IN THE SUPREME COURT OF FLORIDA

LEO EDWARD PERRY, JR.,

Appellant,

CASE NO. SC96499

v.

STATE OF FLORIDA,

Appellee.

_____
/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On February 21, 1997 the staff of a motel in Pensacola found seventy-five-year-old John Johnston dead in the room he rented the previous evening. (T II 250-53).[1] Dr. John Lazarchick, the medical examiner, examined the body at the scene (T III 487-89) and concluded that the victim had been dead between twelve and twenty-four hours. (T III 493). Lazarchick conducted an autopsy on February 22, 1997 (T III 494) and found eight stab wounds to the body, i.e., four to the chest, three to the neck, and a defensive wound to the victim's thumb. (T III 499-515). Three of the chest wounds and one of the neck wounds would have been fatal, and the victim would have felt extreme pain. (T III 502-517). He concluded that the victim was lying face up in bed when stabbed. (T III 518). Jan Johnson, a blood spatter analyst with the Florida Department of Law Enforcement (FDLE), agreed with that conclusion (T IV 725).

Perry's fingerprint was on a soap wrapper found in the room (T IV 641), and his DNA was found in the blood stain on a towel

[1] "T II 250-53" refers to pages 250 through 253 of volume II of the transcripts. The transcripts consist of volumes I through VIII, pages 1 through 1534.

and saliva on a cigarette butt. (T IV 686-87). A woman in the room next to the victim's heard noises from his room around 4:00 a.m. and saw a man resembling Perry drive off in the victim's truck. (T II 290-95). The Florida Highway Patrol found the victim's truck in Palm Beach County and contacted the Escambia County Sheriff's Office. (T III 446). Deputy Sanderson interviewed the driver of the truck and through his investigation identified Perry as the person the driver obtained the truck from. (T III 447-50). Sanderson procured a warrant for Perry's arrest (T III 451), but Perry was not found until New Orleans police arrested him on November 5, 1997. (T IV 618).

Sanderson and Deputy Yuhasz arrested Perry in New Orleans. (T III 451). Perry told them that he took the victim's wallet from the motel room and that he stabbed the victim. (T III 461; VI 1041-42). On November 24, 1997 the grand jury indicted Perry for one count of first-degree murder, either premeditated or during an armed robbery. (R I 1).[2]

At trial Perry testified that he was hitchhiking from Chicago to South Florida on February 20, 1997 when the victim gave him a ride. (T V 805-08). Perry had little money when he

[2] "R I 1" refers to page 1 of volume I of the record. The record consists of volumes I through III, pages 1 through 424.

met the victim. (T V 810-11). Perry's theory of defense was that he was too intoxicated by drugs and alcohol to have formed the intent to rob the victim or to commit premeditated murder. (E.g., T V 822-77). A psychologist, however, testified on behalf of the state that Perry was capable of engaging in purposeful, goal-oriented, intentional behavior at the time of the murder even though he might have been intoxicated. (T VI 1000). The jury convicted Perry of both premeditated and felony murder. (T VII 1227; R II 288).

At the penalty phase Perry's ex-wife testified that he had a history of being violent, that he collected and carried knives, and that he told her how someone could be killed easily with a small knife. (T VII 1289-94). Perry testified about his life (T VII 1333-59), but his mother (with whom he had had no contact for almost a decade) contradicted much of his testimony about his life as a child and teenager. (T VIII 1494-72). Perry's fiancee testified that she knew him between May and October 1997 and never knew him to drink or use drugs. (T VIII 1389). Perry's psychopharmacologist testified that, if what Perry told him were true, Perry suffered a neuroaggressive disorder episode at the time of the homicide. (T VIII 1398-99). Perry took the stand again after these two witnesses and stated that, despite his earlier testimony to the contrary, he was

never drunk between May and October 1997 and did not use drugs during that time because his employer required drug tests. (T VIII 1438-39).

The jury recommended that Perry be sentenced to death by a vote of ten to two. (R II 305; T VIII 1528). Each side filed a sentencing memorandum (R II 312, 332), and the court held a preliminary sentencing hearing on August 5, 1999. (R II 349 et seq.). Thereafter, the court sentenced Perry to death on August 26, 1999, finding that the three aggravators of felony murder/robbery, heinous, atrocious, or cruel (HAC), and cold, calculated, and premeditated (CCP) outweighed the proposed statutory and nonstatutory mitigation. (R III 384-409).

SUMMARY OF ARGUMENT

ISSUE I.

The trial court did not err in denying Perry's motions for judgment of acquittal because the state presented competent substantial evidence to support the jury's finding Perry guilty of both first-degree premeditated and felony murder.

ISSUE II.

The trial court did not err in refusing to allow Perry to question prospective jurors on their understanding of what a term of life imprisonment meant. The court instructed the jury on the possible sentences, and Perry argued to it that a life sentence meant he would not be paroled.

ISSUE III.

The trial court properly allowed the state to call Perry's ex-wife to testify to aggravating evidence and to rebut mitigating evidence.

ISSUE IV.

The trial court properly found this murder to have been committed in a heinous, atrocious, or cruel manner.

ISSUE V.

The trial court did not err in finding the murder was committed in a cold, calculated, and premeditated manner.

ISSUE VI.

The trial court correctly found that the state established the felony murder/robbery aggravator.

ISSUE VII.

The trial court did not err in refusing to give Perry's proposed instruction that the jury's recommended sentence must be given great weight.

ISSUE VIII.

Perry's death sentence is proportionate.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED PERRY'S MOTIONS FOR JUDGMENT OF ACQUITTAL.

Perry argues that the trial court erred in denying his motions for judgment of acquittal because the evidence is insufficient to support his conviction of first-degree murder. There is no merit to this claim.

The state charged Perry with one count of first-degree murder, either "from a premeditated design to effect the death of a human being" or during the commission of the felony of robbery while armed. (R I 1). After the state rested (T IV 773), Perry moved for a judgment of acquittal, arguing that the state had failed to prove first-degree murder, either premeditated or during a felony, and had also not proved that a robbery occurred. (T V 777-79). The trial court denied the motion and told Perry he could argue his theories to the jury. (T V 780). After Perry presented his case, the state called several rebuttal witnesses. (T V, VI 997-1045). Perry renewed his motion for judgment of acquittal, which the trial court denied. (T VI 1046-47).

During the guilt-phase charge conference, Perry asked that the court give a special instruction to the jury on the robbery being an afterthought, and the court granted that request. (T

VI 1068-74; R II 293). Perry also moved for a special verdict form regarding the jury's theory of guilt. (R I 92). After discussing the matter (R II 231-38; T VI 1083-86), the court granted the request, and the verdict form listed first-degree murder with separate questions regarding both premeditation and felony murder. (R II 288). The jury convicted Perry of first-degree murder under both theories. (R II 288; T VII 1227).

When a defendant moves for a judgment of acquittal, he or she "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). This Court has repeatedly affirmed the rule that "courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law." Id.; Gordon v. State, 704 So.2d 107 (Fla. 1997); Gudinas v. State, 693 So.2d 953 (Fla.), cert. denied, 522 U.S. 936 (1997); Barwick v. State, 660 So.2d 685 (Fla. 1995), cert. denied, 516 U.S. 1097 (1996); DeAngelo v. State, 616 So.2d 440 (Fla. 1993); Taylor v. State, 583 So.2d 323 (Fla. 1991). A trial court should "review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to

the exclusion of all other inferences." State v. Law, 559 So.2d 187, 189 (Fla. 1989) (emphasis in original); Miller v. State, 25 Fla.L.Weekly S649 (Fla. August 31, 2000); Benedith v. State, 717 So.2d 472 (Fla. 1998); Orme v. State, 677 So.2d 258 (Fla. 1996), cert. denied, 519 U.S. 1079 (1997); Barwick; Atwater v. State, 626 So.2d 1325 (Fla. 1993), cert. denied, 511 U.S. 1046 (1994). The trial court's review of the evidence must be "in the light most favorable to the State," Law, 559 So.2d at 189, Miller, Benedith, and the state need not "conclusively rebut every possible variation of events which can be inferred from the evidence but [needs] only to introduce competent evidence which in inconsistent with the defendant's theory of events." Atwater, 626 So.2d at 1328; Benedith; Barwick; Law. If the state does this, the case should be presented to the jury: "Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inference which might be drawn from concealed facts, the Court should submit the case to the jury." Lynch, 293 So.2d at 45; Orme; Barwick. Then, as this Court has recognized, "the weight of the evidence and the witnesses' credibility are questions solely for the jury." Donaldson v. State, 722 So.2d 177, 181 (Fla. 1998).

A longstanding rule of appellate review is that judgments of conviction come to reviewing courts with a presumption of correctness and that any conflicts in the evidence must be resolved in favor of the judgment or verdict. Alston v. State, 723 So.2d 148 (Fla. 1998); Donaldson; Terry v. State, 668 So.2d 954 (Fla. 1996); Holton v. State, 573 So.2d 283 (Fla. 1990), cert. denied, 500 U.S. 960 (1991); Williams v. State, 437 So.2d 133 (Fla. 1983), cert. denied, 466 U.S. 909 (1984); Tibbs v. State, 397 So.2d 1120 (Fla. 1981), aff'd, 457 U.S. 31 (1982); Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911 (1976); Taylor v. State, 139 Fla. 542, 190 So. 691 (1939). "It is not this Court's function to retry a case or reweigh conflicting evidence submitted to the trier of fact." Donaldson, 722 So.2d at 181; Guzman v. State, 721 So.2d 1155 (1998), cert. denied, 526 U.S. 1102 (1999); Tibbs. In other words, an appellate court "has no authority at law to substitute its conclusions for that of a jury in passing upon conflicts or disputes in the evidence." Taylor, 139 Fla. at 547, 190 So. at 693. A district court of appeal, in applying this rule, commented that "it is axiomatic that appellate judges, who review only the cold record, are not in a position to fully determine the credibility of witnesses and are not at liberty to simply reweigh the evidence that was presented to the"

factfinder. State v. Reutter, 644 So.2d 564, 565 (Fla. 2d DCA 1994); Guzman; Tibbs. Therefore, because the state prevailed in the trial court, factual conflicts in this case should be resolved in the state's favor, i.e., in the light most favorable to supporting the judgment and sentence. Orme.

Applying the rules set out above, it is obvious that the trial court did not err in denying Perry's motions for judgment of acquittal, that the evidence supports Perry's conviction, and that this Court should affirm that conviction.

Premeditation

As this Court has stated: "Premeditation is a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the act about to be committed and the probable result of that act." Spencer v. State, 645 So.2d 377, 381 (Fla. 1994); Miller; McCutchen v. State, 96 So.2d 152 (Fla. 1957). Premeditation can be inferred based on circumstantial evidence. E.g., Miller.[3] Whether premeditation exists is a question of

[3] This, however, is not a wholly circumstantial case. Perry told the Escambia deputies who arrested him in New Orleans that he stabbed the victim and took his wallet from the motel room ad at trial admitted being in the motel room with the victim, having a bloody knife in his hand after the victim was dead, and fleeing the scene with some of the victim's property. A confession is direct, not circumstantial, evidence of guilt. Walls v. State, 641 So.2d 381, 390 (Fla. 1994), cert. denied, 513 U.S. 1130 (1995). Moreover, Perry's fingerprint and traces

fact for the jury, but the jury in not required "to believe the defendant's version of the facts when the State has produced conflicting evidence." Spencer, 645 So.2d at 381; Finney v. State, 660 So.2d 647 (Fla. 1995), cert. denied, 516 U.S. 1096 (1996); Holton; Cochran v. State, 547 So.2d 928 (Fla. 1989). Moreover, the state "is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict." Cochran, 547 So.2d at 930; Woods v. State, 733 So.2d 980 (Fla. 1999).

Perry's theory of defense was that he was too intoxicated by his consumption of alcohol and drugs to form the requisite intent to have premeditated the murder. On appeal Perry relies on his "confession and trial testimony." (Initial brief at 38, 40). The jury, obviously, did not believe Perry's theory and his testimony, and the state presented competent substantial evidence to support the conviction.

Although Perry testified on cross-examination that he was unsure of the amount of alcohol that he drank on the night in question (T V 917), on direct examination he claimed to have ingested specific amounts and types of alcohol and drugs. (E.g., T V 828-29, 834, 842-46). In spite of the amount of

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of his blood were found in the room. See Orme v. State, 677 So.2d 258 (Fla. 1996), cert. denied, 519 U.S. 1079 (1997).

intoxicants he claimed to have consumed, he admitted that he won all but one of numerous games of pool that he played. (T V 914). Paradoxically, after claiming that he was relying on his habits in describing what he did after returning to the motel room (e.g., T V 859, 921), he testified that, after unrolling his sleeping bag, he reversed its direction because of a light shining in his eyes. Perry testified that, after noticing the victim was dead, he was "paranoid" and "scared" and just grabbed his stuff and the truck keys and fled. (T V 869-70). He managed, however, to gather all of his belongings, except for a crack pipe under the bed and a pair of broken sunglasses, as well as the victim's wallet, the truck keys, and the security chip needed to start the truck. (E.g., T V 935).

In contrast to Perry's testimony, a motel guest in the next room testified that she heard noises from the victim's room around 4:00 a.m. and about twenty minutes later watched someone who looked very similar to Perry drive away in the victim's truck. (T II 290-95). The man had no trouble backing the truck out of its parking space (T II 294) and did not appear to be intoxicated. (T II 300). The medical examiner testified that the victim had four stab wounds to his chest, three to his neck, and one defensive wound to his thumb. (T III 500 et seq.). Three of the chest wounds and one neck wound were fatal. (T III

515-16). At the state's request Harry McLaren, a psychologist, listened to Perry's testimony and then testified as a state witness on rebuttal. McLaren concluded that Perry "was able to engage in purposeful, goal-oriented, intentional behavior during the time period surrounding the homicide." (T VI 1000).

Perry's self-serving testimony was internally inconsistent and inconsistent with the evidence presented by the state. Perry had little money and no means of transportation, while the victim had both. Besides the defensive wound, the other wounds were to the victim's chest and neck, areas where an attack would produce grievous wounds, and four of the seven wounds were, in fact, fatal. The state produced sufficient evidence for the jury to find that Perry committed this murder in a premeditated manner.[4]

Felony Murder

[4] Perry relies on Kirkland v. State, 684 So.2d 732 (Fla. 1996), and Coolen v. State, 696 So.2d 738 (Fla. 1997), but these cases are factually distinguishable. This Court held that Kirkland had no motive for killing his victim, used weapons of opportunity, and, apparently, had no preconceived plan. Here, on the other hand, Perry had a well-planned motive of stealing the victim's money and truck and used a knife other than his boot knife to kill the victim. Coolen and his victim were both intoxicated, and Coolen killed him during "an escalating fight over a beer." 696 So.2d at 741. In the instant case the jury rightfully did not believe Perry's self-serving claims that he was too intoxicated to form the intent to kill the victim.

During his testimony, Perry stated that he never intended to harm or to rob the victim. (T V 876-77). The evidence, however, showed that Perry had little money and no means of transportation and that he wound up with some of the victim's money and his truck which he used to travel to South Florida, his stated destination. Perry claims that the jury could not have convicted him of felony murder during an armed robbery because his appropriation of the victim's property was merely an afterthought. Mahn v. State, 714 So.2d 391 (Fla.1998); Knowles v. State, 632 So.3d 62 (Fla. 1993); Clark v. State, 609 So.2d 513 (Fla. 1992).

At Perry's request, however, the court specifically instructed the jury as follows:

> If the evidence shows that the defendant took the victim's property to effect his escape, but that the taking of the victim's property was an afterthought to the use of force or violence which resulted in the death of the victim, the taking of the victim's property does not constitute robbery, but may constitute theft.

(T VII 1206). The state presented evidence that conflicted with Perry's claim that he did not intend to rob the victim. Perry again relies on his confession and trial testimony. (Initial brief at 42). The jury, however, obviously found the state's evidence more believable than Perry's self-serving claims. Because there is competent substantial evidence to support the

jury's verdict that Perry killed the victim during an armed robbery, this Court should not disturb it.

The State proved that Perry committed first-degree murder, and the jury's verdict should be affirmed.

ISSUE II

THE TRIAL COURT DID NOT ERR BY RESTRICTING PERRY'S QUESTIONING OF PROSPECTIVE JURORS.

Perry argues that the trial court erred in not allowing him to question the prospective jurors about what they thought a life sentence meant. There is no merit to this claim.

During defense questioning at voir dire, the following occurred:

> [Mr. Rollo] Okay. Now, with respect to a penalty phase, I have to ask a few questions. In a penalty phase in a murder trial, should they go that far -- there are only two options in this case -- death by electrocution or -- you don't have to specify that, but it will be a vote -- a majority vote for death or for life imprisonment. That will be the only other result. It will be by simple majority. That's the only result that could happen if a first-degree verdict goes to the jury and there's a finding of guilt. Is there anyone laboring under the misperception that life imprisonment in Florida means life imprisonment and not a term of shorter years due to parole?
>
> MS. NEEL: Your Honor, I object as to relevancy.

> THE COURT: I agree. I'm going to sustain the objection.

(T I 170-71). Counsel did not then, or afterwards, challenge the court's ruling either through objection or argument.

The trial court gave the jury the standard penalty-phase instructions, including the following: "The punishment for this crime is either death or life imprisonment without the possibility of parole." (T VII 1287). During penalty-phase closing argument, Perry's counsel stated that the jury's advisory recommendation would be given great weight and

> has a special significance here today. It has special meaning, and all we're asking you to do is to carefully consider the presentation of evidence in this proceeding and anything else that you think that you should consider with respect to making your decision as to whether or not Leo Perry will be executed or whether or not he will spend the rest of his life in prison without parole.
>
> The law in Florida has changed over the years and the law means exactly that. Life in prison without parole means exactly that. Every breath you take for the rest of your life is life in prison without parole. It didn't used to be that way. We've had other laws, and I'm not going to go into that because I don't want to confuse anybody but, you know, some of the other laws back when we had parole provisions for capital sentencing, you could get out after a certain time. That is not the law in the State of Florida today. Life in prison is life in prison.

(T VIII 1493-94). Counsel went on to argue extensively that under a life sentence Perry would not be paroled and that he had been rehabilitated and would lead a productive, useful life in prison. (T VIII 1509-11). The court then gave the jury the standard penalty-phase closing instructions that mention the only possible penalties several times. (T VIII 1518, 1521).

As this Court has long held:

> The examination on the voir dire in criminal trials . . . should be so varied and elaborated as the circumstances surrounding the jurors under examination in relation to the case on trial would seem to require in order to obtain a fair and impartial jury, whose minds are free of all interest, bias, or prejudice.

Pope v. State, 84 Fla. 428, 438, 94 So. 865, 869 (1922). Perry points to no prospective or actual juror who expressed any concern about what a "life sentence without possibility of parole" meant. Instead, all of the jurors stated that they would follow the court's instructions.

The jury received proper instructions, and, as Perry admits (initial brief at 49), he was allowed to argue about a life sentence and its lack of parole eligibility. There is no merit to his claim that he should receive a new penalty phase. See Walker v. State, 707 So.2d 300, 315 (Fla. 1997); Franqui v. State, 699 So.2d 1312, 1326-27 (Fla. 1997), cert. denied, 523 U.S. 1040 (1998). This issue should be denied.

ISSUE III

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO PRESENT TESTIMONY FROM PERRY'S EX-WIFE.

Perry argues that the trial court erred in allowing the state to call his ex-wife Melissa during the penalty phase and in allowing her to testify to Perry's violent activities and his telling her that it would only take a small knife to kill someone. There is no merit to this claim.

Perry's defense was that he was too intoxicated by drugs and alcohol to intend to kill and rob the victim and that he was not guilty of premeditated or felony murder. (E.g., T VII 1167-68). During his guilt-phase testimony, Perry stated: "At no time did it ever cross my mind to rob Mr. Johnston or do bodily harm to Mr. Johnston." (T V 876-77). During cross-examination, he admitted to having been convicted five times of crimes of dishonesty. (T V 909). Throughout the trial, Perry portrayed himself as nonviolent.

Just before the penalty phase began, the following exchange occurred:

> MS. NEEL: Can I just be heard on something before I start my penalty phase so we'll know? If the Defense is intending to argue, like they attempted to do yesterday, in terms of the fact that the defendant doesn't have a violent history, I feel that I will have a right to call the ex-wife who will talk about his violent

> history. And I say that because he has presented some evidence during the guilt phase indicating that he's not very violent or something along that line, that he wouldn't do anything of violence. And if that is intended to be argued, even if he doesn't testify in the penalty phase, then I feel that I should have the right to bring that up in my part in the penalty phase.
>
> THE COURT: Well, I don't think that you needed to announce that. He's indicated that he's a person that lacks violence, and I think you would be entitled to call the ex-wife notwithstanding what he says on the penalty phase.

(T VII 1283-84). Perry made no objection to the state's proposed course of action.

Thereafter, the state called Melissa Perry and asked her about Perry's being violent. (T VII 1289). Defense counsel objected because "I don't think that's an issue," and the court overruled the objection. (T VII 1289). Melissa Perry then testified about a time when Perry beat a friend so badly that he had to be hospitalized. (T VII 1289-92). She also testified that Perry carried knives (T VII 1292-93) and that he once told her a large knife is not needed to kill someone because, if the jugular vein were cut, a person would die quickly (T VII 1294). During cross-examination, Perry asked her to explain the episode where he beat their friend more fully. (T VII 1299-1301). After the state rested, Perry called his ex-wife and questioned her further about the beating incident. (T VII 1329-32).

Now, Perry claims that the court erred in allowing the State to call his ex-wife because her testimony did not rebut any evidence he presented; the penalty-phase instructions as to what mitigators were being claimed had not been finalized; and the defense had to call Melissa and Perry had to testify to ameliorate her testimony. (Initial brief at 56-57). A trial court' ruling on the admission of evidence will not be reversed unless an abuse of discretion is shown. Alston v. State, 723 So.2d 148 (Fla. 1998); Cummings v. State, 715 So.2d 944 (Fla. 1998). Perry has demonstrated no abuse of discretion.

Perry correctly quotes Hitchcock v. State, 673 So.2d 859, 861 (Fla. 1996), that the state can introduce penalty-phase evidence that relates to aggravators. The statement about cutting someone's jugular vein is directly related to CCP because one of the victim's fatal wounds occurred when his jugular was severed. Thus, this part of the ex-wife's testimony was relevant. Trease v. State, 25 Fla.L.Weekly S622, S625, n.5 (Fla. August 17, 2000); Marquard v. State, 641 So.2d 54, 57 (Fla. 1994), cert. denied, 513 U.S. 1132 (1995).

Moreover, during the guilt phase, as the prosecutor pointed out, one of Perry's main themes was his nonviolence. Criminal activity without convictions can be used to rebut the statutory mitigator of no prior violent criminal activity. Dougan v.

State, 595 So.2d 1 (Fla.), cert. denied, 506 U.S. 942 (1992); Lucas v. State, 568 So.2d 18 (Fla. 1990); Walton v. State, 547 So.2d 622 (Fla. 1989), cert. denied, 493 U.S. 1036 (1990). The fact that the penalty-phase instructions had not been finalized at that time in immaterial. The court instructed the jury on the statutory mitigation of no prior violent felony conviction. That Perry also testified during the penalty phase was not, as implied, mandated by his ex-wife's testimony. Perry told the jury his version of the beating incident (T VII 1346-49) during his extensive testimony about his life and only came back to the stand to testify about his prior convictions after his mental health expert testified about them. (T VIII 1437-38). By claiming to be nonviolent Perry placed this trait in issue. Squires v. State, 450 So.2d 208, 210-11 (Fla.), cert. denied, 469 U.S. 892 (1984).

The ex-wife's testimony did not, as claimed, constitute non-statutory aggravation. Instead it supported statutory aggravators and rebutted proposed mitigation. Unlike in the cases Perry relies on,[5] the complained-about testimony did not impermissibly undermine the credibility of his witnesses and did not become a feature of the trial. Perry has failed to show

[5] Hitchcock v. State, 673 So.2d 859 (Fla. 1996); Geralds v. State, 601 So.2d 1157 (Fla. 1992); Robinson v. State, 487 So.2d 1040 (Fla. 1986).

that the trial court abused its discretion by admitting this evidence, and this claim should be denied.

ISSUE IV

THE TRIAL COURT CORRECTLY FOUND THE MURDER HAD BEEN COMMITTED IN A HEINOUS, ATROCIOUS, OR CRUEL MANNER.

Perry argues that the court erred in instructing the jury on and in finding the murder was committed in a heinous, atrocious, or cruel manner (HAC). There is no merit to this claim.

The trial court made the following findings as to the HAC aggravator:

> 2. The capital felony was especially heinous, atrocious and cruel.
>
> The evidence established that the victim was a 75 year old man who had retired to bed for the evening and was lying tucked in bed, under a sheet, at the time that the attack on the victim commenced.
>
> The victim was stabbed three [sic] times in the chest, all three wounds being in close proximity to each other and one of which penetrated the heart. The Defendant also inflicted three wounds to the neck of the victim, two being on the right side of the neck and one on the left side of the neck. One of said wounds to the neck severed the jugular vein.
>
> The medical examiner testified that the wounds which were inflicted on the victim were all pre-mortem and would be painful.

> In addition, he also testified that the victim had a defensive wound on his thumb and that one of the wounds to the victim's neck was irregular in shape which would be consistent with the victim struggling at the time the Defendant was slashing the victim's throat. The medical examiner also indicated that the victim would have died within about five minutes and would have been unconscious in about a minute and that the wounds were probably delivered in rapid succession. These facts demonstrate that the victim was conscious at the time all of the wounds were inflicted and therefore would have experienced the pain associated with each of the wounds so inflicted.
>
> This aggravating factor has been proven beyond a reasonable doubt and there is competent substantial evidence to prove beyond a reasonable doubt that the offense was committed in a heinous, atrocious and cruel manner and this aggravating factor will be given great weight.

(R III 399-400).

The record supports these findings. John Lazarchick, the medical examiner, identified three wounds to the victim's neck and four to his chest that were consistent with a single-edged knife. (T III 499-501). One of the neck wounds severed the jugular vein and would have been fatal. (T III 502). Due to the irregular shape of this wound, the medical examiner concluded that the victim was struggling when it was inflicted. (T III 503). One wound to the chest entered the pericardium and would have been fatal. (R III 506-08). "Extensive" force was needed to cause this wound because the knife went through bone.

(R III 509). For a second chest wound the knife went between ribs and into the heart, causing another fatal injury. (R III 510). In a third chest wound the knife again went between ribs and into the left lung, causing another injury that would have been fatal without immediate medical attention. (R III 511-12). The eighth wound suffered by the victim was a defensive knife wound to his left thumb. (R III 513-15).

Even though the victim probably would have lost consciousness within a minute of all the wounds being inflicted due to blood loss and probably died within five minutes (T III 517), he was conscious and struggling at the beginning of the attack (T III 517) and would have felt "an extreme amount of pain." (T III 516). The medical examiner testified that, due to the amount of blood on the bed (and the lack of blood elsewhere), the victim was lying face up in the bed when attacked and that, if the victim had moved (i.e., fell onto the bed) after being attacked, there would have been blood "all over the place." (T III 518). Jan Johnson, an FDLE blood-spatter expert, agreed with the medical examiner's conclusions that the victim was lying in bed when stabbed. (T IV 725-26). She based her opinion on the bloodstains on the wall beside the bed and above and below the headboard and the blood pooled on the floor

under the bed. (T IV 732, 734, 736-37). These facts support the trial court's finding HAC in aggravation.

Perry relies on several cases where this Court struck the HAC aggravator, but these cases are factually distinguishable. In Zakrzewski v. State, 717 So.2d 488, 493 (Fla. 1998), cert. denied, 525 U.S. 1126 (1999), this Court found the adult victim's death not be HAC because the first blow from the crowbar rendered her unconscious. Because of the body's decomposition the medical examiner could say nothing conclusively regarding the three stab wounds, so this Court struck HAC in Brown v. State, 644 So.2d 52, 53-54 (Fla. 1994), cert. denied, 514 U.S. 1119 (1995). HAC was struck in Elam v. State, 636 So.2d 1312, 1314 (Fla. 1994), because the victim endured no prolonged suffering or anticipation of death. In Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989), this Court struck HAC because the victim may have been only semiconscious. Similarly, in Scott v. State, 494 So.2d 1134, 1137 (Fla. 1986), there was no evidence that the victim was conscious, or even alive, when run over by a car. This Court approved finding HAC in Scott, however, based on the victim's being beaten several times. The victim in Jackson v. State, 451 So.2d 458, 463 (Fla. 1984), lost consciousness when shot, and, in Herzog v. State,

439 So.2d 1372, 1380 (Fla. 1983), eyewitnesses testified that the victim was unconscious when killed.

This Court has upheld HAC in many cases where the victim was stabbed to death. Brown v. State, 721 So.2d 274, 277 (Fla. 1998), cert. denied, 526 U.S. 1102 (1999); Williamson v. State, 681 So.2d 688, 698 (Fla. 1996), cert. denied, 520 U.S. 1200 (1997); Davis v. State, 648 So.2d 107, 109 (Fla. 1994), cert. denied, 516 U.S. 827 (1995); Derrick v. State, 641 So.2d 378, 381 (Fla. 1994), cert. denied, 513 U.S. 1130 (1995). The medical examiner testified that the victim was conscious and struggling and in extreme pain. Thus, this case is closer to other cases where this Court affirmed the finding of HAC than to the cases cited by Perry. E.g., Bates v. State, 750 So.2d 6, 18 (Fla. 1999) (victim on her back looking at Bates when stabbed twice; would have been conscious for one to two minutes); Guzman v. State, 721 So.2d 1155, 1157 (Fla. 1998) (victim conscious at least when attack began), cert. denied, 526 U.S. 1102 (1999); Mahn v. State, 714 So.2d 391, 399 (Fla. 1998) (victim sustained defensive wounds); Lott v. State, 695 So.2d 1239, 1244 (Fla.) (HAC upheld even though victim may have been unconscious when fatal stab would occurred), cert. denied, 522 U.S. 986 (1997); Campbell v. State, 571 So.2d 415, 418 (Fla. 1990) (victim had defensive wounds).

The record fully supports the trial court's finding this murder to have been committed in an especially heinous, atrocious, or cruel manner, and that finding should be affirmed.

ISSUE V

THE TRIAL COURT PROPERLY FOUND THAT THE STATE ESTABLISHED THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATOR.

Perry argues that the trial court erred in finding that the cold, calculated, and premeditated (CCP) aggravator had been established. There is no merit to this claim.

The court made the following findings as to CCP:

> 3. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner.
>
> The evidence establishes that the Defendant waited for the victim to go to bed and fall asleep and that thereafter the Defendant obtained a knife and methodically stabbed the victim four times in the chest area and slashed his neck three times, severing the jugular vein. The evidence establishes that the knife used to kill the victim was not the boot knife which the Defendant carried on his person and therefore it is logical to assume that the Defendant went about obtaining another knife to kill the victim rather than use the Defendant's own knife. The evidence further establishes that it was not necessary for the Defendant to kill the victim to accomplish his goal and could have taken the victim's truck keys and wallet without killing the victim.

> The nature of the wounds inflicted, one of which severed the jugular vein, was a method of killing that the Defendant had discussed with Melissa Perry when he advised her that you did not need a big knife to kill a person, only a small knife provided that you cut the jugular vein. The Defendant's conduct in this case clearly establishes beyond a reasonable doubt that the victim was executed in a cold, calculated and premeditated manner. This aggravating factor has been proven beyond a reasonable doubt and to this aggravating factor the Court will give great weight.

(R III 400-01).

The state must prove four elements to establish the CCP aggravator: The murder must be "cold;" it must be the product of a careful plan or prearranged design; there must be heightened premeditation; and there must be no pretense of moral or legal justification. Brown v. State, 721 So.2d 274 (Fla. 1998), cert. denied, 526 U.S. 1102 (1999); Lott v. State, 695 So.2d 1239 (Fla.), cert. denied, 522 U.S. 986 (1997); Jones v. State, 690 So.2d 568 (Fla. 1996), cert. denied, 522 U.S. 880 (1997); Walls v. State, 641 So.2d 381 (Fla. 1994), cert. denied, 513 U.S. 1130 (1995). The state met its burden in this case, and the trial court correctly found that CCP had been established.

Perry, however, argues that the court erred in finding this aggravator because: 1) there was no proof the victim was asleep (initial brief at 67-69); 2) the stabbing was not methodical (initial brief at 69-70); 3) the court incorrectly found that

Perry did not use his own knife (initial brief at 70-71); 4) the court improperly found that the murder was not necessary to accomplish the robbery (initial brief at 71-72); and 5) the court improperly relied on Perry's severing the victim's jugular vein. (Initial brief at 72).[6] There is no merit to these claims.

The court's stating that Perry waited for the victim to go to bed and fall asleep is not central to the conclusion that CCP applies to this murder. As Perry admits (initial brief at 67), the state established that the victim was in bed when stabbed. (T III 518; IV 725). Perry argues that his "confession and trial testimony" show that the evidence supported his version of events. (Initial brief at 68). On the contrary, however, the medical examiner stated that the victim did not fall backward onto the bed from a standing position because, if such had happened, there would have been blood "all over the place." (T III 518). Moreover, cuts in the sheet covering the victim were consistent with having been made by a single edged blade. (T IV 664). Perry's testimony refutes his current claim that it would be reasonable to assume that the victim used both the blanket and bedspread as well as the sheet, i.e., he testified that the

[6] Perry does not claim that he had a moral or legal justification.

room was so warm that he took off his jeans and shirt (T V 861) and that he covered the victim with the blanket, spread, and a pillow after killing him. (T V 869).

As Perry points out (initial brief at 68) the victim's merely being asleep does not demonstrate CCP. This is so because CCP pertains more to the state of mind, intent, and motivation of the perpetrator than to the perception of the victim. Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111 (1985); Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984). However, it is reasonable to assume, on the facts of this case, that Perry waited until the victim was asleep or almost so to begin his murderous assault because a person in such a state would be less likely or able to resist the attack effectively.

Also, contrary to Perry's argument, the court properly found the stabbing to have been methodical. The medical examiner testified that four of the eight wounds were fatal, i.e., three to the chest and one to the throat. Instead of flailing around, stabbing indiscriminately, Perry stabbed the victim four times in the chest and three in the throat, two areas of the body where wounds could be expected to be lethal. The facts are not consistent with a frenzied attack, but are consistent with a

plan to inflict the greatest possible injury to the victim in a short time and with little resistance.

Perry claims that the wounds are consistent with his testimony "that the killing was an impulsive, spur-of-the-moment act while he was under the influence of drugs and alcohol." (Initial brief at 69). However, the judge and jury were entitled to, and obviously did, reject Perry's self-serving testimony as contrary to the evidence. Wournos v. State, 644 So.2d 1000, 1008-09 (Fla. 1994), cert. denied, 514 U.S. 1069 (1995); Walls, 641 So.2d at 387; Pardo v. State, 563 So.2d 77, 80 (Fla. 1990); Scott v. State, 494 So.2d 1134, 1138 (Fla. 1986). Moreover, his reliance on Dr. Frazier is not well taken because the doctor's opinion suffers from the same fatal flaw. Frazier repeatedly stated that his assessment of Perry was based on Perry's self-serving statements to the doctor. (E.g., VIII 1398 (lines 16-22), 1400 (lines 21-25), 1402 (lines 2-5), 1404 (lines 19-24), 1407 (lines 2-6 and 19-24), 1408 (lines 2-15), 1434 (lines 14-25)). As such, the judge and jury were free to reject the doctor's opinions. Walls.

Perry also complains about the trial court's concluding that he used a second knife, not his boot knife, to kill the victim. In doing so, he claims he used his boot knife (initial brief at 70) and cites volume V of the transcript, pages 856 through 857

and 863 through 869. In that part of his testimony Perry stated that he carried a three-inch knife in his boot for personal protection (T V 856), that when he came up off the floor he did not know if he had his knife in his hand (T V 865), and that, when he came to himself again, he had "a" knife (T V 868) in his hand. At no time did he testify that he used his double-edged boot knife on the victim. As the state proved, the victim was stabbed with a single-edged knife. (T III 501; IV 665). Because Perry's knife was double-edged, it was reasonable for the court to conclude that Perry procured another, single-edged knife that he used to murder the victim.

Perry also complains about the court's finding he could have stolen the victim's property without killing him. Again, he relies on his self-serving testimony to support his argument. Also again, however, the judge and jury reasonably could have not believed that testimony. As set out in issue I, supra, the evidence was sufficient to support Perry's conviction. Perry's self-serving protestation of lack of intent to rob and kill the victim is belied by his having done both.

The trial court did not err in relying on Perry's having told his ex-wife that one did not need a large knife to kill, a small one would do if the jugular vein were severed. The court properly admitted this testimony (issue III, supra), and the

state established that one of the fatal wounds involved severing the victim's jugular vein. This shows Perry's awareness of what he was doing and of the consequences of his actions. As such, it is valid support for the trial court's finding CCP.

The cases that Perry relies on (initial brief at 68) are factually distinguishable and, therefore, not comparable to the instant cases.[7] Perry's memory was highly selective. He recounted with considerable specificity his activities the night of the murder, including the amount of alcohol and drugs he claimed to have ingested, but then claimed that he had no idea how the victim wound up dead. See Johnson v. State, 608 So.2d 4, 13 (Fla. 1992) (too much purposeful conduct for much consideration to be given to defendant's alleged intoxication),

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[7] For example, unlike in Guzman v. State, 721 So.2d 1155, 1162 (Fla. 1998), cert. denied, 526 U.S. 1102 (1999), a weapon of opportunity was not used, and the evidence shows this murder to have been planned. Unlike in Mahn v. State, 714 So.2d 391, 398 (Fla. 1998), Perry did not use a hastily obtained weapon in a haphazard manner. Unlike Geralds v. State, 601 So.2d 1157, 1163-64 (Fla. 1992), Perry did not try to avoid the victim, immediately killed the victim to effect the robbery, the victim struggled only after being stabbed, and Perry did not use a weapon of opportunity. In Penn v. State, 574 So.2d 1079, 1083 (Fla. 1991), the trial court found a mental mitigator based on Penn's intoxication that tempered his ability to coldly premeditate the murder. The same is not true in this case. The attack in Campbell v. State, 571 So.2d 415, 418 (Fla. 1990), took place in one continuous period during which Campbell had no time to reflect on his actions. Finally, in Blanco v. State, 452 So.2d 520, 526 (Fla. 1984), this Court found it reasonable that the victim surprised Blanco, resulting in his being shot.

cert. denied, 508 U.S. 919 (1993); Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986) (same). The evidence presented by the state contradicted Perry's testimony and shows that this murder was cold, calculated, and premeditated. The court's finding the CCP aggravator should be affirmed because, when there is a legal basis for finding an aggravator, this Court will not substitute its judgment for that of the trial court. Willacy v. State, 696 So.2d 693 (Fla.), cert. denied, 522 U.S. 970 (1997); Occhicone v. State, 570 So.2d 902 (Fla. 1990), cert. denied, 500 U.S. 938 (1991).

Even if this Court disagrees, however, Perry's death sentence should be affirmed. If the CCP aggravator were struck, two aggravators would remain. Balancing HAC and felony murder/robbery against the insubstantial nonstatutory mitigation established by Perry would show that death was the proper penalty. Any error as to CCP, therefore, would be harmless. Geralds v. State, 674 So.2d 96 (Fla.), cert. denied, 519 U.S. 891 (1996); Brown v. State, 644 So.2d 52 (Fla. 1994), cert. denied, 514 U.S. 1117 (1995).

ISSUE VI

THE TRIAL COURT PROPERLY FOUND THE FELONY MURDER AGGRAVATOR TO HAVE BEEN ESTABLISHED.

Perry argues that the trial court erred in instructing the jury on and in finding that the felony murder/robbery aggravator had been established. There is no merit to this claim.

The state charged Perry with one count of first-degree murder, either from a premeditated design or during the commission of the felony of armed robbery. (R I 1). The jury convicted him as charged of both premeditated and felony first-degree murder. (R II 288; T VII 1227). In finding that the state established the felony murder/robbery aggravator the trial court stated:

> 1. The capital felony was committed while the Defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit a robbery or the capital felony was committed for pecuniary gain.
>
> The Defendant claims that the taking of the victim's keys and truck was an afterthought and that the same was taken merely for the purpose of leaving the scene of the homicide in the motel. Defendant further claims that he found the victim's wallet in the glove compartment of the truck. These contentions by the Defendant are inconsistent with the competent and substantial evidence presented at trial and it is apparent that the jury did not accept the Defendant's version of said events. There is substantial, clear and convincing evidence in the record to support the

> conclusion that the murder in question was committed during the commission of a robbery for financial gain.
>
> The Defendant characterized himself as a con man or hustler and the testimony is clear that he was in need of money and transportation at the time of the murder. The Defendant initially told police officers that the wallet was taken from the motel room. Further, the evidence shows that the wallet could not have been in the truck's glove compartment at the time the truck was taken because the Defendant testified at trial that he sat in the truck while the victim checked into the motel and that the Defendant was the last one out of the truck once they got to the motel room and that he never saw the victim put the wallet in the glove compartment. The Defendant further testified that among the items contained in the victim's wallet was $60.00 cash, which the Defendant kept, and the victim's driver's license. It is also this Court's recollection that a clerk from the motel testified that the victim displayed his driver's license for identification and his AARP card to obtain a senior citizen's discount when he registered.
>
> The jury was instructed that the taking of property as an afterthought would not constitute robbery and, notwithstanding such instruction, the jury specifically found that the murder was committed while the Defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit the crime of robbery. Therefore, this Court is of the opinion that this aggravating factor has been proven beyond a reasonable doubt and to this aggravating factor the Court will give great weight.

(R III 398-99).

As set out in issue I, supra, the record supports Perry's conviction of first-degree felony murder committed during an armed robbery. When the state produces sufficient evidence to support conviction of a felony, that evidence also supports the felony murder aggravator. Sliney v. State, 699 So.2d 671 (Fla. 1997), cert. denied, 522 U.S. 1129 (1998); Jones v. State, 652 So.2d 346 (Fla.), cert. denied, 516 U.S. 875 (1995); see also Finney v. State, 660 So.2d 674 (Fla. 1995), cert. denied, 516 U.S. 1096 (1996); Sochor v. State, 619 So.2d 285 (Fla.), cert. denied, 510 U.S. 1025 (1993); Lightbourne v. State, 438 So.2d 380 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984). The trial court, therefore, properly instructed the jury on the felony murder/robbery aggravator and correctly found that this aggravator had been established. There is no merit to this claim, and it should be denied.

ISSUE VII

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON ITS ROLE IN SENTENCING.

Perry claims that the standard jury instruction on the jury's role in sentencing violates Caldwell v. Mississippi, 472 U.S. 320 (1985). There is no merit to this claim, and it should be denied summarily.

At the penalty-phase charge conference Perry asked the court to give his proposed instruction (R II 303) that the court is required to give great weight to the jurors' recommendation. (T VIII 1381). The prosecutor responded that this Court held in Grossman v. State, 525 So.2d 833 (Fla. 1988), receded from on other grounds, Franqui v. State, 699 So.2d 1312 (Fla. 1997), that the standard jury instruction properly apprised the jury of its role. (T VIII 1382). The court agreed with the state and announced that the standard instruction would be given. (T VIII 1382). Thereafter, the court gave the jury the instruction. (T VIII 1515).

Perry recognizes that this Court's prior decisions are adverse to his position (initial brief at 77), but asks this Court to reconsider its prior rulings. This argument ignores, however, that this Court considered and rejected this precise issue in Burns v. State, 699 So.2d 646 (Fla. 1997), cert. denied, 522 U.S. 1121 (1998). In Burns this Court stated that, even in light of Espinosa v. Florida, 505 U.S. 1079 (1992), and Tedder v. State, 322 So.2d 908 (Fla. 1975), "the standard instruction fully advises the jury of the importance of its role and correctly states the law." 699 So.2d at 654. Subsequently, this Court recognized that it had "held that the standard jury instruction fully advises the jury of the importance of its

role, correctly states the law, and does not denigrate the role of the jury." Brown v. State, 721 So.2d 274, 283 (Fla. 1998), cert. denied, 526 U.S. 1102 (1999) (citations omitted).

Perry presents nothing new in this claim, and it should be denied.

ISSUE VIII

PERRY'S DEATH SENTENCE IS PROPORTIONATE.

Perry argues that his death sentence is disproportionate because the state proved the existence of no aggravators, he produced substantial mitigation, and this Court has found the death sentence disproportionate in similar cases. There is no merit to this claim.

Capital sentencing is an individualized proceeding; it is fact-driven and depends on the facts presented in each individual case. See Jones v. State, 580 So.2d 143, 146 (Fla.), cert. denied, 502 U.S. 878 (1991); Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). This Court conducts a proportionality review to insure that death sentences are imposed in a consistent manner. Bates v. State, 750 So.2d 6, 12 (Fla. 1999); Willacy v. State, 696 So.2d 693 (Fla.), cert. denied, 522 U.S. 970 (1997). In conducting its proportionality review, however, this Court does not reweigh the aggravators and mitigators. Bates, 750 So.2d at 12. Instead, it accepts "the jury's recommendation and the trial judge's weighing of the aggravating and mitigating evidence." Id.; Hamilton v. State, 678 So.2d 1228, 1232 (Fla. 1996) (this Court "is not a fact-finding body when it sits to hear appeals in

death cases" and is "constrained by the four corners" of the circuit court's findings).

Contrary to Perry's argument the state demonstrated in issues IV, V, and VI, supra, that the trial court committed no reversible error in finding that the HAC, CCP, and felony murder aggravators had been established. Furthermore, Perry does not challenge the court's findings as to the proposed mitigation he presented. Perry states that "there is record support from which [the statutory mental mitigators] could have been found (initial brief at 79), but the trial court fully considered the proposed mitigators and, within its discretion, found they had not been established and should be given no weight. (R III 402-04). See Trease v. State, 25 Fla.L.Weekly S622 (Fla. August 17, 2000). Perry also does not challenge the trial court's findings on his proposed nonstatutory mitigation, and the court's giving this mitigation little weight should be affirmed. (R III 404-08). Id.

The cases that Perry relies on in his proportionality argument are distinguishable. Williams v. State, 707 So.2d 683 (Fla. 1998); Sinclair v. State, 657 So.2d 1138 (Fla. 1995); DeAngelo v. State, 616 So.2d 440 (Fla. 1993); Clark v. State, 609 So.2d 513 (Fla. 1992); McKinney v. State, 579 So.2d 80 (Fla. 1991); Penn v. State, 574 So.2d 1079 (Fla. 1991); Proffitt v.

State, 510 So.2d 896 (Fla. 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); and Rembert v. State, 445 So.2d 337 (Fla. 1984), are all single-aggravator cases and, as such, are simply not comparable to the instant case. While the state established two aggravators in Terry v. State, 668 So.2d 954 (Fla. 1996), this Court found one of them worth so little weight that Terry is essentially a single-aggravator case and, therefore, not comparable. Finally, Richardson v. State, 437 So.2d 1091 (Fla. 1983), is a jury override case, a type of case that is not comparable to those where the jury recommends a death sentence. Burns v. State, 699 So.2d 646, 649 n.5 (Fla. 1997) ("override cases involve a wholly different legal principle and are thus distinguishable from cases where the jury recommends death), cert. denied, 522 U.S. 1121 (1998); see Williams v. State, 437 So.2d 133 (Fla. 1983), cert. denied, 466 U.S. 909 (1984).

Instead of the cases Perry relies on, the following cases are more comparable to the instant one and, therefore, more appropriate to this Court's proportionality review. E.g., Miller v. State, 25 Fla.L.Weekly S649 (Fla. August 31, 2000) (prior violent felony and felony murder aggravators; ten nonstatutory mitigators); Robinson v. State, 761 So.2d 269 (Fla. 1999) (pecuniary gain, HAC, and CCP aggravators; both statutory mental mitigators and eighteen nonstatutory mitigators); Davis

v. State, 703 So.2d 1055 (Fla. 1997) (HAC and felony murder aggravators; nonstatutory mitigation), cert. denied, 524 U.S. 930 (1998); Kilgore v. State, 688 So.2d 895 (Fla. 1996) (under sentence of imprisonment and prior violent felony aggravators; both statutory mental mitigators and several nonstatutory mitigators), cert. denied, 522 U.S. 832 (1997); Pope v. State, 679 So.2d 710 (Fla. 1996) (prior violent felony and pecuniary gain aggravators; both statutory mental mitigators and several nonstatutory mitigators), cert. denied, 519 U.S. 1123 (1997); Orme v. State, 677 So.2d 258 (Fla. 1996) (felony murder, HAC, and pecuniary gain aggravators; both statutory mental mitigators), cert. denied, 519 U.S. 1079 (1997); Gamble v. State, 659 So.2d 242 (Fla. 1995) (CCP and pecuniary gain aggravators; age and several nonstatutory mitigators), cert. denied, 516 U.S. 1122 (1996); Davis v. State, 648 So.2d 107 (Fla. 1994) (felony murder and HAC aggravators; numerous nonstatutory mitigators), cert. denied, 516 U.S. 827 (1995).

When placed beside truly comparable cases, it is obvious that Perry's death sentence is both appropriate and proportionate. Therefore, this Court should affirm that sentence.

CONCLUSION

For the foregoing reasons the State of Florida asks this Court to affirm Perry's conviction of first-degree murder and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to William McClain, Assistant Public Defender, Office of the Public Defender, 301 South Monroe Street, Leon County Courthouse, Fourth Floor, North, Tallahassee, Florida 32301, this 15th day of September 2000.

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