IN THE SUPREME COURT OF FLORIDA

CHARLES W. FINNEY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 80,990

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

Appellant, CHARLES W. FINNEY, was the defendant in the trial court, and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. Record references are as follows: record (R); supplemental record (SR); trial transcript (T); exhibits (E). All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Charles Finney was charged by indictment filed February 13, 1991 with the first degree murder of Sandra Sutherland, armed robbery, sexual battery, and dealing in stolen property (R16-19). The charge of sexual battery was nolle prossed (R143,153;T3-4). The case proceeded to trial on September 14-18, 1992 before Circuit Judge Susan Sexton and a jury. Appellant was found guilty as charged on the three remaining counts (R93-94;T758). In the penalty phase, over defense objection, appellant was shackled (T815-17, 858-59). The trial judge stated:

> . . . [F]irst of all, for the record, I did not order the shackles. The shackles were decided as a matter of security by the bailiffs and the Sheriff's Office. My feeling about that is, that is their area of expertise. If they made that decision, then I'm going to support that decision.

(T817)

The jury, by a 9-3 vote, recommended the death penalty (R98, T921). On November 10, 1992, after denying as legally insufficient appellant's Motion for Disqualification (T930-39), the trial judge imposed a death sentence for the murder conviction, a sentence of life imprisonment for the armed robbery conviction, and a fifteen year sentence for the conviction of dealing in stolen property (R143-51,153-57;T950-53).

STATEMENT OF THE FACTS

A. Trial

Ruth Sutherland, the mother of Sandra Sutherland, testified that her daughter had lived in the Brookside Apartments for about three years, and had been in Apartment 378 since Labor Day of 1990 (T256-57). Sandra, an airlines reservationist, was 36, single, and had no roommates (T256-57). The apartment was on the ground floor, with a solid front door and a sliding glass door to the patio (T258-59). There was a security system in the apartment, but it was not activated (T259). In the living room there was a cabinet with a television set and a VCR, and there was another small TV in the bedroom (T259-61,E.2,6). Mrs. Sutherland identified a photograph of Sandra's VCR, and identified the handwritten serial numbers at the bottom of the index page of the VCR handbook as being Sandra's handwriting (T262;E.4,6).

At around 11:00 a.m. on January 15, 1991, Sandra stopped by her parents' office to drop off an anniversary gift (T262-63). The next morning, January 16, Sandra telephoned her parents twice. The

second conversation was around 9:30 a.m. (T265-67). Sandra said, "Mother, there was something I forget to tell you earlier." Mrs. Sutherland then heard her say "Hi" and then "Mother, there's someone here. Let me call you back" (T267). However, she did not call back (T267).

At about 2:00 p.m. Sandra's employer called Mrs. Sutherland and told her that Sandra had not shown up for work yet (T267-68). The employer had tried several times to call Sandra's residence and got no answer (T268). Mrs. Sutherland then tried to call. There was no answer, and the answering machine was off (T268-69). An employee of the Sutherlands named Allen Lette went to Sandra's apartment to check on her (T268-69).

Mrs. Sutherland identified State's Exhibit 7 as a piece of paper with an address written in German. The address was that of an acquaintance of Sandra's (T270-72;E18).

On cross-examination, Mrs. Sutherland testified that on January 17, the day after Sandra's death, the police allowed her to enter the apartment (T272-73). She could see that the VCR was missing (T273). [Mrs. Sutherland had last been in the apartment several weeks earlier; the VCR was there at that time (T275)]. The television to which the VCR had been connected was still in place, as were the TV in the bedroom, the stereo, an oil painting, and some crystal (T273-74). Mrs. Sutherland stated that Sandra's jewelry box, which contained bracelets, necklaces, and watches, was missing (T274). As far as Mrs. Sutherland knew, Sandra had not been dating anyone (T275-76).

Allen Lette arrived at Sandra Sutherland's apartment at around 2:00 or 2:30 p.m. on January 16, 1991 (T277-78). He knocked on the front door and got no response. Then he went around back to the sliding glass door (T278). Lette asked a man who was around back working if he had seen anyone come in or out. The man said "No" (T278-79). Lette hollered for Sandra, and when there was no answer he opened the sliding glass door and went inside (T279). He looked in several rooms, and then looked in the bedroom and found Sandra motionless on the bed (T279-80). She was lying face down, naked from the waist down. Lette observed that she had been tied up, beaten, and stabbed a lot of times (T280). He went into the living room to try to call 911, but the cordless phone was inoperable (T280-81). He went outside and told the upstairs neighbors to call 911; then returned to Sandra's apartment to wait for the police and medical services (T281-82).

Lette testified that to the best of his recollection, the only things in the apartment he touched were a bottle, a wooden stick, and the phone (T279-84). Before that day, the last time he was in Sandra's apartment was when he helped her move in, about a month before (T283).

Dwayne Aguiar operates a pawnshop on Nebraska Avenue (T284-85). He identified State's Exhibit 4 as one of his pawn tickets (T285,E12). As part of the pawn transaction, Aguiar keeps one copy, the customer gets a copy, and two copies go to the Tampa Police Department (T285-86). In order to complete the transaction, the customer is required by law to provide identification and an

address (T286-87,289) The completed document must include the individual's signature and his fingerprint (T288).

State's Exhibit 4 indicated that the particular item -- a Mitsubishi VCR, patent no. 775C44 -- was brought in on January 16, 1991 at 1:42 p.m., for a loan of thirty dollars, by Charles William Finney (T288;E12). Aguiar testified that he specifically remembered Mr. Finney (T290).

According to Aguiar, when a customer informs him of a change of address, he first puts down whatever address is on the person's ID, and then writes the new address in another space on the form (T290). Charles Finney's ID had a Georgia address. He gave Aguiar his current Tampa address as 337 Delrio Court (T290; E12). In accordance with the standard procedure, Finney provided his fingerprint and signed the form (T291,E12).

Crime scene technician Michael Pozzouli lifted four latent fingerprints from the Mitsubishi VCR and two from the remote control (T292-97).

Another crime scene technician, Kathleen Kunde, took numerous photographs in Sandra Sutherland's apartment and at the autopsy (T312-19,325,331-32;E33-73). One of the photos depicted the television and the cabinet where the VCR had been (T317;E44). Other photos showed the bedroom in disarray (T318;E47-55). Photographs of Ms. Sutherland's body showed cords around her ankles and wrists and a gag tied around her mouth (T331-32). She had on a one-piece terry cloth housedress (T332). On the nightstand next to the bed were several objects including a radio and a jar (T318;E51).

Ms. Kunde collected various items from the bedroom, including some postcards and pieces of paper (T319-20;E56). One of the papers was State's Exhibit 7 (T321;E18) (previously identified by Ruth Sutherland as having an address written on it in German). Ms. Kunde processed the papers and postcards with chemical dye, and turned them over to the latent print bureau (T320-22,333-34). Altogether, she dusted about eighteen items and got a total of fourteen prints, twelve of which were from the postcards (T333-34). She lifted one print from the lid of the jar of Vita Moist which was on the nightstand (T322-24,334). She did not get any prints from the jar itself (T334). On cross, she stated that there was only one usable print on the lid; she did not remember if there were other bits and pieces of prints which she did not lift because she felt they would not be large enough to be compared (T336-37). She testified that she had no idea when the print on the jar lid was placed there (T388). Ms. Kunde also stated that she photographed and dusted a jewelry box, but was unable to get any lifts from it (T338-39).

David Farnell, a latent fingerprint examiner for the Tampa police, took appellant's fingerprints on January 30, 1991 (T344-45). He compared them to the various latent prints lifted in Sandra Sutherland's apartment, and from the VCR and the pawn ticket. In Farnell's opinion, appellant's right thumb print matched the print on the pawn ticket, the print lifted from the back of the piece of paper with German writing on it, and the print

from the jar lid[1] (T345-50,354). One of the latent prints on the VCR matched appellant's right index and middle fingers; the rest of the lifts from the VCR were of no comparison value (T357-60). Out of fifty total prints, seven were identified (three to appellant, three to Sandra Sutherland, and one to Allen Lette); twenty-five were unidentified (meaning they were capable of being compared, but were not matched to anyone); and eighteen were of no comparison value (T343-59). Two of the unidentified lifts were taken from the inside doorknob of Ms. Sutherland's apartment (T356). Farnell acknowledged that he had no way of knowing when the prints were placed, or how long they had been there (T352-56).

Associate medical examiner Dr. Charles Diggs went to the Sutherland apartment on January 16, 1991. He observed Ms. Sutherland lying face down on the bed, with her hands tied in back. Multiple stab wounds were visible (T374-76). An autopsy was performed the next day (T374,376). Dr. Diggs determined the cause of death to be multiple stab wounds to the back (T384,389). There were a total of thirteen wounds. All but one of these penetrated the lungs, causing internal bleeding, loss of oxygen, unconsciousness, and death (T376-83). No other vital organs were affected, and Dr. Diggs observed no bruises or other significant trauma (T377,380).

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[1] According to Farnell, he found twelve points of identity between appellant's print and those on the pawn ticket and the piece of paper, and eight point of similarity to the print on the jar lid (T349-51). Ordinarily, eight points of identity is the minimum number he would want before signing his name to an identification, although if the known and unknown prints are of sufficient quality, six or seven points might be acceptable (T350).

Dr. Diggs testified, on direct examination by the state, that (except where the wound is directly to the heart), multiple lethal stab wounds cause unconsciousness and death more rapidly than would a single lethal stab wound, because the loss of blood pressure occurs faster (T380-83). With wounds such as those involved here, Dr. Diggs stated "[O]ne of the first things that will tend to happen is that these people will start to lose consciousness" (T382). Unconsciousness could begin in about thirty seconds to a minute, while death would typically occur in four to five minutes, or sometimes sooner (T382-83). According to Dr. Diggs, the presence of hemorrhaging along the wound tracks indicated that Ms. Sutherland was alive while each of the wounds was inflicted (T386-87). He was not able to say how many stab wounds took place before she lost consciousness, but she would have been conscious at least during the first several wounds (T391).

On cross, Dr. Diggs stated that it was his opinion, based on his experience, that the wounds in this case were probably the "result of a frenzic type passion" (T397-98).

Dr. Diggs also testified on cross-examination that tests performed by an outside laboratory indicated the presence of acid phosphatase in the rectal area (T393-95,398). On redirect, he stated that acid phosphatase is a presumptive test for semen, but factors other than sexual activity can also produce acid phosphatase (T398-400). The laboratory results showed no evidence of semen or sperm, and Dr. Diggs did not observe any rectal trauma during his examination (T398-400).

Detective Randy Bell of the Tampa Police Department went to the Sutherland apartment on the afternoon of January 16. The bedroom where Ms. Sutherland was found was in disarray, and appeared to Bell to have been ransacked; the rest of the apartment, while untidy, was basically in shape (T406,418). In the living room was a TV set on top of a small console. There was a shelf underneath where a VCR would be kept. It appeared that a VCR had been removed, because wires had been disconnected and there was a dust outline on the shelf (T407). It also appeared to Bell that a cable box might be missing, but he never verified whether there had been a cable box there (R418).

A warranty book for the VCR, which contained a handwritten serial number and part number, was found in the apartment (T407-08;E4). In trying to locate the VCR, the police began looking at pawn tickets. On January 30, a ticket indicating that Charles Finney had pawned a Mitsubishi brand VCR was brought to Detective Bell's attention (T407,409). The number which was recorded as the serial number on the pawn ticket matched the handwritten part number on the warranty book (T409; E4,12). Bell and Detective McNamara located appellant and interviewed him at the Temple Terrace Police Department on the afternoon of January 30 (T410-11). In accordance with his standard procedure, Bell did not tape record the interview (T422-43). After telling appellant they were investigating a homicide, and after advising him of his rights, the detectives asked him if he knew Sandra Sutherland (T411-13). Appellant said he and Ms. Sutherland had lived in the same area of

the apartment complex for a while, but that he had only seen her twice since she moved into her new apartment on the other side of the complex about eight months earlier (T413-14). Once he had talked to her about putting a screened porch on the back of her residence (T413). Later, about two months ago, he had seen her at the mailbox and they talked about her trip to Germany (T413). Appellant had at one time worked as a maintenance person at the apartment complex, but he was now employed as a cook at the Florida Mental Health Institute (T414).

When the detectives asked his whereabouts on January 16, appellant said he had called in sick with a cold (T414,416). At about 10:30 a.m., some maintenance people came by his apartment to fix some holes in the wall (T414). Appellant then watched television until late in the afternoon when his girlfriend returned with the car (T414). According to Detective Bell, appellant said he never left the apartment (T414-15).

At this point, Bell left the interview room and called his office to verify that the thumb print on the pawn ticket belonged to appellant (T415). He then returned and told appellant that he had information that he had pawned a VCR which belonged to Ms. Sutherland at 1:52 p.m. on the day of the homicide (T415). According to Bell, appellant looked shocked when he mentioned that the VCR belonged to Ms. Sutherland (T416,422). Asked how he came into possession of the VCR, appellant told Bell he found it after taking out the garbage (T415,423). He took it home and then drove it to the pawnshop (T415). Bell did not ask appellant which pawnshop he

took it to, because he already knew that the pawnshop was at Seventh and Nebraska, about nine miles from appellant's residence (T416,425-26).

On cross, Detective Bell stated that another person by the name of William Kunkle came up as a possible suspect at the beginning of the investigation. According to Bell, Kunkle was talked to, but nothing came of it. Hair samples were taken from Kunkle and sent to the FDLE. Kunkle also provided fingerprints and blood and saliva samples (T417,420-21,425).

Detective Bell testified that the toilet lids in both bathrooms in the Sutherland apartment were in the up position. They were not dusted for fingerprints (T419-20). A strand of hair was found in Ms. Sutherland's bathroom sink (T420). A gray shoestring had been found around her neck. Detective Bell looked around the apartment but found no shoestrings missing from any of her shoes (T420). What appeared to be a bloody fingerprint was visible on Ms. Sutherland's wrist. The detectives attempted to lift the print but were unable to do so (T421,424).

On January 30, appellant's apartment was searched but nothing was found linking him to this case (T421). Detective Bell checked the Sheriff's Office's pawn files and found that appellant had pawned a television set on January 15, the day before the homicide. From everything Bell could gather, the TV set was not stolen (T423).

At the close of the state's case, the defense moved for judgment of acquittal, which was denied (T429-46).

The defense called Sydney Bayles, who resides in the same apartment complex as appellant and Sandra Sutherland. Bayles had seen Ms. Sutherland a couple of times in the complex; the last time he saw her was near the mailboxes on the day before she was killed (T447,452). He identified a photograph of her (T448-49). She was standing on the sidewalk, arguing with a big white male whom Bayles had never seen before (T447). The man was about 6'1", 220-230 pounds, with a mustache (T451-52). This individual and Ms. Sutherland were "cussing and screaming at each other", using gestures and obscenities (T448,453-54). Bayles' car window was down and he could hear them plainly (T448). When, out of curiosity, Bayles glanced over at them, the man turned toward him and said, "What the fuck are you looking at?" (T448,452-53). Bayles said "Nothing", and went about his business (T448,453).

The next day, when he saw police vehicles at the complex and learned what had happened, Bayles told the officers what he had seen and heard (T449). He had no further contact with anyone from the police department (R450).

Bayles testified that he had only lived in the apartment complex for about a month (T451). He does not know appellant and has never seen him before (T450).

Dr. Charles Diggs was recalled by the defense. He stated that Ms. Sutherland was probably lying face down on the bed when the stab wounds were inflicted, but he could not tell exactly how she was positioned (T491,497-98, see T464). The person who inflicted the wounds was most likely standing over and behind her, but again

Dr. Diggs could not determine his precise position (T493-94,496, see T467-68). The direction of the wounds was a slight left to right angle (T494-96,500,see T479). This would indicate that the assailant was left-handed, if he was directly behind the victim (T496). However, because he could not determine the exact positions of the individuals, Dr. Diggs was not saying that the perpetrator of this offense was necessarily left-handed (T497).

Dr. Diggs testified that there was no evidence of a struggle, no evidence that the victim was beaten, and no defensive wounds (T492-93,498, see T466,476).

Dr. Diggs stated on proffer that two main possibilities entered his mind when he observed the scene; either a possibly consensual sexual bondage situation, or a situation where the victim may have submitted to being bound and gagged out of fear (T465-66,474,476-77,480-85). While the circumstances were consistent with either hypothesis, Dr. Diggs stated that he did not have enough information to draw a more definite conclusion one way or the other (T474, 476-77,480-485). Defense counsel clarified for the record that he sought only to elicit from Dr. Diggs that the evidence was consistent with consensual bondage which later escalated into a homicide (T460-62,480,484-85).[2] The trial judge initially ruled that she would allow the question, with the state then being permitted to bring out on cross that the evidence was

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[2] The theory of the defense in this case was that this was not a robbery murder committed by appellant, but rather a sexual homicide committed by someone else -- possibly William Kunkle, or the white male whom Sydney Bayles saw having a heated argument with the victim.

consistent with the second hypothesis as well (T480-81). After further discussion, however, the judge disallowed any questioning about the circumstances being consistent with sexual bondage, concluding that it would be speculation (T485,489).

Brad Ganka, a painting contractor, was familiar with the Brookside Apartments, having painted all of the exteriors (T501). He had seen Sandra Sutherland before and knew where her apartment was, although he did not know her by name (T502-04,506). At around 10:00 a.m. on January 16, 1991, Ganka, accompanied by his girlfriend Bernice Phipps, was driving by the complex when he saw an acquaintance of his named Bill standing inside the doorway of Sandra Sutherland's apartment (T502-03). The door was open, and Bill was halfway in, halfway out, leaning against the door (T503-04). As soon as Bill spotted Ganka, he tried to go back in, then came out very quickly, locked the door, and walked around the corner (T503-05,509). Ganka was positive that it was Sandra Sutherland's apartment, and he was certain that Bill locked the door because he saw him with the key in his hand turning it (T503-05, 509). There was nothing obstructing his view (T506,508).

Ganka testified that Bill was working as a carpenter at the Brookside complex (T503). Ganka used to see him every day at work, and "I was kind of friends with him. You know, I talk to him, you know. I wasn't no enemy or nothing" (T504). He described Bill as 5'8" or 5'9", 150-160 pounds, with brown hair (T504). He has since learned that Bill's full name is William Kunkle (T506).

The day after Sandra Sutherland's murder, Ganka told the police what he had seen (T505). He testified at trial that he does not know appellant and has never seen him before (T505).

Bernice Phipps was in the van with Brad Ganka, and she too saw Bill at the entrance to Sandra Sutherland's apartment (T510-13). She knows Bill when she sees him, and there was no doubt in her mind that he was the person she saw (T512). She did not know Ms. Sutherland personally, but she had seen her a couple of times and knew which apartment she lived in (T511). It appeared to Ms. Phipps that Bill was locking the door (T512,514). He then walked pretty fast around the corner (T512).

Ms. Phipps could see plainly out the window from the passenger seat of the van. There was nothing obstructing her view and Brad was not blocking her line of vision (T514). She could see the keys in Bill's hand when he was locking the door (T514).

Ms. Phipps does not know Appellant and has never seen him before (T513).

The trial judge then read to the jury a stipulation agreed to by the state and the defense, stating that debris recovered from Sandra Sutherland's blanket and bed clothing, and several questioned hair samples recovered from her breast area and from the sink and the top of the sink vanity, were submitted to FDLE micro-analyst Debra Steger. Also submitted were known head and pubic hair strands and pubic hair combings from Sandra Sutherland, and known hair strands collected from William Kunkle. Ms. Steger was asked by the Tampa Police Department to check the various exhibits

for the presence of Negroid hair.[3] No Negroid hair was found in the exhibits. Ms. Steger was not asked to do any other comparisons, and was not asked to compare the known hair sample of William Kunkle to the hairs recovered from the scene (T526;R56-57).

Appellant, Charles Finney, took the stand. He is a native of Georgia, and had been living in Tampa since 1985 or 1986. He is divorced, with an eighteen year old son in the Army. In January 1991 he was living in the Brookside Apartments with his fiancee, Tammy Gallimore, and their three year old daughter. He was working as a chef at the Psychiatric Care Center, and was also employed at Chili's Restaurant. Previously, he had been a maintenance worker at the apartment complex (T528-31).

Appellant had lived in his present apartment for about six months, and in the complex for a year and a half (T529-30). When he was in the first apartment, Sandra Sutherland lived in the unit behind him; they were cordial acquaintances (T530). They would talk about the plants on their respective patios, and she gave him advice on how to make them grow (T530). Appellant was in Ms. Sutherland's first apartment about three times on maintenance calls (T531,550).

Both Ms. Sutherland and appellant eventually moved to other apartments in the same complex (T531-32). Prior to her move, she asked appellant if he would screen her patio in her new apartment the way he had done his own, with lattice and wood (T532). Then,

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[3] Appellant is African-American. William Kunkle is white (T590).

after she had moved, appellant saw her on her back patio watering plants, and they talked some more about screening it in (T532-33). She gave him a tape measure and a piece of paper. Then she said not to write on that, and handed him a note pad and pen instead (T533,551-52). He took the measurements (T433,551).

Ms. Sutherland was of German descent, and appellant had been stationed in Germany in the military. They used to converse a little in German and they both liked the food. They agreed that instead of paying cash for appellant to do the patio, she would take him and Tammy to dinner at a German restaurant (T537).

A week or two later, appellant went back to see if she wanted him to go ahead and do the job, and if she had gotten the materials (T534,552). This time he went inside the apartment (T552). Ms. Sutherland told him that the new maintenance man had told her that she had to use aluminum kick plates, which would cost about $400, so she had decided not to screen the patio (R534-36,538-39). She was moving stuff from one room to another in boxes, and taking things out, "little whatnots and stuff" (R536). Appellant helped her move the boxes (T536,552). They talked about her trip to Germany, and a recently canceled trip she had planned to take to Ireland (T537-38). While they were talking, appellant was looking at some cameras and things that were in the boxes (T538,553). He did not specifically recall a jar of Vitamoist creme (T537).

That was the last time appellant was inside Ms. Sutherland's apartment (T536,552). There were a couple of other occasions when he had spoken with her outside. One time, before she moved, he saw

her at the mailboxes and they talked for a little while about her trip. Then, a few days before she was killed, when appellant was coming in early in the morning and Ms. Sutherland was getting ready to leave in her car, she came over to talk to him. They bantered a little bit, and also spoke about the Gulf War (T539-40,555-56).

On January 16, appellant had a cold and didn't go to work (T540). In the morning, after Tammy had left for work, two maintenance men came to patch some holes in the wall where an alarm system had been put in (T541). Then they went to get a supervisor. Appellant decided to take the trash out because the apartment smelled of fish (T541-42). By the dumpster, he saw a box containing a green bag like a military laundry bag, some newspapers, and some pillows (T542). In the bag you could see the corner of something which looked like a compact disc player, but which turned out to be a VCR (T542-43). At the time, the apartments were being renovated and they were throwing things out which had been left in the apartments (T543). Some of these items were in pretty good shape and could be cleaned up or fixed (T543-44). Appellant had found things at the dumpster before. The day before he found the VCR, he had pawned a television he had found there (T543). He testified that the dumpster was four to five buildings down from Sandra Sutherland's apartment (T542).

Appellant, intending to pawn the VCR for pocket cash, took it home and cleaned it up; then took it to the pawnshop (T543-44). Since he had pawned things before, he was familiar with the procedure. He knew he would have to show a picture ID, give his

address, and be fingerprinted. He knew that the serial number on the VCR would be recorded, and that the pawn records go to the police department (T544-45). At the pawnshop, appellant presented his Georgia driver's license and also gave his current local address (T545).

When he was questioned by Detective Bell, he already knew that Ms. Sutherland had been killed, because Tammy read about it in the paper and told him (T546-47). Appellant had known her as Sandy; he had assumed her last name was a German name (R545). When Bell told him that the VCR he had pawned belonged to Sandra Sutherland, he was shocked (T547).

Appellant testified that he was not in Sandra Sutherland's apartment on January 16, 1991; he did not take the VCR out of her apartment, and he did not kill her (T547).

The defense rested, and unsuccessfully renewed its motion for judgment of acquittal (T562).

William Kunkle was called by the state in rebuttal. He was a carpenter working for a contractor at the Brookside Apartments (T564). He is acquainted with Brad Ganka, but did not know Sandra Sutherland or appellant (T566,569). The apartment complex had undergone complete remodeling over the past few years (T565). The renovations had already been completed in unit 378 (Ms. Sutherland's apartment) on January 16, 1991 (T566-67). Kunkle thought he might have hung the front door on that apartment during his first week on the job (R567). Other than that, he never had occasion to go into that apartment (T567). He typically works on unoccupied

apartments, except when he does maintenance orders (T569). As part of his employment, he carries a set of master keys (T569).

Kunkle testified that on January 16, he was working in apartment 307 until around 10:00 or 11:00 a.m.; then stopped in apartment 474 for 5 to 15 minutes to measure counter tops; then worked in apartments 348 and 349 until lunchtime (T567-68,571-72). He stated that he was not at apartment 378 on that day (T569). He did not spend the whole day at the carpenter's shop, although he did go there on occasion; he is "in and out of the shop all day long" (R566,572). Asked whether he recalled telling Detective Stanton that he was working with his father in the shop all day long on January 16, Kunkle replied "No, I told him that the day before the 16th, the 15th, I had worked all day in the shop" (T570).

After he was questioned by the police concerning his whereabouts on January 16, Kunkle provided hair and saliva samples and fingerprints (T568,572). His apartment and car were searched. Several pocket knives were seized and eventually returned (T573-74). Kunkle stated that he uses these knives in his work (T574). About eight months later, at the request of Detective Bell, Kunkle provided a blood sample (T568,573).

Kunkle testified that he is around 5'10" and weighs about 165 pounds (T568). The record indicates that he is a white male (T590).

The state recalled Detective Bell, and introduced a photograph of the front of Sandra Sutherland's apartment (T576-79). The photograph shows a tree on the grass to the left of the front door

(E78). The prosecutor contended that the photo rebutted the testimony of Brad Ganka and Bernice Phipps that their view was not obstructed when they saw William Kunkle in the doorway, while defense counsel contended that it was not proper rebuttal because the tree was not located where it would block their line of vision (T577-79).[4] The judge allowed the photo in "for whatever its worth" (T579).

Detective Bell testified that William Kunkle was interviewed on the day after Ms. Sutherland's murder. Asked his whereabouts, Kunkle said he was working in apartments 348 and 349 from 9:00 a.m. until 11:30 (T626). Blood, hair, and saliva samples were obtained from him, and some knives were recovered in a search of his car (T580). The knives were submitted to the FDLE, and later returned to Kunkle (T580). In July 1992, testing was done to see if semen stains on Ms. Sutherland's bedsheet matched Kunkle's blood type. (T627). Nevertheless, according to Detective Bell, Kunkle had earlier been eliminated as a potential suspect when the pawn ticket was found putting appellant in possession of the VCR (T587,627).

Bell testified that when he interviewed appellant, he informed him at the outset that he was investigating the homicide of Sandra Sutherland (T585). Appellant told Bell that the last time he'd seen her was at the mailbox two months earlier (T585).

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[4] Defense counsel also pointed out in his closing argument that the prosecutor never showed the photograph to either Ganka or Phipps, and never asked them whether the tree was blocking their view (T676-77).

Fingerprint examiner David Farnell was recalled. He testified that he had compared the known fingerprints of William Kunkle to the approximately twenty-five unidentified prints from the Sutherland apartment which were of sufficient quality to be compared. None of those fingerprints matched Kunkle's (T629).

The defense called Tampa homicide detective Richard Stanton on surrebuttal. He had interviewed William Kunkle on January 17, 1991, the day after Sandra Sutherland's murder. Asked where he had been on that date, Kunkle told Stanton that he had spent the entire day of the 16th working in the shop with his father (T633).

A stipulation was read to the jury stating that a small semen stain was found on Ms. Sutherland's bedsheet; the stain could not be dated, and was insufficient to be analyzed by the FDLE serologist; and the serologist had received a blood sample from William Kunkle (T636).

During its deliberations, the jury submitted several questions: (1) "Time that Mr. Finney was at apartment of Sandra Sutherland the last time"; (2) "What time the workers were at Mr. Finney's apartment, 1/16/91"; and (3) "What was testimony of -- how long the fingerprints will be present?" (T736-37, see T737-56). With the assent of counsel, the judge had the court reporter read back to the jury the testimony of appellant and Detective Bell and portions of the testimony of the fingerprint examiner Farnell (T756).

B. **Penalty Phase**

At the beginning of the penalty phase, at the request of the state, the trial court took judicial notice and instructed the jury that "[o]n July 20, 1992, Charles Finney was convicted by a jury of kidnapping, robbery with a weapon and sexual battery with the threat of use of great force. The victim was Judy Baker" (T818-19, see T798; R97). Over several defense objections and motions for mistrial (T798-804,807,811-13,827-31,834-37), the state then introduced the testimony of Judy Baker concerning the events which led to those convictions (T820-38).[5]

The defense called Tammy Gallimore, appellant's girlfriend and the mother of their four year old daughter. They had met in Georgia about seven years before, and formed a friendship which developed into a relationship (T840-41,856). When they met, appellant was working as a foreman for an electric company (T840). He also took a second job at the Greyhound Bus Station, because he was making voluntary child support payments to his ex-wife, for his son from that marriage (T841-42). Tammy described appellant as a hard worker and a good provider; a gentle, kind, and caring person; generous with his friends and well-liked (T840,842-43).

In March, 1988 they moved to Florida, because Tammy wanted to continue her education. Although it meant giving up his secure employment with the power plant, appellant agreed to move, and encouraged her in her decision (T843-44). In Tampa, Tammy got a

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[5] To avoid repetition, Ms. Baker's testimony is summarized in detail in Issue IV, infra.

job at Boise Cascade, and worked full time and attended school full time (T844,846). Appellant found a job as a dietician at the University Hospital (T845-46).[6] Appellant did some of the housework; the rest they did together on the weekends (T846).

On April 21, 1988, their daughter Shannon was born (T847). The pregnancy was unplanned, and Tammy went through a lot of emotional depression at first (T847). She considered an abortion, but neither she nor appellant believed in it. They talked it over and decided to have the child (T847). Appellant was there supporting her throughout the pregnancy and delivery, and the pregnancy turned out to be a joyous time for both of them; "[h]e loved the baby as well when I was carrying it" (T847-48).

When the baby was born, appellant was as happy as she'd ever seen him (T848-49). He was devoted to Shannon; he would stay up with her when she had the colic, and when she was old enough, he would take her for walks around the apartment complex (T849-50).

Appellant is very much artistically inclined (T850). He makes intricate jewelry box houses, with moving compartments, out of popsicle sticks, corn dog sticks, and plywood, and sells then for $75 to $100 or more (T950-51;E94). He would sit down with Shannon at the kitchen table and they would draw things together. Shannon is now showing an artistic ability as far as coloring and drawing which is unusual for a four-year-old (T851). Since he has been in

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[6] Appellant worked at the hospital for about a year, then took a maintenance job with the apartment complex for a year and a half to two years. After that, he became a chef at the U.S.F. Psychiatry Center and also worked at Chili's Restaurant (T845-46,849,854-55).

prison, appellant writes letters to Shannon for Tammy to read to her, and sends drawings with cartoon characters for her to color (T852-53;E96-97).

Tammy testified that Shannon loves her father and misses him very much (T853,855). Whenever they visit, she is excited to see him (T853). Tammy asked the jury to spare appellant's life so their daughter could continue her contact with her father, and know that he loves her (T855-56).

Joseph Williams met appellant and Tammy shortly after they moved to Tampa. He was driving on a hot day, and he saw them walking and holding hands. Appellant had his shirt off and he was holding it over Tammy's head to shelter her (T860-661,863). They seemed warm and loving, and looked like they needed assistance, so Williams stopped and offered them a ride (T861-62). During the conversation in the car, appellant said he'd been to the Veteran's Hospital to fill out a job application, and Williams said he might be able to help him get a job where he worked, at University Hospital (T861-62). As a result, appellant applied there and was hired. He was very grateful to Williams for his help (T862-63).

Williams described appellant at the hospital as "the best working man I ever seen on a job" (T867). He showed the initiative to do extra work that needed to be done, and to help out the other workers (T867). He was later recruited to work at the Psychiatric Center, because the head chef (who had been at University when appellant was employed there) liked his work so much (T868).

Appellant also did some work at Williams' house, and at the homes of Williams' mother and his ex-wife. He could do carpentry, painting, plumbing, roofing, and yardwork (T863,866). Williams offered to pay him, but appellant said he didn't want any money. Williams would call different places to find the going rate for the jobs appellant was doing, and insisted on paying him accordingly (T863).

Williams testified that he had complete trust in appellant (T863-64,866). Williams has two sons, and when they got together with appellant "it was just like three sons to me" (T864-65,868-69). Appellant had been in the military service and was honorably discharged (T864-65). Williams considered him a spiritual person, who loved his wife and child. On the job, girls would come on to appellant because he is a nice-looking fellow. He would turn them down, saying he was happy with his wife and kid and wanted no part of going out (T865). According to Williams, appellant was crazy about his daughter; he was proud of her and always talking about her (T865-66).

Dr. Michael Gamache, a forensic psychologist, evaluated appellant by means which included a clinical interview and psychological testing (T869-74). Appellant was born in Macon, Georgia, the youngest of three children, and was raised in poverty or near poverty (T874-75). His father was a very heavy drinker, who left the family when appellant was about three years old (T874). In school, appellant was an average, or slightly better than average, student (T875). When he reached the higher grades, they introduced

busing for desegregation, and he was switched around between several different schools (T875). He adjusted fairly well, and was neither aggressive nor a discipline problem. He had a lot of friends and got along well with the other students (T875). Dr. Gamache thought appellant's childhood could fairly be characterized as deprived, and there were a lot of barriers and other factors that made life tough for him, but he "did reasonably well in light of the circumstances that he was raised in" (T889-90).

After graduation, appellant enlisted in the Army, where he served in the First Airborne Ranger Division. While in the service, he met his first wife and they had a son, Michael (T876). After two years, he received an honorable discharge, and returned to Macon to continue his education (T875-76). He earned certificates in marketing and sales, and in keypunch and computer operating (T876). He worked construction for a while, and then got a job in jewelry sales in a department store. After that he managed a Church's Chicken restaurant for a couple of years, and eventually managed to obtain a position at the local power plant (T876-77). This was considered a "really plum job" because it had benefits and was secure, and it added credibility and stability to appellant's life (T877).

Appellant was settled down and working and providing for his son. However, as the marriage went on, he and his wife began to drift apart. While both of them were religious, his wife had adopted some beliefs and practices he was uncomfortable with, and she was no longer comfortable with his beliefs. Eventually they

separated and divorced (T877). Appellant regretted his separation from his son, although they maintained a fair bit of contact (T878).

Shortly after his divorce, appellant met Tammy Gallimore and they found some common interests and a common bond. They began seeing each other regularly, and then moved in together (T879). Tammy had goals and ambitions of her own, which included coming to Tampa to continue her education. Appellant was supportive and willing to make the sacrifice of giving up a job which he enjoyed and was doing well at (T879). Despite his good employment history, he encountered difficulty in finding a job in Tampa at first. He struggled a little bit, until he was hired at University Hospital (T879).

Dr. Gamache spoke with Tammy at some length, and concluded that her relationship with appellant is a very positive, very strong one. The whole family is a "pretty tight fit unit", and there is a loving bond between the three of them (T880-81). There is no doubt that appellant loves his daughter Shannon. He is a very important person to her, and will continue to be for the rest of her life (T881,890-91).

In the psychological testing, appellant gave what Dr. Gamache found to be consistent, truthful responses (T883). He is neither psychotic, depressive, manic, nor psychopathic [7] (T884,886). A psychopath, as described by Gamache, is cold, calculating, uncar-

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[7] Dr. Gamache also stated, in response to cross-examination, that appellant is not legally insane (T892).

ing, selfish, thrill-seeking, and manipulative; such people will have a behavioral history of lying, cheating, stealing, vandalism, fighting, and alienating his family (T884-86). Appellant does not have these personality or behavioral characteristics (T885-87). Rather, "he's someone who is fairly comfortable with himself and not in a lot of distress. And that is his personality, that is his style, not just necessarily a reflection of how he's doing right now while he's in jail" (T884).

Dr. Gamache expressed the opinion that appellant has a number of favorable character traits; that he would adjust well in prison and would not be a discipline problem, and that he has an excellent potential for rehabilitation (T887-89). Among these positive indicators are his good work history and employment skills; his service in the military with an honorable discharge; and his family oriented values (described by Gamache as "the primary interest and focus in his life") (T887-88). His culinary, artistic, and craftsmanship abilities, and his good verbal skills, would all enable him to be a productive member of a prison setting (T889).

Asked about the effect which visiting appellant in prison would have on Shannon, Dr. Gamache answered that it will be important to her as she grows up to know that her father loves and cares about her (T891). In Gamache's opinion, the positive effects of her coming to visit him in prison will outweigh the negative effects (T891).

C. Sentencing

After denying appellant's Motion for Disqualification (T930-39), the trial judge sentenced appellant to death. She found three aggravating factors: (1) previous conviction of a felony involving the use or threat of violence; (2) capital felony committed for financial gain; (3) capital felony was especially heinous, atrocious, or cruel (R153-55; T942-47). As mitigating factors, the judge found and gave some weight to (1) appellant's exemplary work and military history; (2) his deprived childhood, marked by poverty and abandonment by an alcoholic father; (3) his positive character traits, such as being a hard worker and a good parent; (4) excellent potential for rehabilitation and productive adjustment within the prison setting; and (5) continued opportunity to maintain a loving relationship with his daughter, through frequent visitation (R155-56, T948-50).

SUMMARY OF THE ARGUMENT

[Issue I]: The circumstantial evidence introduced at trial was legally insufficient to sustain appellant's convictions of first degree murder, armed robbery, and dealing in stolen property. When the state relies entirely on circumstantial evidence to convict an accused, such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. Under this standard, the evidence failed to prove that appellant was the person who committed the crimes. The evidence also failed to prove that the killing was premeditated or that it occurred during the commission of a robbery.

[Issue II]: The trial court erred in excluding the testimony of the associate medical examiner, proffered by the defense, that his observations at the crime scene were consistent with consensual sexual bondage which later escalated into a homicide. The theory of defense at trial was that this was a sexual homicide committed by someone else (possibly William Kunkle or the unidentified white male who was seen arguing with the victim the day before she was killed), rather than -- as the state contended -- a robbery murder committed by appellant.

[Issue III]: The trial court's rubber stamping of the decision made by Sheriff's Office personnel to shackle appellant during the penalty phase of his trial plainly violated this Court's holding in Bello v. State, 547 So. 2d 914, 918 (Fla. 1989), and requires reversal for a new trial. Shackling is an "inherently

prejudicial" practice which may be permitted "only where justified by an essential state interest specific to each trial". Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986). Here, when defense counsel asked to have the shackles removed, no showing of necessity was made. The trial judge stated:

> . . . I did not order the shackles. The shackles were decided as a matter of security by the bailiffs and the Sheriff's Office. My feeling about that is, that is their area of expertise. If they made that decision, then I'm going to support that decision.

(T816-17)

[Issue IV]: In a capital sentencing proceeding, the state may introduce testimony as to the circumstances of a prior violent felony conviction, rather than just the bare fact of that conviction. However, the details cannot be emphasized to the point where the other crime becomes the feature of the penalty trial, or the prejudice outweighs the probative value. Stano v. State, 473 So. 2d 1281, 1289 (Fla. 1985); Rhodes v. State, 547 So. 2d 1201, 1204-05 (Fla. 1989). In the instant case, the trial court erred in overruling defense objections to the testimony of Judy Baker and to the prosecutor's closing argument, as the inflammatory and prejudicial impact of her testimony greatly exceeded its probative value.

[Issue V]: The trial court also erred in refusing to allow the defense to cross-examine Judy Baker concerning her description of her attacker. By prohibiting cross-examination of Mrs. Baker as to her description of her assailant and the accuracy of her identification of appellant, after the state had presented to the jury her detailed and emotionally vivid testimony about what a person

"who later became known to [her] as Charles Finney" had done to her, the trial court violated appellant's rights to confrontation, due process, and a reliable penalty determination. Basic fairness demands that if the state elects to go behind the fact of the prior convictions to present witness testimony as to the details of that offense, then it should not be permitted to turn around and use the fact of the convictions as a shield to prevent traditionally relevant cross-examination challenging the accuracy of the witness' identification.

[Issue VI]: The trial court erred in refusing to specifically instruct the jury on nonstatutory mitigating circumstances including (1) appellant's deprived childhood, (2) his contributions to community and society, (3) his potential for rehabilitation and positive adjustment in prison, and (4) his strong bonding with his daughter. The harmful effect of the error was compounded by the prosecutor's misleading argument to the jury, designed to persuade them that the evidence presented on appellant's behalf did not show legitimate mitigating circumstances, but was merely the product of defense counsel's unlimited "creativity." The court's failure to adequately instruct the jury on mitigating circumstances deprived appellant of an individualized sentencing determination, as required by the Eighth Amendment, see Lockett v. Ohio, 438 U.S. 586 (1978), and rendered the jury's death recommendation and the ensuing death sentence unconstitutionally unreliable.

[Issues I-D and VII]: Of the three aggravating factors found by the trial judge, two (pecuniary gain and HAC) were not proven

beyond a reasonable doubt. Additionally, under the circumstances of this case (where the underlying robbery conviction serves as the basis for both the conviction of felony murder and the finding of the aggravating factor), the pecuniary gain aggravator is constitutionally invalid. See State v. Middlebrooks, 840 S.W. 2d 317 (Tenn 1992), cert. granted, ___U.S.___ (53 CrL 3013) (1993), cert. discharged, ___U.S.___ (54 CrL 2021) (1993). The prior violent felony aggravator is valid, but in the event that appellant's convictions in the Judy Baker case are overturned by the Second DCA, this will eliminate their proper use as an aggravating factor. In view of the substantial mitigating evidence, and the five nonstatutory mitigating factors found by the trial court, the death sentence is disproportionate.

ARGUMENT

ISSUE I

THE CIRCUMSTANTIAL EVIDENCE IS INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTIONS OF FIRST DEGREE MURDER, ARMED ROBBERY, AND DEALING IN STOLEN PROPERTY.

A. The Evidence is Insufficient to Prove Identity

When the state relies entirely upon circumstantial evidence to convict an accused, this Court "[has] always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence." Cox v. State, 555 So. 2d 352 (Fla. 1989); Jaramillo v. State, 417 So. 2d 257 (Fla. 1982); McArthur v. State, 351 So. 2d 972 (Fla. 1977). The state has the burden of producing competent, substantial evidence which is clearly inconsistent with the defendant's hypothesis of innocence; where the state fails to meet this burden, the trial court must grant a judgment of acquittal. Fowler v. State, 492 So. 2d 1344, 1347 (Fla. 1st DCA 1986), rev.den. 503 So. 2d 328 (Fla. 1987), approved in State v. Law, 559 So. 2d 187, 188-89 (Fla. 1989). In applying this standard, the version of the events related by the defendant must be believed if the circumstances do not show that version to be false. McArthur, 351 So. 2d at 976; Fowler, 492 So. 2d at 1347; Rager v. State, 587 So. 2d 1366, 1369 (Fla. 2d DCA 1991). As stated in Fowler:

> . . . [W]e must consider whether, in order to be legally sufficient, the circumstantial evidence relied on by the state must lead only

> to an inference or conclusion that contradicts defendant's hypothesis of innocence, or whether it may be susceptible of two or more inferences, one being consistent with defendant's story and others being inconsistent with such story. We conclude that a circumstantial evidence case should not be submitted to the jury unless the record contains competent, substantial evidence which is susceptible of only <u>one</u> inference and this inference is clearly inconsistent with the defendant's hypothesis of innocence. Evidence that leaves room for two or more inferences of fact, at least one of which is consistent with defendant's hypothesis of innocence, is not legally sufficient to make a case for the jury.

[Emphasis in opinion, footnotes omitted].

The state's case against Charles Finney rested on the circumstantial evidence that, on the afternoon of Sandra Sutherland's death, he pawned a VCR which was missing from her apartment, and that his fingerprint was found in two places in the apartment.[8] (See prosecutor's opening statement, T252). The defense countered that there was a reasonable explanation as to how appellant came into possession of the VCR, and how his fingerprints came to be in Ms. Sutherland's apartment. (See defense opening statement, T254). The defense also presented evidence that the offenses could have been committed by a workman at the apartment complex named William Kunkle, who was seen by two witnesses at the victim's door, with keys in hand appearing to lock it, around the time of the crime; who gave inconsistent statements regarding his whereabouts; and

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[8] The evidence introduced by the state and by the defense is set forth in detail in the Statement of the Facts. Due to page limitations, appellant will rely on that summary without recapitulation.

whose hair sample was never compared to the Caucasian hairs found on the victim's body and at the scene.[9]

The evidence presented by the state, while undoubtedly enough to create a strong suspicion that appellant may have been the person who killed Ms. Sutherland and took the VCR, did not lead only to an inference which contradicted his explanation. Indeed, as in Fowler, several aspects of the evidence tended to corroborate appellant's explanation and support his claim of innocence. Moreover, the state failed to prove that the fingerprints could have been placed on the items only at the time the murder was committed. See Jaramillo v. State, supra, 417 So. 2d at 257; Miles v. State, 466 So. 2d 239 (Fla. 1st DCA 1984), rev. den. sub. nom. State v. Hampton, 476 So. 2d 675 (Fla. 1985); J.C. v. State, 377 So. 2d 731 (Fla. 3d DCA 1979); Williams v. State, 308 So. 2d 595 (Fla. 1st DCA 1975); Knight v. State, 294 So. 2d 387 (Fla. 4th DCA 1974); Ivey v. State, 176 So. 2d 611 (Fla. 3d DCA 1965); Tirko v. State, 138 So. 2d 388 (Fla. 3d DCA 1962). Since appellant explained his possession of the VCR, and showed through his testimony (uncontradicted by the state) that he was in Ms. Sutherland's apartment by her invitation, helping her move boxes, at a time other than at the time of the crime, his explanation must be accepted in the absence of proof by the state showing it to be false.[10] See Sorey v.

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[9] The FDLE microanalyst found no Negroid hair in any of the exhibits. Appellant is African-American. Kunkle is white.

[10] The fingerprint on the envelope with German writing, according to appellant, must have been placed there when he and Ms. Sutherland were discussing screening her patio and she handed him (continued...)

State, 419 So. 2d 810, 814 (Fla. 3d DCA 1982); Amell v. State, 438 So. 2d 42 (Fla. 2d DCA 1983); Williams v. State, supra, 308 So. 2d at 596-97). The circumstantial evidence, as a whole, was insufficient to prove identity or to sustain the convictions of first degree murder, robbery, and dealing in stolen property.[11] Appellant convictions and death sentence must be reversed, with directions to enter an order of acquittal. Jaramillo; Cox.

B. The Evidence is Insufficient to Prove Premeditation

Premeditation is the essential element which distinguishes first degree murder from second degree murder. Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986); Hoefert v. State, 617 So. 2d 1046, 1048 (Fla. 1993). Under Florida law, premeditation means "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide." Spinkellink v. State, 313 So. 2d 666, 670 (Fla. 1975), quoting McCutchen v. State, 96 So. 2d 152, 153 (Fla. 1957). See also Wilson, 493 So. 2d at 1021 (Fla. 1986); Tien Wang v. State, 426 So. 2d 1004, 1005 (Fla. 3d DCA 1983). Premedi-

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[10](...continued)
a piece of paper to write measurements on, then said not to write on that and gave him a notepad instead.

[11] On the dealing count, the state filed to prove that appellant knew or reasonably should have known that the VCR was stolen (see T430,437,445). He testified that they were renovating the apartments and it was not unusual to find usable or saleable items at the dumpster. Indeed, the day before he pawned the VCR, he had pawned a television he found there (T543-44). Detective Bell verified the pawn records and, from everything he could gather, the TV set was not stolen (T423).

tation may be proven by circumstantial evidence. Hoefert, 617 So. 2d at 1048. However, "where . . . premeditation is sought to be established by circumstantial evidence, the evidence relied on by the state must be inconsistent with every other reasonable inference." Wilson, at 1022; Hoefert at 1048; Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989). "Where the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained." Hoefert, at 1048; see Hall v. State, 403 So. 2d 1319, 1321 (Fla. 1981); Smith v. State, 568 So. 2d 965, 967 (Fla. 1st DCA 1990); Tien Wang, 426 So. 2d at 1006. A rage or frenzy is inconsistent with the premeditated intent to kill someone. Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988).

In the instant case, the state's expert, Associate Medical Examiner Diggs, stated on cross-examination that it was his opinion, based on his experience, that the victim's wounds in this case were probably the "result of a frenzic type passion" (T397-98). Later, during the defense's case, Dr. Diggs testified that there was no evidence of a struggle, no evidence that the victim was beaten, and no defensive wounds (T492-93,498, see T466,476). Defense counsel proffered Dr. Diggs' testimony that the evidence he observed at the scene was consistent with consensual sexual bondage which escalated into a homicide. However, Dr. Diggs stated that his observations were also consistent with situations where the victim submits to being bound and gagged out of fear. Because the circumstances were consistent with either hypothesis, Dr. Diggs

stated that he could not draw a more definite conclusion one way or the other. For this reason, the trial judge excluded his testimony on this subject (See T460-89). [See Issue II, infra].

Since the state's own expert concluded that the circumstances were consistent with a consensual act of sexual bondage which escalated into a homicide,[12] and since he testified that the multiple stab wounds were probably the result of a "frenzic type passion" [See Mitchell], it clearly cannot be said that the evidence was inconsistent with every reasonable inference except that of premeditation. Therefore, neither the nature of the weapon, the manner in which the homicide was committed, nor the nature and manner of the wounds provide sufficient circumstantial proof of premeditation. See Spinkellink v. State, 313 So. 2d 666. 670 (Fla. 1975); Larry v. State, 104 So. 2d 352, 354 (Fla. 1958); Smith v. State, 568 So. 2d at 967-68. Assuming arguendo that the evidence was sufficient to prove identity, there was no evidence of previous difficulties between appellant and Ms. Sutherland, and no evidence of any actions by appellant before or after the homicide which would show a premeditated design to kill.[13]

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[12] The state had initially charged appellant with sexual battery, but then nolle prossed that count of the indictment. At trial, it was the defense which introduced evidence to show that sexual activity may have occurred (see T.393-98). The defense's position at trial was that (1) appellant did not commit this crime, and (2) whoever did commit it may have engaged in sexual relations, possibly of a consensual nature, with the victim and it escalated into a rage-type homicide.

[13] The fact that appellant pawned the VCR (even assuming that he was the one who took it from the apartment and who committed the homicide) does not show that the killing was premeditated. The (continued...)

Since the evidence also failed to prove felony murder [Issue I-C, infra], then (again assuming arguendo that the evidence was sufficient to prove identity) appellant's first degree murder conviction and death sentence must be reversed with instructions to enter a judgment and sentence for second degree murder. Hall, 403 So. 2d at 1321; Hoefert, 617 So. 2d at 1050; see Fla. Stat. § 924.-34.

C. The Evidence is Insufficient to Prove Felony Murder and Armed Robbery

As with identity and premeditation, the state relied entirely on circumstantial evidence to prove robbery, felony murder (with robbery as the predicate felony), and the aggravating factor that the homicide was committed for pecuniary gain. Once again, the burden is on the state to introduce evidence which excludes every reasonable hypothesis except that of guilt.[14] Atwater v. State, ___So. 2d ___ (Fla. 1993) [18 F.L.W. S 496]; see e.g. Law; Cox; McArthur; Fowler. Again, this burden has not been met. The evidence in the instant case was entirely consistent with the reason-

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[13](...continued)
state's own expert, Dr. Diggs, testified that the nature of the multiple stab wounds were typical of a crime committed in a frenzy or passion, and were not at all characteristic of a robbery murder (T397-98). The circumstantial evidence is entirely consistent with the reasonable hypothesis that the taking of the VCR was an afterthought instead of a motive. See Issue I-C, infra.

[14] With respect to an aggravating factor sought to be proven by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor. Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992); Eutzy v. State, 458 So. 2d 755, 758 (Fla. 1984).

able hypothesis that the taking of the VCR was an afterthought, and was merely incidental to the homicide. Conversely, there was no evidence that a pre-existing desire to obtain the VCR (or to acquire any other property or money) was the motivating factor, or even a contributing factor, in the homicide. Unlike Atwater, and unlike Bruno v. State, 574 So. 2d 76, 80 (Fla. 1991), there was no evidence of any statements by appellant showing that he "possessed the requisite intent to commit the crime of robbery at the time he committed the murder"[15] See Bruno, 574 So. 2d at 80. Nor did the evidence of appellant's prior acquaintance with Ms. Sutherland (which consisted of his testimony that they were cordial neighbors, and that they had talked about having him screen in her porch) suggest even circumstantially an intent to rob. Contrast Atwater (rejecting argument that taking was an afterthought, where state presented testimony that Atwater had obtained money from Smith [the victim] on previous occasions; that on the day of the killing Smith told a friend he was not going to give Atwater any more money; that Smith had money in his pockets shortly before the killing; and when Smith's body was found, his pockets were turned out and the only money found in the room was a few pennies on the floor); and Bruno (rejecting argument that taking was an afterthought, when prior to homicide Bruno had borrowed a friend's car saying he was going "[t]o get stereo equipment"; Bruno was admiring the stereo in victim's apartment just prior to hitting victim over the head with

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[15] For purposes of this sub-argument, it will be assumed without conceding that the evidence sufficiently established that appellant committed the homicide.

a crowbar; then left the apartment and told another witness that he was going back to get some stereo equipment from the "guy's house who he killed"; and then made several trips back to the apartment for the purpose of stealing the stereo and its associated equipment.)

In addition, in the instant case, the state's own expert, Associate Medical Examiner Diggs, testified on cross as follows:

> MS. PITTMAN [defense counsel]: . . . regarding your examination of the stab wounds, Doctor, isn't it your expert opinion that because of the nature of the wounds it would indicate that they occurred in a quick succession, done in some type of frenzic passionate activity?
>
> DR. DIGGS: That is correct.
>
> Q. Okay, And you, in your expert opinion, would categorize the wounds as passionate-type wounds?
>
> A. Yes. In the past I've seen these types of wounds take place as a result of a frenzic -- frenzic type passion.
>
> Multiple stab wounds, very often, when a person has been -- most forensic pathologists experience -- those of us who have worked in big city jurisdictions for a long period of time, to see a wide pattern of stab wounds, multiple stab wounds such as in this case taking place as a result of a passion type of overkill-type frenzy that you have.
>
> Usually, when a person has been robbed, very often you will only see maybe about one or two stab wounds. Just enough to incapacitate the person.
>
> But in these types of cases there's a lot more going on than that.

(T397-98).

Also, on proffer, Dr. Diggs stated that the evidence he observed at the scene was consistent with an act of sexual bondage, possibly consensual, which escalated into a homicide. However, he said his observations were also consistent with the victim submitting to being bound and gagged out of fear, and because the circumstances were consistent with either hypothesis, the trial court excluded Diggs' testimony on this point (T460-89) [See Issue II, infra].

Plainly, then, the state's circumstantial evidence was susceptible of two (or more) reasonable inferences, at least one of which is that the killing was not done in the commission of a robbery and was not done to obtain the victim's VCR.[16] See Fowler v. State, 492 So. 2d 1344, 1347 (Fla. 1st DCA 1986), rev. den., 503 So. 2d 328 (Fla. 1987), approved in State v. Law, 559 So. 2d 187, 188-89 (Fla. 1989) (circumstantial evidence case "should not be submitted to the jury unless the record contains competent, substantial evi-

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[16] Although the bedroom (unlike the rest of the apartment, which was merely untidy) appeared to Detective Bell to have been "ransacked" (T406,418), and although items which were probably from Ms. Sutherland's purse were found lying near the purse on the bed (T319,R56,58), there was no evidence that anything other than the VCR was taken. Both televisions, the stereo, an oil painting, and the crystal were still in place (T273-74). There was no evidence that anything was taken from her purse or wallet. (See T58, showing the wallet containing cards in the plastic pockets). Although Ms. Sutherland's mother (who was allowed inside the apartment the day after the crime) thought her daughter's jewelry box was missing (T273-74), crime scene technician Kunde testified that on the afternoon of the crime she photographed a jewelry box and dusted it for fingerprints (T338-39, see T313-14). No other evidence regarding a jewelry box was presented. Even assuming arguendo that the evidence were sufficient to prove that Ms. Sutherland's assailant at some point ransacked the bedroom looking for something to steal, there is still no evidence to show whether he did that -- or formed the intent to do that -- before or after the homicide.

dence which is susceptible of only one inference and that inference is clearly inconsistent with the defendant's hypothesis of innocence").

Undersigned counsel wishes to make it clear that he is not arguing that robbery can never be committed by taking the victim's property after the victim has been killed. If the intent to take the money or property exists at the time of the killing, that is clearly sufficient to prove robbery and felony murder. Atwater, Bruno. However, those decisions also indicate that if the evidence does not establish a pre-existing or concurrent intent to rob, then it is insufficient to prove robbery, or felony murder predicated on robbery. See also McCall v. State, 503 So. 2d 1306, 1307 (Fla. 5th DCA 1987), rev'd on other grounds, 524 So. 2d 663 (Fla. 1988) ("neither sexual battery nor robbery can be committed against a corpse").

Appellate courts in numerous other jurisdictions have held accordingly. See, for example, State v. Lopez, 762 P. 2d 545, 552 (Ariz. 1988):

> Obviously, we are not saying that a defendant immunizes himself from a robbery conviction by killing the victim. What we are saying is that the robbery statute requires the coexistence of an intent to commit a robbery with the use of force. If a murder is committed with no intent to commit a robbery, it is still murder but it is not armed robbery. If a theft is conceived of and executed after a murder, it is a theft, but it is not an armed robbery.

In Connolly v. State, 500 So. 2d 57, 62 (Ala.Cr.App. 1985), it was stated:

> An "impressive majority" of jurisdictions which have considered this question in the context of a felony murder charge have "concluded that an accused is not guilty of a felony-murder where he forms felonious intent only after he commits the killing." . . . [A]n accused is not guilty of capital robbery-murder where the intent to rob was formed only after the victim was killed.

People v. Rice, 402 N.Y.S. 2d 191, 192 (N.Y. Sup.Ct. App.Div. 1978) holds:

> If the intent to commit the felony, robbery in this case, came into being after the defendant had killed his victim, the defendant was not guilty and could not be convicted of felony murder. . . . The logical inference from all the evidence was that the taking of the property was an afterthought and that the intent to rob did not precede the killing. At most for the prosecution such inference is equally consistent with an inference of prior intent.

And in Bouwkamp v. State, 833 P.2d 486, 492 (Wyo. 1992) states:

> When a reasonable doubt remains as to whether the felony may have occurred as an afterthought that followed the killing, the killing cannot have been "in the perpetration of the felony," and the homicide may not be elevated to murder in the first degree by application of the felony murder rule.

See also Commonwealth v. Moran, 442 NE 2d 399, 401 (Mass. 1982); People v. Morris, 756 P.2d 843, 854 (Cal. 1988); People v. Tiller, 447 NE2d 174, 181 (Ill. 1982); Branch v. Commonwealth, 300 SE 2d 758, 759-60 (Va. 1983); People v. LeFlore, 293 NW 2d 628, 620-31 (Mich. App. 1980); Woods v. Linehan, 648 F.2d 973, 978 (5th Cir. 1981).

Both under the Florida circumstantial evidence standard [Law; Cox; McArthur] and even under the federal constitutional standard of Jackson v. Virginia, 443 U.S. 307 (1979) [see Woods v. Linehan, 648 F.2d at 978], the evidence in the instant case was insufficient to prove robbery or felony murder predicated on robbery. Since the evidence was also insufficient to prove premeditation [Issue I-B, supra], appellant's murder conviction must be reduced to second degree pursuant to Fla. Stat. §924.34.

Even assuming that this Court were to find the evidence of premeditation to be legally sufficient, the state clearly cannot show beyond a reasonable doubt that the jury's verdict was not based on the erroneously submitted theory of felony murder, or that the felony murder theory did not at least contribute to the jury's first degree murder verdict. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Stromberg v. California, 283 U.S. 359, 368 (1931); Yates v. United States, 354 U.S. 298, 312 (1957) (verdict must "be set aside in cases where the verdict is supportable on one ground but not on another, and it is impossible to tell which ground the jury selected"). See also People v. Guiton, 847 P.2d 45 (Cal. 1993) (harmonizing Stromberg principle with Griffin v. United States, 502 U.S. ___, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991), and applying traditional harmless error review, holding that judgment should be affirmed unless the record demonstrates a reasonable

probability that the jury found the defendant guilty solely on the unsupported theory).[17]

D. The Evidence is Insufficient to Prove the Aggravating Factor that the Homicide was Committed for Pecuniary Gain

In the event that this Court does not reduce the murder conviction to second degree, then the penalty issues will need to be addressed, and one of these is the trial court's finding of the aggravating factor that the homicide was committed for pecuniary gain. Because it is conceptually nearly identical to the robbery and felony murder issues, appellant will discuss it in this Point on Appeal. As this Court has repeatedly held, in order to sustain the aggravating factor, it is not sufficient to show that property or money was taken incidental to the homicide; rather, the state must prove beyond a reasonable doubt that the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain. Peek v. State, 395 So. 2d 492, 499 (Fla. 1981); Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982); Parker v. State, 458 So. 2d 750, 754 (Fla. 1984); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988); Rhodes v. State, 547 So. 2d 1201, 1207 (Fla.

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[17] In the instant case, the record affirmatively demonstrates that, notwithstanding the insufficiency of the evidence as a matter of law, the jury must have concluded that appellant was guilty of felony murder, because it also convicted him on the separate count of armed robbery. That fact, coupled with the facts that the evidence of premeditation (assuming arguendo that it was sufficient to withstand a motion for judgment of acquittal) was circumstantial and hardly overwhelming, and that the state's own expert characterized the stabbing as the result of a frenzic-type passion, demonstrates a more than reasonable probability that the jury convicted appellant solely on the felony murder theory.

1989); Hill v. State, 549 So. 2d 179, 183 (Fla. 1989); (Clarence) Jones v. State, 580 So. 2d 143, 146 (Fla. 1991); Clark v. State, 609 So. 2d 513, 515 (Fla. 1992). See also Young v. Zant, 506 F. Supp. 274, 280-81 (M.D. Ga. 1980). Where the evidence did not show that the defendant "possessed the requisite intent to deprive the victim of her property at the time of the murder", this Court struck a finding that a homicide occurred during the commission of a robbery. Rhodes. Similarly, where the circumstantial evidence fails to prove that the taking of money or property was a primary motive for the homicide, or fails to prove that the taking "was anything but an afterthought" [Clark, 609 So. 2d at 515], neither a finding of the robbery aggravator [Parker; Clark] nor the financial gain aggravator [Simmons; Hill] can be sustained. The financial gain aggravator is invalid unless there is "sufficient evidence to prove a pecuniary motivation for the murder itself beyond a reasonable doubt. Such proof cannot be supplied by inference from the circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance." Simmons, 419 So. 2d at 318; see Hill, 549 So. 2d at 183; Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992); Eutzy v. State, 458 So. 2d 755, 757-58 (Fla. 1984).

The trial judge in the instant case concluded that Scull v. State, supra, was "inapposite" because the item taken in that case (a car) was a mode of transportation which could have been taken to facilitate an escape, while a VCR is not (R154). That, however, does not distinguish Parker (jewelry), Hill (money), Jones (wea-

pon), Clark (money and boots), or Young v. Zant (money) from the instant case, nor does it obviate the requirement that the state prove a pecuniary motivation for the killing.

The state relied below on Floyd v. State, 569 So. 2d 1225 (Fla. 1990) (R108, see T609-12,783). However, as defense counsel pointed out (T783), in Floyd the defendant had admitted to his cellmate that he had broken into a woman's home, and was "ripping her off" when she surprised him. 569 So. 2d at 1230 and 1232. This, combined with the fact that he cashed a $500 check on her account within hours of the murder, was sufficient to sustain a finding of the pecuniary gain aggravator. See also (Randall) Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990) (pecuniary gain aggravator upheld where "[p]rior to the murder, as the victims slept, Jones discussed killing [them] for the purpose of obtaining the pickup"). Thus, in Floyd and Jones the state presented evidence of a pecuniary motive which pre-existed the killing. Here, in contrast, the state introduced no evidence inconsistent with the hypothesis that Sandra Sutherland's assailant did not form the intent to steal from her apartment until after the homicide.

The inadequacy of the state's evidence to prove the pecuniary gain aggravator is further illustrated by the trial judge's attempt to infer a financial motive for the killing of Ms. Sutherland from the penalty phase testimony of Judy Baker regarding a rape and robbery (not resulting in homicide) which occurred nearly two weeks later. First of all, the circumstances of the two criminal episodes were nothing alike; the Baker incident was not, and could not

have been, used as Williams Rule evidence in the guilt phase. Baker was attacked in her place of business; Sutherland in her apartment. Baker was raped but not murdered; Sutherland was murdered, but there was no proof of rape.[18] Baker was a stranger to appellant (who has maintained his innocence of both crimes), while Sutherland was an acquaintance. Moreover, even if there had been sufficient similarity between the crimes, this would not necessarily prove the existence of the aggravating factor beyond a reasonable doubt. See Power v. State, 605 So. 2d 856, 864 (Fla. 1992). This is especially true given the fact that the Baker incident occurred nearly two weeks after the charged offense. It is sheer speculation to infer that because the later crime was motivated by pecuniary gain, the earlier one must also have been so motivated. See Power; see also State v. Drolet, 549 So. 2d 1172 (Fla. 2d DCA 1989) (evidence of later-committed crime irrelevant to show predisposition to commit charged crimes); Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985) (incident not directly related to charged capital felony, even if admissible as part of res gestae, should not be relied on to establish aggravating circumstance).

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[18] The state initially charged appellant with sexual battery in the Sutherland case, but nolle prossed that charge. At trial, it was the defense which contended that sexual activity may have taken place between Ms. Sutherland and a person other than appellant. Unidentified hairs, which could not have been appellant's, were found on her body. If sexual activity occurred, it appears to have been anal sex, unlike the Baker case. Moreover, according to Dr. Diggs' proffered testimony, his observations at the scene were not inconsistent with consensual sexual bondage.

Because elimination of this unproven aggravating factor leaves only two others,[19] and because the jury heard (and the trial court found and gave some weight to) five nonstatutory mitigating factors, the state cannot show beyond a reasonable doubt that consideration of the invalid aggravator did not contribute to the jury's death recommendation or to the judge's imposition of a death sentence. See Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. ___, 100 L. Ed. 2d 854, 859 (1992); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1989); Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977); Jones v. State, 569 So. 2d 1234, 1238-39 (Fla. 1990). Therefore, in the event that this Court does not direct the trial court to discharge appellant [Issue I-A], or reduce his conviction to second degree murder [Issues I-B and C], then it should reverse the death sentence and either reduce the sentence to life imprisonment on proportionality grounds or remand for resentencing before a newly impaneled jury.

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[19] Appellant does not concede the validity of the HAC aggravating factor. See Issue VII-C.

ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO PRESENT THE TESTIMONY OF DR. DIGGS THAT HIS OBSERVATIONS AT THE SCENE WERE CONSISTENT WITH AN ACT OF SEXUAL BONDAGE WHICH ESCALATED INTO A HOMICIDE.

The State initially charged appellant with sexual battery, but later nolle prossed that count, and proceeded on the theory that this homicide was committed for the purpose of robbery. It was the defense which presented evidence, on cross-examination of Dr. Diggs, that the victim's wounds were probably the "result of a frenzic type passion," and that tests indicated the presence of acid phosphatase in her rectal area (T393-95,398). The theory of the defense was that this was not a robbery murder committed by appellant, but rather a sexual homicide committed by someone else -- possibly the workman at the apartment complex, William Kunkle, or possibly the unidentified white male whom Sidney Bayles saw engaged in a heated argument with the victim the day before she was killed. There was evidence that unidentified hairs were found on the victim's breast area, which could not have been appellant's and which were never compared with Kunkle's (T524-26). The defense also introduced evidence that Kunkle was seen by two witnesses at the victim's open door, with keys in his hand appearing to lock it, around the time of the crime; and that he gave inconsistent statements purporting to account for his whereabouts (T501-14,566-72, 626,632-33).

When Dr. Diggs was recalled by the defense, he testified that there was no evidence of a struggle, no evidence that the victim

was beaten, and no defensive wounds (T492-93,498,see T466,476). The state requested that Dr. Diggs' defense testimony be proffered to determine its admissibility. The doctor testified outside the presence of the jury that two main possibilities entered his mind when he observed the scene; either a possibly consensual sexual bondage situation, or a situation where the victim may have submitted to being bound and gagged out of fear (T465-66,474,476-77, 480-85). While the circumstances were consistent with either hypothesis, Dr. Diggs stated that the did not have enough information to draw a more definite conclusion one way or the other (T474,476-77,480-85). Defense counsel clarified for the record that he sought only to elicit from Dr. Diggs that the evidence was consistent with consensual bondage which later escalated into a homicide (T460-62,480,484-85). The trial judge initially ruled that she would allow the question, with the state then being permitted to bring out on cross that the evidence was consistent with the second hypothesis as well (T480-81). After further discussion, however, the judge disallowed any questioning about the circumstances being consistent with sexual bondage, concluding that it would be speculation (T485,489).

The trial judge's exclusion of Dr. Diggs' testimony on this critical point was prejudicial error. Although Diggs could not conclusively determine which hypothesis was true, he did clearly state that in his experience and from his observations the circumstances were consistent with both hypotheses, and he could not exclude either hypothesis. Expert witnesses frequently give testi-

mony of this nature, framed in terms of the evidence being consistent with a hypothetical set of facts. See e.g. Delap v. State, 440 So. 2d 1242, 1253 (Fla. 1983); Fridovich v. State, 489 So. 2d 143, 145-46 (Fla. 4th DCA 1986), rev.den. 496 So. 2d 142 and 500 So. 2d 545 (Fla. 1986); Ward v. State, 519 So. 2d 1083 (Fla. 1st DCA 1988); Brown v. State, 523 So. 2d 729 (Fla. 1st DCA 1988); Russell v. State, 576 So. 2d 389, 392 (Fla. 1st DCA 1991). In Fridovich, for example, the defendant's manslaughter conviction was reversed due to the trial court's erroneous exclusion of the medical examiner's proffered testimony that the circumstances of the shooting were consistent with accident. In Russell, the appellate court found no error in the trial court's allowance of expert testimony from the state's medical witness that the condition he observed was consistent with, though not proof of, forced intercourse.

The defense should therefore have been allowed to introduce Dr. Diggs' testimony that his observations at the scene were consistent with sexual bondage which escalated into a homicide.[20] The state, as the trial judge initially ruled, would then have been permitted to bring out on cross that what he observed was also consistent with the victim submitting to being bound and gagged out of

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[20] The phenomenon of consensual sexual bondage, or its possible connection to this case, is not something which would be within the common understanding or experience of the jurors. See e.g. Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980); Public Health Foundation v. Cole, 352 So. 2d 877, 879 (Fla. 4th DCA 1977). It is, on the other hand, something with which Dr. Diggs is familiar, and it is one of the possibilities which entered his mind when he observed the restraints on the victim's body (T465).

fear (T480-81). The jury could then have determined, in light of the other evidence in the case, which version was true, or whether there was a reasonable doubt as to the state's two hypotheses that this was a robbery murder and that appellant committed it.

Appellant's Sixth Amendment right to present testimony in support of his theory of defense was abridged by the trial court's exclusion of this evidence. Fridovich, 489 So. 2d at 146; see Washington v. Texas, 388 U.S. 14, 18-19 (1967) ("The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law"). The excluded testimony would not only have tended to support appellant's defense that someone else committed the crime; it would also have supported his contentions (at trial and on appeal) that the evidence failed to prove robbery or felony murder or the pecuniary gain aggravating factor. Moreover, if the jury had found, based on Dr. Diggs' observations, that the evidence was not inconsistent with an act of consensual sexual bondage which escalated into a homicide, it might not have found, or might have given less weight to, the "especially heinous, atrocious, or cruel" aggravating factor.

Appellant's convictions and death sentence should be reversed for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO APPELLANT'S BEING SHACKLED DURING THE PENALTY PHASE OF HIS TRIAL, WHERE THERE WAS NO APPARENT REASON (MUCH LESS A NECESSITY) FOR THE SHACKLING, AND WHERE THE COURT MERELY DEFERRED TO THE WISHES OF THE SHERIFF'S PERSONNEL.

The trial court's rubber stamping of the decision made by Sheriff's Office personnel to shackle appellant during the penalty phase of his trial plainly violated this Court's holding in Bello v. State, 547 So. 2d 914, 918 (Fla. 1989), and requires reversal for a new penalty proceeding. In Bello, this Court wrote:

> During the penalty phase, the defendant was shackled. Defense counsel objected, but the trial judge overruled the objection without making any inquiry into the necessity for the shackling. Bello argues that this was prejudicial error requiring a new sentencing proceeding before a jury. We agree. We noted in Elledge v. State, 408 So.2d 1021,1022 (Fla. 1981), cert.denied, 459 U.S. 981, 103 S.Ct. 316, 74 L.Ed.2d 293 (1982), that most "[c]ases which concern such prejudice deal with the adverse effects that such restraints have upon the accused's presumption of innocence." For that reason, it may be that a lesser showing of necessity is required to permit the shackling of the defendant in the penalty phase than in the guilt phase. Contra Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), cert.denied, ___ U.S. ___, 108 S.Ct. 1487, 99 L.Ed.2d 715 (1988). However, this does not mean that no inquiry into the reasons behind the shackling is required in the penalty phase. In Elledge, we noted that
>
> > the record indicate[d] the judge had information that the appellant had threatened to attack his bailiff. Elledge through his confessed acts had proven himself a man of his word when violence

> was threatened, so we would be hard pressed to find the trial court abused its discretion in taking such precautions.
>
> 408 So.2d at 1023. In this case, although defense counsel objected to the shackling and requested that an inquiry be made, the trial judge refused to do so, deferring to the sheriff's apparent judgment that such restraint was necessary without inquiring into the reasons behind that decision. Further, there is no evidence in the record to support the need for such restraint. Shackling is an "inherently prejudicial practice," Holbrook v. Flynn, 475 U.S. 560, 568, 106 S.Ct. 1340, 1345, 89 L.Ed.2d 525 (1986), and must not be done absent at least some showing of necessity. Because the trial judge in this case made no inquiry into the necessity for the shackling, the defendant is entitled to a new sentencing proceeding before a jury.

The trial judge in the instant case committed the same error as in Bello. At the beginning of the penalty phase, the following exchange took place:

> MR. ESCOBAR [defense counsel]: Judge, there is one point. I would like the shackles taken off of Mr. Finney.
>
> THE COURT: Okay. That is a security measure that the Sheriff's Office would like?
>
> THE BAILIFF: Yes.

(R815)

The trial judge thereupon stated that she would overrule the objection (T816). The judge noted that appellant was seated between counsel, and asked "That there is a board -- or not -- there are not legs to the table, but there actually are pieces of board that I think - - does that obscure it when you stand there?" (T816). The bailiff asked "He's going to take the stand?", and

defense counsel said that appellant was going to testify. (R816). The judge said that she would keep the shackles on throughout all of the testimony, and then call a recess before appellant was to take the stand. At that point the shackles would be removed and appellant would be seated with a bailiff behind him, "so that . . . he doesn't walk in front of the jury in the shackles. But at this point they have already found him guilty" (R816).[21] Defense counsel pointed out that appellant had told him he was going to be well-behaved throughout the proceeding and he was very appreciative of the hard work his attorneys had done. The judge replied:

> That may be, but -- I did not order the -- first of all, for the record, I did not order the shackles. The shackles were decided as a matter of security by the bailiffs and the Sheriff's Office. My feeling about that is, that is their area of expertise. If they made that decision, then I'm going to support that decision.

(T816-17).

Both the United States Supreme Court and this Court have recognized that shackling is an inherently prejudicial practice which should be permitted "only where justified by an essential state interest specific to each trial." Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986); see Bello v. State, supra, 547 So. 2d at 918; Stewart v. State, 549 So. 2d 171, 174 (Fla. 1989); Valdes v. State, __So. 2d__ (Fla. 1993) [18 FLW S 4871,483]. The prohibition against shackling is not absolute, but it should never be done "except as a last resort." See Illinois v. Allen, 397 U.S. 337

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[21] The defense subsequently changed its mind and decided not to call appellant as a witness (T858-59).

(1970). "[U]se of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold" Elledge v. Dugger, 823 F. 2d 1439, 1450-52 (11th Cir. 1987); quoting Illinois v. Allen. In addition to the potential prejudicial effect on the jury, "the restraints may confuse the defendant, impair his ability to confer with counsel, and significantly affect the trial strategy he chooses to follow." Zygaldo v. Wainwright, 720 F. 2d 1221, 1223 (11th Cir. 1983); see Kennedy v. Cardwell, 487 F. 2d 101, 106 (6th Cir. 1973). For these reasons, any decision to shackle a defendant must be subjected to close judicial scrutiny to determine if there was an essential state interest furthered. Elledge v. Dugger, supra, citing Holbrook v. Flynn, 475 U.S. at 568-69. The Elledge court also noted that "[n]othing in Holbrook indicates that the Supreme Court did not intend its ruling to apply to the penalty phase of a capital case; furthermore, it is unreasonable to believe that the court made its rule in Holbrook unaware that capital trials are bifurcated. We think Holbrook means what it says. 823 F. 2d at 1451, n.22.

The state may contend that reversal is unwarranted because the record does not affirmatively show that the jurors observed the shackles. Such a contention should be rejected. As previously discussed, shackling is inherently prejudicial, and protective procedures have been adopted by law to ensure that it is never done without good reason. Here, as in Bello, none of these procedures were followed. The Bello decision does not even discuss whether

the jurors could see the restraints; the error was in allowing the defendant to be shackled at the sheriff's officers' discretion without any showing of necessity. Using courtroom furniture to attempt to block the jurors' view cannot substitute for the required showing of an essential state interest specific to each trial to justify the shackling. Otherwise the Holbrook and Bello standards would be meaningless; a trial judge could permit her bailiffs to shackle any defendant at their discretion or whim, and the constitutional error could not be remedied unless the defendant somehow proved that one or more jurors actually observed the shackles. Since a party's ability to interview jurors or inquire into matters which may have affected their deliberations is extremely restricted and discouraged,[22] such a standard would be nearly impossible to satisfy.

In addition, courts have recognized that a defendant who without justification has been tried in shackles is harmed in ways that go beyond the prejudicial impact on the jury. See Elledge v. Dugger, supra; Zygadlo v. Wainwright, supra. It is entirely appropriate for a trial judge -- after she has made the decision to shackle a defendant upon a case-specific showing of necessity -- to try to ameliorate their prejudicial effect by the strategic or fortuitous placement of furniture. See e.g. Stewart v. State, 549 So. 2d 171, 173-74 (Fla. 1989) (trial court ruled that shackles "were

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[22] See e.g. Mitchell v. State, 527 So. 2d 179, 181-82 (Fla. 1988); Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990); Shere v. State, 579 So. 2d 86, 94-95 (Fla. 1991); Gilliam v. State, 582 So. 2d 610, 611 (Fla. 1991); Johnson v. State, 593 So. 2d 206, 210 (Fla. 1992).

both unobtrusive and necessary"; defendant was facing charges of escape and attempted escape, and on a previous occasion had slipped off his manacles); Correll v. Dugger, 558 So. 2d 422, 424 (Fla. 1990) (defendant was found in possession of a comb fashioned into a knife while in jail; trial court concluded he was a security risk); Derrick v. State, 581 So. 2d 31, 35 (Fla. 1991) (defendant found in possession of a screw driver in the jail). But the availability of such measures does not relieve the judge of her constitutionally mandated responsibility to determine whether the shackling is necessary in the first place. See Bello; Holbrook; Elledge v. Dugger.[23]

As this Court recognized in Livingston v. State, 458 So. 2d 235, 238 (Fla. 1984), "some situations carry such an inherent danger of improper influence that courts should remedy the error without requiring the accused to show that any such improper influences actually operated upon or affected the jury." Since

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[23] While hiding a defendant's shackles from the jury's view does not cure the error, when there has been no showing of necessity for the use of shackles, it should also be noted that the trial judge here never made a finding that the shackles could not be seen. She merely stated that appellant was seated between counsel, and there were pieces of board to the table. She asked the bailiff "[D]oes that obscure it when you stand there?" The bailiff, misunderstanding the question, replied "He's going to take the stand?", at which point the judge said she would have the shackles removed outside the jury's presence prior to appellant being called to testify. [The defense subsequently changed its mind, and appellant was not called to testify]. The record does not establish whether the shackles were visible to any or all of the jurors, and the trial judge made no finding that they were not visible. Therefore, the instant case cannot meaningfully be distinguished from Bello.

shackling is inherently prejudicial,[24] a defendant who has been shackled without the requisite showing of necessity need not establish actual prejudice. Davis v. State, 709 P. 2d 207 (Okla. Cr. 1985) (where defendant did not engage in any disruptive conduct that would have justified the use of shackles, reversal was required without regard to whether any of the jurors actually saw the shackles); see Woods v. Dugger, 923 F.2d 1454, 1457 n.3 (11th Cir. 1991). When an error rises to the level of inherent prejudice, it deprives the accused of a fair trial and cannot be written off as "harmless." Woods, 923 F.2d at 1459-60. Appellant's death sentence must be reversed for a new penalty proceeding. Bello.

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[24] Bello, Stewart; Valdes, Holbrook v. Flynn. Webster's New Universal Unabridged Dictionary (2d Ed.) defines inherent as "existing in someone or something as a natural and inseparable quality, characteristic, or right; innate; basic; inborn . . . . "

ISSUE IV

THE TRIAL COURT ERRED IN OVERRULING DEFENSE OBJECTIONS TO THE TESTIMONY OF JUDY BAKER AND TO THE PROSECUTOR'S CLOSING ARGUMENT, WHERE THE INFLAMMATORY AND PREJUDICIAL IMPACT OF HER TESTIMONY OUTWEIGHED ITS PROBATIVE VALUE; ESPECIALLY SINCE THE TRIAL COURT TOOK JUDICIAL NOTICE AND INSTRUCTED THE JURY ON THE FACT OF THE PRIOR CONVICTIONS, AND THE INVESTIGATING OFFICER WAS AVAILABLE TO TESTIFY AS TO THE CIRCUMSTANCES.

In a capital sentencing proceeding, the state may introduce testimony as to the circumstances of a prior violent felony conviction, rather than just the bare fact of that conviction. Stano v. State, 473 So. 2d 1281, 1289 (Fla. 1985). See e.g. Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977); Stewart v. State, 558 So. 2d 416, 419 (Fla. 1990). However, the details cannot be emphasized to the point where the other crime becomes the feature of the penalty trial, or the prejudice outweighs the probative value. Stano, 473 So. 2d at 1289; Rhodes v. State, 547 So. 2d 1201, 1204-05 (Fla. 1989). See also State v. Bey, 610 A. 2d 814, 833-34 (N.J. 1992); State v. Erazo, 594 A. 2d 232, 243-44 (N.J. 1991).

In the instant case, the prosecutor asked the judge to take judicial notice and instruct the jury that on July 20, 1992, appellant was convicted by a jury of the kidnapping, robbery and sexual battery of Judy Baker (R798,818-19;R97). Defense counsel said he had no problem with that, nor did he object to the state calling Detective Fulmer to testify concerning the circumstances of those convictions, but he moved in limine to prevent the state from cal-

ling Mrs. Baker (T798-804,807,812-13). Citing Rhodes, 547 So. 2d at 1204-25 and n.6, counsel argued that Mrs. Baker's live testimony would be inflammatory and unnecessarily prejudicial, especially since the state could present the same information through the detective, without the dramatic emotional impact (T800-01,803-04,807,813). The prosecutor acknowledged that Detective Fulmer was available to testify concerning the facts of the sexual battery, but asserted that the state was electing to use Mrs. Baker (T812). The trial judge allowed her to testify (T810-11).

Judy Baker testified before the jury that she is fifty-eight years old, has been married for thirty-three years, and is the mother of two children (T820). She owns and operates a gift store in Temple Terrace (T820-21). At about 3:45 p.m. on January 29, 1991 a man whom she later identified as appellant came into the store (T821). He said he was looking for a gift, and Mrs. Baker showed him some merchandise (T821-22). She then waited on some other customers, while appellant walked around the store looking at things (R823). When the other people left, appellant asked to see some figurines in the twenty dollar range. Mrs. Baker showed him some, and he said he'd take one (T823). As she turned around, appellant grabbed her and put his hand over her mouth. They struggled, and she ended up on her knees. Appellant grabbed the cordless phone out of her hand, pulled her head back, and showed her a knife (T823-24). He said, "I don't want to hurt you. I just want your money" (T824). He told her to get up and started leading her to a small room to the left. She said, "The money is not in

here." Appellant said he would have to tie her up, and asked if she had any rope (T824). When she said no, he took her blouse off and gagged her with it (T824). He then secured the gag in place, and tied her hands behind her back with electrical cords (T825).

At appellant's direction, Mrs. Baker told him how to get into the register. He went to the register and got out thirty-two dollars (T825). After loosening the gag, he got an additional twenty to thirty dollars out of her purse (T825). He asked her how to lock the front door, and then took the keys out to the counter, but he never did lock the door (T826). He made her get up and go into the storage room. She could hear him tearing a piece of fabric, and he also picked up a tape gun. He came back in and tried to tape the cord around her hands. He was jerking at her bra, and she was crying. He then said "I have to cover your face" (T826-27).

At this point in Mrs. Baker's testimony, the prosecutor requested a brief recess, and defense counsel moved for a mistrial "based upon exactly what I told the Court previously, that unfortunately, Mrs. Baker was not only being used for the eliciting of facts, but also to get sympathy from this jury" (T827). Defense counsel stated that Mrs. Baker was crying on the stand, while the prosecutor said "I think she was visibly getting upset, but I didn't see tears" (T827-31). The judge said she saw a little bit of shaking but no tears, and denied the motion for mistrial (T829-31). Defense counsel requested an immediate curative instruction that the jury must not consider sympathy in the sentencing phase; the prosecutor asked that the instruction be delayed until the

conclusion of Mrs. Baker's testimony; and the judge said she would wait until the end of her testimony to give the instruction (T829-31,839).

Mrs. Baker returned to the stand and testified that when appellant said he had to cover her eyes, she turned to look at him. He got very angry and said "You want to remember what I look like? You want to live?" (T832). He fondled her breasts, used an obscenity, and said she must have been something in her time (T832). He pulled down her slacks and underwear, and he had his penis out. He put his hand in her vagina, and then penetrated her several times (T832).

Mrs. Baker testified that before he left he said "I ought to take care of this so I have nothing to worry about." Then he said "I'm going to go out, but I don't want to see your face at the door for five minutes. I'm going to be taking some other things" (T832). He walked out and closed the door (T832-33).

On cross, defense counsel asked Mrs. Baker how she had described the individual who attacked her to the detective (T834). The prosecutor's objection to this line of questioning was sustained (T834-37). See Issue V, infra.

In his closing argument to the jury, the prosecutor zeroed in on the emotionally charged aspects of Judy Baker's testimony:

> And what do we know about the circumstances of that rape? What do we know? It's in the same area. It's in Temple Terrace. As Mr. Escobar had her point out, she wasn't injured and she wasn't cut. Was she threatened? Remember the comment about the face? "I should just take care of that now."

> What else do we know about it? She was tied behind the back. She was gagged with her own blouse. And she had to go through one of the ultimate human horrors that you live through -- the key being "live through" -- but then she had to go through being touched, fondled and raped. That is Charles Finney.
>
> We also know about the weapon that was used. You see, the weapon of choice for Charles Finney in these two situations was a knife. And we also know as well in Judy Baker's case that the value for the rape of Judy Baker was fifty-five dollars, for money. That is disgusting.

(T901-02)

Defense counsel objected and moved for a mistrial on the ground that the prosecutor was improperly arguing his personal views to the jury (T902-03). The prosecutor said at the bench (in a voice which defense counsel claimed was loud enough for the jury to hear):

> Whatever I say I think, I leave it to the jury. That is disgusting and that is aggravating, and he can disagree with me if he wants to. The jury can reach their own conclusions.

(T903)

The judge overruled the objection, whereupon the prosecutor resumed his argument to the jury:

> That is disgusting, and that is aggravating. Judy Baker had no chance, either. No chance.

(T904)

The trial court erred in overruling appellant's objection to Judy Baker's testimony, and in denying his subsequent motions for mistrial. The inflammatory impact of her testimony far exceeded its probative value. Moreover, it was entirely unnecessary for the

prosecution to inject emotion and pathos into the proceedings, since the judge had agreed (at the state's request) to take judicial notice of, and instruct the jury on, the fact of the prior convictions, and the investigating officer was available to testify as to the details.[25] In Rhodes v. State, supra, 547 So. 2d at 1204-05 and n.6, this Court found error in the introduction of a tape recorded statement by the victim of Rhodes' prior Nevada offenses:

> Although this Court has approved the introduction of testimony concerning the details of prior felony convictions involving violence during the penalty phase of a capital trial, Tompkins; Stano, the line must be drawn when that testimony is not relevant, gives rise to a violation of defendant's confrontation rights, or the prejudicial value outweighs the probative value. Not only did the introduction of the tape recording deny Rhodes his right of cross-examination, but the testimony was irrelevant and highly prejudicial to Rhodes' case. The information presented to the jury did not directly relate to the crime for which Rhodes was on trial, but instead described the physical and emotional trauma and suffering of a victim of a totally collateral crime committed by the appellant.

The Court also observed:

> Furthermore, we see no reason why introduction of the tape recording was necessary to support aggravation in this case. The state had introduced a certified copy of the Nevada judgment and sentence indicating that Rhodes

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[25] Detective Fulmer's testimony would not have been objectionable as hearsay, since hearsay evidence is admissible in a capital sentencing proceeding as long as the defendant is afforded a fair opportunity to rebut it. Fla.Stat. §921.141(1). Detective Fulmer was available to testify, and could have been cross-examined (T812). Moreover, since defense counsel contended that the appropriate way to present the circumstances of the prior convictions (without unnecessarily arousing the jury's emotions) was through Detective Fulmer (T800-01,803,812), any hearsay objection was waived.

> had pled guilty to and was convicted of an offense involving the use or threat of violence. There was the testimony from Captain Rolette regarding his investigation of the incident. This evidence was more than sufficient to establish the aggravating circumstance that Rhodes had previously committed a felony involving the use or threat of violence and to establish the circumstances of the crime.

"A verdict is an intellectual task to be performed on the basis of the applicable law and facts." Jones v. State, 569 So. 2d 1234, 1239 (Fla. 1990). As stated in Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985):

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.[26]

In the instant case, the prosecutor elected to present Judy Baker's live testimony, although it was unnecessary to do so to establish the aggravating factor or the circumstances of the prior convictions. Rhodes. When she became visibly upset on the witness stand, the trial judge denied defense counsel's motion for mistrial. When, in closing argument, the prosecutor further encouraged an emotional reaction (an improperly gave his personal views) by characterizing the collateral offenses as "disgusting", the

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[26] See also Jackson v. State, 522 So. 2d 802, 809 (Fla. 1988); Garron v. State, 528 So. 2d 353, 359-60 (Fla. 1988); Taylor v. State, 583 So. 2d 323, 329-30 (Fla. 1991); King v. State, __So. 2d __ (Fla. 1993) [18 FLW S 465, 466].

judge overruled defense counsel's objection. The prosecutor then repeated his comment for added effect.

Because of the prejudicial impact of these errors, appellant was denied a fair penalty trial. His death sentence must be reversed, and the case remanded for a new penalty proceeding before a newly impaneled jury.

ISSUE V

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO CROSS-EXAMINE JUDY BAKER AS TO HER DESCRIPTION OF HER ATTACKER.

To establish the prior violent felony aggravating factor, the state is not required to "go behind the conviction to show the particulars of the conviction." Thompson v. State, 456 So. 2d 444, 446 (Fla. 1984). However, the state may choose to introduce testimony to show the details of the prior offense [Elledge; Stewart], provided that it does not become the feature of the penalty trial, and as long as the prejudice does not outweigh the probative value [Stano; Rhodes]. See Issue IV, supra. Where, however, the prosecution chooses to introduce the testimony of witnesses in aggravation, a capital defendant is constitutionally entitled to cross-examination and rebuttal. The requirements of due process apply to all three phases of a capital trial. Engle v. State, 438 So. 2d 803, 813 (Fla. 1983). As this Court observed:

> The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the

> fourteenth amendment to the United States Constitution. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 9233 (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. Pointer v. Texas. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. Specht v. Patterson.

Engle v. State, supra, 438 So. 2d at 814.

Accord, Walton v. State, 481 So. 2d 1197, 1200 (Fla. 1985); Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989); Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991); see also Proffitt v. Wainwright, 685 F.2d 1227, 1254 (11th Cir. 1982), cert.den., 464 U.S. 1003 (1983).

In Tafero v. State, 406 So. 2d 89, 95 (Fla. 3d DCA 1981), the Third District Court of Appeal, citing Green v. Georgia, 442 U.S. 95 (1979), recognized in dicta that had Tafero sought to present in his capital sentencing proceeding evidence that a third person had confessed to a crime for which Tafero had been convicted (and which was being used by the state to support the prior violent felony aggravator), admission of such evidence would have been constitutionally required. The testimony of another witness that the victims of the prior crime had admitted to him that they knew Tafero was not the perpetrator would also have been admissible.[27]

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[27] The holding in Tafero was that, under the then applicable standard, the allegations were insufficient for a writ of error coram nobis as to the prior convictions, because the evidence would not conclusively have prevented entry of a conviction, but would at most, if believed, have probably changed the jury's verdict. The legal standard for coram nobis relief has since been relaxed. Jones v. State, 591 So. 2d 911 (Fla. 1991).

In the instant case, the state elected to go behind the convictions and give the jury the details of the other criminal episode. Further, over strenuous defense objection, the state chose to do so via the live testimony of the victim, Judy Baker, rather than through the investigating detective. Mrs. Baker testified on direct that her attacker was a person who later became known to her as Charles Finney (T821). On cross, defense counsel sought to ask her how she had described the attacker to the detective (T834). The prosecutor objected to the cross-examination, contending that it was "basically arguing the lingering doubt as to the prior crime," and that the defense could not go behind the prior jury's verdict (T834-37). Defense counsel countered that the state had "opened the door by eliciting some of these facts" on direct, and that he was entitled to present conflicting evidence (T835-36). The trial judge concluded that the line of cross-examination was improper; she had never seen it done before and was unaware of any theory under which it could be done (T836-37).

By prohibiting cross-examination of Mrs. Baker as to her description of her assailant and the accuracy of her identification of appellant, after the state had presented to the jury her detailed and emotionally vivid testimony about what a person "who later became known to [her] as Charles Finney" had done to her, the trial court violated appellant's rights to confrontation, due process, and a reliable penalty determination. To hold otherwise would mean that (1) the simple fact of the prior conviction, on its face, gives the state an <u>irrebuttable</u> aggravating factor, yet (2)

the prosecution is also free to present live testimony as to the circumstances of the prior offense in order to increase the weight which the jury will give the aggravating factor (and to heighten its emotional impact), while at the same time blocking the defense from any meaningful cross-examination of the witness. Basic fairness demands that if the state elects to go behind the fact of the convictions to present witness testimony as to the details of the offense, then it should not be permitted to turn around and use the fact of the convictions as a shield to prevent traditionally relevant cross-examination challenging the accuracy of the witness' identification.

Appellant's death sentence should be reversed for a new penalty trial before a newly impaneled jury.

ISSUE VI

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON SPECIFIC NON-STATUTORY MITIGATING CIRCUMSTANCES INCLUDING (1) APPELLANT'S DEPRIVED CHILDHOOD, (2) HIS CONTRIBUTIONS TO HIS COMMUNITY AND TO SOCIETY, (3) HIS POTENTIAL FOR REHABILITATION AND POSITIVE ADJUSTMENT WITH THE PRISON SETTING, AND (4) HIS STRONG BONDING WITH HIS DAUGHTER. THE HARMFUL EFFECT OF THE ERROR WAS COMPOUNDED BY THE PROSECUTOR'S MISLEADING ARGUMENT TO THE JURY.

A capital defendant is entitled, both under the United States Constitution and under Florida law, to have the jury fully instructed relative to their consideration of both statutory and

nonstatutory mitigating circumstances.[28] This Court has recognized:

> Under our capital sentencing statute, a defendant has the right to an advisory opinion from a jury.... In determining an advisory sentence, the jury must consider and weigh all aggravating and mitigating circumstances.... The jury must be instructed either by the applicable standard jury instructions or by specially formulated instructions, that their role is to make a recommendation based on the circumstances of the offense and the character and background of the defendant.

Floyd v. State, 497 So. 2d 1211, 1215 (Fla. 1986); Riley v. Wainwright, 517 So. 2d 656, 658 (Fla. 1987).

The Court has also made it clear that "improper, incomplete, or confusing instructions relative to the consideration of both statutory and nonstatutory mitigating evidence does violence to the sentencing scheme and to the jury's fundamental role in that scheme." Riley, 517 So. 2d at 658.

In the instant case, there were no statutory mitigating factors (T789). The defense requested that the trial court instruct the jury on several nonstatutory mitigating factors established by the testimony of Tammy Gallimore, Joe Williams, and Dr. Gamache, i.e. appellant's deprived childhood, his contributions to his community and to society, his good potential for rehabilitation and

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[28] See e.g. Hitchcock v. Dugger, 481 U.S. 393 (1987); State v. Johnson, 257 So. 2d 597 (N.C. 1979) (discussing the applicability of the constitutional principle of Lockett v. Ohio, 438 U.S. 586 (1978) to penalty phase jury instructions); Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976); Toole v. State, 479 So. 2d 731, 433-34 (Fla. 1985); Robinson v. State, 487 So. 2d 1040, 1042-43 (Fla. 1986); Floyd v. State, 497 So. 2d 1211, 1215 (Fla. 1986); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987).

positive adjustment within the prison setting, and his strong bonding with his daughter (T789-92). The prosecutor had submitted two sets of proposed jury instructions; one included instructions on the specific nonstatutory mitigating circumstances, while the other gave only the "catch-all" instruction (T788). The judge stated that she has done it both ways in the past, but more recently she had been giving only the "catch-all" (T788). The prosecutor, relying on Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991), said " -- I'm not going to object to the defendant arguing any of these mitigators. I will object to them being spelled out as nonstatutory mitigators, into the instructions. I would ask that the Court read the catch-all phrase" (T789-90). Defense counsel argued:

> Judge, since the prosecution is going to have the benefit of having their aggravators listed, and since the Court's position is that the Court will send the jury instructions back with the jury, I think it's highly unfair not to at least list the most important mitigating factors that we want them to consider.
>
> THE COURT: Okay. Well, I'm going to go with the catch-all for this reason: The ones that the State has listed are the statutories, and if you had a statutory mitigator, we'll list that. If you don't, I'm going to go to the catch-all phrase and allow you to argue them.

(T790-91)

Defense counsel reiterated that it would be highly prejudicial to appellant for the jury to take back the instructions and see specific aggravators but not see any specific mitigators (T791). He also contended that it would mislead the jurors to consider all of the mitigating evidence as a single mitigating factor, thereby

distorting the weighing process (T792). The judge repeated that she was going to go with the catch-all.[29]

Defense counsel asked the judge if she was going to "allow the prosecution to argue that we do not fit with any of the statutory mitigating?" The prosecutor interjected that he was not going to argue that (T791-92).

In his closing argument to the jury, the prosecutor had this to say about mitigating circumstances:

> Now, I'm going to speak with you about the mitigating and aggravating factors in a moment, because, you see, as we spoke about in voir dire, there are certain things, there is a certain list of things that if these certain circumstances exist, the State can come to you and urge you to sentence the defendant to death. The Defense is only limited by their own creativity. They can argue anything. This was their day in court. This was Charles Finney's day. You didn't hear Ms. Vogel or myself say anything, because that is the way it should be. His witnesses should get up there and tell you whatever they want to, and they did.
>
> And, folks, we haven't heard the first thing that mitigates this murder. Nothing can mitigate this murder. Some of the things we heard today in mitigation, -- and I anticipate Mr. Escobar may pop out some of these to you -- whether the defendant has a good work history. He's been honorably discharged from the service. Folks, there's a lot of people that work well, there's a lot of people who have been honorably discharged, and they don't go out and tie people up and stab them thirteen times. That is not mitigating. That is what society expects, not this.
>
> We heard from a friend of his and his girl friend, Miss Gallimore, and these people love

[29] The jury in this case was instructed "Among the mitigating circumstances you may consider, if established by the evidence, are: any aspect of the defendant's character or record and any other circumstances of the offense" (T918).

him, and they're his friends. Everybody has people -- most everybody has people who love them, and they have friends. And they came up and they testified to you about all the good things he's done for them and the good things he's done for a few people that he's related to or that they know. That is why they're his friend. Everyone has friends. That is not mitigating to this murder.

(T897-88)

* * *

And I anticipate one more mitigator as well will be that Charles Finney will do well in the prison system. But, folks, what does that have to do with this murder? People ask you today, we have concentrated a lot on Charles Finney, and it's hard. But let's remember why we're here. You can't forget Sandra Sutherland. She didn't have to die. She certainly didn't have to die the way she did.

You see, the reason we're here is because of Charles Finney. We're not here because of anyone else. We're not here because of Mr. Williams. We're not here because of Miss Gallimore. We're not here because of Dr. Gamache. We're here because of Charles Finney. Charles Finney is responsible for the death of Sandra Sutherland, but he's also responsible for his own death, because he committed this crime. He forfeited his right to live. That is why we're here.

(T899-900)

In giving only the "catchall" instruction on nonstatutory mitigating factors, and refusing appellant's request for specific jury instructions on factors which have been recognized as valid mitigating circumstances by this Court, the trial judge erred. The error was compounded by the prosecutor's argument to the jury, designed to persuade them that the evidence presented on appellant's behalf did not show legitimate mitigating circumstances, but was merely the product of defense counsel's unlimited "creativity."

To the contrary, all of the nonstatutory mitigating factors submitted by the defense were factually supported by the evidence, and were unrebutted. See Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987). In fact, the trial judge in her subsequent sentencing order found and gave some weight to five nonstatutory mitigators.[30] Each has been recognized as a legitimate mitigating circumstance by this Court. See e.g. Campbell v. State, 571 So. 2d 415, 419 n.4 (Fla. 1990); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) (disadvantaged family background and/or traumatic childhood or adolescence); Rogers v. State, supra, 511 So. 2d at 535 (contributions to family, community, or society, including being a good husband, father, and/or provider, and having a good military record); McCampbell v. State, 421 So. 2d 1072, 1075-76 (Fla. 1982) (exemplary employment record, family background, and potential for rehabilitation); Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988); Valle v. State, 502 So. 2d 1225 (Fla. 1987) (potential for rehabilitation and well-behaved adjustment to life in prison).

Under Florida law, however, the jury is a co-sentencer,[31] and its recommendation is an integral part of the sentencing process

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[30] The mitigating factors found by the trial court are (1) appellant's exemplary work and military history; (2) his deprived childhood, marked by poverty and abandonment by an alcoholic father; (3) his positive character traits, such as being a hard worker and a good parent; (4) his excellent potential for rehabilitation and productive adjustment within the prison setting; and (5) continued opportunity to maintain a loving relationship with his daughter through frequent visitation (R155-56).

[31] Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993).

which the trial judge must give great weight.[32] Therefore, when an instructional error distorts the jurors' weighing process and taints their recommendation, the resulting death sentence cannot stand. See Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. ___, 100 L. Ed. 2d 854, 859 (1992).

The "catchall" instruction is wholly insufficient to guide the jury in its consideration of nonstatutory mitigating circumstances. Essentially it amounts to defining a mitigating factor as "whatever"; and it has a denigrating effect, especially when contrasted with the clear and specific instructions on aggravating factors. See State v. Johnson, 257 So. 2d 597, 616-17 (N.C. 1979). It also has the pernicious effect of allowing the prosecutor to do exactly what he did in this case: to contrast the list of specific, well-defined aggravating circumstances supporting death with the amorphous "catchall" ("The Defense is only limited by their own creativity"), and then urge the jury to give the proffered nonstatutory factors no weight, not because they are unsupported by the evidence, but because they are not mitigating. This was a plain misstatement of the law, and its prejudicial effect could only have been averted by a proper jury instruction informing the jurors that these were, indeed, valid mitigating circumstances, and that their role (as with the aggravators and statutory mitigators) was to determine whether they were supported by the evidence and, if so, how much weight to give them. Rogers.

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[32] See e.g. Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Grossman v. State, 525 So. 2d 833, 839 n.1 and 845 (Fla. 1988); Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991).

This is not to say, of course, that the "catchall" instruction should never be given; only that it cannot serve as a substitute for a requested instruction on a specific nonstatutory mitigating circumstance -- especially one which this Court has recognized as valid. These are every bit as important for the jury to consider and weigh as a statutory mitigator would be, and there is no reason why the jury should not be fully instructed on the applicable substantive law. See e.g. Yohn v. State, 476 So. 2d 123, 126-27 (Fla. 1985) (standard jury instructions are simply a "guideline to be modified and amplified depending upon the facts of each case," and do not relieve the trial judge of his responsibility under the law to charge the jury properly and correctly in each case as it comes before him). See also In the Matter of the Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So. 2d 594, 598, modified 431 So. 2d 599 (Fla. 1981).

Here, the trial judge had given specific instructions on nonstatutory mitigating circumstances in other trials, and the prosecutor submitted two sets of proposed instructions, one of which included the nonstatutory mitigators. The prosecutor successfully objected to the specific instructions. When defense counsel asked the judge if she was going to allow the state "to argue that we do not fit with any of the statutory mitigating", the prosecutor replied that he did not plan to do that. (And that is not exactly what he did; instead he simply argued that the proffered factors were not mitigating at all). Undersigned counsel is aware of Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991), relied on by

the prosecutor below. However, as defense counsel pointed out, Robinson does not say that instructions on nonstatutory mitigators should not be given (T791).[33] Robinson concluded that the catch-all instruction is not ambiguous, and found no reasonable likelihood that the jurors in that case understood the instruction as preventing them from considering and weighing any constitutionally relevant evidence. The circumstances of the instant case are different, in that here the combination of the trial court's denial of the requested instructions and the prosecutor's misleading argument could easily have convinced the jury that the evidence presented on appellant's behalf should not be considered because it is not mitigating (see T897-900).

The state may contend that jury instructions on the nonstatutory mitigating circumstances were unnecessary because, while the prosecutor argued to the jury that these factors were not mitigating, defense counsel argued that they were (see T907-16). However, arguments of counsel cannot substitute for instructions by the court. Taylor v. Kentucky, 436 U.S. 478, 488-89 (1978); Mellins v. State, 395 So. 2d 1207, 1209 (Fla. 4th DCA 1981). The absence of instructions clearly informing the jury that a deprived childhood, an exemplary employment and military record, being a devoted parent, and having good potential for rehabilitation and productivity if sentenced to life imprisonment are all proper mitigating

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[33] In Foster v. State, 614 So. 2d 455, 461-62 (Fla 1992), this Court, citing Robinson, approved an instruction which covered eleven specific nonstatutory mitigating factors, as well as two statutory factors and the catch-all.

factors which it could consider and weigh against the aggravators deprived appellant of an individualized sentencing determination, as required by the Eighth Amendment and Lockett v. Ohio, 438 U.S. 586 (1978) and it progeny. The jury's death recommendation, and the death sentence imposed pursuant thereto, are unreliable and cannot stand.

ISSUE VII

THE TRIAL COURT ERRED IN INSTRUCTING ON AND FINDING AGGRAVATING FACTORS, AND THE SENTENCE OF DEATH IS DISPROPORTIONATE.

A. Pecuniary Gain

As discussed in Issue I, Part D, the evidence failed to prove that the homicide was committed for financial gain. Therefore, the trial court erred in instructing the jury on and finding this aggravating circumstance.

Moreover, where the underlying charge of robbery serves as the basis for both the conviction of felony murder and the finding of an aggravating factor, the aggravator fails to genuinely narrow the class of persons eligible for the death penalty.[34] Under these circumstances, the repetitive aggravating factor cannot constitutionally be weighed by the judge or jury in imposing a death sentence. See State v. Cherry, 257 S.E. 2d 551 (N.C. 1979); cert.

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[34] Regarding the constitutional requirement that an aggravating factor perform a narrowing function, see Zant v. Stephens, 462 U.S. 862, 867 (1983); Lewis v. Jeffers, 497 U.S. 764, 776 (1990); Arave v. Creech, ___U.S.___ (1993)(52 Cr.L 2373, 2376); Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990).

den., 446 U.S. 941 (1980); Engberg v. Meyer, 820 P. 2d 70 (Wyo. 1991); State v. Middlebrooks, 840 S.W. 2d 317 (Tenn. 1992), cert. granted, ___U.S.___ (53 CrL 3013) (1993), cert.discharged, ___U.S.___(54 CrL 2021) (1993). Cf. Stringer v. Black, 503 U.S. ___, 112 S.Ct. ___, 117 L.Ed.2d 367 (1992); Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. ___, 120 L. Ed. 2d 854 (1992).

B. Prior Violent Felony

The trial court's finding of the prior violent felony aggravating factor, based on appellant's convictions for the crimes committed against Judy Baker [see Issues IV and V, supra], was legally valid, notwithstanding the fact that that incident occurred after the charged capital offense. See Daugherty v. State, 419 So. 2d 1067, 1069 (Fla. 1982); Brown v. State, 473 So. 2d 1260, 1266 (Fla. 1985).

Appellant maintained his innocence of the crimes against Mrs. Baker, and his appeal in that case is pending before the Second District Court of Appeal (case no. 92-4580). In the event that his convictions are overturned, this will eliminate their proper use as an aggravating factor. Long v. State, 529 So. 2d 286, 293 (Fla. 1988); Rivera v. Dugger, 629 So. 2d 105, 108-09, (Fla. 1993); Johnson v. Mississippi, 486 U.S. 578 (1988). Since the Baker convictions were appellant's only prior violent felony convictions; since the prosecution chose to introduce before the jury the detailed and emotionally charged live testimony of Mrs. Baker [see Issue IV]; and since substantial mitigating evidence was presented

to the jury (and five nonstatutory mitigators found by the trial judge), the consideration of those convictions by the judge and jury -- if the convictions are overturned -- will not be "harmless error". See Long; Rivera; Preston v. State, 564 So. 2d 120 (Fla. 1990).[35]

C. Especially Heinous, Atrocious or Cruel

An aggravating circumstance may not be weighed in imposing a death sentence unless it is proven beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). Where the evidence of an aggravating factor is circumstantial, it cannot satisfy the burden of proof unless it is "inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds, supra, at 1163; see Eutzy v. State, 458 So. 2d 755, 757-58 (Fla. 1984); Peavy v. State, 442 So. 2d 200, 202 (Fla. 1983).

Under the Eighth and Fourteenth Amendments to the United States Constitution, the constitutionality of the "especially heinous, atrocious, or cruel" (HAC) aggravating factor depends upon its limited application only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Sochor v. Florida, 504 U.S. ___, 112 S. Ct. 2114, 119 L. Ed. 2d 326, 339

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[35] If the Baker convictions are reversed before the instant appeal is decided, this Court should grant relief on direct appeal. Long. If the Baker convictions are reversed after this appeal is decided, appellant will be entitled to post-conviction relief on a Rule 3.850 motion. Rivera; Preston.

(1992); Proffitt v. Florida, 428 U.S. 242, 255-56 (1976). As this Court explained in Shere v. State, 579 So. 2d 86, 95 (Fla. 1991), this factor "is proper only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another" [citing Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) and State v. Dixon, 283 So. 2d 1 (Fla. 1993)]. Moreover, to establish the aggravating factor, it is not sufficient to show that the victim in fact suffered great pain [see Teffeteller v. State, 439 So. 2d 840, 846 (Fla. 1983)]; rather, the state must prove that the defendant intended to torture the victim, or that the crime was meant to be deliberately and extraordinarily painful. Porter, 564 So. 2d 1060, 1063 (Fla. 1990); see also Shere v. State, supra, 579 So. 2d at 96; Omelus v. State, 584 So. 2d 563, 566-67 (Fla. 1991); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993).

In the instant case, defense counsel contended that the HAC aggravator was inapplicable (T784-87; R135-37, 140). The trial judge announced that, while she had originally thought that there was not enough evidence to warrant a jury instruction on HAC, she was now persuaded by Floyd v. State, 569 So. 2d 1225, 1232 (Fla. 1990) to instruct on this factor and allow the state to argue it (T810). The prosecutor extensively argued HAC to the jury (T904-07) [see Bonifay], and went so far as to urge them, over objection,

that "there is no amount of mitigating factors that can outweigh this one aggravating [circumstance]" (T904).

Following the jury's recommendation of death, the trial judge found the HAC aggravator in her order imposing the death penalty (R154-55).

The state's evidence did not meet the standard of proof beyond a reasonable doubt, and did not support the instruction on or the finding of HAC. The associate medical examiner, Dr. Charles Diggs, testified for the prosecution that the cause of the victim's death was multiple stab wounds to the back (T384,389). There were thirteen wounds, all but one of which penetrated the lungs (T377,379). No other vital organs were affected, and Dr. Diggs observed no bruises or other significant trauma (T377,380).[36]

Dr. Diggs testified, on direct examination by the state, that (except where the wound is directly to the heart) multiple lethal stab wounds cause unconsciousness and death more rapidly than would a single lethal stab wound, because the loss of blood pressure occurs faster (T380-83). With wounds such as those involved here, Dr. Diggs stated "[O]ne of the first things that will tend to happen is that these people will start to lose consciousness" (T382). Unconsciousness could begin in about thirty seconds to a minute, while death would typically occur in four to five minutes, or sometimes sooner (T382-83). According to Dr. Diggs, the presence of hemorrhaging along the wound tracks indicated that Ms. Suther-

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[36] When recalled by the defense, Dr. Diggs added that there was no sign of a struggle, no evidence that the victim was beaten, and no defensive wounds (T492-93, 498, see T 466,476).

land was alive while each of the wounds was inflicted (T386-87). He was not able to say how many stab wounds took place before she lost consciousness, but she would have been conscious at least during the first several wounds (T391).

On cross, Dr. Diggs stated that it was his opinion, based on his experience, that the wounds in this case were probably the "result of a frenzic type passion" (T397-98).

Given the rapidity with which unconsciousness and death occurred, the absence of defensive wounds or signs of a struggle, and the lack of evidence of an intent to inflict torture or prolonged suffering, it cannot be said that the "especially heinous, atrocious, or cruel" aggravator was proven beyond a reasonable doubt. Shere; Bonifay. The occurrence of multiple stab wounds does not in itself establish this factor,[37] especially in light of the testimony of the state's medical expert that multiple lethal stab wounds cause unconsciousness and death more quickly than would a single lethal wound. See Demps v. State, 395 So. 2d 501 (Fla. 1981), in which a prison inmate was held on his bed by two fellow inmates and stabbed to death by a third. The victim was discovered in his cell, bleeding profusely, and remained conscious and in pain during the ambulance ride to the hospital. He died soon after arrival. Nevertheless, this Court found that the killing was not so set

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[37] Other jurisdictions have held that multiple stab wounds by themselves are not enough to establish this aggravating circumstance. See, e.g., State v. Hunt, 558 A. 2d 1259, 1289 (N.J. 1989); State v. Tuttle, 780 P. 2d 1203, 1218-19 (Utah 1989).

apart from the norm of capital felonies to render it "especially heinous, atrocious, or cruel" within the meaning of the statute.[38]

Also significant in the instant case is Dr. Diggs' testimony that, based on his experience, the victim's wounds were probably the "result of a frenzic type passion" (T397-98). This Court has recognized that a killing which occurs in a rage or frenzy is inconsistent with premeditation. Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988), see also Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987). Similarly, it is inconsistent with the intent to inflict torture or prolonged suffering, required for a finding of HAC.

The state may argue, as it did below, that HAC was established by the fact that the victim was tied and gagged (T785-86; R109-10). However, circumstantial evidence of an aggravating factor cannot satisfy the burden of proof unless it is inconsistent with any reasonable hypothesis which might negate the factor. Geralds; Eutzy. In the instant case, Dr. Diggs testified on proffer that when he observed the crime scene two main possibilities entered his mind; either a possibly consensual sexual bondage situation, or a situation where the victim may have submitted to being bound and gagged out of fear (T456-66,474,476-77,480-85). Dr. Diggs stated that the circumstances were consistent with either hypothesis, and he could

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[38] The cases relied on by the state and the trial judge below -- Floyd v. State, 569 So. 2d 1225, 1232 (Fla. 1990) and Perry v. State, 522 So. 2d 817, 821 (Fla. 1988) -- are distinguishable in that in those cases there was evidence of defensive wounds. In Perry the victim was also choked and beaten. In Floyd the victim received a bruise to her nose that was consistent with a fight or struggle.

not draw a more definite conclusion one way or the other (T480; see T474-85). Although defense counsel contended that Dr. Diggs' testimony on this point was relevant to show that the evidence was consistent with an act of consensual bondage which later escalated into a homicide, the trial judge excluded it as speculative (T460-62,480,484-85,489). See Issue II.

Since the circumstances were such that the state's own medical expert could not determine whether the bondage was consensual or involuntary -- and in the absence of other evidence unknown to Dr. Diggs which might have answered this question one way or the other -- it cannot be said that the circumstantial evidence was inconsistent with any reasonable hypothesis which would negate the HAC aggravator.

Because the jury was erroneously instructed on HAC, and was exhorted by the prosecutor that there was no amount of mitigation which could outweigh this one aggravating factor, the entire sentencing process was affected. See Espinosa v. Florida. Appellant's death sentence should be reversed, and a new jury should be impaneled to make a recommendation as to the appropriate sentence. Bonifay.

D. Proportionality

Only one valid aggravating circumstance exists in this case. In the event that Appellant's convictions arising out of the robbery and sexual battery of Judy Baker are overturned, there will be no valid aggravating factors, and the death sentence will be imper-

missible. Banda v. State, 536 So. 2d 221, 225 (Fla. 1988); Thompson v. State, 565 So. 2d 1311, 1318 (Fla. 1990) (death sentence is not legally permissible unless state meets burden of proof beyond a reasonable doubt of at least one aggravating circumstance).

Assuming that the Baker convictions are affirmed, that will leave one valid aggravator to be weighed against the five nonstatutory mitigating circumstances found by the trial judge. Under Florida law, the death penalty is reserved only for the most aggravated and least mitigated cases of first degree murder. Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993); DeAngelo v. State, 616 So. 2d 440, 434-44 (Fla. 1993); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989). As was recognized in DeAngelo and Songer, this Court has rarely affirmed death sentences supported by only one valid aggravating factor, and then only when there was very little or nothing in mitigation. The instant case does not fall into that category. Dr. Michael Gamache testified that appellant has a number of favorable character traits; that he would adjust well in prison and would not be a discipline problem, and that he has an excellent potential for rehabilitation (T887-89). Among these positive indicators are his good work history and employment skills; his service in the military with an honorable discharge; and his close family relationships (T887-88). His culinary, artistic, and craftsmanship abilities, and his good verbal skills, would all enable him to be a productive member of a prison setting (T889). Based on the testimony of Dr. Gamache, Tammy Gallimore, and Joseph Williams, the trial judge found as mitigating factors

(1) appellant's exemplary work and military history; (2) his deprived childhood, marked by poverty and abandonment by an alcoholic father; (3) his positive character traits, such as being a hard worker and a good parent; (4) excellent potential for rehabilitation and productive adjustment within the prison setting; and (5) continued opportunity to maintain a loving relationship with his daughter, through frequent visitation (R155-56, T948-50). These are valid and significant mitigating circumstances. See, e.g., Torres-Arboleda v. Dugger, ___So. 2d___, (Fla. 1994)[19 FLW S213]; Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989); Brown v. State, 526 So. 2d 903, 908 (Fla. 1988); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988); McCampbell v. State, 421 So. 2d 1072, 1076 (Fla. 1982).

Appellant's death sentence should be reduced to life imprisonment without possibility of parole for twenty-five years.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority appellant respectfully requests this Court to grant the following relief:

[Issue I-A]: Reverse the first degree murder, armed robbery, and dealing in stolen property convictions with directions to enter an order of acquittal.

[Issue I-B and C]: Reverse the first degree murder conviction with directions to enter a judgment and sentence for second degree murder; and reverse the armed robbery conviction with directions to enter an order of acquittal.

[Issue II]: Reverse the convictions for a new trial.

[Issues III, IV, V, and VI]: Reverse the death sentence for a new penalty proceeding before a newly impaneled jury.

[Issues I-D and VII]: Reverse the death sentence with instructions to impose a sentence of life imprisonment without possibility of parole for twenty-five years.

[Issues I-D and VII (alternative relief)]: Reverse the death sentence for a new penalty proceeding before a newly impaneled jury.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 16th day of May, 1994.

Respectfully submitted,

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