IN THE SUPREME COURT OF FLORIDA

PAUL ANTHONY BROWN,

Appellant,

v. **CASE NO. 89,537**

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE
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ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0438847
444 Seabreeze Boulevard
Suite 5
Daytona Beach, Florida 32118
(904) 238-4990

COUNSEL FOR APPELLEE

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STATEMENT OF THE FACTS

The first degree murder trial of Appellant, Paul Anthony Brown, began on October 15, 1996 before the Honorable R. Michael Hutcheson, judge of the Seventh Judicial Circuit Court in and for Volusia County, Florida. (R 601). Martha Doak, the executive housekeeper at the Plantation Island Time Share Resort in Ormond Beach, Florida, testified to her discovery of the body of Brown's victim, Roger Hensley. (R 657 - 671). Mr. Hensley's body was discovered on November 6, 1992 in room 223 of the resort where he worked as a subcontractor. (R 660). When Ms. Doak entered the unit, she walked into a hall and "there was a breadspread laying in the hall, . . . and I noticed there was blood on it. Then I noticed the gentleman laying in the room." (R 659). The man's body was laying on its stomach, and she saw only the back side of it. (R 670). Ms. Doak reported what she had seen to "upper management," and the police were called and arrived shortly. (R 659).

Ormond Beach Police Officer James Gogarty responded to the crime scene. (R 675-676). He authenticated several photos of the crime scene, showing Mr. Hensley's body, the murder weapon and another knife, items taken into evidence, and numerous areas of blood spatter. (R 677-686). A baggie containing "a green, leafy substance" which the investigators "presumed to be marijuana" was found in the room. (R 687). Officer Gogarty recovered "some of the victim's property" which "had been found on a street corner in Daytona," including Mr. Hensley's driver's license. (R 689).

Roy VonHof testified that Mr. Hensley was employed by his company, Gemstone Concrete Coatings, as "a cement finisher and mechanic. (R 702, 703). The truck Mr. Hensley drove was purchased by Mr. VonHof and belonged to the company. (R 703-704) Mr. Hensley was the only one, other than Mr. VonHof or his son, who had permission to possess that truck. (R 705). Certainly, neither Brown, nor his cohort, Scott McGuire, had such permission. (R 705). The truck was licensed in Pinellas County, Florida and had a Florida tag on it. (R 705). In response to a telephone call from law enforcement authorities in Tennessee, Mr. VonHof's son traveled there and retrieved the truck. (R 705).

Audrey Hudson testified that she worked for a Texaco convenience store in Morrow, Georgia in November, 1992. (R 707). Two men pumped $11 worth of gasoline into the white pickup truck identified at trial as Mr. Hensley's and drove away without paying for it. (R 708, 711). One of the men, who "appeared to be a little nervous," left her a Florida ID with a picture on it that did not match the person who gave it to her. (R 709, 710). Ms. Hudson called the police and turned the ID over to them. (R 710). She identified it at trial. (R 709-710).

Morrow Police Department Officer David Erickson testified that he "took a theft report from [Ms. Hudson] at the gas station where she worked." (R 713). He identified the Florida ID card shown to, and identified by, Ms. Hudson as the one she gave him. (R 714).

FBI Special Agent James Harcum, Jr. testified that on November 8, 1992, he arrested Brown in a small Macon County, Tennessee town

called Bugtussel "on a matter unrelated to this case." (R 740, 741). At the time of his arrest, Brown possessed "a .380 Bryco model 48 semiautomatic pistol." (R 742). "[A] white 1987 Nissan pickup truck" was "parked beside the residence" where Brown was arrested. (R 742). Agent Harcum found a current "wage statement . . . for a Roger Hensley" in "a black tool box . . .." (R 742, 743). Agent Harcum identified Mr. Hensley's truck as the one he found at the house where Brown was arrested. (R 744). He noted that when he found the truck, it had a Tennessee tag on it. (R 744). When the agent called the company listed on the wage statement, Gemstone Concrete, he "found out that the truck was last known to be in possession of a Roger R. Hensley whose body had been found at the Plantation Inn in Ormond Beach, Florida and that he had been murdered." (R 746). Agent Harcum identified Brown. (R 747).

FBI Special Agent Robert Childs transported Brown from the scene of his arrest in Tennessee to jail. (R 747, 749). At the jail, he took the tennis shoes that Brown had been wearing. (R 749). The agent identified them at trial, and they were admitted as State's Exhibit 9. (R 750-751). At the time he took the shoes from him, Brown "mentioned that I guess you'd taken them in for evidence." (R 751).

The following day, Monday, November 9, 1992, Agent Childs interviewed Brown. (R 753). Over defense objection, the agent testified that Brown "admitted to murdering a white male in a motel room in Daytona Beach, Florida on approximately November 4 of

1992." (R 754-757, 758). Brown said "that he committed this murder with another person; Scott." (R 758-759). He added: "I'm a murderer, not only a bank robber."[1] (R 759).

Brown went into more detail, explaining that he and Scott had lived together in Brown's room for about two weeks. (R 759). "[T]hey didn't have transportation to get out of Florida. And so they -- on approximately November 4, 1992, they needed a car." (R 760). According to Brown, "Scott said that they should go to a gay bar, get a car, and kill the guy who owns the car." (R 760). In accordance with this plan, the two men "traveled . . . to a gay bar. They met this guy, who was gay, who gave them a ride in his white truck, the same truck that was at the farmhouse when he was arrested in Tennessee." (R 760). Although Brown did not recall the man's name,[2] the three of them went to his "expensive motel" room "on the beach." (R 760, 761).

Brown claimed that "after they smoked some crack in the apartment, that the gay guy went into his bedroom and laid down on the bed . . .." (R 761). He and Scott went to the kitchen and got knives. (R 761). Brown added that he "didn't really want to do it but Scott talked me into it." (R 762). The two entered the bedroom, "and the gay guy asked Brown to lay down with him and do

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[1] The "bank robber" part of the statement referred to the "unrelated matter" for which Brown had been arrested.

[2] Brown described the man "as about 50 years old, five foot seven, 190 pounds, and he had brown-gray hair." (R 761).

some things. And Brown stated no way." (R 762). Brown claimed that "[a]t that point," he

> stabbed the guy in the chest approximately two to three times. He rolled over to his side, and I stabbed him once in his back. When he rolled onto the floor, Scott, reaching down, took his knife and slit his throat. . . . the blood was squirting all over the place.

(R 762).

Brown added that "Scott tried to wipe the fingerprints off the knives and the motel room." (R 762). However, Brown reported that "he had left his fingerprints on the table, windows, and television."[3] (R 762). Brown claimed to have "gotten blood on himself but he didn't think Scott had gotten any on him, and that he burned the pants that had the blood on them in the stove at the farmhouse in Tennessee." (R 763).

Brown said that he "took $20 from the victim's wallet," and "[b]oth he and Scott got the keys to the white Nissan truck, and then they got in the truck and proceeded to leave town." (R 763).

Brown related that the men stopped "just south of Atlanta" because "they ran out of gas," and "they filled the truck full of gas at a Texaco gas store . . .." (R 764). Brown tried to talk his way out of having the theft immediately reported to the police, and he "left Scott's Florida identification card with them for a show of good faith." (R 764).

According to Brown, Scott stayed at the farmhouse until

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[3] Brown said that he 'and Scott were in the man's room for "approximately 45 minutes." (R 762-763).

November 7th, when "he got mad at Scott and told him to leave." (R 765). "Scott left without saying anything." (R 765). Brown described Scott in detail. (R 766).

Brown commented about the tennis shoes he was wearing when arrested: "[H]e stated, I've worn them a real long time." (R 766). Although Brown did not write out the statement, he read and made corrections to it prior to initialing and signing the form. (R 767).

Agent Childs testified that throughout the interview, and when reviewing the written statement,, reading it, making corrections, and initialing and signing it, Brown appeared to understand what was going on and was talking, and behaving, rationally. (R 770). He was "sober and coherent," and there was no hesitation or any confusion shown by Brown. (R 770-771). Agent Childs identified Brown at trial. (R 771-772).

On cross, defense counsel asked whether Brown was being treated for withdrawal from cocaine addiction. (R 772). Agent Childs said that he was not aware of any such thing, but "it's possible." (R 773). On redirect, Agent Childs testified that Brown exhibited no symptoms or signs of cocaine withdrawal, or anything that would lead one to believe that there was any problem. (R 774). Specifically, he was not trembling, shaking, or in and out of consciousness. (R 774). Further, in addition to telling the agent that he understood his rights and wanted to talk to him, Brown appeared "[v]ery" eager and interested in speaking with the agent about the murder. (R 774). There was no indication that

Brown had been doing cocaine on November 8th or 9th. (R 774, 775).

On recross, defense counsel asked if on the date of his arrest, the agency gave Brown alcohol. (R 776). The agent replied that "[h]e was given a shot of whiskey. That was part of the negotiation to get him out of --." (R 776). The prosecutor complained to the judge that counsel had opened the door to a matter which had previously been ruled inadmissible. "I think at this point I'm entitled to explain why he was given whiskey and what the negotiations were about." (R 777). The judge agreed that "the door has been opened enough to allow you to get in at least to the standoff . . .," but he did not permit evidence of the bank robbery that led to the standoff and Brown's arrest.[4] (R 777). The court ruled that the State could "say there was a standoff, he had a firearm, and that it lasted over two hours." (R 780). Agent Childs' redirect testimony comported with the ruling. (R 782-783). It was also established that Brown was given "[a] capful," and the interview did not occur until the following day. (R 783).

FBI Special Agent John Grant testified that he was involved in transporting Brown from jail to the FBI office to be fingerprinted. (R 788). Agent Grant said that Brown "initiated the conversation with us," and he spoke about his involvement in the murder of a

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[4] The judge explained: "I would think to a layperson, like a jury, they might think that's kind of an unusual procedure, for them to give a suspect alcohol and then question him. You know, leaving the inference that maybe they were trying to, quote, loosen his tongue, so to speak. So over objections, I'm going to allow the state to get into that." (R 778).

Daytona Beach man around November 4, 1992. (R 790). "He stated that, I'm a murderer, not only a bank robber." (R 791). He proceeded to relate the events of the murder as testified to by Agent Childs. (R 792-793). He too, heard Brown say that "he had been wearing those shoes for a long time." (R 793). Likewise, he saw Brown read, initial, correct, and sign the written statement. (R 795). Finally, the agent said that Brown appeared to understand what was happening, that he was sober, coherent in terms of both speech and behavior, and that he gave no indication that he was confused or unaware of what he was discussing. (R 796). He also identified Brown at trial. (R 797).

Ormond Beach Police Department Corporal Henry Osterkamp reported to the scene of the murder and found "[t]he room was pretty much in disarray." (R 800). There was a body in the bedroom, and "[t]hat room was in total disarray." (R 800). "There was a lot of blood present," and "[i]n the bathroom area, there was blood, footprints on the . . . tile floor." (R 800).

Two knives were recovered from Unit 223. (R 803). Both were found in the living room, and they "were similar in shape and design. However, one was normal. It was clean . . . [a]nd the second knife was covered with . . . blood." (R 803). The bloodied knife was found under a cushion. (R 810).

There was an area off the living room which could be accessed through sliding glass doors. (R 806). "The so called balcony area is probably no more than 2 feet in depth," although a person "could actually stand on there and close the sliding glass doors behind .

. . . (R 807).

Corporal Osterkamp traveled to Tennessee to serve an arrest warrant on Brown and "to collect evidence or to obtain evidence from the FBI that they had collected." (R 802). He returned with a pair of basketball shoes taken from Brown after his arrest. (R 802).

Florida Department of Law Enforcement Officer Steven Miller testified that after Brown's arrest, he became aware that there was another person involved in Mr. Hensley's murder. (R 816, 820). Using the information provided by Brown in his November 9th written statement, he tracked down Scott McGuire, Brown's cohort. (R 821). He spoke with Mr. McGuire on February 15th at the Volusia County Branch Jail. (R 826). At that time, Mr. McGuire gave a detailed statement of his involvement in Mr. Hensley's murder.

Scott McGuire testified that in October, 1992, he moved into Brown's room "for approximately two weeks." (R 856). The men lived at "the Tropicana on A1A." (R 856). Brown wanted to go to "[s]omewhere in Tennessee." (R 857). Brown indicated that "he was going to steal someone's car using a gun . . ." which he had shown Mr. McGuire. (R 857).

On "November 4, November 5 . . . of 1992," the men "were walking around all night . . . looking for a car." (R 858). Brown "met someone and motioned for me to step over to the vehicle . . . a truck . . .." (R 858). This occurred "across the street from a gay bar." (R 859). Brown was armed with "his pistol" which he removed from "his waistband," and held it "between the back of the

seat and the back of the truck, behind the driver [Mr. Hensley]. (R 861). The men drove around for "a good 20 minutes to a half hour," and then went to Mr. Hensley's building. (R 862, 863). As they walked up the walk, "Brown said to me in a hushed voice . . . how would you like to do it? . . ." (R 863).

Inside unit 223, Mr. Hensley "offered myself and/or Mr. Brown a job . . . manual labor making $6.50 an hour." (R 863). Mr. McGuire thought that "was a pretty good offer, and being as I was unemployed at the time, I was going to take the man up on his offer." (R 864).

Mr. Hensley went to his kitchen and returned to the two men in the living room "with a round of beer for us." (R 864). They "started talking a little bit." (R 864). Later, Mr. Hensley produced "half a rolled up joint," and the three men smoked it. (R 864). There was no cocaine or other drugs of any kind. (R 865).

Mr. Hensley then "started talking about sleeping arrangements." (R 865). He "emptied out his pockets . . . a couple of one dollar bills he laid down on the table. He said I don't know what you guys' game is. If you've come here to rob me, this is all the money I have. You can take it." (R 865). Both men tried to reassure Mr. Hensley that they were "not here to rob him." (R 865).

Mr. Hensley went to his bedroom and laid down. (R 865-866). "Brown started to say something, and then he motioned for us to step out on the . . . small balcony behind a closed sliding glass door." (R 866). Brown said that "he intended to shoot this man

and steal his truck." (R 866). Mr. McGuire "tried to talk him out of shooting him," pointing out "the gun will make a loud noise . . . and the police will be here." (R 866). Mr. McGuire tried to talk Brown into leaving. (R 866-867). Brown became upset with Mr. McGuire and "walked away from me and went back inside." (R 867).

Mr. McGuire went back inside and announced his intention to leave. (R 867). Brown went into the kitchen, and Mr. McGuire could hear "him just shuffling around in the kitchen area. I thought he was scrounging around just looking for another beer or something to eat . . . . He came back and he had in his hand two steak knives, and he tried to hand me one of them." (R 867). Mr. McGuire first took the knife, and then threw it to the floor, throwing up his hands, stating "I don't want no part of what you got on your mind." (R 868). "It was obvious that he wanted to kill this guy for his truck." (R 868). Again, Brown became angry with Mr. McGuire, and "in a very whispered level," he said "that he didn't need my assistance, that he could take care of this gentleman by himself." (R 868). Brown "made a motion with his hand across his throat like he intended to kill him." (R 869).

Mr. McGuire could see Mr. Hensley "laying down on his bed with his eyes closed." (R 868). Brown told him "if he gets out of the room, not to let him get to the door." (R 869). Mr. McGuire responded "that he was on his own," and "walked away and went back and sat down on the couch. And Mr. Brown went into the man's bedroom." (R 869).

From the couch, Mr. McGuire

> heard what sounded like stabbing sounds, and then I heard this gentleman say something to the effect of, no. And then I heard a tumble on the floor. . . . I got up . . . and walked over to the doorway and saw this gentleman on the floor, bloodied.[5]

(R 869). Brown "was running through the man's bedroom looking for the keys to his truck. . . . [H]e was throwing stuff around and asking, where are the keys, where are the keys." (R 870). Brown found Mr. Hensley's wallet, "and he opened it up and found a $20 bill in it. He called the guy a liar saying he didn't have any money." (R 870).

Although Mr. McGuire did not go into the bedroom, he "stayed right there at the door looking in." (R 870). Throughout this time, he could hear Mr. Hensley making sounds "like he was struggling to breathe, 'gasping his last breaths." (R 871).

Mr. McGuire returned to the living room and began wiping his fingerprints from things he had touched, including the knife Brown had handed him. (R 871, 872, 873). However, it was "another 10 minutes, 15 minutes" before they left the unit. (R 872). "It took him a while to find the keys . . . [a]nd he might have tried to clean himself up. He was an awful mess. He might have used the bathroom." (R 872). Brown had "quite a bit of blood splattered on his clothes and his hands and arms." (R 872). There was none on Mr. McGuire. (R 872).

The men left the building, and drove away in Mr. Hensley's

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[5] At this point, "[o]ne to two minutes" had passed since Brown had entered the room. (R 871).

truck. (R 873). Mr. McGuire drove because Brown had no driver's license. (R 873). Prior to the assault on Mr. Hensley, Mr. McGuire had sold Brown one of his state ID's, noting that although they "really didn't look alike," Brown "didn't seem to care." (R 874). The men "collected our personal belongings and we left town." (R 875).

On the trip to Tennessee, Mr. McGuire "suggested we go to a gas station, get a tank of gas, fill it up, and leave." (R 875). Brown went to talk to the attendant and "handed her my state ID . . ." (R 876). The men left and drove to "some shack" "back in the woods" "almost to the Kentucky border." (R 876). Brown's uncle and his girlfriend were there. (R 876). The next day, on a Saturday afternoon, "I left by myself on foot." (R 876).

Shortly thereafter, Mr. McGuire "was stopped for a routine ID check, and the officer discovered there was a warrant issued from Florida for a failure to appear on a possession of a controlled substance . . .." (R 877). Mr. McGuire first told a version of events "that left me out of the motel where this took place altogether." (R 878). When the officers indicated that they did not believe him, he told them the truth, as he did at trial. (R 878, 894).

Mr. McGuire testified that he pled guilty to second degree murder and stipulated to an upward departure from 22 years to 40.[6]

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[6] Mr. McGuire said he did not believe he was guilty of murder, but his attorney "informed me because we stole this truck, in the course of that felony, this murder was committed by Mr. Brown. And being as I was with him at the time in the apartment, that one is

(R 879). A condition of the agreement required him to "come back and testify to the truth of what happened." (R 879). Mr. McGuire had two prior possession of controlled substances convictions and a prior conviction for petit theft. (R 880). On cross, Mr. McGuire testified that he believes that he "wound up with way more time than I should have . . .," and feels like he got 40 years and a murder conviction for simply stealing a truck. (R 891). Nonetheless, Mr. McGuire honored his agreement with the State to testify truthfully. (R 891-892).

On cross, Mr. McGuire said that he and Brown "usually partied" during the two weeks they were together, and that they consumed a lot of alcohol and did drugs. (R 884). He said that it is "pretty true" that they did crack cocaine "pretty much every day." (R 884). However, he did not have any cocaine on the day of the murder, and to his knowledge, neither did Brown. (R 895). Further, they had "had very little to drink all day," and Brown appeared coherent and knowledgeable of what he was doing when the murder occurred. (R 895-896).

Regarding the existence of a plan, Mr. McGuire said: "Well, it appeared that he had some kind of plan in his mind that he wanted that gentleman dead and* he wanted to take his truck. And he wasn't going to leave unless he did." (R 897). He said that he did not leave when Brown persisted in his murder scheme because "we were

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just as guilty as the other." (R 889). This was the basis of his plea. (R 889).

approximately ten miles at least from our motel . . ." and "I thought I had him talked out of it when I told him don't shoot him." (R 898). Mr. McGuire denied threatening to frame Brown for the murder. (R 893).

Leroy Parker, a Florida Department of Law Enforcement Crime Lab Analyst Supervisor, was accepted as an expert "in the area of crime scene flexion and blood stain pattern analysis." (R 994). Mr. Parker reported to the crime scene on November 6, 1992 and photographed various blood impressions, including shoe impressions in blood. (R 995, 997). He "collected two knives," and "[t]he one that was on the cushion was blood stained."[7] (R 998). Also collected were "items, bottles, Budweiser bottles, and a drinking glass." (R 1002). Fingerprints were lifted from some of these items. (R 1003). Mr. Parker identified photographs of "shoe impressions, in blood on the floor" in the hallway of the victim's home and "in the bathroom . . .." (R 1008, 1009). Mr. Parker testified that the body was found "close to the entranceway to the bedroom." (R 1010). Mr. Parker opined that "a fingerprint in blood or a shoe impression in blood is usually the best evidence you have , , , [b]ecause . . . that individual was present at the time of bloodshed or before the blood had a chance to coagulate." (R 1021).

Mr. Parker testified that he "analyzes the blood stains to

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[7] This knife "was visible with the cushions . . . the handle was sticking up . . , [i]t was embedded in some clothing." (R 1006).

determine the sequence of events." (R 1015). He opined that the stain evidence was consistent with the knife having gone into Mr. Hensley as he lay on the bed. (R 1024). "[T]he force of the impact started on the outside of the bed, and so the victim was moving over . . .." (R 1026). There was "spatter blood" on the "two nightstands on either side of the bed." (R 1026). Mr. Parker testified that Mr. Hensley moved around before falling down, losing consciousness, and expiring. (R 1026).

David James Perry, a "latent print identification" expert of the Florida Department of Law Enforcement testified to the fingerprint identification. (R 1027, 1028, 1030, 1031). Mr. Perry "found one latent fingerprint on the Budweiser bottle" taken from the crime scene which belonged to "Paul Anthony Brown." (R 1031). There were "no prints of comparison value present . . . on the knife." (R 1034).

Senior crime laboratory analyst with the Orlando Regional Crime Laboratory, Jenny T. Ahern, was admitted as "an expert in the area of footwear impression analysis." (R 1036, 1040-1041). She compared the shoes taken from Brown with the bloody footprints found at the crime scene. (R 1041, 1046-1047). She testified that the crime scene footprints were "positively" made by Brown's shoes. (R 1047).

Margaret Carla Tabor of the Orlando Regional Crime Laboratory was admitted as an expert in forensic serology. (R 1050-1051). Ms. Tabor testified that blood of the type of Mr. Hensley's blood was present on Brown's shoes. (R 1051, 1052-1054). Only 1.5% of

the Caucasian population would have Mr. Hensley's blood type. (R 1054). Ms. Tabor determined that the blood on one of the knives was human blood. (R 1055, 1056).

Medical Examiner Ronald Lindsay Reeves was admitted as "an expert in the area of forensic pathology." (R 1057, 1062). Mr. Reeves concluded that "Mr. Hensley died as a result of being repeatedly stabbed with a sharp instrument." (R 1067). He also had "abrasions or scrape marks on his face, his nose, around his mouth," and "incised wounds, wounds that are . . . longer than they are deep across various portions of the neck." (R 1067). Three of the stab wounds punctured the heart. (R 1076). There were also stab wounds to the neck, abdomen, back, and left shoulder. (R 1067, 1076, 1077, 1078, 1083). "[T]here were four wounds that would normally be individually . . . fatal . . ." if medical attention were not immediately available. (R 1067-1068). Three were into the heart, and one punctured the lung in the back. (R 1084). Mr. Hensley had been stabbed nine or ten times. (R 1077). The doctor examined one of the knives found at the crime scene and determined that it was "consistent with the stab wounds and the incised wounds." (R 1071, 1085).

Dr. Reeves testified that the stabbing "didn't happen when the body's just laying there. . . . [T]he victim was moving, during the time he was being stabbed. II (R 1082). Although the doctor did not see any defensive wounds, "there was movement of the victim . . . getting from one place to the other." (R 1087, 1088). Mr. Hensley "probably didn't become unconscious or die for a couple of

minutes." (R 1088). The doctor opined that the testimony "about Mr. Hensley lying on the floor, gasping for breath, and breathing heavily" was "certainly" consistent with the last few minutes of his life. (R 1088). He gave his "expert opinion" that the victim "was alive and conscious when he was being stabbed to death." (R 1089).

After the State rested its case, and the judge denied the defense motion for judgment of acquittal, Brown testified. He said that he was "twenty-five," from "Tennessee," and "on vacation" when he met Scott McGuire in Daytona Beach. (R 1112, 1114). He and Mr. McGuire lived together "approximately about two weeks." (R 1114). Brown claimed the two of them dated women, "drank a lot," and did "a lot of cocaine . . . [j]ust about every other day." (R 1115).

On the day of the murder, he and Mr. McGuire were "walking by a bar" "between 11:00 and 11:30," and Mr. McGuire "striked [sic] up a conversation with a gentleman," Mr. Hensley. (R 1117, 1119). Mr. Hensley agreed to give them a ride to their motel room. (R 1117). Brown claimed that at that time he "was pretty much intoxicated . . .." (R 1117). He said they could not remember how to get to their motel, "[s]o the gentleman suggested that we could stay at his house." (R 1118).

Mr. McGuire was "talking about a job" working with Mr. Hensley, and Brown asked if "it was all right that I slept on the couch." (R 1118). At that point, Brown was "a little high," but "not much . . .." (R 1118).

According to Brown, Mr. Hensley and Mr. McGuire "fired up some

marijuana." (R 1119). Brown "basically kind of dozed off . . .." (R 1119). Mr. McGuire awakened him by "shaking the side of my arm." (R 1120). "Mr. McGuire had a knife in his hand with blood all over it." (R 1120). Brown got "up off the couch, and when I move [sic] around the 'couch to the hallway there, I happened to look down, and McGuire had stabbed Mr. Hensley in the back one time . . .." (R 1120). "McGuire proceeded to take the gentleman by his hair, and he had his head up and was trying to cut on the guy's throat. So at this time, I just started screaming, I said, hey, and I kicked McGuire right here in the shoulder back up off the gentleman, Mr. Hensley." (R 1121).

Brown claimed that he "reached down to Mr. Hensley and I said, are you going to be okay?" (R 1122). He "lifted him up, and it was just too late for him, I seen more . . . blood on his chest," and he was "not moving." (R 1122).

Brown claimed to have injured his hand and "could not defend myself." (R 1122). He said he "was very scared," and was trying "to talk my out of the situation." (R 1122). As he argued with Mr. McGuire, "he was tearing this gentleman's property up . . .." (R 1122).

Brown claims to have seen Mr. McGuire "cleaning a beer bottle off on the table" as he exited the apartment. (R 1123). He "walked out of the motel" and "down the sidewalk . . .." (R 1123). "[A] hundred yards" from the condo, "Mr. McGuire had pulled up beside me in Mr. Hensley's car -- I mean truck." (R 1123). Mr. McGuire "opened the door" and told him, they "got to get out of

here." (R 1123). Brown "decided to get in the truck with Mr. McGuire and made the statement for him to carry me to my motel room." (R 1123). Brown admitted that there was nothing wrong with his legs which would have "prevented you from running away from him, from the scene." (R 1137).

Brown claimed that Mr. McGuire threatened that "if I ever told anybody that what had happened that night, that he had fixed things where he could frame me for the murder that he committed." (R 1123). However, Brown "never would believe that he could do that to me." (R 1124).

Brown said that he had enough money for a bus ride back to Tennessee and denied offering McGuire $1,000 to drive him home. (R 1114). However, he rode to Tennessee with Mr. McGuire in Mr. Hensley's truck. (R 1125). He admitted talking to the gas station attendant in Atlanta, on the way to Tennessee, and giving her "his ID." (R 1125).

Mr. McGuire stayed with him at his friend's house, met his uncle, and went into town and "bought some more cocaine . . . drank a little beer . . .." (R 1125-1126). He split with Mr. McGuire "on a Saturday . . ." after the murder. (R 1126). He was arrested the next day. (R 1126). Brown admitted that Mr. McGuire left Mr. Hensley's truck, which according to his version of events, Mr. McGuire had planned, and murdered, to steal. (R 1139).

Brown admitted that he had a gun while in Daytona, but denied having it with him on the night of the murder. (R 1126). He said that it was the same .380 firearm that he had in his possession

when he was arrested in Tennessee subsequent to the murder. (R 1128).

Brown said that although he told the authorities "something to the extent of what happened, . . . it was nothing to the fact that was in that [his] statement." (R 1127). Despite remembering all other details concerning the day of his arrest, he claimed not to remember "making the statement that I did make to the FBI."[8] (R 1129). He admitted that at no time previously, even while "using drugs and drinking," had he told people he was "a murderer just simply for no reason at all." (R 1132). Brown identified the initials and the signature on the written statement as his. (R 1134, 1135). Later, he attempted to retract his specific testimony on that issue, stating that he did not admit they were his initials or his signature because "I don't remember doing it." (R 1135).

Brown admitted that he had been wearing the shoes taken from him at the time of his arrest for " [alpproximately maybe a month." (R 1133). He also admitted that he had been convicted of nine prior felonies. (R 1142).

Penalty Phase:

The State presented the victim's brother and sister to testify briefly about the victim. (R 1360-1364, 1364-1366). The defendant also presented two penalty phase witnesses: Donald Brown and Ora

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[8] Later, when pressed by the prosecutor, he changed his testimony to: "I did not make that statement." (R 1131).

Lee Moore. (R 1373-1375, 1375-1384).

Mr. Brown, the defendant's uncle, described him as "a pretty nice kid when he was growing up. He never got in trouble. Never smoked pot or nothing. Never took drugs. He never did drink." (R 1374). He said that changed when Brown's mother married Beaufort Adams. (R 1374). Brown "started getting in trouble and stuff.' (R 1375).

Ora Lee Moore, Brown's grandmother, testified that he was born "out of wedlock" and she "had to take him in and raise him." (R 1376). Brown's mother married when Brown was six months old and "[t]hey took him in as his own." (R 1376). The couple separated and divorced when Brown was "about seven years." (R 1377). Thereafter, Brown's mother married Mr. Adams, and "they were together about a year. Then he went to the pen." (R 1377). When Mr. Adams got out, Brown's mother returned to live with him. (R 1378). Brown lived with his grandmother, Ms. Moore, or with his mother and Mr. Adams for the next few years. (R 1378-1379).

Although Mr. Adams, beat Brown's mother, Ms. Moore did not know whether he had ever beat Brown. (R 1379). Ms. Moore said that Mr. Adams influenced Brown by leading him astray. (R 1379).

Brown's mother had no psychological problems. (R 1380). She had no drug addiction until "right after [Mr. Adams] come out of prison the last time." (R 1380). When Brown was 24 or 25 years old, his mother served five years in prison for a murder she committed on a man who "tried to rape her." (R 1380, 1381, 1382).

Ms. Moore said that she loves Brown "very much" and has

"always been there for him." (R 1383). She agreed that Brown is "a pretty smart man" with "some wits about him." (R 1383). She testified that Brown "knew right from wrong . . ." and knew that stealing, hurting others, and murder is wrong. (R 1383-1384).

SUMMARY OF THE ARGUMENTS

Point I: The trial court properly instructed the jury on the heinous, atrocious, or cruel aggravator. The evidence overwhelmingly established that the instant crime met the HAC standard. The brutal multiple stabbing and cutting of the conscious victim, who tried repeatedly, but futilely, to get away from his attacker before drawing his last gasping breaths as he bled to death was not the clean, quick death which might avoid the HAC label. Neither was Appellant's intent in question. Clearly, he was coherent and well knew what he was doing. The trial judge properly found the HAC aggravator, and his order should be upheld.

Point: The trial court properly instructed the jury on the cold, calculated, and premeditated aggravator. The evidence established a careful plan or design which was the product of cool and calm reflection and was not done in a panic, frenzy, or fit of rage. Indeed, appellant's murder plan even included a backup plan in case the victim got away from him. Clearly, there was no pretense of moral or legal justification for this vicious murder. The trial judge properly found the CCP aggravator, and his order should be upheld.

Poin III: The death penalty imposed upon the appellant in this case is not disporportionate. When the aggravators and mitigators found in the instant case are compared to the same, or similiar ones found in other capital murder cases, it is clear that the death pealty is appropriate. Neither is the death penalty imposed

upon the appellant rendered disporportionate by the lesser penalty levied upon the much less culpable codefendant.

Point IV: The standard jury instructions have been approved by this Honorable Court and challenges to them have been repeatedly rejected. The standard instructions do not denigrate the jury's role in sentencing. Appellant is entitled to no relief on this claim.

Point: Florida Statutes § 921.141 is constitutional. The claims raised in this point have all been soundly rejected by this Honorable Court. Appellant has offered no good reason for reconsidering any of them. He is entitled to no relief.

POINT I

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR OR IN FINDING THAT AGGRAVATOR AT SENTENCING.

Brown misrepresents the standard for determining whether a crime was heinous, atrocious, or cruel. (IB at 13-14). In *Jimenez v. State,* No. 85,014, slip op. at 5 (Fla. Oct. 30, 1997), this Court articulated the HAC standard:

> This factor applies to
>
> torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

(emphasis added).

In *Jimenez,* this Court approved the trial court's finding of HAC. The basis therefor was as follows:

> It is certainly reasonable to infer that during this brutal and torturous attack, after being stabbed in the neck, in the side, and several times in the chest and abdomen, that Ms. Minas must have been aware of what was happening to her, and must have known she was going to die. The killing was not done quickly or painlessly. She lingered at least ten minutes while she bled to death. She suffered in pain and fear, all the while feeling helpless and alone, knowing help was outside her door, but could not get in and she could not even call out to them.

Id.

In the instant case, the trial judge wrote:

> The victim was stabbed multiple times and had his throat cut and bled to death. The victim

> was stabbed three times near the heart, two times in the'shoulder area, two times in the stomach area, two times in the back, had his throat slashed, and had other cuts, lacerations, and abrasions. The victim was alive and conscious during the infliction of these knife wounds and it took two or three minutes for all of the wounds to be inflicted on the victim and after the last wound was inflicted, the victim lived another couple of minutes. The victim was laying in his bed when first attacked and the victim got off the bed in an attempt to avoid the attack and moved around the bedroom attempting to get away from the defendant.

(R 109). The trial court applied the correct rule of law, and competent, substantial.evidence supports the court's finding that the murder was heinous, atrocious, or cruel.

In his brief, Brown "does not dispute . . . the number of stab wounds nor their locations," however, he contends that the state did not prove that the murder happened as recited by the trial court. (IB at 14). Brown concludes that because the victim's "body was found right next to the bed," it "in and of itself, refutes the trial court's fanciful theory." (R 16).

At trial, Brown's confession was introduced into evidence. Therein, Brown stated'that he went into the kitchen and got a knife. (R 761). He went into the victim's bedroom where the man was laying down. (R 761, 762). Brown stabbed Mr. Hensley in the chest two or three times. Mr. Hensley rolled away from him, and Brown stabbed the man in his back. Mr. Hensley rolled away again, and onto the floor. (R 762).

Codefendant McGuire testified that Brown got two knives from the kitchen. (R 867). Mr. Hensley was "laying down on his bed

with his eyes closed." (R 868). Brown went inside the bedroom. (R 869). Thereafter Mr. McGuire heard stabbing sounds coming from the room, and he heard Mr. Hensley cry "no"" (R 869). Mr. McGuire "heard a tumble on the floor . . . walked over to the doorway and saw [Mr. Hensley] on the floor, bloodied."[9] (R 869).

State Witness Parker testified that Mr. Hensley's body was found "close to the entranceway to the bedroom." (R 1010). Mr. Parker said that the blood stain evidence indicated that the knife went into Mr. Hensley as he lay on his bed. (R 1024). This expert testified that Mr. Hensley moved around before falling down, losing consciousness, and expiring. (R 1026).

The Medical Examiner testified that Mr. Hensley had been stabbed nine or ten times. (R 1077). "[T]he victim was moving, during the time he was being stabbed." (R 1082). He was moving, "getting from one place to the other." (R 1087, 1088). The medical expert opined that Mr. Hensley "was alive and conscious when he was being stabbed to death."[10] (R 1089).

The State contends that the evidence related above far exceeds

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[9] Brown was running through the man's bedroom looking for the keys to his truck. . . . [H]e was throwing stuff around and asking where are the keys, where are the keys." (emphasis added) (R 870). Throughout this time, Mr. McGuire could hear Mr. Hensley making sounds "like he was struggling to breathe, gasping his last breaths." (R 871). Mr. Hensley was alive and conscious at this point.

[10] The doctor opined that'the testimony "about Mr. Hensley lying on the floor, gasping for breath, and breathing heavily, was "certainly" consistent with the last few minutes of his life. (R 1088).

the competent substantial evidence standard. ***See Thompson v. State,*** 619 So.2d 261, 267 (Fla. 1993)[Substantial evidence establishing manner of murder is the standard]. It overwhelmingly establishes each fact found, and recited, by the trial judge in his subject order regarding HAC. Thus, there was no error in finding the HAC aggravator, much less in instructing the jury on it.

Further, there is no merit to the claim that because "[t]he attack . . . was sudden" and Mr. "Hensley's death was quick" he did not endure prolonged suffering and therefore the HAC factor was inappropriate. (IB at 16-17). Contrary to Brown's representations, Mr. Hensley was not killed without ever knowing he was about to die. He cried out "No"" just after Brown's savage attack began, and he moved repeatedly, trying to avoid Brown's stabbing blows. Mr. Hensley was alive and conscious while he was being stabbed. Finally, as he lay gasping for breath on the floor of his bedroom with his blood pouring out of 9 or 10 stab wounds, Brown repeatedly asked him where the truck keys were. Certainly, Mr. Hensley knew he was about to die and suffered mightily for a time more than sufficient to meet the requirements of this aggravator.

The above-referenced evidence also refutes appellant counsel's fanciful claim that the victim "may have even been asleep at the time of the attack." (IB at 16). Neither was there any evidence to support his claim that Mr. Hensley's "mind was clouded from alcohol and drug use." (IB at 16-17). The evidence showed that the man had a single beer and shared a half of a marijuana

cigarette with the other men. He conversed rationally with them about several subjects including jobs, sleep arrangements, and sexual preference. Thus the evidence was clearly contrary to appellant counsel's subject claims.

Neither is there any merit to Brown's claim that HAC is not appropriate because there was no evidence that he intended to cause extraordinary suffering. The reasonable inferences from the foregoing evidence are to the contrary. Further, in *Spencer v. State,* 691 So.2d 1062, 1064 (Fla. 1996), this Court rejected a similar argument. There the defendant claimed that HAC did not apply "because his mental impairments negated any intent to inflict pain or suffering on the victim." This Court found "no merit to that argument." Id. Brown's is likewise deficient.

Further, even if the argument were valid, the record facts do not support it. The evidence indicated that Brown did not have any cocaine on the day of the murder and had had little alcohol to drink. (R 895-896). Brown appeared coherent and knew what he was doing when the murder occurred. (R 895-896). Thus, there is no evidentiary support for the claim that Brown's "borderline intellectual functioning coupled with daily use of crack cocaine, consumption of mass quantities of alcohol, and marijuana" significantly affected Brown's ability to form any intent necessary for the HAC factor.

Finally, an HAC instruction is properly given to a jury when there is competent substantial evidence to support it. The

evidence in this case, as recounted hereinabove, more than meets the applicable standard. The HAC aggravator was properly instructed upon and found, and the trial court's order in that regard should be upheld. However, assuming *arguendo* that the HAC instruction should not have been given, the error was harmless in light of the three remaining aggravators and the slight nonstatutory mitigation.

POINT II

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON, AND IN FINDING, THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

There are four elements which must be established in regard to the cold, calculated, and premeditated [hereinafter "CCP"] aggravator. They are that the murder was calculated which "consists of a careful plan or prearranged design" and:

> (1) [T]he killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant exhibited heightened premeditation (premeditated); and (3) the defendant had no pretense of moral or legal justification.

Jackson v. State, No. 87,345, slip op. at 3, 4 (Fla. Nov. 6, 1997). ***See Rogers v. State, 511*** So.2d 526, 533 (Fla. 1987), ***cert. denied,*** 484 U.S. 1020, ___ S.Ct. ___, ___ L.Ed.2d ___ (1984).

In ***Jackson,*** this Court found the defendant's actions to be "cold." Id. At 4. Witnesses had testified "that before the struggle, Jackson appeared calm." Id. She calmly told "her story and cooperated with the officers," and she "was able to devise a plan to catch Officer Bevel off guard . . .." Id.

Brown was likewise calm and cold. Brown had not done crack cocaine that day and had only had one beer and shared a half a joint of marijuana with McGuire and Mr. Hensley. (R 864-865, 895). Brown appeared "coherent" and to know "what was going on in that apartment on that evening when that murder occurred." (R 896).

Further, Brown had formed his plan to rob someone of a motor vehicle and to use a deadly weapon in so doing several days prior to the murder. He and McGuire acted on that plan by searching for the vehicle and pursuant to that plan, Brown found Mr. Hensley. Then, at Mr. Hensley's apartment, Brown devised and fine-tuned his final plan to kill Mr. Hensley and steal his truck. In accordance therewith, he coldly carried it out. Thus, the evidence of Brown's coldness exceeds that of Jackson and is more than adequate to support that element of the CCP aggravator.

In ***Jackson,*** the calculation element **was** established by evidence that "demonstrated that Jackson carefully planned the murder." Id. After observing the officer filling out his report, she went to the apartment and got a gun which she placed in her waistband. She went down to the officer's car and began looking through papers therein. When the officer attempted to arrest her, Jackson hit him in his vest, dropped her keys, and shot the officer in the head. All of the planning for this crime occurred after the officer arrived at the scene and after it became apparent to Jackson that she would be arrested for filing a false police report.

In the instant case, the evidence of a calculated plan to murder Mr. Hensley is even greater than that in ***Jackson.*** In October, 1992, Brown told his roommate, Mr. McGuire, of his plan "to steal someone's car using a gun . . ." which Brown possessed. (R 857). He and Mr. McGuire discussed going to a gay bar, finding a man who owned a suitable car, and killing him for the vehicle.

(R 760). On the night of the murder, Brown and McGuire "were walking around all night . . . looking for a car." (R 858). Brown "met someone and motioned for me [McGuire] to step over to the vehicle . . . a truck . . ." near a gay bar. (R 858, 859). Inside the truck, Brown held his gun "between the back of the seat and the back of the truck, behind the driver [Mr. Hensley]." (R 861).

The men drove around for "a good 20 minutes to a half hour," while Brown led Mr. Hensley on a wild goose chase allegedly looking for his motel. (R 861, 862). When Mr. Hensley tired of this, he took the men to his residence. (R 862, 863). As they walked up the walk, "Brown said to me [McGuire] in a hushed voice . . . how would like to do it? . . ." (R 863).

Inside unit 223, Mr. Hensley and the men conversed for about 45 minutes about various subjects. Mr. Hensley invited the men to sleep at his apartment and went to his bedroom and laid down. (R 865-866). McGuire testified that "Brown started to say something, and then he motioned for us to step out on the . . . small balcony behind a closed sliding glass door." (R 866). Brown said that "he intended to shoot this man and steal his truck." (R 866). McGuire "tried to talk him out of shooting him," pointing out "the gun will make a loud noise . , , and the police will be here." (R 866). McGuire tried to get Brown to leave. (R 866-867). Brown became upset with McGuire and "walked away from me and went back inside." (R 867).

McGuire went back inside and announced his intention to leave. (R 867). Brown went into the kitchen, and when he returned "he had

in his hand two steak knives, and he tried to hand me one of them." (R 867). McGuire threw it to the floor, throwing up his hands, stating: "I don't want no part of what you got on your mind." (R 868). "It was obvious that he wanted to kill this guy for his truck." (R 868). Again, Brown became angry with Mr. McGuire, and "in a very whispered level," he said "that he didn't need my assistance, that he could take care of this gentleman by himself." (R 868). Brown "made a motion with his hand across his throat like he intended to kill him." (R 869).

Mr. McGuire could see Mr. Hensley "laying down on his bed with his eyes closed." (R 868). Brown told him "if he gets out of the room, not to let him get to the door." (R 869). McGuire responded "that he was on his own," and "walked away and went back and sat down on the couch. And Mr. Brown went into the man's bedroom." (R 869).

From the couch, Mr. McGuire heard Brown carry out his grisly plan to stab Mr. Hensley to death and thereafter steal his truck. (R 869-874). After collecting their personal belongings, the men left the state in Mr. Hensley's truck, just as Brown had planned. (R 875). The evidence of a careful plan to murder far exceeded that in Jackson and is more than sufficient to support that element of the CCP aggravator.[11]

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[11] In his brief, Brown is less than candid with this Honorable Court when he argues that the murder was not a part of the robbery plan which Brown and McGuire made earlier in the day, but was merely "`a spur of the moment' idea that the pair began discussing only minutes before the crime." (IB at 28). According to Brown in his confession, the plan discussed by the two men prior to commencing

Regarding heightened premeditation, this Court in ***Jackson*** said:

> Jackson, as indicated by her decision to go upstairs and retrieve a gun, made a deliberate and conscious choice to shoot Officer Bevel. Jackson could have left the scene, but instead she purposely returned to confront the officer.

Jackson, No. 87,345, slip op. at 5. In the instant case, the evidence showed that Brown originally planned to kill Mr. Hensley with a gun. However, after discussing it with McGuire, he made a deliberate and conscious choice to modify his murder plan and use a quieter instrument of death. In accordance with that plan, Brown searched for, and found, a knife. Further evidence of heightened premeditation is that after showing McGuire that he planned to cut Mr. Hensley's throat, he attempted to station McGuire as his backup in case the victim got away from him. After thus attempting to cover his bases, Brown entered the room and consciously and deliberately stabbed and cut Mr. Hensley to death.

Like Jackson, Brown could have left the scene, but instead purposely entered Mr. Hensley's bedroom to confront and kill him. Indeed, in the instant'case, Mr. McGuire tried to talk Brown into leaving, but he would have no part of it. The evidence of heightened premeditation far exceeded that in ***Jackson*** and is more than sufficient to support that element of the CCP aggravator.

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their search for a victim on the day of the crime included killing "the guy who owns the car." (R 760).

Finally, there was no pretense of a moral or legal justification for Mr. Hensley's murder. In *Jackson,* the defendant claimed that she had some kind of mental episode (testified to by defense experts at trial) which caused her to believe the officer was attempting to rape her. At trial, Brown had not a scintilla of evidence of any moral pretense or justification, and he does not offer anything in this regard on appeal. The State contends that there is nothing in the instant record which would support any such claim.

The evidence in the instant case left no doubt that Brown fully contemplated effecting Mr. Hensley's death, and he proceeded according to his well thought-out plan to, and did, cause it.12 All of the elements of CCP were clearly present in the instant case. Thus, the trial judge did not err in instructing on, or finding, that factor.

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Again, Brown attempts to mislead this Honorable Court regarding the evidence adduced below when he states that "the trio had spent several hours continuing to drink and imbibe in marijuana." (IB at 25). The State's evidence showed that Brown had had only one beer and had shared half of a joint of marijuana with the other two men. (R 864). Indeed, McGuire testified that Brown had had little to drink that day and was coherent and knew what he was doing at the time he committed the murder. (R 895-896). In fact, Brown testified that he was "a little high," but "not much," and that it was Mr. Hensley and McGuire who "fired up some marijuana." (R 1118, 1119). In light of the evidence below, the instant claim is false and appears to have been presented to this Court in bad faith. (Appellate defense counsel also represented Brown in the trial court.)

POINT III

THE DEATH PENALTY IS NOT A DISPROPORTIONATE SENTENCE IN THIS CASE.

Brown claims that only two of the four aggravators are valid because "[t]he evidence does not support the trial court's finding of HAC or CCP." (IB at 31). Brown is incorrect in regard to both aggravators as set out in Points I and II, ***supra.*** There are four valid aggravators, not two, and those four, weighed against the insubstantial mitigation clearly render the instant death penalty proportionate. See, e.g., Gordon v. State, No. 86,955 (Fla. Nov. 26, 1997) [4 aggravators - committed during robbery, for pecuniary gain, HAC, CCP - and 3 nonstatutory mitigators - family background, religious devotion, life sentence of codefendant]; Foster ***v. State,*** 654 So.2d 112 (Fla. 1995) [3 aggravators - committed during robbery, HAC, CCP - outweighed 14 nonstatutory mitigators - including abusive family background and alcohol/drug addiction]; ***Castro v. State,*** 644 So.2d 987 (Fla. 1994) [4 aggravators - prior violent felony, committed during robbery, HAC, CCP and 2 nonstatutory mitigators - physical and sexual abuse as a child and alcoholic].

Assuming *arguendo* that the HAC and CCP aggravators were improperly found, the death sentence should still be upheld based on the remaining aggravators. Brown concedes that the prior violent felony and committed-for-financial-gain aggravators are valid. (IB at 31). However, he contends that his prior violent

felony "is not a major, significant offense in the realm of prior records of most capital murderers." (IB at 31). In his estimation, only prior murders or attempted homicides qualify for this aggravator. (IB at 32). The State strongly disagrees.

Brown's attempt to undercut the prior violent felony aggravator by claiming that it is factually too weak to support a death sentence based on this aggravator must fail. His prior violent felony is assault with intent to commit armed robbery. (R 1359). Contrary to Brown's contention, this is a significant offense and is within the realm of prior records of other capital murderers.

In Hunter v. State., *660* So.2d *244, 254* (Fla. 1995), this Court reviewed a trial court's conclusion that the prior-violent-felony aggravator and the committed-during-the-course-of-a-felony aggravator outweighed ten non-statutory mitigators. The non-contemporaneous prior violent felonies were two convictions for aggravated battery, one for shooting into an occupied vehicle, and one for attempted armed robbery. *660* So.2d at 254. This Court held "death is not a disproportionate penalty here." *Id.*

Similarly, in *Blanco* v. *State, No.* 85,118 (Fla. Sept. 18, 1997), the same two aggravators were weighed against one statutory mitigating factor and eleven nonstatutory mitigating factors. No. 85,118 slip op. at 2, 2 n.5. The prior violent felony was a conviction for armed robbery and armed burglary. See *Blanco v. State,* 452 So.2d 520, 525 (Fla. 1984) and *Blanco v. State, 438*

So.2d 404 (Fla. 4th DCA 1983).[13] This Court found Blanco's death sentence proportionate. No. 85,118, slip op at 5.

The trial court found only two nonstatutory mitigators, i.e., family background and use of alcohol and drugs. (R 111-112). Thus, with only the two aggravators which Brown concedes were properly found weighed against the two nonstatutory mitigators, the death penalty is still appropriate. See Davis v. State, No. 86,363 (Fla. Nov. 6, 1997)[2 aggravators - committed during sexual battery and HAC - and 4 nonstatutory mitigators including family background, good person, not violent, and evidence was circumstantial only]; *Blanco* v. State, No. 85,118 (Fla. Sept. 18, 1997) [see, *supra*, at 401; *Shellito* v. State, No. 86,931 (Fla. Sept. 11 1997) [1 aggravator - prior violent felony and pecuniary gain merged and 1 statutory mitigator - age - and 2 nonstatutory mitigators - family background and character]; ***Hunter*** v. State, 660 So.2d 244, 254 (Fla. 1995) [*see, supra,* at 40].

Brown next complains that the trial court rejected his proposed statutory mitigation. (IB at 32-33). The circumstance at issue - whether Brown had the capacity to appreciate the criminality of his conduct and conform it to the requirements of the law was substantially impaired - was carefully considered, and

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[13] Blanco's armed robbery and armed burglary convictions were reversed but he was reconvicted of the subject crimes on March 14, 1984. *Blanco*, ***452*** So.2d at ***525.***

the law was substantially impaired - was carefully considered, and rejected, by the trial court. Brown's actions in planning, preparing for, and executing the crime, including the decision to change an important particular of the crime (switch from gun to knife) shortly before its execution, well support the trial court's rejection of this factor.

Further, any evidence of alcohol and cocaine usage immediately prior to the murder is scant. There is simply no support for appellate counsel's claim that the evidence showed that the instant crime was "committed during a drug and alcohol stupor." (IB at 32). Mr. McGuire said that he did not have cocaine on the day of the murder, and he did not believe that Brown had any that day. (R 895). The two men "had very little to drink all day;" they had a single beer at Mr. Hensley's apartment, and the three shared one-half of a joint of marijuana. (R 864-865). Brown appeared coherent and knowledgeable of what he was doing when the murder occurred. (R 895-896). Even Brown said he was "not much" high when the murder occurred, and the carefully planned and executed murder of Mr. Hensley belies the appellant's claim that he acted in a "stupor."

The trial judge found and weighed Brown's "use of alcohol and drug abuse" as a nonstatutory mitigator. (R 111, 112). In light of evidence showing little usage of either substance on the day of the murder, the judge's refusal to find the diminished capacity mitigator cannot be faulted. Indeed, the evidence clearly showed that Brown had the capacity to appreciate the criminality of his

conduct and conform it to the requirements of the law. It is clear from the sentencing order that the trial judge carefully considered the evidence before the court in deciding that the proposed mitigator was not proved, and the evidence of record clearly supports that determination. Thus, there is no error.

Brown next complains of the trial court's rejection of his proposed mitigator regarding the sentence received by the codefendant. Although Brown concedes that "the trial court accepted the version of the facts exonerating Appellant's co-defendant," he claims, without citation to any authority suppoting the proposition, that "[t]oo often and often too late, subsequent investigation reveals that the death-sentenced co-defendant was telling the truth and 'the actual 'bad actor' has been paroled." (IB at 33). The State strongly disagrees with Brown's hypothesis and further contends that even if it were factual, it does nothing to champion his claim in the instant case.

The trier of fact heard the facts and, as Brown concedes, decided them contrary to his position. Indeed, Brown himself confessed to law enforcement officers that he inflicted the fatal stab wounds on Mr. Hensley. (R 762). At trial, Brown claimed to have discovered that Mr. Hensley had been stabbed to death while Brown slept on the man's couch in another room. (R 1119, 1122). However, the codefendant testified that he saw Brown, armed with a knife, enter the victim's bedroom, heard the stabbing sounds and the victim pleading "No!" and saw Mr. Hensley, lying on his bedroom floor, gasping for breath as the blood poured out and he died. (R

869). Clearly, the trial judge had ample evidence on which to base his conclusion that Brown was the principal actor and the codefendant's role was minor. Where, as here, the defendant was the dominant actor and the one who committed the actual murder, the sentence received by the codefendant is not a mitigating factor. Cole v. *State,* No. 87,337 slip op. At 6 (Fla. Sept. 18, 1997).

Brown next complains that the trial court improperly weighed the mitigating circumstances. "Deciding the weight given to a mitigating circumstance is within the trial court's discretion, and a trial court's decision is subject to the abuse-of-discretion standard." *Id. See Foster v. State, 679* So.2d 747, 756 (Fla. 1996) [Neither will it be reversed "because an appellant reaches the opposite conclusion."] . Abuse of discretion can be found "'only where no reasonable man would take the view adopted by the trial court.'" Cole, No. 87,337, at 4 n.16(quoting *Huff v. State, 569* So.2d 1247, 1249 (Fla. 1990).

In a detailed and well-reasoned order, Judge Hutcheson made it clear that he carefully considered all relevant information and weighed it in a manner consistent with the law of this State. (R 108-112). Certainly, it cannot be said that no reasonable man would take the view taken by the trial judge. Thus, the conclusion he reached - that the aggravating circumstances outweigh the mitigating factors - should be upheld by this Honorable Court.

On appeal, Brown complains that the trial judge did not find his age at the time of the offense in mitigation. The evidence

showed, and the trial judge found, that Brown was 25 years old at the time of the murder. (R 111, 1382). Brown argues that although he "was not a juvenile . . ., he was still a young man . . ." who "never really had a chance to mature." (IB at 33).

The State asserts that Brown was not a "young man" in terms of this potential mitigator. This court has repeatedly and consistently upheld a trial judge's rejection of any age as a mitigator where he defendant was even younger than Brown. See, *e.g., Franqui v.* State, No. 84,701 (Fla. July 3, 1997) [21 at time of murder]; ***Johnson*** v. State, 696 So.2d 317 (Fla. 1997) [21 at time of murder]; ***Gudinas v. State, 693*** So.2d 953 (Fla. 1997) [20 at time of murder]; ***Simms v. State,*** 691 So.2d 1112 (Fla. 1996) [24 at time of murder].

The standard of review in regard to this potential mitigator is abuse of discetion. ***Simms,*** 691 So.2d at 1117. Absent evidence establishing that the defendant's "mental emotional, or intellectual age [is] lower than his chronological age, . . . age twenty-four is not a mitigator . . .." Id. A defendant's age, education, and maturity can be discerned from his testimony. ***Cooper v. State,*** 492 So.2d 1059 (Fla. 1986). Indeed, an age of twenty-five does not even require an instruction on age as a potential mitigator.[14] Lara ***v. State,*** 464 So.2d 1173, 1179 (Fla.

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[14] Since Judge Hutcheson instructed on this potential mitigator, (R 1438), Brown received more than he was entitled to.

1985).

In the instant case, Judge Hutcheson concluded:

> [B]ased on the defendant's testimony during the guilt phase and at other times that the defendant addressed this Court, both prior to the jury trial and during the sentencing hearing and after the penalty phase, that the defendant is of normal intelligence, and is in no way retarded. . . . [T]he doctor found the defendant to be of average intelligence, without any psychosis, and of average emotional maturity. The defendant furnished a forensic evaluation which found the defendant not to have' any organic brain impairment and that the defendant was malingering by producing false psychological symptoms to avoid trials . . . .

that the age mitigator had not been proved. (R 111). The trial judge did not abuse his discretion in rejecting Brown's age of 25 (at the time of the murder) as a mitigating factor. Brown's claim to the contrary is wholly without merit.

Brown also complains that Judge Hutcheson "belittled" the evidence of his poor childhood by pointing out that although Brown's mother was physically abused by her husband, Brown was not. (IB at 34). This Court has said that

> if a death sentence is imposed, the court must not only consider any and all mitigating evidence, but must 'expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence.' *Campbell,* 571 So.2d at 419 (footnote omitted)."

Crump v. ***State,*** No. 86,733, Slip op. At 3 (Fla. July 17, 1997).

Contrary to Brown's assertion, the instant order complies with

Campbell in every regard.[15] It explicitly lists and discusses each proposed mitigator and includes the facts the trial court relied upon in reaching its decision regarding each proposed mitigator. (R 110-112). No where does Judge Hutcheson belittle any of Brown's evidence. The evidence the defense presented in its case-in-chief established that although Brown's mother was physically abused by her husband, there was no evidence that Brown had ever been so abused. (R 1379). Judge Hutcheson's mention of that evidence in his order does nothing to belittle it; rather, it is an accurate recitation of evidence presented by the defense at the penalty phase. The trial judge has every right to rely on it! Further, far from belittling Brown's evidence of family background, the judge specifically found that factor as one of the two mitigators he weighed and considered in rendering the sentence in this case. (R 111). Brown cannot invite the presentation of evidence and then complain that the judge relied on it in rendering a decision which was contrary to that which Brown hoped he would reach. *Cf. Terry v. State,* 668 So.2d 954, 962 (Fla. 1996) [invited error doctrine].

Brown asserts that his case is similar to that of Terry v. *State,* **668** So.2d **954** (Fla. 1996) wherein the death penalty was found disproportionate despite the presence of the statutory aggravators -- prior-violent-felony and committed-during-the-

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[15] *Campbell* was reversed. *See Campbell v.* State, 679 So.2d 720 (Fla. 1996).

course-of-a-felony. The *Terry* facts are quite different. In *Terry,* this Court concluded that "although there is not a great deal of mitigation in this case,[16] the aggravation is also not extensive given the totality of the underlying circumstances." Id. This Court identified certain circumstances of the aggravators which rendered them usually weak, to-wit:

(1) The committed-during-the-course-of-a-felony aggravator "is based on the armed robbery being committed by appellant when the killing occurred."

(2) The prior-violent-felony "does not represent an actual violent felony previously committed by Terry, but, rather a contemporaneous conviction as principal to the aggravated assault simultaneously committed by the codefendant Floyd who pointed an inoperable gun at Mr. Franco." (Emphasis added) *Id.* This court stressed that its decision to overturn the death penalty was based on "the fact that [the prior violent felony] occurred at the same time, was committed by a codefendant, and involved the threat of violence with an inoperable gun." *Id.* At 966. This Court explained: "This contrasts with the facts of many other cases where the defendant himself actually committed a prior violent felony such as homicide." *Id.*

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[16] Despite the trial court's having "rejected Terry's minimal nonstatutory nmitigation," this Court noted that the defendant was only *21* when he committed the crime and had "no significant history of prior criminal activity." *668* So.2d at 965.

In Cole v. ***State,*** this Court distinguished Terry on the ground that the prior violent felony was "predicated upon Cole's own actions in forcibly subduing [the victim], handcuffing her, robbing her . . ., and raping her twice." No. 87,337, slip op. At 6 (Sept. ***18, 1997).*** In the instant case, Brown himself committed the prior violent felony.

The death penalty is not disproportionate in Brown's case; the sentence should be upheld.

POINT IV

THE JURY INSTRUCTIONS DO NOT DENIGRATE THE JURY'S TRUE ROLE IN SENTENCING A DEFENDANT TO DEATH.

Brown's claim that the standard jury instruction denigrates the jury's role in sentencing him has been consistently rejected by this Honorable Court. *Johnson v. State, 660* So.2d 637, 647 (Fla. 1995); *Espinosa v. State, 589* So.2d *887, 894* (Fla. 1991); Combs *v. State, 525* So.2d 853, 855-858 (Fla. 1988). There is no reason to reconsider the holdings in those cases as Brown requests. Thus, there is no merit to this issue, and the relief requested should be denied.

POINT V

FLORIDA STATUTES 921.141 IS CONSTITUTIONAL.

1. **The Jury:**

a. Standard Jury Instructions

I. Heinous, Atrocious, and Cruel

This issue was decided adversely to Brown's contention in this Court in *Henyard v. State*, 689 So.2d 239, 245, 255 n.4 & n.6 (Fla. 1996). The State relies on that authority herein.

ii. Felony Murder

This issue was decided adversely to Brown's contention in this Court in *Hunter v. State, 660* So.2d 244, 252, 253 (Fla. 1995). The State relies on that authority herein.

b. Aggravating Circumstances are not Elements of the Crime to be Found by a Majority of the Jury

This issue was decided adversely to Brown's contention in this Court in *Hunter v.* State, 660 So.2d 244, 252, 253 (Fla. 1995) and *Fotopoulos v. State, 608* So.2d 784, 794 n.7 (Fla. 1992). The State relies on that authority herein.

c. Advisory Role

This issue was decided adversely to Brown's contention in this Court in *Hunter* v. *State,* 660 So.2d 244, 252, 253 (Fla. 1995) and *Fotopoulos v.* State, 608 So.2d 784, 794 n.7 (Fla. 1992). The State relies on that authority herein.

2. **Counsel:**

This issue was decided adversely to Brown's contention in this Court in *Fotopoulos v. State, 608* So.2d 784, 794' n.7 (Fla. 1992). The State relies on that authority herein.

3. The Trial **Judge:**

This issue was decided adversely to Brown's contention in this Court in Hunter v. State, 660 So.2d 244, 252, 253 (Fla. 1995) and *Fotopoulos v.* State, 608 So.2d 784, 794 n.7 (Fla. 1992). The State relies on that authority herein.

4. The **Florida Judicial System:**

This issue was decided adversely to Brown's contention in this Court in Hunter *v. State, 660* So.2d 244, 252, 253 (Fla. 1995) and *Fotopoulos v.* State, 608 So.2d 784, 794 n.7 (Fla. 1992). The State relies on that authority herein,

5. **Appellate Review:**

a. **Proffitt**

This issue was decided adversely to Brown's contention in this Court in *Hunter* v. *State,* 660 So.2d 244, 252, 253 (Fla. 1995) and *Fotopoulos v. State, 608* So.2d 784, 794 n.7 (Fla. 1992). The State relies on that authority herein.

b. **Aggravating Circumstances**

This issue was decided adversely to Brown's contention in this Court in *Hunter v. State,* 660 So.2d 244, 252, 253 (Fla. 1995). The

State relies on that authority herein.

Appellate Reweighing

This issue was decided adversely to Brown's contention in this Court in *Fotopoulos v. State,* 608 So.2d 784, 794 n.7 (Fla. 1992). The State relies on that authority herein.

d. **Contemporaneous Objection Rule is not a Procedural Technicality**

This issue was decided adversely to Brown's contention in this Court in *Fotopoulos v. State, 608* So.2d 784, 794 n.7 (Fla. 1992). The State relies on that authority herein.

e. **Tedder**

This issue was decided adversely to Brown's contention in this Court in *Hunter v. State,* 660 So.2d 244, 252, 253 (Fla. 1995) and *Fotopoulos v. State, 608* So.2d 784, 794 n.7 (Fla. 1992). The State relies *on* that authority herein.

6. **Other Alleged Problems with the Statute:**

a. **Lack of Special Verdicts is not Unconstitutional**

This issue was decided adversely to Brown's contention in this Court in *Hunter v. State,* 660 So.2d 244, 252, 253 (Fla. 1995) and *Fotopoulos v. State, 608* So.2d 784, 794 n.7 (Fla. 1992). The State relies on that authority herein.

b. **No Power to Mitigate is not Unconstitutional**

This issue was decided adversely to Brown's contention in this Court in *Hunter v. State, 660* So.2d 244, 252, 253 (Fla. 1995) and

Fotopoulos v. State, 608 So.2d 784, 794 n.7 (Fla. 1992). The State relies on that authority herein.

c. **Florida does not Unconstitutionally Create a Presumption of Death**

This issue was decided adversely to Brown's contention in this Court in *Hunter v. State, 660* So.2d 244, 252, 253 (Fla. 1995) and *Fotopoulos v. State, 608* So.2d 784, 794 n.7 (Fla. 1992). The State relies on that authority herein.

d. **Florida Law does not Unconstitutionally Instruct Juries not to Consider Sympathy**

This issue was decided adversely to Brown's contention in this Court in *Hunter v. State, 660* So.2d 244, 252, 253 (Fla. 1995). The State relies on that authority herein.

e. **Electrocution is not Cruel and** Unusual

Brown claims that electrocution is cruel and unusual punishment. (IB at 51-52). However, this Court has soundly disagreed. *Buenoano v. State, 565* So.2d 309, 311 (Fla. 1990). See *Medina v. State, 690* So.2d *1241, 1244* (Fla. 1977), *cert. denied,* ___ U.S. ___ [117 S.Ct. 13301 (1977).

In his brief, Brown complains that the electric chair causes "unnecessary pain and anguish." (IB at 52). In *Jones v.* Butterworth, 701 So.2d 76, 79 (Fla. 1997), this Court found that: "[E]xecutions in Florida are conducted without any pain whatsoever . . . ." Rejecting claims based on both the United States and the Florida Constitutions, this Court held: "[E]lectrocution in

Florida's electric chair in its present condition is not cruel or unusual punishment." *Id.* at 5. Thus, Brown's instant claim is without merit, and he is entitled to no relief.

CONCLUSION

Based upon the above and foregoing argument the judgment of conviction and sentence of death should be affirmed.

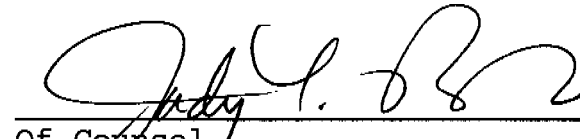
Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
FLA. BAR #0438847
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief has been furnished by U.S. Mail to J. Peyton Quarles, Attorney for Appellant, 501 North Grandview Avenue, Suite 115, Daytona Beach, Florida 32118, this 2nd day of January, 1998.



Of Counsel