IN THE SUPREME COURT OF FLORIDA

JASON BRICE LOONEY,

Appellant,

v. CASE NO. SC00-458

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR WAKULLA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On August 26, 1997, Guerry Wayne Hertz, Jason Brice Looney, and Jimmy Dewayne Dempsey were indicted for the first-degree murders of Melanie King and Robin Keith Spears committed on the 27th day of July, 1997, in Wakulla County, Florida. They were also indicted for burglary of a dwelling while armed, armed robbery with a firearm, arson of a dwelling and use of a firearm during the commission of a felony. (RI 1-3). Pursuant to Rule 3.202, Florida Rules of Criminal Procedure, the defense was notified on August 27, 1997, that the State intended to seek the death penalty against the aforenamed defendants. (RI 14).

Pretrial a series of motions were filed.[1] On April 7, 1999, a hearing was held on Hertz' motion to determine his competency to stand trial (RIII 216-475). Jury selection and the trial commenced November 29, 1999, and concluded on December 9, 1999, with a jury convicting Guerry Hertz and Jason Looney of first-degree murder of Melanie King and Robin Keith Spears; guilty of burglary of a dwelling while armed with a firearm; guilty of armed robbery with a firearm; guilty of arson of a dwelling; and

[1] Motions to sever the cases; to change venue; to suppress statements made by Hertz; to declare Hertz incompetent to stand trial; to preclude the State from introducing evidence relating to events that occurred in Daytona Beach regarding this case; and a plethora of challenges to the imposition of the death sentence, as well as aggravating factors and a request to declare Section 922.10, Florida Statutes, as unconstitutional.

guilty of use of a firearm in the commission of a felony. (RXVIII 2177-2180). The penalty phase of the proceedings were held on December 9, 1999 (RXVIII-XIX 2200-2416). By a majority vote of 10-2, for each murder, the jury recommended and advised that the death penalty be imposed against Guerry Wayne Hertz and Jason Brice Looney. (RXIX 2415-2416; RI 189, 190).

Sentencing was held February 18, 2000, at which time the trial court, in concurring with the jury's recommendation that the death penalty be imposed, prepared a sentencing order, setting forth the aggravating and mitigating circumstances found. (RII 281-290). As to Jason Brice Looney, the trial court found as aggravating factors that (1) Looney was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (aggravated battery in Volusia County, Florida); (2) the capital felony was committed while Looney was engaged in the commission of a burglary, arson and robbery; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (the defendants discussed and determined that they would leave no witnesses); (4) the crime was committed for financial or pecuniary gain (the court merged this aggravating factor with the capital felony was committed during the course of a burglary, arson or robbery);

(5) the murder was especially heinous, atrocious or cruel, and (6) the murder was cold, calculated and premeditated without any pretense of moral or legal justification. (RII 281-286).

In mitigation, the trial court found (1) Looney's age of twenty (20) which was given only moderate weight; (2) as to all other non-statutory mitigation, (a) Looney's difficult childhood was given significant weight; (b) Looney had no significant criminal history or no history of violence and the fact that he posed no problems since being incarcerated was given marginal weight; (c) Looney was remorseful was given moderate weight; (d) the fact that society would be adequately protected if he were to be given a life sentence without the possibility of parole was entitled to little weight, and (e) the fact that a co-defendant, Dempsey, received a life sentence following a plea, was given significant weight and substantially considered by the trial court. (RII 287-290).

Facts of the Case

The State accepts Looney's statement of the facts found on pages 5 through 27 of the Initial Brief of Appellant, but makes the following additions.

John Gunn, a law enforcement investigator with the State Fire Marshall's Office in Tallahassee, Florida, testified that the kind of damage that was done by the fire does not happen

unless an accelerant is used. (RXIII 1628). Moreover, since fire travels upward normally, the pattern that was shown in the trailer of running throughout the house was also consistent with an accelerant being used. (RXIII 1629-1630). Reviewing the pictures, in particular State's Exhibit #1-C, Mr. Gunn was able to demonstrate where the accelerant was used (RXIII 1633-1634), which was around the base of the bed and on the victim's clothing. (RXIII 1634-1636, 1639-1641). Likewise, Ron McCardle, an inspector with the State Fire Marshall's Office, observed that there was extensive fire in the mobile home based on the use of an incendiary, having multiple origins. (RXIII 1642-1644). The fire was set in three different areas and the nature of the fire was consistent with a flammable liquid pattern. It took fifteen to forty minutes for the trailer to burn. (RXIII 1645-1646). Likewise, testimony from James Carver, a chemist from the State Fire Marshall's Office, reflected that clothing found in the Mustang and clothing worn by the victims contained a medium petroleum distillant, turpentine and gasoline. (RXIV 1661-1673).

During the testimony of Officer Shaun Rooney, a Daytona Beach Shores police officer, Hertz' counsel objected to any evidence being presented regarding the car chase and subsequent capture of Hertz and his co-defendants Looney and Dempsey. (RXV

1727-1728). The trial court denied the objection finding that evidence with regard to what transpired in Daytona was relevant to show the circumstances of flight. (RXV 1729).

Catherine Watson testified that Hertz, her nephew, showed up at her home sometime during July 27, 1997. (RXV 1796-1797). She called 911 about an injured person and secured Hertz' gun before the police got there. (RXV 1798-1799).

St. Johns County Deputy Sheriff Shaun Lee testified that he responded to the 911 call about a person being shot (RXV 1802), and found a white male lying on the couch with blood all about who had been shot. He checked the house for weapons and found a .9 millimeter weapon in the bedroom. (RXV 1803). Deputy Sheriff Lee accompanied Hertz to the emergency room and while they were in the rescue unit, Hertz told the deputy that he was driving a "off-white beige truck and friend Jason was driving a black Mustang" and that "he would not have been taken alive if he had been awake." (RXV 1804-1805).

The State also called Robert Hathcock who, at the time, was in the custody of the Wakulla County Jail on a twenty-two month sentence. (RXVI 1845-1846). He identified Hertz as being the cellmate in the Leon County Jail in May through September 1998. They would play cards and draw pictures together and talked about prison and about their crimes. (RXVI 1847-1849). Mr.

Hathcock testified that he knew nothing about the murders and learned all he did from Hertz who told him that they had gotten into a confrontation with police in Daytona and that's how Hertz received his facial scar. Specifically, he testified:

> He started off by telling me that he had gotten into a confrontation with some police officers down in Daytona because I asked him about a scar on his head and that led to – the conversation got back to – **he told me that he and two of his co-defendants had been involved in two murders in Crawfordville and that they had killed** – . . ."

(RXVI 1849-1850) (Emphasis added).

Shortly thereafter, defense counsel for Looney moved for a mistrial or for a severance. Mr. Cummings observed:

> And I think it was very specific. None of this stuff was supposed to come out and now we have a problem here. He made that statement. It incriminates my client. I can't cross-examine Mr. Hertz and I move for a mistrial on behalf of Mr. Looney.
>
> THE COURT: What says the State?
>
> MR. MEGGS: Your Honor, he is absolutely correct. That should not have come out. It was inadvertent. I think a curative instruction would solve the problem and the witness can be instructed to only answer questions as they relate to Mr. Hertz and what Mr. Hertz said he in fact did. I don't think it's a basis for a mistrial.
>
> THE COURT: Okay. I'll allow a fifteen minute recess. In the meantime you instruct the witness.

(RXV 1851).

Following further discussions with regard to the impact Mr. Hathcock's statement - that he and co-defendants had been involved in two murders in Crawfordville - had, the trial court recessed for the evening and took the matter up the next morning. At that time, the Court instructed the jury as follows:

> THE COURT: Let the record reflect that the jury has returned. Again, good morning, members of the jury. I must inquire, have any of you obtained any type of information from any source or in any fashion concerning the subject matters of these trials or these cases? Alright. That being the case, then at this time, then, the State would be prepared to call it's next witness.
>
> And at this time, members of the jury, of course, as I indicated to you in your preliminary instructions, there are certain matters of law to which only the court is concerned, and the matters of facts are your province as the jury. And from time to time we have to conduct our respective provinces and to the exclusion of each other. At this time, the court will instruct you as a matter of law to disregard the testimony of Robert Hathcock in its entirety and the court has stricken Mr. Hathcock as a witness in these cases.
>
> So, at this time, the State will call it's next witness.

(RXVI 1892).

The last witness called by the State was co-defendant Jimmy Dewayne Dempsey. (RXVI 1894). Dempsey testified that he was

twenty-four years old and currently residing at Wakulla County Jail, having pled guilty to two counts of first-degree murder, one count of arson, one count of carrying a concealed weapon by a convicted felon, one count of robbery and having received two consecutive life sentences for the murders. (RXVI 1895). He testified that during the daylight hours of July 26, 1997, he was at Tommy Bull's house doing odd jobs to secure money. He knew Guerry Hertz for over seven years and had just met Looney three days beforehand. After completing his odd jobs, he left with Hertz and Looney when, it became clear, that Bull was not going to be able to give him a ride until the next day. (RXVI 1898-1899). They all left on foot and went to Hertz' house down the road. They started playing cards and started chatting about the fact that they were tired of walking all over the place and not having transport. At some point they decided to "get" a car. Since they did not have any money, Dempsey testified that it was likely they were going to steal one. He noted that he was armed with a .38 special; that Hertz was armed with a .357 Magnum and that Looney had a carbine rifle. While they had no specific plan, Dempsey took his knapsack and had tape in the eventuality they located a car. (RXVI 1900-1901). After an aborted first attempt to get a Jeep Cherokee, they found the mobile home shared by Keith Spears and Melanie King. (RXVI

1903). As they approached the house which was located in some woods, they saw a Mustang and a white truck. Looney laid claim to the car but they were thwarted when they heard a dog barking. Dempsey and Hertz then went to the front door as a decoy and asked if they could use the phone. (RXVI 1903-1904). Melanie King came to the door and when asked if they could use the phone, provided them with a cordless phone. Hertz was standing with him on the porch while Looney had disappeared around the side of the trailer and came up behind him and Hertz. Dempsey pretended to use the phone and told the story about how his car had gone into a ditch and he needed to call his brother. (RXVI 1905). When Dempsey attempted to give the phone back, Hertz said hold up a minute and stuck a .357 through the door. As they got into the house, Hertz grabbed Melanie King around her neck and Looney came in and put a rifle to Keith Spears. Spears was made to lay down on the floor and Melanie King was taped up and placed on the bed. (RXVI 1906-1907). While Keith Spears was on the floor, they noticed a gun holster on the bed and Looney asked Spears where the gun was. Spears told him that it was underneath him and stated “please, don’t hurt me.” The gun, a silver .9 millimeter automatic, was recovered. (RXVI 1910). Dempsey testified that Hertz wanted to scare the couple so he started waving the gun around and broke the fan light. Hertz

demanded that they tell them where the valuables were located and told them “All I want is the stuff” and “Don’t be lying”. (RXVI 1911-1912). Spears was eventually put on the bed so he could be with his “old lady” and so that Dempsey could watch them. (RXVI 1912). Keith Spears and Melanie King were placed face down on the bed, their hands and feet were tied, and their mouths taped. At some point, to make Melanie more comfortable, Dempsey put a pillow under her head. (RXVI 1913).

A VCR, television, jewelry and CD’s were taken from the trailer. Looney found money in an envelope, which was divided up into three piles with about $500.00 per stack. (RXVI 1915-1916). Dempsey admitted that he recognized Melanie King as somebody he and Hertz went to school with and that Spears and King saw their faces although they spent most of the time in the bedroom. (RXVI 1916-1917). Dempsey testified that Hertz and Looney talked in the front bedroom, and that Looney said to Hertz that “are we going to tell him.” Looney indicated that they can’t have any witnesses, we don’t want to go to prison, “We have to do this here”. Although they debated about it, Dempsey testified that he was outvoted and Hertz told him that, if he doesn’t want to, he could just leave. (RXVI 1918). Dempsey went outside and Hertz then told him that he could leave but with a bullet. Although he thought it was a threat, Hertz

seemed to be playful but at one point Hertz was standing behind him with the laser beam aimed at his head. (RXVI 1919-1920). Dempsey testified that Hertz and Looney poured gasoline throughout the trailer and that the odor of the gasoline permeated the trailer. (RXVI 1921-1922). When they entered the back bedroom, Dempsey could see that Melanie King could smell the gasoline and that she knew that they were going to be burned in the trailer. She said that she would "rather die being burnt up than shot". She stated, "Please, God, don't shoot me in the head." Hertz replied, "Sorry, can't do that", and then he proceeded to open fire, Looney followed and then Dempsey shot at Spears twice. (RXVI 1923-1924).

Totally seven shots were fired between Hertz, Looney and himself. They then set fire to the trailer and ran out of the house. Dempsey watched the flames. Looney then called to him and they left. It was Dempsey's view that they were in the trailer a couple of hours. (RXVI 1924). When they left, Hertz drove the truck, Looney the car and they went to Hertz' house and unloaded the loot and divided up the money. (RXVI 1925).

Since they needed cigarettes, they traveled to Tallahassee, got gas and then drove to the Wal-Mart on Thomasville Road where they made purchases and discussed what they should do next. (RXVI 1925-1927). They ultimately ended up in Daytona Beach

Shores where they met up with the police and were subsequently arrested. (RXVI 1928).

On cross-examination by Hertz' counsel, Dempsey admitted that he did not want to go to jail and that he had been hiding out at Hertz' house. He had shot his weapon once prior to that day and thought about and commented about possibly shooting the police if they came to the door to arrest him at Hertz' house. (RXVI 1929-1933). Dempsey admitted that he lied to the police initially and did make a deal to protect himself to save his life. (RXVII 1938-1939). Dempsey was surprised when the door was forced open and Hertz grabbed Melanie King and Looney pointed his rifle at Spears. At no time did he tell Looney what to do, but did tell Looney to shoot Spears if Spears moved. (RXVI 1942-1943). Dempsey admitted that it was his responsibility to guard the victims while the others pillaged the house. (RXVI 1944-1946). Dempsey admitted shooting at Spears twice, but stated that he didn't know who really shot the victims. It was his decision to shoot and "he believed" that he was equally responsible for what happened that night. (RXVI 1950-1951). While he could have left he elected not to but, he said he didn't retrieve gasoline or spread flammable liquid throughout the trailer. (RXVI 1952-1955).

On cross-examination by Looney's counsel, Mr. Cummings, Dempsey admitted that he knew Looney for three days and met him at Hertz' house. (RXVI 1957). The reason that they went to the trailer door was because a dog was barking and they wanted a decoy in order to hot wire the cars. (RXVI 1958-1959). Spears was on the floor when Dempsey entered the house and he did put his gun to Spears' head when they were trying to figure out where Spears' gun was located. Dempsey was the one that told them they needed to shoot Spears if he moved. (RXVI 1960-1961). Dempsey admitted that he knew the victims were scared and that all three of them talked about taking stuff around the victims. (RXVI 1962). The money was split three ways at Hertz' house and unlike Dempsey and Hertz, Looney wore gloves and a mask. (RXVI 1966). Dempsey stated that he fired the gun to make sure the victims were dead but that he believed that the victims were already dead before he fired. (RXVI 1968). He was wearing a "Slayer" t-shirt. His .38 was ultimately found underneath the passenger side of the Mustang in Volusia County. (RXVI 1969-1970).

On redirect examination, Dempsey testified that he thought Spears was already dead when he started firing because of how the body didn't move. (RXVI 1983-1984).

Penalty Phase

On December 9, 1999, the penalty phase of Hertz and Looney's trial commenced.[2] (RXVIII-XIX).

The State first called Reginald Byrd, a Department of Corrections parole officer, who testified that Hertz was on probation at the time of the crime and was in violation status as of July 7, 1997. (RXVIII 2212). The State then introduced a certified copy of the aggravated battery conviction of both Hertz and Looney which had been previously stipulated to by defense counsels. (RXVIII 2213-2214).

The State next called Karen King, Melanie King's mother, who read a prepared statement to the jury. (RXVIII 2214-2217). In summary, her statement provided that Melanie King was a studious person who took her work and education seriously. Ms. King always found time for her family but also was independent. Keith Spears and Melanie were planning on getting married. Her family now, will no longer be able to see her walk down the aisle. She was considered a great asset to her family and worked hard at TCC at her nursing studies as well as working

[2] Following discussions concerning the victim impact statements that were to be presented to the jury, both defense counsel for Hertz and Looney had no objections to the victim impact statements that were to be read. (RXVIII 2182-2183). Further discussions commenced with regard to the limitation on the testimony of Andrew Harris, a cellmate of Dempsey pretrial. (RXVIII 2195-2196). The State agreed that questioning of Harris would be limited to whether, pretrial, Harris was in a cell with Hertz. (RXVIII 2197-2198).

full time at the Florida Lottery. Her death was a great loss to her family since they will no longer be able to share birthdays and holidays and her wedding together.

Janet Spears, Keith Spears' mother, also read a prepared statement concerning her son. (RXVIII 2218-2220). In summary, Mrs. Spears' statement reflected that their lives have changed forever since their only son had been killed and he was the last one to carry on the family's name. Keith Spears was a hard worker and an important asset to their family business. They were a close family and were always smiling and joking. The family was planning Melanie and Keith's wedding. On the last day, Keith spent that day with his grandfather watching baseball on television.

The State rested. (RXVIII 2221).

Looney's Case

Looney's counsel, Gregory Cummings, called Robert Kendrick, a state probation officer. (RXVIII 2227). Mr. Kendrick testified that Looney was on probation since April 22, 1996, for a three year period and that during that time up until these murders, he had had no trouble and observed that Looney was a pretty average probationer. (RXVIII 2228-2229). On cross-examination, Mr. Kendrick testified that Looney was not authorized to carry a weapon. (RXVIII 2229).

Andrew Harris was next called. Harris, incarcerated for second-degree murder, testified that he never met Jason Looney but heard his name when he, Harris, was locked up with Dempsey. He and Dempsey talked about their cases since they were both there for murder and during those discussions, Dempsey told him that Looney was only a lookout. (RXVIII 2232-2233). Harris never remembered Dempsey saying that Looney shot anyone and he recalled that Dempsey said he should have shot Looney because Looney was the most scared of the bunch. Harris recalled that Dempsey said Looney wanted to get out of the car as they traveled to Daytona but that Dempsey would not let him out and threatened to shoot him if he did. Harris testified that he never met or talked to Looney and that he was getting no benefit from testifying. (RXVIII 2233-2334). On cross-examination, Dempsey told Harris that Looney was there all the time; they were there to get money or something. Harris also admitted that he was incarcerated with Hertz and that he talked with Hertz about the case. (RXVIII 2235-2236).

Susan Podgers, Jason Looney's mother, testified that she loved Jason and that he was everyone's favorite. (RXVIII 2236-2237). When Jason was about eighteen months old she went to work one day and that, was the last time, she saw her son alone. (RXVIII 2238). There were allegations of child abuse, however,

no charges were ever brought. Until recently, she was not able to have contact with her son and in fact waited for twenty years until recently when they were reunited. (RXVIII 2238-2243).

Glenda Podgers, Jason Looney's maternal grandmother, testified that at eighteen months, Jason was raped. He was taken to the hospital and after that was turned over the welfare department. (RXVIII 2246-2247). Jason was adopted by his foster parents and Mrs. Podgers testified that she was only allowed to see him weekends and holidays until he was sixteen years old. (RXVIII 2247-2249). Mrs. Podgers observed that Mrs. Looney, Jason's adoptive mother, was very controlling and thought that he would be the next Billy Graham. Church was very important in their household and they would go two or three times a week. She observed that Jason had no choice and further noted that the Looney's were very nice however they would have nothing to do with Jason anymore. (RXVIII 2250-2251). When Jason was sixteen years old, his real grandfather killed himself. At that time Mrs. Looney told Jason that his real grandfather killed himself; that Jason had been raped as a baby and that his grandfather had done it. (RXVIII 2251). Mrs. Podgers testified that after Jason was told about this incident, he did not want to see her any longer and did not respond to cards and calls she sent. (RXVIII 2253). She subsequently

learned that Jason never received the cards or the phone calls (RXVIII 2258). She has been around him the last two years since his incarceration. (RXVIII 2256).

Looney rested his case. (RXVIII 2258).

Hertz's Case

Hertz then presented evidence in his behalf. Deborah Hertz, Hertz' mother who was completely deaf, testified, through an interpreter, that she met Hertz' father, who was likewise hard of hearing but not totally deaf. (RXVIII 2259-2260). They were living together and using drugs. As a result of financial difficulties, they started stealing to pay for drugs, the rent, and were subsequently arrested for theft. (RXVIII 2260-2262). Mrs. Hertz testified that she got pregnant during the time to avoid either of them going to prison and that they finally got married a few months later. (RXVIII 2262-2263). Hertz' father was not a good father and that the two parents fought continuously and continued to use drugs. She also admitted that she used some drugs during the pregnancy but stopped pretty early on because it made her sick. Hertz was born with a club foot. (RXVIII 2264). During her pregnancy, she tried to abort her pregnancy by hitting herself in the stomach several times but she did give birth. Within a few weeks of the birth, she gave Hertz to her mother. (RXVIII 2264-2265). Hertz lived with

his grandparents for the first six months of his life and finally was returned to his parents. Throughout his childhood, he was shuffled back and forth from his parents to his grandparents. (RXVIII 2266-2267). Mr. Hertz would punish his son by spanking him on the bottom until it was purple. She recalled how once when they were totally homeless due to his parents' drug usage, they lived in a van. (RXVIII 2269). Mrs. Hertz admitted that both she and her husband were addicts and their relationship over the years was an "on and off relationship" and "very tumultuous." (RXVIII 2269-2270). Over the years, Hertz had operations to fix his club foot. She recalled one time when Hertz's father started beating him and was on top of him and she had to get her husband off of Hertz. (RXVIII 2273).

Hertz has a younger brother, Casper, who the father seemed to favor and Hertz was jealous of. (RXVIII 2273-2275). The defense published school pictures and also presented evidence that Hertz at an early age was diagnosed with ADHD due to his behavioral problems in school. (RXVIII 2276). Mrs. Hertz observed that when her son was on medication he was much better and that, in 1995-96, Hertz overdosed on Ritalin and tried to kill himself because he had broken up with his girlfriend. He was taken to a psychiatrist. (RXVIII 2278-2279).

Guerry Hertz, Sr., testified that he used marijuana, hashish, Quaaludes, cocaine and acid throughout his life. (RXVIII 2281-2282). He observed that when facing prison, he convinced his then girlfriend that she should get pregnant to avoid prison. (RXVIII 2283). When Hertz was born, he had a club foot and his father was very upset about that and held it against his son. (RXVIII 2284). Soon after his birth, the baby was taken to his wife's mother's house and they did not see the baby for the first six months of its life. He noted that the baby would be taken on and off again to the grandmother's house to live during Hertz' childhood. (RXVIII 2284-2286). He hit his wife during her pregnancy and that she tried to abort the baby. (RXVIII 2288). He observed that they fought in front of the child, that he was not a good father, and Hertz did not have a good childhood. (RXVIII 2289-2290). He admitted giving his son marijuana and other drugs when Hertz was eight and also admitted that he would not allow his son to get his medication Ritalin. (RXVIII 2290-2291). At one point Hertz was living with his father and a roommate, who was a crack cocaine dealer. (RXVIII 2292).

Hertz' lawyer introduced the affidavit of Vita Lincoln, an elementary school teacher from Melbourne Sabel Elementary School who taught Hertz when he was a child. She observed that Hertz

was in the lower group of students and that he had problems sometimes coming to school with dirty clothes and smelling bad. Hertz would stay out all night fishing with his parents for food because they were so poor. When she brought this to the attention of the principal, the principal took Hertz under his wing, bought clothes for him and tried to help. Hertz was a hyperactive kid, unhappy and although he was not stupid, he was hard to motivate. (RXVIII 2295-2298).

Iris Watson, Deborah Hertz' mother, testified that as a baby, Hertz needed surgery for his club foot and had to wear casts that needed to be changed frequently. (RXVIII 2299-2300). At one time, because the cast was not changed timely, Hertz developed sores all over his foot and could not wear a cast and had to wear a special shoe until the wounds healed. (RXVIII 2301). She observed when Hertz was on Ritalin he was happy and did well. When he was not on medicine he did not do as well. He did not have a normal childhood. (RXVIII 2303-2304).

Deborah Hertz, Hertz' aunt, testified that he was never well cared for or clean and frequently was kept off his medicine. (RXVIII 2305). She observed that when Hertz was on his medicine it was like day and night and that his grades depended on whether he was on his medicine. (RXVIII 2307-2308). She recalled a time in February 1997, when a suicide note was found

from Hertz and she filed a report with the Sheriff's Department in an attempt to have him hospitalized under the Baker Act. She admitted that she really didn't know if Hertz was suicidal. (RXVIII 2308-2309). She knew that he had a .22 Rueger pistol and that in 1997 he was using crack cocaine and drugs with his brother. (RXVIII 2309-2310).

On cross-examination, Ms. Hertz admitted that she really did not know much about her nephew before the murders since he was not allowed in her house - because she did not care for his friends. (RXVIII 2310-2311). She did not see him much after his thirteenth birthday and did not know much about him. (RXVIII 2311).

Dr. Michael D'Errico, a forensic psychologist, testified at the penalty phase on behalf of Hertz. He testified that he interviewed Hertz on two separate occasions, October 2, 1998, and October 16, 1998, at Leon County Jail. (RXVIII 2313-2314). He received a plethora of information as to Hertz' background, including a multi-disciplinary assessment from FSU at age fourteen. Dr. D'Errico testified that Hertz suffered from Attention Deficit Hyperactivity Disorder and as a result Hertz had problems all of his life. (RXVIII 2314-2315). ADHD is treated with Ritalin and Hertz had a history of being on and off his medication. (RXVIII 2316-2317). Hertz' childhood was

characterized by abuse, humiliation, low self-esteem and poor self-image and he was born with a club foot. (RXVIII 2318). He observed that it was noteworthy that there as a 39 point spread between Hertz' verbal IQ and his performance IQ which suggested some brain damage, however, neurological testing demonstrated that it was a developmental reason because he was raised in an environment where the spoken language was not used and he suffered from ADHD. (RXVIII 2318-2319). Hertz suffered from suicidal ideations and had a temper problem and clearly had trouble with interpersonal relationships. His modus operandi was to act disruptive if something happened to a relationship, for example. He observed that Hertz overdosed on his Ritalin medication and was hospitalized following his breakup with a girlfriend. He likely had an unspecified cognitive disorder. (RXVIII 2320-2321).

On cross-examination, Dr. D'Errico admitted that Hertz knew what he was doing and the consequences of his conduct, however, he observed that Hertz was impulsive and suffered from ADHD which may have lessened his awareness of the consequences. (RXVIII 2323). In discussing Hertz' suicide attempt, the doctor admitted that Hertz was released after three days of treatment in the hospital with no follow-up. (RXVIII 2324).

No further evidence was presented by Hertz' counsel, however, evidence was introduced regarding Hertz' background. (RXVIII 2325).

Looney's Case -- Reopened

Donnie Crum, a Major in the Wakulla County Sheriff's Department, testified that when he took the statement from Jimmy Dempsey July 27, 1997, he admitted that he shot twice at the end of the shooting spree and stated that "We had already doused the house with gasoline." (RXVIII 2327). Dempsey also stated he was not sure where Looney shot. (RXVIII 2328). On cross-examination by the State, Major Crime observed that the testimony he heard during the course of the trial and the penalty phase was substantially the same statement that he took from Dempsey July 27, 1997. (RXVIII 2338-2339).

Sentencing Hearing January 14, 2000 - Looney and Hertz

At sentencing before the trial court, Karen King was called by the State and testified that Hertz knew her daughter because they lived across the street from Hertz. (RIV 480-481). Mrs. Spears addressed the Court and asked the Court to follow the jury's recommendation. (RIV 484-485).

Looney presented the testimony of Alice Jayne West. Looney was a big brother to her son. Looney took care of her in 1988, when she was infected with the HIV virus. Looney was

kindhearted, loving, trustworthy and not a violent person. (RIV 487). Likewise, Gladys Christine Hinton, Ms. West's mother confirmed Looney's good character, stating that he was not a hard-core criminal and did not deserve the death penalty. (RIV 488).

Susan Podgers, Looney's real mother asked that he be given life, since she had just reunited with him and she wanted a chance with her son. (RIV 489-492).

Hertz's mother stated it was not fair that not everyone would receive life - Hertz didn't deserve death, he was innocent. She believed Dempsey killed the people. (RIV 495-497).

Looney then personally testified before the Court, asking for forgiveness, stating he was sorry for what happened, and that he would give up his life if he could bring them back. (RIV 497-499).

Hertz likewise testified personally, asking for the families to forgive him, stating that he will never get out of jail if he gets life. He will not be able to give his mother grandchildren. He wants to live out his life in prison, because he wants to explain to brothers to stay away from trouble-makers and live their lives without any trouble. (RIV 499-501).

SUMMARY OF ARGUMENT

Looney raises nine issue for appellate review which include both guilty and penalty phase matters. None of which entitle Looney to relief.

Issue I contends that the death penalty is disproportionate due to the fact, a less culpable co-defendant, Jimmy Dempsey, pled guilty to the first-degree murders of Keith Spears and Melanie King and he received life sentences as a result of that plea. Pursuant to Jennings v. State, 718 So.2d 144 (Fla. 1998) and Brown v. State, 721 So.2d 274 (Fla. 1998) et al., Looney is entitled to no relief. Moreover, in reviewing this case for proportionality with similarly circumstanced capital cases -- the aggravating circumstances far outweigh the mitigating circumstances found by the trial court.

Issue II challenges four of the seven aggravating factors found beyond a reasonable doubt by the trial judge. Beyond per adventure, the murders herein were committed to avoid arrest; were cold, calculated and premeditated; were heinous, atrocious or cruel; and were the result of cupidity for pecuniary gain. Looney and his co-defendants murdered Keith Spears and Melanie King for a white Ford Ranger and black Mustang. They did so, after terrorizing and pillaging Melanie and Keith’s abode and then they doused turpentine and gasoline around the bed where

the victims were tied up and gagged -- lying face down. Following a brief exchange where Melanie talked about how she was going to die, Hertz said “no can do” and commenced to fire at close range at the victims. Looney followed and then Dempsey shot twice at Spears. The trio then set fire to the crime scene to ensure neither witnesses nor evidence would survive their handiwork. Clearly all the aforenoted challenged aggravating circumstances were proven beyond a reasonable doubt.

Issue III questions whether the trial court erred in excusing Juror Free who, repeatedly stated, that she did not believe anyone should die for murdering someone. The trial court did not abuse its discretion in finding Ms. Free could not perform her role as a juror in both phases of the capital death penalty system.

Issue IV raises an issue that was not presented to the trial court, to-wit: whether under Apprendi v. U.S., 120 S.Ct. 2348 (2000), a unanimous verdict must obtain at the penalty phase of the trial as to the recommendation of death by the jury. The State has asserted that the issue is procedurally barred for appellate review but would further note, that the United States Supreme Court decision in Apprendi is opposite to Looney’s contention. More importantly, both the majority and dissent in

Apprendi, recognized that Apprendi does not impact state capital sentencing schemes.

Issue V challenges the admission of one crime scene photograph and several autopsy photographs. The record reflects defense counsel's timely objection to the admission of these photographs, however, the trial court denied the objections, finding that each photograph was relevant and assisted witnesses in explaining the evidence. Absent a showing the trial court abused its discretion in ruling on the photographs' admissibility, no error resulted. Should however, this Court disagree, any error was harmless error. See Almeida v. State, 748 So.2d 922, 929-930 (Fla. 1999).

Issue VI raises questions concerning the facts and circumstances that took place in Volusia County surrounding the apprehension and arrest of defendants. Claims challenging the admission of evidence are subject to an abuse of discretion review. In the instant case, the evidence concerning the defendants' capture where all part of the explanation of these murders. The flight of the defendants was a clear indicia of their guilt and the physical evidence found in their possession from the crime scene supported their respective guilt. The "collateral crimes" never became a feature of the State's case in chief.

Issue VII questions whether the trial court erred in not granting a mistrial but rather striking the testimony of Robert Hathcock during trial. While apparent error, the trial court ascertained that the error was harmless and informed the jury to disregard all testimony by the witness. San Martin v. State, 717 So.2d 462, 468-69 (Fla. 1998).

Issue VIII presents another claim for appellate review that was not preserved below. Whether the victim impact statute is unconstitutional because it usurps the Court's rule-making authority. Even if preserved, the claim has been decided adversely to the appellant and he is entitled to no relief.

Issue IX. Sufficiency of the evidence to sustain the convictions is challenged as the last claim for review. The record before this Court demonstrates that Jimmy Dempsey -- Appellant's co-defendant testified and inculpated appellant as one of the shooters in the murders of Keith Spears and Melanie King. Appellant was in possession of proceeds from the murders and was also seen in the area within minutes of the crimes, when he was identified by a "potential victim" in an aborted first attempt to steal Ms. Ventry's automobile.

The State proved beyond a reasonable doubt that appellant committed these murders with his co-defendants.

ARGUMENT

ISSUE I

WHETHER THE DEATH SENTENCE IS PROPORTIONATE.

Looney asserts that in reviewing the totality of the circumstances in this case and in comparison with other capital cases, the imposition of the death penalty is inappropriate and disproportionate. Citing to Ray v. State, 755 So.2d. 604, 611 (Fla. 2000), he argued that there is no distinction between the culpability of Hertz, Looney or Dempsey -- who pled to the two first-degree murder charges and received life sentences for same. Taking issue with the trial courts "attempt to distinguish the three principles roles" (Appellant's Brief at 44), Hertz argues:

> " . . . Dempsey attempted to minimize his role in the crimes by talking about being outvoted and being caught up in an event that was getting out of hand. But it is critical not to be blinded by what Dempsey says; it is critical to focus on what he did. The evidence is overwhelming that what he did does not meaningfully distinguish his culpability from that of Hertz or Looney. To this end, the trial court's sentencing order talks a lot about what happened after the murders. This simply does not matter and glosses over what Dempsey actually did to kill Spears.

(Appellant's Brief at 45.)

What the trial court said with regard to the relative culpability of each defendant is:

> "Finally, the defendant argues that the life sentences of co-defendant, Dempsey, mitigate and require life sentences for this defendant.
>
> Although in his cross-examination testimony Dempsey testified that he "guessed" he was equally responsible for the acts committed by the three defendants on the night they committed their crimes and that he could have left several times during the course of the defendants activity and chose not to do so, the totality of the facts and circumstances in the record completely and substantially show that his dastardly culpability and role in this night of terror was less than either of his co-defendants.
>
> Apparently, Dempsey was the brightest and best educated of the three but after the initial violence and hostile entry into the victims dwelling his role was more of a follower of Hertz and Looney who made the decision concerning killing the victims and burning down their dwelling in which he reluctantly participated. When advised by Hertz that he and Looney had decided to kill the victims he was told by Hertz that if he did not participate with them there was a bullet for him also.
>
> The State also points out that when Hertz and Looney came over to the place where Dempsey (sic) working on the day of the crimes Looney was armed with a 357 pistol he was displaying. When the three left to go steal a car, Dempsey took duct tape to tape the car window they would break in stealing a car. Dempsey was never seen driving either of the stolen vehicles of the victims. At Wal-mart, only one and a half

> hours after the murders, Dempsey was quite and withdrawn while Hertz and Looney were festive and showing off the stolen pick-up and Mustang respectively, to the store clerks as their new cars. When Dempsey and Looney were questioned in Daytona, Looney was armed with one of the murder weapons on his person while Dempsey was not armed. Dempsey gave a detailed confession consistent with the evidence less than twenty-four hours after the murders. According to Major Crum of the Wakulla Sheriff's Department who heard both, Dempsey gave the same consistent to him that he gave in his testimony to the jury. In both, Dempsey expressed genuine remorse. Prior to their killing, Dempsey had shown some compassion for the victims in loosening the tape cutting off their circulation and placing a pillow under one of the victims head. Dempsey was the last to fire his weapon according to his testimony and believed Keith Spears was already dead when he fired. This fact, ably argued to the jury for its significant consideration and weight is entitled to and has been given substantial consideration weight by the Court herein.

(RII 287-290).

As noted in Ray v. State, 755 So.2d at 611-612, this Court has established general principles that equally culpable co-defendants should received equal punishment, Jennings v. State, 718 So.2d 144 (Fla. 1998) and where a more culpable co-defendant receives a life sentence, a sentence of death should not be imposed on a less culpable defendant. Hazen v. State, 700 So.2d 1207 (Fla. 1997). In the Ray case, the Court observed that Ray's co-defendant, Hall, was the shooter.

The Court continued in Ray:

> "Much of the evidence points to Hall as the dominate player in the crimes. It is undisputed that Hall did nearly all the talking during the robbery and appeared to be in command of the operation. In addition, only Hall had shot-gun injuries caused by the officer. Finally, Hall's statements and questions to paramedics suggest that he was responsible for shooting the officer. During sentencing the State argued that although Hall instigated the gun battle, Hall and Ray shot Lindsey. The State sought the death penalty for both. The trial judges own remarks in sentencing Hall reflect that, at a minimum, he believed Ray and Hall to be equally culpable in the shooting. It seems clear that the judge would have imposed equal sentences but for his belief that a failure to abide by the juries recommendation would result in a reversal on appeal. . ."

755 So.2d at 612.

In the instant case, the trial court clearly articulated why death was appropriate in Hertz' and Looney's cases, while the less culpable co-defendant Dempsey received life sentences following pleas of guilty to each murder. The record bears out that while Dempsey went along with Hertz and Looney to steal a car, and while all three of them were armed, Dempsey was the one who had the wherewithal to steal a car, he was the one who took his knap-sack and put tape inside to be used when they stole a car. (RXVII 1900-1901). After the first aborted attempt to get a Jeep Cherokee, it was Dempsey who went to the door of Melanie

King and Keith Spears trailer and asked to use the phone as a diversion so that Looney could go presumable hot-wire one of the vehicles. (RXVII 1903-1905). It was Hertz, however, who stuck his .357 gun through the door and grabbed Melanie King around the neck and it was Looney who came in and put a rifle to Keith Spears. (RXVII 1906-1907). It was Hertz who started waiving his gun around and demanded that the victims tell them where the valuables were located. (RXVII 1911-1912). Dempsey stayed in the back bedroom with the victims to keep an eye on them while Hertz and Looney pillaged the mobile home. (RXVII 1915-1916). Dempsey admitted that Melanie King was a classmate of both he and Hertz and he was sure she saw their faces that day at the trailer. (RXVII 1916-1917). When Dempsey entered the front bedroom, he heard Hertz and Looney talk about what they were going to do. In particular Looney stated that they can't have any witnesses, we don't want to go to jail that we "have to do this here." Dempsey stated he was outvoted and Hertz told him that if he didn't want to do it, he could just leave. (RXVII 1918). Dempsey wasn't sure with regard to whether Hertz was kidding or not because at one point Hertz told him that he could leave with a bullet and at another point, although Hertz seemed to be playful, the laser beam from Hertz' weapon was pointed at his head. (RXVII 1919-1920). Hertz and Looney went and got the

gasoline from the shed outside and, it was Hertz and Looney who poured gasoline throughout the trailer. (RXVII 1921-1922). When Melanie King became aware that they were going to burn the trailer, she said that she would "rather die being burnt up than shot." She pled "Please, God, don't shoot me in the head." Hertz replied, "Sorry, can't do that," and the Hertz shot at Melanie King and Keith Spears, Looney followed and the Dempsey fired twice towards Keith Spears. (RXVII 1923-1924). Dempsey further testified that he thought that Spears was already dead when he fired his two shots because there was no response in Keith Spears' body. (RXVII 1982-1984).

Dempsey denied dousing any accelerant in the trailer and denied setting fire to the trailer. (RXVII 1924, 1981). Dempsey never drove either the Mustang or the Ford Ranger truck and was the quiet one at the Wal-mart on Thomasville Road. His responsibility was to guard the victims while the other's pillaged the house and it was Hertz and Looney who decided to get rid of the victims.

With the exception of the testimony of Andrew Harris, neither Hertz nor Looney presented any evidence to demonstrate that they were less culpable than Dempsey or each other. Andrew Harris testified that he was in a cell with Dempsey and Dempsey said that Looney was a lookout. (RXIX 2232-2233). Harris

recalled that Dempsey said Looney wanted to get out of the car as they traveled from Tallahassee to Daytona[3] but that Dempsey would not let him out and threatened to shoot him if he did. (RXIX 2233-2234).

At the Spencer sentencing hearing before the trial court on January 14, 2000, Karen King, Melanie King's mother stated that Hertz knew her daughter because they had lived across the street from Hertz for a long period of time. (RIV 480-481). Looney and Hertz personally made statements to the trial court asking for forgiveness and expressing sorrow for what happened and further stating that they would give up their lives if that would bring the victims back. (RIV 497-499, 499-501).

Unlike the decision in Ray v. State, supra, where this Court reduced Ray's death sentence to life because his co-defendant Hall, who was the more culpable, received a life sentence, the instant case reflects that the most culpable co-defendants Hertz and Looney warranted the death penalty for the murders of Melanie King and Keith Spears. In Jennings v. State, 718 So.2d 144, 153 (Fla. 1998), the court upheld imposition of the death penalty against Jennings where is was clear that he was the more

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[3] All the evidence at trial reflects that Looney drove the Mustang to Daytona and Dempsey was never in control of the automobile. Looney also bragged to the clerks at Wal-mart that the Mustang was his new car. (RXIV 1612-1614).

culpable in this robbery/murder of a Cracker Barrel restaurant in Naples, Florida. The facts in that case reflect that:

> Dorothy Siddle, Vicki Smith and Jason Wiggins, all of whom worked at the Cracker Barrel restaurant in Naples, were killed during an early morning robbery of the restaurant on November 15, 1995. Upon arriving on the scene, police found the bodies of all three victims lying in pools of blood on the freezer floor with their throats slashed. Victim Siddle's hands were bound behind her back with electrical tape; Smith and Wiggins both had electrical tape around their respective left wrists, but the tape appeared to have come loose from their right wrists . . .

718 So.2d at 145. The court further observed:

> Jennings (age 26) and Jason Graves (age 18) both of whom had previously worked at the Cracker Barrel and knew the victims, were apprehended and jailed approximately three weeks later in Las Vegas, Nevada, where Jenkins ultimately made lengthy statements to Florida law enforcement personnel. In a taped interview, Jenkins blamed the murder on Graves, but admitted his (Jennings') involvement in planning and, after several aborted attempts, actually perpetrating the robbery with Graves. Jennings acknowledged wearing gloves during the robbery and using his buck knife in taping the victim's hands, but claimed that, after doing so, he must have set the buck knife down somewhere and did not remember seeing it again. Jennings further stated that he saw the dead bodies in the freezer and that his foot slipped in some blood, but that he did not remember falling, getting blood on his clothes or hands, or washing his hands in the kitchen sink. Jennings also stated that the Daisy air pistol belong to Graves, and directed

> police to a canal where he and Graves had thrown other evidence of the crime.
>
> In an untaped interview the next day, during which he was confronted with inconsistences in his story and the evidence against him, Jennings stated, "I think I could have been the killer. In my mind I think I could have killed them but in my heart I don't think I could have."

718 So.2d at 146. The court in reviewing these facts observed:

> Jennings' accomplice, 18 year old Jason Graves, was also convicted of the murders but sentenced to life imprisonment for each of the murders. Jennings now argues that his death sentences are impermissible disparate from Graves' sentence of life imprisonment. While the death penalty is disproportionate where a less culpable defendant receives death and a more culpable receives life, see Hasen v. State, 700 So.2d 1207, 1211-14 (Fla. 1997), disparate treatment of co-defendants is permissible in situations where a particular defendant is more culpable. See, Larzelere v. State, 676 So.2d 394, 406-07 (Fla.), cert. denied, ___ U.S. ___, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). Although Jennings urges equal culpability with co-defendant Graves and at present case, the trial court resolved this issue against Jennings in discussing Graves' disparate life sentence as a mitigating factor . . .

718 So.2d 153. The court went on:

> This thorough analysis by the trial court indicates not only was the issue of the co-defendant's life sentence presented to the jury as a mitigating factor, but also that the trial court carefully considered relative culpability. As established in this record, Graves was only 18, whereas Jennings was 26 at the time of the murders.

> The trial court, who presided at both trials, concluded independently that Jennings was the actual killer and thus more culpable than Graves. Moreover, despite finding that Jennings was more culpable and the actual killer, the trial court did consider and instruct the jury on the fact that the co-defendant received a life sentence as a result of the State's waiver of the death penalty as a mitigating factor. . .
>
> We find no abuse of discretion in the trial court's ruling on this issue. The fact that the 18 year old co-defendant received life does not prevent the imposition of the death penalty on Jennings, whom the trial court found to be the actual killer and to be more culpable.

718 So.2d at 154. See also, Larzelere v. State, 676 So.2d 394, 406-407 (Fla. 1996); Howell v. State, 707 So.2d 674 (Fla. 1998); Raleigh v. State, 705 So.2d 1324, 1331 (Fla. 1997); Sliney v. State, 699 So.2d 662, 672 (Fla. 1997); Heath v. State, 648 So.2d 660, 665-66 (Fla. 1994); Brown v. State, 721 So.2d 274, 282 (Fla. 1998), wherein the court upheld the imposition of the death penalty for Brown despite the fact that he asserted that there was disparate treatment with his co-defendant McGuire who pled guilty to second-degree murder punishable by 40 years in exchange for his promise to testify against Brown. Upon reviewing the facts of the case the Court held that the trial court acted within its discretion in imposing the death penalty for Brown. 721 So.2d at 282.

In Sexton v. State, ___ So.2d ___, 25 Fla.L.Weekly S18 (Fla. 2000), the Court held that:

> According to Sexton's argument that the death penalty is disproportionate, as we have often stated, the death penalty is reserved "for the most aggravated and unmitigated of most serious crimes." Clark v. State, 609 So.2d 513, 516 (Fla. 1992) (quoting State v. Dixon, 283 So.2d 1, 7 (Fla. 1993)). This Court performs proportionality review to prevent the imposition of "unusual" punishment contrary to Article 1, § 17 of the Florida Constitution. See Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). In deciding whether death is a proportionate penalty, the Court must consider the totality of the circumstances of the case and compare the case with other capital cases. See Urbin v. State, 714 So.2d 411, 416-17 (Fla. 1998). "It is not a comparison between the numbers of aggravating and mitigating circumstances." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990).
>
> When a co-defendant is equally as culpable or more culpable than the defendant, the disparate treatment of the co-defendant may render the defendant's punishment disproportionate. See Larzelere v. State, 676 So.2d 394, 406 (Fla. 1996). Sexton claims that his death sentence should be reversed because he is not more culpable than the perpetrator of the crime, Willie, who received a sentence of 25 years in prison. Nonetheless, if the defendant is the more culpable participant in the crime, disparate treatment of the co-defendant is justified. See, Id. at 407. "A trial court's determination concerning the relative culpability of a co-perpetrator in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial

> evidence." Puccio v. State, 701 So.2d 858, 860 (Fla. 1997).
>
> The trial court's thorough analysis in the case of the trial court carefully considered the culpability of Sexton and Willie. See Jennings v. State, 718 So.2d 144, 153 (Fla. 1998). As indicated by the trial court sentencing order, the evidence established beyond a reasonable doubt that Sexton was the dominating force behind the murder of Joel and that he was far more culpable than Willie, the actual perpetrator of the homicide. . . .

25 FLW at S822.

* * *

> The court further observed comparing the circumstances of this case to other cases in which the death penalty has been imposed, see Urbin, 714 So.2d at 1617, Sexton's death sentence was proportionate to other cases where "master-minds" have been sentenced to death, even thought they did not actually commit the murder. See Larzelere, 676 So.2d at 407; Fotopoulos v. State, 608 So.2d 784, 792-94 (Fla. 1992).
>
> In light of circumstances of this case, including the existence of the CCP and avoiding arrest aggravators, we find the imposition of the death penalty to be proportionate when compared to other similar cases. . . .

25 FLW at S823.

The trial court's findings are:

(1) Hertz had been previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. Specifically the court found:

> The unrebutted evidence of the State established that the defendant, Looney, was convicted of the crime of aggravated battery in Volusia County, Florida. The aggravated battery offense occurred when the defendant, Looney, struck an approaching Daytona police officer with the stolen Mustang of the murder victim, Spears, during the apprehension and capture of the defendants by the Daytona police.
>
> Although the commission and conviction of such offense occurred after the capital felonies herein, the commission thereof and conviction therefore was prior to the trial and sentencing herein and qualifies as an aggravating circumstance especially in demonstration of the propensity to commit other violent crimes.

(RII 282).

(2) The murder was committed while Hertz was engaged in the commission of a burglary, arson and robbery.

The trial court concluded that these crimes were clearly established observing that:

> "after forcibly entering the victim's dwelling, tying them up, taping their mouth, methodically ransacking their house and selecting the property that they intended to carry away, flammable accelerants of gasoline, turpentine and lighter fluid were spread throughout the dwelling. Defendant, and co-defendants, then gathered around the bed upon which the victims had been placed face down and engaged in further discussions among themselves concerning the victims' fate, a brief exchange prior to repeatedly firing bullets into the heads of the victims. As they were leaving, the flammable accelerants were ignited and the

> dwelling and bodies were engulfed in flames."

(RII 282-283).

(3) The murders were committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. The trial court opined that:

> The evidence clearly established that after the defendant, Looney, and co-defendants had entered the dwelling and subdued the victims that is was realized that the victim Melanie King had gone to school with the defendants Hertz and Dempsey. At one point, the victim King and her family lived across the street from the Hertz family. The defendants, Looney and Hertz, initially discussed and determined that they would leave no witnesses and the defendant Dempsey was informed of this. The methodical execution of the victims by the defendant and his co-defendants with multiple shots to the head and destruction of the victims' home and bodies by fire to eliminate evidence establishes a dominate motive to eliminate witnesses and evidence for the purpose for avoiding or preventing arrest.

(RII 283).

(4) The crime Looney committed was for pecuniary gain. In merging this aggravating factor with the afore noted factor concerning that the murder was committed during the course of a burglary, arson or robbery, the trial court considered these two factors as one. The court specifically found:

> As established by the evidence, defendant and his co-defendants came upon the victims'

> residence seeking to steal a car. When unable to gain entry into the residence by subterfuge, after a forcible and violent entry not were the keys stolen to the Mustang which the defendant was driving and later captured in, but also cash and substantial other property was stolen and carried away by the defendant and his co-defendants.

(RII 284).

(5) The capital murders were committed in a specially heinous, atrocious or cruel manner.

In reviewing the evidence presented, the trial court summarized as following:

> The evidence introduced clearly established that the defendant Looney, and his co-defendants were present in the dwelling of the victims for over two hours before the execution style murder of the victims. The victims were forcibly subdued, restrained and bound head and feet with their mouth and eyes covered with duct tape. The entry into the dwelling was violent and hostile and the victims were violently informed that if they moved or resisted they would be shot.
>
> After deliberate discussion and decision to eliminate the victims as witnesses against them, the defendant and his co-defendants sprinkled and poured gasoline, lighter fluid and turpentine throughout the dwelling and its entrances. Having been bound, gagged, and placed face down in a single bed for approximately two hours and presumably able to hear the defendant and his co-defendants conversation and discussions and smelling the liquid flammables while the three defendants stood around the bed armed with pistols and

> rifles, the victim King suddenly stated "if you are going to burn us please don't shoot us in the head." The defendant Hertz replied "Sorry can't do that" and commenced to repeated firing his pistol into the victims' head. The defendant, Looney, immediately going in with a .30 caliber rifle after which the defendant, Dempsey followed.
>
> Both the victims were unquestionably aware of their impending doom. Imagine the fear, terror, and extreme anxiety of each victim with their hands and feet tied, their mouth and eyes bound by tape. The medical examiner testified that the victims' deaths were by gunshot wounds, not fire. He further testified that he found fluid built up in the lungs of both victims indicating that both victims lived a short time they were initially shot. The co-defendant, Dempsey, further testified that after the others opened fire with volleys to the heads of the victims, he then fired two shots into the head of victim Keith Spears to make sure that he was dead.
>
> There can be no doubt that the murders of each victim was especially heinous, atrocious and cruel. Each murder was indeed consciousless, and pitiless, and was undoubtedly unnecessarily torturous to the victims. The actions of the defendant Looney were clearly vile, wicked and unnecessarily torturous and pitiless. Although understandably the recovery of evidence was substantially impaired by the flames which engulfed the dwelling and victims' bodies, the victim Spears was found by the medical examiner to have an entry and exit wound consistent with a high-powered rifle.

(RII 284-285).

(6) The capital murders were cold, calculated and premeditated without any pretense of moral or legal justification. In setting forth his reasons for determining this aggravating factor, the trial court summarized:

> The evidence established that the defendant and his co-defendants decided that they would steal a vehicle. The defendant, Looney, armed himself with a pistol. He and his co-defendants began to search for a suitable victim and in the course thereof found what they thought was a suitable circumstance upon coming to the residence of the victims after their prior surveillance of another residence. After their forcible and violent entry and binding and gagging of the victims, they conducted a two hour reign of terror. The defendant and his companions clearly, calmly and cooly reflected upon a careful plan or design to murder the victims with deliberate ruthlessness and heightened premeditation without pretense of legal or moral justification. The pattern of shooting the victims in the head exhibited a deliberate intent to eliminate witnesses and the actual manner in which the victims were murdered demonstrates clearly that they were executed in cold blood. Advance procurement of weapons had been made, the victims offered no resistence or provocation and their murders were carried out as a matter of course after being bound and gagged.

(RII 286).[4]

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[4] While Looney in Point II does assail the avoid arrest, CCP, HAC and pecuniary gain aggravating factor, the record reveals and the case law supports each of those aggravating factors being found beyond a reasonable doubt in the instant case.

The trial court found as to mitigation in Looney's case, that the statutory mitigating factor of age of defendant, to-wit 20 years of age, was entitled to and should be given only moderate weight. (RII 286). As to all other non-statutory mitigating factors, the trial court, (1) acknowledged that Looney had a difficult childhood. Looney, as a baby, 18 months old, was taken away from his natural mother. He never knew his real father, and had no contact with his mother until recently and little contact with his grandmother. He was adopted by the Looneys, however, they were controlling and systematically prevented him from having any contact with his real mother and grandmother. He grew up believing that his natural relatives did not want him; believing that he had been rejected. The court afforded this mitigation significant weight. (RII 287).

(2) With regard to Looney having no significant history and no history of violence, nor being a problem which incarcerated or while at trial, the trial court gave this factor marginal weight. (RII 287).

(3) The court recognized Looney's remorsefulness. Accordingly, this factor was given "moderate weight." (RII 288).

(4) With regard to the fact that punishment by life imprisonment without the possibility of parole is a

significantly harsh penalty, the trial court observed that this alternative to the death penalty is not entitled to any significant weight in light of the facts of the case. (RII 288). The court further observed "the defendant also presents in mitigation that the time between the decision to kill and the killing may not have been sufficient to allow for cool and thoughtful consideration. There is no proof therefore in the record to the contrary, the evidence clearly refutes this and clearly establishes otherwise. Accordingly, the court rejects this mitigating circumstance." (RII 288).

(5) The court finally concluded that the possibility of disparate treatment between Looney and Dempsey was argued before the jury for its significant consideration and given substantial consideration weight by the trial court herein. (RII 288-290). The court opined:

> Although in cross-examination testimony Dempsey testified that he "guessed" he was equally responsible for the acts committed by the three defendants on the night they committed their crimes and that he could have left several times during the course of the defendants' activity and chose not to do so, the totality of the facts and circumstances in the record completely and substantially show that his dastardly culpability and role in this night of terror was less than either of his co-defendants.
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> Apparently, Dempsey was the brightest and best educated of the three but after the initial violence and hostile entry into the

victims' dwelling his role was more of a follower of Hertz and Looney who made the decisions concerning killing the victims and burn down their dwelling in which he reluctantly participated. When advised by Hertz that he and Looney had decided to kill the victims he was told by Hertz that if he did not participate with them there was a bullet for him also.

The State also points out that when Hertz and Looney came over to the place where Dempsey (sic) working on the day of the crimes Looney was armed with a .357 pistol he was displaying. When the three left to go steal a car, Dempsey took duct tape to tape the car window they would break in stealing a car. Dempsey was never seen driving either of the stolen vehicles of the victims. At Wal-mart, only one and a half hours after the murders, Dempsey was quiet and withdrawn while Hertz and Looney were festive and showing off the stolen pick-up and Mustang respectively, to the store clerks as their new cars. When Dempsey and Looney were arrested in Daytona, Looney was armed with one of the murder weapons on his person while Dempsey was not armed. Dempsey gave a detailed confession consistent with the evidence less than 24 hours after the murders. According to the Major Crum of the Wakulla Sheriff's Department who heard both, Dempsey gave the same consistent statement to him that he gave in his testimony to the jury. In both, Dempsey expressed genuine remorse. Prior to their killing, Dempsey had shown some compassion for the victims and loosened tape cutting off their circulation and placing a pillow under one of the victims' head. Dempsey was the last to fire his weapon according to his testimony and believed Keith Spears was already dead when he fired. This factor, ably argued to the jury for its significant consideration and weight is entitled to and

> has been given substantial weight by the trial court herein.

(RII 288-290).

Based on the trial courts findings of the aggravation and mitigation, this case, unlike Ray, supra, is one of the most aggravated and least mitigating capital murders. See Fotopolous v. State, supra; Sexton v. State, supra; Jennings v. State, supra; Brown v. State, supra; Sliney v. State, 699 So.2d at 672; and Gore v. State, 706 So.2d 1328 (Fla. 1997).

All relief must be denied as to Looney's assertion that he is entitled to relief based on either disparate treatment between he and Dempsey or that this is not an appropriate death case based on the aggravating and mitigation found by the trial court.

ISSUE II

WHETHER FOUR OF THE SEVEN AGGRAVATING FACTORS FOUND BY THE TRIAL COURT WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

Looney next argues that the aggravator factors that the murders were committed to avoid arrest; that the murders were cold, calculated and premeditated; that the murders were heinous, atrocious and cruel; and that the murders were for pecuniary gain are not supported by competent evidence and proven beyond a reasonable doubt. As to each aggravating factor, the State proved beyond a reasonable doubt that these aggravators factors exists and that the evidence is overwhelming in support of each.

1. Avoid Arrest

The State would readily admit that in order to support this aggravating factor, it must show that the "sole or dominate motive" for the killing was to eliminate witnesses. Jennings v. State, 718 So.2d 144, 151 (Fla. 1998). Looney asserts that in the instant case, the mere fact that the victims knew and could identify the co-defendants was not sufficient to prove the aggravating factor, citing Zack v. State, 753 So.2d 9, 20 (Fla. 2000). Stating that the trial courts findings are misleading at best, Looney argues that there was no evidence other than Dempsey's testimony that Hertz knew or recognized Melanie King

or that "Hertz knew who Melanie King was on July 27, 1997." (Appellant's Brief at 40).

Dempsey testified that he recognized Melanie King, that he and Hertz went to school with her. (RXVII 1916-1917). This evidence is unrebutted by any testimony presented by Hertz. Moreover, Karen King, Melanie's mother testified before the trial judge at the Spencer hearing that she had lived in the same area for approximately 27 years and that Hertz lived across the street. (RIV 480-481). The record also shows that Looney, who had just moved to the area, wore gloves and a mask, while Hertz and Dempsey who had been there all their lives made no attempt to hide their appearances. The trailer was within walking distance of Tom Bull's residence, where they had just come and in the same neighborhood of all the other families.[5] The defendants entered the mobile home fully armed. During the two hours, they scared their victims, they discussed the need to eliminate the victims and, prior to the execution-style murders, they poured gasoline throughout the trailer to assist in covering up the crimes.

These murders were committed to avoid arrest. See Bates v. State, 465 So.2d 490 (Fla. 1985); Oates v. State, 446 So.2d 90

[5] Deputy Clarence Morrison prepared a map of the crime scene and Hertz' house. The distance was less than 1 mile. (RXIV 1679, 1683).

(Fla. 1984); Jennings v. State, 718 So.2d at 150, 151; Riley v. State, 366 So.2d 19, 22 (Fla. 1978); Correll v. State, 523 So.2d 562, 568 (Fla. 1988); Knight v. State, 721 So.2d 287, 298 (Fla. 1998); Trease v. State, 25 FLW S622, S623 (Fla. 2000), and see especially Rodriguez v. State, 753 So.2d 29, 47-48 (Fla. 2000),

> . . . To establish the avoid-arrest aggravator when the murder does not involve a law enforcement officer, the requisite intent to avoid arrest must be 'very strong,' Riley v. State, 366 So.2d 19, 22 (Fla. 1978); that is, the proof must demonstrate beyond a reasonable doubt that the victim was murdered solely or predominantly for the purpose of witness elimination. Urbin v. State, 714 So.2d 411 (Fla. 1998); Consalvo v. State, 697 So.2d 805 (Fla. 1996), cert. denied, 523 U.S. 1109, 118 S.Ct. 1681, 140 L.Ed.2d 819 (1998). Additionally, a murder may be both CCP and committed to avoid arrest as long as distinct facts support each circumstance. Stein v. State, 632 So.2d 1361 (Fla. 1994). The facts supporting CCP must focus on the manner in which the crime was executed, e.g., advance procurement of weapon, lack of provocation, killing carried out as a matter of course, whereas the facts supporting commission to avoid arrest must focus on the defendant's motivation for the crime. Id.
>
> Here, the court found the avoid-arrest aggravator based on the following circumstances: Manuel Rodriguez knew the Josephs; he knew the Josephs were home when he entered their apartment; he armed himself beforehand with a gun and latex gloves; he told Luis Rodriguez to put on a pair of the gloves and not to touch anything; there was an outstanding warrant for Manuel's arrest and Manuel knew that if he was identified he would likely go to jail for a lengthy

> period; after he shot the Josephs, he ordered Luis to shoot Abraham; each of the victims was shot more than once and each was shot from close range in the head; Abraham was shot not only with the gun used by Luis, she was also shot in the head with the gun used by Manuel; and Manuel told Malakoff after the murders that he 'made sure they were all dead.' We find that this evidence is sufficient to support the finding that the murders were committed to avoid arrest.

753 So.2d at 47-48.

This aggravator was clearly proven.

2. Cold, Calculated and Premeditated

Citing Jackson v. State, 648 So.2d 85, 89 (Fla. 1994), and Walls v. State, 641 So.2d 381, 388 (Fla. 1994), Looney sets forth the elements to be proven that, a murder is cold, calculated and premeditated without moral justification. He observes that "the three elements of CCP which require proof beyond a reasonable doubt are that the homicide 1) was "the product of cool and calm reflection not an act prompted by emotional frenzy, panic or a fit of rage (cold)," 2) resulted from the defendant's "careful plan or prearranged design to commit murder before the fatal incident (calculated)," and 3) was committed after "heightened premeditation (premeditated)." (Appellant's Brief at 41). While admitting that the evidence was cold and calculated, Looney takes issue with the fact that the evidence did not support the heightened premeditation

element of this aggravating factor. (Appellant's Brief at 42). Such a contention is without merit.

In Rodriguez v. State, 753 So.2d 29, 46 (Fla. 2000), this Court observed

> . . . here, the Court found CCP based on the following facts: Manuel Rodriguez called Louis Rodriguez to elicit his assistance in the crime; Manuel planned a ruse to enter the apartment but formulated a back-up plan to force his way into the apartment if the plan failed; Manuel armed himself with a loaded handgun and two pairs of latex gloves so as to not to leave any fingerprints in the apartment if the initial plan did not work; Manuel fired an additional shot into each victim from close range to make sure they were dead; none of the elderly victims offered any resistance; each victim was shot while seated and fully compliant; and Manuel told Malakoff that he made certain that the victims were dead.

753 So.2d at 46.

It is inconceivable to suggest that facts in the instant case do not parallel those facts found in Rodriguez in support of the CCP factor. Hertz, Looney and Dempsey determined that they needed an automobile because they were tired of getting around on foot; Hertz, Looney and Dempsey planned to find and in fact did find vehicles that they wanted to steal and then planned a ruse to enter the mobile home by pretending to need to use the telephone; they gained entrance to the home after fully arming themselves with loaded handguns and weapons, Looney

wearing gloves and a mask; after ransacking the house and discussing how they were going to execute the victims, Hertz and Looney doused the mobile home with an accelerant to cover-up their dastardly deeds; Hertz and Looney and finally Dempsey fired shots into the heads of their victims at close range and shot enough times to make sure their victims were dead and to guarantee no witnesses; Hertz and Looney torched the mobile home which ensured that no victims remained alive. Finally, Hertz and Looney, after doing all they could to ensure that their victims were dead, split up the proceeds with Dempsey and then they all fled. Clearly the aforenoted facts which were summarized by the trial court are the identical scenario found by this Court in Rodriguez to conjure up a cold, calculated, premeditated murder. See Knight v. State, 746 So.2d 423, 435 (Fla. 1998); Nelson v. State, 748 So.2d 237, 244 (Fla. 1999); Alston v. State, 723 So.2d 148, 162 (Fla. 1998); Kay v. State, 727 So.2d 227, 229 (Fla. 1998); Bell v. State, 699 So.2d 674, 677 (Fla. 1997) and Jennings v. State, 718 So.2d 144, 152 (Fla. 1998).

No relief should be granted as to this claim.

3. Heinous, Atrocious and Cruel

Looney next argues that the record does not establish heinous, atrocious and cruel because there is insufficient

evidence to show that the victims suffered great pain, or did not die immediately. Citing Brown v. State, 721 So.2d 274, 277 (Fla. 1998), Looney argues that "HAC is proper 'only in torturous murders -- those that events extreme and outrageous depravity as exemplified by the desire to inflict a heightened degree of pain or utter indifference to or enjoyment of the suffering of another.'" (Appellant's Brief at 45).

The trial court characterized the instant murders as execution-style murders where the victims were held at gun point for over two hours, bound and taped lying face down in bed. The record further reveals and the trial court found that prior to being shot to death, the co-defendants "sprinkled and poured gasoline, lighter fluid and turpentine throughout the dwelling and its entrances." The record supports and the trial court found that Melanie King aware that accelerants were being doused throughout the trailer indicated that she would rather burn-up than be shot in the head. Hertz commenced repeatedly firing his pistol into the victims' heads. Looney immediately followed and then Dempsey fired the last two shots. The trial court found the medical examiner found entry and exist wounds that were consistent with rifle shot wounds. Looney, of course, carried a rifle.

In Alston v. State, 723 So.2d 148, 160-161 (Fla. 1998), this Court affirmed the finding that the murder was heinous, atrocious and cruel where the victim James Coon was forced into his own car and spent thirty minutes inside the car with Alston and his co-defendant repeatedly begging for his life. Coon was taken out of the vehicle in a remote location in Jacksonville and "vividly contemplated his death for a minimum of thirty minutes." 723 So.2d at 161. The record reflects and the opinion states:

> . . . the words of James Coon are haunting, "Jesus, Jesus, please let me live so that I can finish college." The defendant's accomplice shot the decedent once, and it appears that this shot was not fatal. . . .
>
> Not content with this assurance from the accomplice, defendant took the firearm from the accomplice and went to the victim who was alive, moaning, and James Coon held up his hand as if to fend off further attacks. The defendant then shot James Coon at least two (2) times, and there is no question that James Coon was then rendered dead. It is difficult for the court to imagine a more heinous, atrocious or cruel manner of inflicting death upon an innocent citizen who just happened to be in the path of this defendant who was then a predator looking for money or other things of value.

723 So.2d at 161.

In Alston, the Florida Supreme Court in upholding the heinous, atrocious and cruel factor observed:

> 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, 522 U.S. 825, 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 knife point through a dark field, forced her to disrobe, and then inflicted a wound certain to be fatal." Id. at 409. We conclude 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.

723 So.2d at 161.

Likewise, in Gore v. State, 706 So.2d 1328, 1335 (Fla. 1997), wherein the court upheld the HAC aggravator providing:

> Although Elliot's death by gunshot was most likely instantaneous, we have held that the action of the defendant preceding the actual killing are relevant to this aggravator. Swafford, 533 So.2d at 277; see also Smith v. State, 424 So.2d 727, 733 (Fla. 1982). We have also held that the fear and emotional strain of the victim from the events preceding the killings may contribute to its heinous nature. Swafford, 533 So.2d at 277 (citations omitted). Here, there is little doubt that Elliot experienced terror from the moment Gore took the gun from the vehicles glove compartment.

> She had been abducted, handcuffed, transported to a remote place, tightly bound, and sexually battered, all under threat of death. Her escape attempt ended in vain with Gore dragging her back towards the house and finally shooting her.

706 So.2d at 1335.

See also Cave v. State, 727 So.2d 227, 229 (Fla. 1998) (victim removed from convenience store at gun point, place in the backseat of her car where she was driven during a fifteen to eighteen minute ride pleading for her life, removed from her car and stabbed and then shot to death); Henyard v. State, 689 So.2d 239, 253 (Fla. 1996) (Henyard and co-defendant stole Ms. Lewis' car and abducted the Lewis family, raped and attempted to murder Ms. Lewis and killed her children by shooting them in the head with a single gunshot wound. "In this case, the trial court found the heinous, atrocious or cruel aggravating factor to be present based upon the entire sequence of events, including the fear and emotional trauma the children suffered during the episode culminating in their deaths and, contrary to Henyard's assertion, not merely because they were young children."), and Wyatt v. State, 641 So.2d 1336, 1340-1341 (Fla. 1994) (evidence shows that the victims were subjected to at least twenty minutes of abuse prior to their deaths. The victims were killed in front of each other and William Edwards begged for his life and stated that he and Frances, his wife, had a two-year old

daughter at home. "Wyatt shot him in the chest. Upon seeing her husband shot Frances Edwards began to cry and Wyatt then shot her in the head while she was in a kneeling position. Having witnessed the shooting of his co-workers, Michael Bornoosh started to pray. Wyatt put his gun to Bornoosh's ear and before he pulled the trigger told him to listen real close to hear the bullet coming. When Wyatt realized that William Edwards was still alive he went back and shot him in the head." HAC upheld.)

The state would submit that in the instant case the facts and circumstances presented and found by the trial court support the heinous, atrocious or cruel aggravating factor for these murder.

4. Pecuniary Gain

The last assault on the aggravating factors found by the trial court concerns whether the murders were for pecuniary gain. Citing Scull v. State, 533 So.2d 1137 (Fla. 1988), Looney argues that the trial court made no finding that "the purpose of the murder or the sole motive for the murder was pecuniary gain." The record reflects, however, that the trial court merged this aggravating factor with the fact that the capital felony was committed during the course of a burglary, arson or robbery. The State would submit that having merged the two, the

trial court was correct in setting forth the basis for doing so. Hertz, Looney and Dempsey approached Melanie King's and Keith Spears' abode with a purpose of stealing a black Mustang and white Ford Ranger. Upon gaining entry into the mobile home, their thievery immediately escalated to anything valuable on the premises including VCR's, TV's and approximately fifteen hundred dollars in cash. There is absolutely no basis to suggest that there was any other motive, let alone the sole or dominate motive for these murders but robbery and pecuniary gain. See Hildwin v. State, 727 So.2d 193, 194-95 (1998); Bates v. State, 750 So.2d 617 (Fla. 1999).

5. Harmless Error

Looney further argues that even should this Court strike any of the four aforenoted aggravating factors complained of, the remaining aggravating factors when compared with the mitigation presented would render any error harmful in this sentencing proceeding.

First, none of the aggravating factors found by the trial court are suspect. The trial court properly found each proven beyond a reasonable doubt. Even assuming for a moment, however, that an aggravating factor is found wanting, facts and circumstances supporting the remaining factors and the mitigation found by the trial court, would render any

erroneously found aggravating factor to be harmless error beyond a reasonable doubt. See Zakrzewski v. State, 717 So.2d 488 (Fla. 1998) (harmless error when HAC struck); Knight v. State, 746 So.2d 423, 435 (Fla. 1998) (striking HAC harmless error); Jones v. State, 748 So.2d 1012, 1027 (Fla. 1999) (striking avoid arrest harmless error); Zack v. State, 753 So.2d 9, 20 (Fla. 2000) (striking avoid arrest factor harmless error).

Based on the foregoing the State would urge this Court to deny all relief as to Issue II on appeal.

ISSUE III

WHETHER THE TRIAL COURT IMPROPERLY EXCUSED FOR CAUSE VENIRE MEMBER WHOSE OPPOSITION TO THE DEATH PENALTY MAY HAVE PREVENTED OR SUBSTANTIALLY IMPAIRED HER ABILITY TO PERFORM AS A JUROR.

Looney argues that Michelle Free was "impermissibly struck from the jury venire on the erroneous grounds that her opposition to the death penalty rose to the level of exclusion under Witherspoon v. Illinois, 391 U.S. 510 (1968), and Wainwright v. Witt, 469 U.S. 412 (1985)." (Appellant's Brief at 53).

The record reflects that Ms. Free was specifically asked

> MR. MEGGS: Ms. Free, we are asking some questions about your feelings about the death penalty, so I have just first off a general question, and then we will get a little more specific.

Do you hold any personal, religious, moral, or conscientious scruples against the imposition of the death penalty?

MS. FREE: No.

MR. MEGGS: Okay. So in an appropriate case, you could vote to impose the death penalty?

MS. FREE: Well, I don't know if I could, really. My feeling is, even if someone did kill someone, it wouldn't bring that other back just by killing.

MR. MEGGS: Well, here's kind of the posture we're in here now. You know, this is kind of informal, but the State is seeking the death penalty in this case. And at the conclusion of all of the evidence, when you go back to deliberate, you are going to return a verdict a guilty or not guilty or some verdict dealing with this murder case.

If you do a verdict of guilty of first-degree murder, then the death penalty is a possibility. Could you vote to impose -- to convict somebody when the death penalty is a possibility?

MS. FREE: No, sir.

MR. MEGGS: You could not?

MS. FREE: No.

MR. MEGGS: Your Honor, I think at this point she's --

THE COURT: Do you have any other questions? All right, Mr. Cummings?

MR. CUMMINGS: Ms. Free, you saying you can't even vote in the guilt phase whether the person is guilty or innocent because you know that there is a possibility of the death penalty, is that correct?

MS. FREE: Yeah.

MR. CUMMINGS: Okay. Could you vote in the guilt of innocent phase if you knew that the possibility was life in prison without parole?

MS. FREE: Yes, I could do that.

MR. CUMMINGS: You could do that?

MS. FREE: Uh-huh.

MR. CUMMINGS: So, in the situation that we're in today, there is two choices. Are you aware that whatever your choice is, it goes as a group recommendation to the jury?

MS. FREE: Uh-huh.

MR. CUMMINGS: Six to six or, whatever way it looks like, its just a recommendation.

MS. FREE: Yeah. Uh-huh.

MR. CUMMINGS: Could you sit in a panel and discuss with you fellow jurors your feelings why the death penalty wasn't appropriate in that case?

MS. FREE: Yes.

MR. CUMMINGS: You could certainly try to impose your opinion on others.

MS. FREE: I would try.

MR. CUMMINGS: And you listen to them, wouldn't you?

MS. FREE: Yes.

MR. CUMMINGS: So assuming you have all this discussion, an open discussion about the possibility of one sentence or the other, are you going to tell us today that you

still couldn't participate in that discussion if you were on a jury?

MS. FREE: I just don't believe that I could actually be -- take a person life. Even if they were found guilty of killing someone, I would just rather them spend the rest of their life in jail because its not going to bring the person back, anyway.

MR. CUMMINGS: And that's true.

MS. FREE: Yeah, so --

MR. CUMMINGS: So you would have your opportunity, then, to express your opinions as to why this person would spend the rest of his natural life in prison, never getting out.

MS. FREE: Yeah.

MR. CUMMINGS: You'd have the ability to try to convince others --

MS. FREE: I would try, yeah.

MR. CUMMINGS: You would try. But you don't necessarily want to be in that position, do you?

MS. FREE: Well, I mean, if I am, it wouldn't matter. My opinion is I just would not want to take someone else's life, just because -- I mean, I know it's bad that they killed someone or anybody kills anybody, but it wouldn't bring that person back.

MR. CUMMINGS: That's true about that. So you could get by the guilt phase to get into this discussion about what's appropriate and you could express your opinion?

MS. FREE: Yes.

> MR. CUMMINGS: So you could sit on the jury part where it's guilt or innocence?
>
> MS. FREE: I believe I could, yes.
>
> MR. CUMMINGS: Okay. But once you get to the other point, you're a little hesitant, but you could go in there and express your opinion to the jurors?
>
> MS. FREE: Yes, sir.
>
> MR. CUMMINGS: This is the way I feel, this is why I feel it, this is why I think life without parole is appropriate; you could do that, couldn't you?
>
> MS. FREE: Yes. . . .

(RIV 170-175) (Emphasis added). Following a series of questions with regard to whether Ms. Free knew anything about the facts and circumstances of the case, the State sought cause challenges as to Ms. Kinsey and Ms. Free:

> MR. MEGGS: Judge, as a matter of law, I think Ms. Kinsey and Ms. Free are disqualified from sitting on this jury. They both has said, without regard to what Mr. Cummings asked them, they both have said they could not vote to impose the death penalty and that they would express their views, but both of them have stated they could not -- one said she could not do it unless it was her daughter. Well, it's not her daughter.
>
> And this one said she could not do it and she would try to talk the other one's out of doing it. So we're trying to pick a jury that will follow the law, and the law is the death penalty is appropriate in Florida. As so I would ask that both of these be excused for cause.

If they were to sit on the jury, we have two already who have made up their mind, that it doesn't matter what we present, they're not going to vote for the death penalty. And that's grounds for cause under Witt. I guess that's a U.S Supreme Court case.

THE COURT: Alright.

MR. CUMMINGS: Judge, if I could just have a minute here to make a note. I believe the State may have a better argument with reference to Ms. Kinsey, the second juror.

But as to Ms. Free, I don't think their argument is as strong. She's certainly going to go in there, she's going to try to impose her opinion, she's going to follow the law.

Initially she couldn't even vote in the guilt phase, but she turned that around; she could vote in the guilt phase.

I don't believe, in respect to Ms. Free, that the State has as good a case for cause under Witt as they do in Kinsey. I'd ask the Court not to excuse Ms. Free for cause.

Ms. Kinsey, she did say absolutely no to my final question, trying to simplify things.

THE COURT: Anything further?

MR. THOMPSON: Judge, I would object to the excusal of both Ms. Kinsey and Ms. Free. They both indicated that they could vote in the guilt or innocence phase, and these defendants are entitled to a cross-section of the community, and so far we have three people come in here.

Two of them have reservations about the death penalty. If we excuse people based upon their hesitancy to vote to impose a death penalty, when they can still vote in

> the guilty and innocence phase, we're depriving Mr. Hertz of a right to a jury that represents a cross-section of the community.
>
> THE COURT: I don't think either of these jurors indicated they could be fair and impartial in all the phases of this case, and I'm going to have to grant the State's motion and to Ms. Kinsey and Ms. Free.
>
> MR. CUMMINGS: So is that a court standard, that we need to ask whether they can be fair and impartial in each phase?
>
> THE COURT: Well, both of the juror indicated and said that under no circumstances would they vote in favor of the death penalty. I don't think there was any equivocation.
>
> There was, I grant you, perhaps a little more maybe with -- well, I'm not sure. I think perhaps more with Ms. Kinsey than there was with Ms. Free, for that matter.
>
> I think under Witt both of them are properly excused, if the State requests a challenge for cause. . . .

(RIV 176-179).

The record reflects that on three separate occasions Ms. Free testified that she could not impose the death penalty "even if someone did kill someone, it wouldn't bring that other person back just by killing them." (RIV 171, 173, 174). Counsels for Hertz and Looney attempted to rehabilitate Ms. Free under a misconceived notion that because a juror may be willing to convict a defendant of first-degree murder, there is no need for that juror to have an open mind with regard to both the

aggravation and mitigation to be presented in the penalty phase of a case. Clearly, Ms. Free could not do that, she was unequivocal with regard to her stance that she would try and convince others that death was not appropriate "no matter what the aggravation or lack of mitigation might show." "My opinion is I just would not want to take someone else's life, just because -- I mean, I know it's bad that they killed someone or anybody kills anybody, but it wouldn't bring that person back." (RIV 174).

In San Martin v. State, 717 So.2d 462, 467-468 (Fla. 1998), this Court observed:

> Finally, San Martin claims that prospective jurors that did not believe in the death penalty were improperly eliminated by peremptory or cause challenges. As United Supreme Court explained in Lockhart, individuals "who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case" are subject to removal for cause. Lockhart, 476 U.S. at 176, 106 S.Ct. 1758. In addition, "the State may properly exercise its peremptory challenges to strike prospective jurors who are opposed to the death penalty, but not subject to challenges for cause . . . [because] [b]oth parties have the right to peremptory strike "persons thought to be inclined against their interest"." (cite omitted). In order to state a claim regarding the striking of a juror for his or her views on the death penalty, San Martin would have to identify a specific instance where a prospective juror was removed for cause even though the jurors view on capital punishment would not "prevent or

> substantially impair the performance of [the jurors] duties as a juror in accordance with [the jurors] instructions and [the jurors] oath." Wainwright v. Witt, 469 U.S. at 424, 105 S.Ct. 844 (quoting Adams v. Texas, 448 U.S. 38, 44, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)) (clarifying decision in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). . . .

717 So.2d at 461-462.

Likewise in Kearse v. State, ___ So.2d ___, 25 Fla.L.Weekly S507 (Fla. 2000), the Court rejected Kearse's challenge to the State's cause challenge of Juror Jeremy. The Court observed

> . . . the test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instruction on the law given by the court. See Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984). A juror must be excused for cause if any reasonable doubt exist as to whether the juror posses an impartial state of mind. See Bryan v. State, 656 So.2d 426, 428 (Fla. 1995). A trial court has great discretion when deciding whether to grant or deny a challenge for cause based on jurors incompetency. See Pentacose v. State, 545 So.2d 861 (Fla. 1989). The decision to deny a challenge for cause will be upheld on appeal if there is support in the record for the decision. See Gore v. State, 706 So.2d 1328, 1332 (Fla. 1997), cert. denied, 525 U.S. 892, 119 S.Ct. 212, 142 L.Ed.2d 174 (1998). "In reviewing a claim of error such as this we have recognized that the trial court has a unique vantage point in the determination of juror bias. The trial court is able to see the jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record." Smith

> v. State, 699 So.2d 629, 635-36 (Fla. 1997), cert. denied, 523 U.S. 1008, 118 S.Ct. 1194, 140 L.Ed.2d 323 and cert. denied, 523 U.S. 1020, 118 S.Ct. 1300, 140 L.Ed.2d 466 (1998); see also Taylor v. State, 638 So.2d 30, 32 (Fla. 1994). It is the trial court's duty to determine a challenge for cause is proper. See Smith, 699 So.2d at 636.
>
> The trial courts finding that Juror Jeremy's views would have substantially impaired her performance as a juror is adequately supported by the record. Throughout questioning by the State and defense counsel Jeremy stated that her feelings about the death penalty would impair her ability to follow the law and that she just could not see herself voting for death when she knew that a true life sentence was an alternative. Thus, there was no error in dismissing Jeremy for cause.

25 Fla.L.Weekly at S509. See also Fernandez v. State, 730 So.2d 277, 281 (Fla. 1999); Hill v. State, 477 So.2d 553, 555-556 (Fla. 1985) and Taylor v. State, 638 So.2d 30-32 (Fla. 1994).

Based on the foregoing there is absolutely no question that Ms. Free could not sit as a fair and impartial juror without substantially impairing her performance in accordance with both the jurors instructions and/or oath. All relief must be denied as to this claim.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION TO REQUIRE UNANIMOUS VERDICTS AT THE PENALTY PHASE.

Citing to Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), Looney argues that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." 120 S.Ct. at 2362-63. In light of the foregoing, Looney argues that under Florida's death penalty scheme the juries recommendation is not unanimous nor is the jury required to tell anyone what aggravation is found. Looney invites this Court "in light of Apprendi" to reexamine the majority vote practice in jury capital sentencing and require jury unanimity, including but not limited to the existence of any aggravating factors and as to the recommended sentence. (Appellant's Brief at 63).

First and foremost, this issue is not properly before the Court since the arguments presented herein were never presented to the trial court. Indeed it would have been an impossibility since Looney's guilt phase and penalty phase trial ended approximately five and a half months before the Apprendi decision was rendered by the United States Supreme Court, June 26, 2000. Second, albeit Looney filed a motion to declare Florida's death penalty unconstitutional based on Schad v. Arizona (RI 39-50), arguments contained therein were based on the United States Supreme Court's decision in Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) concerning

whether the statute, in Florida, not requiring a majority of jurors to determine any specific aggravating factor is arbitrary, capricious and results in a sentence that lacks reliability and is fundamentally unfair in violation of the Sixth, Eight and Fourteenth Amendments to the United States Constitution. The trial court summarily denied said motion on April 16, 1999. (RI 116). Third, the record is clear that the trial court was never specifically asked to rule on any written motion to require that the jury's death recommendation be unanimous. Absent a specific objection or motion, Hertz is entitled no relief. Fourth, even assuming for a moment that something that Looney's counsel may have said at trial would have legitimately raised this claim, the decision in Apprendi v. New Jersey, supra, is in opposite to the issue of whether a jury recommendation should be unanimous. Apprendi requires that a fact that is used to increase the statutory maximum be treated as a element of the crime; which did not change the *jurisprudence* of any capital sentencing scheme. Moreover and more importantly, a majority of the court in Apprendi v. New Jersey recognized that that decision was inapplicable to capital death penalty schemes. "Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing

schemes requiring judges after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona. (Cite omitted)."

Terminally, Looney has not asserted that the jury, rather than the judge, must determine the appropriate penalty. Looney only argues that any jury recommendation needs to be unanimous. Clearly, the core result in Apprendi deals with whether the jury must return a verdict with regard to an element of a crime, not whether a judge can determine the appropriate sentence based on aggravating and mitigating circumstances of a death eligible defendant who has been convicted by a jury of first-degree murder. It is submitted that neither the majority nor the dissent in Apprendi would take issue with this statement.

In State v. Weeks, 2000 WL 1694002 (Del. Nov. 9, 2000), the Delaware Supreme Court rejected a due process challenge to Delaware's bifurcated capital punishment procedure because they were "not persuaded that Apprendi's reach extends to state capital sentencing schemes in which judges are required to find specific aggravating factors before imposing a sentence of death." Citing Apprendi, 120 S.Ct. at 2366, and Walton v. Arizona, 497 U.S. 639, 647-49 (1990). The Delaware Supreme Court explained that the aggravating factor set forth in Section

4209 of the Delaware statutes did not constitute additional elements of capital murder separate from the elements required to be established by the State in the guilt phase. Finding of an aggravating factors does not "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." Id., quoting Apprendi, 120 S.Ct. at 2365.

Based on the foregoing, all relief must be denied as to Issue IV.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN ADMITTING CRIME SCENE PHOTOGRAPHS AND AUTOPSY PHOTOGRAPHS.

Hertz and Looney both objected to the admission of State's Exhibit #1-C, arguing that the picture's value was only to inflame the jury rather than to present relevant evidence. Hertz and Looney argued that two other photographs, State Exhibits #1-T and #1-U, sufficiently showed the crime scene and outline of where the bodies had lain on the bed and therefore it was unnecessary to admit Exhibit #1-C which showed the same scene but with the bodies in place as found by the crime scene investigators. Hertz and Looney also objected to the admission of autopsy photographs of the bodies, specifically State Exhibits #39-A through #39-E because they were unnecessary to illustrate any testimony being presented by the medical

examiner. Finally, the defense objected to the use of the DOAR system used to publish the pictures on a television screen before the jury. (RXIII 1545, 1554, 1584, 1592, 1590-1593).

A. The Crime Scene Photograph Exhibit #1-C

While acknowledging that the test for admissibility of photographs under Florida law is relevancy rather than necessity, citing Pope v. State, 679 So.2d 710, 713 (Fla. 1996), Hertz and Looney argues that because the murders were committed as a result of gunshot wounds, any evidence regarding the arson and the destruction of evidence at the crime scene was not relevant and was done for the sole purpose of inflaming the jury. Such a contention is without merit for a number of reasons. First, Hertz and Looney cited Old Chief v. United States, 519 U.S. 173 (1997), for the proposition that when a defendant stipulates to a fact, thereby eliminating any dispute over the fact, the court must utilize a balancing test under Florida Rule of Evidence 403. If the probative value of the evidence is substantially outweighed by the danger of an unfair prejudice or the needless presentation of cumulative evidence, then the evidence should not be admitted. (Appellant's Brief at 68). Oddly enough, in the instant case, neither Hertz nor Looney pled guilty to the arson charges. Thus, the State was required to go forward and prove the facts that the torching of

Melanie King's and Keith Spears' mobile home was arson. To do that, the State presented the testimony of law enforcement investigators from the State Fire Marshall's Office, in particular John Gunn, who testified that the kind of damage that was done by the fire does not happen unless an accelerant is used. (RXIII 1628). Since a fire can destroy much of the accelerant itself, one has to probe the evidence. John Gunn testified that in looking at State's Exhibit #1-C - that picture demonstrated where the accelerant was used. (RXIII 1633-1634). He observed that the liquid accelerant was placed around the base of the bed and on the victims clothing. Clearly, in showing where the bodies were located when the police first arrived at the crime scene, it aided Mr. Gunn as well as the jury in understanding that any articles underneath the victims in State's Exhibit #1-T and #1-U would have evidence of the accelerant.[6] Additionally, the testimony of Shawn Yao who took pictures of the male's and female's clothing remnants removed from the bodies, explains that Exhibit #1-C showed remnants of clothing of shorts, underwear that were unburned on the bed underneath the female torso. Also it showed there was unburned clothing near the genitalia area of the male and that there was

[6] Chemist James Carver testified that accelerants were found on the remnants of the victims' clothing and the pillow found under Melanie King's head. (RXIV 1662-1665).

foam found under the head of the female. It was his view that the clothing was protected by the bodies. (RXIII 1554-1555, 1569-1571).

Second, State Exhibits #1-A through #1-U reflects a number of areas of the crime scene, not just the burned trailer as suggested by Looney. For example, #1-A was a picture of the trailer; #1-B was the front of the trailer showing the burn damage in front; #1-C showed the bedroom photograph with the bodies in place, specifically showing the box springs of the bed with the bodies lying there face down; that around the bed plywood had to be put down to secure the area based on the extent of the damage; #1-D was an overview of the kitchen and living room area; #1-E was the front of the trailer; #1-F was another picture of the trailer; #1-G was yet another picture of the trailer from another angle; #1-H was the trailer and where the propane tank was; #1-I and #1-J were overhead views; #1-K was the back of the trailer; #1-L was tire tracks; #1-M was more tire tracks; #1-N was a picture of the propane tank from the trailer entry; #1-O was the fire damage done to the propane tank; #1-P was the kitchen area; #1-Q was another picture of the kitchen area; #1-R was a picture of the bedroom area where the bodies were found; #1-S was an overview picture of the area; #1-T was an elevated view where the bodies were located, however

the debris had been cleared and there were no bodies but the outline was there where the bodies were could be seen; #1-U showed a closer picture of the area not burned where the bodies were laying and where the projectiles were found. (RXIII 1560-1569).

Third, State Exhibits #2-C showed pictures of where the cartridges were found around the bed. That picture in conjunction with the pictures of the trailer making up State's Exhibit #1-A through #1-U, helped explain the testimony concerning the cartridges found and why it was difficult to ascertain and identify the number of cartridges found at the crime scene; (RXIII 1576-1579) and that more than seven cartridges were found.

Citing Ruiz v. State, 743 So.2d 1, 8 (Fla. 1999), Looney argues that State's Exhibit #1-C was unnecessary and prejudicial and had no relevancy to the facts and circumstances of the State's case. State's Exhibit #1-C was relevant to explain the circumstances of the crime. Absent a showing that the trial court abused its discretion in allowing the admission of said photograph, no relief should be forthcoming. See Zakrzewski v. State, 717 So.2d 488, 494 (Fla. 1988); Nixon v. State, 572 So.2d 1336, 1342 (Fla. 1990) (seven photographs of victim introduced, four showing the various positions of the victim's charred body

tied to a tree at the crime scene to aid the detective in explaining the condition of the crime scene when the police arrived and three additional photographs taken at the coroner's office which showed the victim's head and upper torso used to explain the pathologist's testimony regarding the nature of the victim's injuries and the cause of her death); Gore v. State, 475 So.2d 1205, 1208 (Fla. 1985) (allegedly gruesome photographs of victim relevant to show condition of the body when first discovered by the police and to show considerable pain inflicted on victim); Alston v. State, 723 So.2d 148, 156 (Fla. 1998), wherein the court authorized the admission of a videotape balancing the interest of Rule 403, Rules of Evidence, finding that the videotape evidence was compelling and highly probative of the issues in the case:

> Indeed, the conduct of the defendant at the time that he talked to the reporters indicates consciousness of guilt, and the prejudicial effect does not outweigh the probative value under the balancing test under 403.

723 So.2d at 156.

The court went on to say:

> A trial judge's ruling on the admissibility of evidence will not be disturbed but absent an abuse of discretion. Kearse v. State, 662 So.2d 677, 684 (Fla. 1995); Blanco v. State, 452 So.2d 520, 523 (Fla. 1984). We agree with the trial court that the substance of what was said on the videotape

> concern the crime which appellant was charged intended to prove a material fact; thus, it was relevant evidence as defined by Section 90.401, Florida Statutes (1995). Williamson v. State, 681 So.2d 688, 696 (Fla. 1996), cert. denied, 520 U.S. 1200, 117 S.Ct. 1561, 137 L.Ed.2d 708 (1997), is applicable. In Williamson, we recognize that proper application of Section 90.403 requires a balancing test by the trial judge. Only when the unfair prejudice substantially outweighs the probative value of the evidence must the evidence be excluded. The trial court's decision on this issue conforms with out determination in Williamson, and we find no abuse of discretion in admitting the evidence.

723 So.2d at 156. See also Mansfield v. State, 758 So.2d 636, 648 (Fla. 2000) (admission of photographs depicting mutilation of the victims genitalia and an autopsy photograph of victim's brain not an abuse of discretion), and Gudinas v. State, 693 So.2d 953, 963 (Fla. 1997); Pangburn v. State, 661 So.2d 1182 (Fla. 1995), and Wilson v. State, 436 So.2d 908 (Fla. 1983).

Looney's reliance on Ruiz v. State, supra, is misplaced. In that case, the court reversed on other grounds but found that it was error for the trial court to allow the State to introduce a blow-up photograph revealing the bloody and disfigured head and upper torso of the victim during the penalty phase of Ruiz's trial. The court noted:

> The record shows that the prosecutor provided no relevant basis for admitting the blow-up at that point in the trial; the standard size photograph from which the

> blow-up was made had already been shown to the jury during the guilt phase. . . .

743 So.2d at 8.

Clearly, that case is distinguishable from the facts and circumstances herein.

B. Admission of Autopsy Photographs

Looney next argues that it was error for the trial court to allow the introduction of autopsy photographs because they assert that the medical examiner's testimony, Dr. David Craig, did not "rely at all on the photographs" and that admission of the photographs was not harmless error because of the "repulsive image of intestines coming out of the body cavity, blown up to a larger than life size."

Dr. David Craig testified that when he prepared the autopsy of the victims he observed that both bodies were badly burned with large portions of their extremities missing, bones fractured due to the burns, skulls partially burned away and that it was extremely difficult to look at the bodies and identify them. In fact, positive identification occurred through the victims' teeth. (RXIII 1580-1583). Defense counsels objected at that point to the admission of any autopsy photographs being introduced (RXIII 1584-1587), and, following argument, the trial court denied the motions, finding that it was necessary for the doctor to use the pictures to explain what

he saw. (RXIII 1587). A renewed objection to the photographs filed by defense counsel (RXIII 1591), following the testimony by Dr. Craig that even though the skulls were burned, he was able to locate two penetrating wounds that were consistent with gunshot wounds that entered the skulls at tremendous force causing extensive damage. (RXIII 1590). The trial court again denied the objections to the photographs and found that question arose as to how many bullets were actually shot and the pictures might show or explain other possible wounds. (RXIII 1592). Defense counsels then complained about the size of the television monitor on which the pictures were broadcast. The trial court looked at the monitor and its position in the courtroom and found that the pictures were not inordinately enlarged. (RXIII 1593).

Dr. Craig observed that State's Exhibit #39-E was a picture of the skull of Melanie King with two wounds to the head. He could not discern however, the bullets' path because of the burned and shattered nature of the skull bone. It was his testimony that he could not tell whether there were other wounds on the body due to the conditions of the body. (RXIII 1594). It was his view that death was caused by a gunshot wound or gunshot wounds and that there was no evidence that the fire caused the deaths. He observed that the lungs were congested

and it was his view that Melanie King lived one or two minutes after the gunshot wounds to her head. There was no soot in her trachea. (RXIV 1594-1596). Autopsy pictures of Mr. Spears were State's Exhibit #39-A, B and C. Exhibit #39-A showed his torso and abdomen, extensive burning on the right side; #39-B showed extensive burns with portions of the legs burned away, and #39-C showed a severely burned skull. (RXIV 1596-1597).

Dr. Craig testified that from #39-A you could see that the burns were down through the skin in the chest and it would have been impossible to detect whether there was any injuries other than the gunshot wounds to the back of the neck of Keith Spears. The burns were so severe and intense that in fact the muscle was gone and his intestines were exposed. It was clear that the gunshot wound was through the posterior portion of the skull. Dr. Craig opined that the exit wound was the frontal lobe near the right eye and that there would have been excessive brain damage however it was his view that Keith Spears was dead at the time of the fire. (RXIV 1598-1599). Dr. Craig stated that Exhibit #39-B showed the lower extremities burned off which would have been due to accelerants being poured on the body which would have enhanced the damage. (RXIV 1600).

Based on the relevancy of said of photographs in explaining the medical examiner's testimony as to the injuries and the

cause of death, the State would submit the trial court did not abuse its discretion in admitting said photographs. Gudinas v. State, 693 So.2d 953, 963 (Fla. 1997), and Zakrzewski v. State, 717 So.2d 488, 494 (Fla. 1998).

Moreover, even assuming for the moment that error may have existed with regard to the admission of any photograph, the State would urge that said admissions was harmless beyond a reasonable doubt. See Almeida v. State, 748 So.2d 922, 929-930 (Fla. 1999).

ISSUE VI

WHETHER THE DETAILS OF THE COLLATERAL CRIMES IN VOLUSIA COUNTY BECAME A FEATURE OF THE TRIAL.

Looney argues that the pursuit and capture of them in Volusia County the same day as the murders, during the guilt phase of their trials, became a feature and prejudiced the cases. Such a contention is without merit.

The facts reveal that while a number of police officers testified as to the pursuit and apprehension of Hertz and Looney, most of that testimony went to their capture and return to Wakulla County from Daytona Beach. The only collateral crime testimony that was introduced was the testimony of Daytona Beach Shores police officers Shawn Rooney and Greg Howard regarding how the Ford Ranger driven by Hertz attempted to hit officer

Howard and knock him down. The record reflects that this testimony may be found (RXV 1734-1736, 1739-1740, 1750-1753, 1755). The sum total of that testimony reflects that Officer Rooney testified that Hertz was driving the Ford Ranger and he saw the truck turn around and start coming back at him and then make a right turn on Hickory Lane. At that point he was headed for Officer Howard's direction and Officer Rooney said he heard a thump and saw a mike go flying into the air. (RXV 1734-1735). He walked over to Hickory Lane and saw Officer Howard fall down; he got back in his vehicle and then saw the Ford Ranger coming at a high rate of speed in reverse towards his car. He jumped out and watched as the Ranger backed up past him. He positively identified the Ranger being driving by Hertz. At that point, the officer fired his weapon and the Ranger left. (RXV 1736-1737). On cross-examination, Officer Rooney testified that the Ranger did not hit him or Officer Howard and he never saw anyone in the Ranger fire a weapon. (RXV 1739).

Officer Howard testified that he heard a vehicle coming up from behind him and saw a white Ford pickup. The truck hit him and knocked him down. He testified that he could not get out of the way. He positively identified Hertz as the driver of the Ford Ranger and said that as the consequences of being hit he lost his radio and he, too, started shooting at the vehicle.

(RXV 1750-1753). On cross-examination, he testified that the truck hit him from behind, however, he sustained no serious injuries. (RXV 1755).

While the defense ultimately stipulated at the penalty phase to the aggravated battery conviction in Volusia County on Officer Howard, the record reflects that the collateral crime evidence that was introduced at the guilt phase of Hertz and Looney's trial was a *de minimus* part of this murder/robbery/arson crime. The facts and circumstances surrounding the pursuit and subsequent arrest of Hertz, Looney and Dempsey were a part of the crime and relevant evidence to explain the circumstances surrounding their capture. Looney is entitled to no relief as to this claim. See Thompson v. State, 748 So.2d 970, 982 (Fla. 1999), wherein the court held:

> This Court has stated that the admission of evidence is within the trial court's discretion and will not be reversed unless defendant demonstrates an abuse of discretion. See Medina v. State, 466 So.2d 1046 (Fla. 1985); Jent v. State, 408 So.2d 1024 (Fla. 1991). The law is well settled that '[w]hen a suspected person in any manner attempts to escape of evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indication after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred to such circumstance.' Straight v. State, 397 So.2d 903, 908 (Fla. 1981). However, we have held that in order to admit this

> evidence, there must be a nexus between the flight, concealment, or resistance to a lawful arrest and the crime for which the defendant is being tried in that specific case. See Escobar v. State, 699 So.2d 988 (Fla. 1997). Moreover, such an interpretation should be made with a sensitivity to the facts of the particular case. See Bundy v. State, 471 So.2d 9 (Fla. 1985) (citing United States v. Borders, 693 F.2d 1318, 1325 (11th Cir. 1982)).
>
> In prior cases, we have upheld the introduction of similar flight evidence as consciousness of guilt where the defendant flees from police after committing a murder. See Shellito v. State, 701 So.2d 837, 840 (Fla. 1997) (even though defendant committed several robberies between the murder and his arrest, evidence that defendant resisted arrest the day after the murder was admissible as consciousness of guilt of the murder); Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (even though defendant escaped after being arrested for misdemeanor traffic warrants, evidence of escape could be used as consciousness of guilt of the murder); Bundy, 471 So.2d at 20 (evidence of defendant's attempt to flee officers six days after the murder was admissible as consciousness of guilt even though defendant was wanted for several murders in other states). In these cases, we upheld the introduction of flight evidence even though the flight could have been attributed to different crimes or warrants.

748 So.2d at 982.

The court, following a detailed account of the high-speed chase and pursuit of Thompson concluded that the facts supported the trial courts admission of flight evidence to show consciousness of guilt. The same is true in the instant case,

however, the State would further note that in the case *sub judice*, the events occurring in Volusia County, Florida, never became a feature of Looney's trial.

ISSUE VII

> THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A MISTRIAL AFTER THE STATE'S WITNESS TESTIFIED ABOUT THE HEARSAY STATEMENT BY A NON-TESTIFYING CODEFENDANT WHICH INCRIMINATED LOONEY.

Looney argues that the trial court should have granted a mistrial when, during the testimony of Robert Hathcock, an inmate who was Hertz' cellmate in the Leon County Jail between May and September 1998. Hathcock, when asked about what Hertz told him about the crime, testified:

> He started off by telling me that he had gotten into a confrontation with some police officers down in Daytona because I asked him about a scar on his head and that led to - - the conversation got back to - - he told me that he and two of his codefendants had been involved in two murders in Crawfordville and that they had killed - -

(RXVI 1849-1850).

A mistrial was not immediately sought, however after three more questions, defense counsel moved for a mistrial or a severance of the trial at that point, arguing that he would not be able to cross-examine Hertz as to the statements he made about this. Defense counsel went on:

> . . . I would think the State would have tried to limit this person's testimony. It's already stated at one point that Mr. Hertz has had - - that he and his codefendants or whatever were involved in two murders. I can't cross-examine Mr. Hertz as to those statements.
>
> At some point in time there was a motion filed to sever these cases because of reasons like this, at least from what I gather from reading the motions, and that was at least granted and then reversed.
>
> MR. MEGGS: Well, we move to consolidate them back.
>
> MR. RAND: Based on the fact there was not going to be any statement used in this manner.
>
> MR. CUMMINGS: And I think it was very specific. None of this stuff was supposed to come out and now we have a big problem here. He's made that statement. It incriminates my client. I can't cross-examine Mr. Hertz and I move for a mistrial on behalf of Mr. Looney.
>
> THE COURT: What says the State?
>
> MR. MEGGS: Your Honor, he is absolutely correct. That should not have come out. It was inadvertent. I think a curative instruction will solve that problem and the witness can be instructed to only answer questions as they relate to Mr. Hertz and what Mr. Hertz said he in fact did. I don't think it's a basis for a mistrial.
>
> THE COURT: Okay. I'll allow a fifteen minute recess.

(RXVI 1850-1851).

The record reflects that at this point the parties continued presenting arguments to the trial court and finally the court recessed for the evening. The next morning, the trial court instructed the jury to disregard as a matter of law any testimony by Hathcock. (RXVII 1892).

Citing United States v. Bruton, 391 U.S. 123 (1968), and Lee v. Illinois, 476 U.S. 530 (1985), Looney seems to suggest that this hearsay statement by Mr. Hathcock of what Hertz might have said required a mistrial. The State would argue to the contrary and suggests that the trial court was correct that this misstatement admitted to as inadvertent by the State, while error, was harmless at best.

Looney argues that "prior to the testimony of inmate Hathcock, there was no direct evidence against either Hertz or Looney, as the State conceded. The testimony of Hathcock, then, provided direct evidence against Mr. Hertz, which would have been allowed if Mr. Hertz had gone to trial by himself. Prejudice to Mr. Looney is that the testimony of Hathcock corroborates the testimony of Dempsey, who supplied the only direct evidence against Mr. Looney." (Appellant's Brief at 74-75).

While it is true that had the State made further inquiry with regard to what Mr. Hathcock heard Mr. Hertz say, the fact

remains that Jimmy Dempsey's testimony and the physical evidence of this case beyond a reasonable doubt placed Looney and his confederates Hertz and Dempsey at the crime scene. Moreover, his testimony reveals that the black Mustang belonging to Melanie King, was seen at the Thomasville Road Wal-Mart in Looney's possession within hours of the murders and, that it was also the vehicle that Looney was captured in, in Volusia County, Florida, following his attempt to flee the police.

The inadvertent statement made by Hathcock which the trial court told the jury the next day to disregard (and the jury never saw Mr. Hathcock again), adequately protected Mr. Looney from any error that occurred at trial. See San Martin v. State, 717 So.2d at 468-69; Johnson v. State, 720 So.2d 232, 236 (Fla. 1998), and Nelson v. State, 748 So.2d 237 (Fla. 1999). No relief should be forthcoming to Looney as to this claim.

ISSUE VIII

THE STATUTE AUTHORIZING VICTIM IMPACT EVIDENCE IS NOT AN UNCONSTITUTIONAL USURPATION OF THE COURT'S RULE-MAKING AUTHORITY UNDER ARTICLE V, SECTION 2, OF THE FLORIDA CONSTITUTION, MAKING THE ADMISSION OF SUCH TESTIMONY UNCONSTITUTIONAL AND REVERSIBLE ERROR.

Looney next argues that Section 921.141(7), Florida Statutes (1996), allowing the admission of victim impact evidence is an unauthorized exercise by the Florida Legislature and in fact is

a usurpation of the responsibilities of the court to adopt rules governing the admission of evidence, citing Allen v. Butterworth, 756 So.2d 52 (Fla. 2000). This issue is procedurally barred. There is no evidence in this record nor does Looney allude to any portions of the record that reflects that the trial court entertained any motion concerning the constitutionality of the victim impact statute.

Even assuming for the moment this issue is properly before the court, the State would submit that any assertion that the capital sentencing statute improperly regulates practice and procedures has been rejected by this Court in Burns v. State, 699 So.2d 646, 653 (Fla.1997), wherein the court stated, ". . . we have also repeatedly upheld Section 921.141 against claims that the capital sentencing statute improperly regulates practice and procedure. (Cite omitted); see also Maxwell v. State, 657 So.2d 1157 (Fla. 1995) (approving on basis of Windom district court's decision which recognizes that section 921.141 does not intrude upon this Court's rule-making authority). . ." 699 So.2d at 653.

Based on the foregoing, Looney is entitled to no relief as to this claim.

ISSUE IX

SUFFICIENCY OF THE EVIDENCE.

Looney argues that the only "direct evidence" of their participation in these crimes charged is the testimony of Jimmy Dempsey. He asserts that without Dempsey's testimony, the case against him is entirely circumstantial. Seeking to have this case portrayed as a circumstantial evidence case in order to change the "standard of review," he claims that without Dempsey's testimony the State "could not have overcome the requirement that the evidence, taken in the light most favorable to the State, be inconsistent with any reasonable hypothesis of innocence. State v. Law, 559 So.2d 187 (Fla. 1989)." (Appellant's Brief at 78-79).

First of all this is not a circumstantial evidence case but rather, there was direct evidence that was showed through Jimmy Dempsey's testimony, that Hertz and Looney and he, shot at the victims. There is record evidence to show that although the mobile home was torched and much of the evidence destroyed, there was sufficient evidence to demonstrate a number of weapons and cartridges were found at the crime scene. The physical evidence supports the accounting by Dempsey of what transpired that day and finally, there was no contradictory evidence thus, Dempsey's testimony went unrebutted. Moreover, it was Hertz and Looney who bragged about being in possession of brand new cars at the Wal-Mart within hours of the murders, and it was Hertz

and Looney who were driving the Mustang and the Ford Ranger, attempting to allude police in Volusia County. Clearly there were strong inferences of guilt that might be drawn from their flight. Property taken from Melanie King and Keith Spears' trailer were found in Hertz' trailer by Hertz' girlfriend the next day, and a weapon that belonged to Keith Spears was found in Hertz' possession at the time of his arrest in St. Johns County. Hertz was seen at Ms. Ventry's door when he attempted to gain entry to use the telephone just prior to the murders occurring and it was clear that when they left the Bull residence, they left together on foot. Within hours after that, Hertz and Looney were in possession of property belonging to the murdered victims. There is absolutely no question that Hertz and Looney committed these crimes and the fact that Dempsey's testimony went unrebutted is unassailable. Based on the totality of the circumstances, the evidence was sufficient to support their convictions. See Jennings v. State, 718 So.2d at 154; Porter v. State, 564 So.2d 1060-64 (Fla. 1990); Brown v. State, 721 So.2d 274, 277-281 (Fla. 1998), and Nelson v. State, 748 So.2d 237, 239 (Fla. 1999).

CONCLUSION

Based on the foregoing all relief should be denied.

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 Barbara Sanders, 80 Market Street, Post Office Box 157, Apalachicola, Florida 32329, this 29th day of December, 2000.

_____
Carolyn M. Snurkowski
Assistant Deputy Attorney General

CERTIFICATE OF TYPE SIZE AND FONT

I hereby certify this brief was typed using Courier New 12 point.

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CAROLYN M. SNURKOWSKI