

IN THE SUPREME COURT OF FLORIDA

GUERRY WAYNE HERTZ,

Appellant,

vs.

Case Number SC00-457

STATE OF FLORIDA,

Appellee.

**APPEAL FROM THE CIRCUIT COURT
IN AND FOR WAKULLA COUNTY
STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

**GARCIA AND SELIGER
FLORIDA BAR NUMBER 244597 (SS)
16 NORTH ADAMS STREET
QUINCY, FLORIDA 32351
(850) 875-4668**

ATTORNEYS FOR APPELLANT

BY: STEVEN L. SELIGER

TABLE OF CONTENTS

| | |
|---|----------|
| TABLE OF CONTENTS .. | i-ii |
| TABLE OF AUTHORITIES .. | iii-viii |
| STATEMENT OF THE CASE .. | .1-17 |
| STATEMENT OF THE FACTS .. | .17-40 |
| SUMMARY OF THE ARGUMENT .. | 40-42 |
| ARGUMENTS | |
| I THE DEATH SENTENCE PROPOSE IN THIS CASE IS DISPROPORTIONATE .. | .42-47 |
| IIA FOUR OF THE SEVEN AGGRAVATING FACTORS UPON WHICH THE JURY WAS INSTRUCTED AND WHICH THE TRIAL COURT FOUND ARE LEGALLY INAPPLICABLE .. | .47-61 |
| IIB THE ERRONEOUS CONSIDERATION OF LEGALLY INAPPLICABLE AGGRAVATORS WAS NOT HARM- LESS ERROR .. | .61-62 |
| III THE TRIAL COURT IMPROPERLY EXCUSED FOR CAUSE A VENIRE MEMBER WHOSE OPPOSITION TO THE DEATH PENALTY DID NOT PREVENT OR SUBSTANTIALLY IMPAIR HER ABILITY TO PERFORM JURY OBLIGATIONS .. | .62-72 |

| | | |
|------|---|-------|
| IV | THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO REQUIRE UNANIMOUS VERDICT | 73-77 |
| V | MR. HERTZ WAS NOT COMPETENT TO STAND TRIAL. . . | 77-79 |
| VI | THE TRIAL COURT ERRED BY ADMITTING GRUESOME PHOTOGRAPHS OF THE BODIES AT THE CRIME SCENE AND THE AUTOPSY | 80-84 |
| VII | THE DETAILS OF THE COLLATERAL CRIMES IN VOLUSIA COUNTY BECAME A FEATURE OF THE TRIAL CAUSING PREJUDICE THAT SUBSTANTIALLY OUTWEIGHED THE PROBATIVE VALUE OF THE EVIDENCE | 84-87 |
| VIII | THE STATUTE AUTHORIZING THE ADMISSION OF VICTIM IMPACT EVIDENCE IS AN UNCONSTITUTIONAL USURPATION OF THE COURT'S RULEMAKING AUTHORITY UNDER ARTICLE V, S2, OF THE FLORIDA CONSTITUTION MAKING THE ADMISSION OF SUCH TESTIMONY UNCONSTITUTIONAL AND REVERSIBLE ERROR | 87-90 |
| IX | THE EVIDENCE WAS INSUFFICIENT AS A MATTER OR LAW TO SUSTAIN THE CONVICTIONS | 90-96 |
| | CONCLUSION | 97 |
| | CERTIFICATE OF SERVICE | 97 |

TABLE OF AUTHORITIES

| <u>Case</u> | <u>Page</u> |
|---|--------------------|
| Adams v. Texas, 448 U.S. 38, 45 (1980) | 70 |
| Allen v. Butterworth, 756 So.2d 52 (Fla. 2000) | 87 |
| Allen v. State, 662 So.2d 323 (Fla. 1995) | 88 |
| Almendarez-Torres v. United States, 523 U.S. 224 (1998) | .76 |
| Almedia v. State, 748 So. 2d 922, 929 (Fla. 1999) | 83 |
| Amado v. State, 585 So. 2d 282, 283 (Fla. 1991) | 78 |
| Anderson v. State, 655 So.2d 1118 (Fla. 1995) | 96 |
| Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) | 73, 76 |
| Article I, Section 16(b) of the Florida Constitution | 89 |
| Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995) | 51, 52 |
| Bishop v. United States, 350 U.S. 961 (1956) | 77 |
| Bonifay v. State, 680 So.2d 413 (Fla. 1996) | 54, 55, 89 |
| Brown v. State, 719 So.2d 882 (Fla. 1998) | 54, 82 |
| Brown v. State, 473 So. 2d 1260 (Fla. 1985) | 47, 59 |

| | |
|---|----------------|
| Buchanan v. Kentucky, 483 U.S. 402 (1987) | 71 |
| Buckner v. State, 714 So. 2d 384, 389 (Fla. 1998) | 55 |
| Bunderick v. State, 528 So. 2d 1247, 1248 (Fla. 1st DCA 1988) | 63 |
| Clark v. State, 443 So. 2d 973, 976 (Fla. 1983) | .47 |
| Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989) | 63 |
| Consalvo v. State, 697 So. 2d 805, 819 (Fla. 1996) | .48, 49, 50 |
| Czubak v. State, 570 So.2d 925 (Fla. 1990) | 87 |
| Davis v. State, 604 So. 2d 794, 798 (Fla. 1992) | .48, 49, 50 |
| Deangelo v. State, 616 So. 2d 440, 443 (Fla. 1993) | 43, 55 |
| Drope v. Missouri, 420 U.S. 162, 172, 179-181 (1975) | 77, 79 |
| Dusky v. United States, 362 U.S. 402 (1960) | 77 |
| Espinosa v. Florida, 112 S. Ct. 2926 (1992) | 61 |
| Fenelon v. State, 594 So.2d 292 (Fla. 1992) | 93 |
| Finney v. State, 660 So. 2d 674, 679 (Fla. 1995) | 63 |
| Fla. Rule App. Proc. 9.140(f) | 90 |
| Flaning v. State, 597 So. 2d 864, 867 (Fla. 3d DCA 1992) | .73, |

| | |
|---|------------------------|
| Florida Rule of Evidence 403 | 82 |
| Florida Rules of Evidence §90.401 and §90.403. | 82 |
| Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1992) | 47, 49, 50, 51, 52, 53 |
| Gore v. State, 719 So.2d 1197 (Fla. 1998) | 87 |
| Gorham v. State, 454 So. 2d 556, 559 (Fla. 1984) | 51, 52 |
| Guzman v. State, 721 So. 2d 1155, 1160 (Fla. 1998) | 55 |
| Hamilton v. State, 547 So. 2d 630, 633-34 (Fla. 1989) | 48, 55, 60 |
| Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984) | 51, 52 |
| Hartley v. State, 686 So. 2d 1316, 1323-24 (Fla. 1996) | .47 |
| Hicks v. Oklahoma, 447 U.S. 343 (1980) | 77 |
| I.R. v. State, 385 So.2d 686 (Fla. 3d DCA 1980) | 91 |
| In Re Amendment of Florida Evidence Code, 404 So.2d 743 (Fla. 1981) | 88 |
| In Re Amendment of Florida Evidence Code, 497 So.2d 239 (Fla. 1986) | 88 |
| In Re Amendment of Florida Evidence Code, 638 So.2d 920 (Fla. 1993) | 88 |
| In re Florida Evidence Code, 675 So.2d 584 (Fla. 1996) | 88 |

| | |
|---|---------------|
| J.A. v. State, 485 So. 2d 872, 873 (Fla. 1st DCA 1986) | 63 |
| Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994) | 51, 53, 55 |
| Jennings v. State, 718 So. 2d 144, 151 (Fla. 1998) | 48 |
| Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990) | .73 |
| Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995) | .55 |
| Lambrix v. State, 494 So. 2d 1143 (Fla. 1986) | 71, 72 |
| Lewis v. State, 377 So. 2d 640, 646 (Fla. 1979) | 54 |
| Lokos v. Capps, 625 F. 2d 1258, 1261 (5th Cir. 1980) | 77 |
| Mansfield v. State, 758 So. 2d 636, 647 (Fla. 2000) | 43 |
| Maynard v. Cartwright, 108 S. Ct. 1853, 1859 (1988) | 62 |
| McArthur v. State, 351 So. 2d 972, 976 n.12 (Fla. 1977) | 63 |
| McMillian v. Pennsylvania, 477 U.S. 79 (1986) | .76 |
| Merritt v. State, 523 So.2d 573 (Fla. 1988) | 93 |
| Miller v. State, 2000 WL 1227744, 2 (Fla. 2000) | 91 |
| Old Chief v. United States, 519 U.S. 172 (1997) | 81, 82 |

| | |
|--|-----------|
| Pate v. Robinson, 383 U.S. 375, 385-386 (1966) | 77 |
| Pate v. Robinson, 383 U.S. 375, 391 (1966) | 79 |
| Payne v. Tennessee, 501 U.S. 808 (1991) | 88 |
| Ponticelli v. State, 593 So. 2d 483, 487 (Fla. 1991) | 79 |
| Pope v. State, 679 So.2d 710, 713 (Fla. 1996) | 81, 87 |
| Randolph v. State, 463 So.2d 186, 189 (Fla. 1984), cert. denied 473 U.S. 907 (1985) | 87 |
| Randolph v. State, 562 So. 2d 331 (Fla. 1990) | 71, 72 |
| Ray v. State, 755 So. 2d 604, 611 (Fla. 2000) | 42, 45 |
| Reese v. Wainwright, 600 F. 2d 1085, 1090-1091 (5th Cir. 1979); cert. denied, 444 U.S. 983 (1979) | 77, 79 |
| Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) | 54 |
| Ruiz v. State, 743 So.2d 1, 8 (Fla. 1999) | 81 |
| Rule 3.211, Fl. R. Cr. P. and Section 916.12, Florida Statutes (1997) | 77 |
| Rule 9.030(a)(1)(a)(i), Fl. R. App. P. | 1 |
| Sanchez-Velasco v. State, 570 So. 2d 908, 915-916 (Fla. 1990) | 70, 72 |
| Santos v. State, 591 So. 2d 160, 163 (Fla. 1991) | 55 |
| Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988) | 48, 60 |
| Section 782.041(1)(a), Fla. Stat. (1999) | |

.74

Section 775.082, Fla. Stat. (1999)
74

Section 921.141(7), Fla. Stat. (1996) 47, 87, 88

Section 922.10 3

Sochor v. Florida, 112 S. Ct. 2114, 2119 (1992)
.62

State v. DiGuilio, 491 So.2d 1129 (Fla. 1996) 61, 62, 84

State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973) 43,
47

State v. Green, 667 So.2d 756, 760 (Fla. 1995) 96

State v. Law, 559 So.2d 187 (Fla. 1989) 91

State v. Moore, 485 So.2d 1279, 1281 (Fla. 1986) 95

State v. Wimberly, 498 So. 2d 929 (Fla. 1986) 77

Steverson v. State, 695 So.2d 687 (Fla. 1997) 85, 86, 87

Terry v. State, 668 So.2d 954, 964 (Fla. 1996) 90

Thompson v. State, 648 So. 2d 692, 695 (Fla. 1994) 60, 73

Tibbs v. State, 397 So.2d 1120 (Fla. 1981) 92

Urbin v. State, 714 So. 2d 411 (Fla. 1998)
.48

Wainwright v. Witt, 469 U.S. 412 (1985) 63, 69, 72

| | |
|---|------------|
| Walls v. State, 641 So. 2d 381, 388 (Fla. 1994) | |
| .51 | |
| Walton v. Arizona, 497 U.S. 639 (1990) | |
| 76 | |
| Wickham v. State, 593 So. 2d 191, 193 (Fla. 1991) | |
| 55 | |
| Wilcox v. Ford, 813 F.2d 1140 (11th Cir. 1987) | 91 |
| Windom v. State, 656 So.2d 432 (Fla. 1995), cert. denied, 516 U.S. 1012 (1995) | 88, 89, 90 |
| Witherspoon v. Illinois, 391 U.S. 510 (1968) | 63, 72 |
| Wilcott v. State, 509 So. 2d 261, 262 (Fla. 1987) | 78 |
| Wilcox v. Ford, 813 F. 2d 1140 (11th Cir. 1987) | |
| .91 | |
| Woods v. State, 733 So. 2d 980, 991 (Fla. 1999) | 47, |
| 53 | |
| Zack v. State, 753 So. 2d 9, 20 (Fla. 2000) | 48, |
| 50 | |

CERTIFICATE OF FONT AND SIZE

I hereby certify this brief was typed in Times New Roman, 14 points.

STATEMENT OF THE CASE

(i) Nature of the Case

This is an appeal from a Wakulla County circuit court order imposing two death sentences on Mr. Hertz for the first-degree murder of Melanie King and Robin Keith Spears. This Court has jurisdiction pursuant to Rule 9.030(a)(1)(a)(i), Fl. R. App. P.

(ii) Course of Proceedings and disposition in lower tribunal.

A grand jury in Wakulla County indicted Jimmy Dempsey, Guerry Hertz and Jason Looney for the first-degree murders of Melanie King and Robin Keith Spears. In addition, the three men were charged with burglary of a dwelling while armed; robbery with a firearm; arson of a dwelling; and using a firearm during the commission of a felony. (R1-1-3)¹ Contemporaneous with the indictment, the State filed a notice of its intent to seek the death penalty against all three men. (R1-13)

Mr. Hertz filed a motion to sever his case from that of the other co-defendants. (R1-19) The judge's order severed the trial of Dempsey from Hertz and Looney. (R1-20) Hertz then filed a motion for change of venue arguing that a trial in Wakulla County was "inherently prejudicial." (R1-23-24) The defense also filed a motion to have experts appointed to render an opinion on Mr. Hertz's competency to stand trial. (R1-

¹Count 6 is erroneously labeled Count IV.

27) The judge granted this request. (R1-30) At the conclusion of the evaluation process, both mental health examiners opined that Mr. Hertz was not presently competent to stand trial. Based on these findings, the defense filed a motion to have Mr. Hertz declared incompetent. (R1-84-100) After a hearing, the trial judge ruled that Mr. Hertz was competent to stand trial. (R1-111) (R3-473-474)

The State filed a motion to consolidate the trials of Hertz and Looney. (R1-37) This seems to be inconsistent with the judge's prior order which only severed Dempsey's case. The defense filed an amended motion to suppress statements made by Mr. Hertz while being transported from Daytona Beach to Crawfordville. (R1-51) This motion was denied. (R1-113) The defense filed a motion to preclude the state from introducing some evidence relating to the Daytona Beach aspect of the case. (R1-167)

The defense filed a series of motions directed toward a possible death sentence. The first motion asked the judge to declare the entire death penalty statute unconstitutional based on Schad v. Arizona. (R1-39) This motion was denied. (R1-116) The defense requested that jurors be questioned individually. (R1-58) The defense also requested a record be made of all hardship excuses made by potential jurors and that none be made with the defense lawyer being present. (R1-62) This motion was granted. (R1-120) The defense filed a motion seeking to have Section

921.141(5)(d) declared unconstitutional on its face. This aggravator deals with the capital felony be committed while the defendant is engaged in the commission of a specified felony. (R1-65) This motion was denied. (R1-117) The defense also made a pre selection request for additional peremptory challenges. (R1-71) This motion was denied. (R1-115) The defense wanted a pretrial order requiring the State to tell which aggravators it was going to rely on and provide the evidentiary basis for these aggravators. (R1-74) This motion was denied. (R1-114) The Court also denied a motion requesting that Section 922.10 be declared unconstitutional. (R1-118)

During the trial, the defendants objected to the introduction of State's Exhibit 1-C, a photograph showing two bodies lying face down side-by-side on the bed, burned beyond recognition. (R13-1544) The defense argued that State's Exhibit 1-T and 1-U illustrated the condition of the crime scene, including the bed, without the bodies. Id. The objection was overruled and all of the photographs of the crime scene were admitted.

The defendant also objected to the use of the autopsy photos, asking to conduct voir dire of the medical examiner to establish the need for the photographs. (R13-1587) The objection to the autopsy photographs to explain the cause of death. (R13-91) The objection was overruled again. (R13-1592) The defense also objected to the method of publication being a "huge colored blowup." (R13-1593)

The defendant objected to evidence of the shootout and capture in Volusia County and the objection was overruled. (R15-1728)

Jason Looney moved for a mistrial when Inmate Hathcock testified about statement that Hertz had made implicating Looney. The basis of the motion was his inability to cross-examine Hertz about the statement. (R15-1850) The State admitted that the testimony was a mistake, but argued that a curative instruction should be sufficient because the mistake was “harmless.” (R15-1851, 1854) The judge treated the motion as one for a severance, over the protests of defense counsel, took the matter under advisement, and denied the State’s request for a curative instruction. (R15-1858) Hertz then asked the judge to advise the jury to disregard the testimony of Hathcock and the judge agreed to do so. (R15-1859) The judge denied the motion for mistrial, struck the testimony of Hathcock, and instructed the jury to disregard the testimony. (R15-1882, 1892)

The defense moved for judgments of acquittal at the close of the State’s case-in-chief and the motions were denied. (R16-1986)

The guilt phase of the trial ended with the jury finding Mr. Hertz guilty of each charge. (R19-2177-2179) (R1-190) (murder of Melaine King); (R1-191) (murder of Robin Spears); (R1-192) (burglary of a dwelling while armed with a firearm); (R1-193) (robbery with a firearm); (R1-194) (arson of a dwelling); (R1-195) (use of a firearm in

the commission of a felony). The jury deliberated for about 90 minutes.

The jury recommended that death be imposed for the murders of Ms. King and Mr. Spears by identical 10-2 votes. (R2-203, 204) (R20-2415) By written order, the judge imposed a sentence of death for each murder. (R1-290-300) In the four noncapital cases, the judge sentence Mr. Hertz to life on the burglary of a dwelling while armed (Count III); (R2-285); life on the robbery with a firearm (Count IV) (R2-286); 30 years on the arson of a dwelling (Count V) (R2-287) and 15 years for the use of a firearm during the commission of a felony. (Count VI) (R2-288).² All sentences were ordered to run consecutive to one another. (R2-289)

From these judgments and sentences, Mr. Hertz filed a timely notice of appeal. (R2-302)

(ii)(a) COMPETENCY HEARING

The defense raised the issue of Mr. Hertz' competency to stand trial. (R1-27) Hertz was evaluated by Michael D'Errico, a private forensic psychologist who had a Ph.D. in clinical and forensic psychology (R3-10) and Joseph Sesta, a neuropsychologist. (R3-47) These mental health experts administered a number of different tests. In October, 1998, Dr. D'Errico performed the Wechsler Adult

²The judge classified all of the noncapital sentences as departures from the guidelines and justified the departures based on the two capital felonies that were not scored. (R2-289) There does not appear to be a scoresheet in the file.

Intelligence Scale-Revised. Hertz had a full scale IQ of 92 but his verbal scale IQ score was 79, with a performance scale IQ of 118. (R1-88)(R3-27-28) This discrepancy led Dr. D'Errico to believe that Hertz suffered from some sort of brain damage. (R1-88) (R3-28)

Mr. Hertz was then evaluated by Dr. Joseph Sesta, a neuropsychologist. (R3-48) Neuropsychology deals with brain illness and how it affects thinking, behavior and the emotional process. (R3-49) Dr. Sesta performed seven hours of testing and interviews, including administering the Halstead-Reitan neuropsychological test battery; tests of verbal and nonverbal memory; a frontal lobe function test: and a competency assessment instrument. (R3-55) The Halstead-Reitan test is the most accurate and reliable measure of human brain function. (R3-50) Hertz' Halstead score indicated a mild range of brain impairment. (R3-62)

Hertz was born on March 8, 1977. (R1-90) His parents were hearing disabled. They could not speak to him while he was growing up. (R3-13) He was raised off and on by his maternal grandmother. (R3-81) The adults in his life observed that Hertz had difficulty paying attention; that he would never sit still. (R3-79) His mother described his behavior as wild and stubborn and he would not listen to her. (R3-85) In school, Hertz would not focus on the teacher but instead picked on the other kids in class. (R3-79) The grandmother, Iris Watson, took him to a doctor who prescribed Ritalin.

(R3-80) Both her and the teacher noticed a marked difference when Hertz was taking the medication. (R3-80) Ms. Watson said that when her grandson was on the medication, he could have an intelligent conversation. (R3-81) His mother also notice his improvement when Hertz was taking Ritalin. (R3-86)

Hertz was diagnosed with Attention Deficit Hyperactivity Disorder (ADHA). (R3-19) This behavior was prevalent during his childhood. (R1-91) He was prescribed Ritalin, which seemed to have some effect on his behavior. (R3-21) When Hertz was 18, he attempted suicide by taking an overdose of the Ritalin. As a result, he spent four days at an inpatient psychiatric treatment center. He was discharged at the time with a diagnosis of adjustment disorder with a depressed mood. (R3-22) Hertz was also diagnosed with having significant cognitive deficits in short-term memory, auditory phonological processing and fluid reasoning. (R1-91)

Both mental health experts noticed that it was difficult getting and holding Hertz's attention during their interviews. Hertz was hyperactive and he would have to be repeatedly reminded to focus on the task at hand. (R3-24) This was especially true of Hertz's test taking ability. (R3-24)(R3-52) Dr. Sesta tried to compensate by taking frequent breaks. (R3-53) The result of the neuropsychological testing showed that Hertz was suffering from mild cerebral disfunction and that the left side of his brain was functioning much more poorly than the right side. In addition, the front part of

his brain was not functioning as well as it should have. (R3-56) These brain problems were of a neuro deficit development disorder. (R3-57) This could be caused by a variety of factors, including being raised in a nonverbal household by deaf parents; his ADHD; and representative of a learning disability. (R3-58) Learning and attention are brain functions and problems with both suggest brain disfunction. (R3-58)

Dr. D'Errico found Mr. Hertz to not be competent to stand trial. (R3-33) He identified three areas of concern -- (1) communicating with his lawyer; (2) displaying appropriate behavior; and (3) testifying relevantly. (R3-34) Dr. D'Errico determined that although Hertz had a factual understanding of the charges against him and the penalties he faced, he did not have a rational understanding of this information. (R3-26) Hertz did not have a realistic assessment of the evidence against him and repeatedly talked about going home. (R3-26) As a consequence, Dr. D'Erico felt that Hertz's ability to assist his attorney in a coherent fashion, especially over time, was unacceptable. (R3-27) An employee of the defense attorney concurred with this conclusion. Her contact with Hertz about the case demonstrated his inability to focus on what was important. He would not answer questions about the case and was always more concerned about peripheral personal matters. (R3-88-89)

Dr. Sesta's conclusions were similar. He believed that Hertz's brain disfunction affected his capacity to appreciate the seriousness of the charges. (R3-63) While

Hertz had a factual understanding of the murder charges and that he faced a possible death sentence, he could not rationally understand the consequences. Again, Hertz repeatedly brought up things he was going to do when he got out of jail. (R3-65) Dr. Sesta's opinion was that Hertz was incompetent to proceed at that time. Hertz's brain disfunction affected his ability to talk with his lawyer and help his lawyer in cross-examining witnesses. (R3-66) Dr. Sesta noted that he had been able to observe Hertz during the hearing and saw Hertz staring off into space, playing with his clothes and body parts, and not paying attention to the proceedings. (R3-66)

The State presented the testimony of Dr. Wayne Conger, a clinical psychologist. Less than five percent of his case work involves criminal cases. (R3-94) Dr. Conger evaluated Hertz twice at the jail for about seven hours. (R3-96) He opined that Hertz was competent to stand trial. (R3-97) Like Dr. Sesta, Dr. Conger administered the Halstead-Reitan test to Mr. Hertz. (R3-97) He agreed that Hertz had a history of learning disability and a lifetime of verbal difficulties. (R3-99) Dr. Conger noted that Hertz's verbal IQ was borderline. (R3-99)

Dr. Conger thought that Hertz could help his lawyer if he wanted to, as he had the ability and memory of events. (R3-100) Hertz had more ability and memory functioning than Hertz gave himself credit for or would show to other people. (R3-102) Regardless of whether Hertz had ADHD, Conger believed Hertz should be able

to sustain attention during the trial. (R3-105) Dr. Conger based this conclusion on the test results of the Halstead-Reitan. (R3-105) Dr. Sesta testified that Dr. Conger's results would be invalid because Dr. Conger disregarded four sections of the test. (R3-135) In addition, Hertz would have learned from taking the same test three weeks before. (R3-109)

The State presented the testimony of Captain William Poole of the Wakulla County Sheriff's Department that in July or August of 1997, he interviewed Hertz at the FDLE office in St. Augustine. (R3-114) At that interview, 20 months prior to the competency hearing, Hertz was able to talk about details of the crime. (R3-115) A State Attorney investigator corroborated this contact. (R3-119) In August of 1997, Hertz was transported from the Volusia County Jail to the Wakulla County Jail. The police had wired the transport van for sound so they could listen to the conversations. (R3-124) Donnie Crum, a major with the Wakulla County Sheriff's Department, said he did not observe any unusual behavior by Hertz during the brief time he saw him during the trip. (R3-125) In addition, one thing Hertz talked about was hurting himself inside the jail. (R3-124)

Finally, the State adduced the testimony of Robert Hathcock. Hathcock was incarcerated in jail on a parole violation at the same time as Hertz. (R3-133) In July 1998, three months before Hertz's first clinical evaluation by Dr. D'Errico, Hathcock

testified that Hertz provided details to him about why Hertz was in jail. (R3-134)

Dr. Sesta was not surprised by Hertz's ability to tell other people about what might have happened. (R3-138) Hertz clearly functioned better sometimes than at other times. (R3-69) It was possible that Hertz had some ability to control how he functioned, especially in more private settings. (R3-70) All this did not change Dr. Sesta's opinion that Mr. Hertz was not competent to stand trial. (R3-138)

PENALTY PHASE

A. State presentation

The State introduced evidence that Mr. Hertz was on felony probation at the time of the commission of the two murders. (R19-2212) In addition, the State introduced a certified copy of an aggravated battery conviction from Volusia County. (R19-2213) This crime occurred after the date of the two murders. Karen King, mother of Melanie King, read a victim impact statement. (R19-2215) Janet Spears, the mother of Keith Spears, read a victim impact statement. (R19-2218)

B. Defense presentation

Hertz' parents were Deborah and Guerry, Sr. Mrs. Hertz was born totally deaf; (R19-2259) her husband had a severe hearing problem. Mr. Hertz left ear is deaf but he could hear some out of his right ear with the use of a hearing aid. (R19-2280) Mr. Hertz had a long history of drug usage, huffing paint and glue when he was ten years

old. (R19-2283) He graduated to using marijuana, hash, quaaludes, cocaine and acid. (R19-2281)

Hertz' parents³ first met while each of them attended the Florida School for the Deaf. (R19-2280) Mrs. Hertz graduated from the school (R19-2259) while Mr. Hertz went there for a short time. (R19-2280) Sometime after Mrs. Hertz finished school, she met up with Mr. Hertz again. Mr. Hertz got Mrs. Hertz hooked on drugs. (R19-2281) To support their habit, the parents began to steal things to pay for the drugs, usually by trading the stolen item for the illegal substance. (R19-2282) At some point, Mr. and Mrs. Hertz got arrested (more than once) for stealing and at one point faced the real probability of going to prison. (R19-2263) To keep from going to the big house, they devised a plan to get Mrs. Hertz pregnant (R19-2283) to avoid going to prison. (R19-2263) The plan worked and both of them received a probation sentence. (R19-2284)

During the early stage of her pregnancy, Mrs. Hertz used drugs. (R19-2264) The parents also fought and Mr. Hertz would physically abuse her. (R19-2264) (R19-2288) The relationship between them deteriorated to the point where she wanted to not be pregnant. To do this she would go to the bathroom and punch herself in the stomach. (R19-2264)

In spite of her efforts, the child was born. (R-19-2265) Hertz was born with a

³The parents married sometime after she got pregnant with Hertz. (R19-2263)

club foot. Apparently the father's family had this physical deformity in their history. (R19-2264) Mr. Hertz held this deformity against his son; because of his physical handicap, he wanted a perfect child. (R19-2284) When Hertz was just weeks old, the parents took him to live with Mrs. Hertz's mother in Ft. Pierce. (R19-2284) Eventually the parents reclaimed the child, but Hertz would return to his grandmother's care more than once. (R19-2304)(R19-2299) In addition, Hertz had continuing medical problems with his club foot. (R19-2301) He had to have multiple operations and any aftercare was affected by the parents' neglect. (R19-2301)(R19-2272)

Getting their child back did not stop the parents from continuing to use drugs. All the money the father earned was used to buy drugs. (R19-2267) The parents continued to fight. They would do this in front of Hertz; he would watch his father beat up his mother. One time the father choked his wife so hard that she could not breathe. When he finally let her go, she had major bruising on her neck. (R19-2268)(R19-2288) The fights were verbal as well. (R19-2288) Mr. Hertz admitted to the inability to control his temper when he was using drugs. (R19-2289) The parents' drug use was a dominant factor in their lives. (R-19-2304)

The child did not escape physical abuse by his father. (R19-2289) Mr. Hertz admitted to hitting and slapping his child. (R19-2268, 2289) He would spank Hertz until his rear end was purple. (R19-2269) The grandmother one time saw fingerprint

marks on the child's face. Mr. Hertz admitted to this. (R19-2303) The parents' drug use also caused severe financial hardships for the family. At one point, the family became homeless and lived out of a van for about 18 months. (R19-2269) Hertz's second grade teacher, Vita Lincoln, taught Hertz at Sable Elementary in Melbourne. (R19-2296) Hertz was in her low achieving class. (R19-2296) Lincoln noticed problems with the child. For instance, he would show up for school in dirty clothes and not properly clean. He smelled bad. Hertz was tired because he had been out all night with his parents fishing. (R19-2297) The family fished as its primary means for getting food. The school's principal, Bill Campbell, took Hertz under his wing and bought him clothes. Mrs. Lincoln learned at this point that the family was homeless. (R19-2297) Hertz was hyperactive and unhappy and had difficulty motivating himself. (R19-2297) He had a hard time being a student in the second grade. (R19-2297, 2292)

When his son was eight, Mr. Hertz started sharing marijuana with him. Hertz would use the drug until he got high. Over the years, Mr. Hertz came to share other drugs with his son. (R19-2290) Mrs. Hertz became addicted to cocaine after her husband got her to try it. Hertz would see his parents use cocaine. (R19-2270) At some point Hertz convinced his mother that she should not reconcile with his father again. (R19-2271) In the past, Mrs. Hertz had agreed to get back with her husband (or ex-husband) supposedly for the benefit of the child. (R19-2271)

The parents also had another child named Casper. (R19-2274) There was no question that the father treated Casper with more love and affection than he did Hertz. (R-19-2274) While the father was happy to buy gifts for Casper, he treated Hertz very differently, almost standoffish. (R19-2274-2275)

Hertz had a very disruptive childhood. His parents were immersed in a bad marriage. (R19-2303) On top of everything else, Hertz was 13 when he was diagnosed with Attention Deficit Hyperactivity Disorder (ADHA). (R19-2315) This diagnosis was confirmed when Hertz was 18 years old. (R19-2315) There was a common form of treatment for this - a psychotropic medication named Ritalin. (R19-2316) Hertz's school records demonstrated that Ritalin was effective in modifying his behavior. (R19-2317) This was confirmed by his parents, his grandmother, and his aunt. His aunt, Deborah Hertz, was a detective with the Leon County Sheriff's Department. (R19-2305) She was around Hertz until he turned 13. (R19-2311) She noticed that Hertz was not well cared for by his parents. When she would get him for the weekend, Hertz would generally be filthy. (R19-2306) Detective Hertz saw Hertz both on and off his medication. When he was not on his medication, Hertz was difficult to control and had only a little attention span. (R19-2307) However, when he was on his medication, he was an entirely different child. (R19-2307)(R19-2303) Hertz would do what he was told and respond appropriately to adult commands. (R19-2307) Hertz's

parents also knew he was a wild and misbehaving child, extremely difficult to control. After Hertz was diagnosed with ADHA and after Hertz had been prescribed Ritalin to control this illness, his parents often refused to give him the medication. (R19-2291, 2277)(R19-2304) At times Hertz's father hid the medication from Hertz. (R19-2291)

As a result of being physically abused and humiliated, Hertz suffered from poor and low self esteem. (R19-2318) His verbal IQ score was 39 points less than the performance scale, a consequence of being raised in a home where spoken language was not used. (R19-2319) This was also because Hertz's ADHA was only sporadically treated. (R19-2319) All this meant that Hertz's ability to understand and use language was substantially less than his ability to perform. (R19-2319)

The ADHA also had the effect of making Hertz impulsive. The ADHA could have interfered with Hertz's ability to fully appreciate the consequences of his behavior. (R19-2323)

Hertz had a history of reacting violently or disruptively when he had trouble with a relationship. In 1995, Hertz tried to commit suicide by overdosing on Ritalin after breaking up with his girlfriend. (R19-2278) After this episode, he was hospitalized and given psychiatric treatment. (R19-2320) The hospital thought Hertz was insane and needed to be treated. (R19-2324) In February of 1997, Hertz was living with Detective Hertz's brother. At that time, she found a suicide note written by her nephew. (R19-

2308) He ran away from the brother's house and stole a gun in the process. (R19-2309) While he was living with Detective Hertz's brother, they were both doing crack cocaine. (R19-2309)

Tellingly, Detective Hertz thought she saw Hertz becoming more like his father and her brother as he grew older. (R19-2312) It should have come as no surprise that Hertz would act out uncontrollably or irresponsibly.

STATEMENT OF THE FACTS

On July 26, 1997, the day before the murders of Melanie King and Keith Spears in Wakulla County, Florida, Jimmy Wayne Dempsey was at Tommy Bull's house in Crawfordville doing odd jobs for Bull's mother. (R14-1603) Dempsey got paid that day. (R17-1896) Around 10:30 p.m., as Bull and Dempsey were watching television, Guerry Wayne Hertz and Jason Brice Looney came over. (R14-1604) Dempsey had known Hertz for seven years and had just met Looney three days before. (R17-1897) Bull knew Hertz but had only met Looney the day before. (R14-1604-05) Looney had a large, chrome pistol stuffed in the back of his pants when he arrived which he removed when he sat down after asking Bull's permission. (R14-1606-07).

Dempsey needed a ride to Tallahassee to get his belongings out of his apartment because he had violated his probation and had to move. (R17-1899) Dempsey had been hiding out at Hertz's trailer the previous three days to avoid being arrested for

violating his probation. (R17-1930) He had a firearm he had brought with him from Tallahassee, and he had used that gun for target practice at Hertz's residence. He had toyed with the idea of shooting it out with police if they came to pick him up. (R17-1932-33) When a police officer did come to Hertz's residence the second day Dempsey was there, Dempsey hid inside the trailer armed with his gun. (R17-1934) He would possibly have shot the officer. Id. Dempsey did not say anyone else was present at the trailer that day. During the three-day period, Hertz did not have a firearm. (R17-1935)

Bull had understood that the three wanted to go to Tallahassee to get Dempsey's television and Nintendo game. (R14-1605) Bull refused to give them a ride because the hour was late, so the trio left on foot around 11 p.m. (R14-1605-06). Hertz and Looney were at Bull's house under 45 minutes. (R14-1605; R17-1898).

Dempsey, Hertz and Looney walked to Hertz's trailer, which was just down the road, planning to play cards. (R17-1899) They discussed that they were tired of walking everywhere, that transportation had become a problem. Id. At some point, they decided to steal a car. (R17-1900) Dempsey was armed with a .38 Special, Looney with a rifle, and Hertz with the .357 pistol that was loaned to him by Looney. Id. Dempsey carried a knapsack which contained the duct tape. (R17-1901) He knew how to hot-wire a car and was going to use the tape on the car's window to minimize

shattering and the chance of getting cut. (R17-1903) The three did not have a set plan. (R17-1901, 1903)

First they spotted a Cherokee and debated whether to steal it. (R17-1901) Because the owner had a very large dog, they were not able to gain entry into the house. (R17-1903) Dempsey did not explain why they needed to gain entry into the house.

Joyce Ventry, the owner of the Cherokee, (R14-1533), was awakened around 2:00 a.m., some three hours after Dempsey, Hertz, and Looney had left Bull's house, by somebody knocking on the side of her house. (R14-1529) She saw a figure outside her window. Id. When she went to the front door to turn on the light, a person was right there. (R14-1530) At the time she thought it was the same person she had seen outside her window. Id. Ms. Ventry could not testify that there was more than one person at her house that night. The person she saw from her window was smaller than the person at the door, but she thought there was just one person. (R14-1533)

The man asked to use the phone because his truck had broken down. (R14-1530) Ms. Ventry told the man at the door not to come in because her barking dog would attack. She identified defendant, Guerry Wayne Hertz, as the man at her door. (R14-1531) Ms. Ventry offered to make the call herself, but the man at the door claimed he could not remember the number. (R14-1536) When he asked for a phone

book, she told him to go away. (R14-1532) Because she became afraid, Ms. Ventry called 911. Id.

Ms. Ventry's home was across the street and down the road about 500 yards from the victims' house trailer, about a mile from Hertz's trailer. (R14-1534), State's Exhibit 10 (map of the area). When the deputy arrived from the 911 dispatch, no one was there outside her home, but footprints were all around. (R14-1535) There is no evidence as to the time the deputy arrived at Ms. Ventry's house.

As Dempsey, Hertz and Looney continued down the road from Ventry's house, on seeing the Mustang, Looney said, "There's my car right there. That's the one I want." (R17-1903) Dempsey approached the car and looked it over. He heard a little dog barking in the yard, (R17-1959), and decided to go up on the porch and knock on the door to ask to use the phone. (R17-1904) Dempsey was trying to get King's attention "so that somebody was supposed to be messing with the car, which was not happening." (R17-1941) Keith Spears and Melanie King came to the door; King gave Dempsey a cordless phone. (R17-1905) Dempsey and Hertz were on the porch, but Looney had come from around the side of the trailer and was on the ground down below the porch. (R17-1905)

Dempsey told Spears and King that one of his "companions" had dropped a cigarette and he had gone in a ditch and got stuck. He said he would call his brother

for help. (R17-1905-06) He wanted to dupe King into opening the door, and she handed him a portable phone. (R17-1942) He pretended to dial "fraudulent" numbers, but then he handed the phone back. (R17-1906) As soon as King took the phone, Hertz said, "Hold on for a minute." He stuck the .357 pistol through the door, went in the house, and grabbed King by the neck. (R17-1906) Spears moved to the right and Looney, with the rifle, entered the house past Dempsey and yelled at Spears, "Don't move." Id. Spears got on the floor and Dempsey entered the house. (R17-1907) Looney noticed an empty holster on the bed, so Dempsey began yelling at Spears to find out where the gun was. Spears had the gun, a nine millimeter automatic handgun, underneath him, which Dempsey took away. (R17-1910) Dempsey told Looney what to do. (R17-1942) He instructed Looney to shoot Spears if he moved. (R17-1943) Dempsey put a gun to Spears' head. (R17-1961) Dempsey put Spears on the bed so that he could watch him better. (R17-1962) He guarded the victims and may have said, "No one will leave the bedroom; I'm in charge." (R17-1944)

Hertz taped King and Dempsey taped Spears with the duct tape from Dempsey's knapsack. (R17-1907, 1912) Hertz tried to scare the Spears into revealing where the valuables were by waving the gun around. (R17-1911-12) In doing so, Hertz broke the globe on the ceiling fan light. Dempsey was standing on Spears at that time. R17-1912.

King was on the bed and Dempsey moved Spears to the bed, even though Spears wanted to stay on the floor. (R17-1913) Dempsey told Spears that he was placing him next to "his old lady" so he would not be scared. (R17-1912) Both Spears and King were face down with their hands and feet bound with duct tape. (R17-1913) Dempsey retaped King because her hands were turning blue, talking to her to reassure her, putting a pillow under her head for her comfort. (R17-1913) According to Dempsey, his desire was to keep them both comfortable because he knew they were scared. (R17-1914)

Property was removed from residence and put in the truck and car. (R17-1914) Dempsey never said who took what items but admitted that he personally "took a few items." Id. Other items taken were the VCR, TV, jewelry, CDs, anything of value. (R17-1915) Dempsey walked into the kitchen and Looney showed him a handful of 100-dollar bills Looney had found; Dempsey described the money as "bright" saying that it made him "feel happy." (R17-1915) Hertz snatched the money out of Looney's hands and put it in Hertz's pocket. (R17-1915)

Dempsey found a purse and looked at the King's driver's license; he realized that he knew King from school. (R17-1916) He was "pretty sure" that Hertz had gone to school with the King also, but could not be certain because Hertz would often interrupt his schooling to go to St. Augustine. (R17-1917) Apparently there was no discussion

that night about whether Hertz knew King. Dempsey thought King had seen his face but he did not know if she had seen Hertz's face, though Hertz's face was "revealed" when he was standing on the porch next to Dempsey. (R17-1917) Looney had been wearing a mask and gloves and could not have been identified. (R17-1967) Dempsey was wearing black pants, a pair of brown work boots with socks, a shirt with "Slayer" written on it, and possibly black shorts under his pants. (R17-1953, 1969)

Dempsey claimed that he spent most of the time in the bedroom "guarding" the victims. At one point he left that bedroom and went through the trailer to the far bedroom. When he entered the room, Looney asked Hertz, "Are you going to tell him?" Dempsey was then told that they could not leave witnesses; Dempsey felt he was outvoted "on this matter." (R17-1918) Hertz told Dempsey that if he did not approve, he could "leave with a bullet." (R17-1918) Dempsey testified that he took the statement "as a threat," but knowing Hertz as he did, he thought it was a "playful" statement. (R17-1919) As Dempsey was going out to check the shed as instructed by Hertz, Hertz aimed at him with the laser scope on a pistol. Id. Dempsey admitted that Hertz never threatened him and admitted that he could have left the scene at any time. (R17-1945)

As Dempsey was outside standing in front of the shed, smoking a cigarette, Hertz came out and Dempsey inarticulately voiced his ambivalence about the situation.

(R17-1920) Hertz told him to go back inside and he did. Id. Once inside, Dempsey saw Looney kneeling at the entertainment center trying to untangle wires. (R17-1921) Then Hertz reentered the trailer with a red container "that you would put accelerant or gasoline in." (R17-1921) Hertz said, "I don't know what you all want to do, but we have to do this." Id. Looney handed the VCR to Dempsey and told him to take it to the car, which he did. (R17-1921) He remembered Hertz pouring gasoline in the living room, but not anywhere else. (R17-1921) He could not remember clearly whether Hertz handed Looney a can. (R17-1922) Dempsey never says that any accelerant other than gasoline was used, contradicting the opinions of the forensic experts that other accelerants, such as turpentine and "medium petroleum distillate," were found on the clothes of the victims and on the clothing found at the time of the capture of the defendants.

The odor of gasoline was in the mobile home. (R17-1922) All three, armed, went to the bedroom where the victims were. (R17-1922) Dempsey had the .38 special, Looney had the rifle, Hertz had the silver pistol with the infrared laser and possibly "the other one.". (R17-1923) Although Dempsey had taped the victims' mouths because he did not want them talking to each other anymore, King, who knew because she smelled gasoline that the men were going to "burn the house down," was able to say that she would rather die "being burnt up in flames than being shot." (R17-

1923) She said, "Please, God, don't shoot me in the head." Hertz said, "Sorry, can't do that." (R17-1924) Hertz shot first, then Looney, then Dempsey, who shot "toward" Spears. (R17-1924) Dempsey recalled at least seven shots being fired. Id. Dempsey admitted that he shot Spears twice in the head. (R17-1950) The first time he shot, there was no response; the second time he could see Spears' body move from the impact. Id. He shot the second time because he wanted to be sure that Spears was dead and not suffering. (R17-1968) The medical examiner testified that Spears was shot once in the head. Dempsey said that Hertz and Looney fired in the direction Spears or King but that he did not know who hit what. (R17-1950)

The fire was started in the living room, and Hertz and Looney ran outside. Id. Dempsey never said who started the fire. Dempsey lingered inside the trailer, looking first at the flames and then at the "bed area" until Looney called him outside, and then Dempsey left. Id. According to Dempsey, the whole episode lasted two hours. Id.

They left in a hurry, with Hertz driving the truck, and Looney driving the car. (R17-1925)

Around 4:30 a.m. on July 27, 1997, Pam Revell-Hodges woke to what she thought was the sound of a car. She thought it was her son returning home. (R14-1523) Her husband looked out the window and saw the trailer of Melanie King and Keith Spears engulfed in flames. (R14-1527) She called 911. (R14-1523) Her

husband, Terry Hodges, tried to put out the fire with a water hose. Because there were no cars in the yard, he thought no one was at home. He realized that the sound that had awakened them was the release valve on the propane gas tank of the trailer. (R14-1524)

Deputy Dan Dailey with the Wakulla County Sheriff Office responded to the call to the scene of the fire at 4:35 a.m. (R14-1538) He said the fire department had arrived 10 to fifteen minutes before he got there. (R14-1539) Although there were no cars parked outside the residence, he saw spin marks from car tires. Id. He secured the area. (R14-1540) He estimated that it took twenty minutes more to put the fire out. Id.

Shawn Yao, a crime lab analyst with the Florida Department of Law Enforcement, testified as an expert witness for the State. He photographed the crime scene. State's Exhibits 1A-U; 2A-D. He collected remnants of clothing from the victims, foam from under the head of the female, and duct tape from the mouth and nose area and left hand of the male. (R14-1555, 1576) He collected a piece of duct tape on the ground outside to the east of the trailer. (R14-1554) He collected bullets by sifting debris from the floor directly under where the heads of the victims had been on the bed. (R14-1560, 1561, 1569) The floor was so damaged by the fire that it was very fragile. (R14-1560) The photographs of the trailer showed the floor burned away

in several areas. (R14-1567, 1568); State's Exhibit 1-P and 1-Q. Yao collected a total of 12 projectiles and 10 casings. (R14-1572); State's Exhibit 3. He took photographs of tire tracks in the yard. (R14-1566), State's Exhibit 1-L, 1-M.

Donald Begue owned a gun shop in Cross City and knew Keith Spears as a customer. (R14-1541) He had sold two handguns to Spears in 1995 and 1996. (R14-1542-1543) One was a .380 Lorcin automatic handgun and the other a P-89 Ruger nine millimeter handgun. (R14-1542); State's exhibits 18 and 32. When it was introduced at trial, the .380 Lorcin automatic handgun had been modified since Begue sold the gun; a laser sight had been added. (R14-1542)

David Williams was a firearms expert with the Florida Department of Law Enforcement. (R16-1818) He analyzed the 12 projectiles recovered from the area of the burned bed. (R16-1820); State's Exhibit 3. Of the 12 projectiles, nine were bullets. (R16-1821) Two of the bullets had been fired from a gun and seven had been heat fired. (R16-1821) Of the two bullets fired from a gun, one was fired from a .380 automatic handgun. In Williams's opinion, that bullet was fired from the .380 Lorcin handgun recovered from Looney at the time of his arrest in Daytona Beach, the handgun owned by Keith Spears and used, according to Dempsey, by Hertz. (R16-1823); State's Exhibit 18. The other bullet was fired from a .30 carbine rifle. (R16-1822) As to the .30 caliber projectile, he could definitely identify the bullet as a .30

caliber, but his tests were inconclusive and he could not say that the bullet was fired from the .30 caliber carbine later found in the constructive possession of Looney and Dempsey. (R16-1826); State's Exhibit 21.

John Gunn with the State Fire Marshal walked through the burned trailer at 6:51 a.m., July 27, 1997. (R14-1626) He determined that a flammable liquid had been used to start the fire. (R14-1633) He opined that accelerants had been poured on and around the bed, but he was not able to detect any accelerants in the nine samples he had taken of the flooring and other material from the trailer. (R14-1634-1636-1638)

Ron Mc Cardle, also with the Fire Marshal, assisted Gunn. (R14-1642) He testified as an expert witness that the fire was incendiary. (R14-1644) He opined that the fire started in three different areas and that a flammable liquid was used. (R14-1645) He estimated that the fire took 15 to 40 minutes to burn, including the time it took to put the fire out. (R14-1646)

James Carver, a chemist with the Fire Marshal, identified turpentine on the male victim's tee-shirt. (R15-1661) He found "medium petroleum distillate," which is lighter fluid, on the male's shorts and underwear and on the female's shirt and shorts. (R15-1662-63-64) He found turpentine on the female's underwear and pillow. (R15-1665) Carver never testified that he found any evidence of gasoline in any samples taken from the crime scene.

The state medical examiner, Dr. David Craig, conducted the autopsy. (R15-1582) He saw that the bodies were severely burned. (R14-1583) He graphically detailed the condition of the bodies as depicted in the photographs: the legs burned off below the knees, the hands burned to nubs, the bones of the arms fractured by the fire and the skulls burned partially away. Id. Dr. Craig did not know why the extremities of the victims had burned off, speculating that it may have been the use of accelerants. He did allow that extremities are often burned away in a fire. (R14-1600) The victims were identified positively by their teeth. (R14-1583)

Dr. Craig testified that there could have been other injuries that were not detected due to the extensive burns. (R14-1598) He explained the depiction in State's Exhibit 39-D as being the central part of the body of Melanie King, with her intestines coming out of the body cavity as a result of the burns. (R14-1588) State's Exhibit 39-E showed severe burns to the head and face of Melanie King. (R14-1589) Dr. Craig also described the autopsy photographs of Keith Spears showing the extensive burns on the torso and abdomen and the intestinal material coming out of the right side as a result of the burns, the arm burned away, the legs burned off below the knees, the contracted left hand, the skull burned away, the burned face. (R14-1596); State's Exhibit 39-A-C. He did not use the photographs to show the cause of death.

Melanie King was shot two times in the head, which caused her death. (R14-

1590) Her death was not caused by the fire. (R14-1595) Dr. Craig was not able to trace the path of the bullet because the skull was burned away. (R14-1594) Dr. Craig testified that it was possible that other bullets struck the body which could not be determined because of the fire. Id. Ms. King lived one to two minutes after she was shot. (R14-1596) However, there was no soot in the trachea, indicating that she was not alive when the fire started. (R14-1596) Dr. Craig never said what kind of bullets killed Melanie King.

Keith Spears was shot one time in the head which caused his death. (R14-1598) The bullet went in the back of the neck and exited above the right eye. (R14-1599) Spears also lived one to two minutes after he was shot, and again, no soot was discovered in his trachea, meaning that he was dead at the time of the fire. (R14-1599) Dr. Craig never said what kind of bullet killed Keith Spears.

A necklace removed from the male victim's neck at the autopsy, was identified by Angie Spears, the sister of Keith Spears, as having belonged to Spears. (R15-1683; R15-1696) Sergeant Ronald Mitchell of the Wakulla Sheriff's Office discovered a number of items at Hertz's trailer, including a suitcase with the identification tag of "Annis M. King," which contained household items such as drinking glasses, a desk lamp, an alarm clock among other items. (R15-1687-1689); State's Exhibits 12A-G. He also identified a jewelry box, a satellite dish receipt with Spears's name on it and

a wooden rack, all found in Hertz's trailer. (R15-1690); State's Exhibits 13, 14, 15. Angie Spears identified the items as belonging to Melanie King. (R15-1697)

After leaving the scene of the murder, Dempsey, Hertz and Looney went to Hertz's trailer, unloaded all the stolen goods, and divided the money. (R17-1916) Dempsey "hesitated" but took his share. (R17-1916) He estimated that each stack was \$500. (R17-1925) Then they drove to Tallahassee and got gas. (R17-1925) They went to Walmart and bought several items. (R17-1926)

Patricia Hill was working the midnight shift as cashier at Walmart in Tallahassee on Thomasville Road. R14-1609. She remembered three men buying an assortment of items in the early morning of July 27, 1997. (R14-1610) She verified the date and time through receipts. (R14-1613); State's Exhibit 24 and 16. One receipt, found later in the Mustang, showed a purchase for Mickey Mouse boxers; Dempsey had bought boxers. (R17-1970) She remembered that the men were "very mannerable," that the short one was quiet, that one of the others said he was going to get married, and that they were going to party. (R14-1610-12) She identified Hertz and Looney as being the two talkative ones. (R14-1614) As the men left, they showed off their automobiles: a black Mustang and white truck. (R14-1614-15)

Colleen Kehrer, the Walmart manager on duty that same time, identified the defendants as being the men in the store who made the purchases and showed off their

vehicles. (R14-1617) All of the men were dressed in black and were "kind of grumpy, grudgy." (R14-1617)

Misty Dawn Barnhill, 19 years old, was the girlfriend of Guerry Wayne Hertz for five to six months before the crime occurred. (R14-1620) She had been the girlfriend of Dempsey. (R17-1937) Dempsey admitted that he and Hertz had had problems over women. (R17-1936) According to Dempsey, his breakup with Barnhill had occurred only one week before the July 27. (R16-1938) Previously, one other of Dempsey's girlfriends had also become Hertz's girlfriend, which had hurt Dempsey's feelings. Id. Barnhill said that Looney was the boyfriend of Barnhill's friend, Shannon. (R14-1621) Looney had met Hertz through Shannon. Id. Looney was staying at Hertz's trailer on July 26, 1997. (R14-1622) Barnhill, who had been living with Hertz, broke up with him on July 26, and left the trailer. (R14-1622) When she returned to the trailer on the afternoon of July 27, 1997, she saw that the trailer was filled with things that had not been there before, such as a television, microwave, furniture. (R14-1624)

DAYTONA BEACH

After the stop at Walmart, Dempsey, Hertz and Looney debated about where to go, with Looney voting for Georgia and Hertz for St. Augustine. (R17-1927) They did not stop in St. Augustine and went on to Daytona Beach because they had met a couple headed in that direction to party. (R17-1928)

Sean Patrick Rooney, a public safety officer in Daytona Beach, testified that he saw a black Mustang stuck in soft sand being pulled out by another vehicle. (R16-1721) He was in a marked unit. Two white males walking to the car stared at him as he ran the tag. (R16-1722) The report came back that the car was stolen. (R16-1723) When he turned around to approach the Mustang, it was moving. (R16-1723) As he followed the Mustang, he saw the Mustang pull up side-by-side with a white Ford Ranger in a parking lot. (R16-1725) Both vehicles drove off, and Rooney followed with his blue light on. (R16-1725) Rooney also determined that the Ranger was stolen. (R16-1726) Both vehicles accelerated when Rooney put on his blue lights. (R16-1727) When the Mustang turned off the main road, it spun out on the lawn, crossed the street, and spun out on another lawn and then stopped. (R16-1732) Both Rooney and backup officer Howard got out of their cars and walked toward the Mustang which had stopped. (R16-1732) Then the Ford Ranger came back to the scene. (R16-1733) Rooney was driving the Mustang with a passenger. (R16-1733) Hertz was driving the Ranger. Id. The Mustang began to move. (R16-1734) Rooney heard shots; he heard a bump and saw Howard's shoulder microphone fly through the air. (R16-1735-36) He then saw the Ranger backing up at a "very high rate of speed." (R16-1736) As Hertz drove the Ranger toward Rooney, Rooney fired three rounds at the Ranger. (R16-1737) Howard also fired. Id. The Ranger drove off. Id. The

Mustang had crashed between a garage and concrete wall. (R16-1738) Dempsey was the passenger. Id. The officer could not remember how Dempsey was dressed. (R16-1739)

Greg Howard with the Daytona Beach Shores Police Department, patrolling in a marked Cherokee in uniform, saw the black Mustang turn off the main road and turned on his blue light in response to Officer Rooney's call for backup. (R16-1745) The Mustang sped away and, after it spun out, was nose-to-nose with his vehicle. (R16-1747) He drew his gun and approached, telling the driver to stop the car and turn off the engine. R16-1748. The driver, Looney, said "no" and was cursing. Id. The Mustang drove off and Howard was somehow thrown from the car; he fired seven to eight times. (R16-1750) As Howard walked down the street, he saw the white Ford pickup behind him. (R16-1751) The truck, driven by Hertz, hit him from behind. (R16-1751-52) He lost his radio and became unconscious for several seconds. (R16-1752) The truck then began to back up toward him. Id. He shot at the truck to try to stop it and it left. (R16-1753)

Officer Charles Mandizha, of the Volusia County Sheriff Office, caught Looney and Dempsey, who had run away from the wreck of the Mustang. (R16-1760) He retrieved a gun from Looney's right front pocket, which was the gun identified by the gun shop owner as having been sold to Keith Spears. (R16-1760); Exhibit 18. The

deputy removed a chambered round and magazine. Id. He identified Looney, (R16-1761), who was wearing blue jean shorts and a ball cap at the time of his arrest. (R16-1762) Dempsey was wearing black shorts and no shirt at the time of his arrest. (R16-1763) Neither were wearing shoes or socks. (R16-1763)

The Ford Ranger was found abandoned in a parking lot behind a doctor's office. (R16-1771) Down the street from the abandoned Ranger was a payphone. (R16-1771)

A Dayton cabdriver received a call to pick up a fare who wanted a ride to St. Augustine. (R16-1793) The driver asked for \$100 up front. Id. The fare was identified by the cabdriver as Hertz. Id. Hertz had a red fender cover around his neck, explaining to the cabdriver that he was sunburned. (R16-1794)

Katherine Watson, Hertz's aunt who lived in St. Augustine, came home and found Hertz lying on her couch in her living room. (R16-1795-96) Her deaf brother-in-law had been there when Hertz arrived. (R16-1797) As Hertz slept, she realized that he was injured, so she tried to telephone Hertz's parents without success. Id. At the urging of her husband, she called 911. (R16-1798) Before the arrival of police, she put Hertz's pistol in her bedroom. (R16-1799) The FDLE collected a Ruger 9 millimeter pistol, the handgun sold to Keith Spears, and ammunition from the aunt's house. (R16-1811); State's Exhibit 32.

The St. Johns County Sheriff's Department arrived and arrested Hertz. (R16-1803) Hertz admitted that he had been driving the Ford Ranger and that Looney was driving the Mustang. (R16-1804) At the hospital, he stated that he would not have been taken alive if he had been awake. (R16-1805) The paramedic who treated Hertz testified that he had multiple gunshot wounds, on his arms and thigh, and a laceration on his head and cheek. (R16-1809)

John Robert Darnell with FDLE seized evidence from the black Mustang and white Ford Ranger in Daytona. (R15-1652) No items of evidence was introduced from the Ford Ranger. Both vehicles had Wakulla County tags. Id. In the Mustang, Darnell found grey pants, a black tee-shirt with the writing "Slayer," a black tee-shirt with "LA Raider," black Addidas shorts, grey tee-shirt with "Pro Drag," a pair of white socks, a pair of Brahman boots, and black Levis. (R15-1654-56); State's Exhibits 9A-I. These items were all analyzed for the presence of accelerants. The chemist found gasoline on the "Slayer" tee-shirt and the pair of boots, which belonged to Dempsey. (R15-1666; R15-1670, 1671) He found gasoline on the grey tee-shirt; the owner was never identified. He found charcoal lighter on one of the socks that belonged to Dempsey. (R15-1670) He found charcoal lighter on the "Raiders" tee-shirt and the black Addidas shorts, the owner of which was never identified. (R15-1669) On the jeans which contained Jimmy Wayne Dempsey's wallet, no traces of a flammable liquid

were found. (R15-1672) The chemist agreed that a negative result in the testing did not mean that the flammable liquid was never on the jeans. (R15-1676)

Robert Darnell, FDLE, recovered a .22 caliber rifle, with eight rounds of ammunition, and a Winchester .243 rifle, loaded with a magazine of four rounds with one in the chamber, from the bushes near where the Ford Ranger had been abandoned. (R16-1768); State's Exhibits 22 and 23. For none of the firearms, except the two Begue sold to Spears, was there ever any testimony about the registration or ownership.

A .38 Special revolver was found under the seat of the Mustang, where Dempsey had been sitting. (R16-1773); Exhibit 19. A .357 Smith & Wesson revolver and a .30 caliber carbine with a scope were also found in the Mustang, and miscellaneous ammunition. (R16-1777; R16-1784) A roll of duct tape was also found. Id. Looney's wallet with \$464.00 was on the console; Dempsey's wallet, with \$380.00, was in a pair of jeans in the back seat. (R16-1778-79) The Ford Ranger was registered to Melanie King. (R16-1780)

Carl Burian, a fingerprint analyst with FDLE, analyzed 20 latent fingerprints taken from the Mustang. (R16-1837) He identified twelve fingerprints and four palm prints of Looney, three fingerprints of Dempsey and two palm prints of Hertz. Id. He concluded that all three had touched the car. Id. There was no testimony about where

on or in the Mustang the prints were found. Pictures of the bullet-riddled Mustang were published. (R16-1840-44); State's Exhibits 41A-C.

ACCOMPLICE AND INFORMANT TESTIMONY

The State presented Robert Hathcock, an inmate at the Wakulla County Jail, who had heard statements that Hertz had made while the two were incarcerated together. Hathcock served 12 years on a 75-year sentence for the second degree murder of his father. (R16-1847) When Hathcock testified, he said that Hertz told him that he and "two of his co-defendants" had been involved in a murder in Crawfordville. (R16-1849-50) After objections and argument of counsel outside the presence of the jury, the jury was instructed not to consider the testimony of Hathcock. (R16-1892)

The State ended its case with the testimony of Jimmy Wayne Dempsey. He was the only witness to provide any direct evidence of the criminal culpability of Jason Looney and Guerry Hertz for the murders. (R16-1855) Before trial, he had been sentenced to two consecutive life terms, pursuant to his plea agreement with the State. (R17-1895) Dempsey admitted that he had violated probation and that he was a convicted felon. (R17-1928) He admitted that his only desire was "not to go to jail." (R17-1929) He admitted that he had lied when he was first caught, and that he had

made a deal to save his life. (R17-1939)

Dempsey had a 3.5 average in dual-enrollment college courses. (R17-1947) He had been prescribed psychiatric medication that he did not take and he had attempted suicide before the night of the murders. (R17-1948) He was a student of the occult; it was he who had taped the victims' eyes. (R17-1949) It was he who shot Spears twice in the head. (R17-1950)

He agreed that no one told him what to do that night, that decisions were made independently. (R17-1950-51) He denied that Hertz's relationship with his former girlfriend affected him. (R17-1954) He denied burning the trailer. (R17-1955) He knew that Looney was from Texas and had only recently come to Florida. Id. He knew that Looney had been upset about losing his girlfriend. Id.

He explained that his decision to plead guilty was recently made, after he had been told repeatedly that he was going to die. (R17-1971) He denied discussing his case with any inmates at the jail other than Hertz and Looney. (R17-1976-77) He had, however, talked to the prosecutor four or five times. (R17-1978)

The only evidence presented by the defense was a joint exhibit of a picture of Dempsey. (R17-1989)

SUMMARY OF THE ARGUMENT

Mr. Hertz raises a variety of challenges to his convictions and death sentence.

In the guilt phase, Mr. Hertz argues that

(1) the evidence was insufficient for a rational jury to convict him of first-degree murder, burglary of a dwelling while armed, robbery with a firearm, arson and possession of a firearm in the commission of a felony. The evidence of Mr. Hertz' participation in these crimes is found only from the testimony of the co-defendant and accomplice Jimmy Dempsey. This testimony is too tenuous to support the verdicts in this case;

(2) he was not competent to stand trial. The defense experts in this case agreed that Hertz suffered from brain disfunction and ADHA. This combination created specific obstacles to Mr. Hertz' ability to rationally understand the case against him and to assist his lawyer in the defense of the case. There was a meaningful short term solution which the people closest to Hertz had confidence would help Hertz become confident - get him on the Ritalin medication. The trial judge's failure to do so rendered the trial an unconstitutional deprivation of Mr. Hertz' due process rights;

(3) the jury selection process in this case eliminated from the pane Michelle Free after the state challenged her for cause. This was wrong. Although Ms. Free was not enamored of the death penalty, she agreed that she could follow the law and fulfil her oath as a juror. Once she understood that life in prison was a possible outcome, she could perform her duties fairly and impartially;

(4) the trial judge improperly admitted pictures of the crime scene and the autopsy that were not relevant to any material fact in dispute;

(5) the trial judge improperly allowed the State to present in great detail information about the events that occurred after the murder in Daytona Beach;

In the penalty phase, Mr. Hertz argues that

(6) the death sentence is disproportionate when you compare his culpability with that of Jimmy Dempsey, the co-defendant who pled guilty and received life sentences. There is simply no meaningful distinction between what Dempsey and Hertz did that resulted in the death of Keith Spears and Melissa King;

(7) the evidence was not sufficient to find the existence of the avoid arrest, pecuniary gain, heinous atrocious and cruel or the cold, calculated, premeditated aggravators. In each instance, the State's evidence failed to establish sufficient proof beyond a reasonable doubt;

(8) the victim impact evidence was improperly admitted; and

(9) the jury verdict recommending death was not unanimous.

ARGUMENT I

THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE

This Court reviews each death sentence for both internal and external

proportionality. First, this Court looks to the facts and circumstances of the case to determine if the death sentence should stand. Ray v. State, 755 So. 2d. 604, 611 (Fla. 2000). If so, this Court compares the “totality of the circumstances in a case and compares it with other capital cases to ensure uniformity in application.” Mansfield v. State, 758 So.2d. 636, 647 (Fla. 2000). In each instance, this Court has stressed “that the death penalty is reserved for ‘the most-aggravated and unmitigated of most serious crimes’.” State v. Dixon, 283 So. 2d. 1, 7 (Fla. 1973); Deangelo v. State, 616 So. 2d. 440, 443 (Fla. 1993).

In this case, no meaningful distinction can be drawn between the behavior of Hertz, Looney and Dempsey. Primarily, the source of this comparative information came from Dempsey.

1. Looney and Dempsey were armed when they left Bull’s house on July 26, 1997. Dempsey and Looney had their own guns; Hertz was not armed.
2. All three concurred in the idea that a car needed to be stolen because they were tired of walking.
3. Dempsey had the backpack with the duct tape in it.
4. After Hertz’s attempt to gain entry into Mr. Vertay’s house fails, Dempsey goes to the door of the Spear/King trailer to use the phone. Hertz is with him on the porch.

5. The use of the phone is a ruse for all three of them to get inside the house.
6. All three are armed when they came into the house.
7. Dempsey ties up Spears and puts him on the bed. Hertz tied up King. Both are placed face down on the bed.
8. All three took property from the trailer before the killings.
9. All three equally shared in the money taken from the trailer.
10. Dempsey is the person that says he knows King. Although Dempsey said he thinks Hertz went to school with King, there is no evidence that Hertz knew King.
11. All three are armed when they go into the bedroom where King and Spears are tied up.
12. Dempsey told Looney to shoot Spears if Spears moved.
13. All three of them shot at King and Spears. Dempsey admits to shooting Spears twice in the head, although the forensic evidence says Spears was only shot once.
14. There was no forensic evidence that says what weapon was used to kill either King or Spears.

The trial court's attempt to distinguish the three participant roles was unavailing. First, the trial court says that after the three entered the trailer, Dempsey "was more of a follower of Hertz and Looney who made the decisions concerning killing the victims

and burning down their dwelling in which he reluctantly participated. When advised by Hertz that he and Looney had decided to kill the victims he was told by Hertz that if he did not participate with them there was a bullet for him also.” (R2-299) This is a gross distortion of the record. Dempsey attempted to minimize his role in the crimes by talking about being outvoted and being caught up in an event that was getting out of hand. But it is critical not to be blinded by what Dempsey says; it is critical to focus on what he did. The evidence is overwhelming that what he did does not meaningfully distinguish his culpability from that of Hertz or Looney. To this end, the trial court’s sentencing order talks a lot about what happened after the murders. This simply does not matter and glosses over what Dempsey actually did to kill Spears.

In Ray v. State, 755 So. 2d. 604 (Fla. 2000), Ray and his cousin Roy Hall robbed the stateline Liquor Store located near the Florida-Georgia line. In preparation for this robbery, the cousins armed themselves with any number of firearms and ammunition. This firepower included a Davis Industries 380 pistol, a SKS 7.62 millimeter rifle and magazine, a 9 millimeter Berretta pistol, and a M-1 carbine semiautomatic rifle. The cousins robbed the store and then stole a car from one of the employees. The cousins left the store in the stolen vehicle which they abandoned in a prearranged location and picked up their original vehicle. Soon after, the vehicle developed some mechanical problems and they had to stop the car to try and fix it.

While out of the car and trying to find the problem, deputy sheriff Lindsey approached them. Lindsey called for backup and then a shootout occurred resulting in the death of deputy Lindsey. Other law enforcement reached the scene as Roy and Hall were leaving in their vehicle. Ultimately, they were stopped and arrested. Hall had been shot multiple times; Ray was uninjured.

The investigation showed that deputy Lindsey was killed by shots fired from a M-1 rifle; Ray's fingerprint was found on the rifle. Ray testified positive for gunshot residue; Hall tested negative. Ray's palm prints were found on the hood of deputy Lindsey's car.

Ray and Hall were convicted of first-degree murder. The jury recommended life imprisonment for Hall and the judge sentenced him accordingly. The jury recommended death for Ray. "Ray presented evidence of his low I.Q., his stable family life and his passive and compliant role in the robbery." The judge found three aggravators, one statutory mitigator - no significant criminal history, and five nonstatutory mitigators: (1) Ray has an I.Q. of 75; (2) Ray shows signs of depression; (3) Ray's father suffers from depression and Ray's family has a history low intelligence; (4) Ray might have brain damage because he was born prematurely; and (5) Ray was a loving husband and caring father to his three children. The judge sentenced Ray to death.

This Court found the death sentence internally disproportionate because it viewed the evidence as indicating that Ray was no more culpable in the death of deputy Lindsey than Hall.

ARGUMENT IIA.

FOUR OF THE SEVEN AGGRAVATING FACTORS UPON WHICH THE JURY WAS INSTRUCTED AND WHICH THE TRIAL COURT FOUND ARE LEGALLY INAPPLICABLE.⁴

The state must prove each element of an aggravating factor beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Such proof cannot be supplied by inference unless the evidence is inconsistent with any reasonable hypothesis that might negate the aggravating factor. Woods v. State, 733 So. 2d 980, 991 (Fla. 1999); Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1992). “[T]he trial court may not draw ‘logical inferences’ to support a finding of a particular aggravating circumstance when the State has not met its burden.” Clark v. State, 443 So. 2d 973, 976 (Fla.

⁴The uncontested evidence established that Mr. Hertz was on probation for a felony conviction at the time the killings occurred. The trial judge properly found this aggravator. Section 921.141(5)(a), Florida Statutes.

The uncontested evidence established that Mr. Hertz had been convicted of aggravated battery in Volusia County prior to the sentence imposed for the murders. The aggravated battery occurred after the killings but this Court has determined that a qualifying felony includes crimes committed subsequent to the capital crime. Brown v. State, 473 So. 2d 1260 (Fla. 1985)

1983). A trial court may not rely on speculation to provide proof of an aggravating circumstance. Hartley v. State, 686 So. 2d 1316, 1323-24 (Fla. 1996); Hamilton v. State, 547 So. 2d 630, 633-34 (Fla. 1989). These general principles, as well as the principles guiding application of the specific aggravating factors discussed below, were not followed in Mr. Hertz's case.

1. Avoiding Arrest

In a case not involving the murder of a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Zack v. State, 753 So. 2d 9, 20 (Fla. 2000); Urbin v. State, 714 So. 2d 411 (Fla. 1998); Consalvo v. State, 697 So. 2d 805, 819 (Fla. 1996). The state must prove that the sole or dominant motive for the killing was to eliminate a witness. Jennings v. State, 718 So. 2d 144, 151 (Fla. 1998); Consalvo, 697 So. 2d at 819; Geralds, 601 So. 2d at 1164. "The fact that witness elimination may have been one of the defendant's motives is not sufficient to find this aggravating circumstance." Davis v. State, 604 So. 2d 794, 798 (Fla. 1992). Speculation that witness elimination was the dominant motive behind the murder is not sufficient. Jennings, 718 So. 2d at 151; Consalvo, 697 So. 2d at 819; Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). The fact that the defendant did not have to murder the victim in order to accomplish a monetary goal is insufficient to establish that the defendant's dominant motive was to avoid arrest. Zack, 753 So. 2d

at 20. The mere fact that the victim knew and could identify the defendant is not sufficient to prove this aggravator. Zack, 753 So. 2d at 20; Consalvo, 697 So. 2d at 819; Geralds, 601 So. 2d at 1164; Davis, 604 So. 2d at 798.

Here, the trial court found this aggravator based solely on the fact that Mr. Hertz was acquainted with the victim:

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

The trial judge's finding is misleading at best. Dempsey testified that he recognized the name Melanie King after he saw a driver's license. Dempsey thought Hertz had gone to school with King but Dempsey was far from certain about this conversation. Interestingly, there is no evidence from Hertz that he knew or recognized King at any time prior to or after her death. This information came from Melanie King's mother. While the families and their respective children may have had contact, nothing in this record says that Hertz knew who Melanie King was on July 27, 1997.

Likewise, the prosecutor's argument to the jury focused on the fact that the victims were known to the defendants.

Recall [Jimmy Dempsey's] testimony, that these people were known and they could not leave any witnesses, and they were going to kill them.

....

Would they have been identified as the perpetrators of this crime had they not killed them.

(R18-2375-76)

Clearly, the court and prosecutor relied upon a legally insufficient basis to support this aggravator--that Mr. Hertz and the victim were acquainted. Zack, 753 So. 2d at 20; Consalvo, 697 So. 2d at 819; Geralds, 601 So. 2d at 1164; Davis, 604 So. 2d at 798. This aggravator was legally inapplicable.

Further, in addition to holding that avoiding arrest applies only when the sole or dominant motive for the murder was avoiding arrest, this Court has held that the pecuniary gain aggravator applies only if the state proves that pecuniary gain was the sole or dominant motive for the murder. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). It is therefore inconsistent to apply both pecuniary gain and avoid arrest in the same case.

2. Cold, Calculated and Premeditated (CCP)

Three elements of CCP which require proof beyond a reasonable doubt are that

the homicide (1) was “the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage (cold),” (2) resulted from the defendant’s “careful plan or prearranged design to commit murder before the fatal incident (calculated),” and (3) was committed after “heightened premeditation (premeditated).” Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). Heightened premeditation is “premeditation over and above what is required for unaggravated first-degree murder.” Walls v. State, 641 So. 2d 381, 388 (Fla. 1994).

“A plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony.” Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995), quoting Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992).

The premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. What is required is that the murderer fully contemplate effecting the victim’s death. The fact that a robbery may have been planned is irrelevant to this issue.

Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984); Gorham v. State, 454 So. 2d 556, 559 (Fla. 1984).

Here, the defense argued that the evidence did not support the “heightened premeditation” element of CCP and that therefore the jury should not be instructed on CCP. The trial court found CCP (R2-295).

The court’s findings on CCP rely upon several impermissible bases. The first

three sentences of the findings rely upon planning of the theft of the car in order to establish heightened premeditation:

The evidence establishes that the defendant and his co-defendants decided they would steal a vehicle. The defendant, Hertz, armed himself with a pistol. He and his co-defendants began to search for a suitable victim and in the course thereof found what they thought was a suitable circumstance upon coming to the residence of the victims after their prior surveillance of another residence.

(R2-295). The facts related in these three sentences indicate only the planning of a car theft, and do not specifically indicate planning of a murder. This is an insufficient basis for this aggravator under Barwick, Geralds, Hardwick and Gorham. In Barwick, the trial court relied upon facts very similar to those relied upon in Mr. Hertz's case, finding the defendant "planned his crimes, selected a knife, gloves for his hands, and a mask for his face. . . . The defendant had planned [other felonies], had armed himself to further those purposes and when a killing became necessary, . . . he killed her." 660 So. 2d at 696. This Court concluded that heightened premeditation had not been established because "the evidence presented does not demonstrate that Barwick had a careful plan or prearranged design to kill the victim. . . . Here, the evidence suggests that Barwick planned to rape, rob, and burglarize rather than kill." Id. (citations omitted).

The next sentence of the court's findings on CCP is a summary of events:

“After their forcible and violent entry and binding and binding and gagging of the victims, they conducted a two-hour reign of terror.” (R2-295). This summary points to no evidence of calm reflection, careful planning, prearranged design or heightened premeditation. Jackson. These events could just as well have resulted from snap decisions as from any planning. There is little direct evidence of any plans made by the defendants. In fact, Dempsey repeatedly testified the three of them had no plan. It is not clear why there were in the house for two hours but the time seemed to be filled mostly with the desire to steal things out of the house. When evidence regarding an aggravator is circumstantial, the aggravator cannot be based upon inference unless the evidence is inconsistent with any reasonable hypothesis that might negate the aggravator. Woods, 733 So. 2d at 991; Geralds, 601 So. 2d at 1163-64.

The last three sentences of the court’s findings on CCP are an exercise in syllogism. “The defendant and his companions clearly, calmly and coolly reflected upon a careful plan or design to murder the victims with deliberate ruthlessness and heightened premeditation without pretense of legal or moral justification. The pattern of shooting the victims in the head exhibited a deliberate intent to eliminate witnesses and the actual manner in which the victims were murdered demonstrates clearly that they were executed in cold blood. Advance procurement of weapons had been made, the victims offered no resistance or provocation and their murders were carried out as

a matter of course after being bound and gagged.” These statements do nothing more than restate the standard of proof. The legal standard is not evidence.

The state’s evidence failed to prove the elements of CCP beyond a reasonable doubt. The trial court erred in instructing the jury on this legally inapplicable factor and erred in finding and weighing this factor.

3. Heinous, Atrocious or Cruel (HAC)

To establish HAC, it is not sufficient to show that the victim suffered great pain, or did not die immediately.⁵ HAC is proper “only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.” Brown v. State, 721 So. 2d 274, 277 (Fla. 1998). Rejecting HAC in Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992), this Court held, “the crime must be both conscienceless or pitiless and unnecessarily torturous” for HAC to apply.

Accordingly, the Court has required a showing that the defendant intended to

⁵ In Brown v. State, 526, So. 2d 903 (Fla. 1988), this Court refused to find HAC in the murder of a police officer, even though the defendant took the officer’s gun and shot him despite his pleas not to do so. In Lewis v. State, 377 So. 2d 640, 646 (Fla. 1979), HAC was not applied even though the victim was shot in the chest, attempted to flee, and was shot again in the back. In Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993), the Court rejected HAC although the victim was shot twice and did not die, but begged for his life, and was then shot twice more.

inflict a high degree of pain or suffering in order to establish HAC. Hamilton v. State, 678 So. 2d 1228 (Fla. 1996); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991). In Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993), the Court held that HAC was not established because there was no evidence the defendant “intended to cause the victim unnecessary and prolonged suffering.”⁶

This Court has also required that the murder was both physically and mentally torturous to the victim. Wickham v. State, 593 So. 2d 191, 193 (Fla. 1991). Thus, the Court has held that the state must prove the victim was conscious during the events. In DeAngelo v. State, 616 So. 2d 440, 442-43 (Fla. 1993), the Court rejected the state’s cross-appeal challenging the trial court’s failure to find HAC because the trial court found the state had failed to prove the victim was conscious during the attack. Likewise, in Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984), the Court held the facts did not support HAC, reasoning, “[w]hen a victim becomes unconscious, the circumstances of further acts contributing to his death cannot support a finding of

⁶This Court’s decisions on the necessity of intent as an element of HAC have been conflicting. In Guzman v. State, 721 So. 2d 1155, 1160 (Fla. 1998), the Court held that “[t]he intention to inflict pain on the victim is not a necessary element of the aggravator,” if the state proves utter indifference. But in numerous other cases, the Court has held that HAC may not properly be found where there is no evidence that the defendant “intended to subject the victim to any prolonged or torturous suffering.” Buckner v. State, 714 So. 2d 384, 389 (Fla. 1998); Hamilton; Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995); Bonifay; Robertson v. State, 611 So. 2d 1228, 1233 (Fla. 1993); Santos.

heinousness.”

Here, the defense objected to the jury being instructed on HAC because the evidence failed to satisfy the definition of HAC.

The trial court applied HAC, finding:

The evidence introduced clearly established that the defendant and his co-defendants were present in the dwelling of the victims for over two hours before the execution style murder of the victims. The victims were forcibly subdued, restrained and bound head and feet with their mouths and eyes covered by duct tape. The entry into the dwelling was violent and hostile and the victims were violently informed that if they moved or resisted they would be shot.

After deliberate discussion and decision to eliminate the victims as witnesses against them, the defendant and his co-defendants sprinkled and poured gasoline, lighter fluid and turpentine throughout the dwelling and its entrances. Having been bound, gagged and placed face down in a single bed for approximately two hours and presumably able to hear the defendant and his co-defendants’ conversations and discussions and smelling the liquid flammables while the three defendants stood around the bed armed with pistols and rifles the victim King suddenly stated “if you are going to burn us please don’t shoot us in the head”. The defendant Hertz replied “sorry can’t do that” and commenced repeatedly firing his pistol into the victims’ head. The defendant, Looney, immediately joined in with a 30 caliber rifle after which the defendant, Dempsey, followed.

Both of the victims were unquestionably aware of their impending doom. Imagine the fear, terror and extreme anxiety of each victim with their hands and feet tied, their mouths and eyes bound by tape. The medical examiner testified that the victims’ deaths were by gun shot wounds, not fire. He further testified that he found fluid built up in the lungs of both victims indicating that both victims lived a short time after they were initially shot. The co-defendant, Dempsey, further testified that

after the other defendants opened fire with volleys to the heads of the two victims, he then fired two shots into the head of the victim Keith Spears to make sure he was dead.

There can be no doubt that the murder of each victim was especially heinous, atrocious and cruel. Each murder was indeed consciousnessless, and pitiless, and was undoubtedly unnecessarily tortuous and pitiless.

(R2-294).

The evidence supports that both King and Spears were restrained shortly after the defendants gained access to their house. They were placed in a bedroom, face down on the bed and tied up with duct tape. (R17-1909) What happened inside the house came only from the mouth of Dempsey. It had to be that most of the two hours involved the three defendants deciding what to take from the house and then taking it.

(R17-1909)

It appears that Dempsey had the most contact with King and Spears. He was the person responsible for guarding them in the bedroom. (R17-1915) He retaped King's hands because the initial taping was too tight. He talked to King to reassure her and put a pillow under her head. Both King and Spears were scared. (R17-1914) In fact, Hertz' plan was to scare them so they would disclose where any valuable items were in the house. (R17-1912)

At some point, Hertz poured gasoline in the living room. But much of the trial

court's order is speculation. The sentencing order says that King and Spears "presumably" could "hear the defendant and co-defendant's conversations and discussions" but there is no evidence of this. There is no evidence that Hertz or Looney poured any other accelerant in the house. Dempsey attributes King saying she would rather die being burnt up in flames than being shot. King also said "Please, God, don't shoot me in the head." (R17-1924) Hertz said "Sorry, can't do that." Hertz fired his gun immediately thereafter, as did Looney and Dempsey. (R17-1924) There is no evidence that Hertz "repeatedly" fired his weapon "into the victims' head." The forensic evidence supports only three bullets fired into King and Spears' heads combined and Dempsey admitted to firing two into Spears' head.

The trial court found that "Both of the victims were unquestionably aware of their impending doom." While this likely true, the real question is when did King and Spears figure this out. There is no evidence that King and Spears knew anything until all three defendants were in the bedroom and King asks not to be shot. The trial court tried to fill this vacuum by writing "Imagine the fear, terror and extreme anxiety of each victim with their hands and feet tied, their mouths and eyes bound by tape." (R2-294) This is all it is, imagination (or speculation). Death by gunshot was almost instantaneous, within a minute or so. There was no evidence that either King or Spears would have been conscious during this brief period of time. Both of them were dead

by gunshot, not the fire. The fire is irrelevant to this discussion.

The trial judge's order lends certainty to knowledge that is guesswork on Dempsey's part. For instance, Dempsey testified that Hertz and Looney fired in the direction of King and Spears and he did not know who hit whom. (R17-1950) There was no testimony that Hertz and Looney "opened fire with volleys to the heads of the two victims . . ." Further, there is nothing to say Spears was dead or alive when Dempsey shot him twice. Dempsey gave his opinion but the forensic evidence contradicts Dempsey's recollection. There was only one gunshot wound to Spears' head, not two.

Killing by gunshot is a death deliberately inflicted by the defendants and therefore does not demonstrate a "desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Brown.

The fact that Mr. Dempsey attempted to reassure the victims indicates the defendants had no "desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Brown. Rather, Mr. Dempsey's statement to the victims indicates they did not want the victims to be afraid.

Further, the trial court relied upon speculation to determine that the victims were mentally tortured, imagining how the victims felt. (R12-2250). A court may not rely upon speculation to support an aggravator. Hamilton.

4. Pecuniary Gain

This aggravator applies only if the dominant or sole motive for the murder is pecuniary gain. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). Here, the trial court applied this aggravator, finding:

As established by the evidence, the defendant and his co-defendants came upon the victims' residence seeking to steal a car. When unable to gain entry into the residence by subterfuge, after a forcible and violent entry not only were the keys stolen to the truck which the defendant was driving and later captured in, but also cash and substantial other property was stolen and carried away by the defendant and his co-defendants.

First, the court made no finding that the dominant or sole motive for the murder was pecuniary gain. Further, in addition to holding that pecuniary gain applies only when the sole or dominant motive for the murder was pecuniary gain, this Court has held that the avoid arrest aggravator applies in a case not involving the murder of a law enforcement officer only if the state proves that avoiding arrest was the sole or dominant motive for the murder. Jennings v. State, 718 So. 2d 144, 151 (Fla. 1998). It is therefore inconsistent to apply both pecuniary gain and avoid arrest in the same case. But see Thompson v. State, 648 So. 2d 692, 695 (Fla. 1994). Applying two aggravators which both require a showing of a sole or dominant motive renders the death sentencing process vague and overbroad, and fails to genuinely narrow the class eligible for the death penalty. Stringer v. Black; Zant v. Stephens.

In addition, the trial judge seemed to merge this aggravator with another aggravator - that the capital felony was committed during the course of a burglary, arson or robbery. Therefore, there should be no separate weight assigned to this aggravator.

ARGUMENT IIB.
THE ERRONEOUS CONSIDERATION OF LEGALLY INAPPLICABLE AGGRAVATORS WAS NOT HARMLESS ERROR.

When any one or more of the aggravators discussed above is invalidated, the state cannot show beyond a reasonable doubt that the erroneous consideration of the aggravator or aggravators was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1989). Mr. Hertz presented a substantial case in mitigation. The trial court found Mr. Hertz established multiple mitigating factors. Further, the court's sentencing order states, "that the aggravating factors present outweigh the mitigating factors." This statement indicates that the court relied upon all of the aggravating factors to impose death, and thus there is no way to tell beyond a reasonable doubt that elimination of even one aggravator would not affect the sentencing decision. DiGuilio.

The state likewise cannot show beyond a reasonable doubt that consideration of one or more invalid aggravators did not contribute to the jury's death recommendation. See Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, Sochor v. Florida, 112 S. Ct. 2114, 2119 (1992); DiGuilio. The jury was overbroadly

instructed on aggravating factors, an error which fails to genuinely narrow the class of persons eligible for the death penalty. Maynard v. Cartwright, 108 S. Ct. 1853, 1859 (1988); Zant v. Stephens. The jury had no way to know that one or more of the aggravators upon which it was instructed were legally inapplicable. See Sochor, 112 S. Ct. at 2122 (“a jury is unlikely to disregard a theory flawed in law”). It therefore must be presumed that the jury found and relied upon these inapplicable aggravators. Espinosa, 112 S. Ct. at 2928. The jury’s weighing process was thus skewed in favor of death. Stringer. Since there was un rebutted evidence of mitigating factors in the record, see Argument 4, the state cannot show beyond a reasonable doubt that the errors in instructing the jury on legally inapplicable aggravators was harmless. DiGuilio. Because the trial court and jury relied upon one or more inapplicable aggravators, Mr. Hertz should be granted a resentencing before a jury.

ARGUMENT III

THE TRIAL COURT IMPROPERLY EXCUSED FOR CAUSE A VENIRE MEMBER WHOSE OPPOSITION TO THE DEATH PENALTY DID NOT PREVENT OR SUBSTANTIALLY IMPAIR HER ABILITY TO PERFORM JURY OBLIGATIONS

Venire member Michelle Free was impermissibly struck from the jury venire on the erroneous grounds that her opposition to the death penalty rose to the level of

exclusion under Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985).

The parties had agreed to conduct certain portions of the voir dire on an individual juror basis. One of the topics addressed in this setting was the juror's belief about the death penalty. The third juror called was Michelle Free. The State first asked her if she held "any personal, religious, moral, or conscientious scruples against the imposition of the death penalty." (R5-171) Mr. Free replied that she did not. The State then asked her if she could vote to impose death "in an appropriate case."

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

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

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

MS. FREE: No, sir.

MR. MEGGS: You could not?

MS. FREE: No.

The defense then questioned Mr. Free.

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

MR. FREE: Yeah.

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

MS. FREE: Uh-huh.

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

MS. FREE: Uh-huh.

MR. CUMMINGS: Six to six or, whichever way it looks like, it's just a recommendation.

MS. FREE: Yeah. Uh-huh.

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

MS. FREE: Yes.

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

MS. FREE: I would try.

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

MS. FREE: Yes.

MR. CUMMINGS: So assuming you have all this discussion, an open discussion about the possibility of one sentence or the other, are you going to tell us today that you still couldn't participate in that discussion if you were on a jury?

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

MR. CUMMINGS: And that's true.

MS. FREE: Yeah, so --

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

MS. FREE: Yeah.

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

MS. FREE: I would try, yeah.

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

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

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

MS. FREE: Yes.

MR. CUMMINGS: So you could sit on the jury part where it's guilt or innocence?

MS. FREE: I believe I could, yes.

MR. CUMMINGS: Okay. But once you get to the other point, you're a little hesitant, but you could go in there and express your opinion to the jurors?

MS. FREE: Yes sir.

MR. CUMMINGS: This is the way I feel, this is why I feel it, this is why I think life without parole is appropriate; you could do that, couldn't you?

MS. FREE: Yes.

The State moved to disqualify Ms. Free.

MR. MEGGS: Judge, as a matter of law, I think Ms. Kinsey⁷ and Ms. Free are disqualified from sitting on this jury. They both have said, without regard to what Mr. Cummings asked them, they both have said they could not vote to impose the death penalty and that they would express their views, but both of them have stated they could not -- one said she could not do it unless it was her daughter. Well, it's not her daughter.

And this one said she could not do it and she would try to talk the

⁷Ms. Kinsey was the juror questioned right before Ms. Free.

other ones out of doing it. So we're trying to pick a jury that will follow the law, and the law is the death penalty is appropriate in Florida. And so I would ask that both of these be excused for cause.

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

The defense countered that Ms. Free unequivocally stated that she would follow the law. Ms. Free was clear that if she had a choice of to vote for life imprisonment, she would not have any problem participating as a juror.

Over the defense's objection, the trial judge excused Ms. Free.

THE COURT: I don't think either of these jurors indicated they could be fair and impartial in all the phases in this case, and I'm going to have to grant the State's motion as to Ms. Kinsey and Mr. Free.

MR. CUMMINGS: So is that the Court's standard, that we need to ask whether they can be fair and impartial in each phase?

THE COURT: Well, both of these jurors indicated and said that under no circumstances would they vote in favor of the death penalty. I don't think there was any equivocations.

There was, I grant you, perhaps a little more maybe with -- well, I'm not sure. I think perhaps more with Ms. Kinney than there was with Ms. Free, for that matter.

I think under Witt both of them are properly excused, if the State requests a challenge for cause."

The U.S. Supreme Court held in Witherspoon that venire members who have general objections to the death penalty could not be excluded from jury service since it would leave a jury composed primarily of people "uncommonly willing to condemn a man to die." 391 U.S. at 521. The Court concluded that

a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

Id. at 522.

The Court later held in Witt that the proper standard for determining when a prospective juror could be excluded for cause because of his or her views on capital punishment was whether the juror's views would

prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

469 U.S. at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

Analyzing the voir dire examination of Ms. Free, there is no indication after she

fully understood her choices, that her views on the death penalty would interfere with what she would take an oath to do - fairly try the issues between the parties. There were two issues - first whether the State could prove the defendants guilt beyond a reasonable doubt, including the crime of first-degree murder. If this came to pass, the juror would be called upon to then make a determination as to a life or death recommendation. But the law is clear - a juror can always recommend life based on that juror's view of the evidence. That is all Ms. Free indicated she would do; she stated more than once that she believed she could fulfill her duties as a juror. See Sanchez-Velasco v. State, 570 So. 2d 908, 915-916 (Fla. 1990) (venirepersons who indicated unequivocally that they could not put aside convictions and follow the law properly excluded; "no venireperson was eliminated who indicated in any way that he or she could follow the law.")

Participation as a juror in a death penalty case engenders feelings and emotions that are not present in other criminal cases. There is no question that for many jurors it is their first opportunity to confront their feelings about the death penalty in a concrete forum (not just discussing it as another news item). Most human beings would have some ambivalence about recommending a sentence of death in a vacuum, that is before the juror has heard the facts of the case. Society would expect a juror to take the responsibility for serving in a death case very seriously.

While “determinations of jurors bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism,” Witt, 469 U.S. at 424, the rest of the voir dire examination gives no hint that Ms. Free would be so close-minded as to be unable to function as a juror. On the contrary, she testified she would be open minded; that she had no dominant opinion as to the outcome of the case.

Ms. Free’s voir dire responses stand in stark contrast to the responses of venirepersons that the Court found were properly stricken for cause in Randolph v. State, 562 So. 2d 331 (Fla. 1990), and Lambrix v. State, 494 So. 2d 1143 (Fla. 1986). In Randolph, the challenged venireperson had “vacillated badly” on the question of whether she could impose the death penalty under any circumstance. The Court correctly concluded that

given juror Hampton’s equivocal answers, we cannot say that the record evinces juror Hampton’s clear ability to set aside her own beliefs ‘in deference to the rule of law.’”

526 So. 2d at 336-337 (quoting Buchanan v. Kentucky, 483 U.S. 402 (1987)).

Likewise, in Lambrix, the challenged venireperson “reportedly wavered when questioned about her ability to vote in favor of the death.” 494 So. 2d at 1146. In determining that the venireperson’s opposition to capital punishment would “substantially impair her ability to act as an impartial juror,” *id.*, the Court particularly noted that “[t]he fact that Mrs. Hill told the trial judge that she could not vote for the

death penalty under any circumstances is controlling.” Id.

The synthesis of the Court’s rulings in Sanchez-Velasco, Randolph and Lambrix yields the following rule for determining whether or not a venire member is Witherspoon/Witt excludable: if venire members respond in any way that they can follow the law and are not close-minded with respect to their ability to impose the death sentence under particular situations, they cannot be subject to exclusion for cause; if, however, venire members equivocate and leave the impression that they cannot impose the death penalty under any circumstances, then they are excludable for cause. This rule comports with and serves to protect both the defendant’s sixth amendment right to have a jury that is not just comprised of people “who are uncommonly willing to condemn a man to die,” Witherspoon, 391 U.S. at 521, and “the State’s legitimate interest” in removing potential jurors who would “frustrate [it] . . . in administering constitutional capital sentencing schemes by not following their oaths.” Witt, U.S. at 423.

ARGUMENT IV

THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO REQUIRE UNANIMOUS VERDICT

In Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), the Supreme Court held, “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Id. at 2362-63. Under Rule 3.440, Fla. R. Cr. P. a jury verdict on a criminal charge must be unanimous. Since jury unanimity has long been the practice in Florida, “It is therefore settled that ‘[i]n this state, the verdict of the jury must be unanimous’ and that any interference with this right denies the defendant a fair trial.” Flanning v. State, 597 So. 2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So. 2d 261 (Fla. 1956). However, in capital cases, this Court has approved allowing the jury to recommend a death sentence based upon a simple majority vote. See, e.g., Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994). The Court has also not required jury unanimity as to the existence of specific aggravating factors. Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990).

In light of Apprendi, the Court should reexamine the majority vote practice in jury capital sentencing and require jury unanimity, including but not limited to the existence of any aggravating factors and as to the recommended sentence. Apprendi requires “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury.” This means that facts which increase

the penalty beyond the statutory maximum are treated as elements of the crime.

An examination of the particulars of the Florida capital sentencing process shows that a death sentence is “beyond the prescribed statutory maximum” and therefore “must be submitted to a jury.” Under Sec. 782.04(1)(a), Fla. Stat. (1999), a first-degree murder conviction is punishable as provided in Sec. 775.082, Fla. Stat.

This section provides:

A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

Sec. 775.082, Fla. Stat. (1999).

A Florida capital defendant is not eligible for the death sentence upon conviction for first-degree murder; without more, the court would only be able to impose life. Sec. 775.082, Fla. Stat. This is so because the Florida capital sentencing statute requires the state to prove at least one aggravating factor beyond a reasonable doubt before the defendant is eligible for a death sentence. Sec. 921.141(2)(a), (3)(a), Fla. Stat. (1999). Thus, under Florida law, the death sentence is not within the “statutory maximum” sentence discussed in Apprendi, but is only available after additional findings are made.

Florida law has long respected the jury’s role in the finding of a fact that

increases the maximum penalty of a particular crime. For instance, a jury deciding a robbery case is told that

The punishment provided by law for the crime of robbery is greater if “in the course of committing the robbery” the defendant carried some kind of weapon. An act is “in the course of committing the robbery” if it occurs in an attempt to commit robbery or in flight after the attempt or commission. Therefore, if you find the defendant guilty of robbery, you must then consider whether the State has further proved those aggravating circumstances and reflect this in your verdict.

Fla. Standard Jury Instructions (1998 Edition), pg. 220. The jury is then provided with choices about the kind of weapon and told that no greater sentence can be imposed unless the jury unanimously finds the defendant carried some particular weapon. See also the crimes of burglary, pg. 196-197; trespass, pg. 204; theft, because the value of the loss affects the penalty, pg. 211; drugs, pg. 305, 308, 311, 317.

Under Apprendi’s reasoning, aggravating factors in the Florida scheme are elements of the charge and should be decided by a unanimous jury. As Apprendi explained, the important consideration is the effect of the factor rather than whether the legislature placed the factor in the definition of the crime or within sentencing provisions. 120 S. Ct. at 2364-66. “[T]he relevant inquiry is one not of form, but of effect--does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” Id. at 2365. Thus, even if a death sentence appears to be within the statutory maximum allowed under Florida law, under

Apprendi's reasoning, the legislature's placement of aggravating factors in a sentencing provision exceeds the state's "authority to define away facts necessary to constitute a criminal offense." Id. at 2360. Apprendi's discussion of prior cases indicates this decision can be made only upon consideration of the particulars of the state law involved and the effect of the factor at issue. See, e.g., 120 S. Ct. at 2360-61 & n.13 (distinguishing McMillan v. Pennsylvania, 477 U.S. 79 (1986)); Id. at 2366 (distinguishing Almendarez-Torres v. United States, 523 U.S. 224 (1998)).

Apprendi has overruled Walton v. Arizona, 497 U.S. 639 (1990), and related cases. See 120 S. Ct. at 2380 (Thomas, J., concurring) (question whether Walton has been overruled is left open); Id. at 2387-88 (O'Connor, J., dissenting) (majority decision inconsistent with Walton). Even if Walton and cases related to it have not been overruled, Apprendi's reasoning establishes that Walton does not apply to the particulars of Florida's capital sentencing scheme. 120 S. Ct. at 2364-66.

The defendants right to jury unanimity was violated by not requiring jury unanimity in the penalty phase vote. Deprivation of this right violates due process. Flanning; Hicks v. Oklahoma, 447 U.S. 343 (1980). This Court should order a jury resentencing.

ARGUMENT V

MR. HERTZ WAS NOT COMPETENT TO STAND

TRIAL

The central inquiry of an incompetency defense is

“whether . . . [the defendant] . . . has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding --and whether he has a rational as well as factual understanding of the proceedings against him.”

Dusky v. United States, 362 U.S. 402 (1960).⁸

The right not to be tried when one is incompetent is so fundamental to the concept of fairness, see Bishop v. United States, 350 U.S. 961 (1956), that special procedures have been developed to protect that right. Pate v. Robinson, 383 U.S. 375, 385-386 (1966).

Florida has crafted Rule 3.211, Fl. R. Cr. P. and Section 916.12, Florida Statutes (1997) as its standard. The Criminal Rule of Procedure requires the judiciary to focus on the following:

(2) In considering the issue of competence to proceed, the examining experts shall consider and include in their report, the following factors and any others deemed relevant by the experts:

⁸While this test originated under federal criminal statutes, it is beyond question that it is also the constitutionally-required (due process) inquiry whenever the competency of a criminal defendant is questioned. Drope v. Missouri, 420 U.S. 162, 172, 179-181 (1975); Lokos v. Capps, 625 F. 2d 1258, 1261 (5th Cir. 1980); Reese v. Wainwright, 600 F. 2d 1085, 1090-1091 (5th Cir. 1979); cert. denied, 444 U.S. 983 (1979).

The defendant's capacity to:

(i) Appreciate the charges or allegations against him; (ii) Appreciate the range and nature of possible penalties, if applicable, which may be imposed in the proceedings against him; (iii) Understand the adversary nature of the legal process; (iv) Disclose to his attorney facts pertinent to the proceedings at issue; (v) Manifest appropriate courtroom behavior; (vi) Testify relevantly.

In this case, the defense expert testimony focused on two criteria - Hertz' lack of rational understanding of the evidence against him and the serious consequences of the weight of the evidence and his inability to assist his attorney during trial. These barriers were primarily the result of Hertz' brain dysfunction and his ADHA. Both defense experts noted that if Hertz were prescribed medication, the Ritalin, and placed in a secure environment, Hertz' competency could be restored in a relatively short period of time.

The State's expert disagreed. Dr. Conger believed that Hertz could put out more effort if he wanted to do this. Although Dr. Conger did not dispute that Hertz suffered from ADHA, Conger believed it would not affect Hertz' ability to help his lawyer during trial. The State also presented witnesses who observed Mr. Hertz shortly after the crime, over a year before the competency hearing. This information, although historically interesting, was not germane to Hertz' present ability to help his lawyer and rationally understand the case against him.

This case had conflicting information regarding certain elements of the competency standard. As such, the trial court had the authority to resolve those conflicts and its decision comes to this Court presumed to be correct. Ponticelli v. State, 593 So. 2d 483, 487 (Fla. 1991)

The record is replete with examples that supported the conclusions of the defense experts, including the employee of Hertz' lawyer. This is a particularly important form of evidence, counsel's own observation of his client.

“Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, . . . an expressed doubt in that regard by one with ‘the closest contact with the defendant,’ Pate v. Robinson, 383 U.S. 375, 391 (1966) (Harlan, J. dissenting), is unquestionably a factor which should be considered.”

Drope v. Missouri, 420 U.S. at 177, n. 13. Counsel's view of the defendant's alleged incompetence is of paramount importance. Reese v. Wainwright, 600 F. 2d 1085, 1092 (5th Cir. 1979), cert. denied, 444 U.S. 983 (1979).

ARGUMENT VI

THE TRIAL COURT ERRED BY ADMITTING GRUESOME PHOTOGRAPHS OF THE BODIES AT THE CRIME SCENE AND THE AUTOPSY.

The defendants objected to the admission a photograph of the bodies at the crime scene, (R13-1554), State's Exhibit 1C. The objection was that the pictures

would only inflame the jury. The defendants argued that two other photographs, State Exhibits 1T and 1U, sufficiently showed the crime scene and the outline of where the bodies had lain on the bed. (R13-1545). The defendants also objected to the admission of the autopsy photographs of the bodies, (R13-1584), State's Exhibits 39A through 39E, and asked for voir dire of the medical examiner to determine if the photographs were necessary to illustrate his testimony as to the cause of death. (R13-1584) The Court did not allow the voir dire. (R13-1584) In fact, the medical examiner did not use the autopsy photographs to show the cause of death. (R13-1589, 1591) The objection was renewed and denied. (R13-1592) The defendants also objected to the method of publication to the jury. (R13-1590-93) The State used the DOAR system to enlarge the photographs to the size of a large television screen. That objection was also overruled. (R13-1593)

A. The probative value of the gruesome pictures of the charred bodies at the scene of the murder and arson was substantially outweighed by the danger of unfair prejudice and needless presentation of cumulative evidence.

The threshold test for the admissibility of photographs under established Florida case law is relevancy rather than necessity. Pope v. State, 679 So.2d 710, 713 (Fla. 1996). In Pope, the crime scene photographs were relevant to show how the murder was committed. The photographs also helped the crime scene technician explain the

condition of the crime scene. Id. In this case the murder was committed with firearms. The photographs showed that the bodies were burned, which was not the cause of death. The crime of arson was depicted in seventeen other photographs which showed that the trailer itself was burned. State's Exhibits 1A,B,D,E,F,G,H,I,J,K,N,O,P,Q,R,T,U. The fact of the arson itself was not in dispute. See Old Chief v. United States, 519 U.S. 172 (1997). Furthermore, two of those photos, State's Exhibit 1T and 1U, showed the same area as State's Exhibit 1C without the bodies. (R13-1545) The enlarged photo was also described in graphic detail to the jury by the crime scene technician.

Ruiz v. State, 743 So.2d 1, 8 (Fla. 1999), is on point. There the prosecution published a two-by-three foot blow up of the victim's upper body, revealing "the bloody and disfigured head and upper torso." This Court found that the enlarged photograph was irrelevant because the standard-size photograph had already been shown to the jury. This Court found that the only purpose of the photo was "simply to inflame the jury." Id. at 8. The Court held that the admission of the photo was error and the conviction was reversed. Id.

The defendants did not dispute that an arson occurred. Under Old Chief v. United States, 519 U.S. 172 (1997), when a defendant stipulates to a fact, thereby eliminating any dispute over the fact, the court must undergo the balancing test in

Florida Rule of Evidence 403. If the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or the needless presentation of cumulative evidence, then the evidence should not be admitted. Unfair prejudice "means and undue tendency to suggest decision on an improper basis, commonly, though not necessarily, on an emotional one." Old Chief, 519 U.S. at 180. The rationale of Old Chief was adopted by this Court in Brown v. State, 719 So.2d 882 (Fla. 1998). Even though Old Chief and Brown are felon-in-possession cases, the rationale of the cases applies in any analysis of relevancy and materiality under Florida Rules of Evidence §90.401 and §90.403.

The only reason for the admission of the photo was to inflame the jury. The prosecutor, before publishing the enlarged photograph, delicately warned the jury to expect a gruesome photograph. ("For the jury's benefit, it [State's Exhibit 1C] depicts the bodies." (R13-1563.)) The photograph was irrelevant and overly prejudicial and should not have been published to the jury. This Court should follow the precedent in Ruiz and reverse the convictions.

(B) The gruesome pictures of the bodies at the autopsy were not used by the medical examiner to illustrate his opinion of the cause of death and were therefore irrelevant.

In Almeida v. State, 748 So.2d 922, 929 (Fla. 1999), this Court applied the test

in Pope and found that the admission of one autopsy photograph was error. The photograph showed the gutted body cavity. This Court cautioned that the Pope test "by no means constitute[d] a carte blanche for the admission of gruesome photos." Id. Noting that the concept of relevance involves materiality and probative value, the Court restated the evidence rule of relevance: "To be relevant, a photo of a deceased victim must be probative of an issue that is in dispute." Id. Because the medical examiner used the photos to show a fact that was not in dispute, the trajectory and the nature of the injuries, the Court found that photographs were not relevant. Further, this Court found that "[a]dmission of the inflammatory photo thus was gratuitous." Id.

In this case, the medical examiner did not use the photographs to demonstrate any facts, disputed or otherwise. His testimony about the cause of death did not rely at all on the photographs. (R13-1584) The detailed account of the damage to the bodies caused by the fire did nothing more than inflame the jury's passions. Because the photographs were not relevant, that is, not probative of any fact in issue, the admission was error.

Nor was the error harmless. The repulsive image of intestines coming out of the body cavity, blown up to a larger than life size, would have lingered with the jury as it contemplated the verdict. The deaths of these victims were not caused by the fire. And yet the jury saw the charred remains, with the extremities burned off, the faces

mutilated, none of which was relevant. Given the highly inflammatory nature of the photographs, it is impossible to say that the admission did not contribute to the verdict. State v. DiGuilio, 491 So.2d 1129 (Fla. 1996). Thus, the convictions should be reversed.

ARGUMENT VII

THE DETAILS OF THE COLLATERAL CRIMES IN VOLUSIA COUNTY BECAME A FEATURE OF THE TRIAL CAUSING PREJUDICE THAT SUBSTANTIALLY OUTWEIGHED THE PROBATIVE VALUE OF THE EVIDENCE.

The day of the murder, the defendants had made their way to Daytona Beach. A substantial number of the State's witnesses and exhibits pertained to the pursuit and capture of the defendants in Volusia County. The State presented gripping testimony about how the defendants were identified and pursued by police. The police witnesses described the defendants' dangerous driving in their attempt to elude the police. Looney was heard by one of the officers crudely cursing the officers in defiance of the lawful order to stop. Looney and Hertz tried to run over the officers and did in fact run down the pursuing police officers. The police fired at both defendants. Looney and Dempsey ran on foot through a neighborhood and were captured. Hertz was wounded and escaped in a long cab ride to a relative's house in St. Johns County. He made statements about not being taken alive after his arrest. The testimony in the

guilt phase of this trial was presented over three days. In the first day, essentially all of the evidence was presented about the crimes in Wakulla County. The third day of trial was Jimmy Wayne Dempsey. The State spent the entire second day of trial detailing these collateral crimes. None of the evidence about the events that occurred in Daytona Beach was relevant to the issue the jury was to decide, whether Hertz and Looney committed the crimes with which they were charged.

In Steverson v. State, 695 So.2d 687 (Fla. 1997), the defendant was tried for the first-degree murder, armed burglary with assault, and armed robbery for the taking of a television and VCR from the victim's trailer. Four days after the murder, a detective and his partner received a tip on the defendant's location. As the officers approached defendant in his car, an exchange of gunfire occurred. The defendant and the detective were injured. At the murder trial, "every emotional aspect" of the shooting was admitted into evidence. Id. at 690. The detective testified, as did his partner, giving a "blow-by-blow" account of all the details. Id. Other police who responded to the scene, and paramedics, also testified. Id. Photographs of the detective's injuries were introduced. Id.

This Court reversed the conviction, holding that the defendant was "unfairly prejudiced by the trial court's error in allowing the State to present excessive evidence of a collateral crime involving the shooting of a police officer such that the other crime

became the feature of the trial." Steverson v. State, 695 So.2d at 687. The Court concluded that photographs of the officer's injuries alone were "so unnecessary and inflammatory that they could have unfairly prejudiced the jury" against the defendant. Id. at 690. And while the Court allowed that "some reference" to the shooting would have been permissible, there was "absolutely no justification for admitting the extensive evidence received here." Id.

Likewise, in the case at bar, there is absolutely no justification for the extensive evidence of the events in Volusia and St. Johns Counties. The defendants were portrayed as violent desperadoes, intent on avoiding capture, willing to kill police officers who were acting in the course of their official duties. While "some evidence" of the arrest and the incriminating evidence discovered in the two vehicles was certainly relevant and admissible, the error lay in allowing the collateral crimes to become a feature of the murder trial. See, Randolph v. State, 463 So.2d 186, 189 (Fla. 1984), **cert. denied** 473 U.S. 907 (1985). Nor can evidence of the attempted murder of the police officers be considered harmless beyond a reasonable doubt. Steverson v. State, 695 So.2d at 690. The improper admission of collateral crimes evidence is presumed harmful "because the jury might consider the bad character thus demonstrated as evidence of guilt of the crime charged." Gore v. State, 719 So.2d 1197 (Fla. 1998); see also, Pope v. State, 679 So.2d 710, 714 (Fla. 1996) and

Czubak v. State, 570 So.2d 925 (Fla. 1990). Therefore, the convictions should be reversed.

ARGUMENT VIII

THE STATUTE AUTHORIZING THE ADMISSION OF VICTIM IMPACT EVIDENCE IS AN UNCONSTITUTIONAL USURPATION OF THE COURT'S RULEMAKING AUTHORITY UNDER ARTICLE V, §2, OF THE FLORIDA CONSTITUTION MAKING THE ADMISSION OF SUCH TESTIMONY UNCONSTITUTIONAL AND REVERSIBLE ERROR.

In Section 921.141(7), Fla. Stat. (1996), the Florida legislature allowed the admission of a certain kind of evidence in the penalty phase of death penalty trials. This statute is a procedural rule which has not been adopted by this Court and therefore the statute is unconstitutional. Allen v. Butterworth, 756 So.2d 52 (Fla. 2000).

Rules of evidence are both procedural and substantive. In re Florida Evidence Code, 675 So.2d 584 (Fla. 1996). This Court has adopted those rules of evidence enacted by the legislature that are recommended by the Florida Bar. See, e.g., In Re Amendment of Florida Evidence Code, 638 So.2d 920 (Fla. 1993); In Re Amendment of Florida Evidence Code, 497 So.2d 239 (Fla. 1986); In Re Amendment of Florida Evidence Code, 404 So.2d 743 (Fla. 1981). Section 921.141(7), Fla. Stat., was enacted as session law 92-81, §1. That law was never adopted by this Court.

This Court has held that Section 921.141 (7), Fla. Stat., is procedural. Allen v. State, 662 So.2d 323 (Fla. 1995). In that case, the Court held that the application of the statute to a crime that occurred before the enactment of the statute did not violate the ex post facto clause of the constitution because the statute was procedural and not substantive. Under Article II, Section 3, of the Florida Constitution, the legislature is prohibited from exercising those powers belonging to the judiciary. See Allen v. Butterworth, 756 So.2d at 59.

This Court held, in Windom v. State, 656 So.2d 432 (Fla. 1995), cert. denied, 516 U.S. 1012 (1995), that the Section 921.141(7), Fla. Stat., does not violate the Eighth Amendment under the authority of the United States Supreme Court decision, Payne v. Tennessee, 501 U.S. 808 (1991). The Court has never considered, however, whether the statute violates the separation of powers doctrine under Florida law. Review of victim impact evidence by this Court has been confined to deciding whether evidence adduced is relevant to "demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." See, e.g. Bonifay v. State, 680 So.2d 413 (Fla. 1996).

Article I, Section 16(b) of the Florida Constitution provides that victims or their lawful representatives are entitled to the right "to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the

constitutional rights of the accused." This Court has already determined that victim impact evidence does not interfere with one of the constitutional rights of the defendant. Windom v. State, 656 So.2d at 438. The Court did not analyze the relevance of the evidence, nor did the Court consider by whom the victims or their representatives are entitled to be heard. The breadth of the construction in Windom, if it is not to be considered as dictum, would allow victims or their representatives to be heard by the jury in all criminal cases if the legislature were to so choose to pass such a statute. From an evidentiary point of view, the question is whether victim impact evidence is relevant, that is what material fact does the evidence tend to prove or disprove. §90.401, Fla. Rule of Evid. This procedural question has never been analyzed by the governmental branch with the constitutional duty to do so: this Court. Until such time as the Court has performed its duty, this statute should not be applied.

Victim impact testimony is unquestionably powerful. But the only thing the evidence accomplishes is inducing the jury to act emotionally when it is considering whether to impose the death penalty. In this case, the defendants were reduced to tears by the reading of the victim impact statements. Only a battle-scarred veteran of death penalty cases might have the ability to be unaffected emotionally when the family of a victim recounts the loss. Perhaps a more appropriate use of such evidence would be a presentation to the trial judge in the sentencing itself, rather than the penalty phase

before the jury. Then the concern of Justice Kogan, that "one or the other side in a criminal case [could] prey on the prejudices some jurors may harbor about particular classes or victims," would be eliminated. Windom v. State, 656 So.2d at 440. Because this error is constitutional, it is per se reversible.

ARGUMENT IX

THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE CONVICTIONS.

The prosecution has the burden to prove every element of the crime beyond a reasonable doubt. If the record does not contain substantial competent evidence to support the verdict, the conviction must be vacated. Terry v. State, 668 So.2d 954, 964 (Fla. 1996). This Court must independently assess the sufficiency of the evidence. Fla. Rule App. Proc. 9.140(f).

The only direct evidence of the participation by Looney and Hertz in the crimes charged was the testimony of Jimmy Wayne Dempsey. Without Dempsey's testimony, the case against Hertz and Looney is entirely circumstantial. A case that depends entirely on circumstantial evidence, of course, is reviewed under a different standard. Miller v. State, 2000 WL 1227744, 2 (Fla. 2000). Dempsey's testimony removes this case from the standard of review for circumstantial cases. Without Dempsey's testimony, the State could not have overcome the requirement that the

evidence, taken in the light most favorable to the State, be inconsistent with any reasonable hypothesis of innocence. State v. Law, 559 So.2d 187 (Fla. 1989).

The State's burden of proof can be met by the introduction of the testimony of a single witness, even when that witness's testimony is uncorroborated and contradicted by other State witnesses. I.R. v. State, 385 So.2d 686 (Fla. 3d DCA 1980). But when that witness is an accomplice, and when the accomplice's testimony is uncorroborated, then there can be no substantial competent evidence if that testimony is "at odds with ordinary common sense or physically impossible under the laws of nature." Wilcox v. Ford, 813 F.2d 1140 (11th Cir. 1987) (refusing to reweigh the evidence).

The question of credibility of that single, uncorroborated, contradictory accomplice witness is left to the jury. This concept is embodied in the Florida Standard Jury Instructions: "You should use great caution in relying on the testimony of a witness who claims to have helped a defendant commit a crime. This is particularly true when there is no other evidence tending to agree with what the witness says about the defendant. However, if the testimony of such a witness convinces you beyond a reasonable doubt of a defendant's guilt or the other evidence in the case does so, then you should find the defendant guilty." Florida Standard Jury Instructions in Criminal Cases, §2.04(b). This Court does not reweigh the evidence on

appeal, but the Court does review the entire record to determine if a reasonable juror could be convinced of guilt beyond a reasonable doubt. Tibbs v. State, 397 So.2d 1120 (Fla. 1981).

A review of the testimony of accomplice Jimmy Wayne Dempsey shows that his uncorroborated testimony is indeed at odds with ordinary common sense or is physically impossible under the laws of nature. According to the record, Looney became acquainted with Hertz and Dempsey three days before the murder occurred. Looney came with Hertz to visit Dempsey at Tommy Bull's house for 30 to 45 minutes the night before the murders. He possessed a large handgun. He left around 11:00 p.m. with Hertz and Dempsey. He was not seen again until 5:24 a.m. in Tallahassee. At that time, he was talkative and mannerable. He possessed one of the vehicles stolen from Spears and King which he showed off as his own to the Walmart clerk.

There was no evidence from the arson scene, such as footprints or fingerprints, to show Looney and Hertz had been there; there was no forensic evidence, such as fingerprints, from the stolen items found in Hertz's trailer showing that Looney ever possessed those items. No projectile from the large handgun in Looney's possession was found at the murder scene. Of the clothing items found in the Mustang, none were identified as belonging to Looney. Looney did attempt to flee from the police, but flight alone is "no more consistent with guilt than innocence." Merritt v. State, 523

So.2d 573 (Fla. 1988); Fenelon v. State, 594 So.2d 292 (Fla. 1992). Evidence of flight may be circumstantial evidence of guilt, but only if a nexus between the flight and the crime is established.

AS TO HERTZ:

Hertz was seen by Tommy Bull for 30 to 45 minutes the night before the murders. He was in the company of Looney. He left around 11:00 p.m. with Looney and Dempsey. He was seen at 2:00 by Ms. Ventry a.m. in Tallahassee asking to use her phone because his truck was broken down. He was seen later, at 5:24 a.m. at the Walmart in Tallahassee. He is talkative and mannerable. He is in the possession of one of the vehicles stolen from Spears and King which he shows off as his own.

There is no evidence from arson scene, like footprints or fingerprints, to show Looney and Hertz had been there; there is no forensic evidence, such as fingerprints, from the stolen items found in Hertz's trailer that Hertz ever possessed those items. While the statutory presumption that possession of recently stolen goods is evidence of theft may apply as another circumstance, there is no proof that Hertz knew those goods were at his residence. Dempsey had been staying at Hertz's residence, and so Dempsey had access to the

residence. Hertz is never seen in possession of a firearm. None of the items of clothing seized in Daytona are ever identified as belonging to Hertz. Although Hertz does attempt to flee from the police, evidence of flight is not sufficient to convict. None of the details of the events at the murder scene supplied by Dempsey are corroborated. Dempsey claims that Looney possessed a rifle; he does not say how, when or where Looney acquired this rifle. Although rifle is recovered from the backseat of the Mustang, Dempsey never identifies that firearm as being the one that he claimed Looney carried and used. There is no testimony as to the registration or ownership of any of the firearms, except the two that belonged to Keith Spears. Dempsey provides no insight to what may have occurred between 11:00 a.m. when the trio left Bull's house, and 2:00 a.m., when Hertz knocks on Ms. Ventry's door. Dempsey says he is the one who knows how to hot-wire a car, and then he says he does not know how to hot-wire a car. He implies that he was trying to create a diversion by knocking on the door at the Spears/King residence, so that the cars could be stolen, but he never explains how that event was supposed to occur since he was the one he knew how to hot wire cars.

Dempsey said that he shot Keith Spears twice in the head at close range, that he

saw the body react to the second bullet. The medical examiner said that Keith Spears was shot only once in the head. Dempsey said that only gasoline was used to start the fire and that Hertz poured the gasoline only in the living room. The fire marshals said that the fire had three origins and that three different kinds of accelerants were used: gasoline, medium petroleum distillate, and turpentine. These substances were found on the clothing of the victims, in direct contradiction to Dempsey's testimony that accelerant was only poured in the living room. The clothes from the Mustang identified as Dempsey's all contained traces of flammable liquids. In State v. Moore, 485 So.2d 1279, 1281 (Fla. 1986), this Court held that a prior inconsistent statement which is the only substantive evidence of guilt is not sufficient to sustain a conviction. The Court emphasized that it was not establishing a procedure whereby appellate courts reweigh the evidence and substitute their judgments for those of the jury." Id. at 1282. The Court was concerned with sufficiency of the evidence "which is a legitimate concern of appellate courts." Id. The Court found that the "risk of convicting an innocent accused is simply too great when the conviction is based entirely on prior inconsistent statements." Id. at 1281. This same rule was applied in Anderson v. State, 655 So.2d 1118 (Fla. 1995) and State v. Green, 667 So.2d 756, 760 (Fla. 1995). In all of these cases, the incriminating testimony comes from a witness who is incompetent or so unreliable that the Court found it necessary to

exercise its power to prevent a miscarriage of justice. Jimmy Wayne Dempsey is no more reliable than the witnesses in Green or Anderson or Moore. The Court should consider his testimony in this case in the same light and reverse the convictions.

CONCLUSION

For the reasons argued in his initial brief, Mr. Hertz requests this Court to (1) reverse his convictions and sentences; (2) reverse his sentence of death and remand with instructions to impose a life sentence without the possibility of parole; or (3) reverse his death sentence and remand with instructions to convene a new penalty phase jury.

**STEVEN SELIGER
GARCIA AND SELIGER
Florida Bar Number 244597
16 North Adams Street
Quincy, Florida 32353-0324
(850) 875-4668
(850) 875-2310 fax**

**Court Appointed Attorney
for Mr. Hertz**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail this ____ day of September, 2000, to **Mr. Robert Butterworth**, Attorney General, The Capitol, Tallahassee, Florida 32399-1050.

STEVEN SELIGER