IN THE SUPREME COURT OF FLORIDA

ROBERT HENRY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 73,433

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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(A) Statement of the Case

On November 2, 1987, Robert Henry murdered Janet Thermidor and Phyllis Harris in the course of robbing a Cloth World store in Deerfield Beach, Florida.

Mr. Henry was arrested on November 3, 1987, as he was in the process of making a "911" telephone call to the Deerfield Beach police department. (R 224).

A first appearance before a magistrate took place on November 4, 1987. (SR 2). Judge Herring appointed the public defender "up till the time of his arraignment." (SR 2). Judge Herring advised Ms. Henry of his right to remain silent. (id).

On November 24, 1987, Henry was arraigned before Judge Polen. (SR 5-12). At that time, the Assistant Public Defender (Mr. Fields) stated he could not represent Henry due to a conflict of interest. (id). Private counsel (Rojas and Solomon) were appointed and a second arraignment was held on December 2, 1987. (SR 13-19).

Mr. Henry was displeased with his attorneys and was appointed new counsel (Mr. Raticoff). (SR 109-111).

Mr. Henry ultimately came up for trial by jury on September 15, 1988.

Against counsel's advise but after full discussion regarding strategy, Mr. Henry testified on his own behalf. (R 2234-2235). As Mr. Henry's brief states, the strategic decision was made not to call other witnesses. (R 2379).

Mr. Henry was found guilty of two counts of first degree murder and one count each of robbery and arson. (R 2532).

During the penalty phase, no witnesses were called by either side. Defense counsel, contrary to Henry's instructions, subpoenaed family members to obtain mitigating testimony. (R 2549). The subpoenaes were ignored. (R 2549). Mr. Henry did not want the court to bring in these witnesses. (R 2551).

Although Mr. Henry refused a continuance (for the production of witnesses) (R 2552-2560), he did specifically request a pre-sentence investigation. (R 2672). The advisory jury suggested death as the appropriate sentence on each count of first degree murder. (R 2667-2668).

A sentencing hearing was conducted on November 7, 1988. (R 2676, et seq.).

Defense counsel advised the court that Henry's relatives had refused to appear during the penalty phase. (R 2679-2680). Both sides received the "PSI" and gave argument. The court recessed until November 9, 1988, at which time Henry was sentenced to death for each murder and to life in prison for the robbery and the arson charges. (R 2694-2704).

(B) Statement of the Facts

Mr. Henry's brief contains two major sections ("Guilt Issues" and "Penalty Issues"), containing many "sub-issues" which are tersely identified by subject matter. For the convenience of the Court, the facts relevant to each sub-issue will be set forth in order.

Facts: Guilt Issues

(a) "Fourth Amendment and Due Process"

The trial court held a full hearing on Mr. Henry's motion to suppress his various post-arrest statements. Relief was granted as to Henry's first statement (given without Miranda warnings), and to his last (given voluntarily, but after counsel had been appointed). (R 2918, 522-529).

It is important to note that defense counsel, Mr. Raticoff complemented the police officers involved (in questioning Henry for their frank, candid and honest testimony during this hearing (R 530). At no time did the police attempt to mislead the court or misstate the facts, (R 530). It is also important to note that the State of Florida agreed that Henry's first statement should be suppressed, (R 481-482).

The first witness at the suppression hearing was Detective Kenny. Det. Kenny was at the scene of the murders when he received word of Janet Thermidor's dying declaration. (R 219-220). Kenny got the defendant's full name from the store manager, Mr. Zimmerman (R 22), and later developed possible addresses on the defendant. (R 222).

Det. Kenny testified that Detectives Gianino and Engle spotted Henry walking along a street around 6:00 a.m. on November 3, 1987, but that Henry escaped on foot. (R 223).

Shortly thereafter, Henry telephoned the police (a "911" call) to report the prior night's robbery. (R 224). While on the telephone, Henry was taken into custody and transpnrted to the police station.

Robert Henry was not read his "Miranda" rights because the police wanted to hear his "report" on the robbery at Cloth World. (R 228).

At 9:10 a.m., Henry was given Miranda warnings and, while he was questioned, Kenny and Assistant State Attorney Coyle began the process of obtaining a warrant. (R 235). The warrant was signed by Judge Coker at 5:00 p.m. (R 235) and was read to Mr. Henry at 5:15 p.m. (R 237).

While various samples were being obtained (pursuant to the warrant), B.S.O. Deputies Corpion and Foley noted that Henry seemed anxious to talk. They asked Kenny if Henry had been "Mirandized" and whether they could speak to him. (R 238).

After they spoke with Henry, they returned to Det. Gianino and Detective Kenny and advised them that Henry was ready to speak. (R 239).

When Detective Kenny saw Mr. Henry, the Appellant was eating a meal from Burger King. (R 239).

Henry received another "Miranda" warning and gave a taped statement. (R 241). The statement was completed at 9:40 p.m. (R 242). Henry invited the police to see him again the next day. (R 241). The police spoke to Henry, again "Mirandizing" him, on November, 4, 1987 (the next morning) at the jail. (R 242).

At Henry's request, they returned again on November 5, 1987, and Henry spoke to them despite having counsel. (R 246).

Detective Corpion testified next. Corpion is the detective who brought food to Mr. Henry. (R 299). Mr. Henry ate his meal at a dining table in a hallway area, not an interrogation room.

(R 299). Corpion made sure that Henry had received his "Miranda" rights, from Gianino before talking to him. (R 299). Henry confessed. (R **300-309).** During this confession, Henry was twice given cigarettes (R **308, 309)** and Detective Corpion said he would not have questioned Mr. Henry if Miranda rights had not been given. (R 318).

Detective Foley testified that Henry ate and that he **(R 342)** got cigarettes and was able to use the bathroom. **(R 343). He** felt Henry had a desire to talk. (R **344).**

Despite offering to "fill in gaps", Detective Foley noted that the police never had to provide details to Mr. Henry. (R 360).

Officer Gianino testified to his initial foot pursuit of Henry (R **376-379)** and to seeing Henry being arrested at the coin laundry. **(R 387).**

Officer Gianino described the holding cell where (Henry was held) as a ten by ten foot room with a bench, a telephone and a phone book. (R 391). Henry accepted cookies and cigarettes. **(R 392).** At **1:15** p.m., Henry was moved to a larger cell with a bed in it. (R **393).** Henry sat on the bed and did not sleep. (R **394). At 3:45** p.m., he was taken to the county booking facility at the courthouse. (R **394).**

Judge Polen agreed with the State that Henry's first (pre-Miranda) statement should be suppressed. (R 522). The court noted that Mr. Henry dialed 911 and was in the process of giving the "robbery" report when the police arrived. (R 525). Judge Polen found that the post-Miranda (taped) statements (all three

of them) were admissible (R 526), but the final statement, taken after counsel was appointed, would also be suppressed despite Mr. Henry's willingness to speak. (R 529).

Finally, the reported comment at (R 2113) (Brief, p. 27), was a moment of hesitation or thought (stuttering) by Mr. Henry and not an attempt to invoke any rights. The representation that Henry was exercising his rights is totally incorrect.

The statement to Nurse Manganiello was completely spontaneous and voluntary. (R 2063). The nurse is not an employee or agent of the police. (R 2054). Mr. Henry did not include the statement to Ms. Manganiello in his motion to suppress, nor did he object to her testimony at the trial. (R 2061-20661.

(b) Dying Declarations of Ms. Thermidor

Mr. Henry's brief concedes that. after his objection to Dr. Podgorny's testimony was overruled, he did nat pose other objections. (Brief, p. 28).

Mr. Henry moved to suppress Ms. Thermidor's dying declarations on the grounds that:

(1) They constitute hearsay, and

(2) Ms. Thermidsr did not know she was dying when she uttered her (taped) statement identifying Henry as the killer.

Mr. Henry based his motion on the concepts that "no one can read another person's thoughts" and "maybe she (Thesmidor) had not given up hope".

The State offered Dr. George Podgorny as an expert on trauma and thermal injury. (R 16). Henry did not object. (R 16). As

a medical doctor and an acknowledged **expert** in emergency treatment of trauma and burns, Dr. Podgorny was able to describe the side effects of various medications on burn patients. (R 22-26). He was also able to predict the impact of the small doses of pain killer given to the very large (224 pound) victim at bar. **(R 23).**

The Appellant objected to Dr. Podgorny's opinion as to "what" Ms. Thermidor may have known, but the court overruled this objection because:

> (1) The opinion was based upon special experience (R 40), and
>
> (2) The court was not accepting everything Dr. Podgorny said as gospel (R **40**).[1]

On cross, Dr. Podgorny agreed that there is always "some hope" of survival in any patient. (R 49). He did not, however, attribute "hope of survival'' to Ms. Thermidor's failure to request a priest. (R **49**).

Mr. Henry's own witness, Nurse Selby, agreed specifically with Dr. Podgorny that Ma. Thermidor knew **she was** going to die. (R 71).

Dr. Dellerson, the Emergency Services Chief at Hollywood Memorial Hospital, another stipulated expert **(R 128),** agreed that **Ms.** Thermidor knew she was dying. (R **131).** Dr. Dellerson, noting Mr. Thermidor's large size and the small dosage (given to her) of pain killers, felt she was lucid and unimpaired by medication (R **149-150),** even if she had been in shock. (R 150).

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[1] Dr. Podgorny has testified on this subject ("knowledge of impending death"), as an expert, in three other states. (R 52).

The court, relying upon the unrebutted nature of both eyewitnesses and expert testimony, determined that Janet Thermidor's final taped statement was a dying declaration. (R 206-211). The Appellant then "preserved" his objection. (R 211).

At no time did Henry or his lawyers accuse the State of using "false" testimony from either Dr. Dellerson or Mr. McGrail (Brief, p.33), who Henry alleges contradicted each other.

Mr. McGrail, a fireman, said that when he found Ms. Thermidor at Cloth World, she had the look of someone who knew she was dying and she was scared. (R 115). Defense counsel successfully objected to the fireman's opinion, but his description of her demeanor before she went to the hospital was allowed.

At no time did defense counsel accuse Dr. Dellerson or Dr. Podgorny of committing perjury on the issue of Janet's blood pressure. Dr. Podgorny noted a systolic blood pressure reading of 112, while Dellerson never described her blood pressure. Dr. Dellerson only testified to her being in shock and suffering diminished blood flow due to her burns. (R 22, 149).

(c) Jury Instructions

The Appellant conceded (Brief, pg. 35) that counsel did not object to the jury instructions as given.

Counsel did not request an instruction on the nonexistent defense of "duress" as to any of the charges. (R 238 - 2404).

Mr. Henry objected to the lack of supporting evidence for an instruction on felony murder but he did not raise the issue

briefed, i.e., whether the instruction was proper based upon the charging document's allegata. (R 2380-2404).

(d) Discovery

Detective Corpion told defense counsel that fibers had been taken from the defendant's fingers (for analysis) at the September 13, 1988, suppression hearing (R 323), two days before trial.

On September 26, **1988,** well into this trial, defense counsel (Mr. Raticoff) advised the court that on the previous Friday, the State gave him a report (by Mr. Ayala) regarding fiber analysis of the fibers from Mr. Henry's hand. (R 1865). Defense counsel noted that the test had apparently only been performed on the same day (Friday, the 23rd). (R 1865). Counsel said:

> Judge, obviously, at this **paint,** I'm going to make my objection, although premature, I guess now is the time to handle it, I know Mr. Ayala is going to be testifying, number one, there is **no allegation an my part the State** withheld **this,** I don't believe that they just ever tested it to this point.

(R 1866) (Emphasis added).

Counsel based his objection solely on the State's delay in running the test. (R 1866). Counsel attempted to argue prejudice but the court reminded counsel that the defense position was that Henry did tie up the victims at the direction of other **robbers.** (R 1869). Thus, there **was** no prejudice. (R **1869-1870).**

To insure against any "**Richardson**" problem, the court told defense counsel he would have all necessary time to depose Mr. Ayala even if it meant excusing the jury. (R 1871).

The recess was later taken and defense counsel interviewed Ayala all he wished. (R 1983-1984). Counsel told the court he was not "rushed" and was able to fully question the witness. (R 1983-1984). Defense counsel stated there was no prejudice to his client. (R 1984).

(e) Prosecutor's Argument

(i) "Amount Stolen"

Mr. Henry never objected to any final guilt phase arguments by the prosecutor. The guilt phase jury was told by the court and by counsel that "what the attorneys say is not evidence". (R 2419, 2420).

Mr. Balke's testimony was not misrepresented by Mr. Satz. Mr. Balke said he was called to the Cloth World store at 4:00 a.m., an November 3, 1987. (R 1542). Balke secured the store once the police left. (R 1543). When his district manager came later that day (November 3rd), they searched the office. (R 1544). The amount of loss was not determined that day because the necessary tape was not available. (R 1560-1561). The tape was found "another day" (R 1561), after which the amount actually missing was known. It is correct, however, that the probable cause affidavit executed on November 3rd, states that the "approximate loss" was $1,200.00. (R 2709). That information's source is not known, nor is it apparent from the record that the

police communicated this information to Mr. Henry.[2]

(ii) "Marine Corps"

No abjection was raised to Mr. Satz's rhetorical challenge to Henry's claim that United States Marines are taught to "collaborate" if captured and questioned.

(f) Submission of Case Without Calling Defense Witnesses

As conceded by Mr. Henry's brief, Henry and counsel decided not to call witnesses other than Henry himself. (R 2378-2380).

(g) Identification of Victims

Two human beings were set on fire and horribly burned to the point where skin was burned off and bodies were charred to the bone. The State had the burden of establishing identity.

Debra Cox was called not only to identify her sister but to resolve defense-raised issues regardiny the clothing she wore that day and the possible use of accelerants by Henry when he set the victim on fire. (R 1293). Defense counsel agreed this was relevant testimony (R 1292), but was merely afraid of possible emotional outbursts. (R 1292). The court overruled the objection. (R 1294). Debra was not shown photographs of her charred sister. (R 1294).

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[2] On page 39 of his brief, Henry argues that Balke gave the police the amount of money stolen on November 3rd, but on page 10 of his brief, Henry states that Balke calculated the amount of the loss "between 1:00 p.m. and 2:00 p.m., on November 4th". Thus, in accusing Mr. Satz of "lying", even Henry doesn't fully understand the facts.

The physical damage to the victims was described by Mr. McGrail without defense objection. (R 1130-1131). No objection was made to Officer Dusenberry's testimony regarding Ms. Thermidor. (R **1365-1366).** No objection **was** made to Mr. Harris' testimony which merely identified his wife's signatures on some checks. (R **1409-1411).**

No objection was made to Mr. Balke's relevant testimony (for the arson charge) of the damage to the store. (R 1572-1573).

All of this is confessed on **page** 45 of Mr. Henry's brief.

(h) Photographs

The court allowed some, but not all, photographs of the defendant's handiwork into **evidence.**

(i) "False" Testimony Regarding Ms. Thermidor's Condition

No factual development is necessary. No objection on the basis of "perjury" **was** made.

(j) "Alternative Theories of First Degree Murder"

No "double jeopardy" argument was offered at **trial.**[3] The indictment accuses Henry of "first degree murder", the allegata states the murder was committed "unlawfully **and** feloniously and from premeditated design", contrary to Section **782.04,** Fla.Stat. (R **2711).**

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[3] None of the pretrial motions to dismiss the indictment raise this issue. A general motion to dismiss the "information" was filed. (R 2792-2793). No supporting facts or arguments were included.

Facts: Penalty Issues

(a) "Reasonable Doubt"

The Appellan did not object (to) or preserve his issue for appellate review.

(b) Ineffective Assistance of Counsel

No factual development is **required** beyond noting that Mr. Henry, who was competent (R 2559), fully concurred in and even helped **direct** penalty phase strategy. (R 2560, 2551, 2553). This includes the decisions regarding Dr. Block. (R 2553).

(c) Defense Requested Jury Instructions

(a) **and** (b) Defense requested instructions misinforming the jury it could exercise unbridled mercy were rejected. (R 2603, 2605).

Oddly, it was defense counsel who, during **the** guilt phase, repeatedly told the jury not to rule on the basis of sympathy, bias or personal feeling for or against either side. (R 2422, **2479).**

(c) Regarding the "premeditation" instruction. Mr. Henry's brief errs (at **p.** 59) in **stating** that Judge Polen denied **the** instruction "**because** the Jury had convicted Mr. Henry of premeditated murder". (id). Judge Polen actually said:

> I think they found him guilty of first degree murder, So, assuming they were proceeding on premeditated **or** bath, that would negate that one.

(R 2602) (Emphasis added).

Defense counsel merely stood on his proposed instruction and never offered the arguments presented on appeal.

(d) As Henry's brief confesses, at page (60), the proposed jury instruction number two did not correctly state the law.

(d) Aggravating Factors

The trial court found the following statutory aggravating factors applicable:

> (1) The murders took place during the course of a felony (robbery and/or arson).
>
> (2) The murders were committed to avoid detection or arrest.
>
> (3) The murders were for pecuniary gain,
>
> (4) The murders were especially heinous, atrocious or cruel.
>
> (5) The murders were cold, calculated and premeditated.

(R 2696-2704).

No non-statutory aggravating factors were found or applied. Mr. Henry requested the PSI and never raised a "Booth" objection to it.

(e) Mitigating Factors

In mitigation, the court found:

> (1) No significant criminal history.
>
> (2) Marine Corps service with an honorable discharge during Henry's first hitch. (non-statutory mitigation).

(R 2696-2704).

(f) Prosecutor's Argument

It is again apparent from the record that the Appellant did not object.

(g) Cumulative Error

No factual development is required.

(h) Constitutionality of
Florida's Death Penalty Statute

No factual development is required.

(i) "Absence af Mr. Henry"

While counsel discussed various strategic decisions with the court prior to the arrival of Mr. Henry (during the penalty phase), when Mr. Henry arrived every strategic decision was recapped with him in the court's **presence,** on the **record.** (R 2550-2560). Mr. Henry also consulted with counsel "off the record". (R 2550).

No portion of the trial **was** held outside Mr. Henry's presence.

(j) Constitutionality of Aggravating Factors

No factual development is required,

(k) "Confrontation Clause"

Mr. Henry requested a PSI and **never** objected to its contents on the grounds raised on appeal.

SUMMARY OF ARGUMENT

Mr. Henry has filed a massive appellate brief which attempts to argue every conceivable issue relating to his case and to capital justice in general. In doing so, Mr. Henry has candidly, and quite properly, confessed that the majority of his appellate issues were not preserved for review in the lower court and/or are expressly contrary to established decisional law.

I. Guilt Phase

The State's guilt phase arguments are most briefly summarizes as follows:

(a) Suppression of Defendant's Confessions

The trial court correctly resolved the Fourth Amendment issues after a full evidentiary hearing and careful consideration of the evidence.

(b) Suppression of Victim's Statement

The last words of Janet Thermidor were carefully scrutinized in a full and fair evidentiary hearing. The trial court weighed the evidence (as per its exclusive function), and ruled that Ms. Thermidor did indeed anticipate death. This decision is not subject to review on the basis of a cold transcript.

(c) Jury Instructions

These issues were not preserved for review and should not have been briefed.

(d) Discovery

The trial court complied with "Richardson" and defense counsel stipulated to the absence of prejudice.

(e) Prosecutor's Arguments

This issue was never preserved for review.

(f) Submission of Case Without Calling Defense Witnesses

This appears to be a matter best left to Rule 3.850 review. The issue itself calls far this Court to second-guess trial strategy and is thus unreviewable.

(g) Identification of Victims

This issue was not preserved and, in fact, the defense agreed that some of the testimony (from Mr. Harris in particular) was proper.

(h) Use of Photographs

The court did not err in admitting a carefully limited number of photographs into evidence.

(i) "Perjured Testimony Regarding Ms. Thermidor"

This issue was never preserved or argued below.

(j) "Alternate Theories of Murder (Double Jeopardy)

This issue was not argued ok preserved below.

briefly summarize our response by noting that the statute is constitutional and was correctly applied in this case.

Tucked into Henry's brief is a challenge to his "Guidelines" sentence. The departure sentence was properly imposed.

ARGUMENT

"GUILT ISSUES"

I

THE TRIAL COURT DID NOT ERR IN SUPPRESSING ONLY TWO OF THE APPELLANT'S FIVE STATEMENTS

Mr. Henry's brief begins its "guilt phase" arguments with a series of challenges to the admissibility of his pre-trial confessions. In particular, Henry asserts these specific errors:

(1) An alleged Fourth Amendment violation.

(2) An alleged violation of the Fifth Amendment and Article I, Sec. 9, of the Florida Constitution.

(3) An alleged violation of the Sixth Amendment and Article I, Sec. 12, af the Florida Constitution.

(4) Alleged ignoral of Henry's invocation of his rights.

(5) An alleged failure to suppress Henry's unsolicited confession to Nurse Manganiello.

These issues are easily refuted and shall be disposed of in order. First, however, the State would take exception to Mr. Henry's unsupported claim of a conspiracy to violate his civil rights.

No one ordered (or forced) Mr. Henry to place a "911" call, reporting the robbery at Cloth World, to the Deerfield Beach Police. The police, indeed, arrested Henry during this phone call and then proceeded to take his story without giving him "Miranda" rights, but the police openly and honestly admitted to this tactical error[4] and made no attempt to "cover up" their

[4] They should have let him talk on the phone and then arrested him.

error or to falsely allege that Kenry received "Miranda" warnings. There was no "conspiracy" and no cover-up, a fact noted by Henry's counsel at the suppression hearing. (R 530).

The State would also note that the trial court held an extensive, full and fair evidentiary hearing and arrived at factual and legal conclusions which are, on appeal, presumptively correct. In reviewing this claim, all facts and all inferences from the facts must be taken in favor of the lower court's decision. Owen v. State, 15 F.L.W. S107 (Fla. 1990); McNamara v. State, 357 So.2d 410 (Fla. 1978). With this in mind we will dispose of Mr. Henry's claims.

(1) Fourth Amendment

Mr. Henry's first claim is the long-discredited one that his three post-Miranda, voluntary, confessions should have been suppressed because the State failed to bring him before a magistrate within 24 hours of his arrest,

Factually, Henry's argument fails because two of the three statements, including his first confession, were given well within 24 hours of his arrest. Thus, the police would have had these statements even if Henry had seen a magistrate on time. (This also belies the conspiracy theory because the police no longer had a motive to delay Henry's appearance or jeopardize their case.). The third statement, taken just prior to his appearance and just barely outside the requisite "24 hours", came as a result of Henry's invitation to the police to come see him. Nothing about this third statement was "coercive" or tainted.

Henry's appeal simply seeks the creation - and post-hoc application - of a new **per se** exclusionary rule. As noted above, this argument has repeatedly been rejected by this Court.

The concept of an improper detention compelling exclusion of an otherwise free and voluntary confession stems from the ancient federal case of **McNabb** v. **United States, 318 U.S. 332 (1943). McNabb,** however, did not require suppression as a matter of constitutional law but instead created a judicial penalty for undue delay (by federal authorities) in bringing a suspect before a magistrate. **McNabb** specifically did **not** apply to the states.

This Hanorable Court refused to create a "McNabb" rule in Florida just four months later. **Finley v. State, 153 Fla. 394, 14 So.2d 844** (Fla. **1943). Defendants** continued to insist that **McNabb** "had to" be followed by the states, causing the United States Supreme Court to finally declare:

> In 1943 this Court, in **McNabb** v. United **States, 318 U.S. 332 (1943),** drew **upon** its supervisory authority over the administration of federal criminal justice to inaugurate an exclusionary practice considerably less stringent than the English . . .
>
> The McNabb case was an innovation which derived from our concern and responsibility for fair modes of criminal proceeding in the federal courts. The States, in the large, have not adopted a similar exclusionary principle. And although we adhere unreservedly to McNabb for federal criminal **cases,** we have **not extended its rule to state prosecutions as a requirement of the Fourteenth Amendment.**

(Emphasis added) **Culombe** v. **Connecticut, 367 U.S. 568, 599-600, 6** L.Ed.2d **1037 1056-1057 (1961).**

Culombe thus makes clear the fact that the states are not required, as a mattes of federal constitutional law, to suppress a statement or confession simply because it was obtained after an illegal detention.[5] This principle was upheld even more recently in New York v. **Harris, 495 U.S. ___,** 109, L.Ed.2d 13 (1990); citing **back to United States v.** Ceccoline, 435 U.S. 268 (1978), when the Court declared its rejection of the motion that an illegal arrest or detention renders any subsequent, voluntary, confession "per se" inadmissible.

As is apparent by the subsequent **cases** of **Harris** and **Ceccoline, Gerstein** v. **Pugh, 420** U.S. 103 **(1975)** did not extend the **McNabb** decision to the states on this issue. (Pugh does refer to McNabb in the context of probable cause determinations but, even then, does not dictate procedures nor does Pugh create any right to reversal of a subsequent conviction (see id at U.S. **119)** or the suppression of any confession. **Harris,** supra.)

Thus, Mr. Henry's first point on appeal is nothing short of a request for this Court to reverse the United States Supreme Court on an issue of Fourth Amendment law, to create an exclusionary rule and then to apply it retroactively to this case. Obviously, Henry is not entitled to this relief.

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[5] Florida has continually refused to promulgate a "McNabb" rule. See **Rollins v. State, 41** So.2d 885 (Fla. **1949); Romanello v. State,** 160 So.2d **529** (Fla. **1st** DCA 1964); **Young v. State, 140** So.2d **97** (Fla. 1962); **State v.** Voutter, **206** So.2d **392 (Fla. 1960); Headrick v. State, 366** So.2d **1190** (Fla. 1st **DCA 1978).** Of course Appellant correctly notes that **Keen v. State, 504** So.2d **396** (Fla. 1987), also defeats **his** claim. Since 2 of the 3 statements were taken before 24 hours had passed, Henry's attempt to circumvent Keen must fail because he did not suffer "unlawful" detention at the time he gave statements.

(2) Article I, §9, Fla. Constitution and the Fifth Amendment

Mr. Henry's second graund for suppression is his "cat out of the bag" argument. As Appellant correctly concedes, the United States Supreme Court, in Oregon v. **Elstad, 470 U.S. 298, 84** L.Ed.2d 222 (1985) held that when the police fail to "Mirandize" a suspect prior to his first statement a second, post-Miranda [6] statement may still be used as evidence as long as it was not the product of coercion or was not involuntary.

Henry egregiously interprets the facts to create the "aura" of coercion. The fact that **Henry,** after eluding foot pursuit, made a "911" call while "agitated" does not mean he was "coerced". Flight and arrest are not meant to be pleasant experiences. More to the point, Henry was never mistreated after his arrest. When he requested food, drink, cigarettes or leave to use the bathroom, his requests were promptly granted. Placed in a cell with a bunk, Henry chose not to sleep.

In **Owen** v. State, **15 F.L.W.** S107 (Fla. 1990), this Court rejected similar claims of psychological coercion.

Mr. Owen complained that he was subjected to a **six** day interrogation, but this Court noted that individual sessions between Owen and the police were short and non-coercive, citing in turn to Martin **v. Wainwright, 770** F.2d **918** (11th Cir. **1985).** This Honorable Court went on to hold that the trial court's findings were presumptively correct and that all facts and

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[6] **Miranda v. Arizona, 384 U.S. 436,** 16 L.Ed.2d **694** (1966).

influences therefrom would be taken in favor of the order denying suppression. See McNamara v. State, supra.

Regarding Mr. Henry's third statement, we again note that Henry invited the police to come and see him and thus was not "coerced" and is not entitled to relief. Zerquera v. State, 549 So.2d 189 (Fla. 1989); Mendyk v. State, 545 So.2d 846 (Fla. 1989).

Inasmuch as Henry has no federal constitutional claim, he attempts to obtain recognition of a "Florida Constitutional Right".

While the State is free, of course, to create rights or protective rules which exceed federal constitutional standards, we submit that nothing in the legislative history of this State suggests that the people have even intended to give murderers more "protection" than required by federal law. To the contrary, Florida (particularly in promulgating the 1982 amendment to the constitution) has made clear its intention to simply track federal supreme court rulings on the issue of criminal rights.[7] Indeed, if one examines Mr. Henry's appellate attacks upon the political "bias" of this State - including its "biased" judiciary, it is hard to fathom how anyone could turn around and accuse such reactionary people (See Brief, at 83) of wanting to extend "Miranda" beyond the scope of the existing federal cases.

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[7] Although not criminal cases, in Florida Canner's Association v. State, 371 So.2d 503 (Fla. 2nd DCA 1979), Affirmed, Cocoa Cola v. State, 406 So.2d 1079 (Fla. 1981), this Court held that Article I, Sec. 9 of the Florida Constitution imposes the same standards as the United States Constitution.

Since Florida interprets Article 1 §9 as tracking the federal constitution, since the trial court found no evidence of coercion and since the "cat out of the bag" theory fails under **Oregon** v. Elstad, supra, Henry is not entitled to relief 'on this point either.

(3) Article I §16, Florida Constitution, and Sixth Amendment

Henry, after not discussing **Gerstein** v. Pugh, **420** U.S. **103** (1975), and conceding the dearth of any federal claim due to Keen **v. State, 504** So.2d **396** (Fla. 1987), rambles on about Fla.R.Crim.P. 3.111(a) and the "need" for counsel at first appearance.

Magistrate's hearings (first appearance) are **not** adversary proceedings. **Gerstein v.** Pugh, **supra.** The reason is that probable cause determinations are themselves not adversarial proceedings and are routinely made by neutral magistrates. The Court (in Pugh) explained:

> Because of its limited function and its nonadversary character, the probable cause determination is not a "critical stage" in the prosecution that would require appointed counsel. The Court has identified **as** "critical stages" those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. Coleman v. **Alabama, 399 U.S. 1, 26** L.Ed.2d **387, 90** S.Ct. **1999 (1970);** United **States v. Wade,** 388 U.S. 218, 226-27, 18 **L.Ed.2d 1149,** 87 S.Ct. **1926 (1967).** In **Coleman** v. Alabama, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth

> Amendment . . . To be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, but this does not present the high probability af substantial harm identified as controlling in **Wade** v. Coleman.
>
> Pugh, supra, at U.S. 122-23.

In Florida, the courts appoint counsel at the preliminary hearing. Mr. Henry apparently wants defense counsel appointed sooner - such as at the moment of arrest (perhaps a lawyer can be placed in every police car) - although he **does** not grace us with a specific suggestion. In fact, Henry's arguments are as frivolous as they are nebulous, since, (1) Henry gave his statements within 24 hours of his arrest. [8] (2) Henry received an appointment of counsel.(3) Henry was charged with nonbondable offenses anyway.

(4) "Invocation of Silence"

This precise issue was not raised below and is barred on appeal.

The quoted portion of Henry's taped statement is not an invocation of any right to remain silent. "I just" or "I can't" do not mean "I refuse" or "I want counsel." They (the comments) go to Henry's ability to remember ("I can't"), not his desire. Henry's argument is a desperate attempt to fluff up some kind of "equivocal" comment where none exists, just so he can try to

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[8] Mr. Henry implies that, for him, the "24 hours" of Rule **3.130** should have been shortened to "12 hours" because he was arrested in the morning. There is no authority for this position and it is unworthy of further comment.

exploit the decision in Martin v. Wainwright, 770 F.2d 918 (11th Cir, 1985), and **Owen** v. **State**, 15 F.L.W. S107 (Fla. 1990).

In **Owen,** the defendant specifically responded to a question by stating "I'd rather not talk about it." (Id. at 108). The defendant at bar did not. "I just'' and "I can't''are not even remotely akin to "I'd rather not talk about it."

Since Owen recognized the presumption of correctness attending the lower Court's ruling and appellant can cite to no legal or factual error by that Court, it is clear that Henry is not entitled to relief on this issue even if he did preserve it.

(5) Statement of Nurse Manganiello

Henry incorrectly states that he **moved** to suppress his admissions to Nurse Manganiello in the lower court. He did not do so. **Henry** did not file a generic attack on "all state agents." Instead, Henry identified and litigated five specific statements and he obtained a specific ruling on those five statements. If, as now alleged, the lower court "failed" to rule on the confession at bar we know that Henry never requested a ruling.

In fact, Henry did not object, or "renew objections" at trial when Manganiello finally testified. (R 2061-66).

Since the issue was not preserved below, Henry cannot appeal it. **Steinhorst v.** State, 412 So.2d 332 (Fla. 1982); **White** v. **State,** 446 So.2d 1031 (Fla. 1984); Tillman v. **State,** 471 So.2d 32 (Fla. 1985).

Without waiving this point, we note that Nurse Manganiello is not an employee or agent of the State in any law enforcement or investigative capacity, She is not, as implied (Brief pg. 28) an employee of Broward County or its jail.

Manganiello works for a private corporation known as Prison Heath Services which provides nurses to the jail. (R 2064) She only intended to conduct a health-screening interview. (R 2063). Henry, out of the blue, told her who he was and what he had done. (R 2063). This so-called "state agent" did not even report this information to the police. (R 2069). This event only surfaced months later, after the state called her in. (R 2065, 2066).

Even if Manganiello could, by some stretch of the imagination, be called a "state agent", Henry's voluntary, post-**Miranda**, outburst was **not** illegally obtained, or improperly admitted. Miranda itself recognizes that such outbursts are admissible and are not the product of interrogation or coercion. **Bottoson** v. **State**, 443 So.2d 962 (Fla. 1983).

(6) Summary

Henry is not entitled to relief since he cannot show, just as he did not sub judice, any nexus between the State's "failure" to get him a first appearance with 24 hours and his decision(s) to give post-Miranda statements. Indeed, Henry made two of the statements well within 24 hours and had no inkling that his hearing would be held a few hours late. Since the "delay" only came about during Henry's third statement - when he **invited** the police **to** see him, the statements cannot realistically be

presented to this Court as the "product" of any "delay." Absent this nexus, Henry must lose. Williams v. State, 466 So.2d 1246 (Fla. 1st DCA 1985); Headrick v. State, 366 So.2d 1190 (Fla. 1st DCA 1979). Even if Henry's failure to receive a hearing within 24 hours "tainted" his arrest, and despite an initial (no-Miranda, suppressed) improper statement, Henry's three uncoerced, post-Miranda statements were not subject to suppression. Perry v. State, 522 So.2d 817 (Fla. 1988); Kight v. State, 512 So.2d 922 (Fla. 1987); Turner v. State, 429 So.2d 318 (Fla. 1st DCA 1982); Wimberly v. State, 393 So.2d 37 (Fla. 3rd DCA 1981); Brewer v. State, 386 So.2d 232 (Fla. 1980).

Neither the facts, the law, nor Henry's exotic constitutional theories warrant relief.

II

THE TRIAL COURT DID NOT ERR IN ADMITTING THE DYING DECLARATION OF JANET THERMIDOR

By pretrial motion, Henry challenged the admission of Janet Thermidor's dying declaration identifying Henry as the murderer. In doing so, Henry himself raised the issue of "what Janet thought" and whether she could foretell her death. Since Henry opened the door to this inquiry, he opened the door to the admission of evidence (including expert opinion evidence) on this point. Tosh v. State, 424 So.2d 97 (Fla. 1st DCA 1983).

The general law surrounding "dying declarations" under Sec. 90.804(2)(b) has been constant even since the advent of the revised evidence code. In Teffeteller v. State, 439 So.2d 840

(Fla. 1983), this Honorable Court held that the admission of dying declarations presents a mixed question of law and fact and thus lower court decisions on point will not be disturbed unless "clearly erroneous." This decision continued (by specific reference) the standard of review recognized in Johnson **v. State, 152 So. 176** (1934).

Teffeteller also recognized that the declarant, in these cases, is not required to verbally express knowledge that he or she is going to **die** in order for (her) statement to be admissible. Furthermore, reassuring or comforting language by persons attending a dying declarant does not remove the status of "dying declaration" from any subsequent statement. In upholding these key principles, **Teffeteller** referred **back to** a long line of Florida cases including Lester v. **State,** 20 So. 232 (Fla. 1896); Covington v. **State, 200 So. 531 (1941)** and **Mills v. State, 264** So.2d **71** (Fla. 1st **DCA** 1972).

In the more recent cases of **Pierce v. State, 538** So.2d **486** (Fla. 3rd **DCA** 1989), the Court relied upon **Teffeteller,** in holding that the declarant's question, "Am I going to die?" does not remove a given statement from the category of "dying declarations."

Confronted with the massive injuries suffered by Ms. Thermidor, the helplessness of **her** situation and the controlling nature of Teffeteller, Mr. Henry has chosen to avoid a direct challenge to the admission of Janet's statements and instead to channel his arguments into four **areas:**

(a) The propriety of expert testimony,

(b) Whether the State used "false" testimony.

(c) The "sufficiency of the evidence."

(d) "Constitutional issues."

Each issue is easily disposed of as follows:

(A) THE PROPRIETY OF EXPERT TESTIMONY

Calling the expert testimony "pseudo scientific mumbo-jumbo", Henry contends that Drs. Podgorny and Dellerson [9] (whom he stipulated were experts in trauma and thermal burn injury and care) were not qualified to opine whether a patient could or did reasonably anticipate her death. This is the same Mr. Henry, of course, who called a nurse (Ms. Selby) to the stand and, on direct, solicited her opinion on the same issue. (R 71).

The whole issue of what Janet was thinking was raised by Henry, who is estopped from complaining about the subsequent inquiry. Henry, of course, contends that he had the right to baldly allege that Janet did not think she would die and that the State had no right to dispute the issue absent an express, contrary, statement by Janet herself. Under Henry's theory, **Teffeteller, supra,** could then be avoided.

As noted above, **Tosh v. State, supra,** recognizes that expert opinions which might otherwise be inadmissible can be rendered admissible when the defendant "opens the door."

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[9] Henry also alleges that an expert opinion was given by paramedic McGrail. The record shows that McGrail testified to the look on Janet's face, but when he started to actually give his opinion of what Janet "knew", a defense objection was sustained. (R 116) Thus, McGrail's opinion is not at issue.

Trial court judges have broad discretion in setting the scope or range of expert testimony. Endress v. State, 462 So.2d 872 (Fla. 2nd DCA 1985); Johnson v. State, 393 So.2d 1069 (Fla. 1980). Although "expert" testimony should not be taken on matters of common understanding or experience, *See* Rodriquez v. State, 413 So.2d 1303 (Fla. 3rd DCA 1982), judicial discretion will not be disturbed unless it is abused. Endress, supra. Even in the presence of judicial error, of course, said error may be harmless. Garron v. State, 528 So.2d 353 (Fla. 1988).

In considering harmless error, we note that doctors Podgorny and Dellerson certainly, aver the course of their careers, had developed some ability to recognize patient attitudes even if they were not clairvoyant. This experience was relevant to the Court's decision making process and certainly was not a matter of common knowledge. Furthermore, the Court was not bound by the expert testimony and was free to reject it if the testimony did not comport with the known facts. Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988); Thompson v. State, 14 F.L.W. 527 (Fla. 1989). Thus, in guaging "harmless error", independent record support for the "expert" opinions can render even an erroneously admitted opinion "harmless" while supporting a properly admitted opinion.

In this case, the horrible and terminal nature of Janet's injuries are undisputed. Defense witness Selby said Janet knew she was dying. Mr. McGrail, the paramedic, said Janet "had the look" of a person who was going to die. This evidence is identical to testimony cited in the Teffeteller and Price opinions. In addition, Price, recognized testimony regarding a

patient's knowledge of impending death once on the so-called "final glide path."

Henry retreats to the notion that there is no general scientific accord on reading a person's thoughts, citing **Bundy** v. State, **455** So.2d **330** (Fla. 1984). **Bundy,** of course, addressed the so-called "Frye" test relating to scientific evidence. We note that Frye has not generally been applied to any disciplines, including psychiatry and psychology, which attempt to define, guess or predict human thoughts, despite the fact that no precise or agreed upon scientific standards exits in those areas.

The opinions expressed by the medical doctors at bar are little different, and no less reliable, than the educated guesses of psychologists or psychiatrists. Furthermore, they were corroborated by lay observations **arid** the evidence. Questions regarding their opinions clearly go to the weight rather than the admission of this evidence - particularly when Henry raised the issue.

(B) FALSE EVIDENCE

Paramedic Miles McGrail found Janet Thermidor at the Cloth World Store and described her as being nearly dead, terrified **and** with a look on her face like she knew she would die. (R 114).

Doctor Dellerson reviewed medical records and listened to a taped statement taken later (at the hospital) when Janet was entering the "glide path to death." **She** was not "totally" calm, she was "**relatively**" calm. **(R 1.32-134).**

From these two observations, Henry concludes:

(1) they were inconsistent, and

(2) they reflect state subornation of perjury.

While conclusion (1) is a debateable proposition hinging on time, place and semantic concerns, conclusion (2) is utter nonsense. This reprehensible allegation was not raised in the lower court and is barred on appeal. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). It will not be dignified with further response. But See Thomas v. State, 210 So.2d 488 (Fla. 2nd DCA 1968); Giles v. State, 363 So.2d 164 (Fla. 3rd DCA 1974); and Bumgarner v. State, 245 So.2d 635 (Fla. 4th DCA 1971).

(3) SUFFICIENCY OF THE EVIDENCE

Although the victim in Teffeteller said "Oh God, I'm dying.'' the decision in that case clearly states that such an affirmative expression is not necessary.

Mr. Henry's argument, therefore, is an attack only upon the interpretation and weight of the evidence, not its sufficiency. Weighing evidence is a trial court function that is not repeated on appeal. Tibbs v. State, 397 So.2d 1120 (Fla. 1981). In addition, his dogged insistence that the State had to offer affirmative statements from Ms. Thermidor reflects either disregard or complete ignoral of the established precedents in this State.

The experts concluded that Janet knew she was dying, as did witnesses called by the State and the defense who were in the position to deal directly with her. (i.e. Nurse Selby, Paramedic McGrail). There was ample record support for the trial judge's

conclusions, thus, whether joined in or not, the conclusions were not "clearly erroneous."[10] **Teffeteller, supra.**

(4) CONSTITUTIONAL ISSUES

Mr. Henry alleges that the admission of a dying declaration into evidence violates the "confrontation clause" since Henry and/or his lawyer was not present to hear the statement. The easy answer, of course, is to note that Henry was not obliged to flee from Ms. Thermidor or the scene of his handiwork.

The State notes, however, the total absence of supporting legal argument beyond Mr. Henry's retreat to the sophism "death is different." Dying declarations are admissible in every jurisdiction **and** no exception can or should be made in capital cases.

III

THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS *TO* THE JURY

As confessed by Mr. Henry, the Appellant never requested a jury instruction on "duress" and never objected (at trial) to the instructions as given. Therefore, Henry has no right to appeal. **Steinhorst,** supra, since **a** defendant cannot appeal a trial court's failure to give unrequested instructions. **Jones v. State, 197 So.2d 829** (Fla. 3rd DCA **1967**); **Maugeri v. State, 460** So.2d 975 (Fla. 3rd DCA **1984**); **Frazier** v. **State, 488** So.2d **166** (Fla. 1st **DCA** 1986); Williams **v. State,** 285 So.2d **13** (Fla. **1973**);

[10] The United States Supreme Court defines this standard as one in which the lower court's conclusion enjoys no record support or is clearly contrary to the evidence. **Anderson v. Bessemer City,** 870 U.S. **564 (1985).**

Bennett v. State, 350 So.2d 556 (Fla. 1st DCA 1977). This is true even in capital cases. McCaskill v. **State,** 344 So.2d 1276 (Fla. 1977).

Of course Fla.R.Crim.P. 3.390(d), also conspicuous by its absence from Henry's brief, states:

> No party may assign as error [sic] grounds of appeal the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict. . .

Henry was charged with first degree murder under §782.04 Fla. Statutes, Premeditation (as the mode of killing) was shown by his procurement of accelerant **and** a hammer, his actual killing of the victims and his disposal of the evidence.

Henry, however, revived the old "phantom robber" story which this Honorable Court has seen before. Henry's fantastic (if not absurd) testimony, was totally uncorroborated. According to Henry, three masked and gloved robbers either hid in the loft (one version) or came in the back (another version) and confronted him. The robbers were black (one version) or completely masked and wore gloves (another version). The robbers were armed, yet had to use Henry's hammer to kill the victims. The robbers elected not to kill Henry, but rather toyed with him and dropped him off over in Pompano, telling him to "have a nice day." Henry never reported the crime to anyone nor did he stop at the first pay phone he passed.

Henry never identified a precise threat to his life, nor did he explain why he tied up Mrs. Harris so tight, nor did he explain why he never tried to escape when left alone.

Duress is not a defense to murder in Florida, (especially premeditated murder as proven hare), See Wright v. State, 402 So.2d 493 (Fla. 3rd DCA 1981); Cawthon v. State, 382 So.2d 796 (Fla. 1st DCA 1980); Parker v. Dugger, 876 F.2d 1470 (11th Cir. 1989).

In Parker, id., the federal court said that even if "duress" could excuse "felony murder" a duress instruction should not be given when both felony and premeditated murder are alleged since the jury could be misled into applying the "duress" theory to both. That question is moot, however, since duress is not a defense to murder, period. [11]

Finally, the defense of "duress" is not established by simple assertion by the defense. There must be competent evidence of, (1) Imminent threat ("present" and immediate), and,(2) No opportunity to escape or avoid the threat. Hawkins v. State, 436 So.2d 44 (Fla. 1983); Wright v. State, 402 So.2d 493 (Fla. 3rd DCA 1981); Stevens v. State, 397 So.2d 324 (Fla. 5th DCA 1981).

When the defendant fails to establish these elements, or where the story is impeached at trial, See Cawthon, supra; Wright, supra, he is not entitled to any instruction on duress.

Here, Henry's story was inconsistent and illogical. Still, even as given, Henry was apparently armed and alone with the

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[11] In response to the contention that duress is a defense to robbery or arson, we note that these are not "capital" charges and thus Henry falls squarely into his "waiver" problem (for not objecting).

victims and had opportunities to escape. Henry's stories do not establish "duress".

Henry is not entitled to appeal because he did not request a duress instruction or object to its "omission", he was not entitled to a duress instruction because it is not a defense to murder, and he failed to testify to the elements of duress anyway.

Henry cannot prevail.

IV

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS "DISCOVERY" CLAIM

Mr. Henry never denied the fact that he tied up Mrs. Harris. His defense was the "phantom robber" story.

During the trial, the State received and delivered a fiber analysis to Mr. Raticoff, who objected [12] to the "discovery violation" (although none was ever shown).

After an appropriate Richardson inquiry, See Richardson v. State, 246 So.2d 771 (Fla. 1971), the Court enabled defense counsel to interview Mr. Ayala (the State's expert). Counsel stipulated that there was no prejudice to the defense after fully interviewing the witness on this undisputed issue.

On appeal, Henry apparently alleges that any allegation of a discovery violation compels per se reversal even if the violation is not proven and no prejudice was suffered. Henry does not cite

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[12] We note again, Raticoff agreed that the test results were not withheld (R 1866) and that he received them the same day the State did. By the time Raticoff even objected he had had the report for several days.

any authority for this proposition and does not even mention **Richardsan.**

Even if we were to assume a discovery violation, counsel's stipulation that there was no prejudice to the defense defeats this claim. **Duest v.** State, **15 F.L.W. 541 (Fla. 1990); Thompson v. State, 15** F.L.W. S347 (Fla. 1990); **United States v. Bagley, 473 U.S. 667 (1985).**

V

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS UNPRESERVED "IMPROPER ARGUMENT" CLAIM

Mr. Henry has fluffed **up** two disputed factual issues into a claim of "improper argument" based upon certain as yet unidentified "false testimony".

Mr. Henry's failure to object at trial totally precludes appellate argument. **Steinhorst, supra; Tillman v. State, 471** So.2d **32** (Fla. 1985); **White** v. **State, 446** So.2d **1031** (Fla. 1984); State v. **Cumbia, 380** So.2d **1031** (Fla. 1980; **Clark** v. **State, 363** So.2d **331** (Fla. 1978).

Without waiving this defense, we note that Mr. Satz' argument acknowledged Henry's "media told me" testimony but also relied upon Mr. Balke's unimpeached testimony as to when the precise amount stolen was calculated. Satz' argument was that Henry **knew** how much he stole. Even if the media shouted an imprecise estimate to Henry, Henry still could have know how much he stole.

We disagree that this issue was "central" or "went to the heart" of the case. Robbery is robbery and murder is murder no

matter the precise amount of cash involved. It is surreal to even allege that the jury was unmoved by the charred victims and resolved this case solely on this collateral issue. Indeed, if the issue was all that vital, Mr. Raticoff would have objected.

The second argument by Mr. Satz went to Henry's claim that the United States Marine Corps teaches its men and women to collaborate. Henry was not tortured, not denied bathroom privileges and not denied sleep. While he did face the "imminent threat" of fast-food, that is not exactly equivalent to some devious Viet Cong interrogation method. The absurdity of Henry's argument was a matter of common knowledge that did not require expert rebuttal. Indeed, expert testimony might not have been admissible, **Rodriquez** v. **State,** 413 So.2d 1303 (Fla. 3rd DCA 1982); since every American is familiar with the phrase "name-rank-and serial number only."

Mr. Satz' argument was a proper attack upon the credibility of Mr. Henry, the "collaboration-coached", marine who was inexplicably spared by the "phantom robbers."

This argument was not improper, which is why trial counsel did not object.

VI

THE APPELLANT IS NOT ENTITLED TO RELIEF ON THE GROUNDS THAT HE HAS NOW DECIDED TO UTILIZE WITNESSES

The State cannot run the defense and the Court cannot dictate how trial counsel should present his case. Thus, the public cannot be penalized when the defense makes a considered

tactical decision not to call witnesses. **Strickland** v. **Washington, 466 U.S. 688 (1984).**

The Appellant's argument reflects nothing more than the fact that Henry wants to retry hi5 case using an alternate strategy. That concept was addressed in **Curry v. Wilson, 405** F.2d 110,113 (9th Cir. **1968):**

> It would be a perversion of the judicial process to now give Curry the **best** of two worlds upon the basis of such an alleged statement by his counsel . . . A contrary result would enable counsel for a defendant to try one strategy by deliberately using, for his client's benefit, evidence that could be claimed to be constitutionally tainted and then, if not satisfied with the result, to get a second trial by claims that the constitutional taint requires a reversal in spite of his tactical decision.

Counsel for Mr. Henry confesses **the** waiver of this **issue** by lack of objection at trial, **Steinhorst, supra,** and **he** candidly acknowledges the lack of legal support for his claim. **Preston** v. State, **260** So.2d **501** (Fla. 1972), [13] He tries to justify inclusion of this needless issue in his needlessly oversized "brief" by contending that **Trushin v.** State, **425 So.2d** 1126 (Fla. 1982) abolishes the contemporaneous objection rule any time **a** "constitutional" challenge to a statute is presented.

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[13] **Preston** plainly sets out the rational for Rule 3,250. **It is** designed to be a **benefit** for the defense when it does not have its own array of witnesses to counter the State's array. Otherwise, the State, as the party with the burden of proof, would call all the witnesses and get first and last argument. Henry's argument is as hollow, therefore, as the long discredited claim that some defendant's are "penalized for going to trial'' because they reject a plea bargains or receive a maximum sentence.

What **Trushin** really says **is** that the rule is waived if a constitutional challenge to **the statute under which the accused was convicted** is challenged since the challenge represents fundamental error. Thus, Henry's claim is barred. It is also meritless but, again, the procedural bar takes precedence and should be employed. Harris v. **Reed, U.S. 103** L.Ed.2d **308 (1989).**

VII

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS DE NOVO "VICTIM EVIDENCE" CLAIM

Since none of the alleged errors delineated and mischaracterized in Henry's brief were objected to or argued below, they are barred on appeal. **Steinhorst** v. **State, supra; Harris v. Reed, supra.** Furthermore, Mr. Henry's own cited cases of **Welty** v. **State,** 402 So.2d 1159, 1162 (Fla. **1981),** states unequivocally:

> Admission of the identification testimony from a member of the victim's family, however, is not fundamental error and may be harmless error in certain circumstances. **Mallory** v. **State, 382** So.2d **1190** (Fla. **1979); Rankin** v. **State, 143** So.2d **193 (Fla. 1962); Barrett v. State,** 266 So.2d **373** (Fla. 4th DCA **1972); Scott** v. **State, 256** So.2d **19** (Fla. 4th DCA **1971).**
>
> Accord: **Thompson v.** State, **15** F.L.W. S.347 (Fla. **1990).**

Even in the context of a "**Booth-Gathers**" (victim impact) claim, **the** failure to preserve the issue at trial precludes review. **Jones** v. **Dugger, 533** So.2d **290** (Fla. 1988); **Eutzy** v. State, 541 So.2d **1143** (Fla. 1989); **Preston** v. **Dugger, 531** So.2d **154** (Fla. **1988).**

Without waiving this procedural bar (Harris v. Reed, supra), the State would nonetheless object to Mr. Henry's characterizations of this evidence.

The victims at bar were horribly burned to the point where identification was not easy. In part, identification stemmed from the shreds of cloth burned onto their bodies, or to their signatures on relevant documents. Of course, for the arson charge, the extent of damage to the building was a requisite element to be proven.

Debra Cox testified only to the clothing Janet wore in response to defense contentions regarding clothing and the use of accelerants. (R 1294). She was not shown photos of her sister (Janet) and did not display emotion. (R 1294). [14] The defense objection was withdrawn! (R 1295).

Mr. Harris, similarly, testified without objection only to compare and identify signatures on various documents signed by his late wife. (R 1409-10). He did not testify to his wife's career, character or anything else. The defense neither objected nor cross examined Harris.

Mr. McGrail merely provided crime scene testimony. His testimony was also relevant to the statutory aggravating factors, Mr. Henry did not preserve these issues for review and has failed to allege or show either error or prejudice. He is not entitled to relief.

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[14] Mr. Balke did not work at the same Cloth World outlet as Mrs. Harris and could not attach a "relevant" time to her signatures. Mr. Harris could by noting when his wife worked and how he knew when she was there.

VIII

THE TRIAL COURT DID NOT ERR IN ADMITTING A LIMITED NUMBER OF PHOTOGRAPHS OF MR. HENRY'S HANDIWORK

The trial judge admitted, with great caution, only a limited number of photographs. As in every death case, however, the defendant complains that he was prejudiced by the admission of photographs of his handiwork.

A defendant is not entitled to insulation from this relevant evidence, and the key to admissibility is nothing more than "relevance". Straight v. **State, 397** So.2d 903 (Fla. 1981). "Relevance" includes evidence of the nature, cause and extent of a victim's injury. Haliburton v. State, 15 F.L.W. S193 (Fla. 1990); **Randolph** v. **State, 15 F.L.W. S271 (Fla. 1990); Thompson v. State, 15** F.L.W. S347 (Fla. 1990).

Young v. State, 234 So.2d **341** (Fla. 1970), cited by Henry, was cited by **Halkburton** as well. The Honorable Court distinguished Young by noting it involved the admission of 45 photographs of marginal relevance.

The photographs admitted at bar were all relevant to specific issues of the extent and **cause** of injury and the commission of this crime. They are only "gruesome" because Henry committed a gruesome crime. As this Honorable Court succinctly put it in **Henderson v.** State, **436** So.2d 196, 200 (Fla. 1985):

> Those whose work products are murdered human being should expect to be confronted by photographs of their accomplishments.

IX

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS "USE OF FALSE TESTIMONY" CLAIM

Mr. Henry devotes four sentences and no authority for this procedurally barred (unpreserved) claim. The fact that expert and lay witnesses arrived at the same conclusion (Janet knew she was dying) but varied in their depictions of her condition does not support a "false" evidence claim. Experts can honestly disagree. This issue is, in any event, barred. Steiahorst, supra.

X

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS "ALTERNATIVE THEORIES" CLAIM

Mr. Henry contends his constitutional rights were violated by an indictment charging him with first degree murder (under either of two theories) and a non specific jury verdict of guilt.

First, Henry alleges "double jeopardy" is implicated because the jury could have bought his duress defense.

Second, citing a 9th Circuit decision interpreting a Nevada statute (and not a "premeditated vs. felony murder" statute at that), Henry baldly alleges he did not know what he was charged with.

Third, Henry contends he has a right to a unanimous verdict.

None of these issues **appear** in Henry's various pretrial motions to dismiss, nor were they argued in any motion for new

trial. All of these claims are waived. Steinhorst, **supra.** Even if they could be read into Henry's motions, they are meritless.

First, there is no evidence that supports the highly speculative notion that this jury believed Henry's "duress" defense. This jury convicted Henry and recommended death (by 9-3 and 8-4 votes). Relief in Florida is not granted on speculation regarding **the** possible thoughts of the jurors. Sullivan **v. State, 303** So.2d **632** (Fla. 1974).

Second, Henry's argument ignores the true relationship between premeditated and felony **murder. As** this Court has "repeatedly explained", **Green** v. State, 475 So.2d 235, 236 (Fla. 1985), these two forms of first degree murder are not "mutually exclusive" or "different kinds of murder." (This is why Givens v. Housewright, 786 F.2d **1378** (9th Cir. 1986), does not apply in Florida.)

Under Sec. 784.02, there is but one crime of murder in the first degree. "Felony" murder is "premeditated murder" and is listed separately **only** because the element of premeditation, as an evidentiary matter, is proven by proving any listed specific intent crime. Since the "difference" between the crimes only goes to the mechanics of proving premeditation, a general charge of first degree murder covers both theories. Knight v. **State, 338** So.2d **201** (Fla. 1976); **Haliburton** v. **State, supra. See also In The Matter Of Use By Trial Court Of Standard** Jury **Instructions In** Capital **Cases,** 431 So.2d 594 (Fla. 1981).

Given the fact that Henry was also charged in the same indictment with the specific underlying felonies of arson and

robbery (and had to defend the issue of intent to commit these felonies anyway) Henry had to prepare defenses to those specific intent crimes anyway. Indeed, no where in his oversized brief does Henry grace us with the nature and extent of any "misleading" of himself or his lawyers due to any defect in the indictment.

Third, a specific verdict as to how "first degree murder" was committed is not required. We were not dealing with two mutually exclusive or conflicting crimes. (See "First" above). **Gorham v. State, 521** So.2d **1067,** 1070 (Fla. 1980), recently reaffirmed without citation in Haliburton, supra, need not be reconsidered.

XI

"THE ACCUMULATION OF ERROR" ARGUMENT DOES NOT COMPEL REVERSAL

The whole can never be greater then the sum of ts parts. Henry's inability to demonstrate error does not entitle him to reversal in the aggregate any more than it **does** on any one point.

ARGUMENT

"PENALTY PHASE"

I

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS UNPRESERVED "FAILURE TO CONSIDER DEFENSE ISSUES" CLAIM

(A) STANDARD OF PROOF

The written sentencing order states that Judge Polen found certain mitigating factors "beyond a reasonable doubt." The order also says that the Court "carefully and conscientiously" followed Section 721.141(2)(b). On appeal, Mr. Henry c'ontends for the first time that the trial judge did not fallow the statute (as he alleged) and that he applied the wrong standard of proof to the mitigating evidence.

Since Henry did not preserve this issue for review by timely (or any other) objection, we submit that this issue is barred. Steinhorst, supra; White v. State, 446 So.2d 1031 (Fla. 1984).

Without waiving this defense, we also reject Henry's claim.

First, the fact that Judge Polen **found** certain mitigating factors to be established "beyond a reasonable doubt" is a reflection only on the evidentiary support for those factors. It is not, even remotely, a statement that "all" suggested mitigating factors were subjected to a "reasonable doubt" standard of proof.

Second, there is strong record support for the fact that Judge Polen satisfied Floyd v. **State**, **497** So.2d 1211 (Fla. 1986). The most significant of the supporting factors is Judge Polen's

specific instruction to the jury R 2881) - not quoted by Henry - that mitigating factors do not **have to be** proven "beyond a reasonable doubt." It is hard to believe that Judge Polen would instruct the jury on the correct standard for receiving this evidence and then, after "carefully and conscientiously applying Section 921.141(2)(b)," ignore his own advice.

We submit, aside from the illogical nature of Henry's claim, that he mistakenly equates the reception of proof with the finding of mitigating factors. While a mitigating factor need not be proven "beyond a reasonable doubt," the sentencer is not required to find the existence of a mitigating factor even if some evidence exists to support it.[15] This was explained in **Rogers** v. **State**, **511** So.2d 526 (Fla. 1987) when this Court set out a three step analysis of putative mitigating factors; to wit:

> (1) The factor should be examined for evidentiary support.
>
> (2) The factor should be judged to see if it actually ameliorates the defendant's conduct on culpability.
>
> (3) The factor should then be weighed against the aggravating factors.

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[15] In **Eddings** v. Oklahoma, **455** U.S. 104 (1982), the Court held that evidence could not be given "no weight" by **not** being **considered.** The Court did not reject the notion that evidence, once considered, could nevertheless be rejected **as** having no weight. In fact, the mere existence of "some weight" is considered only in the course of Tedder-Rule review. See **Fead v.** State, 512 So.2d 176 (Fla. 1987); **Holsworth** v. **State**, **522** So.2d **348** (Fla. 1988); McCampbell v. **State**, 421 So.2d 1072 (Fla. 1982).

Under the **Rogers** test, the sentencer could recognize the existence of mitigating evidence but still reject as unestablished any attending "mitigating factor." Of course, any mitigating factor that was so established would still be weighed against the aggravating factors.

The proposed mitigating factors in Henry's brief are not supported by the record to the extent that Judge Polen was required to find them. Thus, even if he erred, any error was certainly harmless. Reviewing these proposed factors we find:

(A) "Henry was a hard worker."

Henry planned this robbery as an inside jab, just as he had attempted to steal from a previous employer the year before. (SR 190). This record merely proved that Henry's modus operandi was to work himself into a position of trust and then abuse it. While "hard work" might be considered if we were trying to rationalize a life-recommendation in a **Tedder** case, See **Fead,** supra; **McCampbell,** supra; Holsworth, supra., here the jury suggested death after being correctly instructed.

(B) "Henry was bright and had a positive personality."

Henry contends his intelligence and personality made him amenable to rehabilitation. The record shows that Henry received a "break" after trying to steal from Super-X (SR 190), but rather then benefit from rehabilitation, he merely altered his plan. Henry was locked in Super-X. (SR 190) Henry got his own **keys** this time. Henry was caught as he left Super-X. (SR 190). Henry left Cloth World alone and late at night. Henry was caught by coworkers at Super-X (SR 190). This time Henry killed them.

Henry's sinister intelligence does not mitigate, ameliorate or lessen his crimes. **Rogers v. State, supra; Eutzy v. State, 458** So.2d 755 (Fla. 1984).

(e) "Remorse and Cooperation with Police"

Henry fled from the police on foot. To help himself once he realized he was wanted, Henry made a phony 911 report. Henry, even through trial, persisted in his bogus "phantom robber" story. Henry's one comment about the poor women does not ameliorate his crimes. Given his propensity to lie, any remorse could have been feigned to help himself. This factor was not proven. See Puiatti v. State, 495 So.2d 128 (Fla. 1986).

(d) "Lack of Violent Criminal Record"

The fact that the crime at Super-X was not violent led to a "deferred prosecution" and to inclusion of this event in the Court's finding of the "lack of significant criminal record" mitigating factor. Thus, we submit that Henry received the benefit of this "factor" and did not deserve double credit.

Thus, this issue of "consideration of defense issues" was not preserved below and does not reflect either actual error, or if error were to be presumed, either fundamental or reversible error.

II

THE APPELLANT IS NOT ENTITLED TO RELIEF FROM HIS OWN STRATEGIC DECISIONS

Mr. Henry's decision not to call penalty phase witnesses cannot be alleged as grounds for reversal. As this Court noted in White v. State, 446 So.2d 1031 (Fla. 1984), citing McCrae

v.State, 395 So.2d 1145 (Fla. 1980), defendants cannot be allowed to manufacture their own error. See also **Curry** v. Wilson, supra.

Henry is not and never has been incompetent and he personally attested his agreement with counsel's conduct [16] on the record. He did not accuse counsel of ineffectiveness at trial, thus preventing the State from piercing the attorney-client privilege or creating a record from which a claim of "ineffective counsel" could be litigated (or appealed). We submit the Henry cannot blame counsel for a jointly selected strategic decision, **See Bundy v. State,** 497 So.2d 1209 (Fla. 1986), and, by virtue of his failure to preserve the record, cannot prevail.

III

THE TRIAL COURT DID MOT ERR IN REJECTING PROPOSED PENALTY PHASE INSTRUCTIONS

Henry asks this Court to sanction jury instructions which not only misstate the law, but also unleash such unbridled jury discretion to **ignore** the evidence as to return is to the pre-Furman area and thus, in turn, lay the groundwork for a follow-up attack on the death penalty. We submit that this Honorable Court is not so foolish as to fall into this trap.

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[16] At page 56, Henry's brief also alleges that counsel (at trial) had a "conflict of interest" (avoiding a collateral charge of ineffectiveness) which motivated him to put his client personally "on record". Given the nature and proliferation of false accusations against trial lawyers in this State, we do not doubt that the practice of defensive law - like "defensive medicine" has become necessary. Indeed, Henry's own oversized brief with it's prolific array of barred, speculative and moot claims is itself a specimen of the same "defensive law" for which trial counsel has been faulted. We do not fault either counsel.

Henry's requested instructions on unbridled mercy (number 8) and ignoring the evidence (number 6) have repeatedly been rejected. **Mendyk v. State, 545 So.2d 846 (Fla. 1989); Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989); Correll v. State, 15 F.L.W. 5148** (Fla. **1990).**

Henry's instruction number (2) regarding the use of a single aspect of the crime to prove two or more aggravating factors was also rejected by **Mendyk, supra.** ***See*** **also Funchess** v. Wainwright, 776 F.2d 1057 (11th Cir. 1985).

Henry's final requested instruction stated that "lack of intent to kill" should be considered in mitigation when the defendant (as argued on appeal) "merely participated in the felony." This instruction would have clearly misled the jury into thinking that death is not an appropriate penalty for felony murder. The idea that Henry was acting out of duress, or coercion, or was unwilling to kill was **covered** (subsumed) in the standard instructions. **See Bertolotti** v. **Dugger, supra; Correll v. State, supra.**

IV

THE TRIAL COURT DID NOT ERR IN FINDING STATUTORY AGGRAVATING FACTORS

Mr. Henry was found guilty of two counts of first degree murder and the felonies of robbery and arson. Henry was correctly sentenced to death in keeping with the jury's recommendation. Henry's challenge to the court's findings in aggravation fall as follows:

(a) Murder during the course of an enumerated felony.

Henry was convicted not only of murder, but of arson and robbery arising out of the same incident.

Henry alleges that his "double jeopardy" rights were violated because the "guilt phase felony murder instruction" only referred to robbery - thus waiving "arson", while the State's penalty phase argument referred to arson - thus "waiving" robbery.

First, "double jeopardy" attaches to crimes, not mere allegata. There is only one crime of "first degree murder'' and the felony - murder concept only goes to the proof of intent. (See above). Thus, Henry's novel double jeopardy claim, which was not argued below (and is barred under Steinhorst, supra.) is based upon an incorrect legal assumption. [17]

Second, in Ruffin v. **State,** 397 So.2d 277 (Fla. 1981), this Court held that uncharged crimes (kidnapping **and** robbery) can be used to support the finding of murder during the course of a felony where they were proven at trial. Here, both arson and robbery were separately charged **and** were also proven. Thus, during the guilt phase the State, to avoid "doubling", could attach the robbery to the pecuniary gain factor and "arson" to the factor in question here, since both arson and robbery were (now) proven facts (unlike before). The State did not ever waive

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[17] In Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989), there were two separate trials. In the first, the Court specifically found no evidence of felony murder, thus limiting the State on retrial to a premeditation theory. If Delap is in some conflict with Ruffin on the definition of felony murder or on Florida evidence, Ruffin should control.

arson or robbery, but even if it had never charged Henry with those crimes, the Court could still, under Ruffin, have applied them.

Third, Henry goes on to attack the concept of felony murder as an aggravating factor, a point long ago (and repeatedly) rejected. **Clark v. State, 443** So.2d **973** (Fla. 1983) (death penalty is not automatic for felony murders) Miles v. **State, 476** So.2d **172 (Fla. 1985).**

(b) Cold - Calculated - Premeditated

There is no disputing the heightened premeditation involved in this case. Henry worked his way into a position of trust at Cloth World and decided not to repeat the mistakes of his failed Super-X crime. Henry obtained a hammer. Henry obtained an accelerant (none were to be had a Cloth World). Henry picked his time. Henry took care of his victims one at a time. Henry clubbed his victims with a hammer and then he doused them and set them on fire. This was in every sense of the word a crime evincing heightened premeditation. Garron v. State, 528 So.2d 353 (Fla. **1988); Duest** v. **State,** 462 **So.2d 446 (Fla. 1985); Mills v. State, 462** So.2d **1075** (Fla. 1985).

(c) Avoid Arrest

Henry, again careful not to repeat the errors at Super-X, murdered the two potential witnesses to his crime and set them on fire to further obliterate any evidence. While the mere fact that the victims knew Henry would not support this aggravating factor, See **Caruthers** v. **State, 465** So.2d **496** (Fla. 1985), the extra indicia required by the caselaw are present here.

Henry bound and gagged Phyllis in the bathroom. He stole nothing directly from Phyllis. Her death was not necessary for Henry to get the money from the Cloth World office once he tied her up in a back room. Henry only killed Phyllis to silence her. Similarly, once Henry clubbed Janet with the hammer he could have left with his money. Instead, while she begged for mercy, he doused her and set her on fire.

This case compares with **Hooper v. State, 476 So.2d 1273 (Fla.** 1985) and Correll v. State, **523 So.2d 562** (Fla. 1988), in which the mere recognition factor, combined with the fact that the victims were witnesses to other criminal actions by the defendant upheld this factor.

In Correll, the Court noted that the defendant and the victim got along well, thus eliminating any other motive for the killings. Here the same factor applies. Henry admittedly got along well with both victims. The only possible reason to kill them was witness elimination. Even now, the most Henry can allege in response is that he does not know why he killed the victims. (Brief at **67).** We submit that he does. He eliminated witnesses.

(d) Pecuniary Gain

Henry murdered two innocent women in the course of stealing over twelve hundred dollars from a store. Amazingly, Henry argues that the crime was not for pecuniary gain.

The cited defense cases of Hill v. State, 549 So.2d 179 (Fla. 1989), and Scull v. State, 522 So.2d 1137 (1988), both involved the incidental taking of property as an afterthought to

murder. In **Hardwick** v. State, **521** So.2d 1071 (Fla. 1988), there was no hard evidence that anything was stolen at all. These cases are clearly inapplicable.

Here, even using Henry's incredible "phantom **robber**" tale, there was ample evidence that robbery was the motive. Cook **v.** State, **542** So.2d **964 (Fla.** 1989). Henry did not set out to kill two women and then take money **as** an afterthought, Henry set out to rob another employer and murdered two co-workers in the process. **Menendez** v. State, **417** So.2d 312 (Fla. 1982).

(e) Heinous-Atrocious-Cruel (H.A.C.)

Mr. Henry raises two challenges to the application of this factor to the murder of Phyllis Harris. (Henry **concedes** its applicability to Janet Thermidor).

First, Henry alleges that **there** is conflict between Pope v. State, 441 So.2d **1073** (Fla. 1984) and Mills v. State, **476** So.2d 172 (Fla. 1985) on the issue of the defendant's mental state as a factor to be considered. **Pope** addresses the issue only from the perspective of a defendant's lack of remorse, stating that **lack** of remorse cannot be used as an aggravating factor. Thus, Pope is not in conflict with Mills, which correctly considered the defendant's pitilessness or enjoyment of the victim's suffering.

Second, Henry alleges that Phyllis Harris was possibly unconscious and thus feeling no pain when he set her on fire.

The record (R **2044** - et seq.) shows that Henry tied and blindfolded Phyllis in the men's room. Then he fetched the hammer. Then he clubbed and torched Janet, who ran from the office to the ladies' bathroom. Then Henry clubbed Phyllis and

set her on fire. It is clear that Phyllis had plenty of time to sit, in terror, as the horrid events of that night unfolded.

On appeal, Henry alleges that Phyllis might have b en knocked out by the hammer blows and thus did not feel the flames. This contention is similar to the defense position in the victim-burning case of Way **v. State, 496** So.2d **126 (Fla. 1986),** which **this** Court rejected.

While the **Way** decision was reinforced by evidence that his victim screamed, Henry "does not recall" whether Phyllis begged or screamed or not. **(R 2144).** Oddly, Henry never alleged she was **knocked** out and felt neither terror no pain. (R **2144-45).**

We submit that, as in Way, the victim was burned while still alive. She was hog tied, she was terrified, she was alive and conscious when Janet was set an fire. Even if we omit the burning from our heinous, atrocious and cruel determination, Phyllis' terror prior to being clubbed - but not killed - with Henry's hammer makes **this** factor applicable. **Cherry v. State, 544** So.2d **189** (Fla. **1989); Johnson v.State, 497** So.2d **863** (Fla. 1986). [18] Since Henry did not knock out Janet despite hitting her with his hammer, we cannot presume he knocked out Phyllis. If he did not (and since we know she was alive when he set her on fire), this case squarely falls with the **Way** decision.

The record evidence was to be weighed by the trial judge. Tibbs **v. State, 397** So.2d **1120** (Fla. **1981).** Applying this factor to the deference afforded the sentercer as well as the appellate

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[18] **See also Preston v. State, 444** So.2d **939** (Fla. **1984); Adams v. State, 412 So.2d 850** (Fla. **1982)** (victims terror prior to being killed).

presumption (of all facts and inferences favoring the judgment), it appears that this aggravating factor was not misapplied to the Harris murder.

V

THE TRIAL COURT DID NOT APPLY NON-STATUTORY AGGRAVATING FACTORS

Mr. Henry challenges the result abtained in the penalty phase because the trial court was exposed to "improper" aggravating evidence during the guilt phase. Under this theory, capital defendants apparently must be "presumed guilty" even during the guilt phase and the evidence must be tailored accordingly.

The "evidence" complained of was the family member identification evidence complained of in Appellant's point. (I)(G) to wit: (from pg. 43):

(1) Both victims worked two jobs

(2) Janet lived with her sister (Mrs. Cox)

(3) Mrs. Cox could identify the clothing Janet wore.

(4) Descriptions of the victim's jobs,

(5) Evidence of the position and condition of the victims' bodies (from McGrail)

(6) Janet's condition at the hospital when she gave her statement

(7) Phyllis' husband's testimony about her handwriting

(8) Damage to the Cloth World store.

All of this evidence was relevant to guilt-phase issues either required to be proven by law or raised by Henry himself. Murder is not a victimless crime and neither Booth v. **Maryland, 107** S.Ct. **2529 (1987)** nor **South Carolina** v. **Gathers, 109** S.Ct. **2207** (1989), outlawed the admission of all evidence pertaining to the victim.

Evidence of the victims' identity, the crime scene (including photos) or predicate testimony regarding the identification of clothing or signatures is not "Booth" evidence.

There was, however, a victim impact statement in the Pre-Sentence Investigation. Henry, however, did not object to the PSI or to any argument by the prosecutor. The issue therefore, is waived. **Jones** v. Dugger, 533 So.2d 290 (Fla. **1988); Preston** v. **Dugger, 531** So.2d **154 (Fla. 1988).** Even if we examine this **Booth** claim under a harmless error analysis, Henry loses.

In **Barclay v. Florida, 464** U.S. **939** (1983), the Court held that mere exposure to (or even reference to) non-statutory aggravating factors does not constitute reversible error. More recently, in **LeCroy** v. **State, 533** So.2d **750** (Fla. 1988), this Court found "harmless" **Booth** error where the jury was not exposed to the evidence and the Court did not rely upon non-statutory aggravating factors. That is the precise situation at bar. Thus, Mr. Henry is not entitled to appeal his unpreserved Booth claims but, in any event, any error was harmless.

VI

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS CONSTITUTIONAL CLAIMS

Mr. Henry ends his challenge to his death sentence by simply dumping a gaggle of baseless and unpreserved "issues" into his needlessly oversized brief. Indeed, some of his redundant arguments are not even his own but are mere reproductions of a brief filed in the "Bedford" case. *(See* Brief, pg. 93).

The arguments begin with a brief section "D" entitled "Constitutionality of The Florida Death Penalty Statute." After the de rigeur reference to **Furman** v. **Georgia, 408** U.S. **238** (1972), however, Henry abandons his attack on the statute to launch into the jury instructions. None of these instructions were challenged at trial.

The law is clear, Henry cannot appeal these instructions. King **v. Dugger, 15** F.L.W. **11** (Fla. **1990); Ventura** v. **State, 15** F.L.W. S190 **(Fla.** 1990); **Steinhorst, supra.** Thus, **the** jury instructions do not warrant discussion.

Next, Henry attacks the practice of permitting the jury to suggest a sentence by majority vote, after condescendingly "accepting for the sake of argument" only that the constitution does not require jury sentencing. Mr. Henry is directed to read **Spaziano** v. Florida, **468 U.S. 447** (1974), which settled that issue by specifically holding that jury sentencing is not **required** by the constitution. Thus, it makes no difference whether the vote is unanimous or not. See Walton **v. Arizona, 4 F.L.W. S865 (1990).**

Of course, Henry confesses that his "issue" was resolved against him in Alvord v. State, 322 So.2d 533 (Fla. 1975). More recently, this Court rejected this issue in Brown v. State, 15 F.L.W. S167 (Fla. 1990).

After ignoring Spaziano and the relevant caselaw, Henry drifts on to deliberately raise a meritless "Caldwell" claim (again relating to the jury instructions). King v. State, 15 F.L.W. 11 (Fla. 1990).

From there, Henry demands relief because every lawyer in Florida is incompetent. This nonsense was not argued below and is not properly before this Court.

Lawyers alone do not suffer the wrath of Henry. Accusations are made against all of Florida's trial judges, the Justices of this Honorable Court and, (why not) "southern justice" and the "Florida judicial system." (Brief, 81-84). None of this was raised below, nor has it been specifically related to Mr. Ratcoff or Judge Polen or this Honorable Court. It is all waived, Steinhorst, supra.

Eventually, Henry does get around to submitting arguments on our statute.

The "HAC" and "CCP" statutory aggravating factors clearly narrow the class of death eligible defendants. Palmes v. State, 725 F.2d 1511 (Fla. 1984); Dobbert v. State, 409 So.2d 1053 (Fla. 1982); Kelley v. State, 486 So.2d 578 (Fla. 1986).

The "prior violent felony" and "under sentence" factors were not applied in this case but, again, Florida's aggravating factors have consistently been upheld since Proffitt v. Florida,

428 U.S. 242 (1976). See Smith v. State, 424 So.2d 726 (Fla. 1982); Harich v. State, 944 F.2d 1464 (11th Cir. 1988).

The issue of "appellate reweighing" is barred because it was not raised below. The Supreme Court has held that the constitution does not compel or forbid appellate "reweighing" of evidence, thus mooting this issue. Clemons v. Mississippi, 108 L.Ed.2d 725 (1990).

Henry also offers an absurd challenge to the contemporaneous objection rule (Brief pg. 87) which was not preserved below and is not a constitutional issue. The rule is perfectly proper. Wainwright v. Sykes, 433 U.S. 72 (1977).

Henry proceeds to attack this Court's application of its Tedder rule, even though this is not a Tedder case, citing Cochran. In Cochran v. State, 547 So.2d 928 (Fla. 1989), the Court did not confess to incompetence. While the State, particularly since Spaziano, believes in the strict construction of the jury override statutes, relegating the jury to it proper, advisory, role, we reject the motion that evolutionary changes in the law render the law unconstitutional.

Henry decries the lack of special verdicts, but they are not required. Haliburton v. State, 15 F.L.W. S193 (Fla. 1990).

Henry complains that death sentences cannot be mitigated under Rule 3.800. Death sentences, unlike other convictions, receive automatic and guaranteed Supreme Court review instead.

There is no "presumption of death" (argument "c", pg. 89), a point Henry concedes but argues anyway.

VII

APPELLANT WAS NOT "ABSENT" FOR ANY CRUCIAL STAGE OF HIS TRIAL

The attorneys and Judge Polen had an informal, but recorded, discussion while awaiting Mr. Henry's entrance into the Courtroom When Henry arrived his lawyer filled him in on the conversation. None of this took place during the "trial." The jury was not present, no witnesses were called and no rulings were made. The lawyers just discussed their plans for the next phase of the case.

Henry did not object and did not preserve the issue for appeal. Steinhorst, supra.

VIII

CONSTITUTIONALITY OF AGGRAVATING FACTORS

Mr. Henry's brief goes back through the aggravating factors, using extractions from another brief. Again, the HAC, CCP. Pecuniary Gain, felony murder and avoid arrest factors are constitutional. **Proffitt, supra;** Smith, **supra; Palmes, supra; Clark, supra; Kelley,** supra; **Harich,** supra.

Regarding the "rule of lenity", we note that the federal system has already recognized that the consideration of unlimited mitigation creates "asymmetry on the side of mercy." Stanley v. **Zant, 697** F.2d 955 (11th Cir. 1983).

The rule of lenity grew out of the presumption of innocence. It is not a mandate for courts to defeat legislative intent or the will of the people in this democratic society.

Finally, we note that Henry agreed to a PSI, participated in is preparation, reviewed it, offered corrections or input on it, and **never** raised an objection based on "confrontation." As noted above, Henry cannot manufacture reversible error or pervert justice by appealing just because he does not like what his PSI says. **Curry v. Wilson, supra.**

IX

MR. HENRY'S NON-CAPITAL SENTENCES WERE PROPERLY ENHANCED

Henry alleges that the new sentencing guidelines announced in July, 1987, superceded **Hansbrough v.** State, **509** So.2d 1081 (Fla. 1981), and thus preclude any departure sentence. Henry alleges that "victim death" points were already scored under **the** new rules, so the fact that his crimes were capital in nature does not matter.

Florida Rules of Criminal Procedure Re Sentencing Guidelines, 509 So.2d **1088** (Fla. 1987), did not amend the Florida Sentencing Guidelines to suddenly include capital crimes. While the Court should not score victim injury at all under the facts at **bar,** the lowering of Mr. Henry's score would only emphasize the need for departure.

We submit that capital murder is so **apart** from the norm of "victim injury" that it could not be "scored" under the guidelines. (That is why the death penalty exists.) Thus, **Hansborough** continues to **be** good law,

CONCLUSION

Mr. Henry's monumental collection of moot, baseless and procedurally barred claims do not entitle him to relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Gary Caldwell, Assistant Public Defender, 15th Judicial Circuit of Florida, Governmental Center/9th Floor, 301 North Olive Avenue, West Palm Beach, Florida 33401, this 31 day of July, 1990.

MARK MENSER

COUNSEL FOR APPELLEE