IN THE SUPREME COURT OF FLORIDA

WILLIAM F. SILVIA,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC09-220
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES CITED:

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PRELIMINARY STATEMENT

The original record on appeal comprises nineteen consecutively numbered volumes. The pages of the first four volumes are numbered consecutively from 1 to 608. Volume five begins renumbering the pages sequentially from page 1 to 2571 which concludes volume nineteen. Counsel will refer to the record on appeal using the appropriate Roman numeral to designate the volume number followed the appropriate Arabic number referring to the appropriate pages.

STATEMENT OF THE CASE

William F. Silvia, Jr. hereinafter referred to as appellant, was indicted by Grand Jury with Murder in the First Degree and Attempted First Degree Murder. (I 4) The state filed a Notice of Intent to Seek the Penalty of Death. (I 37) The

appellant filed a Motion for Findings of Fact and a Motion For a Statement of Particulars as to Aggravating Circumstances and to Dismiss Indictment for Lack of Notice as to Aggravating Circumstances. (I 43, 46) The trial court denied these motions. (I 169) The appellant filed nine pretrial motions challenging the constitutionality of the Florida death penalty scheme.[1] The trial court denied these Motions.[2] Upon court order the state disclosed that it intended to rely upon three aggravating circumstances.[3]

The case proceeded to trial. The appellant requested that the standard jury instructions be modified to reflect the current law. (V 12) The trial court reserved ruling. (V 32) During trial, the appellant moved for a mistrial. (XIII 1720) Sgt. Hardesty testified that the appellant was transported to the sheriff's office for an

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[1] Fact Finding by Judge, Non-unanimous Jury Recommendation, Violates ***Ring v. Arizona*** I 38; Victim Impact Evidence I 49; Heinous, Atrocious and Cruel Aggravating Factor Improper I 57, I 99; Death Penalty Presumed Punishment I 69; Failure to Provide Adequate Guidance to the Jury I 86; Bare Majority of Jurors is Sufficient to Recommend Death Sentence I 97; Jury Advisory Sentence I 101; Felony Murder Aggravator Improper I 103; Prior Violent Felony Aggravator Improper I 105; Cruel & Unusual Punishment, Bare Majority of Jurors I 107.

[2] I 157.

[3] The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; The defendant knowingly created a great risk of death to many persons; and The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (I 185)

interview. (XIII 1720) Appellant argued that Sgt. Hardesty's testimony is a comment on the appellant's right to remain silent, since the jury was informed that the appellant was given an opportunity to make a statement to Seminole County Sheriff's Office. (XIII 1720) The trial court denied the motion for mistrial. (XIII 1721)

The State rests. (XIII 1737) The Appellant rests. (XIII 1737) During closing argument, the state argued that Patrick Woodard shut the door to the carport to prevent being shot by the appellant, and further stated: "And he – if he didn't close that door, I submit to you he would have taken some buckshot." (XIV 1832) The appellant objected several times to this argument on the grounds that it was a misstatement of the evidence. (XIV 1832) The trial court overruled the objections stating "Allow the jury to rely upon their memory." (XIV 1832) The jury returned a verdict of guilty as charged to both counts. (XIV 1872)

PENALTY PHASE

The appellant objected to the state seeking the CCP[4] aggravating factor. (XV 1885) The trial court overruled the appellant's objection. (XV 1891) The appellant and state agreed to some redactions to the victim impact statements, and the appellant renewed his general objection to victim impact evidence. (XV 1951) The

[4] The Capital Felony was committed in a Cold, Calculated and

state rests. (XV 1974) The defense rests. (XVI 2120)

On the MMPI-2[5] the appellant scored highest on the psychotic deviancy scale. (XVI 2132) When asked to explain psychopathic deviancy, Dr. Danzinger stated in part: "Someone who does not respect authority, the ends justify the means and a lack of remorse." (XVI 2134) The appellant objected to Dr. Danzinger's testimony concerning appellant's lack of remorse, and moved for a mistrial. (XVI 2134) The trial court denied the motion for mistrial on the grounds that Dr. Danzinger was describing the general characteristics of psychopathic deviancy. (XVI 2136) As a curative measure, the trial court directed the state to have Dr. Danzinger clarify that not all general characteristics of psychopathic deviancy apply to the appellant. (XVI 2136) Dr. Danzinger again testified that the appellant lacked remorse. (XVI 2207) Upon appellant's request, the trial court ordered that the testimony concerning lack of remorse be stricken and the jury be instructed to disregard the testimony. (XVI 2209)

The trial court raised the issue of whether the evidence supported the jury being instructed on the knowingly created a risk of death to many persons aggravating factor. (XVI 2242) The appellant argued that the evidence was not sufficient and at best contradictory on the issue. (XVI 2244) The state argued that

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Premeditated Manner.

whether there was sufficient evidence to support this aggravating factor was a jury question, and the trial court agreed. (XVI 2244) The jury returned an advisory sentence of death by a vote of 11-1. (XVI 2404)

The trial court issued a Sentencing Order and found that there were three (3) aggravating factors.[6] (III 566-577) The trial court found that there was mitigation. (III 577-583) The trial court found that the appellant was emotionally distressed by the loss of his job, home and marriage. (III 579) The trial court further found that the capacity of the appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. (III 580) The trial court assigned little and moderate weight to these mitigating factors. (III 579, 580) The trial court found some other non-statutory mitigation, and gave it moderate weight. (III 580-582) The trial court found that the aggravating factors outweighed the mitigating circumstances. (III 583) The trial court sentenced the appellant to death as to Count I and life imprisonment as to Count II. (III 583) The Office of the Public Defender was appointed. (III 588) This appeal follows.

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[5] The Minnesota Multiphasic Personality Inventory Scale, Second Edition

[6] The Defendant was Previously Convicted of Another Capital Felony or a Felony Involving Violence; The Defendant knowingly created a great risk of death to many persons; and The Capital Felony was a homicide and was committed in a Cold, Calculated and Premeditated Manner.

STATEMENT OF THE FACTS

The appellant's estranged wife Patricia Silvia, had separated from the appellant in July 2006. (X 1057) Patricia Silvia, with her minor children from her first marriage, Rachel Sadron and Ross Sadron, lived with her mother Betty Woodard, her sister Robin MacIntre and her step-father Patrick Woodard in a home in Winter Park, Florida. (X 1056, 57) The appellant and Patricia Silvia were married in 2002. (X 1058)

On September 22, 2006 the Woodards had friends over to the house visiting. (X 1063) The appellant appeared at the house and came to the end of the carport. (X 1064) The appellant motioned for Patricia Silvia to come over and talk to him. (X 1064) The two spoke five to ten seconds and Patricia Silvia then returned back to the house. (X 1064) Patricia Silvia went inside the house and Betty Woodard followed her inside. (X 1065) Patricia Silvia was getting ice tea out of the refrigerator when Woodard heard what she thought was a sound of fire crackers. (X 1065) Woodard told her husband that the appellant was outside and she walked past her daughter and asked if she was okay. (X 1065) Betty Woodard then opened the door and was shot. (X 1065)

Jerome Woodard was visiting the Woodards home at the time of the

shooting. (X 1106) Jerome Woodard was in the vicinity of the carport when the appellant arrived to the house. (X 1112) Jerome Woodard observed Patricia Silvia and the appellant talking outside of the carport. (X 1110) According to Rachel Sadron, Patricia Silvia and the appellant spoke for a few minutes, and as Patricia Silvia walked back to the carport the appellant stated that "she would be sorry." (X 1112; X 1157) The appellant proceeded to go back to his truck at the end of the road. (X 1112)

Jerome Woodward then observed the appellant walking up towards the house, and the appellant fired two shotgun shots and Woodard jumped to the ground between the vehicles parked in the carport. (X 1113, 1114) The appellant was approximately thirty (30) feet from the carport when he fired the first shot, and approximately twenty (20) feet from the carport when he fired the second shot. (X 1124) Woodard heard a total of seven shots fired. (X 1118) Jerome Woodward could only confirm the presence of Betty Woodward in the vicinity of the carport when the shooting started. (X 1119) The appellant fired the first shot up into the air. (X 1124) Woodard never observed the appellant shooting the shotgun toward the carport. (X 1128)

Ross Sadron, Patricia Silvia's son, was in the Woodward home when he heard gunshots. (X 1138) Sadron ran towards the door to check on everyone. (X

1138) The door to the carport was open and there was smoke everywhere. (X 1138) Sadron was looking for his sister and standing near his mother when he fell to the ground. (X 1139) As Sadron got up, a shot at the door hit Sadron's mother and she fell in front of him. (X 1139) Sadron continued to look for his sister, and then Beth Parker took him to a bathroom with his sister and Aunt Robin. (X 1140)

Rachel Sadron heard gunshots.[7] (X 1158) While Sadron got up to get her brother, the appellant pointed a gun at her from the end of the carport. (X 1158; 1160) Sadron was suddenly pushed to the ground by her mother and then she crawled inside the house to get to her brother. (X 1159) Sadron was taken into the bathroom by Beth Parker. (X 1159) Sadron saw the front door of the house shut and her grandfather kneeling down. (X 1161) Sadron's mother Patricia Sylvia was collapsed in front of the refrigerator. (X 1161) Sadron continued to hear gunshots when she saw her grandfather by the door. (X 1161) Sadron then saw her grandmother in the carport holding her eye. (X 1162)

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[7] Rachel Sadron's testimony is in direct conflict with the testimony of Betty Woodward, Jerome Woodward and Ross Sadron. Sadron claims that Betty Woodward and Patricia Sylvia were outside the house when the appellant approached Sadron and pointed the gun at her from a foot away in the carport. (X 1172) Patricia Sylvia then pushed Rachel Sadron aside and she fell to the ground and crawled into the house to find her brother. (X 1173) Rachel Sadron then found her brother Ross Sadron in the living room watching a wrestling program. (X 1174) Rachel Sadron stated that her brother Ross Sadron was with her when Patricia Sylvia was shot in the kitchen. (X 1174)

Patrick Woodard was in the bedroom at the time of the shooting. (X 1185) Just prior to the shooting, Betty Woodard came into the bedroom and asked Patrick Woodard to come outside because the appellant was there. (X 1187) Woodward stayed in the bedroom for another minute, and then heard gun shots. (X 1187) Woodward came out of the bedroom and saw Patricia Sylvia laying in front of the refrigerator. (X 1188) Woodward then saw his wife lying on the floor outside the kitchen door. (X 1192) Woodward then saw the appellant standing at the end of the carport looking at Woodward holding the twelve gauge shot gun. (X 1193) The appellant pointed the shotgun at Woodward and pumped the shotgun. (X 1196) Woodward then shut the door. (X 1197) Woodward did not hear any further shots after he closed the door. (XI 1207) The door from the kitchen towards the carport had damage from both birdshot and double aughth buckshot. (XI 1198)

Sgt. Greg Fox of the Maitland Police Department received a BOLO for the appellant and the appellant's vehicle on the evening of September 22, 2006. (XI 1249) Sgt. Fox saw the appellant traveling northbound on state road 17-92 and followed him. (XI 1251) Sgt. Fox stopped the appellant in a hotel parking lot. (XI 1253) Sgt. Fox believed that the appellant was intoxicated because of his driving pattern, and the appellant appeared "kinda out of it" with glassy eyes and laughing

which seemed an odd thing at the time. (XI 1256)

Law enforcement obtained a search warrant of the appellant's hotel room at the Regency Inn. (XI 1271) Law enforcement found a Moss Berg 500 12 gauge shotgun in the hotel room. (XI 1274)

There were three fired shotguns shells and one unfired shotgun shell in the roadway in front of the townhouse. (XI 1351) There was a fired shotgun shell in the grass, in the middle of the two driveways in the middle of the duplex. (XI 1351) There were three fired shotgun shells in the driveway to the west or the left of the Ford Contour. (XI 1351) There were multiple areas of impact from the shotgun shell pellets. (XI 1352) There was one impact site on the Ford Contour. (XI 1352) There were two impact sites on the exterior of the carport door and another impact site on a post located on the carport. (XI 1352)

In the afternoon of September 22, 2006 the appellant came to a gun shop called Shoot Straight. (XII 1493) At approximately 3:30 in the afternoon the appellant purchased a Mossberg Persuader shotgun. (XII 1494)

Dr. Valeria Rao was the associate medical examiner who conducted the autopsy of the victim Patricia Silvia. (XIII 1681) The victim suffered a wound to her head that was located behind her left ear. (XIII 1688) The victim Patricia Silvia's cause of death was shotgun pellet wounds to her head. (XIII 1698)

Sgt. Matthew Hardesty of the Seminole County Sheriff's office assisted the Maitland Police in the transport of the appellant after his arrest. (XIII 1719) Sgt. Hardesty placed the appellant in his patrol vehicle and transported the appellant to the Sheriff's Office for an interview. (XIII 1720) While being transported by Sgt. Hardesty, the appellant asked Sgt. Hardesty if he was married. (XIII 1723) Sgt. Hardesty replied that he was married. (XIII 1723) The appellant indicated that this was the reason that he was in this situation. (XIII 1723) The appellant stated that his wife had spent all of his money that the appellant had placed in a checking account with her name. (XIII 1723) The appellant's wife also began to redate her ex-husband. (XIII 1723) This is reason why he shot her. (XIII 1723)

PENALTY PHASE

Prior to the shootings, Beth Parker went into the house to use the bathroom. (XV 1941) Parker had a conversation with Patrick Woodward by the master bedroom door. (XV 1941) Everybody else was outside.[8] (XV 1942) Betty Woodward came in the house and spoke to Patrick Woodward. (XV 1942) Parker heard the sound of "pop pop," and she followed Patrick Woodward outside the bedroom. (XV 1943) The three children were outside the bedroom door. (XV 1943) The three children had come from the carport area. (XV 1943)

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[8] This testimony is contrary to the testimony of Ross Sadron. Sadron

Patrick Woodward heard shooting and came to the kitchen and saw Patricia Sylvia lying in front of the refrigerator. (XV 1945) Woodward saw the appellant at the end of the carport with a shotgun in his hand. (XV 1945) Woodward stepped over Patricia Sylvia to shut the door, or Woodward would have had shots in his chest. (XV 1945) The appellant fired a shot at Woodward that was stopped by the door.[9] (XV 1946)

DEFENSE CASE

The appellant was the oldest of three children. (XV 1977) The appellant was born in Washington DC, but soon thereafter moved with his family to College Park, Georgia. (XV 1978) During the next eight years in Georgia, the relationship of the appellant's parents was very volatile. (XV 1979) The parents would have both verbal and physical fights. (XV 1979) The appellant would hear and see these fights. (XV 1979) During one incident, the appellant came out of his room and told his parents to stop it. (XV 1980) The parents would ultimately divorce. (XV 1980)

The appellant's parents subsequently remarried, and tried a new start in Altamonte Springs, Florida. (XV 1979) The appellant's parents divorced again in

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testified that he was in the house watching television at this time.

[9] At trial Woodward testified that he saw the appellant standing at the end of the carport looking at Woodward holding the twelve gauge shot gun. (VI 1193) The appellant pointed the shotgun at Woodward and pumped the shotgun. (VI 1196) Woodward then shut the door. (VI 1197) Woodward did not hear any

Florida, and the appellant's mother was killed by a drunk driver in 1999. (XV 1981) The appellant's younger brother John died in 2001 of natural causes related to drug abuse. (XV 1982) The appellant ran away from home on three occasions as a teenager. (XV 1983) On two occasions, the appellant ran away to Venice, California. (XV 1983) During the third episode, the appellant attempted to rob a bank with his brother John. (XV 1983) The appellant was arrested and subsequently spent time in the Florida Hospital psychiatric unit. (XV 1984)

The appellant played little league baseball, and was on a swim team. (XV 1984) The appellant was quiet and a loner with few friends. (XV 1985) The appellant spent a great deal of time in his bedroom alone playing Dungeons and Dragons. (XV 1985) The appellant's sister was classified as being "bipolar" and was placed in a psychiatric ward after the death of her mother. (XV 1986) The appellant's mother remarried and was in business with her new husband. (XV 1987) The appellant and his brother John both worked in their mother's business. (XV 1987) The appellant lost his mother and his job when she was killed. (XV 1987)

Dr. Deborah Day is a licensed psychologist practicing forensic psychology, and she performed an evaluation upon the request of defense counsel. (XV 1994,

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further shots after he closed the door. (VII 1207)

1999) Dr. Day visited the appellant on five separate occasions, and spent eight hours interviewing the appellant. (XV 2000) Dr. Melissa Fogle, a neuropsychologist, also performed an evaluation of the appellant related to concerns based upon the history of head injury and trauma suffered by the appellant. (XV 2000) When the appellant was an adolescent he was institutionalized for two months, and was diagnosed with a schizophrenia form disorder and recommended for inpatient treatment, and then subsequent outpatient treatment. (XV 2004)

The appellant's father was abusive to his mother. (XV 2005) At one point the abuse was turned on the appellant when he first tried to protect his mother. (XV 2006) The appellant's father then became physically and emotionally abusive to the appellant. (XV 2006) The appellant became estranged from his father and emotionally dependant on his mother. (XV 2008) The appellant also began self-medicating by drinking alcohol and smoking marijuana. (XV 2008) The appellant eventually became alcohol dependent in his 20s. (XV 2008) The appellant's first wife Wendy was also an alcohol and drug abuser, and their relationship centered around substance abuse. (XV 2009) The appellant left his first wife after having an affair with the victim Patricia Sylvia. (XV 2009) The appellant suffered from significant anxiety during his first marriage, and saw a psychiatrist for six months

and was placed on medication. (XV 2009)

The appellant's family has a history of substance abuse and mental illness. (XV 2010) The appellant's brother was a substance abuser, the appellant's sister has a bipolar disorder and has had psychiatric hospitalization. (XV 2010) The appellant's paternal grandfather shot and killed himself, and the appellant's paternal uncle suffers from post-traumatic stress disorder from service in the Vietnam War. (XV 2010)

The appellant was drinking excessively when he began an affair with Patricia Sylvia. (XV 2011) The couple both continued to abuse alcohol after their marriage. (XV 2011) During the first three years of their marriage, the appellant and Patricia Sylvia lived on monies obtained from his mother's estate. (XV 2012)

The appellant suffer from bouts of paranoia. (XV 2014) He believes that people are watching him. (XV 2014) There were times that he thought planes and satellites were spying on him. (XV 2015) The appellant came to believe that his wife Patricia Sylvia was having sexual relations with her two older sons. (XV 2015) The appellant stated that the sons would sit too close to their mother, and that Patricia Sylvia would stare at her son's crotch. (XV 2015) The appellant confronted Patricia Sylvia and his step-children about his suspicions, and this was the reason that she left him. (XV 2016) The appellant routinely drank a case of

beer a day, and prior to the shooting of Patricia Sylvia he had drank a six pack of beer. (XV 2018)

The appellant suffered three separate head injuries. (XV 2018) In elementary school, the appellant fell from his desk onto his head; when the appellant was seventeen he had a auto accident where his head hit the windshield requiring stitches; and the appellant was assaulted by drug dealers and the orbital bone around his eye was broken. (XV 2018) Based upon testing the appellant has average limit intelligence (IQ 107), but suffers memory weakness caused by substance abuse and a head injury. (XV 2025; 2059) The appellant suffers from chronic extreme mental health problems. (XV 2028) The appellant is very immature and alienated. (XV 2028) The appellant is impulsive, and acts out his problems. (XV 2028) The appellant has significant levels of anxiety and depression. (XV 2028) The appellant feels hopeless and helpless in his environment. (XV 2028) The appellant showed a number of symptoms suggesting that he has a delusional or bizarre belief system consistent with a psychotic disorder. (XV 2028)

The appellant was functioning at a very low level at the time of the offense, and his functioning improved while in jail. (XV 2035) The appellant suffers a combination of personality disorders. (XV 2037) The appellant has an antisocial

personality disorder because he engaged in conduct against social norms. (XV 2037) The appellant has a schizoid personality disorder which is characterized as being a loner, and having an inability to have relationships with people. (XV 2037) The appellant has a paranoid personality disorder which is classified as believing that people are starring at him, and out to get him. (XV 2038) Dr. Day diagnosed the appellant as having a personality disorder not otherwise specified because the appellant has features of more than one personality disorder. (XV 2038) Dr. Day also diagnosed the appellant with a delusion disorder meaning that the appellant has thinking that is unusual and consistent with some psychotic thought processes. (I 2039) The appellant engages in beliefs that are not real. (XV 2039)

The murder of Patricia Sylvia was "aggressive acting out." (XV 2037) The appellant visited his wife to talk with her. (XV 2042) After speaking to his wife, she went into the house. (XV 2042) The appellant recalls going back to his truck and getting his gun, but does not remember anything else until he hears the gun blast. (XV 2042) The appellant described the shooting as if he was watching the event through a telescope where he can see a round area around him. (XV 2042) The appellant believes that he fired multiple shots, and does not remember anything else until he got back to his hotel. (XV 2042) The appellant was suffering from paranoia that his wife was having an affair with her ex-husband and

another man and that these people and others were out to get him. (XV 2043) Due to the impulsiveness of the appellant and alcohol abuse by appellant, it was more likely he would act out as he did. (XV 2044) The appellant purchased the shotgun for his protection because he was living in his car. (XV 2054) The appellant visited his wife because he wanted to know if they would divorce or reconcile. (XV 2056)

The appellant had the mental capacity to "premeditate the murder in a cold, calculated and premeditated fashion." (XVI 2090) The appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. (XVI 2094) The appellant was under the influence of a mental or emotional disturbance at the time of the murder. (XVI 2095)

STATE CASE

Dr. Danzinger testified as a state expert and was essentially in agreement with Dr. Day's conclusions from the testing. (XVI 2131) The testing was consistent with someone with severe personality and character pathology. (XVI 2131) The appellant scored very high in the scale area of psychopathic deviants and paranoia. (XVI 2133) Psychopathic deviants is a term to describe those people that violate norms of society and do not respect authority. (XVI 2134) The

appellant bought the shotgun for protection from physical attack. (XVI 2137) The appellant had lost his job the day of the shooting. (XVI 2137) After losing his job he went to the gun shop and bought a shotgun and appeared calm, acted appropriately, and not in an uncontrolled frenzy. (XVI 2141) The appellant went to visit his wife without the shotgun was not consistent with someone that feared her family. (XVI 2143) The appellant could not recall the details of the shooting, and reported to Dr. Danzinger a history of blackouts when drinking heavily. (XVI 2145) The appellant's jail records were striking in the absence of any reference to paranoia, hallucinations or psychotic thinking. (XVI 2147)

At the time of the shooting the appellant was slightly impaired due to alcohol intoxication. (XVI 2160) The appellant drove up to the house, and acted appropriately when asked to leave. (XVI 2160) He was able to respond that he wanted to speak to his wife. (XVI 2160) He spoke to his wife. (XVI 2160) There was nothing to suggest that the appellant was in a frenzy, out of control, or seriously mentally ill. (XVI 2161) Dr. Danzinger concluded that the appellant was alcohol dependent. (XVI 2189) The appellant used his limited resources to buy a shotgun after being fired for one of two reasons: First, for protection from unknown people as the appellant stated related to his paranoid personality traits; or two, in keeping with someone with anti-social and paranoid traits that he was

going to talk to his wife to see if he could get her back, and if not he had a gun and might use it. (XVI 2216)

DEFENSE SURREBUTTAL

The appellant told Dr. Danzinger that he purchased the shotgun after feelings that his wife's ex-husband among others was doing him harm including the loss of his home and loss of his job. (XVI 2275) These extreme fears of these people being out to get him began to escalate days before appellant purchased the shotgun. (XVI 2277) At the time that the appellant purchased the shotgun he was suffering from false beliefs, delusions and paranoia. (XVI 2278) At the time of the shooting the appellant did not have an alcohol related blackout, but rather a disassociative episode. (XVII 2288) A disassociative episode is similar to an auto accident where one distances themselves from the event or time stands still. (XVII 2289)

The appellant's jail records detailed two instances where the appellant was suffering from hallucinations or psychotic episodes. (XVII 2291) When the appellant purchased the shotgun he had fears of people walking up to him in his sleep in his truck or the job site. (XVII 2304) He also feared his wife's ex-husband would attack him, possibly with a firearm. (XVII 2305)

SPENCER HEARING

Dr. Daniel Buffington testified as an expert in forensic pharmacology. (XVIII 2595) He reviewed records and conducted a two hour interview of the appellant. (XVIII 2597) Dr. Buffington found that the appellant was both alcohol and marijuana dependent. (XVIII 2606) The appellant's substance abuse would worsen or magnify the problems associated with the appellant's personality disorders. (XVIII 2607) Chronic alcoholism causes pathological changes in the brain, specifically, the midline temporal lobe area of the hippocampus can experience changes to the neurotransmitters. (XVIII 2609) This explains significant psychiatric manifestations in individuals that are chronic alcoholics. (XVIII 2610) Therefore, in the case of the appellant there is no need to be intoxicated to be impaired in the mental functioning. (XVIII 2610)

Prior to the shooting the appellant lost his wife, lost his job and lost his home. (XVIII 2618) The appellant has a documented history of suicidal ideation at different times of peak stress. (XVIII 2618) The appellant's goal in going to see his wife was to reconcile as a foundation to keep on living, and if not, his goal was to commit suicide. (XVIII 2618) Some of appellant's paranoia was fueled by past visits to the Woodward home, where he was chased away by family members and threatened by his wife's ex-husband and elder son. (XVIII 2620) The day of the

shooting was a peak day in terms of environmental and emotional stressors, that would not preclude him from functioning, but would have the potential for delusional and paranoid behavior. (XVIII 2625) The appellant was impaired in his ability to function. (XVIII 2627) After losing his home and his job, the realization of the loss of his marriage caused an extreme emotional disturbance. (XVIII 2628) Dr. Buffington was uncertain as to whether the appellant's ability to understand the nature of his actions or comply with law were impaired. (XVIII 2628)

SUMMARY OF ARGUMENT

Point I: The trial court claimed in the sentencing order that the Cold, Calculated and Premeditated (CCP) aggravating circumstance was proven and should be given great weight. The finding of the CCP aggravating circumstance is not supported by the evidence. The uncontroverted evidence of mental mitigation is contrary to a finding that Sylvia acted in a calm, reflective manner. The shooting was the product of Sylvia's emotional turmoil arising from his domestic relationship with his wife. Moreover, the murder lacked heightened premeditation. The trial court erroneously relied upon this Court's decision in ***Buzia. v. State***. The fact that Sylvia could have left the scene after having words with his wife, and firing multiple shots is not sufficient evidence to support heightened premeditation.

Point II: The trial court claimed in the sentencing order that Sylvia knowing created a great risk of death of many persons and such aggravating factor should be given great weight. In the instant case, there was gunfire intended for one person. When gunfire is involved, the evidence is insufficient to support the aggravating factor of great risk of death to many persons when there is only an intent to kill a particular person and there is no evidence of indiscriminate shooting in the direction of a group of people. When the appellant approached the house

with the shotgun and had no idea where his wife was located. It is uncontroverted that the appellant initially fired one or two warning shots in the air to cause bystanders to flee. The finding of the knowing created a great risk of death of many persons is not supported by the evidence.

Point III: The death sentence is disproportionate when compared with similar cases where the aggravating circumstances are few and the mitigation, especially the mental mitigation, is substantial.

Point IV: The prosecutor repeatedly elicited statements from his expert witness that Sylvia lacked remorse of the murder of his wife over timely defense objection. This testimony improper aroused the passions and prejudice of the jury and denied Sylvia a fair trial.

Point V: The appellant made timely objection to the state's proposed victim impact evidence. The victim's son's statements that "God needed another angel and he picked my mom." and "I know that my mom is watching above and she is my number 1 angel" are not appropriate comment on the victim's uniqueness or loss to the community. However, the trial court permitted these inflammatory and improper references, thereby tainting the jury's recommendation and the resultant sentence of death. The victim's co-worker Aura Boyd testified that: "I have a lot of fear because this showed me it does not matter how you live your life if

someone who does not see a value in a life wants to take it because... maybe they don't want you to end a relationship them." This testimony improperly relayed Boyd's characterizations and opinions about the crime, a direct violation of ***Payne v. Tennessee***. The improper comments by Boyd improperly aroused the passions of the jury, passions which have no place in the capital sentencing determination.

Point VI: Florida's death sentencing scheme is unconstitutional under the Sixth Amendment pursuant to ***RING V. ARIZONA***.

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT COMMITTED THE MURDER IN A COLD, CALCULATED AND PREMEDITATED MANNER.

The trial court claimed in the sentencing order that the Cold, Calculated and Premeditated (CCP) aggravating circumstance[10] was proven and should be given great weight. The trial court noted that on the day of the murder Sylvia purchased a 12 gauge Mossberg Persuader shotgun. There was a surveillance video at the gun store that showed Sylvia purchasing the shotgun. The trial court believed that the video was important because:

> [I]t 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.

Based upon the foregoing the trial court concluded that "there is no evidence that the murder ... was prompted by emotional frenzy, panic, or a fit of rage." This finding by the trial court was error.

The trial court found that the evidence was sufficient to establish that the

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[10] The capital felony was was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. §921.141(5)(j), Florida Statutes (2005)

defendant had a careful plan or prearranged design and heightened premeditation to commit murder before the killing. The trial court relies upon the evidence that Sylvia purchased the murder weapon five and a half hours before the murder; that Sylvia put the murder weapon in his truck before visiting his wife; and that rather than leave after having words with his wife, Sylvia returned from his truck with the shotgun killed his wife. The finding of the CCP aggravating circumstance is not supported by the evidence.

The CCP aggravating circumstance has four elements. ***Jackson v. State***, 648 So.2d 85 (Fla. 1994); ***Walls v. State***, 641 So.2d 381 (Fla. 1994) As this court explained them in ***Walls***,

> Under ***Jackson***, there are four elements that must exist to establish cold calculated premeditation. The first is that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." ***Jackson*** [648 So.2d at 89]....
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> * * * *
>
> Second, ***Jackson*** requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident." ***Jackson***,[648 So.2d at 89]....
>
> * * * *
>
> Third, ***Jackson*** requires "heightened premeditation," which is to say, premeditation over and above what is required for unaggravated first-degree murder....
>
> * * * *

> Finally, ***Jackson*** states that the murder must have "no pretense of moral or legal justification." .... Our cases on this point generally establish that a pretense of moral or legal justification is any colorable claim based at least in part on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide....

Walls, 641 So.2d at 387-388.

LACK OF COOL AND CALM REFLECTION

Dr. Day diagnosed the appellant as having a personality disorder not otherwise specified because the appellant has features of more than one personality disorder. Dr. Day also diagnosed the appellant with a delusion disorder meaning that the appellant has thinking that is unusual and consistent with some psychotic thought processes. Put simply, the appellant engages in beliefs that are not real.

The appellant explained to the state's expert, Dr. Danzinger, that he purchased the shotgun after feelings that his wife's ex-husband among others was doing him harm including the loss of his home and loss of his job. Dr. Day explained that these extreme fears of these people being out to get him began to escalate days before appellant purchased the shotgun. Dr. Day opined that at the time that the appellant purchased the shotgun he was suffering from false beliefs, delusions and paranoia. At the time of the shooting the appellant had consumed a

six-pack of beer, but did not have an alcohol related blackout, but rather a disassociative episode.[11] When the appellant purchased the shotgun he was homeless, and had fears of people walking up to him in his sleep in his truck or his job site. He also feared his wife's ex-husband would attack him, possibly with a firearm. The appellant was suffering from paranoia that his wife was having an affair with her ex-husband and her adult son, and that these people and others were out to get him. Due to the impulsiveness of the appellant and alcohol abuse by appellant, it was more likely he would act out as he did.

Dr. Day concluded that at the time of the shooting, the appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. Also, the appellant was under the influence of a mental or emotional disturbance at the time of the murder.

The state's witness Dr. Danzinger did not disagree with most of Dr. Day's findings. Dr. Danzinger testified that the appellant had suffered from a severe personality and character pathology. The appellant scored very high in the scale area of psychopathic deviants and paranoia.

The uncontroverted evidence of mental mitigation is contrary to a finding that Sylvia acted in a calm, reflective manner. In ***Spencer v. State***, 645 So.2d 377,

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[11] According to Dr. Day a disassociative episode is similar to an auto

384 (Fla. 1994), this Court struck the CCP aggravating factor on nearly identical circumstances. In ***Spencer*** the trial court was presented with nearly identical mental mitigating circumstances. Unlike the instant case, in ***Spencer*** there was evidence that Spencer contemplated the murder well in advance. In striking the CCP aggravating circumstance this Court held:

> However, we find that the evidence does not support the trial court's finding of CCP. Although there is evidence that Spencer contemplated this murder in advance, we find that the evidence offered in support of the mental mitigating circumstances also negates the cold component of the CCP aggravator. During the penalty phase, a clinical psychologist testified that Spencer thought that Karen was trying to steal the painting business, which was a recapitulation of a similar situation with his first wife. The psychologist also testified that Spencer's ability to handle his emotions is severely impaired when he is under such stress. A neuropharmocologist agreed that Spencer has "very limited coping capability," "manifests emotional instability when he is confronted with [sudden shocks and stresses]," and "is going to become paranoid when stressed." This expert opined that Spencer's personality structure and chronic alcoholism rendered him "impaired to an abnormal, intense degree." In light of this evidence, we find that the trial court erred in finding that the murder was CCP.

Spencer at 384.

In ***Santos v. State***, 591 So.2d 160 (Fla. 1991), after threatening to kill Irma Torres two days before, Carlos Santos purchased a gun and took it to her home.

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accident where one distances themselves from the event or time stands still.

Seeing Torres and her children, Santos chased them down and shot them. This Court struck the CCP circumstance, reasoning that, although Santos "acquired a gun in advance and had made death threats – facts that sometimes may support the State's argument for cold, calculated premeditation", the shooting was the product of the defendant's emotional turmoil arising from his domestic relationship with Torres. ***Santos*** at 162 This Court so ruled even though the trial judge rejected both statutory mental mitigating circumstances.

LACK OF HEIGHTENED PREMEDITATION

The trial court found that the evidence was sufficient to establish that Sylvia "exhibited a heightened premeditation." The trial court cited the fact that after speaking with his wife, Sylvia went back to his truck, and used the time to arm himself, return to the house and commit the murder. Moreover, the trial court claims that the Sylvia fired the shotgun four times before he shot at Patricia Sylvia in the kitchen. The trial court relied upon this Court's holding in ***Buzia v. State***, 926 So.2d 1023 (Fla. 2006) stating "when a Defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder" there is heightened premeditation. The facts in ***Buzia*** are distinguishable from the instant case.

The uncontroverted facts in the case at bar are that Sylvia was estranged

from his wife after confronting her about having sexual relations with her sons and her ex-husband. Dr. Day opined that the Sylvia's suspicions of his wife infidelity were likely untrue, but rather a manifestation of his personality disorder. The day of the murder, Sylvia was homeless and living in his truck. The day of the murder the appellant was fired from his job. The court noted that the appellant went to visit his wife with the newly purchased shotgun in his truck. In this case that was not unusual because Sylvia was living in his truck. The shooting was a product of Sylvia's emotional turmoil arising from his domestic relationship with his wife Patricia Sylvia.

Buzia was a handyman that did work at his victim's home. Buzia first brutally assaulted his murder victim's wife as part of his plan to rob the house. Rather than leave with the fruit of his initial robbery, Buzia waited in the home for the murder victim to come home. After assaulting the murder victim, Buzia then got an ax and committed the murder rather than leaving the house. There was no domestic relationship in this case. In finding CCP this Court stated:

> As in *Lynch*, where the defendant waited "thirty to forty minutes" for the victim to arrive home, 841 So.2d at 373, Buzia had a short period of time during which he could have left the scene and not inflicted further harm. He could have "renounce[d] any further violence" by either leaving or, upon Mr. Kersch's arrival, passively explaining to him what occurred. Yet, when he heard the garage door open, he considered his options and decided

> to attack Mr. Kersch as well. He calmly chose the criminal option and "perfect[ed] his plan of attack."
>
> Despite this course, Buzia had one final instance where he could have left the scene without committing further harms-the lapse of time during which he obtained the ax. This interlude was similar to the five to seven minutes in *Lynch.* Moreover, Buzia could have stopped his criminal activity at the level of assault and robbery. Instead, he remained there, obtained the first ax, and thought about "using it to make 'em unconscious." Although he dropped it on the floor, he obtained the other ax and carried out his plan. Buzia could have left the scene without committing further harm, but he remained and committed murder. *See Alston*, 723 So.2d at 161-62 (emphasizing the defendant's choice between stopping at the level of kidnapping and robbery and murdering the victim).

The murder of Patricia Sylvia was not committed in a cold, calculated and premeditated fashion. Due to the domestic turmoil between the parties, and based upon the mental mitigation evidence presented, the murder lacked cool, calm reflection on behalf of William Sylvia. Moreover, the murder lacked heightened premeditation. The trial court erroneously relied upon this Court's decision in ***Buzia. v. State***. The fact that Sylvia could have left the scene after having words with his wife, and firing multiple shots is not sufficient evidence to support heightened premeditation. The conclusion of the trial court should be rejected. The instruction to the jury and the finding of this weighty aggravating circumstance requires that the death sentence must be vacated and reduced to life

or remanded for a new penalty phase.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

The trial court provided a detailed sentencing order concluding that the appellant knowingly created a great risk of death to many persons during the events of his murder of his wife Patricia Sylvia. The trial court found that: "Not counting the murder victim, the evidence is sufficient to establish that Betty Woodard, Patrick Woodward, Ross Shadron, Rachel Sadron, Jerome Woodward and Robin McIntyre were knowingly put in great risk of death by the Defendant." This finding by the trial court is not supported by the evidence.

The trial court relied upon this Court's holding in ***Johnson v. State***, 696 So.2d 326 (Fla. 1997) for the definition of "knowingly put in great risk of death to many persons." In ***Johnson*** this Court held:

> We have stated that this aggravator cannot be supported in situations where death to many people is merely a possibility. Instead, there must be a likelihood or high probability of death to many people. (Citations omitted) Further, we have indicated that the word "many" must be read plainly. Therefore, we uphold the application of this aggravating circumstance in scenarios in which four or more persons other than the victim are threatened with a great risk of death. (Citations omitted)

Johnson at 327. Therefore, an aggravating circumstance will be found with

respect to a capital felony when the defendant knowingly created a great risk of death to many persons. The use of the word "many" means that a great risk of death to a small number of people will not establish this aggravating circumstance. The presence of three other people does not qualify as many persons. Rather, for capital sentencing purposes, the "risk of death to many people" can be applied as an aggravating circumstance in scenarios in which four or more persons other than the victim are threatened with great risk of death. "Great risk" means not a mere possibility, but a likelihood or high probability.

In the instant case, there was gunfire intended for one person. When gunfire is involved, the evidence is insufficient to support the aggravating factor of great risk of death to many persons when there is only an intent to kill a particular person and there is no evidence of indiscriminate shooting in the direction of a group of people. In ***Williams v. State***, 574 So. 2d 136 (Fla. 1991) this Court explained that the mere fact that several people are present during a shooting is not sufficient to support this aggravating factor.

> First, the trial court found the factor of great risk to many persons based on the fact that several other persons were present in the bank at the time of the robbery. We believe this factual situation, without more, is insufficient to support this factor. This factor is properly found only when, beyond any reasonable doubt, the actions of the defendant created an immediate and present risk of death for many persons. While we agree that Williams' actions created some degree of risk, we

> cannot say beyond a reasonable doubt that he created an immediate and present risk to the others in the bank. There is no evidence, for instance, of indiscriminate shooting in the direction of bank customers, but only of an intent to kill the bank guard.

Williams at 137.

Like ***Williams***, the only intended victim in this case was a single person Patricia Sylvia. The evidence is not clear on the number of people present at the carport when Sylvia began shooting. According to eyewitness Jerome Woodward, the appellant approached the house and fired two shotgun shots and Woodard jumped to the ground between the vehicles parked in the carport. The appellant was approximately thirty (30) feet from the carport when the appellant fired the first shot, and that shot was a warning shot in the air. The second shot was not fired at any person. Jerome Woodard heard a total of seven shots fired. Jerome Woodward could only confirm the presence of Betty Woodward in the vicinity of the carport when the shooting started.

After appellant had left the house to get his shotgun, Betty Woodward followed her daughter Patricia Sylvia into the house. Betty Woodward then went into her bedroom to tell her husband that the appellant had come to the house. As Betty Woodward left her bedroom she heard the sound of firecrackers outside. Betty Woodward headed to the kitchen, and Patricia Sylvia was getting ice tea

from the refrigerator. Woodward went past her daughter and asked if she was okay. Woodward asked Patricia Sylvia if she was coming back outside, and Sylvia replied that she would be back out in a minute. Woodward then opened the door to the carport and was shot instantaneously.

The evidence as to what occurred next is contradictory. Rachel Shadron, the victim's daughter, testified that she was outside when the shooting started. Shadron looked to see what was happening and saw the appellant standing at the end of the carport pointing the shotgun at her. Shadron then testified that suddenly she was pushed down by her mother and then she crawled inside the house to get to her brother. The trial court correctly noted that the evidence was inconsistent with Shadron's version of events, nonetheless, found it was believable for purposes of establishing the aggravating factor by simply stating that: "Obviously, when the Defendant was in the carport shooting, chaos occurred." ***See Sentencing Order***, footnote 4.

Ross Shadron was sitting in the house watching television when the shooting started. Ross Shadron testified that he was standing by his mother when she was shot. No other eyewitness could corroborate this account. In fact, Rachel Shadron testified that Ross Shadron was sitting on the couch at the time that her mother was shot. Patrick Woodward testified that when he exited the bedroom of the house he

saw Patricia Sylvia lying on the kitchen floor. Woodward did not see Ross Shadron in the vicinity of his mother immediately after the shooting.

There was no credible evidence as to the location of Robin McIntyre at the time of the shooting. Robin McIntyre did not testify. Beth Parker testified that while she was in the master bedroom everyone was outside. Parker heard the sound of "pop pop," and she followed Patrick Woodward outside the bedroom. The three children were then outside the bedroom door.

Patrick Woodward heard shooting and came to the kitchen and saw Patricia Sylvia lying in front of the refrigerator. Woodward saw the appellant at the end of the carport with a shotgun in his hand. Woodward stepped over Patricia Sylvia to shut the door, or Woodward "would have had shots in his chest." The appellant fired a shot at Woodward that was stopped by the door. At trial, Woodward testified that he saw the appellant standing at the end of the carport looking at Woodward holding the twelve gauge shot gun. The appellant pointed the shotgun at Woodward and pumped the shotgun. Woodward then shut the door, ***and he did not hear any further shots after he closed the door***. (Emphasis added).

This Court has further held that where there is a shooting, for a person to be knowingly put in great risk of death, the evidence must show that many people were "in the line of fire" during the shooting. Where people were located after the

shooting is not relevant. In ***Alvin v. State***, 548 So.2d 1112 (Fla. 1989) this Court held that:

> The judge's findings indicated that when the shooting took place there were four people in the vicinity, two of whom were Powell and Grimes. There were two women in the area, but they were not in the line of fire. We have previously held that the presence of two persons in the immediate proximity to the victim of a murder by shooting is insufficient to establish this aggravating factor. (Citations omitted) The judge also noted that five minutes after the shooting there were in excess of fifty people at the scene. The mere fact that the shooting occurred in an area where many people congregated *after* the shooting is not sufficient to support a finding of this aggravating circumstance.

Alvin at 1115. In the instant case, the evidence supports the finding that both Betty Woodward and Patrick Woodward where in the line of fire during the shooting.[12] This is not meet the four person threshold that is required under ***Johnson***.

In summary, the evidence does not support the trial court's determination that the appellant knowingly intended to created a great risk of death to many persons. The evidence, in fact, suggests otherwise. The appellant approached the house with the shotgun and had no idea where his wife was located. It is uncontroverted that the appellant initially fired one or two warning shots in the air

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[12] This means accepting Mr. Woodward's conflicting testimony.

to cause bystanders to flee. This is not consistent with the trial court's finding. Moreover, the evidence was insufficient or inconsistent on those people the trial court claims the appellant knowingly put in great risk of death. The instruction to the jury and the finding of this weighty aggravating circumstance requires that the death sentence must be vacated and reduced to life or remanded for a new penalty phase.

POINT III

THE DEATH SENTENCE IS DISPROPORTIONATE WHEN COMPARED WITH SIMILAR CASES WHERE THE AGGRAVATING CIRCUMSTANCES ARE FEW AND THE MITIGATION, ESPECIALLY THE MENTAL MITIGATION, IS SUBSTANTIAL.

In ***State v. Dixon***, 283 So.2d 1, 7 (Fla. 1973) this Court held that the death penalty statute provides the capital defendant "concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient." The "concrete safeguards" include proportionality review:

> Review of a sentence of death by this Court, provided by Fla. Stat. 921.141, F.S.A., is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes. Surely such a desire cannot create a violation of the Constitution.

Accordingly, "Our law reserves the death penalty only for the most aggravated and least mitigated murders." ***Kramer v. State***, 619 So.2d 274, 278 (Fla. 1993) ***See also Almeida v. State***, 748 So. 2d 922 (Fla. 1999)(crime must fall within the category of both the most aggravated and least mitigated of murders); ***Terry v. State***, 668 So. 2d 954, 965 (Fla. 1996) (Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances

exist).

Proportionality review is not merely a comparison between the number of aggravating and mitigating circumstances. Proportionality review requires a discrete analysis of the facts, entailing a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. ***Urbin v. State***, 714 So. 2d 411, 416 (Fla. 1998)(quotations and citation omitted; emphasis in original). Proportionality analysis requires the Court to consider the totality of circumstances in a case, in comparison to other capital cases. ***See Porter v. State***, 564 So. 2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991). The Court must compare similar defendants, facts, and sentences. ***Brennan v. State***, 754 So. 2d 1, 10 (Fla. 1999). The standard of review is de novo. ***See Larkins v. State***, 739 So. 2d 90 (Fla. 1999)

This murder was committed by an emotionally disturbed person who has a history from childhood of drug and alcohol abuse. Sylvia purchased the shotgun after feelings that his wife's ex-husband among others was doing him harm including the loss of his home and loss of his job. Dr. Day explained that these extreme fears of these people being out to get him began to escalate days before appellant purchased the shotgun. Dr. Day opined that at the time that the appellant purchased the shotgun he was suffering from false beliefs, delusions and paranoia.

The improper finding of the CCP and Creating Great Risk of Death aggravating circumstances (See Point I& II), the facts and circumstances of this case, and the previous rulings of this Court in similar cases support the finding that Sylvia's death sentence is disproportionate in this case.

In ***Santos v. State***, 591 So.2d 160 (Fla. 1991), after threatening to kill Irma Torres two days before, Carlos Santos purchased a gun and took it to her home. Seeing Torres and her children, Santos chased them down and shot them. In Santos' initial appeal, this Court struck the CCP circumstance, reasoning that, although Santos "acquired a gun in advance and had made death threats – facts that sometimes may support the State's argument for cold, calculated premeditation", the shooting was the product of the defendant's emotional turmoil arising from his domestic relationship with Torres. ***Santos*** at 162

This Court ordered a new penalty phase in ***Santos***. After a new penalty phase, the trial court again sentenced Santos to death. This Court ruled that on proportionality grounds the single aggravating factor of the contemporaneous violent felony weighed against the mental mitigating circumstances required that Santos' sentence be reduced to life. ***See Santos v. State***, 629 So.2d 838 (Fla.1994)

In ***White v. State***, 616 So.2d 21 (Fla. 1993) White and the victim had dated for some time and after their relationship ended, they had several altercations.

Eventually the victim obtained a restraining order enjoining White from committing acts of violence against her and excluding him from her residence for one year. Days before the murder, White broke into the victim's apartment and hit the victim's male companion several times with a crowbar. White was charged with burglary, assault, and aggravated battery. While in jail as a result of this incident, White told another inmate that, if he [White] was given bond, he was going to kill his ex-girlfriend.

Upon his release from jail, White went to a pawnshop and redeemed a shotgun he had previously pawned. ***The pawnbroker testified that White was a regular customer and did not appear to be under the influence of alcohol or drugs.*** (Emphasis added) Soon thereafter, White found his ex-girlfriend leaving work, got out of the car with a shotgun and shot his ex-girlfriend after she screamed and turned to run. While the victim lay on the ground, White fired a second shot into her back. As White returned to the car, he told one of the eyewitnesses, "Deke, I told you so," and then quickly drove away. In reversing the death sentence, this Court stated:

> We agree with White that the trial judge erred in instructing the jury on and finding that this murder was committed in a cold, calculated, and premeditated manner. While the record establishes that the killing was premeditated, the evidence of White's excessive drug use and the trial judge's express finding that White

> committed this offense “while he was high on cocaine” leads us to find that this aggravating factor was not established beyond a reasonable doubt and that the jury should not have been instructed that it could consider this aggravating factor in recommending the imposition of the death penalty. As a result of this conclusion, the death sentence is based upon one aggravating factor and three mitigating factors, each of which is fully supported by the record. Given the evidence of White's drug use and that he was under the influence of extreme mental or emotional disturbance, as well as the evidence that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, we find that the death sentence in this case is disproportionate when we compare it with other cases in which we imposed a life sentence.

White at 25.

The case of ***Farinas v. State***, 569 So.2d 425 (Fla. 1990) is nearly indistinguishable from the instant case. Farinas had previously lived with the victim, and the couple had a child. Two months before the victim was killed, she left Farinas and moved into her parents' home, taking the child with her. On the day of the murder, the victim left her house by car and Farinas was waiting outside the home and followed the car. Farinas continued to follow the car and then tried several times to force the victim's car off the road, finally succeeding in stopping her vehicle. Farinas then approached the victim's car and expressed anger at the victim for reporting to the police that he was harassing her and her family.

Farinas subsequently abducted his ex-girlfriend and left in his car. When

Farinas stopped the car at a stoplight, the victim jumped out of the car and ran, screaming and waving her arms for help. Farinas also jumped from the car and fired a shot from his pistol which hit the victim in the lower middle back. Farinas then approached the victim as she lay face down and, after unjamming his gun three times, fired two shots into the back of her head.

The trial court found the following aggravating circumstances to be applicable: (1) the capital felony was committed while the defendant was engaged in the commission of kidnapping; (2) the capital felony was especially heinous, atrocious, or cruel; and (3) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. As in the instant case, in regard to mitigation, the trial court found that while Farinas was under the influence of a mental or emotional disturbance, it was not of such a nature or degree as to be considered extreme. The trial court also found that although Farinas' capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was impaired, the impairment was not of such a nature or degree as to be considered total or substantial.

In reversing the death sentence in ***Farinas*** on proportionality grounds this Court held that:

> On review of the record, we conclude that there was evidence which tended to establish that the murder was

> committed while the defendant was under the influence of extreme mental or emotional disturbance. § 921.141(6), Fla.Stat. (1985). During the two-month period after the victim moved out of Farinas' home, he continuously called or came to the home of the victim's parents where she was living and would become very upset when not allowed to speak with the victim. He was obsessed with the idea of having the victim return to live with him and was intensely jealous, suspecting that the victim was becoming romantically involved with another man. ***See Kampff v. State***, 371 So.2d 1007 (Fla.1979). We find it significant, also, that the record reflects that the murder was the result of a heated, domestic confrontation. ***Wilson v. State***, 493 So.2d 1019 (Fla.1986). Therefore, although we sustain the conviction for the first-degree murder of Elsidia Landin and recognize that the trial court properly found two aggravating circumstances to be applicable, we conclude that the death sentence is not proportionately warranted in this case. ***Wilson; Ross v. State***, 474 So.2d 1170 (Fla.1985).

Farinas at 431.

The case of ***Kampff v. State***, 371 So.2d 1007 (Fla. 1979) is also very similar to the instant case. In ***Kampff***, the defendant shot and killed his former wife Josephine Kampff, at her place of employment, a bakery and retail store. Five shots were fired, and bullets were fired in rapid succession. There were two persons present besides the appellant and the victim when the shooting took place. As in the instant case, Kampff repeatedly sought to reconcile with his wife. The obsession to reconcile was intensified when he began to suspect that she was

becoming involved romantically with another man. There was also evidence that Kampff had an extreme and chronic problem with alcoholism.

In ***Kampff***, the trial court initially found that the murder was planned in advance.[13] In an subsequent sentencing order, the trial court found the HAC and Risk to Many Persons aggravating circumstances. This Court reversed the death sentence, although not on proportionality grounds, but rather because neither of the two statutory aggravating circumstances found by the trial court were supported by the evidence.

Application of these principles above mandates a reduction of Sylvia's death sentence to life in prison. Sylvia's abusive childhood, history of alcohol and drug abuse, and emotional disturbance places this case among the most mitigated of capital cases. Moreover, the aggravated nature of the crime, as well as the motivation for the crime, were the result of Sylvia's extreme paranoia and emotional disturbance not a desire or design to inflict pain. Sylvia'a sentence of death is disproportionate when compared with other cases in which this Court reversed the death sentence on proportionality grounds. When the facts of the present case are compared to the preceding cases, it is clear that equally culpable defendants have received sentences of life imprisonment. This murder was

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[13] The trial court's initial sentencing order to not specifically mention

committed by an emotionally disturbed individual. This is not one of the most aggravated and least mitigated of capital crimes. The death penalty is not the appropriate punishment for Sylvia, and this Court should reverse his death sentence and remand for imposition of a sentence of life imprisonment with no possibility of parole.

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statutory aggravating circumstances.

POINT IV

THE PROSECUTOR'S REPEATED IMPROPER AND INFLAMMATORY ELICITATION OF IRRELEVANT EVIDENCE TAINTED THE PENALTY PHASE TRIAL AND RENDERED THE ENTIRE PROCEEDING FUNDAMENTALLY UNFAIR.

It is axiomatic that a prosecutor may not make statements calculated only to arouse passions and prejudice or to place irrelevant matters before the jury. ***Vierick v. United States***, 318 U.S. 236, 247 (1943). As stated long ago:

> [W]hile [the prosecuting attorney] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

The Supreme Court's admonition applies with particular force in a capital sentencing proceeding: "Because of the surpassing importance of the jury's penalty determination, a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices." ***Lesko v. Lehman***, 925 F.2d 1527, 1541 (3d Cir.); ***see also Hall v. Wainwright***, 733 F.2d 766 (11th Cir. 1984) ("it is of critical importance that a prosecutor not play on the passions of a jury with a person's life at stake").

The elicitation by the prosecutor here of totally irrelevant and inflammatory

evidence which could only serve to confuse the jury and arouse their passions renders the death sentence fundamentally unfair. The prosecutor, in examining the mental mitigating circumstances, repeatedly elicited testimony from expert witnesses that the appellant lacked remorse. When asked to explain psychopathic deviancy, Dr. Danzinger stated in part: "Someone who does not respect authority, the ends justify the means and a lack of remorse." (XVI 2134) The appellant properly objected to this testimony. Nonetheless, Dr. Danzinger again testified that the appellant lacked remorse. (XVI 2207) Upon appellant's request, the trial court ordered that the testimony concerning lack of remorse be stricken and the jury be instructed to disregard the testimony. (XVI 2209) These matters are all totally irrelevant to the jury's consideration of the appropriate punishment for the defendant in his capital trial.

Inquiries into the appellant's lack of remorse is irrelevant to the mental mitigating circumstances in a capital trial. ***Pope v. State***, 441 So.2d 1073 (Fla. 1983) (For these reasons, we hold that henceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.) ***See also Robinson v. State***, 520 So. 2d 1, 7

(Fla. 1988) As such, this evidence elicited by the prosecutor, could only serve to confuse the jury and get them to base their sentencing decision on irrelevant and inflammatory matters.

Additionally, during closing argument, the state argued that Patrick Woodard shut the door to the carport to prevent being shot by the appellant, and further stated: "And he – if he didn't close that door, I submit to you he would have taken some buckshot." (XIV 1832) The appellant objected several times to this argument on the grounds that it was a misstatement of the evidence. (XIV 1832) The trial court overruled the objections stating "Allow the jury to rely upon their memory." (XIV 1832) It was highly inflammatory and not supported by the evidence that the appellant committed attempted murder of Patrick Woodward. This wrongful misstatement of the evidence could only serve to inflame the passions of the jury, many of whom could have been affected adversely to the appellant.

This Court has long recognized that the comments of the prosecutor can "so deeply implant seeds of prejudice or confusion" that reversal is required even in the absence of an objection. ***Pait v. State***, 112 So. 2d 380 (Fla. 1959); ***see also Urbin v. State,*** 714 So.2d 411, 419-420 (Fla. 1998); ***Garron v. State***, 528 So. 2d 353 (Fla. 1988).

Here, the prosecutor's eliciting improper evidence of lack of remorse, and his repeated improper misstatement of the evidence were so prejudicial that "neither rebuke nor retraction [would] destroy their influence." ***Robinson***, 520 So. 2d 1, 7 (Fla. 1988); ***Pait***, 112 So. 2d at 385. There can be little doubt the prosecutor's actions prejudiced Sylvia. The prosecutor's actions rendered the capital trial proceeding fundamentally unfair and denied the defedant due process of law and rendered his death sentence cruel or unusual punishment. A new trial is required.

POINT V

REVERSIBLE ERROR OCCURRED WHEN THE COURT PERMITTED THE VICTIM IMPACT EVIDENCE TO INCLUDE IRRELEVANT AND PREJUDICIAL MATTERS SUCH THAT IT DENIED DUE PROCESS, FUNDAMENTAL FAIRNESS, AND A RELIABLE JURY RECOMMENDATION.

The admissibility of victim impact evidence, as with all evidence, is within the sound discretion of a trial court. ***State v. Maxwell***, 647 So.2d 871 (Fla. 4th DCA 1994), *aff.*, 657 So.2d 1157 (Fla.1995); ***Schoenwetter v. State***, 931 So.2d 857, 869 (Fla. 2006).

In the abstract, "victim impact" evidence does not necessarily violate the Eighth or Fourteenth Amendments. ***Payne v. Tennessee***, 501 U.S. 808 (1991). In Florida, such evidence is authorized by Section 921.141(7), Florida Statutes, which states:

> **(7) Victim Impact evidence**. - Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as part of victim impact evidence.

The potential unfair prejudice that attends this evidence has been recognized

by the courts. In that regard, "unfair prejudice" is the type of evidence that would logically tend to inflame emotions and which would tend to distract jurors and the court from conducting an impartial and reasoned sentencing analysis:

> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.

Jones v. State, 569 So.2d 1234, 1239 (Fla.1990). ***See Urbin v. State***, 714 So.2d 411, 419 (Fla.1998) (Court has responsibility to monitor practices and control improper influences in imposing death penalty, noting, "Although this legal precept – and indeed the rule of objective, dispassionate law in general – may sometimes be hard to abide, the alternative – a court ruled by emotion – is far worse."). Particularly when presiding over a capital trial, judges are cautioned to be "vigilant [in the] exercise of their responsibility to insure a fair trial." ***Bertolotti v. State***, 476 So.2d 130, 134 (Fla.1985).

As argued below, the misuse of victim impact evidence here denied Due Process and a fair and reliable sentencing proceeding. ***Art. I, §§ 2, 9, 16, 17*** and ***22, Fla. Const.; U.S. Const., Amend. V, VIII, XIV***. For example, the victim's minor son Ross Shadron's statement: "God needed another angel and he picked my

mom." and "I know that my mom is watching above and she is my number 1 angel" (XV) are not appropriate comment on the victim's uniqueness or loss to the community. However, the trial court permitted these inflammatory and improper references, thereby tainting the jury's recommendation and the resultant sentence of death.

Pursuant to Section 90.403, Florida Statute, in ruling on the admissibility of all evidence, including victim impact testimony, the trial court must analyze the individual elements of this evidence with regard to the character of the evidence the State intended to present to the jury. ***See State v. Johnston***, 743 So.2d 22, 23 (Fla. 2d DCA 1999). Trial courts must monitor victim impact evidence closely and prevent it from becoming a feature to the extent that it denies a fair proceeding. ***Id.***

In ***Sexton v. State***, 775 So.2d 923, 932-933 (Fla. 2000) this Court noted that "Although the United States Supreme Court and this Court have ruled that victim impact testimony is admissible, such testimony has specific limits." The Court thus held that testimony of victim's aunt relating to the death of a person not the victim in this case was erroneously admitted because aunt did not limit her testimony to murder victim Joel Good's "uniqueness as an individual human being and the resultant loss to the community's members"). ***See also Windom v. State***, 656 So. 2d 432, 438 (Fla. 1995) (holding that under section 921.141(7) testimony

"about the effect on children in the community other than the victim's two sons was erroneously admitted because it was not limited to the victim's uniqueness and the loss to the community's members by the victim's death").

The evidence introduced here over objection was inadmissible under these standards. The witness Aura Boyd stated: "I have a lot of fear because this showed me it does not matter how you live your life if someone who does not see a value in a life wants to take it because..maybe they don't want you to end a relationship them..." (XV 1964, 65) improperly relayed her characterizations and opinions about the crime, a direct violation of ***Payne***. They were permitted to relay to the jury effects of the crime beyond the permissible, as decried in ***Windom***, ***supra***, and in ***Sexton v. State***, ***supra***. The improper comments by Boyd improperly aroused the passions of the jury, passions which have no place in the capital sentencing determination.

The presentation of this type of information can serve no other purpose then to inflame the jury and to divert it from deciding the case on relevant evidence concerning the crime and the defendant. This death penalty must be reversed.

POINT VI

FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.

During the course of the proceedings, trial counsel repeatedly challenged the constitutionality of Florida's Capital Sentencing Scheme. None of the challenges were successful and William Sylvia was ultimately sentenced to death. Some challenges were based on a denial of Sylvia's Sixth Amendment rights as interpreted by ***Ring v. Arizona***, 536 U.S. 584 (2002). The jury was repeatedly instructed that the ultimate decision on the appropriate sentence was the **sole** responsibility of the trial judge.

Appellant also acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment even though ***Ring*** presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. ***See, e.g. Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002), ***cert. denied,*** 537 U.S. 1070 (2002) and ***King v. Moore***, 831 So.2d 143 (Fla. 2002) ***cert. denied***, 537 U.S. 1069 (2002). Additionally, appellant is aware that this Court has held that it is without

authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. ***See, e.g., State v. Steele***, 921 So.2d 538 (Fla. 2005).

In the instant case, the jury recommendation for Sylvia's death sentence was a majority of eleven (11) to one (1. Moreover, the trial court repeatedly instructed and the state persistently pointed out that the ultimate decision on sentence was the sole responsibility of the judge. If ***Ring v. Arizona*** is the law of the land, and it clearly is, the jury's Sixth Amendment role was repeatedly diminished by the argument and instructions in contravention of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985).

Since the jury did not make specific findings as to aggravating and mitigating factors, we cannot determine at this point whether the jury was unanimous in their decisions on the applicability of appropriate circumstances. Additionally, we cannot know whether or not the jury unanimously determined that there were "sufficient" aggravating factors before addressing the issue of whether they were outweighed by the mitigating circumstances.

At this time, appellant asks this Court to reconsider its position in ***Bottosom*** and ***King*** because ***Ring*** represents a major change in constitutional jurisprudence which would allow this Court to rule on the unconstitutionality of Florida's statute.

This Court should vacate appellant's death sentences and remand for imposition of life imprisonment without the possibility of parole. ***Amends. VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17.***

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate the sentence of death and remand for a new penalty phase, or remand with directions that the appellant receive a life sentence as to Point I and Point II; and vacate the sentence of death and remand with directions that the appellant receive a life sentence as to Point III, IV, V and VI.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to William F. Sylvia, Jr., DC#V29754, Florida State Prison, 7819 N.W. 228th St. Raiford, FL 32026, this 18th day of August, 2009.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

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

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GEORGE D.E. BURDEN
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