

TABLE OF CONTENTS

TABLE OF CITATIONS.....	ii
STATEMENT OF THE CASE AND FACTS.....	1
ARGUMENT.....	2-8
THE TRIAL COURT ERRED IN PRECLUDING EVIDENCE WHICH WAS RELEVANT TO ESTABLISH AGGRAVATING FACTORS, AND NEGATE MENTAL MITIGATORS, AND ALSO ERRED IN MERGING AGGRAVATING FACTORS.	
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	9

TABLE OF CITATIONS

Cases	<u>Page</u>
Echols v. State, 484 So. 2d 565 (Fla. 1985).....	7
Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992).....	7
Rutherford v. State, 545 So. 2d 853 (Fla. 1989).....	7
Suggs v. State, 644 So. 2d 64 (Fla. 1994), cert. denied, U.S. ___, 115 S.Ct. 1794, 131 L.Ed. 2d 722 (1995)	2

STATEMENT OF THE CASE AND FACTS

The State relies on the Statement of the Case and Facts set forth in its Initial Brief of **Appellee**.

ARGUMENT ON CROSS-APPEAL

THE TRIAL COURT ERRED IN PRECLUDING EVIDENCE WHICH WAS RELEVANT TO ESTABLISH AGGRAVATING FACTORS, AND NEGATE MENTAL MITIGATORS, AND ALSO ERRED IN MERGING AGGRAVATING FACTORS.

As detailed in the State's previous brief herein, evidence of the defendant's conversations with attorney Westfield regarding the manner in which another murder had been committed in Dade County, in a case which was being tried in the Dade County Courthouse a few weeks prior to the murders committed by the defendant herein, was relevant to the CCP aggravating factor, as it established the heightened degree of premeditation required for that factor. Such evidence also refuted the defendant's claim that his emotional state was of such a nature as to negate the existence of the CCP factor. Furthermore, since the evidence reflected an awareness on the part of the defendant that this method of murder would inflict an unusually high degree of torture and suffering on the victim, the evidence also tended to establish the existence of the HAC aggravating factor.

The Appellant, in response to this cross-appeal issue, attempts to distinguish the case of Suggs v. State, 644 So. 2d 64, **69 (Fla. 1994)**, cert. denied, U.S. , 115 S.Ct. **1794**, 131 L.Ed. 2d **722 (1995)**, in which a book, entitled ***Deal the First Deadly Blow***, was found in the defendant's residence. That book contained pictures of the types of wounds which matched the wounds found on the victim of the murder

committed by the defendant. The book was deemed to constitute evidence relevant to proving that the murder was cold, calculated and premeditated. The evidence in the instant case is considerably more compelling. While the book, in Suaas, was found in the defendant's residence, there was no direct evidence that the defendant had actually read the book. By contrast, in the instant case, the defendant was clearly a party to the conversations regarding the manner in which the other duct-tape drowning/murder was committed. Furthermore, contrary to the Appellant's argument, the instant murder did not merely involve the use of duct tape. As detailed in the State's prior brief herein, the manner of binding the victims, for the purpose of inflicting substantial torture, prior to drowning, was shown to be common to both cases. The Appellant further seeks to distinguish Suggs on the grounds that the evidence therein "did not seek to introduce a subjective and inflammatory description of another victim's suffering. . . ." Reply Brief of Appellant, p. 33, n. 36. That, however, is a distinction without significance. In the instant case, as noted above, the evidence serves dual purposes, as it proves the HAC factor in addition to the CCP factor. Since it proves that the defendant was aware of the degree of torture that the duct-tape/drowning method of murder was capable of inflicting, the evidence in the instant case was relevant for proving the suffering which inheres in both the type of murder committed and the HAC factor.

As to the Appellant's contention that attorney Westfield was not a medical examiner, it must be noted that Westfield was relating to the defendant what the

testimony in the earlier case was showing. Westfield did not have to be a medical examiner to convey to Walker that testimony in an earlier case demonstrated the high degree of suffering which inhered in this type of murder. Nor did Westfield need to be a medical examiner to establish that the defendant, by virtue of his conversations with Westfield, believed that such a method of murder would cause a high degree of suffering to his own victims.

As to the Appellant's apparent concern that the suffering of Ms. Gibbs in the earlier case would become the "focus" of any testimony from Westfield, a review of Westfield's sworn statement clearly reflects that that is not the case. Westfield's statement primarily relates how he told Walker about the manner in which Ms. Gibbs had been taped, bound and gagged. (R. 289-90). While the suffering of Ms. Gibbs is referred to (R. 290), not only is that reference relevant, for reasons noted above, but it is clearly a brief reference; one which can not reasonably be described as the "focus" of Westfield's statement.

Lastly, on this aspect of the cross-appeal, the Appellant asserts that the evidence would have focused on Westfield's own "feelings and opinions" about the earlier duct-tape murder. There is no reason why the foregoing evidence could not have been introduced without any expression of Westfield's own "opinions." The references to attorney Westfield's emotions and opinions arise in the context of the State's explanation, during a bench conference, as to the reason why Westfield

approached the prosecution to relate his conversations with Walker. Thus, when the court considered this issue at the outset of the penalty phase proceedings, the prosecution advised the court that Westfield "communicated his concerns to the state attorney's office" because he had been troubled by the prospect that his own conversations with Walker contributed to Walker's plans for the instant murders. (1667-68). Similarly, Westfield, in his sworn statement, asserted that he spoke to the prosecutor about his conversations with Walker because it "bothered" him that there were similarities between the instant case and the earlier one which Westfield had discussed with Walker. (R. 292). The emotions and opinions of Westfield were not an essential part of any testimony which he would give; they simply explained why he felt motivated to convey this information to the prosecution, and the prosecution herein was simply advising the court as to how Westfield had come to initiate his contact with the prosecution. Westfield's emotions and opinions could easily be avoided during the course of any in-court testimony which he would give. Westfield could simply have reiterated, word for word, what he told Walker and what Walker said in return. Such testimony would elicit the defendant's knowledge and premeditation, and the nature of the suffering which the defendant believed he could cause through this method of murder.

Under the foregoing circumstances, the trial court erred in excluding evidence which related to two separate aggravating factors.

The trial court also erred in merging two aggravating factors: CCP and pecuniary gain. The essence of the Appellant's response to this cross-appeal issue is that it would be improper to rely on both of these aggravators where the same evidence establishes both of them. The Appellant's analysis is wrong, both factually and legally. Pecuniary gain relates solely to the motive for the murder, the desire to eliminate the child support obligation. (R. 578). The CCP factor, on the other hand, relates to the efforts and planning to perpetrate the murder once the motive has been determined. (R. 579). Thus, the trial court, in the CCP factor, relies on several factual matters which are distinct from the motive for the murder: enlisting the assistance of the defendant's brothers; repeated efforts to lure Ms. Jones to meet him at the movie theater; bringing duct tape to the scene of the crime; taking the victims to a predetermined site in an isolated, remote area, where the murders could be committed without detection and where discovery of the bodies would be hindered or delayed. (R. 579). Thus, contrary to the Appellant's response, the two aggravating factors are predicated upon distinct factual matters.'

More significantly, as a matter of legal analysis, the Appellant appears to be asserting that the pecuniary gain motive can not be divorced from the premeditation

1

Furthermore, since the pecuniary gain motive is satisfied by the murder of the child, thereby eliminating the child support obligation, the CCP factor should, at a minimum, be applicable to the murder of Ms. Jones, as her murder does not eliminate the obligation to pay for the support of the child.

aspect of the CCP factor and that, as a result, it is improper to rely on both factors, since pecuniary gain is related to both. The Appellant's correlation of the two factors is clearly belied by repeated decisions from this Court. While a motive for a murder will always be a part of "premeditation," it is not the essence of the "heightened premeditation" required to sustain the factor. The defendant in Echols v. State, 484 So 2d 565 (Fla. 1985), was paid to carry out a contract killing. Pecuniary gain was thus an important fact related to the defendant's premeditated intent to carry out the contract killing, but it did not preclude this Court from concluding that pecuniary gain and CCP were separate and distinct factors which were both applicable. In Echols, just as in the instant case, the defendant was motivated by pecuniary gain, and the defendant took well-defined steps to carry out the murder which was motivated by pecuniary gain. Likewise, in Fotopoulos v. State, 608 So. 2d 784, 793 (Fla. 1992), the murder was motivated by the desire to collect insurance proceeds resulting from the victim's death, yet that did not preclude a finding that the CCP factor was applicable since the murder had been carefully choreographed. See also, Rutherford v. State, 545 So. 2d 853, 854 (Fla. 1989) (planning a murder for the pecuniary benefit derived from forcing an elderly woman to write a check supported CCP and pecuniary gain factors). In all of the foregoing cases the pecuniary motive is part of the premeditation; in none does it preclude the applicability of both aggravating factors. Similarly, in the instant case, numerous distinct acts, above and beyond the pecuniary motive, reflect the planning and heightened premeditation that support the CCP factor.

Based on the foregoing, both of the factors should have been deemed applicable without the merging of those factors.


4

CONCLUSION

Based on the foregoing, the judgments and sentences should be affirmed and the Court should conclude, on the cross-appeal, that the trial court erred in the rulings which are addressed herein.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



FARIBA N. KOMEILY
Florida Bar No. 0375934
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, N921
P.O. Box 013241
Miami, Florida 33101
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Cross-Appellant was mailed this 22nd day of July, 1996 to CHRISTINA A. SPAULDING, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.



FARIBA N. KOMEILY