IN THE SUPREME COURT OF FLORIDA

JOHNNY HOSKINS,
n/k/a/ JAMIL ALE,

APPELLANT,

CASE NO. 84,737

v.

STATE OF FLORIDA,

APPELLEE.
_____/

APPEAL FROM THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL CIRCUIT IN
AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
FLA. BAR # 0998818
444 SEABREEZE BLVD.5TH FLOOR
DAYTONA BEACH, FL. 32118
(904) 238-4990

ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

m

TABLE OF AUTHORITIES

STATUTES

STATEMENT OF THE CASE

This appeal is from Hoskins' conviction for first degree murder, and the sentence of death imposed for that crime.

Hoskins was indicted on November 10, 1992, by the Brevard County, Florida, grand jury for First Degree Murder, Burglary, Sexual Battery, Kidnapping, and Robbery. (R 2061) Hoskins, who had previously been arrested in Crisp County, Georgia, waived extradition to Florida and entered a plea of not guilty to the five-count indictment. (R **2069-70; 2091**) Jury selection began on March 13, 1994, and, at that time, Hoskins filed a "Motion with Reference to Jury Procedure." (R **2315-17**) The trial court denied that motion (TR 367-71), and the guilt phase proceedings concluded on March 21, 1994, when the jury convicted Hoskins as charged on all counts. (R 2389-93) Penalty phase proceedings were then conducted, but, before imposing sentence, the trial court granted Hoskins' motion for a new penalty phase. (R **2485**)

The second penalty phase began on October 3, 1994. (TR **522**) On October 6, 1994, the jury returned its advisory sentence recommendation of death. (R 2553) That death recommendation was unanimous. (Id.) On November 4, 1994, the trial court sentenced Hoskins to death. (R 609) In the sentencing order, the court

found two aggravating circumstances: that the murder occurred during the course of a sexual battery or kidnapping, and that the murder was especially heinous, atrocious or cruel. (Id.) The defense did not request, and the court did not find, any statutory mitigating circumstances, but did find various items of non-statutory mitigation.

Hoskins gave notice of appeal on November 10, 1994 (R 2609-10), and, on November 18, 1994, the State gave notice of cross-appeal as to the trial court's refusal to find, as additional aggravation, that the cold, calculated and premeditated aggravator applied. (R 2622-23) The record was certified as complete on March 14, 1995. The final supplemental record was certified as complete on November 3, 1995.

STATEMENT OF THE FACTS

The State does not accept the incomplete statement of the facts contained in Hoskins' brief.

The Guilt Phase Evidence

The victim, Dorothy Berger, disappeared from her Melbourne, Florida, home sometime after 6:45 p.m., Saturday, October 17, 1992. (*TR* 840) The timing of Ms. Berger's disappearance is known with some degree of certainty because Pansy Young, a friend of Ms. Berger's, always spoke with her by telephone at 6:20 p.m. (*TR 839*) Ms. Young finished her last conversation with Ms. Berger at 6:45 p.m. on the day that she disappeared. (*TR 840-41*).

At approximately 10:00 p.m. that same night, officers of the Melbourne Police Department were dispatched to Ms. Berger's home in response to a report of an open door at that house. ***(TR 815-16).*** The first officer to arrive observed several things that appeared to be out of the ordinary, such as blood and a broken pair of glasses on the bed. (*TR 818;821*).[1] Crime scene technician Scott Dwyer, also of the Melbourne Police Department, processed the crime scene at Ms. Berger's residence on October 18, 1992, and, during

---

[1]Ms. Berger's television and air conditioner were operating, and the bed, which was unmade, appeared to have been moved away from the wall. (*TR 821*). A shoeprint was visible in the dust on the floor. (*TR* 832-34).

his trial testimony, identified numerous photographs taken at the scene, including photographs of the shoeprints found in the residence. *(TR 1149-50; 1163-64)*. Two statues located in the bedroom of Ms. Berger's house were knocked over *(TR 1153)*, and the victim's purse was located lying on a desk chair *(TR 1158)*. Officer Dwyer also collected some clothesline-type cord from the residence of Thrisha Thomas, Hoskins' girlfriend. *(TR 1186-87; 796)*.[2]

Hoskins was last seen in Melbourne at about "first dark" on October 17, 1992. *(TR 805;808-09)* Hoskins was driving the victim's car at that time. *(TR 810)* At about 5:00 a.m. on October 18, 1992, Hoskins arrived at his parents' home in Arabi, Georgia. *(TR* 864-65) Hoskins was driving the victim's automobile. *(TR 866)* Hoskins borrowed a shovel from his father, left in the automobile, and returned about 20 minutes later. *(TR 866)*

On October 19, 1992, Hoskins was stopped in Cordele, Georgia, by Crisp County [Georgia] Sheriff's Deputies for a traffic violation. *(TR 880)* Hoskins was driving Ms. Berger's car at that time. *(TR 881)* The deputies looked in the car in an attempt to determine its owner, and, ultimately, the car was inventoried. *(TR*

---

[2]Thomas and Hoskins lived next door to the victim. *(TR* 796-7) Hoskins was last seen at his residence on the day Ms. Berger disappeared. *(TR 805)*.

882; 896) At that time, dirt and dried leaves were located in the trunk of the car.(*TR 898*)[3]

Billy Hancock, Chief Deputy of the Crisp County Sheriff's Office, recognized the vegetation found in the trunk of the car as a type common to farms in the southern part of Crisp County. (*TR* 909) Chief Hancock spoke to Hoskins' father, who directed law enforcement officers to a field having that sort of vegetation. (TR 909) The grave where Ms. Berger had been buried was found in that field. (TR *914*)[4]

Dr. Kris Sperry, the Medical Examiner in Atlanta, Georgia, performed a postmortem examination on Ms. Berger's body on October 22, **1992.** ***(TR 943; 947)*** Ms. Berger's hands were tied behind her back, and a gag **was** tied around her face. ***(TR 948)*** Dr. Sperry testified that he observed multiple blunt force trauma injuries on Ms. Berger's face, head, and neck. ***(TR*** *956*) All of the blows that were delivered to Ms. Berger's head, even aggregated, were not enough to cause her death, though one of the blows probably caused her to lose consciousness for some period of time. ***(TR 972; 983)***

---

[3]Blood was also found, located on the jack stand, (*TR* 1244)

[4]The vegetation found in the trunk of the car was the same type that was found at the grave site. *(TR 903)*

All of the head wounds were inflicted by the same sort of instrument, and the other injuries were caused by Ms. Berger being either punched or kicked. (TR 976;978) Ms. Berger was alive when all of the head injuries were inflicted. (TR 982)

Dr. Sperry also found that the gag that was applied to Ms. Berger caused bruising to the left side of her jaw. (TR 985) Ms. Berger died as a result of manual strangulation which was of sufficient force to fracture her larynx. (TR 990-91) All of the head wounds preceded the strangulation (TR 993), and the multiple rib fractures that were also found probably occurred during the strangulation based upon the slight amount of bleeding that was associated with the rib fractures. (TR 994-95)

Dr. Sperry also observed numerous injuries to Ms. Berger's arms and hands, including defensive wounds on her hands, grab injuries on her arms, and various injuries which were consistent with Ms. Berger having been transported in the trunk of an automobile. (TR 997; 1000; 1006; 1008; 1025) The cord with which Ms. Berger's wrists were tied was applied so tightly that the circulation to her hands was cut off. (TR 1007) Ms. Berger sustained vaginal lacerations as a result of forcible sexual assault (TR 1026; 1028), and was alive when that assault took place (TR 1042). Dr. Sperry also observed multiple injuries to Ms.

Berger's legs, and was able to determine that she was alive at the time she was raped and beaten. (*TR* 1043; *1046*)[5]

Scientific analysis of the various items of physical evidence determined that the cord taken from around Ms. Berger's wrists was no different from the cord recovered from Hoskins' Melbourne residence. (*TR 1262-65*) The shoes Hoskins was wearing at the time of his arrest could not be eliminated as the shoes that left the footprints found at the scene. (*TR 1283-1295*) The blood found on the bedspread and in the trunk of the car came from Ms. Berger. (*TR 1342;1345*) DNA analysis of the blood and body fluid evidence established that the blood on the bedspread and towel found at the Melbourne residence, as well as the blood in the trunk of the car, came from the victim. (*TR 1443*) The semen found at the residence and as a result of the sexual assault examination performed on the victim came from Hoskins. (*TR 1444*)

The Penalty Phase Evidence

The penalty phase proceeding that is the subject of this appeal is the second penalty proceeding in this case. The first penalty phase was set aside by the trial court on Hoskins' motion.

---

[5]The bloodstains found on the bedspread in Ms. Berger's home were consistent with bleeding resulting from the vaginal lacerations. (*TR* 1033)

(R 2485)

Robert Sarver was the lead detective assigned to this case. (TR 1216) He was present in the victim's residence when Luminal testing was conducted, and testified that that testing located a small amount of blood on the bed sheet, but that no blood was found anywhere else in the house. (TR 1217-19) No blood was found between the house and the place where Ms. Berger parked her car, but a large pool of blood was present in the trunk of her car. (TR 1220-21) No evidence was found to suggest that Ms. Berger's body had been dragged from her home. (TR 1225)

Dr. Kris Sperry testified that, based upon the observed bruising, he was able to determine that the victim was alive when she was gagged, and that the gag would have caused severe pain. (TR 1270; 1275)[6] Likewise, the lacerations to Ms. Berger's cheeks would have caused moderate to severe pain because the cheekbone was broken. (TR 1276) The various head injuries would have caused profuse bleeding, but would not have caused death. (TR 1278-84) Dr. Sperry testified that the victim was alive when she was raped, and that the cause of her death was manual strangulation. (TR

[6]This is the same medical examiner who testified at the guilt phase. Because the penalty phase was conducted before a different jury, Dr. Sperry testified for a second time.

1300; 1304) Ms. Berger's larynx was fractured as a result of strangulation, and it took three or four minutes for her to die. *(TR 1303; 1306)* A strangulation victim's larynx is not usually crushed, and the fact that that occurred in this case caused Ms. Berger's death to be unusually painful and frightening. *(TR 1308)* Ms. Berger sustained many defensive injuries all over her body *(TR 1288-89)*, and the medical examiner was able to determine that a significant struggle took place *(TR* 1309). Ms. Berger sustained at least 13 separate blows to her head and face and it would have taken at least 15 to 20 minutes to inflict all of the injuries that Ms. Berger received. *(TR 1310)*

At the penalty phase of his trial, Hoskins presented the testimony of his mother and four brothers. That testimony essentially described the life of a poor farm family in rural Georgia. See, e.g., *TR 1395; 1415; 1447; 1450; 1453.* However, that testimony also established that Hoskins' father was a hard worker who made every effort to provide for his family. *(TR 1405)* Hoskins' parents encouraged the children to get an education *(TR 1408)*, and apparently none of Hoskins' brothers have a criminal record. See, e.g., *1405; 1435; 1443; 1455.* All of Hoskins' brothers are employed, and one brother specifically stated that he was never close to the defendant as far as his criminal activities

are concerned. ***(TR 1406; 1456; 1442)***

Hoskins also presented the testimony of Dr. Harry Krop from the first penalty phase proceeding. *(TR* ***1538)*** Dr. Krop testified that Hoskins is not mentally retarded ***(TR*** *1556)*, and that his findings of neurological impairment were "marginal". ***(TR 1547)*** Dr. Krop also testified that he cannot say what effect any brain damage Hoskins may have has on his behavior. ***(TR*** 1565) Dr. Krop was not willing to say that Hoskins is impulsive in his behavior, but was able to conclude that any brain damage Hoskins may have did not affect his ability to plan the commission of this crime. ***(TR*** *1567-*68) The facts of this crime, in the opinion of Dr. Krop, reflect the behavior of a criminal who does not want to be caught. *(TR* 1575) Hoskins' behavior in committing this crime is in no **way** related to the frontal lobe brain damage that may be present. *(TR* ***1576)***

In rebuttal, the State presented the testimony of Karen Palladino, Ph.D., who is employed by the Brevard County School Board in the "Exceptional Student" section. (TR 1593) Based upon her review of records pertaining to the defendant, Dr. Palladino testified that the fluctuation in sub-test scores observed in intelligence tests administered to Hoskins while he was in school was the result of cultural deprivation rather than mental

retardation. (TR 1600-01) Hoskins is not mentally retarded, but is, instead, learning deficient. (TR 1602-05) Nothing in Hoskins' school records indicates that he was ever a discipline problem, and, in fact, those records contain only one reference to anything that even arguably indicates impulsivity on Hoskins' part. (TR 1606-07) Dr. Palladino testified that it is not possible to achieve a score on an intelligence test that inflates the individual's true level of functioning. (TR 1613)

The State also called one of the Brevard County Jail nurses to testify about her interaction with Hoskins. She testified that, based upon her observations, Hoskins was well-able to express himself orally and in writing, and that she saw nothing to suggest that he had any difficulty with instructions given him. (TR 1624; 1633)

The penalty phase jury recommended a sentence of death by a unanimous vote, and the trial court followed that recommendation. (R 2553; 2588-92) The court found two aggravating circumstances (during the course of a sexual battery or kidnapping and heinous, atrocious or cruel) and weak non-statutory mitigation. (R 2588-92) [7]

---

[7] Hoskins conceded the existence of the murder during an enumerated felony aggravator. (TR 1198)

SUMMARY OF ARGUMENT

Hoskins' claim that there was error in the selection of the trial jury because of the manner in which excusals from jury service were handled is barred from review because that issue was not timely raised in the trial court. Moreover, this claim is meritless because the procedure for excusal of persons from jury service was in accord with the statutory provisions governing excusal and disqualification from jury service and, moreover, was in accord with the authority granted to the presiding circuit judge of each judicial circuit. Finally, even if there was error, that error is not of constitutional magnitude and was harmless beyond a reasonable doubt.

Hoskins' motion for extraordinary psychiatric testing was properly denied because Hoskins presented no competent evidence to support his claim that further medical tests were required in order to evaluate his mental condition. The only evidence presented by Hoskins in support of his claim for extraordinary evaluation was the testimony of a neuro-psychologist, who, by his own admission, cannot order that a medical test, which is what Hoskins wanted, be performed. To the extent that Hoskins attempts to raise a due process claim, that claim fails because his status as an indigent did not factor into the trial court's ruling.

process claim, that claim fails because his status as an indigent did not factor into the trial court's ruling.

Hoskins' claim that the sentencing order does not comply with Florida law is meritless. The trial court applied the proper standard in weighing the aggravation and mitigation in this case, and the written sentencing order is more than adequate to allow proper appellate consideration of the sentence. To the extent that Hoskins argues that various matters of "non-statutory mitigation" were not given enough weight by the sentneicng court, that claim is meritless because the sentencing order itself establishes that the trial court weighed the mitigation properly. To the extent that Hoskins claims that the heinous, atrocious, or cruel aggravating circumstance should not have been found, that claim fails on the facts because the evidence establishes, beyond any reasonable doubt, that this murder was especially heinous, atrocious, or cruel. None of the cases relied upon by Hoskins stand for any contrary proposition.

Hoskins' boilerplate claim that the Florida death penalty act is unconstitutional contains 16 claims and sub-claims arguing various "deficiencies" in the Florida sentencing scheme. Each of those claims and sub-claims is either foreclosed by binding precedent, procedurally barred, or both.

The state has cross-appealed the trial court's finding that the cold, calculated, and premeditated aggravating circumstance was not applicable to this case. Under the settled definition of that aggravating circumstance, it is clear, beyond a reasonable doubt, that the heightened premeditation required to establish the cold, calculated, and premeditated aggravating circumstance exists in this case. The trial court should have found this aggravating circumstance, in addition to the two aggravators that it did find applicable.

ARGUMENT

THERE WAS NO CONSTITUTIONAL ERROR IN SELECTION OF THE TRIAL JURY

On pp. 17-18 of his brief, Hoskins argues that the statutory provisions governing excusal from jury service were violated. Hoskins also argues that the trial court erred in refusing to allow him to proffer "evidence" on this "claim." This claim is not a basis for relief for three independently adequate reasons.

A. Hoskins' Claim is not Preserved for Review

The first reason that this claim is not a basis for relief is because the issue **was** not timely raised below. The record reflects, and there is no dispute, that Hoskins' "motion with reference to jury procedure" was filed on March 14, 1994. *(TR*

2315-16). There is also no dispute that jury selection in this case began on that day. *(TR.* 1; *121).*[8]

Hoskins' motion was untimely because the very thing he purportedly attempted to prevent by the filing of his motion took place before he voiced any complaint. Under the administrative order setting out the procedure for granting excusals from jury service, the excusals at issue took place prior to March 14, 1994, because those excusals were handled prior to the time that the venire reported on the first day of jury service. *(R 2317).* Even under a charitable view of the facts (if such a view can be invented), Hoskins allowed the events about which he complains to occur, and only then voiced an objection. That objection came too late to preserve anything for appellate review, and Hoskins should not benefit from such sharp practice. This court should deny relief on this claim because the issue was untimely raised.[9]

B. The Juror Excusal Claim is Meritless, Anyway

The statutory provision setting out the basis for

---

[8] The state objected to the untimeliness of Hoskins' motion, *(TR 22).*

[9] While arguably analogous to an invited error situation, the actions of defense counsel are perhaps more accurately described as "gotcha" litigation tactics. See, e.g., *State v. Belien, 379* So. 2d 446,447 (3rd DCA 1990). Regardless of the name applied to such tactics, Hoskins should not benefit from them.

disqualification and excusal from jury service provides that:

Persons disqualified or excused from service.

1. No person who is under prosecution for crime, or who has been convicted in this state, any federal court, or any other state, territory, or country of bribery, forgery, perjury, larceny, or any other offense that is a felony in this state or which if it had been committed in this state would be a felony, unless restored to civil right, shall be qualified to serve as a juror.

2. (a) Neither the Governor, nor Lieutenant Governor, nor any Cabinet Office, nor Clerk of Court, or Judge shall be qualified to be a juror.

(b) Any full-time federal, state, or local law enforcement officer or such entities' investigative personnel shall be excused from jury service unless such persons choose to serve.

3. No person interested in any issue to be tried therein shall be a juror in any cause; but no person shall be disqualified from sitting in the trial of any suit in which the state or any county or municipal corporation is a party by reason of the fact that such person is a resident or taxpayer within the state or such county or municipal corporation.

4. Any expectant mother and any parent who is not employed full time and who has custody of a child under 6 years of age, upon request, shall be excused from jury service.

5. A presiding judge may, in his discretion, excuse a practicing attorney, a practicing physician, or **a** person who is physically infirm from jury service, except that no person shall be excused from service on a

civil trial jury solely on the basis that the person is deaf or hearing impaired, if that person wishes to serve, unless the presiding judge makes a finding that consideration of the evidence to be presented required auditory discrimination or the timely progression of the trial will be considerably affected thereby. However, nothing in is subsection shall affect a litigant's right to exercise a preemptory challenge.

6. A person may be excused from jury service upon a showing of hardship, extreme inconvenience, or public necessity.

7. A person who was summoned and who reported as a prospective juror in any court in that person's county of residence within 1 year before the first day for which the person is being considered for jury service is exempt from jury service for *1* year from the last day of service.

8. A person 70 years of age or older shall be excused from jury service upon request.

9. Any person who is responsible for the care of a person who, because of mental illness, mental retardation, senility, or other physical or mental incapacity, is incapable of caring for himself shall be excused from jury service upon request

Florida Statutes § 40.013

Hoskins does not allege that the statute is defective, and indeed he cannot because that issue has already been decided against him. See, e.g., *Henderson v. State, 463 So.* 2d 196, 200-201 (Fla. *1985); Hitchcock v. State, 413 So.* 2d 741 (Fla. 1982);

Salvatore v. State, 366 So. 2d ***745, 751*** (Fla. 1978); ***Wilson v. State, 330 so.*** 2d 457 (Fla. 1976). Instead, Hoskins argues that the administrative order in effect at the time of the guilt phase proceedings improperly **delegated** the responsibility of excusing jurors to the Circuit Clerk of Brevard County. Hoskins claims that the error occurred because, according to him, he **was** somehow entitled to have excusals and disqualifications from jury service passed on by a Circuit Judge.

The administrative order which was entered pursuant to ***Florida Statutes*** § *43.26(2)(f)* provides that "the jury clerk may excuse members of a jury venire prior to reporting on the initial **date** of service for reasons set forth in the ***Florida Statutes*** *40.013(1)-(5)* and ***Florida Statutes*** *40.013(7)-(9)*". (*R* 2317). That administrative order also requires the jury clerk to document all excusals by notation on the venire list, and to retain that documentation until the completion of jury service for those jurors. ***Id.*** Court's exhibit 2 is the venire list from which Hoskins' guilt phase jury was drawn.[10]

Hoskins contends that ***each*** excusal from jury service must be

---

"This issue is not applicable to the penalty phase jury because the trial court granted Hoskins' motion for a new penalty phase.

passed on by a judge rather than the jury clerk in order for that excusal (or disqualification) to be valid. The second component of this issue is Hoskins' claim that the trial committed reversible error by not allowing a proffer of evidence on this issue. Neither part of this issue is a basis for reversal.

The underlying premise of Hoskins' claim is that the administrative order deprived him of an impartial jury. He cites no authority for that proposition, and, when the applicable statutory provisions are considered, Hoskins' claim collapses.

Section 40.013 of the ***Florida Statutes*** clearly states that certain individuals are either disqualified from jury service {§ *40.013(1) (2) (3)*}, or shall be excused upon request {§ 40.013 *(4)(7)* (8) (9) }. Sub-section 5 provides that practicing attorneys and physicians (as well as physically "infirm" persons) may be excused in the discretion of the presiding judge.[11] **While** Hoskins has framed the issue as including all of the ***Section 40.013*** grounds (including sub-section 6), that is an overbroad argument which fails to recognize that all but two of the grounds for excusal are mandatory (e.g.: "*...shall* ***be excused...".).*** Because

---

[11] Section 40.013(6) allows excusal "upon a showing of hardship, extreme inconvience, or public necessity." That Section is not included within the duties of the jury clerk set out in the administrative order, and plays no part in the issue before this court.

sub-section six is specifically excluded from the administrative order, the only category of excusal at issue is sub-section five's discretionary excusal of professionals and infirm persons. The administrative order does not create a basis for reversal as to sub-section five, either.

Under § *43.26* of the *Florida Statutes,* the presiding judge of each judicial circuit has broad administrative powers over all of the trial courts (and judges) within that judicial circuit. The catch-all provision of § *43.26(2)(f)* allows the presiding judge "[t]o do everything necessary to promote the prompt and efficient administration of justice in the courts over which he presides." *Florida Statutes,* § *43.26(2)(f)*. The administrative order about which Hoskins complains is based upon that catch-all provision.

There can be no argument, or at least not a serious one, that it was error for the presiding judge to enter an administrative order allowing the jury clerk to excuse prospective venire members who fall within the mandantory excusal categories (such as expectant mothers). Clearly, such an administrative order promotes "the prompt and efficient administration of justice" by eliminating those individuals who have requested to be excused from jury serivce and who, under the statute, are entitled to have that request granted. Any argument to the contrary makes no sense given

that the statute itself has repeatedly been upheld.

Likewise, it is within the authority of the presiding judge to determine, in his discretion, that practicing attorneys or physicians and physically infirm persons should be excused from jury service if they so request. As with the excusal of expectant mothers, the determination by the presiding judge that, in his discretion, the sub-section five excusals should be granted on request promotes the administration of justice and is not at all improper.

The second deficiency with Hoskins' argument is that it overstates the reach of the administrative order and places form over substance. As set out above, the sub-section five excusals are discretionary with the presiding judge, and, in the administrative order, the presiding judge exercised his discretion in favor of granting excusals to individuals falling within the sub-section five category upon their request. However, the reality that Hoskins ignores is that, even without the administrative order, those persons could still be excused from service, and Hoskins would have no basis for complaint. While excusal pursuant to sub-section five could be handled individually by the presiding judge, it is equally proper for those excusals to be handled by an administrative order. In the final analysis, the persons falling

within sub-section five may, in the presiding judge's discretion, be excused upon request under the plain language of the statute. The presiding judge exercised his discretion in favor of excusal and, because that is allowed under the statute, there can be no abuse of that discretion. Because there can, by definition, be no abuse of discretion, there is no error.

Of course, Hoskins has no due process right to have any particular juror serve on his jury. Moreover, if jurors are constitutionally fungible, and the **law** is that that is so, excusal of persons falling under the sub-section five category cannot be a basis for reversal. See, e.g., Georgia *v. McCullum, 112 S.* Ct. 2348 *(1992); Powers v. Ohio, 111 S.* Ct. 1364 (1991).

To the extent that the claim contained in Hoskins' brief can be construed to raise a claim other than one of a violation of § 40.013, such claim or claims are not preserved for appellate review. Florida law is settled that a claim must be timely raised at trial in order to preserve it for appellate review. See, e.g., *Steinhorst v. State,* 412 So. 2d 332, 338 (Fla. 1982). The only claim Hoskins raised below **was** that the *administrative order* was improper--any other claim that may be contained in Hoskins' brief is not preserved by timely objection.

The second component of Hoskins' first claim is that the trial

committed reversible error by not allowing proffered testimony of the court clerk "in order to establish how the excusals from jury service were granted". Appellant's *Brief at 18.* While it is correct that the trial judge did not allow that testimony to be proffered, it does not follow that disallowance of the proffer is a basis for reversal.

Hoskins relies on *Pender v. State, 432 So.* 2d 800 (Fla. 1st DCA 1983), for the proposition that refusal to allow a proffer "on this issue" is reversible error. *Appellant's Brief at 18.* While *Pender* does stand for the proposition that a proffer should generally be allowed, the proffer at issue in that case had nothing to do with the excusal of jurors. Moreover, *Pender* certainly did not establish any rule of law which approximates the rule of per se reversal implied by Hoskins. Under the particular facts of this case, the trial court properly refused to allow the proffer to proceed.

Whether or not refusal to allow a proffer of testimony precludes "effective appellate review" of an issue depends upon the issue itself. Some types of claims do not lend themselves to evidentiary development, and this claim is one of them. The only claim before the trial court (and the only claim preserved for appellate review) was that the administrative order was an unlawful

delegation of judicial authority. That is purely a question of law that can be resolved without evidentiary development. Stated in different terms, the trial court properly denied the substantive motion for the reasons set out at pp. 16-23, above. Nothing that the jury clerk could have testified about would have had any effect on the court's ruling on a question of law, and refusal of the proffer was correct.

Under the particular facts of this claim, nothing that could have been a part of the proffer would have helped Hoskins. If the testimony had been, in substance, that attorneys and physicians were excused on request because the presiding judge had already ruled that, in his discretion, such excusals should be allowed, the only thing that would have been proven is that the administrative order was followed. That testimony would not affect the resolution of the legal issue at all, and would not allow this court to more "effectively" decide this appeal. In other words, the state of the record would be essentially unchanged by the proffered testimony.

However, had the clerk testified that, despite the administrative order, sub-section five excusals were nonetheless presented to a judge, Hoskins' argument would have no basis at all. The record suggests that this scenario is the most likely. The comments of the trial court during argument on this issue suggest

that all requests for excusal from jury service are brought to the attention of the judge responsible for qualifying the venire. *(TR 368-39)*. Even assuming that the proffered testimony was as favorable to Hoskins as possible, the record would remain unchanged. For that reason, under these facts, refusal to allow Hoskins to proffer the testimony was not error.

Alternatively, should this court determine that the proffer should have been allowed, the state suggests that remand for the purpose of receiving the proffer is the appropriate course of action. However, that is the second step in the analysis of the merits of Hoskins' first issue: if this Court determines that the juror excusals were valid (which, for the reasons set out at pp. 16-23, this Court should do), then the proffer component of this claim collapses.

Finally, even if the administrative order is not proper as to § *40.013(5)*, the conviction should not be reversed. Hoskins does not suggest that the jury that heard his case **was** not fair and impartial, nor has he suggested how the result of his trial would have been different had persons falling under sub-section five not been excused before the venire reported for service. There can be no argument that Hoskins would have been acquitted had those persons not been excused, and, even if the persons excused from

service should have been required to present their requests for excusal to a judge, Hoskins cannot establish that any requests would have been refused. Hoskins has no right to approve the granting of such an excuse and, under these facts, any error that may have occurred in no way played a part in the guilty verdict. For that reason, any error that may have occurred was harmless beyond a reasonable doubt. ***State v.*** *DiGuilo,* ***491 So.*** 2d 1129 (Fla. ***1986).*** The conviction and death sentence should be affirmed in all respects.

II. THDENIWAS NO ERROR IN AL OF HOSKINS' MQTION FOR EXTRAORDINARY PSYCHIATRIC TESTING

On PP. 19-35 of his brief, Hoskins argues that he is entitled to a new penalty phase proceeding because the trial court denied his motion for an order directing that a PET (Positron Emission Tomography)-SCAN be performed and that Hoskins be transported to Jacksonville, Florida, for that purpose. While Hoskins attempts to bring this claim within the holding of ***Ake v. Oklahoma, 470*** U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), that effort fails for the following reasons.

In ***Ake,*** the United States Supreme Court held that the due process clause of the Fourteenth Amendment required that, when an indigent defendant's "sanity is likely to be a significant factor

in his defense", the defendant must be provided access to a "competent psychiatrist". ***Ake, 470 U.S.*** at 82-83 and 87 n. 13.[12] The court did not decide the applicability of either the equal protection clause or the Sixth Amendment to this issue. *Id.*, at n. ***13.*** ***Ake*** does not create any constitutional right to a favorable psychiatric opinion, nor does it hold that an "indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." ***Id.,*** at 83.

Most of Hoskins' brief on this point is devoted to a discussion of ***Ake*** that has nothing to do with the facts of this case. The true issue is whether Hoskins has a due process right to further mental status testing when he has been examined (and tested) not only by a neuro-psychologist but also by a neurologist. *(TR* ***1544-45).*** The neurologist did not testify at the penalty phase proceeding (or at any other time), and the testimony of the neuro-psychologist at the first penalty phase was read to the second penalty phase jury. *(TR* ***1538).*** Apparently, the existence of a PET-SCAN facility in Jacksonville was discovered (or the facility was established) between the first and second penalty phase

[12] The *Ake* plurality reached the same result as to mental health assistance at the penalty phase of a capital trial. *Ake, 470* U.S. at 84.

proceedings. *(See, e.g., SR 41).*

Hoskins' claim of an equal protection violation and of an entitlement to "parity with the prosecution" are easily resolved. Hoskins emphasizes that the Public Defender's office was wiling to pay for the PET-SCAN, while, at the same time, refusing to recognize that that fact is fatal to any equal protection claim. To state the obvious in a different way, there is no equal protection component to this claim because Hoskins's status as an indigent did not factor into the PET-SCAN issue. Hoskins is not a part of any "group" of indigents, at least so far as this claim is concerned. The basis upon which the United States Supreme Court reversed the conviction in ***Ake*** is not present in this case because, unlike *Ake,* Hoskins' status as an indigent did not deprive him of anything.

To the extent that Hoskins' claim is one of a denial of due process, that claim does not withstand scrutiny, either. While Hoskins has set out the direct testimony of Dr. Krop which he claims establishes the "necessity" of the PET-SCAN, he has omitted the cross examination testimony which demonstrated that there is no dispute that Hoskins has some brain damage, and that, even with the PET-SCAN (which is a medical test), Dr. Krop would not be able to identify any possible connection between the brain damage and the

murder. (*SR* ***64-65).*** In fact, Dr. Krop testified that, even if a PET-SCAN was conducted, his opinion would be no more definitive than it already is. ***(SR 69).*** The trial court denied Hoskins' motion, finding that the result would be suggestive at best, and that there was "no competent evidence" to show why the testing should be allowed. ***(SR 80; R 2514).***

When Dr. Krop's testimony at the motion hearing is fairly considered, it is clear that the PET-SCAN would have added nothing to his trial testimony.[13] Hoskins received a thorough battery of psychological tests, and was also evaluated by a neurologist. *(TR* 1544-49). The addition of the PET-SCAN would not have added anything. Because of the extensive evaluation Hoskins received, and because the PET-SCAN would not have added to the definitiveness of Dr. Krop's testimony, there can be no due process violation.[14]

As set out above, Hoskins' claimed due process violation is predicated upon the denial of his motion for an order directing the

---

[13] As set out above, Hopkins did not even present Dr. Krop as a live witness, choosing instead to use his transcribed testimony from the first penalty phase.

[14] Whether Dr. Krop is qualified to interpret or use the PET-SCAN results is not apparent from the record. However, the PET-SCAN is a medical test, and Dr. Krop *is* not a medical doctor.

performance of a PET-SCAN and of his motion to be transported to Jacksonville for that testing. Those motions were properly denied for the additional reason that no competent evidence supported Hoskins' motion for that testing. Dr. Krop is a neuro-psychologist, not a physician. ***(SR 66).*** The PET-SCAN is a medical test, not a neuro-psychological test, which would have to be ordered by ***a*** physician--Dr. Krop cannot order that test. ***(SR 70).***[15] However, in addition to being evaluated by Dr. Krop, Hoskins ***was*** also evaluated by a neurologist. (See, e.g., ***SR 71).*** That neurologist never recommended that a PET-SCAN be performed, and was never called as a witness on the motion, even though he was apparently available. ***(TR 1583).*** Finally, Dr. Krop testified that neuro-psychologists do not determine what ***neurological*** tests need to be conducted. ***(SR 69).*** In summary, Hoskins failed to present any ***evidence*** that the PET-SCAN was medically necessary--because of that failure of proof, there was, as the trial court found, no competent evidence that the PET-SCAN should be conducted. There was no due process error because the PET-SCAN would not have added

---

[15] In other words the professional judgment of a medical doctor is needed to determine whether a PET-SCAN is'indicated. *(SR 70).* Because the PET-SCAN involves injecting an imaging fluid into the subject's brain, the need for a medical judgment as to the necessity of that test is obvious,

to the testimony of the ***psychologist*** and because there was no medical evidence (after the neurologist evaluated Hopkins) that the test was even necessary.[16] To the extent that Hoskins directs various criticisms at the trial judge, whether or not the judge did not believe that the state had made Hoskins' mental condition relevant is not the point--no mental state evidence was precluded, and that evidence **was** fully considered in imposing sentence. Likewise, to the extent that Hoskins complains, in Footnote 3, about a comment by the court prior to the testimony of ***Dr. Sperry,*** there is no question that that witness (the medical examiner) testified at the guilt phase (*TR* 943) ***and*** at the second penalty phase. ***(TR*** *1270)* The comment by the court obviously referred to the fact that testimony was being presented for the second time (before the new penalty phase jury, which had not heard it before). In any event, Dr. Sperry is not **a** "mental health doctor" **as** asserted by Hoskins--he is the Forensic Pathologist who conducted the autopsy on Hoskins' victim. The facts do not support Hoskins implication of some disparagement of mental state testimony by the trial judge.

To the extent that Hoskins claims that the trial court's

---

[16] Because of the invasive nature of the PET-SCAN, ordering that test in the absence of medical testimony could well be viewed as irresponsible.

ruling rendered trial counsel and the mental state expert ineffective, that claim is procedurally barred because it was not timely raised at trial. While the state recognizes that ineffective assistance claims are, in general, properly raised in post-conviction proceedings, the sort of ineffectiveness claim contained in Hoskins' brief falls within an exception to that general rule. Rather than being the typical performance-based ineffective assistance claim, the claim contained in Hoskins' brief is a constructive ineffectiveness claim which should **have** been raised at trial. ***Strickland v. Washington, 466*** U.S. 668, 682, 692-3 (1984). Unlike a "normal" ineffective assistance claim, a constructive ineffectiveness claim is based upon the theory that an outside factor beyond counsel's control *caused* ineffective assistance. Because the premise of such a claim is essentially that trial counsel knew what to do and tried to do it but was thwarted in his effort, it is appropriate for ***trial counsel*** to raise such a claim. In this case, trial counsel did not do that, and this claim is procedurally **barred** for that reason.

Even if the ineffective assistance claim (both as to trial counsel and the expert) was not procedurally barred, it would not be a basis for relief. As set out at pp. 27-32, above, the trial court's denial of Hoskins' motion **was** correct. **Because** that ruling

was correct, by definition there can be no ineffectiveness. In addition to denying relief on the substantive claim, this court should address the ineffectiveness claim under the particular facts of this case. Both components of that claim should be denied on alternative grounds of procedural bar and no merit, and the death sentence should be affirmed in all respects.

III. THE SENTENCING COURT PROPERLY IMPOSED A DEATH SENTENCE

On pp. 36-56 of his brief, Hoskins presents three separate arguments attacking his sentence of death. Specifically, Hoskins claims that the sentencing order is deficient, that the mitigators outweigh the aggravators, and that the heinous, atrocious, or cruel aggravating circumstance should not have been found to exist. None of those arguments state a basis for reversal of the death sentence for the reasons set out below.

A. The Sentencing Order Is Not Deficient.

Hoskins' first sub-claim is that the sentencing order does not comply with the requirements of *Campbell* ***v. State, 571 So.*** 2d 415 (Fla. 1990), and ***Rogers v. State,*** 511 So. 2d 526 (Fla. 1987). In Hoskins' opinion, the trial court's "analysis is not of 'unmistakable clarity' and it cannot be said that he 'fulfilled that responsibility' of weighing the aggravating circumstances against the mitigating factors calling for life." ***Appellant's***

brief ***at 38.*** However, even cursory review of the sentencing order, which consists of ten pages, establishes that Hoskins' description of the sentencing order is, to say the least, inaccurate. *(R* ***2583-2598)*** . [17]

In *Campbell* and Rogers, this court held that in addressing mitigating circumstances, "the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature." Campbell, **571** So. 2d at 419. [Footnote and citation omitted], This court stated that each ***established mitigator*** must be expressly considered in the sentencing order, and emphasized that "the relative weight given each mitigating factor is within the province of the sentencing court..." ***Id.,*** at 420. The sentencing court in this case was well aware of these requirements and, in fact, expressly set them out in the introduction of the sentencing order. *(R* ***2593).***

In evaluating the proposed non-statutory mitigation, the sentencing court identified the various non-statutory mitigation

---

[17] No pages numbered ***R*** 2584-88 are found in the record. Apparently, those numbers were omitted when the record was prepared,

proposed by Hoskins and expressly considered and evaluated *each* matter proposed in mitigation. *See, e.g., R 2594-97.* The trial court then weighed the mitigators against the aggravators (during the course of a sexual battery and kidnapping, and especially heinous, atrocious or cruel), and found that either aggravator *standing alone* was sufficient to outweigh the non-statutory mitigation. *(R 2527).* In summarizing its findings, the sentencing court found that, under the particular facts of this *case,* the mitigators were of insignificant weight. That finding is consistent with Florida law, which is well-settled that the relative weight afforded mitigation is a determination for the trial court--in this case, that determination should not be disturbed because it is supported by ample evidence. See, e.g., *Campbell, 571 So.* 2d at *420; Wuornos v. State, 644 So.* 2d 1000, 1010 (Fla. 1994); see also pp. 34-35, above. The sentencing order certainly cannot be described as a "bare bones" order, and, in fact, that order complies with Florida law in all respects. See, *e.g., Schwab v. State, 636 So.* 2d 3 (Fla. 1994). There is no error, and Hoskins' death sentence should be affirmed.[18]

---

[18] *Santos v. State,* 591 So. 2d 160 (Fla. 1991), and *Lamb v. State,* 532 So. 2d 1051 (Fla. 1988), do not control disposition of this claim because the errors that led to reversal in those cases do not exist here.

On pp. 39-42 of his brief, Hoskins argues that *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), requires the death sentence to be set **aside.** In essence, Hoskins' argument is that *Hitchcock* stands not only for the proposition that consideration of mitigation (by the sentencer) must not be restricted, but also that significant weight must be given to that evidence. Despite Hoskins' argument to the contrary, *Hitchcock* has nothing to do with the relative weight that must be ascribed to any *particular* sort of non-statutory mitigation. Hoskins' non-statutory mitigation was given little weight by the sentencing court because it deserved no more than it received. Hoskins' efforts to create a constitutional claim fail because the facts establish that there **was** no error in the weighing of the aggravating circumstances and the mitigating factors. Hoskins' death sentence should be affirmed.

B. The Aggravators Outweigh the Mitigators

On pp. 42-50 of his brief, Hoskins argues that various "non-statutory mitigation" was not given enough weight by the sentencing court. This argument is essentially a variation on the previous argument which is without merit for the same reasons.

There are two components to this claim: that 'un-rebutted evidence of mitigating factors" was ignored by the sentencing

court, and that other purported mitigation was not weighed as heavily as it should have been. *(Appellant's brief at 43).* The first component of this claim is easily disposed of because Hoskins does not identify the "mitigation" he claims was ignored by the sentencing court. That part of this claim is insufficiently briefed and, for that reason is not a basis for reversal. The second component to this sub-claim, while slightly more convoluted, is equally merit- less.

Hoskins' initial argument is that the trial court "utilized the wrong standard for determining what is mitigation and what weight it should have in the capital sentencing decision". *(Appellant's brief at 44.)* That argument is based upon an out-of-context quotation taken from the "Summary of Findings" portion of the sentencing order. *(R 2597).* That summary follows four pages of discussion by the trial court addressing the multiple items of non-statutory mitigation upon which Hoskins relied. The sentencing court specifically recognized that:

> In considering alleged mitigating evidence the court must determine if "the facts alleged in mitigation are supported by the evidence." If those established facts are "capable of mitigating the defendant's punishment, ie., **may** be considered as extenuating or reducing the degree of moral culpability for the crime committed", and if "they are of

> sufficient weight to counterbalance the aggravating factors." *Rogers v. State,* 511 so. 2d *526* (Fla. 1987), *Cert. Denied,* 484 U.S. 120 (1988). The decision as to whether a mitigating circumstance has been established is within the trial court's discretion.

(R 2593). When the sentencing order is fairly considered, it is clear that the court was not only well aware of the law, but also carefully followed it. Of course, judges are presumed to follow the law, *Sochor v. Florida,* 112 S.Ct. 2114 (1992) and, in this case, it is clear that the sentencing court not only stated the proper standard for weighing mitigation evidence, but also that that standard was correctly applied. There is no error.

Hoskins argues that various pieces of "mitigating evidence" should have been given greater weight by the sentencing court. However, in order to even qualify as a mitigator, the proposed mitigating evidence "must, in some way, ameliorate the enormity of the defendant's guilt." *Eutzy* v. State, 458 So. 2d 755, 759 (Fla. *1984) ; see also, Lucas v. State,* 568 So. 2d 18, 23 (Fla. 1990), *remanded for resentencing, death sentence affirmed, 613 So.* 2d 408 (Fla. 1992) .[19] As this court has pointed out, "as a reviewing

---

[19] In ***Rogers*** this court defined mitigators as "factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating ***or reducing the degree of moral culpability for the crime committed". Rogers,*** 511 So. 2d at 534.

court, not a fact-finding court, [this court] cannot make hard-and-fast rules about what must be found in mitigation in any particular case. [Citations omitted]". ***Lucas,*** 568 So. 2d at 23. Likewise, the law is settled that the determination of what sort of evidence is mitigating in a particular case is within the discretion of the trial court. ***See, e.g., Lucas, supra; see also, Wuornos v. State,*** 644 So. 2d 1000, ***1010*** (Fla. ***1994); Lucas v. State, 613 So.*** 2d at 410. Of course, it is not grounds for reversal merely because the defendant disagrees with the sentencing court's findings as to the existence of mitigators, ***Lucas, supra,*** and it would make no sense to find grounds for reversal when, as here, Hoskins is doing that which ***Lucas*** expressly forbids.

Hoskins argues that "great weight" (as mitigation) should have been given to his "heartening, family relationship". ***Appellant's brief at*** 44-6. However good Hoskins' relationship may have been with his family, that fact does nothing to ameliorate the enormity of Hoskins' guilt. In fact, Hoskins lived away from his parents' home since at least 1988, and it can hardly be said that Hoskins' actions toward his family are above and beyond the norm that would be expected given the familial circumstances. Further, the professed "loving relationship" that Hoskins claims to have with his father is inconsistent with his concurrent claims of abuse at

the hands of his father.[20] Of course, Hoskins has no constitutional right to have any specific weight afforded to any particular evidence offered as non-statutory mitigation, and, because of the highly individualized nature of mitigation evidence in general (and non-statutory mitigation in particular), this court has repeatedly declined to establish guidelines setting out the weight that should be afforded to any particular evidence in any particular case. [21]

While the defendant's good relationship with his family was established, that evidence has little to do with Hoskins' character and nothing at all to do with his record or the circumstances of the offense. ***See, e.g.,*** *Lockett* ***v. Ohio, 438 U.S. 586, 684, 98*** S.Ct. ***2954,*** 57 L.Ed.2d 973 (1978) . This proposed mitigator was properly given little weight by the trial court *(R* ***25941,*** and, even if it had been given far greater weight, it would not be enough (alone or in combination) to reasonably to justify a sentence less than death.

Insofar as the claims of abuse as a child are concerned, the

---

[20] As this court noted in *Wuornos,* 644 So. 2d at 1010 n.6, the disposition of controverted evidence is within the discretion of the trial court.

[21] Of course, as the 1 lth Circuit has noted, "mitigation may be in the eye of the beholder". *Stanley v. Zant,* 697 F.2d 955,969 (1 lth Cir. 1983).

sentencing court found that the evidence established that Hoskins had protected his mother from abuse by his father and that, as a result, Hoskins was also struck by his father. (R 2594). The sentencing court gave little weight to this evidence as mitigation. (Id.) Under the facts of this case, whatever abuse Hoskins was subjected to was properly afforded little weight in mitigation because, contrary to Hoskins' claim, there is no evidence at all that there was any effect on Hoskins that was relevant to his character, record, or the circumstances of the offense. At least arguably, the sentencing court was not even required to find this evidence to be mitigating at all. See, e.g., Right v. State, 512 so. 2d 922 (Fla. 1987); Rogers v. State, 511 So. 2d 534 (Fla. 1987). The trial court properly gave little weight to the claims of abuse, and there is no error.

Moreover, whatever alcohol consumption problems Hoskins' father had, those problems began when Hoskins was 12 to 13 years of age (TR 1396) and apparently were not of long duration. Id.[22] The evidence in the record only indicates one or two physical confrontations between Hoskins and his father (TR 1399), while the majority of the evidence indicates that Hoskins' father was a hard

[22]The penalty phase transcript begins with Volume IV of the record.

worker who did the best he could to provide for his family *(TR 1405-6;* 1435-6) and who wanted his children to receive an education. ***(XR 1407-8).*** The evidence does not establish that Hoskins' father was the abusive individual Hoskins' brief implies. This evidence is of inconsequential weight as mitigation.

On pp. 47-49 of his brief, Hoskins argues that the sentencing court gave too little weight to the mental state evidence. The sentencing court found that Hoskins has low actual and functional mental abilities, and that he has a mild brain abnormality which ***may*** cause ***some*** impairment. *(R* ***2594-5).*** In evaluating this evidence the sentencing court stated:

> Defendant presented evidence that he was unsuccessful in school. A psychological evaluation performed on defendant in the seventh grade rated his I.Q. at ***71,*** the lower 3 or 4% of the population. He was placed in educable mentally retarded classes, and his grades improved somewhat in these classes. One test performed at the time indicated that the defendant should have been referred to a neurologist, but no referral **was** made due to lack of funds. A school counselor testified he had limited social skills, and that he was disadvantaged culturally and economically.
>
> The state's mental health expert testified, after reviewing defendant's school records, that she would classify the defendant as a slow learner, not mentally retarded. She questioned reliance on the prior determination of mental retardation, because of the age of the school records.

There was no testimony that due to a mental deficiency, defendant lacked the ability to conform his conduct to the requirements of the **law** or that he did not know that murdering the victim was wrong. On the contrary, the evidence showed that the defendant removed the victim from her home, drove *4* ½ hours with the victim in the trunk, in order to dispose of her.

The court finds that this mitigating circumstance has been proven by the greater weight of the evidence. This non-statutory mitigator is given little or no weight by the court.

The defendant's brother testified that the defendant sustained a head injury as a child. He was chopping wood and the axe hit him in the middle of his forehead. No medical attention was sought for this injury. His mother applied a home remedy, spider webs.

Medical tests administered to defendant showed he had some impairment to the frontal lobe of his brain. This organic brain damage was explained by the defense mental expert, a clinical psychologist, based on various tests. Testimony was presented that such damage could explain deviate behavior in some individuals, but no evidence was presented that defendant's organic brain impairment accounted for the crimes he committed.

The court finds that this non-statutory mitigator was proven by the greater weight of the evidence. However, the court accords little weight to this factor. *(R 2594-95)*.[23]

---

[23] As the sentencing court stated, the presence of mental retardation is controverted. The full scale I.Q. score of 71 does not fall in the mentally retarded range, and Hoskins' penalty phase expert testified that Hoskins is not mentally retarded. *(TR 1556,)*.

Hoskins' penalty phase mental state expert testified that he does not know what effect any brain damage Hoskins may have had on his behavior. *(TR 1565).* That expert testified that he cannot say that whatever frontal lobe damage Hoskins may have causes him to be impulsive, nor can that expert conclude that Hoskins is impulsive in his behavior. *(TR 1567-8).* Moreover, Hoskins' hand-picked expert testified that any frontal lobe damage that Hoskins may have would have no effect on the defendant's ability to plan his actions in advance, and that the facts of this crime do indicate advance planning by Hoskins. *(TR 1568; 1570)*.[24] The evidence establishes that Hoskins' criminal behavior is not related, in *any way,* to whatever frontal lobe damage he may have. *(TR 1576).* Hoskins' mental state expert summarized the evidence best when he testified that Hoskins' actions reflect a defendant who does not want to get caught. *(TR 1575)*.

Under the facts of this case, the mental state 'mitigation" is weak, at best. Moreover, nothing about Hoskins' mental state can

---

[24] Even with the PET Scan, Hoskins' expert testified that he would still need history about Hoskins (that he does not have) to establish impulsivity on the part of the defendant. *(TR 1573).*

in any way be connected to the murder for which Hoskins was sentenced to death. The evidence establishes, at best, that Hoskins is not highly intelligent and that he has some frontal lobe brain damage, but that that had nothing to do with the offenses Hoskins committed. The mental state evidence was properly given little weight as mitigation.[25]

To the extent that Hoskins claims that the crime was a result of a "rage reaction" *(Appellant's brief at 48)*, the facts are inconsistent with that theory.[26] Rather than being a rapid sequence of events, this crime began with the burglary of the victim's residence and the ensuing rape; continued with the victim's abduction and theft of her car; and culminated when Hoskins beat the victim and strangled her to death and disposed of her body in a shallow grave in central Georgia. This crime consumed a substantial amount of time, and can in no way be described as

---

[25] To the extent that Hoskins argues that the sentencing court applied the wrong standard in evaluating the mental state evidence, that claim is based on an out-of-context reading of the sentencing order. See pp. 34-37, above. The sentencing court did not improperly reject any mitigator because of a failure to reach the level of statutory mental mitigation.

[26] To accept the "rage reaction" theory means to accept (without any support) that the "rage" lasted some protracted length of time given the uncontroverted evidence that the victim was *not* killed at her residence.

impulsive.[27]

Hoskins also argues that his upbringing in an impoverished environment in rural Georgia, as well as the (few) specific good deeds set out in the sentencing order should have been given "great weight" in mitigation. Insofar as Hoskins' background is concerned, the trial court found that, while established by the evidence, these matters were entitled to little or no weight in mitigation. *(R **2596).*** While this evidence does, to some degree, create sympathy for Hoskins, it is not truly mitigating in nature. The minimal weight due this evidence is even more apparent when weighed against the status of Hoskins' siblings.

Four of the defendant's brothers testified at the penalty phase proceeding.[28] All of them are apparently employed, and, for all that appears of record, none have never had any legal problems even though they grew up alongside the defendant and had essentially the same childhood experiences. See, e.g., ***TR 1391-92; 1406; 1415; 1436; 1447; 1453.*** This evidence is entitled to little

---

[27]The sentencing court stated that Hoskins drove 4 and ½ hours with the victim in the trunk of her car. That is an optimistic estimate of the time required to drive the approximately 360 miles from Melbourne, Florida to Cordele, Georgia.

[28]These are all of Hoskins surviving siblings. (*TR* 1390).

weight, especially under these facts, and the sentencing court was correct in ruling in that way. See, e.g., ***Hitchcock*** **v. State, 578 so.** 2d at 688. There is no evidence that the circumstances of Hoskins' childhood had ***any*** effect on him and, for that reason, the cases upon which Hoskins relies are distinguishable on the facts. This "mitigator" received all of the weight to which it was entitled.

Finally, the "specific good deeds" (caring for pets, wood working, and teaching his siblings) set out in the sentencing order (*TR* 2596-97) were properly given little weight by the court. Those matters do nothing to provide **a** basis for a sentence less than death and, when compared to the aggravators present in this case, are such weak mitigation that they are of no significance at all. ***See, e.g., Johnson v. State, 660*** So.2d 637 (Fla. 1995); ***Gamble*** *v.* ***State, 659*** So.2d 242 (Fla. ***1995); Tafero v. State, 403 So.*** 2d 355 (Fla. 1981). This "mitigation" was given all the weight it was due, and there is no error. The sentence of death should be affirmed.

C. **The Heinous, Atrocious or Cruel Aggravating Circumstance is Well Established.**

On pp. 50-56 of his brief, Hoskins argues that the sentencing court erred in finding this strangulation murder to be especially

heinous, atrocious, or cruel. Specifically, Hoskins claims that there was no showing that the victim was conscious (at an unspecified point) and that, because of his "state of rage there can be no showing that the defendant intended for the victim to suffer or even intended the method for the killing." ***Appellant's brief at 51.*** The first component of this claim fails on the facts, and the second fails on the law.

In finding this murder to be especially heinous, atrocious, or cruel, the sentencing court stated:

> This aggravating circumstance has been proven beyond all reasonable doubt. State ***v. Dixon, 238 So.*** 2d 1 (Fla. 1983) .
>
> As there was no significant blood found in the home, the only reasonable inference is that the victim was hit on the head after the rape and struggle in her home. Therefore, she must have been conscious during the rape in her home. Her face, neck and wrists suffered injuries from tight binding and gagging. Dorothy Berger had numerous defensive wounds about her hands, arms, and legs, showing she was conscious and vainly attempting to fend off her attacker. The medical examiner testified she was alive when she was bound and gagged, because such bruising does not occur after death. Her body was virtually bruised and lacerated from head to toe. According to the medical examiner, death by manual strangulation requires a constant pressure for three to four minutes.
>
> The defendant bound and gagged Dorothy Berger and placed her in the trunk of her car, as

evidenced by the blood stains in the trunk. The only reasonable inference is that Dorothy Berger was alive at the time she was placed in the car, else there would have been no need to bind and gag her. Clearly, she was alive when gagged, as evidenced by the medical examiner's testimony. The defendant then used Dorothy Berger's car to transport her to Georgia, where he buried her in a field a few miles from his parents home. Defendant kept Dorothy Berger's car, and was apprehended in Georgia driving the car. Her body was discovered buried in the field, bound, gagged and severely beaten.

The brutal rape of the victim sets this murder apart from the norm of capital felonies. According to the testimony of the medical examiner, the rape was painful because of the associated vaginal tearing. A violent sexual assault and resulting trauma can be a factor to support a finding of heinous, atrocious and cruel. *Capehart* v. State, 583 So. 2d 1009 (Fla. 1991).

This court has accepted the expert opinion of the medical examiner that the homicide of Dorothy Berger was the result of strangulation or suffocation, with such force her thyroid cartilage was fractured. The medical examiner was unable to state whether Dorothy Berger was conscious during the strangulation.

However, she clearly was conscious during the savage beating, as evidenced by the defensive wounds. This savage beating shows the defendant's desire to inflict a high degree of pain. The brutal senseless beating inflicted on Dorothy Berger sets this crime apart from the norm of capital felonies and clearly reflects the conscienceless, pitiless and unnecessarily torturous nature of this crime. ***Scott v. State, 494 So.*** 2d 1134 (Fla. 1986).

> Evidence that a victim was severely beaten while warding off blows before being killed has been held sufficient to support a finding that the murder was especially heinous, atrocious and cruel. *Wilson v. State, 493 So.* 2d 1019 (Fla. 1986). The Court finds that the State has proven the murder was especially heinous, atrocious and cruel because of severe beating and violent rape of Dorothy Berger. *Taylor v. State,* 630 So. 2d 1038 (Fla. 1993).

(R *2590-92.)* Those findings by the sentencing court are fully supported by the record, and establish beyond a reasonable doubt that this murder was especially heinous, atrocious or cruel. No case cited by Hoskins compels a different result.[29]

Florida law is settled that strangulation murders are virtually per se heinous, atrocious, or cruel. *Hitchcock v. State,* 578 So. 2d 685 (Fla. 1990), *rev'd. on other grounds, 614* So.2d 483 *(1993).* Florida law is likewise settled that the ordeal of the victim is the focus in determining whether the heinous, atrocious, or cruel aggravator applies. See, e.g., *Copeland v. State, 457 So.* 2d 1012 (Fla. *1984); Stano v. State, 460 So.* 2d 890 (Fla. 1984); Clark *v. State, 443* So. 2d 973 (Fla. 1983); *see also, Preston v. State, 607 So.* 2d 404, 409-10 (Fla. 1992); *Rivera v. State,* 561 So.

---

[29] *Teffeteller* and Porter, which are relied upon by Hoskins, were both gun murders, and cannot rationally be compared to a beating/kidnapping/rape/strangulation murder like this one.

2d 536, *540* (Fla. *1990); Chandler v.* State, 534 So. 2d 701, 704 (Fla. *1988); Phillips* v. State, 476 So.2d 194 (Fla. 1985); *Mason v. State, 438 So.* 2d *374* (Fla. 1983); *Adams* v. *State, 412 So.* 2d 850 (Fla. 1982). Moreover, as this court held in *Magill*, 'it is the entire set of circumstances surrounding the killing" that makes a murder especially heinous, atrocious, or cruel. *Magill v. State, 386 So.* 2d *1188* (Fla. 1980), *cert. denied, 101* S.Ct. 1384 (1981), *appeal upon remand, 428 So.* 2d 649, 651 (Fla. 1989). As the trial court's order demonstrates, the circumstances of this murder are so barbaric that quantification is difficult. The ordeal endured by Ms. Berger clearly establishes that her murder was especially heinous, atrocious, or cruel, and it strains credulity to suggest that that aggravating circumstance is not properly found in this case.

The second component of this claim, that Hoskins did not intend for the murder to be unnecessarily tortuous, has no legal basis. In arguing to the contrary, Hoskins perpetrates the myth of an "intent element" by arguing that *Omelus v. State, 584 So.* 2d *563* (Fla. 1991), and *Teffeteller v. State, 439 So.* 2d 843 (Fla. 1983), stand for that proposition. Neither of those cases compel (or even suggest) the conclusion that a "tortuous intent" requirement has been grafted onto the heinous, atrocious, or cruel aggravator.

Both of those cases were decided based upon their peculiar facts which bear no resemblance to the facts of this case. Moreover, the precise claim contained in Hoskins' brief has been expressly rejected by this court, and there is no reason to revisit the issue. See, e.g., Taylor v. State, 638 So. 2d 30, 34n.4 (Fla. 1994) ; ***Hitchcock v. State,*** 578 So. 2d at 692 ("that ***Hitchcock*** might not have meant the killing to be unnecessarily tortuous does not mean that it actually was not unnecessarily tortuous and therefore, not heinous, atrocious, or cruel"). There is no error in the trial court's finding that the heinous, atrocious, or cruel aggravating circumstance applies to this case, and Hoskins' sentence of death should be affirmed.[30]

Alternatively, without conceding the presence of any error, even if the heinous, atrocious, or cruel aggravator should not have been found, there remains the undisputed aggravator of murder during the course of sexual battery with force likely to cause

---

[30] To the extent that Hoskins may claim that the murder was "impulsive", that claim cannot survive scrutiny. See pp. 43-47, above. To the extent that Hoskins claims, on p. 55 of his brief, that "he simply could not stop because of his frontal lobe damage" which caused a "rage reaction", that claim is inconsistent with his assertion that he cannot present all of his mental state mitigation because he did not receive a PET-Scan, Apparently Hoskins is able to make this argument in the absence of the PET-Scan. In any event, the state suggests that the "rage reaction" argument is similar to the argument that was rejected in *Bertolotti* as frivolous. See, *Bertolotti v. State*, 534 So.2d. 386, 389 (Fla. 1988).

serious personal injury and kidnapping. (*R* 2589).[31] As the sentencing court found, that aggravator, standing alone, is sufficient to outweigh the minimal mitigation under these facts. *(R* ***2597).*** Even if this court should decide that this murder was not especially heinous, atrocious, or cruel, the remaining aggravation is sufficient to support a death sentence. If there **was** error, and the state contends that there was not, that error was harmless beyond a reasonable doubt. State ***v.*** *DiGuilio, supra.*[32]

IV. THE FLORIDA DEATH PENALTY ACT IS CONSTITUTIONAL

On pp. 57-68 of his brief, Hoskins sets out some 16 claims and sub-claims that argue various perceived deficiencies in the Florida sentencing structure. At no point in this argument does Hoskins make any reference to the record.[33] Each claim and sub-claim contained in Point IV (which is mislabeled Point VIII) has already been decided adversely to Hoskins' position. In addition, **a** number of the "claims" Hoskins purports to raise are procedurally barred

---

[31] Hoskins stipulated that this aggravator exists.

[32] In addition to the aggravators found by the sentencing court, the cold, calculated and premeditated aggravator should also have been found. See pp. 63-67, below.

[33] In fact, Hoskins is referred to, in this argument, as the "Appellant". Interestingly, that appellation is used nowhere else in his brief. Apparently, this claim is simply a boiler plate argument.

because they were not raised at trial. In the case of those procedurally barred claims, this court should expressly base its denial of relief on procedural bar grounds. ***See, e.g., Hunter v. State, 660 so.*** 2d 244 (Fla. 1995). Each claim and sub-claim is separately addressed below.[34]

1. The Jury

a) Standard Jury Instructions

To the extent that the first paragraph on page 57 of Hoskins' brief may be an attempt to present an issue for review, the underlying argument is indecipherable. This paragraph states no more than the argumentative and unsupported conclusion of its writer. It is insufficient to brief an issue for appellate review and is, in any event, procedurally barred because this claim was not raised in a timely manner below. ***Steinhorst,*** *supra*.

1. Heinous, Atrocious, or Cruel

On pp. ***57-58*** of his brief, Hoskins argues that the heinous, atrocious, or cruel standard jury instruction 'does not limit and define the heinous, atrocious, or cruel circumstance". However, the jury instruction given in Hoskins' case was the *Proffitt* instruction which this court expressly upheld in ***Preston v. State,***

[34] The state follows Hoskins' numbering system to avoid confusion.

607 So. 2d 404, 410 (Fla. 1992), and ***Power v. State, 605 So.*** 2d 856, 864-5 n.10 (Fla. 1992).[35] Hoskins' claim is foreclosed by binding precedent. ***See, e.g., Johnson*** v. State, 660 So.2d 637 (Fla. 1995) ; *Hannon* v. ***State, 638 So.*** 2d 39, 43 n.3 (Fla. 1994). To the extent that footnote four on p. 58 of Hoskins' brief is sufficient to present any claim that some "tortuous intent" is required before the HAC aggravator can be found, that claim is foreclosed by binding precedent for the reasons set out at pp. 48-54, above. See, e.g., ***Hitchcock v. State, supra.***

b) Majority Verdicts

On p.58 of his brief, Hoskins argues that the death penalty act is unconstitutional 'because it places great weight on margins for death as slim as a bare majority", This claim was superficially raised at trial. (*R **2233).*** Hoskins is not entitled to relief on this claim because it is foreclosed by binding precedent. ***See, e.g., Hunter v. State, supra*** at 252-3 (rejecting

---

[35] The instruction given to Hoskins' penalty phase jury was:

> Heinous means extremely wicked or shockingly evil, Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference, or even enjoyment of, the suffering of others The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts--that show that the crime was conciculess or pitiless and was not--correction--and was unnecessarily tortuous to the victim. *(TR 1895-6).*

identical claim); James v. *State, 453 So.* 2d 786, 792 (Fla. 1984).

c) Aggravators as an Element of the Crime

On p. 59 of his brief, Hoskins argues that the absence of a requirement that aggravating circumstances be unanimously found by the jury is unconstitutional because the aggravators themselves are 'elements of the crime." This claim is procedurally barred because it **was** not raised at trial. *Steinhorst v. State, supra.* Even if not procedurally barred, this claim is foreclosed by binding precedent. See, e.g., *Jones v. State,* 569 So. 2d 1234 (Fla. 1990); See **also,** *Hildwin v. Florida, 490* U.S. 639, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989).

d) The *Caldwell* Claim

On p. 59 of his brief, Hoskins argues that the standard jury instructions 'do not inform the jury of the great importance of its penalty verdict", resulting in a violation of *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This claim is procedurally barred, *Steinhorst,* supra, but, even had it been preserved, it would not be grounds for relief because it is foreclosed by binding precedent. See, *e.g., Hunter, supra,* at 252-3.

2. Counsel

On pp. 59-60 of his brief, Hoskins argues that court-appointed

counsel in capital **cases** are inadequate. This claim is procedurally barred because it was not preserved for appeal, and, even had it been preserved, it is foreclosed by binding precedent. See, ***Hunter, supra,*** at 253 (holding identical claim to be procedurally barred and alternatively meritless).

3. The Trial Judge

On p. 60 of his brief, Hoskins argues that he is entitled to relief **because** of the trial judge's "ambiguous role" in Florida's capital sentencing scheme. This claim is procedurally barred because it was not preserved properly for appeal, ***Steinhorst,*** supra, and, even had it been preserved, it is foreclosed by binding precedent. ***Hunter, supra*** (holding identical claim to be procedurally barred and alternatively meritless).

4. Appellate Review

a) ***Proffitt***

On p. 60 of his brief, Hoskins argues that this court has not adhered to the requirements of ***Proffitt v. Florida, 428*** U.S. 242 (1976). This claim is procedurally barred because it was not properly preserved for appellate review by timely objection. ***Steinhorst, supra.*** Even if this claim had been preserved, it is not a basis for relief because it is foreclosed by binding precedent. ***Hunter, supra,*** **at 253.**

b) Aggravating Circumstances

On pp. 61-62 of his brief, Hoskins argues that the aggravators are applied inconsistently at the appellate level. This claim is procedurally barred because it was not properly preserved for appellate review by timely objection. Steinhorst, *supra.* Even if this claim had been preserved, it is not a basis for relief because it is foreclosed by binding precedent. *Hunter, supra,* at 253.

c) Appellate Re-Weighing

On pp. 62-63 of his brief, Hoskins argues that the Florida Death Penalty Act does not have 'the independent appellate re-weighing of aggravating and mitigating circumstances required by *Proffitt*". This claim is procedurally barred because it is not properly preserved for appellate review. *Steinhorst, supra.* Even if this claim had been preserved, it is foreclosed by binding precedent. *Hunter, supra,* at *253.*

d) Procedural Technicalities

On p. 63 of his brief, Hoskins argues that the contemporaneous objection rule "has institutionalized disparate application of the law in capital sentencing." This claim is procedurally barred because it is not properly preserved for appellate review. *Steinhorst, supra.* Even if this claim had been preserved, it is foreclosed by binding precedent. *Hunter, supra,* at 253 (holding

identical claim to be procedurally barred and alternatively meritless.)

e) Tedder

On pp. 64-64 of his brief, Hoskins argues that "[t]he failure of the Florida Appellate Review Process" is demonstrated by the inability of this court to apply the *Tedder* Rule consistently. This claim is procedurally barred because it is not properly preserved for appellate review. *Steinhorst, supra.* Even if this claim had been preserved, it is foreclosed by binding precedent. *Hunter,* supra, at 253.[36]

6. Other Problems With The Statue[37]

a) Lack of Special Verdicts

On pp. 64-65 of his brief, Hoskins argues that the Death Penalty Act is invalid because it does not provide for special verdicts. The aggravation/mitigation special verdict component of this claim was partially raised by pre-trial motion (*R 2234),* but

---

[36] Because Hoskins' penalty phase jury recommended death by a vote of twelve-zero, the ***Tedder*** Rule is not implicated, anyway.

[37] Hoskins has given this heading the number six (6) even though there is no heading that bears the number five (5). Again, the state has adhered to Hoskins' numbering system to avoid confusion.

the felony murder/premeditated murder component was not. The felony murder/premeditated murder component is procedurally barred because it was not properly preserved by timely objection. *Steinhorst, supra.* The aggravation/mitigation component is foreclosed by binding precedent, and is not a basis for relief. Likewise, the felony murder/premeditated murder component is also foreclosed by binding precedent. *Hunter, supra; Patten v. State, 598 So.* 2d 60 (Fla. *1992); Jones v. State, 569 So.* 2d 1234 (Fla. 1990).

b) No Power To Mitigate

On p. 65 of his brief, Hoskins argues that 'the prohibition against mitigation of a death sentence under Fla. R. Crim. P. 3.800 is unconstitutional". This claim is procedurally barred and, alternatively, foreclosed by binding precedent. *See, e.g., Hunter, supra,* (rejecting identical claim).

c) Florida Creates A Presumption Of Death

On PP. 65-66 of his brief, Hoskins argues that the death penalty act 'creates a presumption of death where, but a single aggravating circumstance appears." This claim is procedurally barred and, alternatively, foreclosed by binding precedent. *Hunter, supra,* (rejecting identical claim).

d) Florida Unconstitutionally Instructs Juries Not To Consider

Sympathy

On pp. 66-67 of his brief, Hoskins argues that the anti-sympathy jury instruction is unconstitutional. Despite Hoskins' claim to the contrary, this claim is procedurally barred because it was not raised at trial. In fact, the arguable anti-sympathy jury instruction was given at the request of the defendant. *(R 2540-41).* No issue is preserved for review, and it would make no sense at all to allow the defendant to seek reversal of his sentence because the instructions that he requested were given. Moreover, even had this claim been preserved for review, it has been expressly rejected by this Court and the United States Supreme Court. *Hunter, supra;* Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).[38]

e) Electrocution Is Cruel and Unusual

On pp.67-68 of his brief, Hoskins argues that death by electrocution is cruel and unusual punishment. This claim is procedurally barred from review because it is not properly preserved. Moreover, even had this claim been preserved, it is foreclosed by binding precedent. *Hunter, supra; see also,* Buenoano

[38] Hoskins relies on the Circuit Court of Appeals opinion that preceded the United States Supreme Court decision in *Parks*. Despite Hoskins' claim, ***Parks* directly** rejected the anti-sympathy claim.

v. State, 565 So. 2d 309 (Fla. 1990).

THE CROSS-APPEAL

THE TRIAL COURT INCORRECTLY DECIDED THAT THE COLD, CALCULATED AND PREMEDITATED AGGRAVATOR WAS NOT PRESENT

The State gave timely notice of cross-appeal of the sentencing court's determination that the cold, calculated and premeditated aggravating circumstance did not apply to Hoskins' case. *(R 2621)* The trial court's rationale, as expressed in the sentencing order, was that the State had not proven that the degree of premeditation exceeded that necessary to support a finding of premeditated first-degree murder. (*R* 2592) The State submits that this aggravating circumstance is well-established under the precedent of this Court, and that the trial court should have found this aggravator, in addition to the ones that were found.'

In *Jackson v. State,* this Court found the standard jury instruction on the cold, calculated and premeditated aggravator to be constitutionally deficient. *Jackson v. State, 648* So.2d 85, 89 (Fla. 1994).[39] However, this Court also set out a jury instruction

---

[39] *Jackson* was decided after the first penalty phase. The fact that ***the pre-Jackson*** CCP instruction was given to the jury is apparently why the trial court granted the motion for a new penalty phase.

defining that aggravator for use until such time as a new standard instruction could be adopted. ***Id.*** That instruction defines the CCP aggravator as follows:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold, and calculated, and premeditated, and that there was no pretense of moral or legal justification. "cold" means the murder was the product of calm and cool reflection. "Calculated" means the defendant had a careful plan or prearranged design to commit the murder. "Premeditated" means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. A "pretense of moral or legal justification" is any claim of justification or excuse that, though legally insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

Id., at n.8. When that definition of the CCP aggravating circumstance is applied to the facts of this case, there is no doubt that this aggravator should also have been found to exist.

The victim in this case, Dorothy Berger, lived next door to Hoskins, and presumably knew and could identify him. (*TR* ***796)*** All of the evidence establishes that Ms. Berger was alive when she was taken from her home. See, e.g., ***R 2591.*** Because no substantial amount of blood was present in the residence, and all of the evidence is that the wounds suffered by Ms. Berger bled profusely, the only possible conclusion is that Hoskins took Ms. Berger from

the house with the intent to kill her at some other (unknown) location and then dispose of her body. Furthermore, the fact that MS. Berger was tied up and gagged establishes beyond a reasonable doubt that she was alive when Hoskins put her into the trunk of her own car. If she had not been alive, Hoskins would have had no reason to restrain her in such a fashion. The presence of multiple defensive wounds also indicates that Ms. Berger was conscious and struggling with Hoskins--there can be no doubt that she saw her attacker well enough to allow her to identify him. No inferential reasoning is required to conclude that Ms. Berger was killed somewhere other than in her home. Likewise, no inference is required to conclude that Hoskins had more than ample time to reflect on his plan before he carried it out.

Florida law is well-settled that heightened premeditation (as set out in the ***Jackson*** jury instruction) is required before the CCP aggravator can be found. That sort of premeditation exists in this case. Even if the crime did not begin as a murder, and even if it began as a caprice, Hoskins' actions in restraining and gagging the victim and transporting her away from her house to kill her and dispose of her body clearly indicate premeditation far beyond that which is required for premeditated first-degree murder. See, e.g., *Wickham* ***v. State,*** 593 So.2d 191 (Fla. **1991**). In other words, this

crime, at the very least, escalated into a "highly planned, calculated, and premeditated effort to commit the crime" *Id.*, at 194, which began (at the latest) with the abduction, continued with the beating and strangulation of the victim, and ended with the burial of her body. The facts of this case indicate a high degree of planning and premeditation, and this prong of the CCP aggravator exists beyond a reasonable doubt.

The cold and calculated components of the CCP aggravator are also well established by the evidence. There is no doubt that the murder of Ms. Berger was the product of cool, calm and dispassionate reflection, given that Hoskins had ample time to contemplate the killing of his victim as he drove toward Georgia with her in the trunk of the car.[40] Moreover, the injuries sustained by the victim indicate that Hoskins was likely kneeling on her chest when he strangled Ms. Berger. (*TR 1305-7*) The murder was anything but accidental--it was the product of a careful plan to avoid detection, not the "rage reaction" Hoskins tries vainly to depict.[41]

---

[40] The exact location where the murder finally occurred is unknown--the only thing that is certain is that Ms. Berger was alive when Hoskins took her from her home.

[41] The fourth component of the CCP aggravator, the absence of a pretense of moral or legal justification, requires only brief mention. There is nothing at all in the record that remotely suggests any justification at all.

The trial court should have found the cold, calculated and premeditated aggravator in addition to the two aggravators that were found to exist. The murder of Ms. Berger was the product of a cold, calculated and premeditated plan by Hoskins to eliminate the only witness to his crimes. The level of premeditation present in this case far exceeds that required to support a verdict of premeditated murder, as evidenced by Hoskins' deliberate strangulation murder of his victim followed by his disposal of Ms. Berger's body in a remote area. This crime falls within the definition of the CCP aggravator beyond a reasonable doubt. This Court should apply that aggravator in addition to those found to exist by the sentencing court.

CONCLUSION

Based upon the foregoing arguments and authorities, the State submits that Hoskins' convictions and death sentence should be affirmed in all respects.

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Kenneth S. Nunnelley
Fla. Bar # 0998818
Office of the Attorney General
444 Seabreeze Boulevard
5th Floor
Daytona Beach, Florida 32118
(904) 238-4990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to James R. Wulchak, Chief, Appellate Division, Assistant Public Defender, 112 Orange Ave., Suite A, Daytona Beach, Fl. 32114 this 13th day of February, 1996.

Of Counsel