IN THE SUPREME COURT OF FLORIDA

RICHARD HENYARD, JR.,

Appellant,

v. CASE NO. 84,314

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LAKE COUNTY
FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

The state accepts the statement of the facts contained in Henyard's brief with the following additions and subject to the noted discrepancies.

The Supression Hearing Facts

Annie Neal has never been employed as a sworn law enforcement officer. *(TR 2931).* Ms. Neal did not force Henyard to accompany her to the Eustis Police Department *(TR 2933),* nor did she in any way force Henyard to meet with the investigating officers. *(TR 2937).*

On January 31, 1993, Henyard came to the Eustis police department and stated that he had information about the murders at issue in this case. *(TR 2947-8).*

FBI Special Agent Dowd did not initially give Henyard the *Miranda* warnings because Henyard said that he had come to the police department voluntarily. *(TR 2956).* Henyard was not arrested at that time, and there was no information to suggest that Henyard was anything other than a witness with some knowledge of the crime. *(TR 2957).* Special Agent Dowd gave Henyard the *Miranda* warnings after information was developed that suggested his involvement in the murders. *(TR 2958).* Henyard stated that he understood his *Miranda* rights, appeared to be literate, and responded appropriately to questioning. *(TR 2960-61).* Henyard was not suffering from any discernible mental disabilities *(TR 2963),* and was not under the influence of alcohol or drugs *(TR 2965).* Henyard never attempted to leave the Police

Department, never said that he did not want to answer further questions, and never stated that he wanted to leave. *(TR 2965).*

Officer Robert Hart of the Eustis Police Department was present along with Special Agent Dowd during the first interview. *(TR 2983-84).* Henyard was no more than a potential witness at the beginning of the interview, was not in custody, and was not forced to remain at the Eustis Police Department. *(TR 2985).* Henyard was not under the influence of alcohol or drugs *(TR 2986),* and responded appropriately to the questions asked of him. *(TR 2987).* Henyard never expressed any desire to stop answering questions, and the first interview was concluded at 4:49 p.m. *(TR 2988).* Henyard was expressly told that he could not be made to stay at the Eustis Police Department *(TR 3000),* and was not forced into waiving his *Miranda* rights *(TR 3004).* Special Agent Robert O'Connor of the Florida Department of Law Enforcement came in contact with Henyard at approximately 2:30 p.m., which was during the first interview that was conducted in this case. *(TR 3006-7).* Agent O'Connor was with Henyard from 2:30 p.m. until the interview ended at 4:49 p.m. *(TR 3008),* and, during that time, Henyard never indicated that he wanted to terminate the interview. *(TR 3008-9).*

The facts set out above appear in the transcript of the May 11, 1994 hearing on Henyard's motion to suppress his statements. Henyard gave three statements to law enforcement, and the trial court ruled that all three statements were admissible. *(TR 3175).* Only one statement (the first one) was offered as evidence at trial.

The Guilt Phase Facts

At about 1:24 a.m. on January 31, 1993, Officer John McKimmey of the Eustis (Florida) Police Department was dispatched to Hicks Ditch Road to investigate a reported sighting of a woman covered with blood. *(TR 1122-24).* The area was extremely foggy, and Officer McKimmey was unable to locate the woman. *(TR 1124).* However, Officer McKimmey did locate a little girl's coat lying off to the side of the road. *(TR 1127).* Later that morning, Officer Adam Donaldson (also of the Eustis Police Department) was dispatched to 1311 Jules Court in Eustis, Florida, in response to a report of a woman outside of that residence claiming to have been raped and shot. *(TR 1131-32).* When he arrived, Officer Donaldson found Dorothy Lewis sitting on the front doorstep wearing a white dress with quite a bit of blood on it. *(TR 1133-34).* There was also quite a bit of dried blood on Ms. Lewis's face. *(TR 1134).* Ms. Lewis was coherent, but was extremely upset and, insofar as what had happened to her, was quite hysterical. *(Id.).* Ms. Lewis told the officer that she had been raped and shot, and was able to give a vague description of her attackers, whom she described as two black males. *(TR 1136-38).* Ms. Lewis also gave a general description of her mother's vehicle, which she had been driving prior to this time. *(TR 1138).* Emergency medical service personnel treated Ms. Lewis at the scene, and she was then taken to the Orlando Regional Medical Center. *(TR 1139).* Prior to being transported, Ms. Lewis stated "Oh, my God, they have my children", and told the officer that her two children had watched her being raped. *(TR 1140).*

Subsequently, the investigation returned to the location of the child's coat found by Officer McKimmey earlier in the morning. In that same location, a remote control garage door opener was located *(TR 1145-46)*, and, shortly thereafter, blood was also found on the ground in that general area. *(TR 1159)*. A search for the Lewis children was instituted, and the bodies of the two children were found following a foot search of the area. *(TR 1163)*. The bodies were located in a brushy area off to the side of the roadway. *(Id.)*

Forensic pathologist Dr. Janet Pillow performed autopsies on Jasmine (age 3) and Jamilya Lewis (age 7) on February 1, 1993. *(TR 1246-48)*. Jasmine, the younger child, had scratches and abrasions on her arm, back and face that were consistent with being scratched by underbrush. *(TR 1249; 1254)*. Jasmine also had a gunshot wound through her left eye *(TR 1254)* that went straight into her head resulting in her death. *(TR 1259)*. The projectile was recovered from inside her skull. *(Id.)*. Powder stippling was present around Jasmine's left eye, and testing indicated that she was shot at a range of three to six inches. *(TR 1785)*. Her left eye was open when that shot was fired. *(TR 1786)*. The older child, Jamilya, *(TR 1263)*, also had scratches and abrasions on her body, and also had a single gunshot wound in the center of the top of her head. *(TR 1264)*. That bullet traveled straight down and slightly to the left of center. *(Id.)*. That projectile was also recovered from Jamilya's body. *(TR 1267)*. Both children died as a result of a gunshot wound to the head. *(TR 1270)*.

Eustis Police Department investigator Scott Barker was involved in serving a search warrant on February 4, 1993, which resulted in the seizure of a pistol from the residence of Alfonso Smalls. *(TR 1301-04).*

Dikeysha Johnson has known Henyard for years. *(TR 1317-18).* She testified that on the Friday morning prior to the murders, the defendant exhibited a firearm to her. *(TR 1321).* That firearm was identified as the one seized in the search of Smalls' residence. *(TR 1322).* Shenise Hayes also saw the defendant, Henyard, on the day before the murders. Henyard was talking about going to a club located in Orlando, and, during the course of that conversation, also showed Shenise Hayes a firearm. *(TR 1330).* That firearm was identified by the witness Hayes as the one that is in evidence. *(TR 1331).* Henyard further told Hayes that he also wanted to go see his father in South Florida and, for that reason, needed a car. *(TR 1333).* Henyard stated that his plan was to kill the owner (of whatever car he stole) and put the victim in the trunk of the car. *(Id.).*

William Pew testified that he saw Henyard with the firearm earlier in the week before the murders. *(TR 1342; 1345).* Pew saw Henyard again on the day before the murders, and Henyard attempted to persuade Pew to participate in a robbery with him. *(TR 1346).* Pew saw Henyard for a second time on the day prior to the murders, and, at that time, Henyard stated that he needed a car, and also exhibited the firearm to Pew for a second time. *(TR 1347; 1350).* Pew identified the firearm as a .22 caliber revolver, and Henyard expressed his intent to commit a robbery at

either the hospital or the Winn Dixie. *(TR 1351).* Smalls was with the defendant at this time, but Henyard was doing all of the talking. *(TR 1353).* Pew identified the firearm that is in evidence as the one that Henyard showed him. *(TR 1358).*

Bryant Smith saw Henyard, Emanuel Yon, and Alfonso Smalls at around midnight on the last Saturday in January [January 30, 1993]. *(TR 1370; 1373).* Smith was able to identify Henyard as the individual who was with Yon and Smalls, but Smith did not know Henyard by name. *(TR 1373; 1383).* Henyard showed the pistol to Smith, and made the comment that the victim tried to go for Henyard's gun so he had to "burn her". *(TR 1378).* The firearm was identified as the one in evidence *(TR 1384),* and a photograph of the victim's car was identified by Smith as being the vehicle that Henyard was in when Smith came in contact with him. *(TR 1385).*

Barbara Joyce Bradford saw the defendant and Smalls in the parking lot of the Winn Dixie at 9:15 to 9:45 p.m. on the Saturday night of the murders. *(TR 1399; 1403; 1410).* Brett Robinson also identified the defendant as being present at the Winn Dixie at that same time. *(TR 1411; 1414).*

Lynette Tschida identified the defendant as one of two individuals who had followed her to her car when she left the Winn Dixie at approximately 10:00 p.m. on January 30, 1993. *(TR 1415; 1432).*

Colinda Smalls testified that, a short time before the murders, Henyard delivered a pistol and some cartridges to Alfonso Smalls, who is her brother. *(TR 1444; 1452; 1454).* Colinda

identified that gun as being the one that is in evidence. *(TR 1455).* At about 11:35 p.m. on the night of January 30, 1993, Henyard came to her residence. *(TR 1456).* Henyard had blood on his hands at that time. *(TR 1458).* The next day, she observed the defendant talking to Alfonso Smalls and pointing his finger at Smalls' face, though she could not hear what was being said. *(TR 1462).* Shortly before the murders, she had heard Henyard make the statement that he was going to go to a club in Orlando, and he would have a car by the end of the week. *(TR 1466).*

Linda Miller saw Henyard on the morning of January 31, 1993. *(TR 1470; 1473).* Henyard asked her if she had heard about the "preacher lady that got killed?". *(TR 1474).* Henyard asked Miller for a ride, and, shortly thereafter, Miller went into the Winn Dixie, where she heard about the crimes. *(TR 1475-1477).* When Miller got back in the car with Henyard, she made the comment that the lady did not die. *(Id.).* Henyard sat up in his seat and asked if the "preacher lady" could identify anyone. *(TR 1478).* Henyard went on to say "I hope she can realize her kids are dead" and, moreover, commented "she didn't even die?". *(TR 1479-1480).* Henyard was nervous and stuttering at that time. *(Id.)*

Eustis Police Department Detective Robert Hart was involved in interviewing Henyard when he came to the Eustis Police Department on January 31, 1993. *(TR 1489; 1496).* Detective Hart noted blood on Henyard's socks during the course of the interview. *(TR 1501).* David Hubbard testified that, following the recovery of the murder weapon, it was determined that there were three live cartridges in the weapon, and six fired shell casings.

A live round was the next one up to be fired. *(TR 1522-23)*. Robert Roush testified that, in 1992, he bought a .22 caliber pistol that he subsequently sold to Luther Reed. *(TR 1542-1544)*. Roush identified the weapon that he purchased as the one that is in evidence. Luther Reed identified the pistol that is in evidence as having been his pistol *(TR 1547; 1550)*, and testified that the defendant spent the night at his house, asked Mr. Reed to prepare some food for him, and, while Reed was out of the room, the defendant took the gun. *(TR 1550-51)*. Henyard left the house shortly thereafter and, when Reed checked, the pistol was gone. *(TR 1552)*.

Gary McCullough, a crime lab analyst with the Florida Department of Law Enforcement, was accepted as an expert in the field of latent finger print examination. *(TR 1557-59)*. McCullough received seven (7) latent finger print lifts from the victim's vehicle, and also received various items collected from inside that vehicle. *(TR 1564-65)*. Two of the seven latent lifts were useful. *(TR 1565)*. A latent fingerprint lifted from a juice can taken from inside the vehicle was positively identified as having been made by Henyard. *(TR 1566; 1568)*.

FDLE firearm and tool mark analyst Susan Komar was also accepted as an expert in her field. *(TR 1570-72)*. Ms. Komar identified various items of evidence that she had examined, and testified that only one fragment of a projectile could be subjected to comparison analysis. *(TR 1586)*. That fragment was taken from the body of Jamilya Lewis, and was fired from the .22 caliber pistol to the exclusion of all others. The physical

evidence was also subjected to gunshot residue testing, and, based upon Ms. Komar's evaluation, it was determined that the shot that killed Jamilya Lewis was fired from a distance of less than 30 inches, and probably closer to 18 inches. *(TR 1587-90).*

Dr. Julia Martin conducted the rape examination on Dorothy Lewis. *(TR 1611; 1616-17).* Dr. Martin testified that Ms. Lewis had a gunshot wound to the forehead with accompanying powder stippling, and that Ms. Lewis' eyes were very swollen. *(TR 1620).* There was much dried blood on her face, two wounds on the left side of her neck, possibly a gunshot wound to the mouth, and a gunshot wound to the left knee. *(TR 1621-23).*

FDLE serologist Nancy Rathman was qualified as an expert witness in the field of RFLP DNA analysis. *(TR 1643-53).* Ms. Rathman testified that she conducted DNA analysis on various items of evidence in connection with this case. *(TR 1672-75).* The various blood stains found on items of Henyard's clothing were identified as having come from Jamilya Lewis, Jasmine Lewis, and Dorothy Lewis. Testing of the rape kit specimens, as well as of the other semen stains, indicated that the semen was contributed by Henyard. *(TR 1685; 1688; 1691; 1695; 1749).*

Dr. Lewis Harold is a general surgeon in Orlando. *(TR 1754-55).* Dr. Harold testified that Ms. Lewis suffered a gunshot wound to the forehead striking her between the eyes as well as gunshot wounds to her upper lip and knee. *(TR 1757).* She also suffered powder burns to her neck from a near miss. *(TR 1757).* The gunshot wound to Ms. Lewis' lip is consistent with a contact or near contact gunshot wound. *(TR 1790).*

Dorothy Lewis, the surviving victim, testified that she left her residence at about 9:50 p.m. on January 30, 1993, driving her mother's blue Chrysler Fifth Avenue. *(TR 1809-11).* The purpose of her trip was to go to the Winn Dixie grocery store. *(TR 1811).* After making her purchases, Ms. Lewis left the store and put her children in the car. *(TR 1816-17).* As Ms. Lewis opened the driver's side door, a man approached her and raised his shirt, showing her a gun. (*TR 1817*). He instructed to Ms. Lewis to get "into the car and don't say a word". Ms. Lewis asked if she could get her children out of the front seat, and the man replied "Yes". (*TR 1818*). That individual then motioned for another man to come over stating "Hey Man, this is the one, or we have one". *(Id.)* That individual came over to the vehicle and got into the driver's seat. *(Id.)*

The driver ultimately stopped the vehicle on a dirt road, got out of the driver's seat, and ordered Ms. Lewis out of the vehicle. *(TR 1824).* At that time, the older individual put Ms. Lewis on the trunk of the car, removed her undergarments, and raped her.[1] *(Id.).* During the course of the rape, Henyard stated to her "open your legs and act like you want it". *(Id.).* After Henyard finished raping Ms. Lewis, the other perpetrator also raped her. (*TR 1826).* After the second rape was completed, Henyard dragged Ms. Lewis off the trunk of the car and told her to sit on the grass. *(TR 1826).* When Ms. Lewis did not sit down

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[1] Throughout her testimony, Ms. Lewis refers to Henyard as the "older one". *(TR 1832).* Henyard was the driver of the vehicle, and did not seem to be taking directions from the other perpetrator. *(TR 1830).*

quickly enough, Henyard pushed her down on the grass and shot her in the knee. *(TR 1827).* After being shot in the leg, Ms. Lewis began to fight. *(TR 1828).* She does not remember being struck with the second, third, or fourth shots. *(TR 1828-29).*

The next thing that Ms. Lewis remembers is walking down the dirt road and hiding every time she saw the headlights of a car because she feared that Henyard would come back after her. *(TR 1829).* She remembers walking up to a house, knocking on the door, and telling the resident of that house that she had been raped and shot, and that she needed help. *(Id.)* She remained at that house until the police arrived. *(Id.).* Henyard never did anything to prevent Ms. Lewis and her children from seeing his face, and at no time instructed her children not to look at his face. *(TR 1829-30).* Neither Henyard nor the co-perpetrator appeared to be under the influence of any intoxicants. *(TR 1830).* Ms. Lewis positively identified Henyard as the individual who kidnapped her, raped her, and shot her. *(TR 1832).*

The Penalty Phase Evidence

The last thing Ms. Lewis remembers before losing consciousness is a gun being aimed at her face. *(TR 2092).* LeRoy Parker, an FDLE analyst, was qualified as a blood stain pattern expert. *(TR 2154-59).* Mr. Parker testified that the blood on Henyard's jacket is "back spatter blood" that resulted from the victim or victims being shot. *(TR 2168).* The defendant was within four feet of the victim at the time of the shooting. *(TR 2169).*

Michael Graves, an attorney in Tavares, testified as an expert for the defense on the sentencing guidelines. *(TR 2219-22).*

Graves testified that his testimony as to the longest possible sentence Henyard could receive was a "worst case scenario". *(TR 2235).* He also testified that sentencing Henyard to six consecutive life sentences would be a departure sentence for which reasons would have to be stated. *(TR 2237).*

Richard Henyard, Sr., the defendant's father, testified that while Henyard stayed with Ms. Jacquline Turner quite a bit, the defendant also stayed with his father in Pahokee until the age of seventeen and a half. *(TR 2254; 2271-72).* For reasons unknown, Henyard took his father off of the visitor list at the Lake county jail. *(TR 2273).* Mr. Henyard, Sr., has had the same job for twenty-eight years, is not an alcoholic, does not take drugs, and has maintained a relationship with the same woman since 1981. *(TR 2273-74).* Mr. Henyard's companion has raised three other children that have not been involved with the criminal justice system, and Mr. Henyard tried to teach his son right from wrong. *(TR 2275).* Moreover, Mr. Henyard consistently encouraged the defendant to maintain his grades in school. *(TR 2276).* Jacquline Turner is Henyard's God-Mother. *(TR 2278-79).* Henyard lived with her for a period of time, but she asked his father to come get him because Henyard would not follow the rules of her house. *(TR 2292).* Ms. Turner took Henyard to church and tried to teach him right from wrong. *(TR 2293).*

Dr. Jethro Toomer testified that, in his opinion, Henyard's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was not extremely impaired. *(TR 2351-52).* Dr. Toomer assumes that Henyard was

smoking marijuana on the night of the murders because that is what Henyard told him. *(TR 2352).* Dr. Toomer found no evidence that Henyard suffers from fetal alcohol syndrome. *(TR 2354-55).* Dr. Toomer testified that even receiving information that conflicted with that conveyed to him by Henyard would not affect his diagnosis. *(TR 2387-89).* Dr. Toomer testifies exclusively for the defense in death penalty cases. *(TR 2392-93).* Dr. Toomer does not believe the Henyard meets the criteria for the two statutory mental mitigators. *(TR 2394).*

Hattie Mae Gamble testified that Jacquline Turner took good care of Henyard. *(TR 2421).* Jacquline Turner was called in rebuttal by the state, and testified that Henyard lived in her house for quite some time and was treated as if he were one of her own children. *(TR 2435-37).* Edith Ewing, Henyard's father's companion, testified that she loves Henyard, and that he came to live with her at the age of 11. *(TR 2414-42).* She accepted Henyard as if he were her own child, and treated him the same as her own children. *(TR 2442).* She tried to give Henyard rules and guidance, and he usually obeyed the rules. *(TR 2443).* Dr. Toomer never attempted to interview Ms. Ewing to determine what information she could relay about Henyard's early life. *(TR 2444).* The jury recommended death for both murders by a vote of 12-0 *(TR 2553).* The trial court followed that recommendation and imposed two death sentences on August 19, 1994. *(TR 3229-30).*

SUMMARY OF THE ARGUMENT

The trial court's ruling on a motion for a change of venue is within that court's discretion, and will only be reversed on

appeal for a palpable abuse of discretion. Standing alone, pretrial publicity does not warrant a change of venue. Denial of a motion for change of venue is proper so long as the jurors can lay aside any extraneous knowledge or opinions concerning the case, and render their verdict based upon the evidence in court. The burden of establishing prejudice is on the defendant. None of the jurors seated in Henyard's case had more than passing knowledge of the crime, and Henyard has failed to allege or demonstrate the presence of any prejudice or lack of impartiality by the jury that was seated. No juror was seated following the denial of a defense challenge for cause, and Henyard has never suggested that he would have used any additional peremptory challenges to remove any juror that actually served.

Henyard complains about the granting of a state challenge for cause and the denial of three defense challenges for cause. The state's challenge for cause was properly granted because the juror clearly stated that his views on the death penalty would prevent him from ever voting to recommend a death sentence in this case. Such an opinion by a juror is sufficient to prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath, and is a sufficient basis for granting a challenge for cause. Henyard's complaint concerning the denial of three of his challenges for cause is not preserved for review. Henyard has never identified a juror that he would have challenged peremptorily had he had the opportunity, and has failed to preserve this claim for review.

Florida law is settled that the trial court's ruling on a Motion to Suppress is presumptively correct, and, furthermore, that all favorable inferences supporting that ruling are afforded to the prevailing party. After a hearing on the Motion to Suppress, the trial court found that Henyard never attempted to terminate the interview. That ruling is well supported by the record, which reflects that Henyard clearly understood that he could stop answering questions at any time, and, in fact, reaffirmed his desire to continue answering questions on three occasions subsequent to the initial *Miranda* waiver. The Motion To Suppress was properly denied. To the extent that Henyard complains that the trial court did not suppress his two statements made after the initial interview, there can be no error with regard to those statements because they were never offered in evidence.

The DNA evidence in this case was properly admitted following a full and complete *Frye* hearing in which the state established that the procedures and analysis techniques used in this case are reliable and are accepted within the scientific community. Alternatively, even if the DNA evidence should not have been admitted, any error is harmless beyond a reasonable doubt because the evidence of guilt is overwhelming even without the results of the DNA analysis.

Henyard's two-part prosecutorial argument claim is without merit. The prosecutor did not denigrate the jury's "inherent pardon power". The statement at issue is in accord with settled law, and there is no error. To the extent that Henyard complains

about the guilt phase closing argument, his claim is not supported by a fair reading of the record.

The statements made by the surviving victim (Dorothy Lewis) to the first law enforcement officer to come to her aid were properly admitted because they were a statement of identification made after perceiving an individual. Under the *Florida Statutes,* such a statement is *non-hearsay* so long as the declarant testifies at trial. All prerequisites are present here, and Ms. Lewis's statement was properly admitted. Moreover, the statements by Ms. Lewis fall within the excited utterance exception to the hearsay rule, and were properly admitted on that theory, as well.

The complaints contained in Henyard's brief concerning the guilt phase jury instructions are all foreclosed by binding precedent.

Even if evidence of Henyard's juvenile conviction for robbery should not have been admitted, any error was harmless. Six other valid prior violent felonies supporting the prior violent felony aggravator. Henyard's complaints concerning the jury instructions on the aggravating factors are not preserved for review by timely objection. Even if the procedural bar is overlooked, there is no error because the prior violent felony aggravator was properly submitted to the jury. To the extent that Henyard complains about the giving of a jury instruction on the witness elimination aggravating circumstance, there was evidence to support that aggravator, and it was not error to submit it to the jury. Finally, the testimony of Dorothy Lewis and LeRoy Parker was properly admitted at the penalty phase of

Henyard's capital trial because that testimony tended to establish the heinous, atrocious, or cruel aggravating circumstance, and, moreover, was relevant to the circumstances of the offense.

To the extent that Henyard argues that the jury instruction given on the heinous, atrocious, or cruel aggravating circumstance is "vague", that claim is foreclosed by binding precedent. Moreover, to the extent that Henyard argues that that aggravating circumstance instruction is inadequate insofar as the "tortuous intent component" of the aggravator is concerned, that claim ignores settled Florida law. The heinous, atrocious, or cruel aggravating circumstance focuses on the perception of the victim, not on the perception of the perpetrator. This claim, too, is foreclosed by binding precedent.

Henyard's claim that the pecuniary gain and heinous, atrocious or cruel aggravators should not have been found to exist is not supported by the evidence. Henyard's own admissions clearly demonstrate that the murders in this case were "an integral step in obtaining some sought-after specific gain." Under settled Florida law, the pecuniary gain aggravating circumstance was proven beyond a reasonable doubt. To the extent that Henyard challenges the application of the heinous, atrocious or cruel aggravator, there is more than enough record support for that aggravator, as well. Fear, mental anguish, and emotional strain are present in this case in abundance, and, given that two small children were terrorized by the defendant for an unknown period of time, it strains credulity to argue that the mental

anguish option of the heinous, atrocious or cruel aggravator is not present.

Finally, the death sentences Henyard received are not disproportionate under the facts of the case. There is no doubt that Henyard was the more culpable participant in the abduction of Ms. Lewis and her children, the rape and attempted murder of Ms. Lewis, and the execution-style murder of two defenseless children. Henyard was the dominant force (or "prime mover") behind the murders, and is more than deserving of the death sentences that he received. Four aggravating circumstances exist beyond a reasonable doubt as to each murder, and the "mitigation" is so weak as to be virtually non-existent. Henyard's convictions and death sentences should be affirmed in all respects.

ARGUMENT

CLAIM I

THE CHANGE OF VENUE CLAIM

On pp. 27-31 of his brief, Henyard argues that his convictions and sentences should be reversed based upon the trial court's denial of his motion for a change of venue. Henyard's claim is supported by neither the facts nor the law, and is not a basis for reversal.

Florida law is settled that the ruling on a motion for a change of venue is within the trial court's discretion. *Gaskin v. State,* 591 So. 2d 917, 919 (Fla. 1991), *citing, Davis v. State,* 461 So. 2d 67, 69 (Fla. 1984), *cert. denied,* 473 U.S. 913, 105 S. Ct. 3540, 87 L.Ed.2d 663 (1985); *see also, Pietri v. State,* 647 So. 2d 1347, 1352

(Fla. 1994); *Wuornos v. State,* 644 So. 2d 1000, 1007 (Fla. 1994); *Robinson v. State,* 610 So. 2d 1288, 1289 (Fla. 1992); *Geralds v. State,* 601 So. 2d 1157, 1159 (Fla. 1992); *Provenzano v. State,* 497 So. 2d 1177 (Fla. 1986). Denial of a defendant's motion for a change of venue will only be reversed on appeal for a palpable abuse of discretion. *See, e.g., Geralds, supra; Davis, supra.* Pretrial publicity alone does not, in and of itself, warrant a change of venue. *See, e.g., Pietri, supra; Provenzano, supra.* Instead, the test for whether a change of venue motion should be granted is:

> Whether the general state of mind of the inhabitants of a community is so infected by knowledge by the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

Pietri v. State, 644 So. 2d at 1352, *quoting, McCaskill v. State,* 344 So. 2d 1276, 1278 (Fla. 1977). Even if a juror has knowledge about the case, that juror is not disqualified so long as "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court". *Irvin v. Dowd,* 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). To state the standard in a slightly different way, "[t]he accused is not entitled to an ignorant jury, just a fair one". *Simmons v. Lockhart,* 814 F.2d 504, 510 (8th Cir. 1987), *cert. denied,* 108 S.Ct. 1489 (1988). The burden of establishing prejudice is on the defendant. *Pietri, supra.*

The voir dire portion of Henyard's capital trial consumed almost 1,000 pages of transcript and included extensive

individual voir dire about the pretrial publicity aspect of this case. *(TR 889)*. The jurors who were selected to serve "all agreed that any pretrial publicity would not bias them and would not interfere with their ability to honor the trial court's instructions". *Wuornos v. State,* 644 So. 2d at 1007; *see also, e.g., Pietri, supra; Geralds, supra; Gaskin, supra. See, TR 74-88; 128-142; 211-230; 246; 252; 438-452; 1022; 1023; 490-500; 1025; 517-524; 562-575; 1033; 1035; 831; 849.* None of the seated jurors had more than slight knowledge of the case, and there is nothing in the record to suggest that the case was decided based on anything other than the evidence at trial, which was, to say the least, overwhelming. *See, e.g., Gaskin, supra; Geralds, supra.* The burden of proving prejudice is on Henyard, and he has utterly failed to demonstrate that he received anything other than a fair trial. *See, e.g., Pietri, supra.*

Henyard argues, on p. 30 of his brief, that because the parties were granted additional peremptory challenges the change of venue motion should have been granted. The basis of that argument is not apparent.[2] What is undisputed is that Henyard was able to excuse, either for cause or peremptorily, each potential juror that he did not want to serve on the actual jury. No seated juror was subject to a challenge for cause that was denied, nor did Henyard ever suggest that he would have used any additional preemptory challenges to remove any juror that was actually seated. Henyard was able to select a fair and impartial jury, and the denial of his motion for a change of venue was not

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[2] As this court noted in *Copeland v. State,* 457 So. 2d 1012, 1017 (Fla. 1984), a change of venue is not required in every high-profile prosecution taking place in a rural community.

a "palpable abuse of discretion". Henyard has failed to allege, much less demonstrate, any prejudice or lack of impartiality on the part of the jury. The fact that additional peremptory challenges were granted means nothing. As is the case in the *Witherspoon/Witt* context, "the trial court is in the best position to observe the attitude and demeanor of a juror and to gauge the quality of the juror's responses." *Johnson v. State,* 20 Fla. Law Weekly S343, 345 (Fla. July 13, 1995). The same holds true in this context, and the trial court's denial of Henyard's change of venue motion should be affirmed in all respects.

CLAIM II

THE JUROR EXCUSAL CLAIM

On pp. 32-36 of his brief, Henyard presents a two-part claim for relief. The first component of the claim is that a state challenge for cause was erroneously granted. The second component of this claim is Henyard's argument that three defense challenges for cause were improperly denied. Neither claim has merit for the reasons set out below and, with regard to the second component, it is procedurally barred, as well.

A. The State Challenge For Cause

Henyard's claim that the trial court erred in granting the state's challenge for cause to juror Schrock is not supported by the record. That juror clearly stated, on no less than five occasions, that he could not under *any circumstances* recommend a sentence of death in this case. *(TR 390-396).* Despite Henyard's argument to the contrary, that juror stated that he would not be able to follow the law. *(TR 396).* The juror's answers during

voir dire established that his views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath". *Darden v. Wainwright,* 477 U.S. 165, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); *Wainwright v. Witt,* 469 U.S. 142, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Adams v. Texas,* 448 U.S. 38, 100 S.Ct. 2521, 581 LL.Ed.2d (1980). That is the standard for granting a state challenge for cause, and there is no doubt that this juror was properly excluded.

To the extent that Henyard argues that the juror "was merely stating that the mitigating factor of the age of the defendant would weigh so heavily in his mind that he would tend to vote for life", the record refutes that argument. In fact, that juror said that the defendant's age alone would *prevent* him from *ever* recommending a death sentence. *(TR 394).* That is a more than adequate basis for granting a challenge for cause, because that juror stated that he would not follow his instructions. Henyard's argument collapses because the true facts do not support his position, and there is no error.

B. The Defense Cause Challenges

Henyard also argues that the trial court improperly denied three of his challenges for cause. This claim is easily resolved, because the facts which establish a clear procedural bar are found on p. 36 of Henyard's brief.

Each of the jurors at issue was peremptorily challenged by Henyard *(Appellant's brief at 36)*, and there is no dispute that Henyard requested and received an additional peremptory

challenge. *(Id.)*. What is omitted from Henyard's brief is the fact that he did not identify any juror who actually served as being a juror whom he would have otherwise struck peremptorily *(See, e.g., TR 1022-1025)*. That is the fatal defect in this claim.

Florida law is clear that, in order to even preserve this issue for review, the defendant must exhaust all peremptories and seek additional peremptory challenges which are denied. *Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985). The defendant "initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges have been exhausted." *Trotter v. State*, 576 So. 2d 691, 693 (Fla. 1990); *see also, Kearse v. State*, No. 79,037 (Fla., June 22, 1995). Henyard has not identified any juror that he would have stricken given the opportunity--he has failed to preserve this claim for review and is entitled to no relief.

CLAIM III

THE TRIAL COURT CORRECTLY DENIED THE MOTION TO SUPPRESS HENYARD'S STATEMENTS

On pp. 37-43 of his brief, Henyard argues that the lower court's denial of his motion to suppress his statements was erroneous. The basis of Henyard's claim is the assertion that his "request to stop the interrogation" was not honored. When the statement is considered in its context, it is clear that the trial court properly denied the motion to suppress.

In his brief, Henyard argues at length that all three statements made by him should have been suppressed. That argument is inconsistent with the argument that appears in connection with Claim V of Henyard's brief, wherein he recognizes that only the first statement (which appears in Supplemental Record Volume I) was even offered in evidence at trial. *See, Appellant's Brief at 57.* The only statement about which Henyard can complain on appeal is the one that was actually offered into evidence--the other two statements, which came later in time, simply do not matter. Whether or not those two statements should have been suppressed is not an issue--they were not offered as evidence, and the result is the same as if they had been suppressed. The portion of Henyard's brief which addresses those statements is mere surplusage.

Insofar as the statement that was admitted into evidence is concerned, Florida law is settled that the trial court's ruling on a motion to suppress is presumptively correct on appellate review, and that all favorable inferences supporting that ruling are afforded to the prevailing party. *See, e.g., Owen v. State,* 560 So. 2d 211 (Fla. 1990). The trial court found, after hearing the *ore tenus* testimony and reviewing the transcript and video tape of the statement, that Henyard never exercised his right to terminate the questioning. *(TR 3175).* That decision was correct and should be affirmed.

The portion of the statement set out on pp. 38-39 of Henyard's brief is found on pp. 31-32 of Supplemental Record Volume I. In that portion of the statement, Henyard obviously

never said that he did not want to answer questions--he only asked how long the questioning would take. Immediately after Henyard asked that question, he properly waived his rights under *Miranda.* *(SR 33-34).* That portion of the statement is not even an equivocal attempt to terminate the interview.

The second part of the statement which Henyard claims was an attempt to end the questioning is set out in full below:

> FBI AGENT: I can't -- I can't talk you into this ok? This is your own decision. You're saying what you're telling us is the truth.
> FBI AGENT: We can get a polygraph operator, a lie detector --
>
> MR. HENYARD: Uh-huh.
>
> FBI AGENT: --operator today. Would you take a polygraph?
>
> MR. HENYARD: I will not take one.
>
> FBI AGENT: Why?
>
> MR. HENYARD: Without the presence of my auntie.
>
> FBI AGENT: Well, where's your -- Who's your attorney?
>
> FBI AGENT: We'll, we'll talk -- No, he said his auntie. His auntie.
>
> FBI AGENT: Oh. We'll get your aunt here.
>
> FBI AGENT: We'll get your aunt here.
>
> MR. HART: Do you want to call her?
>
> MR. DOWD: She can't stay in here while you're taking a polygraph but she'll --
>
> MR. HENYARD: Then I won't take it. I want my auntie sitting right beside me when I take it.

FBI AGENT: Well, let me just tell you -- let me tell you this. Any results of that are only for our benefit. You can't use them in Court. If you flunk it flat, we can't use it in Court but at least we'll know whether you're telling the truth or not and we'll leave it alone, okay? It's just our -- it'll help us. It's an investigative tool we cannot use in Court. I promise you, we cannot use it against you in Court and we'll explain that to your aunt. Okay?

FBI AGENT: (Inaudible) Do you know his aunt?

MR. HART: What's your aunt's name again?

MR. HENYARD: Linda Miller.[3]

FBI AGENT: Linda Miller.

MR. HART: Yes.

FBI AGENT: Maybe we ought to have her brought down here.

FBI AGENT: Yeah, I think so.

MR. HART: Want to call her?

FBI AGENT: Do you want to call her?

MR. HART: Who can I call? Where does she she live at?

MR. HENYARD: Right on Center Street Apartments.

FBI AGENT: Are you going to have somebody go pick her up and bring her down here?

MR. HART: Yeah.

FBI AGENT: Tell her to come on down or stop by and then tell her to come down.

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[3] Linda Miller is not actually Henyard's Aunt. *(TR 1472).*

MR. HART: Yes.

FBI AGENT: I think we need her here.

MR. HART: Center Street Apartment?

MR. HENYARD: Apartment Number 4.

FBI AGENT: (Inaudible) to talk to him. I mean, she has (Inaudible.)

FBI AGENT: Yeah. (Inaudible) While we're at it, we can get some people (Inaudible.)

MR. HART: (DISCUSSION ON TELEPHONE.)

MR. HENYARD: (Inaudible)

FBI AGENT: We'll get your aunt here, okay, and we'll talk to her and then (Inaudible.)

MR. HENYARD: (Inaudible)

MR. HART: (DISCUSSION ON TELEPHONE.) Her little daughter called so she'll pass the message on to her and she'll bring her down here.

FBI AGENT: (Inaudible) After you talk to her -- Don't you want to resolve this right now?

MR. HENYARD: Yes, I do.

FBI AGENT: Okay. You just hang out here. What else you going to do? You going to hang out at the Manors, you can hang out here, okay?

MR. HENYARD: Huh?

FBI AGENT: You just stay here a minute -- you know, we can't force you to stay here (Inaudible.)

MR. HENYARD: Take me to my auntie's house.

FBI AGENT: We're going to have your aunt come down here.

MR. HENYARD: Ya'll (Inaudible.)

FBI AGENT: Yeah, we're going to have --

MR. HENYARD: Superbowl, man. I'm missing my game.

FBI AGENT: Well, it's 6:00. You've got a couple of three hours yet. I mean, you're equivocating a Superbowl to two kids, two innocent children being killed?

MR. HENYARD: I can tell you something. I ain't going to say that I don't care them two children got killed, but I ain't did it, so why worry about it? I ain't killed them children so I ain't got nothing to worry about.
FBI AGENT: Okay. (Inaudible.)

MR. HENYARD: Something told me not to come down here.

FBI AGENT: No, no, no, believe me.

MR. HENYARD: Ya'll doing the same things.

FBI AGENT: No, no, no. Look, who told you not to come down here? Who did?

MR. HENYARD: I told myself not to come.

FBI AGENT: No, no. You're doing the right things.

MR. HENYARD: How I'm going the right thing --

FBI AGENT: You are. You are. You are. I'm telling you, if you didn't -- Look, we -- How would you -- Would you have rather the investigation go on? We'd a wound up at your place --

MR. HENYARD: Yeah, ya'll would have come and got me.

FBI AGENT: You know that, and then it would have been a hell of a lot worse.

MR. HENYARD: Ya'll --

FBI AGENT: Don't you think?

MR. HENYARD: It'd be a H of a lot worse.

FBI AGENT: Huh?

MR. HENYARD: When ya'll would have came and picked me up, it'd a got straight then. See, now I'm sitting down here --

FBI AGENT: Maybe not.

MR. HENYARD: No. Now I'm sitting down here answering all these questions when I could be home.

FBI AGENT: Okay. Suppose -- just suppose -- don't suppose. This is going to happen, this is gonna be solved. You know it's gonna be solved. These are always solved, okay? Suppose we caught up with Alfonso and Emanuel this afternoon and both of them said, "Hey, Richard was with us, he drove us -- drove us down to Orlando and drove the car back, he knew it." Now, do you know what'd happen? A warrant, the police would issue a warrant.

MR. HENYARD: Ya'll just had --

FBI AGENT: For you. And then --

MR. HENYARD: (Inaudible.)

FBI AGENT: And it would be their two words against yours, okay? And that's a little bit heavier than you walking in here and telling us, don't you think?

MR. HENYARD: But still --

FBI AGENT: This is in your favor walking in here.

MR. HENYARD: Yeah, but still, check this out. If ya'll would have went and picked up Emanuel and them and they came and told ya'll that, I wouldn't have to in the presence of my auntie to take that lie detector. I'd been begging

ya'll to give me one, but now I got to sit down here, answer all these questions when I could be doing something else. And the way ya'll talking, ya'll trying to say I had something to do with it. If I'd had something to do with it, I'd a came straight out and told you.

FBI AGENT: Well --

MR. HENYARD: Just like my first time going to jail.

FBI AGENT: Yeah.

MR. HENYARD: The police didn't have to come pick me up, I called them from my house and told them to come get me, I stole her car.

FBI AGENT: That's all -- that's all in your favor. Just hang out a little bit until your aunt gets here, okay?

(SR 48-55).

Shortly thereafter, the investigation was handed over to state investigators and the following occurred:

Q. All right. I want you to go ahead and tell me--you did say you understood all these [rights], right?

A. Uh-huh.

Q. All these rights? I'm not going to read them again to you because you've already been read them, okay?

A. Uh-huh.

Q. They have been read to you, you understand them. They were read to you at 1:33 p.m. and it is now 2:35. They were--just about an hour ago they were read to you, okay?

A. Uh-huh.

Q. Do you still have--do you still want to talk to us?

A. Yes, sir.

Supplemental Record Volume I at 73. Henyard at no time indicated that he did not wish to answer questions and, in fact, the exchange with the FBI agents set out above is, at most, no more than general complaining about the amount of time involved--it is not an effort to terminate the interview. *See, e.g., TR 2965.*

After the initial *Miranda* waiver, Henyard subsequently reaffirmed his desire to continue answering questions on three more occasions. *Supplemental Record Volume I at 103; 140; 172.* Henyard was very much aware that he could terminate the interview, and any claim to the contrary is spurious. The investigators did not ignore Henyard's rights, they carefully protected them. Even under the worst possible view of the evidence, the *Miranda* waiver given to the state investigators is valid because there was never an attempt to terminate the interview. Henyard never attempted to stop answering questions, and there is no error. *(TR 2965; 2988; 2997; 3009).*

Insofar as the two subsequent statements are concerned, there can be no error as to those statements because they were not offered in evidence by the state. To the extent that any comment beyond that is necessary, the record clearly explains that Henyard became extremely upset when talking about the actual murders *(TR 3022-24).* Moreover, the questioning appearing in Supplemental Record Volume II at 24 clearly changed the subject to a less upsetting topic which was acceptable to Henyard. *(Supplemental Record Volume II at 24).* Even if that statement had been

admitted into evidence, there would be no error. Because it was not admitted into evidence, any claim of error is specious. The trial court properly denied Henyard's motion to suppress, and the convictions and sentences should be affirmed in all respects.

CLAIM IV

THE DNA EVIDENCE WAS PROPERLY ADMITTED

On pp. 44-49 of his brief, Henyard argues that the results of the DNA testing conducted in this case should not have been admitted into evidence. For the reasons set out below, there was no error.

DNA evidence is admissible in Florida criminal proceedings, and has been since 1988. *Andrews v. State,* 533 So. 2d 841 (Fla. 5th DCA 1988), *review denied,* 542 So. 2d 1332 (Fla. 1989). As the 5th District Court of Appeals stated, "...evidence derived from DNA print identification appears based on proven scientific principles." *Andrews v. State,* 533 So. 2d at 850. More recently, this court found no error in admitting DNA test results when the defendant failed to "produce anything that questioned the general scientific acceptance of the [DNA] testing." *Robinson v. State,* 610 So. 2d 1288, 1291 (Fla. 1992). Henyard's case suffers from the same failure of proof.

Henyard's argument appears to be predicated upon a National Research Council (hereinafter NRC) report, which, as grafted onto the facts of this case, concentrates on the fact that the Florida Department of Law Enforcement was not an accredited DNA testing

facility at the time the analysis in this case was conducted.[4] Henyard does not now allege that the match criteria utilized in this case are not valid, and, moreover, does not claim that the statistical database utilized by FDLE is invalid.[5] In its final form, Henyard's argument is that "independent experts" should have been called to vouch for the reliability of the testing procedures conducted in this case. That claim is procedurally barred because it was not raised at trial. *See, e.g., Steinhorst v. State,* 636 So. 2d 23 (Fla. 1994). Even if the procedural bar is ignored, Henyard cites no binding authority for his position.

Subsequent of the filing of the initial brief in this case, this Court decided *Hayes v. State,* No. 79,997 (Fla. June 22, 1995). The state does not concede that *Hayes* should be retroactively applicable to this case, but even if it is, that decision is of no help to Henyard for four independently adequate reasons. First, the DNA analysis conducted in this case was based upon the RFLP principle. *(TR 1653).*[6] As this Court noted in *Hayes,* the validity of the RFLP theory of analysis is well-established. *Hayes, supra.* Moreover, and most significantly, the "band-shifting" at issue in *Hayes* is not present in this case. The

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4 A fair reading of the NRC report indicates that accreditation is an aspirational goal, given that, at the time of the report, just which body would accredit anyone was an open question. This argument is a red herring.

5 In the proceedings before the trial court, Henyard did challenge the statistical method employed in this case. *See, e.g., TR 1094-99, see also, Litman affidavit, Supp.R.Vol. 5 at 529-30.* This argument is not made on appeal.

6 PCR testing was apparently also conducted by the Florida Department of Law Enforcement but no testimony based on PCR analysis was presented.

validity and reliability of the RFLP technique is settled, and there should be no question as to its admission into evidence in a Florida trial.

Second, even though the lower court did not have the benefit of the *Hayes* decision, that court conducted a *Frye* hearing prior to trial. The evidence at that hearing established that the RFLP method is widely used, and, moreover, demonstrated that the National Research Council report (upon which Henyard bases his entire argument) did not question the validity of the RFLP process *(TR 2784; 3250-51).* The RFLP method is accepted in the scientific community. *(TR 3251).* FDLE analysts are subject to routine proficiency testing, and the analyst in this case has never failed such a proficiency test. *(TR 3253).* The evidence further establishes that the methodology employed in this case is generally accepted within the scientific community and, hence, the *Hayes/Frye* requirements are well satisfied.[7]

Third, Henyard has pointed to nothing which contradicts the FDLE analyst's testimony. To the extent that Henyard claims that no objective match criteria are employed, that claim is rebutted by the record. *(TR 3284-92).* Likewise, Henyard's argument that the FDLE laboratory that did the testing is not accredited is misleading. The FDLE laboratory involved in this case last underwent accreditation review in 1989, but, at that time, DNA testing was not being performed by that laboratory. *(TR 3269).*

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[7] Henyard's reliance on *Vargas v. State,* 640 So. 2d 1139 (Fla. 1st DCA 1994), is wholly misplaced. *Vargas* was decided on technical grounds dealing with the DNA population database used in that case. *Vargas* has nothing to do with the issues in this case.

The accreditation period is five years, and reinspection was scheduled for the fall of 1994. *(TR 3270).* The DNA section of the lab was scheduled to be evaluated at that time. *(Id.)* In any event, Henyard has pointed to nothing which calls into question the testing methodology used by FDLE.

The FDLE lab has extensive written quality control procedures in place, *(TR 3270-74)*, and Henyard's claim that those safeguards are not the ones contained in the NRC report is simply not supported. Rather, the FDLE policies fully conform with the recommendations contained within the NRC report. *(R 924).* To the extent that Henyard argues that the match criteria are not "objective, precise, and uniformly applied," that claim is rebutted by the record. As the FDLE analyst testified:

> Q. So then it is true that in discussing what to call a conclusive exclusion that, that you would -- anything outside of the plus or minus two point five percent range will definitely be excluded in your opinion?
>
> A. Well, actually to call an exclusion I, I typically would never go as far as sizing an autorad. Exclusions are typically called on visual examination of the autorads because the banding patterns do not match.
>
> Now, there are times where you would call, you would have a visual match, that's one reason for the confirmation process, is to confirm mathematically what your eyes have seen.
>
> Anything that would fall outside of the two and a half percent match criteria would be an exclusion barring that there was nothing that was wrong with that autorad, such as background noise in the autorad, ladder lanes that were not significant, were not -- did

not have the thirty bands of the bands weren't present in the area where you were looking so you had nothing to adjust for.

There are a number of different reasons why calls can be inconclusive but over two and a half percent would be an exclusion unless there was as I stated something major wrong with what you were looking at that you couldn't trust your result such as maybe the control on the gel wasn't where it was supposed to be, either, but over two and a half percent would be an exclusion.

Of course now that is also remembering that our, our match criteria only goes up to the ten thousand kilobase range. Bands over ten thousand kilobases are only evaluated visually, they are not evaluated mathematically so they are not used in any kind of statistical calculation as the frequency of a banding pattern.

Q. But you do use those above ten thousand kilobase pairs when it goes outside maybe the two point five match window somewhat but not the five points, would you go back and look at those higher base pairs --

A. No, sir.

Q. -- to check and see if there was, you know, any distortion of them, maybe call it inconclusive because of that?

A. You would have to, to show me some specific instance in which you are referring to. Bands over ten thousand kilobases or ten thousand ninety-two, I forget, it's the third band down the ladder, are not used. They are used only in visual evaluations of the DNA profile, that's one reason why we say the fixed bend method is conservative, because bands over ten KB are not used in the statistical analysis of those patterns so that's actually one of the conservative features of that method of statistical analysis.

Q. Okay. Well, isn't it true that, that if you had called a bad visual match and then say it fell outside that one point seven five percent plus or minus range of match window but within two point five percent plus or minus, then you'd go back to the autorad to see if there was some curvature or that the ladder was of marginal quality in the region of gel?

A. Yeah, but that again is referring to bands under ten thousand base pairs. Those over ten thousand base pairs, I mean, you can see from the sizing sheets we do size, I mean, they are on the autorad and we keep track of those but they are -- those numbers are not used for those bands, but, yes, between one point seven five, if a band fell outside of one point seven five percent difference or three and a half percent window deal but not over the two and a half, when I wrote the match criteria guidelines we decided that since we had not begun case work that we would actually have a level in our match criteria where there was an inconclusive range, a specified inconclusive range where things could be called inconclusive.

I'm not sure I follow your question or am answering it.

Q. So then I guess what I'm asking then there, there's no precise objective standard for determining when a sample which falls outside a match window should be called inconclusive and when it should be called an exclusion?

A. Again, there are match guidelines that are written, match criteria which you were given but a lot -- however a lot of the decision making process is left in the hands of the examiner based on their experience and expertise in interpreting things, that's what I've been trained to do.

Q. Okay. So it sounds to me then like two different analysts, one may call it inconclusive and one may call an exclusion looking at the same?

A. No sir, I don't believe so. I don't, no I don't believe that would happen.

Q. It's up to that -- it's up to the individual, the individual would have to go by their own standards and it would be up to them to make that call, correct?

A. To a certain extent but as I, I stated before, our files are reviewed by our supervisor and again the autorads are permanent records that can be reviewed and if there is any question as to whether an inconclusive call should have been an exclusionary call which as I stated before I don't know when that would be, then those things would come in to be answered because the autorads are a permanent record. They are looked at by a second individual, and they are reviewed in the review process. Again, if that was, you know, I...

Q. Okay. Well, I guess what I'm getting at then is that, is that you can't go to a document in your lab and say, okay, here's the criteria, this is an exclusion or this is inconclusive?

A. Well, as I stated before, most off the time an exclusion is based on visual examination of the autorad. Yes, there is a document that I can go to, you've been provided with that, it states what our match criteria is, what our match window is, it does try to give some instances where inconclusive would be called and it does state that anything over two and a half percent would be an exclusion unless there is something wrong with the autorad.

Typically, inconclusive calls involve patterns where with one probe you don't have a banding pattern at all present in that particular lane, or two, you have a

very faint banding pattern. Actually most of the inconclusive calls I make are based on the fact that although I have a visual match between two patterns, one pattern is so faint that III cannot image it with the computer imaging system that we have. The human eye is better than any camera. If I can't image it, then I can't call it a match so therefore it's called an inconclusive.

Also those patterns are evaluated, sometimes they are missed and one reason for sizing them is confirm the fact that if the second person cannot get a sizing that is similar, then the patterns, were, in fact, too faint to try to size.

As I stated before, we do have a match criteria, we do have guidelines; however, the experience and the expertise of the analyst comes into play in interpreting autorads. Their experience and expertise is evaluated through proficiency testing, through case file review, through outside aids, through a number of different areas, and if there is any question in this case about an inconclusive call that I made please ask me and I will try to explain to you the reason why it was called inconclusive.

Q. Well, I'm just trying to get -- to determine what the criteria, you know, is in the lab, is there any objective standard for determining this. I guess --

A. Yes, sir.

Q. -- you've answered the question.

A. Okay.

(TR 3286-91). That testimony is more than sufficient under *Hayes.*

In addition to the pre-trial testimony, the state laid an extensive predicate concerning the testing methodology employed

in this case at the time of trial. That testimony included the fact that the actual procedure used in this case was first promulgated by the FBI in 1988, and has been in continuous use since that time. *(TR 1652).* As the FDLE analyst testified:

> Q. Miss Rathman, before we get started with the actual items and your examination of them, will you explain to the jury what safeguards are built into your testing process and examination process to make sure that it's reliable?
>
> A. Well, one, we do have a written protocol which is followed each and every time we do a DNA profiling test in the Orlando Crime Laboratory. Within that procedure, that written procedure, there are certain areas where reagents which are used in the procedure, lot numbers of reagents that are used must be recorded so that if anything were to go wrong within the DNA procedure itself we could track down what the potential problem was.
>
> Another area safeguard is the fact that every time I run a DNA profiling procedure on a particular case a known standard is run in conjunction with those samples and the end product of that known standard, I know what that DNA profile should look like, it is a DNA sample that is not only run in our crime laboratory but is also run in the other FDLE laboratories that perform DNA profiling tests and also other crime laboratories throughout the country.
>
> So that pattern is known, is a known pattern and if that pattern does not appear as it should then I know something has gone wrong within the procedure itself.
>
> There are also two separate locations within the testing process during which time the quality of the DNA that is extracted from a particular blood stain is examined so that I know what type of sample I am working with and what type

> of results I can expect from that sample. And there is another point where after I manipulate the DNA molecule itself with a couple of chemicals that I take another look at that DNA sample to make sure that the process or the chemical reaction that I was trying to produce has actually occurred.
>
> So that is some of the things which are within the protocol itself, the use of the known standard, the use of a written protocol and the recording of which reagents are used in the test.
>
> Also, any time I write a report it is reviewed by my supervisor for technical content and to make sure that the data from the tests actually supports the conclusion that I have drawn.
>
> In addition to that a random sample of the cases that I work each year are reviewed by a forensic serologist who does DNA profiling in one of our other laboratories and that person again is looking to make sure that any conclusions or opinions I have drawn in my report are supported by the scientific data in the file folder.

(TR 1666-68).

Finally, Henyard's suggestion that the state should have brought in "independent experts" to bolster the testing procedures employed by FDLE is not only procedurally barred, but also meritless. This claim was not raised at trial and, for that reason, is procedurally barred under settled Florida law. *Steinhorst, supra.* Moreover, contrary to Henyard's claim, the state properly proved up the reliability of the testing methodology. There is no evidentiary rule that requires an "independent expert" to pass judgment on FDLE's techniques, and, in any event, no such requirement is found in *Frye* or in the Florida evidence

code. The state met its burden of proof under the *Hayes/Frye* standard, and there is no error. In any event, there was no expert testimony contradicting FDLE's methodology, only the affidavit of the defense "expert" who did not testify. The only complaint contained within that affidavit concerns the controversial use of the "ceiling method" of statistical analysis, which was not employed by FDLE, and is not a subject of Henyard's brief on appeal. Henyard had every opportunity to present live testimony in an effort to contradict the FDLE analyst's testimony, but choose instead to rely upon an affidavit. Nothing in the record casts the slightest doubt upon the reliability of the test results, and Henyard is not entitled to relief.

Alternatively, even if the DNA evidence should not have been admitted, any error in the admission of that testimony is harmless beyond a reasonable doubt. The DNA evidence in this case is far from the only evidence of guilt. In addition to that evidence, there is the victim's identification of Henyard as the person who kidnapped, raped, and shot her *(TR 1832)*, as well as Henyard's confession to all of the offenses except for the murders of the children. *(Supplemental Record Vol. I)* Henyard has never denied being at the scene of the murders; he only claims that he did not actually fire the fatal shots. *(TR 1101-02).* Henyard admits that he moved at least one body (after the shootings) and attempts to explain the presence of blood on his clothing in that way. *(TR 1944).* Henyard has never claimed that the blood on his clothing *was not* that of the murder victims. Any

error was harmless beyond a reasonable doubt under the facts. The DNA evidence is wholly consistent with and corroborative of the other evidence, the admission of which is not in dispute. Henyard would have been convicted even in the absence of any DNA testimony.

The DNA evidence in this case was properly admitted following a *Frye* hearing. The methodology employed by the DNA analyst was demonstrated to be well within that which meets with general scientific acceptance, and there was no error in its admission. Henyard's convictions and sentences should be affirmed in all respects.

CLAIM V

THE PROSECUTORIAL ARGUMENT CLAIM

On pp. 50-59 of his brief, Henyard addresses two instances of what he describes as "improper prosecutorial comments". Neither of those claims is a basis for reversal--one claim fails on the law, and the other has no basis in fact when the record is read in context.

The first statement which Henyard claims is improper is the state attorney's statement, during voir dire, that if the aggravators outweigh the mitigators, the sentencing recommendation should be death. Henyard argues that that statement was erroneous because it did not acknowledge the jury's "inherent pardon power." This Court has repeatedly rejected the claim that a "pardon power" jury instruction must be given, and, given that settled rule, it makes no sense to claim that the statement made during voir dire was error. *See, e.g., Foster v. State,*

614 So. 2d 455, 462 (Fla. 1992); *Mendyk v. State*, 545 So. 2d 846, 850 (Fla. 1989). Moreover, the law is settled that it is not error to instruct the jury that it should return a recommendation of death if the aggravators outweigh the mitigators. *See, e.g., Stewart v. State*, 549 So. 2d 1717 (Fla. 1989); *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 547 (1990). The statement made by the prosecutor is in accord with settled law, and there is no error. To the extent that Henyard attempts to equate the "pardon power" issue with the requirement that juries be instructed on lesser included offenses which are supported by the evidence, that comparison is inapt. Just as a pardon power (or unbridled mercy option) instruction *is not* constitutionally required, the lesser included offense instruction *is* constitutionally compelled when the lesser included offense is supported by the evidence. *See, e.g., State v. Wimberly*, 498 So. 2d 929 (Fla. 1986). The statement by the State Attorney was legally accurate, and is not a basis for reversal.[8]

The second claim is based upon an out-of-context quotation taken from the guilt phase closing argument. This claim is not supported by a fair reading of the transcript. Prior to the complained-of argument, the State Attorney argued that the sexual

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[8] To the extent that Henyard claims that the sentencing recommendation is "suspect" because the jury vote totals were changed by the jury before they became final, that is shear speculation.

battery was committed by Henyard. *(TR 1969).* The entire argument, in its context, is as follows:

> And then they will tell you he was cooperative when he went to the police. He eventually told them what happened and he told them that he didn't kill the girls. And my first thought in that regard is, does it matter how many times you tell a lie for it to become the truth? Because I say it nineteen times or nineteen thousand times, does it make it so? And we all know it doesn't. You have to look at everything that is going on and see in that same story he is telling them, I never raped anybody.

(TR 1973-74).

When the closing argument is fairly considered, it is clear that the state attorney was referring to the statement by Henyard that was in evidence, and was not, contrary to Henyard's claim, making a bad faith argument which implied that he never admitted the sexual battery. The trial judge observed the context of both the argument itself and the arguments at the bench on Henyard's objection, and was in the best position to evaluate the matter. His denial of the motion for mistrial was not an abuse of discretion, and there is no basis for reversal. *See, e.g., Powers v. State,* 605 So. 2d 856 (Fla. 1992).

As Henyard points out on p. 57 of his brief, only one of Henyard's three statements was actually offered in evidence.[9] Henyard complains because all three statements were not offered,

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[9] This statement, while correct, is hopelessly irreconcilable with claim 3, above, which argues that the two statements that were not offered into evidence should have been suppressed, and that the fact they were not suppressed gives rise to grounds for reversal.

and asserts that the state's decision not to introduce the remaining statements is "suspicious". *Appellant's Brief at 57.* While Henyard attempts to present a colorable claim, when stripped of its pretensions, his true complaint is that he guessed wrong about the state's trial strategy. That states no legal basis for relief, and, moreover, totally ignores the fact that Henyard could have offered the other two statements into evidence himself had he desired to do so. To the extent that Henyard claims that the prosecutor's argument was false, that claim fails because the facts simply do not support it. *See,* pp. 43-44, above. The state did not present any improper argument, and the convictions and sentences should be affirmed in all respects. *See, e.g., Power, supra.*

CLAIM VI

THE STATEMENTS MADE BY DOROTHY LEWIS TO THE FIRST OFFICER TO ARRIVE WERE PROPERLY ADMITTED AS NON-HEARSAY

On pp. 60-62 of his brief, Henyard argues that the statements made by Dorothy Lewis (the surviving victim) to the first law enforcement officer to come in contact with her should not have been admitted into evidence. The complained-of testimony was properly admitted for three independently adequate reasons.

The first reason that Ms. Lewis' statement was a proper subject for the officer's testimony is because Ms. Lewis' description of the defendants is not hearsay under § 90.801 (2)(c) of the *Florida Statutes*. A statement of identification made after perceiving an individual is specifically made *non-hearsay* so

long as the declarant testifies at trial. § 90.801 (2)(c). Ms. Lewis testified at trial and, therefore, her description of the defendants was not hearsay but was, instead, properly admitted through the testimony of the investigator. *(TR 1809); see, e.g., Powers v. State,* 605 So. 2d 856, 862 (Fla. 1992). There was no error.[10]

The second reason the testimony was properly admitted is because it is admissable under the excited utterance exception to the hearsay rule. *Florida Statutes § 90.803 (2).* There are three components that must exist in order for the exception to apply--each is present in this case. First, there must have been an event (or condition) which was startling enough to cause "nervous excitement". *See generally, Jackson v. State,* 419 So. 2d 394, 396 (Fla. 4th DCA 1982). The events that Ms. Lewis endured, which included being kidnapped at gunpoint, raped twice, shot four times, and then walking some distance for help are certainly startling enough to cause "nervous excitement" sufficient to satisfy the first element of the 803(2) exception.

The second element of the 803(2) exception is that the statement must have been made before there was time to contrive or misrepresent. The third element is that the statement must have been made while the declarant remained under the "stress of the excitement of the event." Under the facts of this case, both components are satisfied from the same facts. While Henyard argues that "several hours" passed between the events and the

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10 The state recognizes that § 90.801 (2)(c) was not the basis for the trial court's ruling. That fact does not render the lower court's ruling erroneous.

statements, that argument ignores the facts. Ms. Lewis was shot and left for dead in an extremely isolated area. *See, TR 1145.* Ms. Lewis walked some distance after regaining consciousness before reaching a residence. *(TR 1132).* Ms. Lewis hid each time that she saw vehicle headlights because she feared that the defendants would return *(TR 1829).* The person at the house where Ms. Lewis sought help would not allow her inside the residence, so Ms. Lewis waited for the police outside. *(TR 1829).* Ms. Lewis had no concept of the passage of time, and, in fact, was primarily concerned with staying alive until the arrival of law enforcement personnel. She simply did not have time to "contrive or misrepresent", and the second component of the exception is established. Likewise, there can be no credible claim that Ms. Lewis was not under the stress of excitement caused by the events that preceded the arrival of law enforcement. Ms. Lewis was hysterical when the first officer arrived, and the third element of the 803(2) exception also exists. The police officer was properly allowed to testify about Ms. Lewis's statement because it falls within the 90.803(2) exception to the hearsay rule. *See, e.g., Power v. State,* 605 So. 2d at 862.

To the extent that Henyard's claim may be directed toward matters other than the description of the defendants, Ms. Lewis's statement that she had been raped and shot clearly falls within the excited utterance exception to the hearsay rule. *See* pp. 46-47, above. In any event, those facts are not disputed, anyway. Henyard admitted that he had raped and shot Ms. Lewis in his opening statement *(TR 1101-1102),* and the testimony by the officer

that Ms. Lewis stated that she had been raped and shot cannot be prejudicial in light of Henyard's admission.[11] Even if the non-identification component of Ms. Lewis's statement to the investigating officer should not have been admitted, any error was harmless beyond a reasonable doubt. *See, e.g., State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986). Henyard's convictions and sentences should be affirmed in all respects.

CLAIM VII

THE GUILT PHASE JURY INSTRUCTION CLAIM

On pp. 63-73 of his brief, Henyard argues that the standard jury instructions on premeditated murder and reasonable doubt are incorrect. Henyard also asserts that his motion for a special verdict as to the theory of guilt was improperly denied. Each of these discrete claims is foreclosed by binding precedent for the reasons set out below.

A. The Premeditated Murder Instruction

Henyard argues that the standard instruction on first-degree murder is constitutionally deficient because it does not adequately instruct the jury that a "premeditated design" to commit murder is a statutory element of that offense. The precise claim contained in Henyard's brief was presented to this court in *Spencer v. State,* 645 So. 2d 377, 382 (Fla. 1994), and was squarely rejected. After analyzing the historical background of the jury instruction, this court expressly found that the standard jury instruction on premeditated murder "addresses all

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11 Ms. Lewis subsequently testified about the same facts. *(TR 1824, 1826-27).*

of the points discussed in *McCutchen* [*v. State,* 96 So. 2d 152, 153 (Fla. 1957)], and thus properly instructs the jury about the element of premeditated design". *Spencer, supra.*

The precise claim presented by Henyard has previously been decided adversely to him, and there is no reason to revisit that issue. There is no deficiency in the standard instruction, and Henyard's requested jury instruction on first-degree murder was properly refused.

B. The Reasonable Doubt Instruction

Henyard further argues that the standard jury instruction on reasonable doubt does not comport with the requirements of the Constitution. This claim was also addressed by this court in *Spencer,* and was also decided adversely to the defendant. *Spencer, supra.* The reasonable doubt jury instruction claim, like the first-degree murder jury instruction claim, is foreclosed by binding precedent. There is no reason to revisit long-settled Florida law. *See also, Esty v. State,* 642 So. 2d 1074, 1078 (Fla. 1994); *Brown v. State,* 565 So. 2d 304, 307 (Fla.), *cert. denied,* 498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990), *abrogated on other grounds, Jackson v. State,* 19 Fla. Law Weekly S215 (Fla. April 21, 1994); *see also, Victor v. Nebraska,* ___U.S.___, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). There is no defect in the standard jury instruction on reasonable doubt, and Henyard's convictions and sentences should be affirmed.

C. The "Special Verdict" Claim

Henyard's final guilt phase jury instruction claim concerns the denial of his requested instruction which purported to

require the jury to make a specific finding as to the theory under which the defendant was convicted. This claim, like the other jury instruction claims, has been decided and expressly rejected by this court. *See, e.g., Patten v. State,* 598 So. 2d 60 (Fla. 1993), *cert. denied,* 113 S.Ct. 1818 (1992); *Young v. State,* 579 So. 2d 721 (Fla. 1991), *cert. denied,* 112 S.Ct. 1198 (1992); *Jones v. State,* 569 So. 2d 1234 (Fla. 1990), *appeal after remand,* 612 So. 2d 1370 (Fla. 1992), *cert. denied,* 114 S.Ct. 112 (1993); *Haliburton v. State,* 561 So. 2d 248 (Fla. 1990), *cert. denied,* 501 U.S. 1259, 111 S.Ct. 2910 115 L.Ed. 2d 1073 (1991). There is no reason for revisiting settled Florida law, and, in fact, *Patten* and *Young* post-date every case relied upon by Henyard in support of his position. This claim is foreclosed by binding precedent, and Henyard's convictions and sentences should be affirmed in all respects.

CLAIM VIII

THE TRIAL COURT CORRECTLY EXERCISED ITS WIDE DISCRETION IN MATTERS PERTAINING TO THE ADMISSION OF EVIDENCE IN THE PENALTY PHASE.

On pp. 74-86 of his brief, Henyard raises three separate claims concerning the admission of evidence at the penalty phase of his trial. None of those claims have merit for the reasons set out below.

A. Any Error In Consideration Of The Juvenile Robbery Was Harmless Beyond A Reasonable Doubt

The trial court's sentencing order reflects the following aggravating factors found applicable to both the murder of seven-year-old Jamilya Lewis and her three-year-old sister Jasmine:

> 1) The defendant has been previously convicted of a capital felony and six non-capital felonies involving the use or threat of violence to the person. Florida Statute 921.141 (5)(b).
>
> a. Armed robbery of Julia Delisle in November in November, 1989.
>
> b. Armed kidnapping of Jamilya's [Jasmine's] younger [older] sister, Jasmine [Jamilya].
>
> c. Armed kidnapping of Jamilya's [Jasmine's] mother.
>
> d. Armed sexual battery of Jamilya's [Jasmine's] mother.
>
> e. Attempted murder of Jamilya's [Jasmine's] mother.
>
> f. Armed robbery of Jamilya's [Jasmine's] mother.
>
> g. First degree murder of Jamilya's [Jasmine's] younger [older] sister, Jasmine [Jamilya].

(R 1495-96, 1504).

Henyard argues that the trial court erred in "considering" his prior juvenile conviction for armed robbery as a prior felony establishing the Section 921.141(5)(b) aggravating circumstance. Subsequent to the filing of Henyard's initial brief, this Court decided *Merck v. State,* 20 Fla.L.Weekly (Fla. October 12, 1995). In *Merck,* this Court found reversible error in the trial court's consideration of an adjudication of delinquency for assault with a deadly weapon. *Id.,* at 539. There are three independently adequate reasons why *Merck* does not establish a basis for reversal of Henyard's death sentences.

The first reason that *Merck* does not provide a basis for reversal of Henyard's sentences is because none of the fanfare which accompanied proof of Merck's juvenile adjudication is present in this case. In contrast to the extensive testimony about Merck's prior offense, the sum total of the testimony about Henyard's robbery conviction consumed two pages of transcript. *(TR 2098-2100).* The testimony about Henyard's robbery conviction was less than minimal, did not come close to becoming a feature of the trial, and could have had no effect at all on the jury's sentencing recommendation. Any error was harmless beyond a reasonable doubt. *See, DiGuilio, supra.*

Because there was so little emphasis placed on the prior robbery, the critical fact that was present in *Merck*, that "we cannot say that dramatic testimony concerning the North Carolina shooting did not taint the recommendation of the jury", *Id.*, is not present. Unlike *Merck*, there was no testimony at all about the circumstances of the robbery aside from that introduced by Henyard. That testimony was far from dramatic, and, in fact, had the effect of greatly minimizing Henyard's role in that offense. *(TR 2210-22).* That testimony established that Henyard was the least culpable of the three defendants (doing no more than serving as the lookout), and that the "weapon" involved was a broomstick. *Id.* That is far from the detailed testimony that was present in *Merck,* and reliance on that case is a comparison of apples and oranges. The testimony about Henyard's prior robbery simply cannot have affected the recommendation of the jury in light of all of the other evidence supporting the prior violent

felony aggravator. Any error was harmless beyond a reasonable doubt. Unlike *Merck*, under the facts of this case, Henyard is not entitled to another sentencing proceeding. His death sentences should be affirmed in all respects.

The second reason that Henyard suffered no prejudice from the introduction of evidence concerning his prior robbery is because, as that evidence was presented to the jury (by Henyard), it was consistent with his argument that he was not the leader in the rape, kidnappings and murders at issue here. As Henyard presented the facts of that robbery, he was no more than a hanger-on who had virtually no role in the actual offense, committed *no act* of violence, and admitted his role and pleaded guilty to the robbery. That evidence is a far cry from the testimony in *Merck* which recited, in graphic detail, Merck's act of shooting a woman in the face for no reason whatsoever. *See, Merck, supra,* at 538. Henyard, in contrast, was able to successfully downplay the robbery (because the facts allowed it), and simply cannot argue that the prior robbery played any role in the jury's recommendation that Henyard be sentenced to death for both murders. Even if the prior violent felony aggravator was removed completely from the sentencing calculus (and to do so would be inconsistent with Florida law because of the six remaining contemporaneous felonies) that result would be the same. The jury recommended two death sentences based upon the facts of the two vicious murders for which Henyard was convicted--the prior armed robbery conviction played no part in the recommendation. Any error was harmless beyond a reasonable

doubt, and to allow Henyard another sentencing hearing based on *Merck* would serve no purpose--the facts of this case are such that the jury would have recommended death with or without the robbery conviction being introduced into evidence. *See, e.g., DiGuilio, supra; Jones, supra; Hendirx, supra, see also, Preston v. State,* 531 So. 2d 154, 159 (Fla. 1988); *Peterka v. State,* 640 So. 2d 59 (Fla. 1994).

To the extent that Henyard may argue that the sentencing court's consideration of the prior robbery was error that requires a new sentencing proceeding, that argument is without merit. While the trial court did identify the robbery as an offense supporting the prior violent felony aggravator that does not establish a basis for reversal. That aggravating circumstance exists beyond a reasonable doubt whether or not the prior robbery is included in the proof. Because the prior violent felony aggravator was proven beyond a reasonable doubt by the six other felonies that Henyard has committed, any error in the consideration of the robbery is harmless beyond a reasonable doubt because the aggravator exists, anyway. The sentencing court's inclusion of the robbery in its sentencing order is essentially surplusage because the prior violent felony aggravator exists beyond a reasonable doubt. There is no reason to set aside Henyard's two death sentences under those facts.[12]

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12 There is no Federal constitutional implication to the trial court's consideration of the robbery as one component of the prior violent felony aggravator. *See, e.g., Lindsey v. Smith,* 820 F.2d 1137, 1154 (11th Cir. 1987); *Brooks v. Francis,* 716 F.2d 780, 791 (11th Cir. 1983).

Assuming for the sake of argument that the robbery was improperly considered in support of the prior violent felony aggravator, the situation that is created is partially analogous to the situation that exists in the context of *Johnson v. Mississippi* error. The law is well-settled that *Johnson* error is properly the subject of harmless error analysis, and that such an error can be harmless. *See, e.g., Owen v. State,* 596 So. 2d 985 (Fla. 1992); *Tafero v. State,* 561 So. 2d 557 (Fla. 1990). If *Johnson* error can be harmless when other valid convictions exist, and the law is clear that that is so, it makes no sense to find reversible error in this case. There is (and can be) no claim that the evidence that was presented to the jury was inaccurate in any way, unlike the situation in *Johnson.* The prior violent felony aggravator is supported by six unquestionably valid convictions which apply to each murder, and it cannot be overemphasized that this aggravator is proven beyond a reasonable doubt. Because that is so, any error is harmless, and Henyard's death sentences should be affirmed in all respects. *See also, Simms v. State,* 602 So. 2d 1255 (Fla. 1992).

In his brief, Henyard claims that "...the state presented the juvenile commitment for robbery and relied upon it in *exhorting* the jury to return a recommendation of death." *Appellant's brief at 76.* In fact, there were only two references made to the armed robbery in the prosecutor's closing argument. *(TR 2469, 2498)* The first instance came in connection with Henyard's argument that his age was substantial mitigation:

> When you are considering, and by the way, I need to clarify one thing. On one of the documents that you're going to have a chance to look at, the judgments from 1989, the previous robbery, I think it indicates that the defendant's date of birth is June 26th, 1975, that's wrong, that's an incorrect typographical error that they made back in '89, it's actually June 26, 1974, as both his father and his mother testified yesterday.

(TR 2469).

The second instance was:

> When he goes before the Judge to be sentenced on Count Eight, he will have all of those prior convictions in his background, as well as the 1989 robbery as a juvenile.
>
> And as to Count Nine, ... [prior convictions omitted] ..., and of course the robbery in 1989.

(TR 2497-98).

Neither of those statements qualifies as an exhortation--they are more appropriately described as benign comments that were not improper. In contrast, Henyard's counsel argued at length about the 1989 conviction:

> Another aggravating circumstance that Mr. Gross says he has proven is what we call a prior violent felony. The defendant has been previously convicted, that means before. The only evidence you have of a previous violent felony is the testimony that Mr. Henyard, as a juvenile, was convicted of Robbery With a Weapon, and if you recall, the first thing we did yesterday from the witness stand, was to bring in a deposition we had taken of Mr. Henyard's lawyer, and that deposition was brought in for the purpose of showing you that although he was convicted of Robbery With a Weapon,

> his involvement was simply as a lookout. Only a lookout. He is not the person that struck that lady. Larry Hayes was the person that struck the lady.
>
> And ladies and gentlemen, that is a doubt to which you can attach a reason with regard to this aggravating circumstance...

(TR 2513-14).

Finally, the Judgment for the armed robbery was introduced, with little fanfare, by a clerk in the Lake County Juvenile Division. Its introduction was not a feature of the trial. *(TR 2098-2100)* Error, if any, was harmless. *DiGuilio*.

B. The Jury Was Properly Instructed Upon Aggravating Factors.

Henyard's argument as to this point concerns jury instructions on the previously argued 1989 juvenile conviction and the avoiding arrest aggravating circumstance. *(TR 2542-2544)* Henyard's argument completely ignores his trial counsel's failure to specifically object to the *giving* of either instruction at the conclusion of the penalty phase instructions. *(TR 2550-2551)* These matters were not properly preserved and are not cognizable in this appeal. *Preston v. State, supra*, at 159; *Henderson v. Singletary*, 616 So. 2d 313, 315 (Fla. 1993). Any renewed objection at the end of the charge to the juvenile conviction related only to its admission into evidence, not the instruction given concerning it. *(R 1274-1277; TR 2073-2078, 2100)* Henyard also did not object to the *giving* of the avoiding arrest aggravating circumsstance instruction, only to the *content* of the instruction, thereby implicitly conceding the applicability of that aggravator. *(R 663, TR 2550-51)*

As set out on pp. 52-59, above, consideration of the 1989 armed robbery conviction was, at worst, harmless error. Even if the jury instruction was error, it was harmless beyond a reasonable doubt given the capital murders and the five (5) other prior violent felonies which clearly established the prior violent felony aggravator. *Preston, supra; Henderson v. Singletary, supra*, at 315 (Fla. 1993).

There was also evidence that supported the giving of a jury instruction on the witness elimination aggravator. *See, Hunter v. State*, 20 Fla. L. Weekly S251, S254 (Fla. June 9, 1995) (Not error for trial court to instruct the jury on the cold, calculated and premeditated aggravator where evidence was presented to support same, even though trial court found it was not proven beyond a reasonable doubt.) In the sentencing order, the trial court found:

> During the week preceding the murders and kidnapping of the victims the defendant, Richard Henyard (Henyard), stated he was going to get himself a car. That the defendant foretold or bragged on Friday evening January 29, 1993 that he would steal someone's car, kill the owner and use the car to drive to Pahokee to see his father.

(R 1492)

In fact, Henyard stole Ms. Lewis's car and attempted to kill her after raping her. After leaving her for dead on the side of the road, he drove a little farther and executed the two remaining witnesses to his crimes, Jamilya and Jasmine. There was most definitely evidence to support the avoiding arrest

aggravator, and it was not error to instruct the jury on this aggravator even though it was not ultimately found by the trial court. *Hunter, supra*. Even if the aggravator should not have been submitted to the jury, any error is harmless beyond a reasonable doubt "...because we can presume that the jury disregarded the factor[s] not supported by the evidence." *Fotopoulos v. State*, 608 So. 2d 784, 792 (Fla. 1992), *cert. denied,* 113 S.Ct. 2377 (1993), *citing, Sochor v. Florida*, ___ U.S. ___, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (1992). Henyard's death sentences should be affirmed in all respects.

C. The Testimony of Dorothy Lewis and LeRoy Parker was Properly Admitted at the Penalty Phase

On pp. 82-85 of his brief, Henyard argues that portions of the penalty phase testimony of Ms. Lewis and of FDLE analyst LeRoy Parker were improperly admitted. The basis of Henyard's claim is that the testimony was irrelevant. That conclusion is only possible through a hyper-restrictive view of the concept of relevance in the context of the penalty phase of a capital trial. There is no legal basis for Henyard's claims for the reasons set out below.

Henyard's first complaint is that Ms. Lewis should not have been allowed to testify that, when she began to pray, the defendant said "you might as well stop calling Jesus: this isn't Jesus, this is Satan." *(TR 2091).* According to Henyard, this testimony is not relevant to any aggravating circumstance and, therefore, its admission was error. Henyard's argument fails because that testimony is clearly relevant to the heinous, atrocious, or cruel aggravating circumstance.

Florida law is settled that, even when the victim dies instantaneously as the result of a gunshot wound, the heinous, atrocious, or cruel aggravating circumstance may still be found based upon the "mental anguish" to which the victim was subjected prior to the actual firing of the fatal shot. *See, e.g., Preston v. State,* 607 So. 2d 404, 409-10 (Fla. 1992); *Phillips v. State,* 476 So. 2d 194, 196 (Fla. 1985); *Routly v. State,* 440 So. 2d 1257, 1265 (Fla. 1983); *Smith v. State,* 424 So. 2d 726 (Fla. 1982); *Griffin v. State,* 414 So. 2d 1025 (Fla. 1982). Henyard can make no credible argument that a statement such as that one would not be utterly terrifying to two little girls who had already been crying in abject terror. *(TR 2090).*[13]

While Henyard makes much of the speculative claim that Jasmine and Jamilya *may* not have heard the statement he made, that argument does not reach the relevance issue. Ms. Lewis testified that she was sitting in the back seat between her daughters, that her girls were quiet at the point in time when Henyard made the statement at issue, and that Henyard spoke loudly enough for her to hear him. *(TR 2090-91).* Ms. Lewis testified that she was sure that her daughters heard Henyard's statement, and that there was nothing wrong either girl's hearing. *(TR 2094).* Obviously, Jamilya and Jasmine cannot testify that they heard Henyard refer to himself as Satan, but the same can be said about anything that is said to a murder victim. That

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13 Ms. Lewis was active in her church, and it is reasonable to assume that her little girls had had religious training. The significance and meaning of Henyard's statement was no doubt comprehensible to them.

fact does not render the statement inadmissable, and Henyard points to no such authority because there is none.[14]

To the extent that Henyard argues that his statement was "prejudicial", that is always true for adverse evidence. *Gilmore v. Armontrout,* 861 F.2d 1061, 1073 (8th Cir. 1988) ("...Adverse evidence is always somewhat prejudicial...") The statement at issue was relevant to the heinous, atrocious, or cruel aggravator, and Henyard should not be heard to complain because the jury was informed of the real extent to which he terrorized two little girls before he stood them side by side on a deserted road and executed them. *Cartwright v. Maynard,* 822 F.2d 1477, 1490 (10th Cir. 1987) (en banc), *affirmed,* 108 S.Ct. 1853 (1988). ("...[T]he attitude of the killer is best evidenced by what the killer has done..."). *Hill v. Black,* 891 F.2d 89, 91-91 n.1 (5th Cir. 1989). ("...A defendant suffers no undue prejudice when true details of his crimes are rendered to the jury considering his punishment...)". Under these facts, it is difficult to conceive of any evidence whatsoever that would be so prejudicial that its admission would be error--the evidence at issue here comes nowhere close to that threshold.

Henyard also argues that it was error to allow the testimony of FDLE analyst LeRoy Parker that back-spatter blood was present on Henyard's clothes, indicating that he was within

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[14] An analogous situation existed in *Koon v. State,* 513 So. 2d 1253, 1255 (Fla. 1987). While Koon's argument was based upon a hearsay objection (and such is inapplicable here), Koon was no more likely to admit having heard the statement at issue than are the victims in this case. If there was no error in *Koon,* and that is the law, there can be no error here.

four feet of the victim when the fatal shot was fired. *(TR 2168-69).* This was error, according to Henyard, because that evidence is not relevant. That argument fails for two reasons.

First, the Death Penalty Act is clear in its expansive definition of relevance--any evidence relevant to the nature of the crime is properly admitted if deemed relevant by the trial court. *Florida Statutes,* § *921.141(1).* Obviously, the proximity of the defendant to his victim has more than enough relevance to the nature of the crime to be properly admitted into evidence. The complained-of evidence was clearly probative, and was properly admitted pursuant to § 921.141(1). Henyard's claim that the evidence was not relevant (and presumably also not probative) is wholly meritless. The blood-spatter evidence went directly to the nature of the crime.

The second reason that Henyard's claim fails is because it is predicated upon an incorrect perception of the scope of evidence allowed at the penalty phase of a capital trial. Relying on *Trotter v. State,* 576 So. 2d 691 (Fla. 1990), and *Trawick v. State,* 473 So. 2d 1235 (Fla. 1985), Henyard makes the sweeping generalization that the only evidence the state may introduce at the penalty phase is that which "properly" relates to an aggravating circumstance. *Trotter* and *Trawick* simply do not stand for that proposition. The error in *Trawick* was the trial court's reliance on a separate crime (apart from the murder at issue) to support the heinous, atrocious, or cruel aggravator, while, in *Trotter,* a sentence of community control was erroneously found to establish the under sentence of imprisonment aggravator. The

facts in those cases have nothing to do with Henyard's claim, and do not provide a basis for reversal.

Moreover, the blood-spatter evidence was proper because Henyard argued that he was not the trigger man, and, moreover, argued that lingering (or residual) doubt was present and should be considered as a non-statutory mitigator. *See, e.g., R 1499; 1508; 1512.* It stands reason on its head to suggest, as Henyard does, that the state is not allowed to present evidence addressing his residual doubt argument. Under Henyard's view, even though he argued at length that he was not the triggerman, the state could not present evidence to the contrary.[15] Henyard cites no authority for his position because it simply is not the law. This court should decline Henyard's invitation to restrict the penalty phase evidence in a way that is inconsistent not only with the statute but also with reason. Henyard's convictions and sentences should be affirmed in all respects.

CLAIM IX

THE STANDARD JURY INSTRUCTION ON HEINOUS, ATROCIOUS OR CRUEL GIVEN IN THIS CAUSE HAS REPEATEDLY PASSED CONSTITUTIONAL MUSTER.

Henyard's "vagueness" argument on pp. 86-88 of his brief should be rejected just as it was by this Court in *Preston v. State*, 607 So. 2d 404, 410 (Fla. 1992):

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15 To the extent that Henyard may argue, in his reply brief, that the state's timing in introducing the blood-spatter evidence was incorrect, that claim does not help him. All of the guilt phase evidence and arguments were incorporated into the penalty phase by judicial notice *(TR 2081)*--the state was entitled to reply to matters Henyard had raised.

> ... Because of this Court's narrowing construction, the United States Supreme Court upheld the aggravating circumstance of heinous, atrocious and cruel against a vagueness challenge in *Proffit v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 854 (1976). Unlike the jury instruction found wanting in *Espinosa v. Florida*, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), the full instruction on heinous, atrocious, or cruel now contained in Florida Standard Jury Instructions in Criminal Cases, which is consistent with *Proffit*, was given in Preston's case.[16]

The same instruction was given in Henyard's case, and his claim is foreclosed by binding precedent. *See, e.g., Johnson v. State*, 20 Fla. L. Weekly S343, 346 (Fla., July 13, 1995); *Hannon v. State*, 638 So. 2d 39, 43 and n.3 (Fla. 1994); *Preston v. State, supra; Power v. State*, 605 So. 2d 856, 864-5 and n.10 (Fla. 1992). Henyard's vagueness claim is meritless.

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[16] The instruction given in Henyard's penalty phase was:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show the crime was conscienceless, pitiless or was unnecessarily tortuous to the victim.
>
> *(TR 2544)*

On pp. 88-90 of his brief, Henyard alternatively argues the instruction is constitutionally infirm on due process grounds, "... in that the instruction below relieves the state of its burden of proving elements of the circumstance as developed by this Court in its caselaw." He then provides "instances" of deficiency, the first of which is "torturous intent."

Henyard's argument as to a "tortuous intent" component of this aggravator completely ignores that Florida law is, and consistently has been, that the heinous, atrocious, or cruel aggravator focuses on the perception of the victim rather than on that of the perpetrator. *See, e.g., Stano v. State,* 460 So. 2d 890 (Fla. 1984). Further, his argument totally disregards that "[t]he mindset or mental anguish of the victim is an important factor in determining whether this aggravating circumstance applies." *Phillips v. State*, 476 So. 2d 194, 196 (Fla. 1985). *See*, pp. 73-79, below. Neither of the cases cited by Henyard in his brief as support for this claim included the "mental anguish" factor. *Porter v. State*, 564 So. 2d 1060 (Fla. 1990); *McKinney v. State*, 579 So. 2d 80 (Fla. 1991). Henyard's "tortuous intent" claim has been expressly rejected by this court as meritless, and there is no need to revisit this issue. *Taylor v. State,* 638 So. 2d 30, 34, n.4 (Fla. 1994).

To the extent that further discussion of this frivolous claim is necessary, some additional comments are in order. First, as this court noted in its last *Hitchcock* opinion, "[t]hat Hitchcock might not have meant the killing to be unnecessarily tortuous does not mean that it actually was not unnecessarily

tortuous and, therefore, not heinous, atrocious, or cruel." *Hitchcock v. State*, 578 So. 2d 685, 692 (Fla. 1990) *cert denied*, 112 S.Ct. 311 (1991). Second, it is absurd to equate "intent to torture" with an intent to kill. That comparison is an attempt to compare apples and oranges that fails. To the extent that any "tortuous intent" element on the part of the defendant exists in connection with this aggravator, it is covered by the standard jury instruction. There is simply no constitutional requirement that the jury be instructed in the manner advocated by Henyard, and the sentences of death should be affirmed.

Alternatively, and secondarily, if any so called "intent" requirement were to be grafted onto the heinous, atrocious, or cruel aggravator, that would be a mere refinement in the law upon which a jury instruction is not required. *Vaught v. State*, 410 So. 2d 147 (Fla. 1987). Even if the proposed jury instruction should have been given, any error is harmless because the murders in this case were heinous, atrocious, or cruel under any definition. *See, e.g., Henderson v. Singletary*, 617 So. 2d 313, 315 (Fla. 1995).

Henyard's other two due process "claims" are simply inapplicable to the facts and would have misled or confused the jury:

> ... The instant [HAC] instruction also does not state that events occurring after the victim dies or loses consciousness are to be excluded from consideration, as this Court has held in Jackson v. State, 451 So. 2d 458 (Fla. 1984). Additionally, the instant instruction does not state that a lingering death does not establish the circumstance, as this Court once

> again held in Teffeteller v. State, 439 So. 2d 840 (Fla. 1983).

Appellant's Brief at 89.

This Court has stated:

> Jury instructions must relate to issues concerning evidence received at trial. (citations omitted) Further, the court should not give instructions which are confusing, contradictory, or misleading. (citations omitted)

Butler v. State, 493 So. 2d 451, 452-453 (Fla. 1986).

A defendant is entitled to an instruction on a theory of defense only if there is evidence to support it. *Robinson v. State*, 574 So. 2d 108, 110-111 (Fla.), *cert. denied*, 112 S.Ct. 131 (1991). Similarly, the trial court in a death penalty case has the discretion not to instruct on aggravating factors clearly unsupported by any evidence. *Johnson v. Singletary*, 612 So. 2d 575 (Fla. 1993), *cert. denied*, 113 S.Ct. 2049. This discretion extends to the giving of specific instructions on nonstatutory mitigating circumstances. *Finney v. State*, 20 Fla. L. Weekly S401 (Fla., July 20, 1995); *See also, Jones v. State*, 612 So. 2d 1370 (Fla. 1992), *cert. denied* 114 S.Ct. 112 (1993); *Robinson v. State, supra*.

Henyard's proposed instruction about post-mortem acts, loss of consciousness and lingering death was inapplicable to the murders of three-year-old Jasmine and seven-year-old Jamilya Lewis because none of those matters existed. The severe mental anguish component of this aggravator is found in the presence of Henyard's child victims when their mother was raped by Henyard and his accomplice, shot several times by Henyard and left for

dead, and when they were taken down the road, placed side by side, and executed. The facts establishing the heinous, atrocious or cruel aggravator began with the kidnapping and did not end until the victims were executed as they begged for their "Mommy!"[17] Henyard's proposed instruction would have been confusing to the jury because they would have been told not to consider matters that clearly did not, and were never claimed, to exist.

Alternatively, and secondarily, the claims advanced by Henyard are, at most, mere refinements in the law upon which a jury instruction is not required. *Vaught v. State, supra.* Even if the proposed jury instruction should have been given, any error is harmless because the murder at issue in this case was heinous, atrocious, or cruel under any definition. *See, e.g., Henderson v. Singletary, supra.*

The Standard Florida Jury Instruction on the heinous, atrocious or cruel aggravator is adequate, has repeatedly withstood constitutional attack, and was properly given in this case.[18]

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[17] "...[T]he victim's [s'] mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." *Swafford v. State,* 533 So. 2d 270, 277 (Fla.), *cert. denied* 109 S.Ct. 1578 (1988); *Preston v. State, supra.*

[18] Henyard's reliance on *Omelius v. State,* 584 So. 2d 563 (Fla. 1991) is misplaced. The peculiar facts of that case are of no help to Henyard.

CLAIM X

THE TRIAL COURT FOUND FOUR AGGRAVATING CIRCUMSTANCES, ALL OF WHICH WERE PROVEN BEYOND A REASONABLE DOUBT.

The trial court found that Henyard's two death sentences for the murders of seven-year-old Jamilya Lewis and her three-year-old little sister, Jasmine Lewis, were each supported by four aggravating circumstances:

> 1) The defendant has been previously convicted of a capital felony and six non-capital felonies involving the use or threat of violence to the person. [Actual listed felonies omitted.]
>
> 2) The defendant committed the murder of Jamilya [and Jasmine] Lewis while he was engaged in the commission of kidnapping Jamilya [and Jasmine] Lewis.
>
> 3) The murder of Jamilya [and Jasmine] Lewis was committed for pecuniary gain.
>
> 4) The murder of Jamilya [and Jasmine] Lewis was especially heinous, atrocious or cruel.

(R 1495-96, 1504, 1512-13)

Each aggravator was established beyond a reasonable doubt. *(R 1512-13).* Henyard challenges only two aggravators: 3) pecuniary gain and 4) heinous, atrocious or cruel.

A. Pecuniary Gain

The trial court found at the outset of its "findings of fact as proven during the guilt and penalty phase of the trial beyond a reasonable doubt", that, during the week preceding the murders Henyard "stated he was going to get himself a car." *(R 1492)* The

court further found that Henyard "foretold or bragged on Friday evening[,] January 29, 1993[,] that he would steal someone's car, kill the owner and use the car to drive to Pahokee to see his father." *(R 1492)*

Henyard's own admissions, as summarized in the sentencing order, clearly demonstrate that the brutal murders of little Jamilya and Jasmine Lewis were "an integral step in obtaining some sought-after specific gain." *Hardwick v. State*, 521 So. 2d 1071, 1076 (Fla.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 184, 102 L.Ed.2d 153 (1988). Henyard stole Ms. Lewis' car, attempted to murder her, and cruelly murdered the other occupants of the car, Jasmine and Jamilya Lewis. The pecuniary gain aggravator was proven beyond a reasonable doubt. *See, Jones v. State*, 569 So. 2d 1234, 1238, (Fla. 1990), *appeal after remand*, 612 So. 2d 1370, 1375 (Fla. 1992), *cert. denied*, 114 S.Ct. 112 ("...Jones coldly and dispassionately decided to kill the victims [male owner and female occupant] in order to steal the truck."); *Gamble v. State*, 20 Fla. L. Weekly S242, S243 (Fla. May 25, 1995) (Co-defendants stole victim's car after brutally murdering him.); *Hall v. State*, 614 So. 2d 473 (Fla. 1993). (Victim, seven months pregnant, abducted, beaten, raped, murdered, and car stolen.).

Alternatively, without conceding error, if this Honorable Court should find that the pecuniary gain aggravator does not apply, it would be harmless beyond a reasonable doubt in light of the other three valid aggravating circumstances. *Peterka v. State*, 640 So. 2d 59 (Fla. 1994), *cert. denied* 115 S.Ct. 940 (1995).

B. Heinous, Atrocious or Cruel

This Court has stated that:

> ... It is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious, and cruel; rather, it is the entire set of circumstances surrounding the killing.
>
> *Magill v. State*, 386 So. 2d 1188 (Fla. 1980), *cert. denied*, 101 S.Ct. 1384 (1981), (*Magill I*), *appeal upon remand*, 428 So. 2d 649, 651 (Fla. 1989), *cert. denied*, 104 S.Ct. 198.

Henyard's attempt to focus this Court's attention upon the execution-style murder of Jasmine and Jamilya Lewis ignores a plethora of precedent which holds that "[t]he mindset or mental anguish of the victim is an important factor in determining whether this aggravating circumstance applies." *Phillips v. State*, 476 So. 2d 194, 196 (Fla. 1985). Even where victims have been murdered by gunshot and have died instantaneously, as with Jamilya and Jasmine, this Court has upheld the application of this factor based upon "mental anguish." *See e.g. Routly v. State*, 440 So. 2d 1257, 1265 (Fla. 1983); *Smith v. State*, 424 So. 2d 726 (Fla. 1982); *Griffin v. State*, 414 So. 2d 1025 (Fla. 1982); *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982); *Adams v. State* 412 So. 2d 850 (Fla. 1982) *cert. denied*, 1159 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); *White v. State*, 403 So. 2d 331 (Fla. 1981); *Knight v. State*, 338 So. 2d 201 (Fla. 1976). Further, "[f]ear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." *Preston v. State*, 607 So. 2d 404, 409-10 (Fla.

1992), *cert. denied*, 113 S.Ct. 1619; *See also, Hitchcock v. State*, 578 So. 2d 685, 693 (Fla. 1990), *cert. denied*, 112 S.Ct. 311 (1991); *Rivera v. State*, 561 So. 2d 536, 540 (Fla. 1990); *Chandler v. State*, 534 So. 2d 701, 704 (Fla. 1988), *cert. denied,* 109 S.Ct. 208; *Phillips v. State*, 476 So. 2d 194 (Fla. 1985); *Mason v. State*, 438 So. 2d 374 (Fla. 1983), *cert. denied*, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984); *Adams v. State* 412 So. 2d 850 (Fla. 1982) *cert. denied*, 1159 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982).

Fear, mental anguish and emotional strain exist in abundance under these facts, but those words do not sufficiently describe the ordeal endured by Henyard's victims. The unknown period of time for which two small children were terrorized certainly establishes the mental anguish component necessary under the prior decisions of this Court.

The trial court's "findings of fact as proven during the guilt and penalty phase of the trial beyond a reasonable doubt," *(R 1492)* demonstrate that the heinous, atrocious and cruel factor was properly found to exist:

> During the week preceding the murders and kidnapping of the victims the defendant, Richard Henyard (Henyard), stated he was going to get himself a car. That the defendant foretold or bragged on Friday evening January 29, 1993 that he would steal someone's car, kill the owner and use the car to drive to Pahokee to see his father.
>
> During this same period of time the defendant stole a revolver from Luther Reed, this revolver, would eventually be proven to be the murder weapon.

Dorothy Lewis, and her children, Jamilya, age seven (7) and Jasmine, age three (3) were shopping at the Winn Dixie store in Eustis on January 30, 1993; the time was approximately 10:15 p.m.

After their shopping was completed, the three exited the Winn Dixie and began walking toward their car. Ms. Lewis was putting her children and groceries into the car, Ms. Lewis was approached by Alphonso Smalls (Smalls) who displayed a revolver, which was the murder weapon. Smalls then ordered Ms. Lewis into the back seat of her car along with her children. At the time of the abduction, Henyard was some distance away near the entrance of the Winn Dixie. Smalls called to Henyard "this is the one, come on." Henyard obtained the keys and began driving out of town, as Smalls gave some instructions on general directions of travel. The children were crying and upset, and as a result, Smalls repeatedly told Ms. Lewis to shut the children up. ("shut the f--- up")

During this time, as the vehicle continued on toward the secluded murder location, Ms. Lewis was beseeching "Jesus" for help; which resulted in Henyard saying, "this ain't Jesus, this is Satan," certainly this comment proved to be a harbinger of what was forthcoming.

Eventually, Henyard stopped the car at a deserted location on Hicks Ditch Road outside the City of Eustis. Ms. Lewis was ordered out of her car. Whereupon, Henyard, proceeded to rape her on the trunk of the car, while her children remained very nearby in the back seat of the car. As Henyard was raping Ms. Lewis, she attempted to reach for the revolver that was at the time laying nearby on the trunk of the car. Smalls seeing this

attempt, grabbed the revolver, saying "you're not going to get the gun bi---". When Henyard eventually completed his rape of Ms. Lewis, Smalls then followed and raped Ms. Lewis, again, while she was on the trunk of her car. After Smalls raped Ms. Lewis; Henyard ordered her to get on the ground near the edge of the road. According to Ms. Lewis she was hesitant to follow Henyard's order, so then Henyard pushed Ms. Lewis to the ground. Henyard, now in possession of the murder weapon then shot Ms. Lewis in her leg. Ms. Lewis began to struggle wildly as Henyard with the revolver in hand, began to draw near. Henyard then proceeded to shoot Ms. Lewis three (3) more times, wounding her in the neck, mouth and a wound to the middle of the forehead between her eyes.

Somehow, Ms. Lewis survived the attempt upon her life and would later, after regaining some of her senses, begin to search for help.

After shooting Ms. Lewis, Henyard and Smalls rolled Ms. Lewis' unconscious body off to the side of the road. Henyard got back into Ms. Lewis' car and drove a short distance down the deserted road, whereupon Henyard stopped the car.

Jasmine and Jamilya who had been in continual close approximation and ear shot of the rapes and shooting of their mother, were continuing to plead for their mother; "I want my Mommy", "Mommy", "Mommy".

After stopping the car, Henyard got out of Ms. Lewis' vehicle and proceeded to lift Jasmine out of the back seat of the car, Jamilya got out without help. Then both of the pleading and sobbing sisters, were taken a short distance from the car, where they were then executed, each with a single bullet to the head.

The evidence establishes, Jasmine's left eye, the sight of her mortal wound, was open when she was shot. Further, the evidence establishes that both children were shot at very close range.

Henyard, in his admissions repeatedly denied shooting the little girls, however the evidence proved that Henyard had "high speed" or "high velocity" blood splatters on his jacket which matched Jamilya Lewis'. This type of blood splatter evidence established that Henyard was less than four (4) feet from Jamilya Lewis when she was executed. Henyard's co-defendant, Smalls['], clothing was found to have no such "high speed" blood splatter evidence.

On the morning of Sunday, January 31, 1993 at Henyard's request, Henyard's "Auntie" took Henyard to the home where Smalls was staying, so he could talk with Smalls. During the conversation Henyard was seen shaking his finger at Smalls, but no part of their conversation was overheard. Not long after this meeting, Henyard went to the Eustis Police Department where he, only after intense questioning, begrudgingly confessed his involvement in these murders.

During the trial it was proven that Henyard was convicted of a capital felony and six non-capital felonies involving violence.

Just prior to the trial the Florida Supreme Court ruled that under Florida Law defendants under sixteen (16) years old can not receive the death penalty, therefore co-defendant Smalls who was fourteen (14) years old at the time of these murders can not be sentenced to death should he be convicted of 1st degree murder.

(R 1492-1495)

On p. 93 of his brief, Henyard argues that the heinous, atrocious or cruel aggravator would not have been proper in this case "had the victims been adults." From that erroneous starting point, Henyard extrapolates his view of this Court's prior decisions to reach the conclusion that, because the victims in this case were young children, the murders were not heinous, atrocious, or cruel. That argument is spurious for the reasons set out at pp. 73-77, above. The very essence of the heinous, atrocious, or cruel aggravating circumstance is an evaluation of the murder from the perspective of the victim. Implicit within that fundamental premise is the recognition that the defendant takes his victim (or in this case victims) as he finds him. Whether or not the eighth aggravating circumstance would have been present had the victims in this case been adults is not the question--the victims in this case were small children, and Henyard cannot change that. When this case is compared to the prior decisions of the Court on the same point, the inescapable conclusion is that this murder was especially heinous, atrocious, or cruel because of the terrorism Henyard inflicted on two small children before he executed them. This murder is especially heinous, atrocious, or cruel under the most restrictive definition of that aggravator imaginable, and epitomizes the sort of case to which this aggravator should be applied. The trial court properly found the murders of both children to be especially heinous, atrocious, or cruel, and there is no error. Henyard's two sentences of death should be affirmed.

While the state does not concede that there was any error in finding the murders of Jasmine and Jamilya Lewis to be especially heinous, atrocious, or cruel, even if that aggravating circumstance (and the pecuniary gain aggravating circumstance), should not have been found by the sentencing court, Henyard's death sentences are still supported by two valid, strong, aggravating circumstances. Even with only two aggravators remaining, Henyard still has six prior violent felonies to his credit, which apply to each murder. Moreover, there is no dispute that the murders in this case were committed during the course of a kidnapping. Those two aggravating circumstances standing alone are sufficient to support the sentences of death in this case.[19] Even if only the 921.141(5)(b) and (d) aggravators are present in this case, those two aggravators are still more than sufficient to support the sentences of death. Even if the pecuniary gain and heinous, atrocious, or cruel aggravators should not have been found, and the state does not concede that that is so, Henyard is still richly deserving of the two death sentences he received. Those sentences should be affirmed in all respects.

CLAIM XI

THE DEATH PENALTY IS PROPORTIONATE IN THIS CAUSE.

This Honorable Court has delineated its proportionality review as follows:

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19 As set at p. 71, above, Henyard does not challenge the application of these two aggravators.

> ... In reviewing a death sentence, this Court must consider the particular circumstances of the case on review in comparison to other decisions we have made, and then decide if death is an appropriate penalty in comparison to those other decisions.

Hunter v. State, supra, at S254.

This Court has found a capital sentence to be proportionate where a co-perpetrator received a life sentence, when the defendant "... was bigger and older than [the co-perpetrator] and was the leader." *Hall v. State, supra,* at 479. This Court has also held that death is proportionate when the defendant was "in charge," the "prime mover," or the "dominant force" behind the murders. *Thompson v. State,* 553 So. 2d 153 (Fla. 1989), *cert. denied,* 110 S.Ct. 2194; *Craig v. State,* 510 So. 2d 857, 870, *cert. denied,* 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 *appeal after remand* 620 So. 2d 174 (Fla. 1987), *appeal on resentencing pending,* Case No. 82,642; *Marek v. State,* 492 So. 2d 1055, 1058 (Fla. 1986), *habeas corpus denied,* 626 So. 2d 160, *cert. denied,* 114 S.Ct. 1869; *Diaz v. State,* 513 So. 2d 1045 (Fla. 1987), *cert. denied,* 484 U.S. 1079, 108 S.Ct. 1061, 87 L.Ed.2d 663 (1988).

"These crimes were a joint operation, with each defendant responsible for the other's acts." *Hall v. State, supra, citing James v. State,* 453 So. 2d 786 (Fla.), *cert. denied* 105 S.Ct. 608 (1984). "... A death sentence is not disproportionate when a less culpable co-defendant receives a less severe sentence." *Hannon v. State, as revised on denial of rehearing,* 638 So. 2d 39, 44 (Fla. 1994), *cert. denied* 115 S.Ct. 1118; *citing Coleman v. State,* 610 So. 2d 1283,

1287 (Fla. 1992), *cert. denied* 114 S.Ct. 321 (1993); *Craig v. State, supra*. "When co-defendants are not equally culpable, the death sentence of the more culpable co-defendant is not unequal justice when another co-defendant receives a life sentence." *Steinhorst v. Singletary,* 638 So. 2d 33 (Fla. 1994), *citing Garcia v. State*, 492 So. 2d 360 (Fla.), *cert. denied*, 497 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986).[20]

As the trial court's sentencing order reflected, the jury recommended death for the murders of seven-year-old Jamilya Lewis, and her toddler sister, three-year-old Jasmine, by a unanimous vote. *(R 1491)* Further, the order set out the sentencing court's findings of fact "proven during the guilt and penalty phase[s] of the trial beyond a reasonable doubt," which demonstrates not only the reason for the unanimous jury recommendation, but also that Henyard was clearly more culpable in the abduction of Ms. Lewis and her two little girls, the rape and attempted murder of Ms. Lewis, and the execution-style murder of her two children. *(R 1492-1495)* The trial court's findings are set out at pp. 74-77, above. However, portions of those findings as to Henyard's dominant role deserve emphasis.

Henyard stated, on January 29, 1993, that he would steal a car, kill the owner, and use that vehicle to drive to south Florida to visit his father. Henyard obtained the murder weapon by stealing it from his Grandfather and, with the exception of the initial abduction of the victims, was in control of that

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20 The sentencing court recognized, in the sentencing order, that the co-perpetrator, Smalls, was not death-eligible because of his age. *(R 1495).*

weapon at all pertinent times. Henyard was the first to rape Ms. Lewis and was the one who ordered her to the ground and shot her four times. Henyard lifted Jasmine from the backseat of the car, and was found to have high-speed blood spatter on his clothing. Henyard was observed shaking his finger at Smalls during a conversation the day after the murder. Henyard was older and bigger than Smalls, and, based upon the evidence (and as found by the trial court), was clearly the leader. *See, e.g., (R 1492-95).* The aggravating factors which were found as to both murders were: (1) prior convictions of a capital felony and six non-capital felonies involving the use or threat of violence to the person; (2) the murder of each child while he was engaged in kidnapping each of them; (3) pecuniary gain; and (4) heinous, atrocious or cruel. *(R 1495-1496; 1504).* Those aggravators "clearly outweigh the mitigating evidence," and the trial court so found. *See, Hall v. State, supra* at 479. *(R 1513)*

The "Mitigation" Evidence

Henyard argues "[t]he record is replete with mitigating factors." Indeed, he asked the trial court to consider 23 nonstatutory factors. *(R 1377-1406).* However, few of those circumstances have found their way into Henyard's initial brief. None of the "non-statutory mitigators" argued in Henyard's brief is entitled to more than slight weight. *Appellant's Brief at 95-6.*

In his brief, Henyard argues as mitigation his age of 18 at the time of the murders and his *mental age* of 13. *Appellant's Brief at 95.* However, as Justice O'Connor pointed out in *Penry,* the "mental age" concept (which is not a legal concept at all) suffers from a number of problems:

> Not surprisingly, courts have long been reluctant to rely on the concept of *mental age* as a basis for exculpating a defendant from criminal responsibility. (citations omitted) ... In light of the inherent problems with the *mental age* concept, and in the absence of better evidence of a national consensus against execution of the retarded, *mental age* should not be adopted as a line-drawing principle in our Eighth Amendment jurisprudence.

Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 2958, 106 L.Ed.2d 256 (1989). Justice O'Connor further pointed out other limitations inherent in the mental age concept:

> ...The *mental age* concept has other limitations as well. Beyond the chronological age of 15 of 16, the mean scores on most intelligence tests cease to increase significantly with age. (citation omittted) As a result, "[t]he average *mental age* of the average 20 year old is not 20 but 15 years." (citations omitted) ([T]he '*mental age*' of the average adult under present norms is approximately 16 years and 8 months"). *Penry*, 109 S.Ct. at 2958.

The sentencing court afforded Henyard's *actual age* "some weight" in mitigation. *(R 1496, 1505)* Henyard argued that the trial court should consider his alleged *mental age* of 13 as non-statutory mitigation. The sentencing court did that, finding that Henyard "... functioned *emotionally* as a 13 to 14 year old."[21] *(R 1497, 1506)* The court was also asked to consider that he was of

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[21] The same circumstances occurred in *Penry*--one of his expert witnesses testified that he estimated Penry's "*mental age*" to be 6½, while the same expert estimated Penry's "social maturity" was that of a 9 or 10 year old. *Id.*, 109 S.Ct. at 2957.

"low intelligence."[22] *(R 1497, 1506)* However these factors depend on Dr. Toomer's testimony, which the trial court afforded "minimal weight" for several reasons. *(R 1500-1501)* In evaluating the credibility of that testimony, the trial court stated:

> ... After taking into consideration all of the evidence on defendant's life and reviewing the defendant's statement and then listening to Dr. Toomer's testimony it can not be reasonably said that his opinions carry much weight, therefore the Court gave each of these factors A through F *little consideration*. *(R 1501)*

In his brief, Henyard further argues that Smalls "... may have in fact been the triggerman in the instant case." (p. 95) The trial court found as follows regarding this factor:

> ... This mitigating factor was *not proven*. The evidence introduced during the course of the initial phase of the trial strongly indicates, that the defendant [Henyard] fired the fatal bullets which killed Jamilya and Jasmine Lewis and this Court so finds.

(R 1504, 1512)

In addition, Ms. Lewis testified that it was Henyard who shot her four times, three times in the face; and Henyard admitted to Bryant Smith that he had to "burn the bitch" [Ms. Lewis] because she tried to go for his gun, and then showed Smith the murder weapon in the glove compartment of her stolen car. *(R 1378, 1756-81, 1827-29)*

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[22] Henyard's full-scale IQ is 85; that places him in the low *average* range of intelligence. *(TR 2310-11).* Henyard is not of "low intelligence" at all.

Henyard argues his upbringing "was less than ideal, to say the least." (p. 95) As regards this matter, the trial court found:

> Factor N- It was proven that during the defendant's formative years he had little or no love or nurturing from his mother. However, as already found in L and M above, *the defendant had two fine upstanding woman [his godmother, Ms. Turner and his father's common-law wife, Ms. Ewing] who acted as mother figures for him and provided more than suitable rules and guidance about how to live.* The Court gave this mitigating circumstance *little consideration.*

(R 1502, 1510-11)

As regards his not having a "father figure" as a role model, the trial court found:

> Factor L- This mitigating factor was not proven. *On the contrary, the defendant did have a father figure, with which the defendant lived for a number of years, a father who deeply cares about the defendant, who works 70-80 hours per week, who doesn't use drugs, who cares for his family and who is law-abiding. Unfortunately, the defendant chose to reject his father's strong example.*

(R 1501-02, 1510)

Henyard acknowledged that "[t]he trial judge put much emphasis on the fact that Appellant had back splatter blood on his clothing, while Alfonso Smalls did not." (p. 96) He then states: "There is no physical evidence to prove that Appellant shot the children." (p. 96) "High speed" blood splatter from Jamilya Lewis was found on Henyard's jacket. The trial court's findings of fact in its sentencing order reflect:

> Henyard, in his admissions repeatedly denied shooting the little girls, however the evidence proved that *Henyard had "high speed" or "high velocity" blood splatters on his jacket which matched Jamilya Lewis'*. This type of blood spatter evidence established that Henyard was less than four (4) feet from Jamilya Lewis when she was executed. Henyard's co-defendant, Smalls['], clothing was found to have no such "high speed" blood spatter evidence.

(R 1494-95)

In addition, three-year-old *Jasmine's* blood was found on Henyard's shorts and on his socks. *(T 1678-81)* .Her blood was not on Smalls' clothing. *(TR 1691-95)*. Finally, as to Henyard's self-serving denial of heinously murdering two small children, the trial court found:

> ... The opinions of Dr. Toomer were based in large part upon the self serving uncorroborated, *lie filled contradictory statement of the defendant*.

(R 1500)

In evaluating the proportionality issue in another case, this court stated "...[t]his cruel, cold-blooded murder clearly falls within the class of killings for which the death penalty is properly imposed." *Hall v. State, supra* at 479; *See also, e.g., Walls v. State* 641 So. 2d 381, 391 (Fla. 1994) (execution-style slaying of helpless woman already terrorized by boyfriend's murder); *Swafford v. State*, 533 So. 2d 270 (Fla. 1988), *cert. denied*, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989) (victim abducted, raped, and killed); *Engle v. State*, 510 So. 2d 881 (Fla. 1987), *cert. denied*, 484 U.S. 1079, 108 S.Ct. 1094, 99 L.Ed.2d 256 (1988) (same); *Cave*

v. State, 476 So. 2d 180 (Fla. 1985), *cert. denied*, 106 S.Ct. 2907 (1986) (co-perpetrators abducted, raped, and killed victim; defendant not actual killer); *Copeland v. State*, 457 So. 2d 1012 (Fla. 1984), *cert. denied*, 4741 U.S. 1030, 105 S.Ct. 2051, 85 L.Ed.2d 324 (1985) (same). The facts of these murders clearly put them within the "class of killings" that far exceed that for which the death penalty is proportionate. Jamilya and Jasmine Lewis were coldly murdered in the culmination of Henyard's plan to obtain a car so he could go to a club in Orlando, Florida. The murder of two helpless children followed an indeterminate period of time in which they were terrorized, both by the circumstances themselves, and by their presence during the rape and attempted murder of their mother. When compared to other cases in which the death penalty was upheld, this case is not only more heavily aggravated than the typical case, but is also more unmitigated than the norm. Much of the "non-statutory mitigation" proffered at trial is conspicuously absent from Henyard's brief on appeal. Even if all of the mitigation argued at trial were considered, it is far less than enough to offset the extraordinary aggravation that is present in this case. As the Supreme Court stated, death "is an extreme sanction, suitable to the most extreme of crimes...". *Gregg v. Georgia,* 428 U.S. 153, 187 (1976). That statement summarizes all that need be said about Henyard's proportionality claim. Death is warranted in this case, is not disproportionate, and is clearly the sentence that Henyard deserves. His sentences of death should not be disturbed.

CONCLUSION

Based upon the foregoing arguments and authorities, Henyard's convictions and sentences of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to: Michael S. Becker, ASSISSTANT PUBLIC DEFENDER, 112 Orange Ave. Ste. A, Daytona Beach, FL 32114 on this the 20th day of November, 1995.

Kenneth S. Nunnelley
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