IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,349

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F.W. CUMMINGS-EL,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS .... iii-viii

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2-19

POINTS ON APPEAL 20

SUMMARY OF THE ARGUMENT 21-22

ARGUMENT 23-62

I.

THE LOWER COURT DID NOT ERR IN EXCUSING POTENTIAL JURORS FOR CAUSE. 23

II.

THE LOWER COURT DID NOT COMMIT REVERSIBLE ERROR WHEN COMMENTING TO THE JURY DURING VOIR DIRE. 31

III.

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY AS TO THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS OR CRUEL. 36

IV.

THERE WAS NO ERROR IN THE TRIAL COURT'S FINDING OF "HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATOR. 40

V.

THE LOWER COURT DID NOT ERR IN FINDING THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED, WITHOUT ANY PRETENSE OF MORAL JUSTIFICATION. 46

VI.

THE LOWER COURT DID NOT ERR IN IMPOSING THE SENTENCE OF DEATH, AS IT IS NOT DISPROPORTIONATE TO OTHER DEATH SENTENCES WHICH HAVE BEEN UPHELD BY THIS COURT. 54

CONCLUSION 63

CERTIFICATE OF SERVICE 63

TABLE OF CITATIONS

CASES **PAGE**

Arbelaez v. State,
626 So. 2d 169 (Fla. 1993) 48-49

Atwater v. State,
626 So. 2d 1325 (Fla. 1993) 48

Blakely v. State,
561 So. 2d 560 (Fla. 1990) 58, 59, 61

Bonifay v. State,
626 So. 2d 1310 (Fla. 1993) 44

Brown v. State,
381 So. 2d 690 (Fla. 1980) 23

Brown v. State,
565 So. 2d 304 (Fla. 1990) 48

Byrd v. State,
481 So. 2d 468 (Fla. 1986) 55, 57

Clark v. State,
363 So. 2d 331 (Fla. 1978) 32

Davis v. State,
620 So. 2d 152 (Fla. 1993),
cert. denied, 114 S.Ct. 1205,
127 L.Ed.2d 552 (1994) 38, 40, 45

Douglas v. State,
575 So. 2d 165 (Fla. 1991) 48

Duest v. State,
462 So. 2d 446, 448 (Fla. 1985) 33, 44

Duncan v. State,
619 So. 2d 279 (Fla. 1993) 55, 57

Elam v. State,
19 Fla. L. Weekly S175 (Fla. 1994) 44

Espinosa v. Florida,
505 U.S. ___, 112 S.Ct. 2926,
120 L.Ed.2d 854 (1992) 36, 38

TABLE OF CITATIONS
(Continued)

CASES **PAGE**

Farinas v. State,
569 So. 2d 425 (Fla. 1990) 57, 60

Ferguson v. State,
417 So. 2d 639 (Fla. 1982) 33

Floyd v. State,
497 So. 2d 1211 (Fla. 1986) 44-45

Garron v. State,
528 So. 2d 353 (Fla. 1988) 48, 60

Gaskin v. State,
615 So. 2d 679 (Fla.), cert. denied,
114 S.Ct. 328, 126 L.Ed.2d 274 (1993) 38

Greer v. Miller,
483 U.S. 756, 766 n. 8, 107 S.Ct. 3102,
97 L.Ed. 2d 618 (1987) 35

Griffin v. State,
639 So. 2d 966 (Fla. 1994) 48

Hall v. State,
614 So.2d 473 (Fla.), cert. denied,
___ U.S. ___, 114 S.Ct. 109,
126 L.Ed.2d 74 (1993) 39

Hannon v. State,
19 Fla. L. Weekly S447 (Fla. 1994) 25-26, 31, 45

Hansbrough v. State,
509 So. 2d 1081 (Fla. 1982) 45

Happ v. State,
618 So. 2d 205 (Fla.), cert. denied,
114 S.Ct. 328, 126 L.Ed.2d 274 (1993) 38

Harvard v. State,
414 So. 2d 1032 (Fla. 1982) 55, 56, 57

TABLE OF CITATIONS
(Continued)

CASES **PAGE**

Hendrix v. State,
637 So. 2d 916, 921 (Fla.), cert. denied,
___ U.S. ___, 115 S.Ct. 916 (1994) 39

Henry v. State,
19 Fla. L. Weekly S653 (Fla. Dec. 15, 1994) 55-56

Herzog v. State,
439 So. 2d 1372 (Fla. 1983) 44

Hodges v. State,
619 So. 2d 272 (Fla.), cert. denied,
114 S.Ct. 560, 126 L.Ed.2d 460 (1993) 38

Jackson v. State,
19 Fla. L. Weekly S215 (Fla. 1994) 46

Jackson v. State,
599 So. 2d 103 (Fla. 1992) 32

Joiner v. State,
618 So. 2d 174, 176, n. 2 (Fla. 1993) 25

Jones v. State,
612 So. 2d 1370 (Fla. 1993) 32

Kampoff v. State,
371 So. 2d 1099 (Fla. 1979) 43

Kennedy v. Singletary,
602 So. 2d 1285 (Fla.), cert. denied,
113 S.Ct. 2, 120 L.Ed. 931 (1992) 38

King v. State,
436 So. 2d 50 (Fla. 1983) 55

Klokoc v. State,
589 So. 2d 219 (Fla. 1991) 49

Lemon v. State,
456 So. 2d 885 (Fla. 1984) 55, 56, 57

Lewis v. State,
377 So. 2d 640 (Fla. 1979) 43

TABLE OF CITATIONS
(Continued)

CASES **PAGE**

Lindsey v. State,
636 So. 2d 1327 (Fla. 1994) 55

Lusk v. State,
446 So. 2d 1038 (Fla. 1984) 44

Maggard v. State,
399 So. 2d 973 (Fla. 1981).......................... 43

Maxwell v. State,
443 So. 2d 967 (Fla. 1983) 23

Mordenti v. State,
630 So. 2d 1080, 1085 (Fla.), cert. denied,
___ U.S. ___, 114 S.Ct. 2726,
129 L.Ed.2d 849 (1994) 39

Morgan v. State,
415 So. 2d 6, 12 (Fla. 1982) 44

Palmes v. Wainwright,
460 So. 2d 362 (Fla. 1984) 54

Ponticelli v. State,
618 So. 2d 154 (Fla.), cert. denied,
114 S.Ct. 352, 126 L.Ed.2d 316 (1993) 38

Porter v. State,
564 So. 2d 1060, 1064 (Fla. 1990),
cert. denied, ___ U.S. ___,
111 S.Ct. 1024, 112 L.Ed. 2d 1106 (1991) 54, 55

Power v. State,
605 So. 2d 856, n. 10 (Fla. 1992),
cert. denied, ___ U.S. ___, 113 S.Ct. 863,
123 L.Ed.2d 483 (1993) 39

Preston v. State,
607 So. 2d 404 (Fla. 1992),
cert. denied, ___ U.S. ___, 113 S.Ct. 1619,
123 L.Ed.2d 178 (1993) 39

Randolph v. State,
562 So. 2d 331 (Fla. 1990) 26, 28, 30

TABLE OF CITATIONS
(Continued)

CASES **PAGE**

Robinson v. State,
574 So. 2d 108 (Fla. 1991) 45, 53

Rogers v. State,
511 So. 2d 526 (Fla. 1983) 45, 53

Ross v. State,
386 So. 2d 1191 (Fla. 1980) 32

Ross v. State,
474 So. 2d 1170 (Fla. 1985) 57, 59

Santos v. State,
591 So. 2d 160 (Fla. 1991) 43-44, 49, 51

Santos v. State,
629 So. 2d 838 (Fla. 1994) 58

Slawson v. State,
619 So. 2d 255, 260-261 (Fla. 1993) 40

Sochor v. Florida,
504 U.S. ___, 112 S.Ct. 2114,
119 L.Ed.2d 326 (1992) 38

Spencer v. State,
19 Fla. L. Weekly S461 (Fla. Sept. 22, 1994) 56-57

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986) 34

State v. Henry,
456 So. 2d 466 (Fla. 1984) 54

State v. Kinchen,
490 So. 2d 21 (Fla. 1985) 33

State v. Marshall,
476 So. 2d 150 (Fla. 1985)............................. 34

State v. Sheperd,
479 So. 2d 106 (Fla. 1985) 33-34

TABLE OF CITATIONS
(Continued)

CASES PAGE

Stein v. State,
632 So. 2d. 1361 (Fla.),
cert. denied, ___ U.S. ___, 115 S.Ct. 111,
130 L.Ed.2d 58 (1994) 39

Stewart v. State,
620 So. 2d 177 (Fla. 1993) 32

Taylor v. State,
19 Fla. L. Weekly S344 (Fla. 1994) 26, 31

Taylor v. State,
630 So.2d 1038 (Fla. 1993),
cert. denied, ___ U.S. ___, 115 S.Ct. 107,
130 L.Ed.2d 54 (1994) 39

Thompson v. State,
619 So. 2d 261 (Fla. 1993) 40

Trotter v. State,
576 So. 2d 691 (Fla. 1990) 26, 31, 45

Turner v. State,
19 Fla. L. Weekly S630 (Fla. 1994) 23-24

Turner v. State,
530 So. 2d 45 (Fla. 1988) 48-49, 52

Wainwright v. Witt,
469 U.S. 412,
105 S.Ct. 844, 83 L.Ed. 2d 841, (1985) 23,26,28

White v. State,
377 So. 2d 1149 (Fla. 1980) 34

Williams v. State,
437 So. 2d 133, 137 (Fla. 1983) 60

Wilson v. State,
493 So. 2d 1019 (Fla. 1986) 57, 58

Witherspoon v. Illinois,
391 U.S. 510 (1968) 23

INTRODUCTION

All parties will be referred to as they stood below or as they stand in this Court. The symbol "R" will be used to designate the record on appeal. The symbol "ST. ___" refers to the lower right hand corner numbers on the pages of the four (4) volumes of "Supplemental Transcript of Proceedings." These volumes comprise the transcripts of voir dire and guilt phase proceedings, which were corrected pursuant to this Court's order of April 15, 1994. The transcripts of the penalty phase proceedings are contained in volumes five (5) and six (6) of the original transcripts of trial. The symbol "T. ___" refers to the upper right hand corner numbers on the pages of these latter volumes. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Defendant, F.W. Cummings-El, also known as Frederick Wooden was charged with the first degree murder of Kathy Williams Good, and one count of armed burglary. (R. 4). Jury selection began on January 25, 1993. (ST. 6 et seq.) The following evidence was presented at trial:

GUILT PHASE

Officer Dieffenback, with Metro-Dade police for the previous 14 years, testified that on September 16, 1991, at 5:44 a.m., he received a dispatch call to respond to 18220 Southwest 102 Avenue, in Dade County, Florida. (ST. 416-417, 420). The officer arrived at the scene, a single family residence, approximately ten minutes later at 5:54 a.m. (ST. 422, 438).

The house was a three bedroom home belonging to sixty-one year old Daisy Adams. (ST. 703, 710). Ms. Adams lived there with her daughter, the victim herein, Kathy Williams Good. (ST. 703, 710). Ms. Adams' two grandsons, Michael Jerry Adams and Tadarius Williams (the victim's 8 yr. old son) also resided with them. (ST. 703). The victim and her son shared a bedroom across a small den from Ms. Adams' bedroom. (ST. 708, 728). Michael Adams, the victim's nephew, usually occupied the third bedroom. (ST. 708).

Upon Officer Dieffenback's arrival, the twenty year old, Michael Adams was standing outside the house, emotionally distraught. (ST. 423, 439, 430-1). He was upset and saying that, "Fred", the victim's ex-boyfriend, had killed her and why weren't the police doing something about it. (ST. 424, 453, 455, 460).

The officer then entered the house and found the victim, Kathy, lying in a hallway outside of her bedroom. (ST. 425). Fire rescue, another officer, Hughes, the victim's son, and mother, and, a friend, Daphanie, were also present inside the house. (ST. 427-8). The victim was already deceased. (ST. 428). She had been stabbed in her bed. (ST. 457). Officer Dieffenback thus set out to secure the scene and preserve evidence. (ST. 427-8). He also separated the witnesses at the scene, so that they could not exchange information or hear each other. (ST. 434, 461).

The officer determined that the victim, her nephew and her friend, Daphanie, had been out celebrating a friend's birthday in Miami Beach. (ST. 438). They had returned home at approximately 5:00 a.m. (ST. 438). Officer Dieffenback first interviewed Michael Adams, who stated he had been asleep, on the floor next to the victim's bed. (ST. 451). He had woken up because the victim was screaming (ST. 441), and saw the defendant leaving the house. (ST. 461). The officer then interviewed the victim's

son, who had been lying awake in the victim's bed, within inches of her. (ST. 456-7). This witness had stated that he saw "Fred", his mother's ex-boyfriend, lean over them, and, thought the latter was "punching" his mother. (ST. 435, 444, 456-7). He also saw "Fred" flee the house. (ST. 435, 462). After the latter interview, within 15-20 minutes after this officer's arrival, Officer Hughes recovered a "restraining order" obtained by the victim against the defendant, who had been identified as the ex-boyfriend. (ST. 431-2, 443, 455). Officer Dieffenback also attempted to interview the victim's mother, Ms. Adams. (ST. 432). The latter, however, was in "shock" and "too distraught"; she was unable to respond to any questions at that time.[1]

Officer Dieffenback also sought to establish the intruder's point of entry to the house. (ST. 450, 461). He was unable to do so; the evidence indicated someone who "knew the scene". (ST. 461-2)[2]. The investigation was then turned over to the homicide division. (ST. 428-9, 468).

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1 Ms. Adams had undergone open heart surgery shortly before the crimes herein, and had to be taken to Deering Hospital due to her emotional state at this time. (ST. 474, 704, 721).

2 Ms. Adams subsequently testified that after the police left, she discovered the screen on the back kitchen door of the house had been cut all around and then pushed back in place, such that it was not noticeable. (ST. 718). She notified the police. (ST. 479). The door swings towards the outside. (ST. 718). There is a latch/padlock on the inside of the door. Id. The padlock usually hung in the door, without being locked, such that you could still open the door from the inside (by removing the lock), but not from the outside. Id. Subsequent to the murder, the padlock was found to have been removed and was laying on the ground outside. (ST. 718-19).

Detectives Miller and Melgarejo testified that they then responded to the scene and gathered evidence. As noted previously, the victim had been stabbed in her bed, as reflected by the blood on the bed and also from "two pieces of a broken knife blade" found near the head of the bed. (ST. 476). A visual and microscopic examination of these pieces reflected that they fit together. (ST. 508-9, 523-4). The pieces of the blade also fit the handle of the broken knife, which was recovered from the outside area of the house. (ST. 477, 491, 508-9, 523-4). A blue towel with blood on it was found next to the broken knife's handle outside. (ST. 477, 491). The padlock to the back door of the house was also recovered from the ground outside. (ST. 479). Latent fingerprints were lifted from the broken knife, padlock, and from various areas and other items inside the house. (ST. 501-2, 504-5). The latents were of no comparison value. (ST. 509-10). Samples of blood, from the bed, the broken knife, the blue towel, other blood splattered areas of the house, and from underneath the victim's fingernails were also collected and examined. (ST. 478, 491-2). All said samples were consistent with the victim's own blood. (ST. 528-9, 531, 534, 536).

Dr. Middleton, associate medical examiner, also responded to the scene, in order to assist in determining how the victim died. (ST. 623, 625). He performed an autopsy on the victim the next day. (ST. 626). The external examination of the body

revealed five (5) stab wounds, and two (2) "cuts" distinguished as "sharp, sharp injury, but often doesn't go in very far." (ST. 627). The cause of death was "multiple sharp edge wounds". (ST. 634). The stab wounds caused "punctured lungs, permitting blood to come out, bleeding out and also compression of the lungs itself", cutting "the oxygen to the brain". (ST. 634).

The initial stab wound was located on the left side of the back, near the armpit area. (ST. 628). This wound was v-shaped, penetrating the body for seven (7) inches; it went to the right and forward in the body. Id. The stab causing the wound also punctured the lungs, causing a lot of bleeding in the chest cavity. Id. It also caused compression of the lungs, which makes it more difficult to breathe. (ST. 628-9, 634). This was a type of wound which is fatal if untreated. (ST. 630). The second stab wound was located on the left lower abdominal area; it was not a fatal type of wound. (ST. 630-1). The next wound reflected that the knife blade entered and exited the left arm, causing two holes. (ST. 631). The blade "went right through the biceps muscle." Id. The fourth stab wound was to the middle of the right hand, in between two fingers. (ST. 632). The blade had penetrated "deep down into the finger for nearly two inches." Id. The fifth stab wound was also to the hand. (ST. 632-3). The two incise wounds, or cuts, were on the inside two ring fingers. (ST. 633).

The wounds to the right and left arm were "defensive" wounds. (ST. 634). Defensive wounds occur, "if the victim is trying to fend out (sic) a knife attack". (ST. 633). The injuries sustained by the victim were consistent with her having been asleep face down, when an individual from the foot of her bed, from the victim's feet, plunged forward, stabbing her deep in the back. The injuries were further consistent with the victim being able to roll over, and attempt to fend off the attack, sustaining the remainder of the wounds to the front of her body. (ST. 635-6).

None of the wounds sustained by the victim would have caused immediate loss of consciousness. (ST. 635). A person receiving wounds similar to those of the victim would be expected to be able to scream, talk, move around, think, and be conscious for some period of time. (ST. 635-6). The period of consciousness is a "variable span"; a person "could" become unconscious within seconds, but could also live for "fifteen or twenty minutes of the actual stabbing". (ST. 635, 643-4).

The restraining order recovered from the scene was also introduced into evidence. (ST. 431). Witness Deborah Griffen, a friend of the victim, who lived in the same neighborhood, testified as to the events which led to obtaining the restraining order. (ST. 569-576).

On August 27, 1991, the victim visited Ms. Griffen's home. (ST. 569-70). They were talking and reminiscing on the front porch. (ST. 570). The defendant came into Ms. Griffen's yard. (ST. 571). He was upset with the victim. Id. He called the victim, and she walked over and talked to him. (ST. 571). The victim was then seen blocking her face, saying "[t]hat's not true", and moving backwards. (ST. 672). The victim then stated she was "going to get her water out of the porch". She came back into the porch, went inside Ms. Griffen's home, and locked the door. (ST. 532). The defendant then approached the porch and was told by Ms. Griffen that he could not go inside her home. (ST. 573). The witness knew the victim did not want to be "bothered" by the defendant, as the latter had been violent. (ST. 578, 582).

The defendant pushed Ms. Griffen away; he then "kicked in" the door to the house. Id. The defendant went inside and Ms. Griffen followed. The victim was in Ms. Griffen's bedroom, on the telephone with the police, describing the events. Id. The defendant snatched the telephone and threw it aside. Id. He then grabbed the victim's arm, held her hands behind her, with her face pushing into the ground. (ST. 574). He then started "kicking" the victim and "stomped on her". Id. The victim was asking for help, but Ms. Griffin was unable to do so. Id. The defendant also picked up a television and threw it on top of the victim. (ST. 575). He then left. Id.

The defendant's sister subsequently called the Griffen home. (ST. 576). The victim did not wish to talk. Id. During the course of this call, the defendant got on the phone and said: "Kathy, I'm going to kill you. Kathy, I'm going to kill your black ass". Id.

The victim was treated at the emergency room at the Deering Hospital as a result of the above events. (ST. 652-3). The hospital record reflected that she sustained a closed fracture of the right wrist. (ST. 653).

Another friend of the victim's, Ellen Thompson, testified that she wrote out the complaint for the restraining order at the victim's request; the latter's arm was in a sling and she couldn't write. (ST. 606, 613). The restraining order was procured the day after the incident causing it, on August 28, 1991. (ST. 602). This witness knew the defendant. (ST. 586). The victim had told her that the defendant had beat her up on numerous occasions. (ST. 598).

Ms. Thompson also testified that two days prior to the above incident, she was sitting with the victim in front of the latter's home. (ST. 588). The defendant approached and called out to the victim to go to him. (ST. 589). The victim said she did not want to, but nevertheless did so, after he started

accusing her of nonexistent sexual relationships. (ST. 589-91). Ms. Thompson was behind the victim. She saw the defendant take out a gun from his car, and grab the victim by the collar, slapping her. (ST. 540-1). At this point, the victim's nephew, Michael Adams, arrived and told the defendant to leave the victim alone. (ST. 591-2). The defendant stated, "I love her. If I can't have her, nobody could have her." (ST. 592).

Ms. Thompson again saw the defendant approximately four to five days prior to the murder, when she, the victim and the victim's son were returning to the Thompson home from a video store. (ST. 593-4). The defendant asked the victim to go over to him. (ST. 594). She said, "Fred, leave me alone. I don't have nothing to do with you. I have a restraining order." Id. The defendant, however, kept coming towards the Thompson home. (ST. 594-5). He was heard saying, "If I can't have you, ain't nobody going to have you." (ST. 595). The defendant left when Ms. Thompson's father came out and asked him to leave the front of their house. (ST. 595).

This witness also testified that on the Sunday night when the instant murder was committed, she had invited the victim, the latter's nephew and another friend, Daphne Roberts, to celebrate her birthday. (ST. 584-5). They went to a club in Miami Beach, where they danced and had two drinks. (ST. 585-6).

The State also presented testimony from the victim's mother, son and nephew. They had all been home at the time of the murder.

The murder took place at Ms. Daisy Adams' home. She testified that she lived there with her daughter, the victim, and her two grandsons, Tadarius Williams and Michael Adams. (ST. 703). Tadarius was the victim's son. Michael was the victim's nephew. Ms. Adams knew the defendant; the latter and the victim had dated and resided together for "a couple of months". (ST. 725). She had seen the defendant "a lot of times." (ST. 716).

On the evening of the murder, Ms. Adams had gone out to play bingo. (ST. 705-6). She returned home at approximately 11:30 p.m. Id. Upon her return, the victim, her nephew Michael, another nephew Corrie, and a friend Daphanie, decided to go out and celebrate Ellen Thompson's birthday. (ST. 706). Ms. Adams remained to watch over Tadarius. Id. The victim's and Tadarius' bedroom is across from Ms. Adams. (ST. 707-8). The witness fell asleep with her television on in her own bedroom, as was her habit. (ST. 706-7, 740). The television was a twenty-six inch one, which "lights up" that area. (ST. 740). The windows of the house in that area have no shades. (ST. 711). The "house is all surrounded by lights". (ST. 713). A street post light and a church spotlight from across the street, shine into the house, lighting it "up like day". (ST. 712-13). Floodlights from a

neighboring home shine into the back of the house, in the kitchen. (ST. 713). You can see without turning on any interior lights, because it is "lid (sic) up already". (ST. 714).

Ms. Adams woke up when she heard her daughter return. (ST. 708). The witness fell back asleep. (ST. 709). She then woke up again because she heard her daughter screaming. Id. She was not concerned when she heard the first screams, as she thought they were just in "fun". Id. However, she then heard her daughter saying, "Mama, Mama, he hurting me. He hurting me." (ST. 710).

Ms. Adams, who was sixty-one years old, was still recovering from heart surgery and thus could not move as quickly as she used to, then got out of bed. Id. She went out of her bedroom, around an entertainment center and into the hallway outside Kathy's bedroom door. (ST. 710-11, 714-15). It took a "little while". (ST. 710-11).

She saw the defendant at the doorway to her daughter's room; he was coming out. (ST. 715). Ms. Adams was about a foot and a half away from the defendant. Id. She testified, "I looked him [defendant] dead in the face and I asked him, what are you doing in my house." (ST. 711). The defendant "shoved" her away and she fell back on top of a sofa in the den area. (ST. 715). The defendant then leaped over the sofa, and ran towards

the back kitchen door. (ST. 717-18). She also saw her grandson, Michael, running after the defendant, trying to catch him. (ST. 718-720). Michael lost him, however, because of some bushes and a fence outside. (ST. 718, 720).

Ms. Adams also saw Kathy come out of her bedroom after the defendant. (ST. 722, 732). Ms. Adams then grabbed her daughter. "[M]inutes" after that, the victim started gradually going down. (ST. 723). She was saying, "Fred, Fred" to Ms. Adams who was holding her. Id. The victim was getting "heavy and heavier", and Ms. Adams, due to her own physical condition, handed her to Michael. (ST. 720, 741-2). Michael had been calling 911 for assistance; Ms. Adams completed the call. (ST. 721, 741-2).

The victim's son, Tadarius, was 8 years old at the time of the murder. (ST. 541). This witness testified that he also knew the defendant, "Fred", as he had lived with Fred and his mother for a while. (ST. 543, 549). On the night in question, his mother had gone out to celebrate a friend's birthday. Id. Upon her return, she came to his window, knocked and asked him to open the front door. (ST. 543-552). Id. Tadarius thus let his mother in. (ST. 544). Her friend Daphane and Michael were with his mother. Id. They all then went to bed. (ST. 545). Tadarius, his mother and Daphane were all on the same bed. Id. Michael was on the floor. They went to sleep, but Tadarius could not fall asleep. Id. He was awake. (ST. 545-6, 553-4). It was

still dark outside, but he could see, because of the TV light from his grandmother's bedroom and the street lights through the window. (ST. 546, 555). He saw "Fred" come inside the bedroom. (ST. 546-7). Tadarius saw the defendant's face, and saw him make "like a punching motion". (ST. 547-8, 565-6). The defendant was reaching from the foot of the bed. (ST. 548), The defendant had long pants on, no shirt, and a towel in his back pocket. (ST. 554). He heard his mother screaming, and also saw the defendant run out of the room. (ST. 558-59).

Michael Adams testified that he knew the defendant even before the latter started dating the victim. (ST. 655). Michael and the defendant were friends, played chess and worked on cars together. (ST. 674-5).

This witness stated that he returned home after the victim and Daphane on the night of the murder. (ST. 659). Daphane let him in the front door which was locked at the time. (ST. 660-1). Michael locked this door back up, used the bathroom, got something to eat, and went to the victim's bedroom. (ST. 661-2). He slept on the floor in that room, because his own bedroom was full of clothes and he did not wish to clean up. (ST. 660, 663). He had dozed off when his aunt began screaming. (ST. 666).

Michael jumped up, and saw somebody without a shirt exiting the room; he followed. Id. The intruder went to the den, bumped

Michael's grandmother, belted her with his right arm, jumped across the sofa, and exited the back door. (ST. 667). As the intruder ran through the kitchen and out the back door, Michael saw his face, from the side, and recognized him as the defendant. (ST. 672-4). The padlock on the back door was missing, as the defendant was able to just push and go straight out the door. (ST. 668). Michael stopped at the back door and did not follow as the defendant had disappeared. (ST. 672, 675).

Michael then picked up the phone in the kitchen and called 911. (ST. 676). He subsequently had to drop the telephone, because his grandmother was holding the victim, but the latter was slipping. Id. He then held the victim, and was reassuring her while his grandmother went to the phone. (ST. 676-7). The victim died in his arms. (ST. 677).

After presentation of the above, the State rested. The defense did not present any evidence in this phase. The jury convicted the defendant, as charged, on January 29, 1993. (ST. 846).

PENALTY PHASE

The penalty phase proceedings were commenced on February 3, 1993. (T. 911 et seq.). The State presented additional testimony from Daisy and Michael Adams as to the duration and victim's state of consciousness during and subsequent to the attack.

Daisy Adams stated that she had heard her daughter scream, really loudly, about three times, without any words. (T. 927). She did not respond until she then heard the victim scream, "Mama, he hurting me." (T. 928). She then got out of bed and went to the victim's room. (T. 929). She saw the defendant coming out of the victim's bedroom. Id. The victim was also coming out, behind the defendant. Id. Ms. Adams, who had been shoved aside by the defendant and had fallen on a sofa, got up and saw that the victim was leaning against the wall in the den. (T. 930-32). The victim was holding one arm beneath the other and trying to reach around towards her back, with the other arm hanging limply at the side. Id. She was saying, "Mama Fred, Fred." (T. 932). Ms. Adams grabbed around the victim's shoulders, holding her up. (T. 934). The victim then started going down and was getting too heavy for Ms. Adams. Id. The latter then called out to Michael to hold the victim, and went to the telephone. Id. Thereafter, she could hear the victim mumbling, but didn't know what she was saying. Id. Ms. Adams also testified that the broken knife and bloody towel, recovered from outside her house, were not from her home. (T. 935).

Michael Adams testified that he woke up when the victim was screaming, "Mama, mama I am cut." (T. 937). The victim had walked out of her bedroom under her own power. (T. 938-39). She was then standing in the living room. While Michael was on the

phone with 911, he saw the victim was falling. (T. 939). He dropped the phone, went to the victim, and held her in a sitting position. Id. Ms. Adams then completed the call. (T. 939). While Michael was holding her, the victim was saying, "I am cut"; her voice started getting lower. (T. 941). Michael tried to comfort her by telling her the paramedics were coming. Id. The victim asked, "What's taking so long." Id. Thereafter, "[s]he went to like jumping and then her eyes got big and her hands dropped and her head rolled." (T. 942).

The State then presented certified copies of the defendant's prior conviction in North Florida, on May 30, 1990, for one count of aggravated battery with great bodily harm. (T. 947-54). Certified copies of the defendant's prior convictions, in 1984, for two (2) counts of robbery, with a dangerous weapon, in the State of North Carolina, were also introduced into evidence. (T. 957-68, 1015-16). The robberies took place at separate times and locations. (T. 960). The State thus concluded its penalty case.

The defense then presented testimony from the defendant's family members. Diane St. Fleur testified that she was the defendant's older sister. (T. 1005). The defendant is thirty-five years old. (T. 1005). There were twelve children in the family, with nine remaining. Id. The family was a loving, close knit one.

The defendant has four children who were taken care of by his sister during his prior incarcerations. The children have been taken care of by their mother since the murder herein. (T. 1006, 1009, 1012-13, 1016). The defendant has treated the members of his family "fine" and has been protective of them. (T. 1007). Ms. St. Fleur does not think that the defendant is a violent person, and does not believe he was guilty of the crimes herein. (T. 1008).

Catherine Covington, another of one of the defendant's older sisters, also testified. (T. 1017). She does not believe the defendant is a violent person, although she has witnessed the defendant "beating up", "or striking" a cousin. (T. 1019). The defendant is a good father, although he "hasn't been there with his children." (T. 1022). The defendant's prior violent convictions did not demonstrate that he was violent, as she had not witnessed those acts. (T. 1024-25). This witness did not believe the defendant was guilty of the crimes herein, either. (T. 1020).

The defense then concluded its presentation of evidence. The jury recommended a sentence of death by a vote of eight to four. (R. 84).

The trial judge imposed the sentence of death, having found the following aggravating factors: (1) the defendant was previously convicted of other felonies involving the use or threat of violence to the person - i.e., two armed robberies in North Carolina and the aggravated battery; (2) the murder was committed during the course of a burglary; (3) the murder was especially heinous, atrocious or cruel; (4) the murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (R. 94-96). No statutory mitigating factors were found by the lower court. (R. 97). The trial court also considered the defendant's sisters' testimony that he was nonviolent, and a loving father. Id. The court found that this "family portrait of the defendant isn't based on fact or in reality as reflected by the evidence in this case." Id.

POINTS ON APPEAL

I.

WHETHER THE TRIAL COURT ERRED IN STRIKING JURORS KOZAKOWSKI AND OSHINSKY FOR CAUSE ON THE BASIS THAT THEY COULD, UNDER NO CIRCUMSTANCES VOTE TO IMPOSE THE DEATH PENALTY?

II.

WHETHER THE TRIAL COURT REVERSIBLY ERRED BY COMMENTING TO THE JURY ON THE DEFENDANT'S BURDEN OF PROOF AND UPON HIS RIGHT TO REMAIN SILENT?

III.

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AS TO THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS OR CRUEL?

IV.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE AGGRAVATING FACTOR OF "HEINOUS, ATROCIOUS AND CRUEL" APPLIED TO THE FACTS OF THIS CASE?

V.

WHETHER THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR OF "COLD, CALCULATING AND PREMEDITATED"?

VI.

WHETHER THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY?

SUMMARY OF THE ARGUMENT

Alleged error in striking two potential jurors for cause has not been preserved for review. Moreover, the trial judge did not abuse his discretion in excusing said jurors, as their responses indicated an inability to impartially apply the law.

Alleged error in the trial court's statements to the venire has not been preserved for review. Moreover, when considered in context, said statements were not fairly susceptible of being interpreted as comments on silence. Even if considered erroneous, any error was harmless beyond a reasonable doubt, in light of the subsequent instruction to the jury.

Alleged error in the jury instruction on the heinous, atrocious and cruel (HAC) aggravating factor has not been preserved for review. Moreover, the jury was properly instructed, in accordance with the standard instruction which has been upheld by this Court.

The trial court's finding of the HAC factor is in accordance with well established precedents from this Court. The instant case involves a brutal multiple stabbing, without any provocation from the victim, who was conscious, aware of the pain inflicted, and attempted to fend off the attack.

The trial court's finding of the cold, calculated, and premeditated aggravating factor is in accordance with this Court's well established precedents, where the defendant, upon calm reflection and with no evidence of any emotional or mental problems, carried out his prior threats to kill the victim.

The totality of the circumstances in the instant case is comparable to and consistent with other capital cases where the sentence of death has been upheld.

ARGUMENT

I.

THE LOWER COURT DID NOT ERR IN EXCUSING POTENTIAL JURORS FOR CAUSE.

The Appellant contends that the trial court reversibly erred in excusing two potential jurors for cause, as they were not "irrevocably opposed to capital punishment." Appellant's Brief at p. 26. This issue has not been preserved for review herein. Moreover, the trial court did not abuse its discretion in removing said potential jurors, in light of their equivocal and conflicting statements which demonstrated an inability to set aside personal beliefs in deference to the rule of law.

The contemporaneous objection rule applies to Witherspoon[3] claims in Florida. Wainwright v. Witt, 469 U.S. 412, 431, n. 11, 105 S.Ct. 844, 83 L.Ed. 2d 841 (1985), citing Brown v. State, 381 So. 2d 690, 693-94 (Fla. 1980); see also, Maxwell v. State, 443 So. 2d 967, 970 (Fla. 1983); Turner v. State, 19 Fla. L. Weekly S630, 631 (Fla. 1994). First, the objection must be made at the time of the State's challenge and prior to the potential juror being excused. Brown, supra, 381 So. 2d at 693. Second, the objection must be made with clarity. Nebulous statements, such as, "'For the record, I don't believe [potential juror] indicated she had a fixed opinion as to whether she could give [the penalty] or not'", do not constitute "an objection to the state's

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3 Witherspoon v. Illinois, 391 U.S. 510 (1968).

challenge or the court's granting it." Turner, supra, 19 Fla. L. Weekly at S631.

In the instant case, the State challenged potential juror Kozakowski on the grounds that he would have required a "much higher standard" of proof under the law. (ST. 122). The defense, much like that in Turner, merely stated, "I thought he had descended from that position." (ST. 122). The prosecution then added that the juror had stated he had already leaned towards life imprisonment, and that he would have to be totally and irrevocably convinced. (ST. 122). There was no response by the defense, and potential juror Kozakowski was thus excused by the court, without any further statements.[4] (ST. 122). In accordance with Turner, defense counsel's above quoted remark does not constitute an objection to the State's challenge or the trial court's grant thereof.

Moreover, the Appellee would note that the record, subsequent to Mr. Kozakowski being excused, reflects that defense counsel was primarily concerned that the challenges for cause were diminishing the number of black potential jurors that he wished to seat on the panel. (ST. 125, 272). At the conclusion of the exercise of all challenges, and immediately prior to the

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4 The only mention of Mr. Kozakowski subsequently, was when the court excused another juror for cause, stating that she needed total proof and "she agreed with number thirteen, which was Kozakowski and she's off." (ST. 125). Defense counsel agreed with the court's statement, and stated: "Doesn't appear to be much argument there." Id.

panel being sworn, defense counsel, having selected an additional black juror, affirmatively expressed his satisfaction with the jurors selected. (ST. 378-9). The defense did not renew any prior objections. The affirmative acceptance of the jury without any reservation, further reflects that the Appellant's claim has not been preserved for review. See, Joiner v. State, 618 So. 2d 174, 176, n. 2 (Fla. 1993) (Neil issue not preserved for review when, after objection to a peremptory challenge, defense affirmatively accepted the jury immediately prior to its being sworn, without reservation of the earlier objection. This Court noted, "[w]ere we to hold otherwise, Joiner could proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial.").

In any event, the Appellee further submits that the trial court did not abuse its discretion in excusing the two potential jurors complained of herein. To prevail upon such a claim of erroneous exclusion, "a defendant must show that the trial court, in excusing the prospective juror for cause, abused its discretion." Hannon v. State, 19 Fla. L. Weekly S447 (Fla. 1994).

"The inability to be impartial about the death penalty is a valid reason to remove a prospective juror for cause." Id. In light of the narrowed standards in capital sentencing schemes, "it does not make sense to require simply that a juror not

'automatically' vote against the death penalty; whether or not a venireman *might* vote for death under certain *personal* standards, the state still may properly challenge that venireman if he refuses to follow the statutory scheme. . . ." Wainwright v. Witt, 469 U.S. 412, 422, 105 S.Ct. 844, 83 L.Ed. 2d 841, 850 (1985). Furthermore, a prospective juror's views regarding capital punishment need not be made "unmistakably clear." Wainwright v. Witt, 469 U.S. at 424. "Despite a lack of clarity in the printed record, 'there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.'" Hannon, 19 Fla. L. Weekly at S447, quoting Wainwright v. Witt, 469 U.S. at 425-26. Thus, where a prospective juror's responses are equivocal, conflicting or vacillating with respect to the ability to be impartial about the death penalty, this Court has upheld the decision of the trial judge on whether such a juror was properly excludable. See, Randolph v. State, 562 So. 2d 331, 335-37 (Fla. 1990); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990); Taylor v. State, 19 Fla. L. Weekly S344 (Fla. 1994); Hannon, supra.

In the instant case, the first prospective juror complained of, Mr. Kozakowski, was asked by the prosecutor whether he was able to listen to the evidence and follow the law with respect to a recommendation of death penalty. He responded in the negative:

> **[PROSECUTOR]:** . . . If you find the defendant guilty of first degree murder, you and eleven other people on the jury, when we get to the second part, are you already going to have your mind made up? What do you think you're going to do? Are you going to be able to listen and follow the law? It's like another trial. You have to start with a clean slate. Do you think you will be able to do that?
>
> **MR. KOZAKOWSKI:** I'm afraid, in my own conscience, that I would go for the imprisonment rather than the death penalty.
>
> **[PROSECUTOR]:** If the judge tells you, well you can't. You have to clean it up and start from scratch. Could you do that or are you still going to be starting from one side or the other? You're still going to be starting, going towards imprisonment?
>
> **MR. KOZAKOWSKI:** I'm very skeptical of the death penalty. I'll always agree I didn't hear the evidence or it's right or this wasn't enough evidence that would linger in my mind.

(ST. 68-69) (emphasis added). Subsequent to the above expression of inability to follow the law, this juror then stated that in cases involving a "child or some defenseless person who's preyed upon," he would have no objections to the death penalty. (ST. 72-73). The State then inquired whether women fell into the above stated defenseless category. This juror first stated that he was, "more likely to vote for a woman," but then added that because of his own marital circumstances, "I'm not too fond for [sic] protecting woman either." (ST. 77). The defense did not question this prospective juror on his views on the death penalty.

The Appellant has argued that, although "Mr. Kozakowski leaned towards life imprisonment, he could and did particularize situations where he would have no objections to the death penalty." Appellant's Brief at p. 18. As noted previously, however, "whether or not a venireman might vote for death under certain personal standards, the state still may properly challenge that venireman if he refuses to follow the statutory scheme. . . ." Wainwright v. Witt, 469 U.S. at 422. Mr. Kozakowski's personal exception for a certain category of defenseless persons, along with his conflicting answer as to who qualified within said group, did not ameliorate his clear expression of inability to follow the law. That inability was made clear, when he stated that "I'll always agree I didn't hear the evidence . . . or this wasn't enough evidence. . .," due to his reservations about the death penalty. The trial judge thus did not abuse his discretion in excusing this prospective juror for cause. Wainwright v. Witt, supra; see also, Randolph, supra, 562 So. 2d at 337 ("The trial court had the opportunity to evaluate the demeanor of the prospective juror, and given juror Hampton's equivocal answers, we can not say that the record evinces juror Hampton's clear ability to set aside her own beliefs 'in deference to the rule of law.'" [citations omitted]).

The second prospective juror, Mr. Oshinsky, also clearly expressed his inability to follow the law. Initially, this

prospective juror stated that he could vote for the death penalty, "only with very great difficulty. I don't see that it serves any social purpose whatsoever." (ST. 321-22). Upon inquiry by the court as to whether he was able to listen to the evidence, Mr. Oshinsky responded, "I believe so, Your Honor." (ST. 322). However, upon subsequent questioning by the prosecutor and the court, this juror stated that he would vote for life imprisonment regardless of the evidence and the law, and could not think of any situation where the death penalty was appropriate:

> **[PROSECUTOR]:** If we get to that point [sentencing phase], you will have a choice. As the Judge explained to you, the choice will be to recommend death in the electric chair or life in prison.
>
> **MR. OSHINSKY:** The alternative is it would be a few years, it would really be a difficult choice. Basically, I don't believe in the death penalty.
>
> **[PROSECUTOR]:** If you were nailed with that choice, do you think that you are already predisposed to select on over the other?
>
> **MR. OSHINSKY:** The way I feel, I would select life in prison.
>
> **[PROSECUTOR]:** If the State proffered evidence and facts and if it supported the law to the point that the recommendation to the law is death in the electric chair, but you had that choice, your choice will be --
>
> **MR. OSHINSKY:** Probably life in prison.
>
> **THE COURT:** Can we present a case to you, can the State present to you a case that would get you to recommend death in the electric chair or is your choice always going to be life in prison?

MR. OSHINSKY: I don't know, but basically life in prison.

THE COURT: And you already lean that way?

MR. OSHINSKY: Yes.

(ST. 326-27) (emphasis added).

The prospective juror then added:

> **MR. OSHINSKY:** In response to the Judge's question, before I indicated that I thought, not withstanding my belief, that I could follow the law. Posing it the way you posed it and perhaps that enlightens what happens in the second phase, that gives me some pause and if it's strictly a recommendation that comes from my belief in the entire content, then I would have to tell you that my recommendation would have to be at best life in prison on a finding of guilty. And whether or not there is some circumstances that would push me beyond that, I can't imagine what that is, but I can't say that that couldn't presented.
>
> **[PROSECUTOR]:** So you're feeling already that if the defendant would be found guilt, you most likely vote life in prison; is that a fair summary?
>
> **MR. OSHINSKY:** It's a fair summary.

(ST. 332-33) (emphasis added).

Mr. Oshinsky did not subsequently recede from the above quoted statements. As with Mr. Kozakowski, there was no attempt at rehabilitating this prospective juror by the defense. It is thus abundantly clear that the trial judge did not abuse his discretion in excusing for cause this prospective juror, who clearly stated his inability to follow the law. Randolph, supra;

Trotter, supra; Taylor, supra; Hannon, supra. The Appellant's claim herein is thus not preserved for review, and lacks merit.

II.

THE LOWER COURT DID NOT COMMIT REVERSIBLE ERROR WHEN COMMENTING TO THE JURY DURING VOIR DIRE.

During the course of voir dire, the prosecutor was questioning the panel members regarding the concept of reasonable doubt. When one of the venire members referred to the "defense case," defense counsel objected, and asked the court to instruct the jury that the defense has no burden of proof. (ST. 247). The judge immediately proceeded to give the requested instruction:

> **THE COURT:** Folks, the only side, the only side of this case who has to go forward and prove anything is the State side. The defense does not have to prove anything. The burden of proof of coming forward with the evidence, of coming forward with the witnesses, coming forward with the exhibits, all that.
>
> The defense is not required to prove anything. They're not required to disprove anything and that burden of proof of coming forward with the evidence is beyond and to the exclusion of every reasonable doubt. So that would not be a requirement. I just want to make sure everybody understands for the defendant to prove that he had a twin,[5] in order

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5 During voir dire, one of the venire members raised the possibility of the defendant having a twin brother, in the context of the discussion of the concept of reasonable doubt. (ST. 247).

> for the state to prove the case, they have to bring to you all the evidence.
>
> It's possible that the defense does not utter a word through the whole trial. Although it wouldn't happen. It shouldn't happen. We need to try to get on, if we can but go ahead.

(ST. 247-48).

The Appellant now asserts that the last two sentences in the court's admonition to the jury constituted an impermissible comment on the defendant's right to remain silent. No such complaint was ever asserted in the trial court. Defense counsel did not object to the court's statement to the jury, move for a mistrial, or request any further clarifying instruction. As such, the issue now asserted on appeal has not been properly preserved for appellate review, and the claim is barred from review in this Court.

Improper comments on silence are subject to appellate review only when the defendant has objected and requested a mistrial. Clark v. State, 363 So. 2d 331, 334-35 (Fla. 1978); Stewart v. State, 620 So. 2d 177 (Fla. 1993). The fact that the comments at issue came from the judge rather than the prosecutor is of no consequence, as the same procedural requirements attach to comments by a judge. See, e.g., Ross v. State, 386 So. 2d 1191, 1195 (Fla. 1980); Jones v. State, 612 So. 2d 1370, 1373-74 (Fla. 1993); Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992).

As there was no objection to the instant comments, this issue is not preserved for appellate review.[6]

Moreover, when the judge's comments are placed in the context of his full statement to the jury, it is evident that the last paragraph could not reasonably be understood to constitute a comment on the defendant's silence.[7] Prior to the final two sentences in the court's admonition to the jury, the court had explicitly been telling the jury that the defendant did not have to prove anything or come forward with any witnesses; that the State had the burden of proving the case. Any effort to construe the final two sentences as a comment on silence, in view of the prior two paragraphs, would be entirely unreasonable, as it would make the final paragraph inconsistent with what the judge had just been telling the jury. When the judge spoke about the possibility that "the defense does not utter a word through the whole trial," adding that "it shouldn't happen," the judge was apparently referring to the remote and bizarre possibility that a defense attorney, not the defendant personally, would not present any arguments to the court, any cross-examination, or responses

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6 It is a further prerequisite to appellate review of allegedly improper comments that the aggrieved party request an instruction from the court that the jury disregard the improper comment. Duest v. State, 462 So. 2d 446, 448 (Fla. 1985); Ferguson v. State, 417 So. 2d 639 (Fla. 1982). That obviously was not done in the instant case, either.

7 The proper test for reviewing alleged comments on the defendant's failure to testify is whether the comments are fairly susceptible of being interpreted by the jury as comments on the failure to testify. State v. Kinchen, 490 So. 2d 21 (Fla. 1985); State v. Sheperd, 479 So. 2d 106, 107 (Fla. 1985).

to questions from the court. Comments which refer to the defense, in general, as opposed to the defendant personally, typically do not implicate the defendant's right to remain silent. See, Sheperd, supra; White v. State, 377 So. 2d 1149 (Fla. 1980).

Assuming, arguendo, that this issue was preserved and is deemed to constitute a comment on silence, any possible error in the judge's comment is harmless beyond a reasonable doubt. Comments on silence, like other improper comments, are subject to harmless error review. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); State v. Marshall, 476 So. 2d 150 (Fla. 1985). Not only was the thrust of the judge's prior comments that the defense did not have the burden of producing evidence or proving its case, but, thereafter, immediately prior to opening arguments, during preliminary instructions, the judge advised the jury as follows:

> Now, in every criminal case, as already mentioned to you, the defendant has the absolute right not to testify. It's his absolute right to remain silent. No juror should ever be concerned that a defendant has exercised his fundamental rights in accordance with the constitution and that should not enter into your deliberations.

(ST. 391). The judge also advised the jury that it would be instructed on the law at the end of the trial. (ST. 388). Consistent with that representation, the judge, at the conclusion of the case, prior to deliberations, did again instruct the jury about the defendant's right to remain silent:

> The constitution requires the State to prove its accusation against the defendant. It is not necessary for the defendant to disprove anything. Nor is the defendant required to prove his innocence. It is up to the State to prove the defendant's guilt by evidence. The defendant exercised a fundamental right by choosing not to be a witness in this case. You must not view this as an admission of guilt or be influenced in any way by his decision. No juror should ever be concerned that the defendant did not take the witness stand to give testimony in the case.

(ST. 839-40). The judge further advised the jury that it "must follow the law as it is set out in these instructions," (ST. 840), and that the jury should "disregard anything that I may have said or done that made you think that I preferred one verdict over another." (ST. 841). Thus, when the judge's allegedly improper comment is put in the context of his prior remarks and subsequent instructions to the jury, any impropriety must be deemed harmless, as it was undoubtedly cured by the remaining instructions. See, Greer v. Miller, 483 U.S. 756, 766 n. 8, 107 S.Ct. 3102, 97 L.Ed. 2d 618 (1987) (In the context of a curative instruction as to a prosecutorial comment on silence, the Court stated: "We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, . . . and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." The curative

instruction was deemed sufficient in the context of a comment on silence.).

III.

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY AS TO THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS OR CRUEL.

The Appellant contends that there was jury instruction error with respect to the Heinous, Atrocious or Cruel (HAC) aggravating factor, pursuant to Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). The Appellant, however, did not object to the jury instruction on any constitutional or vagueness grounds. This issue is thus not preserved for appellate review. Moreover, the claim is also without merit as the jury was properly instructed in accordance with the standard instruction, approved by this Court, on the HAC factor.

The record reflects that defense counsel herein, at the sentencing charge conference, argued that the HAC aggravator was not "applicable" to the facts of the instant case and requested the jury not be instructed at all on said factor:

> **THE COURT:** The crime was especially heinous, atrocious or cruel.
>
> **[PROSECUTOR]:** We will argue that.

> **[DEFENSE COUNSEL]:** I don't think that's applicable judge. There is absolutely nothing in the record to suggest there was anything heinous, atrocious or cruel within the meaning of those terms.

(T. 976). The parties continued to argue the facts of the case, testimony presented, and whether the HAC factor was applicable to the instant case. (T. 926-9). There was no mention of unconstitutionality or vagueness or any inadequacy in the language of the proposed jury instruction; nor was any different or additional instruction requested. Immediately after the above arguments, the trial court reserved ruling on the question of applicability, pending his review of case law. (T. 980). It then announced that, if it decided to instruct the jury, it would then utilize the "standard" instruction.[8] (T. 981). Again, there was no objection to the language or use of the standard instruction. (Id.) Indeed, after the conclusion of the above charge conference, defense counsel characterized the issue as: "whether the heinous, atrocious and cruel is applicable"... (T. 995). The trial court then ruled that, "indeed this is a factor to be considered by the jury in this case." (T. 1027). Defense counsel objected to this ruling, relying only upon his "previous comments." (T. 1027). Finally, at the conclusion of the final sentencing instructions to the jury, the court inquired: "Okay,

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8 The jury conference charge took place on February 3, 1993.

any corrections or additions as read?" The defense responded, "nothing". (T. 1070).

In light of the above, the Appellee respectfully submits that the record is clear that the only defense objection to the HAC aggravator was its applicability, whether it should be considered by the jury at all. Objections as to applicability of the HAC aggravator are not sufficient to preserve any claim of vagueness or unconstitutionality or inadequacy of the jury instructions thereon. See, Davis v. State, 620 So. 2d 152, n.2 (Fla. 1993), cert. denied, 114 S.Ct. 1205, 127 L.Ed.2d 552 (1994)(claim of constitutional inadequacy of the HAC jury instruction, pursuant to Espinosa, supra, was found to be barred, because, "There was no objection at trial made to the wording of the 'heinous, atrocious or cruel' instruction. The objection went only to the applicability of that factor to the case."); See also Gaskin v. State, 615 So. 2d 679 (Fla.), cert. denied, 114 S.Ct. 328, 126 L.Ed.2d 274 (1993); Ponticelli v. State, 618 So. 2d 154 (Fla.), cert. denied, 114 S.Ct. 352, 126 L.Ed.2d 316 (1993); Happ v. State, 618 So. 2d 205 (Fla.), cert. denied, 114 S.Ct. 328, 126 L.Ed.2d 274 (1993); Hodges v. State, 619 So. 2d 272 (Fla.), cert. denied, 114 S.Ct. 560, 126 L.Ed.2d 460 (1993); Kennedy v. Singletary, 602 So. 2d 1285 (Fla.), cert. denied, 113 S.Ct. 2, 120 L.Ed. 931 (1992); Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326, 338 (1992).

Moreover, the jury in the instant case was instructed, in accordance with the revised standard jury instructions, in effect in 1993, which require an additional act showing the crime was conscienceless or pitiless and unnecessarily torturous to the victim.[9] This court has consistently held that said jury instruction is constitutional. See Power v. State, 605 So. 2d 856, 864-5, n. 10 (Fla. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 863, 123 L.Ed.2d 483 (1993); Preston v. State, 607 So. 2d 404, 410 (Fla. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993); Hall v. State, 614 So.2d 473, 478 (Fla.), cert. denied, ___ U.S. ___, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993); Taylor v. State, 630 So.2d 1038, 1043 (Fla. 1993), cert. denied, ___ U.S. ___, 115 S.Ct. 107, 130 L.Ed.2d 54 (1994); Mordenti v. State, 630 So. 2d 1080, 1085 (Fla.), cert. denied, ___ U.S. ___, 114 S.Ct. 2726, 129 L.Ed.2d 849 (1994); Stein v. State, 632 So. 2d. 1361, 1367 (Fla.), cert. denied, ___ U.S. ___, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994); Hendrix v. State, 637 So. 2d 916, 921 (Fla.), cert. denied, ___ U.S. ___, 115 S.Ct. 916 (1994).

Finally, as will be seen in the argument section of point IV on appeal, infra, the facts herein are so indicative of the HAC factor, that there is no reasonable possibility that any

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9 The transcript of the proceedings herein erroneously reflects the use of "or" prior to the words "unnecessarily torturous to the victim", instead of "and". (T. 1066). The court reporter has, however, provided a Certificate of Correction, correcting said typographical error. The Appellee is supplementing the record with said certificate, and has provided a copy of same, attached hereto as Appendix A.

faulty instruction contributed to the sentence. Any error was thus harmless beyond a reasonable doubt. See Slawson v. State, 619 So. 2d 255, 260-261 (Fla. 1993)(inadequate instruction harmless where murder was heinous, atrocious, or cruel under any definition of those terms); Thompson v. State, 619 So. 2d 261, 267 (Fla. 1993)(same); Davis v. State, supra, (same).

IV.

THERE WAS NO ERROR IN THE TRIAL COURT'S FINDING OF "HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATOR.

The trial judge made the following findings of fact with respect to the applicability of the heinous, atrocious, or cruel factor (HAC)in the instant case:

> The evidence showed that the defendant broke into Kathy Williams Good's home, already armed with a knife, and attacked Kathy Williams Good as she lay sleeping in her bed. Kathy Williams Good was sleeping face down when the defendant stabbed her in the back. This initial blow awoke her and Kathy Williams Good began screaming for her mother.
>
> Even though the knife blade was less than 7" long, the back wound was about 7" deep. This violent stabbing was vivid testimony to the defendant's powerful downward physical force causing Kathy Williams Good great pain.
>
> The Medical Examiner testified that the stabbing blow to Kathy Williams Good's back punctured her lungs and she hemorrhaged. Blood began filling her lungs, displacing needed oxygen. Each breath Kathy Williams Good took became harder to get then [sic] the previous one.

> Now awake, Kathy Williams Good rolled over to see her attacker and began defending herself - using her own body. Defendant continued stabbing Kathy Williams Good in her abdomen, completely through her upper outstretched arm, and in her extended hand and between her fingers until his knife blade broke into pieces. There was not one immediate death blow, but numerous stabbings which ended Kathy Williams Good's life after many minutes of suffering. And Kathy Williams Good was painfully aware that she was dying as she repeatedly asked for paramedics in a voice becoming slower and softer until she gradually lost strength and lapsed into unconsciousness.

(R. 95). The above findings are amply supported by the record.

The Appellant, however, has argued that the HAC factor is inapplicable because, the killing "happened quickly and suddenly", with "no evidence of an intent to inflict a high degree of pain". Applicant's brief at PP. 34-35. The Appellant has relied upon the medical examiner's testimony that a person "could become unconscious within seconds" of a stabbing and, that "the point of consciousness would be very short". Appellant's brief at p. 34.

The first flaw in the Appellant's argument is that he has entirely ignored other portions of the medical examiner's testimony. The cause of death in the instant case was "multiple sharp edge wounds". (ST. 634). The victim sustained five stab wounds and two "cuts" (a "sharp sharp injury, but often doesn't go in very far."). (ST. 627). The initial v-shape wound, in the back, penetrated seven inches. (ST. 628). The next wound was to

the left lower abdominal area. (ST. 630). The remainder of the stab wounds and cuts were "defensive" and, inflicted upon the victim's left arm and right hand. (ST. 631-634). The stab to the arm "went right through the biceps muscle", and one of the wounds to the hand penetrated two inches in between the fingers. (Id). The stab wounds caused "punctured lungs, permitting blood to come out, bleeding out and also compression of the lungs itself", cutting "the oxygen to the brain". (ST. 634). A person receiving wounds similar to those of the victim would be expected to move around, think, and be conscious for some period of time. (ST. 635). The wounds themselves would cause pain. (ST. 637). The compression of the lungs would cause "trouble breathing as well. ...Therefore, it becomes a thing that you will be suffering". (ST. 637-8). None of the instant wounds would have caused the victim to immediately lose consciousness. (ST. 635). While a person "could" become unconscious within seconds, it is a "variable span." (Id.). A person could also live for "fifteen or twenty minutes of the actual stabbing". (ST. 643-4).

More significantly, in addition to the above testimony by the medical examiner, the Appellant has also ignored the eyewitness testimony and physical evidence in the instant case. The victim's mother testified that she first heard her daughter screaming, but did not pay much attention. (ST. 709). She then heard the victim screaming, "Mama, Mama, he hurting me. He hurting me." (ST. 710). The victim's own words attest to the

fact that she was awake, conscious, and in pain during the attack. Additional evidence of consciousness and pain was in the form and nature of the defensive wounds sustained by the victim after the initial seven (7) inch stab wound in her back. The victim was defending herself, and the defensive wounds herein reflect that the blade penetrated completely through her arm, and two inches in between the fingers of her hands. The victim did not lose consciousness immediately after the attack either. She was seen walking out of her bedroom after the defendant. She was saying, "I am cut", and while her family was calling for help, she was asking, "What's taking so long". (ST. 220, 722-3, T. 941).

The Appellant's contentions that the victim lost consciousness within seconds and that the killing took place "suddenly", while the victim was asleep, are thus refuted by the record. As to the lack of intent to cause pain, the severity and deep penetration of the wounds, as noted by the trial judge, are ample reflection of the defendant's intent. Moreover, again as noted by the trial judge, this defendant did not stop stabbing the victim until "his knife blade broke into pieces." (R. 95).

In light of the record and findings herein, the Appellant's reliance upon Kampoff v. State, 371 So. 2d 1099 (Fla. 1979); Lewis v. State, 377 So. 2d 640 (Fla. 1979); Maggard v. State, 399 So. 2d 973 (Fla. 1981), Santos v. State, 591 So. 2d 160 (Fla.

1991), and, Bonifay v. State, 626 So. 2d 1310 (Fla. 1993) is unwarranted. All of said cases involved instantaneous or near instantaneous deaths by gunfire. The Appellant's reliance upon Herzog v. State, 439 So. 2d 1372 (Fla. 1983) and Elam v. State, 19 Fla. L. Weekly S175 (Fla. 1994) is also misplaced. In Herzog, supra, at 1380, this Court specifically noted that the victim was under "heavy influence of methaqualone" prior to her death, and was at least "semi-conscious," if not completely unconscious, during the attack. Moreover, it was "unclear" what amount of injury had been inflicted by the defendant, as the victim had apparently inflicted prior self-injury. Id. Likewise in Elam, supra, at S. 176, this Court noted that the attack had taken place in "maybe even half a minute", and that the victim had immediately lost consciousness. As noted above, the record herein refutes any claim of immediate unconsciousness in the instant case.

The finding of the HAC aggravator in the instant case is in accordance with the well established precedent from this Court. See Morgan v. State, 415 So. 2d 6, 12 (Fla. 1982)("Death was caused by one or more of ten stab wounds inflicted upon the victim by Appellant"); Lusk v. State, 446 So. 2d 1038 (Fla. 1984)(victim received three stab wounds and bled to death); Duest v. State, 462 So. 2d 446, 449 (Fla. 1985)(victim was stabbed eleven times, and the "medical examiner's testimony revealed that the victim lived some few minutes before dying".); Floyd v.

State, 497 So. 2d 1211 (Fla. 1986)(victim sustained twelve stab wounds, including a defensive one to the hand, and died within two to four minutes of the attack); Hansbrough v. State, 509 So. 2d 1081 (Fla. 1982)(Several defensive stab wounds, indicating victim was aware of what was happening to her. "Moreover, testimony indicated that she did not die, or even necessarily lose consciousness instantly."); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990)(victim stabbed seven times and conscious); Davis v. State, supra, 620 So. 2d at 152)(multiple stab wounds, and although victim was intoxicated, he "was alive and conscious when each injury was inflicted"); Hannon v. State, 19 Fla. L. Weekly S447 (Fla. 1994)(victim brutally stabbed and screaming for help).

Assuming arguendo that the HAC factor is found to be invalid, based upon the strength of the remaining aggravators, two of which have not been contested, and the virtual absence of mitigation, it must be concluded that the trial court would have imposed the same sentence without finding this aggravator. Any erroneous finding of this factor is thus harmless beyond a reasonable doubt. See, e.g. Rogers v. State, 511 So. 2d 526, 535 (Fla. 1983)(no reasonable likelihood of a different sentence when three aggravators were stricken, but the remaining prior violence and during commission of a felony aggravators remained, outweighing mitigation evidence of good father and provider); Robinson v. State, 574 So. 2d 108, 112 (Fla. 1991).

V.

THE LOWER COURT DID NOT ERR IN FINDING THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED, WITHOUT ANY PRETENSE OF MORAL JUSTIFICATION.

In order to meet the standards of this aggravating factor, it must be shown that (1) "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage"; (2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident"; (3) "the defendant exhibited heightened premeditation"; and (4) "the defendant had no pretense of moral or legal justification." Jackson v. State, 19 Fla. L. Weekly S215, 217 (Fla. 1994). Those factors are established, as detailed by the findings of the lower court in the instant case:

> The evidence clearly showed that defendant's heightened premeditated intent to murder Kathy Williams Good was rooted in his own behavior three weeks prior to her fatal stabbing.
>
> On or about August 24, 1991, the defendant put a gun to Kathy Williams Good's face and told her that he was going to kill her.
>
> Two days later, defendant confronted Kathy Williams Good a second time at her friend's house. Kathy Williams Good tried to hide behind the locked front door, but to no avail. Defendant kicked in the door, punched her, twisted her arm behind her back, broke her wrist, kicked her, stomped on her, threw a television on her, and promised he would kill her.
>
> Within 48 hours, Kathy Williams Good obtained a Domestic Violence Court

> Restraining Order and Injunction against the defendant for his repeated violence.
>
> True to form, the defendant would not be deterred. Defendant had his third confrontation with Kathy Williams Good two weeks after her obtaining the Court Order and nearly five days before murdering her. Then and there, the defendant threatened that if he couldn't have her, no one could.
>
> The evidence further showed defendant's heightened level of premeditation by his own acts immediately before and during Kathy Williams Good's murder.
>
> First, defendant cut the back door screen to remove the door lock from inside the house, and then carefully tucked the screening back into place avoiding detection.
>
> Second, defendant came armed with his own knife. No household knives were missing and none matched his murder weapon.
>
> Third, defendant waited outside for hours until Kathy Williams Good arrived home at 5:30 in the morning.
>
> Fourth, defendant struck Kathy Williams Good in her weakest and most defenseless state - while she slept with her son and her niece beside her on the same bed.
>
> Fifth, defendant stabbed solely Kathy Williams Good even though two others were within his easy reach.

(R. 96).

The Appellant has argued that the cold, calculated and premeditated aggravator (CCP) is not applicable in the instant case. The Appellant contends that the defendant and the victim had a "personal relationship", the defendant was "tremendously upset" about the victim leaving him, and that there was no proof of prior threats to the victim. See Appellant's brief at p. 39.

Initially, the State respectfully contends that the trial judge's findings of prior threats to kill the victim by the defendant are amply supported by the record. Approximately three to four weeks prior to the murder, the defendant grabbed the victim, pointed a gun at her, and stated "If he can't have her, nobody else could have her". (ST. 588-592). Approximately three weeks prior to the murder, subsequent to his violence which led to the restraining order, the defendant, during a telephone conversation, stated: "Kathy, I'm going to kill you. Kathy, I'm going to kill your black ass." (ST. 575-6). Approximately five days prior to the murder, the defendant again announced, "if I can't have you, ain't nobody is going to have you." (ST. 594-5). The existence of such prior threats to kill provide a proper basis for applying the CCP aggravator. Turner v. State, 530 So. 2d 45, 50 (Fla. 1988); Arbelaez v. State, 626 So. 2d 169, 177 (Fla. 1993); Griffin v. State, 639 So. 2d 966 (Fla. 1994); Atwater v. State, 626 So. 2d 1325, 1329 (Fla. 1993); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990). The Appellant's reliance upon Douglas v. State, 575 So. 2d 165 (Fla. 1991) and Garron v. State, 528 So. 2d 353 (Fla. 1988), is unwarranted. These cases did not involve the prior threats to kill evidenced in the instant record. Moreover, said cases reflect spur-of-the-moment killings, during the course of an argument. The victim in the instant case was sleeping when she was first stabbed. It is thus clear the there was no argument at the time of the murder, and,

as such, there was no sense of immediacy between the stabbing and any events leading up to it.

Second the existence of a "personal relationship" between the defendant and the victim is not an automatic bar to finding the CCP aggravator. See, e.g., Klokoc v. State, 589 So. 2d 219 (Fla. 1991) (CCP upheld where defendant murdered daughter, when defendant was frustrated after unsuccessfully attempting to locate his estranged wife, and defendant shot daughter while she slept, to spite his estranged wife); Arbelaez, supra, at 177 (CCP factor valid where defendant's statements indicated that he planned to get revenge for girlfriend's involvement with another man by killing her son); Turner, supra, 530 So. 2d at 50 (CCP upheld where the defendant had threatened to kill the victims who were his estranged wife and her roommate; the defendant believed the victims had a lesbian relationship, and, upon "reflection," he broke into their house, shot his wife and stabbed her roommate; the assertion of "uncontrollable frenzy" was belied by defendant's actions in hiding as a policeman drove by and in resuming the attack thereafter).

The significant factor in "personal relationship" cases where the CCP factor is rejected, is evidence of a disturbed emotional state linked to a deteriorating familial situation. Thus, in Santos v. State, 591 So. 2d 160 (Fla. 1991), relied upon by the Appellant, where the defendant had threatened to kill the

victim, with whom he had previously lived, this aggravator was deemed negated because unrebutted expert testimony established that the defendant's highly emotional and ongoing domestic dispute with the victim and her family had "severely deranged him." The unrebutted expert testimony also established that the defendant "was under extreme emotional distress at the time of the murders, was involved in a denial phenomenon, had an impaired capacity to appreciate the criminality of his conduct, and had an impaired capacity to conform his conduct to the requirements of the law." 591 So. 2d at 163. Additional corroboration of the defendant's deranged mental state was evidenced by factual testimony that similar stress had sent the defendant into a "psychotic state" during the early stages of his trial.

By contrast, in the instant case, there was no evidence adduced as to any connection between a familial situation and the defendant's state of mind. Indeed at the charge conference herein, defense counsel conceded that there was "[n]othing to support" the defendant having acted under the influence of extreme mental or emotional disturbance, or having any impaired mental capacity. (T. 984). Mental mitigating factors were not established in this case, and neither those factors, nor any other form of mental mitigating evidence, existed for the purpose of negating the state of mind which inheres in the CCP factor, in the instant case.

Santos is enlightening from other perspectives as well. Santos involved the type of domestic situation which could plausibly trigger a highly emotional response from the murderer. The defendant had lived with the victim for many years and had a stormy relationship with her, as a result of meddling on the part of the victim's family. The defendant was the father of the victim's child, but the victim refused to give the child the defendant's last name. The defendant also believed that the victim was restricting his access to his child. 591 So. 2d at 161. Such problems are of the sort which can conceivably trigger highly emotional reactions. By contrast, in the instant case, the defendant's relationship with the victim was extremely brief, and there was no child, or other familial, ties to prevent a complete severance of the relationship between the parties. The instant case simply entailed a short-term relationship which ended due to the defendant's violence. Thus, while Santos had stalked the victim for the two days prior to the murder, such conduct is explained, in part, by the intense and complex nature of the parties' relationship and the existence of the child whom the defendant/father could not see. Santos, in short, presents an extreme case, by virtue of both the nature of the expert testimony and the complex, long-term relationship between the parties. Neither of those factors suffices to explain the instant killing.

Finally, just as the defendant's calm actions belied the notion of an uncontrollable frenzy in Turner, supra, so too, in the instant case, the defendant's actions belie the idea that this killing was one which was perpetrated during an uncontrollable frenzy. The defendant did not break down any doors or windows to gain entry. Rather, he acted in an extremely rational and planned manner. He cut the back door screen to remove the door lock from inside the house, and then tucked the screening back into place to avoid detection. A killer who is blinded by emotion would not have acted in such a manner. Similarly, it is significant that the defendant came prepared with the murder weapon and a towel for removal of the blood.

As noted by the lower court, it is also significant that the defendant did not harm the two persons who were sleeping in the same bed with the victim. A person who was blinded by an emotional frenzy would not have been likely to make the calm and rational distinction which saved the others from his actions. Likewise, the fact that the defendant waited until the victim was asleep is also significant. The murderer who is blinded by an emotional frenzy would likely have been motivated to act immediately upon seeing the victim return home. However, this defendant had the calm, rational ability to wait for the moment when he would meet the least resistance. This act of self-restraint also belies the argument that the defendant acted in an emotional frenzy.

Thus, while cases involving "personal relationships" have reached different results regarding the propriety of the CCP aggravator, those cases are not explained by an absolute bar against the finding of this factor. Rather, the cases are explained by their own, individual, unique confluence of circumstances; circumstances which in any given case can either negate or validate the factor. Here, the factor is valid, due to the prior threats, the lack of any immediately preceding argument, the lack of any evidence of emotional disturbance or any other mitigating mental state due to a deteriorating familial situation, the lack of a complex, long-term relationship which could trigger an emotional frenzy, and the existence of calm, rational acts, belying such a frenzy, at the time of the murder.

Finally, assuming arguendo, that this Court deems this factor to be invalid, the Appellee submits that any error in finding this aggravator is harmless beyond a reasonable doubt. In light of the strength of the remaining aggravators, two of which have not been contested here, and the lack of any significant mitigation, the removal of this factor can not be said to have affected the sentence imposed by the trial judge. Rogers, supra; Robinson, supra; and p. 45 herein.

VI.

THE LOWER COURT DID NOT ERR IN IMPOSING THE SENTENCE OF DEATH, AS IT IS NOT DISPROPORTIONATE TO OTHER DEATH SENTENCES WHICH HAVE BEEN UPHELD BY THIS COURT.

"Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." Palmes v. Wainwright, 460 So. 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1024, 112 L.Ed. 2d 1106 (1991). "Absent demonstrable legal error, this Court accepts those aggravating factors and mitigating circumstances found by the trial court as the basis for proportionality review." State v. Henry, 456 So. 2d 466, 469 (Fla. 1984).

The applicable aggravating factors herein are: (1) the defendant was previously convicted of other felonies involving the use or threat of violence to the person - i.e., two armed robberies and one aggravated battery; (2) the murder was committed during the course of a burglary; (3) the murder was especially heinous, atrocious or cruel; (4) the murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. No statutory mitigating factors were found by the lower court. The lower court considered nonstatutory mitigating evidence adduced by the

defendant - i.e., testimony from two sisters that the defendant was a loving father, from a close family, and a nonviolent person. The court's order, however, reflects that such evidence was contradictory and given minimal weight. Thus, this case comes to this Court in the posture of a case with extensive, compelling aggravating circumstances, and de minimis, if any, mitigation.

This Court, on many occasions, has found that the imposition of a death sentence was proportionate in cases comparable to the instant case; cases in which the murder involves a personal relationship between the murderer and the victim; cases which defendants tried to characterize as domestic dispute cases. See, e.g., Henry v. State, 19 Fla. L. Weekly S653 (Fla. Dec. 15, 1994); Lindsey v. State, 636 So. 2d 1327 (Fla. 1994); Duncan v. State, 619 So. 2d 279 (Fla. 1993); Porter v. State, 564 So. 2d 1060 (Fla. 1990); Byrd v. State, 481 So. 2d 468 (Fla. 1986); Lemon v. State, 456 So. 2d 885 (Fla. 1984); King v. State, 436 So. 2d 50 (Fla. 1983); Harvard v. State, 414 So. 2d 1032 (Fla. 1982). These cases, in which the death sentence was affirmed, all reflect that the death sentence herein is proper.

Henry v. State, supra, in which the defendant repeatedly stabbed his wife, presents the most recent example of a "domestic dispute" case in which the death sentence was deemed appropriate. Two aggravating factors existed: a prior violent felony and HAC.

No mitigating factors existed. Under such circumstances, this Court expressly rejected the defendant's argument that the death penalty was inappropriate because the killing resulted from a domestic dispute:

> Henry also argues that because the killing resulted from a domestic dispute, the death penalty is inappropriate. However, under the circumstances of this case, and in comparison with other death cases, we find Henry's death sentence to be proportionate. See, e.g., Lemon v. State, 456 So. 2d 885 (Fla. 1984) (defendant killed ex-girlfriend after previous conviction for similar offense), cert. denied, 469 U.S. 1230, 105 S.Ct. 1223, 84 L.Ed. 2d 370 (1985); King v. State, 436 So. 2d 1230 (defendant killed wife who was seeking divorce, with the Court finding two aggravating and no mitigating factors), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L. Ed. 2d 163 (1984); Harvard v. State, 414 So. 2d 1032 (Fla. 1982) (defendant killed former wife and Court found two aggravating and no mitigating factors), cert. denied, 459 U.S. 1128, 103 S.Ct. 764, 74 L.Ed. 2d 979 (1983).

Henry, at 19 Fla. L. Weekly S655.[10, 11]

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10 Such reasoning has not been limited to cases in which the defendant's prior violent felony was for another murder. See, e.g., Harvard, supra (prior violent felony was for an unrelated aggravated assault); Lemon, supra (prior violent felony was for assault with intent to commit murder for stabbing female victim).

11 Of further significance is this Court's recent decision in Spencer v. State, 19 Fla. L. Weekly S461 (Fla. Sept. 22, 1994). Spencer involved the murder of the defendant's wife after disputes over money and the family business. The defendant had had a history, over a several week period, of stalking and attacking his wife, in the few weeks leading up to the murder. On appeal, this Court found that one of the three aggravating factors had been improperly found, leaving two aggravators: HAC and prior violent felony. Furthermore, the trial court had erred in not finding and weighing some mitigating circumstances. Under

Likewise, in Duncan, supra, the defendant had been living with the woman he murdered, and he stabbed her immediately after her mother had indicated that the defendant should leave their residence. The sole aggravating factor was that the defendant had other convictions for violent felonies: the contemporaneous aggravated assault on the victim's daughter; and a prior murder. The lower court was deemed to have improperly found the existence of several mental mitigating factors. In the absence of such mental mitigation connecting the killing to a domestic dispute, this Court found that the death sentence was appropriate. By contrast, the aggravating factors in the instant case were more extensive and more substantial; and the mitigation was less in the instant case, as numerous nonstatutory factors were considered in Duncan.

In view of the foregoing cases, the death sentence herein must be deemed proper. See also, Harvard, supra; Lemon, supra; King, supra; Lindsay, supra; Byrd, supra. While other cases, such as those relied upon by the Appellant, have resulted in reversals of death sentences in personal relationship situations, see, e.g., Farinas v. State, 569 So. 2d 425 (Fla. 1990); Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Ross v. State, 474 So. 2d

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such facts, this Court did not bar the imposition of the death sentence on the grounds that Spencer was a domestic dispute case. Rather, this Court remanded the case to the trial court, for resentencing, thereby implicitly implying that the death sentence could be appropriate in the context of that domestic dispute.

1170 (Fla. 1985); Blakely v. State, 561 So. 2d 560 (Fla. 1990); Santos v. State, 629 So. 2d 838 (Fla. 1994), such rulings have not hinged on the mere fact that "domestic disputes" were involved. The different results in cases involving domestic disputes focus on several areas: (1) the existence of compelling aggravating circumstances, especially other violent offenses, when the death sentence is upheld; (2) the lack of mitigating factors, or minimal mitigating factors, when the death sentence is upheld; (3) the existence of strong mental mitigating factors, connecting the murder to the dispute, when the death sentence has been deemed inappropriate; and (4) the contemporaneous existence of an argument at the time that the murder was committed, where the death sentence was overturned.[12]

The cases upon which the Appellant relies all have distinguishing features: either minimal aggravating circumstances or extensive mitigation. Several of those cases involve the further factor that the killing occurred during an instantaneous outburst. None present anything resembling the combination which exists in the instant case. For example, in Wilson, supra, this Court focused on the fact that the murder "was most likely [committed] upon reflection of a short duration." 493 So. 2d at 1023. The murder was triggered by an instantaneous outburst. By

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12 This Court, in its opinion in Lemon v. State, 456 So. 2d 885, 888 (Fla. 1984), analyzes several prior domestic dispute cases and points out that in those in which the death sentence was deemed inappropriate, aggravating circumstances were minimal and substantial mitigation existed as well.

contrast, the aggravating factors in the instant case are considerably more compelling, and the instantaneous outburst nature of Wilson does not exist, as the evidence clearly reflects that the Appellant came to the victim's residence, with the murder weapon in his possession, for the express purpose of executing her. Furthermore, the Appellant started stabbing the victim while she was asleep, thus compelling the conclusion that there was no domestic argument contemporaneous with the killing. In a similar vein, the Appellant's prior contact with the victim had been five days earlier, allowing for ample time and reflection, with the opportunity to "cool off" from the prior incident.

Ross, supra, involved just one aggravating factor, HAC, and the failure of the trial court to consider extensive evidence of impairment of mental capacity. Ross also involved an apparent immediacy between the domestic dispute and the murder, as well as a lack of any significant prior violent criminal history on the part of the defendant. 470 So. 2d at 1174. Similarly, in Blakely, supra, two aggravating factors existed, HAC and CCP, while one statutory mitigator existed, the absence of a significant prior criminal history. Blakely also suggested that there was an immediate connection between the domestic dispute and the shooting. One of the factors noted by Blakely was that prior cases in which death sentences had been upheld in the context of domestic disputes had involved prior violent felonies.

561 So. 2d at 561. As noted previously, not all such cases involved prior murders, some involved aggravated assaults. See, e.g., Lemon, supra; Harvard, supra; Williams v. State, 437 So. 2d 133, 137 (Fla. 1983). In the instant case, the defendant had three prior violent felonies: two armed robberies and one aggravated battery.

The other principal case on which the Appellant relies, Farinas, supra, also presents several distinctions. First, only two aggravating factors existed: HAC and during the course of a felony. Second, Farinas obviously lacks the existence of the prior violent felonies. Third, this Court, on appeal, ruled that the trial court should have found that the evidence established that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. The mental mitigating evidence, which was conclusively established, served to explain the commission of the murder. No such mitigation exists in the instant case.[13] Lastly, in Farinas, the separation

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[13] The Appellant also relies on Garron v. State, 528 So. 2d 353 (Fla. 1988). While this Court reversed the conviction itself, and found numerous errors in the penalty phase, this Court also questioned whether the death sentence was appropriate due to the emotional domestic dispute. That, however, came in the context of a case in which all four aggravating factors were deemed to be invalid. The shooting was also deemed a "spontaneous reaction" - a situation which obviously could not exist in the context of the cold-blooded murder of a sleeping victim, with whom there was no immediately preceding argument of any nature. Furthermore, Garron does not refer to the emotional arousal during a domestic dispute as a bar to the death sentence; it refers to it as a factor which "significantly mitigates" the defendant's actions.

of the parties was of great significance because they had a child together.

The State would also question the Appellant's characterization of the instant case as a "domestic dispute" murder. The defendant and victim herein dated and resided together for a "couple of months." The victim ended the relationship due to the defendant's violence. The evidence herein clearly reflects that there were no "disputes" between the parties; the confrontations were one-sided accusations, threats and attacks by the defendant alone. The victim herein followed the only legal remedy available to her and obtained a restraining order. She was merely seeking to avoid any contact with the defendant. The defendant promised to kill her, because, "if he can't have her, nobody else could have her." He then carried out his promise while the victim was sleeping, with no immediately prior argument, dispute or confrontation. Most of the cases involving domestic disputes reflect that there was a two-sided argument in progress. Blakely v. State, supra. Such a situation clearly does not exist when the murderer kills a victim who is sleeping and with whom there had been no contact of any sort for the preceding five days, especially in the context of a short duration relationship with no apparent complexities. The victim herein was not arguing with the defendant; she was not disputing anything with him.

In conclusion, the instant case presents compelling aggravating circumstances, including prior violent felonies, and no mitigating circumstances. Under such conditions, regardless of whether this case is viewed as a "domestic dispute" murder, the death sentence is appropriate.

CONCLUSION

Based on the foregoing, the Appellee respectfully submits that the convictions and sentence of death should be affirmed.

Respectfully submitted,

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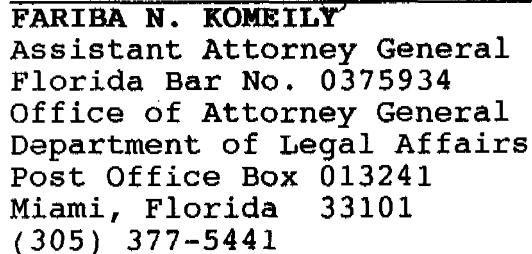

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by mail to **JOHN H. LIPINSKI,** 1455 Northwest 14th Street, Miami, Florida 33125, on this 24 day of February, 1995.

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