

**IN THE SUPREME COURT OF FLORIDA**

JEFFREY G. HUTCHINSON,

Appellant,

v.

Case No. **SC01-500**

STATE OF FLORIDA,

Appellee.

\_\_\_\_\_ /

**SECOND AMENDED INITIAL BRIEF OF APPELLANT**

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## **PRELIMINARY STATEMENT**

Appellant, Jeffrey Glen Hutchinson, was the defendant below and will be referred to in this brief as either "defendant," "appellant," or by his proper name. The State was the prosecuting authority below and will be referred to as "the State."

References to the record on appeal will be by volume number followed by "R" and that will be followed by the page number, both in parentheses.

## **STATEMENT OF THE CASE**

An Indictment filed in the Circuit Court for Okaloosa County on October 5, 1998 charged the Appellant, Jeffrey Hutchinson, with four counts of first-degree premeditated murder. Those allegations also claimed he committed each murder using a shotgun and during the course of aggravated child abuse (1 R 24-26). The State filed a notice that it intended to seek the death penalty (1R 29), and it or the defendant then filed several notices or motions relevant to this appeal:

1. Motion for medical testing, alleging Hutchinson suffers from Gulf War Syndrome (1 R 54). Granted (1 R 71) . Notice of intent to present expert testimony of mental mitigation (12 R 2254).
2. Amended Notice of Intent to Rely upon Insanity Defense (4 R 700).

3. Motions by the State and defense for the appointment of specified mental health experts (4 R 703-707). Granted (10 R 1874). Hutchinson would also ask the court to appoint a confidential mental health expert (6 R 1115), which it apparently did (1 R 54)

4. Notice of Intent to Revoke Notice of Intent to Rely upon Defense of Insanity (4 R 711, 10 R 1844).

5. Motions to suppress an audio "911" tape that allegedly had recorded the defendant's call to the police (5 R 848, 10 R 1825). Denied (15 R 2897).

6. Motion for an individual, sequestered voir dire of the prospective jurors (6 R 1080). Granted in part (15 R 2811).

7. Motion to preclude first degree felony murder theory of prosecution (6 R 1090). Denied (15 R 2844).

8. A pro-se motion to recuse Judge Robert Baron from presiding over Hutchinson's case (7 R 1279). Denied (17 R 3288-89).

9. Two motions in limine to prevent introduction of pictures of the victims (7 R 1293, 1306). Ruling postponed until trial and then generally denied (14 R 1068).

10. A motion filed by the State to determine the defendant's sanity at the time of the offenses and his competency to stand trial (7 R 1310). Granted (7 R 1303).

11. Notice of Intent to Present Expert Testimony of Mental Mitigation (7 R 1334). Filed by Hutchinson.

12. Motion to suppress statements made by the defendant to the police (7 R 1346). Denied in part (18 R 3508-3509, 3511, 3533).

13. Motions to declare Section 921.141(5)(m), Florida Statutes (2000 Supp.), as either unconstitutional or inapplicable to this case (12 R 2216, 2227). Denied (5 R 969).

14. Notice of defendant's waiver of penalty phase trial (13 R 2408).

During the pre-trial proceedings, Hutchinson asked to represent himself (10 R 1860), but he later withdrew that request (10 R 1862, 1870).

The case proceeded to trial before Judge Robert Baron, and the defendant was found guilty as charged (23 R 2383-84). He waived having the jury make a sentencing recommendation (13 R 2408), but both he and the State presented their evidence supporting various mitigating and aggravating factors. The court found the same mitigation for each murder, but was more selective about the aggravating factors applicable to the various victims.

1. As to Renee Flaherty, the court found only that the defendant was previously convicted of the three contemporaneous murders. (14 R 2704)

2. As to Geoffrey Flaherty:

a. The defendant was previously convicted of the three contemporaneous murders.

b. The murder was committed during the course of aggravated child abuse and upon a person less than 12 years old. These two aggravators were merged.

c. The murder was especially heinous, atrocious, or cruel(14 R 2705-2706).

3. As to Amanda and Logan Flaherty:

a. The defendant was previously convicted of the three contemporaneous murders.

b. The murder was committed during the course of aggravated child abuse and upon a person less than 12 years old. These two aggravators were merged.

(14 R 2707-2708)

The court found the following mitigation and gave it significant weight:

1. Hutchinson has no significant history of prior criminal activity.

2. Hutchinson was a decorated military veteran of the Gulf War.

The court found the following mitigation and gave it some, slight, little, or minimal weight:

1. Hutchinson was security officer of the month, quarter and year with the Spokane Security Police at Deaconess Hospital.

2. He served in the army for eight years and received a General Discharge under Honorable Conditions.

3. He has a 15-year-old son whom he has supported financially and emotionally.

4. He has the potential for rehabilitation and productivity while in prison.

5. He has been diagnosed with Gulf War Syndrome.

6. He has been diagnosed with a form of Attention Deficit Disorder.

7. He has never abused illegal drugs.

8. He has provided emotional and financial support to his family.

9. He has the ability to show compassion.

10. He is a high school graduate.

11. He was active in disseminating information about Gulf War Syndrome.

12. He has worked from 1984-1998.

13. He has demonstrated his religious faith while in jail.

14. His large family supports him.

15. He is a skilled motorcycle mechanic.

16. He has designed improvements to motorcycles and has sought patents for those designs.

17. He was under stress immediately after the murders.

18. Friends in the United States and abroad have given him moral support.

19. He was using alcohol at the time of the offense.

(14 R 2708-2714)

The court, after weighing the aggravating and mitigating factors, imposed the following sentences: 1. Life for the murder of Rene Flaherty. 2. Death for the murders of Geoffrey, Amanda, and Logan Flaherty. The life sentence is to run consecutive to the death sentences, which are to be served concurrently with each other (14 R 2714).

The State has filed a notice of Cross-appeal questioning the court's willingness to merge the aggravated child abuse aggravator with the victim was a minor aggravator (14 R 2762).

This appeal follows.

## **STATEMENT OF FACTS**

By September 11, 1998, Jeffrey Hutchinson had been living with his girl friend, Renee Flaherty, and her three children, Geoffrey, 9, Amanda, 7, and Logan, 4 for about 18 months (24 R 1087, 1153). By all accounts the couple had a good relationship, and friends noted that the defendant treated the children as if they were his (24 R 1154-56). Nothing seemed unusual, and indeed, Jeffrey, Renee, and the kids had planned to get together with some friends that night, but one of the latter became sick, and the evening's outing was postponed (22 R 722).

Nevertheless, about seven or eight o'clock that evening, the couple had an argument serious enough for Renee to call a friend in Washington state and through her tears tell her that "she and Jeff were splitting." (24 R 1030) For his part, Hutchinson left the house, got in his truck, and drove to a nearby bar and ordered a couple of beers (23 R 842-43, 845-46). He drank one, and had finished part of the second when he left very upset and appearing disoriented (23 R 849). Before getting into his truck, he brushed past another patron of the bar muttering to himself (23 R 897).

As he left the parking lot, he gunned the engine so that the tires spun throwing dirt and gravel behind (23 R 484). He roared down the road, driving crazily (23 R 975). His truck swerved off the left side of the road, almost hit another car, jumped a gully, traveled up an embankment, and hit a sign, knocking it down (23 R 902 936, 939-43).

One of the vehicle's tires blew, but he drove with a flat tire (23 R 965). During the trip toward his house, he stopped for ten or fifteen seconds then took off again (23 R 959).

A few minutes later someone who was later identified as Hutchinson (24 @ 1148) called the 911 operator and said he had just shot his family (22 R 687-90). But when asked how many people were there, he did not know. Nor did he know how many had been hurt or how they had been injured (22 R 688-92). He also said "There were some guys here ... Those fucking bastards." (22 R 692-93).

The police responded, and when they arrived they found the defendant laying face down in the garage with a portable telephone by his head, still connected to the 911 operator (21 R 599, 22 R 630, 694, 769, 775). He appeared to be unconscious and was unresponsive to the officers (21 R 600, 22 R 773, 23 R 818). When they went inside the house they found the bodies of Renee and two of the children in the master bedroom and the body of Geoffrey in the living room (24 R 1094). Each had been shot once in the head with a shotgun (22 R 607-608, 23 R 812, 24 R 1045-46). Geoffrey's body was found in the living room, and he had two fatal wounds (24 R 1044). None of them had any other injuries (24 R 1062-63). A shotgun was found on a kitchen counter (22 R 607).

As mentioned, the police found Hutchinson in the garage. They handcuffed him and half drug, half carried him to a police car (22 R 797, 24 R 1168). He did not say

anything then, but only grunted (24 R 1173). At the police station, he would eventually talk with the police until he invoked his right to remain silent (18 R 3533). The police ignored that claim and continued to question him. As he first indicated when he called the 911 operator, two men came into his house. He struggled with them, but they shot Renee and the children and fled (22 R 707).

At the time of the homicides, Hutchinson was 38-years-old and was living with Renee Flaherty and her children. By all accounts he and Renee got along well, and he treated the children as his own (24 R 1155-56).

Hutchinson had, as far as the evidence showed, a normal childhood with one exception. His mother and father and brothers and sisters all loved him and testified in glowing terms about the defendant (30 R 2402-2403, 2434, 2453-55). The only problem he had growing up was that he suffered from Attention Deficit Hyperactivity Disorder, for which he took the drug Ritalin (30 R 2422). That calmed him down (30 R 2422).

After graduating from high school, he worked as a security guard, and was so good that he received special commendations and was recognized as the employee of the quarter and year (30 R 2404, 2418 See, Defense Exhibit M). He enjoyed motorcycle racing and had trophies for several races he had either won or placed (30

R 2417). Beyond purely the competition, he also was an excellent and clever mechanic (30 R 2444).

Hutchinson joined the United States Army becoming qualified as a paratrooper and Army Ranger (30 R 2382, Defense Exhibit M). He also was a good soldier, being recognized as soldier of the month, quarter, and year (Defense Exhibit M). He also received the Army Commendation Medal four times, the Army Achievement Medal twice, and two other meritorious achievement certificates (Defense Exhibit M). He was discharged as a sergeant (Defense Exhibit M).

While in the Army, the defendant fought in Desert Storm. In particular, at one point he was near an enemy ammunition/chemical site at Kazimiyah that was destroyed (30 R 2451). After returning from the war, his family noticed that Hutchinson had changed. He became depressed and physically ill, vomited, and lost his hair (30 R 2423, 2436, 2457). He divorced his first wife, married a second, but soon divorced her (See State's Exhibit 137, Neurological/Psychiatric Report, p. 6). Some time later he got into a fight with another soldier, and eventually he was discharged under honorable conditions (4 R 796). Out of the army and since moving to Florida, he held no steady job, "but he went from that doing something every day, working hard to just of scattery, work habits." (31 R 2442)

In time, the defendant began developing symptoms of one who had been exposed to neurotoxins (Deposition of Dr. William Baumzweiger, State's Exhibit 138, pp. 32, 74-75, 77). Eventually, he was diagnosed as having "Gulf War Syndrome," (30 R 2423) which is a controversial diagnosis (Baumzweiger deposition at p. 22, 29-32).

Four mental health doctors examined Hutchinson: a psychiatrist, two psychologists, and one neuropsychiatrist. The psychiatrist, diagnosed him as suffering from a bipolar disorder that was made worse with the large amount of alcohol Hutchinson had drunk (30 R 2375-77), and he concluded that the two statutory mental mitigators, he acted under the influence of an extreme mental or emotional disturbance, and his ability to appreciate the criminality of his conduct was substantial impaired, possibly applied (30 R 2387, 2392). Dr. James Larson and Dr. Harry McClaren, the psychologists, disagreed with the diagnosis and applicability of the two mitigators (31 R 2485-86, 2516-17). Dr. McClaren did agree, however, that the defendant possibly had a damaged brain (31 R 2497). Dr. Larson also acknowledged that childhood hyperactivity is oftentimes a precursor of bipolar disorders (31 R 2525).

Dr. William Baumzweiger never testified at the penalty phase hearing of Hutchinson's trial, but the State offered, and the court admitted, his deposition (State exhibit 138). Dr. Baumzweiger, an authority on the Gulf War Syndrome, had

examined and diagnosed the defendant as suffering from that disorder more than a year before the homicides (Deposition p. 13).

### **SUMMARY OF ARGUMENT**

**ISSUE I.** At the State's request, the court gave the jury a special instruction regarding the weapon used to commit the murders: "You may consider the nature of the weapon used, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted upon the victim in determining whether the crime was premeditated." That amounted to an unfair comment on the evidence of the same genre as flight and circumstantial evidence, which this Court has said is better left to argument by the lawyers rather than as a comment by the court.

**ISSUE II.** Within 30 minutes of Renee Flaherty happily talking with friends about their families getting together for a picnic, she was on the telephone with another friend crying that Hutchinson was leaving her for good. The court admitted that testimony as an excited utterance. That was error because the domestic spat lacked the "startling" quality required to elevate what she said into admissible hearsay. Merely because she was upset does not necessarily mean her reflective thought had evaporated, as clearly was not the case here. Renee Flaherty had the clear presence of

mind to call her best friend, explain her situation, answer questions, and then carry on a 45-minute conversation that ranged over a variety of subjects. What she said when she first talked with this acquaintance was not an excited utterance as this Court has defined and applied that phrase. This out-of-court statement provided the only motive and was featured in the State's argument and theory of the case.

**ISSUE III.** During its closing argument, and over repeated defense objection, the State made several improper arguments, notably it shifted its burden of proof onto Hutchinson, it bolstered the credibility of its witnesses, and argued facts not in evidence. While such improper arguments individually may have amounted to nothing more than a harmless error, when they are considered in the aggregate they become the basis for a new trial.

**ISSUE IV.** The Court, over defense objections, let the jury hear evidence that Hutchinson had talked with the police after they had arrested him. Some of what he told them came after he had invoked his right to remain silent, some had not. In any event, the State never separated the good from the bad, so what the jury heard the police say the defendant had told them was not simply "fairly susceptible" of being considered a comment on his right to remain silent, it clearly was so. This violation of his Fifth Amendment rights raised the unfair expectation that if Hutchinson had talked with the police on September 11/12, he would take the stand at his trial to defend himself, or

rather to assert his claim that “two guys” had burst into his house and killed Renee and her children. Such error, in light of the circumstantial evidence he committed the murders was a reversible mistake.

**ISSUE V.** At the close of the State’s case, Hutchinson moved for a judgment of acquittal because the prosecution had failed to prove he killed Renee and her children with any premeditated intent. The court denied that request, but it should have granted it because the circumstantial evidence shows that the defendant committed these homicides from a generalized ill will or malice. There is no evidence he ever specifically planned or intended to kill Renee and certainly not the children for any minimal length of time, as is required for first degree premeditated murder.

**ISSUE VI.** During one of the lunch breaks, the jury was taken to a nearby restaurant to eat. As they entered, three of the jurors heard an elderly woman tell them “I hope you’re on the jury of the Hutchinson trial, and if you are, I hope you hang him.” When the court learned of this obviously improper comment by a member of the community, he only questioned the jurors about what they had heard and what impact it might have on their ability to be fair. Such a tepid response hardly satisfies the demands our system of justice have developed over the last three quarters of a millennia to ensure that juries are fair and impartial, are shielded from the anger of the community, and can render a just verdict based only on the evidence they hear in court.

**ISSUE VII.** The court, in justifying sentencing Hutchinson to death found, as an aggravator, that the children he killed were less than 12 years old. The legislature added that factor to the list of aggravating factors in 1995 along with three others that justify sentencing a defendant to death based on some characteristic of the victim. The focus of these four new aggravators marked a significant shift in death penalty sentencing. Until they were added, capital sentencers had looked only at the nature of the crime and the status of the defendant to justify sending him to his death. The latest crop of aggravating circumstances allows the jury to recommend death because of some particular factor the victim had, yet for three of them it required more. That is, for example, if the victim was a police officer, the jury could recommend death only if he was killed in the line of duty. There is no similar causal link requirement if the victim is 12 years old. The death of a child by itself justifies a death sentence. Without some sort of nexus between the age of the victim and the murder, this aggravating factor fails to pass constitutional muster and does not “genuinely narrow” the class of persons eligible for execution.

**ISSUE VIII.** The State charged Hutchinson with committing four first degree felony murders, the underlying felony being aggravated child abuse. The problem arises from the fact that the aggravated child abuse-the single shot- for each child victim also became the murder. That is, the shooting was both the aggravated child abuse and

cause of the homicide. The little used merger doctrine, however, should have prevented that result. If not, then other decisions by this Court that reduced the first degree murder convictions for children to second degree murder were wrongly decided. Also, any death of a child that might be a manslaughter or third degree murder will automatically become a first degree murder.

If so, the death of a child by aggravated child abuse will automatically become a first degree murder and will also automatically have at least one aggravating factor: the murder was committed during the course of an aggravated child abuse. Allowing that result, however, does nothing to “genuinely narrow” the class of persons subject to execution, a key requirement Florida’s death penalty scheme must satisfy to remain constitutionally valid.

**ISSUE IX.** Only as to the murder of Geoffrey Flaherty the court found the especially heinous, atrocious, or cruel aggravator. That was error because no evidence showed he had any awareness for any appreciable time of his impending death, and the court had to speculate about what happened to make even a weak case that this aggravator applied.

**ISSUE X.** Death is a disproportionate sentence in this case. Before he went to the Gulf War, Hutchinson had been a hard working, decent son, worker, and soldier. While in Saudi Arabia he and thousands of other soldiers were exposed to a variety of

chemical agents that later affected them physically and mentally. After the war, his physical and mental stability disintegrated, and we see in him a slow, but steady deterioration of his personality and psyche. The murders, thus, became the explosion of total criminality, not of a career criminal, but of a war veteran trying to rebuild a life after Desert Storm.

## **ARGUMENT**

### **ISSUE I**

THE COURT ERRED IN INSTRUCTING THE JURY, OVER DEFENSE OBJECTION, THAT IT COULD CONSIDER THE NATURE OF THE WEAPON USED, THE MANNER IN WHICH THE HOMICIDE WAS COMMITTED, AND THE NATURE AND MANNER OF THE WOUND INFLICTED, IN DETERMINING WHETHER THE CRIME WAS COMMITTED," A VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT GUARANTEES OF A FAIR AND IMPARTIAL TRIAL.

Over defense objection (29 R 2123), the court instructed the jury

You may consider the nature of the weapon used, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted upon the victim in determining whether the crime was premeditated.

(30 R 2275)

Doing so was reversible error, and this Court should conduct a de novo review since this issue involves only an issue of law.

In practice, the judiciary has recognized the power it exerts, perhaps unintentionally, over the lay jury. Indeed, as Justice Kogan noted, judicial comments, though intended as harmless, can significantly shape jury deliberations.

Few portions of a trial are more sensitive than those in which the judge addresses the jury regarding its deliberations. A spontaneous statement by a judge at this crucial time could have serious repercussions; and we, as an appellate court, simply have no way of gauging what that effect might have been.

Colbert v. State, 569 So. 2d 433, 436 (Fla. 1990)(Kogan, dissenting); accord, Webb v. State, 519 So. 2d 748, 749 (Fla. 4<sup>th</sup> DCA 1988); McKinney v. State, 640 So. 2d 1183, 1187 (Fla. 2d DCA 1994).

Though these cases dealt with comments made by the trial judge during the jury's deliberations, they have relevance for this issue. Jurors give special consideration to what the court says and give it more significance than the arguments of the lawyers. Thus, this Court, in recent years, has re-examined various jury instructions that in truth amounted to nothing more than judicial comments on the evidence. For example, in Fenelon v. State, 594 So. 2d 292 (Fla. 1992), it found that the long standing instruction on flight an improper judicial comment on the evidence that was better left to the lawyers than the court. "We are thus persuaded that the

better policy in future cases where evidence of flight has been properly admitted is to reserve comment to counsel, rather than to the court.” Id. at 295.

Similarly, other instructions that amount to judicial comments have been examined and found wanting. This is particularly true of guidance that is not part of the standard jury instructions. Barfield v. State, 613 So. 2d 507, 508 (Fla. 1st DCA 1993). In Barfield, the defendant was charged with theft of a net, which apparently had been recently stolen, and dealing in stolen property. The court, quoting section 812.022(3) Florida Statutes, told the jury that “Proof of the purchase or sale of stolen property at a price substantially below the fair market value unless satisfactorily explained gives rise to an inference that a person buying or selling the property knew or should have known that the property had been stolen.” Relying on this Court’s rationale in Fenelon, the First DCA reversed Barfield’s convictions. “Consequently, we are concerned that this instruction amounts to an improper comment on the evidence by the trial judge and thereby invades the province of the jury.” Id. at 508.

On the other hand, the trial court in Gomez v. State, 672 So. 2d 869 (Fla. 3<sup>rd</sup> DCA 1996), relying on Fenelon, correctly denied a defense requested instruction on character evidence that had been admitted at trial. Similarly, the trial court correctly refused to instruct the jury, in a sexual battery case, that “You should rigidly scrutinize the testimony of the prosecutrix, ... in this case as to the extent and nature of force used

and as to whether consent was or was not ultimately yielded.” Such guidance was “a comment on evidence of the sort criticized by Fenelon.” Kirby v. State, 625 So. 2d 51, 55 (Fla. 3<sup>rd</sup> DCA 1993) Judicial instructions that amount to comments on essential elements of the charged offense are especially onerous and come under quick judicial condemnation. Fecske v. State, 757 So. 2d 548, 549-50 (Fla. 4<sup>th</sup> DCA 2000)(Jury instruction that accurately stated the law on causation “constituted an improper comment on the evidence by the court.”)

Thus, the law is simple. Trial courts are not permitted to comment upon the evidence when instructing the jury. The evidence is for the jury to evaluate. Lithgow Funeral Centers v. Loftin, 60 So. 2d 745 (Fla. 1952).

So here, the court’s instruction on how the jury could use the evidence of the weapon amounted to an unfair judicial comment on the evidence. First, it was not part of the standard jury instructions approved by this Court. Barfield, cited above. Second, the lawyers were the ones who should have made the argument implicit in the guidance, not the court. Like the instruction disapproved in Fenelon, the guidance here called the jury’s attention to specific pieces of evidence produced by the State. Regarding premeditation, it asked them to examine the “nature of the weapon” Hutchinson allegedly had used. It then said the jury should consider the manner in which he committed the homicides in determining if he had the requisite intention to kill.

Finally, the court told them the “nature and manner of the wounds inflicted upon the victim” was a relevant consideration in deciding if the defendant premeditatedly murdered. While these were valid points the jury could have considered, see, Larry v. State, 104 So. 2d 352 (Fla. 1958), they were none the less, ones the prosecutor or defense lawyer and not the judge should have made to shape its arguments.

The State might argue that the court’s mistake amounted to harmless error. Fenelon, cited above. The problem presented in this case is that Hutchinson claimed, in part, that if he killed Renee and her children, he was drunk when he did so (30 R 2281). At trial, he produced evidence that his blood alcohol level at the time of the murders was between .21-.26, which was far above the legal limit of .08 to be considered under the influence of alcohol (28 R 1997) So, the court’s comment about the manner in which the murders were committed, the nature of the weapon used, and the manner of the wounds inflicted, were legitimate points the prosecutor, not the court, should have made. That it “joined” the prosecution team with the objectionable instruction gave undue weight to the State’s side of the scales and diminished the force of Hutchinson’s second degree murder and voluntary intoxication defenses. As such, this Court cannot say that, beyond a reasonable doubt, the improper instruction had no influence on the jury’s verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

## ISSUE II

THE COURT ERRED IN ADMITTING, AS AN EXCITED UTTERANCE, STATEMENTS OF A HOMICIDE VICTIM MADE TO A FRIEND SHE CALLED RESULTING IN THE ONLY MOTIVE FOR THESE MURDERS, A VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL TRIAL.

The provisions of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

\* \* \*

(2) Excited utterance.-A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

About seven p.m., Renee Flaherty and a friend were discussing on the telephone an outing their families were planning. Everything seemed fine between her and Hutchinson (23 R 997-1000).

Thirty minutes later she called Francesca Pruitt, a close friend who lived in Washington state (24 R 1028). Sobbing and breathing hard, Flaherty told her that "I've had a fight with Jeff." (24 R 1029) When Pruitt questioned her further about the dispute, Renee said "We've had a fight . . . It was a big fight and that he had taken some of his stuff and put it in the truck and left." When asked further about Hutchinson's plans, "She [Renee] believed he had left her, he was gone." (24 R 1030).

When asked what she was going to do, she said “I want to come home.”(24 R 1031)  
The conversation then drifted away from Flaherty’s problems. She “calms down and is not crying and not upset” as they talk about their friends (24 R 1010).

Hutchinson objected to admitting Pruitt’s testimony, and the court initially agreed (24 R 1009). The prosecutor quickly focused on what he wanted,”Only the portion that begins with her calling her friend and saying, “‘It’s Renee,’ and she is boo hooing and sobbing over the phone.–“ After further proffering, the court admitted Pruitt’s testimony quoted above, finding that what Flaherty had said was an excited utterance, “based on the nature of the conversation. It would therefore qualify as an exception to the hearsay rule and therefore be admissible.” (24 R 1020-21) That was error, and trial court abused its discretion by admitting it.

Excited utterances are admissible as an exception to the rule against admitting hearsay because “A person who is excited as a result of a startling event does not have the reflective capacity which is essential for conscious misrepresentation. Ehrhardt, Florida Evidence, Section 803.2, (2001 Ed.) In order to admit hearsay under this exception, the State had to establish three elements:

1. There must have been an event startling enough to cause nervous excitement;
2. The statement must have been made before there was time to contrive or misrepresent

3. The statement must have been made while the person was under the stress of excitement cause by the startling events.

Stoll v. State, 762 So. 2d 870, 873 (Fla. 2000).

As to the first requirement-the startling event-an argument that husbands and wives typically have fails to meet the grade. What the law has in mind are those sudden events-shootings, robberies, batteries, rapes, and other such sudden, violent assaults. Garcia v. State, 492 So. 2d 360, 365 (Fla. 1986)(wounded victim); Williams v. State, 714 So. 2d 462, 463 (Fla. 4<sup>th</sup> DCA 1998)(boy friend breaks into house and assaults victim); Ferrell v. State, 686 So. 2d 1324, 1329 (1996)(robbery) Of course, the startling episode need not personally threaten the declarant. Discovering the dead body of one's mother can suspend one's reflective ability. Allison v. State, 661 So. 2d 889, 894 (Fla. 2d DCA 1995). What happens must be sudden and overwhelming or so out of the ordinary that one is unprepared or unable to fabricate. Accordingly, emotional or anticipated shocking situations do not meet the "startling event" requirement.

In this case, Renee Flaherty and Hutchinson had an argument, and one that obviously upset each one. But arguments, especially those where no one is hit, are not the "startling event" the drafters of section 90.803(2) had in mind. People get into

arguments all the time, even emotional ones. Reflective thinking does not inevitably, as a matter of law or experience, disappear.

Moreover, and perhaps more evident, Renee's statement was not made while she was under the stress of the excitement, the third requirement. First, she had the presence of mind to call her friend in Washington. Second, she responded to questions her friend had asked her, prime evidence that she had to reflect and think about the question posed and the answer required. For example, Pruitt asked Renee "Was it a fight or is it just, you know, an argument." She responded that "We've had a fight." Well, no, on further inquiry she said "It was a big fight and that he had taken some of his stuff and put it in the truck and left." (24 R 1029) Flaherty's responses were not those of a wounded victim calling 911 for help or those of a shocked child upon finding the body of her mother. She was simply upset and wanted a shoulder to cry on.

Moreover, we do not know how long she waited before calling Pruitt. At 7 p.m. she talked with a local friend about their families getting together. Thirty minutes later, she was crying to Pruitt. "The test regarding the time elapsed is not a bright-line rule of hours or minutes" Rogers v. State, 660 So2d 237 (Fla. 1995). If "the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in

fact engage in a reflective thought process.” Id., *quoting State v. Jano*, 524 So.2d 600, 662 (Fla. 1988). Thirty minutes is certainly long enough to permit reflective thought and this record is absent any proof to the contrary. While the delay between the startling event and the excited utterance is important, it is typically only one of the factors relevant to resolving the admissibility of statements under 90.803(2). See, Rivera v. State, 718 So. 2d 856, 857 (Fla. 4<sup>th</sup> DCA 1998). Here, Renee was an adult, who while upset, had not been beaten, robbed, or raped, also significant facts. Moreover, assuming the argument was the “startling event,” its quality pales in comparison to the muggings, shootings, and rapes other victims had endured. Thus, we should expect her to have regained her reflective capacity, assuming she ever lost it, much quicker than victims of violent crimes. Indeed, this “excited utterance” “Stretched over a period of minutes” with pauses while Pruitt waited for Renee to calm down and answer her questions, clear evidence the latter was thinking about her responses (24 R 1018-19). Moreover, after she said that Hutchinson was leaving they talked about the problems other friends of theirs had, hardly what one would do who had just experienced a “startling event.” (24 R 1010)<sup>1</sup>

The admission of the this homicide victims’ statements was for one purpose. That is, they provided the only motive for the murders. Not only was it error to admit

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<sup>1</sup> The entire telephone conversation last about 45 minutes (24 R 1031)

these statements under the excited utterance theory, the error was compounded and highlighted by the State's heavy reliance on them in its argument and theory of the case.

The out-of-court statements by the *declarant* may not be used to prove the state of mind or motive of the *defendant*. See Hodges v. State, 525 So.2d 929, 931-21 (Fla.), vacated on other grounds, 506 U.S. 803 (1992); Downs v. State, 574 So.2d 1095, 1098 (Fla. 1991). A homicide victim's state of mind prior to the fatal event generally is neither at issue nor probative of any material issue raised in the murder prosecution. See Kelley v. State, 543 So2d 286, 288 (Fla. 1<sup>st</sup> DCA 1989); Fleming v. State, 457 So2d. 499, 501 (Fla. 2d DCA 1984); Correll v. State, 523 So.2d 562, 565-66 (Fla. 1988). The exception, when the victim's state of mind goes to a material element of the crime, is absent in this case. The admission of this declarants statements allowed proof of the defendants subsequent conduct. Since a declarants statements may not be admitted to prove the defendants subsequent conduct, it was error to allow Flaherty's statements to prove the intent and motive of Hutchinson. See, e. g., Brooks v. State, 787 So.2d 765 (Fla. 2001); Sandoval v. State, 689 So.2d 1258 (Fla. 3<sup>rd</sup> DCA 1997). As in Kelley, the trial court should not have allowed a victims statements to be used against a defendant to establish motive. From the opening bell, the State pointed to the inadmissible statements of homicide victim Flaherty. "On that evening at

approximately 7:15 to 7:30 p.m., Renee and the defendant, Jeffrey Hutchinson, had an argument. They got involved in a fight, a spat.” (21 R 554). “...Renee called a friend of hers by the name of Fran Pruett, in Washington state. Renee was in tears, she was crying. She told Fran that they had had an argument and that Jeff Hutchinson had left her, that he packed up his things and left, and she did not believe that he was coming back. Unfortunately, he did come back.” (21 R 554-555). These powerful statements are found in the first minute of the State’s opening. The State, in redirecting Deanna Adams, highlighted the fact that Deanna Adams did not see nor hear the “argument” between the victim and Hutchinson. Thus, the State raised the spectre and speculation as to the content of the “argument.” (24 R 1160). Even the trial court saw the import of the State’s need for motive in this case. In deciding to admit photos of and contents in Hutchinson’s truck, the trial court stated “Also the court finds that there is an issue in this case as to whether or not there had been any discussion or argument between the parties and whether or not this truck was packed and, if so, what was loaded in the truck and the intention, as evidenced by anything in the truck, the intention that might be drawn by the jury.” (25 R 1282) Therein lies the problem with admitting this dangerous hearsay: proving a defendant’s intent and motive through a homicide victim’s statements. The State’s featuring of this error did not end there. In closing, the State exhorted the jury to convict by arguing “That

doesn't change the fact that they did have a fight this day. We know they had a fight this day. Renee Flaherty's last words to anyone other than her own children and this man were to Fran Pruitt, her best friend, at 7:30 leading up to about 8:15, right before he busted in the door and killed her and in her last words she told her best friend, we've had a fight, he got his things and loaded them up and left...she didn't say it's over, but from her words, you know it was in her mind, and you know why he did this." (30 R 2250) The prosecutor then exalts, "I don't have to prove motive. I've proved it. I've proved it clear as it can be proved, but I don't have to...but I proved the motive for you. Mr. Cobb is wrong." (30 R 2250-51). The State featured Pruitt's testimony because her testimony provided the only explanation for the murder. That is, everyone who knew Hutchinson and Flaherty thought they were a happy couple (23 R 852, 867). And, as the State presented its case, until at least 7 p.m. that was true. Admitting Pruitt's testimony, therefore, was not only error, it was reversible error. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). This Court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

### **ISSUE III**

THE COURT ERRED IN REPEATEDLY OVERRULING OBJECTIONS HUTCHINSON MADE TO THE PROSECUTION'S CLOSING ARGUMENTS, VIOLATIONS OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

This is a routine issue that frequently, perhaps usually, arises in capital cases. It does so because the usual death penalty case involves the murder of an innocent victim, usually under extreme conditions of moral depravity and evil, and those facts by themselves are usually enough to excite the passions of the most sedate prosecutor and fair minded juror.

Accordingly, Hutchinson here claims the assistant state attorney made improper comments during his closing argument. The improprieties were of the sort usually objected to: golden rule, improper bolstering of witness' testimony, and burden shifting. As this Court usually does in matters of this sort, it reviews these claims with the strong dose of skepticism implied in the applicable abuse of discretion standard. Indeed, in most instances when defendants have raised the usual improper closing argument claim, this Court has either found the State's comment within the bounds of appropriate argument or has agreed that they exceeded those limits, but what it said was, in the grand scheme of things, so minor as to have had no impact on the jury's deliberations. What makes the argument in this case unusual is the unusually large

number of gaffes made, the trial court's repeated refusal to correct them, and the harmful effect this accumulation of errors had to have had on any fair minded jury's verdict.

**A. The law on closing arguments.**

The fundamental consideration governing this issue focuses on the notion that jurors are to base their verdict on the evidence presented at trial and according to the law given them. Hence, arguments that appeal to their emotions, that suggest they should convict for reasons less than the defendant is guilty, or invoke their self interest are condemned. Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999)(Trial is to be a neutral arena in which counsel in closing argument is “to assist the jury in analyzing the evidence, not to obscure the jury’s view with personal opinion, emotion, and nonrecord evidence.”) In this case, the prosecutor repeatedly made arguments this and other appellate courts of this State have rejected.

## **B. Burden shifting.**

Fundamentally, the State has the burden of proving the defendant's guilt and it must establish it beyond all reasonable doubts that he is innocent or not guilty. Any argument that suggests the defendant has any obligation to refute the State's case, or that he or she has some duty to challenge its proof violates those core values.

For example, in Gore v. State, 719 So. 2d 1197, 1200 (Fla. 1998), the State said in its closing argument,

You know, instead of standing up here for the next however much time I have left, 25 minutes, and just talking about ridiculous statements which I don't want to anymore, okay, we've all listened to everything, I can't, I can't give you anything else that you haven't heard. I can't make this anymore simpler than it is, because that's what it is. It's simple and it comes down to this in simplicity: If you believe his story, he's not guilty. If you believe he's lying to you, he's guilty. It's that simple.

This Court condemned that argument as improper burden shifting because it enunciated an erroneous and misleading statement of the State's burden of proof because it improperly asked the jury to determine whether Gore was lying as the sole test for determining the issue of his guilt, enunciated an erroneous and misleading statement of the State's burden of proof because it improperly asked the jury to determine whether Gore was lying as the sole test for determining the issue of his guilt. For that reason, it is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict the defendant for some reason other than that the

State has proved its case beyond a reasonable doubt.... Here, the prosecutor's statement, "[i]f you believe he's lying to you, he's guilty," was nothing more than an exhortation to the jury to convict Gore if it found he did not tell the truth. Thus, it was a clearly impermissible argument." Id.(citations omitted.)

In Raupp v. State, 678 So. 2d 1358, 1360-61 (Fla. 5<sup>th</sup> DCA 1996), the State shifted its burden of proof onto the defendant when it noted that the defendant had failed to call his brother in law and his older son as witnesses in his defense against a charge of sexual battery.

In this case, during the State's closing argument, it repeatedly shifted its burden onto the defendant:

Now, Mr. Cobb [defense counsel] will probably tell you that doesn't mean anything. Oh, he could have been just standing around while somebody shot Renee, and shot Logan, and shot Amanda, and shot Geoffrey, and then he could have just called and said, I shot them. No, it is valuable evidence of his guilt, evidence that anybody deciding this case would want to know. If there were no gunshot residue on his hands that would be valuable evidence of innocence.

MR. COBB: Objection. Burden shifting.

THE COURT: Overruled.

(29 R 2186)

Defense counsel was correct, the State had improperly told the jury that if the defendant was innocent, they should expect him to produce evidence-the lack of

gunshot residue on his hands-of his innocence. Yet, Hutchinson had to prove nothing or produce no evidence. He had no burden, contrary to the State's argument.

Similarly, the State also said:

If you do anything, approach your deliberations as a search for the truth and you'll find, as you already know, that the truth is Jeffrey Hutchinson thought he had a reason that night to kill. He thought the loss of Renee and those children was a reason to kill them, however, clouded that judgment was, how illogical it was. He thought he had a reason and he acted on that reason and the evidence points to him and no other.

MR. COBB: Objection. Burden shifting.

THE COURT: Overruled.

(30 R 2271)

### **C. Vouching for the credibility of its witnesses.**

One of the most common improper closing arguments occurs when the State vouches for the credibility of one of its witnesses. For example, in Williams v. State, 747 So. 2d 474, 475 (Fla. 5<sup>th</sup> DCA 1999), the prosecutor argued in closing that “he (the police officer) is just doing his job and telling all the truth. He has no reason to pick out this defendant ...” That was improper because it urge the jury to believe the police officer because he was simply “doing his job,” and hence had no reason to lie. Accord, Livingston v. State, 682 So. 2d 591, 592 (Fla. 2<sup>nd</sup> DCA 1996)(“Officer of the Year” would not risk lying for someone like the defendant. Improper bolstering of the officer's testimony.); Davis v. State, 663 So. 2d 1379 (Fla. 4<sup>th</sup> DCA 1995 ); May v.

State, 600 So. 2d 1266 (Fla. 5<sup>th</sup> DCA 1992)(“Improper vouching occurs when the prosecution places the prestige of the government behind the witness or indicates that information not present to the jury supports the witness’ testimony.”)

In this case, the 911 tape in which Hutchinson allegedly admitted he had “shot his family”(22 R 687) was crucial to the State’s case. Identifying the voice making that admission, therefore, also became absolutely vital. To do this, it called Creighton and Deanna Adams, friends of Hutchinson, to make that crucial identification.<sup>2</sup> Realizing the importance of their testimony, the State in closing improperly bolstered their credibility by asserting they told the truth when they testified.

We know it’s his voice on that tape because his two best friends, the two people that he and Renee and those kids did everything with Creighton Adams and Deanna Adam and their kids. They came in here and told the truth even though they were so closely , closely in companionship with Jeff Hutchinson. They came in here and told the truth, that is his voice on the tape.

MR. COBB: Objection. Improper bolstering.

THE COURT: Overruled.

(29 R 2184)

Well, you consider the credibility of Deanna Adams and Creighton Adams’ testimony. They were his best friends. The only thing that they’ve ever done to Jeff Hutchinson that hurt him in any way was come here and tell the truth.

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<sup>2</sup> It also tried to have one of the officers who questioned the defendant qualified as being able to identify his voice, but the Court refused to let him do that (28 R 1898-99) See Issue II.

MR. COBB: Objection, Your Honor, improper bolstering.  
THE COURT: Overruled. Fair comment on the evidence.

(29 R 2195)

Similarly, it bolstered the credibility of two police officers who had heard the 911 tape by saying they had “just testified to the facts.”

He accuses Sgt. Stewart and Deputy Woodward of being prejudiced by the 911 call. Well, they didn’t testify to anything that sounded prejudiced to me. They just testified to the facts.

MR. COBB: Objection. Counsel testifying, bolstering officer testimony.

THE COURT: Overruled.

(30 R 2285)

**D. Golden Rule or arguing facts not in evidence.**

Obviously, no party can argue facts not in evidence. Dunsizer v. State, 746 So. 2d 1093, 1094 (Fla. 2<sup>nd</sup> 1999)(Casanueva, concurring)(“Arguing facts not in evidence is clearly improper.”) This includes hypothetical scenarios that have no basis from the proof introduced at trial or the reasonable inferences from it. Superior Industries Intern. v. Faulk, 695 So. 2d 376, 380 (Fla. 5<sup>th</sup> 1997)(“Likewise, evoking a parade of imaginary horrors for the jury to consider is improper as referring to facts not in evidence”); Knight v. State, 672 So. 2d 590, 591 (Fla. 4<sup>th</sup> 1992); Dunsizer, (“The record clearly belies the prosecutor’s assertion that the victim was on his knees and begging for his life at the time of the shooting.”)

In this case, there is no evidence Geoffrey Flaherty ever saw Hutchinson shoot anyone, yet the prosecutor, with shotgun in hand, created the horrible imaginary scenario that is what happened.

Each one shot directly in the head, shot where it counts. Then he turned to Geoffrey Flaherty. Geoffrey Flaherty saw it. He saw Amanda laying there with her head blown to pieces. He saw his mother laying there with half a head. He saw his little brother with his face blown apart.

MR. COBB: Objection. Golden rule. Imaginary script.

THE COURT: Overruled.

(29 R 2178)

If [Geoffrey Flaherty] had been in that room, he would have been herded into the bed area just like the rest. He'd have been direct where to be, and he'd have been shot in there, too.

MR. COBB: Objection, Your Honor, Golden rule, imaginary script.

THE COURT: Overruled.

MR. COBB: Yes, sir.

MR. ELMORE: If Geoffrey Flaherty was in that room, he could never have gotten past Jeff Hutchinson who was holding this. No nine year old boy gets past him when he's holding this and doing what it's designed for.

MR. COBB: Objection. Arguing facts not in evidence.

THE COURT Overruled.

(29 R 2178-79)

No evidence supported that argument, nor does any reasonable inference from it.

Thus, the State repeatedly struck more than hard blows. It struck foul ones as well. See, Berger v. United States, 295 U.S. 78 (1935); Dunsizer, cited above. Taken separately, they might be regrettable but not enough to warrant granting a new trial. That is the usual analysis this Court makes when this issue arises, even in murder cases. Yet, this is an unusual case and not simply because of its facts. We have the unusual situation where the State has repeatedly made improper comments and arguments to unfairly convince the jury to convict. Thus, when this Court considers the State's arguments, not separately, but in the aggregate, it must conclude that the trial court abused the discretion given it and it should have ordered a new trial. Brown v. State, 787 So. 2d 229, 231 (Fla. 2<sup>nd</sup> 2001)(No one comment in isolation would have been enough to warrant a new trial, but when considered together, they constituted reversible error.) Because it did not, this Court must now do so.

#### ISSUE IV

THE COURT ERRED IN DENYING HUTCHINSON'S MOTION FOR A MISTRIAL WHEN IT OVERRULED HIS OBJECTION TO THE STATE ELICITING TESTIMONY FROM ONE OF THE INTERROGATING OFFICERS THAT HE HAD TALKED WITH THE DEFENDANT FOR SIX TO SEVEN HOURS AFTER HE HAD BEEN ARRESTED, A COMMENT ON HIS RIGHTS TO REMAIN SILENT AND AN ATTORNEY, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 9 OF THE FLORIDA CONSTITUTION.

The facts relevant to this issue require some explanation and do not neatly fall between four or five pages of the trial transcript. When the police responded to the 911 telephone call on September 11, 1998 they found Hutchinson laying in the garage with a telephone connected to the 911 operator beside his head (21 R 599, 22 R 630, 694, 769, 775). He appeared to be unconscious and was unresponsive to the officers (21 R 600, 22 R 773, 23 R 818). After seeing the bodies in the house, they handcuffed him and half drug, half carried him to a police car (22 R 797, 24 R 1168). He did not say anything then, but only grunted (24 R 1173). The police would eventually read him his Miranda rights, which he initially waived (18 R 3508-3509, 3511). Over the course of several hours they talked with him about the shooting, and after about 2 ½ hours or 3:30 a.m., he said he wanted to stop further questioning (8 R 1567, 9R 1662).

MR. HUTCHINSON: No. Why you're still here is because you're a couple of bloodsucking leeches and you ain't got nothing better to do.

INV. ADAMS: All you've got to say is stop. I've told you that from the get-go.

MR. HUTCHINSON: Then stop.

INV. ADAMS: Okay. You don't want to talk no more.

(9 R 1662)<sup>3</sup>

The police ignored that request and continued to question him and did so until about six o'clock in the morning, 10 hours after they had arrested him (18 R 3478).

Later, Hutchinson filed a motion to suppress what he had told the police that night (7 R 1346 et.seq.). After hearing relevant testimony on the issue, the trial court denied the motion in part, but granted it to the extent that the State could not use statements the defendant had made after he had asserted his right to remain silent (18 R 3508-3509, 3511, 3533) "It's my feeling that the defendant on Page 96 of the interview [9 R 1662] stated unequivocally that he wished to stop the interview. (18 R 3533) . . . "However, it was a re-initiation of the conversation that led to the defendant involuntarily waiving his right against self-incrimination at that point because he had previously invoked that right." (18 R 3537)The State, either stymied by that ruling or

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<sup>3</sup> About 90 minutes earlier Hutchinson, tired of being questioned, told the interrogators, "You guys believe your ludicrous story. Whatever you want to believe. I don't care anymore. I have sat here long enough. Either you arrest me or charge me or kick my ass out. Do it. Now." (9 R 1608) The police did none of that, but continued to question the defendant.

for other reasons, never used the portions of the statement the court said were admissible.<sup>4</sup>

At trial, it did use a tape of the 911 call, and two friends of Hutchinson identified the voice on it as the defendant's (22 R 673, 24 R 1151). Unsatisfied with this lay testimony, the State called Investigator Larry Ashley of the Okaloosa County Sheriff's Office to also identify the voice on the 911 tape as belonging to Hutchinson. During the evening of 11/12 September 1998 he was "in Mr. Hutchinson's presence" from "approximately just before midnight and was there until— with Mr. Hutchinson until six or seven the next morning." (28 R 1880). Evidently, the State was laying the predicate for this policeman to identify Hutchinson's voice as being on the 911 tape.

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<sup>4</sup> The reasons are not hard to find. After questioning Hutchinson for a few minutes, Investigator Ashley asked Hutchinson if he was a religious man, and the defendant said yes (8 R 1587, 1590). Ashley then told him "Those babies and that woman are gone. They are dead, Jeff." (8 R 1590). This revelation obviously stunned Hutchinson. "No, no, no. No, no, God, no. Please, god, no, no, no, no, no, please, no. No. (8 R 1591). From then on Ashley and Adams repeatedly played on Hutchinson's faith to get him to confess. "Do you believe in God, you believe in forgiveness, you believe in heaven and hell" "Do you believe in redemption?" "Why did that happen tonight?" (8 R 1592) "You've got to come clean, Jeff. I mean, you've got to bear your soul to God. I mean, there's only one way to redeem yourself." (8 R 1594) "Jeff, man, you believe in God and you are going to sit here and lie like this? I mean, you are compounding the problem." (8 R 1599) This Court and the United States Supreme Court have repeatedly condemned the so-called "Christian burial techniques" as "unquestionably a blatantly coercive and deceptive ploy." Roman v. State, 475 So. 2d 1228, 1232 (Fla. 1985); Hudson v. State, 538 So. 2d 829, 830-831 (Fla. 1989); Brewer v. Williams, 430 U.S. 387 (1977).

“All right. During that time did you have occasion to become familiar with his voice.”

Counsel for Hutchinson objected at that point.

He talked about familiarity of the voice. He talked about did he make a statement at the jail. He talked about how long were you with Mr. Hutchinson. We think this is an impermissible comment on his right to remain silent. We think that violates that. It’s an indirect, impermissible line of questioning because it is an indirect comment very clearly on Mr. Hutchinson’s right to an attorney, his right to silence, and this back attempt to round it is highly improper. We objection(sic) to the entire line of questioning. We think it has prejudiced the jury and we would move for a mistrial on those grounds. . . .

THE COURT: The objection is overruled. Motion for mistrial denied. You may proceed, Mr. Elmore. . . .

MR. ELMORE (cont’g): Investigatory Ashley, at the north district office from midnight until six in the morning, were you and someone else talking with Jeffrey Glenn Hutchinson?

A. Yes, we were.

MR. COBB: Objection. Request for a continuing objection so I don’t have to keep popping up.

THE COURT: Objection overruled. And continuing objection is noted for the record. Thank you.

(28 R 1880-81)

Although the court overruled Hutchinson’s Fifth Amendment objection to Investigator’s Ashley’s testimony, it ultimately found that this police officer lacked sufficient familiarity with the defendant’s voice to identify it as the one on the 911 tape.

(28 R 1898-99). While correct on that ruling, it erred in finding no constitutional violation in Ashley’s testimony concerning his six to seven hour conversation with Hutchinson, particularly when about halfway through the questioning he had invoked

his right to remain silent (9 R 1662). That testimony not only was “fairly susceptible” of being considered a comment on his right to remain silent, State v. Kinchen, 490 So. 2d 21, 22 (Fla. 1985), it was clearly so. With no facts being in dispute, the issue here becomes a purely legal one for which de novo review is the appropriate standard of review.

That is, the Fifth Amendment to the United States Constitution allows a defendant to remain silent in the face of his accusers, and the State cannot use that silence against him at his subsequent trial. Wainwright v. Greenfield, 474 U.S. 623, 638 (1986). It also prohibits the prosecution from commenting, in any way, on the silence. This fundamental constitutional right, of course, does not limit the State from attacking defenses raised. It only says that the State cannot use his silence against him. Such a tactic infringes on the defendant’s right to remain silent if it is fairly susceptible of being construed by the jury as a comment on the defendant's exercise of his or her right to remain silent. State v. Hoggins, 718 So. 2d 761, 769 (Fla. 1998) This prohibition extends to comments that refer to a defendant’s failure to call certain witnesses. White v. State, 757 So. 2d 542, 547 (Fla. 4<sup>th</sup> DCA 2000). Doing so, impinges not only on the defendant’s right to remain silent, it also shifts the burden of proving his guilt to requiring him to assert his innocence. Id.

In this case, Ashley's admission that Hutchinson had talked with the police after he had asserted his right to remain silent became a comment on his failure to testify and required him to take the stand to prove someone other than him committed the homicides. The Fifth Amendment and the presumption of innocence prohibit that.

Specifically, the jury knew that the defendant had talked with the police about the killing for several hours, and they knew he had claimed "two guys" had murdered Renee and her children. Thus, they could realistically have expected him to have taken the stand in his defense to give them the details he had given the police on the evening of September 11/12. C.f., State v. DeSantiago, 791 So. 2d 1211 (Fla. 5<sup>th</sup> DCA 2001) (Trial court correctly granted a mistrial when police officer made reference to his questioning of the defendant where the court had earlier in the trial suppressed the statements he had made.) Yet, Hutchinson never testified at trial, nor did the State ever carry its burden of showing that he had waived his Miranda rights. Ramirez v. State, 739 So. 2d 568, 575 (Fla. 1999) ("The State bears the burden of proving that the waiver of the Miranda rights was knowing, intelligent and voluntary.) Indeed, the trial court specifically held it had failed to do so during the latter portion of the police interview. At no time during its examination of Investigator Ashley did the State make any effort to limit Ashley's familiarity with Hutchinson's voice solely to that part of their interrogation in which he had waived his right to remain silent. It never realized

the problem Ashley's testimony presented, or evidently recalled the trial court's ruling finding the police had violated the defendant's right to remain silent. As far as it was concerned, the police interrogation blurred together, the admissible with that taken in violation of Hutchinson's Fifth Amendment right to remain silent.

The prosecution thus gave the jury inadmissible testimony that the defendant had spoken with the police for several hours, and the jurors could only have concluded that he had said something in his defense or had given an explanation for the homicides, particularly when the voice on the 911 tape says something about "some guys." (22 R 692) White v. State, 757 So. 2d 542, 547 (Fla. 4<sup>th</sup> DCA 2000). Naturally, if he defended himself that evening, a reasonable juror would have expected him to do the same two years later at his trial. The Fifth Amendment, however, says he need not do so, and if he chooses to remain silent, particularly at trial, he can suffer no penalty for exercising his constitutional right.<sup>5</sup> Yet, he chose to remain silent also when questioned by the police, and he suffered for exercising his fundamental right to cut off questioning and having the police ignore it.

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<sup>5</sup> Indeed, Fla. Std. Inst.(Crim) 2.04(d), which was given to the jury in this case (29 R 2154, 30 R 2284), told them "The Constitution requires the state to prove its accusations against the defendant. It is not necessary for the defendant to disprove anything, nor is the defendant required to prove his innocence. It is up to the state to prove the defendant's guilt by evidence."

Of course comments on a defendant's right to remain silent can be harmless, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), but the State has a very high burden of proving beyond a reasonable doubt that the comment had no effect on the jury's verdict. Here, it cannot lift, much less carry, it. Primarily, Hutchinson called the 911 operator to report the shootings, and significantly, he was very excited and agitated when he talked to her, begging for help, and repeatedly saying he did not know how many people were there, how many people were hurt, or how they got hurt (22 R 691-92, 744). Within seconds, he told the 911 operator that "two guys" or "those fucking bastards" (22 R 691-92) had shot Renee and the three children, and those words would have clearly qualified as an excited utterance. Lopez v. State, 716 So. 2d 301 (Fla. 3d DCA 1998) (Tape-recorded 911 call admissible as excited utterance exception to the hearsay rule). Such statements are admissible as an exception to the hearsay prohibition because, as Professor Ehrhardt says, "A person who is excited as a result of a startling event does not have the reflective capacity which is essential for conscious misrepresentation; therefore statements that are made by the person who is in a state of excitement are spontaneous and have sufficient guarantees of truthfulness." Ehrhardt, Florida Evidence, 2001 edition, Section 803.2. Moreover, a large part of the State's evidence amounted to nothing more than the testimony of several witnesses who reported what they had found at the crime scene. Whether

Hutchinson committed the murders or “two guys” did, this evidence would have remained the same. Thus, the State’s case of Hutchinson’s guilt was largely circumstantial and slim at that. As such, the court’s error in allowing the State’s comment on his Fifth Amendment rights takes on a more ominous hue, and this Court cannot say that the error in allowing the impermissible comment had no effect on the jury’s verdict. This Court should, therefore, reverse the trial court’s judgment and sentence and remand for a new trial.

#### **ISSUE V**

THE COURT ERRED IN DENYING HUTCHINSON’S  
MOTION FOR JUDGMENT OF ACQUITTAL  
BECAUSE THE STATE PRESENTED INSUFFICIENT  
EVIDENCE THE DEFENDANT HAD A  
PREMEDITATED INTENT TO KILL RENEE  
FLAHERTY AND HER CHILDREN.

Of course, this argument presumes Hutchinson is the actual killer. Given the errors at trial below, this authors confidence in the guilty verdicts is one that wavers and vacillates. With that caveat, this issue focuses on the narrow inquiry of whether, at the time he killed Renee Flaherty and her children, Hutchinson had the required premeditated intent so as to justify a first degree murder conviction. As argued here, the answer is no. Instead, he had a “depraved mind” and, hence, was guilty of second degree murder. Because this issue involves a question of the sufficiency of the

evidence, this Court must review it de novo. Jones v. State, 790 So. 2d 1194 (Fla. 1<sup>st</sup> DCA 2001)<sup>6</sup>

### **A. Some background law on premeditation and depraved mind**

The primary distinction between first and second degree murder is the requirement of premeditation for the former offense. Polk v. State, 179 So. 2d 236, 237 (Fla. 2d DCA 1965); Anderson v. State, 276 So. 2d 17 (Fla. 1973). Premeditation is a special, heightened form of specific intent to kill, and if Hutchinson had only the lesser design, he would not be guilty of first degree murder. Hasty v. State, 120 Fla. 269, 162 So. 910 (1935); Littles v. State, 384 So. 2d 744, 745 (Fla. 1st DCA 1980) (“[p]remeditated design to effect the death of a human being is more than simply an intent to commit homicide.”) Instead, premeditation requires the defendant to have had “a fully-formed conscious purpose to kill,” and that means it must exist in his or her mind “for a sufficient length of time to permit reflection” and a determination to kill. Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981) The defendant must, therefore, have had some significant period to have consciously realized he wanted to kill another person. Id.

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<sup>6</sup> Hutchinson preserved this issue by way of a motion for a Judgment of Acquittal made at the conclusion of the State’s case in which he specifically argued “. . . they have not shown, concerning that third element of premeditation that there was a killing after consciously deciding to do so.” (28 R 1923) He renewed that motion after he had presented his case (29 R 2058)

Second degree murder, on the other hand, requires no specific murderous intent. It condemns the person who kills with only a “depraved mind.” It is “malice in the sense of ill will, hatred, or evil intent, and is an inherent deficiency of moral sense and rectitude.” Ramsey v. State, 114 Fla. 766, 154 So. 2d 855. It extends beyond “hatred, ill will and malevolence, and ‘denotes a wicked and corrupt disregard of the lives and safety of others \* \* \* a failure to appreciate social duty.’ 40 Am.Jur.2d, Homicide, Section 50.” Hines v. State 227 So. 2d 334 (Fla. 1969) It connotes a generalized hatred towards all mankind, without a focus on any specific person.

[A] well-defined purpose to kill may be induced, compelled, or constrained by anger of such degree as for the moment to cloud the reason and momentarily obscure what might otherwise be a deliberate purpose by its impelling influence.

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As the element of premeditation is an essential ingredient of the crime to murder in the first degree, it is necessary that the fact of premeditation uninfluenced or uncontrolled by a dominating passion sufficient to obscure the reason based upon an adequate provocation must be established beyond a reasonable doubt before it can be said that the accused was guilty of murder in the first degree as defined by our statute.

Forehand v. State, 171 So. 241, 243 (Fla. 1936)(citations omitted).

Thus, one who kills while acting under the influence of some passion does so with a depraved mind rather than with premeditated intent. Id; Febre v. State, 30 So. 2d 367, 369 (Fla. 1947); Clay v. State, 424 So. 2d 139 (Fla. 3<sup>rd</sup> DCA 1983).

## **B. As applied to this case**

With this law in mind, it becomes readily apparent that when Hutchinson broke down the front door to his house and rushed into the master bedroom, he was acting under the influence of a dominating passion, and the resulting murders of Renee and more especially of Amanda, Logan, and Geoffrey were products of a depraved mind and not one who had a fully realized desire to murder. As such, the State proved the defendant committed only second degree murders.

Here, no one witnessed the homicides, so to affirm the convictions for first degree murder this Court must rely on the circumstantial inferences the State made to justify a finding that Hutchinson had enough time and a clear enough mind to clearly reflect that he was going to kill the woman he loved and the children he treated like his own. Tien Wang v. State, 426 So. 2d 1004 (Fla. 3<sup>rd</sup> DCA 1983); Kirkland v. State, 684 So. 2d 732 (Fla. 1996). That will prove impossible because the circumstances of this case show far less specific intent than established in other cases in which this Court has reduced convictions from first to second degree murder.

By all accounts Renee and Hutchinson enjoyed a good relationship (24 R 1155), and he treated the children as if they were his own (24 R 1156). He had never threatened her, nor was there any evidence there had ever been any friction between them. Kirkland v. State, 684 So. 2d 732 (Fla. 1996)(Despite evidence of friction

between Kirkland and the victim, this Court reduced the former's conviction for first degree murder to second degree murder.) Even 30 minutes before the murders, she was happily talking to a friend on the telephone about their families getting together for an outing (23 R998-1000). As she chatted, Hutchinson apparently walked through the room, and Renee told her that "Jeff says 'Hey, Cindy.' . . .[I]t was just a friendly hey, how are you doing kind of thing." ( 23R 1001). He had never made any threats to kill, as Randy Knowles had done a few weeks before he killed his father and a 10 year old girl who was visiting the trailer next to the one in which he lived. Knowles v. State, 632 So. 2d 62 (Fla. 1993)(conviction for first degree murder of the girl reduced to second degree murder.)

Yet, Renee and Hutchinson obviously had an argument, and a serious one at that, because within 30 minutes he stormed out of his house, threw his clothes and things into his truck and drove to the AMVETS bar. Barefooted, he drank a beer (23 R 863), then left. Disoriented, drunk,<sup>7</sup> and muttering to himself, he rushed out of the bar and got into his truck (23 R 895, 897). Still obviously angry and upset, he gunned the engine and squealed his tires, which threw rocks and dirt as he tore out of the parking lot (23 R 869, 902). He was so mad that he could not drive straight, but,

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<sup>7</sup> At the time of homicides, he had a blood alcohol level between .21-.26. (28 R 1997)

instead, swerved into the oncoming lane (coming within two feet of hitting another car), onto the opposite side of the road, up and over an embankment, crashed into a sign, almost hit a mailbox, and blew out a tire (23 R 914, 918, 924, 939, 959, 963, 965, 975, 980). His driving was so erratic that several people, either coming into the bar or along the route he drove, noticed it, and one called the police to report a drunk driver (23 R 930). Oblivious to the blown tire, he drove home, and once there, he crashed through the front door, rushed past Geoffrey, and into the master bedroom where within a matter of seconds he had killed Renee, Amanda, Logan, and within another few seconds, Geoffrey (30 R 2344).

Hutchinson had no specific intent to murder, much less a premeditated one. He was angry, drunk, and had a general animus toward life. He had the classic depraved mind condemned as second degree murder. He had no motive to kill the children, and only a weak one, if any at all, regarding Renee (30 R 2250). In that sense, this case is similar to Knowles, cited above, and Purkhiser v. State, 210 So. 2d 448 (Fla. 1968). In the latter case, which this Court cited in Knowles, the defendant killed a young girl during a sudden, brief encounter between her father who had come to the door in search of someone else. In Knowles, a very intoxicated defendant shot a ten year old party guest three times then killed his father. In each case this Court reduced the defendant's conviction for first degree murder to second degree murder because the

State had produced insufficient evidence of premeditation. In both cases, the killing of strangers, without any reason, motive, or provocation was second degree murder.

Of course, in this case Hutchinson knew his victims, but his obvious, unchallenged love and affection for Renee and particularly the children, strongly suggests he had no reason to kill them. That is, in Knowles and Purkhiser, this Court relied on the lack of familiarity between the victims and the defendants and the suddenness of the shootings to justify finding the latter lacked the premeditated intent to kill their victims. Instead, they had that generalized malice, ill will, and hatred characteristic of those who commit second degree murders.

Similarly, but with greater justification, the rationale used in those cases should apply to this one. Not only did Hutchinson lack any motive to kill, he had a very evident love for Renee and the children. The sudden, brief episode that resulted in the murders of the children and Renee had no reason. To the contrary, he had every reason to not have shot them. The evidence showed only that he loved them, and none of them, and particularly the children, had ever done anything to provoke him. Indeed, immediately after the homicides he left the shotgun in the kitchen and called 911. Obviously delirious and panicked he admitted shooting his family (22 R 701-709). Beyond that, however, he could give few details, not because he did not have them, but because his mind was so overwhelmed that he could not do so, even though

repeatedly asked. He then collapsed onto the garage floor and remained there until the police arrived (22 R 630, 709).

In Knowles, after Knowles shot his father and the girl, he stole his father's truck and fled to Mulberry, 250 miles away. Sometime during his flight, he stopped long enough to sell the murder weapon and pick up a woman so he could have sex with her. Once at that small central Florida town, he called the police but rather than confessing as Hutchinson would do, he hung up the phone. If what that defendant did before, during, and after the multiple homicides demonstrated only the generalized intent to murder characteristic of second degree murder, what Hutchinson did before, during, and after his killings demonstrated with even greater clarity a mind set of a second degree murderer.

As such, the deaths of Renee and the children were murders, but only second degree ones. This court should reverse the trial court's judgments and sentences, and remand with directions that the lower court adjudicate Hutchinson guilty of four counts of second degree murder.

## ISSUE VI

THE COURT ERRED IN DENYING HUTCHINSON'S MOTION FOR A NEW TRIAL AFTER THREE OF THE JURORS REPORTED HEARING AN UNIDENTIFIED FEMALE TELL THEM, DURING A LUNCH BREAK AT A LOCAL RESTAURANT, THAT THEY "SHOULD HANG HIM [HUTCHINSON]," A VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

During one of the regular lunch breaks, the jurors, as a group, were taken to a local restaurant. As they entered, an elderly woman who was within two feet of some of them said "I hope you're on the jury of the Hutchinson trial, and if you are, I hope you hang him." (25 R 1218). None of the jurors responded but continued into the restaurant, were seated, and ate lunch. Once they returned to the court, one of them, a Mr. Inman, reported the incident to the judge. He related what he had heard, and when questioned by the court said he had never seen the woman before, she was not then in the court room, and that the remark would have no effect on his ability to sit impartially on the remainder of the trial (5 R 1219).

The court then asked the rest of the jury if any of them had heard the comment. Two, Mr. Broxson and Mr. Walton, admitted that they had also heard the inappropriate words (25 R 1224). When questioned about the affect it would have on them, each said it would have none (25 R 1226, 11229).

After hearing these responses, Hutchinson challenged those three jurors for cause, and if the court denied that request, he asked for a mistrial (25 R 1231) “[I]t may actually be in the back of their mind that they are aware of the extensive publicity of the trial and that this gives us great concern that they would be truly able in both phase one and potentially phase two to give a fair trial.” (25 R 1231-32).

The law in this area reaches into the fundamental concerns we have that those charged with crimes have their guilt or innocence decided by fair and impartial jurors. For three quarters of a millennia, western society and particularly Anglo-Saxon culture has relied on the community to pass on the guilt or innocence of its members charged with committing some crime. At the time of the Magna Carta, jurors were chosen because they knew the facts surrounding the crime and would swear to the character of the defendant. There was no distinction between jurors and witnesses, and they often were the same. See, See James R. Gobert & Walter E. Jordan, Jury Selection: The Law, Art, and Science of Selecting a Jury 8 (2d. ed. 1990)(tracing jury development to medieval England and on the European continent). Over the centuries, jury make up radically changed, although their function remained the same. Now, to guarantee a fair and impartial trial, jurors are selected because they are ignorant of the applicable law, the facts of the case, and the pressures the community might want to exert for them to reach their desired “just” verdict. This “sterile” body

of citizens is then given the facts and law. Even the trial itself, however, has filters to ensure the verdict is, as much as is humanly possible, a just one. Evidentiary rules admit only relevant evidence or exclude hearsay, and they control the jury's deliberations so that they consider no matters extraneous to a fair determining of the defendant's guilt.

Similarly, courts only reluctantly admit the testimony of relatives, particularly on matters of identity, because it likely inflames the jurors and may arouse unwarranted jury sympathy for the victim and interject matters irrelevant to the issue of guilt or punishment. See, e.g., Dougan v. State, 470 So. 2d 697 (Fla.1985); Welty v. State, 402 So. 2d 1159 (Fla.1981); Lewis v. State, 377 So. 2d 640 (Fla.1979). Even though feelings of sympathy naturally arise when jurors hear the gruesome details of multiple child killings those emotions cannot enter the jury room.

More fundamentally, voir dire seeks to find only those members of the community who know nothing about the case and who can fairly and impartially decide the defendant's guilt or innocence. Indeed, in this case, the facts are so gruesome, so tragic that defense counsel had a well founded reason to want an in depth and sequestered voir dire of the prospective jurors (6 R 1080). Child killers draw out our most basic feelings of community outrage, as the restaurant patron in this case expressed, that lie too close to the surface to ignore. Calls for vengeance,

such as made here have no place in a trial. “A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.” Jones v. State, 569 So. 2d 1234, 1239 (Fla. 1990). Here, the court recognized the prejudice that could arise from the jurors becoming aware of the community’s hate of Hutchinson, and it tried to control the infectious impact of what the elderly restaurant patron had said. Unfortunately, it failed to do so, and it abused the discretion given to trial judges in matters of this sort when it denied Hutchinson’s motion for new trial. Arbelaez v. State, 626 So. 2d 169, 176 (Fla. 1993); Torres-Arboledo v. State, 524 So. 2d 403, 409 (Fla. 1988).

In this case, the court took only the most timid steps to guarantee Hutchinson a fair trial. It merely inquired of the jurors and got their assurances that they could still be fair and impartial. But such assurances, particularly in light of the evidence presented in this case, and the natural emotions it aroused in minds of the fairest of people, required more. That is, this elderly woman’s comment went to the core of the difficulty of this case: Hutchinson was charged with killing a mother and her three young children. The “isolated” comment touched on the pervading emotional issue

in this case, and it required more than the judge did by gaining their expected guarantees that despite what they had heard they could still remain fair and impartial. What else would they have said? Every one believes he or she is fair, that they can accurately judge the facts with detachment and justice. Reality often times refutes those common understandable self assurances. Thus, merely relying on juror assurances of fairness often was insufficient. What the United States Supreme Court said in a case where community outrage was similarly high and expressed resonates here. "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father." Irvin v. Dowd, 366 U.S. 717, 728 (1961). Indeed, as the nation's high court said in Irvin v. Dowd, this Court must conclude the same: "Where one's life is at stake-and accounting for the frailties of human nature-we can only say that in the light of the circumstances here the finding of impartiality does not meet constitutional standards. Id. The court should have declared a mistrial. This Court should reverse its judgment and sentence and remand for a new trial.

## ISSUE VII

THE COURT ERRED IN CONSIDERING SECTION 921.141(5)(1), FLORIDA STATUTES (2000 SUPP.), AS AN AGGRAVATOR IN SENTENCING HUTCHINSON TO DEATH BECAUSE THERE WAS NO NEXUS BETWEEN THE MURDERS OF RENEE FLAHERTY'S CHILDREN AND THEIR STATUS AS "PERSON[S] LESS THAN 12 YEARS OF AGE," A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

The court, in sentencing Hutchinson to death, considered the "youth" aggravator defined by Section 921.141(5)(1) as it applied to each of Renee Flaherty's children:

The next two aggravating circumstances will be discussed together:

2. The capital felony was committed while the Defendant was engaged in the commission of, or an attempt to commit, aggravated child abuse; and
3. The victim of the capital felony was a person less than twelve (12) years of age.

The Court finds that the circumstances surrounding the death of this child prove beyond any reasonable doubt that the victim, Geoffrey Flaherty, was less than twelve years of age. In fact, Geoffrey Flaherty was nine years old at the time of his death. Further, the Court finds that the circumstances surrounding the death of this child prove beyond any reasonable doubt that the death of Geoffrey Flaherty occurred during the commission of aggravated child abuse. However the Court finds that to assess weight to each of those aggravators separately would constitute improper doubling of aggravating circumstances and for that reason the Court considers only the aggravating circumstance that this child was under the age of twelve at the time of his murder in weighing the aggravating and mitigating circumstances in this case.

(14 R 2705)

Section 921.141(5)(1), Florida Statutes (2000 Supp.), allows the sentencer to consider a victim's age as an aggravating factor if he or she is less than 12 years old:

(5) Aggravating factors shall be limited to the following:

\* \* \*

(1) The victim of the capital felony was a person less than 12 years of age.

In this case, the court improperly used this aggravator because no causal link existed between any of the children's ages and their deaths. Without such a connection, this aggravator does nothing to limit or "genuinely narrow" the category of persons eligible for a death sentence, a key constitutional requirement. Zant v. Stephens, 462 U.S. 862 (1983). As such, the error is fundamental because it "reaches down into the validity of the [death sentence] to the extent that [it] could not have been obtained without the assistance of the alleged error." Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996). Moreover, this Court should conduct a de novo review of this issue because it involves a pure question of law.

State death penalty schemes that have survived constitutional scrutiny have done so because the legislative enactments accomplished two things: they "genuinely narrow[ed] the class of persons eligible for the death penalty and [ they] reasonably justif[ied] the imposition of a more severe sentence on the defendant compared to

others found guilty of murder.” Zant, at 244. That is, section 782.04, Florida Statutes, generally defines murder, and if that is all the state required a defendant to violate to justify being executed then our scheme would fail constitutional muster. Nothing in the language of that provision “genuinely narrows” the class of defendants justly subject to execution from the many more who do not. To overcome that deficiency, the legislature enacted Section 921.141(5), Florida Statutes, which defines those extra relevant factors that must be present in order for a particular defendant to be death worthy. That is, the exclusive list of aggravators “genuinely narrows” the class of person subject to a death sentence. They did that by looking either at certain aspects of the murder, or by examining the nature and criminal history of the defendant, the traditional focus for capital and noncapital sentencers. Williams v. New York, 337 U.S. 241 (1949).

That situation changed in the 1990's. In 1991, the United States Supreme Court approved the use of victim impact statements at capital sentencings, Payne v. Tennessee, 501 U.S. 808 (1991), and this Court soon gave its approval to them with the understanding that they were to have no aggravating value. Windom v. State, 656 So. 2d 432, 438 (Fla. 1995). Within four years, the Florida legislature worked a fundamental shift in Section 921.141(5). Instead of focusing exclusively on the nature

of the crime and the nature of the defendant, as the aggravating factors until 1995 had done, it widened that section's net to include the victim's status.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

This broadening of the aggravator focus to include victim status marked a significant expansion of the scope of Section 921.141, and it moved far beyond the restrained approval the United States Supreme Court and this Court gave to it in Payne and Windom. Whether the drafters appreciated this unprecedented shift in capital sentencing is unknown, but they obviously knew they had to carefully draft these aggravators in order to pass constitutional muster. Well, some of them did. If subsections (j) -(m) allow considerations of the victim's status to aggravate a murder, a plain reading of three of the four aggravators clearly show that the bill writers "genuinely narrowed" the application of those factors. Subsection (j) permits a death sentence if the victim was a police officer and he or she was killed while "engaged in the performance of his or her official duties." Subsection (k) similarly

makes killing an elected or appointed official a death worthy crime, but only if he or she was “engaged in the performance of his or her official duties,” or if the “motive [for the murder] was related, in whole or in part, to the victim’s official capacity.” Subsection (m) permits imposition of a death if the victim was “particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.”

Each of these aggravators required more than simply being a policeman, an elected official, or a senior citizen to justify executing people who kill them. In each instance, the legislature imposed a causal connection between the victim’s status and their deaths. The aged or infirm had to be infirm, and the policeman and politician had to be doing something connected with their jobs when murdered. The drafters realized that simple status, without more, did not genuinely narrow the class of persons eligible for a death sentence, as the legislature clearly recognized. For example, an off duty police officer, in civilian clothes, could be killed during a convenience store robbery/murder because he happened to be in the store to buy a gallon of milk and caught a stray bullet. Without the narrowing “in the performance of his duties” clause the defendant would be eligible for a death sentence for doing nothing more than committing a first degree felony murder, a result that would make subsection (j) unconstitutional.

Yet subsection (l) allows a death sentence if that stray bullet, instead of hitting the policeman, struck and killed his 9-year-old child. That statutory provision allows the sentencer to impose a death sentence simply because the victim was less than 12 years old. Unlike the other victim aggravators, subsection (l) has no causal relation requirement between the victim's status-his or her age- and the murder. Without any "genuine narrowing" of the class of those eligible for a death sentence, that provision violates the Eighth Amendment to the United States Constitution.<sup>8</sup>

The arbitrary age discrimination embodied in subsection 921.141(5)(l), moreover, runs contrary to holdings of this Court that have refused to recognize any distinction in human worth based solely on victim status. Windom v. State, 656 So. 2d 432, 441 (Fla. 1995)(Kogan, concurring.)("In this sense, all human life stands at equal stature before the law."); Jackson v. State, 498 So. 2d 906, 910 (Fla. 1986)("The lifestyle, character traits, and community standing of the victim are not relevant to the determination of whether a given homicide was especially heinous,

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<sup>8</sup> Of course, the legislature has made age distinctions in other criminal statutes. Consent or lack of consent is irrelevant if the defendant has sexual intercourse with a child less than 12 years old. Section 794.011(2), Florida Statutes (2001). Such a statute survives Eighth amendment scrutiny first because a death sentence is not possible. Coker v. Georgia, 433 U.S. 584 (1977); Buford v. State, 403 So. 2d 943 (Fla. 1981), and second because the legislature could legitimately conclude that all children less than 12 years old lack the maturity to knowingly consent to having sexual intercourse.

atrocious, or cruel.”). Accordingly, this Court has recognized no “family exception” to the death penalty, Spencer v. State, 691 So. 2d 1062, 1065 (Fla. 1997), and it has vacated some death sentences of defendants who have killed children. Smalley v. State, 546 So. 2d 720 (Fla. 1989); Knowles v. State, 632 So. 2d 62 (Fla. 1994); Fisher v. State, 715 So. 2d 950 (Fla. 1998); see, Lukehart v. State, 776 So. 2d 906 (Fla. 2000)(Anstead, concurring and dissenting). Hence, the 12-year-old child is as valued in the eyes of the law as his 40 year old father, and his 65 year old grandfather.

Of course, it could be said that the legislature found that the child was per se more vulnerable than adults simply because they were younger, but the facts of this case refute that argument. Hutchinson committed the murders with a shotgun. When defendants use a gun to kill, all their victims, regardless of their ages, die. Bullets do not bounce off their chests when they become teenagers. A gun is a great equalizer, and the age aggravator does nothing to genuinely limit or distinguish among those who commit murders as to who should suffer a death sentence.

When the legislature enacted the cold, calculated, and premeditated aggravator, great concerns arose that it violated the “genuinely narrowing” requirement imposed by the Eighth Amendment. This Court allowed it to survive constitutional scrutiny because it required the State to prove that defendants committed more than

premeditated murders. They had to have had a “heightened premeditation” in order for that new factor to apply. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992); Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). If this Court wants to save subsection (1) it will have to do the same thing. For it to survive attack, this Court will have to require some causal connection between the victim’s age and his or her death. As it now stands, and as the trial court applied it in this case, however, it is unconstitutional.

### **ISSUE VIII**

THE COURT ERRED IN FINDING THAT HUTCHINSON COMMITTED THE MURDER OF THE CHILDREN DURING THE COURSE OF AN AGGRAVATED CHILD ABUSE AND THEN USING THAT FACT TO JUSTIFY IMPOSING A DEATH SENTENCE, A VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

This issue focuses on the problem that arises when the single act giving rise to a charge of aggravated child abuse also is the act that results in the child’s death. Specifically, the State alleged that Hutchinson committed felony murders on Geoffrey, Logan, and Amanda Flaherty with the underlying felonies in each homicide being aggravated child abuse.<sup>9</sup> More specifically, Hutchinson killed each child by shooting

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<sup>9</sup> The State also charged Hutchinson with the felony murder of Renee, the underlying felony being the aggravated child abuse (1 R 24). She was the first one

them with a shotgun. That act -- the shooting -- not only formed the basis for the aggravated child abuse allegation, it also justified the first degree murder charge. As argued here, the trial court should have found, under the peculiar facts of this case, that the aggravated child abuse allegation “merged” with the more serious homicide charge. Thus, the State could have proved Hutchinson’s guilt of first degree murder only under a theory of premeditation, and in the penalty phase portion of the trial, the court could not have found, as it did (14 R 2705-2708), that Hutchinson committed the murder during the course of an aggravated child abuse. Section 921.141(5)(d), Florida Statutes (2000 Supp.).

**A. Some background on felony-murder and narrowing of the issue in this case.**

The felony-murder doctrine, while of longstanding validity, nevertheless is a poor cousin to the preferred method of proving the defendant’s intent to commit a first degree murder: premeditation. “[T]he crime of felony murder is based upon a legal fiction which implies malice aforethought from the actor’s intent to commit the underlying felony” Amlotte v. State, 456 So. 2d 448, 450 (Fla. 1984)(Overton,

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killed, so whatever aggravated abuse Hutchinson may have committed occurred after her death. Hence, the jury could not have convicted the defendant of the felony murder of Renee.

dissenting.) Inferring the requisite murderous intent from the commission of felonies runs the risk of casting too wide a net on those who have killed, and as LaFave and Scott have noted, “Today the law of felony murder varies substantially though the country, largely as a result of efforts to limit the scope of the felony-murder rule.” LaFave and Scott, 2 Substantive Criminal Law, 206.<sup>10</sup> Indeed, this Court in Gray v. State, 652 So. 2d 552, 554 (Fla. 1995), narrowed its reach by declaring that no crime of attempted felony murder existed in Florida.<sup>11</sup> (“This Court now recognizes that the ‘legal fictions required to support the intent for felony murder are simply too great.’”) More specifically, other states and other scholars have united to condemn allowing aggravated battery (of which aggravated child abuse is merely a species) to form the basis for a charge of first degree felony murder. People v. Ireland, 70 Cal. 2d 522, 75 Cal. Rptr. 188, 450 P. 2d 580 (1969); State v. Jones, 896 P.2d 1077 (Kan. 1995); LaFave and Scott, 2 Substantive Criminal Law 229. For example, LaFave and Scott have noted:

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<sup>10</sup> “American jurisdictions have limited the rule in one or more of the following ways: (1) by permitting its use only as to certain types of felonies; . . .(4) by requiring that the underlying felony be independent of the homicide. Id.

<sup>11</sup> The legislature, however, overruled the logic of Gray and declared that attempted felony murder was a crime. Section 782.051, Florida Statutes (2000 Supp.).

Some cases have held that the collateral felony must be a felony which is “independent of the conduct which kills; it must involve conduct separate from the acts of personal violence which constitute a necessary part of the homicide itself. Thus although rape, arson, robbery and burglary are sufficiently independent of the homicide, manslaughter and aggravated battery toward the deceased will not do for felony murder.

This Court has not followed that logic, relying instead on the legislature to define which felonies elevate a homicide into a first degree murder. Accordingly, that body provided a small list of particularly dangerous crimes, such as arson, sexual battery, kidnaping, and robbery to define first degree felony murder. As to those offenses, this Court has found no double jeopardy problem with convictions for both first degree felony murder and the underlying felony. State v. Enmund, 476 So. 2d 165, 167 (Fla. 1985). Significantly, aggravated battery, which, by virtue of the violence implicit in its nature, logically should have been among those offenses defining this species of murder, was excluded as one of the underlying felonies, probably for the equally logical reason that the homicide “swallowed” the aggravated battery. LaFave and Scott, cited above at p. 229.

### **B. Felony murder and aggravated child abuse.**

This changed in 1984 when the legislature added aggravated child abuse, as defined in Section 827.03, Florida Statutes (1998 Supp.)<sup>12</sup> (but not aggravated battery)

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<sup>12</sup> (2) "Aggravated child abuse" occurs when a person:  
(a) Commits aggravated battery on a child;

to the list of felonies justifying a first degree felony-murder conviction. Double jeopardy and other legal problems arose from that amendment to Florida's felony-murder statute.

In resolving that constitutional issue, the United States Supreme Court has said that courts should look to the legislature for guidance. Whalen v. United States, 445 U.S. 684 (1980) (“[W]ithin our federal constitutional framework the legislative power, including the power to define criminal offenses. . .resides wholly with the Congress.”); Albernaz v. United States, 450 U.S. 333, 340 (1981). Accordingly, when faced with a double jeopardy question this Court has focused on section 775.021(4), Florida Statutes (1998 Supp.) as an aid to discern the legislative intent regarding the felony-murder statute. Boler v. State, 678 So. 2d 319 (Fla. 1996). That section provides:

(4)(a) Whoever, in the course of one criminal trans-action or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or

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(b) Willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or

(c) Knowingly or willfully abuses a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child.

transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions of this rule of construction are:

1. Offenses which require identical elements of proof.
2. Offenses which are degrees of the same offense as provided by statute.
3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Accordingly, in Lukehart v. State, 776 So. 2d 9096, 922-23 (Fla 2000), this Court rejected Lukehart's argument that "double jeopardy principles prohibit the dual convictions of felony murder and aggravated child abuse.... Section 775.021(4), Florida Statutes (1995), which provides the test for determining double jeopardy violations, does not prohibit a defendant from being separately convicted and sentenced for felony murder and the qualifying felony."<sup>13</sup> That holding obviously resolved the double jeopardy problem arising from using aggravated child abuse as the underlying felony in a first degree felony murder allegation. Lukehart, however, said nothing about the other fundamental problem inherent in cases such as Hutchinson's where the underlying felony "merges" with the homicide.

### **C. The felony-murder merger doctrine.**

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<sup>13</sup> While Hutchinson believes Lukehart had a good, powerful argument, he acknowledges this Court's ruling in the latter's case, at least as to the double jeopardy contention. By doing this, however, he seeks to preserve the issue for future review.

Unlike the double jeopardy analysis, which looks only to the distinctiveness of the statutory elements of crimes, Blockburger v. United States, 284 U.S. 299 (1932), the merger doctrine examines the facts of the criminal episode. Thus, for example, if Jones and Smith get into a fight, and Jones hits Smith with a pipe who later dies, the State cannot use the aggravated battery of Smith as the underlying felony to justify a first degree felony murder conviction.<sup>14</sup> The facts of the aggravated battery merge with those of the homicide. They are not “independent” of those relevant to establishing the murder.

The merger doctrine—that crimes that are involved in every homicide “merge” with the homicide -- apparently arose in New York because of its overly broad felony murder law. In that state a homicide committed during “any felony” became a felony murder.

Since the phrase “any felony” is broad enough to include even the aggravated assault that is usually involved in any homicide, the result would be that substantially every homicide would constitute first degree murder.

It was to avoid this result that the New York court adopted the doctrine that the supporting felony had to be independent of the homicide.

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<sup>14</sup> Of course, aggravated battery is not one of the enumerated felonies the State can use to prove first degree felony-murder. Section 782.04(1)(a)(2), Florida Statutes (1998 Supp.).

It is obvious that the problem that motivated the New York court to adopt the above rule cannot exist under a statute like Florida's, which limits the felony-murder rule to homicides committed in the perpetration of specified felonies, not including assault in any of its forms.

Robles v. State, 188 So. 2d 789, 792 (Fla. 1966).

Thus, a careful reading of Robles reveals that this Court would have given New York's merger doctrine much more serious consideration if Florida's list of felonies included an "assault in any of its forms." Indeed, without referring to Robles, the Fifth District Court of Appeals considered and resolved this problem in the context of an attempted felony murder where robbery was the underlying felony.

Even if the felony murder rule is held to be a proper way to charge attempted murder of a police officer engaged in the lawful performance of his duty, it was not appropriate in this case. The overt act relied on by the State to justify the attempted murder charge is the knife "thrust ... toward the chest or throat area of Kelly Boaz." But this "overt act" is the only alleged act of force, violence or assault to prove a necessary element of the underlying qualifying offense of robbery. If "force, violence or assault" is not present during the course of the taking, then there is no robbery. Can an essential element of the underlying qualifying offense *also* constitute the "overt act" required to prove attempted murder? If so, then practically every robbery will justify an attempted murder charge. . . . We hold, until the supreme court decides otherwise, that an essential element of the underlying qualifying felony cannot also serve as the overt act necessary to prove attempted murder.

Grinage v. State, 641 So. 2d 1362, 1365-66 (Fla. 5<sup>th</sup> DCA 1994)(Emphasis supplied); approved on other grounds, State v. Grinage, 656 So. 2d 457 (Fla. 1995).

Almost 20 years later after this Court decided Robles, the legislature created that situation emphasized in the quote when it amended Section 782.04(1)(a)(2) to include a special form of assault-aggravated child abuse-to the growing list of felonies that qualified a homicide as a first degree murder. Now, any homicide of a child becomes a first degree murder because each one will always involve an aggravated child abuse. That is, as in this case, the death of the child is the aggravated child abuse, and the aggravated child abuse makes it a first degree murder. Hence, the problem that led to the New York courts creating the merger doctrine exists in Florida. “All [aggravated child abuses] resulting in death could serve as the underlying felony for felony murder.” Mapps v. State, 520 So. 2d 92, 93 (Fla. 4<sup>th</sup> DCA 1988).

If this Court concludes that the merger doctrine has no relevance to homicide cases involving aggravated child abuse, it will also have to conclude that it had improperly found defendants in other cases were guilty of lesser degree murders than the first degree murders they were convicted of committing. Knowles v. State, 632 So. 2d 62 (Fla. 1993); Fisher v. State, 715 So. 2d 950 (Fla. 1998). In Knowles, this Court reduced one of Randy Knowles’ two convictions for first degree murder to second degree murder. One evening in September 1991, Knowles walked to the trailer next to the one he and his father had lived in and shot a ten-year-old girl who had arrived for a birthday party, and who was a stranger to him. He then shot his father

who was sitting in his truck outside his home. Since the killing of the girl, as here, involved an aggravated child abuse-the shooting- this Court should have affirmed the conviction for first degree murder. Instead, relying on well established precedent, Purkhiser v. State, 210 So. 2d 448 (Fla. 1968), it found insufficient evidence to support that conviction and reduced it to second degree murder.

In Fisher, the defendant and three other men fired at least 35 bullets into a house where a person stayed who had gotten into a fight with Fisher earlier in the evening. One of the bullets struck and killed a five-year-old boy who was sleeping on a couch with his mother. This Court reduced Fisher's subsequent conviction for first degree murder to second degree murder because "the proof is clearly sufficient for a conviction of second-degree murder." Fisher, at 952. The shooting of the child was also clearly aggravated child abuse, so this Court should have affirmed the first degree murder conviction.

Killings that would otherwise be manslaughters would similarly become first degree murders. A drunk driver who ran off the road and killed a child would be guilty of first degree murder rather than manslaughter. Duckett v. State, 686 So. 2d 662 (Fla. 2<sup>nd</sup> DCA 1996). Indeed, all vehicular homicides in which a child was killed would automatically become first degree murders. So would all child neglect cases that traditionally are third degree murders. Hermanson v. State, 570 So. 2d 322 (Fla. 2d

DCA 1990)(Third degree murder convictions affirmed for parents who had refused medical treatment for their child who had died of juvenile diabetes.); McDaniel v. State, 566 So. 2d 941 (Fla. 3d DCA 1990)(Third degree murder conviction affirmed for father who had starved his son to death.) Maldonado v. State, 697 So. 2d 1284 (Fla. 5<sup>th</sup> DCA 1997)(Attempted second degree murder where Maldonado punched a four year old girl in the stomach, causing internal injuries); Small v. State, 667 So. 2d 299 (Fla. 1<sup>st</sup> DCA 1995)(Upward sentencing departure for second degree murder of child unwarranted); Robinson v. State, 589 So. 2d 1372 (Fla. 4<sup>th</sup> DCA 1992)(same)

From a slightly different perspective, other good reasons exist to limit the reach of aggravated child abuse felony murder. If every homicide of a child involves an aggravated child abuse then jurors will have only two choices when faced with deciding the fate of a defendant charged with first degree felony murder: guilty of first degree murder or not guilty. There will be no lesser offenses. But those extreme choices, particularly when the defendant has obviously done something wrong but certainly nothing so terrible that he should be executed, place jurors in an unenviable position.

While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this.

For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the “third option” of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Such a risk cannot be tolerated in a case in which the defendant’s life is at stake.

Beck v. Alabama, 447 U.S. 625, 637 (1980).

To minimize the risk that the jury will unfairly convict defendants such as Hutchinson of first degree felony murder, this Court should apply the merger doctrine to prevent the over reaching of felony murder in this special instance.

**D. Aggravated child abuse and death sentencing.**

If not, then Hutchinson’s death sentence has serious constitutional problems. That is, not only is he guilty of committing a first degree felony murder, he will automatically have two aggravating factors (though treated as one, Lukehart, at 925.) that presumptively mean that death is the correct sentence State v. Dixon, 283 So. 2d 1 (Fla. 1973)

In another issue, Hutchinson noted that constitutional death penalty statutes have “genuinely narrowed” the class of first degree murderers so that only those truly deserving a death sentence receive it. Zant v. Stephens, 462 U.S. 862 (1983). Indeed, in Blanco v. State, 706 So. 2d 7 (Fla. 1997), Justice Anstead, specially concurring, noted the problem the felony murder aggravator, section 921.141(5)(d), presented:

The concept of narrowing requires that once it has been established that a defendant is guilty of first-degree murder the sentencer may properly consider only *additional* factors, termed aggravators, that genuinely *narrow* the class of convicted murderers who may be eligible for the death penalty. For example, if a person is guilty of premeditated murder and is shown to have been guilty of *additional* aggravating misconduct, then he becomes part of a narrower, less numerous class of persons eligible for the death penalty. But a person convicted of felony murder who then has the same felony used against her as an aggravator does *not* become a member of a smaller group. Rather, the felony aggravator used there would make the *entire* larger group of felony murderers *automatically* eligible for the death penalty without proof of any additional aggravating misconduct. Hence, the felony aggravator serves no legitimate narrowing function in such a case.

Id. at p. 12 (emphasis in opinion.)

The majority, however, rejected the argument that every felony murder automatically included an aggravating factor.

Blanco next argues that Florida's capital felony sentencing statute is unconstitutional because every person who is convicted of first-degree felony murder automatically qualifies for the aggravating circumstance of commission during the course of an enumerated felony. We disagree. Eligibility for this aggravating circumstance is not automatic: The list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony. A person can commit felony murder via trafficking, car jacking, aggravated stalking, or unlawful distribution, and yet be ineligible for this particular aggravating circumstance. This scheme thus narrows the class of death-eligible defendants. See *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). See generally *White v. State*, 403 So. 2d 331 (Fla.1981). We find no error.

Blanco, at 11. (footnotes omitted.)

In Lukehart, this Court relied on Blanco to reject the defendant's claim that every murder of a child automatically had, as an aggravator, that it was committed during the course of aggravated child abuse. Yet, the underlying felony in Blanco was armed burglary, which was independent of the murder, whereas the acts giving rise to the aggravated child abuse allegation are in this case the same ones that give rise to the murder charge. Hence, every child abuse that ends in a homicide will convert it into a first degree felony murder with at least one aggravator, the committed during the course of an aggravated child abuse aggravator, automatically applicable. Florida's death penalty scheme does not narrow the class of child abusers eligible for a death sentence, which is the critical type of narrowing required when the acts giving rise to the aggravated child abuse are the same ones justifying the murder. That is, to genuinely narrow the class of convicted murderers eligible for a death sentence, when they have also committed an aggravated child abuse, this Court must conclude that the acts giving rise to the child abuse cannot be the same ones that resulted in the youth's death.

Thus, not only would the defendants in the cases cited above have been convicted of first degree murder, they would have automatically been sentenced to death, assuming he or she was still in shock from learning the likelihood of receiving such punishment and had offered nothing in mitigation. This Court should find such

harsh results unlawful or unconstitutional. It should reverse Hutchinson's convictions for first degree murder and sentences of death.

## **ISSUE IX**

THE COURT ERRED IN FINDING THE MURDER OF GEOFFREY FLAHERTY TO HAVE BEEN COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL MANNER, IN VIOLATION OF THIS DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In justifying its death sentence for the murder of Geoffrey Flaherty, the court found Hutchinson had committed it in an especially heinous, atrocious, or cruel manner (14 R 2705-2707).

As discussed above, the medical examiner testified as to the sequence of the deaths of the victims on September 11, 1998. The victim, Geoffrey Flaherty, was the fourth and final victim of the Defendant. Geoffrey Flaherty was first shot in the chest and then fatally shot in the right side of the head. The evidence suggests that the Defendant entered the house wielding a shotgun after having kicked or shoved in the front door. The Defendant then crossed the living room and entered the master bedroom where Renee Flaherty, Amanda Flaherty, and Logan Flaherty were shot. According to the medical and scientific evidence as well as the Defendant's own statement, Geoffrey Flaherty was not in the master bedroom at the time his mother, brother, and sister were shot. However, the evidence is clear that Geoffrey came to the door of the bedroom and would have certainly heard the shotgun blasts as each member of his family was killed at the hands of the Defendant. Moreover, the evidence is clear that Geoffrey would have heard the chilling sound of shotgun shells being racked into the chamber of the shotgun as the Defendant prepared to shoot each victim including Geoffrey himself. The Defendant stood in the bedroom facing Geoffrey, and pulled the trigger. The medical examiner testified that Geoffrey Flaherty had a defensive wound indicating that Geoffrey raised his arm in a vain attempt to ward off the blast that struck him in the chest. Geoffrey then spun around and tried to get away from the Defendant and stumbled into the living room grasping at the arm of the sofa, as evidenced by the blood soaked hand

print, ultimately falling to the floor between the sofa and coffee table. After he fell to the floor, Geoffrey was looking back in the direction of the master bedroom area as the Defendant followed him and then fired the last lead slug through Geoffrey's right ear, which ripped through his head and neck thus ending his young life.

Geoffrey Flaherty saw the Defendant aiming the shotgun at him. Geoffrey knew that he had been shot in the chest as his blood was pouring from his chest and back. We will never know the horror this child experienced. One can only imagine the fear as he was shot in the chest and desperately trying to move away from the Defendant only to look back to see the barrel of the shotgun once again aimed at him. Geoffrey Flaherty knew he was going to die in that moment, and the terror suffered in that moment is incomprehensible. The Defendant walked over to that nine year old boy and, without pity, without conscience, aimed the shotgun one final time and ended Geoffrey's life. The circumstances of the final moments of Geoffrey's life prove beyond a reasonable doubt that Geoffrey's murder was heinous, atrocious, and cruel.

(14 R 2706)

While these essentially uncontested facts show a gruesome murder, they are insufficient to justify finding it especially heinous, atrocious, or cruel. Hutchinson makes this claim because Geoffrey had no prolonged awareness of his impending death. This lack of any mental torture precludes application of this aggravator.<sup>15</sup>

Any consideration of the HAC aggravator must begin with the definition this court provided in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973):

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<sup>15</sup> The court refused to find the HAC aggravator applicable to the murders of Renee, Amanda, or Logan (14 R 2704, 2708).

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies, the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

As this court has applied that definition, it has required HAC murders to have been torturous to the victim. Not simply physically so, but crucial and necessary, the victims must have been mentally tortured as well. Wickham v. State, 593 So. 2d 191, 193 (Fla. 1991); Richardson v. State, 604 So. 2d 1109 (Fla. 1992). Thus, where the Defendant shot a victim, causing instant death, this aggravator may have applied because preceding the painless death was a prolonged or significant period where the victim was aware of his or her impending death. Cooper v. State, 492 So. 2d 1059 (Fla. 1986)(victim bound and helpless, gun misfired three times.); Preston v. State, 607 So. 2d 404 (Fla. 1992)(Fear and strain can justify a HAC finding.) On the other hand, quick deaths, in which the victims had no awareness they were about to be killed, or that they knew for only a short time, do not become especially heinous, atrocious, or cruel, even where he or she was stabbed. Wickham v. State, 593 So. 2d 191 (Fla. 1991)(Ambushing a “Good Samaritan” and shooting him twice was not HAC even though he pled briefly for his life); Scull v. State, 533 So. 2d 1137 (Fla. 1988) (Single

blow to the head.); Wilson v. State, 436 So. 2d 908 (Fla. 1983)(Single stab wound is not HAC).

Awareness of death becomes an important factor, and murders committed when the victim is unconscious or even semi-conscious typically lack the especial mental gruesomeness to make them especially heinous, atrocious, or cruel. Herzog v. State, 439 So. 2d 1372, 1379-80 (Fla. 1983); Clark v. State, 443 So. 2d 973, 977 (Fla. 1984).

From the definition, if the Defendant intended to torture the victim, or exhibited a morbid delight in his or her suffering, the resulting murder can be HAC. Multiple stabbings, brutal beatings, strangulations, and prolonged struggles exhibit this level of indifference to the pain the victim suffered. Pittman v. State, 646 So. 2d 167, 172-73 (Fla. 1994)(Victim strangled, stabbed, drowned in her blood.); Whitton v. State, 649 So. 2d 861, 866-67 (Fla. 1994)(30-minute attack); Hardwick v. State, 521 So. 2d 1071 (Fla. 1988)(5-6 minute attack during which victim was stabbed three times, shot in back and struck about the head.) If he did not, it does not apply. Kearse v. State, 662 So. 2d 677 (Fla. 1995)(No evidence the “defendant intended to cause officer unnecessary and prolonged suffering.”); Williams v. State, 574 So. 2d 136 (Fla. 1991)(HAC “is permissible only in torturous murders. . . .as exemplified either by the desire to inflict a high degree of pain or utter indifference or enjoyment of the suffering of another.”)

In short, as this Court said in James v. State, 695 So. 2d 1229, 1235 (Fla. 1997):

Although this Court also has explained that the HAC aggravator does not apply to most instantaneous deaths or to deaths that occur fairly quickly, fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.

Applying this law to the facts of this case, shows that Geoffrey's murder, as gruesome and tragic as it was, was not especially heinous, atrocious, or cruel, as this court has defined and applied that phrase.

**A. Geoffrey had no lengthy awareness of his impending death.**

Geoffrey simply was unaware of his impending death for any significant time. At most, the time between the first and second shots was only 5 -10 seconds (30 R 2364). This Court has spent more time reading the preceding sentence than the victim had of his impending death. Moreover, that he had such knowledge immediately before being shot has never by itself been sufficient to sustain finding the HAC aggravator. To the contrary, in cases in which the victims not only knew they were about to die and pleaded for their lives, albeit for a short time, such evidence failed to justify finding this aggravator. Brown v. State, 526 So. 2d 903 (Fla. 1988)(Brown takes police officer's gun from him, and after the officer pleads for his life, shoots him. Murder not HAC); Wickham, Wilson, Herzog, cited above. Other evidence, or rather the lack of it, supports that conclusion.

## **B. The trial court's speculation.**

To justify finding Geoffrey's murder especially heinous, atrocious, or cruel, the court had to speculate about several facts, something it obviously could not do. See, Donaldson v. State, 722 So. 2d 177, 191 (Fla. 1998)(Wells, concurring and dissenting). For example,

1. After being shot, "Geoffrey then spun around and tried to get away from the Defendant and stumbled into the living room." (14 R 2706). There is no evidence he tried to flee.

2. "After he fell to the floor, Geoffrey was looking back in the direction of the master bedroom area as the Defendant followed him. . . ." The first shot would have been fatal (28 R 1816), and his body was found with his face looking toward the master bedroom (28 R 1815). There is no evidence he was alive or conscious or saw Hutchinson "follow him."

3. Likewise, there is no evidence Geoffrey "saw the defendant aiming the shotgun at him."

4. Nor does the evidence show that the child "desperately tr[ied] to move away from the Defendant only to look back to see the barrel of the shotgun once again aimed at him." (14 R 2706)

### **C. Other facts not involved in this case.**

In other child murders, this Court has approved a finding that the HAC aggravator applied, but the facts justifying this factor in them were missing from this case. This is, first of all, a “simple” homicide. Geoffrey was not kidnaped, sexually abused, or beaten, any of which could have justified finding this aggravator. Rose v. State, 787 So. 2d 786, 801-802 (Fla. 2001)(abduction) He was killed in his home, not in some remote field or forest. He endured no prolong suffering, nor any lengthy terror. Henyard v. State, 689 So. 2d 239, 254 (Fla. 1997). Moreover, Hutchinson was not Geoffrey’s father, and the boy never saw his father about to kill him. Nor did he ever see the bodies of his brothers and sisters as he was forced to kneel over them. Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998). There was no motive, perverted or rational, for the murder. Id. <sup>16</sup>

In short, those additional facts this Court has required to prove a murder especially heinous, atrocious, or cruel were missing from this case. The only fact that distinguished Geoffrey’s death from those of Amanda and Logan, for which the court refused to find the HAC aggravating factor, was his awareness of his impending death. As shown, however, that knowledge, if he had it at all, was for such a short time that

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<sup>16</sup> The State ostensibly proved that Hutchinson killed Renee Flaherty because they had gotten into an argument (30 R 2250), but it never showed why he killed Geoffrey.

it cannot justify finding this factor. This lack of conclusive proof undoes the court's conclusion on this aggravator. It must be proven beyond a reasonable doubt, State v. Dixon, 283 So. 2d 1 (Fla. 1973), and the circumstantial evidence regarding when he died points with an uncertain hand that he saw Hutchinson for any appreciable length of time. There is no evidence he was conscious, if at all, for very long after the first shot. Where the proof hesitates, this court has ruled that the Defendant must receive the benefit of the doubt. State v. Law, 559 So. 2d 187 (Fla. 1989). Hence, his death was not especially heinous atrocious, or cruel. Wilson, Herzog, cited above.

#### **D. Defensive wounds.**

In justifying a death sentence for the Geoffrey's murder, the court found he had "defensive" wounds. Such injuries, by themselves, are insufficient to make his death especially heinous, atrocious, or cruel because he may have instinctively thrown up his hands immediately before being shot and only a moment or two after seeing the shotgun. Those cases in which the victims tried to defend themselves and in which this aggravator was justified also had them being aware of their impending deaths for a significant period. In Campbell v. State, 571 So. 2d 415 (Fla. 1990), the murder victim was stabbed 23 times over the course of several minutes and had defensive wounds. Likewise, in Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987), some of the victim's 30 or more stab wounds were defensive, indicating she was aware of her

impending death. On the other hand, this court, in Brown v. State, 526 So. 2d 903 (Fla. 1988), refused to find the murder of a policeman especially heinous, atrocious, or cruel, even though the Defendant had taken the officer's gun from him during a struggle and shot him in the arm. Brown killed him despite his pleas not to do so. There, the time between the initial wounding and the murder was so short, that despite the evidence of a "defensive" wound, the HAC aggravator was inapplicable.

In this case, Geoffrey was shot without any warning and was quickly killed. He could not have been aware of his death, if at all, for any length of time. Unlike the victims in Campbell and Hansbrough, Geoffrey was killed almost instantly, and his suffering was mercifully short.

#### **E. The reloading of the gun.**

Justifying finding this aggravator, the trial court said, "Moreover, the evidence is clear that Geoffrey would have heard the chilling sound of shotgun shells being racked into the chamber of the shotgun as the Defendant prepared to shoot each victim including Geoffrey himself." (14 R 2706). In Hamilton v. State, 678 So. 2d 1228, 1231-32 (Fla. 1996), this Court specifically rejected that evidence as justifying the HAC factor. "Moreover, the fact that the gun was reloaded does not, without more, establish intent to inflict a high degree of pain or otherwise torture the victims. Reloading certainly can support such a conclusion in a proper case, but in the context

of a domestic quarrel such as this it also can be consistent with a rage killing that lacks the intent described in Santos v. State, 591 So. 2d 160 (Fla. 1991)]”.

**F. Hutchinson’s intentions.**

Without any contradiction, witnesses testified that Hutchinson loved Renee and her children. There is no evidence he wanted to torture them or that he, in any way, prolonged their deaths to delight in the agony he had inflicted. Donaldson v. State, 722 So. 2d 177, 186-87 (Fla. 1998); Williams, Kearse, cited above.

**G. Santos v. State, 591 So. 2d 160 (Fla. 1991).**

The facts of Santos come close to those here, and what the court did in that case, and the successor, Santos v. State, 629 So. 2d 838 (Fla. 1994), indicate this court should do the same in this case. There, Santos had fathered a child although he and the mother had had a stormy relationship. Heightening the tensions to a breaking point, she refused to give the child his last name, a threat to his misguided sense of masculinity. Sometime before the murders he threatened to kill the mother.

On the day of the murder, Santos saw his girlfriend strolling along a street carrying the baby, accompanied by her son from a former marriage. Santos quickly approached them, and as the mother fled carrying her child, he caught up with her and shot her twice and the baby once. He fled but was arrested a short time later. Although the trial judge found the murders to have been especially heinous, atrocious,

or cruel, this Court rejected that finding. “The present murders happened too quickly and with no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victims.” Id. at 163.

That holding applies to this case. Hutchinson never killed Renee and the children with any indifference to their suffering. He never enjoyed their deaths, as evidenced by his anguish when he called 911, and the shock he was in when found in the garage with the telephone to his ear (8 R 1590-91, 21 R 600, 22 R 690 ). Geoffrey had no prolonged awareness he was about to die. His death was not committed in an especially heinous, atrocious, or cruel manner.

This court should reverse the trial court’s sentencing order and remand for a new sentencing hearing.

## **ISSUE X**

### DEATH IS DISPROPORTIONATE

When this Court reviews death sentences, it compares the case at hand with others involving similar facts. Later, in Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993), the Court expanded on the quality of proportionality review it conducts.

Also, Defendants who commit similar crimes should receive similar punishment. Uniformity thus drives this unusual form of appellate scrutiny. Tilman v. State, 591

So. 2d 167, 169 (Fla. 1991). In this instance, the relevant cases involve defendants who have murdered members of their families.

At the outset, everyone must concede this case does not involve murders for gain, such as collecting on an insurance policy. Zeigler v. State, 580 So. 2d 127 (Fla. 1991); Buenoano v. State, 527 So. 2d 194 (Fla. 1988); Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992); Byrd v. State, 481 So. 2d 468 (Fla. 1985). No one ever suggested Hutchinson murdered Renee and her children for that reason. This Court has also rejected proportionality claims when the defendant has had prior convictions for committing violent crimes, particularly against women. See, Porter v. State, 564 So. 2d 1060 (Fla. 1990); Lemon v. State, 456 So. 2d 885 (Fla. 1984)(prior conviction for assault with intent to commit murder of a woman. Recently released from prison.); Duncan v. State, 619 So. 2d 279 (Fla. 1993)(Prior convictions for second degree murder and aggravated assault.)

Finally, cases in which husbands and fathers have killed their wives and children in an especially heinous, atrocious, or cruel manner and with a cold, calculated and premeditated intent have lost their proportionality arguments before this Court. Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998).

In sentencing Zakrzewski to death, the lower court found, and this Court approved three aggravating factors: 1. Contemporaneous convictions for two

murders, 2. HAC (as to the children only). 3. Cold, calculated, and premeditated. The court found in mitigation the he was under the influence of an extreme emotional disturbance and had no significant prior criminal history as well as a long list of nonstatutory mitigation. He was not drunk, nor had he been drinking on the day of the murders.

Hutchinson differs from Zakrzewski and the defendants in the cited cases in several ways: 1. These were rage killings. 2. He lacked a criminal history of violence. 3. Jealousy was not a motive for the murders. 4. The incident was completely out of character for Hutchinson and his relationship with Renee Flaherty and her children. 5. He had been heavily drinking on the night of the murders. 6. After Hutchinson returned from the Gulf War he was a changed man, physically and mentally. 7. The murders occurred in a very short period. Thus, when the facts of this case are compared with those involving the murders of spouses, lovers, and the like, this Court can only conclude this is not a death case.

Although this Court has never created a “domestic dispute” exception to death sentencing, Spencer v. State, 691 So. 2d 1062, 1065 (Fla. 1996), it has, nonetheless, recognized that family relations often create “intense emotions,” Wright v. State, 586 So. 2d 1024 (Fla. 1991), and it has with consistent regularity refused to affirm death sentences where Defendants have killed their wives, girlfriends, and children when the

former were intensely jealous or filled with an unmanageable anger. Douglas v. State, 575 So.2d 165, 167 (Fla. 1991)(intense jealousy and hatred.); Farinas v. State, 569 So. 2d 425, 431-32 (Fla. 1990)(jealousy).

Douglas and cases like it provide some help here because Hutchinson obviously was not simply mad but in a towering rage when he killed Renee and the children.

Now, many, most, and perhaps all couples will have disagreements and arguments sometimes during their marriage or relationship. Some will have big, major disputes, but we rarely see those that end in murder, and those that do generally have signs that something terrible was looming. For example, in Zakrzewski, cited above, the defendant twice told a neighbor that he would kill his family rather than let them go through a divorce. See, also, Knowles v. State, 632 So. 2d 62 (Fla. 1993). In this case, we have no similar threats. Indeed, everyone who knew Hutchinson and Renee Flaherty said they got along well (24 R 1154-56). Even minutes before the murders, they were obviously happy together. The lower court and even the State recognized as much by not finding or arguing the cold, calculated, and premeditated aggravating factor.

Thus, unlike other defendants, we cannot look to Hutchinson's past for evidence of criminal violence. He simply lacked that marker as the trial court recognized when it found the statutory mitigator that he had no significant history of

criminal activity (14 R 2709). Likewise, we see no evidence he was jealous of Renee, angry with her, or bent on seeking revenge because she had jilted him. Santos v. State, 629 So. 2d 838 (Fla. 1994); Irizarry v. State, 496 So. 2d 822 (Fla. 1986). No witness testified he hated the children, killed them to get back at her, or in a perverted twist of logic wanted to spare them the pain of a breakup. Zakrzewski, cited above; Arbelaez v. State, 626 So. 2d 169 (Fla. 1993). He never abused them in any way, and to the contrary he loved and treated them as if they were his own (24 R 1156). Thus their murders were simply out of character, as is clearly evident by the 911 tape and his reaction when the police told him Renee and the children “were gone.”

Yet, something was wrong. On the night of the murders, Hutchinson had been drinking beer immediately before he and Renee got into an argument. Not simply drinking, he was drunk with a blood alcohol level between .21-.26 (18 R 1997). While that was a major contributor to this tragedy, as this Court has recognized in other cases, the defendant also suffered from serving in the Gulf War. Because of his exposure to chemicals, biological toxins and other contaminants, his body had some obvious physical deterioration such as diarrhea, stomach pain, sensitivity to light and sounds, and insomnia (Deposition of Dr. William Baumzweiger at p. 15).

More ominously, those agents had infiltrated his brain, causing subtle neurological damage (Deposition at p. 15). This brain damage surfaced in several

ways: he had a mild to moderate cognitive deterioration (Deposition at p. 28). He had difficulty trusting his attorney (Deposition at p. 31) , as is evident by the fact that he went through several lawyers before ending with Steven Cobb. Even then, they had a rocky relationship (4 R 768). This latent, persistent mistrust of those close to him indicated a damaged brain. More troublesome, his exposure to chemicals on the battlefield had damaged that part of his brain that helped him distinguish friend from foe. “Jeffrey has a great deal of difficulty in discriminating friend from foe and will often see people as being in some way against him or in some way an enemy or somehow dangerous.” (Deposition at p. 69) His drunkenness, moreover, as should be expected, only made matters worse (Deposition at p. 57). This brain damage explains why he shot the children. Angry at Renee, he made no distinction between her and them. De Angelo v. State, 616 So. 2d 440 (Fla. 1993)(Death sentence proportionately unwarranted where defendant has brain damage and other nonstatutory mental mitigation.)

The murders here were the literal fulfillment of what this Court said about homicides for which a death sentence is inappropriate. They were the explosion of total criminality this court recognized in State v. Dixon, 283 So. 2d 1 (1972), that sometimes overcomes fundamentally decent people.

Finally, if this Court accepts the arguments Hutchinson made regarding the nonapplicability of several of the aggravating factors found by the court, See Issues VI, VII, and VIII, these murders only have one aggravating factor, the contemporaneous murders, and a long list of significant mitigation. While this Court has tended to reduce death sentences in one aggravator cases, e.g. Klokoc v. State, 589 So. 2d 219 (Fla. 1991), that conclusion is more compelling here because the court sentenced the defendant to life for the murder of Renee Hutchinson even though it found the contemporaneous murders aggravator applied to her murder (14 R 2714). Hence, simple fairness dictates similar sentences for the murders of the children.

### **CONCLUSION**

Based on the arguments presented here, the Appellant, Jeffrey Hutchinson, respectfully asks this Honorable Court to grant the following relief: 1. Reverse the trial court's judgment and sentence and remand for a new trial before a different judge; 2. Reverse the trial court's judgment and sentence and remand with instructions to adjudge him guilty of four counts of second degree murder; 3. Reverse the trial court's sentence of death and remand for a new sentencing hearing; or 4. Reverse the trial court's sentence of death and remand with instructions that it impose life sentences for each of the murders.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY a copy of the foregoing has been furnished to **Charmaine Millsaps**, A.A.G., by U.S. mail delivery to The Capitol, Tallahassee, Florida 32399-1050, and to **Jeffrey Hutchinson**, #124849, F.S.P. P.O. Box 181, Starke, FL 32091-0181, on this 19<sup>th</sup> day of April, 2002.

**CERTIFICATE OF FONT SIZE**

I HERBY CERTIFY that, pursuant to Rule 9.210(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

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**KEPLER B. FUNK**