IN THE SUPREME COURT OF FLORIDA

RODERRICK FERRELL,

Appellant,

v. **CASE NO. 93.127**

STATE OF FLORIDA,

Appellee.
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ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On November 25, 1996, the bodies of Richard Wendorf and Naoma Queen were discovered in their Eustis, Florida, home. (R1). The defendant, Roderrick Ferrell, was developed as a suspect, and, on November 27, 1996, a warrant was issued for his arrest. (R3). On December 17, 1996, the Lake County, Florida, grand jury returned an indictment which, *inter alia*, charged Ferrell with two counts of First Degree Murder in the deaths of Richard Wendorf and Naoma Queen. (R20-23)[1]. Ferrell entered a written plea of not guilty on December 17, 1996, and also filed notice of intent to participate in discovery. (R24-27). Ferrell filed a written waiver of speedy trial on January 23, 1997. (R45).

The case proceeded through the pre-trial stages, and, on February 2, 1998, jury selection began. (R782 *et seq.*). A jury was duly impaneled, and, on February 5, 1998, Ferrell decided to enter a plea of guilty to the offenses charged in the indictment. (R1712-1719).[2] The Court accepted the plea and adjudicated Ferrell guilty. (R1720). The jury was made aware of the change of plea, and was discharged until the penalty phase of Ferrell's trial began.

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[1]An amended indictment was returned on January 28, 1997. (R49-52).

[2]The change of plea occurred shortly after the State had begun its opening statement. (R1701-1722).

(R1723-26).

The penalty phase of Ferrell's trial began as scheduled on February 12, 1998. (R1727). On February 23, 1998, the jury recommended that Ferrell be sentenced to death for both murders by a vote of 12-0. (R1913-14). On February 27, 1998, the Court followed the jury's recommendation and imposed two sentences of death on the defendant. (R2057-74). In sentencing Ferrell to death, the Circuit Court found, as aggravating circumstances, that Ferrell had previously been convicted of another capital felony; that the murders were committed during the course of an enumerated felony (burglary or robbery); that the murder of Naoma Queen was especially heinous, atrocious, or cruel; and, that the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R2059-61).[3] The trial court considered and found various statutory and non-statutory mitigators, and, at the conclusion of the weighing process, found that the aggravation outweighed the mitigation. (R2073). Ferrell filed a motion for new trial on March 9, 1998. (R2093). That motion was denied on May 4, 1998. (R2159).[4] Notice

[3]The State has cross-appealed the refusal of the trial court to find the "avoiding arrest" aggravator. (R2194).

[4]Ferrell's unauthorized Rule 3.800 motion was denied in the same order. (R2159).

of appeal was given on May 22, 1998. (R2180). The record was certified as complete and transmitted on September 28, 1998. Ferrell filed his *Initial Brief* on May 26, 1999.

STATEMENT OF THE FACTS

The Statement of the Facts contained in Ferrell's brief is argumentative and is denied. The State relies on the following Statement of the Facts.

On November 25, 1996, Lake County Sheriff's Deputy Jeffery Taylor was dispatched to 24135 Greentree Lane in response to a call to 911 from a person who had returned home and found her parents apparently dead. (TR1824-1831). On arriving at the scene, Deputy Taylor was met by an individual who was, in his words, hysterical. (TR1833). Deputy Taylor searched the residence (TR1834), and found a male subject and a female subject, both of whom were obviously dead. (TR1837-38). Deputy Taylor secured the scene and began gathering information. (TR1841). As a result of information gathered at the scene, a BOLO was issued for a blue Ford Explorer vehicle which was missing from the residence, as well as for Heather Wendorf, a juvenile who was supposed to be at the residence but was not. (TR1843).

Farley Caudill is a Crime Scene Technician with the Lake

County Sheriff's Office. (TR1853). He became involved in this case at about 11:00 PM on November 25, 1996, when he was dispatched to the crime scene. (TR1855-56). Deputy Caudill went to the Sheriff's Office and, together with Crime Scene Technician Gene Cushing, loaded the major crime scene vehicle and then went to the scene. (TR1856). The area outside of the residence was searched, and, at about 4:09 AM, the first entry into the residence took place. (TR1857-63).[5] Deputy Caudill identified various photographs that were taken of the crime scene, including photographs of the victims' bodies and photographs of the scene itself, which showed that various dresser drawers had been emptied onto the bed and that the phone in the master bedroom had been disconnected. (TR1859-89).

The following afternoon, crime scene processing had been sufficiently completed to allow the removal of the victims' bodies. (TR1889). At about 2:30 PM on November 26, 1996, the medical examiner was admitted into the residence, where she conducted a visual examination of the bodies prior to their removal. (TR1890).[6] Various shoeprints were found on the floor, which were photographed. (TR1901-06).

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[5]At this time, all personnel were wearing biohazard suits with gloves and face masks to prevent any contamination. (TR1865).

[6]Three skull fragments were recovered, two from under the dining room table, and one from the top of a vacuum cleaner. (TR1895-6; 1898).

On November 28, 1996, Deputy Caudill traveled to Baton Rouge, Louisiana, where he came into contact with Ferrell. (TR1907). Ferrell was photographed, and, in addition, photos of the soles of his shoes were taken. (TR1908; 1911). While in Baton Rouge, Deputy Caudill also processed a blue Ford Explorer. (TR1916). The vehicle displayed a Kentucky license plate, but that license plate did not belong on the vehicle. (TR1918). A wooden stick wrapped with black electrical tape was found on the passenger side rear floorboard of the vehicle. (TR1920). Based upon his observations at the crime scene, Deputy Caudill was able to determine Ms. Queen's location when she first confronted her killer, as well as the location where she received the fatal blows. (TR1925).

Audrey Presson lived in Eustis, Florida, for 15 years, and moved to New York in June of 1997. (TR1954). She was acquainted with Ferrell while she lived in Eustis, and considered him to be a friend. (TR1954-55). Ferrell later moved from Eustis, and talked on the phone with Miss Presson about once a week. (TR1956). She saw Ferrell again on the night before the murders that gave rise to this case. (TR1956-57). On that evening, Ferrell came by Audrey's house and introduced her to three of his traveling companions. (TR1957). Scott Anderson, who was with Ferrell, told Audrey "We're going to have some fun tomorrow night", and Ferrell stated that

they were in town on unfinished business.(TR1960). Ferrell did not appear to be under the influence of alcohol or drugs at that time. (TR1961).

Dr. Laura Hair is an Associate Medical Examiner in District 5, which includes Lake County, Florida. (TR1994-95).[7] Dr. Hair was involved in the investigation of this case, and was present at the murder scene when the victims' bodies were removed. (TR1995-98). An initial examination of the bodies at the scene revealed that Mr. Wendorf had multiple wounds to his head, face and chest, and that Ms. Queen had multiple injuries to her head, face, arms and hands. (TR1998). Dr. Hair performed an autopsy examination on both victims. (TR1990). There were twenty-two separate wounds on Mr. Wendorf's head. (TR1991). The wounds inflicted on Mr. Wendorf fractured the bones of his skull and penetrated into his brain. (TR1997-99). In addition, there were nine or ten wounds to Mr. Wendorf's chest area (TR2000). Dr. Hair testified that, in her opinion as a pathologist, a crowbar could have caused the injuries found on Mr. Wendorf. (TR2020). Mr. Wendorf had two fractured ribs, and his injuries are consistent with him having been struck a number of times by a very hard or very heavy object. (TR2021).

[7]Dr. Hair was stipulated to be an expert in the field of Pathology. (TR1995).

Mr. Wendorf died as a result of “chop” wounds and blunt impact to the head with skull fractures and brain laceration. (TR2023).

Dr. Hair also identified the injuries found on Ms. Queen’s body at the time of autopsy. (TR2023). She identified some twenty-one separate wounds to the head and face area. (TR2039-41). In addition, a number of wounds were found on her hands and arms. (TR2041-42). The wounds on Naoma Queen’s arms are consistent with defensive wounds. (TR2049). Such wounds are consistent with someone being conscious and trying to defend themselves against an attack. (TR2049). Ms. Queen died of chop wounds of blunt impact to the head with skull fractures and laceration -- three of the injuries actually penetrated into the brain and severed the brain stem from the rest of the brain. (TR2050). It would not be possible for someone with a severed brain stem to resist an attacker. (TR2052).

Jim Brinkley is a Crime Scene Investigator for the Lake County Sheriff’s Office. (TR2063). He took a number of photographs of the interior of the Wendorf home, as well as taking measurements of the interior of the residence to reproduce a floor plan of that structure. (TR2064). Moreover, Mr. Brinkley collected a tooth that was found on the body of Mr. Wendorf. (TR2064). Mr. Brinkley also used a special device and collected a scraping from under the

fingernails of Ms. Queen. (TR2069-71).[8]

James Welbourne is a uniformed patrol officer with the Baton Rouge City Police Department. (TR2085). On November 28, 1996, Officer Welbourne observed a Ford Explorer matching the description of a vehicle wanted in Florida in connection with a double homicide. (TR2086-91). Officer Welbourne called for a backup unit and secured the occupants of the Ford Explorer. (TR2093-24). Officer Welbourne identified Ferrell and the Explorer from photographs taken at the time of the arrest. (TR2095).[9] Ferrell appeared to be the individual who was in control and to whom the others looked for leadership. (TR2098-99).

Ferrell called Dr. Wade Myers to testify out of order about the results of his evaluation of the defendant. (TR2143-45). Ferrell told Dr. Myers that he had used LSD forty or more times (TR2161) and would laugh inappropriately. (TR2164). Dr. Myers diagnosed Ferrell with a schizotypal personality disorder (TR2175), as well as dysthymia (depression), poly-substance abuse, and a learning disability in the area of mathematics. (TR2179). Dr. Myers is of the opinion that both mental mitigators apply to

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[8]Ferrell stipulated to the chain of custody as to the fingernail scraping evidence. (TR2071).

[9]Ferrell did not appear to be under the influence of alcohol or drugs when he was taken into custody. (TR2097).

Ferrell. (TR2180).

Dr. Myers administered various tests to Ferrell, but the testing results of the Million test were invalid. (TR2191). Ferrell's test scores indicate that he was not telling the truth. (TR2193). This undercuts Dr. Myers' conclusions that Ferrell was abused by his grandfather, who, when interviewed by Dr. Myers, denied such abuse. (TR2221-22). Dr. Myers had "forgotten" that Ferrell had given the police in Louisiana a false name, but admitted that Ferrell stated "that he would fuck with them so they couldn't call the police" and that he would break their knees if they tried to be heroes. (TR2224). Ferrell stated that he passed by one house because he didn't kill anybody under sixteen. (TR2225). Ms. Queen's brain stem was severed from her spinal cord, and, as a doctor, Dr. Myers knows that movement following that event would not be possible. (TR2227). Ferrell does not have multiple personalities, and is of average intelligence. (TR2229-30).

Dr. Myers did not diagnosis Ferrell as having conduct disorder. (TR2237). However, Ferrell meets a number of the criteria for a diagnosis of conduct disorder. (TR2239-45). Included among the incidents which meet those diagnostic criteria are Ferrell's expulsion from high school for threatening to cut a

teacher's throat (TR2239), throwing a knife at his mother and kicking another individual in the face (TR2240), having self-reported being physically cruel to other people, as well as having self-reported beating cats to death and having broken into an animal shelter and mutilated dogs. (TR2241-42). Despite the presence of a sufficient number of the diagnostic criteria to support a diagnosis of conduct disorder, Dr. Myers did not make that diagnosis of Ferrell. (TR2245). Ferrell's scores on the MMPI testing indicated a strong possibility of malingering . (TR2250-51). Ferrell's behavior in hiding when a car approached, avoiding houses with children because he did not believe in killing people under sixteen, and avoiding houses with sophisticated security devices indicates that he does not want to get caught and is thinking about what he is doing. (TR2255-56). Ferrell knows right from wrong, and has often lied to get out of trouble. (TR2254; 2257). Ferrell's involvement with the occult did not seem to be connected to any aggressive behavior. (TR2278).

Mr. Timothy Petry is a forensic analyst with the Florida Department of Law Enforcement's Orlando Crime Laboratory. (TR2290). He has previously testified and been qualified as an expert in the field of forensic serology and stain identification. (TR2290). Mr. Petry identified various items of evidence. (TR2292-2301). Human

blood was found on the boot taken from Ferrell and on the gloves found in the Ford Explorer. (TR2301-2305).

Ferrell was permitted to call Dr. Harry Krop out of order. (TR2321). Dr. Krop testified concerning his opinions and conclusions about the defendant, and, on cross-examination, testified that Ferrell tried to portray himself as more mentally ill than he was. (TR2427). Dr. Krop did not believe Ferrell's story of multiple personalities, and did not see any psychotic behavior during the testing or interview process. (TR2433-34). Claiming to be a vampire is a way of getting attention -- Ferrell does not truly think that he is a vampire. (TR2436). Ferrell knows right from wrong, and, when he entered the garage of the Wendorf home on the night of the murders, he found a better weapon thinking that he "might as well enjoy" it. (TR2439). Ferrell told Dr. Krop that he swung the crowbar at Mr. Wendorf's head about five times and stopped just short of hitting him. (TR2441). On the sixth occasion, Ferrell thought, "who cares", and struck Mr. Wendorf approximately twenty-five times with the crowbar. (TR2441). Dr. Krop does not believe that Ferrell is insane. (TR2447). Ferrell can distinguish right from wrong, and can conform his conduct to the requirements of law if he chooses to do so. (TR2447). Ferrell has been a discipline problem in the Lake County Jail. (TR2450).

Anne Montgomery is the Director of Operations at Reliagene Technologies, and is responsible for running the forensic department. (TR2462). This facility is a DNA testing laboratory which exclusively performs DNA typing. (TR2463). Ms. Montgomery was accepted as an expert in the field of DNA analysis. Foreign DNA material was found under Ms. Queen's fingernails, and it was not possible to exclude Ferrell as the donor of that material. (TR 2488). The material found under her fingernails is consistent with Ferrell's DNA profile. (TR2490). Moreover, the blood found on Ferrell's boots is consistent with Ms. Queen's DNA profile. (TR2493). Mr. Wendorf cannot be excluded as the donor of the blood found on Ferrell's jeans. (TR2497). Mr. Wendorf cannot be excluded as the donor of the blood found in the bloody shoe prints found on the tile floor and the blood stains found in the Ford Explorer. (TR2499).

Debra Fisher is a Senior Crime Laboratory Analyst assigned to the Latent and Print section of the Florida Department of Law Enforcement at the Orlando Regional Crime Laboratory. (TR2505). Shoe print identification is a part of her job function. (TR2506).[10] Ms. Fisher examined the latent shoe prints collected from the crime scene and compared them to the boots taken from Ferrell. (TR 2506-

[10]Ferrell stipulated to Ms. Fisher's expertise in this area.

07). Ms. Fisher was able to conclude that the left boot taken from Ferrell probably made the impression collected from the crime scene. (TR2511; 2516). Ms. Fisher was further able to determine that the footprint found on the tile taken from the floor of the Wendorf's residence was made by the right boot collected from the defendant. (TR2518-19).

Desiree Nutt testified that she was employed at the Lake County Jail in December of 1997. (TR2528). Ferrell was housed in the jail at that time, and she came in contact with him. (TR2528). On December 3, 1997, Ferrell made statements to Ms. Nutt regarding the security at the Lake County Jail, and made various statements concerning his intent to attempt to escape from custody. (TR2529-33).

Shannon Yohe lives in Eustis, Florida, and knows the defendant from school. (TR2548-49). Ferrell came to her house in Eustis, Florida, on November 24, 1996, (the Sunday before Thanksgiving). (TR2550). Ferrell was accompanied by three other people who were introduced to Ms. Yohe. (TR2551). At that time, Ferrell was driving a "reddish, maroon, older car". (TR2551). On November 25, 1996, Ferrell and his traveling companions again appeared at Ms. Yohe's house. (TR2553-54). She allowed Ferrell to make a telephone call to Heather Wendorf, and, during that telephone call,

heard Ferrell getting directions to Ms. Wendorf's house. (TR2555). Before leaving Ms. Yohe's residence, Ferrell stated that he was going to steal the Wendorf's car because his car wasn't working properly, and that he was going to kill Heather Wendorf's parents because he wanted their car. (TR2558). At no time when Ms. Yohe was in contact with Ferrell did he appear to be intoxicated or under the influence of drugs or alcohol. (TR2561).

Suzanne LeClair lives in the Eustis, Florida, area, and is Jeanine LeClair's mother. (TR2575). Mrs. LeClair knows Heather Wendorf, and knew the entire Wendorf family. (TR2576). On November 24, 1996, she received a telephone call at her home from Shannon Yohe (TR2576-77). On November 25, 1996 (which is Jeanine LeClair's birthday), Heather Wendorf called the LeClair residence. (TR2578-79). After dinner was finished, Mrs. LeClair noticed that her daughter's door was open and that she was not home. (TR2579). Jeanine was waiting at the end of the driveway for Heather Wendorf, who was planning on running away from home. (TR2581-82). Mrs. LeClair attempted to call the Wendorf residence, but the phone was dead. (TR2582). Mrs. LeClair then drove over to the Wendorf residence (which was not a great distance away), and observed law enforcement present at the scene. (TR2582-83).

Charles Frazier is a Seminole County, Florida, Sheriff's

Deputy. (TR2584). During the week of Thanksgiving, 1996, he found a "small red vehicle" abandoned on State Road 600 (which is also known as 17-92), near the lakefront in Sanford. (TR2585). A Florida tag was displayed on that vehicle, and, when the communications center ran the tag, it came back registered to a Ford Explorer. (TR2585-86). Subsequently, it was determined that the red car belonged to an individual from Kentucky. (TR2586). The Lake County Sheriff's Office sent personnel to the scene, and the vehicle recovered by Deputy Frazier was towed back to Lake County for processing. (TR2586-87).

Ron Shirley is a Lake County Sheriff's Office Crime Scene Technician. (TR2590). He processed the vehicle that was recovered from the Sanford, Florida, area. (TR2590). He identified the license plate that was found in the vehicle, and also identified a map of the State of Florida that was found under the driver's seat. (TR2591-92).

Deputy Al Gussler testified that he investigated the credit card transactions for Mr. Wendorf's "Discover Card." (TR2595-96). That investigation revealed three transactions on November 26, 1996: a Walmart in Tallahassee, an Amoco in Tallahassee, and a Shell Staton in Crestview, Florida. (TR2596). Those cities are located on Interstate 10 between Tavares and Baton Rouge,

Louisiana. (TR2597).

Dennis Moran is a homicide detective with the Baton Rouge, Louisiana, Police Department. (TR2620). On November 28, 1996, Detective Moran received a telephone call from a Lake County, Florida, Sheriff's Investigator regarding the Wendorf homicide. (TR2622). A telephone call from a suspect in the Wendorfs' murder had been made to a family member in South Dakota from a telephone located in Baton Rouge. (TR2622). The Baton Rouge authorities were advised that the suspect vehicle was a 1993 Ford Explorer that was blue in color bearing a Kentucky license plate. (TR2624). The vehicle was located at a motel, and its occupants were taken into custody and brought to the police department. (TR2625-27). The four individuals who had been brought in were provided with bathroom facilities, as well as being provided with food and drink. (TR2629). Ultimately, Ferrell gave a statement to law enforcement that was videotaped. (TR2630-32).

Thomas Dewey is a Detective with the Baton Rouge Police Department. (TR2650). On November 28, 1996, he was assigned to Homicide-Robbery Division of the Police Department. (TR2651). He became involved in the Ferrell matter, and transported Ferrell from the scene of his arrest to the detective division's offices. (TR2652). Ferrell commented to Detective Dewey that he was "glad

to be caught" because he had "been on the run for several days." (TR2653). Detective Dewey attempted to discourage Ferrell from talking because he knew that he was a juvenile and did not know what the case was about. (TR2653-54). Detective Dewey was present during an interview with Ferrell, and stated that Ferrell was "very nonchalant about the whole incident" and "bragged about how he was the strongest one and other people looked toward him" because he was the leader of this group. (TR2656). Ferrell came across as wanting to talk about the murders, and bragging about them. (TR2657).

Sergeant Ben Odom is a Sergeant with the Baton Rouge Police Department Robbery-Homicide Division. (TR2664-65). On November 28, 1996, he came in contact with the defendant after Ferrell was taken into custody. (TR2666-67).[11] Ultimately, Ferrell executed a written *Miranda* warning waiver and gave a statement. (TR2674). Ferrell was not under the influence of alcohol or any other controlled substance. (TR2677).

Detective Gussler testified again and authenticated various videotaped interviews of the defendant. (TR2698-2720). In those

[11]Sergeant Odom advised Ferrell, and the four other individuals, of their constitutional rights under Miranda. (TR2668). Ferrell indicated that he understood his rights. (TR2669).

videotapes, Ferrell stated “Scott [Anderson] was following right behind me like a little lost puppy,” and went on to admit beating both victims to death with a crowbar. (TR2730-32). Ferrell stated specifically that Anderson was in the house, but did not take part in the actual murders. (TR2734).

A second videotaped statement between Ferrell and Lake County Sheriff’s Detective Gussler was also played for the jury. (TR2750). Ferrell stated that he had been read his rights and understood them. (TR2755-57). Ferrell stated that he looked for a better weapon in the Wendorf’s garage, because all he had was a stick. (TR2767). Ferrell found a crowbar, which he thought was better. (TR2768). Ferrell admitted to beating both victims to death and taking Mr. Wendorf’s wallet and keys and some other property. (TR2772-76).[12]

Paula Queen Loci is Ruth Queen’s oldest daughter. (TR2830). Ms. Loci testified about the loss she and her family and the community suffered as a result of Mrs. Queen’s murder. (TR2831).[13]

Robert Wendorf is Richard Wendorf’s younger brother. (TR2835). He testified about his loss as a result of his older brother’s murder. (TR2836-45).

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[12]Ferrell testified that "it was a rush, actually" to commit the murders. (TR2799).

[13]Heather Wendorf is the witness’s half sister. (TR2833).

Ferrell presented various witnesses who testified concerning his background and early life. (TR2857 et seq.).

Ashley Elkins testified that Ferrell always tried to intimidate people and wanted her to be afraid of him. (TR2960). Ms. Elkins testified that Ferrell was manipulative and would often try to play on the emotions of others to get what he wanted. (TR2961). Ferrell stalked Ms. Elkins for a period of time, and told her that he was powerful and thought it was funny that he could hurt people. (TR2962-63).

Steven Murphy testified that he is the one who "crossed over" Ferrell into the "vampire" lifestyle. (TR2974-75). Murphy testified that one of the laws of "being a vampire" is that killing is forbidden, and that a “vampire” is not allowed to take the blood of anyone without obtaining their permission. (TR2986). He taught and stressed these precepts to Ferrell when he "crossed him over". (TR2986-87).

Matthew Goodman also testified that Ferrell would regularly manipulate people and tried to control others. (TR3031).

Captain Kevin Drinan is the supervisor of the Lake County Jail. He testified that Ferrell was found with a "shank" in his

possession. (TR3088).[14]

During cross examination, Sondra Gibson, Ferrell's mother, testified that the hospital records indicating that there was nothing wrong with Ferrell at the time of his birth are incorrect. (TR3164-65).[15] Ferrell was supposed to appear in court on November 25, 1996, the day the murders at issue in this case took place. (TR3168-69).

Dr. Elizabeth McMann is a clinical psychologist who has evaluated the defendant. (TR3180). She is of the opinion that Ferrell meets the criteria for schizotypal personality disorder. (TR3238). She has no basis to believe that Ferrell could not appreciate the criminality of his conduct or conform his conduct to the requirements of law. (TR3238). She does, however, say that his ability to stop behavior is somehow impaired. (TR3239). Further, Dr. McMann believes that Ferrell can function appropriately in prison. (TR3240). Dr. McMann is opposed to the death penalty. (TR3246). She found no indication of brain damage, no indication that Ferrell suffered an abnormal birth, and, moreover, testified that he has an average IQ. (TR3247). Ferrell was running from the

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[14]A shank is any object that may be fashioned into a knife. (TR3088).

[15]During direct examination, Gibson testified that the umbilical cord was wrapped around Ferrell's neck. (TR3123)

law when he left Kentucky, and was not simply "going on vacation". (TR3250).[16] Ferrell's behavior during and following the murders indicates an attempt to avoid being caught.(TR3261-62).

In rebuttal, the State presented the testimony of the following witnesses.

Dennis Fisher is a principal at an elementary school in Graves County, Kentucky. (TR3273). In 1996, he was an assistant principal at Calloway High School, which is in the city of Murray, Kentucky. (TR3274). In that capacity, Mr. Fisher was in charge of discipline at the school, and had multiple interactions with the defendant. (TR3274). While Ferrell dressed in a somewhat unusual fashion, that was not a particular problem. (TR3275). Ferrell's behavior in not doing what was expected of him was the problem that the school had with him, and Mr. Fisher counseled and met with him on numerous occasions. (TR3275-76). Mr. Fisher tried to nurture Ferrell's good qualities, but Ferrell's responses were, at best, nonchalant. (TR3277). In conversation with Ferrell's mother, she had told Mr. Fisher that she was afraid of Ferrell and that he had "gotten physical" with her. (TR3282). Mr. Fisher testified that he and the school system gave Ferrell all the breaks in the world but that

[16]Dana Cooper referred to Ferrell talking about killing people during the trip from Kentucky to Florida. (TR3254).

Ferrell would not conform to the system. (TR3284). In an incident involving a teacher at the Calloway County High School, Ferrell stated that he could slit the teacher's throat. (TR3286-87).

Debra Mooney is a social worker in Calloway County, Kentucky. (TR3290). In 1996, she was employed as a social worker at the Western Kentucky Regional Mental Health Center. (TR3290). In her work as a mental health professional, she came in contact with Rod Ferrell on May 2, 1996. (TR3291). She wanted Ferrell to continue treatment with her, and there were a number of other mental health professionals available to him at the Western Kentucky Regional Mental Health Board. (TR3292). Ferrell missed the next three scheduled appointments, and did not return until October 3. (TR3293). She was unable to meet with Ferrell on the 3rd because she had another client who was expressing suicidal thoughts, and, moreover, because she did not expect Ferrell to keep his appointment, she brought in the potentially suicidal client, instead. (TR3294). Ferrell never kept any other appointments with her. (TR3294). She was not able to help Mr. Ferrell, despite her best efforts, because he was non-compliant, and missed several sessions. (TR3296). Ferrell exhibited normal thoughts, normal mood and affect, normal insight, above-normal intellect, and was alert and oriented. (TR3303-04).

Jane Ann Turner is a court designated worker in Calloway County for Juvenile Services. (TR3308-09). Ferrell's mother filed a complaint with social services based upon suspected drug use by Ferrell, as well as her concerns about his involvement in the occult. (TR3310-11). Moreover, Ferrell was staying out and not obeying his curfew and was bringing over friends that his mother did not approve of. (TR3311). As a result of the complaint filed by Ferrell's mother, there was an agreement entered into where Ferrell was required to perform certain things as a part of the disposition of that status complaint. (TR3312-13). Ferrell initially kept the terms of the agreement, but began breaking his curfew and being verbally abusive to his mother shortly thereafter. (TR3315-16). Ultimately, the agreement was terminated and the complaint was turned over to the court as a juvenile petition. (TR3316). The matter was referred to the court, and Ferrell was expected to return to court on November 25, 1996.[17]

SUMMARY OF THE ARGUMENT

Ferrell's claim of an impermissible "restriction" on the length of time allowed for closing argument was not properly preserved by timely objection. Moreover, the trial court did not abuse its discretion in limiting closing argument to 45 minutes to

[17]The day of the murders in Lake County, Florida.

the side. In any event, under the facts, assuming *arguendo* that some error took place, it was harmless.

The claim of "judicial bias" is procedurally barred because no motion for disqualification was made within 10 days of the discovery of the facts supporting the motion. Alternatively, this claim is meritless because the facts do not support it.

Ferrell's claim that the trial court "restricted" *voir dire* improperly is not supported by the record. There is no legal basis for his claim, and, in any event, assuming that some error occurred, it was harmless.

The "lay witness opinion testimony" claim has no legal basis -- the complained-of testimony was not "opinion" testimony in the first place. Moreover, that testimony was given during the penalty phase of Ferrell's trial, with the attendant relaxed evidentiary standards. Finally, any error was harmless beyond a reasonable doubt under these facts.

The claim concerning the denial of the motion to suppress has no legal basis -- a second, **unchallenged** statement that included a full confession to the murders was admitted into evidence. Any error associated with another statement was harmless because the evidence was placed before the jury through a statement that Ferrell concedes was properly admitted. Moreover, both statements

were properly admitted, and, for that reason, there is no basis for relief.

The trial court properly denied Ferrell's motion for a change of venue. A fair and impartial jury was selected, and there is no error. In any event, Ferrell has not identified any juror whom he claims was biased, nor has he alleged that his trial was not fair and impartial.

Ferrell's claim concerning the admission of testimony about his plans to escape from the Lake County Jail is not a basis for reversal. The complained-of testimony was properly admitted. In any event, that testimony was used by the sentencing court to support a **mitigating** circumstance found in the sentencing order. Moreover, any error was harmless beyond a reasonable doubt.

The sentencing court properly found the cold, calculated, and premeditated aggravator based upon proof beyond a reasonable doubt of the "elements" of this aggravating circumstance. Settled law supports the finding of this aggravator.

The sentencing court properly found the heinous, atrocious, or cruel aggravator. The components of this aggravating circumstance were established beyond a reasonable doubt, and the heinous, atrocious, or cruel aggravator was properly found under settled Florida law.

Death is a proportionate sentence in this case. Four strong aggravators exist: cold, calculated, and premeditated; heinous, atrocious, or cruel; prior violent felony; and during the course of a felony. Those aggravating circumstances outweigh the mitigation, and death is the appropriate sentence.

Ferrell's claim that it would be unconstitutional to execute him because he was 16 years old at the time of the murders is not a basis for relief. United States Supreme Court precedent establishes that a sentence of death can constitutionally be imposed on a 16-year-old killer, and this Court should honor that precedent and uphold the sentence of death in this case.

In the final sentencing order, the trial court erroneously found that the avoiding arrest aggravator was not proven by the state. The evidence established that the dominant motive for the murders was the elimination of witnesses, which is the standard for finding this aggravator when the victim is not a law enforcement officer.

The trial court also erroneously excluded testimony that Ferrell was fleeing law enforcement. Such testimony was relevant to the avoiding arrest aggravator, and should have been admitted.

ARGUMENT

I. THE LIMITATION ON CLOSING ARGUMENT CLAIM

On pages 23-33 of the *Initial Brief*, Ferrell argues that the trial court "abused its discretion" by limiting closing argument to 45 minutes to the side. Whether this claim is properly preserved is, at the very least, an open question. However, it is clear that the trial court did not abuse its discretion in imposing a limitation on the length of closing argument.

This claim has its "foundation" in the following cryptic comment by the trial court:

> I intend to give both of you, over noted objection, forty-five minutes each for closing, State first, Defense last.

(TR2915).[18] Those time parameters were emphasized by the trial court on at least two subsequent occasions. (TR3328-29; 3337). The record does not reveal, and no testimony establishes, which party's objection was the "noted objection" referred to by the trial court. Ferrell's argument is, from its inception, based upon the **assumption** that it was the defense that "objected." That assumption finds no support in the record.[19] **At no time did defense counsel**

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[18]The citation form "TR----" is used to refer to the 15 volumes of testimony.

[19]The most that the record shows is that **either** the State **or** Ferrell objected to some aspect of 45 minutes being allotted for final argument. That is not a sufficient basis for relief, and Ferrell's claim is nothing more than uninformed and unsupported speculation.

voice an objection or attempt to convince the trial court to "reconsider" any prior ruling. Defense counsel's closing argument consists of some 25 pages of transcript and appears to have lasted approximately 45 minutes. (TR3366-91). Defense counsel did not assert, at the conclusion of that argument, that there were additional matters to be argued, did not identify any argument that was not made as a result of the time limitation, and did not ask the trial court to reconsider its decision to limit closing argument to 45 minutes. Because that is so, nothing is preserved for appellate review.

The issue contained in this claim is analogous to a claim for relief based upon a denial of additional peremptory challenges, which requires that all challenges be exhausted, and additional challenges be requested for use against specified venire members before any claim is preserved for appellate review. The claim contained in Ferrell's brief is the functional equivalent of such a peremptory challenge claim, and, because Ferrell never even argued to the court that he would make an additional argument if given the time, he has preserved nothing for this Court's review. Of course, this claim is reviewed under the abuse of discretion standard. Before the trial court can be placed in error, that court should have the benefit of an objection by defense counsel which

placed the court on notice of the substance of the objection. Nothing resembling such an objection appears in the record, and, for that reason, nothing is preserved for review by this Court.

In addition to not being preserved for appellate review, the record, as "reconstructed", is considerably less clear on this issue than Ferrell suggests. According to the testimony at the record reconstruction hearing, **only** Ferrell remembered his attorney objecting to a 45-minute limitation on closing argument. (SR569-70). Ferrell was very specific that this objection was made in open court (not during a bench conference) before the jury was brought into the courtroom[20]. (SR569-70). Ferrell's trial counsel **thinks** that she **probably** objected to any limitation on closing argument, but could not specifically recall[21]. (SR548-9). The courtroom deputy who served as bailiff during Ferrell's trial had no recollection of any objection by defense counsel. (SR554). The courtroom clerk had no recollection of any objection to the length of time allowed for closing argument, and testified that such an objection would be reflected in her chronological summary in the court file if such

[20]Ferrell was quite certain that the "objection" was not made at the bench because, according to Ferrell, the headphones that allowed him to hear bench conferences did not work so he did not use them. (SR569-70).

[21]Ferrell's co-counsel also had no recollection of any objection being made. (SR 551-2).

objection was made. (SR554-5). The court reporter who took Ferrell's trial had no recollection of any objection by defense counsel. (SR555). Finally, neither of the prosecutors involved in this case had any recollection of any objection to the length of closing argument. (SR555-6). The trial court stated:

> I will state for the record, I also have no specific recollection as to whether or not [defense counsel] made some verbal objection at some point when we were not on the record. But I will reiterate, it has to be that [defense counsel] indicated to me at some time that she objected to the forty-five minute limitation because I would not have said "over objection" otherwise.

(SR552). Despite that statement of what "has to be," when all of the evidence is considered, it points toward the absence of an objection.

Of the individuals involved, Ferrell is the **only** person who has **any** recollection of an objection to the limitation on closing argument. Obviously, Ferrell has a greater interest in the outcome of this litigation than anyone else, and, further, is the one person with a track record of dishonesty and deceit. (See, e.g., TR2427). If, as Ferrell claims, such objection took place in open court in the presence of the prosecution, the bailiffs, the court reporter, and the clerk, **someone** would have remembered the objection being made, and, moreover, it would be recorded in the clerk's record and in the transcript of the proceedings. However,

the state of the record is that the only person who has **any** recall about the matter in question is the one person with the greatest vested interest in the outcome of his case. Ferrell's testimony is completely incredible, and is unworthy of belief.

When the remaining testimony is fairly considered, that testimony leads to the conclusion that no objection was made by defense counsel to the length of time allowed for final summation. That conclusion is bolstered by the testimony of the two persons whose duty it would have been to record such an objection -- the court clerk and the court reporter. Neither of those individuals had **any** recollection of such an objection being made. In fact, as the court clerk testified, such an objection **would** be indicated in her court file had it been made. The absence of such a notation, coupled with the total absence of any such objection in the transcript itself, is evidence that no such objection was made.[22] There is no persuasive evidence to the contrary, and there is no basis for relief on this claim because it was not properly preserved for appellate review.

In addition to the foregoing reasons for denial of relief on

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[22]The testimony of the clerk that such objection would have been indicated in the file had it been made supports the conclusion that, because there is no record of objection in the file, no objection was made.

this claim, even assuming that an objection was made (and that it was timely and sufficient to preserve any issue for review), there is no basis for relief because there was no abuse of discretion on the part of the trial court. As this Court has repeatedly held, "[w]e have clearly held that trial courts also have broad discretion in the procedural conduct of trials". *Moore v. State,* 701 So.2d 545, 549 (Fla. 1997); *Rock v. State,* 638 So.2d 933, 934 (Fla. 1994). Other than providing a ready issue for appeal, Ferrell has not suggested how the trial court "abused" its discretion in restricting counsel for the parties to 45 minutes to the side for closing argument[23]. A review of defense counsel's closing argument reveals a cogent, sensible, and rational argument in favor of a sentence of life without parole rather than death. However, despite the hyperbole of Ferrell's brief, nothing in his brief even purports to identify how Ferrell was prejudiced by the trial court's discretionary ruling. While defense counsel frequently desires an unlimited amount of time for closing argument, the state of the law is that it is within the discretion of the trial court, as a part of the inherent authority of the court, to impose a

[23]The **only** thing that Ferrell's trial counsel said that she would have done differently if she had had more time would have been to read several documents to the jury rather than "simply reminding them to look at these documents during deliberations." *Initial Brief* at 26.

limitation of the length of closing argument. There is no rule that requires that closing argument be of any particular length, and there is no formula for calculating a "reasonable" time. However, under the facts of this case, 45 minutes was enough time for defense counsel to present an argument that clearly and concisely stated the defendant's position and argument in support of a sentence less than death.[24]

Finally, the facts of this brutal double-murder obviously made it incredibly difficult to argue against a sentence of death, and made it difficult, at best, to adduce mitigation sufficient to persuade a jury to recommend a sentence less than death[25]. Under these facts, it is not possible to conclude that Ferrell's jury would have recommended a different sentence if defense counsel had been allowed an unlimited amount of time for closing argument. Ferrell cannot demonstrate any prejudice, cannot demonstrate an abuse of discretion, and, moreover, cannot demonstrate harmful

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[24]Ferrell's *Initial Brief* is 95 pages long and contains 11 principal issues. Oral argument before this Court is limited to 30 minutes in which to present legal argument on those issues. Surely Ferrell does not believe that such is an insufficient amount of time.

[25]A review of the penalty phase closing arguments in other recent cases reveals that such argument consumes, on average, approximately 20 pages. Ferrell's, at 26 pages, is relatively long.

error[26]. If it was error to limit the length of closing argument, (assuming it was limited), and the State does not concede that it was, that error was harmless beyond a reasonable doubt. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986).

II. THE JUDICIAL BIAS CLAIM

On pages 34-40 of his brief, Ferrell claims that he is entitled to relief "[b]ecause of the trial court's appearance of partiality." *Initial Brief* at 40. In an effort to create a basis for relief from whole cloth, Ferrell attempts to force this case into the facts of various Fourth District Court of Appeals cases which held, in essence, that the trial judge "went too far in assisting the prosecutor." *Id.* Those cases are distinguishable on their face, do not support Ferrell's position, and are not a basis for relief. Moreover, Ferrell is not entitled to relief on this claim because it is procedurally barred.

Florida law is settled that a motion to disqualify a trial judge must be raised within 10 days of the discovery of the facts supporting the motion. There is no question that the "facts" now

[26]This claim appears to be, as much as anything, a convenient issue based upon an unexplained remark by the trial court. Other than reading various documents to the jury, what would have been different with more time for closing is unelaborated. A reference to those documents, rather than a reading of them, was certainly sufficient, and, in the eyes of the jury, was probably preferable.

alleged as a basis for the claim of judicial bias were well-known to Ferrell at the time of jury selection, and could have been used as the basis for a motion for disqualification at that time. There is also no question that Ferrell waited until long after his trial was over to raise this claim. Because Ferrell did not comply with *Florida Rule of Judicial Administration* Rule 2.160(e), he has waived his right to seek relief on this claim. Rule 2.160(e) exists to insure that claims of "judicial bias" are raised in a timely fashion rather than being held in reserve against an adverse result and then being presented for the first time on appeal. This claim is not available to Ferrell, and all relief should be denied.

In addition to not having been properly preserved for review, this claim is meritless. In an effort to create an issue of appeal, Ferrell argues that the trial court "first appeared less than neutral during jury selection." *Initial Brief* at 36.[27] The true facts are that the juror at issue, Jefferson, was late in returning to the courtroom during *voir dire*, which, as this Court is aware, creates an unnecessary disruption in the proceedings by requiring that everyone wait until such time as the late prospective juror

[27]Ferrell attempts to incorporate claims I and III into his "judicial bias" claim. Those "claims", to the extent that they are properly presented in the brief, were not timely raised in the trial court, and, moreover, are meritless for the reasons set out in the State's brief.

arrives.[28] Such lateness has been held to supply a valid, race-neutral reason for exercising a peremptory challenge against the late juror, *Turner v.* State, 645 So.2d 444 (Fla. 1994), *Smith v. State*, 699 So.2d 629 (Fla. 1997), and it makes no sense to suggest that the trial Court's comments indicate anything other than the practical problems that arise when one juror fails to follow the Court's instructions[29]. Whatever that does indicate, it does not indicate bias against the defendant.

Another component of this claim is Ferrell's assertion that the trial court "supplied" the State with "race-neutral reasons" to peremptorily challenge juror Jefferson. That argument is, at best, based upon a strained reading of the record. The true facts are that, during the discussion about that juror's absence, the State pointed out that Jefferson had said that he was "opposed to the death penalty" but able to follow the court's instructions, which, as the State noted, was a proper basis for a peremptory challenge.

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[28]The record shows that the Court allowed an hour and one-half for lunch, and waited 10 minutes beyond that before addressing the issue of the missing juror. (TR 1595). Defense counsel asked the Court to wait 5 minutes, and the Court instead offered to wait **10 minutes** before addressing other options to deal with the problem. (TR 1596). That means that, when all that went on is taken into account, the Court was willing to wait approximately 30 minutes for **one** juror. That is hardly an indication of bias or prejudice.

[29]The reasons given by the State for striking this juror are well-supported by the record. (TR 935; 1354; 1357-8; 1526).

(TR 1598). Obviously, the State was well aware of the potential need to justify its peremptory challenges, and did not need the Court to provide the reasons for such challenges. The *voir dire* examination of Jefferson provided the reasons for challenging him, and the fact that the Court and the State noted the same reasons is hardly surprising, unless Ferrell believes that the fact that the Court noted certain reasons for exercising a peremptory challenge somehow precludes the State from using those same reasons[30]. Such a conclusion is nonsense. The trial court did nothing improper, and there is no basis for reversal. Ferrell's sentence should be affirmed in all respects.

III. THE RESTRICTION ON *VOIR DIRE* CLAIM

On pages 41-45 of his brief, Ferrell argues that he is entitled to relief based upon a "limitation" on *voir dire* examination. Ferrell does not claim that the jury that tried the penalty phase (and recommended death unanimously) was in some way "biased". Instead, his claim appears to be that he is entitled to a new penalty phase because the trial court sustained the State's objections to questions concerning smoking and school detention because that "violated" an unidentified constitutional right and

[30]Ferrell does not, and has never, argued that the reasons given by the State for peremptorily challenging Jefferson are not valid.

resulted in some unknown prejudice. (TR 1633-36).[31] The true facts are that Ferrell was allowed to engage in extensive *voir dire* questioning (of jurors who had already completed questionnaires (TR 907)), to the extent that the Court remarked that the defense *voir dire* lasted, at that point, some two-and-one-half hours, compared to one hour for the state. (TR1634-35). Moreover, the transcript of this case shows that *voir dire* consumes five volumes of transcript, which is hardly a "limited" amount.

The first identified complaint is that the trial court sustained the state's objection to a certain questioning for the stated reason that "it calls for them to commit to a position when they don't know any facts and haven't been given the law." (TR 1031). In a portion of the record that is omitted from Ferrell's brief, the prosecution pointed out that "[t]he question is will they follow the law", to which the Court responded "[t]hat's correct". (TR 1031). To the extent that further discussion is necessary, it is clear that the proper inquiry is whether the prospective juror will follow the law, not whether the juror will,

[31]Ferrell also complains that the trial court did not allow him to engage in unending *voir dire* concerning the death penalty. The record supports the conclusion that **extensive** *voir dire* on the death-qualification issue was conducted. There is no right to engage in repetitive and cumulative questioning, and it is the duty of the court to prevent or limit such where appropriate.

in the abstract, always "vote for death." That is the proper inquiry, and the trial court properly sustained the State's objection to speculative, abstract questioning by the defense. There is no error, and no basis for relief.

Ferrell next complains that the trial court improperly "precluded further inquiry" into the prospective juror's "feelings about the death penalty." This issue is based on cumulative questioning that came late in the jury selection process, after extensive questioning on that subject had been conducted (TR883-904; R1576). The facts are that the complained of matter occurred shortly before final selection of the jury was completed[32], and dealt with a juror who was removed peremptorily by Ferrell. (TR 1650). Ferrell has not alleged that he was prejudiced in any way, nor has he alleged that any juror was not fair and impartial. In short, Ferrell seeks reversal of his sentences of death when there is no error, when his rights were not affected in any way, and when he was tried by a jury that was acceptable to him. (TR 1655). There is no basis for relief because, under the most favorable view of the matter possible, any error was harmless beyond a reasonable doubt. *State v. DiGuilio, supra.*

To the extent that Ferrell argues that *Florida Rule of*

[32]Jury selection begins at page 1644 of the record.

Criminal Procedure 3.281 was not complied with, his brief contains no more than a bare claim of non-compliance with the rule on the part of the trial court. However, there is no objection appearing of record in which Ferrell alleges that Rule 3.281 was not complied with[33], nor is there any suggestion by trial counsel that *voir dire* was hampered in some fashion[34]. There is no support for Ferrell's claim of error, and there is no basis for relief, assuming, *arguendo*, that a violation of Rule 3.281 would, in fact, compel such a result.

Finally, even assuming for purposes of argument that there was some error, that error was harmless. Based upon Ferrell's *Initial Brief,* the most that has been alleged is a claim that a rule of criminal procedure was not followed. There is no citation to the record to support that claim, nor is there any explanation as to the sort of prejudice resulting from the alleged "error". The most that has been alleged is a technical error that had no adverse effect on Ferrell, and is harmless beyond a reasonable doubt. *DiGuilio, supra.* There is no basis for relief.

IV. THE "OPINION TESTIMONY" CLAIM

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[33]Prior to trial, Ferrell filed a motion in which he sought production of the Rule 3.281 documents long before trial. (TR560). That motion was denied. (TR1004).

[34]Comments by trial counsel seem to suggest that the materials at issue were in their possession. (TR 1694).

On pages 46-50 of his brief, Ferrell argues that the trial court erred in allowing what is described by Ferrell as "opinion testimony" on the part of a State witness. This claim fails for the following reasons.

The testimony at issue, in its entirety, reads as follows:

> Q: In your conversations that you had with Mr. Ferrell, did he particularly tell you what he was doing in the State of Florida?
>
> A: He said that he was there, he was here in Eustis on unfinished business.
>
> Q: You had been a friend of Mr. Ferrell's and had spoken to him on a number of occasions, it that true?
>
> A: Yes.
>
> Q: What did that mean to you having known him and knowing how he spoke?
>
> [Defense counsel]: Your Honor, I would object that it is speculative. She can't understand what was going on in my client's mind, nor what was meant by the statement and we would ask that the witness not be allowed to answer.
>
> The Court: She wasn't asked that. She was asked what it meant to her. She can answer that. Overruled.
>
> Q: Miss Presson?
>
> A: My understanding that it's -- unfinished business means that somebody has done somebody else wrong and they will pay for it, that's unfinished business.

(TR 1960-61). A fair reading of the record, without interpreting it to suit one's purpose, demonstrates that the witness was not asked to speculate or otherwise interpret Ferrell's statement. What the

witness was asked to do, which was completely proper, was to testify as to what the phrase "unfinished business" meant to her. That is not improper, nor is it speculative, because the witness was not asked to "interpret" what Ferrell said.[35] In any event, the complained-of testimony came during the penalty phase of Ferrell's trial, with the attendant relaxed evidentiary standards. Even assuming *arguendo* that the testimony at issue should not have been allowed, Ferrell cannot make the leap from technical error to a basis for reversal. Under the facts of this case, any error was harmless beyond a reasonable doubt because Ferrell was not prejudiced by the testimony at issue. *DiGuilio, supra.* Ferrell's death sentences should be affirmed in all respects.

V. THE DENIAL OF THE MOTION TO SUPPRESS CLAIM

On pages 51-61 of his *Initial Brief,* Ferrell argues that the trial court erroneously denied his motion to suppress the statement given to Louisiana law enforcement officers. This claim is not a basis for relief for the following reasons.

The first reason that Ferrell's claim of error in denying the motion to suppress the statement given to the Louisiana authorities fails is because a second, **unchallenged** statement given to **Florida**

[35]Despite Ferrell's attempts to force a square peg into a round hole, this is not lay witness opinion testimony.

law enforcement officers was also admitted during Ferrell's penalty phase. (TR 2749-2823). Ferrell does not challenge that statement in his brief, and, in fact, makes no reference to it at all. That unchallenged statement is a full confession to two brutal murders, and, because its admission is not challenged on appeal, even assuming that it was error to admit the first statement, any error was harmless because the same evidence was placed before the penalty phase jury in the statement that Ferrell concedes was properly admitted. Ferrell's claim is internally inconsistent, and, moreover, has no basis in law or fact. This Court should deny all relief.

In addition to denying relief on this claim because it is based upon a flawed legal premise, this Court should also deny relief because the State established that the both statements were admissible into evidence. At the hearing on the motion to suppress, the State established that the defendants were not mistreated or abused in any fashion, that their basic human needs were attended to, and that Ferrell was interviewed (on two occasions) for no more than two-and-one-half hours. (TR 348, 424, 432, 435, 441, 456, 479). The record further demonstrates that Ferrell was given his *Miranda* rights on three occasions, and on each occasion stated that he understood his rights and was willing to talk to law enforcement

despite understanding his rights. (TR 395-97; 428-35; 534-36). Ferrell was offered no promises or inducements, was not under the influence of alcohol or drugs, and, moreover, declined the opportunity to contact his parents. (TR 441; 435; 448). Ferrell stated specifically that he was giving the statement because it was the truth, not because he wanted to be able to see Charity Keesee. (TR 537). Despite Ferrell's hyperbolic efforts to create a coercive element surrounding his confession, the totality of the evidence establishes that his two confessions were given following a knowing, voluntary, and intelligent waiver of his *Miranda* rights, which was not, in any way, obtained by improper coercion.[36] The facts of this case are, if anything, less compelling than the facts of *Bruno*, where this Court held, "[t]here was no police overreaching, and the fact that Bruno's confession was motivated in part by concern over the welfare of his son does not provide a basis for suppressing the confession." *Bruno v. State,* 574 So.2d 76, 80 (Fla. 1991). The State carried its burden of proving the voluntariness of the two statements, and the trial court's denial of the motion to suppress is not clearly erroneous. *Thompson v.*

[36]Ferrell was **not** under anything remotely resembling continuous questioning at the police station. (TR 348). One interview lasted 40 minutes (TR 456), and the second (with Florida officers) lasted 54 minutes (TR 461).

State, 548 So.2d 198, 204 (Fla. 1989). The sentences of death should be affirmed in all respects.[37]

On pages 57-61 of his brief, Ferrell raises a sub-claim in which he argues that his confession is inadmissible in a Florida proceeding because it is inadmissible under **Louisiana** law. This claim collapses for several reasons. The first defect with Ferrell's claim is that the admissibility of the confession under Louisiana law does not affect the admissibility of the confession in a Florida penalty phase proceeding, where the **only** exclusion is of evidence obtained in violation of the United States or Florida Constitutions. §921.141(1), *Fla. Stat.* Ferrell has not even alleged a violation of the United States Constitution, and, because that is so, has not alleged any basis for reversal.[38]

This claim is also not a basis for relief because the second

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[37]On page 55 of his *Initial Brief*, Ferrell claims that he had had little sleep in the seven days between the murders and his arrest in Louisiana. That is false -- according to Ferrell's own brief, the murders occurred late on November 25, 1996. Ferrell was arrested on November 28, 1996. (TR 340). Ferrell also claims that he had consumed a "bottle of wine" on an empty stomach shortly before he was taken into custody. The true facts are that that wine was consumed two-and-one-half hours after the **murders**, which took place earlier in the week. (TR 443).

[38]For the reasons set out above, the statements at issue were not obtained in violation of the Florida Constitution. There is no constitutional claim in Ferrell's brief, and, hence, no ground for relief.

statement, taken by **Florida** officers, is not challenged herein[39]. That statement was introduced into evidence, and is not challenged on appeal. Because Ferrell has conceded the admissibility of that statement, the most that this issue does is raise an error that was harmless beyond a reasonable doubt in light of the unchallenged, virtually identical, evidence before the jury. This claim is a non-issue, and the sentences of death should not be disturbed.[40]

VI. THE CHANGE OF VENUE CLAIM

On pages 62-66 of his brief, Ferrell argues that it was error for the trial court to deny his motion for change of venue. Despite Ferrell's protestations, a fair and impartial jury was selected, and, therefore, there is no basis for relief.

The facts of this case, at least with regard to the change of venue issue, are disturbingly similar to those of another Lake County double-homicide. In *Henyard v. State,* this Court decided the identical claim in the following way:

> In *McCaskill v. State*, 344 So.2d 1276, 1278 (Fla. 1977), we adopted the test set forth in *Murphy v. Florida*, 421

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[39]As discussed above, the second statement is not mentioned in Ferrell's brief.

[40]Ferrell does not explain, because he cannot, how it was error for Florida officers to take a statement in Louisiana that was in all respects admissible under Florida law (which is the only law that matters with respect to this case). The **Florida** officers did not have to comply with Louisiana law, and the claim contained in Ferrell's brief fails.

U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), and *Kelley v. State*, 212 So.2d 27 (Fla. 2d DCA 1968), for determining whether to grant a change of venue:

> Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

Id. at 1278 (quoting *Kelley*, 212 So.2d at 28). *See also Pietri v. State*, 644 So.2d 1347 (Fla. 1994), *cert. denied*, --- U.S. ----, 115 S.Ct. 2588, 132 L.Ed.2d 836 (1995). In *Manning v. State*, 378 So.2d 274 (Fla.1980), we further explained:

> An application for change of venue is addressed to the sound discretion of the trial court, but the defendant has the burden of ... showing that the setting of the trial is inherently prejudicial because of the general atmosphere and state of mind of the inhabitants in the community. A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result. The trial court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process, or may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause.

Id. at 276 (citation omitted). **Ordinarily, absent an extreme or unusual situation, the need to change venue should not be determined until an attempt is made to**

> **select a jury.**
>
> During the actual voir dire here, each prospective juror was questioned thoroughly and individually about his or her exposure to the pretrial publicity surrounding the case. While the jurors had all read or heard something about the case, each stated that he or she had not formed an opinion and would consider only the evidence presented during the trial in making a decision. Further, the record demonstrates that the members of Henyard's venire did not possess such prejudice or extensive knowledge of the case as to require a change of venue. Therefore, we find that on the record before us, the trial court did not abuse its discretion in denying Henyard's motions for a change of venue.

Henyard v. State, 689 So.2d 239, 245-6 (Fla. 1996). [emphasis added].

In this case, as in *Henyard*, the question is not whether the case was the subject of publicity. Instead, the question is whether the jury that was empaneled to try the case was able to decide the case based upon the law and the evidence, putting aside any other knowledge about the case. A fair and impartial jury is what Ferrell was entitled to, and is what he received. There is no basis for reversal.

To the extent that further discussion of this claim is necessary, Ferrell had not identified any juror (who was seated to try this case) that was biased against him, nor has he even claimed that the jury was not fair and impartial. While Ferrell may "doubt" that he could receive a fair trial in a case as "salacious as this

one", that is not the standard by which a change of venue motion is evaluated[41]. Under *Henyard*, the denial of the motion for change of venue was proper. The sentences should not be disturbed.

To the extent that Ferrell complains that he did not receive a list of the prospective jurors in compliance with *Florida Rule of Criminal Procedure* 3.281, the record reflects that the required list was provided to counsel on the morning of the **first** day of the multi-day *voir dire* process. (TR 1695). Ferrell has not suggested how he was prejudiced in any way, and, if there was error, it was harmless beyond a reasonable doubt. *DiGuilio, supra.*

VII. THE "INFLAMMATORY EVIDENCE" CLAIM

On pages 67-68 of his brief, Ferrell argues that the trial court erred in admitting evidence of Ferrell's plans to escape from the Lake County Jail. According to Ferrell, this evidence was irrelevant to the penalty phase issues. For the following reasons, this claim is not a basis for reversal of Ferrell's sentences.

Ferrell's argument is based on the premise that the State somehow breached an agreement not to "go into" what Ferrell labels "collateral crime" evidence. That argument is based on an

[41]Given that "salacious" is defined by Webster's *Collegiate Dictionary-Tenth Edition*, as "arousing or appealing to sexual desire or imagination", that descriptive term seems inapplicable to the beating-death of two people.

inaccurate reading of the record. The true facts are that the complained-of testimony came in through the reading of a written report prepared by the witness which was admitted under the "past recollection recorded" hearsay exception. (TR 2526). Before the witness testified, the trial court stated:

> It [the report] can all be read, **every word of it**, as long as it qualifies as past recollection recorded, but not admitted.
>
> If the Defense won't agree to admit it [the report] then we will just have to do it the hard way.

(TR 2526). When the record is read without slanting it to support a particular interpretation, it is clear that defense counsel was well aware that the report detailing Ferrell's "escape plans" would be read, **in its entirety**, to the penalty phase jury.[42]

In his brief, Ferrell claims that the introduction of his statements to a Lake County Jail corrections officer were "collateral crime" evidence. This novel theory collapses because Ferrell has not identified what "crime" was introduced by the report at issue. While it is true that evidence of Ferrell's "escape plan" was introduced as a result, it is also true that that very evidence was cited to establish a **mitigating** circumstance in

[42]No testimony was "mysteriously elicited ... from the witness". The witness read her report, as everyone knew she would. Ferrell's insinuations are not based on the true facts.

the Court's sentencing order.[43] It hardly makes sense for Ferrell to argue against the admission of evidence that was relied on to establish a mitigating circumstance. In addition to not being evidence of a crime to begin with, the evidence at issue was turned on the State and used in mitigation. There is no basis for reversal because this claim has no legal basis.

To the extent that this "claim" deserves further discussion, Florida law is settled that the determination of the admissibility of evidence at the penalty phase of a capital trial is based on relevancy.[44] In the context of this case, the evidence of "escape plans" is certainly relevant to Ferrell's ability to adapt to incarceration, and, moreover, is highly relevant to his character, which is the primary focus of the penalty phase proceeding.[45] The complained-of evidence was of obvious relevance, and was properly

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[43]"As a result of child abuse Rodderrick Ferrell suffered a low sense of self, an inability to experience self love, sense of safety, and ability to trust which made Rod prone to **attention seeking behavior** and manipulation by others. This was established by the evidence of the experts **and it is obvious from the discussion Rod had at the jail with Desiree Nutt.**" (TR 2072).

[44]Ferrell cites *Castro v. State*, 547 So.2d 111, 115 (Fla. 1989) in support of his position. That case dealt with true collateral crime evidence in an entirely different context than that of this case. *Castro* (and the other cases in Ferrell's brief) do not control, nor do they compel reversal.

[45]For reasons that are not apparent, the sentencing court found that Ferrell could function in prison. (TR 2073).

admitted. There is no basis for reversal, and Ferrell should not be heard to complain, especially when the evidence upon which he seeks reversal was used to establish one mitigator and not considered when the trial court found another. Ferrell's complaint is unreasonable because he benefitted from the admission of the evidence he now challenges. There was no prejudice, and, hence, there is no basis for relief.

Alternatively, even if the evidence at issue should not have been admitted, and even if it truly is evidence of a collateral crime, any error is harmless beyond a reasonable doubt.[46] Under the facts of this double murder, and in view of the extensive aggravation, it is inconceivable that the jury would have recommended a life sentence had they not heard of Ferrell's "escape plans". Because that is so, there is no basis for reversal because Ferrell was not prejudiced. Any error was harmless beyond a reasonable doubt. *DiGuilio, supra.*

VIII. THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATOR

On pages 69-73 of his brief, Ferrell argues that the sentencing court should not have found the cold, calculated, and

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[46]Ferrell's claim is that the evidence is of a collateral **crime**. Telling a correctional officer about his plans to escape may indicate less than exceptional planning, but it is not a crime of any sort.

premeditated aggravating circumstance. This claim lacks merit.

In finding that the cold, calculated, and premeditated aggravator applied to the murders in this case, the trial court stated:

> This circumstance is proven beyond a reasonable doubt by Ferrell's statements on the afternoon of the murders that he was going to kill the victims, his careful surveillance of the home before entry, the procurement of a deadly weapon in advance of his entry into the home, the lack of resistance of Richard Wendorf and the number, location and severity of the wounds inflicted on both of the victims. *Stein v. State,* 632 So.2d 1361 (Fla. 1994); *Jones v. State,* 612 So.2d 1370 (Fla. 1992). This factor is given great weight.

(TR2061). In setting out the facts of the case as established by the evidence, the court had previously stated:

> . . . Ferrell and the group returned to Shannon Yohee's home to call[Jeanine] LeClaire and Heather Wendorf to tell them of the change of plans. Shannon Yohee was told of the group's car problems and heard a discussion among Ferrell and his group that they would take the Wendorf's vehicle. Ferrell discussed with the group, in Shannon Yohee's presence, a plan to kill Heather Wendorf's parents and take their Ford Explorer vehicle. Ferrell spoke to Heather Wendorf by telephone, drew a map to her house from her directions, and shortly thereafter left the Yohee residence.
>
> The group arrived in the area of the Wendorf residence and met Heather Wendorf down the road from her home. Ferrell sent the three girls, Heather Wendorf, Dana Cooper, and Charity Keesee, to visit Heather's boyfriend and pick up Jeanine LeClaire. Ferrell and Anderson remained in the area of the Wendorf home in order to burglarize the home, take money and the vehicle, and to kill Richard Wendorf and Naoma Queen. In furtherance of this plan both had armed themselves with clubs.

Ferrell and Anderson engaged in an exterior search of the Wendorf home to determine where entry could be made. They then entered the home through an unlocked garage entryway door and searched the garage to find a better weapon. Several potential weapons were considered before Ferrell determined to arm himself with a crowbar. Entry was then made into the home and one phone was pulled from the wall. Richard Wendorf, who was asleep on the family room sofa, was the first victim. He was beaten by Ferrell in the head multiple times with the crowbar. His injuries were extensive wounds to the head, some of which fractured his skull leading to his death. He also had multiple chest wounds which fractured his ribs on the right side. After Richard Wendorf's death, Naoma Queen came from the bathroom to the kitchen area of the home where she confronted Ferrell. Ferrell had blood on his clothes from her husband's beating and carried the crowbar in his hands. Ms. Queen spilled hot coffee on him, scratched his face and fought him until she was beaten to the floor and was then beaten in the head multiple times.

After the murders, Ferrell and Anderson searched the house for valuables, money, and keys. A Discover card was taken from the body of Richard Wendorf. Ferrell and Anderson then left the house in the Wendorf's Explorer. Ferrell and Anderson in the Explorer met Cooper, Keesee and Heather Wendorf in the Buick Skyhawk as the girls were returning to the area of the Wendorf's home. The entire group then left Eustis. . . .

Because of a telephone call made in Baton Rouge, Louisiana, to one of Charity Keesee's relatives, a BOLO was issued and all five subjects were apprehended. There followed two video taped statements from Ferrell recounting slightly different versions of the crimes to Baton Rouge Police Sergeant Ben Odom and later to Lake Count Sheriff's Deputy Al Gussler and Sergeant Wayne Longo. In these statements, Ferrell recounts in detail surveying the home, entering the garage and choosing a weapon, entering the home, disabling a telephone, committing the murders of both victims and taking property and the vehicle from their home.

(TR2057-58). Shannon Yohee testified that, on Monday, November 25, 1996, Ferrell and three others "showed up" at her home asking to use the telephone. (TR 2554). Ferrell got directions to the Wendorf residence from Heather Wendorf, and recorded those directions on a hand-drawn map. (TR 2555-6). Shortly thereafter, the following conversation took place, as described by Ms. Yohee:

> Okay. When we were sitting there and Rod started saying that he was going to go steal the Wendorf's car and -- because his car wasn't working right, like I said before, and **he said that he wanted to go kill her parents and I asked him why and he said because he wanted their car.**
> . . .

(TR 2558).

Under settled Florida law, the cold, calculated, and premeditated aggravator has four elements:

> 1. a murder that was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage;
>
> 2. the murder was the product of a careful plan or prearranged design to commit murder before the fatal incident;
>
> 3. there was premeditation over and above that required for unaggravated first-degree murder; and,
>
> 4. there is no pretense of moral or legal justification.

Walls v. State, 641 So.2d 381 (Fla. 1994). A pretense of moral or legal justification is:

> any colorable (FN4) claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide. *E.g., Banda; Christian v. State,* 550 So.2d 450 (Fla. 1989), *cert. denied*, 494 U.S. 1028, 110 S.Ct. 1475, 108 L.Ed.2d 612 (1990).
>
> > FN4. "Colorable" means "that which is in appearance only, ... having the appearance of truth." Black's Law Dictionary 265 (6th ed. 1991). "Appearance" means there must be at least some basis in fact to support the defendant's belief that the killing would be excusable, justifiable, or subject to a legal defense. Of course, we are not dealing here with delusional defendants, as in *Santos*, whose internal distortion of reality more properly is relevant to the "coldness" element.

Walls v. State, supra. When those criteria are applied to the facts of this case, the cold, calculated, and premeditated aggravator is established beyond a reasonable doubt.

Based upon the testimony of Shannon Yohee, there is no doubt that the murders in this case were the product of cool and calm reflection -- Ferrell stated that he was going to kill the victims because he wanted their car. This statement was made well before the murders occurred, and there is nothing to support Ferrell's self-serving claims of a "frenzied attack". Ferrell discussed committing two murders in a calm, dispassionate manner several hours before he carried his plan out. The first part of the cold, calculated, and premeditated aggravator is well established.

Likewise, the second and third prongs of this aggravator were proven beyond a reasonable doubt. The evidence clearly established that Ferrell surveiled the Wendorf home before entering through an unlocked door, procured a weapon from the garage which was preferable to the one that he had brought with him, silently entered the home, and, upon finding Mr. Wendorf asleep on the couch, proceeded to beat him to death in accord with the plan. When confronted by Ms. Queen, Ferrell followed the plan and beat her to death as well, though he was somewhat hampered by her unexpectedly strong resistance. (TR2732).[47] Moreover, the heightened premeditation component exists beyond a reasonable doubt. It was well-established by the evidence that Ferrell was discussing his plan to kill his victims to obtain their car well before the plan was executed. This degree of planning and ruthlessness is more than sufficient to establish the third component of the cold, calculated, and premeditated aggravating circumstance. Finally, there is no colorable claim that the two murders were committed for any reason other than to obtain the victims' car. While Ferrell claims that the murders were committed so that Heather Wendorf

[47]Obviously, neither Ferrell nor anyone else could have pre-planned the exact location within the residence at which the two victims would be encountered. That fact does not affect the applicability of the cold, calculated, and premeditated aggravator.

"could escape to a better life", those self-serving statements are contradicted by the unequivocal statement to Shannon Yohee that he intended to kill his victims because he needed their car.[48] Each component of the cold, calculated, and premeditated aggravator has been established beyond a reasonable doubt. There is no basis for Ferrell's self-serving claims, and competent substantial evidence supports this aggravator.

IX. THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR

On pages 74-79 of his brief, Ferrell argues that the heinous, atrocious, or cruel aggravating circumstance (which was found as to one of his two murders) was improperly found because, according to Ferrell, the evidence does not support it. This claim is not a basis for relief for the reasons set out below.

In finding the heinous, atrocious, or cruel aggravator, the sentencing court made the following findings:

> This circumstance is clearly proved by the facts recited above beyond a reasonable doubt. When Ferrell confronted Naoma Queen his clothes were blood stained from her husband's beating and Ferrell had the crowbar in his hands. Ms. Queen spilled hot coffee on him, scratched his face and fought him until she was beaten to the floor and

[48]The statement referred to at TR3040-41 of the record may actually have been made by Ferrell instead of by Heather. (TR 3047-48). Ferrell denied the statement to Shannon Yohee, and testified that he thought that Heather's parents were hurting her. (TR 3578-84). At most, the conflicting testimony created a question of fact that the court resolved against Ferrell.

> was then beaten in the head multiple times. It is clear from the defensive wounds on her hands and arms as well as Ferrell's own description of the event that Ms. Queen was faced with unspeakable fear and terror as she faced and fought her murderer. These facts support a finding of heinous, atrocious, and cruel. [citations omitted]. This circumstance is given great weight by the Court as it shows Ferrell's complete indifference to, and enjoyment of, the suffering of Ms. Queen.

(TR2060). Those findings have ample support in the record. The medical examiner who conducted the autopsy of Ms. Queen identified 21 separate, identifiable wounds. (TR 2036-41).[49] A number of those wounds were to Ms. Queen's head, but she also sustained a number of defensive wounds, which indicate that she was conscious when those wounds were inflicted. (TR 2049).

Ferrell argues that he did not intend for the murder of Ms. Queen to be "conscienceless or pitiless", and, therefore the heinous, atrocious, or cruel aggravator cannot apply. This claim is foreclosed by clear precedent. This Court has stated:

> Although Mahn claims he did not deliberately inflict pain and thought the initial stabbings would cause death quickly, the record reflects that Debra Shanko was stabbed numerous times, sustained some defensive wounds, and was still alive when Mahn fled the scene. The record also confirms that Anthony Shanko was stabbed numerous times and sustained several defensive wounds. Although initially asleep when attacked, Anthony's defensive

[49]Three of those wounds resulted in Ms. Queen's brainstem being severed from the brain, resulting in death. (TR 2051). Those wounds were obviously inflicted after Ms. Queen sustained the defensive wounds.

> wounds demonstrate he awoke during the attack and attempted to fend off further stabbings.

Mahn v. State, 714 So.2d 391, 399 (Fla. 1998). In affirming the application of the heinous, atrocious, or cruel aggravator in another beating death, this Court held:

> The testimony supports the State's theory that many if not all of the injuries, were inflicted before a blow to the head caused unconsciousness and eventually death. We believe the evidence is broad enough that a trier of fact could reasonably infer that the victim was conscious during the sexual batteries and other injuries that were inflicted upon her before her death. Therefore, we agree with the State that the trial court did not abuse its discretion in finding that the HAC aggravator was proven beyond a reasonable doubt. As in *Wuornos v. State*, 644 So.2d 1012, 1019 (Fla. 1994), we affirm this finding since "the State's theory ... prevailed, is supported by the facts, and has been proven beyond a reasonable doubt."

Gudinas v. State, 693 So.2d 953, 966 (Fla. 1997). *See also, Kimbrough v. State,* 700 So.2d 634, 638 (Fla. 1997); *Lawrence v. State,* 698 So.2d 1219 (Fla. 1997); *Bogle v. State*, 655 So.2d 1103 (Fla.), *cert. denied*, 516 U.S. 978, 116 S.Ct. 483, 133 L.Ed.2d 410 (1995); *Whitton v. State*, 649 So.2d 861 (Fla. 1994), *cert. denied*, 516 U.S. 832, 116 S.Ct. 106, 133 L.Ed.2d 59 (1995); *Colina v. State*, 634 So.2d 1077 (Fla.), *cert. denied*, 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 289 (1994). There is no basis for reversal on this record, which supports the heinous, atrocious, or cruel aggravator beyond a reasonable doubt.

To the extent that further discussion of the "intent element" of the heinous, atrocious, or cruel aggravator is necessary, this Court squarely rejected such a claim in *Guzman v. State,* where this Court held:

> We also reject Guzman's argument that the HAC aggravator should not apply because there is no evidence that Colvin was intentionally made to suffer. **The intention of the killer to inflict pain on the victim is not a necessary element of the aggravator.** As previously noted, the HAC aggravator may be applied to torturous murders where the killer was utterly indifferent to the suffering of another. *See Kearse; Cheshire*.

Guzman v. State, 721 So.2d 1155, 1160 (Fla. 1998).

In a remarkably misleading bit of appellate advocacy, Ferrell seems to argue that because Ms. Queen "[took] the offensive with a preemptive strike of scalding hot coffee", her murder was not unnecessarily torturous and, therefore, was not heinous, atrocious, or cruel.[50] No rule of law known to counsel for the State suggests or implies that resistance by a murder victim somehow removes a murder from eligibility for the heinous, atrocious, or cruel aggravator. This claim is frivolous, has no basis in law or reason, and is not a basis for reversal of Ferrell's death sentence. The heinous, atrocious, or cruel aggravator is supported by competent

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[50]Ferrell also claims that the sentencing court found that Ms. Queen "recoil[ed] in abject terror". *Initial Brief* at 76. Such language appears nowhere in the sentencing order.

substantial evidence, and Ferrell's sentences of death should not be disturbed.

X. DEATH IS THE PROPER SENTENCE

On pages 80-84 of his brief, Ferrell argues that the beating murders of two people during a burglary in order to gain possession of their vehicle do not present a case in which death is the proper sentence. Ferrell's claim is based upon two theories, neither of which has any factual or legal basis.

Ferrell's first claim is that the cold, calculated, and premeditated and heinous, atrocious, or cruel aggravators were improperly found. For the reasons set out above, both of those aggravators were shown to exist beyond a reasonable doubt by competent substantial evidence[51]. Because that is so, Ferrell's argument is based upon a faulty premise -- this case is heavily aggravated, and is the sort of case for which death is the proper penalty.[52] Ferrell's complaints concerning the weight given the

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[51]For the reasons set out in the State's Cross-Appeal, the sentencing court should have found the avoiding arrest aggravator, and should not have merged the pecuniary gain aggravator with the felony-murder aggravator.

[52]Ferrell concedes that the prior violent felony aggravator and the "felony-murder" aggravator apply. According to Ferrell, these are "garden variety" aggravating circumstances. Whatever that means, the Legislature obviously believed them to be significant to the sentencing structure, otherwise they would not have among the first aggravators listed in the statute.

various aggravators are no more than his dissatisfaction over having received the sentences he deserves -- the weight given an aggravator is the province of the sentencing court, and Ferrell's "fail[ure] to see why" certain aggravators were given the weight that they were is not a valid complaint.

The second component of Ferrell's proportionality claim is his argument that the mitigation was not given enough weight. Once again, the weight given to mitigating evidence is within the province of the sentencing court, and the fact that Ferrell does not like the result is meaningless. *Cole v. State, supra; Blanco v. State,* 706 So.2d 7 (Fla. 1997); *Foster v. State,* 654 So.2d 112 (Fla. 1995). In addressing the various mitigation, the trial court stated:

> Ferrell presented testimony and evidence in this cause in an attempt to establish both statutory and non-statutory mitigating circumstances. In particular, the Defense presented the videotape recording of Ferrell making his guilty pleas to this Court and the testimony of three mental health expert witnesses and nineteen other witnesses. **Notwithstanding this evidence, the jury unanimously returned advisory recommendations for two death sentences.**
>
> The Defense argued to the jury in this case that it should find, and give significant weight to, three statutory mitigating circumstances and twenty-one non-statutory mitigating circumstances. These mitigating circumstances, or mitigators, were actually listed in numbered fashion for the jury by Defense counsel during her closing argument in this case. Each of those mitigators is discussed below. Many of these mitigating

> circumstances are similar to one another or otherwise overlap each other.

(TR2061).

Under settled Florida law, a "mitigating circumstance" is broadly defined as being a fact that somehow reduces the defendant's degree of culpability for the murder he stands convicted of. *King v. State*, 623 So.2d 486 (Fla. 1993); *Rogers v. State*, 511 So.2d 526 (Fla. 1987); *Hall v. State*, 614 So.2d 473, 479 (Fla. 1993) *Preston v. State*, 607 So.2d 404 (Fla. 1992). Once a fact offered as mitigation has been established, it must be considered if it is truly "mitigating", but the weight given a particular mitigator is within the province of the sentencing court. *King v. State*, 623 So.2d 486 (Fla. 1993); *Rogers v. State*, 511 So.2d 526 (Fla. 1987); *Hall v. State*, 614 So.2d 473, 479 (Fla. 1993) *Preston v. State*, 607 So.2d 404 (Fla. 1992). A defendant is not entitled to relief merely because he is not satisfied with the weight given certain proffered mitigators. *See, e.g., Ferrell v. State*, 653 So.2d 367, 371 (Fla. 1995). The sentencing order in this case is highly detailed, and devoted some 12 single-spaced pages to discussion of the various proffered mitigators. As that order makes clear, the existence of the facts offered in mitigation and the **mitigating effect** of those facts are two different matters. While various "mitigation" tends to evoke sympathy for the

defendant, the aggravators that were proven beyond a reasonable doubt outweigh the mitigation. Of course, the weighing of aggravators and mitigators is not simply a counting process. The sentencing court undertook a careful analysis of the sentencing factors, and found that the aggravating circumstances outweighed the mitigation. That finding is supported by competent substantial evidence, and should not be disturbed. Death is the proper sentence[53].

XI. FERRELL'S AGE AS BAR TO EXECUTION

On pages 85-94 of his *Initial Brief*, and in his *Supplemental Brief*, Ferrell argues that because he was sixteen years and eight months old when he planned and carried out the burglary, robbery, and beating deaths of two people in order to obtain their vehicle, he should not be executed for those murders. Citing to this Court's July 8, 1999, decision in *Brennan v. State,* No. 90,279, Ferrell asserts that the law compels reduction of his sentences of death to sentences of life without parole. *Brennan* is wrongly decided, and

[53]Despite Ferrell's evident belief that Heather Wendorf should have been prosecuted for the murders, the fact is that the Lake County grand jury twice refused to indict her in connection with the death of her parents. If the acquittal of a "co-defendant" is not mitigating, and that is the law, *Larzalere v. State,* 676 So.2d 394 (Fla. 1996), then the fact that the grand jury refused to indict Heather Wendorf is of no significance to Ferrell's sentence. The report of the second grand jury is attached to Ferrell's brief as an appendix. The decision of the grand jury should be respected.

should be overruled.[54]

Ferrell has not sufficiently briefed this issue in his three-page supplemental brief, which does not comply with the spirit of this Court's order for supplemental briefing. Instead, Ferrell has violated this Court's well-settled rule that:

> In any event, it clearly is not proper for counsel to attempt to cross-reference issues from a *brief* in a distinct case pending in the same court. [footnote omitted]. The law is well settled that failure to raise an available issue constitutes an admission that no error occurred. Moreover, we do not believe it wise to put an appellate court or opposing counsel in the position of guessing which arguments counsel deems relevant to which of the separate cases, nor do we support a rule that might encourage counsel to brief the Court through a simple incorporation by reference. Accordingly, all available issues not raised in the present briefs are barred.

Johnson v. State, 660 So.2d 637, 645 (Fla. 1995) [emphasis in original]; *see also, Johnson v. State,* 660 So.2d 648, 653 (Fla. 1995). Ferrell's supplemental brief does not comply with settled Florida law.

In the *Brennan* decision, this Court relied on *Allen v. State*, 636 So.2d 494 (Fla. 1994) for the proposition that a defendant who was 16 at the time of committing a death-eligible murder (or murders, as in Ferrell's case) cannot be executed as a matter of

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[54]This Court issued a modified opinion in *Brennan v. State*, 24 Fla. Law Weekly S495 (October 21, 1999).

law. *Brennan* extrapolated the *Allen* decision to apply to 16-year-old murderers, even though *Allen* did not, by its plain terms, decide the death-eligibility of that group of killers. Moreover, while this Court stated in *Brennan* that it did not base *Allen* on United States Supreme Court case law, the fact is that *Allen* reached the same result as *Thompson v. Oklahoma*, 487 U.S. 815 (1988), which held that a defendant who was fifteen at the time of the crime could not constitutionally be executed. Under Article 1, Section 17 of the *Florida Constitution* (as amended on November 3, 1998), the "cruel or unusual" provision of the State constitution must be interpreted in conformity with United States Supreme Court precedent. Under such precedent, it is not "cruel or unusual" to impose a sentence of death on a defendant who was 16 years old at the time of the murder giving rise to the sentence of death. This Court should do as it is required to do under the Florida Constitution, and follow Federal constitutional precedent on this issue. *Stanford v. Kentucky,* 492 U.S. 361 (1989).

In the *Brennan* decision, this Court made much of the fact that few 16-year-old killers are sentenced to death, and that, of the recent defendants falling into that category, all three have had their sentences vacated. *Brennan,* ms. op. at 13. While that statement is true as far as it goes, the Court did not recognize

that Jeffery Farina has been sentenced to death by a Volusia County jury[55], and, moreover, Ferrell's appeal was pending when this Court decided *Brennan.* Obviously, the advisory juries in this case and in the Farina case believed that death was the proper punishment **despite the age of the defendant at the time of the crimes**. The age of the defendant was given effect as mitigation, which is the proper place for such consideration. That does not render the imposition of a sentence of death unconstitutional when a 16-year-old commits a first-degree murder that is eligible for a sentence of death, and is so heavily aggravated and unmitigated that a death sentence withstands proportionality review. Ferrell's death sentence should not be disturbed. *See, Lamb v. State*, 532 So.2d 1051 (Fla. 1988).

On October 21, 1999, this Court issued a revised opinion in *Brennan v. State,* 24 Fla. L. Weekly S495 (Fla., Oct. 21, 1999), which reached the same result as the original opinion -- the death sentence was reduced to a sentence of life without parole. However, the revised *Brennan* opinion did not address the specific issue of

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[55]Farina's first death sentence was vacated based upon a jury selection error. *Farina v. State,* 680 So.2d 392, 399 (Fla. 1996). Two other cases were mentioned in *Brennan*: *Morgan v. State,* 639 So.2d 6 (Fla. 1994)(death sentence reversed on proportionality grounds); and *Brown v. State*, 367 So.2d 616 (Fla. 1979)(death sentence reversed based on *Tedder* error).

the November 1998 amendment to Article I, Section 17 of the *Florida Constitution*, and the applicability of that amendment to Brennan's case.[56]

On November 3, 1998, Article I, Section 17 of the Florida Constitution was modified to read as follow:

> Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the Legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, **shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.** Any method of execution shall be allowed, unless prohibited bu the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. **This section shall apply retroactively.**

Fla. Const. Art. I § 17 (1999). [emphasis added].

Based upon the clear language of the State Constitution, this

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[56]In footnote 4 to the *Brennan* opinion, the majority criticized the State for raising the November 1998 amendment "for the first time" in the State's motion for rehearing. Such criticism is curious, since the case was submitted for decision before the amendment became law. Oral argument was conducted in *Brennan* on June 2, 1998, five months **before** the effective date of the constitutional amendment at issue.

Court is required to construe the state constitutional prohibition against cruel or unusual punishments in conformance with the United States Supreme Court's construction and interpretation of the Eighth Amendment to the Constitution of the United States. However, the *Brennan* opinion did not follow the State Constitution, and, instead, held that *Stanford v. Kentucky* was "not binding on our state constitutional analysis", even though the United States Supreme Court had held in that case that it was **not** unconstitutional to impose a sentence of death on an individual who was sixteen years old at the time of the offense. *Stanford v. Kentucky,* 492 U.S. 361, 380 (1979). Under the plain language of the November 1998 amendment to Article I, § 17, *Stanford* is clearly binding on this Court's analysis of the constitutional claim -- under that settled law, Ferrell's claim is meritless because a sentence of death can constitutionally be imposed on him.

To the extent that Ferrell may argue that there is some deficiency with the "conformity clause" amendment to Article I, § 17, Florida law is clear that such amendments are valid. Such a "conformity clause" amendment to Article I, § 12 of the Florida Constitution was approved in 1982, which required that the state constitutional right to freedom from unreasonable searches and seizures "shall be construed in conformity" with the Fourth

Amendment to the United States Constitution. **This Court has repeatedly acknowledged that the conformity clause amendment absolutely binds this Court to follow the interpretations of the United States Supreme Court with regard to the Fourth Amendment.** *Rolling v. State,* 695 So.2d 278, 297 n. 10 (Fla. 1997); *Soca v. State*, 673 So.2d 24, 27 (Fla. 1996); *Bernie v. State,* 524 So.2d 988, 990 (Fla. 1988). This Court has held that the 1982 amendment to Article I, § 12 is prospective only in application because the amendment did not provide for retroactive application. *State v. Lavazzoli*, 434 So.2d 321 (Fla. 1983). Such reasoning does not apply to the Article I, § 17 amendment because the 1998 amendment expressly provides that the provision is **retroactive** in its application. To the extent that the *Brennan* majority questioned whether application of the amendment to Article I, § 17 would be a violation of the *ex post facto* prohibition contained in the United States Constitution because it "adversely affected the substantive law in effect at the time of the original crime", **the substantive law at the time of Ferrell's crime did not make him ineligible to receive a death sentence**. Under any view of the law, at the time of Ferrell's crime, and at the time he was sentenced to death, **no decision by this Court precluded such a sentence, and, moreover, United States Supreme Court precedent established that such a**

sentence was constitutional.[57] Ferrell was eligible (under both the United States and Florida Constitutions) for a death sentence at the time he committed two murders, and was likewise eligible for such a sentence under the law in effect when he was sentenced to death. Because that is true, the conformity clause amendment to Article I, § 17 did **not** affect the substantive law in effect at the time of the crime. Under such law, death was an available sentence. That sentence should not be disturbed.

Based upon the plain language of Article I, § 17 of the Florida Constitution, this Court is clearly required to follow the United States Supreme Court's decisions concerning the construction of the state or federal protections from cruel and/or unusual punishment. There is no doubt that *Stanford v. Kentucky* is a decision of the United States Supreme Court which rejected a claim that it violates the Eighth Amendment to the United States Constitution to impose a sentence of death on a defendant who was sixteen years old when he committed the capital offense. Those two fundamental propositions are not open to debate, and, because that is so, the only conclusion possible is that Ferrell's sentence of

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[57]This Court has never delineated whether the Eighth Amendment "cruel and unusual" prohibition is broader than the Article I, § 17 "cruel or unusual" provision. *See, State v. Hale,* 630 So.2d 521 (Fla. 1993). Because that is the state of the law, there does not seem to be a valid *ex post facto* issue in this case.

death should not be disturbed.

While it may be true that no modern execution has been carried out in a case in which the defendant was under 17 at the time of the crime, that is only half of the analysis which, standing alone, establishes nothing about the existence of any "consensus" regarding the death-eligibility of a juvenile defendant.[58] The relatively small number of 16-year-old capital defendants is most likely explained by the relatively small number of first-degree murders committed by such individuals rather than by any reluctance to impose death sentences on such individuals. The most that any infrequency of death sentences for 16-year-old defendants indicates (assuming a number of prosecutions that resulted in first-degree-murder convictions but no death sentence), is that age is being given effect as a mitigator, and that Florida sentencers are following the law and reserving the death penalty for the most aggravated and least mitigated of murders. While it may be "unusual" for a 16-year-old to receive a death sentence, it is even more "unusual" for a 16-year-old to commit such a crime in the

[58]The only fact of significance to the "consensus" component is that, **in a majority of death penalty jurisdictions**, sixteen-year-old defendants are death-eligible. *Stanford v. Kentucky*, 492 U.S. at 373-4.

first place.[59] That does not render the imposition of a sentence of death **unconstitutional** in the circumstance when a 16-year-old commits a first-degree-murder that is eligible for a sentence of death, and which is so heavily aggravated and unmitigated that it withstands proportionality review. Ferrell's case falls within that category, and his sentences of death should not be disturbed.

THE STATE'S CROSS-APPEAL

I. THE TRIAL COURT ERRONEOUSLY REFUSED TO FIND THE AVOIDING ARREST AGGRAVATOR

In the final sentencing order, the sentencing court found that the avoiding arrest aggravating circumstance was not proven. The sentencing court should have found the existence of that aggravator because the dominant motive for the murders was the elimination of witnesses, which is the standard for application of this aggravator to the murder of non-law enforcement witnesses. *Wike v. State,* 698 So.2d 817 (Fla. 1997); *Preston v. State,* 607 So.2d 404 (Fla. 1992). The evidence, which was in the form of a statement by Ferrell, was that "taking out" (killing) the victims was discussed by Ferrell and Anderson before they entered the Wendorf residence[60]. (TR1953;

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[59]The term “unusual” is not used here in the constitutional sense.

[60]Ferrell stated, "Oh, we decided at that point before, because I pulled Scott to the side **because I got to thinking about how Heather's parents would probably react and I didn't want to be**

2765). Moreover, the evidence was that Ferrell obtained a more lethal weapon from the Wendorf's garage before he entered their home, beat them to death, and took the Ford Explorer that he had set out to obtain. Based upon the evidence supporting this aggravator, it is clear beyond a reasonable doubt that the two victims were beaten to death to eliminate the only two witnesses to the theft of their vehicle, thereby delaying the discovery of the crime and making an undetected escape much easier. The primary motivation for the murder of two people was the furtherance of Ferrell's goal of escaping detection[61]. This aggravator should have been found by the sentencing court, and, moreover, should receive great weight in the weighing of aggravators and mitigators. *See, e.g., Stein v. State*, 632 So.2d 1361 (Fla. 1994). *See also, Jones v. State*, No. 90,664 (Nov. 12, 1999). This Court should correct that error of law, and apply the witness elimination aggravator.

II. THE EXCLUSION OF TESTIMONY ISSUE

The trial court also prevented the State from presenting the

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found ....". (TR2765). In addition, Ferrell had discussed killing the victims on other, prior, occasions. See page 12, above.

[61]That this goal was successful is evidenced by the fact that Ferrell was not taken into custody until several days later, and by the fact that the only reason he was located in Baton Rouge, Louisiana, was by virtue of a tip to law enforcement from a family member of one of Ferrell's companions. But for that tip, Ferrell would not, at the least, have been apprehended as quickly as he was.

testimony of Audrey Presson that Ferrell had left the State of Kentucky because "he was running from the law because they had found him building bombs." (TR1978).[62] This testimony was improperly excluded by the trial court because it was relevant to the "avoiding arrest" aggravator. Specifically, this testimony was relevant, as the State argued below, because the evidence was that the vehicle in which Ferrell was traveling kept breaking down, and he needed another vehicle to continue his flight to Louisiana. (TR1979). As such, the relevancy of this evidence was that it supports the avoiding arrest aggravator by explaining Ferrell's motivation for avoiding capture as well as in fleshing out the motive for the theft of the Wendorf's vehicle. Of course, because the evidence was offered at the penalty phase of Ferrell's capital trial, relevancy was the standard for admission. § 921.141(3)(e), *Fla. Stat.* Because the evidence was relevant, it should have been admitted.

[62]The State presented this testimony in the form of a proffer. (TR 1978).

CONCLUSION

For the reasons set out above, Ferrell's sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Christopher S. Quarles, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this _____ day of December, 1999.

Of Counsel