IN THE SUPREME COURT OF FLORIDA

LESLY JEAN-PHILIPPE
Appellant,

v. **CASE NO. SC11-1274**

STATE OF FLORIDA,

Appellee.
/

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

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGE(S)**

TABLE OF CITATIONS

(Continued)

CASES **PAGE(S)**

TABLE OF CITATIONS

(Continued)

CASES **PAGE(S)**

TABLE OF CITATIONS

(Continued)

CASES **PAGE(S)**

TABLE OF CITATIONS

(Continued)

CASES **PAGE(S)**

TABLE OF CITATIONS

(Continued)

CONSTITUTIONS AND STATUTES **PAGE(S)**

OTHER SOURCES

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INITIAL BRIEF OF APPELLANT

I. PRELIMINARY STATEMENT

LESLEY JEAN-PHILIPPE was the defendant in this capital case, and he will be referred to in this brief as either appellant, defendant, or by his proper name. References to the Record on Appeal will be by the volume number in Arabic numbers followed by the appropriate page number, all in parentheses.

STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Duval County on January 7, 2009, charged Lesly Jean-Philippe, with one count of first-degree murder, burglary of a dwelling, and aggravated battery with a deadly weapon (1 R 25-27). The State also filed a notice that it intended to seek a sentence of death for the first-degree murder allegation (1 R 28). Jean-Philippe filed several death penalty related motions, and one motion to dismiss the burglary allegation, which the court granted (3 R 546, 7 R 1270). The defendant proceeded to trial before Judge Adrian Soud on only the murder and aggravated battery .

As to those charges, the jury found the defendant guilty as charged on both counts (4 R 614-16). At the subsequent penalty phase portion of the trial, the jury unanimously recommended a death sentence (5 R 958). The court, following that verdict, sentenced the defendant to death. Justifying that punishment, the court found in aggravation:

1. The defendant was previously convicted of the aggravated battery.

2. The murder was especially heinous, atrocious, or cruel.

3. The defendant committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(5 R 991-95)

Mitigating the death sentence, the court found:

1. The Defendant had no significant history of prior criminal activity. (Some weight)

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

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

4. The Defendant was physically talented, excelling in football and track. (Little weight)

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

6. The Defendants family is very close. (Some weight).

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

8. 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)

9. The Defendant served in the United States Navy. (Some weight)

10. The Defendant's judgment was impaired. (Little weight)

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

12. The Defendant's courtroom demeanor was excellent. (No weight)

13. The Defendant can contribute to the improvement of other prisoners. (Slight weight)

The court adjudged the defendant guilty of both the murder and aggravated battery. It sentenced him to serve 15 years in prison for the aggravated battery, and it is to run concurrently with the death sentence (5 R 975, 10 R 1837).

This appeal follows.

STATEMENT OF THE FACTS

By August 2009, Lesly Jean-Philippe and his wife, Elkie, had been married 3 years (13 R 496) They had one child, or rather, Elkie had a five-year-old son, Sanai, that the defendant treated as his own (13 R 442). Elkie was in the Navy and worked as a medic (15 R 863-64). Her husband had also served in that branch of the military, but he had left the service, and was enrolled in a local college in Jacksonville where they lived (13 R 497, 501).

By August and perhaps as early as July,[1] the marriage had foundered, and for Elkie, at least, divorce was the only solution she saw for the relationship (13 R 434).[2] She saw a social worker at the Jacksonville Naval Base, and during their meeting, the defendant showed up, wanting to talk with his wife (17 R 1224-27). The social worker would not let him see her, and she closed and locked her office door. When the defendant tried to get in she called security, who talked with him

[1] In July, Elkie was attending some training in Virginia. The defendant visited her, and sometime during the evening of July 22, he looked at the telephone numbers on her cell phone. He became suspicious when he saw the same number several times, and Elkie could only say that they came from "somebody she was going to school with that was a friend of hers." (17 R 1245). He became angry, and when base security showed up at the naval lodging he took the phone and broke it (17 R 1241). He also had her military identification card, which he gave to security (17 R 1242).

[2] On August 21, she took off her wedding ring and yelled "I can't do this anymore" and threw the ring in the garbage (15 R 870-71).

(17 R 1231). After Elkie's appointment was over, security escorted her to her car, and she left (17 R 1232).

Even though Elkie wanted to end her marriage, Jean-Philippe loved his wife, did not want a divorce, and was trying to work things out (13 R 439, 498 501). Apparently, to give them some time and space to think about their future, Jean-Philippe returned to his parent's home in Rhode Island on the 22nd of August to stay for a while (15 R 913). They sent text messages to each other concerning on their marriage, and Elkie promised she would call him (15 R 915-16). About the 25th of the month, matters had deteriorated so much that he realized he needed to return to Florida (13 R 434). The next day, he repeatedly tried to reach her by his cell phone, wanting to "Just talk to me please." (14 R 923) She did not want to do so, telling her husband that "My phone is going to die so stop calling" and "I only have 15% of battery left. Stop calling." (15 R 924). Undeterred, he called and sent text messages to her sister, Roya Gordon, who had flown in from California for a visit on the 26th (13 R 440, 443).[3] Ms. Gordon told Jean-Philippe her sister did not want to talk with her, and she "did not want to be bothered by him." (13 R 444-45). Ignoring that request, as Elkie and her sister drove from the airport to Elkie's

[3] Elkie and her sister planned to go to Miami the next day to attend a birthday party (13 R 499).

apartment, he called Roya and Elkie "constantly back to back, like the whole ride to the apartment our phones were just going off." (13 R 445)[4] Indeed, telephone records showed he tried at least 60 times over the course of three hours to reach his wife while he was in Rhode Island (15 R 936-45).

The defendant flew into the Jacksonville airport at 7:14 p.m. on the 26th, and within minutes of the plane's landing he tried again to reach his wife or Roya. He made at least 14 attempts over the next two hours, the last call being made at 9:52 p.m. (15 R 944-46).

He took a cab from the airport to the apartment where they lived, and he got there no later than 8:30 p.m. (15 R 812, 820). Before going to the front door, however, he took a tire jack from Elkie's car (see exhibit 57, 14 R 694, 697), which was parked near the apartment he and his wife lived in (14 R 694, 697).

About an hour later (13 R 510), Jean-Philippe went to the front door, knocked, and said he was the "pizza guy." (13 R 448). Elkie was running water for Sanai's bath and trying on clothes her sister had bought for her (13 R 447-48). Roya did not feel right, and she grabbed a knife as she and her sister went to the door (13 R 448-49). When Elkie opened it, he came inside, and hit Roya on the

[4] At trial, telephone records indicated Jean-Philippe had called his wife's cell phone repeatedly.

head with the tire iron (13 R 449-50). She grabbed her cell phone, went into the bedroom and then into the bathroom unsuccessfully trying to call 911 (13 R 451). While there, she heard her sister screaming and asking him, "No, stop, please, things of that nature." (13 R 452). She never heard him scream or say anything (13 R 452). At some point the screaming stopped, and it seemed as if they were talking, but she then heard louder, longer screams, "it just wasn't stopping." (13 R 453-54).

Roya fled the house, and as she left she saw her sister on the floor, and the defendant with his hand up in the air (13 R 455). He stabbed Elsie 53 times. Several nonfatal wounds were in her head, neck, nose and face (15 R 963-63). She had 10 wounds to her back and 7 or 8 stab wounds to her chest penetrated her lungs, and they would have been fatal (15 R 967-69). She also had defensive wounds on her hands and arms (15 R 973-77). There was also evidence of 6 or 7 blunt force injuries (14 R 958-59).

Death was not instantaneous, and she died by bleeding to death (15 R 956, 983).

Ms. Gordon ran outside with blood coming from the wounds she had suffered (13 R 512). She also carried the knife (13 R 457). Now able to get a signal, she called 911 (13 R 457). Neighbors responded to the screaming they heard, and one

of them threw a bottle through the apartment window and said "The cops are on the way . . . I was the cops for them to open the door." (13 R 535). At one point, the door was cracked open, but the neighbor stayed outside (13 R 535-36). About 15 minutes later the police arrived (13 R 512). When they went inside the apartment they saw Elsie laying on the floor, bleeding (14 R 610). She was not dead, but feebly asked for help (13 R 564). An ambulance arrived and took her to a nearby hospital where she died from the many stab wounds, but especially the ones to her lungs (1 R 616; 15 R 982).

The police also saw Jean-Philippe laying on the floor of the apartment, face down (13 R 566-67). Two knives were nearby (13 R 570, 572). He had been stabbed superficially multiple times in his chest and twice to his abdomen. More seriously he also had wounds on both sides of his neck (16 R 1061-62, 1065). He was unconscious, in shock, and had stopped breathing (13 R 545; 16 R 1063, 1065).

The police also found Sanai in the bathtub, screaming for "mommy and daddy." (13 R 597)

Jean-Philippe's parents were from the Caribbean island of St. Martin, and they had moved to the United States when he was four years old (17 R 1268). He

did very well in school (17 R 1269), making his mother and father very happy (17 R 1269). He always went to church and got along well with his sister (17 R 1283, 1285). He was nice to the members of his church, was a youth leader, and a "very popular person, very affable, very well mannered, very well liked." (17 R 1323, 1336). He did remarkably well in school. He also was a gifted athlete, and he was on the high school football and track teams, eventually earning varsity letters in 7 sports(17 R 1346; 18 R 1399). His football team won the state championship his junior year, and he was its captain his senior year (17 R 1832-83). He was a hard worker (18 R 1398). For him to have killed his wife was the last thing his friends would have expected from him (18 R 1402). Indeed, he had told friends and his sister he was deeply remorseful for murdering Elkie (18 R 1407, 1416).

After he graduated from high school, his parents wanted him to go to college, but he enlisted in the Navy (17 R 1287). He had legal problems while in the service. In December 2005 he was arrested for underage drinking and given the military's "nonjudicial" punishment (18 R 1438). By then he was an E-3, and he was reduced in grade to an E-2 for that and given an oral reprimand (18 R 1439). A month later he was tried and convicted in a "special court martial" for wrongfully appropriating funds (18 R 1439). For those offenses, he was jailed for 30 days,

fined, and reduced in rank to an E-1 (18 R 1440). He was allowed to stay in the Navy, however, and when he left in September 2008, he had been promoted to the rank of E-4, had received excellent work evaluations, and had been given a commendation for his service (18 R 1443).[5]

After he left the Navy, he enrolled at Florida State College of Jacksonville in 2008 and attended school continuously until 2009 (17 R 1313), doing very well generally until the summer 2009 semester when he failed every subject (17 R 1314-1316). During the Spring 2009 semester he did so well in Biology that the instructor used his lab notebooks as an example for the rest of the class (17 R 1320).

[5] Jean-Philippe had originally enlisted for a term of 6 years, but that was reduced to 4 years (18 R 1440). There is no evidence that the Navy had placed any bar to him re-enlisting if he had so desired.

SUMMARY OF THE ARGUMENTS

ISSUE I. Over defense objection, the court allowed the State to introduce the telephone records of the defendant's, his wife's, and his sister in law's cell phones for August 22 and 26, 2009. Not only that, it permitted the State to present the telephone records of the text messages between the defendant, his wife, and his sister-in-law for August 26. That was error for several reasons. First, although §90.902(11), Fla. Stat. 2009, allows for self-authentication of the telephone records, the State produced only such documentation for the defendant's cell phone. It did not do so for Elkie's or Roya's telephones. Second, if the records may have been admitted as a business record and an exception to the rule against hearsay, the record of the text messages was hearsay, for which no exception was provided. That is, the text messages were themselves hearsay within hearsay, and as such were inadmissible. Finally, even though the State produced the records of calls and text messages from the defendant's cell phone, it never showed that he made the calls.

ISSUE II. In justifying a death sentence, the court found Jean-Philippe committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. That was error because the evidence

showed that on August 26, 2009, the defendant was hardly clearly thinking, or showed any methodical deliberation in his planning. To the contrary, the slow simmer that had been building for months finally erupted that day in an act of total criminality. By the evidence of his frantic, almost desperate efforts to talk with his wife, his choice of a murder weapon, the almost random stabbings, and the obvious explosion of emotions on the evening of August 26, 2009, this was not a cold, calculated, and premeditated murder.

ISSUE III. The court improperly gave the heinous, atrocious or cruel aggravating circumstance great weight without ever addressing the legal and factual point that the multiple wounds reflected the defendant's mental and emotional state and loss of control. Killings involving many wounds are indicative of a frenzied, panicked attack and reflect a causal relationship between the nature of the wounds and the mitigation regarding the defendant's loss of control at the time of the homicide. This Court has held that in such cases, the HAC factor is of diminished aggravating value since the manner of death is a product of the defendant's mental status.

ISSUE IV. A death sentence is disproportionate for this terrible crime. Murders committed in the sway of passion that often arise when a marriage is in its

final days often do not deserve a death sentence. Such was the case here. Jean-Philippe obviously was obsessed with the possibility of his wife ending their marriage. From the August confrontation at the social worker's office to the incessant telephone calls and text messages, he repeatedly, repeatedly, repeatedly, ad nauseam, tried to talk with his wife. For his part, she did not simply tell him it was over, she did something worse: she ignored him. The slow, simmering emotions evident in July and August erupted into a full, roiling boil on August 26. Murderers who commit their killings under the sway of such inflamed passions do not merit a death sentence

ISSUE V. Although this Court has concluded that the United States Supreme Court's ruling in Ring v. Arizona, 536 U.S. 584 (2002) has no application to Florida's death sentencing scheme, Jean-Philippe raises this issue here in the hopes that the brilliance of the argument he makes will convince it to reverse its courts, and if it does not, he has preserved the issue so that perhaps he can convince another court of this Court's error.

ARGUMENT

ISSUE I:

THE COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE OF SEVERAL TEXT MESSAGES ALLEGEDLY BETWEEN JEAN-PHILIPPE, HIS WIFE, AND HIS SISTER-IN-LAW, A VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSERS.

Before trial, the State filed a "Notice of Intent to Rely on Certification of Business Record." (3 R 544). Jean-Philippe in turn filed a "Motion to Object to Notice of Intent to Rely on Certification of Business Record, or in the Alternative, Motion in Limine." (3 R 571-76) The defendant alleged that telephone records of his cell phone, including the telephone numbers he called and the text messages he sent and received should have been excluded because they were (1) Testimonial hearsay, and admitting them would violate the holding of Crawford v. Washington, 541 U.S. 36 (2004), and (2) They violated this Court's holding in Brooks v. State, 918 So. 2d 181 (Fla. 2005) in that the person who provided the information about the hearsay had no personal knowledge of what was said, and the deputy who would testify about the telephone records company would not have that required knowledge (7 R 1308; 15 R 896, 933-34).

At the hearing on the motion, the State said there was no confrontation issue, and it intended to rely on §90.902(11), Fla. Stat. (2009), which allows a party to "self authenticate"

> (11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring 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, provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.

Specifically, it said it intended to use only telephone calls, and not "text messages." (7 R 1278)

The court denied the defendant's motion (7 R 1280).

At trial, the State called Sergeant Bobby Frank Bowers of the Jacksonville Sheriff's Office to testify, not only as to the phone calls but a redacted list of text messages sent and received by Jean-Philippe, presumably his friends, his wife, and his sister-in-law.

The court erred in its ruling for several reasons: (1) The text messages were "double" hearsay, which, in this case was inadmissible; (2) The business records exception to hearsay rule did not apply to the text messages in this case; and (3) The State never verified that the messages ostensibly sent from the defendant's cell phone were, in fact, sent by him.

This Court should review this issue and its subsidiary parts under an abuse of discretion standard of review. Tumblin v. State, 29 So. 3d 1093 (Fla. 2010).

1. The court's ruling and the evidence admitted.

At trial, Sergeant Bowers presented the text messages between Jean-Philippe, his wife, his sister-in-law, and a couple of friends. It also presented evidence of the times he called his wife and sister-in-law but they never answered his calls.

> **MR. MOODY**: The first text that was sent back on 8/21/09?
> **MR. BOWERS:** It states, "I got to talk to you about something big."
> **MR. MOODY:** ... 8/22/09.
> **MR. BOWERS:** ... "I missed my flight. ... Me and her are just talking about a lot of shit right now."... It says, "Aite hold ya head up and be strong bro."
> **MR. MOODY:** Is there an outgoing message in response to that? ...
> **MR. BOWERS:** It says, "I will, thanx man." ...
> * * *

MR. MOODY: victim in this case, Elkie Shea Jean-Philippe? ...

MR. BOWERS: If you need proof that it's not just me, look at the weather channel, I don't think I'm going to be going home today because of the hurricane,

MR. MOODY: ... at 8/22/09, ...

MR. BOWERS: "I'm coming home today. Ask your brother about the details and please keep this quiet, so far it's only going to be you, Rachelle, Linda and your brother who know."

MR. MOODY: ... 8/22/09 GMT ... From a Leonard Jusme? ...

MR. BOWERS: It says, "What happened with y'all talking?"

MR. MOODY: ... outgoing response ...

MR. BOWERS: It says, "We did but we still need some time apart I believe. I'll try figure out things through the week I'm up here. I'm about to turn my phone off because the plane is literally taking off now."

MR. MOODY: ... 8/22/09, GMT time, to Elkie Shea Jean-Philippe? ...

MR. BOWERS: It states, "Call me, I dunno when I'm leaving yet."... It says, "My flight is being delayed again due to the weather. Right now I'm hoping I at least can make it home tonight." ... "Please call me."

MR. MOODY: ... have there been any incoming responses to this phone - -

MR. BOWERS: No, ... "I landed safely but can you please call me the first chance you get, please, I wanna talk to you."

MR. MOODY: ... dated August 23rd, 2009? ... Elkie Shea Jean-Philippe's phone on August 23rd, 2009, at 0201 hours GMT time? ...

MR. BOWERS: It says, "Call me tonight when you get home. I'm not trying to convince you to do anything I've just realized some things and I wanna say it to you now rather than later, this is not a frightening situation or anything like that, trust me, please call."...

MR. MOODY: And what is that response?

MR. BOWERS: She replied, "K." ... It says, "Are you still " Anderson's house?" ... "I'm trying to put sanai to bed and clean the bed off. I'll call you in a few, or I'll call in a few."

MR. MOODY: ... text message from a Leonard Jusme? ...

MR. BOWERS: It says, "You guys haven't talked still, I'm assuming." ... It says, "Not since Saturday night, I'm planning on calling her tonight though.

MR. MOODY: Is there another outgoing text message from defendant's phone to Leonard Jusme following that up? ...

MR. BOWERS: "I heard her talkin to my mom yesterday though, her mind is still the same." ... It states, "What trips me out though is the fact that every single time says it she always says my heart says yes, but my mind says no.' My thing is why ever mention that notion if you keep saying you're prolly not going to change your mind."

MR. MOODY: ... reply text from Leonard Jusme ...

MR. BOWERS: It states, "Girls are walking conflictions." ... It says, "I think your mother is key to a resolution." ... "Yeah but she's also been talking to her mom who is for the divorce."

MR. MOODY: And is there a response by Leonard Jusme ...

MR. BOWERS: "Walking conflictions brotha."

MR. MOODY:... outgoing response ...

MR. BOWERS: "This wait is kilin me though, time is both a gift and a curse." ...

MR. MOODY: ...an incoming text from Leonard Jusme concerning that conversation? ...

MR. BOWERS: "Indeed. All you can do, though."

MR. MOODY: And then on 8/25/09 ... is an outgoing text to Elkie Shea Jean-Philippe, the victim's cell phone? ... And from the defendant's cell phone? ...

MR. BOWERS: "Open your heart to God. With him and through him all things are possible."

MR. MOODY: And on 8/26/09 at 04:02... there another outgoing text that is coming from the defendant's cell phone to the victim's cell phone?

MR. BOWERS: Yes.... "Trust in the Lord with all your heart and don't lean on your own understand. In all things acknowledge him, and he shall direct your way. (Proverbs 3:35-6)." ...

MR. MOODY: ... incoming text message from Leonard Jusme again.

MR. BOWERS: It says, "how you doing today brotha?"

MR. MOODY: And that was from 8/26/09, 13:50 Green ... outgoing text from the defendant's ...

MR. BOWERS: "Trying to keep my head above water."

MR. MOODY: Is there an incoming text response ...

MR. BOWERS: It states, "You're going to be alright, can't keep a good haitian down. How's home at least?"

MR. MOODY: ... outgoing text ...

MR. BOWERS: It states, "Bored outta my mind, you busy?"

MR. MOODY: ... on 8/26/09 at 13:15 GMT time; ... another outgoing text by the defendant's cell phone to Elkie Shea Jean-Philippe? ...

MR. BOWERS: "Call me when you go to lunch please."

MR. MOODY: Is there an outgoing text message ... to Roya or Tasgna Gordon? ...

MR. BOWERS: "Hey when you get a chance can you call me or text me please, thanx."

MR. MOODY: ... on 8/26/09 ... incoming text from a Ruth Laurent?

MR. BOWERS: "How r u?"...

MR. MOODY: And is there another incoming text at 15:59 GMT time from Ruth Laurent? ...

MR. BOWERS: It states, "I'll take that as good."

MR. MOODY: ... an outgoing text response...

MR. BOWERS: It states, "Not really."

MR. MOODY: ... on 8/26/09 at 18:57 ... incoming text message from the victim's cell phone, Elkie Shea Jean-Philippe? ...

MR. BOWERS: It states, "My phone is going to die so stop calling.

MR. MOODY: ... response from the defendant's cell ...

MR. BOWERS: "Just talk to me please."

MR. MOODY: ... text message from the defendant's cell phone at that time to the victim's cell phone? ...

MR. BOWERS: "If we're gonna get a divorce then fine, whatever but I don't want this to end with you hating me."

MR. MOODY: another outgoing text from the defendant's cell phone? ...8/26/09 at 19:00 ...

MR. BOWERS: "You told me to go to him and told me fuck you, seriously how am I supposed to react to that."

MR. MOODY: ... defendant's cell phone to the victim's cell phone now at 8/26/09 at 19:01 GMT time? ...

MR. BOWERS: It states, "I know what I did was fucked up but I just want to talk, seeing the way you are now. . . I'll listen to reason and I won't push the issue of us anymore."

MR. MOODY: ... a response from the victim's cell phone ...

MR. BOWERS: It states, "I only have 15 % of battery left. Stop calling."

MR. MOODY: ... response by the defendant's cell...

MR. BOWERS: It says, "Talk to me please."

MR. MOODY: incoming text message from the victim's cell phone to the defendant's cell phone? ...

MR. BOWERS: It states, "Later."

MR. MOODY: And is there an outgoing text message from the defendant's cell phone to the victim's cell phone? ...

MR. BOWERS: It states, "Jus pick up and hear me out please, if you just talk to me I won't keep calling."

MR. MOODY: ... text message from Roya Gordon ...

MR. BOWERS: It states, "I just called u." ...

MR. MOODY: And that's to the defendant's cell phone? ...

MR. BOWERS: It states, "I was flying. I just got to philly. What's up?" ...

MR. MOODY: ... victim's phone to the defendant's phone? ...

MR. BOWERS: I'm going to the airport. I'll talk to you later, my battery is very low."

MR. MOODY: ... Is there an incoming text message from Roya Gordon? ...

MR. BOWERS: It states, "Please don't call me anymore." ...

MR. MOODY: ... what I'm showing you a Power Point presentation of the actual phone records that you were ... beginning on his cell phone records on the date of the incident, August 26th, 2009; correct? ...

do you recognize the phone numbers for the victim in this case Elkie Shea Jean-Philippe?

MR. BOWERS: Yes, I do. ...

MS. BUNCOME-WILLIAMS [defense counsel]: Your Honor, I'm objecting, as I did before, as to personal knowledge.... yet still they're using the witness presently who is not a certified business, um, person who certified the record to go ahead and delineate each one and explain it, um, where he is not the person who has personal knowledge regarding that record. ...

THE COURT: ... if he wants to testify as to time and essentially read the document, that I will permit. The interpretation beyond that I'm not going to permit, so to that extent the objection is sustained. But if wants to reference, look at a time and essentially read it, that I'll permit....

MR. MOODY: Sir, I guess we can go row by row, but basically every column on this entire page, would you say this record reflect that it was a call made from the defendant's cell phone to the victim's Elkie Shea Jean-Philippe's cell phone? ... And the various times associated would be going down them?

MR. BOWERS: 12:05, 12:06, 12:06, 12:06, 12:06 - - --check for completness12:07, 12:07, 12:07, 12:07, 12:08, 12:08, 12:09, 12:10, 12;12, 12:12, 12:16....

MR. MOODY: ... from the defendant's cell phone being made to the victim's cell phone? ...Jean-Philippe. And, sir, are those all again on August 26th, 2009? ...

MR. BOWERS: The times are 12:23, 12:33, 12:39, 12:51, 12:51, 12:52, 12:57, 12:59, 1:03, 1:07, 1:08, 1:09. ... 1:10, 1:22, 1:34, 1:45, 1:47, and 1:50, 2:28, 2:37 and 2:55.

MR. MOODY: On the next page, sir ... defendant's cell phone, but this one going to the other victim, Roya Gordon? ...

MR. BOWERS: The time was 2:25 p.m.

MR. MOODY: ... originated from the defendant's cell phone to the victim's cell phone? ...

MR. BOWERS: Yes. 2:57, 2:57, 2:58, 2:58, 3:01, 3:02, 3:02, 3:02, 3:02, 3:03, 3:03, 3:04, 3:05 and again at 3:05. ... 8/26/09, still from Providence, ... were 3:08 and 3:21.

MR. MOODY: ... defendant's cell phone and was made to Roya's cell phone?

MR. BOWERS: were 3:21 and 3:22. ...

MR. MOODY: ... defendant's cell phone to Elkie Shea Jean-Philippe?

MR. BOWERS: At 3:28 p.m.

MR. MOODY: ... defendant's cell phone to Roya Gordon's cell phone?

MR. BOWERS: The times are 3:29, 3:29 and 3:35. ...

MR. MOODY: ... defendant's cell phone being made to Elkie Shea Jean-Philippe's cell phone? ...

MR. BOWERS: Are 4:46, 4:47, 5:01, 5:13, 5:24 and 7:14.

MR. MOODY: And so specifically now we're in Jacksonville,... the servicing area, and that is the call that was at 7:14 p.m.; correct? ... And what time was that flight arrival?

MR. BOWERS: 7:14, the time of the first call.

MR. MOODY: ... defendant's cell phone and were made to Elkie Shea Jean-Philippe's cell phone? ...

MR. BOWERS: The times are 7:23, 7:25 and 7:28. ... The times are 8:01, 8:47 and 8:56. ...

MR. MOODY: ... now to Roya Gordon's cell phone? ...

MR. BOWERS: The times are 8:56 and 8:57. ...

MR. MOODY: ... defendant's cell phone ... Elkie Shea Jean-Philippe's ...

MR. BOWERS: The times are 8:58 and 9:08.

MR. MOODY: ... to the cell phone of Roya Gordon? ...

MR. BOWERS: 9:08 and 9:16 p.m. ...

MR. MOODY: ... defendant's cell phone to Roya Gordon's cell phone? ...

M**R. BOWERS:**9:18 p.m. ...

MR. MOODY: ...the last call, ... believe is at 9:52 p.m., ... the defendant's cell phone to the cell phone of Elkie Shea Jean-Philippe? ...

(15 R 909-46)

2. The several areas of law implicated by the court's ruling.

Section 90.803(6), Fla. Stat. (2009). provides the starting point for the controlling law in this case. It provides:

> (6) Records of regularly conducted business activity.—
>
> (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 © 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.
>
> (b) Evidence in the form of an opinion or diagnosis is inadmissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.
>
> (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 upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. 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.

Specifically, in order for a party to take advantage of this law, it must prove the record was:

(1) made at or near the time of the event recorded;

(2) by or from information transmitted by a person with knowledge;

(3) kept in the course of a regularly conducted business activity; and

(4) that it was the regular practice of that business to make such a record

Brooks v. State, 918 So. 2d 181, 193 (Fla. 2005)

Now, §90.902(11) quoted above merely provides a mechanism for the self authentication of business records. They become so, if, accompanying those records, there is a declaration or certification by the custodian that the record was made near the time of the event in question by a person with knowledge of the matters. The declaration must also say that the record was kept in the courts of regularly conducted activity and that it was made as a matter of regular practice. Yisrael v. State 986 So. 2d 491, 496-97 (Fla. 2008); Ehrhardt's Florida Evidence, 2010 edition, §902.11.

In this case, the State provided that declaration only as to Jean-Philippe's telephone (3 R 585). Bobbi Jones, the "Legal Compliance Analyst" with the telephone company provided "call detail records" that amounted only to a record of

what other telephone number originated on the cell phone ostensibly belonging to the defendant, what number was dialed, when, and how long the conversation, if any lasted. That was its exhibit 86 (3 R 586-600). State Exhibit 87 (4 R601-608) contains text messages not only from the defendant's cell phone, but from Roya Gordon, and Elkie. As to that exhibit there is no similar affidavit from Mr. Jones. Hence, as a preliminary matter, the State failed to satisfy the predicate requirements of §90.902(11) as Exhibit 87 to the text messages.

If this Court can get past the predicate problems of Exhibit 87, other more substantive difficulties exist. Merely satisfying or providing an alternate predicate to admitting the records from the telephones does not thereby allow whatever was in that record to be admitted. That is, even though the record of the cell phone calls and text messages was admitted under §90.902(11), those phone calls and text messages are not thereby admissible if they were otherwise inadmissible hearsay. Pridgeon v. State, 605 So. 2d 1004, 1006 (Fla. 1992)

In Brooks, the State introduced the testimony of Billie Madero, an employee of Florida's Department of Revenue. She testified that she had received a telephone call from someone who said she was Rachel Carson, and she had requested that a case be opened against Walker Davis, Jr., for child support. Davis and Brooks were accused and convicted of later killing Ms. Carson and her three-month-old

daughter. Ms. Madero recorded the information the victim gave her on a template sheet of paper that contained responses to a series of standard questions. Over defense objection, the court allowed the recorded responses as a business record exception to the rule against hearsay.

On appeal, this Court held that the trial court erred (though harmlessly) in admitting this testimony

> The admission of Madero's testimony violates the proscription against hearsay evidence. . . .To the extent the individual making the record does not have personal knowledge of the information contained therein, the second prong of the predicate requires the information to have been supplied by an individual who does have personal knowledge of the information and who was acting in the course of a regularly conducted business activity. . . . If this predicate is not satisfied, then the information contained in the record is inadmissible hearsay, unless it falls within another exception to the hearsay rule.
>
> The business record exception does not permit the admission into evidence of the hearsay statements within the Department of Revenue record. The information in the record regarding the alleged relationships between Carlson, Stuart (the infant), and Davis was not within Madero's personal knowledge, but was supplied by Rachel Carlson, who, obviously, was not acting within the course of a regularly conducted business activity. . .
>
> We thus conclude that the trial court erred in admitting Madero's testimony regarding the substance of the Department of Revenue record.

Id. at 192-193 (citations omitted.)

Thus, to admit "hearsay within hearsay" both statements must be admissible under some exception to the hearsay rule. Harris v. Game & Fresh Water Fish Commission, 495 So. 2d 806, 809 (Fla. 1st DCA 1986).

Other cases from the District Courts of Appeal follow this standard law. In Thomas v. State, 993 So. 2d 105, 106-109 (Fla. 1st DCA 2008) the court erroneously and not harmlessly erred when it admitted an email written by Natalie Zepp to Michelle McCord, both employees of the apartment complex where the victim and Thomas shared an apartment. Thomas objected to the email as a whole, but also to the introduction of statements within the email that Ms. Zepp, the employee who wrote the email, reported the victim Baldwin made to her: "This resident called and says that she's had someone (Steven Thomas) living in her ap[artmen]t for the past year that is not on the lease and now she wants him out but he refuses to leave. What can we do?"

In reversing Thomas's murder conviction, the First DCA said:

> The trial court erred in admitting the underlined portions of the email. While the employee who wrote the email had firsthand knowledge of Ms. Baldwin's desire to evict-and could presumably, if asked, have so testified-there was no evidence that she had personal knowledge of any of the surrounding circumstances. Although the learned trial judge appeared to recognize this distinction-and ruled handwritten notes made by the employee as to Ms. Baldwin's reasons for wanting to evict Mr. Thomas inadmissible as hearsay-he

> nevertheless allowed the State to introduce the email without redaction.
>
> The email contains two "levels" of hearsay. The email is itself hearsay because it is an out-of-court statement being offered for the truth of the matters asserted. See §90.801(1)8, Fla. Stat. (2007). It is Ms. Zepp's account of what Ms. Baldwin told her. Its accuracy depends both on Ms. Zepp's veracity and on Ms. Baldwin's veracity. Within the email-the first tier of hearsay-lies another layer of hearsay: the statement made by Ms. Baldwin to Ms. Zepp, viz., "that she's had someone (Steven Thomas) living in her ap[artmen]t for the past year that is not on the lease and ... he refuses to leave." There was no evidence that Ms. Zepp had firsthand knowledge of these matters. Rather, her "knowledge" that Ms. Baldwin "had someone (Steven Thomas) living in her ap[artmen]t for the past year that is not on the lease and ... [that] he refuses to leave" was hearsay. She was recounting statements she said she heard Ms. Baldwin make. Ms. Baldwin's statements were not, of course, business records themselves.
>
> As recounted by Ms. Zepp, they were not admissible, because they did not qualify for an exception to the hearsay rule in their own right. See §90.805, Fla. Stat. (2007).

Thomas at 107-108.

Similarly, in M.S v. Department of Children and Families, 6 So. 3d 102, 103-105 (Fla. 5th DCA 2009), the Fifth DCA reversed a lower court's dependency ruling relying on Brooks. In that case, an investigator with the Department of Children and Families, took the child, M.S., into protective custody based largely on the erratic behavior of the mother. He based that decision largely on "the correspondence with child protective services in Montgomery County, Maryland, where the family had lived prior to Florida."

The father objected that the records should not be admitted as business records because they contained hearsay and were unreliable, but the court admitted them. That was error, the Fifth DCA held because

> To the extent the individual making the record does not have personal knowledge of the information contained therein, the second prong of the predicate[for admission of statements under §90.803(6)] requires the information to have been supplied by an individual who does have personal knowledge of the information and who was acting in the course of a regularly conducted business activity. .. .If this predicate is not satisfied, then the information contained in the record is inadmissible hearsay, unless it falls within another exception to the hearsay rule. . . .The records in this case consisted mostly of inadmissible hearsay statements from unknown persons in Maryland.

3. Applying this law to the facts of this case.

Brooks, Thomas, and M.S. clearly support Jean-Philippe's argument. Specifically, assuming the State properly established the predicate for admitting the telephone company's records of the text messages sent to and from Jean-Philippe's, Elkie, and Ms. Gordon's cell phones, it never provided any exception, as the State also failed to do in Brooks, and the other cited cases, for admitting the text of what the telephone had recorded. There is no evidence Sergeant Bowers had any personal knowledge of what was "texted." This was, in short, a classic "hearsay within hearsay" problem. The prosecutor never showed that the jury could

legitimately hear or see the text messages that the telephone company had recorded. As such, as in Brooks, and the other cases, that was error.

There is, however, another perhaps more subtle error. The State never established that the textual hearsay, though it may have come from the defendant's cell phone, also came from him, personally. That is, it never authenticated that the defendant sent the text messages (15 R 933-34).

In Manuel v. State, 524 So. 2d 441 (Fla. 1st DCA 1988), Tyrone Kirkse, who was present at the scene of the robbery Manuel had been charged with committing, said that before trial a man identifying himself as "Clarence" had called him several times and that on one occasion he had asked Kirkse to "Look out for me." He told him "no," at which point the man said, "Think about it." Kirkse knew the defendant only because he had seen him at the robbery and knew his first name was Clarence.

On appeal, the First District Court of Appeal held the trial court should have excluded that part of Kirkse's testimony. It did so because the State had never produced any proof that the "Clarence" identified in the telephone call was Clarence Manuel. "By failing to unambiguously connect the defendant's voice to that of the telephone caller, the prosecution did not lay a proper predicate for the admissibility of the telephone communications." Id. at 736.

Similarly, and perhaps more significantly, here, the State never clearly connected the text messages it said came from the defendant's cell phone to the defendant. That is, it never proved any evidence that Jean-Philippe sent his wife and sister -in-law anything. Hence, as in Manuel, the Court erred in allowing the jury to consider in the guilt and penalty phases of his trial this evidence. Accord, Hargrove v. State, 530 So. 2d 441, 443 (Fla. 4th DCA 1988)("By failing to properly connect the appellant's voice to that of the caller, the prosecution did not lay a proper predicate for the admissibility of the telephone communication and its admission into evidence was error.")

In short, the State never established that Sergeant. Bowers had any personal knowledge of who sent the text messages.

Now, this argument applies not only to the text messages, but also to the numerous calls made from the defendant's cell phone, which Elkie or her sister never answered (15 R 936-46). The State again presented no evidence that Sergeant Bowers somehow knew the defendant had made them.

Of course, the State can regretfully agree that Jean-Philippe is correct, but argue that whatever error occurred was harmless, or had no effect on the jury's

verdict. Manuel; Brooks, cited above. It can make that argument, but it should also fail to convince this Court.

The State's major problem of proof at trial lay in establishing the intent Jean-Philippe had when he stabbed his wife. Was it premeditated, or only that of one having a "depraved mind" that would justify a conviction for second degree murder. Of course, the number of stab wounds supports a finding of premeditation, Davis v. State, 26 So. 3d 519, 530 (Fla. 2009)("Multiple stab wounds deliberately aimed at vital organs support a finding of premeditation for first-degree murder.") (citation omitted). But there are other cases where the defendant repeatedly stabbed his or her victim and did not thereby commit a first degree premeditated murder. Green v. State, 715 So. 2d 940 (Fla.1998) ("[E]vidence that victim suffered stabbing and blunt trauma wounds along with manual strangulation, which was cause of death, was insufficient to prove that defendant had the requisite premeditation required for first-degree murder). So, stab wounds, without more, do not, as a matter of fact or law, compel a first degree premeditated murder conviction.

But the prosecution's case became stronger when it also argued, as it repeatedly did in its Initial and final closing arguments, that Jean-Philippe formed

his murderous intent long before he burst into the apartment. How do we know that? Look to the message texts. They show it.

> [Y]ou could, through the evidence, you could sense his agitation, his frustration. You heard from these text messages on I think August 24th, a couple of days earlier, he's talking to his friend. How's it going? Many, this waiting is killing me. Time is a gift And a curse. How true that was. Because it's all he could think about, how is he going to stop this from happening."

(16 R 1078-79)

> And not only Elkie, but you heard how he was continuously calling Roy, Hey, where are you? What's going on? Have you talked with your sister? You heard at how at one point, and I believe the record shows it's around 9:18, he called Roya again and she finally said, enough is enough, Don't call anymore. She wasn't rude abut it. She wasn't ugly about it. Her text even says, "Please don't call me anymore." It doesn't say "F you, leave us alone. It doesn't say, you know, Stop. Please don't call us anymore. And when that happened, that was it, his last hope was gone and he knew it. And he made that last call to Elkie at 9:52, and again Elkie didn't pick up.
>
> And it was at that point when he made that call that in a cold, thoughtful, premeditated manner, he walked to this car, he went to this trunk, unscrewed the tire jack, and armed with this tire jack, he walked down this hallway (publishing photographs), went to this door, and pretended to be a pizza guy.

(16 R 1079-80; See also16 R 1086-87, 1123-25)

The defendant, during his closing argument, rather than talking about the legitimate evidence, had to divert attention to minimizing the text messages. (16 R 1098, 1101-1102, 1108). He should not have had to do that.

Now, if the court erred in admitting this evidence in the guilt phase, the magnitude of the error became compounded in the penalty phase of the defendant's trial. There, the State again brought to the jury's attention the content of the text messages and the incessant calling to justify finding the Cold, Calculated, and Premeditated aggravator (9 R 1623-24).

Thus, the lower court erred in admitting the business records, and it was not a harmless error in either the guilt or penalty phases of the Jean-Philippe's trial.

This Court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial, or at least a new penalty phase hearing.

ISSUE II:

THE COURT ERRED IN FINDING THAT JEAN-PHILLIP COMMITTED THE MURDER OF HIS WIFE IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION, A VIOLATION OF HIS EIGHTH AMENDMENT RIGHTS.

In justifying sentencing Jean-Philippe to death the court found that he had committed the murder in a cold, calculated, and premeditated manner without any pretense of legal or moral justification:

> 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 produce of cool and calm reflection rather than 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, this 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 that the Defendant's marriage was failing and its demise was imminent. After leaving 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.[6] 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 Sanai 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.[7] This facts speak clearly to the cold, calculated and premeditated designed 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 his 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

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[6] 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 Defendant's friends and family during the penalty phase, had they known Defendant's plans to go to Jacksonville, they would have advised the Defendant not to go and would have done everything possible to persuade and/or keep him from going.

[7] 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).

> Florida at the 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.**

(5 R 995- 96)(Emphasis in court's order.)

The court erred in finding this aggravator, and this Court should review this issue under a competent substantial evidence standard of review. Williams v. State, 37 So. 3d 187 (Fla. 2010); Conde v. State, 860 So. 2d 930, 953 (Fla. 2003); Smith v. State, 28 So. 3d 838 (Fla. 2009).

This Court has aided a trial judge faced with the daunting task of evaluating and applying the statutorily created cold, calculated and premeditated aggravator. In Jackson v. State, 645 So. 2d 84, 89 (Fla. 1994), and more recently in Lynch v. State, 841 So. 2d 362, 372 (Fla. 2003), this Court provided the analytical approach for the sentencing judge to use:

> Thus, in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), ...that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), ... that the defendant exhibited heightened premeditation

(premeditated), and that the defendant had no pretense of moral or legal justification.

Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994); accord, Lynch v. State, supra (Citations omitted, emphasis in opinion.) Additionally, and particularly important in this case, if the court wants to use this aggravator to justify a death sentence, the proof must establish it beyond a reasonable doubt. Specifically, as to each of the four elements of this aggravator, They must individually be proven beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). See Geralds v. State, 601 So. 2d 1157, 1163 (Fla.1992)("The State is required to establish the existence of all aggravating circumstances beyond a reasonable doubt."). Where the evidence regarding this aggravator is entirely circumstantial, as it is in the case, the State can satisfy the burden of proof only if the evidence is "inconsistent with any reasonable hypothesis which might negate the aggravating factor." Id.

While the court in this case recognized and used the analysis articulated in Jackson, (5 R 995) its findings in support of this aggravator fail to satisfy at least two of its elements as this court has defined them. Specifically, the evidence it used, and significantly the evidence it ignored, refute the element that Jean-Philippe had a cold and careful plan to commit murder.

1. The coldness of the murder.

As recognized by the court, the Jean-Philippe marriage was failing and "its demise was imminent" (5 R 995), yet it gave that significant factor no consideration as mitigation (5 R 1000-1012). Of course, this Court has rejected marital status or domestic troubles as a per se mitigating factor of such significance that, as a matter of fact or law, justifies a life sentence. Spencer v. State, 691 So. 2d 1062 (Fla. 1997); Lynch v. State, 841 So. 2d 362, 377 (Fla. 2003)(This Court "does not recognize a domestic dispute exception in connection with death penalty analysis.") While domestic problems may not require a life sentence in the same way that mental retardation or youth do, the passions and inflamed emotions that uniquely can arise in those close personal relationships nonetheless present a strong reason to very carefully examine the justification for sentencing a murderous spouse to death. Santos v. State, 591 So. 2d 160 (Fla. 1991)("[T]he fact that the present killing arose from a domestic dispute tends to negate cold, calculated premeditation."); Porter v. State, 564 So. 2d 1060, 1065 (Fla.1990) (Barkett, J., dissenting)("I do not suggest that there is an "unrequited love" exception to the death penalty. Nonetheless, this Court consistently has accepted as substantial mitigation the inflamed passions and intense emotions of such situations.") It is not the domestic dispute by itself that

negates the coldness or calculation of the murder, but the fact that because of the domestic dispute the defendant acted with inflamed passions and intense emotions. Indeed, in this case, but for the failing marriage, Jean-Philippe would not have killed his wife, and that he did so arose from the intense emotions deriving from what his wife may have done, or was doing to him by ignoring him.

That is, in Elkie's mind the marriage was over (13 R 434). In Jean-Philippe's it was in trouble, but it was not so weak that it was beyond salvaging, as he told his wife: "We can work it out." (14 R 820, 14 R 891) To give them some time to cool off and re-examine their relationship, he returned to his home in Rhode Island (15 R 913). He stayed there for some time, but he became suspicious his wife might be unfaithful (17 R 1240, 1245, 1384, 1388) when she could not or would not explain whose telephone numbers he had found on her cell phone (17 R 1240). He decided to return to Florida, perhaps to kill her, but as likely to confront her about her fidelity, and if possible, "work it out." (14 R 820, 891). There is no evidence that he snuck back into the state, as the court's order concludes (5 R 995).

Heightening his fears for the worse, he repeatedly and maddeningly tried to reach Elkie 76 times in the hours before knocking on their apartment door to discuss their relationship (14 R 936- 45). When she told him to stop calling her

because she claimed her cell phone battery was low (14 R 922, 924), he sent her a text message asking her to "Just talk to me please." (14 R 923). Apparently, he also called his sister-in-law because she also told him "Please don't call me anymore." (14 R 926).

Such maddening, incessant calling and recalling indicates a mind obsessed with his wife and their marriage. It demonstrates a frenzied man and a husband frantically trying to find out if his wife had remained true to him and wanted to save their marriage. The phone calls and the hasty return to Florida refute any notion that he coldly or calmly killed his wife. Other facts support that conclusion.

When he arrived at Jacksonville, he immediately went to his apartment (14 R 812). Now the court says he "patiently laid in wait" for his wife to return, but there is no evidence of that, or, rather he had little choice but to wait for her to return from the airport where she had gone to pick up her sister (5 R 995; 14 R 891). For all the evidence shows, he may very well have walked around the neighborhood, patiently waiting for her to return. That scenario makes more sense because when he knocked on the front door of the apartment, Elkie and Roya had been inside long enough for them to be trying on the clothes while Sanai was taking a bath (13 R 447).

Moreover, there is no evidence he brought the murder weapon to the apartment, which, as the court noted in a footnote, would have supported the CCP aggravator. Sireci v. Moore, 825 So. 2d 882, 886-87 (Fla. 2002). Indeed, in Carter v. State, 980 So. 2d 473 (Fla. 2008), this Court found the CCP aggravator based on the facts that Pinckney Carter had parked his truck outside the house of his former girlfriend, took a .22 caliber rifle that was hanging in the cab of the truck, and went to the house where he killed her, her new boyfriend, and her daughter. Id. at 478. Carter brought the rifle to the murder because it was in his truck, and had been there for some time. Jean-Philippe brought no weapon with him to his apartment but had to rummage in Elkie's car to find something. Moreover, when Roya opened the door, she met the defendant with a knife in her hand (13 R 448-49).

Additionally, Jean-Philippe may have gotten a tire iron from his wife's car, but it was not the murder weapon. The court, in fact, overlooked that crucial fact: "There were no words exchanged - no expressions of love, no apologies, and no request for reconciliation. . . . Immediately upon the door opening, the Defendant barged inside, hit Ms. Gordon in the head with the tire jack, and then turned all his attention to Elkie." (5 R 996)

After hitting Roya with the tire iron, he then apparently dropped it and searched for and found a knife to attack his wife. Thus, instead of bringing a tire iron to the apartment to kill her, he used a steak knife that he had found in the apartment. Now, it may have been conveniently laying somewhere, or it may have been in a drawer, but the point is that he never brought the murder weapon to the apartment, as Carter did. Instead, he used whatever he could find. That scenario, and especially using whatever weapon that happened to be available, fails to show the careful planning required to justify the CCP aggravator.

Additionally the defendant did not flee after attacking his wife, as Pinckney Carter did, but tried to kill himself immediately after he had stabbed his wife, another fact the court ignored in its analysis of this factor. Of course, the circumstantial evidence could support the theory that Jean-Philippe planned for this to be a murder suicide If so, that conclusion only further supports the notion that Jean-Philippe never carefully planned the murder, or carried it out with some methodical coolness.

In Hardy v. State, 716 So. 2d 761 (Fla. 1998), Hardy killed a law enforcement officer who had stopped him and three other companions who had driven around town until their car broke down. Hardy had a gun, and before the

officer showed up he had tried to give it to one of his friends who refused to take it. Once stopped the defendant realized the officer would find the weapon, and he became, as one friend later described him, paranoid and flinching. Hardy apparently made a spur-of-the moment decision to shoot the officer. After doing so, he tried to commit suicide.

In sentencing Hardy to death for the murder of the policeman, the trial court found the CCP aggravator. This Court rejected that finding, however, noting "A Suicide is not an action characteristic of someone who reflected on his decision to extinguish the life of another. Accordingly, it is just as likely that Hardy panicked and shot the officer as it is that his actions were the result of calm and cool reflection." Id. at 766.

Similarly, in this case, it is just as likely that Jean-Philippe acted under the emotional distress of the impending divorce when he killed his wife. As in Hardy, his actions were not the result of calm and cool reflection.

Other reasons support this conclusion. Suspicions of marital infidelity, since at least biblical times, have given rise to natural feelings of anger and rage that time barely assuages. Santos v. State, 591 So. 2d 160 (Fla. 1991)("[T]he fact that the present killing arose from a domestic dispute tends to negate cold, calculated

premeditation.") Indeed, even though this Court has said defendant's marital difficulties cannot automatically avoid death row for killing their husbands or more likely, their wives, Spencer v. State, 691 So. 2d 1062 (Fla. 1997), the heightened emotions arising from failing marriages or intimate relationships have nonetheless undermined the confidence a court must have in finding the murder of a wife or lover as particularly cold or calculated. Indeed, it is just because the defendant and his victim have been in a long term relationship and emotionally exposed themselves to their spouses that when that trust and intimacy have been violated a rejected husband or wife hurts the most. That pain can, and in this case, did, transmogrify into rage and anger.

The court acknowledged that this was a domestic killing, but rejected that as having any significance because it was "not a case of a frenzied murder born of passion after a spontaneous, unexpected argument." (5 R 996). Apparently, unless the defendant kills under the influence of some immediate, extreme emotional disturbance, a spousal killing cannot be done with any inflamed passions.

Now, to have said Jean-Philippe killed his wife in the heat of passion, may have stretched that defense to first degree murder beyond justification. But the simmering, frantic emotions that had been on a low heat for days, came to a rapid

boil when Elkie ignored and even snubbed her husband's pleas to talk, and his incessant efforts to do so. By the time he got to their apartment, he must have been angry and frustrated, and such emotions reduced the coldness of the subsequent murder and its calculation. The evidence, in short, was entirely consistent with a crime of irrational, heated passion brought on by a domestic dispute. Douglas v. State, 575 So. 2d 165 (Fla.1991). Accord Irizarry v. State, 496 So. 2d 822, 825 (Fla.1986); Ross v. State, 474 So. 2d 1170 (Fla.1985); Blair v. State, 406 So. 2d 1103 (Fla.1981); Kampff v. State, 371 So. 2d 1007 (Fla.1979); Chambers v. State, 339 So. 2d 204 (Fla.1976).

As such, the court erred in finding the murder to have been done with the coldness required to justify the CCP aggravator.

2. The careful plan or prearranged design.

The facts also belie any conclusion that the defendant had done some extensive calculation in planning his wife's death. Instead, what happened evinces only a "plan as you go" approach. For example, until he got to his house he had no weapon. Apparently realizing that lack, he did not try to get a knife or gun. Instead, he went to his car and pulled a tire jack out of the trunk. That, of course,

could be a weapon, and a deadly one at that, but it is not what one instinctively goes for when looking for a murder weapon.

Moreover, whatever planning, careful or not, that came up with the idea of using a tire iron, collapsed because Jean-Philippe never used it to kill his wife. Instead, he hit his sister-in-law on the head with it when Elkie answered his knock on the door after announcing he was the "pizza guy." (5 R 996) Now, if using the tire iron was part of his careful planning, he would have kept it after hitting Roya. Instead, he apparently discarded it and went for a steak knife. If there was careful planning or calculation in getting the tire iron there was none in getting and using the steak knife (14 R 661, 783). It could be a deadly weapon, obviously, but maybe not so obviously because one of the knives used was so flimsy that it bent (14 R 676).

Moreover, the lack of calculation or careful planning also emerges from the wounds Elkie suffered. None were to her heart, which a person who wanted to kill would have aimed for. Davis v. State, 26 So. 3d 519, 530 (Fla.2009)("Multiple stab wounds deliberately aimed at vital organs support a finding of premeditation for first-degree murder.") Instead, the scattered stabs about her upper and lower body evince a frenzied mind at work striking wherever he could. See, Christian v. State,

550 So. 2d 450, 453-54 (Fla. 1989)(McDonald, dissenting)(methodical execution where prison inmate stabs another inmate 26 times, including his eyes, spits in his face, and then throws him over the third floor balcony of the prison.) . Indeed, the fatal wounds to the lungs did not cause immediate death or even unconsciousness because Elkie remained conscious and alive for quite awhile after the attack (14 R 611, 615-16). The manner of death evinces no careful plan required by this murder to have been calculated.

What is more, after stabbing his wife, Jean-Philippe tried to kill himself, and almost succeeded, which is very strong evidence that he had no plan or design to kill his wife. For example, in Carter, cited above, after the defendant had killed his former girlfriend and her new boyfriend, he threw away the rifle that he had used to kill them, and fled to Mexico. The defendant in this case never did something similar. He never left the apartment or threw away the murder weapon. Instead he stabbed himself in the stomach and slashed his throat. That shows no planning or calculation. Other cases from this Court show what is needed to satisfy the calculation prong of this aggravator.

In Davis v. State, 2 So. 3d 952 (2008) Davis walked about 600 yards to the victim's trailer and carried a knife with him. He wore extra clothing so he could

change out of bloody clothing he would have once he had killed his victims. He also carried a bag in which to place them after the murders. At the trailer, he sat on the victims' front steps for between two and thirty minutes contemplating what to do, and he hid his knife while knocking on the door. He forced his way into the trailer after asking the victim a few questions and began stabbing her but stopped when another person entered the room. The prior planning and preparations for what to do after the murders show the calculation this Court expects murders to exhibit for the CCP aggravator to apply.

In Thompson v. State, 648 So. 2d 692 (1994), the defendant had worked at a cemetery but had been fired. On the day of the murders, he carried a gun and knife to the cemetery office and kidnapped two of its employees. He drove them to an isolated area and forced them to lie on ground before shooting the female victim in the back of the head, and shooting the male victim in the face and stabbing him nine times. Those murders were committed with the calculation required for application of the CCP aggravator. Harris v. State, 843 So. 2d 856, 867-868 (Fla. 2003)(The victim was shot once in the back of the head, "which is by its very nature cold.") The victims were killed in a place that was likely to hide the killings, and the

victims, or at least one of them, was killed execution style after both were forced to the ground.

In this case there is no evidence like that presented in Davis or Thompson that shows such similar planning to hide the murder, or make the killing easier. There is very little proof that the defendant killed his wife after making a careful plan or according to some prearranged design. What happened simply belies that.

Consequently, the trial court erred in finding Jean-Philippe committed the murder in a cold, calculated, and premeditated manner.

At this point, the State could concede error but claim the trial court harmlessly erred. McWatters v. State, 36 So. 3d 613, 642 (Fla. 2010) This Court should not follow that siren call. It should not because if the State presented insufficient evidence to support this aggravator, the court should not have instructed the jury on the CCP aggravator. But it did, and without any idea if it found it and what weight it may have given that factor, this Court cannot say beyond a reasonable doubt that it played no part in its death recommendation.

Therefore, this Court should reverse the trial court's sentence of death and remand for a new sentencing phase trial.

ISSUE III:

THE TRIAL COURT ABUSED ITS DISCRETION IN GIVING GREAT WEIGHT TO THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE, SINCE THE CRIME WAS CONSISTENT WITH A PANICKED, FRENZIED ATTACK.

A trial court's decision as to the weight afforded an aggravating circumstance is reviewed on appeal for abuse of discretion. See, e.g., Sexton v. State, 775 So. 2d 923, 934 (Fla. 2000).

The trial court found the aggravating circumstance that the homicide was especially heinous, atrocious or cruel (HAC) based on the number of blows administered to the victim and the presence of wounds to the arms and hands consistent with defensive wounds. (5 R 992-933). The presence or absence of defensive wounds is evidence tending to establish whether or not the victim was conscious and aware of impending death at the time of the fatal wound and can be a critical fact determining the applicability of the HAC circumstance. See, e.g., Williams v. State, 37 So. 3d 187, 198-201 (Fla. 2010); Zakrzewski v. State, 717 So. 2d 488, 492-493 (Fla. 1998). However, HAC killings involving many wounds also indicate a frenzied, panicked attack and reflect a causal relationship between the nature of the wounds and the defendant' loss of control at the time of the homicide. This Court has held that in such cases, the HAC factor, although properly

found, is of diminished aggravating value since the manner of death is a product of the defendant's mental status. See, e.g., Penn v. State, 574 So. 2d 1079 (Fla. 1991)(cocaine addicted defendant beat his sleeping mother with a hammer as he stole property from her house); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985)(victim brutally beaten when defendant who had drinking problems lost control of his anger in a domestic argument); Miller v. State, 373 So. 2d 882, 886 (Fla. 1979)(defendant's stabbing a taxi driver seven times during a robbery deemed a product of defendant's mental illness); Jones v. State, 332 So. 2d 615 (Fla. 1976) (mentally ill defendant stabbed victim multiple times).

In this case, the court gave the HAC circumstance great weight without addressing the legal and factual point that the multiple wounds indicated the defendant's mental and emotional state and loss of control. (5 R 992-94). The evidence showed on August 26, 2009, Jean-Philippe had repeatedly tried to reach his wife to talk with her about saving their marriage (15 R 922-23). Indeed, over the course of an hour or three he tried unsuccessfully 74 times to call her or her sister, who was with her (15 R 936-46). For a devoted Christian whose life had been one of success and achievement, Elkie's decision to end the marriage without talking to him, and her possible infidelity, presented him with a failure that he could

do nothing to save. That must have been frustrating, and his attack on her with the more than 50 stab wounds, none done methodically or with any apparent object in mind, clearly demonstrated expression of the pent up anger, shame, and frustration.[8]

While the trial court's finding of the HAC circumstance in this case may be sufficiently supported by the evidence, the weight afforded the aggravating circumstance is not justified.

The improper weighing of the HAC circumstance is not harmless in this case. As the trial court specifically stated, this factor "has been held to be one of the most weighty of aggravating circumstances in Florida's sentencing calculus," and in this case, it was "given great weight in determining the appropriate sentence to be imposed." (5 R 992, 994) That was error.

Jean-Philippe's death sentence, therefore, must be reversed.

[8]In discussing the CCP aggravator, the court said, "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." (5 R 1837)(emphasis added.) Even so, people can still act in a frenzied manner when deeply, emotionally hurt from a persistent marriage that appears heading for divorce, and the wounded spouse can do nothing to avoid the apparently inevitable unhappy ending.

ISSUE IV:

A DEATH SENTENCE IS PROPORTIONATELY UNWARRANTED.

Jean-Philippe argues that despite the three aggravators the trial court found to justify a death sentence, one being improperly found, and another (HAC) deserving little consideration, this Court should find death a disproportionate sentence, and reduce his punishment to life in prison without the possibility of parole. As this Court is undoubtedly aware, it has the unique obligation in capital sentencing cases to determine whether death is proportionately warranted.

> In capital cases, this Court compares the circumstances presented in the appellant's case with the circumstances of similar cases to determine whether death is a proportionate punishment See Wade v. State, 41 So. 3d 857, 879 (Fla.2010), cert. denied, ___ U.S. ___, 131 S.Ct. 1004, 178 L.Ed.2d 835 (2011). The purpose of this review is "to prevent the imposition of 'unusual' punishments contrary to article I, section 17 of the Florida Constitution." Parker v. State, 873 So. 2d 270, 291 (Fla.2004). As we have previously stated: "[T]he death penalty is 'reserved only for those cases where the most aggravating and least mitigating circumstances exist.'" Smith v. State, 28 So. 3d 838, 874 (Fla.2009) (quoting Terry v. State, 668 So. 2d 954, 965 (Fla.1996)). However, the proportionality analysis "is not a comparison between the number of aggravating and mitigating circumstances." Sexton v. State, 775 So. 2d 923, 935 (Fla.2000) (quoting Porter v. State, 564 So. 2d 1060, 1064 (Fla.1990)). "Rather, [the analysis] entails 'a qualitative review by this Court of the underlying basis for each aggravator and mitigator.' " Simpson v. State, 3 So. 3d 1135, 1148 (Fla. 2009) (quoting Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998))

Caylor v. State, Case No. SC09-2366 (Fla. Oct. 27, 2011)

In this case, we have an estranged husband who killed his wife he suspected of committing adultery (17 R 1240, 1245, 1384, 1388). While domestic killings are not per se exempt from a death sentence, and are evaluated in the same manner as other cases, they nonetheless produce some of the most emotionally explosive situations for which death may be an inappropriate punishment for the defendant.

Here, the court found three aggravating factors, one of which, the aggravated battery, the defendant does not challenge. The court also found that he committed the murder in a cold, calculated and premeditated manner, and it was especially heinous, atrocious, or cruel. As to the former, Jean-Philippe argued in Issue I that the court erred in finding it. As to the latter, although the court properly found it, he contended in Issue II that it abused its discretion in giving it great weight. In a sense, the murder, while heinous, atrocious, or cruel was not especially so.

Moreover, while the defendant does not challenge the sufficiency of the evidence of the prior conviction of a violent felony aggravator, he points out that in his case, the prior violent felony was the aggravated battery he had committed on his sister in law at the time he killed his wife. Such an offense, while admittedly violent, pales in comparison for proportionality analysis with the convictions

defendants in other cases had for violence. In Ferrell v. State, 680 So. 2d 390 (Fla.1996), Ferrell committed a second-degree murder when he walked up to the victim as she sat in her car and shot her eight times. Finding that the killing bore "many earmarks" to the subsequent capital murder, this Court concluded that the death sentence was "commensurate to the crime in light of the similar nature of the prior violent offense." Id. at 391; Duncan v. State, 619 So. 2d 279 (Fla.1993) ("[T]he prior killing was a second-degree murder of a fellow inmate.")

Here, there are no similar, numerous earmarks between the murder of Elkie and the aggravated battery of Roya. Hence, for proportionality purposes, the conviction for the aggravated battery carries little significance.

As to the mitigation, the court did not find the two statutory mental mitigators, but it did find he had no history of significant criminal activity, and other nonstatutory mitigation (5 R 997-1000, 6 R 1001-1012). As to the mental mitigators, while Jean-Philippe may not have been acting with his capacity to appreciate the criminality of his conduct as substantially impaired, it was nevertheless impaired. We say this because until the evening of August 26, the defendant had led a largely law abiding life, and it certainly was one free of violence. He had grown up in a God fearing family and was an active church goer

who, to all intents, had incorporated the Christian message of loving thy neighbor into his life. Outside his marriage there was not even a hint of any violent proclivities lurking underneath the peaceful man.

Similarly, if he was not under the influence of some extreme emotional disturbance, he was, nonetheless, under the sway of some emotional turmoil. For a man who had known only success in life, in school and on the athletic field, facing the imminent break-up of his marriage was devastating, intellectually and emotionally. Heightening the tensions, on August 26th, Elkie and her sister deliberately ignored his incessant, frantic calls to try to talk with him and try to work something out. And she did so for what must have seemed a trivial reason - - the battery on her cell phone was low "so stop calling." (15 R 922-24). Now the defendant is not suggesting the his wife somehow contributed to or was a participant in her death sufficient enough to justify finding the mitigating factor of "victim participant," §921.141(6)(c), Fla. Stat. (2009), but she did nothing to assuage the doubts and fears in her husband's increasingly emotionally exhausted mind. When he tried to talk to her, she did not push him away. She did something worse. She ignored him. When he wanted to know who she was talking to, afraid that it might be another man, she said nothing (17 R 1240, 1245, 1384, 1388). What

was he to think, except the worst, that she was committing adultery and was ending their marriage for another man. Indeed, after stabbing his wife in what can only be considered a frenzied attack, he tried to kill himself, and almost succeeded (16 R 1061-65). This evidence was proffered, but not admitted at trial (16 1069).

This emotional chaos must have been alien to the defendant. Until August 26, his life had been in large part the American dream. The son of immigrants, and an immigrant himself as a child, he had worked hard in school and been very successful. He was popular with his friends, and loved and respected by his elders and relatives (17 R). He had excelled in football, track, and other sports, captaining the football team his senior year of high school and winning letters in 7 sports. (17 R 1832-33; 18 R 1399). His parents were justifiably proud of their boy (8 R 1414), and they had visions of him going to college, and succeeding there (8 R 1431).

But their son had a different, more patriotic goal. Instead of college, he wanted to serve his adopted country, and after graduating from high school he joined the United States Navy (17 R 1347). Admittedly he had some problems with the law, and he was reduced in rank from E-3 to E-1 (18 R 1439-40). But in the remaining time he had left in his enlistment, he was promoted to E-4, and beyond that, he received a commendation for his valuable service (17 R 1288; 18 R 1442).

After leaving the Navy, he resumed his academic career, and there, until the summer 2009 semester, his native intelligence and ability to achieve success emerged, as it had done in High school and the Navy (17 R 1315-16). Indeed, his work was so good in Biology, that the instructor held it up to the rest of the class as model of excellence (17 R 1320).

Thus, despite the aggravation present in this case, it is not one of the most aggravated this Court has seen. And, despite the absence of the statutory mental mitigators, this case is also not one of the least mitigated this Court has considered. As such, it should find that a death sentence is not proportionately warranted.[10] A biased sampling of other cases supports this conclusion.

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[10] The jury unanimously recommended death (5 R 958), but part of the reason it may have done so arises from the improper guilt phase argument the prosecutor made, such as "And I think it's incredible that as Elkie Shea Jean-Philippe was being murdered, as she was fighting to her life, her last thoughts were for her child, Please don't kill my baby." (6 R 1082) "It is but by the grace of God we are here on one murder case and not two. It is literally by the grace of God that Roya Gordon-."(Objection sustained 6 R 1083) "This man did not have the courage to, before he tried to kill himself to say, 'I'm going to kill myself, but she's in here and you might be able to save her?" (6 R 1111) 'How many times did he stab her in the back? Did he enjoy it? Did he enjoy the pain that he was inflicting upon this innocent victim whose only request was to leave me alone." (6 R 1112) "And that's what this case boils down to, an innocent young woman, who had a career in front of her, who unfortunately decide that, even though she was married to this man, that it was not going to work and she took steps to try to distance herself from him." (6 R 1113) "And you know that she didn't die right away, in terms of the murder itself

In White v. State, 616 So. 2d 21, 22 (Fla.1993), White and the victim's dating relationship ended badly. Unable to overcome his attachment to her, White, some months later, hit the victim's new boyfriend with a crowbar, and when arrested, White promised to kill his former girlfriend. True to his word, he got a shotgun after his release from jail and drove to the victim's place of employment where he saw her in the parking lot. She screamed as she turned to run, and White shot her. He fired a second shot into as she lay on the ground, telling her, "I told you so,"

This Court, in considering the emotional circumstances created by the failed relationship, found that a death sentence was disproportionate, despite its obvious coldness, calculation, and heightened premeditation. White, 616 So. 2d at 25. Similarly, in Douglas v. State, 575 So. 2d 165, 167 (Fla.1991) this Court found the death sentence imposed disproportionate because the defendant, who had been involved with the victim's wife, abducted the victim and his wife, and tortured him for four-hours. He then hit the victim in the head, shattering the stock of rifle he had, and shot him in the head. Death was proportionately unwarranted

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didn't happen right away, there was periods of pausing. He was like what, was he enjoying it, seeing her or hearing her beg for her life? Oh, now you're going to realize I'm the man here. You don't want me. Now you're going to pay. Now you're going to suffer. . . And all this while that four or five year old boy was in the bathroom " (6 R 1117-18). See also (6 R 1123, 1124)_

In Ross v. State, 474 So. 2d 1170, 1174 (Fla.1985) a death sentence was disproportionate even though Ross had bludgeoned wife to death. In Halliwell v. State, 323 So. 2d 557, 561-62 (Fla.1975) this Court reversed Halliwell's death sentence because he was in love with the victim's wife and became violently enraged at the victim's treatment of her, beating him to death with a breaker bar.

Finally, in Farinas v. State, 569 So. 2d 425, 427 (Fla. 1990), Farinas had an intense desire for his former girlfriend to resume their relationship and return to live with him. One day, he forced her car from the road and then confronted her about reporting his harassing her to the police. He kidnapped her, and when she tried to flee he shot her in the back, paralyzing her. His gun jammed, but undeterred, he fixed it, and shot her twice in the head as she lay face down. Despite the existence of two aggravators, this Court found death a disproportionate sentence. Farinas, at 569 So. 2d 431-32.

Thus, in cases factually more dreadful than this, where defendants brutally and methodically killed girlfriends or ex-girlfriends this Court has found death disproportionate. It should do so in this case, because Jean-Philippe killed a woman, who, as the State said in its closing argument had promised to "hold, in sickness and in health, for better or worse, until death do us part." (16 R 1076) That promise, solemnly entered into, lay in tatters at the defendant's feet, and if he had no

justification, legally or morally for killing her, in light of the cases he has cited and discussed, he should nonetheless not face a death sentence.

This Court should reverse the sentence of death and remand with instructions that the trial court sentence the defendant to life in prison.

ISSUE V:

THIS COURT WRONGLY DECIDED BOTTOSON V. MOORE, 863 SO. 2D 393 (FLA. 2002), AND KING V. MOORE, 831 SO. 2D 403 (FLA. 2002).

To be blunt, this Court wrongly rejected Linroy Bottoson's and Amos King's arguments when it concluded that the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), had no relevance to Florida's death penalty scheme. Because this argument involves only matters of law, this Court should review it de novo.

In that case, the United States Supreme Court held that, pursuant to Apprendi v. New Jersey, 530 US. 446 (2000), capital defendants are entitled to a jury determination "of any fact on which the legislature conditions" an increase of the maximum punishment of death. Apprendi had held that any fact, other than a prior conviction, which increases the maximum penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt.

In Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S.Ct. 657 (2002), this Court rejected all Ring challenges by simply noting that the nation's high court had upheld Florida's capital sentencing statute several times, and this Court had no authority to declare it unconstitutional in light of that repeated approval.

> Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and although Bottoson contends that there now

> are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address this issue. In a comparable situation, the United States Supreme Court held:
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> > If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriquez de Quijas v. Shearson/ American Express, 490 U.S. 477, 484 (1989); Bottoson, cited above, at 695 (footnote omitted.).

The rule followed in Rodriquez de Quijas, has a notable exception. If there is an "intervening development in the law" this Court can determine that impact on Florida's administration of its death penalty statute. See, Hubbard v. United States, 514 U.S. 695 (1995).

> Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. . . . Nonetheless, we have held that "any departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212, 104 S. Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. . . .
>
> In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, . . . or where the later law has rendered the

> decision irreconcilable with competing legal doctrines or policies, ... the Court has not hesitated to overrule an earlier decision.

Patterson v. McLean Credit Union, 491 U.S.164, 172-73 (1989); see, Ring, cited above at 536 U.S. at 608. Moreover, the "intervening development of the law" exception has particularly strong relevance when those developments come from the case law produced by the United States Supreme Court. Hubbard, cited above (Rehnquist dissenting at pp. 719-20.). The question, therefore, focuses on whether Ring is such an "intervening development in the law" that this Court can re-examine the constitutionality of this state's death penalty law in light of that in decision. The answer obviously is that it is a major decision whose seismic ripples have been felt not only in the United States Supreme Court's death penalty jurisprudence, but in that of the states. For example, Ring specifically overruled Walton v. Arizona, 497 U.S. 639 (1992), a case that 12 years earlier had upheld Arizona's capital sentencing scheme against a Sixth Amendment attack. Indeed, in overruling that case, the Ring court relied on part of the quoted portion of Patterson, that its decisions were not sacrosanct, but could be overruled "where the necessity and propriety of doing so has been established." Ring, cited above at p. 608 (Quoting Patterson, at 172) Subsequent developments in the law, notably Apprendi, justified that unusual step of overruling its own case.

Opinions of members of this Court also support the idea that this Court should examine Ring's impact on Florida's death sentencing scheme. Indeed, Justice Lewis, in his concurring opinion in Bottoson, hints or suggests that slavish obeisance to stare decisis was contrary to Ring's fundamental holding. "Blind adherence to prior authority, which is inconsistent with Ring, does not, in my view, adequately respond to or resolve the challenges presented by, or resolve the challenges presented by, the new constitutional framework announced in Ring." Bottoson, cited above at p. 725. Justice Anstead viewed Ring "as the most significant death penalty decision from the United States Supreme Court in the past thirty years," and he believes the court "honor bound to apply Ring's interpretation of the requirements of the Sixth Amendment to Florida's death penalty scheme." Duest v. State, 855 So. 2d 33 (Fla. 2003)(Anstead, concurring and dissenting); Bottoson, cited above, at page 703 (Anstead dissenting. Ring invalidates the "death penalty schemes of virtually all states."11 Justice Pariente agrees with Justice Anstead "that Ring does raise serious concerns as to potential constitutional infirmities in our present capital sentencing scheme." Id. at p. 719. Justice Shaw concludes that Ring, "therefore, has a direct impact on Florida's capital sentencing

[11] Justices Quince, Lewis and Pariente agree that "there are deficiencies in our current death penalty sentencing instructions." Id. at 702, 723, 731.

statute." Id. at p. 717. That every member of this Court added a concurring or dissenting opinion to the per curiam opinion in Bottoson also underscores the conclusion that Ring qualifies as such a significant change or development in death penalty jurisprudence that this Court can and should determine the extent to which it affects it. Likewise, that members of the Court continue to discuss Ring, usually as a dissenting or concurring opinion, only justifies the conclusion that Ring has weighed heavily on this Court, as a court, and as individual members of it.

Of course, one might ask, as Justice Wells does in his concurring opinion in Bottoson, that if Ring were so significant a change, why the United States Supreme Court refused to consider Bottoson's serious Ring claim. Bottoson, at pp. 697-98. It may have refused certiorari for any reason, and that it failed to consider Bottoson's and King's claims give that denial no precedential value, as that Court and this one have said. Alabama v. Evans, 461 U.S. 230 (1983); Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So. 2d 310 (Fla. 1983). Moreover, if one must look for a reason, one need look no further than the procedural posture of Bottoson and King. That is, both cases were post conviction cases, and as such, notions of finality of verdicts are so strong that Anew rules generally should not be applied retroactively to cases on collateral review. Teague

v. Lane, 489 U.S. 288, 305, 310 (1989). Moreover, subsequent actions by the nation's high court refutes Justice Wells' conclusion that if Florida's capital sentencing statute has Ring problems, the United States Supreme Court would have granted certiorari and remanded in light of that case. It has done so only for Arizona cases, e.g., Harrod v. Arizona, 536 U.S. 953 (2002); Pandeli v. Arizona, 536 U.S. 953 (2002); and Sansing v. Arizona, 536 U.S. 953 (2002). Moreover, it specifically rejected a Florida defendant's efforts to join his case to Ring. Rose v. Florida, 535 U.S. 951 (2002). Thus, in light of fn. 6 in Ring, in which the Supreme Court classified Florida's death scheme as a hybrid, and thus different from Arizona's method of sentencing defendants to death, it may simply have not wanted to deal with a post conviction case from a state with a different death penalty scheme than that presented by Arizona. See, Bottoson, cited above, p. 728 (Lewis, concurring). While noting several similarities between Arizona's and Florida's death penalty statutes, he also found "several distinctions.")

There is, therefore, no reason to believe the United States Supreme Court will accept this Court's invitation to reconsider this State's death penalty statute without first hearing from this Court how it believes Ring does or does not affect it. This Court should and it has every right to re-examine the constitutionality of this State's

death penalty statute and determine for itself if, or to what extent, Ring modifies how we, as a State, put men and women to death

When it does, this Court should consider the following issues:

Justice Pariente's position that no Ring problem exists if "one of the aggravating circumstances found by the trial court was a prior violent felony conviction." Lawrence v. State, 846 So. 2d 440 (Fla. 2003)(Pariente, concurring):

> I have concluded that a strict reading of Ring does not require jury findings on all the considerations bearing on the trial judge's decision to impose death under section 921.141, Florida Statutes (2002).. . . [Proffitt v. Florida, 428 U.S.242, 252 (1976)] has "never suggested that jury sentencing is required".... I continue to believe that the strict holding of Ring is satisfied where the trial judge has found an aggravating circumstance that rests solely on the fact of a prior conviction, rendering the defendant eligible for the death penalty.

Duest, cited above (Pariente, concurring.) In this case, the trial court found three aggravating factors, none of which would have satisfied her criteria.

Justice Anstead rejected Justice Pariente's partial solution to the Ring problem, and Jean-Philippe adopts it as his response to her position.

> In effect, the Court's decision adopts a per se harmlessness rule as to Apprendi and Ring claims in cases that involve the existence of the prior violent felony aggravating circumstance, even though the trial court expressly found and relied upon other significant aggravating circumstances not found by a jury in imposing the death penalty. I believe this decision violates the core principle of Ring that aggravating circumstances actually relied upon to impose a death sentence may not be determined by a judge alone.

Duest, cited above (Anstead, concurring and dissenting). Or, as Justice Anstead said in a footnote in Duest, "The question, however, under Ring is whether a trial court may rely on aggravating circumstances not found by a jury in actually imposing a death sentence." (Emphasis in opinion.).

Unanimous jury recommendations and specific findings by it. Under Florida law, the jury, which this Court recognized in Espinosa v. Florida, 505 U.S. 1079 (1992), had a significant role in Florida's death penalty scheme, can only recommend death. The trial judge, giving that verdict "great weight," imposes the appropriate punishment. Id. This Court in Ring, identified Florida along with Delaware, Indiana, and Alabama as the only states that had a hybrid sentencing scheme that expected the judge and jury to actively participate in imposing the death penalty. Unique among other death penalty states and the sentencing schemes of the other hybrid statutes except Alabama,[12] Florida allows a non-unanimous capital sentencing jury to recommend death. Section 921.141(3), Florida Statutes (2002). Under Ring, Jean-Philippe's death sentence may be unconstitutional.

[12] Alabama, like Florida, allows juries to return a non-unanimous death recommendation, but at least 10 of the jurors must agree that is the appropriate punishment. Ala. Crim. Code. Florida requires only a bare majority vote for death. Section 921.141(3), Florida Statutes (2002). Since Ring, the Delaware legislature passed, and its Governor has signed legislation requiring unanimous death recommendations. SB449.

Bottoson, cited above, at 714 (Shaw, concurring in result only); Butler v. State, 842 So. 2d 817 (Fla. 2003)(Pariente, concurring in part).

Pre-Ring, the Florida Supreme Court, relying on non capital cases from this Court that found no Sixth or Fourteenth Amendment problems to non-unanimous verdicts, Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972), approved non unanimous jury verdicts of death. Even without Ring, that Florida reliance on non-capital cases to justify its capital sentencing procedure would be troublesome in light of this Court's declaration that heightened Eighth Amendment protections guide its decisions in death penalty cases. Simmons v. South Carolina, 512 U.S. 154 (1994) (Souter, concurring); Ford v. Wainwright, 477 U.S. 399 (1986). Ring, with its express respect for the Sixth Amendment's fundamental right of the voice of the community to be heard in a capital case, presents a strong argument that when a person's life is at stake that voice should unanimously declare the defendant should die.

This approval of a non-unanimous jury vote in death sentencing in light of Ring has troubled members of the state court. Indeed, Justice Pariente, has repeatedly had problems with split death recommendations:

> The eleven -to-one vote on the advisory sentence may very well violate the constitutional right to a unanimous jury in light of the

> holding in Ring that the jury is the finder of fact on aggravating circumstances that qualify the defendant for the death penalty.

See Anderson v. State, 841 So. 2d 390 (Fla. 2003)(Pariente, J. Concurring as to conviction and concurring in result only as to sentence); Lawrence v. State, 846 So. 2d 440 (Fla. 2003); Butler v. State, 842 So. 2d 817 (Fla. 2003) (Pariente, concurring and dissenting); Hodges v. State, Case No. SC01-1718 (Fla. June 19, 2003)(Pariente, dissenting); Bottoson v. Moore, 833 So. 2d 693, 709 (Fla. 2002)(Anstead, dissenting).

This Court should re-examine its holding in Bottoson and consider the impact Ring has on Florida' death penalty scheme. It should also reverse Jean-Philippe's sentence of death and remand for a new sentencing trial.

CONCLUSION

Based on the arguments presented here, the Appellant, Lesly Jean-Philippe, respectfully asks this honorable court to: 1. Reverse the trial court's judgment and sentence and remand for a new trial, or, 2. Reverse the trial court's sentence of death and remand for a new sentencing trial, or 3. Reverse the trial court's sentence of death and remand for it to impose a sentence of life in prison.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by electronic transmission to **MEREDITH CHARBULA**, Assistant Attorney General, The Capital, Tallahassee, Fl 32399-1050; and by U.S. Mail to **Lesly Jean-Philippe,** Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this ____ day of February 2012. I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the Florida Rule of Appellate Procedure 9.210(a)(2).

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