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IN THE SUPREME COURT OF FLORIDA

CHADWICK BANKS,

Appellant/Cross-Appellee,

v. CASE NO. 83,774

STATE OF FLORIDA,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR GADSDEN COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE/INITIAL RRIEF OF CROSS-APPELLANT

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STATEMENT OF THE CASE

The State accepts Banks' statement of the case except for the following amplification and clarification.

Banks fails to note that, after defense counsel objected to the standard CCP instruction, the trial court modified that instruction (TR 869). The State does not agree that defense counsel renewed any objections to the jury instructions at the time the jury was instructed.

The State would note that there are no jury selection issues raised on appeal, nor any issue concerning the standard instructions about the weighing of aggravators and mitigators. Moreover, because of Banks' plea of no contest, there are no guilt-phase issues.

Finally, the State would amplify the circumstances surrounding the prior aggravated assault convictions. A little more than a year before the instant murders, Banks pled no contest to two charges of aggravated assault. Adjudication of guilt was withheld and Banks was placed on probation. He was still on probation when he murdered Cassandra Banks and Melody Cooper. Before this case was presented to the jury, his probation for the prior assaults was revoked and Banks was adjudicated guilty. Thus, at the time of sentencing in this case, Banks had been adjudicated guilty of the

two prior assaults. (TR **18-19);** State's exhibit 40 (on file in this Court). Although State's Exhibit 40, containing the information, plea and adjudication of guilt were admitted into evidence and considered by the jury, nevertheless, the trial court ultimately determined that these two priors "did not exist" for purposes of aggravation, because Banks had not been adjudicated at the time of the murders (R 178). The State cross-appeals this erroneous determination.

STATEMENT OF THE **FACTS**

The State accepts Banks' statement of the facts, except for the following amplification and clarification.

The State would first note that, notwithstanding testimony that **Banks** had consumed several drinks the evening before the murders, and his own statement to police that he had been "real intoxicated," he was described by one bartender at Dut's as acting 'normal;" he had been shooting pool and winning, and was neither slurring his speech nor stumbling (TR 529-30). The other bartender testified that Banks did not seem to be intoxicated (TR 782). Banks' cousin testified that when he saw Banks at work the morning after the murders, Banks did not act high nor smell of alcohol (TR **741).** Furthermore, when Banks was questioned by police the next

morning, he was "calm" and "neat," and behaving normally (TR 658). He did not appear to be intoxicated (TR 695). Banks told police that he had smoked marijuana the previous evening (TR 688); however, a urinalysis was negative for the presence of cannabis (TR 696).

Contrary to Banks' assertion that he and Cassandra "apparently had some kind of confrontation" the evening before the murder, the witness whose testimony he cites for this proposition testified that she had never seen Banks and his wife argue or fight (TR 528). Neither she nor any other witness observed any confrontation that evening (TR 528-29, 782). Cassandra had already gone home when a witness saw Banks talking to a woman shortly before 2:15 to 2:30 a.m. (TR 530).

When Banks talked to the police some six hours later, he initially denied killing his wife and 10-year-old stepdaughter, but, after two hours of questioning, admitted that he had shot them (TR 658, 661). He also admitted that he had "molested" his stepdaughter before he shot her (TR 678). He denied having anal sex with his stepdaughter (TR 675), but her anus was "widely dilated and relaxed," indicating anal penetration, and Banks' sperm was found in her anus (and, as well, on her T-shirt, her inner thigh, on the floor and in Banks' own underwear) (TR 721-22, 639-

42, 647). In addition, a pubic hair microscopically consistent with Banks' own pubic hair was found deep inside his stepdaughter's vagina (TR 648, 720).

Banks admitted that he entered the mobile home carrying the murder weapon (TR 677), and that he first shot his wife in the head before walking to the stepdaughter's bedroom (TR 678). She was awake and asked him what he was doing (TR 678-79). He set the gun down and "had sex" with her (TR 680). He denied that she had resisted, but acknowledged that he had "spanked" her (TR 680).

In fact, the bedroom was in disarray; the victim had a bad bruise on her forehead and an abrasion on her right eyebrow; Banks' blood was under her fingernails; her underwear was torn off and the lining of her anus was torn (TR 586, 592, 605, 639-40, 720-22).

Banks acknowledged that he 'might need some counseling" (TR 681).

The evidence will be further discussed in argument.

SUMMARY OF THE ARGUMENT

There are six issues on appeal, plus one issue on cross-appeal: (1) Banks did not preserve his objection to the CCP instruction because he failed to present the trial court with a "true alternative" and also because he did not clearly object to the modified CCP instruction that the trial court drafted following Banks' objection to the standard instruction. Furthermore, although the trial court ultimately did not find the CCP aggravator to have been proved beyond a reasonable doubt, the evidence was sufficient to warrant a CCP instruction. Finally, in light of the remaining valid aggravators and minimal mitigation, any error here was harmless. (2) After first murdering his wife, Banks physically and sexually assaulted his 10-year-old stepdaughter for some 20 minutes prior to murdering her. The trial court did not err in finding this murder to have been heinous, atrocious and cruel. (3) Under the facts of this case, the trial court did not err in "doubling" the HAC and sexual battery aggravators. (4) Because Banks had been adjudicated guilty of two prior aggravated assaults at the time of sentencing in this case, the trial court did not err in instructing the jury as to these prior violent felony convictions. The trial judge really should have weighed these two

prior violent felony convictions in aggravation himself, when he sentenced Banks. (5) Considering the contemporaneous **sexual** battery as aggravating the crime of murder was not unconstitutional. *(6)* The trial court's sentencing order complied with the dictates of Campbell v. State, **571** So.2d 415 (Fla. 1990). (Cross-appeal) The trial court **erred** as a matter of law in rejecting two prior violent felonies in aggravation, because even though Banks had not been adjudicated guilty of these offenses at the time he committed this murder, **he** was adjudicated guilty before he **was** sentenced in this case.

ARGUMENT

ISSUE I

APPELLANT'S OBJECTIONS TO THE TRIAL COURT'S CCP INSTRUCTIONS ARE NOT PRESERVED FOR APPELLATE REVIEW; ANY ERROR IS HARMLESS IN THIS CASE

Banks first contends that the jury instruction concerning the cold, calculated and premeditated aggravator was error (1) because the evidence of heightened premeditation was insufficient to warrant such an instruction, and (2) because the instruction was insufficient under Jackson v. State, 648 So.2d 85 (Fla. 1994).

As to the second part, Banks asserts that trial counsel "objected to the jury instruction based on this Court's holding in Jackson ..." Appellant's brief at 18. The State assumes that Banks does not mean to imply that trial counsel actually cited Jackson, as Jackson was not decided until April 21, 1994, while the CCP instruction at issue was delivered to the jury on March 18, 1994. Thus, the trial court did not have the benefit of this Court's Jackson opinion at the time the jury was charged. The State agrees that trial counsel did object to the constitutional adequacy of the standard CCP instruction (TR 857). However, the

State does not agree that Banks has preserved for appeal any objection to the CCP instruction actually delivered in this case.

The record indicates that, at the time of the charge conference, trial counsel planned to "submit some language for the record" (TR 856). However, the record does not reflect that defense counsel ever submitted a proposed expanded instruction. The defendants in Jackson v. State, supra; Fennie v. State, 648 So.2d 495 (Fla. 1994); Walls v. State, 641 So.2d 381, 387 (Fla. 1994); Foster, 654 So.2d 112 (Fla. 1995); and Archer v. State, Fla. L. Weekly S119, (Fla. Mar. 19, 1996), all preserved their complaints about the constitutional validity of the trial court's CCP instruction both by objecting to the standard CCP instruction and by requesting expanded instructions incorporating case law defining the parameters of the CCP aggravator. "[M]erely raising an objection to the standard instruction is not sufficient to preserve the issue for review." Estv v. State, 642 So.2d 1074, 1080 (Fla. 1994). Here, as in Esty, it is not enough that Banks' trial counsel objected to the the standard instruction; trial counsel must also have proposed a valid alternative to preserve his objection for appeal. Banks's trial counsel does not appear to have done so, and this issue is procedurally barred for this reason. Johnson v. State, 660 So.2d 637, 648 (Fla. 1995) (where

substitute HAC instruction urged by trial counsel was not significantly different from standard instruction, issue is "procedurally barred for failure to present a true alternative") .

Furthermore, it is not at all clear that trial counsel objected to the CCP instruction that the court actually gave. Following the charge conference at which the defense had objected to the standard CCP instruction -- without suggesting an alternative -- the trial court drafted its own expanded CCP instruction to deliver to the jury. It should be noted that the trial counsel's objection to the standard CCP instruction was only one of a number of objections to the standard penalty-phase instructions lodged by the defense during the charge conference.[1] The next day, defense counsel stated that he had reviewed the proposed instructions submitted by the trial court and that it was his understanding that the trial judge had modified the standard CCP instruction and, as well, the standard penalty-phase

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[1] Trial counsel objected to the word "advisory" in respect to the jury's sentence recommendation (TR 846), to the standard instructions about the weighing process (TR 847), to the instruction concerning the prior violent felonies (TR 850), to the felony-murder aggravator (TR 850-51), to the HAC instruction (TR 852-56), to the CCP instruction (TR 856-9), to doubling the felony-murder and the HAC aggravators (TR 864-65), and to the lack of any definition of reasonable doubt in the penalty-phase standard instructions (TR 866-68).

instruction concerning reasonable doubt (TR 869).[2] The judge confirmed that he had made these changes to the standard instructions. Trial counsel's only response was: "So we would just note our objection to the instructions as given, over our ones we said yesterday and the ones we submitted in writing" (TR 869).

Aside from the one-sentence response to the final version of the court's proposed instructions, trial counsel interposed no further objection to the jury instructions, and neither raised nor renewed any objections to the charge at the conclusion of the sentencing charge. Trial counsel's vague and indefinite response to the court's final version of its instructions, the State would contend, is insufficient to preserve any issue concerning the CCP instruction for appeal. Although with the benefit of hindsight it is apparent that the modified CCP instruction delivered by the trial court fails to satisfy the rule subsequently announced in Jackson, the trial court could reasonably have assumed that its attempt to modify the standard CCP instruction met with defense counsel's approval. There certainly is nothing in defense counsel's response that clearly indicates that defense counsel was doing anything other than preserving his objections to the many

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[2] As noted in Archer v. State, supra, there is no definition of reasonable doubt in the standard penalty-phase instructions.

other portions of the standard charge which the trial court did not amend. Trial counsel did not make a clear or specific objection to the CCP instruction actually delivered by the trial court, and therefore has failed to preserve for appellate review any issue of the validity of this instruction. Johnston v. State, 497 So.2d 863, 869 (Fla. 1986) (general objection not made with the required specificity to apprise the trial court of error or to preserve the objection for appellate review); Craia v. State, 510 So.2d 857, 864 (Fla. 1987) (defense counsel's attempt to have motion for mistrial apply to entire argument could not preserve for review objections not specifically made to the trial court).

This Court has held consistently that, for an issue to be preserved properly for appellate review, the appellate arguments must be the same as the arguments raised in the lower court. Larkins v. State, 655 So.2d 95, 99 (Fla. 1995); Peterka v. State, 640 So.2d 59 (Fla. 1994); Bertolotti v. State, 565 So.2d 1343 (Fla. 1990); Jackson v. State, 451 So.2d 458 (Fla. 1984); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Banks has failed to demonstrate the necessary congruence between any trial claim and the claim he is attempting to raise on this appeal. Therefore, this claim is procedurally barred.

As for the claim that the evidence was insufficient to support giving an instruction on the CCP aggravator, the State recognizes that the trial judge ultimately found that the CCP aggravator "was not proved beyond a reasonable doubt" (R 180). This factual determination is entitled to deference. However, just because the trial judge did not himself find that the CCP aggravator had been proved beyond a reasonable doubt does not mean that the evidence would not have supported a contrary finding, much less that the evidence was insufficient even to warrant a CCP instruction. Bowden v. State, 588 So.2d 225, 231 (Fla. 1991) ("The fact that the state did not prove this aggravator to the trial court's satisfaction does not require a conclusion that there was insufficient evidence of robbery to allow the jury to consider the factor. Where, as here, evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required."); Hunter v. State, 660 So.2d 244, 252 (Fla. 1995) (jury should be instructed on those aggravators for which "credible and competent evidence has been presented;" by contrast, for actual sentencing purposes, aggravator must be proved beyond a reasonable doubt). The evidence in this case was sufficient to support a CCP instruction.

The evidence shows that sometime after he left Dut's, Banks drove to the mobile home he shared with his wife and stepdaughter, parked in the rear of the home and sat there for several minutes (T 548). Then, instead of entering the home by the back door (the usual means of ingress), he walked around to the front door, carrying the murder weapon (TR 548-49, 562, 676-77). He entered the home without turning on the lights, went to the bedroom he shared with his wife and shot her in the head at point-blank range as she lay sleeping (TR 549, 714). Banks then walked to the other end of the mobile home, in the dark, weapon in hand, to the bedroom where his lo-year-old stepdaughter slept (TR 678). He sexually assaulted her both vaginally and anally. Then, while she was crouched on the floor on all fours, Banks pulled her head back and fired **a** bullet through the top of her head, killing her (TR 724-25).

The evidence is sufficient to support a finding that Banks planned at the outset to murder Melody Cooper. To this end, he coldly and calmly obtained the murder weapon in advance, entered his home by stealth, murdered the only adult who might interfere with his plans for Melody Cooper, and then sexually assaulted and murdered Melody Cooper. He killed each victim execution-style with a single gunshot to the head. Compare Halliburton v. State, 561

So.2d. 248, 252 (Fla. 1990) (where defendant broke into home and killed victim while he slept, just to see if he could kill, murder was CCP);

The facts of this murder readily support a conclusion that Banks had formed a prearranged design to commit murder before he entered the mobile home, and maintained that prearranged design as he proceeded towards Melody's bedroom after he had murdered his sleeping wife. Walls v. State, 641 So.2d 381, 388 (Fla. 1994) (at point when defendant left first victim's body, he "obviously" had formed prearranged design to kill second victim, located in other part of house). In addition, the murder of Melody Cooper was 'a protracted execution style slaying which is by its very nature cold." Fennie v. State, 648 So.2d 95, 99 (Fla. 1994). "The lengthy nature of the crime also goes to the heightened premeditation necessary to establish this aggravating factor." Ibid. Banks had ample time to reflect on the consequences of his actions, not only while he sat in his vehicle behind the mobile home prior to the crime, but also during the time that elapsed following the execution-style slaying of his wife as he walked down the hall to the bedroom where his stepdaughter slept, and further during the time he was brutally raping and sodomizing the latter before slaying her execution style. Foster v. State, 654 So.2d 112, 115

(Fla. 1995) (the several minutes that elapsed between concealing the victim's body and inflicting the mortal wound gave the defendant 'ample time to reflect on his actions and their attendant consequences" and was "compelling evidence" of heightened premeditation).

The fact that Banks first murdered the only adult that in reasonable possibility could have come to Melody Cooper's aid demonstrates the deliberate ruthlessness necessary to raise his premeditation above that generally required for premeditated first-degree murder. Cf. Fennie v. State, supra (deliberate ruthlessness found where defendant eliminated the possibility of witnesses or assistance by transporting victim to secluded area).

As for the last CCP factor, there was neither evidence nor contention raised at trial that Banks had a pretense of moral or legal justification for raping, sodomizing and then murdering Melody Cooper. Compare Banda v. State, 536 So.2d 221 (Fla. 1988) (pretense of moral or legal justification existed where uncontroverted evidence that victim was violent man who had threatened accused who then killed to prevent victim from killing him).

Contrary to Banks' contention, competent and credible evidence supports the CCP instruction in this case. Even if the trial judge

ultimately was not persuaded beyond a reasonable doubt that this aggravator had been established, there was no error in instructing the jury on this aggravating factor.

Should this Court disagree with any of the foregoing, however, and conclude for whatever reason that the trial court's CCP instruction was error, the State would contend that any error is harmless beyond a reasonable doubt. The trial judge found three aggravators, including prior capital felony conviction, HAC and contemporaneous sexual battery. Banks does not dispute the prior capital felony conviction, and has no factual dispute with the felony-murder aggravator. Moreover, his dispute with the WAC finding is clearly without merit. Furthermore, as the State will argue *infra*, the trial court erred as a matter of law in not also finding that Banks had two prior *violent* felony convictions in addition to a prior *capital* felony conviction. This Court is entitled to consider these two clearly-established prior violent felony convictions in accordance with its "responsibility to review the entire record in death penalty cases and the well-established rule that all evidence and matters appearing in the record should be considered which support the trial court's decision, *Echols v. State*, 484 So.2d 568, 576-77 (Fla. 1986).

Against this significant and weighty aggravation, the trial court found only one statutory mitigator (Banks' age of 21, which the trial court gave little weight because Banks was mature and intelligent) and several nonstatutory mitigators (none of which were entitled to much weight). In light of the strong aggravation and minimal mitigation, there is no reasonable possibility that any error in instructing the jury as to the CCP aggravator affected the jury's recommendation of death. Castro v. State, 644 So.2d 987 (Fla. 1994); Fennie v. State, supra; Armstrong v. State, 642 So.2d 730 (Fla. 1994).

ISSUE II.

THE TRIAL COURT PROPERLY FOUND THAT THIS MURDER WAS HEINOUS, ATROCIOUS OR CRUEL

Banks' second claim is that the evidence is not sufficient to prove the heinous, atrocious or cruel aggravator beyond a reasonable doubt. Banks contends that the facts of this crime are not "vile and shocking" and are not distinguishable from the "norm[al]" homicide. Appellant's brief at 21. The State cannot agree. The trial court was amply justified in concluding from the evidence that Banks' actions were "conscienceless and pitiless and unnecessarily torturous to the victim, Melody Cooper" (R 180).

By Banks' own admission, after he shot his wife, he went to Melody Cooper's room (TR 677-78). Melody Cooper was awake. She asked him what he was doing (TR 678-79). He "spanked" her (TR 680). Then he "molested her" for "about twenty minutes" (TR 678-79). Then he shot her (TR 678).

Banks denied having anal sex with Melody Cooper, and claimed that she had not tried to get away or to fight him (TR 675, 680). The physical evidence demonstrated the contrary, however.

Melody Cooper's body was found face down, on her knees, on the floor beside her bed. She was nude below the waist, and her posterior and genitalia were exposed (TR 587, 724). Her underpants had been torn and lay under a T-shirt that had what appeared to be a footprint on it (TR 605). Her anus was "widely dilated and relaxed," and the lining of her anus was torn, indicating anal intercourse (TR 721-22). In addition, vaginal intercourse was indicated by the presence of a pubic hair deep inside the victim's vagina that was microscopically consistent with Banks' pubic hair (TR 648, 720). Banks' semen was found in the victim's anus, on her T-shirt, on her inner thigh, on the floor and in Banks' own underwear (TR 639-42, 647).

The victim's bedroom and her bed were in disarray (TR 586, 592). She had a bad bruise on the right side of her forehead and

an abrasion on her right eyebrow (TR 720-21). There was a blood stain on the bed sheet. Blood identified as Banks' was found under Melody Cooper's fingernails and on the pillowcase, while blood on the victim's T-shirt was identified as hers (TR 639-40).

The medical examiner testified that, given the position of the body, which did not move after the shot, the victim's head must have been "pulled back real far ... to get the gun to shoot in the top of the head" (TR 724-25).

The disarray of the bedroom, the bruise and abrasion on the victim's forehead, the defendant's blood under the victim's fingernails, the tear in her anal lining, the pubic hair in her vagina, her torn underwear, the presence of sperm everywhere (including inside the victim's anus), and Banks' own admission that he "molested" the victim for twenty minutes -- all demonstrate that before she was murdered, this lo-year-old-girl was subjected to a lengthy and vicious physical and sexual assault as her mother lay dead at the other end of the mobile home.

Banks' appellate counsel argues that HAC may be found only when the homicide is distinguishable from the "norm," when it is Vile and shocking," and when it evinces "extreme and outrageous depravity." AB at 21. But even if it could be considered "normal" to walk into the bedroom of one's lo-year-old stepdaughter in the

middle of the night and shoot her, it is most assuredly not within the 'norm of premeditated murders," Robertson v. State, 611 So.2d 1228 (Fla. 1993), to first shoot the mother as she lay sleeping, and then to enter the stepdaughter's bedroom, rip off her underwear, sexually assault her both vaginally and anally, and finally to snatch her head back and shoot her in the top of the head.

Although it is true that the HAC aggravator does not apply where "death results from a single gunshot and there are no additional acts of torture or harm," Cochran v. State, 547 So.2d 928 (Fla. 1989), it is also true that the HAC aggravator may be "supported by the actions of the offender preceding the actual killing, including . . . sexual abuse." Swafford v. State, 533 So.2d 270, 277 (Fla. 1988). Accord, Lightbourne v. State, 438 So.2d 380, 391 (Fla. 1983). "Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." Preston v. State, 607 So.2d 404, 410 (Fla. 1992). "Moreover, the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." Swafford v. State, supra. It may sensibly be inferred from the circumstances of this case that the "fear and emotional strain" experienced by

Melody Cooper as she struggled unsuccessfully against being hideously violated by the very person she should have been able to rely upon for succor and protection truly is 'beyond description by the written word." Routly v. State, 440 So.2d 1257, 1265 (Fla. 1983). The trial court did not err by concluding that the "actions of the Defendant, Chadwick D. Banks, clearly demonstrate that the crime was conscienceless and pitiless and unnecessarily torturous to the victim, Melody Cooper," and that the HAC aggravator had been proved beyond a reasonable doubt. (R 180).

ISSUE III

THE TRIAL COURT DID NOT IMPERMISSIBLY DOUBLE THE STATUTORY AGGRAVATORS OF "DURING THE COMMISSION OF A FELONY" AND "HEINOUS, ATROCIOUS OR CRUEL

The trial court found that the existence of the felony aggravator:

> 'was confirmed by the evidence presented in the penalty phase of the trial, after Defendant had plead No Contest to the murders of Cassandra Banks and Melody Cooper, and to Sexual Battery on a Child under Twelve (12) Years of Age By a Person Sixteen [sic] Years of Age or Older, the sexual battery having been committed on Melody Cooper prior to Defendant's murdering her."

The trial court concluded that the evidence was "clear" and that this aggravating circumstance was proved beyond a reasonable doubt (R 179).

In addition, the trial court also found that the heinous, atrocious or cruel aggravating circumstance had been proved beyond a reasonable doubt. Although the victim "died almost instantly" after being shot, the court concluded that it was

> 'clear from the evidence presented that the victim, a child under twelve (12) years of age, was physically and sexuallv assaulted for approximately twenty (20) minutes prior to Defendant's murdering her. The actions of the Defendant, Chadwick D. Banks, clearly demonstrate that the crime was conscienceless and pitiless and unnecessarily torturous to the victim, Melody Cooper." (R 180) (Emphasis supplied) .

Reasoning that statutory aggravators "cannot be doubled" when they "refer to the same aspect of the crime," Banks argues that it was improper to "double" the HAC and felony-murder aggravators because "the trial court has relied solely on the fact that the victim was sexually assaulted before her death" to sustain the HAC finding. Appellant's Brief at 23-4.

The State would respond, first, that the trial court did not rely "solely" upon the sexual assault to sustain its HAC finding; as the court's order plainly demonstrates, the trial court found that Banks sexually and physically assaulted the victim. The

victim's bedroom was in disarray, and her face **was** scraped and bruised. Banks admitted that he "spanked" the victim (in response to the question whether the victim had resisted the sexual assault) (TR 680). Furthermore the sexual battery would have been completed when Banks vaginally penetrated the victim; he additionally penetrated her anally, tearing her anal lining in the process.

In Echols v. State, 484 So.2d 568, 575 (Fla. 1985), this Court stated:

> "There is no reason why the facts in a given case may not support multiple aggravating factors provided the aggravating factors are themselves separate and distinct and not merely restatements of each other as in a murder committed during a robbery and murder for pecuniary gain, or murder committed to eliminate a witness and murder committed to hinder law enforcement."

Banks has cited no cases in which this Court has held that HAC and murder during the commission of a sexual battery cannot be "doubled." In fact, this Court has upheld death sentences that were based upon separate findings of murder during a sexual battery and HAC. E.g., Lishtbourne v. State, 438 So.2d 380, 390-91 (Fla. 1983) (aggravators included murder during sexual battery and HAC based on forced oral and vaginal sex followed by single shot to head); Reed v. State, 560 So.2d 203, 207 (Fla. 1990) (aggravators included murder during sexual battery and HAC based upon physical and sexual abuse).

The HAC and contemporaneous felony aggravators were not based upon the "same essential feature of the crime." Larzelere v. State, 21 Fla.L.Weekly S147, S151 (Fla. March 28, 1996). The felony aggravator was based upon the commission of a sexual battery on a child under the age of 12 by a person over the age of 18, while the HAC aggravator was based upon an extended period of physical and sexual abuse that was conscienceless and pitiless and unnecessarily torturous to the victim. It was not improper to consider these two aggravators separately.

Should this Court disagree with any of the foregoing, however, the State would contend that any error was harmless beyond a reasonable doubt. Banks does not dispute that the circumstances of this murder include the fact that he first murdered his wife and then vaginally and anally assaulted his LO-year-old stepdaughter before murdering her. Even if the sexual battery aggravator and the HAC aggravator were merged, there would remain two strong aggravators: the merged HAC/sexual battery and the prior capital felony conviction. Furthermore, as the State will argue jnfra, the trial court also should have found that Banks had two prior violent felony convictions in addition to the prior capital felony conviction. As noted previously, this Court is entitled to consider these two prior violent felony convictions in accordance

with its "responsibility to review the entire record in death penalty cases and the well-established rule that all evidence and matters appearing in the record should be considered which support the trial court's decision." Echols v. State, supra at 576-77. Against this significant and weighty aggravation, there is only one statutory mitigator (Banks' age of 21, which the trial court gave little weight because Banks was mature and intelligent) and several nonstatutory mitigators, none of which were entitled to much weight. The trial court found that the aggravating circumstances, "collectively or individually, far outweigh all the mitigating circumstances" (R 184). Combining the HAC and felony aggravators into one would not have affected the sentence imposed by the court.

ISSUE IV

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT BANKS' PRIOR VIOLENT FELONY CONVICTIONS COULD BE CONSIDERED IN AGGRAVATION

At the time of this murder, Banks was on probation in Gadsden county pursuant to a plea of no contest, entered July 23, 1991, to charges of aggravated assaults upon James Edward Baker and Tyrone Davis, in Gadsden County case number 91-249 (State's Exhibit 40 B). Adjudication of guilt **was** withheld until Banks entered his plea in the instant case, on March 14, 1994, at which time the trial court

revoked Banks' probation and adjudicated him guilty on both counts of aggravated assault (TR 18-19). Following these events, the jury voir dire examination was conducted and a jury was selected. On March 16, 1994, the trial court signed a written judgment, reducing to writing his oral pronouncement adjudicating Banks guilty of the prior aggravated assaults (State's Exhibit 40 C). The presentation of evidence commenced on March 16, 1994, in the instant murder case. State's Exhibit 40 A, B and C, containing the information, plea and adjudication of guilt as to the prior aggravated assaults, was introduced into evidence, and considered by the jury as to sentence (TR 729). The jury rendered its advisory sentence on March 18, 1994 -- four days after the trial judge orally adjudicated Banks guilty on the prior aggravated assaults, and two days after the trial judge signed the written document adjudicating Banks guilty.

Banks argues that it was error to instruct the jury on that portion of § 921.141 (5) (b) relating to prior violent felony convictions. (He does not complain of the jury instruction or the trial court's finding that Banks previously was convicted of a capital felony.) The basis of Banks' objection is that at the time of the murder, Banks had neither pled guilty nor been adjudicated

guilty of the two prior aggravated assaults, and therefore had not been convicted of these assaults at the time of the murder.

The State agrees that, at the time of this murder, Banks had not been adjudicated guilty for the prior aggravated assaults. The State also agrees that a plea of no contest without an adjudication of guilt does not amount to a 'conviction" for purposes of satisfying the prior violent felony aggravator. Garron v. State, 528 So.2d 353, 358 (Fla. 1988).[3] However, the relevant inquiry is not whether Banks had been adjudicated guilty of the prior felonies at the time he committed the murder, it is whether he had been adjudicated guilty at the time of sentencing. "The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance." Kins v. State, 390 So.2d 315, 320 (Fla. 1980) (Emphasis supplied). This aggravator has been applied not only to prior crimes, but also to contemporaneous crimes (committed against different victims), e.g., Correll v. State, 523 So.2d 562, 568 (Fla. 1988), and even to crimes committed after the death-penalty crime, so long as the conviction was obtained by the time

[3] A plea of guilty, by contrast, suffices even absent an adjudication of guilt. McCrae v. State, 395 So.2d 1145, 1153-54 (Fla. 1980).

of the sentencing. Elledge v. State, 346 So.2d 998 (Fla. 1977). The record shows unequivocally that Banks had been adjudicated guilty at the time of sentencing. Therefore, the two aggravated assault convictions were properly admitted in evidence and considered by the jury on the issue of sentence. The only error committed by the trial judge is in basing its rejection of the prior violent convictions on the fact that at the time of the murders Banks had not been adjudicated guilty of the two aggravated assaults (R 178).

Although the trial court failed to weigh the two prior violent felony convictions in aggravation, this Court may consider them to the extent they might be relevant either to any question of harmless error or to proportionality, in accordance with the court's "responsibility to review the entire record in death penalty cases and the well-established appellate rule that all evidence and matters appearing in the record should be considered which support the trial court's decision." Echols v. State, sunra, 484 So.2d at 576-77.[4]

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[4] Unlike the situation in Cannadv v. St-ate, 620 So.2d 165, 170-71 (Fla. 1993), the State is not raising the applicability of the prior violent felony aggravator for the first time on appeal. Moreover, the State is not here contending that the death penalty may be affirmed solely on the basis of a single aggravator not even presented below. In this case, not only were other aggravators

ISSUE V

THE FELONY MURDER AGGRAVATOR IS NOT UNCONSTITUTIONAL

Here, Banks contends that it was error to instruct the jury on the aggravating factor that the murder was "committed while the defendant was engaged in the commission of a sexual battery" (TR 850, 893). He argues that this amounts to an 'automatic aggravating circumstance" which is unconstitutional because it does not sufficiently narrow the class of persons eligible for the death penalty. This argument, however, has been repeatedly rejected, by the United States Supreme Court, Lowenfield v. Phelss, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), by the 11th Circuit Court of Appeals, Bertolotti v. Duaaer, 883 F.2d 1503, 1527 (11th Cir. 1989), and by this Court, Stewart v. State, 588 So.2d 972, 973 (Fla. 1991); Enqle v. Dugger, 576 So.2d 696, 704 (Fla. 1991); Squires v. State, 450 So.2d 208, 221 (Fla. 1984). All of these

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found by the trial court, but the prior capital/violent felony aggravator is established by the prior capital felony conviction; the two violent felonies would only add weight to an aggravator found to exist by the trial court. Nevertheless, in case this Court might consider a cross-appeal a prerequisite to consideration of the two prior violent felony convictions, the State files a cross-appeal on this issue contemporaneously with this appeal.

cases recognize that the requisite narrowing can occur at the guilt phase of the trial.

The sexual battery of a person under the age of 12 by a person over the age of 18 is itself a capital felony. § 794.011 (2) Fla. Statutes. An offender who has committed murder during the commission of a sexual battery of a lo-year-old girl therefore has committed two very serious offenses. The commission of an additional serious offense in addition to murder is a factor which narrows the class of persons eligible for the death penalty. Furthermore, the contemporaneous commission of a sexual battery of a lo-year-old girl reasonably justifies a more severe penalty for the girl's murder. This, of course, is just another way of saying that had Banks not committed a sexual battery in addition to murder, this would be a less aggravated murder. The fact that he did sexually assault his stepdaughter before killing her makes the murder more aggravated than it otherwise would be. Thus, the contemporaneous felony aggravator fully meets the test of a valid aggravator. Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) ('To avoid this constitutional flaw [of arbitrary and capricious sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe

sentence on the defendant compared to others found guilty of murder.").

Banks' automatic-aggravator argument is without merit.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN ITS EVALUATION OF MITIGATING CIRCUMSTANCES

In Campbell v. State, 571 So.2d 415, 419 (Fla. 1990), this Court held that a trial court sentencing a defendant to death must "expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." The trial court in this case did exactly that.

Prior to sentencing, the defense submitted a sentencing memorandum (R 155-176), proposing 10 mitigating factors, one of which was the statutory age mitigator, and the other nine of which were suggested nonstatutory mitigators. In its sentencing order, the trial court addressed all of these proposed mitigators except for Banks' number 8, in which Banks had proposed that his

convictions for two other capital offenses in addition to the murder of Melody Cooper mitigated this offense because the court could structure a sentence that would truly be a life sentence (R 174). Banks does not complain of the trial court's failure to address this proposed mitigator (and it difficult to see how multiple capital felony convictions could be anything other than aggravating).

Banks complains about the trial court's alleged "outright rejection" of two of the proposed non-statutory mitigators and about the weight assigned to the remaining mitigators.[5]

As for the trial court's rejection of the proposed mitigator that Banks committed the crime while he was under the influence of alcohol, it cannot be said that the trial judge rejected uncontroverted factual evidence. There was testimony from numerous

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[5] These included Banks' military service, employment history, good character, and contribution to the community and family, which the trial court found were "no more that society expects from the average individual, and thus not entitled to great weight;" his potential for rehabilitation, which the trial court found was entitled to "some weight;" his cooperation with police, which occurred only after an initial denial of guilt and after Banks was advised that a witness could place him at the scene, and was therefore only entitled to 'minimal weight;" his love and support from his family, entitled to "some weight;" and the statutory mitigator of age (21), which the court gave "minimal weight" in light of evidence that Banks is a mature and intelligent person (TR 182-183).

witnesses that Banks appeared to be sober before and after he committed the crime. Furthermore, the trial court ruled in the alternative that even if this mitigator had been established, it would have been entitled only to minimal weight. The primary finding was authorized, but even if it were error, the alternative finding was within the court's discretion. "While voluntary intoxication or drug use might be a mitigator, whether it actually is depends upon the particular facts of a case." Johnson v. State, 608 So.2d 4, 13 (Fla. 1992). Here, as in Johnson, there was too much purposeful conduct for the court to have given any significant weight to Banks' alleged alcohol intoxication, a self-imposed disability that the facts show not to have been a mitigator in this case.

The second proposed nonstatutory mitigator rejected by the trial judge was Banks' religious activities. As noted in Banks' memorandum, there is evidence that Banks and his family attended church regularly as he grew up, and that, following his marriage, Banks began attending services with his wife and her family. In fact, Banks had attended Kingdom Hall the evening before murdering his wife and sexually battering and murdering his stepdaughter. Banks has not explained how attending church the evening before committing such a crime might mitigate his guilt. As this Court

has noted, there are "no hard and fast rules about what must be found in mitigation in any particular case .... Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain with the trial court's discretion." Lucas v. State, 568 So.2d 18 (Fla. 1990). Accord, Burger v. Kemp, 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (defendant's alleged mitigation evidence is "by no means uniformly helpful" to the defense; quoting with approval 11th Circuit's observation that "mitigation may be in the eye of the beholder"). The trial court's rejection of Banks' religious participation as a nonstatutory mitigating factor was not an abuse of discretion. But even if it was, any error was harmless. Zeisler v. State, 580 So.2d 127, 130-31 (Fla. 1991) (mitigating effect of church and community participation described by this Court as "minuscule" in comparison with the enormity of the crimes committed).

As for the weight assigned to the remaining mitigators, 'this Court has repeatedly recognized that it is within the purview of the trial court to determine whether a particular mitigating circumstance was proven and the weight to be given to it." Foster v. State, 654 So.2d 112, 114 (Fla. 1995). So long as the trial court considers all the evidence presented in mitigation -- and

this trial judge clearly did just that -- the court's findings as to mitigation will stand absent a palpable abuse of discretion. E.g., Cook v. State, 542 So.2d 964, 971 (Fla. 1984); Hudson v. State, 538 So.2d 829 (Fla. 1989); Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983). There was no abuse of discretion in this case, and any possible deficiency in the trial court's sentencing order would be harmless beyond a reasonable doubt. Wickham v. State, 593 So.2d 191 (Fla. 1991); Cook v. State, 581 So.2d 141 (Fla. 1991); Rogers v. State, 511 So.2d 526 (Fla. 1987).

Finally, although Banks does not raise any issue concerning the issue of proportionality, the State would note that this Court has consistently approved death sentences for defendants in cases similar to this one. Banks does not contest the prior capital felony aggravator or the contemporaneous sexual battery aggravator. In addition, notwithstanding Banks' argument to the contrary, the evidence amply supports the trial court's finding that the murder of Melody Cooper was heinous, atrocious or cruel. Furthermore, as the State argues in its cross appeal, the trial court should also have weighed in aggravation Banks' two prior violent felony convictions. Banks does not suffer any mental infirmities, and he was not the victim of a deprived or abusive childhood. Mitigation was minimal. This crime is more aggravated than numerous domestic

cases in which this Court has upheld the death penalty. Henry v. State, 649 So.2d 1366 (Fla. 1995) (defendant convicted of murder of wife; two aggravators: prior violent felony and HAC); Lindsey v. State, 636 So.2d 1327 (Fla. 1994) (defendant murdered girlfriend and her brother; two aggravating factors, including prior conviction of second-degree murder); Porter v. State, 564 So.2d 1060 (Fla. 1990) (defendant murdered former girlfriend and her current boyfriend; three valid aggravators: prior violent felony conviction, murder committed during burglary, CCP); Lemon v. State, 456 So.2d 885 (Fla. 1984) (defendant murdered his girlfriend; aggravators included prior violent felony and HAC); King v. State, 436 So.2d 50 (Fla. 1983) (defendant murdered girlfriend; two aggravators, including previous murder conviction); Harvard v. State, 414 So.2d 1032 (Fla. 1982) (defendant murdered former wife; two aggravators, including prior violent felony conviction).

ISSUE ON CROSS APPEAL

THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO CONSIDER BANKS' TWO PRIOR VIOLENT FELONY CONVICTIONS IN AGGRAVATION

As noted previously, the trial court rejected that portion of the prior violent/capital felony conviction aggravator which related to Banks' two prior violent felony convictions. The trial

court based its rejection of the two prior violent felony convictions in aggravation solely on the fact that at the time of the murder Banks was on probation and had not yet been adjudicated guilty. However, the relevant inquiry is not whether Banks had been adjudicated guilty of the prior felonies at the time he committed the murder, it is whether he had been adjudicated guilty at the **time** of the sentencing. Kins v. State, supra; Correll v. State, supra; Elledge v. State, supra.

As demonstrated in the State's argument on Issue IV, the evidence is undisputed that at the time of sentencing Banks had been adjudicated guilty of the two prior aggravated assaults, and the trial court erred as a matter of law in failing to consider these two prior convictions in aggravation. This Court should treat this additional aggravation as having been established notwithstanding the trial court's finding to the contrary.

The State acknowledges that this cross appeal is not timely filed, but asks this Court to exercise its discretion to consider it. See Loaez v. State, 638 So.2d 931, 932 (Fla. 1994) (filing of notice of cross-appeal is not jurisdictional). Inasmuch as Banks himself raised an issue concerning whether it **was** proper to consider the prior violent felonies in aggravation, he will neither suffer prejudice nor be deprived of adequate notice if this Court

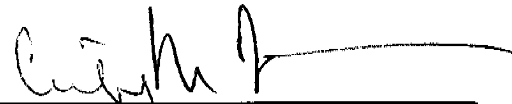
allows this untimely cross-appeal. Walker v. State, 457 So.2d 1136 (Fla. 1st DCA 1984).

CONCLUSION

For all the foregoing reasons, Bank's convictions and death sentence should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Teresa J. Sopp, Esq., Liberty Center, 7077 Bonneval Road, Suite 200, Jacksonville, Florida, 32216-6062, this 15TH day of April, 1996.

CURTIS M: FRENCH
Assistant Attorney General