IN THE SUPREME COURT OF FLORIDA

STEVEN M. EVANS,

Appellant,

v. **CASE NO. SC95-993**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On May 2, 1996, the defendant, Steven Evans, was charged in a two-count Indictment with First Degree Murder and Kidnapping of Kenneth Lewis. (R614-15). The Public Defender's Office for the Ninth Judicial Circuit was appointed to represent Evans, but, shortly thereafter, filed a motion to withdraw (R620;623-25). Private counsel was ultimately appointed to represent Evans. (R630).[1]

On March 2, 1998, experts were appointed for purposes of conducting a Competency and Sanity Evaluation, and a hearing on the findings thereof was ordered. (R759-63). Following such hearing, Evans was adjudicated incompetent to proceed and committed to the Florida Department of Children and Families. (R781-84).[2]

The Court ultimately found Evans competent to proceed (R1415), and, while jury selection was underway, made yet another finding that Evans was competent to proceed. (TR130). On April 9, 1999, the jury found Evans guilty of the offenses charged in the Indictment. (R2182-85). On April 15, 1999, the

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[1] Co-counsel was ultimately appointed. (R703).

[2] Evans was subsequently found competent to proceed by the Court (R826), and, once again, was found incompetent to proceed and involuntarily committed. (R1327-30).

jury recommended that Evans be sentenced to death by a vote of 11 to 1. (R2237). A *Spencer* Hearing was duly conducted on May 7, 1999, and, on June 7, 1999, the Circuit Court of Orange County imposed the sentence of death on Steven Maurice Evans. (R2202-2203;2307-2320). This appeal follows.

STATEMENT OF THE FACTS

In addition to the facts contained in the defendant's initial brief, the State relies upon the following facts.

On April 25, 1996, the defendant, Steven Maurice Evans, the victim, Kenneth Lewis, and criminal associates Edward Francis and Gervalow Ward borrowed a car from Evans' girlfriend, Shana Wright, and drove from Orlando, Florida to Sanford, Florida, for the purpose of robbing a "dope dealer" of "five keys" of dope. (R1131;726;1252).[3] When the group arrived in Sanford, Ward was positioned under what was apparently a large truck, and was armed with a .380 caliber pistol and a shotgun. (R1133). Francis was positioned near some bushes, where he was observed by Ward. (R1135). Ward observed the brake lights on the get-away car come on, and then observed the car back up and leave. (R1134).

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[3] Evans is referred to in the record by his nickname, "L.A.." (R1125). Ward's nickname is "Dred," Francis is known as "Jersey," and Lewis (the victim) was known as "Capone." (R1241;1243;1251).

The remaining members of the group, Ward, Francis, and the defendant, then went to the residence of an acquaintance in Sanford, where Evans used the telephone. (R1136-38;1254).[4]

Evans, Ward, and Francis obtained a ride from Sanford back to Wright's apartment in Orlando with Mark Quinn. (R1139;1255). After arriving at Wright's apartment, Evans located Wright by paging her, and then beat her. (R736;1140).[5] Evans believed that Lewis had abandoned the group in Sanford because he wanted to rob Shana Wright. (R1141). Lewis arrived at Wright's apartment some time after the rest of the group, and, when he came to the door, Evans directed everyone to hide in the apartment. (R1257). The group was waiting for Lewis, and Evans was armed with a pistol. (R1143). The door to Wright's apartment was opened, and the group grabbed Lewis, disarmed him, and began beating him. (R1144-1150).[6] Evans then directed that Lewis be tied up, which was done by using a

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[4] Evans called his girlfriend, Shana Wright, and instructed her to remove a bag of money from their apartment, and to get out of the house because "they're coming for you." (R729). This call was placed between 2:00 and 3:00 a.m. on April 26, 1996. (R728). Evans also told Ms. Wright to report the car stolen. (R730).

[5] The group had returned to Orlando, from Sanford, accompanied by Quinn and another individual named Blane Stafford. (R904;907).

[6] The beating administered to the victim lasted between 10 and 20 minutes. (R1150;1262).

telephone cord. (R1259;1151).[7]

Evans then directed one of the group to obtain a shampoo bottle for him, and he cut the top of the bottle, stuffed plastic bags inside, and placed the barrel of the .22 pistol in it, wrapping black tape around the barrel. (R1157-58;1254). Ward was sent, by Evans, to determine if anyone was about who might see them, and, on getting the all clear (R1159), Evans, Ward and Francis then walked Lewis, still tied up, out to a drainage ditch behind the apartment building. (R1160).[8] On arriving at the drainage ditch, Evans shoved Lewis into the water, placed the pistol with its homemade silencer near his head, and fired five shots. (R1161;1266). Four of those shots struck Lewis in the head. (R1161). Evans, Ward, and Lewis all had blood on their shoes and pants.[9] (R1164;1266).[10] Ward

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[7] At this point in the events of the evening, Orlando Police Department Officers came to the door of the apartment with respect to the car that Wright had reported stolen. Evans directed Wright to get rid of the officers, which she did. (R1153;748).

[8] Lewis was also gagged at this time. (R1259).

[9] Blane Stafford testified that Evans had blood on his pants leg. (R936). Evans told Wright that he had to get a new suit because he got brains all over it. (R754).

[10] In his statement of the facts, Evans asserts that certain testimony about Reebok shoes and the impressions left by those

described Lewis' execution in the following way:

> When we got to the ditch, we walked down to where the water is at from the top.
>
> So when we got there L.A. pushed on Capone to fall in the water, so Capone fell.
>
> He fell, like, on his side so that's when he told Capone, he say, he said:
>
> > "We are the last three, we are the last three, we are the last three mother fuckers that you left.["]
> >
> > He said, "We are the last three mother fuckers that you are going to see on this earth."
> >
> > And that's when he put the shampoo bottle to his head and he shot him four times and on the fifth time it missed and it went into the water.

(R1161).

The medical examiner, Dr. Wilson Broussard, conducted an autopsy of Lewis' body, and testified that the cause of death was multiple gunshot wounds to the head. (R830-835). Four of those projectiles went into the back of Lewis' head and did not exit. (R830). The fifth projectile did not penetrate.[11]

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shoes at the scene of Lewis' murder was stricken. That is true, but omits to state that the expert had become confused about the shoes in question, and testified that another pair of shoes, that were taken from Evans, were **also** consistent with shoe print impressions found at the scene of the murder. (R1346-1350).

[11] The projectiles that entered Lewis' head would each have been

In addition to the gunshot wounds, Dr. Broussard identified a laceration above Lewis' right eyebrow, swelling and contusions over the left eye, an abrasion below his left clavicle, abrasions on his upper lip, and a fracture of the two front incisor teeth. (R852-53). All of the injuries were inflicted within 12 to 24 hours of Lewis' death. (R854).

Five empty cartridge cases were recovered from the scene of the murder, (R1086), and a number of latent fingerprints were lifted from the 1980 blue Oldsmobile belonging to Shana Wright. (R1077;1089;1100). The fingerprints recovered from the Oldsmobile were identified as having been made by the defendant, Steven Evans. (R1113). Likewise, the cartridge case recovered from the inside of the Oldsmobile was fired from the same weapon that fired the five shots into the victim. (R1357).

The defendant testified in his own defense, and denied that "L.A." is his nickname as well as denying even knowing witness Ward. (R1383-1384). He admitted knowing Wright, but denied ever having been in her apartment, and disavowed any "boyfriend-girlfriend" relationship with her. (R1384-1385). Evans denied ever having been near the canal/drainage ditch which was the scene of the murder. (R1393). Evans did,

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independently fatal. (R831-33).

however, admit to having two prior felony convictions. The jury returned a verdict of guilty on April 9, 1999. (R1532).

PENALTY PHASE

During the penalty phase of Evans' capital trial, the State presented evidence, in the form of a judgment and sentence, that Evans had previously been convicted of the offense of robbery with a firearm or destructive device on February 3, 1994. (R1581).

Evans presented evidence at the penalty phase that consisted of the testimony of family members and friends. Evans' mother testified that he had an accident at about age ten, which caused him to suffer from headaches that were treated with medication. (R1583;1598;1603). Evans ultimately married, committed adultery, and was "disassociated" from his church. (R1611-1613).[12] Other friends of Evans testified about his background and early life, and, in substance, testified that he had a "healthy" household. (*See, e.g.*, R1825).

Evans also presented the testimony of three mental health professionals, who testified, variously, that Evans is a paranoid schizophrenic (SR45), suffers from a "psychotic

[12] Up until that time, Evans was an active member of the Jehovah Witnesses Church, as was the rest of his family. (R1592).

disorder" (R1724) with a possibility of bipolar disorder (R1758), and that Evans suffers from "bipolar disorder" and manic depression. (R1908).[13] One of the mental state professionals did acknowledge that Evans was aggressive and had behavior problems while in school. (R1941).[14] None of the defense experts offered an opinion as to the applicability of the statutory mental mitigators. At the conclusion of the evidence, the jury recommended that Evans be sentenced to death by a vote of 11 to 1. (R2061). Following a *Spencer* Hearing on May 7, 1999, the court issued a sentencing order on June 7, 1999, imposing the sentence of death on the defendant Steven Evans. (R2336).[15] Notice of appeal was given on June 30, 1999, and the record was certified as complete and transmitted on November 18, 1999. A supplemental record was

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[13] Florida State Hospital staff observed no psychotic symptoms during the time Evans was in their custody. (R1780-81). None of the records support the claim that Evans was "smearing feces" in his cell. (R1781).

[14] Evans' reports of sexual activity and gang membership are inconsistent with statements by his family and church acquuaintances. (R1945). The descriptions of Evans' behavior are also consistent with anti-social personality disorder. (R1940-41).

[15] Against advice of counsel, Evans objected to the introduction of mental health reports (R532), and to the introduction of depositions of his co-defendants. (R533-34;549).

filed on April 12, 2000, and Evans filed his initial brief on May 2, 2000.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion when it found Evans competent to stand trial. The trial court properly evaluated the evidence concerning Evans' mental state, and determined that he was competent to proceed. Competent, substantial evidence supports the trial court's decision, and there is no abuse of discretion.

The circuit court properly found the cold, calculated, and premeditated aggravating circumstance in sentencing Evans to death. This execution-style murder falls squarely within the definition of the cold, calculated, and premeditated aggravator, and that finding by the sentencing court should not be disturbed.

The sentencing court also properly applied the heinous, atrocious, or cruel aggravating circumstance in sentencing Evans to death. Under the facts of this case, as the sentencing court found in its sentencing order, Evans' victim was forced to contemplate his impending death for a substantial period of time before he was executed by the defendant. There was more than enough physical and mental torture of the victim to bring this murder within the

definition of the heinous, atrocious or cruel aggravator.

The sentencing court properly weighed the aggravation and mitigation and imposed a sentence of death. Evans' argument concerning the weighing process has no basis in law or fact because the weight given to the various mitigation is within the discretion of the trial court, and, in this case, is well-supported by competent, substantial evidence.

Death is the appropriate sentence in this case and, when the facts of this case are compared to other cases in which the death penalty has been upheld, it is clear that there is no basis for a proportionality challenge to Evans' sentence of death. That sentence should not be disturbed.

Evans' motion for a mistrial which was purportedly based upon a reference to his "prior criminal record" was not preserved by a proper objection, and, moreover, is not a basis for relief because he cannot establish that any substantial right was adversely affected. No "collateral crime evidence" was offered, nor was improper character evidence presented. There is no basis for relief.

The claim that certain "irrelevant evidence" was presented has no legal basis. The evidence in question was relevant to the matters before the jury, and its admission was proper.

Evans' claim that the jury's 11 to 1 recommendation that

he be sentenced to death is a “split vote jury recommendation” is foreclosed by binding precedent. This claim is not a basis for relief because it has no legal basis.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING EVANS COMPETENT TO STAND TRIAL

On pages 32-38 of his *Initial Brief,* Evans argues that the circuit court abused its discretion in ruling that he was competent to stand trial. The claim contained in Evans’ brief was raised, for the first time, by oral motion on the day that jury selection began in this case[16]. (TR-17). For the reasons set out below, the trial court did not abuse its discretion when it determined that Evans was competent to stand trial.

Florida law is well-settled that the disposition of a claim of incompetency to proceed is reviewed under the abuse of discretion standard. This Court has summarized the state of the law in the following way:

> The test for whether a defendant is competent to stand trial is whether "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824, 825 (1960); *see also* Sec. 916.12(1),

[16] Evans states, incorrectly, that a “competency motion” was made after the jury was selected. (TR-17, *et seq*).

> *Fla. Stat*. (1993); *Fla.R.Crim.P.* 3.211(a)(1). The reports of experts are "merely advisory to the [trial court], which itself retains the responsibility of the decision." *Muhammad v. State*, 494 So.2d 969, 973 (Fla. 1986) (*quoting Brown v. State*, 245 So.2d 68, 70 (Fla. 1971), *vacated in part on other grounds,* 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 759 (1972)), *cert. denied*, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987). And, even when the experts' reports conflict, it is the function of the trial court to resolve such factual disputes. *Fowler v. State*, 255 So.2d 513, 514 (Fla. 1971). The trial court must consider all evidence relative to competence and its decision will stand absent a showing of abuse of discretion. *Carter v. State*, 576 So.2d 1291, 1292 (Fla. 1989), *cert. denied*, 502 U.S. 879, 112 S.Ct. 225, 116 L.Ed.2d 182 (1991).

Hunter v. State, 660 So.2d 244, 247 (Fla. 1995). Stated in different terms, "[i]nsanity *vel non* is not simply ascertained by head count of the experts . . .". *Hutchins v. Woodard,* 730 F.2d 953, 955 (4th Cir. 1984). Moreover, as the Eighth Circuit Court of Appeals has pointed out, "[t]he issue [competence] is more one of common sense and good moral judgment (fields in which the competence of judges should equal that of psychiatrists) than of medical expertise." *Smith v. Armontrout,* 865 F.2d 1502, 1505 (8th Cir. 1988) (*en banc*), *mandate recalled and appeal reinstated*, 865 F.2d 1515 (1988) (*en banc*), *denial of relief aff'd,* 888 F.2d 530 (8th Cir. 1989). When these fundamental precepts are applied to Evans'

case, there is no basis for relief because there was no abuse of discretion by the trial judge.

The evidence before the trial court with respect to competence to stand trial consisted of the testimony of three mental health professionals who had evaluated Evans for the purpose of determining his competence to proceed. The first such expert, Dr. Michael Herkov, evaluated Evans' competence[17], at the request of defense counsel, two days prior to testifying that Evans was competent to stand trial. (TR103-5).[18] At the time of his testimony, Dr. Herkov was aware of the contrary opinion of Dr. Gutman as to Evans' competence, and disagreed with that conclusion. (TR105).

Dr. Allen Berns also evaluated Evans with respect to his competence to proceed, and had last seen Evans on March 9, 1999, less than a month prior to his testimony. (TR106). Dr. Berns had also been made aware of Dr. Gutman's opinion that Evans was not competent, and had reviewed various documents with respect to Dr. Gutman's opinion and the facts upon which it was based. (TR107-8). None of that information caused Dr.

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[17] Dr. Herkov's opinion was based upon his evaluation of Evans, and was consistent with his previously-reached opinion as to competence. (TR104).

[18] Dr. Herkov evaluated Evans on April 3, 1999, and trial began on April 5, 1999. (TR104).

Berns to change his opinion. (TR107).

Dr. Michael Gutman evaluated Evans on March 18, 1999, and determined that he was competent to proceed. (TR109). Subsequently, Dr. Gutman read documents that had existed prior to the March 18, 1999, evaluation, and, based upon the details of the offense contained therein, as well as Evans' refusal to consider a mental state defense, determined that Evans was not competent. (TR114-5). During cross-examination, it developed that Dr. Gutman's change of opinion was based upon his reading of a part of one statement as well as the fact that Evans would not discuss a not guilty by reason of insanity defense with Dr. Gutman. (TR119-22).

After hearing all of the testimony, and after having the opportunity to observe Evans during that testimony, the trial court found that the defendant was competent to proceed. The true facts are that the **only** testimony supporting a finding of incompetence was based upon matters which preceded the trial by a significant period of time, and were of no relevance to Evans' mental state at the time his trial began. The trial court properly considered the evidence before it, and, based upon the circumstances of the case, exercised its discretion in favor of determining that Evans was competent to proceed. Competent, substantial evidence supports that determination,

which is not an abuse of discretion. The lower court should be affirmed in all respects.

To the extent that further discussion of this issue is necessary, it is true that Evans was hospitalized for evaluation of his mental state. (TR123). However, Evans was discharged, and was competent to stand trial.[19] Further, to the extent that Evans makes reference to specific mental state diagnoses on page 35 of his *Initial Brief*, **no such testimony was presented in connection with the hearing on the motion to determine competency**. Testimony with respect to those various diagnoses was presented for the first time at the penalty phase of Evans' trial, and cannot be used in this fashion to place the trial court in error based upon "evidence" that was not even presented to it.[20] The trial court did not abuse its discretion in finding Evans competent to stand trial -- that

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[19] While Evans makes much of the fact that he was "involuntarily committed", the fact of such a commitment does not carry with it a presumption of continuing impairment. Such a connotation is inconsistent with any notion that the defendant's condition can improve.

[20] Evans' brief is a blend of various mental state issues -- competence to stand trial, competence at the time of the offense, and mental state issues as they relate to penalty phase mitigation. Each discrete mental state issue has its own "standard", and comparison is not practical, at least in the situation presented by this case.

determination should be affirmed in all respects.

II. THE SENTENCING COURT PROPERLY FOUND THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE

On pages 39-43 of his *Initial Brief*, Evans argues that the sentencing court improperly found the cold, calculated, and premeditated aggravating circumstance. The fundamental premise of Evans' argument, and the basis for his claim that the cold, calculated, and premeditated aggravator does not apply, is that the "shooting was quickly accomplished in seconds". This argument ignores the facts of the offense, which demonstrate an offense that was an execution-type murder, which, in every way, is a classic example of the sort of crime to which the cold, calculated, and premeditated aggravator applies.

In finding the applicability of the cold, calculated, and premeditated aggravator, the trial court stated:

> After having been left behind in Seminole County, Defendant, Mr. Frances, Mr. Ward, and two others who had not been involved in the initial home invasion scheme made their way back to Orlando. At Defendant's direction, they lay in wait for Mr. Lewis to return. When he did, Defendant proceeded to orchestrate the beating of Mr. Lewis. He had Mr. Lewis gagged and bound, first by chain, then with telephone cord. Defendant fashioned a homemade silencer, placed it onto a handgun and, while Quinn and Francis escorted Mr. Lewis to the culvert, informed the victim of his intent to murder him. He then executed Mr. Lewis who was completely helpless to resist, shooting him in the head six times. This aggravating factor was proven beyond a reasonable

doubt.

(R2328-29). In defining the cold, calculated, and premeditated aggravator, this Court held (as Evans correctly states) that:

> in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), *Richardson,* 604 So.2d at 1109; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), *Rogers,* 511 So.2d at 533; and that the defendant exhibited heightened premeditation (premeditated), *Id.*; and that the defendant had no pretense of moral or legal justification. *Banda v. State*, 536 So.2d 221, 224-25 (Fla. 1988), *cert. denied*, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989).

Jackson v. State, 648 So.2d 85, 89 (Fla. 1994). The murder in this case falls squarely within that definition.

In the sentencing order, the trial court explained that Evans committed this murder not in a fit of rage, as is alleged in the *Initial Brief*, but rather in the calm, dispassionate manner of the execution of an individual who has betrayed his criminal cohorts. Likewise, as the trial court found, Evans had a prearranged plan to commit this murder -- if constructing a silencer for the murder weapon and then escorting the victim, while restrained in such a way as to render escape impossible, to his place of execution does not establish the "calculation" element of the aggravator, that

element can likely never be established. Likewise, the victim's execution, which included a pronouncement of "sentence", was carried out with multiple gunshots to the back of the head and is chilling in its ruthlessness, well demonstrates the requisite heightened premeditation required under the *Jackson* definition. Finally, there is no "pretense of moral or legal justification" with respect to this murder. There is no pretense that would serve to avoid the application of the cold, calculated, and premeditated aggravator under these facts -- these facts present a case of a cold, calculated, and premeditated murder which was committed to punish the victim for abandoning his criminal colleagues in the middle of a planned crime. These facts establish the cold, calculated, and premeditated aggravator, not a pretense of moral or legal justification. *See, e.g., Trepal v. State*, 621 So.2d 1321 (Fla. 1993); *Jones v. State,* 612 So.2d 1370 (Fla. 1992); *Cruse v. State*, 588 So.2d 983 (Fla. 1991); *Dougan v. State*, 595 So.2d 1 (Fla. 1992).

In *Trepal*, this Court rejected a claim of moral or legal justification not unlike the one contained in Evans' brief:

> Trepal asserts that his murder was not "committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification," [footnote omitted] because the facts do not show the heightened premeditation necessary for this

> aggravating circumstance to apply, or alternatively, **the murder was justified because the Carrs were troublesome neighbors. We reject this specious reasoning.** We have said that this circumstance can be shown by "such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course." *Swafford v. State*, 533 So.2d 270, 277 (Fla. 1988), *cert. denied*, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989). We also have said that the heightened premeditation required for the application of this circumstance can be shown "if the murder was committed in a manner that was cold and calculated." *Provenzano v. State*, 497 So.2d 1177, 1183 (Fla. 1986), *cert. denied*, 481 U.S. 1024, 107 S.Ct. 1912, 95 L.Ed.2d 518 (1987).

Trepal v. State, 621 So.2d at 1367. The murder committed by Evans was cold, calculated, and premeditated under any definition of that aggravator, and the death sentence should be affirmed in all respects. *See, e.g., Eutzy v. State*, 458 So.2d 755 (Fla. 1984) (execution-style murder); *see also*, *Knight v. State*, 746 So.2d 423, 436 (Fla. 1998) (“Even if Knight did not make the final decision to execute the two victims until sometime during his lengthy journey to his final destination, that journey provided an abundance of time for Knight to coldly and calmly decide to kill.”); *Donaldson v. State,* 722 So.2d 177, 187 (Fla. 1998) (“There was no evidence that Donaldson feared the victims or that the victims intended to rob him.”).*Gordon v. State,* 704 So.2d 107, 114 (Fla. 1997) (CCP is primarily reserved for contract, **execution-style**, and

witness-elimination killings); *See Archer v. State*, 673 So.2d 17, 19 (Fla. 1996), *cert. denied*, 117 S.Ct. 197, 136 L.Ed.2d 134 (1996) (same); *Dailey v. State*, 594 So.2d 254, 259 (Fla. 1991) (same); *Hansbrough v. State*, 509 So.2d 1081 (Fla. 1987).

Moreover, as this Court has held:

> Zakrzewski asserts that because he was under extreme emotional distress at the time of the murders, it was impossible for him to commit the murders in a cold, calculated, and premeditated fashion. Further, Zakrzewski argues that the murders were committed with a pretense of moral justification. We disagree. On the day of the murders, Zakrzewski left work at lunch in order to buy a machete. Zakrzewski proceeded to set up the murder scene before his family arrived home, by placing the machete behind the bathroom door. We find these actions to be both calculated and premeditated. *See Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987) (stating that " 'calculation' consists of a careful plan or prearranged design"); *Walls v. State*, 641 So.2d 381 (Fla. 1994) (holding that CCP requires heightened premeditation, over and above what is required for premeditated first-degree murder, which can be evidenced by a "degree of deliberate ruthlessness"). In addition, Zakrzewski had the entire day for "cool and calm reflection," and the murders were not "prompted by emotional frenzy, panic, or a fit of rage." *Jackson v. State,* 648 So.2d 85, 89 (Fla. 1994) Thus, the murders satisfy the cold element of CCP. *See Id.* Finally, we do not find that killing one's own family to save them from having to go through a divorce constitutes a pretense of moral or legal justification. *See Hill v. State*, 688 So.2d 901, 907 (Fla. 1996), *cert. denied*, --- U.S. ----, 118 S.Ct. 265, 139 L.Ed.2d 191 (1997) (stating that "**[n]o one may take the life of another indiscriminately, regardless of what that person may perceive as justification**" (*quoting Dougan v. State,*

595 So.2d 1, 6 (Fla.1992))).

Zakrzewski v. State, 717 So.2d 488, 492 (Fla. 1998). *See also, Douglas v. State*, 575 So.2d 165, 167 (Fla.1991) (CCP aggravator "normally, although not exclusively, applies to execution-style or contract murders."); *Jones v. State,* 690 So.2d 568, 571 (Fla. 1996)

("Jones shot [the victim] twice in the head at close range, an execution-style killing. Coldness exists beyond any reasonable doubt."). This case can accurately be described as an execution-style murder, and the cold, calculated, and premeditated aggravator is applicable to this case. Evans' sentence of death should not be disturbed.

Finally, without conceding error of any sort, death is sill the appropriate sentence even if this Court should determine that the cold, calculated, and premeditated aggravator was improperly applied to this case. Even if that aggravator is removed from the sentencing calculus, significant aggravating circumstances remain -- because that is so, if there was error associated with the trial court's application of the cold, calculated, and premeditated aggravating circumstance, that error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986).

III. THE SENTENCING COURT PROPERLY FOUND THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE

On pages 44-51 of his brief, Evans argues that the sentencing court improperly found that the murder of Kenneth Lewis was especially heinous, atrocious, or cruel. This argument is predicated upon an inaccurate interpretation of the applicability of the heinous, atrocious, or cruel aggravating circumstance. For the reasons set out below, the heinous, atrocious, or cruel aggravator was properly applied to this case.

In finding that the murder of Mr. Lewis was especially heinous, atrocious, or cruel, the sentencing court found as follows:

> Mr. Lewis walked unsuspectingly into the apartment on April 26, 1996. The next thing he knew, he was grabbed, surrounded by four others, interrogated, gagged, bound, and beaten. He endured this abuse for hours. Mr. Lewis would have suffered a complete sense of helplessness. How his hopes must have risen when a police officer came to the door. He was, however, removed to a back bedroom, still bound and gagged, and kept silent by two of the other participants in this offense. Any hope of rescue was dashed as the officer left and returned to his other duties.
>
> Mr. Lewis was provided no due process. He was tried for violating the rules of the gang. His right to remain silent was a gag placed into his mouth and firmly secured by a bandana. He was first beaten for his breach of trust and then was convicted by Defendant and sentenced to die. He was marched out,

> bound and still gagged, unable to call out for help. He had watched his executioner prepare the means of his death, and one can only imagine the terror Mr. Lewis suffered during the long walk down the stairs, behind the apartment complex, around a fence and down the banks of the culvert, knowing all along that he would soon be dead. Steven Evans then erased any hope Mr. Lewis might have had by formally pronouncing sentence, telling him he was going to die.
>
> The defense has contended that Mr. Lewis could well have been unconscious at the time of death, but that is not supported by the evidence. Each of the witnesses testified that Mr. Lewis **walked** out of the apartment, albeit at gun point. He was well aware of what was happening.
>
> The codefendants testified that even as they marshaled Mr. Lewis toward the culvert, they were unaware that Defendant was actually going to kill Mr. Lewis. That testimony is not credible, lacks common sense, and is disingenuous. It certainly would not have been the perspective of Mr. Lewis. He knew as he made that long walk that it would be his last.
>
> The extensive time Mr. Lewis had to contemplate his own demise, the helplessness of being bound and gagged, his having to walk to his place of execution, and the fact he was informed of Defendant's intent to kill him, all make this death one especially heinous, atrocious, and cruel. This aggravating circumstance was proven beyond a reasonable doubt.

(R2327-28) (emphasis in original).

To the extent that Evans argues that the trial court "misinterpreted the evidence", the sentencing order evaluated the evidence before it, resolved the conflicts in the evidence, and concluded that the victim was aware of his

impending death for a substantial period of time before Evans ended his ordeal. Evans' contrary argument is based on the testimony of the codefendants that they did not know that Evans was going to kill the victim when he was escorted outside of the apartment -- the sentencing court found that testimony unworthy of belief, and that is a credibility determination that should not be disturbed. *See, State v. Spaziano,* 692 So.2d 174 (Fla. 1997). Likewise, to the extent that Evans suggests that the victim was unconscious when he was shot, that argument is inconsistent with all of the evidence, which was that Mr. Lewis was forced to **walk** from the apartment to the place of his execution, as the sentencing court found. (R2328). The sentencing order is supported by competent substantial evidence, is not an abuse of discretion, and should not be disturbed.

To the extent that further discussion of the applicability of the heinous, atrocious, or cruel aggravator is necessary, Florida law is settled that:

> Execution-style murders are not HAC unless the state presents evidence to show some physical or mental torture of the victim. *Hartley v. State*, 686 So.2d 1316 (Fla. 1996), *cert. denied*, --- U.S. ----, 118 S.Ct. 86, 139 L.Ed.2d 43 (1997); *Ferrell v. State*, 686 So.2d 1324 (Fla. 1996), *cert. denied*, 520 U.S. 1173, 117 S.Ct. 1443, 137 L.Ed.2d 549 (1997). Regarding mental torture, this Court, in *Preston v. State*, 607 So.2d 404 (Fla. 1992), upheld the HAC

> aggravator where the defendant "forced the victim to drive to a remote location, made her walk at knifepoint through a dark field, forced her to disrobe, and then inflicted a wound certain to be fatal." *Id.* at 409. We concluded that the victim undoubtedly "suffered great fear and terror during the events leading up to her murder." *Id*. at 409-10. In this case, we find that the trial court's findings are supported by competent, substantial evidence. Accordingly, we find no error with the trial court's legal conclusion that this murder was especially heinous, atrocious, or cruel.

Alston v. State, 723 So.2d 148, 161(Fla. 1998). *See also, Henyard v. State,* 689 So.2d 239 (Fla. 1996). Under these facts, the State has clearly demonstrated the requisite physical and mental torture that brings this murder within the definition of the heinous, atrocious, or cruel aggravator. There is no error in the sentencing order.

Finally, Evans devotes a substantial portion of his brief on this issue to the argument that Evans did not “intend” for his victim to suffer. That argument is based upon an inaccurate perception of Florida law, which has clearly rejected any suggestion that there is an “intent element” associated with the heinous, atrocious, or cruel aggravator. This Court has squarely rejected this argument, stating:

> 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) (emphasis added). In another case decided the same day as *Guzman*, this Court also rejected the "intent element" argument:

> This Court has held that "[t]he factor of heinous, atrocious, or cruel is proper only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." *Shere*, 579 So.2d at 95; *Cheshire v. State*, 568 So.2d 908, 912 (Fla. 1990); *State v. Dixon,* 283 So.2d 1, 9 (Fla. 1973). Unlike the cold, calculated and premeditated aggravator, which pertains specifically to the state of mind, intent and motivation of the defendant, **the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death**. *Stano v. State,* 460 So.2d 890, 893 (Fla. 1984).

Brown v. State, 721 So.2d 274, 277 (Fla. 1998) (emphasis added). *See also, Hitchcock v. State,* 25 Fla. L. Weekly S239, (Fla., Mar. 23, 2000) ("We reject Hitchcock's claim that the HAC instruction should have made clear that HAC applies only if the State has proven intent to cause extraordinary mental anguish or physical pain. *See Guzman v. State*, 721 So.2d 1155, 1160 (Fla. 1998) ("The intention of the killer to inflict pain on the victim is not a necessary element of the aggravator.")"); *Bates v. State,* 750 So.2d 6, 17(Fla. 1999);

Mahn v. State, 714 So.2d 391, 399 (Fla. 1998). Evans' claim is foreclosed by binding precedent[21].

Finally, even if this Court determines that the heinous, atrocious, or cruel aggravator was improperly found, death is still the appropriate sentence for Evans' crime. While the State does not concede that any error exists, even in the absence of the heinousness aggravator, sufficient aggravation exists to outweigh the mitigation found by the sentencing court. Any error was harmless beyond a reasonable doubt, and the sentence of death should not be disturbed. *State v. DiGuilio, supra*.

IV. THE WEIGHING OF AGGRAVATION AND MITIGATION CLAIM

On pages 52-66 of his brief, Evans sets out what appears to be a claim that the sentencing court afforded too much weight to various aggravating circumstances, and not enough weight to the mitigation offered by Evans. This claim is founded on several incorrect bases, including the premise that certain aggravators were improperly found, Evans' continuing assertion that the mitigation was not given enough weight by the sentencing court, and the argument (which is inconsistent

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[21] On page 51 of his brief, Evans concedes that he is guilty of the premeditated murder of Kenneth Lewis. That concession is inconsistent with the guilt phase issues contained in his brief, and is likewise inconsistent with the competency issue.

with Claim VIII) that the jury's 11-1 vote recommending a sentence of death is the result of "inappropriate considerations". For the reasons set out below, none of those assertions are grounds for relief.

Florida law is long-settled that the weight to be afforded a mitigating factor is within the discretion of the trial court, and will not be disturbed on appeal so long as it is supported by competent, substantial evidence. *Mansfield v. State,* 25 Fla. L. Weekly S246 (Fla., March 30, 2000); *Campbell v. State,* 571 So.2d 415, 420 (Fla. 1990); *see also, Raleigh v. state,* 705 So.2d 1324, 1330 (Fla. 1997); *Nibert v. State*, 574 So.2d 1059, 1062 (Fla. 1990). A review of the sentencing order demonstrates that the sentencing court complied with the dictates of Florida law in every respect.

In sentencing Evans to death, the trial court found that the following aggravating circumstances had been proven beyond a reasonable doubt:

> 1. that the capital felony had been committed by a person under sentence of imprisonment;
>
> 2. that the defendant had previously been convicted of a felony involving the use or threat of violence;
>
> 3. that the capital felony was committed while the defendant was engaged in the commission of an enumerated felony (kidnaping);
>
> 4. that the capital felony was especially heinous,

> atrocious, or cruel; and,
>
> 5. that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(R2326-28). With respect to the various statutory and non-statutory mitigation offered, the trial court stated:

> Before addressing statutory and nonstatutory mitigating factors, the Court notes that at the *Spencer* hearing, Defendant, against advise of counsel, attempted to prohibit his attorneys from presenting additional testimony and/or evidence in mitigation of sentence. He requested that the Court follow the jury's recommendation and impose the death penalty. The Court, fully apprised of Defendant's wishes, followed the procedure mandated by the Florida Supreme Court in *Koon v. Dugger*, 619 So.2d 246, 250 (Fla. 1993). After numerous admonitions by the Court, Defendant still chose to adhere to his request that no mitigating evidence be presented on his behalf. Nevertheless, in an abundance of caution toward preserving Defendant's right to due process, the Court has reviewed all statutory and nonstatutory mitigating factors raised at the hearing, including all mitigating evidence proffered pursuant to *Koon.*

(R2329).

In conducting the consideration of proffered mitigation offered over the defendant's objection, the trial court considered and weighed that mitigation evidence in accord with the decisions of this Court in *Hauser v. State,* 701 So.2d 329 (Fla. 1997), and *Farr v. State,* 621 So.2d 1368 (Fla. 1993). The trial court found as follows with respect to mitigation:

> 1. the capital felony was committed while the

> defendant was under the influence of extreme mental or emotional disturbance. Substantial weight was given to this mitigator.
>
> 2. the "accomplice" mitigator did not exist because Evans was the leader in the criminal enterprise that led up to the killing, as well as in the killing itself.
>
> 3. the victim was not a participant in Evans' conduct, nor did the victim consent to his own kidnapping and murder.
>
> 4. with respect to the impairment of Evans' capacity to appreciate the criminality of his conduct and conform his conduct to the requirements of law, the sentencing court stated, "[w]hile the evidence reasonably established that Defendant suffers from some sort of mental or emotional disorder, it is far less clear that it affected his ability to appreciate the criminality of his conduct or to conform his conduct to the requirement of law". The court gave this mitigator some weight, giving Evans the benefit of the doubt.
>
> 5. with respect to the various mon-statutory mitigators urged by Evans, the trial court gave little weight to various substance abuse issues and to the "family, character, and community" issues. The court gave no weight to the remaining non-statutory mitigators advanced by Evans.

(R2332-36). Clearly, the sentencing court gave careful consideration to the aggravating and mitigating circumstances, carefully weighed them as required by Florida law, and found that the aggravators outweighed the mitigation, with the result that death was the proper sentence. The sentencing court did not abuse its discretion in sentencing Evans to death, and that sentence should not be disturbed.

To the extent that this issue requires further discussion, Evans relies on a wholly speculative list of "inappropriate considerations that **may** have influenced the jury's vote" to argue that the jury's recommendation of death as the proper sentence should be disregarded. *Initial Brief*, at 55-56. Interestingly, Evans argues, in Claim VIII, that the jury's 11-1 vote is a "split verdict" that is "unconstitutional". Those positions are completely inconsistent, and cannot be reconciled. Under Evans' theory (apparently, for the theory is not explained), a jury's recommendation of death can only be considered if it is (1) unanimous, and (2) cannot possibly have been based upon any "influence", no matter how speculative. That is not the law because it makes no sense.

The linchpin of Evans' argument appears to be that the heinous, atrocious, or cruel, felony-murder, and cold, calculated, and premeditated aggravators were improperly found. With respect to the heinous, atrocious, or cruel and cold, calculated, and premeditated components of this claim, the State relies on the discussion with respect to those aggravators set out herein. With respect to the felony-murder aggravator, the sentencing court stated:

> Mr. Lewis was seized by Defendant and his associates, bound, and gagged. At one point, Mr. Lewis was forcibly moved into a back bedroom while

> the police were at the door to the apartment investigating a reported theft of an automobile. Subsequently, he was forced, at gunpoint, out of the apartment to the location previously described where he met his demise. These acts which deprived Mr. Lewis of his freedom of movement are temporally and spatially distinct from the murder itself such that they constitute the separate offense of kidnaping. The Court finds that this aggravator was proven beyond a reasonable doubt.

(R2327). Those findings are supported by the evidence, and should not be disturbed.[22] With respect to the mitigation evidence, the Court explained its weighing of that mitigation evidence, and, under settled Florida law, the weight given to particular mitigation is within the discretion of the sentencing court. Evans has not alleged, much less established, an abuse of discretion. The trial court properly weighed the penalty phase evidence, and the sentence of death should not be disturbed.

V. DEATH IS THE PROPORTIONATE SENTENCE

On pages 67-69 of his brief, Evans argues that death is not proportionate to his crime. This argument, like the preceding one, is based on the false premise that the heinous, atrocious, or cruel, felony-murder, and cold, calculated, and premeditated aggravators do not apply to this case. For the

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[22] Evans concedes that the "under sentence of imprisonment" and "prior violent felony" aggravators are present. *Initial Brief*, at 60-61.

reasons set out above, each of those aggravators applies here. Because that is so, Evans' argument is, in at least some respects, incomplete.

In any event, the combination of aggravation and mitigation present in this case is closely matched by the facts of *Henyard v. State*, where this Court upheld the death sentence, stating:

> Finally, upon consideration of all of the circumstances, we further conclude that Henyard's death sentences are not disproportionate to death sentences imposed in other cases. *See, e.g., Walls v. State*, 641 So.2d 381, 391 (Fla. 1994) (death sentence upheld for execution-style killing of woman after she witnessed boyfriend's murder), *cert. denied*, --- U.S. ----, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995); *Cave v. State*, 476 So.2d 180 (Fla.1985), *cert. denied*, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986) (death sentence proportionate where co-perpetrators abducted, raped, and killed victim; defendant not actual killer).

Henyard v. State, 689 So.2d 239, 255 (Fla. 1996). *See also, Jones v. State,* 748 So.2d 1012 (Fla. 1999); *Gaskin v. State*, 591 So.2d 917 (Fla.1991); *Hildwin v. State,* 727 So.2d 193 (Fla. 1998); *Howell v. State,* 707 So.2d 674 (Fla. 1998). Finally, in *Moore v. State*, this court rejected a proportionality challenge to the death sentence, stating:

> In *Pope v. State*, 679 So.2d 710 (Fla. 1996), *cert. denied*, --- U.S. ----, 117 S.Ct. 975, 136 L.Ed.2d 858 (1997), we held the death penalty was proportionate where there were two aggravating

> factors (the murder was committed for pecuniary gain and the defendant had been convicted of a prior violent felony), two statutory mitigating circumstances (commission while under the influence of extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of the conduct), and three nonstatutory mitigating circumstances (defendant was intoxicated, committed the murder subsequent to a disagreement with his girlfriend, and was under the influence of mental or emotional disturbance). In *Melton v. State*, 638 So.2d 927 (Fla. 1994), we held the death penalty was proportionate where there were two aggravating factors (the murder was committed for pecuniary gain and the defendant had been convicted of a prior violent felony) and some nonstatutory mitigation. We find that the death penalty was proportionate here. *See also Consalvo v. State*, 697 So.2d 805 (Fla. 1996) (holding death penalty was proportionate where there were two aggravating factors--avoiding arrest and commission during the course of a burglary--with some nonstatutory mitigation).

Moore v. State, 701 So.2d 545, 552 (Fla. 1997). Death is the proper sentence in this case, and Evans' sentence of death should be affirmed in all respects.

VI. THE MOTION FOR MISTRIAL WAS PROPERLY DENIED

On pages 70-72 of his brief, Evans argues that the trial court should have granted a mistrial when a "state witness referred to appellant's prior criminal record." This issue was not preserved by a timely objection, and, moreover, is not a basis for reversal because there was no basis for a mistrial in the first place.

The full record with respect to this issue reads as

follows:

> Q. Let me show you what's been marked as State's Exhibit X for identification and State's Exhibit V composite, and ask if you have had occasion to examine those in the past?
>
> A. Yes. I have.
>
> Q. And did you compare those to prints from the records of the Orlando Police Department of Steven Maurice Evans?
>
> A. Yes. I did.
>
> Q. Now, the prints that you compared those to originally, did you today roll a set of prints from a gentleman here in the courtroom?
>
> A. Yes.
>
> Q. Did you compare -- do you see that person in the courtroom here today?
>
> A. Yes.
>
> Q. Would you point him out for us and describe what he is wearing?
>
> A. Yes.

(TR1107-08). At that point, defense counsel objected -- the principal basis for the objection was apparently that there had been no predicate established for the fingerprints that were compared to the latent fingerprints contained in State's Exhibits X and V. (TR1109-10).[23]

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[23] Defense counsel did refer, in passing, to "improper character evidence", but the predicate issue was the objection pressed to the court. (TR1110).

Florida law is settled that an objection, stating the specific grounds on which it is based, must be made **before** an answer is given -- otherwise, the objection is untimely and preserves nothing for review. § 90.104(1)(a), *Fla. Stat.*; *Rowe v. State*, 120 Fla. 649, 163 So. 22, 23 (1935) ("The purpose of an objection being to prevent a question from being answered until after a ruling of the court can be obtained, it is well settled that it is too late to interpose an objection after the question has been answered."). In this case, Evans did not object until well after the "offensive" question had been answered. In failing to object in a timely fashion, and there is no basis to conclude that he was somehow precluded from doing so, Evans waived any objection he may have had to any question concerning the source of the fingerprints to which the crime scene latent fingerprints were compared. There is no basis for reversal because nothing is preserved for appellate review[24].

Alternatively, without conceding that Evans' objection at trial was sufficient to preserve anything for review, assuming *arguendo* that the objection was timely, Evans cannot establish

[24] Moreover, Evans' refusal to stipulate to identity served, in a very real sense, to invite the "error" complained of here. It is axiomatic that a defendant cannot invite an error and profit from it. (TR1108).

that any substantial right was adversely affected. That is what he must establish in order to be entitled to any relief, and he cannot carry his burden of proof. Evans' argument, when stripped of its pretensions, is that the jury would conclude that a passing reference to "'records of the Orlando Police Department' could mean nothing but a criminal history". *Initial Brief*, at 71. With all respect, the records of a police department can include numerous documents that have nothing to do with any criminal offense. The reference to "records" is far too vague to justify the unequivocal meaning ascribed to it by Evans. This was not "collateral crime evidence"[25], nor did it amount to improperly offered character evidence[26]. Because that is so, Evans has not shown that any substantial right held by him was adversely affected, and, therefore, has shown no basis for any relief. In any event,

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[25] Evans' attempt to label this issue as one involving the "erroneous admission of collateral crime evidence" is, at best, disingenuous. There is no claim that this is a ***Williams*** Rule issue, and the attempt to make such a comparison is meaningless.

[26] Evans' reference to the ***Coit*** decision is misleading. In that case, the Court held, "The officer's bare statement that he had had other occasions to 'run across Mr. Coit' was given in explanation of the officer's ability to recognize appellant." ***Coit v. State,*** 440 So.2d 409, 413 (Fla. 1 DCA 1983).

Evans testified in his own defense at the guilt phase of his capital trial, **and admitted that he had been convicted of two felonies**. (TR1396). Because evidence of Evans' criminal history was properly before the jury as a result of his own testimony, it is specious to suggest that a reference to "records of the Orlando Police Department" had any effect on the outcome of the proceeding. Any error, assuming *arguendo* that one occurred, was harmless. *State v. DiGuilio*, *supra*.

To the extent that Evans claims that this "error" requires reversal of his death sentence, that argument is spurious. Evans admitted that he had been convicted of two felonies, and the sentencing court found the prior violent felony aggravating circumstance. (R2326). There is no basis for relief with respect to either the guilt or penalty phases of Evans' trial.

VII. THE "IRRELEVANT EVIDENCE" CLAIM

On pages 73-76 of his brief, Evans complains that certain "irrelevant evidence" was introduced over timely objection. However, when the evidence and the record are fairly considered, there is no basis for reversal.

With respect to the "shell casing" (or cartridge case) found inside of the automobile involved in this offense, that cartridge case was identified as having been fired from the

same weapon which fired the fatal shots into Kenneth Lewis' head. (TR1357-59). As the State argued at the time of trial:

> The relevance is that a shellcasing found in the car matches the shellcasings found at the scene which supports the witness's testimony that the participants in this crime were involved with that car. That's why these people became suspects to begin with.

(TR1218-19). Obviously, evidence which tends to connect the car used by Evans to the crime scene is both logically and legally relevant to the facts in issue in this case. The cartridge case recovered from the vehicle was properly admitted into evidence, and there is no basis for relief.

Evans also complains that evidence that he was a member of the "Cryps" was put before the jury, and that the jury was informed that Evans and his cohorts were in Sanford, Florida immediately preceding the murder for the purpose of robbing a "dope dealer". Despite Evans' claims, both of those facts are relevant to the crime for which he was on trial. Evans' gang membership was obviously relevant to explain to the jury who the various participants in this crime were and how they were acquainted, as well as to explain the events and activities that culminated in the execution of Mr. Lewis.[27] Likewise, this

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[27] The references to gang membership are very limited. (R1124-1126;1128,1129;1242-1250).

evidence was part of the *res gestae* of the offenses at issue, and, as such, was properly admitted. *See, e.g., Kimbrough v. State*, 700 So.2d 634, 639(Fla. 1997); *Jefferson v. State*, 128 So.2d 132, 137 (Fla. 1961) ("It is a homicide committed during the perpetration of a felony, if the homicide is part of the *res gestae* of the felony."). The evidence about which Evans complains was properly admitted, and there is no basis for reversal.

Alternatively and secondarily, even if this evidence should not have been admitted, there is no basis for reversal because any error was harmless beyond a reasonable doubt. In view of the nature of the crime, and the strong evidence of Evans' guilt, there can be no colorable argument that Evans would not have been convicted if the jury had been kept ignorant of his membership in the Cryps and the reason why Evans and his colleagues were present in Sanford, Florida. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986). Any error, assuming that one occurred, was harmless beyond a reasonable doubt.

VIII. THE "SPLIT VERDICT" ISSUE

On pages 77-80 of his brief, Evans argues that the jury's 11-1 recommendation that he be sentenced to death is a "split vote jury recommendation" which does not, according to Evans,

comply with state and federal constitutional standards. This claim is foreclosed by binding precedent in addition to being procedurally barred.

In rejecting the claim pressed by Evans, this Court has held:

> Jones contends that section 921.141(2), *Florida Statutes* (1987), and the federal constitution require jurors to use a special verdict form and to unanimously agree upon the existence of the specific aggravating factors applicable in each case. We have previously decided this question adversely to Jones's position. *James v. State*, 453 So.2d 786, 792 (Fla.), *cert. denied*, 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984); *Alvord v. State*, 322 So.2d 533, 536 (Fla. 1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976).

Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990). Evans has advanced no reason for changing settled Florida law, and, in any event, the constitutionality of the Florida death penalty act was upheld long ago. *Proffitt v. Florida,* 428 U.S. 279 (1976).

Further, in addition to being foreclosed by binding precedent, Evans' claim is not preserved for appellate review because there was no timely objection at trial. Florida law is settled that, in the absence of a timely and specific objection at trial, nothing is preserved for review on appeal.

CONCLUSION

For the reasons set out above, Evans' 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 George D.E. Burden, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, on this _____ day of August, 2000.

Of Counsel