IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2323

JUSTIN CURTIS HEYNE

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE/CROSS-APPEAL

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

BILL McCOLLUM
ATTORNEY GENERAL

COUNSEL FOR APPELLEE
KENNETH S. NUNNELLEY
Fla. Bar No. 998818
SENIOR ASSISTANT ATTORNEY GENERAL
444 SEABREEZE BLVD., SUITE 500
DAYTONA BEACH, FLORIDA 32114
(386)238-4990
FAX-(386)226-0457

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STATEMENT OF THE CASE AND FACTS

On the morning of March 30, 2006, Debra Reed accompanied her daughter, Sarah Buckoski, and Sarah's 5-year-old daughter, Ivory Hamilton, Reed's granddaughter, to the pediatric dentist. Ivory had injured four teeth on the playground the previous day and was having them removed. (V17, R1519, 1520-21). Ivory was very upset at the dentist and had to be restrained. She was given general anesthesia. (V17, R1531). Subsequent to the dental appointment, Reed did not notice any marks on Ivory's cheek. (V17, R1529).[1]

At 2:30 p.m., Reed returned Buckoski and Hamilton to their home,[2] where they lived with Benjamin Hamilton, Ivory's father, and Justin Heyne, the Appellant. (V17, R1522, 1524). Reed drove home, which was ten minutes from her daughter's house. (V17, R1523). Reed was home for about fifteen minutes when she received a phone call from a church near Buckoski's home, telling Reed that she needed to return to Buckoski's house. (V17, R1526-27). However, Buckoski's street was blocked off by police. (V17, R1527).

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[1] Reed occasionally saw firearms lying around the Buckoski/Hamilton home and told Sarah it was not a good idea. (V17, R1527-28, 1532).

[2] The victims lived at 4545 Moon Road, Titusville. (V17, R1522).

Yvette Bernard was a neighbor of the Buckoski/Hamilton family. (V17, R1535). On March 30, Bernard's daughter woke her from a nap and told her to go to the Buckoski/Hamilton home. (V17, R1536-37, 1543). When Bernard got to the front door, she heard Buckoski hollering, "Somebody please help me. Somebody please help me." (V17, R1537). Bernard found Benjamin Hamilton in the master bedroom,[3] lying on the bed in his underwear. He had been shot and was struggling to breathe. ((V17, R1538). Bernard saw "blood on the bed with the brains." (V17, R1539). Sarah Buckoski was lying on the floor next to bed in a fetal position. She had been shot and was "just screaming" for help. (V17, R1538-39, 1563). Bernard saw Ivory Hamilton lying in a fetal position behind her mother up against the wall. (V17, R1540, 1543-44). Bernard checked for a pulse and knew Ivory was already deceased. (V17, R1540). Bernard saw a handgun lying on the floor near the bedroom entrance. (V17, R1540). Bernard called 911. (V17, R1541).

Officer Brian Roy responded to the crime scene. (V17, R1555-56, 1575). Yvette Bernard told Roy to "help them." (V17, R1557, 1575). Several officers responded to the scene. (V17, R1556-57, 1575). Roy found Benjamin Hamilton lying face down on the bed in the master bedroom. Sarah Buckoski and Ivory Hamilton

[3] The bedroom measured twelve feet by thirteen feet. (V19, R1878).

were lying on the floor in between the bed and the wall. (V17, R1558). Roy found a black and grey nine millimeter Kel-Tec semi-automatic pistol on the master bedroom floor, between the end of the bed and the doorway. (V17, R1569). It contained a jammed cartridge. (V17, R1565). Roy also found a loaded handgun with a cocked hammer on the sofa in the living room.[4] (V17, R1560, 1561, 1566, 1570, 1572, 1575-76). Roy did not see any signs of struggle in the home. (V17, R1563). Roy spoke to Sarah Buckoski as EMT's removed her from the home. Buckoski said she did not know who shot her. (V17, R1563-64).

Roxanne Larabie was Heyne's girlfriend. (V17, R1586-87). On March 30, Heyne called Larabie and requested she pick him up in Titusville. (V17, R1587). Heyne was "upset and irritated, scared" and "sweaty." (V17, R1588). Heyne told Larabie "he was just leaving Ben's and Sarah's house." (V17, R1589). Heyne said "he shot Ben and Sarah." (V17, R1590). When Larabie asked about Ivory, Heyne "just looked at me and said she was gone." (V17, R1590). Heyne said "he was going to hell" because "of what he had done to Ben and Sarah." (V17, R1590).

Heyne was carrying a pillow case. Heyne told Larabie the pillow case contained a gun. (V17, R1588). Larabie said he could

[4] Officer Roy gave one of the handguns to Officer Matt Demmon to use for dog tracking purposes. (V17, R1562, 1581). Demmon returned it to Roy, and the handguns were given to evidence technician Ron Larson. (V17, R1562, 1581).

not have a gun in her home. She told Heyne to leave. (V17, R1588-89). However, Heyne did not leave. He went into Larabie's bedroom, put the gun on her bed, and took a shower. (V17, R1589). At some point, Heyne went into Larabie's attic. (V17, R1595). Heyne took a shower and then asked Larabie to take him to the mall "to buy him a replacement pair of clothes." (V17, R1590). Heyne asked Larabie to drive by "Moon Road." Larabie saw "police, crime scene, helicopters." (V17, R1591).

When they arrived at the mall, Heyne directed Larabie to purchase a pair of black shoes and a pair of black shorts, "exactly" the shoes and shorts he was wearing. (V17, R1591-92).[5] Larabie's children stayed in the car with Heyne. (V17, R1594). After Larabie made a purchase, the four of them returned to Larabie's house. (V17, R1594).

Heyne's mother called Larabie's house. Heyne told Larabie his mother was coming to get him. (V17, R1595).

On March 30, at approximately 4:30 p.m., Officer Jeffrey Watson interviewed Heyne at the Hamilton/Buckoski home. (V18,

[5] Heyne moved for a mistrial when Larabie stated Heyne "wouldn't allow" her children to go into the mall with her. Heyne claimed this was a discovery violation as it was previously undisclosed. (V17, R1592-93). The court denied the motion for mistrial and struck Larabie's statement. (V17, R1593). Defense counsel rejected the court's offer of a curative instruction. (V17, R1593-94). Heyne renewed his motion for a judgment of acquittal which was denied. (V20, R2052-53).

R1619-20-21).[6] After the interview, Heyne was free to leave. (V18, R1633). Watson called Larabie. (V17, R1595). Larabie told Watson that Heyne was with her for part of the day. (V17, R1595-96; V18, R1624-25). Watson then spoke with Larabie at her home and again at the police station. (V17, R1596; V18, R1625, 1634). Larabie consented to a search of her attic where police found drugs. (V17, 1597; V18, R1625, 1627-28, 1634). Larabie said she did not put the drugs in the attic. (V17, R1597). Subsequent to Larabie's interview, Watson radioed officers and Heyne was taken into custody. (V18, R1633).

Officer Joel Hunter responded to the crime scene. (V18, R1636-37). In addition to observing the bodies of Ben Hamilton, Ivory Hamilton, and Sarah Buckoski in the master bedroom, Hunter retrieved a nine-millimeter casing lying on the floor at the foot of the bed. (V18, R1640, 1641, 1642, 1645-46). Hunter photographed the casing and submitted it for evidence. (V18, R1642).

Hunter assisted in taking Heyne into custody. Hunter then responded to Larabie's home and searched the attic. (V18, R1647, 1648-49). Hunter located a K-Swiss shoe box near a "bubbled up" piece of insulation at the roof joists. (V18, R1649). The box contained a pair of men's black Dickie shorts with a stain on

[6] The interview took place in Watson's patrol car. (V18, R1622). The recorded audio interview was published for the jury. (V18, R1622, 1623, State Exh. 7).

the right pocket, a pair of black Reebok tennis shoes, and a firearm wrapped up tightly in a white T-shirt and taped with brown packaging tape. (V18, R1650, 1652, 1656, 1658).

Hunter stood outside the interview room at the police station while Heyne was interviewed. (V18, R1659). At some point, Detective Esposito opened the interview room door. Hunter stood at the door with the "K Swiss box" in hand. (V18, R1660-61; V19, R1953-54).

Dr. Sajid Qaiser, medical examiner, performed the autopsies on Benjamin Hamilton, Sarah Buckoski, and Ivory Hamilton. (V18, R1667-68, 1672, 1681, 1696). Qaiser took blood samples from each of the victims. (V18, R1708-09).

The first autopsy was performed on Benjamin Hamilton. (V18, R1672). Hamilton's hands had been bagged and the bags taped closed. (V18, R1714-15, 1784). Qaiser did not see any marks or bruises on Hamilton's hands. (V18, R1715). Hamilton had an entrance gunshot wound to the left temple which exited the right temple. (V18, R1673, 1678, 1679). There was no stippling present. Hamilton's eye was fractured with a secondary fracture to his skull. (V18, R1678, 1742). In Qaiser's opinion, the distance of the fired shot was "indeterminate" as something could have "absorbed the stippling or soot." (V18, R1680, 1717). Qaiser could not estimate the distance between the shooter and

Hamilton. (V18, R1718). Qaiser concluded Benjamin Hamilton was killed by the gunshot wound to the head. (V18, R1680).

Sarah Buckoski died two days after she was shot. Qaiser performed her autopsy the following day, on April 2nd. (V18, R1681). Buckoski had two gunshot wounds: one to her left upper arm, and one to her head. (V18, R1682, 1686). There was an entrance and exit wound on her arm, a "through and through" wound, which did not have any stippling. (V18, R1683, 1687, 1742). The muzzle of the gun was at least two feet away when Buckoski was shot in the arm. (V18, R1689-90). It is possible that Buckoski's arm was over her head and the bullet entered and exited through her arm and then into her head. (V18, R1734-35). It's also possible Buckoski was shot twice, or, the bullet that killed Ben Hamilton also killed Sara Buckoski. (V18, R1735, 1741). The entrance wound to Buckoski's head was to the center of the posterior part of her head. (V18, R1690). There was a partial exit wound one inch away from the entrance wound. (V18, R1690, 1691). The entrance wound destroyed a portion of Buckoski's brain: the occipital lobe and parietal lobe, and part of the temporal lobe. (V18, R1691). Her skull fractured into multiple fragments in that portion of her skull. (V18, R1691). The other part of Buckoski's brain was still intact. (V18, R1692). This wound was consistent with the fact that Buckoski spoke to medical personnel but had no recollection at the time

who had shot her, due to the portion of brain that was destroyed. (V18, R1692, 1695). Qaiser could not estimate the distance between the shooter and Buckoski when she was shot. (V18, R1718). The cause of death for Sarah Buckoski was multiple gunshot wounds. (V18, R1699).

Dr. Qaiser performed the autopsy on Ivory Hamilton. (V18, R1695). Ivory was forty-seven inches tall and weighed fifty-five pounds. (V18, R1696). She had a gunshot wound to the head and pattern contusions on her left cheek. (V18, R1696). The pattern of contusions on Ivory's cheek was a "parallel line of bruises," consistent with a "slap." (V18, R1697, 1698). Qaiser said the contusions were "inflicted by a forceful blow or impact." (V18, R1725). Qaiser noted Ivory's freshly missing teeth, which contained clotting in the sockets. (V18, R1699, 1723-24).[7] He estimated the missing teeth occurred within a few hours to one or two days. (V18, R1724, 1736). Qaiser estimated that Ivory was slapped at approximately the same time she was shot to death. (V18, R1702, 1724).[8] Ivory had a gunshot wound to the left side of her head. There were round abrasions, indicative of gun

[7] Qaiser was not aware that Ivory's teeth had been removed. He testified the teeth were "missing" not "removed." (R18, R1723).

[8] Dr. Qaiser testified that the color of the contusions on Ivory Hamilton's cheek indicated she was slapped within a "few hours maximum" of the time of her death. In addition, there was edema on the surface of her cheek. (V18, R1737). It was not likely that the swelling was a result of the teeth removal. It was a result "of direct slap." (V18, R1739).

powder stippling. (V18, R1704). The muzzle of the gun was within two feet of Ivory's head when she was shot, a "close-range" shot. (V18, R1705, 1720). The pattern of the bullet fractured a portion of Ivory's jaw and fractured her skull. (V18, R1705). The bullet's trajectory entered the left side of Ivory's head, and continued in a downward angle to the right side. (V18, R1727). Qaiser said it was "possible" Ivory ran in front of the gun. (V18, R1732).[9] Ivory died within a few seconds to a few minutes after she was shot. (V18, R1733, 1734). Qaiser concluded the cause of death for Ivory Hamilton was a gunshot wound to the head. (V18, R1707).

Denise Fitzgerald, crime scene technician, delivered the K-Swiss shoe box and some of its contents to Florida Department of Law Enforcement (FDLE) personnel. (V18, R1743-44, 1745, 1746). For safety reasons, Fitzgerald removed the handgun from the box, placed it in a paper bag, taped a bullet proof vest around it, and also delivered it to FDLE personnel. (V18, R1747-48, 1749).

Ron Larson, crime scene technician, responded to the crime scene. (V18, R1751). Officer Hunter gave Larson a shell casing recovered from the bedroom floor. (V18, R1752). Officer Roy gave Larson a recovered semi-automatic handgun (which contained a

[9] As discussed later in this brief, that "possibility" is sheer speculation.

jammed round in the breach) and a revolver. (V18, R1753-54). Larson submitted both weapons to FDLE personnel. (V18, R1754).

Larson attended the autopsies of Ben Hamilton, Sarah Buckoski, and Ivory Hamilton. (V18, R1755). He collected the projectile Dr. Qaiser removed from Ivory's right cheek. (V18, R1755). In addition, he collected the blood sample cards ("FTA"S") Dr. Qaiser made from each victim's blood as well as scrapings and fingernail clippings. (V18, R1756-57, 1783).

Larson assisted FDLE in gathering evidence. The home contained a surveillance system[10] on the front door and the southeast bedroom, which was the master bedroom. (V18, R1758, 1759, 1786). Larson recovered drug paraphernalia (a scale and baggies) from the top of the dresser in the master bedroom. (V18, R1761, 1762, 1774). A cardboard box at the foot of the dresser contained a black trash bag of marijuana. (V18, R1762, 1771-72, 1773, 1785-86). The baggies were consistent with the type used to package marijuana. (V18, R1776).

Larson was present when a shotgun inside a case was located under the bed in the master bedroom. (V18, R1784).

Larson said a gunshot residue ("GSR") test was not conducted on Benjamin Hamilton as, "pursuant to the Florida Department of Law Enforcement protocol, guns discharged in a

[10] Although images of the front door and bedroom could be seen on a big screen television in the living room area, there was no video recording equipment located. (V18, R1758-59, 1787).

room, all persons in that room will have gunshot residue on their person, so a test would not be conclusive." (V18, R1787-88). A gunshot residue test was conducted on Heyne. (V18, R1788).

Scott Henderson, FDLE crime lab analyst,[11] responded to the crime scene. (V18, R1789-90). Henderson duties included responding to major crime scenes to identify, document, collect, and preserve items of evidence. In addition, he is trained in blood stain pattern analysis and shooting or trajectory analysis. (V9, R1790). Henderson photographed the house and items located within the home. (V18, R1791). Photographs of blood on the master bedroom floor had markings indicating bodies had been moved by rescue personnel. (V19, R1818). There was a bullet hole on the master bedroom wall next to the bed, eighteen inches from the floor. Henderson recovered a copper jacket of a bullet inside the wall. (V19, R1819, 1822). A fired cartridge case was located on the floor near the dresser. (V19, R1823). Henderson did see any bullet holes in the mattress after the linens were removed. (V19, R1824). Henderson saw a plastic shotgun case underneath the bed after the mattress had been removed. (V19, R1825). The case contained a pump-action shotgun loaded with five shells, and nine loose shells. (V19, R1784,

[11] Henderson is currently employed as a criminalist with the Hennepin County Sheriff's Office in Minnesota. (V18, R1789, 1842).

1858). In addition, a zippered, leather case containing a .22 caliber revolver and ammunition was found on a nightstand in the bedroom. The cylinder contained five unfired cartridges. (V19, R1825-26, 1829). Crime scene technician Ron Larson gave Henderson two handguns he had collected earlier: a nine millimeter handgun and a .357[12] millimeter handgun. (V19, R1826, 1828, 1830). Henderson noted the jammed cartridge in the nine millimeter handgun. (V19, R1827). A safe, located on a nightstand, contained a small brown *Louis Vuitton* box, a cigarette roller, and keys, which had been inserted into the lock of the safe. (V19, R1836, 1859). There were bullet ricochet marks on the floor of the safe. Projectile fragments were found inside the safe (at the back) underneath a piece of felt-type liner. (V19, R1859, 1860). Three boxes of live ammunition were collected: one box of Federal thirty-eight Special plus-P ammunition contained fifteen bullets; one box of Mag Neck three-eighty auto contained forty-four cartridges; and one box of Winchester three-eighty contained thirty-one cartridges. (V19, R1868; 1875; 1883).

Henderson was unable to conduct blood stain pattern analysis because the blood stains appeared to have been altered during the emergency medical service rescue efforts. (V19,

[12] The trial transcript reflects that a ".327" handgun was collected. (V19, R1828). No weapon of that caliber is involved in this case.

R1837, 1842). There were swipe or drag marks in the blood stains, as well as shoe tracks or shoe impressions. (V19, R1837-38). Henderson concluded it was difficult to ascertain any sequence of events that occurred in the bedroom based on the alteration of the blood stains. (V19, R1838).

Henderson examined the bullet hole in the far side wall of the bedroom. It was not possible to determine the trajectory of the bullet. (V19, R1838, 1842). The wall was made of a particular kind of drywall concrete material where the bullet penetrated the wall and beyond, making it impossible to find a secondary mark. (V19, R1838, 1843). In addition, Henderson said it is frequently not possible to examine bullet injuries in individuals in order to conduct any reconstruction analysis. Henderson said, “Individuals are in motion all the time or moving ... if the projectile strikes bones or other areas of the body, the path can be deflected. So it’s no longer a straight path but has been altered by some intervening object.” (V19, R1839). Moving a body or transporting injured people also eliminates any ability to reconstruct a projectile’s path in the bodies. (V19, R1839-40). Henderson said, “pretty much every item in the room was gone through.” Personnel searched for any kind of ammunition components or items of evidence. (V19, R1864-65).

A shoe box in the bedroom contained small plastic baggies and a larger baggie containing marijuana. (V19, R1849-50). In

addition, there was a large, black trash bag lying in front of the dresser that contained a large amount of compressed, brick-like bundles of marijuana. (V19, R1850). A white trash bag containing marijuana was found on the west side of the night stand, right inside the entrance to the room. (V19, R1867). Marijuana was also found on top of the nightstand above the safe. (V19, R1876).

A photograph taken of the front exterior of the house showed the front door and adjacent window. There were some small indentations in the stucco facia between the door and the window, as well as some holes in the door frame and window glass, which were consistent with shotgun pellets. (V19, R1857). The damage appeared to be a few weeks old. (V19, R1877).

Heather Earhart, FDLE crime scene analyst, examines evidence for the presence or absence of a controlled substance. (V19, R1884-85). Earhart examined the contents of two cardboard box collected at the crime scene. One box contained 31 grams of cocaine and the other contained 2,193 grams of cannabis. (V19, R1886-87; 1888-89). In addition, the white trash bag and black trash bag collected from the bedroom contained a combined 2,216 grams of cannabis. (V19, R1887). Other items of evidence collected contained different amounts of cannabis. (V19, 1890).

Vicki Bellino, DNA analyst with the Florida Department of Law Enforcement, received the blood stain cards of the three

victims. (V19, R1900, 1904). Bellino also examined the safe collected from the Hamiltons' bedroom. She located a projectile fragment in the back of the safe and sent it to the firearms section of FDLE for analysis. (V19, R1905-06). Bellino did not observe any blood stains on the bullet fragment. (V19, R1906, 1914). Bellino examined various cartridge cases and bullet fragments collected at the scene. Some of the evidence had no indication of blood. On the items which tested positive for blood, she was not able to obtain a DNA profile. (V19, R1916, 1917). However, the white pillow case (State Exh. 69) which had been wrapped around the revolver found in the K-Swiss shoe box found in Larabie's attic contained Ben Hamilton's DNA. (V19, R1834, 1918).

Bellino examined the other contents of the K-Swiss shoe box. (V19, R1919). There was no indication of blood on the shoes in the box. (V19, R1919). However, the bloodstain on the shorts contained Ben Hamilton's DNA. (V19, R1920-21). The safe found in the master bedroom contained DNA profiles that matched Buckoski and Ben Hamilton. (V19, R1923).

Christine Murphy, firearms analyst with FDLE, examined five firearms submitted as evidence. (V19, R1925, 1927-28). The firearms included: a .22 magnum caliber North American Arms revolver; a twelve gauge Noble deer trail pump action shotgun; a .357 magnum caliber Smith and Wesson revolver; a nine millimeter

Luger Kel-Tec pistol; and a .38 Special Taurus revolver. A trigger pull test conducted on the nine millimeter handgun measured between eight and a quarter and eight and a half pounds. (V19, R1928, 1929, 1937). The trigger pull on the .38 special Taurus revolver measured between ten and a half and eleven pounds. (V19, R1936-37). Murphy examined two cartridge cases that were submitted as evidence. (V19, R1931, State Exhs. 17, 60). Murphy identified the cartridge cases as having been fired from the Kel-Tec nine millimeter pistol. (V19, R1931). The bullet removed from Ivory Hamilton had been fired from the .38 Special Taurus revolver. (V19, R1932-34). The bullet fragments found in the safe were also fired from the .38 Special Taurus revolver. (V19, R1934-35). The projectile fragment core and jacket removed from the southeast wall could not be linked to a specific weapon. (V19, R1820-21; 1936).

Detective Arthur Esposito, Titusville Police Department, interviewed Heyne on March 30, after he was taken into custody. (V19, R1944, 1945-46). The interview was videotaped.[13] (V19, R1947, 1957, 1973, State Exhs. 79, 80). Heyne was informed of his *Miranda*[14] rights. Heyne understood his rights and agreed to

[13] The interview lasted for approximately three hours and was published to the jury. (V19, R1964, 1974-75, 1980). In addition, a portion of the interview was offered as proffered testimony. (V19, R1997-2000; V20, R2015-17).

[14] *Miranda v. Arizona*, 384 U.S. 436 (1966).

talk with Esposito. (V19, R1948, 1949). Heyne did not sign the *Miranda* form as he was handcuffed for safety reasons. (V19, R1947-48). With Heyne's assistance, Esposito drew a sketch of the master bedroom as Heyne described it. (V19, R1955, 1963, State Exh. 78).

Esposito discussed certain topics with Heyne which included "God," "accident," and "self-defense." (V19, R1965, 1984). Esposito told Heyne that even when there are "accidents," a person still does time. (V19, R1966). Esposito discussed different scenarios with Heyne to help "jar the defendant's memory." (V19, R1983).

Heyne told Esposito that he lived with the Hamilton/Buckoski family and also worked with Hamilton. (V19, R1968-69). Esposito questioned Heyne about drug trafficking going in and out of the house. (V19, R1969, 1970). Esposito discussed scenarios with Heyne that included premeditation, manslaughter, and intent. (V19, R1980). Heyne admitted his role in the crimes after he saw the K-Swiss box in Officer Hunter's hands. (V19, R1967).

Heyne's motion for a judgment of acquittal was denied. (V20, R2018-52).

Darel Heyne's testimony was proffered.[15] (V20, R2064). Heyne, Appellant's father, owned and operated a construction business. Ben Hamilton and Appellant worked for him. (V20, R2065). Hamilton and Appellant worked together "ninety-nine percent of the time. They liked working together. They rode together. They lived together." (V20, R2066). There was no "ill-will" between them, "it was the complete opposite of that." (V20, R2068). Appellant occasionally brought Ivory Hamilton to Heyne's house when he was babysitting. (V20, R2068). Appellant did not exhibit any "ill-will" toward Ivory. (V20, R2069). On March 30, Appellant and Hamilton were sent to a job site in Merritt Island. Their truck broke down and had to be towed. Heyne and Appellant towed the truck back while another employee and Hamilton went to Merritt Island. Heyne later picked up Hamilton in Merritt Island and brought him home around 2:30 to 2:45. (V20, R2070). Heyne said Appellant was not at the house when he dropped off Hamilton. He did not know where Appellant was at that time. (V20, R2071).

Michelle Cullin lived with her mother, Yvette Bernard, next door to the Hamilton/Buckoski family. (V20, R2073-74). On March 30, at approximately 2:45 to 3:00 p.m., Cullin heard "some noises that it was like a couple of pops. It was kind of muffled

[15] The trial court ruled this testimony to be inadmissible. (V20, R2072).

in between as well." It was "more than three but less than six." The sounds were in a fast sequence with a time frame as long as ten seconds. (V20, R2074-75, 2084). Cullin recalled there were roofers in the area using a nail gun, but was not certain of the time they were working. (V20, R2075). She did not see the workers doing construction work that day but heard "construction noises" that day and previous days. (V20, R2079, 2083, 2084).

The court denied Heyne's renewed motions for a directed verdict, judgment of acquittal as to Counts I, II, and III, and motion for a mistrial based upon the testimony of Roxanne Larabie. (V20, R2093-94).

On August 4, 2009, the jury returned its verdict finding Heyne guilty as charged in the indictment of three counts of First Degree Premeditated Murder. (V21, R2283-84).

The penalty phase began on August 5, 2009. (V21, R2287).

Ron Larson, crime scene technician, has compared thousands of sets of fingerprints during his career. (V21, R2369, 2370). Larson collected fingerprints from Heyne on December 12, 2008, which matched those on a print card containing Heyne's prints from a previous conviction. (V21, R2371, 2373).

Detective Arthur Esposito interviewed Heyne on March 30, 2006. (V21, R2376-77). A CD containing a portion of the interview was entered into evidence. (V21, R2377).

Juanita Perez, Ben Hamilton's mother and Ivory's grandmother, read a statement to the court. (V21, R2383-88).

Meredith Peacock, victim advocate, read a statement to the court, which was prepared by Debra Reed, Sara Buckoski's mother. (V21, R2390-92).

Lori Swaby, program specialist for Osceola County school system, taught Heyne in elementary school. Heyne was in special education classes. (V21, R2396, 2397). Heyne was athletic, well-liked, and respected. (V21, R2398).

Lauren Harvin taught at an alternative education high school that Heyne attended. (V22, R2416-17). Heyne was a happy student who always completed his work. He was "kind of the leader" among students, "a good kid." (V22, R2418). Heyne had a good family background, and always tried to do his best. (V22, R2420).

Bill Hottenstein has taught special education classes for over thirty years in both Florida and Louisiana. He also taught in the Louisiana prison system and was involved in the prison ministry. (V22, R2421-22). Hottenstein taught Heyne in high school. Heyne was classified as having special learning disabilities and emotional difficulties. (V22, R2422, 2434). Heyne was "the most positive student in the classroom." (V22, R2425). Heyne often broke up fights or protected other students. (V22, R2426-27). After Heyne ended up incarcerated in the

Osceola County jail, Hottenstein taught him there, as well. (V22, R2428).

Heyne was sent to Columbia Correctional Institution. After his release, Hottenstein and Heyne kept in touch. (V22, R2430-31). They were supposed to meet for dinner the day of the murders. (V22, R2432).

Dr. William Riebsame, psychologist, evaluated Heyne over a three year period. (V22, R2435, 2442). He interviewed Heyne eight times and conducted psychological testing. (V22, R2442, 2505). He reviewed a vast amount of records, including school records, medical records, jail records and police reports. (V22, R2442). In addition, he reviewed psychological evaluations of Heyne from 1998. (V22, R2451).

In Riebsame's opinion, Heyne has a long-standing history of emotional and behavioral problems dating back to the age of five. (V22, R2443). Riebsame said Heyne's mother reported that Heyne was born a month late. She had a difficult pregnancy. Heyne was slow in learning how to walk and talk. However, he was active and very aggressive. (V22, R2445-46). At five years old, Heyne's parents took him to see a child psychiatrist who recommended placement in a mental hospital. Heyne's parents chose not to hospitalize him and cared for him at home. (V22, R2446). He was placed in special education classes but continued to have behavioral problems. At age ten, Heyne saw another child

psychiatrist and was diagnosed with attention deficit hyperactivity disorder. He was placed on psychostimulants such as Ritalin and Adderall. (V22, R2446). These medications lessened Heyne's impulsivity. (V23, R2626).

Heyne performed well in school during his middle school years both academically and behaviorally. (V22, R2446-47). Heyne was less consistent with his medication when he entered high school. At age sixteen he started getting in trouble with police. (V22, R2447). A psychological report from 1998 (when Heyne was sixteen) indicated Heyne was diagnosed with attention deficit hyperactivity disorder as well as depressive disorder. (V22, R2451-52).

Heyne told Riebsame about his alcohol and drug dependence that was occurring around the time of the murders. In Riebsame's opinion, Heyne was suffering from attention deficit hyperactivity disorder, and alcohol and cocaine intoxication at the time of the offenses. (V22, R2448-49).

Heyne had previously been treated for bipolar disorder in prison. Riebsame said "consideration should be given to the possibility of a bipolar disorder." (V22, V2449, 2450, 2510; V23, R2635). Heyne had made a few suicide attempts in prison and also had behavior problems. As a result, Heyne was administered Lithium and antidepressants to help stabilize his moods. (V22, R2450-51).

In March 2008, Riebsame spoke with Dr. Gebell, a neurologist, who had previously evaluated Heyne. Gebell identified "soft signs of a neurological disorder." (V22, R2452, 2486-87, 2504). With the exception of relying on Gebell's assessment of the "soft signs of a neurological disorder," Riebsame gave Dr. Gebell's assessment "very little" significance. (V22, R2492-93, 2501; V23, R2617). Riebsame did not agree with Gebell's diagnosis of Asperger's Syndrome or with Gebell's finding that Heyne did not have head trauma. (V22, R2493, 2501; V23, R2617). Both Heyne and his mother reported numerous concussions. (V22, R2494). In Riebsame's opinion, the neuropsychological testing Riebsame administered to Heyne indicated some sort of brain abnormality or brain damage.[16] (V22, R2453).

Riebsame reviewed test data from Dr. Golden, a neurologist, who had previously evaluated Heyne. Golden's test data indicated Heyne had impulse control issues as well as childhood trauma. Both of Heyne's parents as well as Heyne denied any kind of abuse history. (V22, R2454). Golden indicated Heyne may be suffering from post-traumatic stress disorder as well as borderline personality disorder. (V22, R2454).

[16] Heyne suffered a concussion at age three when he fell off a dresser and another concussion when he was an adolescent. (V22, R2453).

Riebsame spoke with Dr. Joseph Wu, M.D., who specializes in brain imaging. (V22, R2454-55). Subsequent to a PET scan conducted on Heyne on August 23 2008, Dr. Wu's report indicated "some sort of brain abnormality in the temporal and parietal lobes." (V22, R2455; V23, R2618, 2619, 2684).[17] These areas of the brain affect language development and impulse control. (V22, R2455-56). Prior to the murders, Heyne attempted suicide by trying to throw himself in front of a train. One of his siblings rescued him. Subsequent to that incident, Heyne spent time in a hospital. The murders occurred a few months later. (V22, R2456-57). Intelligence testing from 1989 indicated Heyne's IQ was 91, which is in the low-average to average range. (V22, R2457).

Results from the tests administered by Riebsame indicated Heyne was not malingering. (V22, R2458). His IQ score was comparable to the 1989 IQ score. (V22, R2459).

Riebsame said Heyne self-reported that he and Ben Hamilton had abused cocaine during the four days leading up to the murders as well as on the day of the murders.[18] (V22, R2462). In addition, Heyne self-reported smoking marijuana cigarettes with cocaine in them as well as drinking between ten and twelve beers

[17] There was no record of Heyne having suffered a head injury in jail between his arrest on March 30, 2006, and the PET scan conducted on August 23, 2008. (V23, R2619, 2684).

[18] There was no toxicology screening conducted on Heyne subsequent to his arrest. (V22, R2507).

throughout the morning and into the afternoon during an eight hour period. (V22, R2462, 2505, 2520). However, a toxicology report indicated Hamilton did not have any cocaine in his system at 5:00 p.m. on the day he was killed. (V22, R2597). In addition, Riebsame noted that Heyne appeared to be unconscious or passed out on a jail cell floor after his arrest. (V23, R2629). This behavior is common to someone who has been on a drug binge. (V23, R2629).

Heyne told Riebsame that he and Hamilton had conflicts about selling drugs and money issues prior to the murders. (V22, R2463). Heyne admitted to Riebsame that he shot all three victims. (V22, R2464, 2505). On the afternoon of the murders, Heyne said both he and Hamilton were armed, and that at some point, Hamilton had "waived a pistol." After he shot Hamilton, Heyne told Riebsame that Buckoski came into the room "screaming." When she dived under the bed, Heyne thought she was "going for a gun" and he shot her. Heyne told Riebsame he recalled Ivory was crying and tugging on his pants, that he shot her, but could not recall how that shooting occurred. (V22, R2464, 2506, 2561). In Riebsame's opinion, Heyne knew what he was doing when he shot the three victims, knew that it was wrong, and was able to appreciate the criminality of his conduct. (V22, R2561; V23, R2635). Riebsame was aware of the following: Heyne hid a gun in a pillow case and then ran out the

back door of the residence after the shootings; called his girlfriend to come and get him; went back to her home; showered; hid the gun and bloody clothing in her attic; and subsequently went to the mall to buy new clothing that was the same type that he had been wearing. (V22, R2562-65). Riebsame said "there is [sic] no intellectual issues ... in Heyne's case." (V22, R2566). Heyne's actions were logical. (V22, R2568).

At the time of the shootings, Riebsame estimated Heyne's mental or emotional maturity as that of a sixteen or seventeen year old adolescent. (V22, R2467). However, if Riebsame utilized a math formula that calculated Heyne's mental age compared to his chronological age, then Heyne's mental age would be closer to nineteen years old.[19] (V22, R2473-74). Heyne scored an 88 on the WAIS IQ test,[20] which was consistent with his elementary school IQ score. (V22, R2470-71).

Riebsame administered an executive function test which included a mazes subtest, judgment subtest, category subtest, and word generation subtest. (V22, R2477-78). The executive function test is designed to measure a person's ability to plan

[19] Riebsame utilized the Shipley Institute of Living Scale to calculate Heyne's mental age. (V22, R2558).

[20] Heyne scored an 85 on the verbal IQ and a 94 on the performance IQ. (V22, R2471-72). Riebsame assessed Heyne's perception abilities, planning, foresight, problem solving skills, mental flexibility, and impulse control. A report by Dr. Wu indicated a brain deficit. (V22, R2475-76).

and perform logical problem solving, and to measure a person's level of impulsivity, mental flexibility, and ability to perform complex decision-making. (V23, R2620-21). Heyne scored between the thirty-five to forty-eight range in these categories, which falls in the "mild impairment" to average range. (V22, R2478-80; V23, R2622). Heyne's overall score was in the twelfth percentile, which indicates mild impairment. (V23, R2622). Riebsame said a person who scores low on this test would not respond to situations in a logical and practical way. (V23, R2621).

In Riebsame's opinion, due to Heyne's mental impairment and in conjunction with being under the influence of drugs and alcohol when he shot the three victims, he was agitated, his judgment was impaired, and he reacted impulsively. (V22, R2465-66, 2507, 2511, 2513). Riebsame diagnosed Heyne with ADHD: "it does not go away. It changes across a person's life span." (V22, R2510, V23, R2627).

Riebsame administered the Personality Assessment Inventory test to Heyne which measures whether a person is exaggerating or minimizing their problems. Heyne completed the test in a reliable and valid way. (V23, R2623-24). He admitted his alcohol and drug problems have caused difficulty throughout his life, which includes a history of criminal activity. (V23, R2624). Heyne is impulsive and gets involved in volatile and intense

relationships. He is sensitive to criticism, but can come across "in a warm manner." However, if Heyne's mood changes, he can appear hostile and demanding. Others may not know how he would react. Heyne has potential for suicidal behavior. (V23, R2625).

Riebsame said there was no indication that five-year-old Ivory Hamilton criticized Heyne or was volatile with him. "To the contrary, they appeared to have a good relationship." The only sound Ivory made during this "emotionally charged situation"[21] was her crying. (V23, R2644).

Heyne was suffering from an extreme mental disturbance and was not able to conform his conduct to the requirements of the law. (V22, R2466, 2512; V23, R2635-36). However, Heyne's actions were driven by his voluntary substance intoxication and mental disorder. (V22, R2512, 2513). Heyne made "very impulsive moment-to-moment decisions with little or no consideration for the actions, unfortunately." (V23, R2643).[22]

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[21] Heyne told Riebsame that Hamilton called him insulting names and accused Heyne of owing him money while he was waving a gun at Heyne. (V23, R2645).

[22] Riebsame testified on a proffer about the toxicology reports for Heyne and Ben Hamilton. (V22, R2572-2596). A toxicology report indicated Hamilton did not have any cocaine in his system at 5:00 p.m., which was several hours before his death at 8:57 p.m. (V22, R2582, 2597). Riebsame did not know how long it is after someone consumes cocaine before there is no trace in the body. (V22, R2600).

Dr. Joseph Wu, M.D., is an associate professor of psychiatry at the University of California Irvine College of Medicine, and clinical director for the University's Brain Imaging Center. (V23, R2648-49). The brain imaging center assesses neuropsychiatric conditions by using PET scans. (V23, R2649). PET scans assess brain function. (V23, R2660). By utilizing PET scans, Wu specializes in assessing conditions such as traumatic brain injury, Alzheimer's disease, Parkinson's disease, schizophrenia, depression, and addiction. (V23, R2649). Wu said he "would never make a diagnosis from just looking at a person's PET scan by itself." (V23, R2673, 2683). A person's history and other tests must be taken into consideration to make a diagnosis. (V23, R2674).

Heyne's PET scan results indicated an abnormality in the temporal lobe and the parietal lobe. (V23, R2674, 2676). Wu compared the results with another scan of an age match male, normal control. (V23, R2674, 2676). There was a significant asymmetry in Heyne's left temporal area which indicated a history of brain trauma or some type of traumatic brain injury. (V23, R2676). Records indicated Heyne suffered a concussion at age 5. Neuropsychological testing administered to Heyne at age 7 indicated a perceptual speed of age 5 and a full scale IQ of 91. Since his processing speed was significantly lower than his IQ, this indicated brain trauma at a young age. (V23, R2677-78). He

failed a speech language test at age 8 despite having an “almost normal IQ,” which indicated cognitive impairment. (V23, R2678). Although Heyne was diagnosed with ADHD, people with this disorder generally do not have a slow perceptual speed as Heyne does. (V23, R2678).

Wu said Heyne had poor impulse control at a young age. He started abusing marijuana at age 11, alcohol at age 14, and cocaine at age 15. Wu said patients with brain injuries are more likely to develop addiction problems because of their poor impulse control. At age 16, Heyne was sent to a rehabilitation program. At age 17, Heyne tried to choke another student in class. Heyne has cognitive and emotional processing deficits. (V23, R2679).

After Heyne was sent to prison he attempted suicide on a number of occasions. He was treated with anti-depressants. (V23, R2679-80). Mood swings indicated a “bi-polar disease of some sort.” (V23, R2680). Wu said brain injured people are much more likely to develop mood disorders or depression. (V23, R2680). Heyne suffered another head injury in 2004. In 2005, Heyne was suicidal. Heyne’s brother restrained him from jumping in front of a train. (V23, R2680-81). Wu said a person with a head injury is much more likely to suffer further head injuries and “to have even further catastrophic responses with subsequent injuries.” (V23, R2681).

Wu reviewed voluminous records which included Heyne's school records and testing results, prison records, witness statements, and a DVD containing Heyne's confession. (V23, R2683-84). Since there was no record of any head injury subsequent to the shootings in March 2006, Wu concluded that the August 2008 PET scan results indicated the state of Heyne's brain on March 30, 2006. (V23, R2685).

Wu testified that the temporal lobe is one of the two areas of the brain that controls impulse along with the frontal lobe. (V23, R2685). Heyne was significantly impaired in his ability to control aggressive impulse due to a neurological failure. (V23, R2690). Heyne's abuse of cocaine and alcohol the day of the shootings was "like pouring gasoline on a fire." (V23, R2692). Given the scenario that Hamilton pointed a gun at Heyne, and threatened him, Heyne would not have been able to control his aggression, his behavior, and his fear. (V23, R2697). In addition, due to "his injured brain and the substances on top of it," Heyne would not have had the ability to control his behavior and impulses with respect to Buckoski and Ivory Hamilton. (V23, R2704, 2705). Wu said a person who is a regular heavy drug user would metabolize drugs at a faster rate. (V23, R2706).

In Dr. Wu's opinion, Heyne was under the influence of an extreme mental or emotional disturbance at the time of the

shootings. His capacity to conform his conduct to the requirements of the law was substantially impaired. (V23, R2705-06).

Wu said the PET scan machine used on Heyne is a different model than the one he uses. The normals Wu used to compare Heyne's results were from the machine Wu uses himself. (V23, R2710-11). A PET scan does not provide a specific quantitative formula that predicts a specific behavior. (V23, R2711).

Wu did not recall reviewing any of the neuropsychological test results Heyne obtained that had been administered by Dr. Riebsame. (V23, R2730). Wu and Dr. Golden reached the same conclusion with regard to Heyne's brain injury. (V23, R2740).

Jeanna Heyne, Appellant's older sister by two years, said she and Appellant have always had a special bond. They shared the same friends. (V24, R2815-16). When they were in high school, they smoked marijuana together in lieu of attending school. (V24, R2817). They smoked a "blunt"[23] every morning before school. (v24, R2818). Heyne and Appellant were best friends, and he was protective of her. (V24, R2818).

Appellant was friendly with a few elderly neighbors. He helped them with yard work and sat and talked with them after school. (V24, R2819).

[23] A blunt is marijuana rolled into cigars. (V24, R2818).

After Appellant's first incarceration he changed. He was nervous and distant with the family. (V24, R2819). Nonetheless, Heyne and Appellant have always maintained a bond. (V24, R2820). Appellant referred to Ben Hamilton "the brother that he never had." Ivory Hamilton "was like a niece to him." Ben Hamilton was Appellant's son's[24] godfather. (V24, R2823).

Darel Heyne, Appellant's father, said his wife had a difficult pregnancy with Appellant. Appellant was born a month late. (V24, R2825). Appellant also has an older brother, Jeremy. Both Jeremy and Jeanna progressed and developed while Appellant "was always behind. He was always slow." (V24, R2826). Disciplining Appellant "was extremely hard." Appellant was "tough but not smart." He was strong, big and rebellious. (V24, R2827).

When Appellant was three and one-half years old, he spent a night in the hospital after suffering a concussion. (V24, R2829). At five years old, his pediatrician suggested his parents take him to a behavioral learning center, Laurel Oaks. Appellant was not listening, would not respond and was aggressive toward his parents. (V24, R2828). At age eight, Appellant was prescribed Ritalin and started playing football. (V24, R2830). The combination of medicine and sports helped with

[24] At the time of trial, Heyne's son was three years old and suffered from severe birth defects. (V24, R2850).

Appellant's demeanor. He was calmer, he studied, and got along with his peers. (V24, R2834). When Appellant was a teenager, he suffered a hard hit during football practice. He was dazed and "glassy-eyed." However, Heyne did not take Appellant to the hospital. (V24, R2835-36).

Appellant stopped taking Ritalin in his teens as he did not like the effects. Consequently, his grades dropped and he was not allowed to play sports. (V24, R2837). Appellant helped elderly neighbors and worked in their yards. (V24, R2838).

Appellant was sent to prison for robbery and released when he was twenty-four years old. He isolated himself and did not want to be around people. (V24, R2839). Appellant started working construction jobs in Heyne's company. Appellant got Ben Hamilton a job with Heyne, as well. (V24, R2840). Appellant and Hamilton "had a very tight bond." (V24, R2841).

Heyne and his wife spoke to Appellant about his suspected drug use and suggested he live with them. (V24, R2844, 2846).

After Heyne heard about the shootings, he tracked Appellant down and sent his wife to get Appellant at Roxanne Larabie's home. Heyne noticed Appellant "was coming down. You could tell that he just -- it was like talking to him and he was staring at you but nothing would register." (V24, R2852). The Heynes brought Appellant back to the Moon Road home. (V24, R2852).

Officer Jeffrey Watson is trained and experienced in dealing with people under the influence of drugs and/or alcohol. (V24, R2887). He did not detect the smell of alcohol when he interviewed Heyne in his patrol car on March 30, 2006, shortly after the murders. (V24, R2888, 2891). There were no physical or verbal signs from Heyne that indicated he was under the influence of drugs or alcohol. (V24, R2888-89, 2890).

Detective Arthur Esposito has worked for thirty-six years in law enforcement. On March 30, 2006, he interviewed Heyne for three hours at the Titusville Police Department. (V24, R2896). Esposito did not observe or detect any signs that Heyne was under the influence of drugs or alcohol. (V24, R2898-99). After Esposito left the room, Heyne went to sleep on the floor. (V24, R2896-97, 2903).

On August 10, 2009, the jury returned the following recommendations: 1) Count I – a sentence of life imprisonment without the possibility of parole for the murder of Benjamin Hamilton; 2) Count II – a sentence of death by a vote of eight to four for the murder of Sarah Buckoski; and 3) Count III - a sentence of death by a vote of ten to two for the murder of Ivory Hamilton. (V25, R3017-18).

A *Spencer* Hearing was conducted on August 29, 2009. (V3, R404-17).

On December 17, 2009, the court followed the jury's advisory sentence and imposed a sentence of death on Justin Heyne for the murder of Ivory Hamilton and imposed a sentence of life without the possibility of parole for the murder of Benjamin Hamilton. (V3, R421, 422). The court overrode the jury's recommendation of death for the murder of Sarah Buckoski and sentenced Heyne to life without the possibility of parole. (V3, R421).

For the murder of Ivory Hamilton, the court found the following aggravating circumstances: 1) previously convicted of another capital felony or a felony involving the use or threat of violence to the person – great weight; 2) heinous, atrocious or cruel – great weight; and 3) victim less than twelve years old – great weight. (V8, R1225-27). For the murder of Sarah Buckoski, the court found one aggravating circumstance: previously convicted of another capital felony or a felony involving the use or threat of violence to the person – great weight. (V8, R1225-26). The court found the following mitigating circumstances: 1) defendant suffers from a mental illness – great weight; 2) defendant has brain damage and brain deficits – great weight; 3) defendant had a problem with substance abuse and dependence – moderate weight; 4) capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired - moderate

weight; 5) under the influence of extreme mental or emotional disturbance - little weight; 6) – defendant was a good, caring father to his handicapped son – very little weight; 7) defendant cared for elderly neighbors – very little weight; 8) defendant gave his coat to a homeless person – very little weight; 9) as a child, defendant protected younger, weaker children – very little weight; 10) defendant played sports and was devastated when he could no longer play – very little weight; 11) at age five, it was recommended defendant receive in-patient psychiatric treatment but did not receive it – moderate weight; 12) history of suicide attempts and self-destructive behavior – moderate weight; 13) good behavior during trial - some weight. The court did not find the following mitigating circumstances: 1) the victims Ben Hamilton and Sarah Buckoski participated in the defendant's conduct or consented to the act (death penalty not imposed); 2) defendant's age; 3) effect of a death sentence on his family; 4) defendant developmentally delayed; and 5) defendant was not taking his medications at the time of the shootings which controlled his impulsive behavior in the past. (V8, R1227-31).

For the murder of Ivory Hamilton, the court found that the aggravation outweighed the mitigation, and imposed a sentence of death. (V8, R1233-34). The court concluded the mitigation outweighed the aggravating circumstance for the murder of Sarah

Buckoski and imposed a life sentence without the possibility of parole. (V8, R1233). The court imposed a life sentence without the possibility of parole for the murder of Benjamin Hamilton. (V8, R1232-33).

This appeal follows.

SUMAMRY OF THE ARGUMENT

The motion for a judgment of acquittal was properly denied. Competent substantial evidence supports the three first-degree murder convictions -- each count of the indictment was properly allowed to go to the jury.

Under the facts of this case, the murder of five-year-old Ivory Hamilton was especially heinous, atrocious or cruel. The sentencing court properly found this aggravator applicable based on the facts (which included Ivory witnessing the murders of her parents), and that finding is supported by competent substantial evidence.

The claim that the sentencing court "rejected mitigating evidence" is not supported by the facts. The sentencing order shows that the court properly assessed and weighed the proposed mitigation, and did not "reject" any mitigation that Heyne proposed.

Death is the proper sentence in this case. At least three aggravating circumstances exist, and each factor was properly given great weight. When the mitigation is weighed against that

substantial aggravation, death is the only sentence that is proper for Ivory's murder.

The sentencing court improperly rejected the "witness elimination" aggravating factor. The facts, which are essentially undisputed, show that Heyne had no reason at all for killing five-year-old Ivory other than to keep her from identifying him as the person who killed her parents. This Court should apply the witness elimination aggravator to this case in addition to the other three aggravators found by the sentencing court.

ARGUMENT

I. THE DENIAL OF THE JUDGMENT OF ACQUITTAL CLAIM[25]

On pages 27-33 of his brief, Heyne says that his motion for judgment of acquittal should have been granted as to the three counts contained in the indictment. The standard of review for the denial of a motion for judgment of acquittal is whether the verdict is supported by substantial, competent evidence. *See Crump v. State*, 622 So. 2d 963, 971 (Fla. 1993) (question of whether evidence fails to exclude any reasonable hypothesis of innocence is for jury to determine, and if there is substantial, competent evidence to support jury verdict, verdict will not be

[25] It bears repeating that Heyne only received a sentence of death for the murder of five-year-old Ivory Hamilton. While the jury recommended death for the murder of her mother, the trial court overrode that recommendation based upon the erroneous, but unappealable, belief that there was insufficient aggravation.

reversed on appeal); *Tibbs v. State*, 397 So. 2d 1120 (Fla. 1981), *aff'd*, 457 U.S. 31 (1982) (concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment); *Francis v. State*, 808 So. 2d 110, 131 (Fla. 2001) ("In moving for a judgment of acquittal, a defendant 'admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence.' *Lynch v. State*, 293 So. 2d 44, 45 (Fla. 1974)"). There is no basis for relief -- each count of the indictment was properly allowed to go to the jury.

With respect to the murder of Benjamin Hamilton, Heyne's sole claim is that he had argued that the use of deadly force was in self-defense, and was therefore justified. Aside from the fact that a self-defense claim creates a jury question, *State v. Hull*, 933 So. 2d 1279, 1280 (Fla. 2nd DCA 2006); *Lusk v. State*, 531 So. 2d 1377, 1381 (Fla. 2nd DCA 1988), there was ample evidence that not only rebutted the self-defense claim, but also established premeditation beyond any doubt. As to premeditation, there was no doubt at all that Heyne entered Benjamin Hamilton's bedroom after arming himself with a .38-caliber Taurus revolver.

(SR, V6, R119).[26] Heyne admitted this fact in his statement. The testimony established that Benjamin Hamilton was found face down on his bed, with a gunshot wound to his head. (V17, R1558, V18, R1680). While a second weapon (the Kel-Tec 9mm) was located in the bedroom, even assuming that Heyne's statement that Benjamin Hamilton had armed himself with this weapon is true, it makes no difference.

It is undisputed that Heyne was armed **when he entered the room**, and, according to Heyne's statement, Benjamin Hamilton dropped the 9mm pistol to the floor when Ivory Hamilton (the minor victim) entered the room. (SR, V6, R148). Even if there were some self-defense element to the scenario, it no longer existed when Benjamin Hamilton voluntarily relinquished his weapon -- in any event, self-defense did not come into play for the child victim.[27] The fact that Heyne was armed when he entered the victim's bedroom, coupled with his stated intent that they either "shake hands or [] do what we gotta do" (SR, V6, R157), along with the fact that the victim was shot once in the head

[26] There is no .357 caliber pistol involved in this case. The murder weapon was a Taurus .38. See Order at V8, R1220, at footnote 2.

[27] There is no real dispute that the weapon used by Heyne was the Taurus revolver recovered from his girlfriend's attic. (SR, V6, R133-34, 162).

establish a premeditated murder beyond any doubt. As to Benjamin Hamilton, this claim is meritless.

With respect to Sarah Buckoski, the evidence showed that she was shot in the head while on the floor trying to protect herself with her arm over her head.[28] There is no dispute that Sarah entered the bedroom **after** Heyne's initial confrontation with Benjamin, and there is evidence that Heyne did not even know that Sarah was at the residence. (SR, V6, R116, 117-18, 124, 128, 131, 156-57). Heyne could have left without doing anything to Sarah, but, according to his own statement, he shot her **because she was screaming** after Benjamin had been shot. (SR, V6, R158). To the extent that Heyne suggests a self-defense component to the murder of Sarah, no inference supports that suggestion. It is true that a cased shotgun was under the bed on the same side where Sarah's body was found, but it is also true that Sarah was found huddled with her head under the bed, and there was no indication that she had tried to take the shotgun out of its case. *See,* State's Exhibit 57, 58; (V18, 1784). The photographs of that weapon indicate that it was found in a hard-plastic case that was fully latched at the time of its discovery. *Id.* Moreover, it is nonsensical to suggest that Sarah would have attempted to get to the shotgun when there was a

[28] No powder stippling was found on this wound or on the wound to Benjamin Hamilton's head. (V18, R1678, 1687, 1692).

readily-accessible handgun in the living room area of the house where she had been before entering the bedroom. (*See, e.g.,* SR, V6, R160; V17, R1561).[29] Sarah was shot simply because she was a witness. Her murder was premeditated beyond any doubt.

Finally, as to the murder of Ivory Hamilton, the evidence is that Heyne was the only one who was armed when Ivory entered the bedroom, and, furthermore, the evidence is that Ivory was shot in the head from close range, as indicated by the powder stippling around the entry wound to her head. (V18, R1704). Ivory was slapped in the face shortly before she was killed, and the evidence is that Heyne is the only person who could have inflicted that injury. (SR, V6, 152-54; V18, R1697; V18, R1702-03, 1725). **Further, the evidence shows that Heyne had to walk around the bed in order to slap Ivory and then shoot her in the head at close range.** *See*, State's Ex. 73, 78; (V19, R1882; R1955). Those facts establish that Ivory was killed simply because she was a witness -- her murder was also premeditated. There is no basis for relief, and there was no error in the denial of the motion for judgment of acquittal.

II. THE HEINOUSNESS AGGRAVATOR

On pages 34-41 of his brief, Heyne says that the trial court should not have found the heinous, atrocious or cruel

[29] Heyne incorrectly referred to this handgun as "a 380" -- in fact it was a .357 Magnum caliber revolver. (V17, R1561; V19, R1828; SR, V6, R155;).

aggravating circumstance applicable to the murder of Ivory Hamilton. Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in *Alston v. State,* 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," *quoting Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997), *cert. denied*, 522 U.S. 970 (1997). There is no error in finding the heinousness aggravator when the true facts are considered.

In finding that this aggravating circumstance was applicable, the trial court said:

> Most deaths caused by gunshot do not qualify as being heinous, atrocious, or cruel. Death by gunshot is generally instantaneous, or nearly so, and the Supreme Court of Florida has consistently held this aggravating circumstance does not apply in these cases, unless the shooting is accompanied by additional acts resulting in mental or physical torture to the victim. *Diaz v. State*, 860 So. 2d 960, 966-967 (Fla. 2003); *Rimmer v. State*, 825 So. 2d 304, 327-328 (Fla. 2002); *Robertson*, 611 So. 2d at 1228. The death of Ivory Hamilton was instantaneous but it

> only came after Ivory had witnessed the murder of her father and her mother. While the series of events occurred relatively quickly, Ivory heard the noise of the discharge of a large caliber hand gun and saw her father shot in the head, then she saw and heard her mother screaming and heard another shot while she witnessed her mother's murder. Finally, while crying in panic, she tugged at the defendant's shorts and was shot in the head. The time may have been short between the first shot and the last, but Ivory experienced terror and fear no five year old child should ever experience in those brief moments.
>
> The court finds this aggravating circumstance to have been established beyond a reasonable doubt and it is given great weight.

(V8, R1226-27).[30] Those findings are squarely based in the evidence from trial, and, because that is so, they are supported by competent substantial evidence and should not be disturbed.[31]

The central component of Heyne's argument is his claim that the murder of five-year-old Ivory Hamilton was not heinous, atrocious or cruel because he did not **intend** to "cause unnecessary and prolonged suffering." *Initial Brief* at 35. That argument is based on a misstatement of Florida law, which is that a claim "that HAC must be struck because HAC only applies

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[30] The court did not mention that Ivory was slapped before she was shot -- that certainly would have increased her fear even more.

[31] On page 36 of his brief, Heyne says that "no physical evidence [] provides any certainty concerning how the murders occurred." It is true that the scene was disturbed by emergency medical personnel, but that is to be expected, since two of Heyne's three victims were still alive when law enforcement arrived at the scene. The fact that the sequence of events was established by testimony instead of physical evidence makes no difference.

in instances in which the defendant intended to commit a heinous, atrocious, or cruel murder, is without merit as the 'intention of the killer to inflict pain on the victim is not a necessary element of the aggravator.' *Guzman v. State*, 721 So. 2d 1155, 1160 (Fla. 1998); *see also Hitchcock v. State*, 755 So. 2d 638, 644 (Fla. 2000)." *Schwab v. State*, 814 So. 2d 402, 406 (Fla. 2002); *McGirth v. State*, 2010 WL 4483506 (Fla. Nov. 10, 2010). The facts of this case are similar to the facts in *Francis*, where this Court also upheld the heinousness aggravator, saying:

> It is important to note that we have upheld a finding of HAC where the medical examiner has determined that the victim was conscious for merely seconds. *See Rolling v. State*, 695 So. 2d 278, 296 (Fla. 1997) (upholding HAC where medical examiner concluded that victim was conscious anywhere between 30 and 60 seconds after she was initially attacked); *Peavy v. State*, 442 So. 2d 200, 202-03 (Fla.1983) (upholding finding of HAC where medical examiner testified that victim lost consciousness within seconds and bled to death in a minute or less and there were no defensive wounds).
>
> Moreover, as we have previously noted, "the fear and emotional strain preceding the death of the victim may be considered as contributing to the heinous nature of a capital felony." *See Walker*, 707 So.2d at 315; *see also James v. State,* 695 So. 2d 1229, 1235 (Fla. 1997) ("[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel."). In this case, although the evidence did not establish which of the two victims was attacked first, the one who was first attacked undoubtedly experienced a tremendous amount of fear, not only for herself, but also for what would happen to her twin. In a similar manner, the victim who was

> attacked second must have experienced extreme anguish at witnessing her sister being brutally stabbed and in contemplating and attempting to escape her inevitable fate. We arrive at this logical inference based on the evidence, including photographs presented at the guilt phase, which clearly establishes that these two women were murdered in their home only a few feet apart from each other. As a result, we conclude that the trial court's HAC finding is further buttressed by the logical fear and emotional stress experienced by the two elderly sisters prior to their deaths as the events were unfolding in close proximity to one another. [FN16]
>
> > [FN16] There is no evidence in the record to suggest that the bodies of the victims had been moved after they were killed. As such, we note that one of the sisters was killed in an area designated the living room and the other was killed in the kitchen area. The evidence, however, shows that these rooms were joined and divided only by a single waist-high counter top. Thus, it would have been impossible for the victims not to have seen each other. **Based on the record and close proximity within which the victims were murdered, no speculation is required to conclude that both victims were subjected to appalling amounts of fear and stress before their deaths.**

Francis v. State, 808 So. 2d 110, 135 (Fla. 2001). (emphasis added). The highlighted portion of the *Francis* decision is particularly relevant to this case, where all three victims were shot to death in a room measuring 12 feet by 13 feet. No speculation is necessary to conclude that Ivory Hamilton was subjected to an overwhelming amount of fear. *See also*, *Farina v. State*, 801 So. 2d 44 (Fla. 2001). The sentencing

court properly found the heinousness aggravator, and gave it the great weight it deserved. There is no basis for reversal.

Alternatively and secondarily, without conceding error of any sort, death is still the proper sentence even if the heinousness aggravator is removed from the sentencing equation. Even without that aggravator, the prior violent felony (actually 2 of them) and the victim under 12 aggravators remain unchallenged. Under the facts of this case, any single aggravator by itself is sufficient to support the death sentence. Two of the three aggravators are far more than sufficient. Even if there was some error, it was harmless beyond a reasonable doubt. *State v. DiGiulio*, 491 So. 2d 1129 (Fla. 1986).

III. THE "REJECTION OF MITIGATION" CLAIM[32]

On pages 42-47 of his brief, Heyne says that the sentencing court "erred when it rejected statutory mitigating" evidence. This Court in *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), established relevant standards of review for mitigating circumstances: 1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to *de novo* review by this Court; 2) whether a mitigating circumstance has

[32] Heyne says that the sentencing court "rejected" the statutory mental mitigating circumstances. As explained below, that is not what happened. This claim is based on a false representation of what the sentencing court did.

been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; and finally, 3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. *See also Kearse v. State*, 770 So. 2d 1119, 1134 (Fla. 2000) (observing that whether a particular mitigating circumstance exists and the weight to be given to that mitigator are matters within the discretion of the sentencing court); *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000) (receding in part from *Campbell* and holding that, though a court must consider all the mitigating circumstances, it may assign "little or no" weight to a mitigator); *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000) (explaining that the trial court may reject a claim that a mitigating circumstance has been proven provided that the record contains competent substantial evidence to support the rejection). This Court has said:

> In summary, we have established a number of broad principles for the trial courts to use in evaluating the mitigating evidence offered by defendants. A trial court must find as a mitigating circumstance each proposed factor that has been established by the greater weight of the evidence and that is truly mitigating in nature. However, a trial court may reject a proposed mitigator if the mitigator is not proven or if there is competent, substantial evidence to support its rejection. Even expert opinion evidence may be rejected if that evidence cannot be reconciled with the other evidence in the case. Finally, even where a mitigating circumstance is found a trial court may give it no weight when that circumstance is not mitigating based on the unique facts of the case.

Coday v. State, 946 So. 2d 988, 1003 (Fla. 2006).[33] That is the state of the law, and the sentencing court followed it exactly.

Heyne's argument is based on a partial quotation from the sentencing order, which he has set out at page 46 of his brief. When the other relevant parts of the sentencing order are considered, it is clear that the sentencing court did not abuse its discretion in the weight assigned to the statutory mental mitigating factors. In weighing the mitigation, the sentencing court said:

> 1. The defendant suffers from a mental illness.
>
> This mitigating circumstance was presented through the testimony of Dr. William Riebsame, who spent approximately 20 hours interviewing and testing the defendant and who reviewed various records, including school records, medical records, Department of Corrections records, police reports, and jail records. He also considered a report supplied by Dr. Daniels and test results from Dr. Gebel and the PET scan results supplied by Dr. Joseph Wu.
>
> Dr. Riebsame diagnosed the defendant to have ADHD from age 5 as well as possible bi-polar disorder. Dr. Riebsame believes that one or the other or both of these disorders have caused the defendant to have impulse control disorder. He also diagnosed the defendant to have cocaine and alcohol dependence from an early age.
>
> This mitigating circumstance was established by the evidence and the Court gives it great weight.

[33] Heyne's argument opens with partial, out-of-context, quotations from *Coday* which inaccurately represent the holding in that case.

2. The defendant has brain damage and brain deficits.

Dr. Joseph Wu, an associate professor of psychiatry at the University of California, performed a PET scan on the defendant and found abnormalities. His opinion is that the defendant's brain images are Consistent with Someone who has a history of traumatic brain injury The defendant's history includes a concussion at age *5* arid, at age 7, he tested processing speed was significantly lower than his I.Q. score, which is a classic neuropsychological testing sign of brain trauma. Prison records show the defendant had another head injury in 2004.

Dr. Wu testified that people with these types of brain injury to the temporal and parietal lobes have significant problems regulating aggression and impulse and are more likely to develop addiction to alcohol and drugs.

This mitigating circumstance was established and the Court gives it great weight.

3. The defendant had a problem with substance abuse and dependence, in particular with cocaine and alcohol.

The jury was not instructed on this mitigating circumstance but it was clearly established by the evidence. The defendant claims that he used both cocaine and alcohol earlier in the day of the day of the murders. His father picked the defendant up about an hour and a half after the murders and the defendant appeared to be coming down from alcohol or drugs. Additionally, the defendant appeared to be sleeping while waiting to be questioned by the homicide and that could be a sign of intoxication. However, at the time of the murders he had no difficulty obtaining the murder weapon, firing it with deadly accuracy, and contacting Roxanne Larabie immediately thereafter in order to conceal the murder weapon, his clothes, and the drugs he removed from the residence. The Court concludes that if the defendant was under the influence of alcohol or drugs at the time of the murders, he was not affected to the point of being significantly impaired, and this mitigating

circumstance is given moderate weight.

4. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

This mitigating circumstance is related to numbers 1, 2, and 3. It was established through the testimony of Dr. Riebsame and Dr. Wu. However, the Court finds that the combination of brain deficits and consumption of drugs and alcohol at the time of the murders amounts to impairment of the defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, but not substantial impairment. This mitigating circumstance is given moderate weight.

5. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

This mitigating circumstance is related to numbers 1, 2, 3, and 4. The evidence establishes the emotional disturbance which influenced the defendant's actions immediately before the murders was anger. He and Benjamin Hamilton had an argument just before the murders and strong words were exchanged between them. While the mitigating circumstance of being under the influence of an emotional disturbance, but not an extreme emotional disturbance, was established by the evidence, it is given little weight.

(V8, R1227-29). When the sentencing order is considered in context, it is clear that there was no abuse of discretion. This claim is meritless.

IV. THE DEATH SENTENCE IS PROPORTIONATE

This Court has described its proportionality review in the following way:

> Proportionality review "is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State*, 564 So. 2d 1060, 1064

> (Fla. 1990). Instead, the Court looks at the totality of the circumstances to determine if death is warranted in comparison to other cases where the sentence of death has been upheld. Id. This Court has made clear that HAC is one of the "most serious aggravators set out in the statutory sentencing scheme." *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999).

England v. State, 940 So. 2d 389, 408 (Fla. 2006). In sentencing Heyne to death for the murder of Ivory Hamilton, the court found three aggravating factors: that Heyne had previously been convicted of a capital felony; that the murder was especially heinous, atrocious or cruel; and that the victim was less than 12 years of age. (V8, R1225-1227).[34] Each of those factors was properly given great weight by the court. Arrayed against that extensive aggravation is various mitigation which the court properly considered and ultimately found did not outweigh the aggravating factors. This Court has upheld death sentences in similar circumstances, and there is no reason this case should be treated differently. *See, Reynolds v. State,* 934 So. 2d 1128, 1156 (Fla. 2006); *Lynch v. State,* 841 So. 2d 362, 369 (Fla. 2003); *Henyard v. State,* 689 So. 2d 239, 254 (Fla. 1996).

[34] The sentencing court rejected the "witness elimination" aggravator. That ruling is difficult to reconcile with the facts of the case and the deliberate process Heyne went through before he executed Ivory Hamilton. There was simply no reason for him to kill her other than to eliminate the only remaining witness.

To the extent that Heyne attaches some significance to the trial court's rejection of the jury's recommended death sentence for the murder of Sarah Buckowski, he does not explain how the sentences are related. The sentencing court only found one aggravator for Sarah's murder, and, while the correctness of that determination is debatable, it cannot be reviewed. What is before this Court is the death sentence imposed for the murder of a five-year-old child -- that sentence is supported by three aggravating factors, each of which was properly given great weight by the sentencing court. The sentencing court correctly found that those aggravators outweighed the mitigation, and that result should not be disturbed. Death is the proper sentence in this case.

THE CROSS APPEAL

THE SENTENCING COURT ERRONEOUSLY REJECTED THE WITNESS ELIMINATION AGGRAVATOR

In his statement, Heyne responded affirmatively when asked if he had killed Ivory because she was a witness.[35] (SR, V6, R150-51). The sentencing court recognized this fact, but concluded nonetheless that the witness elimination aggravator had not been proven. *See,* Vol. 8, R1220-21 and n.4. That conclusion is erroneous, and should be reversed.

[35] Later in his statement, Heyne professed, "I wouldn't kill Ivory because she seen me." (SR, V6, R151). This statement does not render the witness elimination aggravator inapplicable.

The evidence (in addition to Heyne's explicit statement) shows that Ivory was shot in the head from close range, as indicated by the powder stippling around the entry wound to her head. (V18, R1704). Ivory was slapped in the face shortly before she was killed, and the evidence is that Heyne is the only person who could have inflicted that injury. (SR, V6, 152-54; V18, R1697; V18, R1702-03, 1725). **Further, the evidence shows that Heyne had to walk around the bed in order to slap Ivory and then shoot her in the head at close range.** *See*, State's Ex. 73, 78; (V19, R1882; R1955). There is no dispute as to these facts, and there is no suggestion at all that Ivory was killed for any reason other than the fact that she was a witness to the murder of her parents. The law is well-settled that when the victim is not a law enforcement officer, the witness elimination aggravator requires clear proof that the defendant's dominant or only motive was the elimination of a witness. *Menendez v. State*, 368 So. 2d 1278 (Fla. 1979); *Riley v. State*, 366 So. 2d 19 (Fla. 1978). However, contrary to the trial court's finding, **the fact that the defendant had other motives for the killing does not preclude the application of this factor.** *Howell v. State*, 707 So. 2d 674 (Fla. 1998). Contrary to the lower court's interpretation of *Preston*, that case explicitly held that:

> We have long held that in order to establish this aggravating factor where the victim is not a law enforcement officer, the State must show that the sole

> or dominant motive for the murder was the elimination of the witness. *Perry v. State*, 522 So. 2d 817, 820 (Fla. 1988); *Bates v. State*, 465 So. 2d 490, 492 (Fla. 1985). **However, this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes.** *Swafford v. State*, 533 So. 2d 270, 276 n. 6 (Fla. 1988), *cert. denied*, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989).
>
> We have upheld the application of this aggravating circumstance in cases similar to this one, where a robbery victim was abducted from the scene of the crime and transported to a different location where he or she was then killed. *See, e.g., Swafford*, 533 So. 2d 270 (defendant robbed gas station then took attendant to remote area where he raped and shot her); *Cave v. State*, 476 So. 2d 180, 188 (Fla. 1985) (victim was kidnapped from store and taken thirteen miles to a rural area and killed after robbery), *cert. denied,* 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986); *Martin v. State*, 420 So. 2d 583 (Fla. 1982) (defendant robbed convenience store, abducted store employee, sexually battered and then stabbed her), *cert. denied*, 460 U.S. 1056, 103 S.Ct. 1508, 75 L.Ed.2d 937 (1983). The only reasonable inference to be drawn from the facts of this case is that Preston kidnapped Walker from the store and transported her to a more remote location in order to eliminate the sole witness to the crime.

Preston v. State, 607 So. 2d 404, 409 (Fla. 1992). (emphasis added). Rather than standing for the proposition that the witness elimination aggravator is inapplicable here, *Preston* supports finding that aggravator. In this case, there is no need to infer Heyne's thought processes because he told law enforcement that he killed Ivory because she was a witness. And, even if some inferential analysis was necessary, the facts allow no other conclusion. Heyne had to reposition himself in order to

be within reach of Ivory, and he clearly did so, as established by the slap mark to her face and the stippling around the gunshot wound to her head. Ivory knew Heyne, had entered the room where he had just shot her parents, and was clearly no threat to Heyne except as a witness who could identify him. This case is similar to *Correll,* where this Court said:

> It is also likely that Correll's daughter, Tuesday, was a witness to the murders. Since the relationship between Tuesday and her father appeared cordial, it is difficult to see why she was killed except to eliminate her as a witness. *See Hooper v. State*, 476 So. 2d 1253 (Fla. 1985), *cert. denied*, 475 U.S. 1098, 106 S.Ct. 1501, 89 L.Ed.2d 901 (1986).

Correll v. State, 523 So. 2d 562, 568 (Fla. 1988). In fact, the only substantive difference between this case and the *Correll* facts is that here there is no doubt that Ivory had seen what Heyne had done to her parents. There was no reason to kill her except to eliminate her as a witness. The lower court was wrong when it concluded to the contrary and refused to apply this aggravator, which is established within the terms of settled Florida law.

CONCLUSION

Heyne's conviction and sentence of death should be affirmed in all respects.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd., 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **George D.E. Burden,** Assistant Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118, on this _____ day of November, 2010.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL