15IN THE SUPREME COURT OF FLORIDA

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ALFRED LEWIS FENNIE,

Appellant,

v. CASE NO. 80,923

STATE OF FLORIDA,

Appellee.

_______________________________/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

Appellee accepts the statement of facts recited by appellant subject to the following inclusions and any noted discrepancies.

The body of Mary Strickland Shearin was found in a grassy dump site. With slight gusts of wind, there were all sorts of things blowing about, which would tend to deposit fibers on her having nothing to do with the killing and remove fibers or hair from the killer (R 1041, 1052).

Mary was garbed in a gray T-shirt with black trim and had green army fatigue type shorts (R 1027). The top arc of her T-shirt said "Low Country." The bottom arc said "Charleston, South Carolina" in orange print. Across the middle in white print was the name "Harley Davidson." (R 1031). She had a tattoo four to five inches in length of an aqua-colored snake on her right thigh. On her left shoulder was a two-headed unicorn. On the right shoulder was a combination of a mushroom, butterfly and beetle (R 1032). No jewelry was found on her body (R 1101). Her feet were clean, which led the police to believe she had been wearing shoes at one time, since the roads consisted of sand or limerock (R 1028).

Mary had been shot in the back of the head (R 1027, 1044). Since the blood flowed straight down from the wound police felt she may very well have been shot at the site her body was found (R 1044). There was no indication she had been moved after beginning to bleed. There was no change in blood flow from the head and lividity was consistent with the positioning of the body (R 1045-46).

No identification was found around Mary's body (R 1028). She was identified through fingerprint comparison (R 1086-1088). The jury was prohibited from hearing that her prints had been on file with the Tampa Police Department because of a prior petit theft in 1977 (R 1064).

No physical evidence was found near the body. A search with metal detectors failed to yield any spent shell casings (R 1089).

The authorities spoke to a woman at the scene named Kim Rowe (R 1035).

Mary's hands were tied behind her with an off-white rope which was looped two times around her wrists (R 1095). The rope was removed during the autopsy and turned over to law enforcement (R 1099). The two lengths of rope were admitted into evidence as state's exhibit 4 (R 1100).

On autopsy, Dr. Pillow also found bruises on the back of Mary's left hand, at the base of the left thumb, and toward the back of the left wrist. Close to the area of the elbow there was also some bruising. The fingernail on the right middle finger was torn at one margin (R 1101). All the bruises were grossly red to blue, indicating they were fresh bruises (R 1104). While Dr. Pillow stated that she found no physical indication of forced sexual intercourse she elaborated that in an adult woman who's had prior sexual activity there may not be physical evidence such as bruising or lacerations to the genitalia (R 1118). She opined that the bruises on the groin were consistent with the possibility of forced sexual activity (R 1120). It was Dr.

Pillow's opinion that Mary had sexual intercourse sometime shortly prior to her death (R 1136). It could have occurred within days (R 1137). In making her findings as to the cause of death, Dr. Pillow dismissed the possibility of a drug overdose (R 1130).

When John Shearin last saw his wife, Mary, the morning of September 8, 1991, he did not notice any tears in her T-shirt or bruises on her arms and legs (R 1148). She was wearing her wedding ring, a double diamond engagement/wedding band with one big diamond. She could have had on one of her gold chain necklaces but he didn't notice. He believed she was carrying a purse that evening. She also carries a check book (R 1149). John Identified one of his checks. It did not appear to be Mary's signature on the signature line. "It kind of looks like somebody tried to make that her writing." (R 1150). John also indicated on cross-examination that he did not withdraw thirty dollars from a Presto machine on Florida Avenue at 3:18 a.m. that morning. He also indicated that he had asked his wife if she had a drug problem and she had told him no. He had some suspicions about her friends whom he referred to as "the Peter-Smith" people (R 1152).

Officer Gary Balkcum of the city of Tampa Police Department was the officer that initiated the traffic stop of the missing 1986 Cadillac. He apprehended the driver, who gave the name "Ezell Foster." He placed him under arrest for Grand Theft Motor Vehicle and Driving With License Suspended and read him his constitutional rights (R 1162; 1164). "Foster" indicated that he

understood them (R 1163). He did not have Foster execute a written Miranda waiver. No one threatened Foster or offered him anything in order to get him to talk in Officer Balkcum's presence. Foster was taken to the district office and turned over to Detective Stanton (R 1164).

Deputy Tim Whitfield testified that the .25 Caliber Raven Arms firearm found in the Cadillac was very smooth and had a chrome surface, which is excellent for the retention of print residue. It seemed very unusual to him that no prints were on it and the only explanation was the possibility that it had been cleaned off (R 1183). A single white tennis type shoe, that came from a female, was found in the trunk (R 1184). Mary's husband had described her as last wearing shorts, a Charleston Harley Davidson shirt he had bought her and "tennis shoe like things." (R 1147). On the driver's side of the trunk a portion of the carpet had been pulled away (R 1184).

The negro hair which did not match Fennie's or the co-defendant's was found in vacuum sweepings from the trunk of the Cadillac (R 1227). An analysis of pubic hair combings revealed no transfer between appellant and the victim (R 1227). When two people come into contact they may or may not transfer hairs from themselves to an object. In most cases a transfer is not found (R 1229).

"Foster" (Fennie) told Detective Richard Kramer of the Hernando County Sheriff's Department that after Mr. Jim returned without the lady who had been in the car, he and Mr. Jim drove around, then went to Lake and 22nd Street where Foster dropped

Mr. Jim off at about 9:00 a.m. Mr. Jim told him to return with the vehicle at 1:00 p.m. that afternoon. Foster then went to a friend's house and picked up a casting net and went fishing until approximately 3:45 that afternoon, then went back to the location and picked up Mr. Jim (R 1256). Until approximately 10 o'clock that night Foster drove Mr. Jim around to several locations in the area, stopping to purchase and sell crack cocaine (R 1257). He dropped Mr. Jim off at Lake and 22nd at approximately 10:00 p.m. that night (R 1257). The final time that Foster hooked up with Mr. Jim at the Robles Park area was at approximately 2:45 a.m. after the Chicken Bar closed at which Foster was playing pool. They then went to Bexley's Barbecue at approximately 3:00 a.m. where Mr. Jim stated that he saw the sergeant and they then left and were stopped (R 1259-60). State's Exhibit 13 is a certified copy of a Florida identification card from the Department of Motor Vehicles in Tallahassee bearing the name Ezell Foster, Junior. The picture on the card was that of Alfred Lewis Fennie (R 1261). Detective Kramer saw the wallet size version of this card (R 1261). It's how Fennie identified himself after he was stopped (R 1264). Detective Kramer made an in-court identification of Fennie as the man he interviewed who had given the name Ezell Foster, Junior (R 1262). Fennie also told Detective Kramer that Mr. Jim was going to put the blame on him due to the fact that all the evidence pointed to him since he was driving the victim's car and his fingerprints were on the gun (R 1263). The vehicle had been transported to an impound lot and the inside had not been molested. At that point in time

Detective Kramer had no clue there was any kind of weapon in the car much less a weapon that may have had something to do with Mary Shearin's death (R 1268).

Ansell Rose was able to identify Fennie as the man who had given him a ride and had been stopped by the police (R 1293). Rose's full name is Ansell George Rose and he has never gone by "Jim" or "Mr. Jim." (R 1293-94).

Fennie gave a second statement to Detective James Noblitt of the Tampa Police Department (R 1321). When Fennie admitted that he had cashed a check on Monday because he needed money he was referring to a check on the victim's account at the Tampa Bay Credit Union (R 1330). When Fennie pulled over to the side of the road and told Eric to stop hurting the woman, Eric had been hitting the victim in the face (R 1331).

Fennie stated in the taped statement to Detective Kramer, which was played for the jury, that he also noticed there was some rope up under the concrete blocks on the back passenger side of the car, on the floor and on the seat (R 1357). Frazier was striking the victim's face (R 1358). The victim asked Fennie not to let him hurt her. Fennie was trying to get her to understand that he wasn't going to hurt them (R 1358). Fennie believed that Frazier had tied the victim up because when he put the blocks out, closed the door, and went around, he noticed she was sitting kind of awkward in the seat (R 1362). Thirty dollars had been offered to Fennie on the way to Robles Park to pick up crack cocaine to drive him around while he smoked (R 1369-70). Fennie indicated he observed one soft-bottomed white shoe in the trunk.

He assumed Frazier had taken the rope and put it in the trunk at the detail shop (R 1371). He indicated that Mary had been wearing a white-colored T-shirt and dark colored shorts. He didn't notice if she was wearing shoes when Frazier escorted her alone down the dirt road. He believed that she was bruised from trying to jump from the car. He never really got a chance to look down at her legs because she was crying and begging him not to do anything to her because she wanted to go home to her kids (R 1374). Fennie indicated that in the car he saw Frazier wearing Mary's ring on his small finger (R 1376). It was a wedding-style ring. It was a band and an engagement ring made together. It had one big stone with several little stones around it. Frazier gave it to his girlfriend Regina. Fennie saw her wearing it Monday evening about 7:30 (R 1377). After giving the taped statement Fennie was placed under arrest and transported back to Hernando County. He was arrested for first-degree murder.

Detective Kramer testified that every time he talked to Fennie he changed his story. Even the last taped statement included things Fennie had never said before (R 1389). Prior to the taped statement Fennie never told Detective Kramer that Frazier had pulled a gun on him (R 1390). He never admitted actually being in the woods in the area where Mary Shearin was killed. During the second statement he told Detective Kramer he never left Hillsborough County. Then he said that he stayed at the Circle K and Michael drove off and came back without the lady. In the taped statement he indicated he went with Michael

and the lady to the woods and Michael directed him where to turn. He also indicated in the taped statement that he had met his girlfriend, Pam Colbert, at the detail shop (R 1391). He had originally told Detective Kramer that Mr. Jim, the passenger in the car, was responsible for whatever had happened to the lady. Detective Kramer was able to establish that was a lie, as well. When Detective Kramer took the taped statement from Fennie he thought it was the most truthful statement he was going to be able to get from Fennie. Detective Kramer does not believe even this taped statement is the truth (R 1391).

Regina Rogers told Detective Richard Stanton of the Tampa Police Department that Michael Frazier told her he found the ring when he gave it to her. She had it since noon on Sunday (R 1399).

John Shearin identified his wife's wedding ring and it was admitted into evidence as state's exhibit 15 (R 1404). The ring cost around $2,000. Mary wouldn't take it off except to clean it (R 1405). Mr. Shearin further testified that he kept oil, transmission fluid, windshield wipers, an emergency road kit and some metric tools in a motor oil box and Tupperware canister. There was no rope in the car (R 1405). His wife won a tag at a biker benefit. It said "Harley Davidson" and was on the front of the car (R 1406). He identified state's exhibit 16 as his wife's shoe (R 1407-08). He further indicated that his wife carried credit cards in her billfold in her purse. She had an automatic teller machine card to Tampa Bay Federal Credit Union with the ID number 7953. In September 1991, he had money in both his

checking and savings accounts (R 1409). His bank statement was admitted as state's exhibit 17 (R 1410). The balance in the checking account as of September 9th, the night his wife disappeared, was $447.79, which included state's exhibit 12, check number 4271, for two hundred dollars, with a signature he indicated was not his wife's. The savings account balance was $657.69 (R 1411). That figure reflects a deduction of $30 on September 9th from a Publix at 8815 North Florida Avenue in Tampa (R 1412).

Officer John Preyer had previously taken a picture of Michael Frazier a couple of months before. He was investigating a false imprisonment and battery complaint between Frazier and Regina Rogers. When Officer Preyer saw Mr. Frazier on that day he was in a jealous rage and struck Ms. Rogers in his presence (R 1437).

Detective Richard Kramer testified that after he had transported Fennie back to Hernando County he was notified that the Tampa Police Department had taken Michael Frazier into custody. He and two other officers responded back down to Tampa and met with some Tampa police officers. Frazier was escorted up to the second floor interview room (R 1439). The interview began at approximately 4:24 a.m. Detective Kramer left after about a half an hour and with the assistance of Detective Noblitt verified some of the statements he had obtained from Frazier at that point. Detective Noblitt contacted Regina Rogers and she gave a statement at the Tampa Police Department. The detectives then met with Michael Frazier's aunt. Pamela Colbert was also

present. Pamela took them back to her residence and they obtained clothing she said Frazier and Fennie had been wearing the morning of the incident. They next went to Bob's Class Auto Detail Shop and spoke to Mr. Daniel Myers. They then returned to the Tampa Police Department (R 1441). They spoke to Frazier regarding the information they had received. He gave them a statement at that time. They eventually took a taped statement from him on September 11, 1991 (R 1442-43). Detectives Carlos Douglas and Noblitt found Pamela Colbert at her mother's house and she returned to the police department with them. They took several statements from her (R 1444). Detective Douglas obtained warrants for Colbert and Frazier for first-degree murder, kidnapping and robbery. Colbert and Frazier were arrested for first-degree murder in connection with the death of Mary Elaine Shearin (R 1445).

Detective Douglas spoke with Frazier again on September 17, 1991, at the Hernando County Jail. Their forensic technician had been at the jail. Frazier gave Detective Kramer a note indicating that he wanted to speak with him at the county jail (R 1445). Detectives Douglas and Kramer went to the jail on the 17th and obtained a statement from Frazier (R 1446).

Michael Antoine Frazier went on trial on October 19, 1992, in front of the same judge, Judge Springstead. He was convicted of robbery with a firearm, kidnapping while armed and first-degree murder (R 1464). The state sought the death penalty but the jury recommended life in prison. Frazier entered into a written agreement with the state, which was admitted as state's

exhibit 18 (R 1464). Frazier agreed to fully cooperate in the prosecution of Fennie and to provide full and truthful testimony during all trial and pre-trial proceedings in exchange for the state recommending a life sentence for the first-degree murder and foregoing seeking a jury override and recommending a concurrent sentence of life under the Florida sentencing guidelines on the offense of kidnapping with a firearm and a concurrent term of fifteen years for the offense of robbery and not seeking classification as a violent habitual felon or enhancement of the sentences for kidnapping and robbery. The state was also to tender a certification in Frazier's commitment package that he has cooperated with authorities and provided substantial assistance in the prosecution of Fennie (R 1466-67). It was acknowledged that the state's position would probably remain that Frazier should not receive early release. The sentencing court was not bound by the terms of the agreement (R 1468). After Frazier entered into the agreement the state attorney's office came to jail and interrogated him. Fennie's attorneys also spoke to him (R 1469-70). The terms of the agreement were brought out before the jury. Prior to testifying Frazier indicated that he intended to honor that agreement (R 1470).

According to Frazier's testimony, when he took after the victim's car he saw Fennie with a purse in his hands, credit card and jewelry. There was the ring and a gold chain, but he doesn't know what happened to the chain (R 1514). It was while they were driving to the City Bank of Tampa that Fennie was talking to the

lady through the back seat, asking her the number of the card (R 1476). When Fennie got in the backseat of the car with Mary, Frazier heard her say that she didn't let her husband do these types of things to her (R 1478). Her voice sounded upset, almost crying (R 1505). When she told Fennie she had given the correct numbers she was scared, shaking and about to cry (R 1504). When Frazier walked her down the dirt road and she asked about going home and seeing her children she was real scared as if she knew what was going to happen. She was "crying-talking." It sounded like she was crying while she was talking (R 1505). The auto detail shop was closed at first so they went to Grandy's Restaurant so Colbert could use the restroom. Frazier pulled another brick out there, which made the fourth brick. They then went back to the detail shop (R 1499). It was Fennie who went through the glove compartment of the car looking for credit cards after they picked up Pam (R 1504). Frazier made an in-court identification of Fennie (R 1505). When Fennie went to the automatic teller machine at the bank the machine gobbled up the credit card and a camera took a picture of Fennie and Frazier which Frazier identified (R 1559).

Forensic specialist Gary Kimble with the Hernando County Sheriff's Office processed Mary's Cadillac (R 1567). A latent print was taken from the front of the Tampa Bay Federal Credit Union Mastercard. A second was lifted from the back of a BP gasoline card (R 1569). The cards were found in the glove compartment (R 1568). Russ Knodle processed the exterior of the car and found latent prints on the outside of the trunk at the

lock, outside of the left side of the trunk and outside the left-rear door (R 1581). All of the prints were left by Fennie (R 1583). A crescent wrench and a pair of vise-grips were found inside the trunk (R 1590; 1593).

Denise Mattingly also testified that she saw a big yellowish, cream-colored car moving after the man left the Circle K store (R 1602).

Stephanie Mefford also testified that the woman who came into Stuckey's Restaurant wore her hair in dreadlocks (R 1607).

State's exhibit 23, a videotape of a previous direct and cross-examination of Terrance La Voy was published to the jury (R 1645-46). Mr. La Voy was held to be duly qualified as an expert in the area of forensic firearms and ballistics analysis (R 1031). He determined that the projectile recovered from the body of Mary Elaine Shearin was fired from the .25 automatic caliber Raven Arms semi-automatic pistol (R 1035-36).

Detective Gary Kimble testified that he was able to stick his fingers out of the trunk toward the window without a tool by pushing up with his knees (R 1660).

James White also testified that the tires of the car were especially dirty (R 1676). One of the two men said "Make sure you clean my tires good." (R 1677). He washed the tires and put Armor-All on them to make them look shiny (R 1677-78).

Regina Rogers testified that she had been dating Frazier for eight years (R 1682). Frazier is Pamela Colbert's cousin. Fennie is Colbert's boyfriend (R 1683). Frazier lived with Colbert. Fennie would be there off and on (R 1683). In

September 1991, a Tampa Police Detective came to her home and took a ring (R 1685). Frazier had given it to her the Sunday before he was arrested. He told her he found it on 22nd and Columbus Drive. When she saw Frazier that Sunday she saw a bite mark on the right side of his right hand. He told her Pam's baby, Boniface, had bitten him (R 1686). The previous Thursday she saw a gun in Colbert's apartment (R 1687). Colbert's son had picked the gun up. Regina took it from him. She asked Colbert if she knew her son had the gun. Colbert told her to get Alfred to get it and take it away (R 1688). She said "I told Alfred to get up and move the gun." Fennie picked up the gun and went upstairs. Regina described it as a small gun with a gold and brown handle. State's exhibit 25 looked like the gun that she saw (R 1689). She made an in-court identification of Fennie (R 1690). She further testified that she never knew Frazier to go by the name Eric and had never seen him with a gold chain with the name Eric on it (R 1690). Fennie did not have a job (R 1695).

John Herman also testified that the bank kept a record of transactions for the branch (R 1725). The records reflect two fifty-dollar transactions (R 1726). The codes indicate that the transactions were not successful. The wrong personal identification number was keyed in after the card was inserted in the machine (R 1727). The machine then seizes the card which is destroyed (R 1728). The three photos, state's exhibit 31, reflect Fennie at the machine wearing a baseball hat (R 1724, 1740-41).

At the penalty phase, the state resubmitted and relied upon the evidence presented during the guilt phase. The court took judicial notice of the evidence presented and instructed the jury that it could consider any and all of it (R 1947-1948).

Annie Fennie, appellant's mother, also testified in the penalty phase that Alfred did not work on a regular basis all the time: "Sometimes six months. Sometimes less than six months. Cause he always had somebody to give him." (R 1953). She further testified that when Alfred was big enough to walk he would go over to his father's house. He still goes by sometimes (R 1952). When Alfred was two years old his father and his wife tried to get custody of him or take him (R 1955). Ms. Fennie lived in the projects while Alfred was younger, from 1979-1987 then she moved out (R 1954). She indicated that she didn't socialize too much and that's also the way her kids are (R 1954). Alfred's brothers and sisters love him (R 1955). Alfred got his GED in a corrections institution (R 1956). He made C-level grades in school (R 1957). He stopped going to public school. Then went back but stopped going to Buffalo Adult School (R 1960). The mother of two of his daughters is married. She didn't know who supported all the kids (R 1957). On cross-examination she indicated that a lot of women gave Alfred money (R 1962). Colbert gave him money to keep him from being with other women (R 1963). One night Alfred was returning from the dog track and a woman he was going with came up behind him and gashed him in the arm with her knife (R 1964). At one time all four of Ms. Fennie's children lived in the projects (R 1964). The other

three Fennie children didn't commit crimes. Kathy never even had a traffic ticket (R 1965).

Kathy Lewis Reed, appellant's older sister also testified that Fennie went to church a few times in his younger days but "Alfred mostly was a gambler." He had broken with the church (R 1974). When asked why her brother should be given life instead of death Ms. Reed indicated that Alfred loves women, has plenty of them, does what he can for them, and even their kids have taken up with him. He also helped his gambling lady friends (R 1977). He also had a talent for drawing (R 1978). On cross-examination she indicated that she had been raised with her brother but had never been in trouble. She knew for sure he had been in prison twice (R 1978). He had been in jail probably five times. She had no explanation as to why he killed Mary in the manner in which he did. She indicated there was no reason for it because he knew she had money and would give it to him. She would slide him money and tell him he didn't have to ask anyone for anything (R 1979).

Denise Williams has been Fennie's lady friend for about a year since he's been incarcerated (R 1988). They met playing pool (R 1989). He has written to her a lot and included drawings of valentines, birds and hearts in his letters (R 1990-91).

Melanie Simmons also testified that the contact between her and Fennie had fallen off and she had not seen him for five or six months before he was arrested (R 2002). She did not imply that he devoted his life to taking care of his niece. She did not see him every time she visited the home. She acknowledged

that just about everyone on death row could show others how easy it is to get in trouble (R 2003). She testified she was not telling the jury he should not get the death penalty. She was not making any judgments. She acknowledged a previous statement wherein she indicated Fennie actually deserved the death penalty (R 2004).

At the conclusion of the penalty phase the jury recommended the death penalty by a vote of 12-0 (R 389). The trial judge followed the jury's recommendation and sentenced Fennie to death finding the aggravating factor that (1) the murder was committed while he was engaged or an accomplice in the commission of a kidnapping (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest (3) the murder was committed for financial gain (4) the murder was especially heinous, atrocious or cruel and (5) the murder was committed in a cold, calculated or premeditated manner without any pretense of moral or legal justification. The court found that no statutory mitigating circumstances were proven. The following nonstatutory mitigating factors were found: (1) the defendant came from a broken home and his father had little contact with him as he was growing up (2) defendant is the father of three children (3) defendant has some talent an artist (4) the defendant has paid child support to the mothers of his children when he could (5) the defendant has counseled children about obeying their elders and about the perils of prison life and a life of crime (6) the defendant spent time caring for his sister's children, including one who was handicapped (7) the defendant has been a model

prisoner in the eyes of the staff of the Hernando County Jail (8) the defendant grew up in the housing projects of Tampa (9) the defendant is a human being and (10) the defendant was not known to be a violent type of person.

SUMMARY OF THE ARGUMENT

I. The trial court did not palpably abuse its discretion in denying a defense requested continuance where there was no certification the motion was made in good faith, counsel had previous statements of the witness and knew what he would testify to at trial, was provided all relevant documents, deposed the witness, and had sufficient time for investigation and never renewed the motion. Testimony concerning the fact that the victim may have used a wrench to pry her fingers through the trunk was cumulative to information the defense already had as the defense knew the victim had stuck her fingers through the trunk and the defense was not hampered in its case by this new implication. Counsel adequately cross-examined the witness. Any error was harmless beyond a reasonable doubt.

II. The trial court properly denied Fennie's request to be present during the deposition of Michael Frazier as no good cause for being present was demonstrated. Counsel had videotaped Frazier's trial, received his statements in discovery, had adequate time to prepare, and appellant has failed to show how his defense was in any way hampered by his not being present at the deposition.

III. The claim that the HAC jury instruction fails to limit the jury's discretion is waived by virtue of the defense asking for an almost identical instruction; the instruction approved in *Proffitt v. Florida,* 428 U.S. 242 (1976), was given; there was no error in giving further inapplicable instructions suggested by the defense; any error is harmless beyond a reasonable doubt. No

objection was made that the CCP instruction was vague and such claim is barred. Such instruction stands under an *Arave v. Creech,* 113 S.Ct. 1534 (1993), analysis. Any error is harmless beyond a reasonable doubt.

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

V. The CCP aggravating factor is not unconstitutionally vague or overbroad; this court has applied consistent, limiting constructions.

VI. The prosecutor did not comment on Fennie's failure to testify but only commented as to the basis of the jury's life recommendation for Frazier, which involved Frazier's testimony.

VII. The avoiding arrest aggravator was properly applied as the dominant motive for the murder was witness elimination, not anger at the victim for giving incorrect ATM numbers. Fennie coldly, calculatedly and premeditatedly planned her murder after he realized she had seen his face and could identify him. The CCP factor is, thus, also appropriately present. The murder of Mary was conscienceless, pitiless and unnecessarily torturous as she was robbed, abducted, raped, and then suffered stark terror in learning she was ultimately to be killed by being thrown in the water with cement blocks tied to her legs. Even if the court should strike any aggravators, in view of the weak mitigators, death remains the appropriate sentence.

VIII. Appellant has not preserved his claims on appeal by simply reciting the claims themselves and failing to present argument.

The remaining automatic aggravator claim is before the United States Supreme Court. Potential jurors opposed to the death penalty may be excluded for cause.

I THE TRIAL COURT DID NOT PALPABLY ABUSE ITS DISCRETION IN DENYING A CONTINUANCE.

The record reflects that defense counsel was advised at 4:08 p.m. the day before jury selection began that Michael Frazier was to be a state's witness against Fennie (R 15; 278). No formal written motion for a continuance with a certificate that it was filed in good faith appears in the record. Defense counsel's office had previously videotaped Frazier's trial (R 17, 25), which would indicate that there was some expectation that Frazier would possibly become a witness. The case had been continued some number of times and the defense had waived speedy trial (R 56; 60; 63; 142; 155; 163). Where a continuance has once been granted there is less excuse for a party not being ready for trial. *Ahren v. Willis,* 6 Fla. 359 (1855). The defense had all of the statements Frazier gave to the police (R 25), and a recorded statement taken from Frazier by the state the night before was provided to defense counsel (R 20; 1635). Counsel was to be assisted in whatever he needed in the way of witnesses (R 20). The defense was provided a hard copy of the transcript of Frazier's testimony (R 22; 1635). Counsel was already prepared enough at that point to recall that on cross-examination of Frazier his lie about the bite mark on his hand was brought out, which differed from his previous statements. The court indicated it would instanter provide a subpoena for Regina Rogers, who did appear at trial (R 21; 1681). Frazier's letters to Rogers were turned over to the defense. The court would direct any witnesses the defense wanted to be present (R 23). All witnesses who could

have impeaching information were already made available to the defense during discovery (R 41). Ansell Rose was to be made available to the defense at its convenience (R 44). The defense was given copies of all the certified judgments and sentences on Frazier (R 26). The defense could not say that it had no knowledge Frazier was involved or did not know the extent of his involvement based on the reports and his taped statement (R 31). Counsel really appeared only to be complaining about having to alter his trial strategy (R 31). Where testimony could have been reasonably anticipated a continuance is not warranted. *Moore v. State,* 59 Fla. 23, 52 So. 971 (1910). Seven days were available to the defense before it was even time to put on its case (R 1627).

The trial judge found that the defense was not surprised or adversely affected in their ability to prepare for trial since Frazier, from the very beginning, has been a co-defendant, and his involvement and knowledge in the case had been known to the defense through police reports, depositions, the actual trial testimony and the recorded statements Frazier gave (R 32). Frazier *was* made available to the defense for deposition (R 1635). In *Diaz v. State,* 513 So. 2d 1045 (Fla. 1987), this court held in similar robbery, kidnapping and murder case that the trial court had not abused its discretion in denying a continuance a week before trial where defense counsel was immediately able to depose the inmate to be called despite a claim of insufficient time to discuss the statement with the attorney. The court in this case further indicated that it would

reconsider the motion to continue if at any time it appeared that the defense was unable to procure a witness or was unable to secure documents for purposes of impeachment of Frazier's testimony (R 33). The defense did not thereafter request a continuance on the ground that it was unprepared to attack the testimony of Michael Frazier, or that it was unable to get information from the officer Frazier spoke to or could not subpoena witnesses for impeachment purposes.

The record in the case reveals that counsel was fully able to cross examine Frazier as to his agreement with the state, the circumstances of the crime, and any inconsistency in statements (R 1506-1558). Tampa officer John Preyer was cross-examined as to a prior battery complaint involving Frazier and Regina Rogers and brought out the fact Frazier had hit her (R 1437). It was brought out that upon his arrest Frazier had a bite mark he was trying to hide on his hand (R 1432-35). It was also brought out that Frazier initially lied and said he knew nothing about the murder and said his cousin's child had bitten him (R 1502). It was also brought out that Frazier sold cocaine and would jump into people's cars, get money and leave, never giving them the cocaine (R 1511). It was also brought out that Frazier had been convicted of first degree murder, armed kidnapping and armed robbery and the state had agreed not to seek the death penalty or sentencing under the habitual offender statute (R 1463-69). Frazier also admitted he had never known Fennie to be violent. Appellee would submit that by not again formally requesting a continuance or bringing any problems to the attention of the

trial court the appellant has waived the right to complain that he was hampered by the trial court's failure to initially grant a continuance. An error committed by the trial court relative to a continuance will not be reviewed unless the issue was properly raised at trial. *Reynolds v. Smith,* 49 Fla. 217, 38 So. 903 (1905). It is clear that the defense was not prejudiced by late notice that Michael Frazier would be a witness against Fennie. Under Fennie's various versions of the incident Frazier would have to have been investigated by the defense as the scapegoat triggerman, in any event, which is borne out by the videotaping of Frazier's testimony and the facts brought out at this trial. As was the case in *Bouie v. State,* 539 So. 2d 1113 (Fla. 1990), where the defendant confessed to a cellmate on the second day of jury selection, no undue prejudice has been shown where counsel was able to depose the witness. Further complaints were not made. The record reflects that counsel performed more than adequately in eliciting beneficial information that was available.

No palpable abuse of judicial discretion is clearly and affirmatively shown by the record. *See, Waldron v. State,* 41 Fla. 263, 26 So. 701 (1899); *Magill v. State,* 386 So. 2d 1188 (Fla. 1980). If there was any initial error, it was cured by making Frazier available for deposition, providing the defense with requested documents, counsel's failure to complain after such remedial measures were taken and his adequate performance at trial. *Jerry v. State,* 99 Fla. 1330, 128 So. 807 (1930). Any error was harmless. *Dupree v. State,* 125 Fla. 58, 169 So. 600 (1936).

The defense took the deposition of Michael Frazier on Saturday, November 7, 1992. Prior to that it had all of his statements and trial testimony. The state had previously asked technician Gary Kimble to get into the trunk of the victim's car and see if he could get his fingers out. He was able to get them out near the glass at the back edge where the trunk closes (R 1560). The defense was informed of that at Frazier's deposition (R 1561). The defense had previously inspected the trunk. Defense counsel indicated that he had not seen damage where Frazier later indicated (R 1562). At the deposition the parties learned exactly where on the trunk the victim's hand came out (R 1563). The prosecutor indicated "it was never clear exactly where until he -- I could sit him down, myself, and have him draw me a picture where on the trunk the fingers came out, on Saturday." (R 1629). Frazier made a drawing that was attached to the deposition (R 1565). The state then asked Kimble to go back with a tool and see if he could get his fingers out of the trunk at the place Frazier described seeing them. Kimble did so and was able to get his fingers out. Kimble was also asked to see if he could engage in conversation with someone in the passenger area of the car while he was in the trunk and Kimble was able to. The state provided this information to the defense during the trial on November 11, 1992 (R 1561). Defense counsel moved in limine to preclude introduction of such testimony. The state indicated that the testimony did not have to come in through Kimble at that point in time but that Kimble could first be made available for the defense to talk to and the car could be

inspected at the impound that evening (R 1564). The court indicated that it would direct the court reporter to remain so defense counsel could take Kimble's deposition at five o'clock. The state agreed and indicated that if defense counsel wanted to look at the trunk of the car they could do it that evening (R 1565). The court then indicated "It might very well be that we're worried about an issue that's not going to surface if Mr. Fanter has acceding to take -- to discuss Mr. Kimble's testimony (R 1565). Defense counsel made no further argument or motions. The next morning, November 12, 1992, the defense moved for a continuance, based on Kimble's deposition, to get their own independent expert to examine the vehicle and to conduct scientific tests (R 1627). The court noted and the state acknowledged that it would not be calling an expert but that Officer Kimble would be testifying that he rattled the trunk and managed to get his hand out. The defense indicated that it wanted an expert to examine the pry mark identification and have an independent person see what they could do in the same situation (R 1628). The court asked defense counsel what precluded him from doing this some time ago even though the state has been slow in developing this based on their representation that Frazier's testimony precipitated their inquiry (R 1628). Defense counsel indicated that Frazier said something in his original statement about the fingers, which is "something Mr. Tatti had been bantering about since the first day this case began." The state pointed out that the issue of the fingers coming out someplace on the trunk has been there since the trial

started and defense counsel has had the opportunity to examine the trunk (R 1629). The court recalled that back in pre-trials there were special requests to transport the defendant to Polk County (R 1629). The defense acknowledged that a possible inference from the medical examiner's testimony was that the trunk lid had been closed on her fingers after she was deceased (R 1630). The defense then indicated that when they inspected the vehicle the pry evidence was not readily apparent and would not have put them on notice to look for something else. The court then asked "Do you have a witness then to offer testimony to that effect, that we can all look at from there?" The defense indicated it would bring Mr. Franklin in to testify. The trial judge indicated counsel had every right to do that and that the issue had been readily developed by the defense and there was no basis for a continuance (R 1630). The defense responded that Mr. Kimble had removed a gasket whereas the defense didn't have the ability to remove things and physically alter the vehicle. The trial judge pointed out that he had been very liberal in granting requests to aid the pre-trial discovery process (R 1631). The state pointed out that it had asked defense counsel last night if he wanted to go look at the car and the mark and defense counsel declined, indicating that he wanted to see it in the daylight (R 1633). Defense counsel indicated that when he viewed the vehicle he wasn't advised there was any mark and didn't learn of it until after the deposition (R 1633). The court indicated that based on these new issues a *Richardson v. State,* 246 So. 2d 771 (Fla. 1971), hearing was necessary (R 1634). The court found as a matter of

law that the state had not withheld any information and that information was given to the defense as soon as it became available (R 1634). It was determined that this was not an intentional or willful violation. The court also found that there is some material relevance to this newly discovered evidence that would relate to the testimony that has been offered and bolster the state's case to a certain degree and that the evidence was substantial. Frazier's last recorded statement in which he indicated that the hand was out of the trunk on the interstate, precipitating them pulling over was made available to the defendant within twenty days of his arrest (R 1636). Colbert said the same thing in her interview and those transcripts were given to defense counsel in October (R 1637). Defense counsel approached the bench to point out facets of the picture not readily available on inspection (R 1637). The court indicated that it saw a ripple in the photo depicting the car as the way the defense saw it when they looked at it (R 1639). The court determined that this was an issue put before the defense early on and there was no need or justification for a continuance. The defense pointed out the state would have been on the same notice thirteen months ago to have done the same thing the prosecutor did last night (R 1640). The court indicated that the only issue before it was to make a *Richardson* determination. It then determined that the issue in evidence was equally available to both sides and that there was no evidence that the defense has been substantially prejudiced in the preparation of its defense (R 1641). The court found pursuant to *Richardson* that there was no

violation that would warrant granting a motion to exclude this evidence (R 1642). Mr. Kimble testified that after being placed in the trunk of the Cadillac he was able to get three fingers outside of the trunk along the driver's side edge using the back side of a crescent wrench (R 1648). When the state attempted to introduce photos of the damage to the trunk area the defense objected on the basis of the prior motion and grounds previously argued. The court asked "Those grounds are specifically addressing the rules of discovery?" Defense counsel responded "Yes, sir." The defense complained of lack of predicate that the witness is an expert in tool-mark identification and there were no before and after photos which were necessary because the witness enlarged the damage (R 1652). The objection was overruled and the photos were admitted (R 1654-55). On cross-examination counsel brought out the fact that Mr. Kimble was not qualified and was not an expert in the field of tool and pry-mark identification (R 1657); that he made no tests with the radio on regarding the conversation (R 1658); that he did not put the actual wrench the victim used into evidence and did not take it out to use in the experiment but used the first available crescent wrench (R 1659); that he could not say when the damage in the trunk was made and could not tell whether or not there was a heavy object banged on the side of the trunk to make that mark (R 1661). The defense moved to exclude the witness' testimony based on a violation of "the rule" claiming someone had discussed Frazier's testimony with him since the rule had been invoked. The state only told them to try and get their hand out of the

trunk prior to Frazier's testimony (R 1664). The court found no violation (R 1666).

The record reflects that the state did not use an expert, in the first place, but only Officer Kimble, to testify as to his ability to get his fingers through the side of the trunk, so there was no reason for the defense to secure their own rebuttal expert witness. The showing that the applicant will be able to find a witness to testify in his behalf must be of a realistic expectancy and not a matter of speculation. *Diehl v. State,* 117 Fla. 816, 158 So. 504 (1935). The defense could have had their investigator check the feasibility of such undertaking at the impound lot the evening before but chose not to even view the car. The defense was not prevented from putting on their witness "Franklin" but did not do so. Counsel knew all along Frazier and Colbert claimed the victim had stuck her fingers through the trunk. Counsel had even developed a theory the trunk had been closed on the victim after her death. The only conclusion to be drawn from this is that defense counsel, himself, felt that such testimony could not be rebutted. The only added dimension resulting from the testing is the inference that the wrench the victim armed herself with was also used to facilitate sticking her fingers through the trunk. The defense had all of the same information available to it as the state and could have drawn the same conclusions and gone into this as well as the state.

The information gleaned from the test is cumulative to Frazier's testimony. Frazier said Fennie talked to the victim through the seat and that the victim had stuck her fingers

through the trunk. Again, especially in the absence of a formal motion, sworn to by the applicant, accompanied by a certificate that the motion for continuance is made in good faith, *see* Fla.R.Crim.P. 3.190(g)(4), it cannot seriously be argued counsel was surprised by Frazier's expected testimony. Testimony implying that the victim may have used a wrench to facilitate sticking her fingers through the trunk is hardly dispositive of the outcome, in any event. Counsel was able to raise doubt as to the legitimacy of the test on cross-examination. The evidence still reflects that the victim was shot by Fennie and considering the robbery, kidnaping and rape preceding the murder, the same aggravating factors would stand even without the added information. Any error is harmless beyond a reasonable doubt. *Dupree v. State*, 125 Fla. 58, 169 So. 600 (1936).

II THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST TO BE PRESENT DURING THE DEPOSITION OF MICHAEL FRAZIER.

Appellant complains that he was not allowed to be personally present during the deposition of Michael Frazier.

The record reflects that defense counsel was advised at 4:08 p.m. the day before jury selection began that Michael Frazier was to be a state's witness against Fennie (R 15). Defense counsel's office had previously videotaped the trials of Frazier and Colbert and Frazier's testimony therein (R 17, 25). The defense had all of the statements that Frazier gave to the police (R 25). Counsel was provided with a list of any witnesses the state may call. Frazier by his own admission is a ten-time convicted felon and the judgments and sentences were provided to

the defense (R 26). A recorded statement taken from Frazier by the state the night before was provided to defense counsel (R 20; 1635). Frazier's trial testimony did not materially differ from the statements he gave the officers except for the admission that he had initially lied and told the officers that the child, Boniface, had bitten his hand rather than the victim. The statement taken the night before did not differ from the previous testimony and statements (R 21). The defense had Frazier's statements contained in police reports as well as his last taped statement to police (R 28-31). The defense was provided a hard copy of the transcript of Frazier's testimony (R 22; 1635). The terms of the agreement between the state and Frazier was made known to the defense prior to the deposition (R 27). Seven days were available to the defense before it was even time to present its defense (R 1627). The court indicated it would direct any witness the defense wanted to be present (R 23). The court found that the defense was not surprised or adversely affected in their ability to prepare for trial since Frazier from the very beginning has been a co-defendant and his involvement and knowledge in this case has been known to the defense through police reports, depositions, the actual trial testimony and recorded statements Frazier gave (R 32). The trial judge also indicated that if counsel could show him some necessary purpose for Fennie being at the deposition he would entertain the request to have him present. Counsel indicated such was necessary because he would be in the middle of trial. The judge denied the request (R 39). Frazier was made available to the defense for

deposition Thursday. Defense counsel postponed the deposition until Saturday, after the transcript, trial testimony and proffer had been made available (R 1635).

Florida Rule of Criminal Procedure 3.220(h)(6), provides that a defendant shall not be physically present at a deposition except on stipulation of the parties or a court order for good cause shown. No good cause has been demonstrated in this case. The record reflects that counsel well knew from previous discovery and the trial of Frazier exactly what his version of the events would be and had ample time to discuss the same with Fennie from the beginning of the case up until the time of the actual deposition. Fennie has failed to demonstrate how his defense was hampered in any way by his not being allowed to be present at the deposition of Frazier. The deposition was neither taken on application of the state nor used against Fennie at trial. *Cf. Gore v. State,* 599 So. 2d 978 (Fla. 1992). Considering the vast reservoir of information previously available to Fennie, the only discernible purpose for his being at the deposition in the first place would be to intimidate a skittish state witness.

III THE TRIAL COURT DID NOT VIOLATE THE FIFTH, EIGHTH OR FOURTEENTH AMENDMENTS IN REFUSING TO GIVE INSTRUCTIONS REQUESTED BY THE DEFENSE ON THE HEINOUS, ATROCIOUS OR CRUEL OR COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTORS.

Defense counsel prepared a special jury instruction on the heinous, atrocious or cruel aggravating factor as set out below.

> In considering the aggravating factor of heinous, atrocious and cruel, the following definitions should be considered:

> 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 utter indifference to, or even enjoyment of, the suffering of another. 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 tortuous to the victim.
>
> In order to find that the aggravating factor of especially heinous, atrocious and cruel applies to these facts, the victim's knowledge of his impending death should be considered.
>
> Acts committed after the death of the victim are not relevant in considering whether the homicide was "especially heinous, atrocious or cruel."

(R 404).

Defense counsel objected to the instruction on the HAC aggravator on the grounds that it was vague, arbitrary and failed to adequately give the jury boundaries under which they can find that the aggravating factor does exist (R 1935). Defense counsel indicated that "The language would appear to have the definition contained in *State v. Dixon,* 283 So. 2d 1 (Fla. 1973), following a line of cases from *Espinosa v. Florida,* 112 S.Ct. 2926 (1992). More recent cases indicate that the Court has been finding that that is so vague that it's unconstitutional." The defense then moved to strike any reference to "heinous, atrocious and cruel" in the jury instruction and argument (R 1935). The state responded that limiting language had been added that "the kind of crime intended

to be included as heinous, atrocious and cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim" and that such language had not appeared in any case the Supreme Court had decided was vague. The trial judge stated that "Obviously, that language was included by the Florida Supreme Court to address the concerns that the federal appellate courts had surrounding the earlier instruction on heinous, atrocious and cruel" (R 1936). The court held that the additional language eliminated the concern that the instruction may be vague in the minds of the jury (R 1937). The state later noted that virtually all of the language in the second paragraph of the defense's special requested instruction above was already included [in the standard instruction] (R 2021). The state had no objection to the language of paragraph three other than the substitution of the word "circumstance" for "factor" and "her" instead of "his." (R 2022). The state objected to the last paragraph because there had been no evidence of any acts committed after the death (R 2022). Defense counsel admitted that there was no specific direct evidence that anything was done to the body of the victim after death (R 2023). Counsel argued, however, that the language was still appropriate because things had occurred after death, such as concealing the crime, and the body had been left in the woods and was mutilated by the ravaging of insects and animals, which could be attributed to the heinousness factor (R 2025). The lower court indicated that the state would not be precluded from arguing the postmortem conduct of the defendant as it would

reflect on the defendant's intentions prior to the death and that the case law addresses specific acts done to the deceased after death (R 2024). The trial judge then held "I'm not going to give Defense Requested Instruction Number 4. The Court believes that the standard instruction that has been provided by the Supreme Court adequately addresses the issues. And I do not feel the last paragraph in Defense's Requested Instruction Number 4 is adequate for proper understanding of the law based on my understanding." (R 2025).

Prior to deliberations in the penalty phase the judge instructed the jury as follows:

> Number four, the crime for which the defendant is to be sentenced was especially heinous, atrocious, or 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 2143). The court then inquired of counsel "All right. Mr. Tatti, Mr. Lee, are there any additional -- additions or deletions?" The defense responded that there were none except those previously discussed (R 2147).

The trial judge found that the murder of Mary Shearin was, indeed, heinous, atrocious and cruel. In support of the finding the judge stated:

> Mrs. Shearin died as a result of a single bullet wound, which rendered her unconscious instantly. Yet she suffered before her death. The autopsy revealed numerous bruises on her body. She was placed in the trunk of her car by a man with a gun. She was taken to a deserted darkened alley where the gunman raped her. There was obvious fear in her voice as she told Mr. Fennie that she did not allow her husband to do the things he was doing to her. There was fear in her voice as she insisted that she had given the correct number for her automatic teller machine card. While in the trunk, she was in a position to hear the occupants of the car discussing the merits and methods of killing her. She was terrified to the point of wedging her fingers past the trunk lid in an attempt to get help. She was desperate enough to face two men, one armed with a gun, while she was armed only with a wrench. After being tied up, Mrs. Shearin began to cry as she pleaded to be allowed to go home to see her children.

(R 455).

The judge found that the facts of the case reveal that Mary Elaine Shearin had "foreknowledge of death, extreme anxiety and fear." (R 456). The court also found that the mistreatment suffered by the victim in *Koon v. State,* 513 So. 2d 1253 (Fla. 1987), was analogous to that suffered by Mrs. Shearin, who, in addition to everything else, was raped, confined in her trunk for hours, and forced to listen to a discussion of the method of her own death." (R 457). The trial judge then set forth his reasoning in finding this aggravator:

> To conclude that Mary Elaine Shearin did not suffer extreme emotional pain is to ignore the facts of this case. Borrowing from the Florida Standard Jury Instructions in Criminal Cases, Mr.

> Fennie's every act toward the victim was conscienceless and pitiless. From the time she was raped until the bullet ended her suffering, Mrs. Shearin experienced mental torture far beyond that which was necessary to accomplish her death. Surely, by any definition, what happened to Mary Elaine Shearin is shockingly evil.

(R 457).

The appellant argues on appeal that he is entitled to a new penalty phase for the failure to give the requested instruction. He contends that the same constitutional infirmity recognized by the United States Supreme Court in *Espinosa v. Florida,* 112 S.Ct. 2926 (1992), is present in the instant case as the instructions actually given fail to limit the jury's discretion. Appellant complains of the failure to give the requested instruction which correctly stated the law and would have served to limit the application of the aggravating circumstance.

Appellant presumes too much in assuming that *Espinosa v. Florida,* 112 S.Ct. 2926 (1992), error has been preserved in this case. Defense counsel's proposed instruction does not differ in any **significant** way from the instruction actually given, as far as the definitions of HAC are concerned. Thus, appellant joined in the lower court's understanding as to the HAC definitions and has waived any right to complain of language from *Dixon* and the instruction on appeal. Appellant's proposed instruction was essentially given. The opinion in *Sochor v. Florida,* 112 S. Ct. 2114, 2120 (1992) made it crystal clear that *Espinosa*-type complaints can be considered waived for lack of objection or prosecution. *See also, Mills v. Singletary,* 622 So. 2d 943 (Fla. 1993).

In *Espinosa*, one of the instructions 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." On appeal to the Supreme Court of Florida, the petitioner in *Espinosa* argued that the "wicked, evil, atrocious or cruel" instruction was vague and therefore left the jury with insufficient guidance when to find the existence of the aggravating factor. The United States Supreme Court found the particular instruction to be unconstitutionally vague and that the jury had, therefore, weighed an invalid aggravating factor and by giving great weight to the jury recommendation the trial court had also indirectly weighed the invalid factor. 112 S. Ct. at 2928. Appellee would submit that in *Espinosa* the Court 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). The right result was reached in *Bertolotti v. Dugger,* 883 F.2d 1503 (11th Cir. 1989), where the Eleventh Circuit accorded Florida the *Walton v. Arizona,* 110 S.Ct. 3047 (1990)/*Lindsey v. Thigpen,* 875 F.2d 1509 (11th Cir. 1989), presumption that the sentencing judge followed the law, including limiting constructions placed on the statute by this court. The sentencing judge's very existence is to correct jury error. Where he is overzealous, a

jury override will not stand. He or she is a check on the jury and *Tedder v. State,* 322 So. 2d 908 (Fla. 1975) , cannot transform this check on unrestrained jury passion into an equal co-actor. If it does then this court is the actual sentencer.

In *Preston v. State,* 607 So. 2d 404 (Fla. 1992), this court indicated that "unlike the jury instruction found wanting in *Espinosa v. Florida,* 112 S. Ct. 2926 (1992), the full instruction on heinous, atrocious, or cruel now contained in Florida Standard Jury Instructions in Criminal Cases is consistent with *Proffitt v. Florida,* 428 U.S. 242 (1976)." In the instant case the jury was also instructed in the language approved in *Proffitt, see, Sochor v. Florida,* 112 S. Ct. 2114 (1992), that "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." Appellant would be entitled to no relief even if this claim could be considered.

Espinosa error has hardly been created because the lower court refused to go beyond the *Proffitt* approved language and instruct the jury that acts committed after the death of the victim are not relevant when there was absolutely no evidence at all in this case that the defendant committed any acts upon the victim after her death. Instructions to the jury must be applicable to the issues in the case at bar. *Knowles v. Henderson,* 156 Fla. 31, 22 So. 2d 384 (1945). Mere abstract propositions of law should not be given. *Driver v. State,* 46 So. 2d 718 (Fla. 1950). The victim's knowledge of his or her impending death is

an inherent consideration already present in the standard instruction regarding whether the crime "was unnecessarily torturous to the victim." Every pronouncement of this appellate court need not evolve into a jury instruction. *Proffitt* hardly requires such wordiness.

Even if the instruction was found to be invalid, its use should be found to constitute harmless error given that the record in this case supports a finding, beyond a reasonable doubt, of this aggravating factor. *See, Melendez v. State,* 498 So. 2d 1258 (Fla. 1986); *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986).

Defense counsel prepared a special jury instruction on the cold, calculated and premeditated aggravating factor as set out below:

> In considering the aggravating factor of cold, calculated and premeditated, you are instructed that simple premeditation does not qualify under this circumstance. This circumstance requires a "greater level" of premeditation or methodical intent than the amount of premeditation necessary for a first degree murder conviction.
>
> This aggravating circumstance requires proof of premeditation in a heightened degree, a degree higher than that required for premeditation necessary to convict for first degree murder.
>
> *This aggravating circumstance emphasizes cold calculation that occurs before the commencement of the murder.*
>
> a) "Cold" means totally without emotion or passion.
>
> b) "calculated", means a careful plan or prearranged design.

(R 405).

The state indicated that it proposed definitions to be included in the CCP instruction taken from cases from the Florida Supreme Court which had not yet been added to the standard jury instructions. "Cold" was defined as meaning "without emotion or passion" and "calculated" defined to mean "a careful plan or prearranged design." (R 1938). The defense agreed that "that is the language with respect to 'cold, calculated, *and* premeditated' in that line of cases" and indicated that it did not object to the language being included in the instruction but argued that there was no evidence to justify the instruction at all (R 1939). At the charge conference defense counsel suggested that its own proposed instruction is the proper instruction on "cold, calculated and premeditated." The state argued that the definition of "cold" and "calculated" are already included in the instruction submitted by the state. The trial judge stated that "Based on what has previously been discussed, and the form in which the instruction on 'cold, calculated and premeditated' now exist, I believe that the issues raised by DRI Number 5 are adequately addressed." Accordingly, the judge denied Defense's Requested Instruction Number 5 as it "has already been complied with as the law would otherwise require." The defense indicated "We would reserve our issue for purposes of the aggravating circumstances require proof of premeditation to a heightened degree higher than simply premeditated first-degree murder." The trial judge then stated "Again, I think that that factor is adequately addressed in the standard instructions proper." (R 2026).

Prior to deliberations in the penalty phase the judge instructed the jury as follows:

> Number five, the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Cold means without emotion or passion. Calculated means a careful plan or prearranged design.

(R 2143).

The trial judge did find that the murder of Mary Shearin was committed in a cold, calculated and premeditated manner. The trial judge found as follows:

> From the time the victim was raped, placed back in the trunk of her car, and the Defendant obtained the four concrete blocks, clearly he was reflecting upon the manner by which he would kill Mary Elaine Shearin. When he later obtained the rope from his girlfriend's apartment, he was acting upon his plan to kill the victim. As the car left the outskirts of Tampa, he announced that he had to kill Mrs. Shearin, because she had seen his face. Later, when told by Mr. Frazier that he (Frazier) did not have the heart to kill someone, Mr. Fennie stated: "If you don't have the heart to do it, then don't be around when it's done." Later still, Mr. Fennie announced that he changed his mind; rather than drown Mrs. Shearin with the concrete blocks, he had decided to shoot her. Her captors drove her to a remote area of Hernando County, stopping several times along the way.
>
> Several minutes before Mrs. Shearin's murder, Mr. Fennie ignored the victim's plea to be allowed to go home and see her children. He tied her hands behind her back, and calmly walked her down a dirt road until he found an appropriately isolated location. Mr. Fennie then executed the victim with one shot to the back of her head. According

> to the facts presented at trial, at a minimum, two hours elapsed between the time Mr. Fennie obtained the concrete blocks with which to drown the victim, and her eventual execution by shooting.
>
> The facts of this case compel no other conclusion that the murder of Mary Elaine Shearin was cold, calculated and premeditated. See, State v. Malloy, 382 So. 2d 1190 (Fla. 1979): ". . . execution type murders . . . ordinarily should result in the imposition of the death penalty." (382 So. 2d at 1193.) In the instant cause, the Defendant executed Mary Elaine Shearin.

(R 457-458).

The appellant argues on appeal that he is entitled to a new penalty phase for the failure to give the requested instruction. He contends that the same constitutional infirmity recognized in *Hodges v. Florida*, 113 S.Ct. 33 (1992), is present in the instant case as the instructions actually given fail to limit the jury's discretion.

Fennie did not object at the charge conference or after the instruction was given that the wording of the instruction on the CCP aggravator was unconstitutionally insufficient or vague and his current claim is procedurally barred. *Mills v. Singletary*, 622 So. 2d 943 (Fla. 1993); *Hodges v. State*, 619 So. 2d 272 (Fla. 1993). The requested instruction was simply presented as the preferred instruction in terms of Florida law.

This court is not faced with "pejorative adjectives such as 'especially heinous, atrocious, or cruel' - terms that describe a crime as a whole and that the Court has held to be unconstitutionally vague." *Arave v. Creech*, 113 S.Ct. 1534, 1541 (1993). As was the case in *Arave*, the terms now in issue, "cold,

calculated and premeditated" describe the defendant's **attitude** toward his conduct and his victim. "The law has long recognized that a defendant's state of mind is not a 'subjective' matter, but a fact to be inferred from the surrounding circumstances." 113 S.Ct. at 1541. The language at issue here is no less clear and objective than the language sustained in *Arave*. Appellant acquiesced in this matter, in any event, since the definitions given parallel his own requested instruction and defense counsel had no objection to the state's proposed definitions. Again, there is hardly *Espinosa* or *Hodges* error because the trial judge refused to give a more elaborate jury instruction which includes every appellate pronouncement of this court. The "careful plan or prearranged design" language is taken from this court's opinion in *Rogers v. State,* 511 So. 2d 526 (Fla. 1987), and such plan or design would naturally include heightened premeditation.

On this record, there is no reasonable possibility the giving of the challenged instructions contributed to the jury's recommendation of death. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986). Both of these aggravating factors were established beyond a reasonable doubt under any definition of the terms. *See, Henderson v. Singletary,* 617 So. 2d 313, 315 (Fla. 1993). Moreover, if either or both of the factors were struck the death penalty would still be appropriate considering the remaining aggravating factors and the weak nonstatutory mitigation and any conceivable error here clearly is harmless beyond a reasonable doubt. *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986).

IV THE STATUTORY AGGRAVATING FACTOR OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS NOT UNCONSTITUTIONALLY VAGUE.

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.

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 appellant 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." Appellant 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.

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.

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,* 283 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 appellant's assertion, however, this court has not limited itself to these terms in reviewing the

HAC aggravating factor. Appellant 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 early on 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," and this language permeates the decisions of this court. Where not expressly mentioned, this adviso served no less as a beacon.

The existence of inconsistent and overbroad constructions has not been demonstrated by the alleged inconsistencies offered by the appellant. 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 because the victim's perception can be ascertained from the act itself. 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 in *Proffitt* 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. The jury was also properly instructed in this case in the *Dixon* language approved in *Proffitt v. Florida,* 428 U.S. 242 (1976), and, thus, had adequate guidance. *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.

V 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.

This court has consistently rejected the argument that the cold, calculated, and premeditated aggravating factor is unconstitutionally vague and overbroad, *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). *See, Fotopoulos v. State,* 608 So. 2d 784 (Fla. 1992). 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 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.

Even if the CCP aggravating circumstance 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). Even if this court has been inconsistent in its limiting constructions defense counsel should not be heard to complain of limiting constructions, in any event, where counsel participated himself in formulating limiting constructions and the jury was instructed for the large part in terms requested or acquiesced in by the defense as to what is cold and calculated.

VI THE TRIAL COURT PROPERLY OVERRULED APPELLANT'S OBJECTION AND DENIED HIS MOTION FOR MISTRIAL AS THE PROSECUTOR DID NOT COMMENT ON APPELLANT'S FAILURE TO TESTIFY IN CLOSING ARGUMENT IN THE PENALTY PHASE.

Appellant complains that the prosecutor commented during his closing argument in the penalty phase on appellant's failure to testify.

It was brought out during the testimony of Michael Antoine Frazier that the jury had recommended life in prison (R 1464). The defense introduced into evidence as defense exhibits 2 and 3 in the penalty phase the advisory judgments of life and sentences rendered in the case of Frazier and Pamela Colbert (R 2058). During closing argument in the penalty phase the prosecutor stated as follows:

> The defense has presented some mitigating evidence. One of the things they have presented, actually two different jury recommendations from the two previous trials, from Mr. Frazier and Ms. Colbert, and that I would concede is something that is proven. It is beyond dispute that the other two juries recommended a life sentence for Mr. Frazier and Ms. Colbert.
>
> The question that I ask you to determine is how much weight are those recommendations to be given? And when you are considering that question, I ask you to consider some of the salient facts that you heard during the course of this trial. For example, with regard to Mr. Frazier's recommendation for life, Mr. Frazier told you that he testified before his jury. They had his testimony to consider when they decided to --

(R 2100).

The defense objected on the ground that the last statement was a comment on Fennie's constitutional right to remain silent since, evidently, it implied that they did not have Fennie's testimony before them (R 2101). The prosecutor, upon questioning by the court, indicated that what he was driving at was that Frazier's jury heard his testimony and this jury also heard that testimony indicating that Frazier was not the triggerman (R 2101). The

objection was overruled (R 2101). The trial court did not interpret the prosecutor's remark to be an improper comment on Fennie's right to remain silent but as a fair comment, based on the documents put into evidence and two prior recommendations, that there should be a distinction made and the life recommendations of the co-defendants should not be considered a mitigating factor (R 2103). The court wondered "how else could he make the point that he's trying to make?" (R 2102). The motion for mistrial was denied (R 2105). The prosecutor then continued:

> As I was saying, the trial jury in Mr. Frazier's trial had the benefit of hearing the same testimony, hearing his testimony, at which point they concluded he was guilty of first-degree murder, armed kidnapping, and unarmed robbery. They had the benefit of the principal instruction which is the law here in Florida. You may have wondered why the principal instruction was being given to you. Mr. Fennie actually participated in the death of Mary Elaine Shearin, and the robbery of Elaine Shearin, and the kidnapping of Elaine Shearin. The reason the principal instruction was so important was because understanding that one can be guilty of a crime without actively participating in that crime yourself, simply by assisting the active participant, understanding that, we knew that you would not jump to the conclusion that Mr. Frazier must have actively killed Elaine Shearin simply was of the fact that he was convicted.
>
> After hearing that testimony, after learning about the law pertaining to principals, and after convicting him, that jury came back and made a recommendation for life.
>
> The law here in the State of Florida says that a mitigating circumstance, for

a trial jury to consider, is that a defendant is an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor.

When you consider the weight to assign to that jury's recommendation as to Mr. Frazier, ask yourselves, is it possible that that jury came to the conclusion that Mr. Fennie was the active participant and that Mr. Frazier was -- his participation was relatively minor.

Keep in mind when you are considering how much weight to give to that particular jury's recommendation, they didn't make a recommendation as to Mr. Fennie, that was not before them. The same thing goes as to the recommendation with regard to Ms. Colbert. The same law pertains to her recommendation as well.

Now, the defense has told you over the last few days, and I'm sure they will continue to tell you today, that Michael Frazier is the real killer here. That Michael Frazier is the one who caused Elaine Shearin to die. I want you to stop and think for just a minute about Mr. Fennie's original statement to the police on the morning he was arrested. Do you remember that?

At the time he was Ezell Foster. And at that time Mr. Foster told this wild story about a fellow named Mr. Jim. Mr. Jim was the convenient scapegoat early that morning when he was arrested.

I suggest to you that when that scapegoat didn't work he tried Eric. And when that scapegoat didn't work, he tried Michael Antoine Frazier. I suggest to you that Michael Antoine Frazier is merely the most recent, most convenient scapegoat they have. And I suggest to you that if the police had not been able, that morning, to disprove the baloney story that he was telling them about Mr. Jim, that he, through his

> attorneys, would be up here now arguing to you that it was really Mr. Jim who killed Elaine Shearin.

(R 2105-2107).

Having cut the prosecutor off before he could even finish his statement the defense now psychically and incredulously argues the "obvious implication" of the unfinished statement was that "since Frazier testified in his trial his testimony was more believable [?] than appellant's [?] (there is no testimony from appellant) who chose to exercise his constitutional right and not testify in his trial." Initial brief of appellant p.68. This argument is based on pure speculation and is not borne out by the remainder of the prosecutor's argument. The defense cannot make the comment subject to an interpretation bringing it within the prohibition by premature objection in mid-statement. Whether a prosecutor's remark is improper comment on a defendant's right to remain silent depends upon the *full* context in which it was made and whether the jury could fairly conclude that the prosecutor meant that the defendant, if innocent, could explain the circumstances, but if guilty would not. *Gosney v. State,* 382 So. 2d 838 (Fla. 1st DCA 1980). That is not the case here.

Appellant petulantly demands to have his cake and eat it too. He would have the advisory jury believe that Fennie was entitled to the same life recommendation as Frazier and Colbert and that there was no factual distinctions and prohibit the state from explaining to the jury that the factual scenario in the case of Fennie was different since, as a triggerman, he is more culpable. The testimony of Frazier was essential in determining

who was the triggerman. All the prosecutor wanted to establish was that Frazier testified, that he testified in this trial and that Frazier's jury had the benefit of his testimony in determining that Fennie was the triggerman and recommending Frazier receive a life sentence (R 2104). The defense previously pointed out on cross-examination of Frazier that he had testified at his own trial and tried to impeach him from the transcript (R 1509; 1518). The statement of the prosecuting attorney in closing argument, when taken in the context of the record as a whole amounted to nothing more than legitimate comment on evidence as it existed before the jury and did not amount to an impermissible comment on the defendant's failure to testify. "[A] prosecutorial comment in reference to the defense generally as opposed to the defendant cannot be 'fairly susceptible' to being interpreted by the jury as referring to the defendant's failure to testify." *State v. Shepherd,* 479 So. 2d 106, 107 (Fla. 1985). The state attorney has the right to draw the jury's attention to conflicting evidence and to evidence not in conflict and can call attention to evidence which is contradictory or affected with inherent improbability, and, in doing so, he or she is not doing anything which can be construed as a comment upon a defendant's failure voluntarily to take the stand and testify for himself. *Smith v. State,* 90 So. 2d 304 (Fla. 1956).

Appellant is correct that the proper test for reviewing comments is whether the alleged comments are fairly susceptible of being interpreted by the jury as referring to the defendant's failure to testify. *State v. Kinchen,* 490 So. 2d 21 (Fla. 1985).

But there is no presumption that jurors invariably draw the wrong conclusions from statements "in which only lawyers or judges sensitized to possible error could even detect a sinister implication." *See, Kinnon v. State,* 439 So. 2d 958, 960 (Fla. 3d DCA 1983).

Appellant has further failed to demonstrate how this meritless claim is even applicable to the *penalty* phase, at which point guilt has *already* been determined and is not even an issue. It is hard to see how such a comment could possibly taint the validity of the jury's recommendation since this court has held that residual doubt of guilt is not a valid sentencing concern. *King v. State,* 514 So. 2d 354 (Fla. 1984). If it affected the aggravator in question it was legitimately designed to. Considering the numerous aggravators and weak mitigation, if there was error it was entirely harmless. *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986); *State v. Loury,* 498 So. 2d 427 (Fla. 1986).

VII THE TRIAL COURT PROPERLY IMPOSED THE DEATH PENALTY BASED ON APPLICABLE AGGRAVATING FACTORS.

Appellant first complains that the avoiding arrest aggravating factor was improperly applied because the elimination of a witness is only a partial reason for the homicide in this case. Appellant postulates that the victim could have been killed out of frustration because it was perceived that she was lying about the numbers needed to withdraw money from the ATM.

Fennie took the victim's ring, which was worth $2,000, as well as her gold chain (R 1514; 1405). He also took a check and later cashed it on Monday for $200.00 (R 1329; 1441). Thirty

dollars was ultimately obtained from a Publix on North Florida Avenue after the victim had been disposed of at 3:18 a.m. (R 1412, 1706). Fennie originally had the woman's purse (R 1474) and would probably have taken the check early on. After the two unsuccessful attempts to get money from the City Bank and the Barnett Bank using the credit cards, Fennie got into the backseat alone with the woman (R 1478) and bruises on the victim's groin present the possible scenario of forced sexual intercourse (R 1120-1136). At that point in time Fennie had appropriated considerable property from Mary and was not so enraged at her that he couldn't further make use of her by engaging in sexual activity. It was after the forced intercourse that Fennie decided to dispose of the victim because he drove to a brick company and put four cement blocks in the backseat (R 1479). He retrieved some rope at Pamela Colbert's apartment (R 1481). They drove north out of Tampa (R 1482). Fennie actually told Frazier that Mary had seen his face and he had to do her in and was going to tie the bricks to her legs and throw her in water (R 1482). Mary then became active, rattling something in the trunk and ultimately sticking her fingers outside of the trunk (R 1483-84). Fennie then escalated the plan and decided just to shoot her (R 1483). He removed three of the blocks at a flea market, got gas and drove to a wooded area (R 1484-1487). Fennie was not so mad at the woman that he could not quiz her about credit card numbers again. He unlocked the trunk and discussed the credit card numbers with the woman. She insisted she gave him the right numbers (R 1487-88). There was no rage on the part of Fennie at

this point in time. He evidently believed the woman or felt she had outlived her usefulness anyway because he then headed back to a convenience store to find out where the nearest bank was (R 1489) then killed the woman before he actually went to the bank (R 1494-95).

In *Riley v. State,* 366 So. 2d 19, 22 (Fla. 1978), this court stated that "the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of requisite intent to avoid arrest and detection must be very strong in these cases." It must be clearly shown that the dominant or only motive for the murder was the elimination of the witness. *Bates v. State,* 465 So. 2d 490 (Fla. 1985); *Oats v. State,* 446 So. 2d 90 (Fla. 1984). In *Rembert v. State,* 445 So. 2d 337 (Fla. 1984), cited by appellant, all there was was the mere fact of a death. The murder in *Rembert* was a classic felony murder. Rembert hit the elderly bait shop owner over the head a couple of times, took money and left. The victim was alive and died later. Rembert took no steps to ensure his death before he left. In *Perry v. State,* 522 So. 2d 817, 820 (Fla. 1988), there was no direct evidence of motive. In *Amazon v. State,* 487 So. 2d 8, 13 (Fla. 1986), this court determined, in a *jury override* case, that the jury could have discounted an unrecorded statement of Amazon to a detective that he killed to avoid arrest because the murders occurred during the frenzied attack of a drug using, emotional cripple. All of these cases are distinguishable from the present case, particularly *Amazon*. The motive for the murder was provided by Amazon, himself, who acted under emotional

disturbance. In the present case, there is no reason to discount Fennie's statement to Frazier, which was obviously believed by the jury.

While mere speculation that witness elimination was the dominant motive behind a murder cannot be considered as an aggravating circumstance, *see, Scull v. State,* 533 So. 2d 1137 (Fla. 1988), here the motive was not based on speculation but was provided by the defendant himself and supported by a factual scenario which reveals witness elimination to be the dominant motive, not anger at the victim. This case falls within the ambit of *Lopez v. State,* 536 So. 2d 226 (Fla. 1988), where the defendant stated to an accomplice that he had to shoot the victims because he could not afford to leave any witnesses behind.

Appellant next argues that the heinous, atrocious or cruel aggravating factor was improperly found. Appellant suggests that the instant murder by shooting is ordinary and not set apart from the norm of premeditated murders and analogizes it to a series of cases involving simple shootings and a beating. Appellant disputes the lower court's finding that "while in the trunk, she was in a position to hear the occupants of the car discussing the merits and methods of killing her" (R 455). Appellant also contends that the trial court's statement that "she was taken to a deserted darkened alley where the gunman raped her" (R 4550 is nothing more than conjecture. Appellant also asserts that there is no evidence that the victim begged for her life to be spared. Appellant concludes that the evidence is insufficient to prove

beyond a reasonable doubt that the murder was committed in a heinous, atrocious and cruel fashion.

The state must prove applicable aggravating circumstances beyond a reasonable doubt. *Johnson v. State,* 438 So. 2d 774 (Fla. 1983). The rule that every aggravating factor to warrant the death penalty must be proven beyond a reasonable doubt does not proscribe the use of circumstantial evidence so long as that evidence is inconsistent with a reasonable hypothesis which negates the aggravating factor. *Eutzy v. State,* 458 So. 2d 755 (Fla. 1984).

It is clear that while in the trunk Mary was in a position to hear Fennie talking about killing her (R 455). Frazier testified that Fennie forced Mary into the trunk at gunpoint (R 1474). While they were driving to the City Bank of Tampa, Fennie was talking to the victim through the backseat, asking her the number of the card (R 1476). While Detective Gary Kimble was in the trunk of the car two other officers in the passenger area were able to hold a conversation with each other and with Kimble. Kimble had no difficulty hearing them (R 1656). There was no evidence that a radio was playing at the time of the abduction. It was shortly after Fennie said he was going to do Mary in and tie bricks to her legs and throw her in the water that she began to rattle something in the trunk (R 1483). After Fennie said he was going to shoot her she managed to stick her fingers out of the side of the trunk (R 1484) in the obvious hope someone would see it and notify authorities. When the trunk was finally opened she had armed herself with a wrench (R 1490). The obvious import of her actions is that she overheard her fate being discussed.

Dr. Pillow found bruises on the victim's groin consistent with forced sexual activity (R 1120). It was her opinion that Mary had sexual intercourse sometime shortly prior to her death (R 1136). It was not with her husband (R 1151). In the early hours of the morning the death car was parked in an area near a library across the street from a high school, according to Fennie in his taped statement (R 1355), where there would obviously be no activity at such hour. Fennie admitted having intercourse with Mary but claimed it was consensual after smoking crack cocaine and that Mary wanted to thank him for helping her get it (R 1323; 1355). This is hardly a reasonable hypothesis so as to negate the heinousness factor and counsel offers nothing better at this juncture. First of all, Mary had a hysterectomy, did not care much for sex (R 1151), and it is highly unlikely she would have offered that as a gratuity. Bruises on the groin are not consistent with a sex as reward theory. They were in the backseat of the car five to ten minutes (R 1479). Mary told Fennie she didn't let her husband "do these types of things *to her*" and such statement was consistent with (1) a physical act being performed upon her for which appellant offers no alternative explanation and (2) her aversion to sex. That it was not consensual is evidenced by the fact that her voice sounded upset, almost crying (R 1503). The trial court's finding that Mary was raped is hardly conjecture.

Detective Kramer thought the last taped statement he took from Fennie was the most truthful statement he would get (R 1391). Fennie indicated in that statement that prior to the

killer escorting her down the road Mary was "crying and begging him not to do anything to her because she wanted to go home to her kids." (R 1374). The killer turned out to be Fennie not Frazier. This is consistent with Frazier's testimony that "when Fennie walked her down the dirt road and she asked about going home and seeing her children she was real scared as if she knew what was going to happen. She was 'crying-talking.' It sounded like she was crying while she was talking." (R 1505). Contrary to appellant's assertion there was ample evidence to support the finding that the victim begged for her life to be spared.

Although Mary died of a gunshot wound to the head, additional acts of cruelty provide an evidentiary basis for finding the HAC factor and distinguish this case from the less elaborate homicides cited by appellant. The finding of this factor need not rest on the actual method of killing but can be found where a victim endures rape, robbery and kidnapping prior to her death. *Cf. Copeland v. State,* 457 So. 2d 1012 (Fla. 1984); *Jackson v. State,* 522 So. 2d 802 (Fla. 1988)(victim shot, forced into laundry bag on back floor and driven around remote areas, pleading for medical treatment and aware of likelihood of impending death); *Scott v. State,* 494 So. 2d 1134 (Fla. 1986)(victim beaten, driven to deserted area, became conscious, suffered stark terror from awareness of likelihood of death); *Cooper v. State,* 492 So. 2d 1059 (Fla. 1986)(murder victims bound and rendered helpless, gun pointed at head, misfired three times, another pleaded for life); *Francis v. State,* 473 So. 2d 672 (Fla. 1985)(victim forced to crawl on hands and knees and beg for life,

hands taped behind his back, threatened with injections of foreign substances into his body and finally shot in the heart). Helpless anticipation of impending death may serve as a basis for this aggravating factor. *Clark v. State,* 443 So. 2d 973 (Fla. 1983). The trial court's findings of fact and the statement of facts reflect that elements of the worst factual scenarios of prior cases coalesce in the instant case and demand that Mary's nightmarish ending be recognized for what it was. After Fennie accosted Mary and took her property he could have put her out of the car. Mary had to know he had something in mind for her when she was put in the trunk. Aside from the trauma of a robbery she had to undergo a lengthy abduction. She was next treated to a rape, then a discussion about how her life would end. She tried to attract help to no avail. She armed herself with the only available weapon, a wrench. When the trunk was finally opened and she saw the gun pointed at her she had to know she was powerless to save herself, nevertheless she fought against her ultimate fate and bit Frazier's hand. Losing the final round, her hands were bound behind her back and she was marched down a dirt road to meet her maker with the sole recourse left to her being to plead for her life. Without doubt this was a conscienceless, pitiless crime unnecessarily torturous to the victim.

Appellant finds inconsistency in the fact that the court found that the reason for the killing was because Mary saw Fennie's face yet also found that Fennie concocted an elaborate scheme and planned to murder her. The fact that Fennie drove her

to a remote area does not mean that this was a cold, calculated and premeditated murder but only that he sought a place where detection would be less likely. Appellant also maintains that the time spent driving around was in furtherance of a robbery by securing numbers to the ATM account rather than in furtherance of a cold, calculated plan to murder the victim.

Several important facts distinguish this case from *Preston v. State*, 444 So. 2d 939 (Fla. 1984). This is not simply a robbery that didn't work out. There was also the rape. Fennie did not immediately kill Mary when he realized she had seen his face, he did concoct a scheme. He drove to a brick company and took four cement blocks (R 1479). He took rope from Colbert's apartment, (R 1481) apparently in pursuit of his scheme to drown her by anchoring the cement blocks to her legs (R 1482). The facts in *Preston* reveal no search for the accoutrements of a lengthily contemplated murder. Colbert came with them and drove, apparently so Frazier could be enlisted to help Fennie secure the victim (R 1482). They left Tampa heading north (R 1482). When the victim became a nuisance in the trunk Fennie deliberated again and decided the murder would be accomplished by shooting. He then found a remote place where the shot would likely go unheard. She was bound, to prevent escape. She was then summarily executed by a shot to the back of the head. The trial court noted that at least two hours elapsed from the point Fennie got the blocks to the actual execution. This is a case involving more than simple premeditation. The evidence proves beyond a reasonable doubt that Fennie carefully planned to commit the

murder. While a simple killing during the course of a robbery may be insufficient to show the aggravating factor of a cold, calculated and premeditated murder, *cf. Perry v. State,* 522 So. 2d 817 (Fla. 1988), this court has held that evidence that a defendant planned a robbery in advance and planned to leave no witnesses supports the finding of this factor. *Remeta v. State,* 522 So. 2d 825 (Fla. 1988). Fennie indicated he needed to do Mary in because she had seen his face. This case is similar to *Ponticelli v. State,* 593 So. 2d 483 (Fla. 1991), where the defendant got the victims to leave their home, drove them to another location, announced his intention to kill them, then shot them in the back of the head. The fact of a prior robbery hardly militates against finding this factor and adds to the coldness dimension of the factor in the absence of any evidence of panic or impulsive action. This factor is appropriately upheld in execution-style murders. *Cannady v. State,* 427 So. 2d 723 (Fla. 1983).

Even if this court should strike any of the above factors, the weak mitigation hardly outweighs the remaining aggravators and, after applying a harmless error analysis, the death sentence should be affirmed.

VIII THE CLAIM THAT FLORIDA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IS PROCEDURALLY BARRED.

The automatic aggravating circumstance claim was rejected in *Lowenfeld v. Phelps,* 484 U.S. 231 (1988). It is presently before the United States Supreme Court again in *Tennessee v. Middlebrooks,* No. 92-989. In *Wainwright v. Witt,* 469 U.S. 412 (1985), the Court

held that potential jurors who are opposed to the death penalty may be excluded for cause.

The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues and such claims are deemed to be waived. *Duest v. State,* 555 So.2d 849 (Fla. 1990); *Medina v. State, 573* So. 2d 293 (Fla. 1990). The remainder of claims raised by appellant are barred.

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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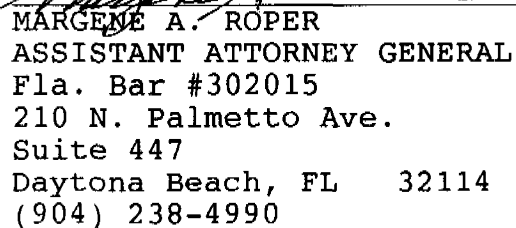
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by Delivery in the basket at the Fifth District Court of Appeal to Michael S. Becker, Assistant Public defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, ______ day of November, 1993.

Margene A. Roper
Of Counsel