IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC11-842
LT CASE NO.: 2007-CF-000866

WILLIAM GREGORY,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY, FLORIDA
REPLY BRIEF OF APPELLANT

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There are fundamental areas of disagreement in this appeal to each issue raised by the Appellant in the Initial Brief. Appellant has stated his position in the Initial Brief and now responds to Appellee's Answer Brief.

ISSUE I

THE MOTION TO DISQUALIFY WAS LEGALLY SUFFICIENT

A Motion to Disqualify is governed procedurally by Florida Rule of Judicial Administration 2.330, which states the following in full:

(c) Motion

A motion to disqualify shall:

1. be in writing;

2. allege specifically the facts and reasons upon which the movant relies as the grounds for disqualification;

3. be sworn to by the party by signing the motion under oath or by separate affidavit; and

4. the attorney for the party shall separately certify that the motion and the client's statements are made in good faith.

(d) Grounds

A motion to disqualify shall show:

1. that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge.

(e) Time

> A motion to disqualify shall be filed within a reasonable time not to exceed 10 days after the discovery of the facts constituting grounds for the Motion and shall be promptly presented to the court for an immediate ruling.

(f) Determination

> The judge against whom an initial Motion to Disqualify under subdivision(d)(1) shall determine only the legal sufficiency of the Motion and shall not pass on the truth of the facts alleged. If the Motion is legally sufficient, the judges ***shall*** (emphasis added) immediately enter an order granting disqualification and proceed no further in the action.

In Appellant's case, all conditions required by this Rule were satisfied. As required under Rule 2.330, the Motion was in writing; it alleged specific facts upon which the movant relied; it was sworn to under oath by separate affidavit; and the attorney separately certified that the Motion was made in good faith.

In addition, subsection (d) was satisfied, as the Motion contained a statement that the (Appellant) feared he would not receive a fair trial due to specific biases or prejudices of the trial judge and sets out the factual basis in specific detail.

Subsection (e) of Rule 2.330 was satisfied; the Motion was timely filed within ten (10) days of the grounds upon which the Motion was based.

It is clear that the Motion to Disqualify filed by Appellant satisfied all conditions required under which the trial judge was then legally required to recuse himself under subsection (f). It is well settled that Rule 2.330 clearly states that once the prior conditions have been met, the trial judge "shall immediately enter an

order granting disqualification and proceed no further in the action." (Rule 2.330(f)). Despite the fact that all prior conditions had been met and satisfied, the trial judge refused to recuse himself.

In their attempt to respond, Appellee cites *Arbelaez v. State,* 898 So.2d 25 (Fla. 2005). In *Arbelaez*, the basis for the Motion to Disqualify was that the trial judge had, in a *separate and prior* capital case (*Manso v. State*, 704 So. 2d 516 (Fla. 1997)), made a comment about Manso receiving a "jolt of electricity" if he was found to be competent to proceed (emphasis added). *Arbelaez* at 37. The Court ruled against Arbelaez, ruling that Arbelaez:

> failed to allege facts sufficient to establish a "well-grounded fear" that he would not receive a fair and impartial hearing before Judge Rothenberg. Nothing in Arbelaez's motion directly linked the judge's alleged comment in the *Manso* case to Arbelaez. Although the comment certainly evinced a predisposition regarding the outcome of Manso's case--namely, that Judge Rothenberg intended to impose a sentence of death--the comment did not, on its face, evince a predisposition about all capital cases or show a personal bias or prejudice against Arbelaez simply because he was a capital defendant.

Arbelaez at 38.

The *Arbelaez* case is distinguishable to the instant case. In *Arbelaez* the trial judge did *not* make any comments about Arbelaez, his case, the facts or what was or was not going to happen to Arbelaez should he be found guilty. All comments and statements that the judge in Arbelaez made were statements made in another case towards another defendant. Arbelaez then tried to use those comments in his

own case, which the Court deemed irrelevant and formed the basis as to why the Motion to Disqualify was denied.

That is clearly not the factual situation in this case. In this case, the trial judge directly commented on the facts of this case. This distinction is critical and cannot be overlooked. The trial judge stated on the record that he found an alleged statement the State planned to introduce – that Appellant, approximately eight months prior to the murder , allegedly threatened to kill the victim if he ever found her with another man – to be "prophetic." The trial judge commented on the very case over which he was presiding and evidenced his bias towards this defendant in this case. This statement was heard by the Appellant, who immediately felt he would not receive a fair trial. The facts are clearly distinguishable from the facts in *Arbelaez.*

The State also cites Griffin v. State, 866 So.2d 1 (Fla. 2003) and cites a very brief, one-sentence rationale as to why the Motion to Disqualify was denied in that case ("Judge expressed belief defendant would keep on committing crimes; judge's ex-parte explanation to the victim's father of a delay in the trial"). For the record, that is the entire explanation by the Court in a 38 page opinion. There are no other facts or factual basis mentioned in the entire opinion that would shed any light as to why the Court ruled that way, other than to state that the trial judge had made the comment about his beliefs concerning Griffin in *1987.* Without any further

explanation of the rationale or about the facts of that case, we cannot speculate or presume to know the reasons the Court ruled the way it did. Without that, *Griffin* clearly adds nothing to Appellant's situation and is therefore distinguishable.

The State lastly cites Jackson v. State, 599 So.2d 103 (Fla. 1992). As with the other cases cited by the State, *Jackson* is distinguishable. In that case, Jackson filed a Motion to Disqualify the trial judge on the grounds that the judge had made prior adverse rulings and had previously heard the evidence. It is well settled that adverse ruling is not a legal reason for a Motion to Disqualify. Neither of those were cited as grounds for the Motion in Appellant's case and therefore, have no bearing on Appellant's case. The *Jackson* case cited by the State is not relevant authority.

ISSUE II

THE TRIAL JUDGE ABUSED HIS DISCRETION BY DENYING DEFENDANT'S THIRD MOTION IN LIMINE

The trial court committed reversible error by denying Defendant's Motion in Limine #3. This Motion concerned the testimony of Francis Bowling, a witness who knew the Defendant from their time working together as roofers. The state presented testimony from witness Bowling regarding statements that Defendant allegedly made to Bowling approximately eight (8) months prior to the homicides. According to witness Bowling, Defendant allegedly stated that he would harm or kill Skylar Meekins or anyone else if she (Skylar) ever left Defendant.

The State cites LaMarca v. State, 785 So.2d 1209 (Fla. 2001) as evidence that the statement in the instant case was properly admitted because in *LaMarca,* the statement that he intended to kill his son-in-law was made five (5) months earlier. The court ruled in part that "the statement was made five (5) months before the murder." However, that is far from the sole reason the Court in *LaMarca* ruled that statement to be admissible. In the interest of full disclosure to this Court, the *LaMarca* court ruled that:

> Evidence of appellant's guilt includes his statement five months before the murder that he wanted to kill the victim; he was seen several times with the firearm used to commit the murder; just before the murder he was seen by his neighbor entering his trailer with the victim and they seemed to be arguing; the victim was missing later that night; the police found the victim's body in appellant's trailer early the next morning; after departing the bar with the victim and in the victim's car, appellant returned to the bar alone and with the victim's car; upon seeing a policeman hours after the murder he fled; the night of the murder he told a friend that he killed his son-in-law, that it "sucked," but that he had to do it; and that he continued his flight to Washington State. Thus, there is no reasonable possibility that the error affected the verdict.

LaMarca at 1210.

The facts in *LaMarca* are a far cry from the facts of the instant case and are easily distinguishable. The only evidence of Appellant's guilt was the alleged statement allegedly made to Francis Bowling eight (8) months prior to the murders. In distinguishing *LaMarca,* Appellant was never seen with the firearm used to commit the murders; he was not seen entering the residence where the murders

took place; he was not seen either arguing with or even speaking with the victims on the day or night of the murders; the victims were found in victim Skyler Meekins' residence, not in Appellant's residence; Appellant was never in possession of any automobile of either victim; Appellant never fled the area, in fact he remained in the area; and he never told anyone that he committed the murders. Based on the foregoing, *LaMarca* is not on point. Not only that, it further strengthens the argument that the admission of that statement by Francis Bowling – in a case containing none of the other facts and circumstances present in *LaMarca* – constitutes reversible error.

The State next cites Dennis v. State, 817 So.2d 741 (Fla. 2002) to argue Appellant's statement was more probative than prejudicial. In that case, Dennis was convicted of killing a woman with whom he had a relationship and had fathered a child. There was testimony from numerous witnesses that Dennis had stalked, threatened and assaulted the victim on numerous occasions. In ruling that evidence to be probative and therefore admissible, the Court in *Dennis* stated:

> The evidence Dennis complains of came from several of Lumpkins' family members and friends who recounted incidents in which Dennis would stalk Lumpkins. Particularly, Lumpkins' uncle described one incident in which Dennis threatened to kill him and Lumpkins as he aimed a gun at both of them. In sum, the evidence depicted the turbulent and sometimes violent relationship between Dennis and Lumpkins.

Dennis at 762.

The facts and circumstances in *Dennis* are far more egregious than in the instant case. There are no allegations of prior physical violence by Appellant, and there is certainly no evidence to suggest that Appellant was ever in possession of a firearm, much less pointing a firearm at someone. Therefore, *Dennis* is distinguishable and not on point.

Finally, the State cites Aguiluz v. State, 43 So.3d 800 (Fla. 2010) regarding the admissibility of a defendant's threats to kill a victim. In *Aguiluz,* the defendant had threatened to kill the victim three (3) weeks prior to actually doing so. The Court in that case ruled the statement to be admissible. In this case, Appellant allegedly made the statement eight (8) months prior to the murders taking place; not three (3) weeks, not one (1) month, not two (2) months, not three (3) months. While it can be argued that a three week period is not remote in time, eight months certainly is too far removed. Therefore, *Aguiluz* is not a proper authority.

ISSUE III

THE TRIAL JUDGE ABUSED HIS DISCRETION BY ADMITTING TESTIMONY FROM TYRONE GRAVES

Tyrone Graves, a State witness who was to testify that Appellant allegedly made remarks to him about "blowing off" the victim's head if she ever cheated on him, was called by the State to testify in Appellant's trial. From the witness stand, under questioning from the prosecutor, Graves did not, and could not, identify

Appellant. The defense timely objected, but was overruled. The testimony should have been excluded.

The State cites McCrae v. State, 395 So.2d 1145 (Fla. 1980) as their sole case in support of their position. In that case, McCrae was convicted of brutally murdering an elderly woman in 1974. There was evidence in that case that McCrae had frequented the neighborhood in which he had committed the murder, approaching numerous elderly residents under the guise of asking for directions, asking other questions, or approaching other residents asking if some fictitious resident lived there. The residents of this area all gave a specific description about the suspect, stating he was a black male with a cast on his arm and all described his modus operandi, to which every witness testified substantially the same. In fact, the Court in *McCrae*, in allowing the testimony, reasoned that:

> Although appellant argues that the testimony of Mrs. Veal and Mrs. Bergner is irrelevant because they failed to identify him, he ignores the fact that both witnesses stated that the person who attempted to gain entrance to their homes met the general description of appellant. Both women described an individual closely resembling appellant who, on October 13, 1973, was in the immediate area where the crime was committed at the approximate time of its commission. Therefore, their testimony was relevant and admissible as to the issue of identity. Appellant's contentions are merely questions for the jury as to the weight to be accorded the testimony.

McCrae at 1152.

> However, more telling is the further opinion of the Court: Appellant also argues that the testimony of Faith Gertner and William

> Smith was irrelevant because the incident which they described occurred almost six months before the instant crime. Similarly, appellant submits there was no factual thread connecting the two events. We disagree. Mrs. Gertner's testimony was admissible because she was able to identify the appellant and because, allegedly, she established that a common plan or scheme was employed by appellant to gain admittance to the victims' homes. Bryant v. State, 235 So.2d 721 (Fla. 1970); Winstead v. State, 91 So.2d 809 (Fla. 1956).

McCrae at 1153

The *McCrae* case is distinguishable based on the Court's rationale for allowing the testimony of the two witnesses who could not positively identify him. Not only were other witnesses able to positively identify McCrae, but the two who failed to do so – Gertner and Smith – both "established that a common plan or scheme was employed by [McCrae] to gain admittance to the victims' homes."

In the instant case involving Appellant Gregory, State witness Tyrone Graves failed to identify Appellant at trial. Unlike *McCrae*, there were no other witnesses to the alleged statement to which Graves testified; there was no established plan or scheme; there was no corroborative evidence; and there were certainly no witnesses to place Appellant Gregory in the vicinity at the time of the murders. Therefore, *McCrae* is easily distinguished.

The State attempts to substantiate the admissibility of Graves' testimony by characterizing it as an admission and cites cases to support their position. The cases cited by the State are misplaced and are easily distinguishable.

In Swafford v. State, 533 So.2d 270 (Fla. 1988), evidence indicated that Swafford had murdered and sexually battered a woman in February, 1982. The victim had been shot a total of nine times, with two shots to the head. The state also presented evidence that Swafford made statements from which an inference of his guilt of the crimes charged could be drawn. Ernest Johnson told of an incident that took place about two months after this murder. After meeting Swafford at an auto race track, Johnson accompanied him to his brother's house. When leaving the brother's house, Swafford suggested to Johnson that they "go get some women" or made a statement to that effect. Johnson testified as follows concerning what happened then:

> Q. Okay. What happened then? What was said by the Defendant?
>
> A. He just asked me if I wanted to go get some girl and I said yeah.
>
> Q. And then what took place?
>
> A. We got in -- he asked me if I wanted to take my truck and I said no, so we went in his car.
>
> All right. We went and got a six-pack of beer and started riding. And he said, do you want to get a girl, and I said yeah, where do you want to get one, or something like that. He said, I'll get one.
>
> So, as we was driving, I said, you know, where are you going to get her at. He said, I'll get her. He said -- he said, you won't have to worry about nothing the way I'm going to get her, or he put it in that way. And he said -- he said, we'll get one and we'll do anything we want to her. And he said, you won't have to worry about it because we won't get caught.

> So, I said, how are you going to do that? And he said, we'll do anything we want to and I'll shoot her.
>
> So, he said if -- you know, he said that he'd get rid of her, he'd waste her, and he said, I'll shoot her in the head.
>
> I said, man, you're crazy. He said, no, I'll shoot her in the head twice and I'll make damn good and sure that she's, you know, she's dead. He said, there won't be no witnesses.
>
> So, I asked him, I said, man, don't -- you know, don't that bother you. And he said, it does for a while, you know, you just get used to it.

Swafford at 272-273.

The trial court admitted Johnson's testimony under two separate theories – similar fact evidence and as an admission of guilt. The Court ruled that:

> Swafford's statement that "you just get used to it," when viewed in the context of his having just said that they could get a girl, do anything they wanted to with her and shoot her twice in the head so there wouldn't be any witnesses, was evidence which tended to prove that he had committed just such a crime in Daytona Beach only two months before. *Swafford* at 274.

That is neither relevant nor similar to the situation in this case. Appellant had committed no prior crimes to which Graves was referring and there was no similar fact evidence in the case. The alleged statement to Graves cannot be interpreted to be an admission because the alleged statement occurred months prior to the actual murders. Therefore, there was no crime to which the statement could possibly refer. *Swafford* is not a proper authority.

The State then cites Foster v. State, 778 So.2d 906 (Fla. 2000) as authority for justifying testimony that Appellant allegedly knew that victim Daniel Dyer was dating Appellant's ex-girlfriend and that Dyer "ruined his life." In *Foster*, a teenage gang made up of both high school students and non-students decided to vandalize the local high school and then burn it down. At approximately 9:30 p.m., as they were in the process of burglarizing the school and stealing some items, they were caught by a teacher at the school who was driving home from a school function. He retrieved some of the stolen items and told them he would be reporting them to the police the next day. This statement – that the teacher told some gang members that he would be reporting them to the authorities - was then reported to the leader of the gang, who was not present when the statement was made, and at that moment, the gang decided that the teacher was to be murdered and hatched an immediate plan to kill him that night. The court in *Foster* ruled that statement to be admissible to show knowledge and motive.

The State attempts to use the *Foster* case to justify admission of the Appellant's statement to victim Daniel Dyer, that Dyer "ruined his life" to show motive for allegedly killing him. However, the *Foster* case is distinguishable. In that case, the gang members were caught red-handed, by a teacher, in the process of committing several felonies, and the teacher swore he was going to turn them in to the police first thing the next morning. The gang members then killed the

teacher several hours later in order to prevent that from happening. There is a direct correlation between the teacher's statement and the murder. It was immediate and was done to silence him so that the gang would not be incriminated.

In the present case, the alleged statement by Appellant that Dyer "ruined his life" is hardly indicative of motive to kill. No crime had been committed when Appellant allegedly made the statement, there was no immediate threat of detection of anything illegal, there was no threat of violence and there was certainly no indication that Appellant intended to kill Dyer. *Foster* is not proper authority and the statement allegedly made by Appellant should not have been admitted.

ISSUE 4

THE TRIAL JUDGE ABUSED HIS DISRECTION BY ALLOWING TESTIMONY FROM MICHAEL GREEN AND CORI ALDRICH

Testimony from Michael Green and Cori Aldrich was impermissible hearsay and should have been disallowed by the trial judge. Michael Green testified about a conversation that he'd had with Daniel Dyer about a week prior to the murders. According to Green, Dyer told him that Appellant had allegedly called and said "I want to personally thank you for ruining my family." Defense objection to the hearsay testimony was overruled.

Cori Aldrich also testified to an alleged conversation that Daniel Dyer told her he'd had with Appellant. Dyer told Aldrich that Appellant had called him and said "I want to personally thank you for ruining my life." Defense objection to that

testimony on the basis that the testimony was hearsay was also overruled by the trial judge.

In their Answer Brief, the State lists Section 90.803(3)(a), Florida Statutes as the state of mind exception to the hearsay rule:

> (a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
>
> 1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.
>
> 2. Prove or explain acts of subsequent conduct of the declarant.

The State then attempts to use Monlyn v. State, 705 So.2d 1 (Fla. 1997) as authority. In that case, Monlyn told a fellow inmate, the day before he escaped from jail, that he was going to escape, get a shotgun and kill the first person he saw with a car. The inmate's testimony was admitted as an exception to the hearsay rule to show Monlyn's state of mind and to prove the subsequent acts of Monlyn. *Monlyn* at 10.

The facts and circumstance of the present case are completely different from the situation in *Monlyn.* Even if believed and taken at face value, the statement "I want to personally thank you for ruining my family/life" does not fall under that exception to the hearsay rule. There is no threat to do harm, no threat of violence, no statement of plan, intent, motive, design, mental feeling, pain or bodily health,

and there is certainly nothing in that statement to prove any acts or subsequent conduct. In addition, there is no reasonable or sufficient nexus between that statement and the subsequent crime that would make Appellant's statement relevant or admissible. Monlyn's statement of his intent to escape and kill someone showed intent, plan, motive, design and was also used to show his subsequent acts. None of that is present in Appellant's case. *Monlyn* is therefore not proper authority.

The State then attempts to justify the trial court's decision by citing numerous other reasons a hearsay statement may be admissible, none of which apply or are on point with the situation in Appellant's case. They cite cases in which the statement could possibly be introduced to show motive, knowledge or identity. Escobar v. State, 699 So.2d 988 (Fla. 1997); Chatman v. State, 687 So. 2d 860 (Fla. 1st DCA 1997); Colina v. State, 570 So. 2d 929 (Fla. 1990); Duncan v. State, 616 So.2d. 140 (Fla. 1st DCA 1993); and State v. Freber, 366 So.2d 426 (Fla. 1978). A careful reading of these cases shows none to be on point or relevant to the instant case. Appellant's alleged statement to Dyer about ruining his family, or his life, does not fall under the exception to the hearsay rule and should not have been admitted as evidence at trial.

ISSUES V/VI

THE TRIAL COURT ERRED BY FINDING THE MURDERS TO BE "COLD, CALCULATED AND PREMEDITATED" AND BY ALLOWING THAT FACTOR TO BE ADMITTED

In their Answer Brief, the State in pp. 75-76 copied the trial judge's order finding this aggravating factor to be relevant and admissible. However, the Order contains errors in finding that the CCP aggravator was proven beyond a reasonable doubt.

The State failed to present any evidence to support this aggravating factor, nor were the three (3) main elements ever proven beyond any reasonable doubt. Initially, the State presented witnesses Francis Bowling and Tyrone Graves, both of whom testified to statements allegedly made by Defendant to the effect of if (Defendant) ever caught his girlfriend cheating on him, he would kill her and the guy she was with. Taken in the light most favorable to the State, this does not equate to a cold, calculated plan on part of the Defendant. In fact, as presented by the State, the alleged statement to witness Bowling was made eight (8) months prior to the homicides while the two were working on a roof, and Bowling said he did not take Defendant seriously. The statement to Graves was made approximately two (2) months prior.

According to the evidence and testimony in this case, Skylar Meekins and Daniel Dyer started dating July 4, 2007, and this relationship was known to

Defendant. No testimony was presented of any plan to kill Daniel Dyer or to harm him in any manner during the period of time leading up to the homicides.

The Dyer hearsay statement was allegedly made days prior to the homicides and, at best, shows Defendant to be sad or jealous and/or upset about losing his family. It certainly does not indicate a cold, calculated plan to kill anyone. The evidence presented by the State is completely devoid of any showing of a cool, calm and reflective planning of the crimes that would support the aggravating factor of cold, calculated and premeditated (CCP) aggravating circumstance.

Aggravating Circumstance: Cold, Calculated and Premeditated

Fla. Stat. 921.141(5)(i) lays out what initially needs to be proven:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

As previously mentioned, the Florida Supreme Court has stated that this is one of the most serious of the aggravating circumstances. *Larkins v. State*, 739 So.2d 90 (Fla. 1999). In the 1994 case of *Jackson v. State*, 648 So.2d 85 (Fla. 1994), the Supreme Court delineated four (4) specific elements which must be proven beyond a reasonable doubt before the factor is established:

1. 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;"

2. That the murder be a product of a "careful plan or prearranged design to commit murder before the fatal incident;"

3. "Heightened premeditation," which was described as premeditation over and above what is required for first degree murder; and

4. The murder must have "no pretense of moral or legal justification."

Jackson at 89.

The State cites Farina v. State, 801 So.2d 44 (Fla. 2001) as authority that the CCP factor was properly admitted. In that case, Anthony Farina and his brother Jeffrey were convicted of the murders of several Taco Bell employees. In ruling that the CCP aggravator was proven beyond a reasonable doubt, the Court stated:

> In the instant case the following facts support the CCP aggravating circumstance: this specific Taco Bell restaurant was chosen as the target for the robbery because Anthony was familiar with its employees and procedures; Anthony visited the restaurant earlier in the evening to see who was working and the brothers discussed the fact that Anthony knew three of the employees present that night; the brothers purchased bullets for their gun before the robbery; the employees were rounded up and confined to small area where they would be easier to control; the brothers' discussion just before the shooting began and Anthony's comment that it was "[Jeffery's] call" shows intent to carry out plans to kill; and none of the victims offered resistance. Therefore, we find competent, substantial evidence in the record supporting the finding that the murder was cold, calculated, and premeditated without any pretense of moral or legal justification. Accordingly, we hold that the trial court did not err in its finding of the CCP aggravating circumstance.

Farina at 54.

The facts and circumstances in *Farina* are far more egregious and showed far more planning and attention to detail. In Appellant's case, there was no master plan; he had not visited or scoped out the house that evening; he did not purchase a

gun; he did not purchase bullets; he did not arrive at the house armed with a firearm; and there was no evidence indicating that Appellant had any intent to carry out any plan to kill. Therefore, *Farina* is distinguishable and is not proper authority.

In a similar vein, the State cites Bell v. State, 699 So.2d 674. In that case, Bell had sworn revenge against another person who had shot and killed Bell's brother. Bell repeatedly made the threats over a five month period and repeatedly told numerous people that he was going to kill the man who had killed his brother. He procured an AK-47 assault rifle, a thirty round magazine and 160 bullets. He stalked the victims and followed their car, waiting until the victims exited a lounge and got into the car. The Court found that the CCP requirements had been met.

The facts and circumstances of Appellant's case do not measure up to the facts in *Bell*. There were no repeated threatening statements by Appellant, there was no prior procurement of any weapons by Appellant, Appellant did not swear revenge and did not buy a firearm, a magazine or bullets. Bell had a plan and intent to kill; Appellant did not.

The State then cites Lynch v. State, 841 So.2d 362 (Fla. 2003), where the Court upheld the CCP aggravator. In that case, Lynch went to the home of a woman with whom he'd been having an affair. The woman was not home but her thirteen year old daughter was. Lynch went in and terrorized the daughter for 30 to

40 minutes, admitting that the daughter was terrified because he had displayed the guns to her, she was aware of them and was "petrified." The thirteen year old then had to witness her mother being shot prior to her own death. In addition, Lynch had, two days prior to the murders, written a letter to his wife that detailed his future plans. In upholding the CCP aggravator and distinguishing Geralds v. State, 601 So.2d 1157 (Fla. 1992), the Court reasoned that:

> Unlike the circumstances in *Geralds*, the totality of the evidence here unquestionably supports CCP. The letter was not the only piece of evidence that supports CCP. The factors that support a finding of CCP here demonstrate that Lynch waited two days between writing the incriminating letter and executing his plan, had knowledge of and experience with handguns, took three such weapons with him as he proceeded to Morgan's apartment, and held Morgan's daughter hostage for thirty to forty minutes before Morgan arrived home. Therefore, in conjunction with all of the other evidence, it was not error to rely upon the letter to support the finding of CCP.

Lynch at 372.

The facts and circumstances of the instant case are far more similar to the situation in *Geralds* than they are to *Lynch.* In *Geralds*, the defendant had done some carpentry work on the victim's home, which spoke to how well the victim and her husband were doing financially. The victim drove a Mercedes Benz and Gerald had seen copious amounts of jewelry in the residence, and he became aware that cash was hidden inside the house. A week prior to the murder, the victim and her children encountered Geralds in a mall, at which time the victim told Geralds that her husband was out of town. Geralds then saw one of the kids later at a video

arcade and proceeded to quiz the children on their school schedules, along with their father's schedule and when he was due back in town. Approximately one week later, the children returned home from school to find their mother dead, the house ransacked and their mother's Mercedes missing.

In determining that the CCP aggravator did not apply and was not proven, the *Geralds* court stated that:

> Geralds argues that this evidence establishes, at best, an unplanned killing in the course of a planned burglary, and that a planned burglary does not necessarily include a plan to kill. Geralds offers a number of reasonable hypotheses which are inconsistent with a finding of heightened premeditation. Geralds argues, first, that he allegedly gained information about the family's schedule to *avoid* contact with anyone during the burglary; second, the fact that the victim was bound first rather than immediately killed shows that the homicide was not planned; third, there was evidence of a struggle prior to the killing; and fourth, the knife was a weapon of opportunity from the kitchen rather than one brought to the scene.
>
> Thus, although one hypothesis could support premeditated murder, another cohesive reasonable hypothesis is that Geralds tied the victim's wrists in order to interrogate her regarding the location of money which was hidden in the house. However, after she refused to reveal the location, Geralds became enraged and killed her in sudden anger. Alternatively, the victim could have struggled to escape and been killed during the struggle.
>
> In light of the fact that the evidence regarding premeditation in this case is susceptible to these divergent interpretations, we find the State has failed to meet its burden of establishing beyond a reasonable doubt that this homicide was committed in a cold, calculated, and premeditated manner. Consequently, the trial court erred in finding this aggravating circumstance.

Geralds at 1163-1164.

The facts and circumstances of the instant case are far more similar to *Geralds* than they are to *Lynch.* In Appellant's case, as in *Geralds*, the evidence suggests an unplanned killing in the course of either a trespassing or a burglary, and a planned trespass or burglary does not necessarily include a plan to kill. The shotgun was a weapon of opportunity (it had been stored in a hallway closet) rather than one brought to the scene. Based on that, an additional reasonable hypothesis is that Appellant illegally entered the Meekins' residence because he could not bear to be away from Skylar and was overwhelmed with his feelings for her and his desire to see her, flew into a jealous rage when he saw her and Daniel Dyer together, and killed them in sudden anger. In light of this divergent interpretation, the State failed to meet the burden of establishing that these murders were committed in a cold, calculated and premeditated manner and the trial court erred in finding this aggravator.

ISSUE VII

SUFFICIENCY OF THE EVIDENCE AND PROPORTIONALITY

In death penalty cases, the Court conducts an independent review of the sufficiency of the evidence and must determine whether sufficient evidence exists to support a First Degree murder conviction. Insko v. State, 969 So.2d 992 (Fla. 2007); Snelgrove v. State, 921 So.2d 560 (Fla. 2005). "Sufficient evidence" has been defined by this Court as being competent and substantial. Blake v. State, 972

So.2d 839 (Fla. 2007). The State has briefed these issues so Appellant responds in kind.

Sufficiency of the Evidence

In the instant case, there is no competent or substantial evidence in the record to support Appellant's First Degree murder convictions. The instant case is similar to and on point with Geralds v. State. In Appellant's case, the evidence suggests an unplanned killing in the course of either a trespassing or a burglary, and a planned trespass or burglary does not necessarily include a plan to kill. Appellant wanted to see Skyler Meekins, the mother of his child and the woman he still loved. He either walked the five miles from his house to her residence or obtained a ride, in plain sight without trying to hide and not approaching the residence in a stealthy manner. He did not have any weapons on him, nor did he obtain any weapons prior to entering the residence. At the Meekins residence, he either trespassed when he entered or planned to commit a burglary. Once inside the residence, he saw Skyler sleeping in bed with Daniel Dyer. At that point, Appellant obtained the weapon used in the slaying. The shotgun, which had been stored in a hallway closet of the Meekins residence, was a weapon of opportunity rather than one brought to the scene. Based on that, an additional reasonable hypothesis is that Appellant illegally entered the Meekins residence because he could not bear to be away from Skylar and was overwhelmed with his feelings for

her and his desire to see her, flew into a jealous rage when he saw her and Daniel Dyer together, and killed them in sudden anger.

Proportionality

It is within the Court's province to review the proportionality of a death sentence and to consider the totality of the circumstances to determine whether the sentence should be upheld.

In Appellant's case, the jury recommended the death penalty by a vote of 7 – 5 for each murder. The trial court then sentenced Appellant to death after weighing the statutory aggravating factors against the statutory and non-statutory mitigating factors. In sentencing Appellant to death, the trial court found four (4) aggravating factors:

1. The crime was committed while the defendant had previously been convicted of a felony and was on felony probation;

2. The defendant was previously or contemporaneously convicted of a felony involving the use or threat of violence to a person;

3. The crime was committed while the defendant was engaged in the commission of or an attempt to commit the crime of burglary; and

4. The murder was cold, calculated and premeditated.

(ROA Vol. IV, pp.718-728)

The trial court also found one (1) statutory mitigating circumstance and six (6) non-statutory mitigating factors:

1. The crime was committed while under the influence of extreme emotional or mental disturbance;

2. Long standing drug problem;

3. Grew up without his father and was raised by his mother;

4. Forced to witness sexual abuse during his childhood;

5. Dysfunctional childhood;

6. Impaired at the time of the homicides due to ingestion of drugs and/or alcohol; and

7. Employed and a good worker.

(ROA Vol. IV, pp. 722-727)

The State relies on Pooler v. State, 704 So.2d 1375 (Fla. 1997). In that case, Pooler had previously threatened to kill his girlfriend, told people he was going to do it, and showed up at her residence two days later and confronted her with a gun. Pooler then shot the victim's brother in the back as he tried to flee, dragged him back to the apartment by his leg, and terrorized the victim. Pooler had also cut the phone lines so that it would be impossible for the victims to call for help. As her brother was dragged back to the apartment, the victim tried to flee. Pooler caught up with her and struck her in the head with the gun, dragged her toward his car, then repeatedly shot her in front of numerous witnesses while making statements to her about how he told her he was going to do this to her and asking if she wanted some more. He shot her five (5) times, then got in his car and drove away.

The jury recommended death by a vote of nine to three. The trial court found the following aggravators: (1) that the defendant had a prior violent felony conviction (contemporaneous attempted first-degree murder of Alvonza); (2) that the murder was committed during the commission of a burglary; and (3) that the murder was heinous, atrocious, or cruel (HAC). The trial court found as statutory mitigation that the crime was committed while Pooler was under the influence of extreme mental or emotional disturbance, but gave that finding little weight.

The facts and circumstances of Appellant's case are distinguishable from *Pooler*. The court found Pooler's actions to be heinous, atrocious and cruel (unlike Appellant's case), and also found little in the way of mitigation. Far more on point with Appellant's situation is Farinas v. State, 569 So.2d 425 (Fla. 1990). Testimony at trial established that the appellant, Farinas, had previously lived with the victim for approximately two years but they were not married. During this time, 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 November 25, 1985, the victim and her sister drove their father to work. Farinas was waiting outside the home and followed the car. Farinas continued to follow the car after the two women dropped their father off at work and 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. When the victim's sister urged her to drive away, Farinas leaned into the vehicle and removed the keys from the ignition, ordered the victim out of the vehicle, and guided her by the arm to his car. After returning the keys to the victim's sister, Farinas drove away with the victim in his car despite the pleas of the victim and her sister. 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. According to the medical examiner, this injury caused instant paralysis from the waist down. 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.

In ruling that the CCP factor was not proven and did not apply and that the death sentence was disproportionate, the Court stated:

> In Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988), we noted that "calculation" consists of "a careful plan or prearranged design." We also noted that the heightened premeditation described in the capital sentencing statute must bear the indicia of "calculation." We therefore reject the state's argument that because Farinas approached the victim after firing the first shot and then unjammed his gun three times before firing the fatal shots to the back of the victim's head afforded him time to contemplate his actions, thereby establishing heightened premeditation. The fact that Farinas had to unjam his gun three times before firing the fatal shots does not evidence a heightened premeditation bearing the indicia of a plan or pre-arranged design. Because the state has failed to prove beyond a reasonable doubt that

> Farinas' actions were accomplished in a "calculated" manner, this aggravating factor is not applicable in the present case.

Farinas at 431.

In addition, the Court goes on to state:

> 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. 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

Based on that reasoning, the Court in Farinas vacated the death sentence and remanded to case with directions to impose a life sentence. The facts and circumstances of *Farinas* are almost identical to Appellant's and the case is directly on point. Therefore, based on *Farinas*, the trial court erred in finding that the CCP aggravator was proven and the imposed death sentence in the instant case is disproportionate.

CONCLUSION

For all of the foregoing reasons, the convictions and sentences in this case should be reversed. For the Florida death penalty process to have any integrity, this Court should not allow a citizen of this State to be subject to execution based on the issues raised in this case. Gregory respectfully requests this Court remand with instructions to discharge, remand for a new trial and/or remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail to the Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050, via U.S. Mail and E-mail transmission to Ms. Barbara Davis, Assistant Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118, and via U.S. mail to the Appellant, Mr. William A. Gregory, DC# V19522, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32026 on this 26th day of April,2012.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is typed in Times New Roman font, and it is in size 14 font.

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