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IN THE SUPREME COURT OF FLORIDA

ROBERT EUGENE HENDRIX,

Appellant,

v. CASE NO. 79,048

STATE OF FLORIDA,

Appellee.
______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE
INITIAL BRIEF OF CROSS-APPELLANT

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STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's recitation of the case and facts subject to the following additions, deletions and corrections.

Robert E. Hendrix was charged with armed burglary (R 1137; 1142). He and his cousin, Elmer Scott, broke into a house and were caught (R 1375). According to Hendrix' account, he and Elmer were ransacking the house when the owner came home. Elmer panicked, ran downstairs, tried to run out the front door and was caught (R 1382-83). Hendrix, however, managed to escape by exiting the way they came in, through the second floor window (R 1383). Hendrix was upset because his own cousin had decided to testify against him (R 1384).

Hendrix indicated on several occasions that he would like to "cut the S.O.B.'s throat." (R 1386). He told Wallace Smith that someone was trying to turn state's evidence against him, which he didn't like. He was looking at three to four years and had to do something before he went to court (R 1238-39). A court date had been scheduled for August 28, 1990 (R 1147). Hendrix told Christopher Broome that he was going to get Elmer back and kill him. One plan involved blowing up the gas tank in the back of Elmer's trailer (R 1365). Another plan was to shoot him in his truck on his way from work. He asked Broome to drive while he shot Elmer but Broome refused (R 1366). After receiving papers in August pertaining to his case Hendrix remarked to JoAnn Elrod "Wouldn't it be a shame if Elmer didn't show up for court?" (R 1405). Hendrix did not want to accept the plea offer (R 1502).

One of the plans to kill Elmer called for Denise Turbyville, with whom he lived, to put the hood of the car up, pretend it was broken down, and flag Elmer down on his way from work. Hendrix would then come around from the other side of the car and shoot him (R 1511). Hendrix also mentioned the fact that there were propane tanks on the back of the Scotts' trailer (R 1512). A couple of weeks before Hendrix' court date, he and Denise drove by the trailer in Sorrento to see if they had been keeping their windows open. If the windows were open, Hendrix was going to climb in and kill them in their sleep, but the windows were not open when they drove by (R 1518-19).

In mid July 1990, Bernard Campbell went to Elmer's trailer to visit. Elmer introduced a man as his cousin Robert and called him "Bobby." He was drinking beer. Michelle asked what everyone wanted with supper and Bobby said in a rude manner "I have a drink." Elmer said "Don't pay any attention to him, he's had a bad day." Bobby replied "Well, you're the cause of it. I ought to stomp your scrawny little ass." Campbell started to get up because he did not want to be in the middle of a fight. Elmer said "Let's go outside." As he started out Bobby said "You've been running your mouth and you should have kept it shut. You keep running your mouth and I'll shut it for you." The cousin had a billed cap on, was husky, in his early twenties, with bushy, shoulder length, sandy brown hair and a beard. Campbell testified that Hendrix looks like him (R 2108-18). At the time of Hendrix' arrest, his hair was a little bit longer than collar length and he had a heavy build with a pot belly (R 2142).

Hendrix attempted to secure a gun from several friends. (R 1229;1888;1991) Approximately three to four weeks before his arrest Jennifer Branum was at his parents place. Hendrix asked her if she knew where to get a "throw-away" gun. She didn't know what he was talking about and told him "no." (R 1888). By "throw-away" gun, Hendrix meant a gun without serial numbers which could not be traced (R 1514). David Taylor worked with him at Fountain Construction (R 1100). Shortly before Hendrix was arrested he called Taylor and wanted to know if he could get a .38 or .357. He indicated that he was going to kill someone. Taylor didn't take him seriously (R 1101-02). Hendrix also asked Roger Terry if he had any small guns for sale but didn't tell him why he wanted one. Terry did not have any (R 1228-29). A day or two before Hendrix' arrest he asked Pam Rosa if he could borrow one of her husband's guns. She told him he would have to talk to her husband. She asked him what he wanted the gun for and Hendrix told her she was better off not knowing (R 1990).

At Hendrix' request, Denise made several phone calls to friends in an attempt to obtain a throw-away gun (R 1514-15). She did not find one (R 1517). On or around August 24, 1990, Elizabeth Smith visited Denise at her home (R 1847). Denise took a telephone call while she was there and then told her the substance of the conversation (R 1849). After she got off the telephone she asked Smith if she knew where she could get a throw-away gun. Smith did not know. She told Smith that Hendrix and his cousin had robbed a place and they were going to be more lenient on the cousin if he testified against Hendrix. Hendrix

was scared to go to jail so they were going to get rid of Elmer by pretending that their car was broken down on the side of the road and shooting him or going to his house and killing him and disposing of his wife, too, if she was there. Denise said they had guns hanging around the house "like Monopoly." She told Smith not to tell anyone of the plan because it was serious (R 1868-77).

The week prior to the murders Henry Campbell witnessed an argument in front of the Scott residence. A man told Elmer "I'm going to be tearing up some mother fucken ass, your ass, mother fucker. I will tear up your ass. If you do this I will tear up some ass I promise you that." He was waving his hands. Campbell later read newspaper articles concerning the person who had been arrested for the murders and identified Hendrix' picture as the man he saw threatening Scott (R 2158-63).

On the morning of August 27, 1990, Hendrix got up and left the house alone (R 1523). He was gone until approximately 4:30 p.m. (R 1523). When he arrived home, he had a gun with him (R 1523). He did not tell Denise where he got it (R 1523). He handled it with a bandanna (R 1553). That evening he told Denise that he had test fired the gun (R 1525). Around 7:00 p.m. next door neighbor Marlene Adams heard what she thought were firecrackers (R 1297). A few friends came over and sat around with Hendrix and Denise and smoked marijuana (R 1530). Denise confided to Jennifer Branum that Hendrix wanted her to drop him off down the road from the Scott's house so he could go in and kill Elmer. Branum told her she was crazy if she drove him (R

1533-34). Later, around 12:30 a.m. Marlene Adams was awakened by her dog barking and saw a car next door with the motor running, without headlights on, and heard two doors slam (R 1298-99).

Despite her statements to Branum and Smith, Denise claimed that it did not dawn on her that Hendrix was serious about murdering Elmer until he started to get ready (R 1535;37). He got the gun ready and figured out a way to make a mask, using her black T shirt with an eagle and Harley Davidson on it. He pulled it over his head, pulled it up, and tied the sleeves back so you could only see his eyes. He also had gardening gloves and a dark brown baseball cap (R 1536).

After Denise dropped Hendrix off near Elmer's trailer, she drove to the county line and pulled off to the side of the road (R 1544). It was prearranged that she would meet him at the Orange County line but he had told her to first drive to the Handy Way in downtown Sorrento after she dropped him off, then turn around and come back. He even timed the drive to make sure he had enough time to execute his plan (R 1539-41). It was not several minutes but **seven** minutes before Hendrix returned to the car (R 1545). She noticed him wipe blood off the door handle on the passenger side (R 1553). A field test was later done with Luminol and there was fluorescence on the front area of the passenger side and the door handle insert (R 2171-84). When they returned home Hendrix took a shower (R 1547). She saw his tennis shoes inside the bathroom and they were red (R 1547). Hendrix then burned his clothes (R 1547). The neighbors awakened to an odor in the air that smelled funny and gave them a headache (R

1312). Cloth, fiber and a shell casing were later recovered in the burn pit (R 1023; S Ex 12.). Material not inconsistent with an athletic-type shoe was also found (R 2242).

Hendrix recounted to Denise that he shot Elmer in the head (R 1549). He told him "I'll see you in hell." (R 1550). Michelle came at him and tried to fight him (R 1549). He hit Elmer in the head with the gun handle, which shattered, to knock him out (R 1550). Michelle tried to run away. She was screaming "No, Bobby, No!" He saw a knife, grabbed it and cut her neck (R 1550). He was upset because she did not want to die (R 1549). He then went back and cut Elmer in the neck, too, for insurance (R 1552). He left the gun there. He covered his face on the way back to the car so no one would recognize him or be able to identify him (R 1551-52).

Dinah Lynn lived next door to the Scotts (R 1965). Around 11:50 p.m. on August 27, 1990, she was awakened by running footsteps in the Scotts' mobile home , barking by the Scott's dogs and some popping sounds. There had been domestic disturbances at the Scotts before and she did not call the police (R 1965-82). Juan Perez also lived next door to the Scotts (R 2048). After the news ended at 11:30 p.m. he went into the bathroom. While there he heard a commotion at the Scotts. He heard several bangs like someone was hitting the wall very hard. He went into the back yard and heard loud voices arguing. He heard Michelle yell "no" and a voice he did not recognize yell "shut up." The voice was a man's and was angry. He saw shadows in their bedroom window or the baby's bedroom window . He

returned to his house. He heard a dog barking and saw the door open facing his house. He saw a heavyset male with blond, shoulder length hair and a beard, wearing pants, a blue or green button shirt and a baseball cap. He had something in his right hand. He walked down the driveway toward the front gate to the street, opened the left side of the gate, closed it, and turned right heading toward Palmetto Street. Perez then observed shadows heading left (R 2048-75).

The bodies of Elmer and Michelle Scott were discovered on August 28, 1990, at approximately 6:00 p.m. (R 948-49). Lake County Deputy Sheriff Leon Stewart testified that there was a large amount of blood on the bodies and the floor beside them (R 949). State's Composite Exhibit 1, 3 and 6 accurately depict the bodies and the scene. A projectile had passed through the loveseat near the door, and was recovered in a stud in the wall (R 1004). Grips from a weapon were found near Elmer's head. A knife was found on the floor between the bedroom and utility area (R 1017). State's Exhibit 22, a .22 revolver, was found on the bed in the master bedroom with tape and paper wrapped around the end of it (R 1017-18; 2216). There were no signs of forced entry at the Scott's trailer (R 953). Robbery was ruled out as a motive as State's Exhibit 8, a purse, was found unzipped on the top of the dryer in the utility area with money in plain view (R 1012-13).

An autopsy was performed on each of the bodies (R 1044). Elmer had one close contact bullet wound to his left cheekbone, which entered his mouth and was retrieved from the back of his

throat (R 1046-49; 1065) It passed through the sinus, maxilla, hard pallet of the mouth, grazed the tongue and knocked out the left upper molars (R 1046). This shot was not fatal and would not have rendered him unconscious (R 1049). A firearms examiner testified that the two bullets recovered could have been fired from the .22 revolver (R 1271-80).

Elmer also suffered multiple lacerations to the scalp, on the left back side, and multiple fractures to the skull, beneath these lacerations (R 1049-50). The fractures were depressed, with fragments of the bone driven into the brain, caused by a blunt object (R 1050-51). The scalp wounds would have bled quite a bit (R 1051). The medical examiner testified that the recovered .22 revolver is the type of weapon that could have inflicted the injuries to the back of the head (R 1064). The blows to the back of the head would not have rendered Elmer immediately unconscious as a result of blood loss, since no major vessel was severed. While trauma to the brain, itself, could have caused unconsciousness, people have been known to receive severe blows to the head and remain conscious and lucid for a while (R 1051). A piece of metal was found within the muscles of the scalp area (R 1049). It could have come from the missing portion of the trigger (R 1065).

Elmer also had three stab wounds to the left side of his neck (R 1057). Both carotid arteries were severed (R 1057). State's Exhibit 12, the recovered knife, could have caused the injuries as the width and depth of the wounds were consistent with the size of the knife (R 1064). These wounds would have caused almost immediate unconsciousness (R 1058).

The right side of Elmer's forehead had scrapes and his knees had a scrape abrasion from rubbing against something (R 1059). There were no defensive wounds (R 1085). The medical examiner testified that these various wounds were not inflicted after death. (R 1084-85).

The medical examiner opined that Elmer was probably incapacitated first because of the severity of his injuries and the lack of defense wounds (R 1087). The likely scenario was that Elmer was shot first but because the bullet just went into his mouth he could still move around, so the assailant, who had run out of bullets, had to find another weapon. The gun that shot Elmer was then used to cause the blunt trauma to the brain. While he was unconscious on the floor he was stabbed in the neck with the knife (R 1085).

The autopsy performed on Michelle revealed a bullet wound behind her left ear and one to the left side of her eye and one to her right leg (R 1067). The shot to the left side of the eye appeared to have been done at close contact (R 1068). The bullets were recovered in the sinuses (R 1067-68). The firearms examiner testified that they could have been fired from the .22 revolver (R 1271-80). Neither bullet wound to the head would have rendered her immediately unconscious (R 1070).

Michelle also suffered head and scalp lacerations caused by a blunt object like that used on Elmer. There were two skull fractures but they were not substantial (R 1070). The blows to the head were not that severe and people have been known to run or walk even with severe injuries (R 1071).

Michelle also suffered multiple knife wounds to the back of the neck, chest, left breast, left arm, left side of the back and on her hands, wrists and forearms (R 1067). She received approximately thirty-one stab wounds (R 1073). One wound severed her windpipe and another penetrated her spleen (R 1072). There were multiple defense wounds to the hands and wrists (R 1072). There was a deep cut to the palm of the hand consistent with grabbing a knife blade and wounds to the forearm consistent with blocking (R 1070-80). The knife recovered at the scene could have caused the stab wounds (R 1073).

The bullet wound to the leg did not fracture the bone and Michelle would have been able to move around on her feet (R 1082). The wounds to the head were not lethal and she still would have been able to move (R 1082-83). Even after all thirty-one stab wounds, she would not have been immediately unconscious, as no major vessel was severed except the spleen, which did not bleed that much, and she would have been able to inflict injuries on her killer (R 1083-86). The ultimate cause of death was that she bled to death (R 1084).

State's Exhibit 10, a homemade silencer, had been taped on the front of the barrel of the gun (R 1096). On redirect examination, the medical examiner indicated that the close contact wounds to the left side of both victims' heads were in almost the exact same location and it was consistent with having been fired out of a gun such as the .22 revolver from a distance of an inch or two away (R 1096).

Hendrix was arrested at his home at approximately 4:30 a.m. on August 29, 1990 (R 1411). The residence was searched and a shell casing was found in a laundry basket in the closet (R 1039; S Ex14).

On the afternoon of August 29, 1990, Denise went over to Jennifer Branum's house (R 1898). Denise admitted to her that she dropped Hendrix off, he went in the trailer and pretended he had car trouble or something, asked if he could use the phone and was let in. Hendrix said he shot them, broke the gun over Elmer's head and cut their throats to make sure they were dead. The serial numbers of the gun had been scratched off and it was left at the trailer. No fingerprints were left at the house. She waited for Hendrix on the other side of the county line in the car (R 1898-1904). There was a little bit of blood on the car's passenger handle but it had been wiped off (R 1903). Denise told her not to tell anyone (R 1904). Prior to her arrest Denise also visited Pam Rosa (R 1993). She told her that she had driven the car that night and waited at the Lake/Orange County line. Hendrix knocked on the door and they let him in. He pretended his car was broken down and that he was calling for help. He asked to use the bathroom but someone was in there and he had to wait. After the person came out he went in and wrapped a black T shirt around his face so that only his eyes were showing (R 1994). He came out and shot his cousin and his wife. He cut the vein in his cousin's neck. The wife was going to the door yelling "Bobby, Bobby!" She was shot in the head. Denise heard six shots. Hendrix left and ran. She had to flash her

lights to get his attention. He came up to the car and told her not to look at him. He crawled in his car and they went home. They went in the back yard, burned his clothes, then went to bed (R 1993-96).

Denise was arrested on September 5, 1990 (R 1559). The next day Hendrix called the house to speak to her. When her mother told Hendrix of her arrest he said "Oh, my God, no, not Denise, she didn't have anything to do with this" and kept repeating it over and over (R 1413).

Denise first told authorities that Hendrix was in bed with her all night, didn't have a gun, and that she had given him a pair of sneakers (R 1633). A few hours after Hendrix was arrested he had called Denise and told her to just tell the police that he and she were at home in bed (R 1560). She later denied telling anyone that she wanted to get a firearm or that there was a firearm in her residence (R 1642-43). She explained the casing found at the residence by stating that a friend of the family had been shooting a gun off there (R 1648). She told them Hendrix had not burned anything (R 1648). She denied knowing what a "throw-away" gun was (R 1671). She was trying to protect Hendrix because she loved him (R 1636). When he found out that she was subpoenaed to testify in front of the Grand Jury he told her to keep her mouth shut (R 1571). She invoked the Fifth Amendment but ultimately testified because of the questioning and aggravation (R 1586; 1589-90).

Roger LaForce was incarcerated in the Lake County Jail and placed in a cell with Hendrix (R 1172). Among other things,

Hendrix told him that he couldn't face going back to prison and was afraid they would habitualize him (R 1195). He had previously told Terry Turbyville, prior to the murders, that if he ever went back to prison, it would be for life (R 1376). He said that he made it look like a revenge killing because Michelle was an informant, and that is why she got the worst of it (R 1198). He made it look more gruesome than it had to be (R 1199). He knew that she was an informant because she had turned in a friend of his or something like that (R 1219). He had previously told Denise that Michelle was a narc for the Lake County Sheriff's Department (R 1528). He drove his orange 1983 Mustang to the trailer in Sorrento (R 1179). He said that he didn't need a disguise to go into his own cousin's house (R 1179). He indicated that a bloody palm print had been found which was supposedly his, but he didn't think it was his, and the Sheriff's Department had a pair of bloody Converse tennis shoes that were matched to footprints outside the trailer. He owned a pair but didn't say they were his (R 1179-80; 1205). He also told LaForce that Elmer was shot once and hit on the back of the head with a gun and the trigger stuck in the back of his head (R 1180; 1199). He indicated that he paid twenty dollars for the gun in Apopka and said it was nontraceable and had no serial numbers (R 1181). He said that a couple of neighbors heard the shots but didn't pay attention to it because Sorrento gets wild at night (R 1181). When it clicked in LaForce's mind that the "Elmer" being discussed by Hendrix was the same Elmer who had asked LaForce's wife for a date, LaForce told Hendrix "he was trying to hit on my

wife" and Hendrix responded "Yeah, he was a bastard, wasn't he? But he isn't anymore." (R 1219).

Barbara Gangloff, the wife of Hendrix' cellmate, Gary Gangloff, asked Hendrix if he had done what he was accused of doing and inquired as to why he would take a life. Hendrix responded "You've got to do what you got to do." (R 1323-24) On another occasion she asked him point blank "Bobby, just tell me, did you do it?" Hendrix said "I told you I did." (R 1324)

PENALTY PHASE

Dr Manuel Leal testified that Elmer "could" have been unconscious very soon after the blows to his head, (R 2611) not that he was "likely" unconscious. He had previously testified in the guilt phase that the blows to the back of the head would not have rendered Elmer immediately unconscious as a result of blood losss, since no major vessel was severed, and while trauma to the brain, itself, could have caused unconsciousness, people have been known to receive severe blows to the head and remain conscious and lucid for a while (R 1051).

After receiving two gunshot wounds to the head and one to the leg Michelle would still have been able to see and hear the ten blows to the back of her husband's head being administered. The injuries to her brain didn't incapacite her to the point of being oblivious to what was going on (R 1213). Because of the presence of defense wounds, she had to have been alert and awake at the time she was stabbed (R 2614). She could have seen the killer looking for the knife and coming at her with it (R 2615).

Dr. Leal estimated there were thirty-one stab wounds (R 2615). There were three wounds to the back; one wound which pierced the spleen; seven across the back of the neck; a number of stab wounds to the front of the neck, one of which pierced the windpipe; stab wounds to her left breast; and thirteen superficial wounds (R 2615-2617). Other than the stab wounds to the windpipe and the wound to the spleen, which had to have occurred toward the end of the stabbing, due to the small amount of blood in the abdominal cavity, the other stab wounds were not immediately life-threatening (R 2616-17). She could have lost consciousness before her heart finally stopped beating (R 2618). The minimum time from the assault until she lost so much blood that she would have passed out would be three minutes. The maximum amount of time would be five to eight minutes (R 2620). Michelle would have been aware of what was going on around her and could feel pain, and fear (R 2621). The superficial wounds could have occurred after she lost consciousness, if the person was trying to make it look like a revenge killing (R 2627). Three minutes could have easily transpired while Hendrix was taking care of Elmer (R 2619).

Defense witness, licensed psychologist Phillip M. Tell was accepted as an expert in the field of psychology and psychological evaluations (R 2634-36). He is not board certified and teaches psychological testing at the University of Central Florida (R 2637). At the end of August in 1983 he evaluated Hendrix, who was referred to him by HRS. He had no independent recollection of the evaluation and referred to his report (R

2637; 2639). He testified that Hendrix had an IQ of 98 and was in the middle to average range of intellectual functioning (R 2643). Hendrix was a good, clear thinker and although he had previously been diagnosed as being learning disabled, he found no evidence of it from the category test (R 2643; 2644). There were indications that Hendrix had a conscience because he felt very guilty over something he had done or that had happened to him that he felt was very wrong and bad (R 2649). Nothing indicated that Hendrix was in any way responsible for causing the traffic accident in which his brother was killed. Dr. Tell could not say what caused the guilt (R 2654). Hendrix had the ability to think clearly, had excellent reasoning abilities, was able to discern cause and effect relationships and should have been fully capable of appreciating the consequences of his behavior (R 2653). Dr. Tell found that Hendrix was moderately angry, rebellious, and disliked rules and regulations (R 2653).

Hendrix' school records do not contain any indication that a teacher or administrator saw or suspected any kind of abuse of Hendrix or that such abuse was reported to them (R 2667). The only evidence Dr. Paskewicz had regarding the possible abuse of Hendrix was Hendrix' own statement (R 2669). He did not interview the family or Hendrix' friends and did not review any depositions (R 2666).

Doris Ann Hendrix, the appellant's sister, testified that their father usually disciplined them, but sometimes the mother did. They would usually get sent to their rooms but if they did something really bad they would be spanked (R 2674). The father

was tougher on the boys and spanked them with belts or switches (R 2675). She further testified that it was an old fashioned family and that her father was trying to do the best he could and there were a lot of good times (R 2680). Hendrix' high school diploma and certificate of merit for outstanding performance in human relations was admitted without objection (R 2691).

The jury subsequently recommended the death penalty by a vote of 12 to 0 (R 2747). Regarding the murder of **Elmer Scott**, the sentencing judge found five aggravating factors were present: 1) the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; 2) the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws; 3) the capital felony was committed while the defendant was engaged in the commission of an armed burglary of a dwelling; 4) the capital felony was especially heinous, atrocious, or cruel; and 5) the defendant was previously convicted of another capital felony, the murder of Susan Michelle Scott. As to the murder of **Susan Michelle Scott**, the sentencing judge found five aggravating factors were present: 1) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; 2) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; 3) the capital felony was committed while the defendant was engaged in the commission of an armed burglary of a dwelling; 4) the defendant was previously convicted of another capital felony, the

murder of Elmer Bryant Scott; and 5) the capital felony was especially heinous, atrocious or cruel. The judge further found that no statutory mitigating circumstances were established by the greater weight of the evidence. Hendrix' family history, juvenile history, close relationship with his mother and sisters, the sentence of his codefendant Alma Denise Turbyville to seventy-five years as a result of her negotiated plea in return for her cooperation in this case, were found to give rise to nonstatutory mitigating circumstances, which were given weight by the lower court. The court found as to both murders that the aggravating circumstances outweighed the mitigating circumstances and would do so even if the defendant's age of 23 years old was taken into account as a mitigating factor. The sentencing judge followed the recommendation of the jury and sentenced Hendrix to death by electrocution for the murder of Elmer Scott and to death by electrocution for the murder of Susan Michelle Scott, which sentence is to run consecutive and not concurrent to the death sentence imposed for the murder of Elmer Scott. Hendrix was also sentenced to life imprisonment and given credit for time served on the burglary conviction, which is to run consecutive to the death sentences and to thirty years each on the two counts of conspiracy to commit first degree murder with credit for time served, which sentences are to run consecutive to the death sentences (R 3851-58).

SUMMARY OF ARGUMENT

1. The trial judge's ruling that he was not disqualified from presiding over the trial in this cause should have been challenged on a writ of prohibition and not by appeal from a final judgment of conviction and sentence of death.

2. Appellant, a Caucasian, has no standing under the Equal Protection Clause to complain that the jury selection process resulted in the under-representation of African-Americans in the venire. Appellant has failed to demonstrate a sufficient disparity to support a sixth amendment claim of under-representation. There is no systematic exclusion where the venire is randomly selected from color blind voter registration lists.

3. The prosecutor's remarks did not imply that he had personal knowledge of the case and did not lead the jury to believe that other evidence, unavailable to them, justified his belief. The jury was fully instructed as to the reasonable doubt standard and the court instructed the jury to disregard the prosecutor's comment that when this court wrote the reasonable doubt instruction they had cases like this in mind. In light of the substantial evidence the exhortation not to let Hendrix get away with murder was not improper. None of the alleged errors did substantial harm or caused material prejudice in view of the overwhelming evidence of guilt.

4. There is nothing in the record to indicate that the jury was able to hear the victim's father's remark to Hendrix as he left the stand "You did it didn't you." Any *possible* damage was

avoided by a curative instruction to disregard Mr. Scott's emotional outburst. The record in this case established to a moral certainty that Hendrix killed the Scotts and there is no reasonable possibility the verdict would have been different in the absence of this error. This issue is procedurally barred, in any event, as the only ground of objection to this witness' testimony raised below was that of relevance.

5. Photographs depicting different views of the victims' bodies were not gruesome and were relevant to assist the medical examiner and the trial court did not abuse its discretion in admitting the photographs into evidence. The purpose of the videotape was not to demonstrate the victims' injuries.

6. The trial court did not err in denying appellant's motion for judgment of acquittal with regard to the conspiracy counts of the indictment as the co-conspirator knew of Hendrix' plan and assisted him in executing it, fully intending that two murders be committed. Each murder was separately conceived of and two counts of conspiracy were proven.

7. The statutory aggravating factor of an especially heinous, atrocious or cruel murder is not unconstitutionally vague. This court has applied consistent limiting instructions.

8. It was not argued below that the heinous, atrocious, or cruel instruction was unconstitutionally vague and such complaint is waived.

9. *Maynard v. Cartwright,* 486 U.S. 356 (1988), is inapposite to Florida's death penalty sentencing.

10. Even if the jury was improperly instructed as to the heinous, atrocious and cruel and cold, calculated and premeditated aggravating factors, it must be presumed that the judge followed the limiting constructions of this court.

11. Error in such instructions was harmless. This court could find such factors applicable for the first time on appeal.

12. A crime involving the use or threat of use of force should count as a prior violent felony even though it does not result in a conviction but an adjudication of delinquency as the violent behavior is what should be looked at, not the legal disposition of the charge.

I THE CLAIM THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S SUGGESTION OF DISQUALIFICATION IS WAIVED.

Prior to trial defense counsel filed a suggestion of disqualification alleging that while Judge Lockett was in private practice, Ms. Michelle Morley, counsel for co-defendant Alma Denise Turbyville, (who pled guilty and testified against Hendrix) consulted with him concerning her representation of Turbyville and he reviewed the evidence against Turbyville and rendered advice to Ms. Morley (R 3448). The suggestion concluded that such prior connection with the case created a conflict of interest or the appearance thereof and Judge Lockett should disqualify himself, especially in view of the fact that this case involved two counts of first degree murder and the state sought the death penalty. The defense cited the case of *State ex. rel. Ambler v. Hocker*, 15 So. 581 (Fla. 1894), in support of the suggestion (R 3449).

The state filed a response to the suggestion, arguing that it was legally deficient. Its position was that the requirements of section 38.02, Florida Statutes (1991), pursuant to which the suggestion was made, had not been met. Section 38.02 indicates that a judge should be disqualified from hearing a case if he is a party, or related to a party, or related to an attorney for a party, has an interest in the outcome, or is a material witness in the case. Nowhere in the statute is any mention of "conflict of interest" as grounds for disqualification (R 3488-89).

At the hearing on the suggestion defense counsel indicated that the matter had been brought to his attention by Ms. Morley

(R 2294). Counsel was under the impression that she had received authorization from the court to consult with another attorney and had consulted with Judge Lockett at great length and reviewed her files with him. Counsel argued that the situation presented an "appearance" of a conflict of interest, which should be avoided in a death penalty case. The defense stated that there was *no* suggestion that Judge Lockett could not be fair or impartial and it was *not* proceeding on that ground, but under the statute cited in *Hocker* which stands for the proposition that any prior connection with a case is a basis for disqualification (R 2794-96). "This type of disqualification is not a matter involving bias or prejudice." (R 2796).

Judge Lockett accepted the factual representations in the suggestion as correct but found the suggestion to be legally insufficient (R 2797).

Prior to the testimony of Alma Denise Turbyville in the guilt phase Judge Lockett stated for the record that he had never represented Turbyville and had never seen her before. Ms. Morley had talked to him once about Turbyville testifying before the grand jury. He gave her his opinion. He was in private practice then (R 1495). He was not paid for the consultation and never asked to be paid. He did not know if Turbyville was aware that Ms. Morley had sought a second opinion (R 1496). He indicated that he would require Ms. Morley to be present for a deposition and that he would voluntarily submit himself to one (R 1942).

Turbyville remembered being told not to divulge what she ultimately testified to before the grand jury (R 1499). She

testified that she did not think her attorney sought a second opinion (R 1589).

Michelle Morley testified, after the defense had rested, that she represented Turbyville who had been subpoenaed before the grand jury two to three weeks after her arrest. She did not know she was the subject of an investigation by the grand jury until after she was indicted (R 2504-05). It was her understanding that Denise was to testify against Hendrix (R 2505). The night before the grand jury met Denise told her more than she had previously told her. She felt it was beyond her capability. The Public Defender recommended that she talk to Judge Lockett. At that time he was in private practice and not on the bench (R 2506). She went to his office and spoke to him shortly before Denise was to appear before the grand jury. His partner Ms. Blair was present. Judge Lockett was not paid for the consultation. She disclosed to them everything her client had told her. They had agreed it would be kept confidential. Then-attorney Lockett advised her to instruct Denise not to testify before the grand jury and to invoke the Fifth Amendment. That is what she did (R 2508). She told her client she had consulted with him and relayed his advice (R 2510). On another occasion she discussed with him information her client had disclosed that might be helpful to the state. Tactically, she wanted to know whether she should disclose it to the state or use it to her client's advantage (R 2512). She was court appointed (R 2508). At some point the case against Hendrix was so strong that the state decided it may not need Denise to testify and they

put her on notice that the death penalty was a possibility. Attorney Lockett indicated only that he would be *interested* in associating with her. She moved the court to appoint associate counsel to assist her (R 2512). By the time her motion came before the court Judge Lockett had been nominated or had applied for the judgeship and the court was reluctant to appoint him, knowing that at some point he may have to withdraw (R 2513). Mr. Graves was appointed in March, 1991 (R 2512). After Graves was appointed to assist her she does not recall further discussing the case with Judge Lockett (R 2513).

The court later made another statement for the record regarding the suggestion. It seemed to Judge Lockett that the ground alleged was that he knew too much about what Denise was going to testify to before the grand jury (R 2525). In addition to his initial ruling Judge Lockett stated that he thought the defendant had waived that ground by asking him to read the grand jury minutes, which he did, which included Denise's entire testimony. The defense responded that that was not the nature of their motion. They were not alleging bias or anything improper. The motion was based solely on Judge Lockett's prior connection with the case (R 2526).

Section 38.02, Florida Statutes (1991), states that "any such order declaring a judge qualified shall not be subject to *collateral* attack but shall be subject to *review* by the court having *appellate jurisdiction* of the cause in connection with which the order was entered." Laws 1951, Chapter 26890 §1 rewrote this last sentence of the section. It formerly read "Any such order

declaring a judge qualified shall be *assignable as error* and shall be subject only to *review* by the supreme court on *writ of error,* if the cause be one at law, and *by appeal,* if the cause be one in chancery, but such an order shall not be subject to collateral attack." Laws 1963, Chapter 63-559, §6, deleted the words "by the supreme court" from the end of the penultimate sentence and inserted this present final sentence. While the present provision makes reference to "review" by "the court having appellate jurisdiction" the language of the statute does not authorize the raising of such issue on direct appeal from a final judgment. Historically, only an order of disqualification duly entered, not an order refusing to approve a suggestion for disqualification in a case was subject to being assigned as error and reviewed upon an appeal from that order or from the final decree in the cause. The statute of 1933 (chapter 16053, section 4155(2), C.G.L. 1934, Supplement) forbid collateral attacks and assignments of error on appeal that undertook to challenge the qualifications of a judge who had affirmatively held himself not disqualified and who, without the intervention of any direct attack on his right to further proceed with the cause to a final decree, had so proceeded and had duly entered a final decree in such cause. *State v. Sarasota County,* 118 Fla. 629, 159 So. 797, 800 (1935). The present language of section 38.02 is even more restrictive. Whether a judge is disqualified to hear suits should be tested by mandamus or prohibition proceedings and not by appeals from final decrees. *State v. Sarasota County, supra. Cf. In re Florida Conference Association of Seventh Day Adventists,* 128 Fla. 677,

175 So. 715 (1937). This is especially so in a capital case where the defense has absolutely no reason to suspect bias on the part of the judge, can take its chances and then complain upon an adverse judgment and sentence that it should all be done again with a different judge even though it can point to no ruling affected by any past association of the judge. That section 38.02 should be so construed is evident from section 38.06, Florida Statutes (1991) which states "where, on a suggestion of disqualification the judge enters an order declaring himself qualified, the orders, judgments and decrees entered therein by the said judge shall *not* be *void* and shall not be subject to collateral attack." The state would submit that appellant has untimely chosen the wrong remedy and should not be heard to complain.

Section 38.02, Florida Statutes (1991) also provides:

> In any cause ... any party ... may at any time before final judgment ... show by a suggestion filed ... that the judge before whom the cause is pending, or some person related to said judge is a *party thereto, or is interested* in the result thereof, or that said judge is *related to an attorney* ... of record, ... or that said judge is a *material witness* for or against one of the parties.

The grounds for disqualification under section 38.02 are very narrow: 1) the judge or his relative is a party; 2) the judge or his relative is interested in the result; 3) the judge is related to one of the attorneys or; 4) the judge is a material witness. No allegations were ever made that Judge Lockett was a party, was interested in the result, was related to one of the

attorneys or was a material witness. Thus, no grounds were present which would have required Judge Lockett to disqualify himself. A suggestion of disqualification of a trial judge is properly overruled where it is not based on any *statutory* ground. *See, Baskin v. State ex rel. Tracy,* 115 Fla. 392, 155 So. 655 (1934). The appearance of a conflict of "interest" is certainly not a statutory ground.

The only possible allegation which would have tended to support the ground of interest in the result was the claim that Judge Lockett consulted with Ms. Morley pursuant to court authorization, which would imply he was to receive some compensation (R 2794-96). This allegation proved not to be true, however, as Ms. Morley testified that Judge Lockett was *not* appointed to the case (R 2513). He was never paid for the consultation and never asked to be paid (R 2508; 1496). He had no expectation of future monies. He essentially dispensed free legal advice to a fellow attorney and had no interest in the case. It has long been held that an interest sufficient to disqualify a judge must be a pecuniary or property interest in the action or its result. *State ex rel. Amos v. Chillingworth,* 93 Fla. 1107, 113 So. 563 (1927). The interest must be direct and immediate, not uncertain or speculative and a mere interest in an abstract question that may be involved in the cause is insufficient. A judge is expressly authorized to inquire into and determine the facts, and is expected and required to disqualify himself only if he is, in fact, interested in the result of the cause. *State ex rel. Cannon v. Churchwell,* 195 So. 2d

599 (Fla. 4th DCA 1967). It is clear that there can be no "appearance" of conflict of interest where there is *no interest at all*.

State ex rel. Ambler v. Hocker, 34 Fla. 25, 15 So. 581 (1894), was decided long ago and the ground for disqualification discussed in *Hocker*, and its progeny, namely, a prior attorney-client relationship, is not an enumerated ground for disqualification in section 38.02, which supercedes the *Hocker* decision.

There was no prior attorney-client relationship in the present case, in any event. The most Judge Lockett did was to give his opinion to a colleague. Judge Lockett never met Turbyville and was never paid by her. He never associated and was not court appointed to her case. Denise was only a witness and not a party to this case. The "supplemental" matters or proceedings in *Hocker* that former counsel was precluded from presiding over as judge were proceedings to enforce execution levied upon property, as the judge was counsel of record for the plaintiff in the suit in which execution was issued. Thus, there was a direct relationship between the earlier and the later case, which is not true in the present case. The separate trial of Hendrix is not a matter supplemental to Turbyville's negotiated plea but is a distinct proceeding.

Judge Lockett noted that it seemed the real complaint was that he knew too much about what Turbyville was going to testify to before the grand jury. This situation is no different than the situation where a judge presides over the trial of a co-

defendant whose defense is based on the other defendant's culpability and is exposed to evidence inculpating that defendant and later presides over that defendant's trial. The contention that the trial of a co-defendant by the same trial judge requires his disqualification when the two defendants give different accounts of the crime has been rejected. In *Walton v. State,* 481 So. 2d 1197, 1199 (Fla. 1985), this court noted that the same knowledge could have come from pretrial hearings or discovery. In this case the same knowledge came to Judge Lockett from reading the grand jury minutes, which included Denise's testimony, thereby not only waiving but mooting such issue. In *Dragovich v. State,* 492 So. 2d 350, 352 (Fla. 1986), this court held that the mere fact that a judge has previously heard evidence is not a legally sufficient basis for recusal. Allegations that a trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that the judge discussed his or her opinion with others, is generally legally insufficient to mandate disqualification. *Id.* at 352. It should also be remembered that defense counsel was not even concerned that the judge might be biased by such information and, evidently, felt that he would not be. Defense counsel's only concern was "appearances." The state would submit that "appearances" should not be enough to justify the cost of retrial and resentencing in a capital case where the defendant could have filed a writ of prohibition and had the issue decided prior to trial. There also can be no appearance of conflict in a factual scenario in which no actual conflict can be discerned.

II APPELLANT HAS NO STANDING UNDER THE EQUAL PROTECTION CLAUSE TO COMPLAIN THAT THE JURY SELECTION PROCESS RESULTED IN THE UNDER-REPRESENTATION OF AFRICAN AMERICANS IN THE VENIRE; THE SIXTH AMENDMENT CLAIM IS WITHOUT MERIT AND HAS BEEN REJECTED.

Appellant's motion to strike the jury panel was heard before Judge Lockett prior to trial[1] (R 3033). The court took

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[1] The Supervisor of Elections for Lake County, Emogene W. Stegall testified that in order to register to vote in Lake County one must be a legal resident of Lake County, eighteen years of age and a citizen of the United States (R 3046-48). When the person registers they take their full name, resident and mailing addresses, date of birth, party affiliation, race and sex. An oath is then administered. There is no fee (R 3049). There are no tests. No consideration is given to the race of the individual. Affirmative efforts are made to ensure that minorities such as African-Americans are afforded an opportunity to register to vote. A booth was set up for nine days at the Lake County Fair (R 3050). Last year she traveled throughout the county. In 1990, there were two drives in the Leesburg area at the NAACP building and in front of Winn Dixie on a Friday evening to try and register people who came in to shop for groceries (R 3051). The list of registered voters is kept on a computer (R 3051). The Chief Judge issues an order with a cutoff date to give them permission to make a tape of all of the registered voters (R 3031). The elections office is on line with the clerk of the court. The clerk is given permission to make the tape and then it is certified to the clerk of the court. No consideration is given to excluding any person's name (R 3052). She recorded the race of the voter because it is on the form subscribed by statute that the Secretary of State gives them. She goes wherever there is an interest in registering. She doesn't believe that, historically, blacks have registered in the same proportion as the white population (R 3053). Approximately two thousand six hundred African-Americans are registered to vote out of approximately sixty-three thousand. She does not know what percentage of the population of Lake County is comprised of African-Americans (R 3054). Jury Clerk, Faye Osebold also testified. Her function is to summon juries for jury trials. It is done by computer. The process used has been reviewed and approved by the Chief Judge of the Circuit and the Supreme Court of Florida (R 3056-58). The clerk's office receives a computerized list of all registered voters. The names of people who have been excused permanently are removed (R 3058). A number is sent to them by the Office of State Court Administrator, and a random number is generated by their computer. She instructs the computer that she wants x number of jurors for a particular date (R 3059). The computer creates a list, a venire, and the jury

judicial notice of the numbers cited in the motion with regard to the statistical abstract (R 3034). Defense counsel argued that any disparity was systematic because the system uses voter registration rolls. The trial judge denied the motion to strike the jury panel (R 3069). After the jury was selected, but before it was sworn, the defense renewed its pretrial motion and noted that each African-American that appeared was stricken for cause and there was no African-Americans seated on the jury (R 882).

In *Casteneda v. Partida,* 430 U.S. 482, 494 (1977), the United States Supreme Court held that to demonstrate a violation of the Equal Protection Clause of the Fourteenth Amendment a defendant must have standing. To establish standing, the defendant must be a member of the group that he or she alleges was under-represented in the selection process. The requirement of belonging to an identifiable, excluded group was followed by this court in *Valle v. State,* 474 So. 2d 796, 800 (Fla. 1985). Later, however, in *Craig v. State,* 583 So. 2d 1018, 1020 (Fla. 1991), this court held that a white man had standing to challenge the constitutionality of a jury districting system which required that a black defendant charged with a crime in a predominantly white district be tried in that district while a white defendant charged with a crime in a predominantly black district could be tried in either district even though he was not tried in the

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summons (R 3060). The software which selects the names from the list does not read the field within the computer which contains the race, sex, age or date of birth of the voter. Name and address, alone, is what is used. That is the basis upon which jurors are selected for Lake County (R 3060). No statistics on the race of the jury panels and actual jurors selected to serve are kept (R 3061).

district in which his race was a minority. The districting system was challenged on other grounds as well as the equal protection challenge, including an allegation of a sixth amendment violation. The state would submit that the reasoning in *Casteneda* is correct. It recognizes that the evil to be remedied is the under-representation of a particular group. If the defendant is not a member of that group he has not been affirmatively harmed or denied equal protection of the law since he has no right to a jury comprised of any particular group.

A defendant may demonstrate a violation of the Sixth Amendment right to an impartial jury trial by proving that the jury venire from which the petit jury was selected did not represent a fair cross-section of the community. *Duren v. Missouri,* 439 U.S. 357, 359-60 (1979). A defendant need not be a member of the under-represented group to have standing to raise a Sixth Amendment claim. *Taylor v. Louisiana,* 419 U.S. 522, 526 (1975).

In *Duren v. Missouri,* 439 U.S. 357 (1979), the Supreme Court held that to establish a prima facie violation of the fair cross-section requirement, a defendant must show that: (1) the group alleged to be excluded is a distinctive group in the community; (2) the group was not fairly represented in the venire from which the petit jury was chosen; and (3) the under-representation resulted from a systematic exclusion of the group in the jury selection process.

Appellee would first submit that sporadic statistics from the last decade are insufficient to establish present discriminatory jury selection. Such statistics are otherwise

flawed. The actual total population for the years 1982, 1984 and 1986 is not known and the low 1980 figure of 104,870 is used despite the fact that there were 13,551 more registered voters in 1986 than in 1980. There were 315 more African-American voters in 1986. Such figures reflect considerable population growth and the 13.10% figure representing the percentage of African-Americans in the total population does not take such growth into account and cannot be accurate. Also the total population for 1988 is not known and the 1989 estimated population of 146,000 which includes 17,000 African-Americans is projected retroactively to 1988. Even accepting such statistics no under-representation of African-Americans is demonstrated. Averaging these figures African-Americans constituted 12.37% of the community and 6.79% of the possible venires, which is not a sufficient disparity to demonstrate under-representation. (No figures were provided as to jurors of known race and the proportion of African-Americans). *See, United States v. McAnderson,* 914 F.2d 934, 941 (7th Cir. 1990) (no fair cross-section violation when African-Americans constituted 20% of the community and 12% of jury pool because *de minimis* disparity). *See, also, United States v. Rodriguez,* 776 F.2d 1509, 1511-12 (11th Cir. 1985). This court has previously rejected such claim indicating that "the use of voter registration lists is color blind." *Bryant v. State,* 386 So. 2d 237, 240 (Fla. 1980). The facts of this case show no systematic exclusion and the third prong of the *Duren* test has not been met. There is no systematic exclusion when the venire is randomly selected according to authorized plan. *See, United*

States v. Guy, 924 F.2d 702, 705-06 (7th Cir. 1991). Also, a lower registration vote among African-Americans than among whites should not be determinative. *See, United States v. Biaggi*, 909 F.2d 662, 677 (2d Cir. 1990). That section 1 Chapter 91-235 amends section 40.01, Florida Statutes (1991), effective January 1, 1998, to provide that jurors shall be taken from persons who possess a driver's license should be of no avail to appellant. This court has previously stated "While the legislature might choose to supply viable supplemental jury sources, the failure to do so does not equal purposeful exclusion. *Bryant v. State*, 386 So. 2d 237, 240 (Fla. 1980). *See also, Valle v. State*, 474 So. 2d 796, 800 (Fla. 1985). The decision in *Bryant* is correct. Decisional case law has acknowledged that many African-Americans live in larger urban areas. *Alston v. Manson*, 791 F.2d 255, 257 (2d Cir. 1986). Many city dwellers rely on public transportation and have no occasion to obtain driver's licenses. No system of selection will *ever* be all-inclusive. All that is required is a "fair" cross-section of the community.

III THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL ON THE BASIS OF COMMENTS MADE BY THE PROSECUTOR DURING OPENING AND CLOSING STATEMENT.

Appellant complains of the prosecutor's use of the pronoun "we." He also complains of the use of the word "I" in the statement "I can guarantee you she was reluctant to come in and talk to the police about her friend or her friends." Appellant argues that these terms imply personal knowledge or belief on the part of the prosecutor. Appellant cites no authority in support of his argument that the use of the term "we" is improper. Since appellant also complains of the use of the term "I" it is apparently the appellant's position that during argument the prosecutor can only refer to the "state." This is hardly ever done and has heretofore never been the law. Prosecutors routinely use the expression "I submit to you" and such is not an improper assertion of personal belief. *See, United States v. Lacayo,* 758 F.2d 1559 (11th Cir. 1985). The prosecutor's remarks did not lead the jury to believe that other evidence, unavailable to them, justified the belief. *See, United States v. Rodriguez,* 585 F.2d 1234 (5th Cir. 1978).

It is not improper to inform the jury of an investigation and how the crime was solved when the witness' expected testimony will match any described statements to the police or others previously given. The jury is well aware that witnesses give statements prior to trial and that, in effect, is how they become witnesses.

Though it is not the prerogative of an attorney, in his closing arguments, to instruct the jury on the law and criminal proceedings, it is appropriate for an attorney to relate applicable law to the facts of the case. *Taylor v. State,* 330 So. 2d 91 (Fla. 1st DCA 1976). Prior to indicating that when the Supreme Court wrote the reasonable doubt instruction they had cases like this and theoretical defenses like this in mind, the prosecutor commented to the jury that "The judge will tell you that a reasonable doubt is not a possible doubt, speculative, imaginary, or forced doubt, such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt." (R 2444). The court instructed the jury to disregard what the Supreme Court had in mind when they wrote that instruction (R 2445). This was sufficient. The jury was fully instructed as to "reasonable doubt" by the trial court (R 2482). Moreover, the jurors were instructed prior to closing arguments that the prosecutor's arguments are not to be construed as evidence in the case or instructions on the law (R 2350).

Considerable latitude is allowed in arguments on the merits of the case; logical inferences from the evidence are permissible; public prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of criminal laws, and their discussion of evidence, so long as it remains within the limits of the record, is not to be condemned merely because they appeal to the jury to perform a public duty by bringing in a verdict of guilty. *Spencer v. State,* 1333 So. 2d 729

(Fla. 1961). In telling the jury that the question before them was "whether Hendrix and his lawyer's theory is going to get away with murder," the prosecutor was trying to convey the idea that the defense was incredible in light of substantial evidence presented by the state. *Cf. Gallan v. State,* 455 So. 2d 473 (5th DCA 1984). In view of Hendrix' many admissions this was a fair comment on the evidence, and not so egregious as to entitle Hendrix to a mistrial.

Wide latitude is permitted in arguing to a jury. *Breedlove v. State,* 413 So. 2d 1, 8 (Fla. 1982). The control of comments is within the trial court's discretion, and an appellate court should not interfere unless an abuse of such discretion is shown. *Breedlove, supra,* at 8. Considering the overwhelming evidence against Hendrix the remarks in the present case could not have influenced the jury to reach a more severe verdict of guilt than it would have done otherwise. The evidence in this case was not close. Prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The standard of appellate review is "whether the error committed was so prejudicial as to vitiate the entire trial." *State v. Murray,* 443 So. 2d 955 (Fla. 1984). Any alleged errors in this case did no substantial harm and caused no material prejudice and the trial court was correct in denying motions for mistrial. There is no reasonable possibility that any of the complained of errors contributed to the conviction and the error is harmless. *State v. DiGuilio,* 492 So. 2d 1129, 1135 (Fla. 1986).

IV THE CLAIM THAT THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR MISTRIAL IS WAIVED.

The state announced that its next witness would be Elmer Scott, Sr. (R 2080). Defense counsel asked for a proffer (R 2080). It is not accurate to say that the court *denied* the request for a proffer. Prior to any ruling by the court the state *did* proffer the nature of the expected testimony:

> Judge, he's going to be a very brief witness just to describe some of the layout of the residence and some other details about the appearance of his son on the night in question, it will be very brief and I don't think he's going to be prejudicial. I talked to him about maintaining his composure, and I think he's going to be able to do it.

(R 2080).

Defense counsel countered: "What's the relevance of that, I don't understand?" The state responded "It will be clear in closing argument. I would rather not explain the relevance now." (R 2081). Although Judge Lockett stated "All right, he's not required to give you a proffer when he calls a witness," and indicated defense counsel could object when the questions were asked, (R 2081) a proffer had actually already been given of the expected testimony, and what was eschewed was simply advance legal argument as to the relevance of questions not yet asked.

Elmer Scott, Sr. took the stand and recited his full name and address. When asked if he was the father of Elmer Bryant Scott defense counsel objected that such information was irrelevant and immaterial, after the witness stated that he was the father of Elmer Bryant Scott. The court overruled the

objection (R 2083). Direct examination continued without objection as Scott testified that Elmer worked at Barbour Motor Line the summer of 1990; was a local truck driver who delivered things to nurseries; needed a shave on August 27, 1990, when he saw him and Michelle at his residence; that he went two or three days without shaving; and that August 27, 1990 was the last time he saw Elmer alive (R 2084). The state then indicated it had no further questions. The defense indicated that it had no questions but that it would like to take up a matter out of the presence of the jury (R 2085). As the witness stepped down he said to Hendrix "You done it, didn't you?" The court directed "Mr. Scott, leave the room now." The defense indicated that it had another motion. The jury was removed from the courtroom (R 2085).

Defense counsel Kirkland stated that he *gave* the prosecutor "the *benefit of the doubt* that he did *not* grossly and improperly influence this jury with that kind of evidence." While he felt that the prosecutor "should have anticipated that this man would break down in tears, (the record is devoid of such occurrence), I don't think he could have anticipated that he would have walked out of here and pointed at this defendant and said 'you done it', in the presence of this jury." Counsel argued that case law forbids drawing on the sympathies of those who have mothers and fathers and wives and children by indicating the status of a deceased person. He then incongruously asked that the State Attorney be admonished because "he has trifled with that man's life." Co-counsel, Mr. Turner, then interceded and specifically

made a motion for mistrial, indicating "What I heard the man say is, you done it or you did it, didn't you. Hendrix, himself, indicated that the witness said "You done it, didn't you." The court denied the motion for mistrial.

Judge Lockett noted that the court reporter was closer to Mr. Scott when he made the remark to the defendant (R 2088). The judge further indicated that he could not hear what Mr. Scott said. He was as close to Mr. Scott as the jury. He heard him say something but he did not hear what he said (R 2198). The court reporter also advised him after the jury was removed that she could not hear what he said and transcribed that as "inaudible." (R 2088). The remark appears in the record because the comment was picked up by the tape recorder and Judge Lockett told the court reporter to transcribe from the recorder but had her personally state for the record that she did not hear what Mr. Scott said, (R 2197) although she was not expecting any comment to come. She was the closest one to Mr. Scott, between him and the jury (R 2198). Jane Keck, who was in the audience, indicated that she had heard the witness say "You did it, didn't you?" She was sitting three rows back and away from the judge and the court reporter on the side behind the prosecution table, somewhat off to the side (R 2101). Mr. Scott was facing in the general direction of Hendrix. People in the audience were closer, which would be away from the jury (R 2198). The court declined to poll the jury (R 2198).

The prosecutor indicated that there were other relevant questions he intended to ask the witness but abandoned because he

detected "signs" in his face that he was starting to lose his composure. He did not put the witness on for the purpose of prejudicing the jury and instructed him to maintain his composure and fully expected him to be able to do so (R 2088). The prosecutors had met with Mr. Scott at the murder scene six weeks before and at no time did he display any such emotion (R 2099). Assistant State Attorney Ridgway indicated he wouldn't risk a mistrial in a case like this for something that cheap (R 2100).

Hendrix had told Denise that if Michelle was going to be at the house when he went there he would have to kill her, too. The prosecutor hoped to establish through Mr. Scott that Michelle was not working at the time, thereby establishing premeditation through advance knowledge that she would be there. He also wanted to establish that Hendrix had lived in the mobile home before Elmer and Michelle were married and knew the layout (R 2090). Mr. Scott later cleaned the residence and saw no signs of forced entry. He also wanted to establish that Elmer and Michelle owned the residence, in view of the burglary charge against Hendrix and that Michelle and Elmer smoked cigarettes, since some of the photographs showed cigarettes in an ashtray in the vicinity of the love seat (R 2090). Also, the things that were brought out could not have been established through non-family member witnesses. The fact that hair was found on Michelle's shorts appeared to be an important factor to the defense and he wanted to establish that earlier that day she had been visiting with a number of people in the family at the residence of Mr. and Mrs. Scott (R 2091).

Mr. Turner subsequently argued that whether or not the jury heard the specific words, it was obvious an angry exchange was taking place as it was not a friendly greeting. He asked the court to instruct the jury to disregard the testimony as being irrelevant (R 2093). The state argued that some of the testimony was relevant. Mr. Scott tended to show his emotions at the end and grimaced a little bit so an instruction to disregard any emotion he showed would, therefore, be appropriate, but not to disregard the *content* of his testimony (R 2095). Defense counsel replied "I guess you should instruct the jury about disregarding the display of emotions. I don't know if that really cures anything, but I guess it's the minimum that can be done. I think to protect the record we would ask for an admonishment, but we don't feel that will cure anything (R 2098).

Judge Lockett subsequently instructed the jurors to disregard the emotional outbursts of Mr. Elmer Scott, Sr., just before he left the courtroom as that type of matter has no place in a trial of this magnitude (R 2107). He asked them to assure him that they could abide by it to the very best of their human ability and they indicated that they understood (R 2106).

There is absolutely no evidence, as opposing counsel suggests, that this witness ever broke down in tears. Such an inference cannot be drawn from Mr. Kirkland's statement mentioning the possible breaking down in tears (R 2086). Mr. Kirkland was simply indicating that while the prosecutor may have been prepared for the *possibility* of the witness' crying, he never could have anticipated something of this magnitude from the

witness. The record reflects only a little bit of grimacing on the part of this witness (R 2095).

There was no "exchange" at all between the witness and Hendrix, no less an "angry" one. There was only the one statement "You did it, didn't you?" The record shows no response on Hendrix' part.

Defense counsel had no "fears" that were "realized." Prior to the testimony defense counsel only inquired as to its relevance and hardly alerted the court to the possibility of undue jury sympathy by virtue of any outburst. The proffer was requested only as to relevance. No argument was made to preclude the victim's father's testimony on the basis of inflaming the passions of the jury.

Hendrix' expectation that Michelle may be in the house could well have been based on the fact that she was not working and was likely to be there. Visiting a house is not the equivalent of living there in terms of knowledge of where weapons or knives may be found for use or which direction or through which doors the victim may seek to escape.

It is clear that the victim's expected testimony was relevant and the prosecutors had no reason to anticipate an outburst, not only from past contact with the witness, but also because of the innocuous line of questioning which made no reference to the victims' terrible fates. There simply was no cheap appeal for sympathy. There was a plethora of evidence available to persuade the jury to convict.

Persons the same distance or closer to Mr. Scott than the jury did not hear his remark, i.e., the court reporter and the judge. That an inanimate object such as a tape recorder was able to unintelligently pick up the remark says nothing about the jury's auditory capacity. The judge heard Mr. Scott talk, as well, but the fact remains that those equally distant or closer than the jury could not *understand* what he said. Members of the audience were *much* closer to the defendant and this passing witness and the fact that they heard the remark, again, says nothing as to the jury. With no reason to suspect that the jury heard anything at all it would be foolish to poll them and alert them to the fact something happened.

While Hendrix complains on appeal that everyone should have anticipated that this witness would do something inappropriate to inflame the jury, the record does not bear this out. Defense counsel below, Mr. Kirkland, indicated that the prosecutor would have no reason to expect such a comment from the witness. From past contact with this witness the prosecutors had no reason at all to suspect a lack of composure on the part of this witness. Counsel is in no position to complain of the state "dragging this witness in by the heels for obviously inflammatory purposes" when the only specific objection raised below prior to the witness' testimony was on grounds of relevancy. In a similar case, *Rodriguez v. State,* 17 Fla. L. Weekly S623, 625 (Fla. Oct. 8, 1992), the defendant claimed that it was error to permit the victim's sister-in-law to offer identification testimony due to the inherently inflammatory nature of such testimony. This court

found such claim was not preserved by specific objection since the only objection to the identification testimony was based on relevancy. It is well settled that the specific legal ground upon which a claim is based must be raised at trial and a claim different than that raised below will not be heard on appeal. *See, e.g., Bertolotti v. State,* 565 So. 2d 1343, 1345 (Fla. 1990); *Craig v. State,* 510 So. 2d 857, 864 (Fla. 1987). The after-the-fact protestations mouthed below should not serve to save this issue for appeal. The defense cannot put itself in the catbird's seat by vaguely complaining that the witness had nothing relevant to say then lying in wait for a lapse in composure whereby it could assume the role of Monday morning quarterback. The state, as well as the defendant, is entitled to fairness. The defense was obviously aware that this witness was a member of the victim's family. An objection based on *Welty v. State,* 402 So. 2d 1159 (Fla. 1981), could certainly have been made at trial *before* this witness testified.

Welty held that members of a deceased victim's family may not testify at a murder prosecution for purposes of *identifying* the victim where nonrelated, credible witnesses are available to make identification so that the defendant is assured as dispassionate a trial as possible and to prevent the interjection of matters not germane to the issue of guilt. 402 So. 2d at 1162. That is not precisely the situation here. There is a potential for the loss of composure in identifying a deceased victim which is not present in a case like this where no identification is being made and the questions to the witness are hardly emotion-provoking.

The information sought to be elicited from Mr. Scott was by no means impermissible and could not have been come by through the testimony of nonrelated witnesses, especially since the other people Michelle visited during the day were also family members (R 2096).

The holding in *Welty* may also well be tempered by the post *Payne v. Tennessee,* 111 S.Ct. 2597 (1991), case law of this court. Where a family member's testimony is relevant to the circumstances of the crime, it would not seem that such testimony amounts to improper evidence regarding the personal characteristics of the victim and emotional impact of the crime on the victim's family. *See, Sireci v. State,* 587 So. 2d 450, 454 (Fla. 1991); *see also, Hitchcock v. State,* 578 So. 2d 685, 691 (Fla. 1990). The purpose in having Mr. Scott testify was not improper. What actually happened when Mr. Scott testified was unexpected. In *Hodges v. State,* 595 So. 2d 929, 933 (Fla. 1992), this court found that the victim's sister's breaking down in tears while testifying was not impermissible victim impact evidence. That is much more egregious than the simple grimace that occurred in this case followed by an unintelligible statement.

In *Welty,* the Supreme Court of Florida indicated that identification of the victim by a family member may be harmless error. 402 So. 2d at 1162. In *Grossman v. State,* 525 So. 2d 833, 842, 845 (Fla. 1988), this court held pre-*Payne* that the admission of victim impact evidence at sentencing is subject to a harmless error analyses. It is the state's position that the right to complain of error is waived and there actually was no

error. Should the court not wish to end its analysis there the state would also submit that what occurred below was a lot less than prejudicial. No one suggested the jury saw any grimacing. The statement was either not heard at all or was unintelligible to those the same distance or closer to the incident than the jurors. In an abundance of caution the jury was instructed to ignore any emotional outburst by the witness. Jurors can well be expected to assume that family members of a victim would be bitter toward a defendant and since, they are instructed in the law, the jurors hardly would have blindly accepted Mr. Scott's assessment of Hendrix' guilt or lack thereof. In *Valle v. State*, 581 So. 2d 40, 48 (Fla. 1981), there was a little testimony that improperly focused on the loss felt by a dead officer's family and friends and this court held, again, pre *Payne* that such evidence was not sufficiently prejudicial in content and quantity to require reversal. In the present case there was *minute* evidence - one apparently unintelligible statement. The record in this case established to a moral certainty that Hendrix killed the Scotts and there is no reasonable possibility the verdict would have been different in the absence of this error.

V THE TRIAL COURT DID NOT ERR IN ADMITTING RELEVANT PHOTOGRAPHS INTO EVIDENCE AND HENDRIX WAS NOT DENIED DUE PROCESS THEREBY.

Hendrix complains that because there was a video tape of the scene showing the bodies in the position in which they were found the photographs served no other purpose except to inflame the jury.

State's Composite Exhibit 1 consisted of three photos depicting the bodies at the scene. The photos were admitted into evidence over defense objection that they were gruesome and not necessary. They were introduced during the testimony of Deputy Sheriff Leon Steward and accurately reflect the way the scene looked (R 955-960). State's exhibit 3 is a fifteen to twenty minute videotape of the scene (R 944). Craig Willis of the Tech Crime Scene Division testified that it accurately reflected the scene. It was played in open court without audio (R 998). Half of the videotape featured the *outside* of the residence, then the deputies walked through the house with the recorder (R 944). The bodies were only a two to three minute feature (R 944). The rest of the tape showed the various rooms in the trailer where blood stains or spatters were located or where weapons were found (R 955-1000). State's Composite Exhibit 13 consisted of sixteen slides and three eight by ten pictures depicting different views of the body of Michelle before the autopsy and incisions (R 1028-30). The defense complained that the exhibit was gruesome and that its probative value was outweighed by prejudice (R 1031). The lower court found that the pictures were not overly gruesome

and could be relevant to assist the medical examiner and Exhibit 13 was admitted into evidence (R 1033-34). The slides were viewed in open court and the medical examiner described the wounds (R 1077-80). The three photos depicted wounds other than those reflected in the slides (R 1081-82). State's Exhibit 17 is a photo of Elmer Scott as he was presented to the medical examiner (R 1055). Exhibit 18 is a composite consisting of five autopsy pictures of Elmer Scott reflecting his injuries (R 1054-55). The defense objected that they were gruesome and cumulative (R 1054-55). The lower court ruled that the photos were not excessively gruesome and they were admitted into evidence (R 1054). The medical examiner described the injuries depicted in the Polaroids (R 1060-63).

The trial court has discretion, absent abuse, to admit relevant photographic evidence. *Thompson v. State,* 565 So. 2d 1311, 1314 (Fla. 1990). The basic test for admissibility of photographs is relevance. *Nixon v. State,* 572 So. 2d 1336, 1342 (Fla. 1990); *Haliburton v. State,* 561 So. 2d 248 (Fla. 1990). The probative worth of the photographs admitted in the instant case outweighed any prejudice. There was no abuse of discretion in the admission of these slides and photographs. The medical examiner and the deputy sheriff who investigated the case used the photos during their testimony. The photographs were relevant to the circumstances of the murder and assisted the medical examiner in explaining the nature and location of the two victims' injuries and the cause of their deaths. *See, Nixon,* 572 So. 2d at 1342 (photographs admissible to assist medical examiner

in illustrating nature of wounds and cause of death); *Burns v. State,* 18 Fla. L. Weekly S35, 36 (Fla. Dec. 24, 1992), (color slides admissible for same purpose).

There was no error in the admission of the photos simply because the videotape had been admitted. The videotape depicted the murder scene. It demonstrated the location the victims were shot, their position, blood stains, and locations of weapons. The videotape reflected the struggle that had occurred in the residence and, while the victims were included in it, its purpose was not to demonstrate injuries. The photographs depicted the nature and location of wounds. *See, Davis v. State,* 586 So. 2d 1038, 1041 (Fla. 1991).

VI THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WITH REGARD TO THE CONSPIRACY COUNTS OF THE INDICTMENT.

At the conclusion of the state's case, defense counsel moved for a judgment of acquittal with regard to the conspiracy counts of the indictment alleging that there was no evidence to support them. Counsel argued that the co-conspirator, Denise Turbyville, never thought she was doing anything wrong and did not intend that any crimes be committed (R 2246-2251). Hendrix now asserts that the evidence below failed to show that any conspiracy was proven and alternatively, if this court rules that sufficient evidence to support a conspiracy was presented, two counts of conspiracy were not proven.

Appellant argues that the evidence shows that while Hendrix had talked with Denise about killing Elmer Scott and discussed with her ways that he could accomplish this, rejecting some and finally settling on a plan, and although Denise did make a phone call for him to see if a throw-away gun could be obtained, the record is devoid of any evidence that Denise intended that a crime be committed or that she agreed to commit a crime. The evidence further shows only that she drove to an area near the scene, dropped him off, waited until he committed the crime and then drove him home. Appellant concludes that while this evidence is sufficient to support a conviction for Turbyville as an aider and abettor, it is not sufficient to demonstrate a conspiracy on the parts of Hendrix and Turbyville and a judgment of acquittal should have been granted.

Appellant argues, alternatively, that the evidence showed only a single conspiracy. While a conspiracy may have for its object violations of two or more criminal laws it is a single offense no matter how many repeated violations of the law may have been the object thereof.

Appellant contends that the evidence showed that he discussed killing Elmer Scott with Denise and while he did contemplate killing Michelle if she was present, the evidence shows that there was never any conspiracy to kill Michelle Scott. Appellant had come up with several alternative methods of killing Elmer but rejected them because it would have possibly resulted in the death of Michelle (R 1511-1513) who was never the intended victim of Hendrix' plans.

Appellant further argues that any conspiracy that was proven necessarily included all of the offenses which Hendrix committed to achieve his purpose. As a single conspiracy exists regardless of the number of crimes which are contemplated. Therefore, appellant concludes that if this court finds that there was sufficient evidence of a conspiracy, it must still reverse one of the convictions for conspiracy on the grounds that two separate and distinct conspiracies were not proven.

The crime of conspiracy consists of an express or implied agreement between two or more persons to commit the criminal offense, and an intention to commit the offense. *Williams v. State,* 592 So. 2d 737 (Fla. 1st DCA 1992). Direct proof of criminal agreement is not necessary to establish conspiracy. The jury may infer from all the surrounding circumstances that a common

purpose to commit the crime existed. *Pino v. State,* 573 So. 2d 151 (Fla. 3d DCA 1991). While presence at the scene of the crime is not sufficient to establish a conspiracy, presence is a factor that may be considered in determining whether a conspiracy existed. *Wilder v. State,* 587 So. 2d 543 (Fla. 1st DCA 1991); *Baxter v. State,* 586 So. 2d 1196 (Fla. 2d DCA 1991). Two or more persons may unlawfully conspire with each other to commit murder in the first degree, thereby committing the crime of conspiracy, with the understanding that the means of accomplishing the unlawful homicide would be determined at a later date. *State v. Smith,* 240 So. 2d 807 (Fla. 1970).

In the present case the evidence shows that Hendrix did more than just talk with Turbyville about killing Elmer Scott. He discussed with her ways that he could accomplish this including the possible murder of Michelle, which became a necessary murder when the final plan involved murdering Scott in his home where his wife would be present. Turbyville tried to help him find a throw-away gun. Contrary to appellant's assertion the record is not devoid of any evidence that Turbyville intended that a crime be committed or that she agreed to commit a crime. An early plan called for her to be an active participant by pretending her car was broken down and flagging Elmer down on his way to work (R 1511). Prior to the murder she revealed this plan to Elizabeth Smith. She also divulged the other plan in which they would go to his house, kill him, and dispose of his wife, too, if she was there. She instructed Smith not to reveal the plan because "it was serous." (R 1868-77).

When Hendrix arrived home the afternoon of August 27, 1990, he had a gun with him which he handled with a bandanna and test fired (R 1523; 1533; 1525). She confided to Jennifer Branum that Hendrix wanted her to drop him off down the road from the Scott's house so he could go in and kill Elmer (R 1533-34). Turbyville knew that Hendrix was serious about murdering Elmer when he started getting ready (R 1535-37). She drove him to the trailer, anyway, with knowledge that two murders were probably going to take place and acted with the intent that they would take place.

Two separate and distinct conspiracies were proven. The first plan involved killing Elmer when Michelle was not around. When the plan changed to murdering Elmer in his home the possibility of the death of Michelle was then contemplated, discussed and not rejected. This is not a case of repeated violations of the law but of two first degree murders separately contemplated.

VII AND IX THE STATUTORY AGGRAVATING FACTOR OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS NOT UNCONSTITUTIONALLY VAGUE AND THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE THE DEFENSE REQUESTED JURY INSTRUCTIONS ON THIS FACTOR.

Appellant complains that the terms "extremely wicked or shockingly evil" and "outrageously wicked and vile" of the "limiting construction" condemned by the United States Supreme Court in *Shell v. Mississippi,* 111 S.Ct. 313 (1990), as being too vague are the precise ones used by this court to review the heinous, atrocious or cruel statutory aggravating factor. The limiting construction is alleged to be too indefinite to comport with constitutional requirements and the definitions do not provide any guidance to the jury when the factor is first weighed, to the sentencer when the factor is next weighed, and to this court when the factor is reviewed and the limiting construction is applied. Initial Brief of Appellant p. 61.

Appellant argues that the inconsistent approval of the factor by this court under the same or substantially similar factual scenarios shows that the factor remains prone to arbitrary and capricious application. As an instance of such arbitrary application Hendrix asks this court to compare the language of *Hitchcock v. State,* 578 So. 2d 685, 692 (Fla. 1990), where the court stated that the HAC factor "pertains more to the victim's perception of the circumstances than to the perpetrator's" with the language employed in *Mills v. State,* 476 So. 2d 172, 178 (Fla. 1985), where the court indicated that it must look to the act itself that brought about the death and that "the

intent and method employed by the wrongdoers is what needs to be examined." Hendrix contends that it is an arbitrary distinction to say that one murder is especially heinous because, for a matter of minutes, while being driven approximately two to three miles, a victim perceived that death may be imminent, yet say that another murder was not heinous because, where for hours after the fatal wound was inflicted, a victim suffered and waited impending death. Initial Brief of Appellant p. 63.

Appellant concludes that because the HAC statutory aggravating factor is itself vague, and because the limiting construction used by this court both facially and as applied is too vague and indefinite to comport with the Eighth and Fourteenth Amendments, the instant death sentence imposed in reliance on the HAC statutory factor must be vacated and the matter remanded for a new penalty phase before a new jury. Initial Brief of Appellant pp. 63-64.

Defense counsel requested special jury instructions on the HAC aggravating factor (R 3647, 3685-3690). The trial court refused to give these instructions:

> The aggravating circumstance that the murder was especially heinous, atrocious and cruel applies only where the actual commission of the murder was accomplished by such additional acts as to set the crime apart from the norm of capital first degree murders.
>
> Premeditation does not make a killing especially heinous, atrocious and cruel.
>
> . . .
>
> ... The evil, wicked, atrocious, or cruel nature of the offense is lessened

> to the degree it results from an irrational frenzy on the part of the Defendant.
>
> . . .
>
> ... This offense cannot be especially evil, wicked, atrocious, or cruel unless you find that the Defendant acted with the purpose to torture or to commit an aggravated battery on the victim before the victim's death and in fact carried out such a purpose.
>
> . . .
>
> ... If the victim in this case lost consciousness, any event which occurred after unconsciousness began cannot be considered as evidence of the especially wicked, evil, atrocious, or cruel nature of the crime. Any event after the death of the victim cannot be considered as evidence of the especially wicked, evil, atrocious, or cruel nature of the crime. If you have reason to doubt whether some particular event occurred after unconsciousness or death, you cannot consider that event in deciding whether the State has established this aggravating circumstance.

The trial court actually instructed the jury as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious and cruel;
>
> "Heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts

> that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim. (R 3730-3731; 2737).

Hendrix contends that these instructions are fatally flawed and his death sentence cannot be sustained. He argues that the same constitutional infirmity recognized by the United States Supreme Court in *Espinosa v. Florida,* 112 S.Ct. (1992), is present in the instant case. Thus, the instructions given by the trial judge failed to limit the jury's discretion and understanding and they were left to guess at whether these aggravating circumstances applied. Hendrix contends that the requested instructions correctly stated the law and would have served to limit the application of the aggravating circumstances. The state argued to the jury that these aggravating circumstances were very important. Hendrix concludes that it cannot be said that the erroneous instructions did not contribute to the jury's recommendation and he is entitled to a new penalty phase. Initial Brief of Appellant pp. 43-46.

Appellee would submit such claim is waived. It would appear that appellant did not object to the vagueness of the instruction (R 2563; 2580-81) below and deprived the judge of the opportunity to rule upon or correct the charge on the grounds now urged. *See, Burns v. State,* 18 Fla. L. Weekly S35, 38 n.9 (Fla. Dec. 24, 1992).

In *Shell v. Mississippi,* 111 S.Ct. 313 (1990), the United States Supreme Court held that the limiting instruction used to define the "especially heinous, atrocious, or cruel" aggravating factor

for capital murder, which stated that "the word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others" was unconstitutionally vague. In *State v. Dixon*, 281 So. 2d 1 (Fla. 1973), the Supreme Court of Florida construed the term "heinous" to mean extremely wicked or shockingly evil; "atrocious" to mean outrageously wicked and vile; and "cruel" to mean designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. Contrary to Hendrix' assertion, however, this court has not limited itself to these terms in reviewing the HAC aggravating factor. Hendrix fails to recognize that guidance *was* given in *Dixon* and such criteria applied by this court. The Supreme Court of Florida did not stop at simply defining what heinous, atrocious, or cruel meant in *Dixon* but actually enunciated what was intended to be included in the class of capital crimes. It stated "What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." 283 So. 2d at 9. The United States Supreme Court held in *Proffitt v. Florida*, 428 U.S. 242 (1976), that the sentencer had adequate guidance, understanding the factor to apply to the conscienceless or pitiless crime which is unnecessarily torturous to the victim. Hendrix mounts his

attack, perhaps, on the basis of language found in *Sochor v. Florida,* 112 S.Ct. 2114 (1992):

> Sochor contends, however, that he State *Supreme Court's post-Proffitt cases have not adhered to Dixon's limitation as stated in Proffitt, but instead evince inconsistent and overbroad constructions that leave a trial court without sufficient guidance.* And we may well agree with him that the Supreme Court of Florida has not confined its discussions on the matter to the *Dixon* language we approved in *Proffitt*, but *has on occasion continued to invoke the entire Dixon statement quoted above, perhaps thinking that Proffitt approved it all. See, e.g., Porter v. State,* 564 So. 2d 1060 (Fla. 1990), *cert. denied,* 498 U.S. ___, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991); *Cherry v. State,* 544 So. 2d 184, 187 (Fla. 1989), *cert. denied,* 494 U.S. 1090, 110 S.Ct. 1835, 108 L.Ed.2d 963 (1990); *Lucas v. State,* 376 So. 2d 1149, 1153 (Fla. 1979).

112 S.Ct. at 2121.

Such argument must fail, however. If the Supreme Court of Florida has on occasion continued to invoke the entire *Dixon* statement, such error is necessarily harmless, since the definitive *Dixon* language cannot be tainted by preceding definitions that neither add to nor detract from the definitive language and have been essentially declared nullities. The existence of inconsistent and overbroad constructions has not been demonstrated.

To attach the qualifying HAC label to the capital felony there must be additional acts setting it apart from the norm and it must be a conscienceless or pitiless crime which is unnecessarily torturous. In determining whether any given capital felony fits within that class it stands to reason that it

is necessary, depending on the case, to look at the act itself and the victim's perception of the circumstances. As Justice Souter noted in *Sochor v. Florida,* 112 S.Ct. 2114, 2121 (1992), "the State Supreme Court has consistently held that heinousness is properly found if the defendant strangled a conscious victim." In the case of strangulation it is not necessary to look beyond the act itself because the victim's perception is known from the act. Since strangling takes some amount of time it can safely be assumed the victim is in great fear and suffering emotional strain. Some acts make the capital felony almost per se heinous, atrocious, or cruel. *See, Hitchcock v. State,* 578 So. 2d 685, 693 (Fla. 1990). Other murderous acts such as shooting with a shotgun may cause or the instruments thereof may be designed to cause immediate death and ending the analysis there would not result in a finding that the capital felony was heinous, atrocious or cruel. *See, Mills v. State,* 476 So. 2d 172, 179 (Fla. 1985); *Teffeteller v. State,* 439 So. 2d 840 (Fla. 1983). Even in such cases, however, there may be additional acts setting the crime apart from the norm, looking at the crime from the victim's perspective, that would qualify the crime as heinous, atrocious or cruel such as a preceding kidnapping or death march, *see, Koon v. State,* 513 So. 2d 1258 (Fla. 1987), or delay whereby the victim could obsess about his or her impending death or toying with the victim such as firing bullets into the extremities before administering the coup de grace. *See, Swafford v. State,* 533 So. 2d 270 (1988). What this court has generally looked at is whether the victim is tortured, either physically or emotionally by the

killer. *See, Cook v. State,* 542 So. 2d 964 (Fla. 1989). There is no arbitrary and capricious application by virtue of the fact that the court examines both the act and the victim's perception depending on the factual scenario. Such analysis is consistent with the approved *Dixon* definition and essential to determining if the crime was pitiless and unnecessarily torturous or accompanied by additional acts setting the crime apart from the norm. It is also not an arbitrary distinction to find a murder preceded by an abduction to be susceptible to an application of the HAC factor while not finding such factor applicable to a lingering death from a gunshot wound. An abduction causes great fear and emotional strain, which is different than the actual process of dying, itself, which we all ultimately undergo. Thus, pursuant to *Walton v. Arizona,* 497 U.S. 639 (1990), it was not error for the trial judge to weigh an aggravating factor defined by statute with impermissible vagueness, when the state Supreme Court had construed the statutory language narrowly in prior cases. 110 S.Ct. at 3075, 3076.

While it is a moot question, since Florida's heinousness factor has been subjected to the limitation of a narrow construction from this court, the state would point out that the jury was instructed in the *Dixon* language approved in *Proffitt v. Florida,* 428 U.S. 242 (1976), and, thus, had adequate guidance and the instructions are hardly fatally flawed. *See, Power v. State,* 605 So. 2d 856, 864 n.10 (Fla. 1992). In *Espinosa v. Florida,* 112 S.Ct. 2926 (1992), one of the instructions merely informed the jury that it was entitled to find as an aggravating factor that

the murder of which it had found Espinosa guilty was "especially wicked, evil, atrocious or cruel." 112 S.Ct. at 2927. That is not the case here. Neither does *Espinosa* mandate instructions such as those suggested by Hendrix, many of which have no application to his case, or are misstatements of the law. It is not necessary to inform the jury of every nuance of decisional law, in any event, and Hendrix could have separately challenged this aggravator on that basis.

VIII THIS COURT'S INTERPRETATION AND APPLICATION OF THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR HAS NOT RESULTED IN AN ARBITRARY AND CAPRICIOUS APPLICATION OF THE DEATH PENALTY AND THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE THE DEFENSE REQUESTED JURY INSTRUCTIONS ON THIS FACTOR.

This court has consistently rejected the argument that the cold, calculated, and premeditated aggravating factor is unconstitutionally vague and overbroad,[2] *Klokoc v. State,* 589 So. 2d 219, 222 (Fla. 1991); *Brown v. State,* 565 So. 2d 304 (Fla. 1990); even post- *Hodges v. Florida,* 113 S.Ct. 33 (1992). *Fotopoulos v. State,* 18 FLW S18 (Fla. Dec. 24, 1992) (Revised opinion). This aggravator also genuinely narrows the class of persons eligible for the death penalty. *Harich v. Dugger,* 844 F.2d 1464 (11th Cir. 1988). Appellant has failed to demonstrate any arbitrariness in application. Contrary to appellant's assertion this court has explicitly defined the level of premeditation required - it is "heightened" premeditation. *See, Hamblen v. State,* 527 So. 2d 800 (Fla. 1988). The "manner" of killing reflects upon the perpetrator's "state of mind" and "actions" can be accomplished in a calculated manner. There is no inconsistency in considering the manner of killing in determining intent. In *Banda v. State,* 536 So. 2d 221 (Fla. 1988), the victim was a violent man and the defendant plotted to kill him to prevent the victim from killing him, and in *Cannady v. State,* 427 So. 2d 723 (Fla. 1983), the

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[2] The state strongly disagrees that the terms of the statute itself give no guidance. The common man knows the meaning of the terms "cold, calculated, and premeditated," and "without pretense of moral or legal justification." Such terms are hardly as obscure as terms such as "heinous" or "atrocious."

defendant had an interest in protecting his own life, whereas the defendant in *Provenzano v. State,* entered the courthouse with the *intent* of killing officers and deliberately shot the bailiff at point blank range. The claim of justification must rebut the cold and calculating nature of the homicide. There has been no inconsistency in the application of the second prong of this factor. Decisions narrowing the definition of this factor do not constitute jurisprudential upheavals that would even require retroactive application. *Eutzy v. State,* 541 So. 2d 1143 (Fla. 1989). Some room must be left for evolution of the law. Such is hardly arbitrary and capricious, especially as to a defendant who could only benefit from such narrowing. *Harris v. State,* 438 So. 2d 787 (Fla. 1983), is distinguishable from *Mason v. State,* 438 So. 2d 374 (Fla. 1983). The determinative factor was not that the weapons were taken from the premises. It would appear that in *Harris* the victim discovered Harris during a burglary whereas in *Mason* the burglar deliberately attacked a sleeping victim. There has been no inconsistency in applying this factor to felony murder situations. The occurrence of an abduction alone does not warrant application of the CCP factor. In *Hill v. State,* 422 So. 2d 816 (Fla. 1982), the defendant planned on raping and murdering the victim beforehand. In *Smith v. State,* 424 So. 2d 726 (Fla. 1983), they transported an abducted clerk to another county and took her to a motel room, raped her, then transported her to a wooded area, walked her into the woods and shot her three times on the back of the head. Such a scenario involves planning, especially the planning of an execution. The same type of

planning was present in *Justus v. State,* 438 So. 2d 358 (Fla. 1983), where the perpetrators first took the victim to a bank and Eckerd Drugs so she could get them money. In *Mann v. State,* 420 So. 2d 578 (Fla. 1982), there was psychiatric testimony the defendant was emotionally disturbed which is the antithesis of cold and calculating. In *Cannady v. State,* 427 So. 2d 723 (Fla. 1983), the defendant did not mean to shoot the victim but did so when he jumped at him. In *Preston v. State,* 444 So. 2d 939 (Fla. 1984), there was no period of reflection or involved series of atrocious events.

Appellee would submit appellant has waived any complaint as to the actual instruction as it would appear that the grounds for challenge now raised were not argued to the trial judge below (R 2541-2600). *See, Burns v. State,* 18 Fla. L. Weekly S35, 38 n.9 (Fla. Dec. 24, 1992).

In *Brown v. State,* 595 So. 2d 929, 934 (Fla. 1992), the standard instruction on CCP had been given. This court held "We have previously found *Maynard v. Cartwright,* 486 U.S. 356 (1988), inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor. We find Brown's attempt to transfer *Maynard* to this state and to a different aggravating factor misplaced." 565 So. 2d at 308.

Even if the HAC and CCP aggravating circumstances should be found constitutionally wanting, pursuant to *Walton v. Arizona,* 110 S.Ct. 3047 (1990), where a judge is responsible for sentencing, it may be presumed that he or she followed the law, including the limiting constructions placed on the statute by this court.

Espinosa v. Florida, 112 S.Ct. 2926 (1992), misinterpreted the Florida sentencing system by erroneously assigning the sentencing burden to the jury initially, as a "co-actor," and then insinuating that the trial judge does nothing more than rubber stamp their "recommendation." Such conclusion is contrary to the decisions of this court indicating that the jury is merely an advisory body. *See, Grossman v. State,* 525 So. 2d 833, 839-40 (Fla. 1988); *Combs v. State,* 525 So. 2d 853 (Fla. 1988). A definitive statement needs to be made as to the respective roles of the jury and judge.

Error in the HAC and CCP[3] instructions was harmless. Even if more complete definitions had been given, it would not have changed the outcome under *Chapman v. California,* 386 U.S. 18 (1967). *Spaziano v. Florida,* 468 U.S. 447 (1984), ruled that neither the Sixth Amendment, the Eighth Amendment, nor any other constitutional provision provides a defendant with the right to have a jury determine the appropriateness of a capital sentence. Pursuant to *Clemons v. Mississippi,* 110 S.Ct. 1441 (1990), this court is the paramount sentencing authority and in reviewing a death sentence based in part on an invalid or improperly defined aggravating circumstance may affirm the sentence after reweighing

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[3] The trial judge actually instructed the jury in the terms used in the statute. The defense had requested the following instructions: 1) "cold" means totally without emotion or passion, 2) "calculated" means that the decision to kill was formed a sufficient time in advance of the killing to plan and contemplate. This aggravating circumstance requires proof of premeditation in a heightened degree, more than that required to convict of first degree murder, 3) a cold, calculated and premeditated crime is one in which the Defendant thought out, designed, prepared, or adapted by forethought or careful plan the offense he committed.

aggravating and mitigating factors, or after conducting a harmless-error analysis. Assuming, arguendo, that an error in instruction to the jury also taints the sentence of the trial judge under the reasoning in *Espinosa* there is nothing to preclude this court from either 1) ignoring the reasoning of the sentencer altogether and itself finding the existence of the two aggravating factors anew or 2) conducting a harmless error analysis in regard to the instruction by finding that the factors were appropriately applied.

CROSS-APPEAL

I THE TRIAL COURT ERRED IN NOT ALLOWING THE STATE TO PRESENT EVIDENCE OF A PRIOR VIOLENT FELONY WHILE HENDRIX WAS A JUVENILE.

The state was prepared to present evidence that while Hendrix was sixteen years old he was arrested, pled no contest and was adjudicated delinquent on the charge of aggravated assault. The trial court refused to allow such evidence to be presented and considered in determining the applicability of the aggravating factor that the defendant was previously convicted of a felony involving the use or threat of violence to the person (R 2697).

A crime involving the use or threat of use of force against another person should still count as a prior violent felony even though the result was not a conviction but an adjudication of delinquency as a juvenile. In *Campbell v. State,* 571 So. 2d 415, 418 (Fla. 1990), this court noted that the appellant had cited no authority in support of his assertion that prior juvenile convictions cannot be considered in aggravation and found that the court had correctly found that Campbell was previously convicted of a felony involving the use or threat of violence. As far as any character analysis of a defendant is concerned, the operative terms used in section 921.141(5)(b), Florida Statutes (1991) are "use" or "threat of violence." As far as the past conduct of the defendant is concerned, which is the very issue in the penalty phase, there is no real distinction between an adjudication of "delinquency" and a "conviction." Such a legal

distinction would reflect only how the criminal justice system has treated such behavior. In *McCare v. State,* 395 So.2d 1145 (Fla. 1980), the Supreme Court of Florida held that the word "convicted" as used in this section means a valid guilty plea or jury verdict of guilty for a violent felony and that an adjudication of guilt is not necessary for such a "conviction" to be considered in the capital sentencing character analysis. Hendrix pled no contest to the charge of aggravated assault. It is the past violent behavior that should be examined, not the legal formalities in recognition of the same. It is well settled that even a conviction remote in time may be used as an aggravator. *Kelley v. State,* 597 So. 2d 262 (Fla. 1992). Unscored juvenile offenses have been held to be a valid reason for departure under the sentencing guidelines. *See, Crocker v. State,* 568 So. 2d 116 (Fla. 5th DCA 1990). There is no language in subsection (5)(b) indicating that a capital defendant should be shielded in the character analysis by virtue of past status as a juvenile.

The state would submit that such evidence should have been admitted in the present case to establish the aggravating factor of a previous conviction of a felony involving the use or threat of violence to the person. There is no language in subsection (5)(b) indicating that a capital defendant should be shielded in the character analysis by virtue of past status as a juvenile.

CONCLUSION

Based on the foregoing arguments and authorities, appellee requests this court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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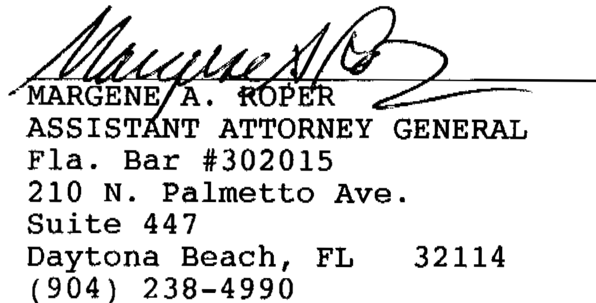

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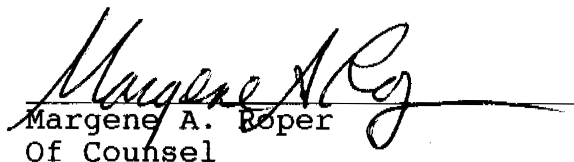
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by delivery in his box at the Fifth District Court of Appeal to Michael S. Becker, Esquire, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 28th day of January, 1993.



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