's sister was placed with a foster family but Appellant stayed in the orphanage. (Vol. XII, 102) Eventually Appellant's sister went to college where she met her husband and they ultimately moved to Florida. (Vol. XII, 102-103) Once they settled in Florida, Theynga sent a ticket for Appellant so he could come and live with them. (Vol. XII, 103) By this time Appellant was 18 years of age and he was still in high school and worked for Theynga's husband. (Vol. XII, 104) Theynga has three children to whom Appellant is a very good uncle. (Vol. XII, 105) When Appellant married Amy, she already had a daughter but they did not tell Appellant's parents about this instead letting them think that Lana was Appellant's daughter. (Vol. XII, 108) This was because in the Vietnamese culture children born out of wedlock are not accepted. (Vol. XII, 109) Appellant never saw his father before the

father died and had spoken to his mother by phone but could not afford to go and visit her. (Vol. XII, 111) Appellant never talks about the escape from Vietnam because it is too painful. (Vol. XII, 112) Theynga's husband Nguyen Cont Xuan also escaped Vietnam in 1979 and came to America where he met Theynga and married her. (Vol. 12, 147-150) Around 1990, Appellant moved in with them in Florida and he taught Appellant how to do electronics repairs and Appellant worked for him for one year. (Vol. XII, 151-152) Chanh Nguyen is the owner of an electronics repair store which opened in 1992 and closed 2004. (Vol. XII, 133) Appellant worked for Chanh for ten years and he was an excellent worker. (Vol. XII, 134) Appellant would work 14 to 15 hours a day six days a week and sometimes bring his children to work. (Vol. XII, 135) Appellant was a very caring father. (Vol. XII, 136) When Chanh closed his repair shop, he referred Appellant for employment with Crystal T.V. which was a repair center for electronic equipment. (Vol. XII, 162-163) Tom Diamond employed Appellant for approximately three months to do home repairs and Appellant was a good hard worker and very conscientious worker. (Vol. XII, 123) Appellant would work six days a week from 9:00 in the morning until 6:00 P.M. (Vol. XII, 165) Diamond knew that Appellant was very concerned about his family. (Vol. XII, 165) When Appellant was arrested, his vehicle was ultimately towed to the police impound center. (Vol. XII, 175) The vehicle was left there for a couple of years until at the request of defense counsel, the police inventoried the car. (Vol. XII,

176) In the car the police located a wallet with money and at least sixteen different envelopes (pieces of mail) addressed to Amy Pham. (Vol. XII, 177-179) In the wallet was found over $1,000.00 in three separate sections. (Vol. XII, 191-193)

Thuog Foshee was from Vietnam but left in 1969 when she married a serviceman. (Vol. XIII, 261) After spending three years in Thailand, Foshee came to the United States where she is the owner of a construction and landscaping business. (Vol. XIII, 262) Prior to this though Foshee visited several refugee camps in the Philippines and in Malaysia. (Vol. XIII, 262-263) The camps were very unsanitary and provided very little shelter. (Vol. XIII, 265) Foshee works with Vietnamese who come to the United States in a effort to help them cope with the change in cultures. (Vol. XIII, 265) Because many families lose members when trying to escape, Foshee assists in finding sponsors in the United States for Vietnamese refugees and their families. (Vol. XIII, 266) In her experience, Foshee believes that those who come to the United States with intact families do better than those without. (Vol. XIII, 267) In the Vietnamese culture, parents, education, and children are very important. (Vol. XIII, 268) The family employs very strict discipline and some parents beat their children if they do not do well in school. (Vol. XIII, 268) Most Vietnamese who come to the United States try to maintain their cultures in the hope that their children will someday return to the homeland. (Vol. XIII, 268) It is quite a struggle to do so because in the United States everything is freer and not

so rigid. (Vol. XIII, 269) For the most part, Vietnamese boat people are law-abiding citizens because freedom is very important to them. (Vol. XIII, 274)

A CBC video was played for the jury which documented the problems faced by the refugees from Vietnam, Cambodia and Laos. (Defense exhibit 7, Vol. XVIII 284-296) Thousands leave Vietnam daily and end up in squalid detention camps where they are unwelcomed and unwanted. (Vol. XIII, 284-286) The refugees are moved to other camps and ultimately are placed in other countries. (Vol. XIII, 287) Dr. Debra Day, a licensed psychologist and mental health counselor, first met Appellant the day after he was arrested at the Seminole County Correctional Facility. (Vol. XIII, 298-300) Appellant was despondent, depressed and suicidal and unable to communicate with Dr. Day. (Vol. XIII, 301) Appellant made no eye contact with her and their brief conversation was about Appellant's children whom he was concerned about. (Vol. XIII, 301) Dr. Day next met with Appellant on February 22, 2005, and found Appellant more responsive but still significantly depressed. (Vol. XIII, 302) Appellant was experiencing flashbacks and was in great distress. (Vol. XIII, 303) Dr. Day next met with Appellant July 2, 2006, and was able to get some family information from him. (Vol. XIII, 304) Appellant came to the United States with his sister but his mother is still is Vietnam. (Vol. XIII, 304) Appellant married his wife in a Vietnamese ceremony and a few years later in a United States ceremony to make it legal. (Vol. XIII, 304) Although

Appellant's wife was pregnant when she met Appellant it was not his child but Appellant accepted the child as his own. (Vol. XIII, 305) Appellant and his wife had two more children together. (Vol. XIII, 305) Although Appellant told Dr. Day that he left Vietnam with his sister on a boat he was unable to talk about it. (Vol. XIII, 305) At a minimum, Dr. Day felt that Appellant was experiencing a major depressive disorder. (Vol. XIII, 303) Dr. Day got a sense of significant trauma but was unaware of the source of this trauma. (Vol. XIII, 303) Dr. Day felt that Appellant had a mood disorder and a depressive disorder. (Vol. XIII, 305) During their conversations, Appellant kept his hand over his eye and answered in short, one-word responses. (Vol. XIII, 305) Often times Appellant asked Dr. Day to repeat her questions. (Vol. XIII 306) By the next meeting with Appellant on January 14, 2007, Dr. Day had learned that in the Asian culture it is a sign of respect not to make eye contact which explained Appellant's actions in that regard. (Vol. XIII, 306) In January, 2007, Appellant was in a highly manic state and unable to communicate. (Vol. XIII, 307) Appellant was quite paranoid and suspicious and his thoughts were racing from subject to subject. (Vol. XIII, 307) Dr. Day was so concerned that she immediately contacted Appellant's attorney to let them know her concerns. (Vol. XIII, 307) Dr. Day noted that the jail medical staff had started Appellant on psychotropic medications but Appellant was having a hard time with them. (Vol. XIII, 308) At one point Appellant was stockpiling his medications in order to

attempt suicide. (Vol. XIII, 308) Appellant was seen by two psychiatrists and ultimately was found incompetent to proceed and was sent to the state hospital. (Vol. XIII, 308) When Appellant was returned he remained on medication which he apparently is complying with. (Vol. XIII, 309) Dr. Danzinger who examined Appellant felt he had significant mental health issues but Appellant had stopped communicating with him. (Vol. XIII, 309) Dr. Danzinger felt that Appellant had a bipolar illness. (Vol. XIII, 310) Appellant definitely suffered a mood disorder which is clinically-based and which is either an anxiety or psychotic related disorder. (Vol. XIII, 310) Appellant also suffered personality disorders which are enduring personality traits that lead a person to misinterpret their environment and act in certain predictable and inappropriate ways. (Vol. XIII, 310-311) Personality disorders are biologically based and not clinically based and developed over time based on environmental stressors or trauma. (Vol. XIII, 311) Dr. Day also interviewed Appellant's sister for two hours and learned that Appellant was born in 1972 to a mother who worked in a restaurant and a father who was in the army. (Vol. XIII, 312) Once Saigon fell to the communists in 1975 the family was in turmoil and subject of criminal prosecution. (Vol. XIII, 312) Appellant's father was arrested and sent to a holding camp for a year until he was able to escape but then he went into hiding. (Vol. XIII, 313) Although the family had been a middle class family it began losing everything once the communists took over. (Vol. XIII, 313) The family began attempts

at leaving Vietnam but met with failure and sometimes tragedy. (Vol. XIII, 313-314) One brother died during an attempted escape. (Vol. XIII, 313) Other family members were arrested and imprisoned. (Vol. XIII, 313-314) The family made an escape try when Appellant was nine or ten years of age and Appellant and his sister were captured. (Vol. XIII, 314) Appellant was placed in a military prison at the age of nine for about a year and was separated from his family. (Vol. XIII, 314) During this year, Appellant developed disorganized attachments not knowing whom he could trust. (Vol. XIII, 316) Appellant kept losing people who were closest to him which set the stage for his inability in later years to be emotionally attached to people. (Vol. XIII, 316) Appellant's father and several siblings escaped on two boat; the boat with the father and some siblings were captured but the one with Appellant, his sister and his cousin escaped. (Vol. XIII, 316) During this escape there were several near drowning episodes which was particularly traumatizing for Appellant who could not swim. (Vol. XIII, 317) Each time they attempted to escape Appellant was told they were going to the zoo and this meant that over time, Appellant associated going to the zoo with never seeing his family again and has caused much anger to build up. (Vol. XIII, 317) While on the boat, Appellant became ill and nearly died. (Vol. XIII, 318) Appellant's boat arrived in a camp in Malaysia and his cousin promptly left. (Vol. XIII, 318) Appellant and his sister were shipped to another camp where they were separated by sex so he had no contact with her.

(Vol. XIII, 319) Appellant who was 10 or 11 at the time had virtually lost everyone who was close to him. (Vol. XIII, 319) Appellant remained in the camp for two years and ultimately arrived in the United States with his sister through Catholic charities who placed Appellant and his sister in a orphanage. (Vol. XIII, 320-321) Appellant's sister was placed in a foster home which represented another loss for Appellant as he now had no one to confide in. (Vol. XIII, 321) Appellant perceived he had been abandoned by his family and couldn't understand why they would send him away. (Vol. XIII, 322) About this time Appellant began acting out which prevented or sabotaged any attempt to place him in foster care. (Vol. XIII, 322) Appellant's sister ultimately went to college and met her partner and they moved to Florida. (Vol. XIII, 322) Appellant's sister sent for Appellant to come and live with them. (Vol. XIII, 323) Dr. Day believed that everything changed for Appellant at age three. (Vol. XIII, 324) Because of these traumatic events, Appellant never experienced the normal progression of reaching independence. (Vol. XIII, 324) In reviewing other information, Dr. Day noted that Dr. Ballentine examined Appellant and agreed with Dr. Day's assessment. (Vol. XIII, 325) Appellant suffered from a major depressive disorder and there was a suggestion that he suffered a bipolar spectrum disorder. (Vol. XIII, 325) However, it was impossible to make this diagnosis without sufficient historical information. (Vol. XIII, 326) Dr. Day said the major depressive disorder is not just having a bad day but rather it is a sustained

period of time where Appellant's mood is significantly depressed to the point where it interferes with aspects of his life. (Vol. XIII, 327) The fact that Appellant succeeded in a very tedious and technical job does not foreclose this diagnosis. (Vol. XIII, 328) Appellant experienced no other successes in his life. (Vol. XIII, 328) Appellant's personality disorder is deeply rooted in his early childhood experiences. (Vol. XIII, 329) If these negative experiences are sustained, one would most likely develop a thinking disorder which would affect his relationships. (Vol. XIII, 329) Dr. Day believed that on October 23-24, 2005, Appellant was experiencing a clinically-based disorder and also a personality disorder. (Vol. XIII, 330) Appellant was under significant stress and duress at the time. (Vol. XIII, 330) Appellant has a major depressive disorder and possibly a bipolar illness though that cannot clearly be established. (Vol. XIII, 330) This condition had to have been pre-existing because one cannot develop a severe disorder overnight. (Vol. XIII, 330) Dr. Day's axis one diagnosis was severe depressive disorder for which Appellant would be referred to a psychiatrist for management with the medication and therapy. (Vol. XIII, 331-332) Her axis two diagnosis is a personality disorder NOS [not otherwise specified] which manifests itself in three ways: a) anti-social personality disorder; b) border line personality disorder; and c) dependent personality disorder which means that Appellant does not have a good sense of himself to live separately from others but at the same time resents that he is dependent on others. (Vol. XIII, 333) The border

line personality disorder manifests itself as a person who needs relationships but hates that he need relationships. (Vol. XIII, 333) Such an individual is very volatile and inappropriate. (Vol. XIII, 333) Appellant's family fell apart and at a very early age he was forced to function independently at a time when children his age cannot make good decisions. (Vol. XIII, 334) Since Appellant has been on his medications in the jail there has been positive improvement. (Vol. XIII, 336) Dr. Day noted that in 2005, before this event happened, Dr. Tressler examined Appellant and gave an axis one diagnosis of adjustment disorder with mixed disturbance of mood and conduct. (Vol. XIII, 337) At that time, Dr. Tressler said "something's happened and he's not adjusting to it, and there's a mood component and a behavior component to what he's doing right now." (Vol. XIII, 337) Dr. Tressler defined Appellant as an alleged victim of physical and sexual abuse as a child. (Vol. XIII, 337) Dr. Tressler's axis two diagnosis was a personality disorder NOS which was consistent with Dr. Day's conclusions. (Vol. XIII, 337) From all these prior records, Dr. Day was able to note that nearly a year and a half prior to the offense there was something going on with Appellant. (Vol. XIII, 338) All the professionals who examined him agreed that Appellant had a mood disorder. (Vol. XIII, 338) The question is whether it is a major depressive disorder or a bipolar illness. (Vol. XIII, 338) All of the professionals say Appellant suffers a personality disorder. (Vol. XIII, 338) While considering Appellant's situation, Dr. Day educated herself about the Vietnamese

family system and culture. (Vol. XIII, 342) The Vietnamese family is patriarchal and women are not equal to men. (Vol. XIII, 343) Domestic violence is prevalent in Vietnamese families. (Vol. XIII, 343) Families are paramount and thus there is a low divorce rate among Vietnamese. (Vol. XIII, 343) Mental illness is not talked about and not treated in Vietnam. (Vol. XIII, 343) Appellant exhibited signs of post-traumatic stress disorder from his childhood experiences. (Vol. XIII, 345) Although Dr. Day cannot fully diagnose Appellant because he is uncooperative in providing a history, the precursors are there. (Vol. XIII, 346) Appellant is not necessarily uncooperative but simply unable to retrieve this information because of the traumas that he suffered. (Vol. XIII, 348) All the personality disorders and depressive disorders came together the night that Appellant's wife was killed such that Appellant's ability to conform his conduct to the requirements of the law was substantially impaired. (Vol. XIII, 250) Appellant appears to have been significantly emotionally impacted by the death of his wife. (Vol. XIII, 350) The mental state of Appellant on the night his wife was killed was such that the combination of the mood disorder and personality disorder together with the stressors of her arriving at the apartment with a boyfriend that Appellant committed the offense while under extreme emotional disturbance. (Vol. XIII, 375) All of these problems could cause Appellant to have no recollection of what happened that night. (Vol. XIII, 375) While the death of Amy Pham was not exclusively a consequence of the mental

illness of Appellant, that was certainly a component of it. (Vol. XIII, 376-377)

Dr. William Riebsame, a licensed psychologist was initially asked by the court to do a competency evaluation on Appellant in July of 2007. (Vol. XII, 381-383) Dr. Riebsame was unable to communicate at all with Appellant at that time so his findings were very equivocal but he agreed that Appellant should be sent to the state hospital. (Vol. XIII, 384-387) Following Appellant's conviction, Dr. Riebsame met twice with Appellant and Appellant was very cooperative with him. (Vol. XIV, 404) Appellant is of average intelligence and suffers from a mood disorder which varies in intensity. (Vol. XIV, 404, 407) The fact that Appellant maintained his job made Dr. Riebsame opine that he was likely not suffering from a severe mood disorder. (Vol. XIV, 409) Again, while Appellant has had events which could trigger depression, the fact he maintained employment was not consistent in Dr. Riebsame's opinion with a major depressive disorder. (Vol. XIV, 411) Dr. Riebsame does believe that Appellant suffers from a mood disorder and a personality disorder NOS as the other mental health professionals found. (Vol. XIV, 411-412) Dr. Riebsame found no evidence of any psychotic disorders and believes that Appellant appreciated the criminality of his actions. (Vol. XIV, 434, 436) Although Dr. Riebsame believes that Appellant was under emotional disturbance at the time of the event this was not extreme. (Vol. XIV, 439) Dr. Riebsame's most recent evaluation of Appellant provides psychological evidence indicating the existence of a

long-standing emotional and behavioral difficulties which reflected the chaotic nature of Appellant's childhood. (Vol. XIV, 445) Just because Appellant can work at a trade doesn't mean the underlying difficulties aren't there. (Vol. XIV, 447) If these emerge, Appellant will act inappropriately. (Vol. XIV, 447) Dr. Richardson noted that Appellant had personality difficulties and mental problems in 2002 and he noted that Appellant could benefit from individual counseling. (Vol. XIV, 450-451) Appellant, in fact, sought counseling but never received it. (Vol. XIV, 451) Appellant has a definite lack of insight into his interpersonal difficulties which contributed to worsening the situation. (Vol. XIV, 452) When Dr. Riebsame conducted psychological testing, he found no indication of Appellant faking either good or bad. (Vol. XIV, 454) The various stressors past and present have adversely affected Appellant's self esteem and his past childhood trauma continues to the present. (Vol. XIV, 455, 455??) Some of the tests that Dr. Riebsame administered revealed a possible post traumatic stress disorder and possible bipolar disorder. (Vol. XIV, 459) Dr. Riebsame noted that there was some lack of ability on Appellant's part to conform his behavior to the requirements of the law. (Vol. XIV, 462) Dr. Riebsame noted that the diagnostic interpretive results of the tests he administered to Appellant are consistent with the findings by Drs. Ballentine, Dansinger, Day, and Tressler. (Vol. XIV, 480)

SPENCER HEARING FACTS

Formal Deputy Ollianda Csisko testified concerning an incident she was involved in while attempting to remove appellant from a court proceeding. (Vol. XVIII 1113-1133) She attempted to grab appellant who was in waist, hand and foot restraints, by the chains and appellant twisted her hands ultimately resulting in broken fingers, a broken arm and a broken hand. (Vol. XVIII 1123) Appellant had been charged with aggravated battery and was convicted only of battery on a law enforcement officer. (Vol. XVIII 1109)

Dr. Jacquelyn Olander a licensed psychologist conducted a neuropsychological evaluation of appellant. (Vol. XVIII 1138) Dr. Olander met with appellant on June 12, 2008. (Vol. XVIII 1139) Prior to this, Dr. Olander had received a lot of material including a psychological evaluation and raw data from Dr. Tressler who administrated the Shipley IQ test to appellant, prior evaluations by Dr. Ballentine and Dr. Danziger who conducted no IQ testing, and an evaluation and raw data from Dr. Riebsame who tested appellant using the Wechsler Abbreviated Scale of Intelligence (WASI). (Vol. XVIII 1139-1143) Additionally, Dr. Olander reviewed depositions of several people, medical records, a guardian ad litem report from a dependency matter involving appellant, and a CBC report on the Vietnamese boat people. (Vol. XVIII 1143-1147) The Shipley IQ test that Dr. Tressler administered is a very simple self-test. (Vol. XVIII 1140) This test was developed in the 1940s and has not really been updated so the field of neuropsychology does not use it. (Vol. XVIII 1140) The gold standard for testing is the Wechsler. (Vol.

XVIII 1140) The full scale Wechsler test includes many sub-tests. (Vol. XVIII 1147) The WASI which was administered by Dr. Riebsame tested only the verbal and matrix sub tests. (Vol. XVIII 1148) The criticism of WASI is that it tends to overestimate a person's IQ and is thus unreliable. (Vol. XVIII 1149) In administering the full scale Wechsler test, Dr. Olander administered both the verbal and the matrix sub-tests as did Dr. Riebsame. Appellant scored best on the matrix reasoning which is a multiple choice test and is not a timed test. (Vol. XVIII 1149) In the verbal portion, appellant scored low average. (Vol. XVIII 1150) In virtually every other area of the test appellant scored as borderline impaired or significantly impaired. (Vol. XVIII 1153-67) Dr. Olander spoke with appellant's sister who described their escape from Vietnam in a boat. (Vol. XVIII 1169) She related how there were a large number of people crammed into small area and food was not a apportioned but merely thrown into the hole and people had to fight for it. (Vol. XVIII 1170) One canteen of water for forty people was passed around daily. (Vol. XVIII 1170) During this several week long boat escape, appellant fell ill and was in and out of consciousness. (Vol. XVIII 1170) Appellant has no memories of this. (Vol. XVIII 1171) Dr. Olander felt that appellant suffered from dehydration which causes brain damage. (Vol. XVIII 1117) Dr. Olander recounted a study which was done on 31 elite army soldiers who were placed under stress kept in heat and given minimal food. (Vol. XVIII 1173) After 53 hours under such conditions these soldiers suffered significant impairment

in their cognitive abilities. (Vol. XVIII 1173) Contrasted to this Dr. Olander stated that children are more vulnerable to dehydration and the brain swelling can lead to unconsciousness. (Vol. XVIII 1174) A number of areas of impairment in appellant's executive skills are consistent with an individual who experienced encephalopathy stemming from dehydration. (Vol. XVIII 1175) In four sub-tests of design fluency tests, appellant's performance ranged from severely impaired to low average. (Vol. XVIII 1175) Dr. Olander did not find it unrealistic to expect appellant to be able to work repairing electronics given his strong work ethic. (Vol. XVIII 1180-1181) Dr. Olander believed that at the time of his wife's death, appellant was experiencing significant reduced mental capacity stemming from dehydration. (Vol. XVIII 1189) Appellant experiences a significantly reduced mental capacity stemming from his impaired neuropsychological functioning which has an organic basis. (Vol. XVIII 1191) This had a negative impact on his development, his ability to cope, his ability to adapt, his ability to maintain relationships and his ability to trust people. (Vol. XVIII 1191)

Dr. William Riebsame testified that he found appellant to be of average intelligence based on the WASI which he admitted was a reduced version of the full scale intelligence test. (Vol. XVIII 1222) He noted that in 2002, Dr. Tressler administrated the Shipley and appellant scored high average with no cognitive impairment. (Vol. XVIII 1222) Dr. Riebsame believed that Dr. Olander's findings were inconsistent with what other mental

health professionals had found. (Vol. XVIII 1225) However, he admitted that Dr. Danziger and Dr. Ballentine never did any testing and their conclusion that appellant was of average intelligence was done during a competency evaluation. (Vol. XVIII 1238) In fact no other doctor has performed any of the comprehensive type of testing that Dr. Olander did. (Vol. XVIII 1240) Dr. Riebsame believed that real life information trumps tests results and that appellant's ability to function in a job was inconsistent with the findings of Dr. Olander. (Vol. XVIII 1230) Dr. Riebsame further opined that someone with the impairment that Dr. Olander found would have had problems most of his life. Dr. Riebsame opined that appellant was able to function in school although he admitted he never saw any school records of appellant. (Vol. XVIII 1240) Dr. Riebsame also admitted that appellant did have some problems with authority throughout his life. (Vol. XVIII 1229) Finally, Dr. Riebsame admitted that if indeed appellant has the cognitive difficulties revealed by Dr. Olander's testing it would make his personality problems ever worse. (Vol. XVIII 1253)

SUMMARY OF THE ARGUMENTS

Point I: It is improper for a prosecutor in closing arguments to shift the burden of proof from the state to the defendant and to further demean the defendant or the defense.

Point II: An accused is entitled to a fair and impartial jury who will follow the law. For jurors have stated their unwillingness to follow the law or have demonstrated a racial or ethnic bias, a mistrial is required.

Point III: It is improper for a trial court to consider factual matter with regard to aggravating circumstances that was never submitted to a jury. On its face, the offense of battery on a police officer does not qualify as a prior violent felony.

Point IV: Florida's capital scheme violates the dictates of the United States Supreme Court in ***Appendi, Ring,*** and their progeny.

Point V: The death of Phi Pham was not heinous atrocious and cruel.

Point VI: The actions of appellant were insufficient to meet the test required for application of the cold calculated and premeditated aggravating circumstance.

Point VII: The death penalty in the instant case is disproportionate.

ARGUMENTS

POINT I

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF IMPROPER COMMENTS BY THE PROSECUTOR IN HIS CLOSING ARGUMENTS.

During the prosecutor's closing arguments the following transpired:

> THE COURT: 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.

(Vol. XI, 1414-1415) And again during the prosecutor's rebuttal argument the following transpired:

> 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.

* * * *

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

(Vol., XI 1464-1465) Appellant contends that this argument by counsel for the state was clearly improper. Appellant is entitled to a new trial because of it.

The control of prosecutorial arguments to the jury is within the trial court's discretion. ***Conde v. State***, 860 So.2d 930, 950 (Fla. 2003) In ***Ruiz v. State***, 743 So.2d 1 (Fla. 1999) this Court reversed a conviction for first degree murder and sentence of death holding that the prosecutors had engaged in misconduct in closing arguments in both the guilt and penalty phases. ***Ruiz*** involved what can be categorized as a catalog of prosecutorial improprieties. One of the offending comments was that if the defendant were Pinocchio, his nose would be so big none of us would be able to fit in this

courtroom. This court found that comment to be offensive because it demeaned and ridiculed the defendant. In the instant case the prosecutor's categorization of the defendant's testimony as "nonsense" and "nonsensical" similarly demeans and ridicules the defendant. In ***Anderson v. State***, 863 So.2d 169 (Fla. 2003) this Court found the comment by the prosecutor that the defense was employing the National Enquirer defense to be improper. Similarly in ***Henry v. State***, 743 So.2d 52, 53 (Fla. 5th DCA 1999) the court held that it was improper to refer to the defendant's version of events as the "most ridiculous defense" the prosecutor has ever heard. Referring to the defense as a "pathetic fantasy" has similarly been held to be improper. ***Izquierdo v. State***, 724 So.2d 124, 125 (Fla. 3rd DCA 1998) The prosecutor's characterization of appellant's testimony as "nonsense" and "nonsensical" is clearly improper and appellant's objection should have been sustained. Any comment by the prosecutor that suggests that the defendant has some burden of proving anything at trial has also been condemned. ***Freeman v. State***, 717 So.2d 105, 106 (Fla. 5th DCA 1998); ***Bush v. State***, 809 So.2d 107 (Fla. 4th DCA 2002) The trial court in this case recognized the impropriety of the state's argument and sustained the objection. However, the state continued on the same lines suggesting to the jury that the defendant had not explained to them certain aspects of the offense. This went beyond a comment on the defendant's testimony. Appellant testified he had no idea how his wife got stabbed. In light of that testimony appellant could not be expected to explain

any of the details of the offense to the jury. Indeed he was not required to do so. When this comment is combined with the improper comment in the earlier argument of the prosecutor, appellant contends that he was clearly prejudiced and entitled to a new trial.

POINT II

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AND MOTION FOR NEW PENALTY PHASE WHERE THE EVIDENCE REVEALED THAT THERE WAS CLEAR JUROR MISCONDUCT.

Appellant and his wife were both born in Vietnam. Appellant's life was deeply affected by the war in Vietnam and the fall of South Vietnam to the communists. It greatly affected his family and his life and would figure prominently in the penalty phase should he be convicted of first degree murder. Consequently, defense counsel questioned a potential jury panel concerning their ability to accept as mitigating evidence the cultural differences and the effect the significant and traumatic events during appellant's formative years had on his psyche and his ability to function in modern American society. Defense counsel was able to extract from virtually the entire panel, their assurances that they would listen to and consider these important mitigating circumstances. Following presentation of evidence in the guilt phase, the jury did indeed find the appellant guilty of first degree murder of his wife. Three weeks later the penalty phase commenced. On the morning of the second day of the penalty phase, the court informed the parties that it had been handed a letter from the bailiff which had been written by one of the alternate jurors. (Vol. XIII, 218) This juror, Mr. Valenti, stated that during the guilt phase of the trial, there

were jurors who had reached conclusions about the evidence in the guilt phase in the trial before they were properly allowed to discuss it and they were indeed discussing the case among themselves in violation of the court's admonition. Mr. Valenti further stated that the same thing was occurring during the penalty phase in that there were comments being made by jurors which indicated they were not going to fairly consider all the evidence and indeed had already dismissed the mitigation before the penalty phase was even completed. Defense counsel moved for a mistrial on the grounds that the jury would not give the defendant and his evidence a fair determination because they were unwilling to follow the court's orders to consider the law. Juror Valenti was interviewed by the court and counsel and Juror Valenti stated that he heard at least two individuals on the jury making these statements that he described in his letter. One comment was about the "sad story", another comment was that verdicts are "emotional decisions". (Vol. XIII, 223) Juror Appleman, who served as foreperson, was examined and although she denied making any comments, she also heard a comment that "everyone has a rough life in some cases, but you are - - this is the law, this is - - there is right and wrong, and, you know, if you wanted to come to America, you have to live by American standards, American law." (Vol. XIII, 241) Juror Perkins, who served on the jury, was questioned and indicated that he heard comments that "it's too bad to hear those kinds of stories, but, you know, a lot of people have tough luck." (XIII, 246-247) Subsequently, the matter was addressed before jury

deliberations in the penalty phase and counsel presented case law to the court in support of his motion for mistrial. (XIV, 493) The trial court denied the motion for mistrial stating that based on the inquiry of the three jurors that while there may have been a lack of compliance with the court's instructions, that it did not demure to the verdict. (XIV, 504-505) The court further made a statement that it offered to bring in every individual juror that is on the jury for individual inquiry. (XIV, 504) Following deliberations, the jury returned a verdict of the recommendation of death by a vote of ten to two. Defense counsel subsequently filed a motion for new penalty phase and a motion to interview all the jurors which the court denied.

An appellate court reviews a trial court's ruling on a motion for mistrial under an abuse of discretion standard. ***Salazar v. State***, 991 So.2d 364 (Fla. 2008). Trial courts have broad discretion when ruling on motions for new trial and motions for mistrial. ***Ricks v. Loyola***, 822 So.2d 502, 506 (Fla. 2002). A ruling on a motion for mistrial is within the sound discretion of the trial court and should be granted only when it is necessary to ensure the defendant receives a fair trial. ***Cole v. State***, 701 So.2d 845, 853(Fla. 1997). Stated differently, a "motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial." ***England v. State***, 940 So.2d 389, 401-402(Fla. 2006) Similarly, a court's decision on whether to allow an interview of jurors after trial is subject to review for an abuse of discretion. ***Marshall v. State***, 976

So.2d 1071, 1076(Fla. 2007)

The right to have a case decided by an impartial jury has been equated to the constitutional right to a fair trial. ***Singer v. State***, 109 So.2d 7(Fla. 1959) A juror must be able to lay aside any bias or prejudice and render a vote solely upon the evidence presented and the instructions of the law given by the court. ***Lusk v. State***, 446 So.2d 1038 (Fla. 1984) Much as been written about what constitutes jury misconduct and can provide a basis for relief. It is a well-settled rule that a verdict cannot be subsequently impeached by conduct which inheres in the verdict. ***Marshall v. State***, 854 So.2d 1235 (Fla. 2003) However, in order to constitute juror misconduct, and therefore, a matter extrinsic to the verdict sufficient to set aside the verdict or for a post-trial jury inquiry, Florida and other courts have consistently held that some objective act must have been committed by or in the presence of the jury or a juror which compromising integrity of the fact-finding process. ***Maler v. The Baptist Hospital of Miami***, ***Inc.,*** 559 So.2d 1157 (Fla. 3rd DCA 1989) Additionally, where a juror lies about a material matter during jury selection it is been held that this is misconduct sufficient to support a motion for a new trial. ***Sconyers v. State***, 513 So.2d 1113(Fla. 2nd DCA 1987) Additionally, where a jury makes vile racial, religious, or ethnic slurs against the party or witness during trial or jury deliberations, a mistrial is required. ***United States v. Heller***, 785 F.2d 1524, 1527-28(11th Cir. 1986) In fact, appeals to racial bias when they are made openly among the jurors

constitute overt acts of misconduct sufficient to bring into question the basic fairness of the jury trial. ***Powell v. Allstate Insurance Co.,*** 652 So.2d 354 (Fla. 1995)

Applying the foregoing to the instant case, appellant is clearly entitled to a new penalty phase. As the trial court recognized, it is without doubt that the jury venire disregarded the trial court's instructions not to discuss the case prior to actually beginning deliberations. The affidavit of juror Valenti and his testimony show that indeed comments were made by the jurors that indicated they were rejecting mitigation even before it was fully presented. The statement regarding that when you come to America "you have to live by American standards and American laws" represents a categorical rejection of the mitigating evidence that was being presented. Appellant was a Vietnamese refugee. The evidence clearly showed that the cultural mores in Vietnam were greatly different from those in America. Thus, the categorical rejection of this evidence represents the kind of racial bias condemned in ***Powell, supra***. Additionally, the comments regarding the disregard for the "tough life" is in stark contrast of the assurances given by the jurors during *voir dire* that they would indeed consider these factors. Thus, the untruthfulness of some of the jurors during *voir dire* is similarly grounds for relief. ***Sconyers, supra***. In the motion for new penalty phase and request to interview three remaining jurors, the trial court denied relief finding no misconduct and further noted that appellant had been given the opportunity to question all the jurors. However, that should not have been the

deciding factor. First, when discussing the matter during the penalty phase, it was clear from the three jurors who had been interviewed that other jurors in fact had heard and made a comment. Thus, the court was on notice that these comments went beyond the three jurors who were actually interviewed. Second, while a post verdict motion to interview jurors is left to the sound discretion of the trial court, the courts acknowledgment that it had already given the opportunity to interview all the jurors, is an indication that the court abused its discretion. It became not a question of whether appellant could interview the jurors but came down to a question of when to interview the jurors. This type of fanciful, arbitrary ruling is clearly an abuse of discretion. Third, the error herein occurred prior to jury deliberations. Thus, the trial court's assertion that the error did not "immure[sic]" is irrelevant. Misconduct occurred. The trial court had the perfect opportunity to nip it in the bud so to speak. While granting a new penalty phase may have been burdensome, it really was the only fair way to ensure that appellant received the due process to which he was entitled. Appellant is entitled to a new penalty phase.

POINT III

IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN TAKING TESTIMONY REGARDING APPELLANT'S PRIOR BATTERY ON A LAW ENFORCEMENT OFFICER CONVICTION AND IN RELYING ON SUCH CONVICTION TO SUPPORT A FINDING OF PRIOR VIOLENT FELONY IN AGGRAVATION.

Subsequent to the commission of the instant offense, appellant was charged with committing a aggravated battery on a law enforcement officer and went to trial and was convicted of the lesser included offense of battery on a law enforcement officer. The conviction occurred after the penalty phase in the instant case. At the ***Spencer***[2] hearing, the state was permitted, over objection, to present the testimony of the alleged victim of the battery on a law enforcement officer to prove the aggravating factor of prior violent felony. The trial court found this battery on a law enforcement officer qualified and referenced it in its findings of fact in regard to this aggravating circumstance. (Vol. III, 559) Appellant contends that this is clearly error.

While the decision to allow the admission of evidence is a matter left to the discretion of the trial court, a decision on a question of law is reviewed *de novo*. Appellant submits that the instant case involved a question of law. In ***Apprendi v. New Jersey***, 530 US 466, 490(2000) the United States Supreme Court held:

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

The ***Appendi*** holding was extended to capital cases in ***Ring v. Arizona***, 536 US 584 (2002). This Court, of course, has held that a prior violent felony conviction is an aggravating factor which is outside the dictates of ***Ring***. ***Johnson v. State***, 969 So.2d 938, 961(Fla. 2007). However, in the instant case that is not the end of the inquiry. In order for this aggravating factor to apply, the prior crime has to be one involving the use or threat of violence. Appellant was convicted of battery on a law enforcement officer. In ***State v. Kearns***, 961 So.2d 211(Fla. 2007) this Court held that battery on a law enforcement officer was not a "forcible felony" that could be used to enhance a subsequent felony as a violent career criminal because the offense could be committed by a simple, intentional touching of a police officer that did not involve use or threat of physical force or violence. The only relevant consideration in determining whether an offense constitutes a forcible felony within the meaning of the violent career criminal statute is the statutory elements of the offense. Thus, the "fact" of the prior conviction for battery on a law enforcement officer is not proof that appellant committed a violent felony. The only way that this offense could be deemed "violent" for purposes of application as an aggravating circumstance is to present extrinsic evidence going beyond

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

the mere fact of the conviction. It is this additional evidence that distinguishes this from the cases in which this Court has previously rejected the ***Ring*** application to Florida's sentencing scheme. It was improper for the trial court to independently consider evidence of an aggravating circumstance that was not presented to the jury. To be sure, appellant did not stipulate to his prior conviction as meeting the test of the aggravating circumstance. The trial court should not have heard the evidence and should not have referenced this in its findings of fact.

POINT IV

APPELLANT'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONS BECAUSE THE FACTS THAT MUST BE FOUND TO IMPOSE IT WERE NOT ALLEGED IN THE CHARGING DOCUMENT NOR WERE THEY UNANIMOUSLY FOUND TO EXIST BEYOND A REASONABLE DOUBT BY A 12-PERSON JURY.

Apprendi v. New Jersey, 530 U.S. 466 (2000) was firmly established long before this trial judge was asked to follow the law. A court is required to provide fundamental due process rights mandated by the United States Constitution. Authorization to do so does not come from the Legislature. It instead emanates from the Constitution itself. This trial judge was asked to provide basic due process rights guaranteed by the Florida Constitution and by Florida law. The judge refused because he believed he did not have the power to follow the law. Such continued delay in the administration of justice is wrong and it unnecessarily risks the efficacy of death sentences imposed after the expenditure of time, finite public resources and human emotion. It is time to correct this problem.[3]

Nine years ago, ***Apprendi*** held that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must

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[3] Matters of statutory construction and constitutional challenges are subject to *de novo* review on appeal since they are decisions of law. ***City of Jacksonville v. Cook***, 765 So.2d 289 (Fla. 1st DCA 2000).

be submitted to a jury, and proved beyond a reasonable doubt." ***Apprendi***, 530 U.S., at 490. In the ***Apprendi***-related case that followed[4] the United States Supreme Court (hereinafter "COURT" to distinguish from this Honorable Court) analyzed the particular statutory scheme to determine whether procedural Due Process was provided when a judge imposed a particular sentence under that particular statutory scheme. Courts are supposed to require that statutes be enforced in accordance with the Constitution. ***Apprendi*** held nothing more. Other courts may do nothing less.

It is first here stressed that the minimal procedural due process requirements explained in ***Apprendi*** do <u>not</u> involve the Eighth Amendment because ***Apprendi*** expressly excluded capital sentencing schemes (and thus the Eighth Amendment) from its analysis. "***Apprendi***, 530 U.S. 466, 496 (2000) ("For reasons we have explained, the capital cases are not controlling[.]"). This distinction was not missed when Florida first declined to apply ***Apprendi*** to capital cases. See ***Mills v. Moore***, 786 So.2d 532, 537 (Fla. 2001) ("No court has extended ***Apprendi*** to capital sentencing schemes, and <u>*the plain language of*</u>

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[4] The precursor to ***Apprendi*** involved a federal statute. See ***Jones v. United States***, 526 U.S. 227, 243 n.6 (1999) ("under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt." ***Apprendi*** quoted the foregoing language and recognized that "The Fourteenth Amendment commands the same answer in this case involving <u>*a state statute*</u>." ***Apprendi***, 520 U.S. at 476 (emphasis added). Thus its holding includes Due Process under the Fifth Amendment as also applied by the Fourteenth Amendment.

Apprendi indicates that the case is not intended to apply to capital schemes.") (Emphasis added); ***Mills v. State***, 786 So.2d 547, 548 (Fla. 2001) ("We held that ***Apprendi*** is not applicable to this case *since the majority opinion in Apprendi indicates that Apprendi does not affect capital sentencing schemes*.") (Emphasis added); ***Mann v. Moore***, 794 So.2d 595, 599 (Fla. 2001); ***Card v. State***, 803 So.2d 613, 628 fn.13 (Fla. 2001).

Ring v. Arizona, 536 U.S. 584 (2002), however, makes these Florida decisions moot and any reasoning that precedes ***Ring*** wholly inapposite. ***Ring*** is neither a confusing nor a complex decision. It first extended the due process analysis contained in ***Apprendi*** to capital cases by expressly overruling that portion of ***Walton v. Arizona***, 497 U.S. 639 (1990) that allowed a death sentence to be imposed based on facts not found by a jury:

> ***Apprendi's*** reasoning is irreconcilable with ***Walton's*** holding in this regard, and today we overrule ***Walton*** in relevant part. *Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment*.

Ring v. Arizona, 536 U.S. at 588 (Emphasis added). ***Ring*** next observed that "*Under Arizona law*, Ring could not be sentenced to death, the maximum penalty for first-degree murder, unless further findings were made." ***Ring***, 536 U.S. at 592 (Emphasis added). The COURT then applied the ***Apprendi*** analysis to *Arizona* law and concluded that the additional finding of fact (the existence of "at least one" aggravating factor) upon which a death sentence is based in Arizona must be made by a jury beyond a reasonable doubt:

Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. See 200 Ariz., at 279, 25 P.3d, at 1151 (citing §13-703). This was so because, *in Arizona, a "death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist beyond a reasonable doubt*." 200 Ariz., at 279, 25 P.3d, at 1151 (*citing §13-703*). The question presented is whether *that* aggravating factor may be found by the judge, *as Arizona law specifies*, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.

Ring, 536 U.S. at 597 (Emphasis added) (footnotes omitted).

Obviously, the specific analysis of the Arizona capital sentencing scheme cannot control what jury findings are required in other states unless the statutory schemes are identical. Simply said, the ***Apprendi*** analysis focuses on what factual findings are required to impose a particular sanction within a particular statutory scheme. ***Ring*** addressed Arizona's statutory scheme. Florida courts cannot look at Arizona's statutes to determine what findings must be made by the jury because Florida's statutory scheme is materially different than Arizona's.

Apprendi makes clear that courts may no longer blindly accept the notion that a legislature controls the entitlement to constitutional due process rights by labeling a crime to be a "capital" offense, a "life" felony, a "Class B" felony or a bologna sandwich. Such blindness by a court today is not deference to separation of powers – it is an abdication of duty and authority. Stated simply, legislatures enact laws. Courts enforce them consistent with the state and federal constitutions. The COURT has repeatedly made very clear that

courts are not following the law if they uphold a sentence that is based on factual findings not made by a jury beyond a reasonable doubt. It is time for Florida to follow the law.

Specifically, in ***Blakely v. Washington***, 542 U.S 296 (2004), the COURT invalidated a 53-month sentence because the factual finding required to impose it was not made in accordance with Due Process. The State argued that Blakely's 53-month sentence was permissible because Blakely had been convicted of a class "B" felony that was punishable by 10 years. The COURT disagreed because a factual finding by the judge after the jury verdict issued was yet required to deviate from the standard sentence. "The 'maximum sentence' is no more 10 years here than it was 20 years in ***Apprendi*** (because that is what the judge could have imposed upon finding a hate crime) or death in ***Ring*** (because that is what the judge could have imposed upon finding an aggravator)." ***Blakely***, 542 U.S. at 304. The COURT in ***Blakely*** explained this fully and unequivocally:

> In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless contends that there was no ***Apprendi*** violation because the relevant "statutory maximum" is not 53 months, but the 10-year maximum for class B felonies in §9A.20.021(1)(b). Our precedents make clear, however, that the "statutory maximum" for ***Apprendi*** purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* See ***Ring***, ***supra***, at 602 ("The maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting ***Apprendi***, ***supra***, at 483)); ***Harris v. United States***, 536 U.S. 545, 563 (2002) (plurality opinion) (same); cf. ***Apprendi, supra***, at 488 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's

verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," ***Bishop, supra***, §87, at 55, and the judge exceeds his proper authority.
Blakely, 542 U.S. at 303-304 (Emphasis in original).

The COURT next applied ***Apprendi*** to the federal sentencing guidelines in ***United States v. Booker***, 543 U.S. 220 (2005), where sentences being imposed were obviously less than the maximum specified by the United States Code yet they were based on additional factual findings that followed a conviction. The COURT reaffirmed the holding set forth in ***Apprendi*** and again very clearly explained what due process requires:

Accordingly, we reaffirm our holding in ***Apprendi****:* Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

United States v. Booker, 543 U.S. 220, 244 (2005). The COURT avoided holding the entire federal sentencing guidelines unconstitutional by striking only the portion of the statute that made the guidelines mandatory, pointing out that, "Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, *compatible with the Constitution*, that Congress judges best for the federal system of justice." ***Booker***, 543 U.S. at 265 (emphasis added). Again, the Legislature was responsible for enacting laws. The COURT's concern was its duty to enforce the Constitution.

More recently, in ***Cunningham v. California***, 549 U.S. 270 (2007), the COURT

invalidated California's determinate sentencing statutes. That opinion is unequivocal: "This Court has repeatedly held that, under the Sixth Amendment, *any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence*." ***Cunningham***, 549 U.S. at 281 (2007) (Emphasis added) (citations omitted). These cases leave no room for discussion.

Appellant cited the foregoing cases from the highest court in America and repeatedly asked that they be followed. (Vol. I, 74-152; Vol. II, 311-338; 215-218; 252-260) By refusing, "the judge exceed[ed] his proper authority." ***Blakely***, 542 U.S. at 304. In short, reversal of Appellant's death sentence and imposition of a life sentence are required for each and all of the following violations of basic due process that occurred over timely objection:

A: DENIAL OF APPELLANT'S MOTION TO PRECLUDE THE DEATH PENALTY DUE TO THE FAILURE OF THE INDICTMENT TO ALLEGE A CRIME PUNISHABLE BY THE DEATH PENALTY -

Article I, section 15(a) of the Florida Constitution guarantees the right to indictment for a capital crime. Florida law requires that the charging document contain allegations of all facts necessary to impose a particular punishment. This is true even as to a mandatory sentence that is less than the "statutory maximum" sanction for the offense of which the defendant stands convicted. E.g., ***Lane v. State***, 996 So.2d 226 (Fla. 4th DCA 2008) (due

process is violated where a person receives a mandatory sentence for discharging a firearm when the information alleges only that he "carried" it); ***Jackson v. State***, 852 So.2d 941, 944-45 (Fla. 4th DCA 2003) (same); ***McEachern v. State***, 388 So.2d 244, 246-48 (Fla. 5th DCA 1980) (though supported by evidence, conviction must be reversed "[s]ince he was not so charged, [and] we can only assume that the State did not intend to charge him with the higher degree of the crime, though we fail to understand why it was done."); ***State v. Dye***, 346 So.2d 538, 541 (Fla. 1977) (An information must allege each essential element of a crime and no essential element should be left to inference).

Count I of Appellant's indictment charged the crime of premeditated murder as follows:

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

In the Circuit Court of the Eighteenth Judicial Circuit of the State of Florida for Seminole County, at the Fall Term thereof, in the year of our Lord, two thousand five, the Grand Jurors of the State of Florida, inquiring in and for the body of the County of Seminole, upon their oaths do charge that:

Count I: IN THE COUNTY OF SEMINOLE, STATE OF FLORIDA, on or about October 22, 2005, TAI A. PHAM did unlawfully kill a human being, Phi Pham, by cutting or stabbing Phi Pham with a weapon, to wit: a knife; and said killing was perpetrated by TAI A. PHAM from a premeditated design to effect the death of Phi Pham, contrary to Section 782.04(1)(a), Florida Statutes.

(Vol. I 22) Appellant's indictment failed to contain any language that tracked or otherwise referred to §775.082 and §921.141, Florida Statutes and there is no indication that the

grand jury considered and applied that legislation.

A premeditated murder is deemed to be first-degree murder and a capital[5] felony by §782.04, Florida Statutes, but it is not punishable by death because imposition of capital punishment under Florida's capital sentencing scheme requires that additional findings of fact be made *after* a defendant is convicted of premeditated murder. Specifically, §775.082, Florida Statutes (with emphasis added in pertinent parts) states:

775.082. Penalties; applicability of sentencing structures; mandatory, minimum sentences for certain reoffenders previously released from prison.

(1) A person *who has been convicted* of a capital felony shall be punished by death *if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court* that such person shall be punished by death, *otherwise such person shall be punished by life imprisonment* and shall be ineligible for parole.

The plain language of §775.082 thus requires that, for a death sentence to be authorized, findings of fact must be made under §921.141 for "a person *who has been convicted*" of a capital felony. By the statute's own terms the death penalty requires additional findings to be made in accordance with "the procedure set forth in §921.141." It could not be clearer that ***Apprendi*** and ***Ring*** apply because further findings of fact are required for imposition of a death sentence for "a person who has been convicted" of first degree murder.

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[5] In Florida, an offense that the Legislature labels a "capital" offense is not if imposition of the death penalty is not a possibility. See ***Rusaw v. State***, 451 U.S. 469, 470 (Fla. 1984) ("This Court has long held that a capital crime is one where death is a

The ***Apprendi*** analysis therefore turns to the statute that specifies what precise findings must be made. The answer is found in Section 921.141(3), Florida Statutes, which in pertinent part (with emphasis added) plainly states without ambiguity the following:

§ 921.141(3).

Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, *but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:*

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In *each* case in which the court imposes the death sentence, the determination of the court *shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings*. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

The statute says that there are only two sentences that may be imposed on a person found guilty of a capital felony. If no findings are made, a life sentence without possibility of parole must be imposed. If a death sentence is to be imposed, the statute patently and plainly requires "specific written findings of fact" (plural) to support a death sentence. It plainly requires that "findings" (plural) be made that "a" and "b" exist. Those are the

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possible penalty.") (citing ***Donaldson v. Sack***, 265 So.2d 499 (Fla. 1972)).

findings required by ***Apprendi***.

Not only does §921.141(3) require that both "a" and "b" be found, §921.141(3)(a) requires that *at least two* aggravating circumstances be found to exist. This necessarily follows because the statute requires that "sufficient aggravating circumstances (plural) exist." This language is not ambiguous and it is not susceptible to being interpreted to mean "one or more" circumstance. For the State to allege the existence of a crime that is punishable by the death penalty under §§775.082 and 921.141(3), Florida Statutes, it must contain those factual allegations required by these two statutes, that is, that "sufficient aggravating circumstances exist as enumerated in subsection (5)" and that "insufficient mitigating circumstances exist to outweigh the aggravating circumstances.

Florida requires that the charging document contain an allegation of "every essential element" of the crime to be punished:

> The first issue in this case is whether the information charging Price with the crime of sexual battery on a physically incapacitated person was fatally defective. Due process of law requires the State to allege every essential element when charging a violation of law to provide the accused with sufficient notice of the allegations against him. Art, I, §9, Fla. Const.; ***M.F. v. State***, 583 So.2d 1383,l 1386-87 (Fla. 1991). There is a denial of due process when there is a conviction on a charge not made in the information or indictment. ***See Gray v. State***, 435 So.2d at 818; ***see also, Thornville v. Alabama,*** 310 U.S. 88, 60 L..Ed.2d 735, 84 L.Ed.2d 1093 (1940); ***De Jonge v. Oregon***, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937). For an information to sufficiently charge a crime it must follow the statute, clearly charge each of the essential elements, and sufficiently advise the accused of the specific crime with which he is charged. ***See Rosin v. Anderson***, 155 Fla. 673, 21 So.2d 143, 144 (Fla. 1945). Generally the test for granting relief based on a defect in the information is actual prejudice to the fairness of the trial. *See Gray*, 435 So.2d 818 (citing ***Lackos v. State***, 339 So.2d 217 (Fla. 1976).

Price v. State, 995 So.2d 401, 404 (Fla. 2008). Any argument that "sentencing factors" do not have to be alleged in the charging document ignores ***Apprendi***, ***Jones***, ***Blakely***, and Florida cases such as ***Insko v. State***, 969 So.2d 992 (Fla. 2007), ***Lane***, ***supra***, ***Price***, ***supra*** and ***Jackson***, ***supra***.

Appellant was here charged in Count I with premeditated murder. The absence of any language in the indictment that qualified Appellant for the death penalty was timely and specifically pointed out to the judge. That defect could easily have been timely corrected. Indeed, that is stated rationale for requiring specific objections to be timely made to a trial court. See ***Harrell v. State***, 894 So.2d 935, 940 (Fla. 2005); ***Castor v. State***, 365 So.2d 701, 703 (Fla. 1978). This judge was expressly shown controlling authority that facts required to be proved under ***Apprendi*** must also be properly charged:

> As we noted earlier, ***Apprendi*** renders moot most discussions of whether a particular fact is an element of the crime or a potential sentencing enhancement. Both must now be submitted to the jury and found beyond a reasonable doubt. Whether a fact is an element, however, remains important to whether it must be alleged in indictments and informations.

Insko v. State, 969 So.2d 992, 997 (Fla. 2007).

Insko ultimately held that the defendant waived the ***Apprendi*** issue by failing to timely object to it. That same result applies to all now convicted of a capital crime who failed to timely object and specifically argue that she was not eligible for the death penalty because their indictment failed to allege the specific criteria required by §775.082 and

§921.141(3), Florida Statutes. In addition to allegations that track §782.04, the charging document must also allege that "sufficient aggravating circumstances exist as enumerated in§921.141(5)" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." The precise argument is not that the indictment failed to allege particular aggravating circumstances. Here, Appellant timely objected and sought to have that error corrected. The error could have and should have been timely corrected if the grand jury agreed with the State's contention. The preserved error now requires reversal of the death sentence and imposition of a life sentence, for not only were those statutory factual findings not alleged, they were not found in accordance with due process and the law over timely and specific objection.

B: FLORIDA'S DEATH PENALTY IS APPLIED IN VIOLATION OF DUE PROCESS, EQUAL PROTECTION AND THE SEPARATION OF POWERS PROSCRIPTION UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS 2, 9, 15(a), 16 AND 22 OF THE FLORIDA CONSTITUTION AND ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION.

The holding in ***Apprendi*** is clear. Respectfully, Florida's scattershot adherence to ***Apprendi*** is not. Remarkably, nine years after ***Apprendi*** and seven years after ***Ring***, Florida has yet to expressly require that death penalty trials provide the Due Process protections guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Assuming that politeness to the United States Supreme Court trumps

the constitutional right to have a jury find eligibility for the death penalty in accordance with the procedures unequivocally required by the federal Constitution, Florida could yet, but has not, provided those same procedural due process rights under article I, sections 2, 9, 15(a), 16 and 22 of the Florida Constitution.

Appellant argued that Florida's capital sentencing scheme requires findings of "sufficient aggravating circumstances" and "insufficient mitigating circumstances" and that those facts must be alleged in his indictment and unanimously found to exist beyond a reasonable doubt by a 12-person jury. The denial of these basic guarantees, Appellant submits, denied him Due Process under the Fifth, Sixth and Fourteenth Amendment to the United States Constitution. Appellant pointed out to the trial judge that Florida affirmatively prohibits[6] trial judges from using a special verdict form that details juror findings concerning aggravating circumstances but stressed that did not interfere with the findings that must be made concerning "sufficient aggravating circumstances" and "insufficient mitigating circumstances." (Vol. II, 252-260). He pointed out that, by requiring only "one or more" aggravating circumstances to support a death sentence Florida is interpreting an unambiguous statute in violation of the separation of powers proscription contained in article II, section 3 of the Florida Constitution. He further argued

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[6] ***State v. Steele***, 921 So.2d 538, 548 (Fla. 2005) ("We hold that a trial court departs from the essential requirements of law in a death penalty case by using a penalty phase special verdict form that details the jurors' determination concerning aggravating

that the denial of these rights denies Due Process violates under the Fourteenth Amendment to the United States Constitution, and also denies Equal Protection under the Fourteenth Amendment because Florida *does* provide those same due process rights recognized in ***Apprendi*** to criminal defendants who are not charged with first-degree murder. E.g., ***Galindez v. State***, 955 So.2d 517 (Fla. 2007) ("we hold that harmless error analysis applies to *Apprendi* and *Blakely* error.**"**); ***Insko***, ***supra***. (same). Failing to timely apply ***Apprendi*** at the trial court level in capital cases only to then hold the error to be "harmless" is a distortion of Florida statutory law that also violates those Constitutional rights.

More specifically, Florida does not apply ***Apprendi*** to death penalty cases and instead prohibits trial judges from using special verdict forms to demonstrate the jury's findings as to *individual* aggravating circumstances. ***Steele***, ***supra***. The Court then refuses to grant meaningful relief on appeal by ruling that ***Ring*** [sic] "is satisfied" if the jury found the existence of a contemporaneous violent felony that is treated under Florida law as a *prior* violent felony ***e.g***. ***Deparvine v. State***, 33 So. 2d 351 (Fla. 2008) ("Deparvine's claim is without merit since it is undisputed that he has prior felony convictions and this Court has held that the existence of such convictions as aggravating factors moots any claim under ***Ring***."); ***Salazar v. State***, 991 So.2d 364 (Fla. 2008) ("***Ring*** is satisfied in this

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factors found by the jury.")

case because the trial court applied the prior violent felony conviction aggravator based on Salazar's conviction for the contemporaneous attempted murder of Ronze Cummings."). ***See also***, ***Duest v. State***, 855 So.2d 33, 49 (Fla. 2003) ("We have previously rejected claims under *Apprendi* and *Ring* in cases involving the aggravating factor of a previous conviction of a felony involving violence."); ***Doorbal v. State***, 837 So.2d 940, 963 (Fla. 2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"). ***Ring*** is not the issue. ***Apprendi*** is. Florida statutory law does not authorize the death penalty if "one or more" aggravating circumstances exist. That is a fiction created by appellate decisions in violation of article II, section 3 of the Florida Constitution.

The existence of "one or more" aggravating circumstance(s) is NOT the "specific findings" required by §921.141(3), Florida Statutes. Rather, the statute requires both that "*sufficient* aggravating circumstances" exist and that "*insufficient* mitigating circumstances exist to outweigh the aggravating circumstances." An appellate ruling that due process is satisfied because a jury found a contemporaneous felony elevates one circumstance above all others and effectively renders the other meaningless. The terms "sufficient" and "insufficient" connote a weighing process, not a mere finding of the existence of one factor. That is so basic that it was immediately perceived and

affirmatively explained in ***State v. Dixon***, 283 So.2d 1, 10 (Fla. 1973):

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

"Sufficient" is synonymous with "adequate, enough and ample. The Unabridged Edition of ***The Random House Dictionary of the English Language***, p.1421 defines "sufficient" as "adequate for the purpose; enough." The commonly-understood meaning of sufficient is not "one or more." That language is contained in Arizona's death penalty statutory scheme. Florida cannot use Arizona law to resolve Florida Due Process issues framed by Florida statutes and if the Florida Legislature had intended for "one or more" aggravating circumstances to justify the death penalty it presumably would have said so. Florida is ignoring the plain language of the controlling statute. Florida is denying the right to due process as to the factors that determine the eligibility of a convicted first-degree murderer to be punished by death. This delay in the administration of justice violates article I, section 21 of the Florida Constitution and denies Due Process under the Fourteenth Amendment to the United States Constitution.

Florida's position that a jury's determination of the existence of one aggravating circumstance satisfies ***Ring*** is a violation of article II, section 3 of the Florida

Constitution. The analysis of Arizona law in ***Ring*** is of no import outside of the State of Arizona unless the statutes of other states are identical. Florida's statute is not identical to the Arizona death penalty statutes. Specifically, the Arizona statute analyzed in ***Ring*** provided:

> In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact **finds one or more** of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.

Ariz.Rev.Stat. Ann, §13.703(E) (emphasis added). The emphasized statutory language was the basis of the COURT'S ***Apprendi*** analysis:

> Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made. The State's first-degree murder statute prescribes that the offense "is punishable by death or life imprisonment as provided by § 13-703." Ariz.Rev.Stat. Ann. § 13-1105(C) (West 2001). The cross-referenced section, § 13-703, directs the judge who presided at trial to "conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances ... for the purpose of determining the sentence to be imposed." § 13-703(C) (West Supp.2001). The statute further instructs: "The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state." *Ibid.*
>
> At the conclusion of the sentencing hearing, the judge is to determine the presence or absence of the enumerated "aggravating circumstances" and any "mitigating circumstances." **The State's law authorizes the judge to sentence the defendant to death only if there is at least one aggravating circumstance** and "there are no mitigating circumstances sufficiently substantial to call for leniency." § 13-703(F).

Ring v. Arizona, 536 U.S. 584, 592-593 (2002) (Emphasis added) (footnotes omitted). The "one or more" language in ***Ring*** pertains to the corresponding language contained in the Arizona Revised Statute. It is not a pronouncement of a constitutional litmus test applicable outside of Arizona.

In Florida, to sentence a person who has been convicted of first-degree murder to the death penalty, two additional "findings" must be made under Section 921.141(3), Florida Statutes

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

(c) Section 921.141(3), Florida Statutes. The statute is not ambiguous and it does not authorize the death penalty if "one or more" factors exist.

Yet, in well over[7] 50 direct appeals of death sentences, Florida has rejected claims that Florida's death penalty is being unconstitutionally applied under ***Apprendi*** and/or ***Ring***. A person such as Franklin whose jury unanimously recommended the death penalty was provided due process under ***Apprendi*** because to make that unanimous recommendation the jury made the statutorily required findings. So, too, the defendants who did not timely raise the issue now presented by Appellant cannot receive relief

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[7] See ***Franklin v. State***, 965 So.2d 79, 101-102 (Fla. 2007) ("In over fifty cases

because the issue was waived by not being specifically presented and because ***Apprendi*** will not be applied retroactively. Simply said, Appellant's death sentence must be reversed and a life sentence without possibility of parole imposed because his jury did not unanimously find beyond a reasonable doubt that sufficient aggravating circumstances exist as enumerated in subsection 5, nor did they unanimously decide that insufficient mitigating circumstances exist to outweigh the aggravating circumstances. These specific things, over timely objection, were neither properly alleged nor proven in accordance with due process. It is time to correct the flaws with Florida's death penalty to the extent that they can be judicially corrected. The Legislature simply does not have to authorize a court to require compliance with the state and federal constitutions. The Constitution itself is all the authorization needed for a court to require due process.

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since ***Ring's*** release, this Court has rejected similar ***Ring*** claims."

POINT V

IN VIOLATION OF THE EIGHTH AND FOURTEENTH TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT IMPOSED THE DEATH PENALTY UPON AN ERRONEOUS FINDING THAT THE MURDER WAS COMMITTED IN A HEINOUS, ATROCIOUS AND CRUEL MANNER.

In sentencing appellant to death, Judge Alva found that the murder was committed in a heinous, atrocious and cruel manner without any pretense of moral or legal justification. In support of this finding the trial court stated:

> Per Dr. Bulic, the medical examiner, the victim Phi Pham was stabbed at least six times. Phi's daughter Lana witnessed the first stab to her throat. Given the nature of the wounds, the victim would have suffered a high degree 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 he 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 the 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 of Phi Pham was especially heinous, atrocious or cruel;
>
> 1. The defendant inflicted at least six stab wounds to the chest, abdomen, arm, and

base of the victims 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 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 away in 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.

(Vol. III, 561-562)

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. ***Martin v. State***, 420 So.2d 583 (Fla. 1982); ***State v. Dixon***, 283 So.2d 1, 9 (Fla. 1973). The state has failed in this burden with regard to the aggravating circumstance found by the trial court, that of heinous, atrocious, or cruel. The court's finding of HAC for this murder, is based on matters not proven by substantial, competent evidence beyond a reasonable doubt, and on erroneous findings, and thus does not support this circumstance and cannot provide the basis for the sentence of death.

This Court has defined the aggravating circumstance of heinous, atrocious, or cruel in ***State v. Dixon, supra*** at 9:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, ***Tedder v. State***, 322 So.2d 980, 910 (Fla. 1975), this Court further defined its interpretation of the legislature's intent that the aggravating circumstance only apply to crime **especially** heinous, atrocious, or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

State v. Dixon, supra at 9.

As this Court has stated in ***Santos v. State***, 591 So.2d 160, 163 (Fla. 1991), and ***Cheshire v. State***, 568 So.2d 908, 912 (Fla. 1990), this factor is appropriate only in torturous murders which exhibit a *desire* to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. ***See, e.g., Douglas v. State***, 575 So.2d 165, 166 (Fla. 1991) (torture-murder involving heinous acts extending over four hours). The present killing of Robinson happened quickly with no substantial suggestion that the defendant *intended* to inflict a high degree of pain or otherwise torture the victim. The evidence herein does not indicate there was any struggle at all. Rather it reflects a surprise, grenzied attach of rather short duration. The only evidence here of any type of resistance was the presence of a single defensive wound on the back of the hand of the

victim, not the palm as found by the trial court. (Vol. IX 1180)

In ***Tompkins v. State***, 502 So.2d 415, 421 (Fla.1986), affirming the HAC finding, the medical examiner testified that death by strangulation was not instantaneous and the evidence supported a finding that the victim was not only conscious but engaged in a desperate, lengthy struggle for life, fighting violently to get away. Contrasting the evidence in the instant case with that of ***Tompkins*** and ***Conde v. State***, 860 So.2d 930, 955 (Fla. 2003), shows that this factor is not applicable here.

In ***Conde***, the medical examiner testified that the victim's *numerous* defensive wounds, which included bruised knees and elbows, a fractured tooth, torn fingernails, and a bruise around the sensitive ear area, indicated a violent struggle and that the victim was alive and conscious for some period of time while Conde was strangling her. The medical examiner also found brain swelling, indicating sustained pressure on the neck, and air hunger, which usually involves longer consciousness than those instances when the blood is completely cut off. Lastly, the examiner testified that the victim suffered a broken hyoid bone in her neck, which may have led to neck swelling even after Conde released his grip, causing the victim to experience air hunger longer than the twenty to thirty seconds Conde stated it had taken him to strangle her. The totality of this evidence provided competent, substantial evidence that the victim was conscious for a period of time during which she struggled with Conde, sustained numerous bodily injuries, and likely knew her death was

imminent. ***Id***.

In contrast, the state failed to meet its burden in this case, however. Much of the trial court's findings with regard to this aggravator presupposes that the victim was conscious throughout most of the events. However, the evidence simply did not support that finding. Dr. Bulic testified that all the wounds were inflicted in a matter of seconds. Dr. Bulic said the victim may have lived from two to ten minutes but could not say she was conscious the whole time. (Vol. XII 60-62) There also was no evidence that the victim heard the struggle between Appellant and Higgins. This is pure speculation.

In ***Rhodes v. State***, 547 So.2d 1201 (Fla. 1989), the decomposing body of an approximately forty-year-old female, missing her lower right leg, was found in debris being used to construct a berm in St. Petersburg. The medical examiner determined manual strangulation to be the cause of death because the hyoid bone in the victim's throat was broken. Rhodes was interviewed by detectives, and during that and subsequent interviews, Rhodes gave different and sometimes conflicting statements to his interviewers, always denying that he raped or killed the victim. He subsequently offered to tell how the victim had died if he could be guaranteed he would spend the rest of his life in a mental health facility. Rhodes then claimed the victim died accidentally when she fell three stories while in a hotel. At trial three of Rhodes' fellow inmates at the jail were called as witnesses for the state. Each inmate testified that Rhodes admitted killing

the victim.

The trial court in ***Rhodes*** had found that HAC applied stating:

> That the murder of Karen Nieradka was especially heinous, atrocious and cruel in that the victim was manually strangled and the clumps of her own hair found in her clenched hands indicates the pain and mental anguish that she must have suffered in the process.

This Court, however, rejected the trial court's finding of the HAC aggravating circumstance finding that the victim may have been semiconscious at the time of her death according to the conflicting stories told by Rhodes. Further, the Court, quoting ***State v. Dixon, supra***, found nothing about the commission of this capital felony "to set the crime apart from the norm of capital felonies."

In ***DeAngelo v. State***, 616 So.2d 440 (Fla. 1993), the defendant struck the victim on the head, used manual strangulation, and then strangled the victim with a ligature. The trial court did not find the presence of this aggravator. In rejecting the state's request for the HAC aggravating circumstance, this Court upheld the trial court, agreeing that the state had failed to prove that the victim was conscious during the ordeal, relying on the medical examiner's testimony as to the possibility that at the time she was strangled with the ligature the victim was unconscious as a result of the pressure of the manual choking and the absence of a struggle or defensive wounds.

The facts of the instant case reveal that there was no intentional torture of the

victim. There was no factual, non-speculative evidence to suggest that the infliction of this strangulation was so prolonged as to amount to lengthy, deliberate torture, as that term is rationally and legally understood.

This circumstance is proper only in "torturous murders," such as that found in the contrasting case of ***Brown v. State***, 721 So.2d 274 (Fla. 1998), where the victim was stabbed nine or ten times, and received additional blunt trauma injuries. Expert testimony showed there that the victim was alive and conscious during the attack. ***Id***. at 278. By contrast, here, the medical examiner's testimony reveals that consciousness could have been lost within a relatively brief period of time. Thus there is no additional evidence to elevate the Robinson killing to heinous, atrocious, and cruel.

The contrast between those cases involving torture or depravity and the instant case should be clear. ***Contrast, e.g., Davis v. State***, 604 So.2d 794 (Fla. 1992), wherein the medical examiner testified that the 73-year-old victim likely was not rendered unconscious by a blow to the head and could have been conscious for thirty to sixty *minutes*, while slowly bleeding to death from the stab wounds. As such, in the instant case, the state has failed to prove this factor of torture or depravity beyond a reasonable doubt regarding the Robinson killing. The conclusion of the trial court should be rejected.

POINT VI

IN VIOLATION OF THE EIGHTH AND FOURTEENTH TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT IMPOSED THE DEATH PENALTY UPON AN ERRONEOUS FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

In sentencing appellant to death, Judge Alva found that the murder was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification. In support of this finding the trial court stated:

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, 3) 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 plan or prearranged design by the defendant to commit the murder included the following facts:

1. The defendant phoned 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 secreted himself behind a closet door in Lana's room to facilitate his attack.
7. Upon the victim's entry to the bedroom, the defendant immediately attacked and stabbed her without provocation.

This evidence will not, and should not be viewed differently by this Court because

the homicide stems from a domestic situation. *Pooler v. State*, 704 So.2d 1375 (Fla 1997). No evidence of any moral or legal justification for the murder was presented or argued.

The court finds this aggravator has been proved beyond a reasonable doubt.

(Vol. III, 562-563

At least one commentator has exposed the inconsistency with which this Court has reviewed this aggravating circumstance. ***Kennedy,*** "Florida's Cold, Calculated and Premeditated Aggravating Circumstance in Death Penalty Cases", 17 Stetson L. rev. 47 (1987). It does appear, however, that the "cold, calculated, and premeditated" aggravating factor "is frequently and appropriately applied in cases of contract murder or execution style killings and 'emphasizes cold calculation before the murder itself'." ***Perry v. State***, 522 So.2d 817 (Fla. 1988). ***See also Garron v. State***, 528 So.2d 353 (Fla. 1988)(heightened premeditation aggravating factor was intended to apply to execution or contracts-style killings). This Court has held that this factor requires proof of "a careful plan or prearranged design." ***Mitchell v. State***, 527 So.2d 129 (Fla. 1988). While the heinous, atrocious and cruel factor focusing primarily on the suffering of the victim and the nature of the crime itself, the cold, calculated, and premeditated factor focuses on the state of mind of the perpetrator. ***Mason v. State***, 438 So.2d 374 (Fla. 1983); ***Michael v. State***, 437 So.2d 138 (Fla. 1983) As stated in ***Preston v. State***, 444 So.2d 939, 946 (Fla. 1984):

> [the cold, calculated, and premeditated] aggravating

> circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events where a substantial period of reflection and thought by the perpetrator. ***See, e.g., Jent v. State***, (eyewitness related a particularly lengthy series of events which included beating, transporting, raping, and setting victim on fire); ***Middleton v. State***, 426 So.2d 548 (Fla. 1982)(defendant confessed he sat with a shotgun in his hand for an hour, looking at the victim as she slept and thinking about killing her);***Bolender v. State***, 522 So.2d 833 (Fla. 1982), ***cert. denied***, ___ U.S. ___, 103 Sup.Ct. 2111, 77 L.Ed. 2d 315 (1983)(defendant held the victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died).

An intentional or deliberate killing during the commission of another felony does not necessarily qualify for the premeditation aggravating circumstance. ***Maxwell v. State***, 443 So.2d 967 (Fla. 1983). However, where additional facts show greater planning prior to or during the killing, the homicide becomes "execution style." ***E.g., Routly v. State***, 447 So.2d 1257 (Fla. 1983)(burglary victim bound and transported to a remote area before he was killed with a gunshot); ***Rose v. State***, 472 So.2d 1155 (Fla. 1985)(defendant had to search for a concrete block, walked to the victim, and asked the victim to sit up and struck him six to eight times). In sum, the cold calculated and premeditated aggravating factor applies to the manner of killing characterized by a heightened premeditation beyond that required to establish premeditated murder. ***Caruthers v. State***, 465 So.2d 496 (Fla. 1985).

Applying the law to the instant case, is clear that the murder of Phi Pham is not cold, calculated and premeditated. The evidence does not show that appellant phoned

Lana to ascertain she was alone in the apartment. Rather, the evidence shows appellant phoned to speak to his daughter Zena and learned Lana was home alone. Appellant's motivation in going to the apartment was to speak to his wife about her actions in giving condoms to their 13 and 10 year old daughters, something which understandably upset him. He also wished to give money for the children to his wife and to deliver mail to her. This was verified when the police inventoried appellant's vehicle and found the money and the mail. Additionally a used condom and wrapper were recovered from Lana's bedroom. Finally, the trial court found that there was no pretense of any moral or legal justification. However, the state's own case made out a pretense of justification. According to Websters Collegiate dictionary (1981) "pretense" is defined as "a claim made or implied especially one not supported by fact; pretext." Thus, by its very definition, a pretense is something that is false. In the instant case, appellant is not arguing that there is any actual moral or legal justification for the death of Pallis Paulk. However there may have been a **pretense of justification** as the evidence showed that appellant and his wife disagreed over the upbringing of their children. Appellant followed the more traditional "patriarchal" culture of the Vietnamese where family is paramount and fathers are very strict. Phi Pham was much more liberal or "Americanized" with the children. Phi Pham was pregnant with another man's child when she married appellant. This is frowned upon in the Vietnamese culture. In fact, they never even told appellant's

parents about if for fear Phi Pham and Lana would be rejected. On the day Phi Pham was killed, appellant had just learned Phi Pham had furnished condoms to their 13 year old and to their 10 year old daughters. Understandably, appellant was extremely upset over that. Given his upbringing, this certainly satisfies as a "pretense" of moral justification.

In summary, the facts of the instant case do not make out a situation for the application of the cold calculated and premeditated aggravating factor. Rather, this was an unfortunate event brought about by deep-rooted cultural differences. The trial court erred in finding this factor.

POINT VII

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE IMPOSITION OF THE DEATH PENALTY IS PROPORTIONATELY UNWARRANTED IN THIS CASE.

In reviewing a death sentence, this Court must consider and compare the circumstances of the case at issue with the circumstances of other decisions to determine if the death penalty is appropriate. ***Livingston v. State***, 565 So.2d 1288 (Fla. 1988). In the instant case, the trial court found four aggravating factors, that the capital murder was committed for the purpose of avoiding arrest, that appellant had a prior conviction for a violent felony, that the murder was committed in a cold, calculated and premeditated manner, and that the murder was heinous atrocious and cruel.[8] The trial court found several mitigating factors.[9] This Court has noted that the death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied "to only the most aggravated and unmitigated of most serious crimes." ***State v. Dixon***, 283 So.2d 1, 7 (Fla. 1973); ***Holsworth v. State***, 522 So.2d 348 (Fla. 1988).

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[8] Appellant is contending that there was insufficient evidence to support the CCP and HAC factors. ***See Points VI and V, supra***.

This Court has described the "proportionality review" performed in every capital death case as follows: Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances. ***Porter v. State***, 564 So.2d 1060, 1064 (Fla.1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). ***Accord Hudson v. State***, 538 So.2d 829 at 831 (Fla.1989); ***Menendez v. State***, 419 So.2d 312, 315 (Fla.1982). Proportionality review "requires a discrete analysis of the facts," ***Terry v. State***, 668 So.2d 954, 965 (Fla.1996), entailing a ***qualitative*** review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis.

The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, Sec. 17, Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. ***Tillman v. State***, 591 So.2d 167 (Fla.1991). Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I,

Sec. 9, Fla. Const.; ***Porter***. Proportionality review also arises in part by necessary implication from the mandatory, exclusive jurisdiction this Court has over death appeals. Art. V, Sec. 3(b)(1), Fla. Const. The obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty law. Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death penalty law. ***See Tillman*** at 169.

A comparison of the instant case to other cases decided by this Court leads to the conclusion that the death penalty is not proportionately warranted in this case. ***Blakley v. State***, 561 So.2d 560 (Fla. 1990)(death sentence was disproportionate despite finding two aggravating circumstances: heinous atrocious and cruel and cold, calculated and premeditated); ***Livingston v. State,*** 565 So.2d 1288 (Fla. 1988)(death penalty disproportionate despite finding two aggravating circumstances: previous conviction of a violent felony and commission of the murder during an armed robbery); ***Farinas v. State***, 569 So.2d 1425 (Fla. 1990)(death sentence not proportionate where defendant convicted of first degree murder of girlfriend even though trial court properly found two aggravating circumstances: capital felony was committed while defendant was engaged in the commission of a kidnaping, and the capital felony was especially heinous, atrocious and cruel); ***Fitzpatrick v. State***, 527 So.2d 809(Fla. 1988)(death penalty not proportionate despite finding of five aggravating circumstances and three mitigating circumstances);

Wilson v. State, 493 So.2d 1019(Fla. 1986)(death sentence not proportionately warranted despite trial court's proper findings of two aggravating circumstances and no mitigating circumstances).

In ***Kramer v. State***, 619 So.2d 274 (Fla. 1993) this Court held that the death penalty was disproportionate despite findings by the trial court that the murder was heinous, atrocious and cruel and that the defendant had a prior conviction for a violent felony. In that case, the evidence demonstrated that Kramer systematically pulverized the victim as he tried to get away and fend off the blows. Kramer delivered a minimum of nine to ten blows; none but the final two would have been fatal. The evidence showed that the attack began in an upper portion of an embankment and proceeded down approximately fifteen feet to the culvert, and then further down the culvert to the final resting place of the victim. The final blows which were delivered with a concrete block were inflicted while the victim's head was lying against the cement. Additionally, the prior violent felony that Kramer had was a near identical attack on a previous victim with a concrete block. Despite these facts, this Court had no problem reducing the penalty to life where these two aggravating factors were offset by the mitigation including Kramer's alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison.

In the instant case, appellant is contending that two of the aggravating factors (CCP

and HAC) have not been proven. The aggravating factor of the prior violent felony has arguably been proven but must be placed in proper context to understand the importance of it. The crime occurred contemporaneously with the murder. Thus, this Court is left with two valid aggravating factors which should be accorded some weight which must be balanced against the overwhelming evidence of mitigation. That appellant suffered an incredibly traumatic childhood is beyond question. The horrors of living through a communist takeover in South Vietnam are well documented. Appellant was imprisoned at age 8 for trying to escape and made to work at hard labor. He was separated from virtually all of his family except for his sister, from whom he was ultimately separated also. He spent two years in squalid conditions in refugee camp. He suffered greatly and was deprived of any semblance of a childhood. He was relocated to a foreign country where he could not even speak the language. Every mental health professional agreed he suffered mood disorders and personality disorders. There certainly was some evidence of mental disorders although the professionals disagreed as to the severity. The instant case is surely not one of the most aggravated and least mitigated cases. This Court must vacate appellant's death sentence and remand the cause with instructions to resentence him to life.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to reverse his judgment and sentence and remand the cause for a new trial, a new penalty phase, or in the alternative to reduce the sentence to life.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Tai Pham, #953712, Florida State Prison, 7819 NW 228th St., Raiford, FL. 32026 , this 29th day of September, 2009.

_____
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 point.

_____
MICHAEL S. BECKER
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