IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-220

WILLIAM FRANCES SILVIA

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

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

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STATEMENT OF THE CASE

William Silvia (referred to as "Appellant" because he killed his wife with the same surname) was indicted for the first-degree murder of his wife, Patricia Silvia, and the attempted first-degree murder of his mother-in-law, Betty Woodard. (V1, P5)[1]. He was tried by jury from June 2 to 6, 2008. (V5-14, T1-1879). The jury found Appellant guilty of premeditated murder during which he discharged a firearm, and attempted premeditated murder during which he discharged a firearm. (V3, P415-418).

The penalty phase was held July 17-21, 2008. (V15-17, T1880-2411). The jury recommended a sentence of death by a margin of 11-1. (V3, P486). The *Spencer* hearing took place November 19, 2008. (V19, T2588-2687), and sentencing was January 28, 2009. (V19, T2688-2696). The trial judge entered a comprehensive sentencing order finding three aggravating circumstances:

> (1) Prior violent felony: contemporaneous attempted murder of Betty Woodard – great weight;

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[1] Cites to the record on appeal are:

-volume number "V" followed by "P" for pleadings. Pleadings constitute volumes 1 through 4 and pages 1 through 608;
-volume number "V" followed by "T" for transcripts of hearings, trial, and penalty phase. Transcripts constitute volumes 5 though 19 and pages 1 through 2696.

(2) Great risk of death to many persons: ten persons were attending the cookout, shotgun pellets were in all areas in which these persons were located; Appellant shot at the door behind which Patrick Woodard stood; the victim's son was standing next to her when she was shot; Appellant pointed the shotgun at the victim's daughter but another person pushed her from behind and she escaped; Appellant shot into the carport where the guests were sitting; Appellant fired 7 shots total – great weight;

(3) Cold, calculated and premeditated: Appellant calmly purchased a shotgun, bird shot and buck shot the day of the murder; Appellant had tried to reconcile with Patricia – the day of the murder he told her "you will be sorry"; Appellant retrieved the shotgun from his car, walked back to the house and started shooting – great weight.

(V3, P566-576).

The trial judge did not find any statutory mitigating circumstance, but found several non-statutory mitigating circumstances:

(1) Emotional distress from loss of job and divorce – little weight;

(2) Impaired ability to conform conduct due to chronic personality disorder NOS and chronic alcohol dependence – moderate weight;

(3) Chronic personality disorder NOS with paranoid, anti-social and schizoid features and alcohol dependence – moderate weight;

(4) Chronic alcohol dependence – moderate weight;

(5) Diagnosis as teenager with schizoid or schizophreniform disorder – little weight;

(6) Grew up in dysfunctional family setting with domestic violence – little weight.

(V3, P577-583).

STATEMENT OF THE FACTS

Appellant and his wife, Patricia Silvia, separated in July 2006. Patricia had two children, Ross and Rachel. After the separation, Patricia and the children went to live with her parents, Patrick and Betty Woodard. (V10, T1134-35, 1154-55, 1059). Robin McIntyre, Patricia's sister who had Down Syndrome, also lived with the Woodards. (V10, T1056-57). Appellant would come by the Woodards' house to speak with Patricia. Sometimes it was early in the morning and sometimes he would bang on the doors and windows. Patricia would not speak to him. (V10, T1060).

On September 22, 2006, the Woodards hosted a cookout in the carport area of their home. (V10, T1063). Patricia, Rachel, Ross, Robin, Patrick, Betty, several neighbors, and Jerome Woodard were at the cookout. (V10, T1119, 1133, 117, 1153, 1156, 1176, 1177-79, 1184). Appellant arrived and asked Patricia to come to the end of the driveway to talk with him. They spoke for a few seconds, then Patricia went inside the house. Betty thought Appellant left the property. (V10, T1064). Betty went into the house to tell her husband Appellant was at the house, then suddenly she heard what sounded like firecrackers. (V10, T1065). Betty opened the door to the carport and saw only "flash of light." The next thing Betty

remembered was waking up in a pool of blood.[2] (V10, T1065). Patricia was lying on the floor in the kitchen. (V10, T1066).

Jerome Woodard, Patrick's younger brother, was at the Woodards' house on September 22. (V10, T1105-06, 1107). He testified that around 9:00 p.m., Appellant arrived and asked to speak to Patricia. (V10, T1109, 1120). Patricia "seemed like she was startled" but told Rachel, "don't worry about it," and spoke to Appellant at the corner of the carport. (V10, T1110). After talking for a few minutes, Patricia came back up the carport. Appellant walked towards his truck. (V10, T1112). Appellant returned within a few minutes. (V10, T1113, 1121). Jerome was in the carport when he saw Appellant "walking up." (V10, T1113, 1119-20, 1130). He asked Appellant, "What are you doing here? I thought you were leaving." (V10, T1129, 1130). Jerome "saw a muzzle flash and heard a shot." Then, "another shot rung off." Jerome dropped to the ground and hid between two vehicles. (V10, T1113, 1114, 1121). Jerome heard seven shots and could hear shells ejecting from the shotgun. (V10, T1115, 1118).

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[2] Appellant shot Betty Woodard in the face. Her jaw was shattered and her left eye removed. She lost the entire left side of her face and no longer has a sense of smell. Nerve damage affects the use of her left arm. (V10, T1070, 1072).

Ross Shadron, 15,[3] was watching television in the living room. (V10, T1137, 1156). At one point, he went outside and saw Appellant at the corner of the carport. (V10, T1137, 1148). Appellant "had his arms crossed, and he was just standing there." (V10, T1137, 1148, 1150). Ross went back inside. (V10, T1138, 1145). His mother came in the house and went to the refrigerator. (V10, T1148-49). About 15 minutes later, he heard gunshots. He ran toward the door and everybody was running inside. (V10, T1138). Ross "saw smoke everywhere." Robin McIntyre was "screaming." (V10, T1138). Ross was standing next to his mother as the others ran inside the house. (V10, T1139). Appellant "shot at the door, and I believe the bullet hit my mom and she fell in front of me." (V10, T1139, 1146). Ross started "screaming and crying." He saw blood. (V10, T1140). He couldn't find Rachel and was just screaming. (V10, T1140). Beth Parker took Ross to the bathroom. Rachel and Robin also made it into the bathroom. (V10, T1140). They called the police, and the police arrived and questioned everyone. (V10, T1141).

Rachel Shadron, 17, was in the carport when Appellant arrived. (V10, T1156). She was "hanging out" with family and friends on the carport. Everyone

[3] Age on date of testimony.

was in the carport except her brother, who was in the house. (V10, R1156). When Rachel asked Appellant what he wanted, he said he needed to talk to Patricia. (V10, T1157, 1168). Patricia and Appellant spoke at the edge of the carport "for a few seconds" and then Patricia walked away. Appellant told Patricia she "would be sorry." (V10, T1157, 1158, 1169). Rachel saw Appellant walk to his truck. (V10, T1158). The next thing Rachel remembered was hearing gunshots. She stood up to get Ross and Appellant pointed the gun at her. (V10, T1158). Appellant was standing less than a foot away from Rachel when he pointed the shotgun at her. (V10, 1171). "Someone" pushed her and she crawled into the house to get her brother. (V10, T1159, 1173). Neighbors Doug Caldwell and Beth Parker then directed Rachel toward the bathroom. (V10, T1159). Rachel saw her grandfather kneeling down near the front door, holding it shut. Her mother had "collapsed in front of the refrigerator." (V10, T1161, 1174). Her grandmother (Betty) was in the carport "holding her eye." (V10, T1161-62). When her grandfather (Patrick) was kneeling down by the front door, Rachel could still hear gunshots. (V10, R1161).

Patrick Woodard helped Patricia and her children move into his home on July 14, 2006. (V10, T1180, 1181). He testified that on several occasions, Appellant came to Woodard's home in the middle of the night and asked to speak to Patricia. (V10, T1181, 1182). Patrick told Appellant to leave, which he did.

(V10, T1183). On September 22, Patrick and Beth Parker were chatting in a bedroom in the house when Betty came in and asked him to go outside because "Will was here." (V10, T1186-87). A few minutes later, Patrick heard gunshots. (V10, T1187). He went into the kitchen and saw Patricia lying in front of the refrigerator. (V10, T1187-88, 1189). Betty was lying outside the open door that led into the carport area. (V10, T1192-93). Patrick saw Appellant standing at the end of the carport. (V10, T1193). Appellant pumped the shotgun and aimed it at Patrick. (V10, T1196). Patrick stepped over Patricia's body and shut the door. (V10, T1197). Appellant shot at the door. (V10, T1198). Patrick waited a few minutes before opening the door. Appellant was gone. Patrick tended to his wife and called 911. (V11, T1207). Patrick told the police Appellant was the shooter and described the vehicle he was driving. (V11, T1210).

When the deputies responded to the shooting scene they found Betty, still conscious, lying in the carport. (V11, T1216). Her condition was "grim" due to massive facial injuries and head trauma. Patricia was deceased. (V11, T1230, 1231-32, 1235-36).

A BOLO was issued for Appellant. (V11, T1249). On September 23, at 3:00 a.m., a deputy saw a vehicle pass that matched the BOLO description. (V11, T1247, 1250, 1262, 1263). Appellant slowed down and made "eye contact" with

the deputy. Appellant then drifted into the median and jerked the steering wheel to get back in the correct lane. (V11, T1251-52, 1258). He "was swerving around" and driving at a slow rate. (V11, T1259). When the deputy received confirmation the vehicle belonged to Appellant, he requested backup units. (V11, T1250-51). The deputy thought Appellant's driving pattern indicated intoxication. (V11, T1256, 1259). Appellant made an "abrupt" turn into a motel parking lot.[4] A vehicle backing out of the lot blocked Appellant, forcing him to stop. Appellant complied with orders to exit his vehicle and was handcuffed. (V11, T1253-54, 1257, 1260). He appeared to be "impaired or intoxicated." (V11, T1256). He had "glazed glassy eyes" and was laughing. (V11, T1256, 1260-61).

A search warrant was obtained for Appellant's motel room at the Regency Inn. Deputies found a pump action .12 gauge Mossberg shotgun. (V11, T1271, 1272, 1274, 1285). The shotgun did not have a typical stock. The short barrel provided for a "bigger spread pattern." (V11, T1288). The shotgun held eight shells in the magazine and one in the chamber. (V11, T1292). According to the receipt found in Appellant's truck, he purchased the shotgun on September 22, 2006, at 3:30 p.m. from Shoot Straight Gun Shop in Casselberry. (V11, T1279).

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[4] Appellant rented a room at the Regency Inn motel at 4:40 p.m. (V11, T1260; State Exhibit #128 at V2, P376).

The gun shop's video security system showed Appellant purchasing the weapon. (V11, T1280-81; V12, T1494, 1508, 1514, Exh. 100-102).

Investigator Jaynes was the primary investigator. (V11, T1268). He was familiar with guns and rifles of all types. (V11, T1284). For a shell to eject, the Mossberg shotgun needed to be pumped. When one shell is ejected, another will enter the chamber. (V11, T1287). A .12 gauge shotgun can be loaded with different ammunition: a single slug, buckshot, or birdshot. (V11, T1290). Shot pellets come in different sizes. (V11, T1291). A double-aught (.00) buckshot shell contains 9 pellets that are 30 caliber and is the type of shot used to shoot large animals. (V11, T1192, 1194). Appellant's shotgun could hold 8 shells in the tubular magazine, plus one in the chamber. (V11, T1292). Haynes test-fired Appellant's gun with the same size type of buckshot found at the scene. (V11, T1295).

A total of eight shotgun shells were collected from the murder scene. (V10, T1090-91; V11, T1351, 1363, State Exhibit #55). Four shells were found in the road in front of the Woodard house; one shell was found in the grass between the two driveways, and three shells were in the driveway to the left of the Ford. (V11, T1351, State Exhibit #6-C). One of the shells collected from the roadway had not been fired. (V11, T1351). Three of the shells were birdshot: the unfired shell and two of the fired shells. Five of the shells were .00 buckshot. (V11, T1304, 1364-

65). There was "a large amount of blood on the carport." (V11, T1351). There was an impact site on the side of the Ford in the driveway, two on the carport door, and one on a post in the carport. (V11, T1352; State Exhibits #2-4 at V2, P267-69 and State Exhibit #30 at V2, P294). Various pellets were collected from the kitchen, porch, and carport area. (V11, T1370; State Exhibit #74 at V2, P334).

Patricia's body was inside the door leading into the house from the carport with "a large pool of blood around her." (V11, T1352). There were multiple areas of impact from shotgun pellets. (V11, T1352; State Exhibits #28-29 at V2, P292-93). Blood spatter and "what appears to be flesh" was on the wall next to the carport doorway. (V11, T1374). Projectile holes were in the refrigerator, the ceiling, and the cabinet above the refrigerator. (V11, T1377; V13, T1617, State Exhibits #63-66 at V2, P323-326). There were impact marks from pellets that hit the door leading from the carport into the kitchen. (State Exhibit #11 and #19 at V2, P273, 276).

Pursuant to a search warrant for Appellant's room at the Regency Inn, officers found an empty box of Federal ammunition, a wrapper to a shot shell holder, and several weapon manuals. (V12, T1439-40, State Exhibit #91 at V2, P350). A black duffle bag contained shotgun shells, clothing, and other miscellaneous items. (V12, T1441-42: State Exhibits 93, 95, 97 at V2, P352, 354,

356). The shotgun shells collected from Appellant's motel room were the same brand as those collected at the Woodards' home. (V12, T1554-55; State Exhibits #116, 118-125). Several empty beer bottles[5] were located. (V12, T1527-28; V13, T1654). The shotgun, fully loaded, was found inside a black duffle bag. (V12, T1528, 1530). A black shirt and jeans were found on the bed and floor. (V12, T1532). Appellant's wallet and keys were in the motel room. (V12, T1557-58; State Exhibit #117). In the front seat of Appellant's truck was the divorce petition between he and Patricia. (State Exhibit #129 at V2, P377). A firearms analyst examined and test-fired the 12 gauge Mossberg shotgun and concluded the shells collected at the crime scene were fired from the shotgun. (V11, T1396, 1398; V12, T1406, 1408-09, Exh. 12).

Dr. Valerie Rao, medical examiner, performed the autopsy on Patricia Silvia. (V13, T1679, 1681). Silvia had some non-serious abrasions on her face. (V13, T1688). There was a pellet gunshot entry wound behind her left ear which entered her skull. (V13, T1688-89). A"big pellet" entered through the top of Patricia's left ear, entered her skull and stopped in the right front lobe of her brain. (V13, T1690, 1701). There were additional pellet wounds on the back of Patricia's

[5] Two receipts for bar dated September 22, 2006, at 6:09 p.m., and September 22, 2006, at 10:02 p.m., were located in Appellant's room. Each receipt was for the purchase of a six pack of beer. (V12, T1528-29; State Exhibit #87 at V2, P346).

head. (V13, T1691). Three pellet holes entered through the occipital bone and "actually drag[ged] her brain through that". There was massive trauma to her head. (V13, T1692). Either the pellets or bone fragments caused exit wounds. (V13, T1694). Dr. Rao concluded Patricia died as a result of shotgun pellet wounds to her head. (V13, T1698).

Sergeant Matthew Hardesty transported Appellant after his arrest. (V13, T1717, 1719). Appellant asked Hardesty whether he was married and said "he was in this situation" because he was married. Appellant said his wife spent all their money then started dating her ex-husband, "and because of that, that is the reason why he shot her." (V13, T1723). Sgt. Hardesty made some handwritten notes after Appellant spoke to him. Hardesty later entered the notes into a computer. (V11, T1724).

PENALTY PHASE TESTIMONY

The State presented two fact witnesses[6]: Beth Parker and Patrick Woodard. Beth testified that when she went into the house right before the shooting, she and Patrick were in the house and everyone else was in the carport (V15, T1942). Then Betty came in and said something to Patrick (V15, T1942). She heard shots

[6] The victim advocate read victim impact letters written by Ross Shadron, Rachel Shadron, Robby Shadron, Randy Shadron, and Aura Boyd. (V15, T1954-66). Pam Wyatt, Patricia's sister, testified. (V15, T1966-74).

and went towards the sound, she found "three kids standing in front of me" (V15, T1943). She took them into the bathroom. (V15, T1943).

Patrick testified that he heard shooting, saw Patricia lying on the kitchen floor in front of the refrigerator, saw Appellant outside pointing a gun at him, stepped over Patricia, and shut the door. Appellant fired a shot at the door. (V15, T1945).

Appellant's father, William Silvia, Sr. ("William") testified that Appellant was born March 25, 1965, and has a sister and brother. (V15, T1977). Appellant had no medical problems growing up, and the family was financially stable. (V15, T1988).

William and Appellant's mother had a volatile relationship which was sometimes physical (V15, T1979). William and Appellant's mother had domestic disputes through the years. One of those disputes resulted in authorities being called; however, Appellant did not live at home at that time. (V15, T1989).

Appellant's mother was killed by a drunk driver in 1999 or 2000, and Appellant's brother died in 2001. (V15, T1981). Appellant was around 35 years old when his mother died. (V15, T1987). He was affected by her death because they worked together in a screen business, and when she died Appellant was unemployed. (V15, T1987).

Appellant's brother had a drug problem and his sister was bipolar. (V15, T1981, 1986). Appellant and his brother ran away from home two or three times. Twice they went to Venice Beach, California. One time the police called William to let him know they found the boys trying to rob a bank. (V15, T1983). Appellant went to the psychiatric unit at Florida Hospital. (V15, T1984).

As a youngster, Appellant played little league and was on the swim team. (V15, T1984). Later on, Appellant was not involved in sports. He was quiet and reserved: more of a loner. He was interested in Dungeons and Dragons. (V15, T1985). After Appellant became an adult, William did not have much contact with Appellant. "He went his way and I went mine." They would go years without talking. (V15, T1986).

Dr. Deborah Day, psychologist, first visited with Appellant in December 2006. (V15, T1999). She testified that Appellant was the oldest of four children. The family moved to Orlando when Appellant was 13 years old because of the father's employment. (V15, T2005). Appellant smoked pot and drank alcohol since adolescence. (V15, T2008). Appellant's father was abusive to both Appellant and his mother. (V15, T2005-06). The father would hit Appellant with his fist and with a leather belt. (V15, T2007). When his parents divorced, Appellant stayed close to his mother but not his father. Appellant married and

moved to Tampa. He has no biological children. His first marriage lasted 10 years. (V15, T2008). Appellant left his first wife because he was having an affair with Patricia, the victim, who he later married. (V15, T2009). Patricia had four children prior to marrying Appellant. Two of those children lived with Patricia and Appellant. (V15, T2009).

Appellant had seen a psychiatrist for months during the time he was married to Wendy. (V15, T2009). His brother died from a drug-induced heart attack. His sister was bi-polar. His grandfather committed suicide, and his uncle has post traumatic stress disorder from serving in Viet Nam. (V15, T2010). Appellant's sister was the executor of his mother estate; however, the sister had a breakdown and was hospitalized. Appellant became the executor and spent all the money in the trust set up for his brother's children. He and Patricia lived on that income for three years. (V15, T2012). When the money was gone, Appellant and Patricia lived in a mobile home. Patricia worked, and Appellant was unemployed. Patricia left. Appellant was evicted. He lived in his car. (V15, T2016). At one point he got a job and lived on the job site, but he eventually ended up living in his car again. (V15, T2017). The day of the murder Appellant was unemployed again. (V15, T2020).

During the time Appellant lived with Patricia, he said he starting having paranoid thoughts. (V15, T2014). He thought people were watching him and planes overhead were spying on him. Appellant also believed Patricia was having an affair with her two oldest sons. (V15, T2015, 2043). These ideations were not corroborated by any other source. (V15, T2063). He thought Patricia was having an affair with her ex-husband after she left Appellant. Appellant has sustained 3 head injuries in his life: one at school when he fell out of a desk, one during a car accident, and one when he was mugged in 2005. (V15, T2018). Appellant obtained a GED and truck driver license. He worked a series of jobs, but none of them ever seemed to work out. (V15, T2019).

Dr. Day did IQ and neuropsychological testing on Appellant and looked for brain damage. (V15, T2022). Dr. Fogle, a neuropsychologist, also visited Appellant. (V15, T2023). Appellant's IQ is 107, which is average. (V15, T2025, 2059). He has some weakness in memory which could be due to drug and alcohol consumption or head trauma. (V15, T2026). There were no gross signs of brain injury or trauma. (V15, T2026). In Dr. Day's opinion, Appellant has "extreme" mental health problems. (V15, T2028). Her diagnoses included personality disorder, NOS, with a combination of antisocial, schizoid, and paranoid elements; and delusional disorder. (V15, T2037, 2039). Her diagnosis of delusional disorder

was based on non-bizarre delusions, and Appellant did not report he experienced any type of delusion on the day of the murder. (V15, T2049-50).

Appellant told Dr. Day he went to see Patricia, they talked, then he went to the truck and got his shotgun. Appellant claimed he did not remember anything else until he heard gunshots and that he did not remember leaving the residence. (V15, T2042). He did remember being back in his motel room. (V15, T2043). He went to talk to Patricia about whether they were going to reconcile or get a divorce. (V15, T2056).

Dr. Day had not reviewed the video of Appellant buying the shotgun 6 hours before the murder. (V15, T2049, 2053). Appellant told Dr. Day he purchased the shotgun for safety because he was living in his car. (V15, T2054). Dr. Day admitted that Appellant had never had a "black out" and there was no direct evidence of alcohol consumption before the murder. (V15, T2053). Appellant has had no incident of psychosis while incarcerated. (V15, T2057). In Dr. Day's opinion, Appellant met the criteria for anti-social personality disorder, except that there was no evidence of onset before age 15. (V15, T2072-75). In Dr. Day's opinion, Appellant did have the mental capacity to premeditate the murder in a cold, calculated, premeditated fashion. (V15, T2090). Appellant's ability to

appreciate the criminality of his actions was not substantially impaired, nor was he under the influence of an extreme emotional disturbance. (V15, T2094, 2095).

The State called Dr. Jeffrey Danziger, psychiatrist, as a rebuttal witness. (V16, T2120). Dr. Danziger conducted an evaluation of Appellant on June 10, 2008. (V16, T2125). Dr. Danziger agreed with Dr. Day that psychological testing was consistent with "severe personality and character pathology" and described Appellant as:

> Someone with a long-standing history of being suspicious of others, blaming others, sort of a hostile, irritable individual, suspicious, resentful, irritable, argumentative, perhaps even obnoxious. Someone who has difficulty with authority. Someone who likely has substance abuse issues. The profile was possibly consistent with someone who may have bizarre thinking and bizarre thoughts. It did not prove that he was psychotic.

(V16, T2131-32).

On the MMPI-2, Appellant scored very high on the psychopathic deviant and paranoia scales. (V16, T2132-33).

Appellant was fired the day of the murder. (V16, T2137). Dr. Danziger had reviewed the videotape of Appellant purchasing the shotgun, and said it appeared to be a "routine transaction." (V16, T2141). Appellant was calm and acting normally. (V16, T2142). The time of the transaction showed on the videotape as 3:42 p.m. on September 22, 2006. (V16, T2141). Appellant told Dr. Danziger he

purchased the shotgun for protection from “someone”. (V16, T2136). He said that when he was firing the gun it was like he was in a dream. (V16, T2143). Dr. Danziger opined that when a defendant can remember everything except the criminal act, it raises suspicion. (V16, T2144). Appellant said he would have blackouts if he was drinking heavily. Before the murder, Appellant said he drank a 6-pack, but denied being impaired by alcohol. (V16, T2145). Appellant said that after Patricia told him she would not reconcile, he went and got the gun. (V16, T2150).

Appellant self-reported delusions. This could indicate a delusional disorder or alcohol ingestion to the point it became toxic. (V16, T2148). Jail records did not indicate paranoia, hallucinations or psychosis. Basically, Appellant was a model prisoner. (V16, T2147). Although a guard relayed information to a nurse one time that Appellant was acting strangely and the nurse referred him to the jail psychologist for “hallucination anxiety,” the psychologist ruled out psychosis and treated Appellant for depression. (V17, T2312-13). Dr. Danziger noted that when Appellant was in jail where there were no drugs or alcohol, he was not having delusions. (V16, T2149).

Dr. Danziger had reviewed the medical records from the 2005 mugging. The records indicated no loss of consciousness and no indications of brain injury.

Appellant had a facial fracture. He was not admitted to the hospital. (V16, T2150). Dr. Danziger reviewed the school incident with Appellant, and there was no treatment for having fallen out of his desk. After the car accident, Appellant was seen at the emergency room, given stitches, and sent home. He may have had a concussion. (V16, T2151). There was nothing in Appellant's medical history to suggest serious brain injury. (V16, T2151). In any case, alcohol was the more likely cause of any brain damage. Alcohol affects memory. (V16, T2152).

Dr. Danziger agreed with Dr. Day's diagnosis of personality disorder NOS with anti-social and paranoid traits. Dr. Danziger was not as certain as Dr. Day about the schizoid part, which Dr. Danziger said was "possible." (V16, T2152). In his opinion, the antisocial characteristic was the prominent one. (V16, T2155). Dr. Danziger also agreed with Dr. Day that appellant is alcohol dependent. (V16, T2154).

SPENCER[7] **HEARING TESTIMONY**

At the *Spencer* hearing on November 19, 2008, the defense presented the testimony of Dr. Buffington and the State presented testimony of Dr. Danziger. (V19, T2588-2687). Dr. Buffington, pharmacologist, saw Appellant on October

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

17, 2008, after the penalty phase. (V19, T2596-97). According to Appellant's self-report, he would try to get sober but could not. (V19, T2605). In Dr. Buffington's opinion, Appellant was both alcohol and marijuana dependent. (V19, T2606). Alcohol and marijuana use can be the source of paranoia and the fact that Appellant was experiencing paranoia showed chronic use. (V19, T2607). Alcoholics have pathological changes in the brain. (V19, T2609). An alcoholic can be impaired even when the alcohol consumption is low or non-existent. Rapid consumption will cause an elevated effect of the alcohol. (V19, T2610). Appellant likes to engage in rapid consumption. (V19, T2611).

On the day of the murder, Appellant reported consuming a 6-pack in a short time. (V19, T2612). Dr. Buffington explained that an alcohol-related black out is not a total loss of consciousness but is more like retrograde amnesia. (V19, T2613). Appellant had a type of fragmented amnesia because he could remember portions of the events. (V19, T2614). Dr. Buffington admitted that there were no signs of intoxication at the time of the murder, and this was not an "intoxication" case. (V19, T2616).

In Dr. Buffington's opinion, even though the videotape of the shotgun purchase showed Appellant functioning normally, he could have been operating under a delusion. (V19, T2615). The fact that Appellant paid cash for the gun and

rented a motel room could indicate suicide. Appellant has a documented history of suicidal ideations. Further, he had lost his family, job, and home. Appellant's goal might have been to commit suicide if there was no reconciliation with Patricia. Alcoholics have a higher suicide rate than other people. (V19, T2623).

Appellant was paranoid that Patricia's family members were out to get him. (V19, T2619). Family members had chased him away from the Woodard home and followed him through traffic. (V19, T2620). Appellant had been threatened by Patricia's son, Ronnie, and her ex-husband. (V19, T2620). In Dr. Buffington's opinion, delusions are part of paranoia. One of Appellant's delusions was that she was having sex with her son. (V19, T2621-22).

On cross-examination, Dr. Buffington conceded that there were 3 to 3½ hours between the time Appellant purchased the 6-pack of beer and the murder. (V19, T2634). Dr. Buffington did not know whether Appellant drank the beer fast or slow. (V19, T2635). Dr. Buffington did not view the videotape of Appellant purchasing the shotgun. (V19, T2647). Appellant did not tell either Dr. Day or Dr. Danziger he was suicidal. (V19, T2646). Dr. Buffington admitted that Appellant had many opportunities to commit suicide if he wanted to. (V19, T2648). Further, the fact Appellant purchased 4 boxes of ammunition with 5 shells in each box was

inconsistent with suicide. (V19, T2649). Twenty (20) shells are not required to kill oneself. (V19, T2650).

In rebuttal, Dr. Danziger testified that Appellant does not have a full-blown delusional disorder or paranoid delusions: he has paranoid personality characteristics. (V19, T2661). Appellant does not have a mental illness: he has a personality disorder. (V19, T2661). Appellant never said he purchased the gun in order to commit suicide. In fact, Appellant denied wanting to commit suicide. (V19, T2663). Last, drinking a 6-pack over a period of 3 hours is not excessive for an alcoholic. (V19, T2664).

SUMMARY OF ARGUMENTS

Point I: The cold, calculated, and premeditated aggravating circumstance was proven beyond a reasonable doubt, and the trial court findings are supported by substantial competent evidence. Appellant purchased a shotgun. Six hours later he drove to the murder scene with divorce papers on the front seat and the shotgun loaded with 8 rounds. When his wife, Patricia, told him she would not reconcile, Appellant said "You'll be sorry." He turned and walked to his truck, got his shotgun, and started firing as he approached the house, pumping a new shell into the chamber 7 times. He shot Patricia's mother, who was standing between him and Patricia. He then shot Patricia in the head. Error, if any, was harmless.

Point II. The "risk of death" aggravating circumstance was proven beyond a reasonable doubt, and the trial court findings are supported by substantial competent evidence. This Court has held that placing four persons in danger is sufficient to establish this aggravator. Betty Woodard, Patrick Woodard, Ross Shadron, Rachel Shadron, Jerome Woodard and Robin McIntyre were knowingly put in great risk of death by Appellant. Betty was shot in the fact when Appellant was trying to get to Patricia, the murder victim. Appellant pointed a gun at Patrick and pumped it; however, Patrick managed to shut the door. Notwithstanding, Appellant shot the door. Ross and Rachel were standing next to Patricia when she

was shot. Jerome was in the carport and hid behind the Ford which Appellant then shot. Pellets also hit the pillar behind Jerome. Robin was in the carport when Appellant started firing indiscriminately. She ran into the house and past Betty and Patricia as Appellant was firing. Error, if any, was harmless.

Point III. This case is proportional to other death-sentenced defendants. This case involves the cold execution of a wife who would not reconcile with her husband and the attempted murder of a mother who tried to protect her daughter, only to be shot in the face. Appellant risked the lives of the murder victim's children, her parents, her sister, and her uncle by repeatedly firing into the carport and at the door behind which Patrick Woodard hid. As to the sufficiency of the evidence, there were multiple eyewitnesses who survived the attack and recounted each horrifying detail.

Point IV. Appellant complains of two instances in which Dr. Danziger answered a question regarding antisocial personality disorder. The first question was asked by the prosecutor and the second by defense counsel. The trial judge did not abuse her discretion in overruling the objection to Dr. Danziger's answer and denying the motion for mistrial. There was no prosecutorial misconduct. Dr. Danziger was testifying about the characteristics of antisocial personality disorder, one of which is lack of remorse. Ironically, defense counsel asked Dr. Danziger

the same question 75 pages later, then moved to strike the question and answer. Appellant also protests the prosecutor's closing argument at the penalty phase that Patrick Woodard would have "taken some buckshot" if he hadn't closed the door before Appellant shot it. This was a fair comment on the evidence and mirrored the testimony given by the witness. Error, if any, was harmless.

Point V. There was no objection to the two comments cited as inappropriate victim impact evidence, and this issue is not preserved for review. The comments did not constitute fundamental error. Error, if any, was harmless.

Point VI. Florida's death penalty statute is not unconstitutional under *Ring v. Arizona*. Further, *Ring* is not implicated by this case, which involves a contemporaneous attempted murder on which the jury unanimously convicted Appellant.

ARGUMENT

POINT I

THE TRIAL JUDGE DID NOT ERR IN FINDING THE AGGRAVATING CIRCUMSTANCE "COLD, CALCULATED, AND PREMEDITATED."

Appellant claims that the trial judge improperly found, as a statutory aggravator, that the murder of Patricia was cold, calculated, and premeditated. In the sentencing order, the trial judge wrote:

> To establish this aggravator, the State must prove beyond a reasonable doubt that (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 legal or moral justification. *Jackson v. State*, 704 So. 2d 500 (Fla. 1997), *Nelson v. State*, 748 So. 2d 237 (Fla. 1999), and *Sereci [sic] v. Moore*, 825 So. 2d 882 (Fla. 2002). The court incorporates the findings and conclusions from the two prior aggravators into this aggravator.[8]
>
> The evidence is sufficient to establish that the murder of Patricia Silvia was the product of cool and calm reflection by the Defendant and not prompted by emotional frenzy, panic, or a fit of rage. The Defendant and Patricia Silvia were married in 2002. In July of 2006, Patricia Silvia separated from the Defendant and she and her two minor children, Ross and Rachel Shadron, moved in with Betty and Patrick Woodard at their Zelina Point home. From the date of the separation until the evening of September 22, 2006, the Defendant came by the Woodard's home several times and called on the phone to

[8] The "two prior aggravators" were prior-violent-felony" and "great risk of death." The trial judge made lengthy factual findings as to each aggravating circumstance.

talk to Patricia Silvia, seeking to reconcile with her. Patricia Silvia was not receptive to the Defendant's attempts to reconcile.

On September 22, 2006, at approximately 3:50 pm., the Defendant purchased a 12 gauge Mossberg Persuader shotgun from Shoot Straight II.[5] The surveillance video from Shoot Straight II shows the Defendant looking at the guns in the store, speaking with the store clerk, selecting the 12 gauge Mossberg Persuader shotgun, purchasing the shotgun and leaving the store with the shotgun.[6] This video is important because it shows the Defendant on the day of the murder calmly participating in a routine transaction. The Defendant exhibited no bizarre, agitated, frenzied or panicked behavior. The Defendant was calm the entire time he was at Shoot Straight II. He then went to Al's Army Navy where he purchased four individual boxes of shells, including both bird and buck shot.

[5] State's Exhibit 101.

[6] State's Exhibit 100.

The Defendant rented a hotel room at the Regency Inn on Highway 17-92 in Fern Park that same afternoon and purchased a six-pack of beer at the nearby Winn¬Dixie at 6:09 p.m.[7] Approximately five and a half hours after purchasing the shotgun, the Defendant drove to the Woodard's home with the shotgun and ammunition in his truck.

[7] State's Exhibit 87.

Later that evening the Defendant went to the Woodward's home to give Patricia Silvia one last chance to reconcile with him, and, if she refused, to kill her. When Patricia Silvia walked away from the Defendant after briefly speaking with him, Rachel Shadron heard the Defendant tell her mother, "You will be sorry." The Defendant walked back to his truck, got his shotgun, and, as he walked back to the Woodard's house, commenced shooting. The first shot was fired into the air and the next six shots were fired into the Woodard's carport and house. After firing seven rounds and killing Patricia Silvia, the Defendant walked back to his truck and drove away.

There is no evidence that the Defendant was intoxicated at the time of the murder or at anytime on September 22, 2006. There is no evidence that the murder of Patricia Silvia, or any of Defendant's conduct on September 22, 2006, was prompted by emotional frenzy, panic, or a fit of rage.

The Defendant was arrested in the early morning hours of September 23, 2006. The Defendant asked Sergeant Hardesty, the law enforcement officer driving him to the jail, if he was married. Sergeant Hardesty said, 'Yes." The Defendant then stated, "That's the reason I'm in this situation. My wife spent all my money. I placed the checking account in her name. She started re-dating her ex-husband. That is the reason I shot her."[8] Sergeant Hardesty described the Defendant as lacking any type of emotion during his arrest and transport to jail. The evidence supports the "cold" element of the CCP aggravator.

[8] The Defendant's statement is not verbatim.

The evidence is sufficient to establish that the Defendant had a careful plan or prearranged design to commit murder before the killing. Approximately five and a half hours before killing Patricia Silvia, the Defendant armed himself by purchasing the shotgun and shells used to kill her. He put the shotgun and shells in his truck when he went to the Woodard's house that evening. The Defendant's plan was to give Patricia Silvia one last chance to reconcile with him and, if she refused, to kill her.

When Patricia Silvia walked away from him that evening, Rachel heard the Defendant say to her mother, "You will be sorry." He walked back to his truck. The Defendant could have gotten into his truck and driven away. No one followed the Defendant when he left the Woodard's home. Instead, the Defendant calmly continued to carry out his plan to kill. The Defendant got his shotgun and walked back approximately one hundred feet to the carport, shooting as he walked, until he had a clear shot of Patricia Silvia. Then he shot her in the head.

The Defendant gave the mental health experts in this case different reasons for purchasing the shotgun on September 22, 2006. At first, the Defendant reported that he bought it for his own safety. He was sleeping in his truck and he said he needed the shotgun to protect himself. The Defendant had been homeless for some time prior to September 22, 2006. Then, he said he was afraid of the Woodard family. Yet, the Defendant did not take the shotgun with him the first time he went to the Woodard's home. At some point, he reported he was afraid of Patricia Silvia's ex-husband. Lastly, he told Dr. Buffington that he bought the shotgun to commit suicide.[9] Neither Dr. Day nor Dr. Danziger found the Defendant suicidal. The court rejects the Defendant's inconsistent statements as to why he purchased the shotgun and finds the Defendant purchased the shotgun to kill Patricia Silvia.

[9] The court questions the purchase of four boxes of shells if the goal is suicide.

Patricia Silvia's murder was neither spontaneous, nor impulsive. The killing of Patricia Silvia was carried out as a matter of course, consistent with the Defendant's careful plan. The evidence supports the "calculated" element of the CCP aggravator.

The evidence is sufficient to establish that the Defendant exhibited a heightened premeditation. The "heightened premeditation" required by the CCP aggravator is more than what is required to prove first degree, premeditated murder. The Florida Supreme Court has found the heightened premeditation required for this aggravator when a Defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder. *See Buzia v. State*, 926 So. 2d 1203 (Fla. 2006).

The Defendant's actions rise to the level of "heightened premeditation" because after speaking with Patricia Silvia, the Defendant had the opportunity to leave the Woodard's house, get into his truck, drive away, and not commit the murder; instead, he used the

time to arm himself, return to the Woodard's house, and commit the murder.

Additionally, the time lapse that occurred between the time the Defendant armed himself and the time he shot Patricia Silvia allowed the Defendant to reflect upon his criminal conduct and to change his mind. Each time the Defendant fired his shotgun, he had to pump the shotgun. The Defendant shot at least four times before he shot at Patricia Silvia in the Woodard's kitchen. The Defendant used this time to perfect his plan and ruthlessly get closer to Patricia Silvia so he could kill her.

The Defendant's actions reflect a deliberate and conscious choice to commit murder. The Defendant's actions rise to the level of deliberate ruthlessness and support the 'heightened premeditation" element of the CCP aggravator.

The evidence is sufficient to establish that the Defendant had no pretense of any legal or moral justification. No evidence of any moral or legal justification for the murder was presented and none was argued.

The Defendant has been diagnosed by Dr. Danziger with a chronic personality disorder not otherwise specified (NOS), with characteristics that include paranoid, anti-social and schizoid components, and with chronic alcohol dependence. However, the evidence establishes that the Defendant had the ability to engage in cool and calm reflection, make a careful plan to commit the murder and exhibit the required heightened premeditation. Dr. Day testified that the Defendant had the mental capacity to commit the murder in a cold, calculated and premeditated fashion and the court accepts her testimony as being credible. *See Evans v. State*, 800 So.2d 182 (Fla. 2001).

The court finds that each of the elements of the CCP aggravator has been proven beyond a reasonable doubt and the court gives great weight to the CCP aggravator.

(V3, P571-577).

The trial court findings are supported by substantial competent evidence. A receipt found in Appellant's truck showed he purchased the shotgun on September 22, 2006, at 3:30 p.m., from Shoot Straight Gun Shop in Casselberry. (V11, T1279). The gun shop's video security system showed Appellant purchasing the weapon. (V11, T1280-81; V12, T1494, 1508, 1514, Exh. 100-102). Later that evening, Appellant went to the Woodards' home where they were hosting an outside get-together in the carport. Appellant asked Patricia to come to the end of the driveway to talk with him. They spoke for a few seconds. (V10, T1064). As Patricia walked away, Appellant told her she "would be sorry." (V10, T1157, 1158, 1169). Rachel and Jerome saw Appellant walk to his truck as Patricia went inside the house. (V10, T1064, 1112, 1158). Rachel and Jerome said Appellant returned within a few minutes. (V10, T1113, 1121). Jerome "saw a muzzle flash and heard a shot." Then, "another shot rung off." Jerome dropped to the ground and hid between two vehicles. (V10, T1113, 1114, 1121). Jerome heard seven shots and could hear shells ejecting from the shotgun. (V10, T1115, 1118). Rachel, still in the carport, said Appellant was standing less than a foot away from her when he pointed the shotgun at her. (V10, 1158, 1171). Still inside the home, Betty heard what sounded like firecrackers. (V10, T1065). Betty opened the door

to the carport and saw only "flash of light." The next thing Betty remembered was waking up in a pool of blood. (V10, T1065). Ross was standing next to his mother as the others ran inside the house. (V10, T1139). Appellant shot her in the head as her two children stood by (V10, T1139, 1146). Patrick Woodard heard gunshots, he went into the kitchen and saw Patricia lying in front of the refrigerator. (V10, T1187-88, 1189). Patrick saw Appellant standing at the end of the carport. (V10, T1193). Appellant pumped the shotgun and aimed it at Patrick. (V10, T1196). Patrick stepped over Patricia's body and shut the door. (V10, T1197). Appellant shot at the door. (V10, T1198).

This Court's review of a trial court's finding regarding an aggravator is limited to whether the trial court applies the correct law and whether its finding is supported by competent, substantial evidence. *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997); see also *Cave v. State*, 727 So. 2d 227, 230 (Fla. 1998).

Appellant calmly purchased a shotgun and 20 rounds. He rented a motel room and prepared his assault. He went to Patricia's residence, divorce papers on the front seat of his truck. He calmly talked to her, but when she said she would not reconcile, he walked back to his truck and got his shotgun. He fired seven shots, pumping the shotgun to reload each time. CCP can be indicated by the circumstances if they point to such facts as advance procurement of a weapon, lack

of resistance or provocation, and the appearance of a killing carried out as a matter of course. *See Farina v. State*, 801 So. 2d 44, 53-54 (Fla. 2001); *Bell v. State*, 699 So. 2d 674, 677 (Fla. 1997).

At any point in the series of events, Appellant could have left. He could have left after talking to Patricia. He could have left after he shot up the Ford and carport column. Or when he shot Betty in the face. Appellant had planned this moment and nothing would deter him. Even after he shot Patricia in the head, he pumped his gun to reload another round and pointed it at Patrick, who stood between Appellant and his dying wife. When a defendant has opportunities to abandon his crime but continues on to kill unresisting victim(s), the CCP aggravating circumstance is proper. *See McCoy v. State*, 853 So. 2d 396, 407-408 (Fla. 2003); *Looney v. State*, 803 So. 2d 656, 678 (Fla. 2001) (applying CCP where "the defendants had ample opportunity to reflect upon their actions, following which they mutually decided to shoot the victims execution-style"), *cert. denied*, 536 U.S. 966, 122 S.Ct. 2678, 153 L.Ed.2d 850 (2002); *Alston v. State*, 723 So. 2d 148, 162 (Fla. 1998) (sustaining the CCP aggravator where the defendant had ample opportunity to release the victim but chose to kill him); *Eutzy v. State*, 458 So. 2d 755, 757 (Fla. 1984) (sustaining CCP where there was no sign of struggle, yet the victim was shot execution-style).

Silvia compares his case to *Santos v. State*, 591 So. 2d 160 (Fla. 1991), and argues that the cold, calculated aggravating circumstance is negated by "emotional turmoil arising from his domestic relationship." (Initial Brief at 31). *Santos* was an aberration and has been distinguished by this Court. *See Carter v. State*, 980 So. 2d 473 (Fla.), cert. denied, --- U.S. ----, 129 S.Ct. 400, 172 L.Ed.2d 292 (2008) (defendant drove to ex-girlfriend's home with weapon, demanded she answer questions about their relationship, and deliberately shot the ex-girlfriend and her boyfriend multiple times at close range); *Davis v. State*, 2 So. 3d 952, 960 -961 (Fla. 2008) (double homicide in which defendant carried weapon to victims' trailer, forced his way in, stabbed first victim then stopped when second victim entered room, persevered through multiple stabbings and obtained new knife when one broke, did not harm child).

Appellant also asserts that the mental health mitigation found by the trial court negates a finding of CCP. However, this Court has held:

> Owens' claim that his mental illness must negate the CCP aggravator is unpersuasive. We have held: "A defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation." *Evans*, 800 So. 2d at 193.

Owen v. State, 862 So. 2d 687, 701-702 (Fla. 2003).

In *Evans v. State*, 800 So. 2d 182 (Fla. 2001), the defendant raised the argument now raised by Appellant, and this Court held:

> The fact that the trial court recognized and gave substantial weight to the mental mitigator does not necessarily mean that the murder was an act prompted by emotional frenzy, panic, or a fit of rage, as Evans argues here. A defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation. See *Sexton v. State*, 775 So. 2d 923, 934 (Fla. 2000) (evidence established heightened premeditation, lengthy and careful planning and prearrangement, and an execution-style killing to support CCP aggravator despite "great weight" given to the defendant's mental impairment). While the events leading up to the murder may have made Evans emotionally charged, his actions do not suggest a frenzied, spur-of-the-moment attack. The evidence in this case supports the trial court's findings; therefore, the trial court did not err in finding CCP.

Evans v. State, 800 So. 2d 182, 193 (Fla. 2001). *Owens* and *Evans* directly contradict Appellant's theory regarding CCP versus the mental health mitigators.

Appellant attempts to distinguish *Buzia v. State*, 926 So. 2d 1023 (Fla. 2006); however, *Buzia* supports the State's position that Silvia easily could have left the scene rather than retrieving his shotgun from the truck and shooting two innocent victims. He could have left after the first, second, third or fourth shot. Or even the fifth. But, he consciously chose to continue pumping another shell into the chamber and shooting or threatening to shoot, anyone who came between him and Patricia.

Even if this Court struck this aggravating circumstance, any error was harmless. When this Court strikes an aggravating factor on appeal, "the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence." *Jennings v. State*, 782 So.2d 853, 863 n. 9 (Fla.2001); *see also Douglas v. State*, 878 So.2d 1246, 1268 (Fla.2004) ("Striking [an] aggravator necessitates a harmless error analysis."). *See also Hill v. State*, 643 So.2d 1071, 1073 (Fla.1994) ("When this court strikes one or more aggravating circumstances relied upon by a trial judge in sentencing a defendant to death, we may conduct a harmless error analysis based on what the sentencer actually found in determining whether the sentence of death is still appropriate.") *Diaz v. State*, 860 So. 2d 960, 968 (Fla. 2003)(harmless error found after court struck HAC).

POINT II

THE TRIAL JUDGE DID NOT ERR IN FINDING THE AGGRAVATING CIRCUMSTANCE "GREAT RISK OF DEATH."

Appellant claims that the trial judge improperly found, as a statutory aggravator, that he created a great risk of death to many people. In the sentencing order, the trial judge wrote:

> To support a finding of this aggravator, the State must prove that the Defendant knowingly created a great risk of death to many persons. In

Johnson v. State, 696 So.2d 326, (Fla. 1997), the Florida Supreme Court established that "many persons" means four or more persons, other than the victim.

On the evening of September 22, 2006, at approximately 9:20 p.m., the Woodard family was having a cookout at their home located at 2536 Zelina Point, Seminole County, Florida. The Woodard home is owned by Patrick and Betty Woodard, Patricia Silvia's step-father and mother. In addition to Patrick and Betty Woodard, Patricia Silvia and her minor children, Ross Shadron and Rachel Shadron, were present at the cookout. Also present at the cookout were Jerome Woodard, Patrick Woodard's brother; Robin Mcintyre, Patricia Silvia's sister who suffers from Down Syndrome; and Beth Parker and Doug Caldwell, family friends. Not counting the murder victim, the evidence is sufficient to establish that Betty Woodard, Patrick Woodard, Ross Shadron, Rachel Shadron, Jerome Woodard and Robin McIntyre were knowingly put in great risk of death by the Defendant.

Betty Woodard was in great risk of death when the Defendant shot her in the face. On the evening of the family cookout, Betty Woodard was sitting in her carport and talking with Patricia Silvia, her daughter, Rachel Shadron, her granddaughter, and Jerome Woodard, her brother-in-law. The Defendant showed up that evening and spoke briefly with Patricia. He then turned around and walked away. Betty Woodard thought he had left. Both she and Patricia then went inside the house.

Betty Woodard told her husband that the Defendant was at their house. She was inside the home when she thought she heard firecrackers. At that time, Patricia Woodard was in the kitchen getting ice tea out of the refrigerator. As Betty walked past Patricia, she asked Patricia if she was okay and if she was coming back outside. Patricia told her mother that she would be back outside in a minute. Betty Woodard opened the door to the carport and saw a flash of light. She fell forward into the carport and woke up lying in a pool of blood. Three shotgun pellets were later removed from her left eye. The Defendant knowingly created a great risk of death to Betty Woodard.

Patrick Woodard was put in great risk of death by the Defendant. On the evening of the cookout, Patrick Woodard was in the master bedroom talking with Beth Parker when his wife came to the master bedroom door and told him the Defendant was at their home. Betty asked him to come outside. Patrick Woodard continued talking with Beth Parker until he heard gunshots. Later it was discovered that one of the shotgun pellets went through the kitchen wall into the master bedroom.

By the time Patrick Woodard entered the kitchen, he saw Patricia Silvia lying on the kitchen floor in front of the refrigerator. Then, looking through the open carport door, he saw his wife lying on the ground in the carport bleeding. While looking into the carport, Patrick Woodard saw the Defendant looking directly at him. He then saw the Defendant pump his shotgun and point the shotgun at him to shoot him in his chest. Patrick Woodard stepped over Patricia Silvia and shut the door to the carport so he would not be shot in the chest.

Patrick Woodard held the carport door closed, waited for the Defendant to leave and then opened the carport door to attend to his wife. After all the shooting, the carport door, which was solid wood, had both buck shot and bird shot in it. The Defendant knowingly created a great risk of death to Patrick Woodard.

Ross Shadron was put in great risk of death by the Defendant. Ross Shadron, Patricia Silvia's son, was twelve years old at the time of the family gathering. He was inside the home watching television when he heard gunshots. He ran towards the carport door. He saw smoke everywhere. He was looking for his sister, Rachel. He saw his mother standing beside him and saw her fall in front of him. Ross Shadron was standing close to his mother when she was shot. The shotgun pellets that hit his Mother and the refrigerator and kitchen cabinets could have killed Ross Shadron. The Defendant knowingly created a great risk of death to Ross Shadron.

Rachel Shadron was put in great risk of death by the Defendant. Rachel Shadron, Patricia Silvia's daughter, was fifteen years old at the

time of the family gathering. She was in the carport with her mother, her grandmother, her aunt Robin Mcintyre, Jerome Woodard, and Doug Caldwell when the Defendant arrived at the Woodard home.

Betty Woodward was sitting next to Patricia Silvia when the Defendant walked up to the carport. He stood there for a moment, then Rachel asked him what he wanted. The Defendant said that he needed to speak with her mother. Patricia Silvia walked out to the edge of the carport to where the Defendant was standing and spoke with him briefly, then she returned to the carport. As Patricia was walking away from the Defendant, Rachel Shadron heard the Defendant tell her mother that she would be sorry. The Defendant then walked away from the Woodward's home toward the street. He had parked his truck at the end of the street.

Rachel was talking in the carport and did not notice the Defendant again until she heard gun shots. She looked to see what was happening and saw the Defendant standing at the edge of the carport and pointing his shotgun at her. The shotgun was approximately one foot away from her. Suddenly, she was pushed down from behind and fell onto the carport floor.[4] She then crawled inside the house to find her brother. As she was crawling through the carport door into the house, and heading for the bathroom, she continued to hear gunshots. As she crawled through the kitchen, she saw her mother on the floor in front of the refrigerator and her grandfather holding the carport door shut. The Defendant knowingly created a great risk of death to Rachel Shadron.

[4] Rachel Shadron thought it was her mother behind her who pushed her down but she did not testify that she actually saw who pushed her to the ground. The evidence in the case establishes that Patricia Silvia was in the kitchen when the Defendant was in the carport shooting. While Patricia Silvia could not have been the person who pushed Rachel to the ground, the court finds that someone in the carport pushed Rachel to the ground when the Defendant pointed his shotgun at her. Obviously, when the Defendant was in the carport shooting, chaos occurred.

> Jerome Woodard was in great risk of death when he was standing at the edge of the Woodard's carport and the Defendant began firing his shotgun. The Woodard's carport is a one car carport. He hit the ground as the Defendant fired his second shot and did not get up because he feared for his life. The crime scene drawing and photos show pellets struck the front of the Ford Contour he had hid behind and the carport column near him. He was lying on the floor of the carport between the front and rear tires of the Ford Contour as the Defendant continued to shoot. Jerome Woodard heard seven shots in total and saw the Defendant walk away before he got up. The Defendant knowingly created a great risk of death to Jerome Woodard.
>
> Robin McIntyre was in great risk of death as she was also in the carport when the shooting started. After the shooting started but before Patrick Woodard shut the carport door, she entered the home through the carport door. Robin McIntyre suffers from Down Syndrome and did not testify. The Defendant knowingly created a great risk of death to Robin Mcintyre.
>
> The physical evidence, photographs and testimony of crime scene technicians establish the Defendant fired seven shots from a 12 gauge shotgun at the Woodard's home on September 22, 2006. The shots impacted areas on the left front quarter panel of the Ford Contour in the driveway, the carport column on the other side of the Ford, the carport door leading into the kitchen, the refrigerator and cabinets in the kitchen, and the master bedroom wall.
>
> This aggravating factor has been proven beyond a reasonable doubt and is given great weight by the court.

(V3, P567-571).

These findings are supported by substantial competent evidence.

Betty Woodard opened the door to the carport and saw only "flash of light." The next thing Betty remembered was waking up in a pool of blood.[9] (V10, T1065).

Patrick Woodard saw Appellant standing at the end of the carport. (V10, T1193). Appellant pumped the shotgun and aimed it at Patrick. (V10, T1196). Patrick stepped over Patricia's body and shut the door. (V10, T1197). Appellant shot at the door. (V10, T1198).

When the shooting started, Ross Shadron ran toward the door near the carport. Everybody was "just running in" through the open door. (V10, 1153). Ross was standing next to his mother as the others ran inside the house. (V10, R1139). Appellant shot at the door. Patricia Silvia fell in front of Ross. (V10, T1139, 1146).

Rachel Shadron was in the carport when she heard gunshots. She stood up to get Ross. (V10, T1156, 1158). Appellant was standing less than a foot away from Rachel when he pointed the shotgun at her. (V10, 1171).

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[9] As a result of being shot, Betty Woodard's jaw was shattered and her left eye was removed. She lost the entire left side of her face and no longer has a sense of smell. Nerve damaged affects the use of her left arm. (V10, T1070, 1072).

Jerome Woodard was in the carport when he saw Appellant "walking up." (V10, T1113, 1119-20, 1130). Jerome "saw a muzzle flash and heard a shot." Then, "another shot rung off." Jerome dropped to the ground and hid between two vehicles. (V10, T1113, 1114, 1121). There was birdshot in the car behind which Jerome hid and in a pillar near him. (V11, T1352; State Exhibits #2-4 at V2, P267-69 and State Exhibit #30 at V2, P294)

Robin McIntyre, Patricia Silvia's sister who had Down Syndrome, lived with the Woodards. (V10, T1056-57, 1183). Robin McIntyre was in the carport when the shooting started. (V10, T1063). Robin ran in the house through the open carport door before Partrick Woodard closed it. (V10, T1138-39, 1153).

This Court's review of a trial court's finding regarding an aggravator is limited to whether the trial court applies the correct law and whether its finding is supported by competent, substantial evidence. *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997); see also *Cave v. State*, 727 So. 2d 227, 230 (Fla. 1998).

In *Johnson v. State*, 696 So. 2d 326, 334 (Fla. 1997), this Court explained:

> As his final issue, Johnson claims that the trial judge improperly found, as a statutory aggravator, that Johnson created a great risk of death to many people. In his sentencing order, the trial judge wrote:
>
> > Four people, plus Tequila Larkins, were in the laundromat when the Defendant broke in and began shooting. People were forced to hit the floor and take whatever cover was available. Sixteen bullet fragments were later found in the

> laundromat. In his confession, the Defendant admitted that he was at one point trying to shoot his way out. At least one witness stated that he could feel shots hitting near his feet as he lay crouched on the floor. Unquestionably, the Defendant created a great risk of death to many persons.
>
> After reviewing the record, we agree that it supports this aggravator. Walter Hills, Eric Bettle, Jerry Briggs, and Valerie Briggs were all in immediate risk of death. Our case law supports the application of this aggravator in similar circumstances. *See Fitzpatrick v. State*, 437 So.2d 1072, 1077 (Fla.1983) (holding a great risk of death to many was demonstrated where defendant shot at two nonvictims and held two other nonvictims at gunpoint), *habeas corpus granted on other grounds,* 490 So.2d 938 (Fla.1986).

Appellant's actions created a great risk of death to many persons. He approached the house in Rambo-like fashion, pumping shells into his shotgun as he got closer and closer. Pellets hit the car, different locations in the carport, and the carport door. Pellets were inside the house in the kitchen, dining room and bedroom. There were six unarmed, and innocent people in the carport when appellant approached, shooting and pointing the shotgun at people. Jerome ducked behind the Ford and the others took refuge in the house. Pointing a weapon at people and shooting seven shots in a confined area certainly created a "likelihood" or "high probability" that the Woodard family and their guests would be hit and killed. *See Raulerson v. State*, 420 So. 2d 567, 571 (Fla. 1982); *See also*, *Trepal v. State*, 621 So. 2d 1361, 1367 (Fla. 1993) (Cola laced with Thallium); *Way v. State*,

496 So. 2d 126, 128 (Fla. 1986) (arson endangered child playing in house and firefighters responding to scene).

Error, if any, was harmless. When this Court strikes an aggravating factor on appeal, "the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence." *Jennings v. State,* 782 So.2d 853, 863 n. 9 (Fla.2001); *see also Douglas v. State,* 878 So.2d 1246, 1268 (Fla.2004) ("Striking [an] aggravator necessitates a harmless error analysis."). *See also Hill v. State*, 643 So.2d 1071, 1073 (Fla.1994) ("When this court strikes one or more aggravating circumstances relied upon by a trial judge in sentencing a defendant to death, we may conduct a harmless error analysis based on what the sentencer actually found in determining whether the sentence of death is still appropriate.") *Diaz v. State*, 860 So. 2d 960, 968 (Fla. 2003)(harmless error found after court struck HAC).

POINT III

THIS CASE IS PROPORTIONAL TO OTHER DEATH-SENTENCED DEFENDANTS; THERE IS SUFFICIENT EVIDENCE OF GUILT.

Appellant argues this case is not proportional to other death cases. He focuses on his childhood (he was 35 years old when this murder occurred), drug and alcohol abuse (his own experts admitted he was not intoxicated at the time) his

emotional disturbance (despite the fact Dr. Day testified he was not extremely emotionally disturbed and the murder was not the product of delusions), and that the trial judge erred in finding the "great risk of harm" aggravating circumstance (Point II herein).

Appellant cites to *Santos v. State*, 629 So. 2d 838 (Fla. 1994) and *White v. State*, 616 So. 2d 21 (Fla. 1993), which are both single-aggravator cases. Appellant also cites *Farinas v. State*, 569 So. 2d 425 (Fla. 1990), in which the defendant was under the influence of extreme emotional disturbance and was the result of a domestic dispute. This Court has long since buried the "domestic dispute" exception to the death penalty, explaining:

> Upon review, we find that the imposition of the death penalty in this case is proportionately warranted. While the evidence reveals a close, almost familial type of relationship between Evans and Johnson, this factor alone does not render Evans' death sentence disproportionate. As we explained in *Spencer v. State*, 691 So. 2d 1062 (Fla. 1996), "this Court has never approved a 'domestic dispute' exception to imposition of the death penalty." *Id*. at 1065; see also *Blackwood v. State*, 777 So. 2d 399, 412 (Fla. 2000); *Zakrzewski v. State*, 717 So. 2d 488, 493 (Fla. 1998).FN6 In some murders that result from domestic disputes, we have determined that the cold, calculated, and premeditated aggravating circumstance (CCP) was erroneously found because the heated passions involved were antithetical to "cold" deliberation. *See Santos v. State*, 591 So. 2d 160, 162-63 (Fla. 1991) (concluding that the CCP aggravator was not applicable where the defendant was involved in an ongoing, highly emotional domestic dispute with victim and her family, even though he had acquired a gun in advance and made previous death threats against victim; concluding that murder was not "cold" even though it may have

> appeared to be calculated); *Douglas v. State*, 575 So. 2d 165, 167 (Fla. 1991) (same as to killing that arose from a domestic dispute associated with a lover's triangle). "However, we have only reversed the death penalty if the striking of the CCP aggravator results in the death sentence being disproportionate." *Spencer*, 691 So. 2d at 1065. Instead, our proportionality analysis properly "focuses on whether death is a proportionate penalty after considering the totality of the circumstances in a particular case." *Blackwood*, 777 So. 2d at 412.
>
> > FN6. To the extent that the proportionality analysis in *Blakely v. State*, 561 So. 2d 560 (Fla. 1990), and *Wilson v. State*, 493 So. 2d1019 (Fla. 1986), rests on a "domestic dispute exception to imposition of the death penalty" that this Court has disavowed in *Spence*r and subsequent cases, we recede from *Blakely* and *Wilson*.

Evans v. State, 838 So. 2d 1090, 1098 (Fla. 2002). More recently, this Court clarified that the domestic-violence "exception" to the death penalty is unfortunate history. *Floyd v. State/McNeil*, 34 Fla. L. Weekly S359 (Fla. June 4, 2009).

This case involves a vicious homicide and attempted murder. The trial judge found three aggravating circumstances: cold, calculated, and premeditated; knowing risk of harm, and prior violent felony. In mitigation, the trial judge found:

> (1) Emotional distress from loss of job and divorce – little weight;
>
> (2) Impaired ability to conform conduct due to chronic personality disorder NOS and chronic alcohol dependence – moderate weight;
>
> (3) Chronic personality disorder NOS with paranoid, anti-social and schizoid features and alcohol dependence – moderate weight;

(4) Chronic alcohol dependence – moderate weight;

(5) Diagnosis as teenager with schizoid or schizophreniform disorder – little weight;

(6) Grew up in dysfunctional family setting with domestic violence – little weight.

(V3, P577-583).

The CCP aggravator is one of the most serious aggravators set out in the statutory sentencing scheme. *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006). Similarly, the prior violent felony aggravator is regarded as one of the weightiest aggravators. *See Jones v. State*, 998 So. 2d 573 (Fla. 2008). In the present case, that prior violent felony was attempted murder.

Appellant was 35 years old when he disfigured his mother-in-law and killed his wife. The dominant personality disorder that drove him was antisocial personality disorder. He was also alcohol-dependent. Being antisocial and alcohol dependent hardly outweighs the horror of this cold, calculated murder during which Appellant risked the lives of the entire Woodard family and succeeded in changing Betty Woodard's life forever.

This case is proportionate to other homicides involving similar aggravating and mitigating circumstances. *See Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006); *Robinson v. State*, 761 So. 2d 269, 272 -273 (Fla. 1999); *Floyd v. State*, 850

So. 2d 383, 408-409 (Fla. 2002); *Evans v. State,* 838 So. 2d 1090, 1097-1098 (Fla. 2002). The State also notes that this Court has upheld death sentences where the prior violent felony aggravator was the only one present. *See, e.g., Rodgers v. State,* 948 So. 2d 655 (Fla. 2006); *LaMarca v. State,* 785 So. 2d 1209, 1217 (Fla. 2001); *Ferrell v. State,* 680 So. 2d 390, 391 (Fla. 1996).

Sufficiency of the evidence. Although not raised by Silvia, this Court will always review the record of a death penalty case to determine whether the evidence is sufficient to support the murder conviction. *Winkles v. State,* 894 So. 2d 842, 847 (Fla. 2005). Appellant murdered Patricia Silvia in front of her parents and children all of whom survived to testify. Appellant also confessed to killing Patricia because she spent all his money.

POINT IV

THE TRIAL JUDGE DID NOT ABUSE HER DISCRETION BY DENYING A MOTION FOR MISTRIAL AND OVERRULING AN OBJECTION.

During the direct examination of Dr. Danziger, the State's expert at the penalty phase, the following occurred:

> A:(Dr Danziger) Then you take that MMPI data and say, well, does it fit what we know about this person? Let's look at our interviews with him. Let's look at other tests. Let's look at our interviews with him. Let's look at what people say about him. You put all of the pieces together. In this case, I believe that Dr. Day and I are in agreement that the MMPI-2 profile does accurately describe him.

Q: (Prosecutor) The 4 Scale did you call that the psychopathic deviancy and if so, can you explain what that is?

A: The 4 Scale clinically means someone that may tend to violate the norms of society. **Someone who does not respect authority, the end justifies the means and a lack of remorse.** So the higher that you score on that scale, the stronger those characteristics.

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

THE COURT: Yes.

(Whereupon the following conversation was held outside the hearing of the jury.)

MR. CAUDILL: Lack of remorse is absolutely improper to be interjected in to a penalty phase in a capital case by the State. They have had an opportunity to speak with this doctor. They were present for his deposition.

They talked to him at length about the four/six scale and the things and the information that it provides and to go through it in detail. There is no way that they could not have prevented Dr. Danziger from saying what he just said. He just introduced lack of remorse in to this trial and that is completely improper. I am moving for a mistrial.

THE COURT: Response.

MR. WHITE: He's talking about the general characteristics of somebody who scores there. He is not saying that this defendant lacks remorse. He's talking generally about the characteristics that a high Scale 4 score shows. I do not intend to make lack of remorse an aggravating circumstance or in any way an issue of this trial. This is just part of what the MMPI says.

MR. CAUDILL: Judge, here's the problem. We didn't introduce -- we have not suggested to this jury that we're going to argue remorse

as a mitigating circumstance here. There was no testimony about it and even if we had, they don't get to counter it by showing that. They don't get to introduce that when it is not -- they can't do that and for him to talk -- every other word out of his mouth is talking about how the profile, the four/six profile, is accurate to our client.

When he threw in that four/six profile lack of remorse -- to distinguish it from our client it can't be done because every other word out of the doctor's mouth in reference to the test result of the MMPI in a four/six profile is that he just got through saying it thirty seconds before that was consistent and accurate picture of our client and then he threw that in. He didn't say it in his deposition so we didn't see it coming to object to it before now.

THE COURT: Deny the motion for mistrial. I do want to say I think that it would be appropriate if we have a four/six profile to say not all of the characteristics -- **he was just asking about general characteristics?**

MR. WHITE: How about if I ask him so what the MMPI leaves you with is a general hypothesis of what someone might be like, would that clarify it?

THE COURT: I think that you need to go back out to clarify that just because you have a profile doesn't mean that you have all of these characteristics. Make that clear.

MR. WHITE: Okay, I will ask it that way.

(Whereupon proceedings resumed in open court.)

BY MR. WHITE:

Q Now, Doctor, the MMPI-2 it generates a very general profile. That doesn't necessarily that somebody who is scored that way has all of those characteristics necessarily, is that true just yes or no?

A Yes, that is true.

(V16, T2133-36) (Emphasis supplied).

Approximately 75 pages later during cross-examination of Dr. Danziger by defense counsel, the following occurred:

> A: (Dr. Danziger) That in my opinion is yes. My understanding is that he had multiple jobs, evicted from homes, could not sustain employment. When he had money from his mother's death, apparently blew through that money. Did not handle it properly. In my opinion, there is a history of irresponsibility in his work and financial life leading to some serious consequences.
>
> Q And were there other criteria of these antisocial personality disorders that you observed in Mr. Silvia?
>
> A **Limited remorse. Not much remorse for what has happened or what has been done.**
>
> MR. CAUDILL: Can we approach?
>
> THE COURT: Yes.
>
> (Whereupon the following conversation was held outside the hearing of the jury.)
>
> MR. CAUDILL: I thought that the State was going to have a conversation with their doctor about staying away from his lack of remorse thing.
>
> THE COURT: Response from the State.
>
> MR. WHITE: **Judge, I stayed away from it. I stayed away from these categories. I stayed away from asking any further questions about those to avoid that, they didn't. It is not my fault. It is an open-ended question and he gave him an honest answer.**

MR. CAUDILL: It's not very difficult to speak to a person with Dr. Danziger's education to suggest that you don't say that. Just don't say that.

THE COURT: What are you asking me to do at this point?

MR. CAUDILL: I don't know how to deal with it at this point in time. I am just very concerned that we had a conversation earlier when they asked a question to introduce that about this trial and I believed that there was going to be a conversation to indicate to the doctor that lack of remorse was not something that should be brought up in this trial. I don't know why that didn't happen.

THE COURT: **It wasn't my understanding that the State was going to speak with the witness about that. It was my understanding that the State was going to stay away from that subject matter.**[10]

MR. CAUDILL: They mentioned it as part of the remedy. I heard them mention.

THE COURT: You heard them mention?

MR. CAUDILL: That they would speak with the doctor.

THE COURT: I understand. What are you asking the court to do at this point?

Do you want to have your question withdrawn and answer stricken?

MR. CAUDILL: Yes.

THE COURT: Then if you will go back and request it that's what we will do.

---

[10] The trial judge's recollection was accurate as the previously-cited passage shows.

(Whereupon proceedings resumed in open court.)

MR. CAUDILL: Your Honor, I ask that the previous question and answer be stricken and the jury be instructed to disregard them.

THE COURT: Yes, the court will pursuant to your request strike the previous question and also strike the previous answer. And, ladies and gentlemen, that means that you are not to consider either the question or the answer in your deliberations.

Anything further?

MR. CAUDILL: No, Your Honor. Thank you.

THE COURT: They are both stricken.

(V16, T2207-2209) (Emphasis supplied).

The record shows that the prosecutor was asking the mental health expert about how antisocial behavior is diagnosed. The testimony was immediately curtailed and the prosecutor re-phased the question. The second instance cited was when **defense counsel** repeated the same question he had previously objected to Dr. Danziger gave the same answer. Defense counsel then attempted to blame the answer on the prosecutor; however, defense counsel had not, as he later advised the judge, asked that the witness be instructed not to mention remorse when discussing antisocial personality characteristics.

The State was not attempting to introduce lack of remorse. The prosecutor was, as was defense counsel on cross-examination, questioning Dr. Danziger

regarding his diagnosis of antisocial personality disorder. One of the diagnostic criteria for antisocial personality disorder is "lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another." *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision, 2000.

The trial judge properly denied the motion for mistrial. This Court has repeatedly held that this Court reviews a trial court's ruling on a motion for mistrial under an abuse of discretion standard. *See England v. State*, 940 So.2d 389, 402 (Fla.2006) ("A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review"); *Snipes v. State*, 733 So.2d 1000, 1005 (Fla.1999) ("A decision on a motion for a mistrial is within the discretion of the trial judge and such a motion should be granted only in the case of absolute necessity."); "A motion for mistrial should be granted only when it is necessary to ensure that 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*, 940 So.2d at 401-02; see *Hamilton v. State*, 703 So.2d 1038, 1041 (Fla.1997) ("A mistrial is appropriate only where the error is so prejudicial as to vitiate the entire trial."). Under the abuse of discretion standard, a trial court's ruling will be upheld unless the "judicial

action is arbitrary, fanciful, or unreasonable.... [D]iscretion is abused only where no reasonable [person] would take the view adopted by the trial court." *Trease v. State*, 768 So.2d 1050, 1053 n. 2 (Fla.2000). There was no such error in the present case.

Appellant's second cited incident of "misconduct" was during closing argument at the penalty phase. (V14, T1832). Defense counsel objected two times in succession that the prosecutor was misstating the evidence. The first objection was when the prosecutor stated that Patrick was shutting the door as Appellant shot (V14, T1831), and the second objection was that Patrick would have "taken some buckshot" if he hadn't shut the door. (V14, T1832). The trial judge overruled the objection and stated that she would "allow the jury to rely upon their memory."

Patrick testified at the penalty phase that as he went to the door to help his wife and daughter, he saw Appellant point the gun at him. He shut the door and Appellant fired at the door. (V15, T1945). Rachel also testified that when her grandfather (Patrick) was kneeling down by the door, she could still hear gunshots. (V10, R1161).

There were two impact sites on the exterior of the carport door. (V11, T1352; State Exhibits #28-29 at V2, P292-93). The prosecutor's argument was a fair comment on the evidence.

The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." *Bertolotti v. State,* 476 So.2d 130, 134 (Fla.1985). "Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment." *Mann v. State,* 603 So.2d 1141, 1143 (Fla.1992). The control of comments during closing argument is within the trial court's discretion and an appellate court will not interfere unless an abuse of discretion is shown. *Breedlove v. State,* 413 So.2d 1, 8 (Fla. 1982). The trial judge did not abuse her discretion in overruling the objection.

Error, if any, was harmless. Any error in prosecutorial comments is harmless if there is no reasonable probability that those comments affected the verdict. *See Pagan v. State,* 830 So.2d 792, 813 (Fla. 2002)(reference to Desert Storm); *Hitchcock v. State,* 755 So.2d 638, 643 (Fla. 2000)(comment on mitigation); *Cole v, State,* 701 So.2d 845, 853(Fla. 1997) (comment by witness about prior history).

POINT V

THE ISSUE REGARDING VICTIM IMPACT EVIDENCE IS NOT PRESERVED FOR REVIEW; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING VICTIM IMPACT TESTIMONY

Appellant cites to two comments read from victim letters, and claims the comments denied Appellant a fair trial. First, this issue is not preserved for review as there was no specific objection to the comments cited. In order to preserve an issue for appellate review, a specific objection must be made to the testimony so that the trial judge has an opportunity to rule on the objection. *See Archer v. State*, 934 So. 2d 1187, 1206 (Fla. 2006*); Harrell v. State*, 894 So. 2d 935, 940 (Fla.2005); *Windom v. State*, 656 So. 2d 4328-439 (Fla. 1995). Appellant gives no record cite to any objection, and this issue is inadequately briefed. *See Simmons v. State*, 934 So. 2d 1100, 1111, n.12 (Fla. 2006), *citing Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). The State will attempt to address whether there were objections to victim impact.[11]

[11] By attempting to address this issue, the State does not waive the argument that this issue is insufficiently pled, but simply to assist this Court. The State also notes that there was no objection to the number of letters read, which was six (6). (V15, T1952; comment of prosecutor that "we ended up getting to six with no objection.").

Appellant filed a pre-trial Motion to Limit Victim Impact Evidence and Argument. (V1, P66-68). The arguments included in the motion included:

> (1) victim impact testimony should not be introduced at the guilt phase;
>
> (2) victim impact testimony should be introduced through the least inflammatory witness;
>
> (3) victim impact evidence should not characterize of give opinions about the defendant, the crime, or the appropriate sentence.

Appellant also filed a Motion to Allow Victim Impact Evidence Before the Judge Alone and Motion to Videotape Victim Impact Evidence. (V1, R111-116). The trial judge entered an Order Granting, in part, Defendant's Motion to Limit Victim Impact Evidence and Argument. (V1, P163-164). That order held:

> (1) The State is precluded from introducing victim impact evidence during the guilt phase;
>
> (2) Regarding limiting testimony to non-relatives, the case is unique because some of the decedent's relatives are also alleged victims or witnesses to the crime. Therefore, the court did not preclude the relatives from testifying;
>
> (3) testimony must comply with Fla. Stat. §921.151(7).

The issue of victim impact was addressed at the beginning of the penalty phase when the prosecutor broached the subject as follows:

> MR. WHITE: One last thing that I don't know how we are going to handle it but it is the victim impact evidence or testimony. I think that

we are going to have one victim impact statement read by Pam Wyatt. We have three others.

THE COURT: And who is Pam Morgan?

MR. WHITE: Wyatt.

THE COURT: Pam Wyatt.

MR. WHITE: She is the sister of the deceased.

MS. VALENTINI: And she can actually read the kids' letters as well.

MR. WHITE: There are three additional letters. She's going to read the one that she wrote and then there is one from the children of the deceased.

MS. VALENTINI: There is a couple.

THE COURT: One letter each from each child? Two letters?

MS. VALENTINI: Judge, each of the children did write a letter and we provided copies to defense counsel although we would like to present them to the court aren't necessarily requesting that they all be read.

Part of my decision was going to be based on the Defense's position on them to just try to work with everybody and get it accomplished as far as which ones are read based on any comments or objection that they may have.

We can strike certain sentences or lines from them pursuant to an objection and case law. There is also a letter from a colleague at the day care center where she worked. We are requesting that those be read to the jury. We have other letters to present to the court, but not be read to the jurors.

MR. WHITE: Or presented to the jurors.

MS. VALENTINI: Or presented to the jurors, that's correct.

MR. FIGGATT: Judge, the State of Florida provided counsel copies of letters. They were received in my office via e-mail at 4:56 yesterday afternoon. They are approximately eighteen pages that I have and the information that they just provided to Your Honor to the effect that they have other letters that the jury will not see if that is something they sent me yesterday, great. If it is not, I object to the court receiving letters that I have never seen.

(V15 T1906-1907).

A discussion of the timeliness of the letters took place, and defense counsel asked the court to exclude all the letters. Then the following transpired:

MR. WHITE: We have four letters. I think that altogether they constitute how many pages? They are handwritten. Some of them are typed.

THE COURT: Were all four of the authors of these letters listed as potential witnesses in the penalty phase?

MR. WHITE: All except the lady from the work environment of the –

THE COURT: The work colleague as you referred to her?

MR. WHITE: Yes. Yes. The others are the children who had previously testified, I believe.

MR. CAUDILL: Not all of them.

MR. WHITE: There is one from Ross. There is one from Rachel. I believe you can recall that they testified.

Is there one from Ronny?

MS. VALENTINI: Yes.

MR. WHITE: Ronny Shadron has been listed as a witness. There's one from him. That's the other son of the victim and then Pam Wyatt has been listed as a witness as well. We excluded her. You may recall we excluded her and her brother from sitting in the penalty phase or the guilt phase at the request of the Defense.

They are all listed. The only one that isn't is the lady from the Pee-Wee Ranch.

THE COURT: Is there are an opportunity to have these letters addressed later on today and then possibly read in whole or in part tomorrow which would give defense counsel more time?

MR. WHITE: The only issue would be procedurally that we intend to call I think two witnesses this morning. Normally, we would put on the victim impact statements as part of our case. I don't have an objection if the Defense prefers this, we can hold that and we can put it on at the end to give them tonight to review these materials. I would be glad to do that as part of perhaps our rebuttal case.

THE COURT: Response from the Defense.

MR. CAUDILL: Judge, what I am looking for right now is my memory was because I wanted to respond to the State's proposition that the only reason that they were substituting live testimony for written victim impact statements was to accommodate us and my memory was that the court entered a ruling requiring or an order requiring them to do that and give it to us within a reasonable time prior to this proceeding.

The court did enter an order or according to the clerk's computer granting our motion to limit the impact evidence. I think that I am about to get to that document in the court file and we can see what it said. What you said, Judge.

THE COURT: You did file a motion to limit victim impact evidence and argument.

MS. VALENTINI: Judge, did you say that they filed that motion?

THE COURT: Yes.

MR. CAUDILL: Judge, actually your order doesn't -- I apologize, guys. I was thinking about another case perhaps, but I don't see an order filed that directs them to be in writing so I apologize for that. That was my memory.

THE COURT: Well, there was a motion to limit victim impact evidence and argument.

MR. WHITE: I think that we just found your order that resulted from that.

MR. CAUDILL: It was granted in part which required them to comply with the statute and not be introducing it in the guilt phase. The order does say that close relatives or those type of people would be permitted to testify.

MR. WHITE: So, what we did was undertake putting it all in writing in order to try to protect the record and allow the Defense an opportunity to know what we are putting on and litigate that before it was put on and then to now say that we're to be damned because we gave that to them late yesterday I think is pretty ridiculous.

I mean, I would have liked to have gotten it to you earlier and we tried.

THE COURT: All right, counsel --

MR. FIGGATT: I didn't say the State was going to be damned, I said it was damning evidence.

THE COURT: Yes, you clearly said it was damning evidence.

Now, how much time do you need to review the letters and be prepared to address them?

MR. FIGGATT: I can address them now. The question was whether or not they had to give me notice before now or yesterday at 4:56.

THE COURT: I will deny the request to exclude the letters.

MR. FIGGATT: Then the particulars in that – all right, so generally that's on the notice issue. **I am reviewing our request to exclude it generally even though that I acknowledge that that is not the present state of the law.**

THE COURT: I will deny that request. **I of course would prefer the letters over the live testimony.** I think it would be less as you said emotional than if we have the live witnesses.

MR. FIGGATT: Now we have gotten through those first and the State was trying to tell the court how they would present that. Mr. White, if you thought that I was saying anything about damning you, you understand that was not my --

MR. WHITE: All right. You were critical of us, let's put it that way. But what I propose and I think that we are open to either way. Normally, we would proceed this morning. We have two other witnesses and then we put on the victim impact.

But if the defense counsel feels it would be better and would like more time for us to -- for him to look at the letters and for us to perhaps later address any objections they have, I don't mind putting them on tomorrow at the close of our case.

THE COURT: Sir, which way would you prefer?

MR. WHITE: That would be at the close of our rebuttal case.

MR. FIGGATT: This morning.

THE COURT: You would prefer this morning?

MR. FIGGATT: Yes.

THE COURT: Is there something that I need to be involved with in addressing these letters or is that something that you can work out amongst yourselves without court involvement?

MS. VALENTINI: I think that there is potential that we can work it out without Your Honor.

THE COURT: We will recess then at the appropriate time to allow you all to do that.

MR. WHITE: Okay.

MR. CAUDILL: We sort of now know who is going to read them.

MS. VALENTINI: We will do it with two people. Pamela Wyatt will read the letter that she has written and whichever children's letters are read and then a nonparty will read the other one.

MS. VALENTINI: Is this Ms. Boyd from the school?

MS. VALENTINI: Yes.

THE COURT: Attorney Valentini, did you just say that Pamela Wyatt will read her letter and then each letter from the children?

MS. VALENTINI: Yes, Judge, and I am hesitant about which one that we will actually read just based on any objections that we have. I just want them to flow the easiest.

THE COURT: This is your plan at this point in time and then you are going to have who read the letter from the colleague?

MR. WHITE: We could have Ms. Valentini read that in to the record.

MR. FIGGATT: Ms. Boyd is not going to read it?

MS. VALENTINI: She's not. She's not present.

MR. FIGGATT: Counsel reading it is really awkward.

MS. VALENTINI: We have a victim advocate that is present that can read. I know in other cases victim advocates have read the letters.

THE COURT: Okay. The victim advocate will read it. This is the plan at this point in time. I know that you all after you looked at the letters may change it but let's start out with that.

Anything further?

(V15, T1910-1917). (Emphasis supplied).

Subsequently, before the letters were actually read to the jury, defense counsel stated:

MR. CAUDILL: What I would like to do, Judge, if you will permit me is the thing that they were going to do next is to introduce the victim impact evidence. The parties have come to an agreement on the redactions of some of these statements.

Can I go ahead and renew our objection, just a general objection, to victim impact evidence. You have already ruled on it. I would rather do it now if I may instead of in front of the jury.

THE COURT: Well, did you want to do it right now?

MR. CAUDILL: I think that I just did.

THE COURT: Good. Hearing no additional argument, the court will deny the motion.

MR. FIGGATT: What we wanted to do is not address the court on each individual exhibit as they are offered in evidence or as they may be offered for identification.

That's what we're trying to obviate the need to do before the jury.

THE COURT: Yes.

MR. FIGGATT: In light of the court's ruling, it is sort of tacky.

THE COURT: Do you want a standing objection?

MR. FIGGATT: If I may call it that.

THE COURT: Let's call it that.

MR. FIGGATT: Thank you.

THE COURT: I will allow you to have a standing objection as to each one of the -- are there four exhibits?

MS. VALENTINI: Or five I believe, Judge.

THE COURT: You had said the work colleague?

MS. VALENTINI: Yes, we ended up getting to six with no objection.

THE COURT: How did we arrive at six?

THE DEPUTY: The jury is present.

(Whereupon the jury entered the courtroom.)

THE COURT: Welcome back. Please be seated.

MS. VALENTINI: May the State proceed, Your Honor?

THE COURT: Yes.

(V15, T1951-1953). (Emphasis supplied).

The above sections are the sections of the penalty phase which deal with victim impact. The victim advocate read 6 letters, and Pam Wyatt testified. (V15, T1954-1974). There were no objections during the presentation. At one point, defense counsel requested the victim-impact instruction, and the judge complied. (V15, T1956-57).

The above sections show that the only objections raised were those in the pre-trial motions which the judge ruled on, and with which the State complied. The "standing objection" was based on a general objection to victim impact evidence and not to any specific statement in the letters. In fact, defense counsel reviewed and redacted the letters before they were read. Because there was no specific objection, Appellant needs to establish fundamental error.

The testimony cited by Appellant does not rise to the level of fundamental error. *See Davis v. State*, 928 So.2d 1089, 1134 (Fla. 2005) (victim impact evidence admitted in **guilt** phase that the victim's nickname was Skip, he had a little dog, and he had retired from NASA). *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003) (concluding that there was no fundamental error where testimony was presented of the victim giving food to an elderly woman; helping a man whose car was repossessed; caring for his younger adopted son who was an amputee; and protecting a friend's daughter who was smaller than her playmates by carrying her

on his shoulders and calling her a "queen"); *Sims v. State*, 602 So. 2d 1253, 1257 (Fla.1992) (concluding that a witness's statement that she did not know the victim's family but knew he had children does not constitute victim impact evidence). Error, if any, was harmless, *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). *See also Windom v. State*, 656 So. 2d 432, 439 (Fla. 1995).

POINT VI

THE *RING* CLAIM HAS NO MERIT

Appellant acknowledges that *Ring v. Arizona*, 536 U.S. 584 (2002), does not apply to this case but asks this Court to overrule years of precedent. (Brief at 48-49). Appellant provides no compelling reason for this Court to reverse itself. Moreover, the trial court found the aggravating circumstances of during-a-felony and prior-violent-felony. Appellant was convicted of the attempted murder of Betty Woodard. Thus, *Ring* does not apply to this case. *See Overton v. State/McDonough*, 976 So. 2d 536 (2007) (prior violent felony); *Jones v. State/Crosby*, 855 So. 2d 611, 619 (Fla. 2003) (prior violent felony).

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests this Honorable Court affirm the order of the trial court and deny all relief.

Respectfully submitted,
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_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by Hand Delivery to George Burden, Office of the Public Defender, 444 Seabreeze Blvd., Daytona Beach, Florida 32118, this _____ day of November, 2009.

_____
Assistant Attorney General

CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

_____
Assistant Attorney General