IN THE SUPREME COURT OF FLORIDA

LESLY JEAN-PHILIPPE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC11-1274

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

STEPHEN R. WHITE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 159089

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 Ext. 4579
(850) 487-0997 (FAX)

COUNSEL FOR APPELLEE

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## PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Jean-Philippe." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The record, including transcripts, are referenced as the volume number followed by any applicable page numbers. For example, "IX 1661" designates page 1661 of Volume IX of a transcript page in the record on appeal.

It appears that a major portion of the transcript for the penalty phase is duplicated at XVII 1193 et seq. As an example, the last transcribed page of volume XVIII is XVIII 1449, which is identical to VIII 1593. Since the version beginning at VII appears complete, the State cites to it rather than the version beginning at XVII 1193. Also, VIII 1595 to 1668 appears to have been duplicated at IX 1670 to IX 1743.

"SE" and "DE" designate State and defense exhibits, respectively.

Unless otherwise indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

## STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts. The State begins with a "Timeline" that provides an overview of events in the case and an index for where those events are located in the record on appeal.

**Case Timeline.**

| DATE | EVENT |
|---|---|
| 8/26/2009 | Elkie Jean-Philippe, age 24 and 5'6", 141 pounds, (XV 957; see also I 3), stabbed and cut 52 to 53 times, resulting in her death (See XV 958-59); |
| 1/7/2010 | Defendant Lesly Jean-Philippe, Age 23, 5'11" 200 pounds (I 1), indicted and charged with First Degree Murder of victim Elkie Jean-Philippe, Burglary of a Dwelling, and Aggravated Battery with a Deadly Weapon upon Roya Gordon (I 25-27); |
| 3/4/2011 | Hearing on defense's Motion to Object to Notice of Intent to Rely on Certification of Business Record, or in the Alternative, Motion in Limine (VII 1271-81; see also XV 826 et seq.); [**ISSUE I**] |
| 3/4/2011 | State "abandoned" Count 2, the armed burglary count (VIII 1270), and trial court, without objection from the State, granted motion to dismiss Count 2 of the indictment (III 566-68); |
| 3/4/2011 | Trial court denied defense's Motion to Object to Notice of Intent to Rely on Certification of Business Record, or in the Alternative, Motion in Limine (III 571-76; VII 1280); [**ISSUE I**] |
| 3/7/2011 | Jury selection began(XI), and, on 3/8/2011, guilt-phase of jury trial began (XIII 407); |
| 3/10/2011 | Jury verdict finding Jean-Philippe guilty as charged of First Degree Murder with a weapon and Aggravated battery with a deadly weapon |

| DATE | EVENT |
|---|---|
| | (XVI 1171-73; IV 614-16); |
| 3/16/2011 | Jury trial penalty phase began (VII 1335); jury recommended death by a 12-to-0 vote (IX 1661-63; V 958);[1] |
| 5/6/2011 | Spencer hearing (IX 1745-1773); defense[2] sentencing memorandum (VI 1015-29); |
| 6/2/2011 | Judge Adrian Soud sentenced Jean-Philippe to death (X; V 982-VI 1014); |
| 6/23/2011 | Notice of Appeal (VI 1030; see Index of VI), resulting in this appeal. |

**Basic Background and Events Immediately Surrounding the Murder.**

When she was murdered, Elkie Shea Jean-Philippe was married to Defendant-Appellant Jean-Philippe (XIII 432-33, 496-97). When Jean-Philippe killed Elkie, she was in the Navy (XV 863-66), and he had already left the Navy (XIII 507).

About August 21, 2009, Elkie, the murder victim, and Jean-Philippe split up, with Jean-Philippe going up to Rhode island. (Compare, e.g., XIII 442-43 with XV 871-77) The murder victim stayed in Jacksonville with her son. (See XIII 438-43) He was not Jean-Philippe's natural son, but Jean-Philippe provided for

[1] As discussed in the Preliminary Statement, segments of the transcript of the penalty phase appear to be at two locations in the record.

[2] It appears that the State's sentencing memorandum was omitted from the record on appeal, but, since it is not crucial to the resolution of the appeal, the State has not supplemented with it.

the son's support. (XIII 491-92, 497)

Elkie lived at the Paradise Island Apartments in Jacksonville. (See XIII 510)

The victim's younger sister, Roya Tasga Gordon, knew that the victim intended to divorce Jean-Philippe. (XIII 434, 440; see also XIII 439; XV 891)[3] Jean-Philippe knew Elkie wanted a divorce. (XIII 440) From multiple conversations with Jean-Philippe, Roya also knew that Jean-Philippe did not want a divorce. (XIII 439-440) Jean-Philippe told Roya that he felt that Elkie "still wants to be with him" (XIII 439) and he told Roya that "he loved her and still wanted to make the marriage work" (XIII 498).

On August 26, 2009, Roya, who was in the Navy and stationed in California (XIII 430-32), flew from San Diego to Jacksonville to see the Elkie because of recent conversations she had with Elkie and Jean-Philippe (XIII 438; see also XV 889-91, 505-506). She came to Jacksonville because Elkie had told her "what was going on" (XIII 506); Elkie "was having problems" (XIII 498). A concern was that the victim was home alone with her five-year-old son. (XIII 442) Elkie arrived in Jacksonville at 8:15pm. (XIII 441)

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[3] The sister referred to the Defendant as "Chris." (XIII 433; see also XV 891)

That same day, August 26, Jean-Philippe exchanged several voice and text messages with Roya. (XIII 443) When Roya arrived in Jacksonville, Jean-Philippe called Roya's phone and wanted to know if she was with Elkie. (XIII 444-45) Roya said she was not with Elkie, and Elkie "didn't want to be bothered by him." (XIII 444-45) At about 9:22pm, Roya, by text message, directed Jean-Philippe, "Do not call me anymore." (IV 608)

At about 9:30pm, Elkie, with her son in the car with her (XIII 442; XV 891), picked up Roya at the Jacksonville airport (XIII 443).

While Roya was with Elkie that night, Jean-Philippe called Elkie's phone "a lot." (XIII 445) Roya testified, "our phones were just going off." (XIII 445)

When Elkie, Roya, and Elkie's son arrived at the Paradise Island Apartments where Elkie was living, Jean-Philippe called Roya again. Jean-Philippe asked Roya her location, she told him they just arrived at the apartment, and when he asked to speak with Elkie, Roya told him that Elkie did not wish to speak with him. "He said, Okay, and then hung up the phone." (XIII 446)

Jean-Philippe called Roya again and complained that Roya had told him that she was at the airport and "now you're at the apartment, are you lying to me?" (XIII 446)

That day, Jean-Philippe had actually flown from Rhode Island to Jacksonville. (See XIV 650, 654, 656-57, 700; XV 895-97; SE

17 copied in IV). Between about 7:30pm and 8:30pm, Jean-Philippe, by taxi, had already arrived at the apartment complex where Elkie was living with her son. (See XV 812-17; see also XV 820-21)[4]

While en route in the taxi and about five minutes prior to arriving at the Paradise Island Apartments, Jean-Philippe was on the phone. During the conversation, Jean-Philippe raised his voice, in a confrontational tone, saying "Wait a minute, we can work it out." (XV 815-16, 822)

The taxi dropped off Jean-Philippe "all the way to the back" (XV 816) of the apartments.

At 9:52pm, Jean-Philippe attempted to call Elkie. (See III 597)

Throughout the foregoing events on August 26, including throughout the phone calls that day, Roya had no indication that Jean-Philippe was anywhere other than Rhode Island. (XIII 443-44, 446-47, 506-507; see also XIII 526)

Jean-Philippe obtained a car jack from Elkie's car (XIII 482-83, SE 54-56 copied in IV), parked in the lot outside (XIII 483-

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[4] The taxi driver, Alfonso Mobley, testified about driving Jean-Philippe from the airport to Paradise Island apartments. He picked up Jean-Philippe between 7 and 8pm on August 26, 2009, and the drive took a little over a half hour. (XV 911-15) Mr. Mobley identified documents from the fare. (See XV 817-19), including the credit card receipt (SE 16 in IV).

84, SE 54), by removing it from its location in the trunk (See XIII 449-50; XIV 663-64, 668, 685-86, 696-98).

At about 10pm or a little after 10pm (See XIII 510), Elkie and Roya Gordon heard someone knocking at the door (XIII 447). At the time of the knocking, Elkie's son was in the bathtub taking a bath. (XIII 447) Elkie had some sort of conversation with the person at the door, Roya heard "something about a pizza guy," and then Elkie asked Roya if she had ordered a pizza. (XIII 448, 502-503, 508; see also XIII 519-20, 526) Roya testified that "it didn't feel right," so she grabbed a knife and went to the door with her sister. (XIII 448-49) Roya continued:

> She [Elkie] -- um, she slowly -- she opens the door, and Chris [Jean-Philippe], he comes barging through and he has this metal object in his hand, which I later learned to be a tire tool, a tire jack, and he [immediately (XIII 450)] hits me across the head with it.

(XIII 449) Roya continued:

> ... I was wearing glasses, so that knocked any glasses off, and I didn't fall, but I stumbled.
>
> ...
>
> ... I [had] put my cell phone on the kitchen counter, so I just reached for my cell phone and I ran into the bedroom, and then I ran into the bathroom that was inside the bedroom and I tried to call 911, but I didn't have any reception.

(XIII 451; see also Roya identifying glasses in photograph and testifying, "I was wearing them, and, um, when I was hit over the head, they flew off, XIII 469-70) Jean-Philippe had gone

through the front door when he hit Roya. (XIII 477; see also XIII 519-22)

When Roya ran into the bathroom and closed its door (XIII 481), she did not know where Elkie went (XIII 450). Roya had carried the knife with her to the bathroom. (XIII 451-52) Roya "was bleeding ... a lot." (XIII 488)

While in the bathroom, Roya heard her sister screaming, "No, stop, please, help me, and things of that nature" (XIII 452-53), and then heard some muffled voices,[5] then heard louder screams, "long loud screams" from Elkie (XIII 453-54). The duration of the first set of screaming was about a "couple of minutes," "[i]t seemed like a long time." (XIII 490) The muffled talking lasted "maybe 15, 20 seconds," "very brief." (XIII 490-91) Roya could not specify the exact duration of the second round of screaming, but the second round "just kept going and going, ... it wasn't stopping." (XIII 454)

Roya never heard Jean-Philippe scream or say anything during these events. (XIII 452; see also XIII 454-55)

Roya testified that "if he killed her [Elkie], he was just going to come in the bathroom and kill" her. (XIII 454) "I didn't have a choice but to try and get out." (XIII 454) Roya

[5] Roya said she could not hear what was being said (XIII 508), but she apparently inferred that that "maybe ... they were talking things out" (XIII 453).

ran out of the bathroom and out the front door. As she ran by, she saw Jean-Philippe and Elkie in the kitchen, with Jean-Philippe "standing over her" with "his hand up the air" and Elkie beneath him on the floor. She demonstrated for the jury what she saw. (XIII 455-56) At this time, Roya "couldn't hear any screams." (XIII 457)

Roya, still with a knife in her hand, ran out to the parking lot. She spoke with 911. (XIII 357) The 911 tape (SE 89) was played for the jury and included the following excerpts:

> ROYA GORDON: ... [H]e came and he busted me in the head with a metal thing. ... [XIII 460]
>
> 911 OPERATOR: Okay. Is your sister in there?
>
> ROYA GORDON: Yes, my sister.
>
> 911 OPERATOR: Is she screaming from the apartments now?
>
> ROYA GORDON: I don't know, I'm away from the apartment right now, I can't hear. I'm afraid to go close. [XIII 461]
>
> 911 OPERATOR: Okay, ma'am. (Inaudible). Are you injured in the head?
>
> ROYA GORDON: Yes, I'm injured in the head, I'm all bleeding everywhere. [XIII 462)
>
> ROYA GORDON: He was supposed to be in Rhode Island. He left. Oh, my God, (inaudible) for now, please. [XIII 463]

She identified what appeared to be the same knife she had grabbed. (XIII 489)

Neighbor, Ernest Weekly, lived at the Paradise Island Apartments (XIII 510) in a building "kind of catty-corner ... across the parking lot" from where Elkie lived (XIII 517). Around 10pm or a little after 10pm, he heard Roya screaming

outside. (XIII 511) He went up to her. (XIII 512) She was saying, "Help me, help me." She was very emotional. (XIII 524) She was "like in shock" and "bleeding from the head down into her face" (XIII 511) with "blood coming down from her forehead into her eyes" (XIII 512). She was "bleeding very badly" (XIII 513) and covered in blood (XIII 524). She said she was being attacked by her brother-in-law. (XIII 512) Mr. Weekly took the knife from her. (XIII 511-13; XIII 464) Roya was already on the phone with 911, and Weekly continued the conversation with 911. (XIII 512-13, 526-27)

That night,[6] a next door neighbor, Christina Leon, heard "[l]oud screaming" from a female. (XIII 529) She told her roommate and visiting friends to be quiet so she could listen more closely. Ms. Leon's testimony continued:

> [A]t that point I actually heard real blood curdling screams, um, somebody asking for help. And then I ran out outside of my apartment to find out which apartment those screams were actually coming from, and realized it was the one right next to mine.

(XIII 530) Ms. Leon ran to the victim's door and heard, "Help me, "He's going to kill me." Ms. Leon banged on the victim's door, saying, "Open the door, let her out." (XIII 531) At this point there was more screaming inside. (XIII 532)

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[6] Ms. Leon said "it had to be a little after midnight or 1:00" (XIII 529-30), so she was not sure of the time.

At some point while Ms. Leon was banging on the door, Ms. Roya ("a black female") exited the apartment with blood on her forehead and wielding "a small kitchen knife." (XIII 532) Ms. Roya "kept saying, 'He's going to kill my sister, he's going to kill my sister.'" Roya also said, "Help." (XIII 532) Roya "seemed very scared, very, very scared." (XIII 532)

Ms. Leon ran inside her apartment and told her roommate and friends to call 911 and armed herself with a kitchen knife (XIII 531) and then a BB gun, which she thought could scare the assailant into thinking it was a real gun (XIII 532-33).

Ms. Leon ran back to the victim's apartment and "continued to knock on the door." She also ran around to the back door, but all the doors were locked. (XIII 533) She continued:

> I continued to bang on that [back] door and the front door, um, even at one point saying that I was the police, to open up the door, just so I could try to stop the screaming that was happening in there.
>
> Q. That was my next question actually. As you were doing of all this running around, was the screaming continuing?
>
> A. Yes, sir. Um, multiple times the screaming continued, Don't hurt me. Um, help me. And then, um, shortly after that is when I heard a baby crying, or what sounded like a young child screaming and crying for help as well.
>
> Q. Could you actually see from these different viewpoints where you ran around, could you actually see inside of the apartment?
>
> A. At different times the lighting had changed and I could see where shadows running back and forth, but nothing distinct.

(XIII 533-34)

Ms. Leon ran back into her apartment and returned to the

victim's apartment with a glass Bacardi bottle. She noticed that the lights on the victim's apartment went on and then off. She threw it through a back window to "cause a distraction." (XIII 534-35; see also SE 8, 9, 52, 53; XIV 643, 692-94) When she returned to throw the bottle, the female was still screaming inside the apartment. (XIII 535) She continued:

> Q. When you threw the bottle through the window, did the screaming stop?
>
> A. At points the screaming did stop when I threw the bottle through the window, and that's when I would make more noise outside, um, say, The cops are on the way, saying I was the cops, for them to open the door, to her out, to stop, um, that way I would at least know that someone in there was still alive.

(XIII 535)

At one point, the door to the victim's apartment was cracked open, but Ms. Leon did not enter because she feared for her own life. (XIII 536)

Ms. Leon heard screaming for "about 15 minutes or so." (XIII 536) Ms. Leon never heard a male voice inside the apartment. (XIII 537)

At about 10:12pm, Officer Caldwell was dispatched to the Paradise Island Apartments, and he testified that he arrived a couple of minutes later. (XIII 547-49; see also XIII 584; XIII 606) He heard a child screaming inside the apartment (XIII 559, 591) and he saw Roya "bloody," "visibly upset," and having "trouble talking" (XIII 559-60).

The police found Elkie laying on her back on the floor in the

apartment. (XIII 562, 590-92) She said, "Help me" several times. She was covered in blood and "appeared to be in pain." (XIII 564, 591) Rescue described her as "covered in a lot of blood," and stating in a raised voice, "Help me, help me, help me, and she was kind of flailing her arms around." (XIV 610-11) Rescue described the victim's wounds as "numerous stab wounds, chest, back, face," with a potentially fatal chest wound, in which blood and air was being expelled, of particular concern. (XIV 611-12)

When Officer Caldwell went a little further into the apartment and looked over the counter, he saw Jean-Philippe laying face-down on the floor, with two knives next to his hands, which an officer instructed Rescue to kick out of the way for safety. (XIII 566-70, 572, 580-81; see also XIII 595-97) There was blood coming from Jean-Philippe. (XIII 579) There were also two knives in area of the kitchen sinks. (XIV 663, 666-67, 673, 675-76) There was "blood everywhere." (XIII 581)

The police found Elkie's son screaming and crying in the bathtub. (XIII 593-95)

Rescue left the scene at 10:41pm, and the entire time that Rescue was at the scene, Elkie was conscious, awake, and appeared to be in pain. (XIV 615) While being transported to the hospital, she remained conscious but had trouble breathing. (XV 616, 618)

The medical examiner testified that Elkie Shea Jean-Philippe had suffered six to seven blunt-force wounds (XV 958-59, 970, 971), including a "contusion on her right forehead" (XV 963), a contusion or bruise to the right neck from a blow or from pressure (XV 981-82) She sustained an abrasion "across the middle of her upper right shin." (XV 976)

Elkie had been stabbed and cut 52 to 53 times, causing her death. (XV 956, 958) Seven or eight of the stab wounds were "potentially fatal." (XV 982) Having sustained these injuries, the victim would have still been able to talk, move, and fight for minutes. (XV 982-83)

She had wounds to her arms and hands that can be defensive. (XV 977) They included "two deep cuts ... across the back of her arm" (XV 972), "some cuts across the back of the [right] forearm" (XV 973), some more cuts farther down the right forearm (XV 973), a cut, with some bruising around it, in the middle-inside of her left arm (XV 973), a stab near a knuckle of the right hand (XV 974), a "cut across the base of the [right] thumb" and two additional cuts of the right hand (XV 974), two cuts to her left thumb (XV 975), "a stab that goes through that index finger, pointer finger" (Id.), another cut next to the middle finger (Id.), one cut going across three fingers of the left hand (Id.), "a cut across the middle pad of the [left] index finger" (XV 976), "a bruise at the tip of the index

finger," and a "cut near the fat of the thumb" (XV 976).

A stab wound on the top of the victim's head went through her scalp and into the top, outer layer of the skull. (XV 964, 980) It "cut into the bone." (XV 990)

There were two up-and-down incision wounds to the back of the head. The same blade caused them but from different directions. (XV 965) There was also an incision wound at the back of the neck. (XV 980)

There were five cuts in the area of her ear. (XV 962-63) There was a "deep cut across the upper lip on her left side." (XV 962)

There were ten stab wounds in the victim's back. (XV 970-71, 981)

The victim had multiple wounds to her chest and abdomen. (XV 966-67) Some of them were fatal. (XV 967) There were about seven or eight wounds that penetrated. (XV 967) One went into her left lung. (XV 967-69, 979-80) The doctor described a wound above the left breast as "big gaping." (XV 979) Another stab wound went "under the first rib and down into the lobe of the right lung and then out and into the middle lobe of the right lung." (XV 978)

Three stab wounds were in the upper abdomen. (XV 969) One went into the liver and stomach. (XV 980)

The doctor discussed the varied orientations and locations of

the victim's wounds unlike "a whole bunch of wounds in a very couple of few seconds in one area"; here, "there has been time passage and movement at that time." (XV 985-86) The injuries were "great" in number and "in many places," so "they changed positions, so it had to take some time." (XV 987) The injuries occurred "over a matter of minutes." (XV 987; 994) He could not say whether it was "three or 15." (XV 994)

The victim's injuries do not match the "kind of a pattern" for a frenzied type of killing. (XV 992)

The victim was alive during these injuries (XV 964) and would have had to have been in pain (XV 989).

**Additional Events Leading Up to the Murder.**

Jose Alonso, a United States Navy Corpsman, testified that he worked with Elkie Shea Jean-Philippe, who was also a Navy corpsman. (XV 860-66) On August 20, 2009, Corpsman Alonso noticed a change in Elkie's behavior. In contrast to her usual friendliness and zeal for helping people out, "it was like she lost that spark, ... she was very distant and quiet, which was new." (XV 868-69)

On August 21, 2009, the victim was "[v]ery emotional" and took off her wedding ring and threw it in the garbage can, stating "I can't do this anymore." (XV 871-72) Corpsman Alonso picked up the victim's son from daycare and returned him to the hospital, where the victim was located and where the son watched

cartoons. (XV 873-74) At the hospital, Jean-Philippe approached Corpsman Alonso and called the son "like he was going to take him." Corpsman Alonso called the victim, who instructed him not to let the Jean-Philippe take her son. (XV 874-76) The son stayed with Alonso. (XV 876) Later that morning, Jean-Philippe approached Alonso and the son again. Jean-Philippe said he was there to "say goodbye" and spoke with the son a couple of minutes and left. (XV 877) About 1 or 1:30 that afternoon, Alonso turned the son over to the victim and never saw the victim alive again. (XV 878)

**Additional Evidence.**

Crime Scene Detective Detective Kipple testified that he recovered a taxicab receipt bearing the name "Lesly Jean-Philippe" and dated "8-26-9" (XIV 650, 654, 700; SE 16 copied in IV), a Southwest Airlines claims ticket that includes the flight number and check-in time of 08/26/2009 02:35PM (XIV 650, 654, 656-57, 700; SE 17 copied in IV), and a cell phone (XIV 654, 699) from pants located on the floor of the crime-scene apartment. He also found a wallet and credit cards in the pants. (XIV 654-55) Rescue had cut the pants off of Jean-Philippe. (XIV 759-63)

The baggage claim ticket found in Jean-Philippe's pants pocket was for a flight from Rhode Island arriving in Jacksonville at 7:14pm the day of the murder. (XV 895-96)

The car jack found in the victim's apartment (XIV 663, 668, 698; see SE 23, 32, 33 copied in IV) matched the space for the car jack in the car that Roya had identified as the victim's (XIII 482-83, SE 54-56 copied in IV), including a match of the screws that hold the jack in place and the recovered jack's "fit within that space" in the trunk (XIV 696-98).

Two latent prints from Jean-Philippe's right thumb were identified on the car jack. There was no other identifiable print on the jack. (XV 804-805)

Roya Gordon testified that the shirt Elkie wore that night, prior to the murder, was white, not the color in a photograph. (XIII 487-88)

Roya identified opened boxes of knives near where she grabbed the steak knife before going to the door. When she grabbed the knife, the boxes were closed. (XIII 474-75; SE 24, 25)

Detective Kipple testified concerning bloody knives he observed and recovered. The blade on one of the knives was bent. He also discussed opened knife boxes, with knives missing from them. (XIV 661, 663, 666-76) Evidence Technician Carter subsequently recovered an additional bloody knife from the apartment. (XIV 769-71)

Photographs of the murder scene were introduced and discussed. (See, e.g., XIII 466 et seq.; XIII 537 et seq.; XIII 553 et seq.; XIII 567 et seq.; XIII 586 et seq.; XIV 629 et

seq.) A diagram of the apartment-murder scene was introduced. (See SE 88, III 1837; XIV 644-48)

Detective Kipple observed, and identified photographs of, blood in the bathroom. (XIV 679-81, 685) Detective Kipple observed the broken window and Bacardi bottle. (XIV 643, 692-93)

Lead Detective Bobby Bowers testified concerning text messages that had been downloaded from the Defendant's cell phone. (XV 899-926; SE 87 at IV 601-608) [**ISSUE I**] Records from the Defendant's cell phone provider were also discussed and introduced into evidence. (See XV 928 et seq.; SE 86 at III 584-600) [**ISSUE I**] The records indicated that, on August 26, 2009, Jean-Philippe placed 74 phone calls to Elkie in which she did not answer, (See SE 86, copied at III 584-600) and at about 9:22pm, Roya texted Jean-Philippe telling him, "Don't call us anymore" (IV 608).

**State Rests, Defense Proffer, and Guilty Verdicts.**

The State rested (XV 995), and the defense proffered testimony and photographs from Officer Valentine (XVI 1024-42), which the trial court ruled inadmissible (XVI 1042-46). The defense also proffered the testimony of Dr. Joan Huffman concerning Jean-Philippe's wounds (XVI 1058-66), but the doctor could not indicate whether the wounds were self-inflicted (XVI 1066). The defendant had no defensive wounds on his hands or arms. (XVI 1066-67) Although the State withdrew its objection,

the trial court maintained a ruling that the matter was inadmissible (XVI 1067-68) but then offered to allow the defense to call the doctor (XVI 1068), which defense counsel declined (XVI 1069).

The trial court conducted a colloquy of Jean-Philippe concerning his decision not to testify (XVI 1070-72), and the defense rested without putting on any evidence in the guilt phase (XVI 1075).

The jury found Jean-Philippe guilty as charged of First Degree Murder with a weapon and Aggravated battery with a deadly weapon. (XVI 1171-73; IV 614-16)

**Penalty Phase.**

In the jury penalty phase, the State called as a witness Angela Hill, a social worker at the Naval Hospital. She testified that on August 21, 2009, Elkie came to her office and indicated that she wanted to leave her husband. Elkie was nervous and very upset. (VII 1369-71) Elkie said that Jean-Philippe was controlling (VII 1375) and the previous night, Jean-Philippe held her at knife-point and cut her hair (VII 1371, 1379).

While Elkie was there, Jean-Philippe came and demanded to speak with Elkie. (VII 1373, 1378) When Ms. Hill locked the door to her office, "he rattled the doorknob trying to get in." (VII 1373) Ms. Hill called security. (VII 1373-74) She "continued to

speak with Ms. Gordon. Elkie was pacing the floor, very nervous and upset that he was outside the door." (VII 1374) Elkie was willing to speak with Jean-Philippe as long as security was there; he said that he could not understand why she was in Ms. Hill's office. (VII 1376) She was unwilling to go home with Jean-Philippe and, instead, a security person escorted her to her car while another security person stayed with Jean-Philippe upstairs in the hospital. (VII 1376-77)

James Gordon testified that at 11:41pm on July 22, 2009, while in law enforcement in the Navy, he was dispatched to a dispute at the Navy Lodge. (VII 1379-82) Elkie and Jean-Philippe were there, and "she wanted to leave and she was not being allowed to leave." Jean-Philippe had her military ID and her cell phone and would not give them to her. (VII 1383, 1386) When the officer asked for him to give the cell phone back to her, Jean-Philippe "took it and he hit it on the table in the room," breaking it. (VII 1384) Elkie left with the child, and Jean-Philippe remained at the Navy lodging. (VII 1387-88)

The following victim-impact witnesses testified: Avril Gordon, victim's mother (VII 1390-96); Julieann Davis, a co-worker and friend (VII 1396-1400); Shawn James O'Reilly (VII 1400-VIII 1403); and, Roya Gordon, the victim's sister, who had testified in the guilt phase (VIII 1404-1408).

The defense, with Jean-Philippe's consent, abandoned the

statutory mental mitigators of extreme emotional disturbance and substantial impairment and reserved the right to argue Jean-Philippe's "emotional situation" as non-statutory mitigation. (VII 1328-31)

The defense called several witnesses, who testified concerning Jean-Philippe's background: Edith Jean-Philippe, the Defendant's mother (VIII 1411-45); Reel Hyppolite, a relative who loves Jean-Philippe (VIII 1445-54); Lori Glenn Collins, the registrar for Florida State College of Jacksonville, who produced college records for Jean-Philippe (VIII 1455-61); Holly Ayers who read a letter regarding Jean-Philippe's academics (VIII 1461-65) and church (VIII 1476-78); Raymonde Charles, a childhood friend (VIII 1465-73); Lunie Hyppolite, Jean-Philippe's cousin (VIII 1478-80); Nadege Hyppolite, Jean-Philippe's cousin (VIII 1481-82); Nerva Jean-Philippe, the Defendant's father (VIII 1483-98, includes letter); Jesse Jean-Philippe, a cousin 9VIII 1499-1504); Pellege Laurent, an uncle (VIII 1505-1515); Jackie Eugene, a minister where Jean-Philippe had gone to church (VIII 1515-18); Frank Touze, another minister who had known Jean-Philippe a long time and who "blessed" Jean-Philippe's marriage to Elkie (VIII 1519-24); Andres Valencia, a school and "lifelong" friend of Jean-Philippe (VIII 1525-34); Tohib Giwa, a "lifelong" friend of Jean-Philippe, who saw Jean-Philippe two days prior to the murder and observed that Jean-

Philippe "was very down," like he "had never seen him ... before," whom Jean-Philippe told that his wife was trying to leave him, and whom Jean-Philippe did not tell that he was going to Jacksonville (VIII 1538-1553); and Tabitha Jean-Philippe, Defendant's sister who said, for example, that Jean-Philippe won a stuffed bear for her at Six Flags, helped her with her homework, has consulted with him about her problems, and indicated that Defendant was sad because his wife wanted to leave him (VIII 1553-69).

Tabitha Jean-Philippe testified that she spoke with Jean-Philippe the day of the murder, and she did not know he was returning to Jacksonville from Rhode Island. (VIII 1559)

Jean-Philippe's background included excelling in school (VIII 1413, 1428-29), never forgetting his mother's birthday (VIII 1414), his church attendance (VIII 1427), a strict father (VIII 1430-31), and being taught right from wrong (VIII 1437; see also VIII 1489).

On cross-examination, Jean-Philippe's mother indicated that he was demoted and put in the brig when he got in trouble two times in the Navy (VIII 1434-37) and that he mistreated the victim (VIII 1438) and loved her (VIII 1441). She told her son to come to Rhode island. (VIII 1440)

The defense announced that Jean-Philippe would not testify, and the trial court conducted a colloquy on the matter. (VIII

1570-72)

In rebuttal, the State called Sarah Helen Griffin, a special agent with Naval Criminal Investigative Services. She testified about records showing Jean-Philippe's offenses for underage drinking and driving under the influence, wrongfully appropriating funds concerning some cell phones and being reduced in rank. (VIII 1581-85) On cross-examination, she indicated that Jean-Philippe also received a commendation. (VII 1585-87).

The jury recommended the death sentence by a vote of 12 to 0. (IX 1661-63; V 958)

**Spencer Hearing.**

On May 6, 2011, the trial court conducted a Spencer Hearing. The defense presented a letter and a "behavioral" health evaluation and contested aspects of the presentence investigation. Arguments were also heard. (See IX 1752-74)

**Sentencing and Attendant Trial Court Findings.**

The trial court found the following aggravating circumstances and supported each with findings of fact:

> 1. The Defendant was previously convicted of a felony involving the use of violence to another person. §921.141(5)(b), Fla. Stat. (2011). (great weight)
>
> 2. The capital felony was committed was especially heinous, atrocious, or cruel. §921.141(5)(h), Fla. Stat. (2011). (great weight)
>
> 3. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner and without any

pretense of moral or legal justification. §921.141(5)(i), Fla. Stat. (2011). (great weight)

(V 991-96)

The trial court found the following statutory mitigator:

1. The Defendant has no significant history of prior criminal activity. § 921.141(6)(a), Fla. Stat. (2011). (some weight)

(V 997-98) The trial court rejected the age mitigator. (V 998-1000)

The trial court evaluated the following non-statutory mitigation:

1. The Defendant was born in St. Martin and moved to the United States when he was a young boy. (little weight)

2. The Defendant was a good student in school, was attending college and wanted to become a doctor. (little weight)

3. The Defendant was physically talented, excelling in football and track. (little weight)

4. The Defendant's father was strict and did not allow the Defendant to "hang out" with friends and girls like the Defendant wanted. (not mitigating, no weight)

5. The Defendant had one girlfriend in high school and he took her to the prom. (not established)

6. The Defendant was a good son, brother, and friend and would help those in need. (some weight)

7. The Defendant's family is very close. (some weight)

8. The Defendant was raised in a Christian home, attended church regularly, and participated in the church's youth program. (some weight)

9. The Defendant has the love and support of his family, friends, and church who visit him in jail and will continue to do so in prison. (little weight)

10. The Defendant served in the United States Navy. (some weight)

11. The Defendant was in the process of adopting [S.G.] and changing his last name to match his own. ("in light of the facts of this case, the Court gives it no weight")

12. The Defendant's judgment was impaired. (slight weight)

13. The Defendant showed remorse, will live with his actions for the rest of his life and accepts responsibility. (little weight)

14. The Defendant's courtroom demeanor was excellent. (no weight)

15. The Defendant can contribute to the improvement of other prisoners. (slight weight)

16. Other factors contended to be mitigating in nature. (rejected various additional mitigation proposed in Defendant's memorandum)

(VI 1001-1012)

Judge Adrian Soud sentenced Jean-Philippe to death. (X; V 982-VI 1014)

## SUMMARY OF ARGUMENT

All of the appellate issues pale in comparison with what Jean-Philippe did to his wife, Elkie, Jean-Philippe in the evening of August 26, 2009.

Jean-Philippe and Elkie had separated. He was supposed to be in Rhode Island. Elkie and her sister, Roya, thought they were safe in Jacksonville at the Paradise Islands Apartment, where Elkie was living. They were wrong.

Unknown to Elkie and Roya, on the day he murdered Elkie, Jean-Philippe had sneaked into Jacksonville. He took a taxi to the rear of Paradise Islands Apartment complex. He waited for Elkie and Roya to return to the apartment from Elkie's trip to

the airport to pick up Roya, who had flown that day to Jacksonville out of concern for Elkie.

That night, Jean-Philippe armed himself with a deadly weapon. He extracted a metal car jack from Elkie's car, which was parked in the apartments' parking lot. With the car jack in hand, he knocked at the apartment door and pretended to be a pizza deliveryman. His ruse worked. Elkie opened the door and without any provocation, Jean-Philippe barged in and whacked Roya in the head with the metal jack, knocking her glasses off her head and causing her to bleed profusely and retreat to a bathroom. As Jean-Philippe entered the apartment, he said nothing. He made no attempts at reconciliation. Instead, he had already made up his mind. He was a man with a purpose, the cold, calculated, predesigned purpose to kill.

Over a period of at least 15 minutes, Elkie screamed for her life, as Jean-Philippe repeatedly stabbed and cut her all over her body from numerous angles as she tried to ward off Jean-Philippe's attack.

Ms. Leon, a neighbor, heard Elkie's "real blood curdling screams" and attempted to assist Elkie by banging on Elkie's front and back doors, pretending to be the police, pretending to have a real gun even though she only had a BB gun and a household knife, and throwing a liquor bottle through one of Elkie's windows. Throughout her efforts, Ms. Leon heard the

victim screaming for help inside. She heard no male voice inside.

When the police and rescue arrived, the victim was still alive, conscious, and in pain, begging for help. She subsequently died from the multiple knife wounds that Jean-Philippe inflicted upon her. She had seven or eight potentially fatal stab wounds. Jean-Philippe pierced each of her lungs. He punctured her liver and her stomach. One sharp blow penetrated into the bone of her skull. The medical examiner described numerous wounds on Elkie's arms and hands, consistent with attempting to defend herself. Jean-Philippe inflicted a total of about 52 to 53 stab and cut wounds on the victim all over her body, front and back, from various angles. The medical examiner testified that the victim's wounds were inconsistent with a frenzied type of killing.

In the face of overwhelming evidence of Jean-Philippe's guilt and aggravated culpability, the Initial Brief complains, in ISSUE I, about the State's introduction at trial of some text messages that were downloaded from Jean-Philippe's cell phone, which he had in his pants pocket when rescue arrived. ISSUE I also complains about the introduction of an AT&T log of calls to and from Jean-Philippe's cell phone. Neither of the ISSUE I claims was preserved, neither has merit, and neither is consequential to the outcome of the case.

ISSUE II's claim that the evidence was insufficient for CCP cannot overcome the strength of the evidence showing that Jean-Philippe coldly planned to kill the victim and executed that plan. He surreptitiously came to the victim's apartment that night, waited for her to come home, armed himself with a deadly weapon (the car jack from the victim's car), lied about being a pizza deliveryman to get Elkie to open the door, and when she opened it, barged in, bashed, cut, and stabbed her over an extensive period. That night, Jean-Philippe was a determined man with a deadly purpose.

ISSUE III's claim that the evidence was insufficient for HAC great-weight cannot overcome the strength of the evidence showing the extensive and protracted injuries and pain that Jean-Philippe inflicted upon Elkie. There was record-grounded reason supporting the trial court's weighing of this aggravator. The trial court's weighing was thereby reasonable and not an abuse of discretion.

The HAC inflicted upon Elkie, the CCP of Jean-Philippe's motivated planning and implementation, and the prior violent felony of his bashing Roya with the car jack far overshadow Jean-Philippe's mitigation and render the death sentence proportionate, making ISSUE IV meritless.

ISSUE V, the Ring claim, is also meritless.

None of the appellate issues merit any relief.

## ARGUMENT

**OVERARCHING STANDARD OF APPELLATE REVIEW.**

An actual -- or when fundamental error is alleged, an omitted -- ruling of the trial court is the subject of an appeal. Accordingly, this Court recently re-affirmed the "Tipsy Coachmen" principle that a "trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment." State v. Hankerson, 65 So.3d 502, 505-506 (Fla. 2011)(reaffirming Dade County School Board v. Radio Station WQBA, 731 So.2d 638, 645 (Fla. 1999)). See also Robertson v. State, 829 So.2d 901 (Fla. 2002)(collected cases and analyzed the parameters of "right for any reason" principle of appellate review); Butler v. Yusem, 44 So.3d 102, 105 (Fla. 2010)("key to this ["Tipsy Coachman"] doctrine is whether the record before the trial court can support the alternative principle of law"); Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("affirmed ... if the evidence or an alternative theory supports it"); Jaworski v. State, 804 So.2d 415, 419 (Fla. 4th DCA 2001)("As an appellate court, however, we are obligated to entertain any basis to affirm the judgment under review, even one the appellee has failed to argue"); Ochran v. U.S., 273 F.3d 1315, 1316 (11th Cir. 2001)("We conclude that summary judgment for the defendant was appropriate, but for a different reason"); U.S. v. Benitez, 165 Fed.Appx. 764, 767, 2006 WL 222828, 3 (11th Cir. 2006)(unpublished; "We may affirm a district court's decision on

grounds the district court did not address").

**SUPPLEMENTAL ISSUE: WAS THE EVIDENCE SUFFICIENT FOR FIRST DEGREE MURDER?**

Recognizing that this Court automatically reviews the sufficiency of evidence for First degree Murder where the Defendant was sentenced to death, the evidence of premeditation was strong. It included Jean-Philippe's extended determination to kill Elkie. He had a motive of Elkie's decision to divorce him (XIII 434, 439-40; see also XIII 439; XV 891), to the point where, about a week before the murder, she threw her wedding ring in the garbage can (XV 871-72) and she would not allow her son to be with Jean-Philippe alone (XV 874-77; see also XV 883) and Jean-Philippe told the son "goodbye" (XV 877).

Even though Elkie's sister, Roya, had communicated with Jean-Philippe some the day of the murder, Jean-Philippe gave no inkling that he was coming to Jacksonville from Rhode Island. (XIII 443-47, 463, 506-507, 526)

When Jean-Philippe secretly arrived at the victim's apartment complex, he had the taxi drop him off at the rear of the complex. (XV 816)

Jean-Philippe waited about an hour for the victim to arrive home. (Compare XV 812-17, 820-21) with XIII 442-43, 458-60, 510-11, 547)

Jean-Philippe obtained a car jack from Elkie's car (XIII 482-83, SE 54-56 copied in IV), parked in the lot outside (XIII 483-

84, SE 54), by removing it from its location in the trunk (See XIII 449-50; XIV 663-64, 668, 685-86, 696-98).

He came to Elkie's apartment door with the car jack. (Compare XIII 449-50 with XIV 663-64, 668-69; XV 804-805; SE 23, 32, 33)

At the door to the apartment, he pretended to be a pizza deliveryman. (XIII 448, 502-503, 508, 519-20, 526)

As Elkie opened the door and without any provocation, Jean-Philippe barged his way into the apartment and immediately bashed Roya with the tire jack, knocking her glasses off her face and causing her to stumble. (See XIII 449-50)

Jean-Philippe then assaulted Elkie, bruising her several times, (XV 958-59, 963, 970, 971, 976, 981-82) and stabbed and cut her 52 or 53 times (XV 956, 958) from various angles. For example, he stabbed the **top of her head** with such force that it penetrated the skull bone. (XV 964, 980) He cut the **back of her head** from different directions. (XV 965) There were ten stab wounds in **the victim's back**. (XV 970-71, 981) **On the side** of her body, there were five cuts in the area of her ear. (XV 962-63) **On the front of her body**, there was a "deep cut across the upper lip on her left side." (XV 962) The victim had multiple wounds to her chest and abdomen. (XV 966-67) One went into the liver and stomach. (XV 980) One went into her left lung (XV 967-69, 979-80) and another wound went into the middle lobe of the right lung (XV 978).

In inflicting these injuries on Elkie, there was "time passage and movement." (XV 985-86) The victim's injuries do not match the "kind of a pattern" for a frenzied type of killing. (XV 992)

As Jean-Philippe inflicted these injuries on Elkie over time, she screamed for her life over at least about a 15-minute span. (XIII 536)

This evidence was not only sufficient for premeditation, it was sufficient for CCP, discussed in ISSUE II infra.

**ISSUE I: DID THE TRIAL COURT REVERSIBLY ERR BY ADMITTING INTO EVIDENCE TEXT MESSAGES OBTAINED FROM THE DEFENDANT'S CELL PHONE AND ADMITTING AN AT&T RECORD SHOWING THE DATES, TIMES, AND DURATION OF CALLS TO & FROM DEFENDANT'S CELL PHONE? (IB 15-35, RESTATED)**

**The Text Messages.**

Jean-Philippe's Initial Brief contends that the trial court reversibly erred in admitting into evidence several text messages. He claims (IB 17, 24-33) that the messages were double hearsay, the business records exception was inapplicable, and there was no verification that Jean-Philippe sent the text messages. However, the appellate issue was not preserved, and Jean-Philippe's phone as the origin of the evidence renders it admissible. In any event, other evidence not only corroborated the reliability of the messages but also renders any alleged error harmless.

**A. Preservation.**

The appellate issue concerning the text messages was not preserved below. Defense counsel did not contest the admissibility of the text messages on the same grounds as Jean-Philippe asserts on appeal. Moreover, defense counsel argued that more text messages should be admitted into evidence.

On March 1, 2009, the defense filed a "Motion to Object to Notice of Intent to Rely on Certification of Business Record, or in the Alternative, Motion in Limine." (III 572-76) The motion requested the exclusion of "**Phone records from AT&T**." (III 572) The Motion alleged a violation of Crawford v. Washington, 541 U.S. 36 (2004) (III 573-75), which is not raised here. In the midst of the Motion's Crawford argument, the Motion also conclusorily inserted a statement of law concerning Brooks v. State, 918 So.2d 181 (Fla 2005), without any developed argument attempting to apply the law to facts here. (See III 575) Given the context of this argument, it appears to have been intended as support, albeit undeveloped, for the Crawford claim, again not raised here.

Consistent with the defense's concern over the AT&T records and **not the admissibility of the text messages**, at a Friday, March 4, 2011, hearing, defense counsel indicated that "the text messages" range from June to August and asked the State to indicate its intent concerning the range of text messages it

intended to introduce so the defense could consider whether it "need[ed] to introduce any others that would clarify the ones they intend to use." (VII 1271-72; see also XV 1274) The prosecutor responded that the State had satisfied its obligation by providing all of the text messages, which were incoming and outgoing and which were all retrieved from Jean-Philippe's phone, to the defense. (VII 1272-73) The prosecutor continued, without objection:

> ... those are the text messages that were **taken directly off the Defendant's phone** so of course the Defendant knows what's on his phone. **They were his text messages that he received and sent**.

(VII 1273-74) The prosecutor then indicated that the State intended to introduce messages the day of the murder and the week prior to the murder and some "may be from July" but the State reserved the right to react to whatever the defense did at trial. (VII 1275-76)

The trial court observed that the State has now provided some direction to the defense and took up the defense's written motion. (VII 1276) Defense counsel then argued that using only a "certification to bring in the text messages and the phone calls" violated the "right to confrontation." (VII 1276-77) The prosecutor responded by citing to the evidence code and some case law (VII 1277-78) and clarified that the certification is being used only "for phone calls," **not for the text of the text messages**, which the State intended to introduce through the

police, who would be subject to cross-examination. (VII 1278-79) The trial court then focused on the affidavit for the phone calls and asked defense counsel if she had any more argument, to which she responded, "No, Your Honor." (VII 1279-80)

The trial court then ruled on the phone calls, distinguishing the text messages:

> THE COURT: The Defendant's motion is denied. I will permit the certification based on my review of the correspondence from AT&T National Compliance Center dated February 28, 2011, signed and notarized by a Keona Garrett from Texas. Also allowing in light of the State's representation that they pertain to records identifying time to phone calls and not the substance of any phone calls and **they are not pertaining to the text messages and the substance based -- or the substance of those messages**.

(VII 1280) The trial court followed up with a written order denying the defense's Motion to Object to Notice of Intent to Rely on Certification of Business Record, or in the Alternative, Motion in Limine. (III 571-76)

In the trial, Roya Gordon referenced phone calls and an exchange of several voice and text messages with Jean-Philippe. (XIII 443-46, 500-501, 506-507)

Towards the end of the trial, the prosecutor indicated that the State has prepared a "sufficient redacted copy of the various text messages that we plan on introducing," described the messages, and stated his understanding that the defense is contending that some messages have been left out or "are out of context." (XV 826-29) The prosecutor offered to introduce all of

the text messages. (XV 828) The following exchange occurred next:

> THE COURT: How many text messages from the defendant's perspective should be included that are not?
>
> MS. BUNCOME-WILLIAMS: Seven.
>
> THE COURT: Seven messages or seven pages?
>
> MS. BUNCOME-WILLIAMS: Seven messages.
>
> THE COURT: And are -- what pages are the -- well, let me back up. Do you believe any of the messages contained within quadruple I should be excluded?
>
> MS. BUNCOME-WILLIAMS: No.
>
> THE COURT: Okay. So there is not any dispute as to the appropriateness, if the proper foundations are laid, as to those messages coming in. The question -- the defendant's perception or position is there are other messages not included in quadruple I that we beli[e]ve for context say should be included?
>
> MS. BUNCOME-WILLIAMS: Well, let me start first in that I object to the entire as prejudicial prejudicial [sic] value outweighing probative value first off. That's my objection totally. The Court is going to overrule that based on the ruling that you previously gave me in regards to my motion.
>
> THE COURT: Um-hum.
>
> MS. BUNCOME-WILLIAMS: And based on that, I have gone through -- and just so the Court is clear, remember my motion was asking for a statement of particulars so that this wouldn't be an issue today when I asked for it on Friday, said I could review it and the Court ruled against me on that. It was provided to me this morning for me to look through it. ...

(XV 829-30)

Defense counsel then discussed **specific text messages that the defense wanted included in the evidence**. (See XV 831-44) In the discussion, defense counsel **explicitly requested the inclusion of a "response"** (XV 839) and argued, in support of

adding messages, that the **"conversations that they had throughout" should be "document[ed]"** (XV 843). Ultimately, the trial court resolved adding the messages the defense requested and observed: "So that all of those requested by the defense were added without objection by the State." (XV 844)

The parties then stipulated to a statement to be read to the jury indicating that some massages were redacted because they were not relevant. (XV 846-47) Defense counsel explicitly stated she had no objections to the stipulation. (XV 847)

The prosecutor then discussed the logistics of producing the version of the exhibit ("IIII") containing the text messages that the defense requested. (XV 855-56)

The exhibit was introduced through Detective Bobby Bowers (See XV 901 et seq.) as State's Exhibit 87 (copied at IV 601-608). When the trial court asked defense counsel if there was "[a]ny objection," defense counsel responded only "as previously stated" (XV 904) and a little later reiterated, "I object to the exhibit" (XV 906), thereby adding nothing specific to what had already been discussed. At this point, the trial court observed the prior objection as preserved, and the trial court read, without further objection, the stipulated instruction to the jury:

> THE COURT: 'Ladies and gentlemen, by agreement of the parties, for this stage of the trial, **certain text messages acquired from the defendant's cellular phone** have been redacted. The redacted text messages are not relevant and

you are not to concern yourselves with why this occurred or with the content of any redacted messages.'

(XV 906)

Accordingly, defense counsel referenced texting exchanges in her closing argument to the jury:

> **His texting** and he's saying, Please pick up the phone, please pick up the phone. We hear from Roya say they keep missing the calls. And then **she texted back** and said, I was on the plane, what's up? And apparently he tries to call her again right after that.

(XVI 1098) She continued:

> And, yes, he did call his wife at least 74 times that day. But what you also saw, and what you'll also -- you also saw is that **she was texting him back, too**, and indicating that her battery was low, and asking him to stop calling because the battery was low. But he continued to call and say, Just pick up, just pick up.

(XVI 1101)

Thus, defense counsel explicitly admitted that the text messages represented exchanges between the Defendant and others and that they, in fact, were "acquired from the defendant's cellular phone." Defense counsel even actively sought the introduction of additional text messages. As such, the ISSUE I arguments were waived below. While there was no error here and while there was no fundamental error here, even fundamental error can be waived. See Armstrong v. State, 579 So.2d 734, 735 (Fla. 1991)("fundamental error may be waived where defense counsel requests an erroneous instruction"); State v. Lucas, 645 So.2d 425, 427 (Fla. 1994).

Even where defense counsel only conclusorily stated that

"prejudicial value outweigh[s] probative value," she failed to specify the nature of the prejudice or the nature of the relatively weak probative value. A Section 90.403 analysis generally assumes evidence that is, or at least may be, otherwise admissible. See, e.g., Ehrhardt, Fla. Evidence, §403.1 ("Despite logically relevant evidence being admissible ... trial court may exclude evidence under section 90.403 even though it is admissible under a particular code section"). As such, defense counsel at least suggested that the text messages were otherwise admissible, thereby further waiving ISSUE I's arguments.

In sum, while the defense developed an extensive Crawford argument attacking the admissibility of the AT&T records, the only objection to the text messages was based on prejudice outweighing probative value, but this objection contained no specificity whatsoever.

The Initial Brief (IB 15) does point to the defense's citation to Brooks, but, as discussed, the defense motion cited to Brooks in support of its Crawford claim pertaining to the AT&T affidavit listing phone calls, not as support for any developed argument that the text messages obtained directly from Jean-Philippe's cell phone were double hearsay or were otherwise not properly authenticated.

In conclusion, ISSUE I's arguments concerning the

admissibility of the text messages were not preserved by presenting them to the trial court below.[7] See, e.g., Farina v. State, 937 So.2d 612, 629 (Fla. 2006)(relevancy objection insufficient to preserve appellate claim of prosecutorial misconduct; not "the specific contention asserted as legal ground for the objection ... below"); Harrell v. State, 894 So.2d 935, 940 (Fla. 2005)(three components for "proper preservation"; "purpose of this rule is to 'place[] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings'"); Gore v. State, 706 So.2d 1328, 1334 (Fla. 1997)(argument below was not the same as the one on appeal); Geralds v. State, 674 So.2d 96, 98-99, 98 n. 6 (Fla. 1996) (two claims of unconstitutionality of jury instructions pertaining to death penalty proceedings); Filan v. State, 768 So.2d 1100, 1101 (Fla. 4th DCA 2000)(issue regarding section 90.803(6) held unpreserved because "this precise objection was not made to the trial court"); U.S. v. Taylor, 54 F.3d 967, 972 (1st Cir.

[7] Moreover, although not necessary to resolve this issue, here the record supports an inference that the State was prejudiced by the defense's agreement that these were outgoing and incoming text messages obtained from Jean-Philippe's phone and were admissible, except for their "prejudice." The prosecutor announced his intention to call the officer who downloaded the text messages from Jean-Philippe's phone (XV 904), but, ultimately, he was not called as a witness (See XV 904-995). The position of the defense obviated the need to call him.

1995)("raise-or-waive rule prevents sandbagging"); Cf. State v. Raydo, 713 So.2d 996, 997-1000 (Fla. 1998)(speculative harm; claim unpreserved).

For example, in Steinhorst v. State, 412 So.2d 332, 336-38 (Fla. 1982), the trial court ruled on the admissibility of evidence. There, defense counsel posed an argument to the trial court concerning impeachment, but, on appeal, the claim was re-packaged in terms of developing a defense theory. Steinhorst held, "Since defense counsel did not present this latter argument to the trial court, it is not properly before this Court on appeal." Here, the adequacy of the foundation for admitting the text messages was not specifically contested below, and, indeed, in defense counsel actively seeking to expand the text messages presented to the jury, the defense admitted to the nature of and, in essence, even the admissibility of the text messages,[8] except for the conclusory statement concerning prejudice, which informed the trial court of nothing.

If the admissibility of the text messages is reviewed on its merits, the standard of review is whether the trial court's ruling was reasonable, which the State discusses next.

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[8] The State discusses the AT&T records infra.

**B. If the Merits are Reached, the "Reasonableness" Standard of Appellate Review.**

"Admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion." Jones v. State, 963 So.2d 180, 185 (Fla. 2007)(citing Ray v. State, 755 So.2d 604, 610 (Fla. 2000); Zack v. State, 753 So.2d 9, 16 (Fla. 2000); Cole v. State, 701 So.2d 845, 854 (Fla. 1997)). "Discretion is abused only where no reasonable person would take the view adopted by the trial court." Jones, 963 So.2d at 185 (citing Trease v. State, 768 So.2d 1050, 1053 n. 2 (Fla. 2000); Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990)).

Therefore, if the merits are reached, the appellate issue becomes whether Jean-Philippe's Initial Brief demonstrated that the trial court's admission of the text messages was unreasonable.

**C. Reasonableness of Admitting the Text Messages.**

In the circumstances of this case, admitting the text messages was reasonable.

As a threshold matter, the State contests the Initial Brief's predicate (E.g., IB 30) that the text messages were admitted through "the telephone company's records." Instead, the text messages were downloaded directly from Jean-Philippe's phone (See XV 901-902). Detective Bower's trial testimony (See XV 904-

926) merely mouthed what had been downloaded (See XV 901-904) and introduced as an exhibit containing a separate summary of the downloaded text (SE 87, copied at IV 601-608), in redacted form with the full participation of the defense, as discussed in the "Preservation" section supra. Therefore, the cell phone's storage space contained the text, and as a machine, it was not a declarant for purposes of Section 90.801's hearsay principles. Instead, A "declarant is a "person," §90.801(1)(b). Accordingly, Bowe v. State, 785 So.2d 531, 532 (Fla. 4th DCA 2001)(citing out of state cases), explained that ""[t]he caller I.D. display and pager readouts are not statements generated by a person, so they are not hearsay within the meaning of subsection 90.801(1)(c)." In Bowe, a "detective's in court testimony about a caller I.D. and a mobile pager's numerical display was not hearsay," and here, Detective Bowers in court testimony of what had been downloaded from Jean-Philippe's phone was not hearsay.

Likewise, Avilez v. State, 50 So.3d 1189, 1192 (Fla. 4th DCA 2010), held that a "key lock printout is not a statement generated by a person."

Analogously, the recording of a defendant's confession in a phone call from the jail does not become hearsay when the machine repeats the call in the courtroom. Here, the cell

phone's text messages could have lawfully[9] been displayed to the jury directly from the cell phone, but logistically, transcribing the messages onto separate sheets of paper facilitated logistics and allowed for them to be redacted as defense counsel requested. Thus, here it was not even a matter of transcribing what was heard on a tape, but rather of simply repeating the text that was already there on the phone in text form.

In sum, mirroring the text messages onto a piece of paper did not entail any inadmissible "double hearsay."

Indeed, the accuracy of SE 87 was not challenged in the trial court. See discussion of record in "Preservation" section supra.

Turning to the content of the text messages themselves, many of them were **not hearsay at all** because they were not being offered to prove the truth of the matter asserted in the statements. See §90.801, Fla. Stat.; Jackson v. State, 25 So.3d 518, 530 (Fla. 2009)("Hunt's testimony was not offered to prove the truth of the matter asserted, i.e., whether Jackson had threatened him. Accordingly, it was not hearsay"); Bowe, 785 So.2d at 533 (coded message sent to pager, not offered to "prove

[9] The discussion concerns the law. Since this matter was not raised as such below, the record does not appear to address technical aspects of feasibility and methodology of displaying the text messages in the courtroom directly transmitted from the phone.

the truth of the matter asserted, but to show that the recipient of the numerical message was the defendant, since the numbers appeared on his pager").

Thus, Reynolds v. State, 934 So.2d 1128, 1140-41 (Fla. 2006), discussed evidence that would have otherwise "qualify[ied] as inadmissible hearsay within hearsay," but under the facts of the case, the "statements were not being offered to establish their truth, and, therefore, ... conclude[d] that the trial court improperly concluded that they were subject to the hearsay rule of inadmissibility."

Colina v. State, 570 So.2d 929, 932 (Fla. 1990), held someone's statements about another person were admissible to show that those two other people knew each other. Colina also held that someone's threat to the defendant was admissible to show that other person's "threatening behavior and thereby decrease Colina's own culpability."

Foster v. State, 778 So.2d 906, 915 (Fla. 2000), upheld the admissibility of statements on alternative grounds, including "[t]he statements were also admitted to establish that Foster had a motive for killing Schwebes as soon as he found out about Schwebes' promise to tell the authorities the next morning."

Here, for example, akin to Foster, and perhaps most significantly, the 8/26/09 01:22:26 (9:22pm) text message from Roya Gordon, "Please don't call me anymore" to Jean-Philippe (IV

608) was not offered to prove that Jean-Philippe did not call any more, but rather, it was offered as part of the evidence showing its likely affect on Jean-Philippe, in Foster's terms, towards proving Jean-Philippe's motive. Indeed, this message was less than an hour prior to Jean-Philippe obtaining the tire jack, barging into the apartment, whacking Roya in the head with the tire jack, and then knifing Elkie as she screamed for help over a protracted period.

See also Dawson v. State, 951 So.2d 931, 934 (Fla. 4th DCA 2007)("the informant's statement, 'Tell Roger I need a quarter,' recorded on the videotape ... was admissible as a verbal act").

Further, many of the messages were originated by Jean-Philippe, designated as "Outgoing." (See IV 604-608) As such, they were statements by a party to the litigation and thereby admissible pursuant to §90.803(18)("statement that is offered against a party and is ... (a) His own statement"). See, e.g., State Farm Fire and Casualty Co. v. Higgins, 788 So.2d 992, 1007-1008 (Fla. 4th DCA 2001)(en banc; "Ingalls's statements to various physicians were admissible as admissions of a party under section 90.803(18)(a)"; reviewed on other ground 894 So.2d 5 (Fla. 2004)).

Ehrhardt's Florida Evidence, §803.18a Admissions—In personal or representative capacity (current on-line version, footnotes omitted), summarizes:

> Any statement of an adverse party is admissible against that party under section 90.803(18), including oral or written assertions and electronic messages, e.g, email and Twitter. For example, the adverse party's email, tax returns, ... have been found to be admissions.

Here, an example of a statement by the other party occurred on August 21-22, when Jean-Philippe indicated that he was going to Rhode Island where his parents were located and which he considered "home." (See IV 604-605) On August 24, Jean-Philippe admitted that he knew that Elkie had been "talking to her mom who is for the divorce." (IV 606)

Many of the outgoing and incoming calls were part of a conversation in which one message depended on the other for meaning. These exchanges were admissible. Bowens v. State, 80 So.3d 1056, 1057 (Fla. 4th DCA 2012), recently held that the statements of the defendant and another person were admissible. Discussing Crawford, not raised here, the Fourth DCA relied, in part, on United States v. Hendricks, 395 F.3d 173 (3d Cir. 2005): "Since part of the conversations was admissible, the circuit court held that all of the conversations, including the confidential informant's part of the conversation, should be admissible to place the defendant's and co-conspirator's statements into context." Bowens, 80 So.3d at 1058, properly held:

> In this case, Bowens's side of the surreptitiously recorded conversation is admissible as a party admission under section 90.803(18)(a), Florida Statutes. Michael's side of

> the conversation is admissible to place Bowens's statements into context.

See generally Bradley v. State, 787 So.2d 732, 742 (Fla. 2001)("McWhite brothers then broke her vehicle's windows, as directed by Bradley. For a good part of this episode, according to the testimony, Bradley was in constant communication with Mrs. Jones through his cellular phone").

Here, for example, on August 26 at 18:57:07 (3:57pm), the afternoon of the murder, Elkie texted Jean-Philippe, "My phone is going to die so stop calling." Two minutes later, Jean-Philippe responded, "Just talk to me please" and followed-up with a few more messages. (See IV 607-608) Elkie responded, "I only have 15% of battery left. Stop calling," then Jean-Philippe texted, "Talk to me please." (IV 608) The full import of Jean-Philippe's messages is realized when they are put in the context of the messages he was receiving.

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F.Supp.2d 966, 973-75 (C.D.Cal. 2006), instructively applied many of the foregoing principles to emails sent by, and received by, a party.

Dickens v. State, 927 A.2d 32, 36-38 (Md.Ct.SpecialApp. 2007), upheld the admissibility of text messages under circumstances weaker than those here. Unlike the compelling fact here where the messages were found on the defendant's phone, there, incriminating messages were found on the victim's phone.

Dickens held the messages admissible because of the circumstances surrounding them. For example, a "text message sent on August 25, 2004, at 8:25 a.m. had no return phone number," but was still admissible because of the content of the message. "[T]ext messages sent on July 6–7, 2004, ... were sent by a person calling himself or herself 'Doll/M'," but the message referred to "until death do us part" and the defendant was the victim's estranged husband, and the "Doll/M" was used in another message. "Under all these circumstances, the trial judge did not err in ruling that the text messages were properly authenticated."

In addition to it being uncontested in the trial court that the text messages were exchanges between Jean-Philippe and others, as discussed in the "Preservation" section, and in addition to the applicability of hearsay exclusions and exceptions, it was also uncontested below that the text messages were obtained from Jean-Philippe's cell phone.

Detective Slayton obtained the cell phone (SE 77) from Jean-Philippe's pants pocket (XV 899-901) and Officer Taylor, who was trained in the area, downloaded them from that phone and compiled them on paper (XV 901-902).

Further, the nature of the messages corroborate the conclusion that it was his phone and the messages were to and from him. For example, message #1800 referenced Elkie's son by

name (IV 606), which was established through witness testimony in the trial (XIII 442). Messages #1846 and #1879 referenced divorce (IV 606, 607), and there was witness testimony at trial concerning Elkie wanting to divorce Jean-Philippe (E.g., XIII 440).

Several of the messages indicated that, on August 26, Jean-Philippe persisted in calling and texting Elkie and Roya (IV 607-608), and witness testimony established that Jean-Philippe's calling and texting attempts were unwanted. Thus, Roya testified at trial that on August 26, Jean-Philippe exchanged several voice and text messages with Roya. (XIII 443) Roya indicated that while she was with Elkie that night, Jean-Philippe called Elkie's phone "a lot," "our phones were just going off." (XIII 445)

The taxi driver testified that, while en route in the taxi and about five minutes prior to arriving at the Paradise Island Apartments, Jean-Philippe, on the phone, raised his voice, in a confrontational tone, saying "Wait a minute, we can work it out." (XV 815-16, 822)

In one of the phone calls initiated by Jean-Philippe, Roya told him that Elkie "didn't want to be bothered by him." (XIII 445) When Elkie, Roya, and Elkie's son arrived at the Paradise Island Apartments where Elkie was living, Jean-Philippe called Roya again and wanted to speak with Elkie, and Roya told him

that Elkie did not wish to speak with him. "He said, Okay, and then hung up the phone." (XIII 446) Jean-Philippe called Roya again and complained that Roya had told him that she was at the airport and "now you're at the apartment, are you lying to me?" (XIII 446)

Therefore, the juxtaposition of the text messages with other evidence corroborates their reliability.

Moreover, Jean-Philippe's cell phone was like a box that was labeled "my text messages" that Jean-Philippe was carrying around. Cf. ITT Real Estate Equities, Inc. v. Chandler Ins. Agency, Inc., 617 So.2d 750, 751 (Fla. 4th DCA 1993)("senior property manager at the shopping center in question" who had control over "documents contained in his leasing files")

The State submits State v. Lumarque, 44 So.3d 171, 172-73 (Fla. 3d DCA 2010), as correctly decided on a related issue. It concerned the admissibility of "two sexually suggestive images and eleven text messages between the ex-wife and a boyfriend, found on the defendant's cellular telephone." The trial court ruled as admissible only "the two images and one of the text messages" that a witness had personally seen but excluded the others. Lumarque reversed the trial court's exclusion and reasoned:

> The images and text messages were found on the defendant's cellular telephone, seized pursuant to a search of the defendant's home through a warrant shortly after the alleged incident. This fact, testified by the State's

> forensics expert, is sufficient to authenticate these exhibits. *U.S. v. Caldwell*, 776 F.2d 989, 1001-02 (11th Cir.1985) (holding that authentication of evidence merely requires a finding that the evidence is what it purports to be). ... Regardless how these images and text messages might have found their way onto the defendant's cellular telephone, the State has presented sufficient evidence at this stage that these exhibits constitute evidence of motive. *Craig v. State*, 510 So.2d 857, 863 (Fla.1987) (stating that evidence of motive is admissible when it would help the jury understand other evidence). Accordingly, they are admissible into evidence at the trial of this case upon the State laying the proper predicates as indicated by this opinion.

Here, the State produced evidence that the cell phone containing the evidence belonged to Jean-Philippe and the detective testified, without objection, that a trained officer downloaded the messages. In Lumarque, subject to relevancy, the status of the cell phone as defendant's was sufficient. Here, the State proved much more. It was in Jean-Philippe's pants pocket the night of the murder. The content of the messages were consistent with each other and with other circumstances in the case, all indicating that Jean-Philippe personally used the cell phone to communicate with others through texting. Accordingly, there was evidence demonstrating the authenticity and nature of the text messages.

**D. Issue I, Failing to Rebut Circumstances Supporting Admissibility.**

As discussed in the preceding sections, there were various justifications rendering the admission of the text messages reasonable. Indeed, not only did defense counsel fail to rebut

adequate grounds for affirmance, defense counsel recognized the nature of the text messages and the admissibility of the text messages, except for contending their prejudicial nature, which was not developed below and which is not raised here. In contrast with the prima facie justification for admissibility, the defense presented nothing in rebuttal to the trial court. Cf. Murray v. State, 838 So.2d 1073, 1082 (Fla. 2002)("In seeking to exclude certain evidence, Murray bears the initial burden of demonstrating the probability of tampering ... Once this burden has been met, the burden shifts to the proponent of the evidence to submit evidence that tampering did not occur"). Here, as in People v. Chromik, 946 N.E.2d 1039, 1055-57 (Ill.App. 3d Dist. 2011), "Defendant did not deny sending even a single one of the purported text messages," and here, the Defendant did not deny receiving the text messages that were introduced. Instead, the defense wanted more messages introduced.

On appeal, Jean-Philippe asserts (IB 24-25) the business records exception as "the starting point for the controlling case law," but the words in the text messages were not introduced pursuant to this exception. Instead, they were introduced as they were found in Jean-Philippe's possession on his cell phone.

Jean-Philippe discusses (IB 27-28, 30-31) Brooks v. State,

918 So.2d 181 (Fla. 2005), overruled on other ground State v. Sturdivant, 2012 WL 572977 (Fla. 2012), at some length. However, there, unlike here, an agency's record was introduced and the record contained information that a caller to the agency provided. There, as background, "Rachel Carlson and her three-month-old daughter, Alexis Stuart, were found stabbed to death in Carlson's running vehicle in Crestview, Florida. Carlson's paramour, Walker Davis, and Brooks were charged with the murders. Davis was married and had two children, and his wife was pregnant with their third child. However, the victim believed Davis was also the father of her child and demanded support from him. Davis became concerned about this pressure." 918 So.2d at 186-87. Brooks and Davis were cousins. "[T]he State advanced at trial the theory that Brooks was motivated to kill, at least in part, by the desire to aid his cousin in evading child support payments. There [wa]s very little record evidence, however, demonstrating that either Davis or Brooks was aware of Carlson's desire to obtain child support or any steps taken by Carlson to actually obtain such support." 918 So.2d at 192.

In Brooks, the agency record at issue "documented a call received from an individual who had identified herself as Rachel Carlson and requested that a case be opened against Walker Davis, Jr., for child support." There, the "summary record of the telephone conversation testified to by Madero was not a

complaint for child support that Davis would have been served with or would have received a copy of." 918 So.2d at 192. Here, in contrast, the text messages were found on Jean-Philippe's cell phone that was in his possession the day of the murder and that contained messages that were consistent with other evidence and with each other. Moreover, "[w]ithout evidence showing that Davis or Brooks knew of Carlson's support request, the Department of Revenue record is irrelevant to anyone's intent and motive." 918 So.2d at 193. Here, the messages on Jean-Philippe's cell phone provided background for his motive to kill the victim. There, the admissibility of the agency's record depended on the application of the business records exception. Here, in contrast, this cell phone was Jean-Philippe's container for his text messages that he had sent and received. Brooks does not assist ISSUE I.

Jean-Philippe discusses (IB 28-29) Thomas v. State, 993 So.2d 105 (Fla. 1st DCA 2008). However, there, like Brooks, and unlike here, admissibility was dependent upon the application of the business records exception, and the business record, itself, was not directly linked to the defendant. In contrast to here, where the defendant's cell phone contains the messages, there, the record was "an email written by Natalie Zepp to Michelle McCord, both employees of the apartment complex where Ms. Baldwin and Mr. Thomas shared an apartment." There, the record contained a

statement that the resident-victim wanted the defendant out of the apartment, but evidence apparently did not establish that the defendant knew of the content record maintained by the business. Here, the messages did not concern communications between two people about what a third person said, none of whom was the defendant, but rather, the messages were on Jean-Philippe's cell phone and directed to him and sent from him. Thomas does not apply here.

Finally, more like Brooks and Thomas, and unlike here, in M.S. v. Department of Children and Families, 6 So.3d 102 (Fla. 4th DCA 2009)(IB 29-30), records of Maryland Child Protective Services were inadmissible as a business record since they contained "mostly … inadmissible hearsay statements from unknown persons in Maryland." Here, Jean-Philippe was a direct party to the messages stored on a container that he carried in his pants pocket.

In conclusion, defense counsel correctly ascertained that the text messages were admissible. ISSUE I's attack on the admissibility of the text messages has no merit.

**E. Harmless Error.**

Arguendo, any error was harmless.

As discussed above, non-text-message evidence corroborated the reliability of the text messages. This corroborating evidence also renders the use of the text messages harmless.

Moreover, as discussed in the "Supplemental Issue and Facts supra, there was compelling evidence of Jean-Philippe's extended determination to kill Elkie, as the evidence showed that he --

- Had a motive for killing Elkie;
- Sneaked into Jacksonville from Rhode Island and a taxi dropped him off at the rear of the apartment complex;
- Waited about an hour for the victim to arrive home;
- Obtained a car jack from Elkie's car parked in the lot outside by removing it from its location in the trunk;
- Walked up to Elkie's apartment door with the car jack;
- At the door to the apartment, pretended to be a pizza deliveryman;
- As Elkie opened the door and without any provocation, barged his way into the apartment and immediately bashed Roya with the tire jack, knocking her glasses off her face and causing her to stumble;
- Assaulted Elkie, bruising her several places and stabbing and cut her 52 or 53 times all over her body and from various angles, thereby also showing "time passage and movement"; and,
- Inflicted the injuries on Elkie over time as a neighbor heard her scream for her life for about 15 minutes.

See, e.g., Brooks v. State, 918 So.2d 181, 194-197 (Fla. 2005)(applied harmless error and discussed "properly admitted evidence upon which the jury could have legitimately relied"); Moore v. State, 701 So.2d 545, 550 (Fla. 1997) ("Because there was direct evidence from other witnesses that Moore possessed a gun on the actual day of the murder and direct evidence that Moore shot the victim, there is no reasonable possibility that

the error contributed to the conviction here").

For the penalty phase, the evidence not only established CCP, but also HAC and the prior felony of the aggravated battery on Roya.

Penalty phase evidence also demonstrated Jean-Philippe's abusive and controlling behavior through evidence that --

- On August 20, 2009, less than a week before the murder, Jean-Philippe held Elkie at knife-point and cut her hair (VII 1371, 1379);
- On August 21, 2009, less than a week before the murder, at a public office where ELkie was seeking help, Jean-Philippe demanded to speak with Elkie (VII 1373, 1378) and "rattled the doorknob trying to get in" through a locked door (VII 1373); and,
- On July 22, 2009, Jean-Philippe had Elkie's military ID and her cell phone and would not give them to her (VII 1383, 1386).

Even Jean-Philippe's mother candidly admitted that he mistreated the victim. (VIII 1438)

**AT&T Records.**

ISSUE I's block quote (IB 17-23) combines and blurs the AT&T records with the text messages. Actually, ISSUE I's argument (See IB 33) barely mentions the AT&T records, as such.

The State clarifies that the AT&T records were admitted into evidence as SE 86 located in the record at III 584-600. Detective Bowers testified concerning this record at XV 926-46.

Any claim concerning the AT&T records was not preserved below. As discussed above, the defense did move to exclude the

AT&T records, and while the motion did mention predicates for admissibility in passing (III 573-74), its focus was on Crawford. The motion discussed prerequisites for admissibility of a business record, but did not argue how this record failed to meet those criteria. (See par. 4, III 573; par. 5, III 573-74; par 11, III 675; par. 12, III 575).

At trial, when the prosecutor submitted SE 86 for admission into evidence, defense counsel indicated that she had no objection other than those she had already stated. (XV 927-28) After the prosecutor elicited several details of the exhibit (XV 928-33), defense counsel objected on the ground that the witness did not have personal knowledge, and the Court sustained the objection, stating that the witness could testify only to what was on the record. (XV 933-35) Defense counsel did not object again during the remaining duration of the detective's testimony concerning the AT&T records. (See XV 935-46) Therefore, to the degree that, in the middle of the Detective's testimony, the defense expanded its objection to the AT&T records, the defense objection was sustained, and the defense failed to further complain to the trial court.

Moreover, in her closing argument, defense counsel expressly admitted that Jean-Philippe had placed the 74 calls reflected in the AT&T log and interrelated this discussion with her reliance on the text messages:

> And, yes, he did call his wife at least 74 times that day. But what you also saw, and what you'll also -- you also saw is that she was texting him back, too, and indicating that her battery was low, and asking him to stop calling because the battery was low. But he continued to call and say, Just pick up, just pick up.

(XVI 1101)

Therefore, ISUUE I's attack on the AT&T records was unpreserved below. See, e.g., Companioni v. City of Tampa, 51 So.3d 452, 456 (Fla. 2010)(" when a party objects to instances of attorney misconduct during trial, and the objection is sustained, the party must also timely move for a mistrial in order to preserve the issue for a trial court's review of a motion for a new trial"); Marquard v. State, 850 So.2d 417, 433 (Fla. 2002)("trial court sustained the objection ... Defense counsel never objected when the instruction was given... issue was not properly preserved... appellate counsel was not ineffective in failing to raise it on appeal"); Lara v. State, 464 So.2d 1173, 1180 (Fla. 1985)("court sustained an objection by appellant's counsel, but there was neither a request for a curative instruction nor a motion for mistrial"); Harrell, 894 So.2d at 940; Steinhorst, 412 So.2d at 336-38.

Arguendo, if the merits concerning the AT&T records are addressed, they have none.

Section 90.803(6), expressly provides:

> The provision of s.90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

> (a) A **memorandum, report, record, or data compilation, in any form**, of **acts, events, conditions**, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if **kept in the course of a regularly conducted business activity** and if it was the **regular practice of that business activity to make such memorandum, report, record, or data compilation**, all as shown by the testimony of the custodian or other qualified witness, **or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11)**, **unless the sources of information or other circumstances show lack of trustworthiness**. The term 'business' as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
>
> ...
>
> (c) A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve **reasonable written notice** of that intention... A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial. A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good cause shown may grant relief from the waiver.

Accordingly, Section 90.902(11), Fla. Stat. provides for the self-authentication of a business record if the declaration or certification certifies or declares that the record "(a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters; (b) Was kept in the course of the regularly conducted activity; and (c) Was made as a regular practice in the course of the regularly conducted activity ...."

Here, the State complied with Sections 90.803(6) and 90.902(11). The State filed its Notice (III 544) and produced the affidavit of the pertinent records custodian that swore and

attested that the attached record contained "true and correct copies of subscriber information." The affidavit continued:

> The attached copies of billing records are maintained by AT&T in the ordinary course of business. I maintain and routinely rely on these documents in the course of my duties as Custodian of Records and Legal Compliance Analyst.

(III 585). Accordingly, Detective Bowers testified that he obtained the phone records for the Defendant's cell phone from AT&T through a subpoena. (XV 926-27)

The affiant, on AT&T letterhead, swore and attested that the documents were maintained as billing records and that the custodian, as a part of AT&T's business, regularly relies on them. Thus, these are ongoing records on which the affiant regularly relies. The records were not created after-the-fact. The records were "part of a regularly conducted activity." In essence, the affiant, in his official capacity at AT&T, has personal knowledge that these are regular billing records, sufficiently reliable that he "routinely" relies on them. And, finally, the affidavit clearly states that the records were created in the "regular practice in the ordinary course of its business." Thus, the logs of Jean-Philippe's cell calls satisfied the statutes as interpreted in Yisrael v. State, 993 So.2d 952, 956-58 (Fla. 2008).

Indeed, the document's reliance upon billing records provides additional indicia of reliability. See Jackson v. State, 877

So.2d 816, 817-818 (Fla. 4th DCA 2004)("obvious motive for accuracy in billing records"; "extracted from the archived records in response to the subpoena"; discussed United States v. Linn, 880 F.2d 209 (9th Cir.1989)(computer printout recording phone calls).

The State sufficiently laid "a predicate pursuant to section 90.803(6)(a)," thereby shifting "the burden ... on the party opposing admission to prove the untrustworthiness of the report." Nimmons v. State, 814 So.2d 1153, 1155 (Fla. 5th DCA 2002)(applying Baber v. State, 775 So.2d 258 (Fla. 2000)("a hospital record of a blood test made for medical purposes, which is maintained by the hospital as a medical or business record, may be admitted in criminal cases pursuant to the business record exception to the hearsay rule").

**Here, the defense tendered nothing to the trial court that suggested that these records were untrustworthy**.

Put another way, the State produced a prima facie showing that the AT&T record was accurate and genuine, which the defense did not refute. See Garcia v. State, 564 So.2d 124, 126 (Fla. 1990)("Evidence is authenticated when prima facie evidence is introduced to prove that the proffered evidence is authentic"). See also U.S. v. Lamons, 532 F.3d 1251, 1263-64 (11th Cir. 2008) (data relating to telephone calls to a particular number, machine generated and not a statement of a person, data not

hearsay under FRE 801(a).)

Brooks, Thomas, and M.S. do not assist ISSUE I concerning the AT&T records. Here, the records were routinely kept business records simply showing a log of calls. Unlike those cases, the records did not contain assertions of someone calling into the agency or ad hoc statements between two employees about an external assertion or "inadmissible hearsay statements from unknown persons in Maryland." Here, in contrast to those cases, the entire content of what was admitted into evidence was grounded on a business' motive to maintain accurate billing records.

Here, the AT&T log of calls (SE 86) was admissible. There was no error.

Arguendo, if somehow this portion of ISSUE I was preserved and results in a holding of error, it was harmless in light of the other properly admitted evidence, described in the text-message discussion supra and the Facts supra.

**ISSUE II: WAS THE EVIDENCE SUFFICIENT FOR CCP? (IB 36-51, RESTATED)**

ISSUE II claims that the trial court erred in finding CCP.

**A. The Trial Court's Order and Evidence and Case Law Supporting the Trial Court's Finding of CCP.**

On appeal, the trial court's finding of an aggravator merits affirmance if competent substantial evidence supports it. See, e.g., Douglas v. State, 878 So.2d 1246, 1260-61 (Fla. 2004)

(citing Willacy v. State, 696 So.2d 693, 695 (Fla. 1997)).

Here, the trial court's finding merits affirmance:

> **3. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner and without any pretense of moral or legal justification. § 921.141(5)(i), Fla. Stat. (2011).**
>
> The State must prove the following to establish this aggravating circumstance: 1) the killing was the product of cool and calm reflection rather that an act prompted by emotional frenzy, panic, or fit of rage (cold); 2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); 3) the defendant exhibited heightened premeditation (premeditated); and 4) the defendant had no pretense of moral or legal justification. Jackson v. State, 648 So.2d 85, 89-90 (Fla. 1994). The evidence establishes this aggravating circumstance beyond a reasonable doubt.
>
> The Court provided in great detail supra, the events that transpired days, as well as minutes, prior to the murder. These facts need not simply be repeated. However, the Court does highlight the facts that most directly prove the Defendant's murder of Elkie Shea Jean-Philippe, was cold, calculated and premeditated.
>
> Evidence makes clear the Defendant's marriage was failing and its demise was imminent. After leaving for Rhode Island as agreed with his wife, the Defendant returned unannounced to Jacksonville, Florida and the marital residence - all the while cloaked in subterfuge. The Defendant told no one of his travels. Indeed, he told one friend inquiring of his plans that he was bored.[FN18] Whether returning to Jacksonville to achieve reconciliation with the woman he loved or the whole while intending to murder her, his premeditated plans become crystal clear when all efforts to reach out to his wife returned void. The Defendant patiently laid in wait for Elkie and Ms. Gordon to return to the apartment from the airport, likely watching her, Ms. Gordon and [S.] walk to the apartment. Once they arrived and went into the apartment, the Defendant retrieved a tire jack from Elkie's car. The Defendant then walked to the apartment, knocked on the door and identified himself as a pizza delivery man.[FN19] Th[e]se facts speak clearly to the cold, calculated and premeditated design formed by the Defendant in the many minutes, if not hours, before his crime.

> When a suspicious Elkie and Ms. Gordon opened the door, there were no words exchanged - no expressions of love, no apologies, and no request for reconciliation. There was simply a man, determined in mind and resolved in heart, to deliberately bring his Wife's life to an end. Immediately upon the door opening, the Defendant barged inside, hit Ms. Gordon in the head with the tire jack, and then turned all attention to Elkie. While this incident is domestic in nature, to be clear, it is not a case of a frenzied murder born of passion after a spontaneous, unexpected argument. This case is of an entirely different ilk. The Defendant was not residing with his wife when he killed her. Indeed, he was not residing in the State of Florida at this time. Rather, he arranged to return to Jacksonville in stealth, unbeknownst to anyone, including his own friends and family.
>
> Certainly, a failing marriage can provide no legal or moral basis for the Defendant's crime in this particular case. Indeed, no facts, no reasoning and no arguments can form such basis. **This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed.**
>
> > FN18. The day the Defendant left for Rhode Island, a close friend of the Defendant sent him a text message asking what he was doing. The Defendant's response was, 'Bored out of my mind.' As testified to by some of the Defendant's friends and family during the penalty phase, had they known about the Defendant's plans to go to Jacksonville, they would have advised [t]he Defendant not to go and would have done everything possible to persuade and/or keep him from going.
> >
> > FN19. The acquisition of the tire jack as well as the Defendant's pretending to be a pizza delivery man evidences the reflection and careful planning required by Florida law for a finding that the murder was cold and calculated. Sireci v. Moore, 825 So. 2d. 882, 886-87 (Fla. 2002).

(V 995-996, bold and underlining in original)

Thus, the trial court properly laid out the elements of CCP and discussed the competent substantial evidence that supported those elements. The trial court's order, on its face, merits affirmance.

Accordingly, as Jean-Philippe acknowledges, this Court has clarified that there is no domestic dispute exception to CCP. See Lynch v. State, 841 So.2d 362, 377-78 (Fla. 2003)("This Court does not recognize a domestic dispute exception in connection with death penalty analysis"; analyzed CCP on the facts of the case).

As the trial court summarized, and as the State has documented with supporting record citations in the Facts, discussion of the SUPPLEMENTAL ISSUE (sufficiency for premeditation), and harmless-error discussion of the text messages in ISSUE I, Jean-Philippe's efforts to control Elkie by keeping her in the marriage had obviously failed and she did not want to talk with him anymore, thereby providing motive for killing Elkie. Jean-Philippe sneaked into Jacksonville from Rhode Island, and, immediately after Jean-Philippe raised his voice on the phone, the taxi dropped him off at the rear of the apartment complex.

Jean-Philippe waited over an hour at the apartment complex for the victim to arrive home and to make his move. He armed himself with a deadly weapon by extracting a car jack from the trunk of Elkie's car parked in an outside lot. He walked up to Elkie's apartment door with the car jack. He was mentally able to realize that ingress into the apartment would not be consensual. He was able to conceal his identity from his own

wife and trick her into opening the door by pretending to be a pizza deliveryman. As Elkie opened the door and without any provocation or discussion, he barged his way into the apartment and immediately disabled a potential impediment to his purpose by bashing Roya in the head with the tire jack, knocking her glasses off her face and causing her to stumble and bleed profusely. As the trial court astutely observed:

> **When a suspicious Elkie and Ms. Gordon opened the door, there were no words exchanged - no expressions of love, no apologies, and no request for reconciliation. There was simply a man, determined in mind and resolved in heart, to deliberately bring his Wife's life to an end**.

(V 996)

Instead of attempting reconciliation, having not been provoked in any way, and having whacked Roya in the head with the deadly weapon he brought with him, Jean-Philippe "turned all attention to Elkie" (V 996), bruising her several times, stabbing and cutting her 52 or 53 times all over her body and from various angles in spite of her attempts to defend herself, thereby also showing determination through, in the medical examiner's words, "time passage and movement."

Indeed, even though it appears that Ms. Leon was not aware of the assault on Elkie from its inception that night, her testimony documents about 15 minutes of Jean-Philippe's determined assault as she heard Elkie's screams for her life.

Not only did the medical examiner contradict any theory of a

frenzied killing, but also Ms. Leon never heard a male voice inside the apartment. The only person screaming was Elkie, as Jean-Philippe persisted in his deadly assault.

Moreover, additional penalty-relevant evidence set the stage for the August 26th assault. For example, on August 20, 2009, less than a week before the murder, Jean-Philippe held Elkie at knife-point and cut her hair. On August 21, at a public office where Elkie was seeking help, Jean-Philippe demanded to speak with Elkie and "rattled the doorknob trying to get in" through a locked door and said good-bye to Elkie's son.

Therefore, the Initial Brief mistakes Jean-Philippe's motive for "passion" (IB 40-41). Indeed, Jean-Philippe methodically implemented his motive: Sneaking into town, taxi'ing to the rear area of the apartment complex, waiting for his prey, arming himself with a deadly weapon, the car jack from Elkie's car, and pretending to be a pizza deliveryman are not indicia of unthinking rage -- quite the contrary.

In Davis v. State, 2 So.3d 952, 960 (Fla. 2008), like here, the defendant armed himself with a deadly weapon prior to walking to the victims' door. There, the defendant brought more implements with him and may have walked farther and, but here the defendant perpetrated his plan by not alerting the victim he was coming to Jacksonville and by pretending to be a pizza deliveryman. There, the defendant waited some minutes outside

the residence, and here the defendant had waited over an hour at the apartment complex, and here he patiently waited at the apartment door and played his pizza-man role to open the door to his murder. Here, and in Davis, the defendant barged inside the residence when he had the opportunity.

Here, like Davis, the process of murdering the victim(s) by inflicting extensive injuries and overcoming a struggling victim showed his determination. In Davis, the defendant stabbed one victim 18 times and the other one 16 times. Here, Jean-Philippe inflicted 52 or 53 cut and stab wounds at nearly at every area of the victim's body. Here, the victim's defensive wounds were very extensive.

Here, as in Davis, the defendant used as additional weapons, knives he found at the murder scene. Here, as in Davis, the defendant had the rational ability to distinguish an innocent child on the premises.

Here as more compelling support for CCP, unlike Davis, there is no evidence of a frenzy. In Davis, the defendant "testified that when he committed the homicides, he had no control over his physical body and that he could only see and hear, not feel or think." 2 So.3d at 956. Here, Jean-Philippe did not testify in either the guilt or penalty phases. In Davis, "Dr. Krop testified that Davis 'was in [a] dissociative state at the time which certainly reflects a person who is in considerable

emotional distress. I feel that his judgment was compromised." 2 So.3d at 957-58. Here, there was no such mental health testimony; no psychologist testified on the Jean-Philippe's behalf.

In Davis, "[w]hile the trial court found that Davis was experiencing extreme mental or emotional distress when he committed the murders, the evidence as a whole established that CCP was applicable." 2 So.3d at 961. Here, there was no such trial court mental-health finding. (Compare VI 1009)

The discussion of Carter v. State, 980 So.2d 473 (Fla. 2008), in Davis, 2 So.3d at 961 is instructive:

> In *Carter v. State*, 980 So.2d 473 (Fla.), cert. denied, --- U.S. ----, 129 S.Ct. 400, 172 L.Ed.2d 292 (2008), the defendant admitted driving to the home of Elizabeth Reed, his ex-fiancée, with a loaded rifle and entering the home with the rifle concealed against his leg and his finger on the trigger. Once in the home, Carter demanded that Reed answer questions about their relationship. When Reed reached for the rifle, Carter struggled and the gun discharged, fatally striking Reed's daughter. Carter then deliberately shot Reed and her boyfriend multiple times at close range. This Court found that the record sufficiently supported the finding of CCP for the murders of Reed and her boyfriend. Id. at 482.

Here, as in Carter, a prior relationship set the stage for the murder. Here, as in Carter, the defendant, prior to killing the victim, demanded that the victim respond to his inquiry about the relationship. Here, as in Carter, the defendant gained access with a deadly weapon that he had concealed. And here, as in Carter, a struggle was involved in the murder. Here, there is

more evidence of CCP than in Carter based upon Jean-Philippe's surreptitious arrival in Jacksonville, gaining access to the apartment by lying about his identity, engaging in a protracted struggle with the victim evinced through the extensive cuts to her arms and hands, and manually inflicting additional extensive knife wounds over at least 15 minute period as the victim screamed and fought for her life.

Here, as in Davis and Carter, there is competent substantial evidence supporting the trial court finding of CCP.

**B. The Initial Brief's Incorrect Facts.**

The State disputes several of the facts argued in the Initial Brief.

Jean-Philippe states (IB 41) that there is "no evidence that he snuck back into the State." This is incorrect. There was. As discussed supra, until Roya saw Jean-Philippe bash her head with the tire jack, Roya had no idea that Jean-Philippe had come back to Jacksonville. Instead, she thought he was still in Rhode Island. (See XIII 443-47, 463, 506-507, 526) Indeed, in Jean-Philippe's text messages to Roya and Elkie that were introduced, he does not state that he is on his way, or in, Jacksonville. (See IV 607-608) Accordingly, the taxicab did not drop Jean-Philippe at the victim's apartment, but instead, at the rear of the apartment complex. (See XV 816)

The Initial Brief says (IB 41) that he went to the "apartment

door to discuss their relationship." One does not "discuss a relationship" with a tire jack. One does not discuss a relationship by misrepresenting oneself as a delivery person. One does not discuss anything by immediately assaulting two residents. Jean-Philippe said nothing as he barged, bashed, stabbed, and slashed. The only thing Jean-Philippe communicated that night was, through his actions, his cold and extensively calculated intent to kill Elkie. Indeed, Jean-Philippe did not even testify at the trial regarding his intentions.

Jean-Philippe repeatedly claims (IB 42, 48) that the murder was "maddening" and "frenzied." This overlooks Jean-Philippe sneaking back into Jacksonville, being dropped off at the rear of the apartment complex, waiting for the victim to return home, preparing by retrieving the car jack, deceiving at the door, and immediately perpetrating his intent over a protracted period. This also overlooks the medical examiner's testimony that the victim's wounds did not indicate that the way Elkie was cut and stabbed was inconsistent with a frenzy.

The Initial Brief argues (43-44, 47-48) that Jean-Philippe really did not bring the murder weapon to the apartment because he brought a car jack to the apartment then killed the victim with a knife. This overlooks Jean-Philippe's use of the car jack to bash Roya upside the head and barge his way inside, where he then cut and slashed the victim 52-53 times and also inflicted

bruises and abrasions that the victim. He came to the apartment with a deadly weapon, the car jack, and demonstrated his lethal intent from the git-go. Switching to another deadly weapon after he arrived is not a defense to CCP, as Davis illustrates. "Best laid plan" is not an element of CCP.

The Initial Brief suggests (IB 44, 49) that there can be no CCP since Jean-Philippe tried to kill himself, but CCP entails a state of mind concerning a murder of another person and state of mind leading up to it. While attempted suicide might be evidence of a mental state that could be relevant to CCP, it does not bar it. Indeed, here, without the Defendant's testimony and without a mental health expert's testimony, there is no evidence whatsoever that makes any of Jean-Philippe's injuries inflicted **after** he implemented his plan relevant to his state of mind leading up to murdering Elkie, when he flew to Jacksonville and deceived his way into access to the victim and slashing, cutting, and stabbing her 52 to 53 times. Accordingly, the trial court found no statutory mental mitigation, which is uncontested on appeal. And, even if there had been statutory mental mitigation, it would not have precluded a finding of CCP. See, e.g., Silvia v. State, 60 So.3d 959, 970-71 (Fla. 2011)("a 'defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the ability to experience cool and calm reflection, make a careful plan or prearranged

design to commit murder, and exhibit heightened premeditation.'")(citing Evans v. State, 800 So.2d 182, 193 (Fla. 2001); Owen v. State, 862 So.2d 687, 701 (Fla. 2003) (rejected defendant's claim that his mental illness must negate the CCP aggravator). See also, e.g., Gill v. State, 14 So.3d 946, 957, 962 (Fla. 2009)(multiple prior suicide attempts; "presence of mental illness does not automatically make a finding of CCP inapplicable where the facts otherwise establish that the murder was committed in a cold, calculated and premeditated manner without pretense of justification").

Thus, the facts on which the Initial Brief relief relies (IB 44-51) in discussing several cases are incorrect or incomplete. Jean-Philippe did not kill Elkie in a "panic[] or "spur of the moment" (IB 45). The "domestic dispute" (IB 45) and "fail[ed] marriage" (IB 46) added to the evidence of CCP rather than tending to "negate" it. The absence of a stab wound to the heart (IB 48) overlooks the extreme injuries to the victim all over her body, including, not only the defensive wounds but also seven or eight of the stab wounds that were "potentially fatal" (XV 982).

Moreover, cases in which this Court upheld CCP (See IB 49-51) are precedent for determining when there are sufficient facts for CCP, not when the facts are insufficient for CCP. Indeed, here, Davis (IB 49-50), as discussed supra, supports affirming

the trial court's finding of CCP here.

**C. Harmless Error.**

The does not "concede error" (IB 51) for all the reasons that the trial court found CCP and for all the reasons discussed in this brief. However, if somehow, CCP is struck, the State respectfully submits that the prior violent felony and the extreme HAC, both very weighty aggravators, support a holding of harmless error affirming the death sentence here.

**ISSUE III: WAS THE TRIAL COURT UNREASONABLE IN GIVING GREAT WEIGHT TO HAC? (IB 52-54, RESTATED)**

After a correct recitation of applicable law and principles (See V 992), the trial court found the following record-grounded facts in support of giving great weight to the HAC aggravator:

> On the night of her murder, Elkie endured fifty-two (52) or fifty-three (53) sharp force injuries, as well as six (6) or seven (7) blunt force injuries ....[FN15] Elkie's own husband treated her body in the most brutal of fashions, stabbing her in her head, neck, nose, lip, jaw, abdomen, back, arms, and chest. The Medical Examiner's photographs of Elkie show, in addition to the numerous stab wounds, gaping knife wounds to the back of her arms, an upper lip sliced in two and an ear that was almost completely cut off. The Medical Examiner photographs speak more eloquently than these feeble words, not only to the location of Elkie's wounds, but the extent, nature and manner thereof. All evidence points to a painful, long death.
>
> In a manner consistent with Elkie's death, revealed by the evidence and the Medical Examiner photographs, Ms. Gordon testified that Elkie was continuously screaming out in pain. As if the pain of the flesh wounds was not enough, some of the knife wounds passed through Elkie's lungs,[FN16] making it extremely difficult for her to breathe. There were multiple defensive wounds to her arms and hands, evidence of Elkie's courage as she fought for her life, [S.]’s life, and Ms. Gordon's life. But she was

no match for *her husband*, who literally put a knife into her skull.[FN17]

Elkie was alive when all of the wounds were inflicted upon her. According to James Gibson, an engineer with the Jacksonville Fire and Rescue Department, Elkie was alive, never lost consciousness, and remained aware of what was happening from the time he encountered Elkie at the apartment until he left her in the emergency room a[t] Shands Jacksonville Hospital. Elkie died from blood loss due to the numerous wounds. Elkie lived this most horrific nightmare for a substantial period of time. The Defendant - mercilessly and without conscience - tortured Elkie, stabbing nearly every area of her body over a period of minutes.

When 911 was called and medical help arrived, they saw an alive and conscious Elkie lying on the floor, head turned toward the door, softly uttering 'Help me, help me.' Unfortunately, because the Defendant had not yet been located and the scene was not secured, more precious time passed before anyone could provide medical assistance to Elkie.

To heighten Elkie's agony, Elkie was fully aware of the presence of her only child just a few feet away, screaming and crying out in the bathtub. While struggling to breathe, begging for her life, her child remained her concern. During the fight for her life, Elkie was heard by neighbors outside the apartment begging for [S.]'s life, stating something to the effect, 'God help me. Please don’t kill my baby.' While the brutal scene had quieted by the time help arrived, [S.] could be heard crying and screaming from the bathroom, a sound that no doubt pierced the ears - and the heart - of a dying Elkie, a mother who lay helpless on the floor, unable to assist her child.

The Court finds that the murder of Elkie was heinous, atrocious, and cruel. The Defendant murdered Elkie without conscience, showing no mercy, and in a manner intended to inflict the most suffering possible. **This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed.**

FN15. Prior to being stabbed, Elkie watched as the Defendant forcefully hit her sister in the head with a deadly weapon.

FN16. Some of the knife wounds also passed into Elkie's liver.

> FN17. As discussed supra, the blade of one of the four bloody knives found in the kitchen area was obviously bent, leading one to reasonably infer that was the knife that penetrated Elkie's skull.

(V 992-94, bold and underlining in original) Standing on its own, the trial court's order merits affirmance.

ISSUE III argues that the trial court was unreasonable in assessing great weight to HAC because Jean-Philippe murdered the victim in a frenzy. While Jean-Philippe is correct concerning the standard of review, he is incorrect in applying it here.

As a preliminary matter, the State continues to contest Jean-Philippe's self-serving conclusion that he killed Elkie in a frenzy or out-of-control emotional state. As discussed in ISSUE II, the failure of the marriage was proved as a motive for the killing, and there is no evidence that required the trial court to conclude that Jean-Philippe was in an out-of-control frenzy. Indeed, as discussed in ISSUE II, the facts of this case prove to the contrary.

The Initial Brief, however, is correct concerning the standard of appellate review: The standard for reviewing the trial-court's weight of an aggravator is abuse of discretion, and therefore the reasonableness of finding HAC. Compare, e.g., Hess v. State, 794 So.2d 1249, 1265 (Fla. 2001)("weight assigned to a mitigating circumstance is within the trial court's discretion and is subject to the abuse of discretion standard") with Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.

1980)("where no reasonable man would take the view adopted by the trial court").

As the non-prevailing party below, it is Jean-Philippe's appellate burden to demonstrate that the trial court's great-weight was unreasonable. ISSUE III fails to meet this burden.

**As a matter of law**, the premise for Jean-Philippe's claim is incorrect in his focus on the murderer's perspective to evaluate HAC. Instead, as the trial court properly observed, citing authorities (V 992), the victim's perspective is the focus for HAC. For example, Hernandez v. State, 4 So.3d 642, 654, 669-70 (Fla. 2009)(quoting Brown v. State, 721 So.2d 274, 277 (Fla. 1998), and Lynch v. State, 841 So.2d 362, 369 (Fla. 2003)), where the trial court had afforded "great weight" to HAC, upheld finding HAC and summarized its principles: "'[T]he HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death.' ... Furthermore, we have held that '[i]n determining whether the HAC factor was present, **the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator**.'"

Similarly, Orme v. State, 25 So.3d 536, 551-52 (Fla. 2009)(collecting cases), relied upon details of the injuries to the victim and evidence of the victim's "aware[ness] of her impending death" in upholding HAC even though the evidence did

not show that the defendant "enjoyed the suffering of his victim." In Orme, the victim struggling for her life, like here, supports HAC: "Evidence of Redd's struggle indicates that Redd was aware of her impending death." Id. at 551.

Here, as the trial court analyzed, from Elkie's perspective, HAC abounded. Moreover, here, affording great weight is consistent with other cases. See, e.g., Tai A. Pham v. State, 70 So.3d 485, 491 n.2, 497-98 (Fla. 2011)(HAC, great weight; upheld sufficiency for HAC; victim stabbed six times, high degree of pain, defensive wound, daughter present); Rigterink v. State, 66 So.3d 866, 971-74 (Fla. 2011)(HAC, great weight, multiple stab wounds, defensive wounds; HAC not contested, but upheld proportionality).

Thus, the victims wounds in Banks v. State, 46 So.3d 989, 992, 994, 1000 (Fla. 2010), included 14 stab wounds at varied locations on the body, 6 or more "hard stabs," abrasions and contusions, "[t]he Victim attempted to defend herself against this attack, and was conscious and aware throughout the attack," and "[s]he ultimately died from a loss of blood due to the stab wounds to her heart." There, the trial court assessed "very great weight" to the HAC. While Banks did not review the weighting, it relied on the trial court's finding of HAC in holding that the death penalty was proportionate. Here, Elkie's wounds were more extensive than the victim's wounds in Banks.

Francis v. State, 808 So.2d 110, 134-35 (Fla. 2001), upheld the trial court's consideration of HAC, among other aggravators. There, one victim was stabbed 20 times and another victim was stabbed 16 times. One victim had no defensive wounds. There, the medical examiner testified that "the victims could have remained conscious for as little as a few seconds and for as long as a few minutes." Here, the victim's stab wounds and struggle for her life were far more extensive, and she was "conscious" far longer than a few minutes. There, viewing another victim being attacked was a factor, and here Elkie saw Jean-Philippe bash Roya in the head and knew her son was vulnerable in the apartment, as witnesses testified that they heard the child screaming while Elkie was still at the scene.

Here, the suffering that Jean-Philippe inflicted upon Elkie's lingered as she cried out for help when the police and Rescue arrived.

Morrison v. State, 818 So.2d 432, 439, 454-55 (Fla. 2002), upheld finding HAC, which the trial court gave "great weight." There, the defendant inflicted a grievous knife wound to the victim's neck. There, "one cut [was] deep enough actually to nick the victim's vertebrae." In Morrison, the victim's "vocal cords were rendered useless." In Morrison, "the victim died by effectively drowning in his own blood." Here, while the victim did not drown in her own blood, Jean-Philippe inflicted numerous

offensive and defensive wounds on the victim, and her ability to use her vocal cords left artifacts proving an extended torment more than sufficient for HAC and its great weight.

In conclusion, the trial court reasonably assigned great weight to HAC, meriting affirmance.

**ISSUE IV: IS THE DEATH SENTENCE PROPORTIONATE? (IB 55-63, RESTATED)**

With a 12-to-0 jury recommendation of death (IX 1661-63; V 958), the trial court correctly found the very weighty aggravators of HAC, CCP, and prior violent felony (V 982-VI 1014; see ISSUE II, ISSUE III, supra); moreover, unlike many murderers, Jean-Philippe was intelligent and raised with abundant opportunities, education, and emphasis on knowing right from wrong (See, e.g., VIII 1425-38, 1487-97) but he discarded his opportunities and upbringing when he secretly flew to Jacksonville and taxi'd to the rear of the apartment complex, armed himself with a deadly weapon by extracting the car jack from the victim's car, concealed his identity from Elkie by pretending to be a pizza delivery person, barged inside and took Roya out of the picture by bashing her in the head with the car jack, and stabbed, cut, and slashed Elkie about 52 times over an extended period as she attempted to defend herself and screamed for help.

In the face of weighty aggravation and the opportunities that Jean-Philippe threw away, the Initial brief continues to attempt

to rely upon the incorrect assumption that this was a frenzied killing. The evidence in the record negating Jean-Philippe's frenzy argument has been discussed supra, especially in ISSUE II, buttressed through detailed record-citing discussion of the SUPPLEEMNTAL ISSUE and Facts supra.

Albeit a non-dispositive matter, the State disputes Jean-Philippe's assertion that the record he cites (IB 56, 58) at "17 R 1240, 1245, 1384, 1388" (See also same testimony in VII 1379 et seq.) shows that he suspected that Elkie was committing adultery. The State clarifies that, at XVII 1240 & 1245, James Gordon, a former Navy law enforcement officer, was testifying. Gordon had testified that, on July 22, 2009, he responded to a "dispute" call (XVII 1237) in which he encountered Elkie and Jean-Philippe in a hotel room (XVII 1238). Elkie indicated to the officer that Jean-Philippe would not let her leave and that Jean-Philippe would not give her military ID and cell phone to her. (XVII 1239) When the officer told Jean-Philippe to return the cell phone to Elkie, Jean-Philippe hit the cell phone on the table, breaking it. (XVII 1240) The officer testified that because Jean-Philippe saw other calls on the cell bill, he said he suspected that Elkie had feelings for someone else. (XVII 1240, 1244-45) Elkie told the officer that the phone number on the bill was a classmate friend. (XVII 1245) Thus, no suspicion of adultery was shown in those transcript pages.

At pages 1384 and 1388, Andres Valencia was testifying in the penalty phase for Jean-Philippe. He was a lifelong friend of Jean-Philippe. (XVII 1382) He did not testify about any suspected adultery at page 1384. On cross-examination, he testified about Jean-Philippe losing rank because of a DUI and misappropriating funds (XVII 1387-88) and being required to pay $600 a month in restitution (XVII 1388). He testified that he knew that Elkie wanted a divorce, Jean-Philippe flew to Rhode Island on August 21st, and he had no idea that Jean-Philippe returned to Jacksonville on August 26th. His testimony actually corroborated the secret nature of Jean-Philippe's trip to Jacksonville the day he killed Elkie. (See XVII 1389-90; see also, e.g., Jean-Philippe's mother did not know about his 8/26 trip to Jacksonville, at VIII 1440-41)

In any event, even if Jean-Philippe did suspect Elkie of having a relationship with another man, it would have supported his motive to kill her, and, given all the facts discussed supra, there was no probative evidence of any resulting frenzy in the immediate situation surrounding the murder.

Turning directly to ISSUE IV's claim, given the totality of the facts in this case and the totality of strong aggravation and weak mitigation, the death penalty is proportionate.

Here, the facts supported the trial court giving **great weight** to each of the aggravating factors, See also ISSUE II & ISSUE

III supra:

- **Prior violent felony** based upon Jean-Philippe (as he tricked Elkie into opening the door and barged his way inside) bashing Roya in the head with the car jack "with such force, the blow knocked off Ms. Gordon's glasses and caused her to stumble" (V 991-92);

- **HAC**, described in detail in the trial court's order (V 992-94) and discussed in ISSUE III supra, based on Jean-Philippe inflicting extensive and painful injuries on the victim, her repeated cries for help, and her son audibly crying in the apartment while she was helpless to assist him due to Jean-Philippe's actions; and,

- **CCP**, described in detail in the trial court's order (V 995-96) and discussed in ISSUE II supra, based on Jean-Philippe's surreptitious return to the Jacksonville apartment, waiting for Elkie to return to the apartment, retrieving the tire jack from Elkie's car, perpetrating the pizzaman ruse to trick Elkie into opening the door, barging inside without attempting to communicate in any way, hitting Roya in the head with the tire jack, and "then turn[ing] his attention to Elkie.'

In contrast with these very serious aggravators that the trial court lawfully weighted "great[ly]", there was **no statutory mental mitigation**. The mitigator of **no prior significant history** was weakened due to Jean-Philippe's prior DUI and prior Larceny scheme. (V 997-98) The remaining mitigation was non-statutory and not weighty, with most of the mitigators afforded only slight or little weight and, at most, given "some weight." (See VI 1001-1014) Indeed, Jean-Philippe's background presents a picture of a person raised with opportunities that many people do not have. He was raised in a good family that loved him. He was raised to know right from

wrong. Instead of consistently taking advantage of these opportunities, he chose to plan to kill Elkie and implemented his plan with compound deception and compound and multifaceted brutality.

Compared with other cases, the death sentence imposed on Jean-Philippe was proportionate.

Here, each of the aggravators is generally considered to be especially weighty. HAC is one of the most serious aggravators in the statutory sentencing scheme. See, e.g., Douglas v. State, 878 So.2d 1246, 1262 (Fla. 2004). The prior violent felony aggravating circumstance is also "especially weighty." See, e.g., Frances v. State, 970 So.2d 806, 817 (Fla. 2007)(citing Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996)); Duncan v. State, 619 So. 2d 279, 284 (Fla. 1993) (affirming death sentence where sole aggravating factor was prior second-degree murder). In addition, CCP aggravator is one of the "most serious aggravators set out in the statutory sentencing scheme." Larkins v. State, 739 So.2d 90, 95 (Fla. 1999).

The HAC facts in Tai A. Pham v. State, 70 So.3d 485, 497-498 (Fla. 2011)(10-2 jury vote), were not as extensive as the HAC facts here. There, the victim was stabbed six times. There, like here, the trial court found HAC, CCP, and prior violent felony. There, while the committed-during-a-felony was also found, here the facts of the HAC were more serious, and, unlike Tai A. Pham

there was no statutory mental mitigation. Tai A. Pham, 70 So.3d at 500, upheld proportionality and provided several additional comparable cases that support proportionality here:

> Under the totality of the circumstances, Pham's sentence is proportional in relation to other death sentences that this Court has upheld. *See*, *e.g.*, *Banks v. State*, 46 So.3d 989 (Fla. 2010) (death sentence proportionate in a stabbing murder where the jury recommended death ten-to-two and the trial court found three aggravators: prior violent felony, HAC, and CCP; and five mitigating circumstances: low IQ, brain deficit, antisocial personality traits, not the only participant, and difficult youth); *Merck v. State*, 975 So.2d 1054 (Fla. 2007) (death sentence proportionate for stabbing murder where trial court found prior violent felony and HAC aggravators, statutory age mitigator, and several nonstatutory mitigators, including a difficult family background, alcohol use the night of the murder, and a capacity to form positive relationships); *Singleton v. State*, 783 So.2d 970 (Fla. 2001) (death sentence proportionate for stabbing murder where trial court found prior violent felony and HAC aggravators as well as substantial mitigation, including extreme mental or emotional disturbance, impaired capacity to appreciate criminality of conduct or to conform conduct to requirements of law, and that defendant was under influence of alcohol and possibly medication at time of offense); *Blackwood v. State*, 777 So.2d 399 (Fla. 2000) (death sentence proportionate for strangulation murder where trial court found HAC aggravator, one statutory mitigator, and eight nonstatutory mitigators).

Indeed, here the aggravating factors are as serious, or more serious, as those in Banks (stabbing, prior violent felony, HAC, CCP), Merck (prior violent felony, HAC), Singleton (stabbing, prior violent felony, HAC), and Blackwood (HAC).

Here, the mitigation is weaker than in each of the foregoing cases. Banks included a low IQ, brain deficit (moderate weight), and a difficult youth. Merck included statutory age mitigator,

difficult family background, and alcohol use the night of the murder. Singleton included both statutory mental mitigators. And, Blackwood included, like here, the one statutory mitigator of no prior significant history of prior criminal conduct, but there, the trial court's "significant" weight gave it more weight the trial court's "some" weight here.

Moreover, in Blackwood, 777 So.2d at 405, the trial court found the mitigator of "(1) emotional disturbance at the time of the crime (moderate weight)," whereas here the trial court merely found that the defense established, through lay witnesses, that this murder was "generally out of character for the Defendant," the Defendant had been "acting down and depressed," and "the Defendant's grades had significantly dropped in the months prior to the murder," all of which were given only "slight weight." (VI 1009) Further, in Blackwood, unlike Jean-Philippe's obvious intelligence here, the trial court found "(8) appellant's low intelligence level (some weight)."

Here, as in Blackwood, HAC would have outweighed all of the mitigation. Blackwood, 777 So.2d at 412, reasoned:

> While only the HAC aggravating circumstance was present in this case, the trial court found that this aggravating circumstance outweighed the mitigating circumstances, including that the appellant and the victim had been involved in a relationship that ended several months before the killing.
>
> ...

> [W]e cannot conclude that the trial court abused its discretion in determining that the HAC aggravator outweighed the mitigators.

Here, Elkie's extensive injuries and protracted struggle for her life are at least as aggravating as the strangulation in Blackwood.

In Rogers v. State, 783 So.2d 980, 885-87, 1002-1003 (Fla. 2001), the victim was stabbed only twice, and like here, there were bruises and evidence of a struggle. There, one of the aggravators was HAC and the other one was pecuniary gain, whereas here the greatly-weighted HAC is accompanied by greatly weighted prior violent felony and greatly weighted CCP. There, some weight was afforded to the impaired capacity mental mitigator, whereas here is no comparable mental mitigation. There and here, childhood, family, and employment related mitigation was found but not afforded much weight. And there, unlike here, "drinking alcohol for a few hours on the day he came into contact with the victim" was also found (little weight). This case is proportionate to Rogers.

Everett v. State, 893 So.2d 1278, 1287-88 (Fla. 2004), upheld the death penalty where there were three aggravators, including HAC, "one of the most serious statutory aggravators." There, like here, the defendant went to the victim's home armed with a weapon and attacked the female victim. In Everett, like here lack of significant history of prior criminal activity was found

but not afforded much weight, there "little weight." Other mitigation in Everett was more significant than the mitigation here. Everett included "statutory mitigating factors [of] … under the influence of 'some type of substance,' … lack of a significant history of prior criminal activity." Also mitigating were "family background," "drug use," "remorse," "good conduct in custody, the alternative punishment of life imprisonment, and appellant's confession." This case is proportionate to Everett.

Hudson v. State, 538 So.2d 829, 829-30, 831 (Fla. 1989), upheld the death sentence where the defendant went to the victim's residence at night armed with a knife and used it to kill her, like here. The victim screamed, like here, and the defendant stabbed her to death, like here. There were two aggravators in Hudson, previous conviction of a violent felony and committed during an armed burglary, and here the HAC and two other aggravators are at least as weighty as Hudson's. In Hudson, the trial court "gave little weight to[] the statutory mitigating factors of being under extreme mental or emotional disturbance, impaired capacity to conform conduct to requirements of law, and Hudson's age (22 years)." Here, there was no statutory mental mitigation.

In contrast with the foregoing cases that support proportionality in this case, the cases that Jean-Philippe tenders are not comparable to the situation here.

Unlike here, in White v. State, 616 So.2d 21, 25 (Fla. 1993)(IB 61), there was no CCP, the defendant "committed this offense 'while he was high on cocaine,'" and a statutory mental mitigator applied. Unlike the aggravation and mitigation here, there, "only one valid aggravating circumstance in this case is offset by the substantial mitigating evidence in the record."

Unlike the jury's 12-0 death recommendation here, Douglas v. State, 575 So.2d 165, 167 (Fla. 1991)(IB 61-62), was a jury override, reasoning, "A trial court may not impose the death penalty over a jury's recommendation of life imprisonment unless the facts suggesting death are so clear and convincing that no reasonable person could differ."

In Ross v. State, 474 So.2d 1170, 1172 (Fla. 1985)(IB 62), unlike here, the trial court expressly rejected CCP. There, while HAC was present, the trial court erred in "not consider[ing] as mitigating factors the sentencing phase testimony of the appellant's family members relating to the appellant's drinking problems, the testimony of the state's key witness, Harwood, that the appellant confessed he had been drinking when he attacked the victim, or the evidence that the killing was the result of an angry domestic dispute in which the victim realized the appellant was having difficulty controlling his emotions." There, unlike here, evidence did support a frenzied murder committed **while** the defendant was actually

arguing with his wife.

Unlike here, in Halliwell v. State, 323 So.2d 557 (Fla. 1975)(IB 62), the defendant was a decorated war veteran who became enraged when the murder victim bragged about beating "Sandra," with whom he was very close. Here, the evidence disproved a frenzied killing, and Jean-Philippe did not kill under the banner of spontaneously defending another person.

Unlike the CCP here, Farinas v. State, 569 So.2d 425, 431 (Fla. 1990), indicated that unjamming a gun was insufficient for CCP. Unlike here, in Farinas, there was evidence that the defendant was "under the influence of extreme mental or emotional disturbance." In Farinas, unlike Jean-Philippe's planning and deception here, the defendant, immediately prior to shooting the victim, spontaneously displayed his anger at the murder victim.

In conclusion,[10] this case is not like the cases that Jean-

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[10] In a footnote, the Initial Brief also interjects (IB 60-61 n.10) complaints about the prosecutor's guilt-phase closing arguments. However, Jean-Philippe fails to specify how those arguments were improper. As such, any claim based upon those arguments are not preserved at the appellate level. See, e.g., Bryant v. State, 901 So.2d 810, 827-28 (Fla. 2005)(state habeas petition alleging IAC claim concerning appellate counsel, "cursory"; "waived"); Whitfield v. State, 923 So.2d 375, 379 (Fla. 2005)("merely conclusory arguments"); Lawrence v. State, 831 So.2d 121, 133 (Fla. 2002)("Lawrence complains, in a single sentence ... bare claim is unsupported by argument); Sweet v. State, 810 So.2d 854, 870 (Fla. 2002)("a sentence or two";

Philippe cites, and it is proportionate to several cases on which the State relies. The death sentence merits affirmance.

**ISSUE V: RING CLAIM. (IB 64-74, RESTATED)**

ISSUE V attempts to re-litigate the application of Ring v. Arizona, 536 U.S. 584 (2002).

This Court has "repeatedly rejected constitutional challenges to Florida's death penalty under *Ring*." Ault v. State, 53 So.3d 175, 205-206 (Fla. 2010)(citing Bottoson v. Moore, 833 So.2d 693 (Fla. 2002); King v. Moore, 831 So.2d 143 (Fla. 2002)). It should reject Jean-Philippe's challenge.

In Florida, in contrast with Arizona, the maximum penalty for First Degree Murder is, and has been, death. Compare §782.04(1) with §775.082, Fla. Stat.[11] A jury determination is not required to increase the penalty. In Florida, Ring does not apply.

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unpreserved). Indeed, the prevailing party-below should not be required to construct the Appellant's argument and rebut its own construction. "For the record," the State notes that, in this penalty-phase issue, Jean-Philippe is not complaining about penalty-phase arguments, and the jury had been fully instructed on its duty. Further, the prosecutor's arguments were grounded on the evidence and therefore proper advocacy. For example, Jean-Philippe's determination in overcoming the victim struggling for her life and Jean-Philippe callously disregarding the presence of the child in the apartment were relevant to premeditation.

[11] In Peterson v. State, 2012 WL 1722581, *23 (Fla. 2012), Justice Pariente dissenting, joined by two other justices disagreed: "I conclude that the maximum penalty after a finding of guilt for first-degree murder in Florida is life imprisonment."

Even if Ring applied in Florida, Frances v. State, 970 So. 2d 806, 822 (Fla. 2007), collected cases and summarized that "the prior violent felony aggravating circumstance," applicable here (V 991-92), renders Ring inapplicable.

Moreover, here the jury explicitly found, during the guilt phase, beyond a reasonable doubt, that Jean-Philippe committed an aggravated battery. (XVI 1171-73; IV 614-16) This unanimous jury finding satisfies Ring.

Yet further, the jury in this case recommended death by a vote of 12 to 0. (IX 1661-63; V 958) As this Court explained in State v. Steele, 921 So.2d 538, 544-46 (Fla. 2005), a jury recommendation of death is a jury finding at least one aggravator, thereby satisfying any Ring requirement. Steele noted that this Court's interpretation of Ring is "is consistent with the United States Supreme Court's assessment of Florida's capital sentencing statute" in Jones v. United States, 526 U.S. 227, 250-51 (1999)(discussing Hildwin v. Florida, 490 U.S. 638 (1989)). See also Ault v. State, 53 So.3d 175, 205 (Fla. 2010)(rejecting a Ring challenge and noting "to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt the existence of at least one aggravating circumstance listed in the capital sentencing statute"; citing Steele). Therefore, pursuant to both this Court's and the United States Supreme Court's view of a jury's

recommendation of death, Ring is satisfied.

Here, where the jury recommended death and then the Judge sentenced Jean-Philippe to death, the death penalty process included a jury determination plus a judge's determination. Arizona's Ring-era scheme was judge-only sentencing. Adding a judge on top of a jury does not violate the Sixth Amendment right to a jury trial. Here, the Defendant has had his jury determination, and he has had the added benefit of a second opportunity to convince the Judge.

For each of the foregoing reasons, Jean-Philippe has been provided more than Ring requires.

## CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death.

## CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on June 1st, 2012: David A. Davis; Assistant Public Defender; Office of the Public Defender; Leon County Courthouse; 301 South Monroe Street, Suite 401; Tallahassee FL 32301.

## CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

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By: STEPHEN R. WHITE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 159089
Attorney for Appellee, State of Fla.
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 Ext. 4579
(850) 487-0997 (FAX)

AG#: L11-2-1241