IN THE SUPREME COURT OF FLORIDA

ROBERT T. HAWK,	:	
Appellant,	:	
vs.	:	Case No. 88,179
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Robert Hawk, the defendant in this case, is legally deaf, as were the victims. Licensed interpreters signed at trial for Hawk and for the witness who were deaf. (15/15) The sign language interpreters were Sonny Searles, Elizabeth Millikin, Josephine Corrick and Hank Reidelberger. (15/30)

References to the record on appeal in this case will be made to the volume number, followed by a slash and the page number or numbers (Vol/page). References to the Supplemental Record will be referenced by the letters "SR," followed by a slash and the page number or numbers.

Volumes 1 through 9 contain pleadings, depositions and court documents. Volume 10 contains the written sentencing order and other trial documents, and the Notice of Appeal and other appellate documents. (10/1663-1804) The allocution hearing, sentencing hearing, and motion for new trial hearing are contained in Volume 11. (11/1805-1917) The exhibits and exhibit lists are in Volumes 1 through 14. (12-14/1918-61) Voir dire is contained in Volumes 15 and 16. (15-16/1-343) The guilt phase of the trial is in Volumes 17 through 22, and the penalty phase in Volume 23. The Supplemental Record contains the pretrial suppression hearing and a very short penalty phase hearing.

The issues in this brief are arranged in approximate chronological order, as they are best understood by this arrangement.

The order of the issues in no way indicates undersigned counsel's opinion as to the relative merits of the issues.

STATEMENT OF THE CASE

Appellant, Robert T. Hawk, was indicted by a Pinellas County grand jury on March 2, 1993, for the first-degree murder of Betty Gray. He was also charged with the attempted murder of her husband, Matthew Gray. (1/6-7) The crimes allegedly occurred on or between the 18th and 19th of February, 1993.

Hawk was tried by jury January 16 through January 20, 1996, and found guilty as charged. (22/1266) Penalty phase was held January 23, 1996. (23/1335-1420) The jury recommended death by an eight to four vote. (10/1710, 23/1409)

At the March 29, 1996, sentencing, the trial court sentenced Hawk to death as to the first-degree murder. (10/1707-09, 1714, 11/1878) His written sentencing order was filed contemporaneously. (10/1710-14) He adjudicated Hawk guilty of attempted first-degree murder and sentenced him to a consecutive term of thirty years. The departure was based on "the heinous nature of the offense and the concurrent murder in the first degree." (11/1869-70, 1878)

The judge also found that Hawk had violated his probation and adjudicated him guilty of carnal intercourse with a minor, and burglary. He terminated Hawk's probation, and sentenced him, in accordance with the sentencing guidelines, to five-and-a-half years in prison for each offense, to run concurrently. (11/1867-69)

Motion for New Trial was denied at a hearing held May 3, 1996. (11/1805-1917) Notice of Appeal to this Court was filed May 17, 1996. (10/1764) The Public Defender for the Tenth Judicial Circuit was appointed by amended order on May 29, 1996. (10/1778)

STATEMENT OF THE FACTS

STATE'S CASE

Beth Teas, age 16, lived next door to Matthew and Betty Gray, an older couple, both of whom were hearing impaired. Beth was at home alone on Friday, February 19, 1993. (18/532-33) At 11:00 that morning, someone knocked on her door. She looked through the peephole and, because she did not know the "guy" at the door, did not answer. (18/534, 537) She saw the man go to the back door of the Grays' house and enter without knocking. She noticed that the back screen was leaning against the Grays' house on the ground below the window. She called her father, who called the police. (18/535, 537)

Several minutes later, Beth saw the man walk out of the Grays' house with a towel in his right hand. The towel appeared to be draped over an object in his hand. He got into the Grays' car, and drove away. (18/526, 46-47) Beth Teas met with the detectives. She and an artist drew a composite. (18/539) In court, Beth identified Hawk as the man she had seen enter the Grays' house. (18/537)

Deputy John Jewett, Pinellas County Sheriff's Department, was dispatched to the Grays' house on February 19, 1993, to investigate a reported burglary. (18/566) He noticed that one of the jalousie windows by the deadbolt in the back door had been removed. The kitchen window next to the door had a screen out of it. The screen was leaning against the window, which was slightly

open with a curtain caught in it. The rear door was not locked. Inside, Deputy Jewett noticed that the garage door was ajar. The garage and living room area appeared to be in order. The front door had a deadbolt with keys in it. It was locked. (18/568-70)

As he proceeded down the hall toward the bedrooms, he saw hair sticking out of the northeast bedroom, right by the doorway. He heard very labored breathing. He then saw Mrs. Gray's body on the floor of the northeast bedroom. She had massive trauma over her left eye and dried blood on her face. She was lying on her back with her legs apart, with panties and a "Depends" pad at her feet. Jewett checked but found no pulse. (18/571)

The door to the opposite, or northwest, bedroom was closed. As Jewett pushed it open, he saw Mr. Gray on the bed, with massive trauma to his head. He immediately called for assistance. (18/571-72) The paramedics arrived shortly. Mrs. Gray was pronounced dead at the scene. Mr. Gray was transported to Bayfront Medical Center in St. Petersburg by "Bayflite" helicopter. (18/572-73)

Sergeant Stephanie Campbell, Pinellas County Sheriff's Department, looked for money in the Grays' wallets and throughout the house but was unable to find any, except for some coins in a desk in Mr. Gray's bedroom. (18/602-03) They found a screwdriver under the desk, and pry marks on top of the desk, but no murder weapon or tools with blood on them. (18/605-06) She was unable to determine that anything was removed from the house. (18/621)

Deputy Kenneth Kanoski went to Bayfront Medical Center to contact Mr. Gray, age 63, who had been "Bayflited" there. When Kanoski arrived, Gray was incoherent. (19/654, 656-58) He was scheduled for surgery later in the day. (19/663) Kanoski was advised that the Grays' vehicle had been located behind a group of strip stores less than two blocks from the Grays' house He was assigned to surveillance of the vehicle in case someone returned to get it. (19/663-64) A couple hours later, the vehicle was towed and entered into evidence..[1] (19/665-68)

Dr. Robert Davis, associate medical examiner, responded to the scene of the homicide at 8:30 p.m. on Friday, February 19, 1993. (20/800) The house had no heat or air conditioning. Mrs. Gray's body was cold, and full rigor mortis was present, indicating that she had been dead for at least 12 to 14 hours, but not more than 24 hours. (20/808-09) Thus, Mrs. Gray died between 9:00 the previous evening (Thursday) and 9:00 that morning (Friday). (20/810)

The autopsy showed that Mrs. Gray was five feet, five inches tall, and weighed 198 pounds. She was sixty years old. (20/811) The cause of her death was massive blunt force injury to her head. (20/814) The pattern of blood in the lungs indicated that Mrs. Gray may have taken three or four breaths. (20/823-24, 828)

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[1] Detective Madden located the vehicle at the Convenient Food Mart about 5:45 p.m, a five minute walk from Robert Hawk's house. (20/891-92) The Grays lived just a few minutes from Hawk. (20/894)

Dr. Davis could not determine the sequence of the head wounds. Once the injury to the left side of her head occurred, the victim would have been immediately unconscious, and death would have occurred within several seconds. (20/827)

The prosecutor also showed Dr. Davis photographs of Mr. Gray, whom he had not examined. Dr. Davis again found non-specific crescent shaped wounds. (20/821-22) He said that the wounds were consistent with the same weapon being used on both victims.

The prosecutor inquired about a bruise on the left side of Mrs. Gray's wrist. Dr. Davis said that the wound's location was consistent with being a defensive wound, but he had a problem with the age of the bruise. Although he could not rule out the possibility that this was a defensive wound, he found indications that it was an older bruise. He said it was very difficult to age bruises; thus, he could not be certain whether this bruise was old or new. It looked older than the head injuries. (20/814-21, 828)

Alyce Fredericks positively identified a latent print taken from the Grays' kitchen window as Robert Hawk's right thumb print. She identified Hawk's left palm print as the print found on the driver's side window of Grays' car. It is impossible to tell when a fingerprint was made. She found prints in the Gray's house that were not made by anyone with known prints. (20/847, 857, 859-61)

Michael Madden, Pinellas County Sheriff's Department, was assigned case agent. (20/885-86) Among other things, he observed a shoe print on Betty Gray's bed. (20/889) Daniel Attenberger, supervisory agent for the FBI, examined Hawk's left shoe and comparing it to the shoe print left on Mrs. Gray's bed. He concluded that Hawk's shoe made the impression. (21/1083-91)

Khoa Nguyen, 18, was a neighbor of the Grays. In the early morning hours of Friday, February 19, 1993, he and a friend were sitting in the car talking. The car was parked between his house the Grays' house. They saw Robert Hawk walk past their car. (20/474) About an hour later, someone started and restarted the car, making a grinding noise. Nguyen turned and saw someone back up and drive away, but could not see who was driving. (20/478-79)

Luis Valles, age 23 and hearing impaired, knew Hawk from high school and the Florida School for the Deaf. (17/415-17) Since he had been attending St. Petersburg Junior College, he just saw Hawk occasionally. On February 18th, Hawk showed up at his apartment unexpectedly, sometime after midnight. (17/418) He seemed nervous and jittery. Hawk told him that he "blew away people," and that he "killed a couple of people." In sign language, Hawk pointed his hand in a gesture like he was firing a gun. When Valles did not believe him, Hawk showed Valles some blood on the wrists of his sweater. Valles thought Hawk was intoxicated at the time because his eyes were red and his breath smelled of alcohol. (17/425) He admitted they all got drunk

every time they "partied." (17/426)

Late in the afternoon of the following day, Luis Valles saw news of the crime, including a composite of the suspect. He contacted Crime Stoppers and a detective at the Pinellas County Sheriff's Department. (19/731-38) Thomas Klein received the call from Luis Valles at 7:36 Friday evening, by TDD phone.[2] (19/739-44) Billy Theiss, 27 and hearing-impaired, still lived with his mother at the time of the trial. (17/507) He recalled that Robert Hawk came to his house and told him that he had a new car which his father bought for him. Billy went for a ride with Hawk in the car. (17/512-13) Hawk showed him a wad of money. (17/515)

At the time of the trial, Billy's brother, Matthew Theiss, 22, had been incarcerated at Lancaster Correctional Institute for six months, serving a 25-month sentence for twelve felonies. (17/487-89) He knew Hawk through his brother, Billy. Because of Billy, Matthew had learned to communicate in sign language. (17/489-90)

At the time of the homicide, Matthew was living with his mother and brother. At 1:00 or 1:30 a.m. on February 19, 1993, Hawk arrived at their house in a blue Cavalier. (17/492) He told Theiss that his father was buying the car for him. Although Hawk usually had bad breath and did not take care of himself very

[2] TDD phone is a special telephone for deaf persons.

well, he was clean, had shaved and was wearing deodorant. (17/494-95)

Although Matthew recognized Hawk from the police sketch, he did not call the police, but waited to see what would happen. (17/496-98)

Benjamin Vieczorek, age 18, testified that Hawk lived with his family for about four months. His family consisted of his mother and his brother, Daniel. (17/435-38) On the evening of February 18, 1993, he and a couple friends were at his home when Bobby Hawk showed up. Bobby seemed "kind of sketchy" and "wasn't himself." He told Vieczorek that he shot someone. Vieczorek thought Hawk was joking. When Hawk displayed blood on his wrists and blood splatter on his chest, Vieczorek was shocked. (17/438)

Jimmy Palmer, age 17, was one of the boys who was visiting Benjamin Vieczorek that night. (17/447-48) He agreed that Hawk seemed nervous and related the same information as Benjamin. (17/450)

Mrs. Robin Vieczorek testified that Hawk was like a son to her. (17/461) One night when she arrived home from work, Bobby was there with her sons. (17/464, 468) He wanted her to see his car. The car was a grayish-bluish sedan. Hawk said his mother bought the car for him. (17/465-68)

Rickie Brooks saw Robert Hawk on Friday, February 19th, at Tampa Technical where he went to school. Bobby was driving a blue Cavalier. He said he father gave it to him. (19/728-29)

Dennis Copenhaver, age 23, knew Robert Hawk from Southland Roller Palace, a skating rink owned by Hawk's parents. (19/746-47) He remembered seeing Hawk at the skating rink about the time of the homicide. Hawk told him that a couple people in his neighborhood got killed, and that they got hit with a hammer. Copenhaver did not believe Hawk because he was known for telling stories. (19/749)

Gerri Shillito, concession manager and cashier at Southland, had worked for Bobby Hawk's parents, Pat and Glenn Sarley, for almost ten years. She and Bobby Hawk were very close friends. She was working on Thursday, February 18, 1993, at the all-night skate. Although Bobby usually attended the all-night skates, she did not see him there that night. The following night, Bobby was there. He was very nervous. Usually he was a "happy-go-lucky dude." Rather than skating with the other kids, he stayed in the DJ booth with her. He was very serious. (19/758-62) At 11:00 p.m., he asked her to go with him to his parents' private office and to turn on the news. Bobby told her that someone had been murdered in his neighborhood. (19/763)

Debbie Thomas, age 24 and hearing impaired, knew Robert Hawk through her boyfriend Christopher ("Kit") Clements, 23, who was also hearing impaired. (17/387-89) Thomas said she and Hawk were very close; he was like a brother to her, and visited her home every day. (17/389) Over defense objection (17/391), she testified that, about three days before the crime occurred, Hawk

said he could "hit old people," that he could "fuck them up," and that he could "beat up old people." (17/394) Her boyfriend knew Hawk from the skating rink, and also from the school for the deaf in St. Augustine. (17/408) Clements also heard Hawk's comments several days before the murder. (17/411)

Late Friday afternoon, Detective Madden received information that Robert Hawk was a suspect. (20/889) At 1:30 a.m. the following morning, he and a sign language interpreter, Nancy Freeland, arrived at Hawk's home. Hawk was at home by himself, and agreed to accompany them to the sheriff's office to talk to him. (20/902)

After Hawk was taken to the sheriff's office, Deputy Kanoski secured the residence and awaited the return of Hawk's parents. They returned at 2:55 a.m. (91/670) While at Hawk's residence, Kanoski had a phone conversation with an attorney contacted by Hawk's parents. At 3:25 a.m., he relayed to Sergeant Ring that the attorney wished that the defendant not talk to anyone. (19/681)

Madden, Freeland and Hawk arrived at the sheriff's office shortly after 2:00 a.m. on February 20, 1993. The interview began at 2:25 a.m. (20/903) An audiotape of Hawk's statement, interpreted by Nancy Freeland, was played for the jury. (20/907) Madden first read Hawk his rights. (20/907-08) When Madden asked if Hawk would talk to him about the incident in his neighborhood, Hawk said he had "no idea about it." After Madden asked him

several times if he would answer questions about it, Hawk finally agreed to do so. (20/909) (See Issue I, infra.)

Hawk first told Detective Madden that he was with Billy Theiss and Missy Noon at their house on Thursday night from 5:30 or 6:00 until 12:30 when he went to bed. (20/912) On Friday, he walked to the home of Billy Theiss who owed him money. Billy was not at home. That evening he went skating. (20/913-14)

Hawk said he had a moped and had not driven a car for a long time. (20/915) He said he knew a deaf couple in his neighborhood but had not seen them for one-and-a-half years. He admitted that he had walked by their house on Friday morning while taking a shortcut to the Theiss house, but denied going in. (20/916-17) He rang the doorbell at the house next to the Grays' but no one answered. He wanted to ask where the Grays' car was. (20/920)

When Detective Madden confronted Hawk with Beth Teas' statement, and told him that many of his deaf friends saw him in the Grays' car and some of them called in to report that he had talked to them about killing "these people," Hawk said he had "no idea." When Madden told him that "Billy" took a ride in the car, and asked him how he got the car, Hawk said he just got the keys. On Friday afternoon, he knocked on the door and no one answered. He thought something was wrong. He found the back door open and saw blood "all over" and was shocked. He took the car. (20/923-24)

Hawk admitted that he took the car and went to Billy's on

Thursday night. When Madden accused him of lying, Hawk said he was afraid because he knew "these people were -- " Madden then asked him why his fingerprints were on the window that he climbed through to get in the house. Hawk then told Madden he just opened the window. The keys were in the front door. (20/927)

When Madden suggested that on Thursday night Hawk went through the window and killed the woman, Hawk said that: "The lady was laying there on her back, on the floor by the bed. I saw her." When Madden reminded him that Billy saw him in the car Thursday night, he said it was Friday afternoon. When Madden said that Billy saw him Thursday night and went for a ride with him until about 2:00 a.m., Hawk said, "That's right." (20/929) Upon further confrontation by Madden, Hawk said that the house was open on Thursday.[3] He pushed up the window by the kitchen but did not go in because the door was open. He saw Mrs. Gray from the hallway. Mr. Gray was on the bed in another room. (20/930-31) Madden then told Hawk that he was going to be charged with "their murder." (20/931)

Charles F. Edel, Broward County Sheriff's Office, testified as an expert in blood stain identification and interpretation.

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[3] Hawk seemed confused about the day of the week that the events occurred. (20/924, 926) Because the interview took place during the night following the homicides, it is hard to understand why Hawk was confused unless he did not understand the questions or was intoxicated. Hawk's statements were not always in response to the questions. For example, when Madden asked, "What kind of shoes are those?", Hawk responded, "On the weekend?" (20/918) .

(20/957 -66, 974) He went to the Grays' home to look for blood stains by using the chemical "Luminol." (21/977-80) By use of a photograph of Mrs. Gray's body at the scene, he determined that a left palm print was located six to eight inches from her head area. (21/984-85) She was on the bed at the time of the primary bloodshed. (21/987) In his opinion, the weapon was a claw hammer. (21/1006)

Special Agent Michael Malone, FBI hair and fiber expert, examined a hair found in Betty Gray's eye. He opined that it had been forcibly removed. Although it was consistent with Hawk's hair, hair identification is not an exact science. (21/1048) Additionally, the hair could have been transferred from the head itself, or from clothing or another item to which it had been transferred earlier. (21/1004-05)

DEFENSE CASE

After the judge denied the defense motion for judgment of acquittal (21/1093), Robert Hawk testified, through an interpreter. (21/1094) He said that he was nineteen years old at the time of the offense. He was not sure how much schooling he had had but thought maybe 11th grade. He went to special schools. He could not remember how long he had been deaf but knew it was caused by meningitis when he was about two-and-a-half years old. He said he did not read lips very well, but if the speaker were close to him and spoke slowly, he could understand.

Generally, when he reads lips, he understands about 25 percent. (21/1095-97)

Hawk said that he learned to know the Grays when he was nine years old. Over several years he helped at their house by painting and mowing the grass, from when he was about nine to thirteen. He had problems with them because the Grays sexually abused him.[4]

Bobby explained that, when he went to their house and talked awhile, the Grays showed him X-rated movies of sex with children. When the movies ended, they put him in the bedroom and Betty Gray took her clothes off and "put her hand on [her] vagina and moved it back and forth and played with [his] penis." He sucked on her breasts. Later, Matthew Gray undressed and joined them. He put his hand on Bobby's penis and moved it back and forth. He tried to put Bobby's mouth on his penis but Bobby did not remember whether that happened. (21/1102) Bobby said these things happened about ten times or more, but that he did not tell anyone because he was afraid. The Grays told him that, if he every told

[4] At this point, the prosecutor objected and, when asked the grounds, said, "It's just outrageous." The judge overruled his objection. Defense counsel then asked the judge to instruct the jury to disregard the prosecutor's comment and to instruct the prosecutor to stop the sarcastic glances as well. The judge told the jury to disregard the comments of [both] counsel. (21/1098-99) (See Issue III, infra) The judge overruled the prosecutor's relevancy objection after Hawk's counsel explained that the testimony was relevant to the issues of second-degree murder and intent, and showed the relationship between Hawk and the Grays. (21/1101-02)

anyone, they would hurt or maybe kill him to prevent "whatever." (21/1103)

Bobby testified further that he did not remember what happened February 18, 1993. He was not working at the time.[5] He stayed home, watched TV, and worked with his hands fixing things. He was drinking and using drugs a lot, because he was an alcoholic. At that time he was drinking two quarts of beer, using LSD twice and pot fifteen times each day. (21/1104) He did not remember going to Mr. and Mrs. Gray's house on February 18th or 19th of 1993. He did not remember anything about that time because he was constantly high and drunk. He first said he did not talk to Detective Madden, but then said he remembered talking to him with Mrs. Freeland as an interpreter. He said he was high or on drugs then and did not remember what he told them. (21/1106) He did not remember driving the Grays' car to his friends' houses. (21/1122)

On cross-examination, Hawk said he did not complain of the sexual abuse because he was afraid. The prosecutor then asked, "And the first time you are complaining is when you are facing a charge of first degree murder for the death of Betty Gray. Isn't that true?" Hawk said yes. (21/1110-13)

The prosecutor asked Bobby if the Grays were in their fifties when the sexual abuse occurred. He did not know.

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[5] He later said that he received SSI from the government, apparently because he was deaf. (21/1111)

(21/1109) Upon further questioning by the prosecutor, Hawk said he had no idea how old the Grays were at the time of the murder. He finally said that it seemed like they were in their forties.[6] (21/1110) He said that, although he did not remember the events, Madden told him what he had done. He became aware that he had been arrested and charged with murder when he saw it on the news. (21/1117-18)

STATE'S REBUTTAL TESTIMONY

On rebuttal, the State recalled Detective Madden who testified that he did not find X-rated videos in the Grays' house, although they did have several videos. (22/1140-41) He testified further that, when he questioned Robert Hawk, Hawk never mentioned that the Grays forced him to watch X-rated films.[7] Had Hawk so indicated, he would probably have inventoried the videos in the Grays' house to determine if any were adult movies. (22/1144) He said Hawk did not made any allegations of sexual abuse by the Grays. (22/1148)

Madden also testified that, when he encountered Hawk at his home, and when he took Hawk's statement at the sheriff's office, Hawk was walking fine. Madden did not smell alcohol or see any

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[6] The Grays were actually in their sixties. Hawk's inability to assess age within two decades suggests a reasoning problem.

[7] The defense objected and moved for a mistrial because Madden's testimony violated Hawk's right to remain silent. (22/1142) (See Issue III, infra.)

sign that Hawk was intoxicated or on drugs. (22/1144-46) He admitted Hawk said he did not know what was going on. (22/1150)

Nancy Freeland testified that she is an interpreter for the Deaf Service Center, and had interpreted for Bobby Hawk before. (22/1151, 1155) When she interpreted for him on the night of his arrest and during his statement to Detective Madden, she noticed nothing that would indicate that Hawk was intoxicated or had any problem functioning. (22/1156-57)

The State then called Matthew Gray, over defense objection that he had not been qualified as to competency. (22/1138, 1161-62) When asked whether he ever sexually molested Robert Hawk, Gray said, through an interpreter, "No, no, no." He was asked nothing more and the defense did not cross-examine. (22/1163) Gray was the last witness that the jury saw prior to rendering its verdict.

PENALTY PHASE

Hawk's mother, Patricia Sarley, testified that her son was born in Tallahassee on July 31, 1973. (23/1345) She gave birth to Bobby when she was only sixteen. His father, Robert Hawk, was eighteen when they were married, at which time she was pregnant with Bobby. They moved to New Jersey because Hawk's father wanted to move around and find different jobs. He did "[a]bout anything he could do," mainly labor. (23/1346) Most of the time they were on welfare and lived with different acquaintances.

(23/1347)

They first moved to Hiawatha, New Jersey. About six months later they moved to Newark because they could no longer stay with the family they were living with. The next family had a small apartment with seven people living in it. Bobby's father had met the man at work and they moved in with his family. She thought they were still on welfare. Her husband worked in a machine shop.

They stayed in Newark for six to eight months. (23/1347-48)

The Hawks then moved to Chillicothe, Missouri, which was Mr. Hawk's hometown. He got work with the railroad. They stayed there another six to eight months, then traveled to Salem, Oregon, accompanied by her husband's brother, his girlfriend, and their three children. (23/1348) This time they moved because Mr. Hawk liked to move around and find different places to live. (23/1349)

In Salem, they met a couple who were generous enough to let all eight of them live with them in an apartment. They stayed in Oregon about eight months. Mr. Hawk worked as a roofer. His wife never found a job. She took care of Bobby. (23/1350)

They departed Salem, headed for Miami, Florida. They drove to Tallahassee where she and Bobby remained with her father while Bobby's father and the man who was with them continued to Miami. Bobby's father thought he had a job waiting there, but did not. (23/1350) Bobby and his mother stayed in Tallahassee about two

weeks or a month. They then moved back to Missouri because they had no where else to go. They first lived in the basement of Mr. Hawk's sister-in-law's house. They lived there a couple months, then moved to Chicago in the winter of 1975. They lived in an apartment with people from Tallahassee. (23/1350-1353)

At age three, Bobby became ill with spinal meningitis. He was hospitalized for thirteen days. While in the hospital, he "went back to being a baby." He was bottle fed and back on diapers. Once the disease was under control, he returned home. She noticed that Bobby was not responding when she called him, so took him back to All Children's Hospital in Chicago. He was totally deaf in his right ear and 95 percent deaf in his left ear. (23/1353)

Mr. Hawk was unable to handle Bobby's deafness. He would hit Bobby on the head with a ring he wore, yell at him, and throw him in his bedroom. Finally, she could not handle his treatment of Bobby anymore, so left him when Bobby was four-and-a-half.

She found an apartment in a little better neighborhood in Chicago. She and Bobby were on public assistance and received food stamps. Two months later, Mr. Hawk located them, abducted Bobby, and took him back to his hometown in Missouri. Since that time, Bobby has had no contact with his natural father. (23/1353-54)

Mrs. Sarley's circumstances improved immensely after she "got rid of a deadbeat father." At times, she was able to work,

although it was still hard to make ends meet. Her mother, who lived in Chicago, cared for Bobby on weekends so she could work overtime. Mrs. Sarley and Bobby stayed in Chicago for seven years. She took classes at the hospital to learn to cope with a deaf child. At that time she was twenty and twenty-one. (23/1355) Although Bobby participated in a counseling program at school, he had continual behavioral problems. (23/1156)

In 1982, Mrs. Sarley married her current husband, Glenn Sarley. She met Mr. Sarley in Chicago and they moved to Pinellas County, Florida, together. At first, they thought the move had helped Bobby, but then his behavior problems reoccurred. They sought counseling but eventually he was expelled from Morgan Fitzgerald School for the last time. They enrolled him in the Florida School for the Deaf and Blind in St. Augustine, where he stayed for two-and-a-half years. (23/1156-58)

Bobby then returned home and lived with his mother and step-father. They always loved him. Mrs. Sarley said she did not believe Bobby ever matured. He always had a hard time and never accepted being deaf. When he was sixteen, he began to have a problem with alcohol and drugs. They had trouble getting him to work, go to school, or learn a trade. Although he would agree to do so, he had an attention span of about thirty minutes so would quit after awhile. He never learned a skill. After Bobby returned home, he did not mature at all. (23/1358-59)

On the night that Mr. and Mrs. Gray were attacked, the

Sarleys went to the airport to meet friends. Bobby badly wanted to go with them but they did not have room in the car. He was "real mad" at her because she would not let him go. They returned about 2:30 in the morning. They had drinks at the airport. When they returned home, every light in the house was on and the door was open. Bobby returned at about 2:45 a.m. Mrs. Sarley could not tell whether he had been drinking because she was so drunk herself. (23/1361)

Mrs. Sarley asked the jury not to give Bobby the death penalty. (23/1362) Hawk's aunt, Linda Claypool, had also seen some good in her nephew and loved him. (23/1343-44) Pursuant to stipulation between counsel, defense counsel read letters from Hawk's step-paternal grandparents. They pointed out that Bobby had problems with his deafness; that he had always had mental problems; and that his mother was very young then and did not know how to get proper treatment for his problems. (23/1364-65)

SENTENCING HEARING

Dr. Robert Berland, forensic psychologist, testified for the first time at the sentencing hearing. (11/1809-35) His evaluation of Robert Hawk was interrupted when plea negotiations commenced. After the negotiations were unsuccessful, his sign interpreter was hospitalized. By the time the interpreter returned to work, the public defender was no longer involved in the case and Berland's involvement ended. Berland performed

psychological testing, including the MMPI and the Wechsler Adult Intelligence Scale, a standardized intelligence measure which is extremely reliable in showing brain damage. (11/1814-15, 1823)

Dr. Berland saw Hawk in October, 1993. He administered the MMPI orally, using a sign interpreter to be certain that Hawk understood the questions. The test profile indicated that it was not faked. Hawk's score was in the range typical of someone with an active psychosis. (11/1821) It evidenced delusional paranoid thinking and schizophrenia with hallucinations.

His mania score was extremely high. In fact, Dr. Berland said that Hawk had very unusual profile because he had never seen anyone score that high on the mania scale. This is important because the mania adds fuel to the patient's disturbance and increases the likelihood that he will act on his bizarre or aggressive impulses. Someone with that much mania is almost certain to feel so much pressure he would not be able to resist acting on his impulses. Hawk's profile was very energized and disturbed. (11/1822)

The MMPI profile reflected a biologically determined mental illness associated with a defect in brain functioning. Because he became deaf as a result of spinal meningitis, which causes brain damage, Hawk's brain impairment seems to have resulted from that. He would react well to a structured environment. (11/1822-23)

The Wechsler Intelligence Scale, administered in June of

1994, indicated a low score in communications which Berland believed to result from Hawk's lack of intelligence rather than because he did not understand the questions. His score on the digit span subtests showed brain injury in the left and right hemispheres, especially in the left. His subtest scores varied significantly. If all of his scores were at the level of the lowest -- comprehension, Hawk's IQ would be 71 (nearly retarded). If all of his scores were at the level of the highest, his IQ would be 138 (superior). This difference of four standard deviations is clinically and dramatically significant, reflecting damage to brain tissue. (11/1826-29)

Although Dr. Berland did not interview Hawk concerning the homicide or his drug use, he said that alcohol and other drugs generally tended to exacerbate or intensify mental illness. He had no information from which to determine whether Hawk's existing mental illness was exacerbated mildly at the time of the offense or whether he became "floridly and uncontrollably psychotic" because of drug and alcohol use. (11/1831) His actions following the crime did not indicate that he did not have the mental illness, but that he was able to hide the symptoms. (11/1833)

Hawk's mother, Mrs. Sarley, testified that her son was first evaluated at the age of five because HRS was called in because Bobby was bruised from discipline. He was having trouble in school and had started a fire at a sorority house. (11/1837) HRS

determined that Bobby was severely emotionally disturbed and needed psychological help. He received psychiatric help once or twice a week for several years. When they moved to Florida, the counseling was discontinued due to a lack of funds. (11/1838) Later, while attending the Florida School for the Deaf and Blind, Bobby saw a psychologist affiliated with the school. (11/1839) When he returned to the Pinellas County school system at age fifteen, he was evaluated and had counseling at school. The counselor said he was severely emotionally disturbed. (11/1840-41)

Mrs. Sarley said that society does not accept the deaf or the mentally ill. Bobby is a product of society, not a cold-blooded killer. She said that Bobby made a mistake he can never repay and that we are all the victims. Hawk's aunt noted that, although their family committed no crime, they were being punished. She said she loved Hawk; that he did not know the beauty of life; and that he needed help. (11/1841-43)

Defense counsel read a statement by Robert Hawk. (11/1849-50) He apologized for what happened and asked the court to forgive him. He said he would become a good man and "give good life to victims for what he owes." He wrote that he was drunk and drugged; was wrong not to help the victims; and had mental problems. The letter was difficult to understand because of the grammatical problems.

At sentencing, March 29, 1996, the trial judge departed from

the guidelines and sentenced Hawk to 30 years for the attempted murder of Matthew Gray. (11/1869-70) He sentenced Hawk to death for the murder of Betty Gray. (11/1870-78) In his sentencing order, the court found that the aggravators outweighed the mitigation. (10/1714) (See Issue IX, infra.)

SUMMARY OF THE ARGUMENT

This is not a death case. (Issue IX) The Appellant, Robert Hawk, age nineteen and deaf, for some inexplicable reason entered the home of an older deaf couple in his neighborhood, and attacked them with a blunt instrument while they were in bed. The wife, Betty Gray, died almost immediately. Her husband, Matthew Gray, survived the attack but, unfortunately, was severely disabled.

Hawk has been profoundly deaf since age three, when he had spinal meningitis. According to his forensic expert, Dr. Robert Berland, he was apparently also brain damaged as a result of his illness. Hawk suffers delusional paranoid thinking and schizophrenia with hallucinations. Dr. Berland had never seen anyone score as high as Hawk on the mania scale. Hawk's profile was very energized and very disturbed. (11/1822) In addition, he had a difficult childhood, continual problems in school, and was almost constantly in counseling. At age sixteen, he began to abuse drugs and alcohol. He had a very short attention span and could not hold a job. He received disability income and lived with his parents. Why Hawk committed this crime is unclear. He had no serious prior convictions. Although he took the Grays' car and drove it around, he eventually abandoned it nearby. He could not take it home where he lived with his parents. There was no proof that he took money from the Grays. He must have known he would be caught because he drove

the Grays' car around to show his friends; showed them the blood on his clothes, and told them he shot someone.

When taken into custody a day later, Hawk was advised of his Miranda rights. Through an interpreter, he made statements which indicated that he may not have understood his right to remain silent; thus, the trial judge erred by failing to suppress his statements which, although not an admission of guilt as to the murder, were very incriminating. (Issue I) He eventually admitted that he had seen the victims after they had been attacked, and that he took their car and drove it around.

Although Hawk had commented to a friend several days earlier, that he could beat up old people, he made no prior threats to rob or kill anyone. Because the State failed to prove premediation or that Hawk committed the homicide while engaged in any felony, the conviction should only have been for second-degree murder, and second-degree attempted murder. (Issue II)

Likewise, the trial court erred by finding that the murder was committed for pecuniary gain, because the State failed to show that Hawk's motive was financial gain. (Issue VIII) Although the judge declined to find the murder heinous, atrocious and cruel, as a matter of law, he instructed the jury on this factor, over defense objection both as to the form of the instruction and its applicability. (Issues V and VI) Additionally, he erroneously instructed on the pecuniary gain factor (Issue VIII), and failed to instruct the jurors on the

sentencing option of life without parole. (Issue VII) These errors contributed to the 8-4 death recommendation, thus tainting it and making it unreliable. The judge's consideration of the pecuniary gain aggravator was error which generally requires resentencing, but in this case requires that the sentence be reduced to life because only one aggravator remains, and the mitigation, as noted above, was substantial.

Many of these errors were compounded by the prosecutor's continual misconduct. He made improper statements and arguments during voir dire, opening statement, the defense case, and both closing statements. He described Hawk's testimony as "outrageous," argued facts not supported by the evidence, made a "message to the deaf community" argument, and described Hawk in various derogatory terms. The cumulative prosecutorial misconduct, to which defense counsel objected repeatedly, was reversible error. (Issue III)

The prosecutor's "outrageous" grounds for objection occurred when Hawk testified that Mr. and Mrs. Gray had sexually abused him when he was ages nine through thirteen. Even though the prosecutor had represented that he would not call Mr. Gray to testify because of his health and communication problems, he called Mr. Gray to testify in rebuttal, only to deny the sexual abuse. Over defense counsel's objection that Gray was not competent to testify, the trial judge allowed the testimony without making any competency inquiry, based only on the

prosecutor's representation that Gray was competent. This was extremely prejudicial because Mr. Gray did not appear competent, a court order finding him incompetent was in effect, and the jury was unfairly prejudiced by observing Gray's pathetic condition, which was not probative of Hawk's guilt.

If this case is not remanded for retrial on second-degree murder and second-degree attempted murder charges, the Court must vacate the death penalty and order the trial court to sentence Hawk to life in prison. Because of the weighty mitigation and, because only one aggravator is sustainable, this is clearly not a death case. (Issue IX)

ISSUE I

THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION TO SUPPRESS HAWK'S STATEMENTS TO LAW ENFORCEMENT AS UNKNOWING AND INVOLUNTARY.

Before a defendant's statement to law enforcement may be admitted into evidence, the State must show that it was knowingly and voluntarily given. Amends. IV, V, VI, & XIV, U.S. Const.; §§ 9, 13, 16, Fla. Const.; see also Miranda v. Arizona, 384 U.S. 436 (1966); Traylor v. State, 596 So. 2d 957, 966 (Fla. 1992) (if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if must immediately stop). It is unclear whether Robert Hawk, who is profoundly deaf, understood his rights and made a knowing and intelligent waiver.[8]

At Hawk's pretrial suppression hearing, Detective Michael Madden, Pinellas County Sheriff's Office, testified that, when Robert Hawk became a suspect in the investigation of the death of Betty Gray, he contacted Nancy Freeland, an interpreter from the Deaf Service Center, who accompanied him to Hawk's residence, where he lived with his parents. They arrived at about 1:00 a.m., on February 20, 1993, slightly more than 24 hours after the homicide. (SR. 8-9) When Hawk answered the door, Madden asked

[8] Defense counsel filed a pretrial Motion to Suppress, alleging that Robert Hawk's statements to law enforcement were involuntarily and illegally obtained in violation of sections 9, 13, and 16 of the Florida Constitution, and Amendments IV, V, VI, and XIV of the United States Constitution. (9/1502-03)

him, through the interpreter, if he would be willing to accompany them to the sheriff's office to talk about the investigation of an incident hat happened in the neighborhood. Hawk said that he would, but that he wanted to change his clothing first. They let them wait in the house while he changed, then accompanied them to the sheriff's office. Madden described Hawk as calm and willing to cooperate; he did not appear to be under the influence of alcohol. (SR/9-10)

At the police station, the audiotaped interview was conducted through the interpreter. After about forty minutes, it was terminated because Hawk asked for an attorney. Hawk initially denied having been in the Gray's home, but later admitted he had been in the house and had seen the two victims. (SR/15) He first stated that he had not driven a car for over a year, but later admitted having taken and driven the Grays' car. The portion of the interview, involving the Miranda warnings, was as follows:

> DETECTIVE MADDEN: I'm here to ask you some questions about an incident that happened close to your house in reference for our case number 93-35227. Today is February 20th, 1993, and the time is approximately 0225 hours. Before I ask you any questions, Robert, I'm going to read you your rights. If you have any questions, go ahead and ask, okay?
>
> You understand that you have the right to remain silent?
>
> Has he responded?
>
> THE INTERPRETER: Yes.

DETECTIVE MADDEN: Anything you say can and will be used against you in a court of law.

THE INTERPRETER: For what?

DETECTIVE MADDEN: It says very simply, anything you say can and will be used against you in a court of law. Do you understand that?

THE INTERPRETER: Yes.

DETECTIVE MADDEN: Do you understand that you have the right to talk to a lawyer and have him present with you while you're being questioned?

THE INTERPRETER: Do you understand? Yes.

DETECTIVE MADDEN: If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish.

THE INTERPRETER: Yes.

DETECTIVE MADDEN: Do you understand each of these rights that I have explained to you?

THE INTERPRETER: Yes.

DETECTIVE MADDEN: Having these rights in mind, do you wish to talk to me now?

THE INTERPRETER: For what?

DETECTIVE MADDEN: It's about the incident -- I'm going to ask you about the incident that happened around the corner from your house.

THE INTERPRETER: You talking about in my house? I wasn't at my house all day. Arrived about 3:00 o'clock.

DETECTIVE MADDEN: Well, it's an incident that happened down the street from your house in your same neighborhood. Do you understand that?

THE INTERPRETER: Yes.

DETECTIVE MADDEN: All right. I'm going to ask you again then, having these rights in mind do you wish to

talk to me now about that?

THE INTERPRETER: I have no idea about it.

DETECTIVE MADDEN: Well, do you mind answering questions about the incident?

THE INTERPRETER: I don't know what's going on.

DETECTIVE MADDEN: All right. I want to ask you some questions about an incident, the incident that happened around the corner from your house where somebody got killed.

THE INTERPRETER: I don't know.

DETECTIVE MADDEN: I need to know if you want to talk to me about it.

THE INTERPRETER: Yes.

(SR/20-23) Madden said that Hawk was not arrested until after the interview was concluded. (SR/24)

Madden did not videotape the interview because he did not have an interviewing room with a video camera. Although the sheriff's department videotapes DUIs, the equipment is kept at the jail. The equipment for videotaping crime scenes [as was done in this case], is kept at the Technical Services Building. Madden did not try to obtain video equipment because he though that it would cause too much "down time" before they would be able to start the interview. Nor was Robert Hawk given a written waiver of rights to read and sign. Madden said that, although he knew Hawk was able to read and write, he did not use the written waiver because he had the interpreter. He chose to read from the card to Hawk so that the whole interview would be

interpreted.

Nancy Freeland, an interpreter for the Deaf Service Center, testified that she is nationally certified. She said that she had interpreted for Robert Hawk two or three times before. (SR/41, 45) She had no problem interpreting for Hawk. Because he was able to read lips and speak some orally, she used a combination of sign language and speaking so he could read her lips. (SR/46)

Freeland said that Hawk appeared to be alert while talking them and she had no problem communicating with him. (SR/47) Because it is common practice to videotape interviews with deaf people, she suggested it to Madden. She thought he said that they could not locate the equipment, or that it was not working, but she was not sure. (SR/57) She thought that Hawk was given a written Miranda warning to read but was not sure. (SR/58)

The attorneys and the trial court judge had difficulty telling which responses on the transcript were verbal responses from Hawk, which were interpretations of what he said, and which were interpretations of instances where he nodded his head. Freeland could not remember when Hawk responded audibly and when he responded in sign language during the interview. Freeland thought Hawk's communication skills were good, possibly because he was very oral, and she could pretty much follow his sentence structure. (SR/68-70)

The judge found the statements to have been freely and

voluntarily given and denied the defense motion. (SR/84-85) At trial, defense counsel renewed his objection to matters presented at the suppression hearing. The judge again ruled that Hawk's statement was freely, voluntarily, knowingly and intelligently made. (20/871-76) The trial court judge readopted and incorporated the suppression hearing, and confirmed his prior ruling and Hawk's statement was freely and voluntarily given. (20/878-79)

The problem in this case is not whether Hawk's Miranda rights were properly translated, but whether he understood them and comprehended their significance. When Madden attempted to explain Hawk's rights, Hawk's initial responses were, "For what?", "I don't know what's going on," "I have no idea about it," and "I don't know." Most of the remainder of his responses were "yes." (SR/21-22) When the interpreter said "yes," we do not know whether Hawk nodded, said "yes" verbally, or responded in sign language. It is unclear whether "yes" meant he agreed or understood the question.

Before receiving a response of "yes," Detective Madden had to ask Hawk five times whether, with his Miranda rights in mind, he wanted to talk to him. Hawk's first response was "For what?" His second response, after Madden explained that he wanted to ask him about an incident that happened in his neighborhood, was "I have no idea about it." When Madden again asked if he minded answering questions about it, Hawk responded, "I don't know

what's going on." His fourth response to the question was, "I don't know." Significantly, when Madden asked Hawk for the third time if he wanted to talk to him about the incident, Hawk said, "I don't know what's going on." (SR/22) Although Hawk could have meant that he did not know anything about the "incident," it is equally if not more likely that he meant what the words imply; that he had no idea what was going on in the interview. No one asked Hawk what he meant by that. He may have finally answered, "yes," merely because he got tired of being asked the same incomprehensible question. The bottom line is that Hawk's waiver was based upon an interpretation of "yes," which may have been a head nod, just two questions after he said he did not know what was going on.

Although Nancy Freeland thought that Hawk understood the questions, the "best evidence" in this case is the transcript itself. Freeland purportedly interpreted everything that was said. Accordingly, if what Hawk said is unclear from the transcript, it was no clearer to her. It is clear that Hawk did not understand as well as Freeland led the court to believe because, when Madden said he wanted to talk ask Hawk about "the incident that happened around the corner from your house," Hawk inappropriately responded: "You talking about in my house? I wasn't at my house all day. Arrived about 3:00 o'clock." (SR/22)

Dr. Berland testified that comprehension was Hawk's lowest test score on the Weschler Adult Intelligence Test. If all of

his scores had been at that level, his IQ would be only 71. Berland thought that Hawk understood the questions but "simply lacked the intelligence to answer enough of them to get a higher score." (11/1826-27) This suggests that Hawk may have understood the words, but not comprehended their meaning.

Sometimes, under the totality of the circumstances test, see Smith v. Illinois, 469 U.S. 91, 99 (1984); State v. Rowell, 476 So. 2d 149 (Fla. 1985), a request to remain silent is not clear but equivocal. In such cases, the police and the courts must apply the standard applied to equivocal requests for assistance of counsel.

Until 1994, both Florida and federal law required that, unless the police immediately limited their next questions to clarifying the equivocal request and obtaining the suspect's permission to proceed, any resulting statements were inadmissible. Towne v. Dugger, 899 F.2d 1104 (11th Cir.), cert. denied, 498 U.S. 991 (1990); Long v. State, 517 So. 2d 664 (Fla. 1987), cert. denied, 486 U.S. 1017 (1988). The courts also applied this standard to equivocal requests to cut off questioning:

> "[W]henever even an equivocal request for an attorney is made by a suspect during a custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one subject only. Further questioning thereafter must be limited to clarifying that request until it is clarified." . . . We see no reason to apply a different rule to equivocal invocations of the right to cut off questioning.

Martin v. Wainwright, 770 F.2d 918, 924 (11th Cir. 1985), quoting Thompson v. Wainwright, 601 F.2d 768, 771-72 (5th Cir. 1979).

Since these federal opinions were rendered, however, the United States Supreme Court, in Davis v. United States, 512 U.S. 452 (1994), held that, when a suspect makes an ambiguous or equivocal request for counsel, cessation of questioning is not required. The suspect must unambiguously request counsel and must articulate that desire sufficiently clearly so that a reasonable officer would understand the statement to be a request for an attorney. Florida, however, still adheres to the old rule.

This Court has maintained that, to be admissible, confessions must "pass muster" under both the state and federal constitutions. Traylor v. State, 596 So. 2d 957 (Fla. 1992) (adopted Miranda as a state-compelled procedure under Florida Constitution). Therefore, Florida adheres to "the well-established rule that a suspect's equivocal assertion of a Miranda right terminates any further questioning except that which is designed to clarify the suspect's wishes." Owen v. State, 560 So. 2d 207, 211 (Fla. 1990); see also Long v. State, 517 So. 2d 664 (Fla. 1987), cert. denied 486 U.S. 1017 (1988); see Almeida v. State, 687 So. 2d (Fla. 4th DCA 1997) (certifying question as to whether this Court would adhere to Traylor in light of Davis).

In this case, although Hawk never clearly asked to stop the

interrogation, he made may equivocal requests and statements such as "For what?", "I don't know what's going on," "I have no idea about it," and "I don't know." These responses indicated either that Hawk did not understand his rights or that he was hesitant to answer questions. Madden should have immediately attempted to clarify Hawk's responses before continuing his questioning.

The proper standard for determining the voluntariness of a Miranda waiver is preponderance of the evidence. Balthazar v. State, 549 So. 2d 661 (Fla. 1989); Jesus v. State, 556 So. 2d 1361, 1362 (Fla. 4th DCA 1990); see also Colorado v. Connelly, 479 U.S. 157 (1986) (Fifth Amendment likewise requires government to prove voluntariness by preponderance of evidence). Although the standard of proof remains the same, the State's burden in proving voluntariness is heavier when a defendant claims a language barrier.

> [T]he degree of a defendant's ability to adequately speak and understand English is a significant factor which must be considered in the totality of the circumstances. Since that factor is not present in the average case, it would ordinarily require the state to present additional proof to establish a knowledgeable waiver. We see no difference between a language factor and other facts which might impinge upon a knowledgeable and voluntary waiver, such as limited intelligence or education, mental retardation, or emotional stress.

Balthazar, 549 So. 2d at 662. Although Balthazar and Jesus were not deaf, they had limited understanding of English. Their difficulty comprehending the language bears a certain similarity to the difficulty of a deaf person who speaks primarily sign

language.[9] As the Balthazar court noted, facts which impinge upon a knowledgeable and voluntary waiver require the State to present additional proof. Clearly, the State was required to do so in this case.

Although Detective Madden complied with the statute requiring an interpreter, he did not attempt to clarify Hawk's confusion or make an effort to ascertain that Hawk understood his rights and waived his right to counsel.[10] He could have asked Hawk to repeat back what he understood. When Hawk said he did not understand what was going on, Madden could have asked him what he meant by that. Even better, in addition to the sign interpretation of the Miranda rights, he could have had Hawk read the written waiver form and sign it. See Rawls v. State, 596 So. 2d 1255 (Fla. 2d DCA 1992) (defendant who was somewhat deaf but read lips and carried on intelligent conversation was given Miranda warnings to read and signed written waiver afterwards). Madden could also have taken the time to obtain video equipment

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[9] Dr. Berland testified that, when he was working with a sign interpreter while administering the Weschler Intelligence Scale to Hawk, he was working with a foreign language with an extremely different grammatical structure than English. (11/1825) Sign language employs hand signs and other signals to convey meaning. Unless the interpreter spells out the words to the deaf person, the meaning is necessarily imprecise. Accordingly, Miranda warnings are not in exactly the same form when interpreted to a deaf person.

[10] Section 901.245, Florida Statutes (1995), provides that, when a deaf person is arrested and taken into custody, the services of a qualified interpreter should be obtained, if possible.

to record Hawk's signing.[11]

A deaf person lives in a somewhat isolated world. His knowledge is limited because he cannot hear much of the information the rest of us gain merely from "eavesdropping." Even if he reads lips, he understands only what is directed toward him. If he attends a lecture or a church service without a sign interpreter, he can pick-up only parts of the lecture or sermon and may not understand its meaning. If the speaker looks to the side or walks across the floor, the deaf person misses part of the speech. He cannot hear the radio, and must watch attentively to read lips or read the TV screen if the program is closed-captioned. Surely, such a person lacks the knowledge of a hearing person.

Robert Hawk is such a person. He has been deaf from age three. He was barely nineteen when the murder occurred, and had not finished high school. It is difficult to imagine his level of understanding. Although he may have understood his right to a lawyer (he later requested one), he may not have understood the benefits of counsel. He probably did not know that, if he refused to answer questions, his silence could not be used against him.

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[11] At this point, Mrs. Gray was dead, her husband was in the hospital, and Hawk was in custody. Madden did not explain why they were in such a hurry to take his statement that they could not take time to procure video equipment so that his understanding of his rights would not be in question.

This statement should have been suppressed. Accordingly, the Court should reverse and remand for a new trial.

ISSUE II

THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION FOR JUDGMENT OF ACQUITTAL OF FIRST-DEGREE MURDER BECAUSE THE STATE FAILED TO (1) PRESENT SUFFICIENT EVIDENCE OF PREMEDITATION, OR TO (2) PROVE HAWK KILLED MRS. GRAY DURING THE COMMISSION OF A THEFT, AS CHARGED IN THE INDICTMENT, TO PROVE FELONY MURDER.

When the State fails to produce evidence that is legally sufficient to support the convictions, and acquittal is required. Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), aff'd, 457 U.S. 31 (1982). Similarly, when the State fails to produce sufficient evidence to support either premeditation or felony murder, the defendant may be convicted, at most, of second-degree murder and, in this case, attempted second-degree murder. see generally, Terry v. State, 668 So. 2d 954 (Fla. 1996) (evidence insufficient to prove premeditation). For this Court to find that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt. Tibbs, 397 So. 2d at 1123. In contrast, sufficient evidence is "such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded." Id. (quoting Black's Law Dictionary 1285 (5th ed. 1979)).

In this case, neither counsel requested separate verdict for premeditated and felony murder. (22/1212-13) Thus, the jurors

rendered a general verdict of guilt as to first-degree murder, as charged. (9/1635) The State failed to prove either premeditation or felony murder, because it failed to prove Hawk's intent. Thus, if a new trial is not granted, Hawk's convictions must be reduced to second-degree murder and attempted second-degree murder.

PREMEDITATION

Although the State presented direct evidence indicating that Hawk killed the victim, its evidence as to premeditation was merely circumstantial.[12] Premeditation may be shown by circumstantial evidence. Sireci v. State, 399 So. 2d 964 (Fla. 1981), cert denied, 456 U.S. 984, (1982). The evidence, however, must be both consistent with guilt and inconsistent with any reasonable hypothesis of innocence. Mungin v. State, 22 Fla. L. Weekly S107, 108 (Mar. 6, 1997); McArthur v. State, 351 So. 2d 972 (Fla. 1977). Evidence which establishes only a suspicion or probability of guilt (or, in this case, premeditation) is insufficient. McArthur, at 976 n.12. The court should grant a motion for judgment of acquittal in a circumstantial evidence case "if the state fails to present evidence from which the jury

[12] At the end of the State's case, the trial court denied the defense motion for judgment of acquittal which was based on insufficient evidence to establish premeditation, and a complete lack of evidence that Hawk entered the premises with intent to commit a theft, to support the felony murder theory. (21/1093) After rebuttal, he renewed his motion for judgment of acquittal. (22/1166-67)

can exclude every reasonable hypothesis except that of guilt." State v. Law, 559 So. 2d 187, 188 (Fla. 1989). In this case, the evidence was insufficient to prove that Hawk intended to kill anyone. Therefore, Hawk's first-degree murder conviction must be reversed and his death sentence vacated.

Recently, this Court reiterated that premeditation is "a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." Mungin v. State, 22 Fla. L. Weekly S107, 108 (Fla. Mar. 6, 1997) (citing Asay v. State, 580 So. 2d 610, 612 (Fla.), cert. denied, 502 U.S. 895 (1991). Accordingly, premeditation requires "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Roberts v. State, 510 So. 2d 885, 888 (Fla. 1987), cert. denied, 485 U.S. 943 (1988). Second- degree murder, on the other hand, requires no specific intent to kill. Second-degree murder is committed when an unintended death results from an act "imminently dangerous to another and evincing a depraved mind regardless of human life." § 782.04 (2), Fla. Stat. (1995); Marasa v. State, 394 So. 2d 544, 545 (Fla. 5th DCA), rev. denied, 402 So. 2d 613 (Fla. 1981).[13]

[13] An act is imminently dangerous to another and evinces a depraved mind if it is (1) an act that a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, (2) is done from ill will, hatred,

This Court has recognized several types of evidence from which the presence or absence of premeditation may be inferred: the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, the nature of the wounds, and the manner in which the wounds were inflicted. Sireci, 399 So. 2d at 967; Hill v. State, 133 So. 2d 68, 72 (Fla. 1961).

Other courts and commentators have grouped the evidence from which premeditation may be inferred into three categories: (1) facts showing planning activity directed toward a killing purpose; (2) facts from which a motive to kill could be inferred; and (3) facts about the nature of the killing from which it may be inferred "the manner of killing was so particular and exacting the defendant must have killed according to a preconceived design." See W. R. LaFave & A. W. Scott, 2 Substantive Criminal Law, s. 7.7, at 238 (1986) [hereinafter "LaFave & Scott"].

> Illustrative of the first category are such acts by the defendant as prior possession of the murder weapon, surreptitious approach of the victim, or taking the prospective victim to a place where others are unlikely to intrude. In the second category are prior threats by the defendant to do violence to the victim, plans or desires of the defendant which would be facilitated by the death of the victim, and prior conduct of the victim known to have angered the defendant. As to the third category, the manner of killing, what is required

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spite, or evil intent, and (3) is of a nature that the act itself indicates an indifference to human life. Marasa, 394 So. 2d at 545.

> is evidence (usually based upon examination of the victim's body) showing the wounds were deliberately placed at vital areas of the body.

Id. at 239-40 (citations omitted).

The present case lacks evidence in any of these categories. As for preplanning, the State produced nothing more than Hawk's alleged comment to two friends that he could beat up old people. This was not preplanning of a murder but, rather, abstract thoughts of beating up undetermined "old people" for no apparent reason.

The record is silent as to what Hawk intended to do when he entered the Grays' home that night. It is not enough that the defendant had time to premeditate and deliberate. One must actually premeditate and deliberate, as well as actually intend to kill, to be guilty of first-degree, murder LaFave & Scott, at 238. The fact that Mr. Gray survived the attack supports the theory that Hawk did not necessarily intend to kill either of the Grays. There was no evidence of planning necessarily directed toward a killing. Cf. Peterka v. State, 640 So. 2d 59 (Fla. 1994) (evidence of preplanning), cert. denied, 115 S.Ct. 940, 130 L.Ed.2d 884 (1995). No evidence shows that Hawk entered the Gray's home with a weapon. The weapon was never found. He may have found whatever he used to beat the victims inside their house.

Nor is there any evidence from which a motive to kill can be inferred. Although the evidence might support the inference that

Hawk beat the victims to steal their money, or that he beat them because they sexually abused him years earlier, neither of these motives were established. Cf. Clark v. State, 609 So. 2d 513 (Fla. 1993) (defendant killed victim to get his job).

The last category of evidence, the manner of killing, is weakest of all. What is required is evidence that the wounds were deliberately placed at vital areas of the body. See Caraker v. State, 84 So. 2d 50, 51 (Fla. 1956); LaFave & Scott, at 240; see, e.g., Mungin, 22 Fla. L. Weekly at S107 (evidence of premeditation insufficient where robbery victim shot in head at close range with weapon procured in advance, and there were no eye witnesses); Jackson v. State, 575 So. 2d 181, 186 (Fla. 1991).

Here, there is no evidence that Betty Gray's wounds were carefully placed to effect death. If one were to knock someone out with a hammer or other heavy object, one would hit the person on the head. Although the blows were considerably more than were necessary to render Betty Gray unconscious, Matthew Gray's wounds were also more than were necessary to render him unconscious; yet he survived the attack. The manner in which Mrs. Gray was killed was neither particular nor exacting. The wounds were just as consistent with an impetuous, indiscriminate attack as with a calculated plan to take life.

Evidence of premeditated design must be supported by more than guesswork and suspicion. See Jenkins v. State, 161 So. 2d

840 (Fla. 1935). In this case, the State's case for premeditated murder consisted of surmise, conjecture, and speculation, rather than proof. The State presented no direct evidence that the murder of Betty Gray was premeditated. The medical examiner testified only that the cause of Mrs. Gray's death was massive blunt force injury to the head. Dr. Davis found several semi-crescent shaped injuries produced by blunt force, possibly a hammer. (20/814-19) He was not able to determine the sequence of the wounds. (20/827) Once the injury to the left side of her head occurred, she would have been immediately unconscious. Death would have occurred within several seconds. (20/827)

This Court explained the standard of review when guilt is supported only by circumstantial evidence in Davis v. State, 90 So. 2d 629 (Fla. 1956):

> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

90 So. 2d at 631; see also Crump v. State, 622 So. 2d 963 (Fla. 1993) (state must exclude every other reasonable inference that may be drawn from circumstantial evidence to prove premeditation

through circumstantial evidence); Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989) (circumstantial evidence must not only be consistent with premeditation but must also be inconsistent with every other reasonable inference).

At trial, the state presented testimony from two witnesses that, several days before the homicide, Hawk said that he could "fuck up" or "beat up" old people. (17/394, 411) This evidence suggests that Hawk may not have intended to kill the Grays, but merely to beat them up. The evidence fell far short of establishing premeditated murder. It showed, at most, the state of mind required for second-degree murder and attempted second-degree murder.

FELONY MURDER

Furthermore, the State failed to prove that Hawk killed Mrs. Gray during the commission of a theft, as charged in the indictment, to support a conviction for felony murder. The prosecutor presented no evidence that Hawk entered the Grays' home to commit a theft. The court instructed the jury that it must find that,

> [a]t the time of entering or remaining in the structure Robert Hawk had a fully-formed, conscious intent to commit the offense of theft in that structure. Proof of the entering of a structure stealthily and without the consent of the owner or occupant may justify a finding that the entering was with the intent to commit a crime if, from all of the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the intent occurred. . . .

> Even though an unlawful entering or remaining in a structure is proved, if the evidence does not establish that it was done with intent to commit theft, the Defendant must be found not guilty. (22/1239-1240)

As discussed above, Hawk's intent may have been to beat up the victims, ie, "beat up old people." He knew the Grays and may have had a grudge against them. In fact, he testified that they sexually abused him when he was young which, if true, would be a motive to cause them pain but not necessarily to kill them. If he intended to steal their money, as the State contended, he would not have needed to kill them. Because they were both in bed, and both were deaf, he might easily have robbed them without doing them any harm. If they awakened, he would have needed only to render them senseless, or "beat them up."

If Hawk disliked the Grays, he may have been in a rage when he beat them, thus accounting for the multiple injuries. Maybe he intended only to "beat up" the Grays but got carried away and did more harm than intended. "A rage is inconsistent with the premeditated intent to kill someone." Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988) (stabbed 110 times) If Hawk killed Mrs. Gray because he lost control, the homicide was not premeditated.

This theory is supported by Dr. Berland's testimony that Hawk suffered from delusional paranoid thinking and schizophrenia with hallucinations. His MMPI mania score was extremely high; in fact, it was the highest score Dr. Berland had ever seen on the mania scale. His MMPI profile was very energized and very

disturbed. The mania would surely have caused Hawk to act upon whatever bizarre or aggressive impulses he had. (11/1822)

Hawk testified that he used drugs and alcohol at the time the crimes were committed. He did not remember anything about that time because he was constantly high and drunk. (21/1106) His mother testified that Hawk began to abuse drugs at age sixteen. (23/1358-59) One of the witnesses, Luis Valles, thought Hawk was intoxicated the night of the crime because his eyes were red and his breath smelled of alcohol. (17/425) Valles admitted that they all got drunk every time they "partied." (17/426)

Although Dr. Berland did not interview Hawk concerning the homicide or his drug use, he said that alcohol and other drugs generally tended to exacerbate or intensify mental illness. He had no information from which to determine whether Hawk's mental illness was exacerbated mildly at the time of the offense or whether he became "floridly and uncontrollably psychotic" because of drug and alcohol use. (11/1831)

The jury was more likely to have found that Hawk committed the homicide for the purpose of theft based on the erroneous jury instruction on the possession of recently stolen property. Over defense objection (21/1061), the judge instructed that:

> Proof of unexplained possession by an accused of property recently stolen by means of a burglary may justify a conviction of burglary with intent to steal that property if the circumstances of the burglary and of the possession of the stolen property, when considered in the light of all the evidence in the case, convince you beyond a reasonable doubt that the

Defendant committed the burglary. (22/1240)

Although Hawk displayed a wad of money to his friends, he did not say where the money came from. The State presented no evidence that it came from the Grays' house, or that any money was taken from the Grays' house. Maybe the Grays had no money in the house. Although Hawk took their car, it may have been an afterthought. He did not take the car until after the homicides. Thus, Mrs. Gray was not killed while Hawk was committing a theft. There was no evidence that the car key was in the house. It may have been in the car. One would be required to speculate as to whether Hawk committed the homicide during the commission of a theft. The jury, however, upon hearing the jury instruction concerning possession of recently stolen property, would most likely assume that Hawk's temporary possession of the Grays' car was the possession of recently stolen property required to find him guilty of felony murder.

The facts presented by the state in this case failed to show either premeditation or felony murder. Thus, the circumstantial evidence was consistent with innocence as to first-degree murder. A judgment of acquittal of first-degree murder must be granted and the conviction reduced at least to second-degree murder.

ISSUE III

A NEW TRIAL IS REQUIRED BECAUSE THE PROSECUTOR MADE CUMULATIVE COMMENTS AND ARGUMENTS THAT WERE NOT BASED ON THE EVIDENCE, WERE OUTRAGEOUS AND INFLAMMATORY, AND WERE UNFAIRLY PREJUDICIAL TO THE APPELLANT.

It is well established that counsel has the duty to refrain from inflammatory and abusive argument. Stewart v. State, 51 So. 2d 494 (Fla. 1951). Prosecutors in particular have a duty to seek justice and a fair trial:

> Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.

Id. at 495. The prosecutor has the responsibility to seek justice, not merely to win a conviction. Garron v. State, 528 So. 2d 353, 359 (Fla. 1988) (violations of prosecutor's duty to seek justice and not merely "win" a death recommendation cannot be condoned); ABA Standards for Criminal Justice 3-5.8 (1980).

Unfortunately, the prosecutor in the present case failed to heed this Court's admonitions to seek justice and a fair trial. During voir dire and throughout the trial and penalty proceeding, he made comments and arguments intended to inflame and prejudice the jury. They were not based on evidence in the case and were extremely prejudicial to Hawk. They were so harmful when considered together that a new trial is required.

VOIR DIRE

The prosecutor began trying to prejudice the jury before the trial had even begun. During voir dire, in response to a juror's concern about the possibility that the defendant would not testify, the prosecutor correctly explained that the State had to prove Mr. Hawk's guilt beyond a reasonable doubt, and that Hawk had no obligation to testify or put on evidence. He continued:

> I'm going to suggest to you at the close of the State's case with the evidence that I put on, you're going to be very convinced beyond a reasonable doubt that Mr. Hawk is guilty. But the point is --

(16/247-48) Defense counsel objected, asserting that the prosecutor was getting into closing argument. The court sustained the objection but refused to give a cautionary instruction to the panel. Defense counsel moved for mistrial because the prosecutor had inserted his personal opinion as to the guilt of the defendant -- an inappropriate comment to make to the panel. The trial judge denied the motion, but instructed the prosecutor that he was not to argue his case on voir dire. (16/248) Defense counsel renewed his request for a cautionary instruction that it was improper for the prosecutor to offer his personal opinion as to the guilt of the defendant. The judge instructed the jury to "please disregard the last comment as to the suggestion of the prosecutor." (16/249-51) He denied the motion for mistrial. (9/1504)

Although the cautionary instruction may have helped, it did

not cure the error. The trial had not begun. The jury had not been selected or sworn. Before the first witness had testified, the prosecutor told the prospective jury that they would be "very convinced" by the evidence that Hawk was guilty. Voir dire is a vehicle for selecting unbiased jurors. The court and counsel are careful to weed out prospective jurors who have been exposed to pretrial publicity and have formed opinion. See Singer v. State, 109 So. 2d 7, 24 (Fla. 1959). In this case, the prosecutor exposed the entire jury panel to his biased opinion, thus assuring that the jury would be predisposed to find Hawk guilty before the trial even started. The trial judge erred by failing to grant a mistrial and start over with a new jury venire.

OPENING STATEMENT

During opening statement, the prosecutor continued to exposed the jury to his biased opinion of Hawk. He argued as follows:

> The evidence will show, ladies and gentlemen, that Robert Hawk is an amoral, vicious, cold-blooded killer. And at the close of the State's case --

(17/357) Defense counsel asked to approach the bench, at which time the judge said, "Motion denied." Defense counsel asked to put the motion on the record and the court allowed it. (17/357) Defense counsel moved for mistrial because of the inflammatory nature of the prosecutor's argument; because it exceeded the scope of an opening statement; and because the prosecutor's

personal attack on Hawk's character as "amoral" was improper.

Defense counsel moved for a cautionary instruction. The prosecutor responded that the evidence would show that this was a cold, calculated killing; that by the time the judge saw the photos, his characterization of Hawk would be borne out by the evidence. The judge denied the defense motion without prejudice in case the prosecutor's characterization was not borne out by the evidence. (17/376) Although the judge cautioned the jury to disregard the prosecutor's last comment, and that argument of counsel is not evidence, defense counsel maintained that the instruction would not overcome the prejudice. (17/377-79) Despite the judge's ruling, the prosecutor then told the jury that, in closing, he would be able to come back in much stronger terms, based on the evidence, and to expect it. (17/379-80)

The purpose of opening argument is to outline for the jury the evidence that counsel expects to elicit from the witnesses and the evidence. It is not an opportunity for the prosecutor to call the defendant names. In Perez v. State, 22 Fla. L. Weekly D243 (Fla. 3d DCA Jan. 22, 1997), the court noted that it is always wrong to call a defendant names by citing him as an examples of a criminal type. An "amoral, vicious, cold-blooded killer" is definitely a criminal type.[14] No matter what the

[14] In his penalty phase closing argument, discussed infra, the prosecutor made a similar inflammatory argument, calling Robert Haw a "vicious killer" and a "savage killer." (23/1371) The prosecutor erred by using "name-calling" to convince the jury

evidence showed, it was improper for the prosecutor to call Hawk names. Whether Hawk was "amoral" or a "vicious cold-blooded killer," are subjective determinations. No evidence could **prove** that he was or is "amoral" or "cold-blooded." Thus, the trial court erred by denying the defense motion for mistrial, without prejudice in the event that the prosecutor's characterization was not borne out by the evidence. (17/376) Such was an impossibility.

"OUTRAGEOUS" COMMENTS DURING DEFENSE CASE

During the defense case, the prosecutor staged an emotional outburst before the jury. Hawk testified that he learned to know Mr. and Mrs. Gray when he was nine years old. He did odd jobs for them from when he was about nine to thirteen. He said that the Grays sexually abused him. At that point, the prosecutor jumped up and objected. When asked the grounds, he exclaimed, "It's just outrageous!" The judge overruled his objection. Defense counsel asked the judge to instruct the jury to disregard the prosecutor's outburst, and to instruct the prosecutor to stop the sarcastic glances as well. The judge instructed the jury to

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to recommend imposition of the death penalty. (See note 17, infra.)

disregard the comments of [both] counsel. (21/1098-99)[15] The prosecutor's argument was unacceptable because it violated the prohibition against prejudicial emotional and vindictive exhibitions of temperament. Stewart v. State, 51 So. 2d at 495.

On cross-examination, Hawk said he did not complain of the sexual abuse to the police because he was afraid. The prosecutor then asked, "And the first time you are complaining is when you are facing a charge of first degree murder for the death of Betty Gray. Isn't that true" Hawk said yes. (21/1113)

The prosecutor asked Hawk whether, after he had been arrested and was in jail, he still told no one about the abuse. Hawk said he did not because he was afraid. Defense counsel objected because the question implicated that Hawk may have told his attorneys during confidential communications. He asked for a mistrial because the question was a comment on Hawk's failure to "testify" at the time of his arrest. The judge told the prosecutor to be more specific as to the form of his questions. Defense counsel's request for a cautionary instruction was denied. (21/1118-20) Despite the judge's warning, the prosecutor

[15] Hawk explained that, the Grays would show him X-rated movies of sex with children. They would put him in the bedroom and Betty Gray would take her clothes off and put her hand on her vagina and move it back and forth and play with his penis. He then sucked on her breasts and later Matthew Gray undressed and joined them. He put his hand on Bobby's penis and moved it back and forth. Gray tried to put Bobby's mouth on his penis but Bobby did not remember whether that happened. (21/1102-03)

asked Hawk whether, "after you realized you had been arrested for their murders, you did not tell the police about this sexual abuse, you did not tell your friends about this sexual abuse.?" The trial judge overruled defense counsel's objection. Hawk said he had not. (21/1121)

On rebuttal, Detective Madden who testified that, when he questioned Robert Hawk, Hawk never mentioned that the Grays forced him to watch X-rated films. The defense objected and moved for a mistrial because Madden's testimony violated Hawk's right to remain silent. The judge denied the motion for mistrial and refused the defense request for a curative instruction. (22/1142) When the prosecutor asked Madden whether Hawk made any allegations of sexual misconduct by either of the Grays during the taped interview, the defense again objected and moved for a mistrial. The judge overruled the objection and denied the motion for mistrial. (22/1148)

The prosecutor's exclamation, in front of the jury, that Hawk's accusations of sexual abuse were "just outrageous," was extremely disturbing and prejudicial. This and his following questions to Hawk made it very obvious that the prosecutor believed that Hawk made up this story to mitigate his actions. Although Hawk's testimony may have seemed rather far-fetched, especially in light of his failure to complain earlier, it is not at all uncommon for children to hide sexual abuse for years, either out of fear or humiliation, or because the child thinks

that no one will believe him and that he will be punished for his participation. Moreover, although Mr. and Mrs. Gray apparently showed no signs of being sexual predators, many seemingly innocent people are guilty of sexual abuse. Unfortunately, sexual abuse is a common crime. If the Grays really did sexually abuse Hawk, the prosecutor's sarcasm was inexcusable. Moreover, the prosecutor could not possibly know whether these accusations were true.

While attempting to get Hawk to admit that he had a selective memory, the prosecutor continued as follows:

> Q [By Mr. Heyman]: The things you can't remember are the things that will convict you of murder in the first degree; isn't that correct?
>
> Mr. McDermott: Object. It calls for a legal conclusion on the part of the witness, Judge.
>
> The Court: Overruled.
>
> Q: [By Mr. Heyman]: Isn't that true, Mr. Hawk?
>
> A: No.
>
> Q: Isn't that why you concocted these outrageous allegations of sexual abuse the first time here, three years after you killed Betty Gray and you maimed Matthew Gray. Isn't that the real truth?
>
> A. No. . . . (Bench Conference)
>
> Mr. McDermitt: Your Honor, I renew my motion for a mistrial based on the -- Mr. Heyman's cross-examination and reference to whether or not Robert Hawk told the police about these incidents. His further reference did he tell anyone about them until he got in court infringes on attorney/client relationship.
>
> Also, I further move for a mistrial based on the inflammatory questioning . . . of Mr. Heyman to Mr.

> Hawk as being in the form of testimony as opposed to questions. On those grounds I move for a mistrial.
>
> The Court: Motion for mistrial denied. Motion for curative instruction is denied.

(21/1125-27)

The prosecutor insinuated that Hawk made up the sexual abuse. It is improper for the prosecutor to accuse the defendant of lying, Lopez v. State, 555 So. 2d 1298 (Fla. 3d DCA 1990), or to insinuate that the defense was a fabrication. Huff v. State, 544 So. 2d 1143 (Fla. 4th DCA 1989). Personal attacks on the defendant, his theory of defense, and defense counsel are improper. "A prosecutor may not ridicule a defendant or his theory of defense. . . ." Riley v. State, 560 So. 2d 279, 280 (Fla. 3d DCA 1990). "Such remarks constitute a personal attack on opposing counsel and are clearly improper." Jenkins v. State, 563 So. 2d 791 (Fla. 1st DCA 1990). The comments improperly conveyed the prosecutor's personal belief in Hawk's guilt on the basis of his personal feelings rather than the evidence before the jury. See Riley, 560 So. 2d at 280; Jones v. State, 449 So. 2d 313, 314-15 (Fla. 5th DCA 1984); Singletary v. State, 483 So. 2d 8, 10 (Fla. 2d DCA 1985).

The prosecutor's insinuations that, because Hawk did not tell Madden about the Grays' sexual abuse, he was lying, were also susceptible of being interpreted by the jury as comments upon Hawk's right to remain silent at the time of arrest. Although Hawk gave a statement to Madden, he did not admit to

attacking the Grays. Madden did not ask Hawk whether the Grays had sexually abused him, whether he had a reason to attack them, or even whether he liked them. Thus, he would not be expected to blurt out a secret that he had hidden for years.

The prosecutor asked Hawk why he did not tell someone after he was incarcerated and out of danger. Although he did not say so, Hawk may have told no one because he felt embarrassed and guilty about it. Perhaps it was so hard for him to admit that he was not able to do so until he was fighting a first-degree murder charge.

In any event, the prosecutor's questions insinuated that, if the sexual abuse accusations were true, Hawk would have revealed it upon his arrest. See Santana v. State, 548 So. 2d 293 (Fla. 4th DCA 1989) (prosecution cannot question defendant's failure to give exculpatory statement prior to trial).

The state may not penalize a defendant for exercising a legal right by using his exercise of that right as evidence against him at trial. See Doyle v. Ohio, 426 U.S. 610 (1976) (Miranda warnings carry an implied promise that "silence will carry no penalty."); State v. Thornton, 491 So. 2d 1143, 1144 (Fla. 1986) (error to make comment which could be interpreted as comment on defendant's right to remain silent).

GUILT PHASE CLOSING ARGUMENT

During his guilt phase closing argument, the prosecutor

again accused Hawk of lying. He made the following remarks to the jury:

> When [Detective Madden] talked to [Hawk] about did he know anything about this, I have no idea about it. That's a lie. I don't know what's going on. That's not true. I don't know. . . That's not true.

(22/1211) Defense counsel asked to approach the bench and moved for a mistrial because the prosecutor was interjecting his personal opinion. He argued that it was inappropriate for the prosecutor to say that a witness was lying or a certain thing was true or false. In other words, the prosecutor was giving the jury his personal viewpoint on the witnesses and testimony.

The prosecutor responded that his comments were based on the evidence; Hawk's statement was inconsistent with what the other evidence and testimony showed. The judge told the prosecutor to make it "perfectly clear" that he was not arguing his personal views, and denied the motion for mistrial. (22/1211-12) Although Hawk's statement to law enforcement was inconsistent, he may have been confused, due to his chronic substance abuse or his deafness, rather than lying. In any event, it is always improper for the prosecutor to accuse the defendant of lying. Lopez v. State, 555 So. 2d 1298 (Fla. 3d DCA 1990) (improper to refer to defendant as drug dealer who was lying on the stand). The prosecutor did so repeatedly throughout this trial.

PENALTY PHASE CLOSING

The prosecutor's penalty phase closing was even worse. He commenced with the following emotional argument:

> To the youth of both societies life is taken for granted. To the senior citizens of those same societies life has changed for they have learned that life is finite and something to be cherished.

(23/1367) Defense counsel objected to the argument as inflammatory, but was overruled. The prosecutor continued along the same lines as follows:

> While the young oftentimes take life for granted, the elders of any society appreciate that life is finite and only have so much to make their mark in this world. the events of February 18th and 19th of 1993 saw a tragic clash of these two views of life. Betty Hawk and her husband Matthew, on one hand, in their '60s, retired, living the life of simple joys, going to bingo halls put on by the deaf community. Robert Hawk, on the other hand, in his 18 years had been nothing but a high school dropout, unemployed, living off his parents' couch and out of their refrigerator.

(23/1368) These arguments were (1) not based on any evidence in the case;[16] (2) emotional and inflammatory; and (3) included more improper name-calling. The prosecutor's opinion that Hawk was "nothing but a high school dropout, unemployed, living off his parents' couch and out of their refrigerator," was an unnecessarily rude and insulting comment which supported none of the aggravating factors. The inference was that Hawk should be executed not because he killed someone, but because he was worthless.

[16] There was no testimony that the Grays "lived a life of simple joys" or went to bingo halls put on by the deaf community.

After several objections, the judge advised counsel to only make objections when absolutely necessary. (23/1371) The prosecutor immediately argued that,

> while those aggravating factors are very real and oh so tragic, the mitigating factors are nothing but pathetic excuses to explain away the actions of a savage killer. That savage killer sits before you in this courtroom, Robert Hawk.

(23/1371) It is improper for the prosecutor to call the defendant names. Perez, 22 Fla. L. Weekly D243; Lopez, 555 So. 2d 1298.

With no evidence to support it, the prosecutor made the following argument in support of the HAC aggravator:

> [Mrs. Gray] had wounds to her neck, she had wounds to her forehead, she had wounds to her mouth. Evidence that she's trying to move to get away from this hammer --
>
> Objection. Facts not in evidence.
>
> Overruled.
>
> She's struggling as best she can in her nightgown, in her own bed, to get away from this attacker. Struggling to somehow defend herself. What additional evidence is there that this struggle was not over in an instant, that she was not immediately unconscious? Take a look at that wound on her left forearm. Now, Dr. Davis said one thing about wounds; it's very difficult to tell their age. And he didn't stick his neck out and say with all certainty that was a defensive wound, but he did say it's in a position where I would expect a defensive wound to be found.
>
> And isn't it coincidental, perhaps, that the wound was on her left wrist and the majority of the damage is to the left side of her forehead. Putting that wrist up in a vain attempt to ward off the blows by the vicious killer that you have found guilty of her murder. . . .

> But there's more. Remember the hair Malone testified about? . . . Forcefully plucked from the body of Robert Hawk. When did that occur if the first blow knocked her out? Did it happen after the first blow? The second blow? The tenth blow? You can look at the evidence in this case and establish whether or not this was a struggle between a defenseless sixty-year-old woman and a healthy, yet lazy eighteen-year-old man."

(23/1377-78) At the end of closing argument, defense counsel requested a mistrial based on the prosecutor's inflammatory argument that Mrs. Gray was struggling during the attack. He correctly argued that the State introduced no evidence to support the argument. He was denied a mistrial or curative instruction.

In Bertolotti v. State, 476 So. 2d 130 (Fla. 1985), this Court described the function of closing argument as follows:

> 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.

476 So. 2d at 134. The State presented no evidence that Mrs. Gray struggled. The prosecutor ignored the evidence and painted a misleading picture of the crime to inflame the emotions of the jurors.

Although Mrs. Gray had a bruise on her arm at a location consistent with being a defensive wound, the medical examiner said he had a problem with the age of the bruise. Although he could not rule out the possibility that it was a defensive wound, it appeared to be older than the injuries to her head. (20/814,

819, 828) The prosecutor intentionally misled the jury by reversing the probability that the bruise was a defensive wound. The doctor's testimony reflected that the bruise was more likely to be an older bruise.

Although a hair found in Mrs. Gray's eye had been forcefully plucked and was consistent with Hawk's head hair (according to FBI's Michael Malone), hair identification is not an exact science. (21/1048) If it was Hawk's hair, there are many ways this hair could have been pulled from Hawk's head other than a struggle with Mrs. Gray. For example, Hawk may have pulled the hair from his head when he combed his hair earlier. The hair could then have been transferred to Mrs. Gray from Hawk's clothing, to which it had been transferred earlier. (21/1004) Alternatively, Hawk may have caught his hair on something and a strand landed in Gray's eye.

Accordingly, the prosecutor's prejudicial argument about the alleged struggle of Mrs. Gray was based on mere speculation. The evidence did not support the prosecutor's speculation and, in fact, supported the opposite conclusion. The judge should not have allowed the jury recommendation to be tainted by this improper argument. The prosecutor's "zeal must be curbed when it pushes the argument into speculation and innuendo." Holton v. State, 573 So. 2d 284, 288-289 (Fla. 1991).[17]

[17] The argument was worsened by the prosecutor's references to Hawk as a "savage killer" and a "vicious killer,"which, of

To make matters worse, the prosecutor made this argument to convince the jurors that the murder was heinous, atrocious or cruel, a factor which the trial judge found to be inapplicable as a matter of law. Although the prosecutor was entitled to argue this factor because the jury was instructed on it, the fact that he argued facts not in evidence and encouraged the jurors to speculate that Mrs. Gray put up a struggle, when the evidence was otherwise, made it more likely that the jury relied on the inapplicable factor in recommending the death sentence. Even though the judge found HAC inapplicable, he gave great weight to the jury recommendation which was tainted by its consideration of this inapplicable aggravator, thus placing a heavy thumb on the death's side of the scale. See generally, Stringer v. Black, 503 U.S. ____, 112 S.Ct. 1130, 117 L.Ed. 2d 367 (1992) (jury's consideration of "committed during a felony" aggravator in a felony murder case is duplicative and thus taints death recommendation).

To compound these errors, during his penalty phase closing argument, the prosecutor attempted to denigrate the mitigating evidence that Hawk was deaf. He made a "message to the deaf community" argument, as follows:

> Robert Hawk is deaf, Matthew Gray is deaf, Betty Gray was deaf. At least five of the State's witnesses were deaf. Obviously it was something that is cause for some sympathy. Robert Hawk didn't get dealt a full

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course, was more improper and inflammatory name-calling.

> deck as a result of his inability to hear from the time he was three-years-old. But is it a reason to mitigate this case and outweigh the aggravating factors? I don't need to list names of people who have achieved greatness in spite of deafness or even more significant handicaps; we all know who they are. . . . The only people I need to point out to your attention are the people that you heard here in the trial last week. The Defendant's own friends went to school, going to college, had a family, have jobs. . . . Consider [deafness] in your deliberations . . . But if you go back there and you think that for some reason, because Robert Hawk is deaf and for that reason alone that this case merits a life recommendation in spite of all the aggravating factors, then that recommendation is an insult to all who have achieved greatness and lived law abiding and productive lives in spite of the same handicap.

(23/1382-83) Defense counsel objected because no evidence showed that a life recommendation would be an insult to deaf people who have achieved greatness. The argument was inflammatory. Telling the jury that a life recommendation might affect the deaf community was a "message to the community" argument. The judge denied the motion for mistrial and curative instruction. (23/1390)

The above comment violated the prohibition against "sending a message to the community" by telling the jurors that the deaf community would be insulted if Hawk were shown mercy because of his deafness. The "community" to which this case was of most interest was the deaf community. Both the Hawk and the Grays lived in the Pinellas Park area of St. Petersburg, in which the Deaf Service Center is located. A number of witnesses were also deaf, and lived in the same area. The jury may have been

particularly influenced by the argument because the Grays were deaf. Not only was this an impermissible basis for a death recommendation, but it may well have been inaccurate. Perhaps the deaf community -- even those who achieved greatness -- would not want a deaf person to be electrocuted.

This Court has consistently condemned such arguments. See e.g., Campbell v. State, 679 So. 2d 720 (Fla. 1996); Crump v. State, 622 So. 2d 963 (Fla. 1993); Bertolotti v. State, 476 So. 2d 130 (Fla. 1985); State v. Wheeler, 468 So. 2d 978 (Fla. l985) ("drugs in the schools" closing argument); Sandoval v. State, 22 Fla. L. Weekly D705, 706 (Fla. 3d DCA March 19, 1997) ("send the community a message"); Boatwright v. State, 452 So. 2d 666 (Fla. 4th DCA 1984). This is because such an argument diverts the jurors from their task and prompts them to consider matters extraneous to the evidence. Moreover, it is calculated to inflame the passions of the jury. "Although the prosecutor may prosecute with vigor, he is not free to strike foul blows." Id. at 667. He should not seek a death recommendation by asking the jury to consider matters clearly outside the scope of jury deliberations.

In Campbell, the prosecutor told the jury, in closing, that "the death penalty is a message sent to a number of members of our society who choose not to follow the law." The Court reversed, based in this and another form of prosecutorial misconduct. The Campbell Court concluded that "the State has

failed "to prove beyond a reasonable doubt that the error[s]. . .did not contribute to the [recommended sentence]." 679 So. 2d at 724-25 (citing State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986)). In view of the prosecutor's argument, jurors in this case may have voted for death not out of a reasoned sense of justice but because they did not want to offend the deaf community.

The prosecutor's penalty phase closing argument was improper for three reasons. First, it was clearly designed to inflame the jurors' passions so that the verdict would be an emotional response rather than based on the evidence. Second, the argument was irrelevant because it was not related to any aggravator. Third, the argument was based on evidence that was not admitted at trial.

Not only did the prosecutor violate his duty by seeking to inflame the jury, the trial court failed to perform its own duty to put an end to such misconduct. In Stewart v. State, 51 So. 2d at 494, this Court ruled that "it is the duty of the trial court on his own motion to restrain and rebuke counsel from indulging in such argument." See Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985) ("[W]e commend to trial judges the vigilant exercise of their responsibility to insure a fair trial."); see also Taylor v. State, 583 So. 2d 323, 329-30 (Fla. 1991); King v. State, 623 So. 2d 486 (Fla. 1993); Ailer v. State, 114 So. 2d 348 (Fla. 2d DCA 1959) (Firmly entrenched rule that judge must halt

improper remarks of counsel, whether objection made or not).

CUMULATIVE ERROR

Although errors at trial may not be cause for reversal when standing alone, their cumulative effect can substantially prejudice a defendant, thereby warranting a new trial. See e.g, Rhodes v. State, 547 So. 2d 1201, 1205-06 (Fla. 1989) (cumulative penalty phase arguments reversible error); Garron, 528 So. 2d at 359 (cumulative prosecutorial misconduct overstepped bounds of zealous advocacy); Perkins v. State, 349 So. 2d 776, 778 (Fla. 2d DCA 1977) ("While a defendant is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error").

In this case, the errors accumulated and accumulated and accumulated. Moreover, unlike some cases, see e.g, Crump v. State, 622 So. 2d 963 (Fla. 1993); Ailer v. State, 114 So. 2d 348 (Fla. 2d DCA 1959), in which counsel failed to object, Hawk's counsel raised a contemporary objection to each of the prosecutor's improper comments and, in nearly every instance, requested a mistrial.

This Court has firmly rejected the notion that error can be deemed harmless on the basis of sufficient or even overwhelming evidence. The proper test for harmless error places the burden on the State to prove that there is no reasonable possibility that the error affected to the verdict. State v. Lee, 531 So. 2d 133, 136-137 (Fla. 1988); State v. DiGuilio, 491 So. 2d 1129, 1135-36 (Fla. 1986). In this case, the State cannot prove beyond a reasonable

doubt that the prosecutor's misconduct did not contribute to the convictions. The jury could have determined that Hawk did not Intend to kill the Grays. Thus, it reasonably could have found Hawk guilty of second-degree and attempted second-degree murder. Moreover, many of these errors undoubtedly biased the jurors in making their penalty recommendation.

In determining whether there is a reasonable possibility that the prosecutor's misconduct contributed to the verdict, this Court should consider the prosecutor's motivation for making such inflammatory and abusive arguments. This Court has so often condemned such misconduct that the prosecutor must have believed it necessary to make this argument to persuade the jury to find Hawk guilty of first-degree murder and to recommend the death penalty.

This Court must not condone the prosecutor's misconduct in this case. The cumulative effect of the prosecutor's improper remarks violated Hawk's constitutional right to a fair trial. Nowitzke v. State, 572 So. 2d 1346, 1350, 1356 (Fla. 1990); Garron, 528 So. 2d at 358-359. If there is a reasonable possibility that cumulative errors contributed to the conviction, a new trial is required. Chapman v. California, 386 U.S. 18 (1967). In this case, there is more than a reasonable possibility that at least some of the jurors were improperly influenced by the prosecutor's prejudicial remarks and that his extrajudicial arguments contributed to the verdict. The case must be remanded for a new trial.

ISSUE IV

THE TRIAL COURT ERRED BY ALLOWING VICTIM MATTHEW GRAY TO TESTIFY IN REBUTTAL WITHOUT FIRST DETERMINING HIS COMPETENCE TO TESTIFY.

Generally, it is the function of the trial judge whose observations are firsthand to determine the competency of a witness to testify. Lloyd v. State, 524 So. 2d 396, 400 (Fla. 1988); Kaelin v. State, 410 So. 2d 1355, 1356-57 (Fla. 4th DCA 1982). In this case, however, the trial court abused his discretion by allowing Matthew Grey to testify on rebuttal, over defense objection, without even conducting a competency hearing or questioning Gray to determine whether he knew the truth from a lie.

After Appellant Robert Hawk testified that the victims, Mr. and Mrs. Gray, sexually molested him when he was nine to thirteen years old, the prosecutor announced his intention to call Matthew Gray as a rebuttal witness. He had earlier represented to the defense that Mr. Gray was not able to communicate and would not be a witness. Defense counsel questioned Gray's competency to testify and asserted that it would be inappropriate for the State to "just bring him in for sympathy." (22/1135)

Of course, the prosecutor asserted that he had tried to keep Gray out of the trial, but that Hawk brought him in by his accusations of sexual abuse. He informed the court that he would ask Mr. Gray only whether he sexually molested Mr. Hawk. He would not ask Gray whether Hawk killed his wife because he was not sure whether Gray remembered or whether he had just been told that Hawk

committed the crime. He said Gray might try to blurt it out, but that he had instructed him not to do so. He was sure Gray was competent to testify as to whether he sexually molested Hawk. (22/1135-36)

Defense counsel requested a proffer, to which the prosecutor objected. When the trial court asked if Gray was competent to testify, the prosecutor said that the interpreters would testify that they could communicate with him. He said that he could represent, as an officer of the court, that Gray could communicate through interpreters. He represented further that he had asked Gray if he knew the truth from a lie and right from wrong. The judge said he would allow Gray's testimony based on the prosecutor's representations. (22/1138)

The State called Matthew Gray in rebuttal. (22/1161) When the prosecutor asked whether he knew Robert Hawk, Gray said, "Yes. Yes. Yes. He stole --" The prosecutor stopped him. (22/1161) Defense counsel moved for a mistrial. He said that,

> The man's condition is pitiful. He's not able to testify, he hasn't been qualified and he's blurted out something that's totally inflammatory. (22/1162)

Defense counsel was not sure whether Gray said "stole" or "killed," but argued that Gray should have been qualified and his competency determined outside the presence of the jury. The judge responded that "he's presumed to be competent." He denied the motion for mistrial based on the prosecutor's representation as to Gray's competency. (22/1162-63)

When asked whether he ever sexually molested Robert Hawk, Mr. Gray said, "No, no, no." The prosecutor asked nothing further and the defense did not cross-examine him. (22/1163) Defense counsel renewed his motion for mistrial and for a curative instruction. The judge said he did not think the jury even heard what Gray first blurted out; that it was made in the [voice] of a deaf person. Defense counsel responded that he heard it. (22/1164-65)

The prosecutor he did not object to a curative instruction but disagreed with defense counsel's objection. He said that if Gray said Hawk stole, he meant at the time of the crime -- the car or keys or money; not a former crime. The judge concluded that a curative instruction would be more prejudicial to the defense so denied the defense request. (22/1166)

The prerequisites of competency are universally recognized. A witness must have sufficient intelligence to understand the nature and obligations of the oath and the ability to perceive, remember and narrate the incident. Powell v. State, 373 So. 2d 73 (Fla. 1st DCA 1979). Thus, intelligence is a key component of competency. Bell v. State, 93 So. 2d 575 (Fla. 1957). Although Matthew Gray may have been intelligent prior to his injuries, the court failed to determine to what extent his intelligence was affected by his head injuries.

Competency to testify is established when a witness has sufficient understanding to comprehend the obligations of the oath and is capable of giving a correct account of the matters which he

has seen or heard relative to the question at issue. Kaelin, 410 So. 2d at 1327-28). In the case at hand, Matthew Gray was apparently not capable of relating the circumstances of the assault. The prosecutor admitted that he did not know whether Gray remembered the assault or if he had been told that Hawk was the perpetrator. Because the prosecutor questioned Gray's ability to communicate, he represented that he would not call Gray as a witness. The prosecutor's prior hesitation, and defense counsel's objections, were borne out by Gray's attempt to blurt out that Hawk "stole" or "killed," although he had been advised not to do so.

An Order of Incompetency [as to Matthew Gray] was issued by the Pinellas County Circuit Court on April 8, 1993. The order related that Gray had an **impaired ability to communicate**; diabetes; **impaired memory confusion, disorientation as to time, place and person**; seizure disorder; multiple skull fractures; paralysis of the right arm; and congenital deafness. The order deprived him of the legal capacity to marry, vote, apply for benefits or driver's license, travel, work, contract, sue and defend lawsuits, manage property and income or dispose thereof, determine his residence, consent to medical treatment, or make decisions about his social environment or other aspects of life. Attorney F. M. Wells was appointed plenary guardian of his person and property. (10/1687-94)

At the hearing on the defense Motion for New Trial, the State attorney represented that he was unaware of the incompetency order

when he called Gray to testify in rebuttal.[18] He was, of course, aware of Gray's serious injuries and mental impairment and had not planned to have Gray testify. Moreover, because he had reason to suspect that Gray was not competent, he had a duty to investigate or at least to inform the court that Gray might not be competent. Instead, he represented, as an officer of the court, that Gray **was** competent to testify.

Once the trial court was apprised by defense counsel that Mr. Gray's competency was in question, and a proffer was requested, the trial judge had a duty to question the prospective witness outside the presence of the jury to attempt to determine his competency. If a question remained, he should have consulted a psychiatric expert who had examined Gray.

In Griffin v. State, 526 So. 2d 752 (Fla. 1st DCA 1988), the court found that the competency hearing conducted by the trial court was inadequate to determine the ability of a four-year-old to testify truthfully. Although the child answered the prosecutor's questions correctly,[19] the court found that the prosecution had not

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[18] Defense counsel did not know about the incompetency order when he objected to Gray's competency, and did not have time to investigate his competency prior to the rebuttal. (11/1896) At the Motion for New Trial hearing, the prosecutor gave defense counsel an order of partial restoration of competency. (11/1902) Although the order returned some of Gray's rights, it did not change the original diagnosis, and was insufficient to establish competency.

[19] The child, who was wearing black shoes, responded that, if the prosecutor told her that her shoes were red, that would be a lie. She said that when she lied to her "mommy," her mother

"unequivocally established" that the child was able to separate fact from fantasy. Id. at 755.

In Wade v. State, 586 So. 2d 1200, 1203 (Fla. 1st DCA 1991), the court found the extensive inquiry into the child's competency inadequate because the prosecutor asked no questions which would have established whether the child was capable of recollecting events which occurred between eight months and two year prior. Similarly, in this case, neither the prosecutor nor the trial judge even attempted to determine whether Mr. Gray was able to recall events which occurred six to ten years earlier, at the time Hawk alleged that the sexual abuse took place.

It is unbelievable that the trial judge allowed the prosecutor to vouch for Matthew Gray's competency based on a prior alleged conversation between the prosecution and Gray, outside of the presence of the court and the defense. Surely, the court would not have allowed a potential witness to testify, over the prosecutor's objection as to competency, based solely upon defense counsel's representation that he was competent. In the cases discussed above, the appellate courts found the judge's questioning inadequate to determine witness competency; in this case, the judge asked no questions and made no attempt to determine competency. This certainly constitutes reversible error.

While it is true that a witness is presumed competent to

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would put her in her room. Id. at 755.

testify, § 90.601, Fla. Stat. (1995), the presumption is rebuttable. When a prospective witness's ability and capacity to testify is challenged, as was the case here, the trial court must decide whether the "witness has sufficient intelligence to receive a just impression of the facts about which he or she is to testify and has sufficient capacity to relate them correctly, and appreciates the need to tell the truth." Lloyd v. State, 524 So. 2d 396, 400 (Fla. 1988). At the very least, the court should have asked Gray whether he remembered the years prior to his injury.

Appellee may argue that, if the State did not call Mr. Gray to rebut Hawk's accusations of sexual abuse, the jurors might believe that it must be true. This could have been handled, however, by a stipulation between counsel that the jury be advised that Mr. Gray was unable to testify due his health problems. Even without such a stipulation, the jurors would certainly realize that Mr. Gray might not be well enough to testify, and that he would deny the sexual abuse if he did testify. Moreover, it is questionable whether Gray would have even remembered whether he and his wife sexually abused Hawk.

A further problem was that defense counsel was effectively denied the right to confront the witness. If he had attempted to cross-examine Mr. Gray about the alleged sexual abuse, who knows what Mr. Gray would have blurted out. Defense counsel could not risk asking Mr. Gray such questions as whether Robert Hawk had worked for them or visited them when he was younger, because Gray

might blurt out other irrelevant or untrue statements. Had the court allowed a proffer, as the defense requested, this might have ameliorated this problem or, more likely, convinced the court that Gray was not competent to testify.

Gray's appearance in court was extremely prejudicial. defense counsel noted that he was pathetic. This surely influenced the jurors to convict Hawk, if only out of sympathy for the surviving victim. This is an improper consideration in the guilt phase of a trial. The extent of Mr. Gray's injuries had no bearing on whether Hawk was guilty of the crime. Obviously, the prejudice to Hawk far outweighed any probative value of Gray's limited testimony.

To make matters worse, the prosecutor used Gray's brief appearance to enhance an aggravating factor during the penalty phase of the trial. He called the jury's attention to Mr. Gray's condition in his penalty phase closing:

> The [prior violent felony] aggravating factor. . . can apply to any violent felony that could have arisen from a bar fight where someone hit another person over the head with a pool cue. That could have been an aggravating factor of this category. However, in this case, that aggravating factor is oh so real and oh so firsthand in your awareness. Not only were you able to see the photographs of the injuries of Matthew Gray, you were also able to witness the result that that aggravating factor has had upon the life of Matthew Gray.

(23/1372)

The jury may also have considered this argument and their view of Mr. Gray to erroneously conclude that the murder was heinous, atrocious and cruel. (See Issue VI, infra.)

ISSUE V

THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION TO DECLARE THE HEINOUS, ATROCIOUS OR CRUEL JURY INSTRUCTION UNCONSTITUTIONAL AND DECLINE TO INSTRUCT THE JURY ON THE FACTOR.

Defense counsel filed a pretrial motion to declare section 921.121(5)(h) of the Florida Statutes (Heinous, Atrocious or Cruel Aggravating Factor) Unconstitutional. The motion alleged that the HAC factor is vague and not capable of being understood by the jury, so that the jury is unable to narrow crimes eligible for the death penalty. Defense counsel alleged that he was unable to fashion a jury instruction which would cure the vagueness. (9/1588)

At trial, defense counsel moved to declare the HAC aggravating factor unconstitutional. Again, counsel said he did not have a proposed instruction because he could not "dream up" one that would satisfy what the legislature was trying to do with the aggravator. He did not know of any language that would overcome the problems with the HAC factor. (23/1319-20, 1333)

In Sochor v. Florida, 504 U.S. 527 (1992), the United States Supreme Court stated that the HAC aggravating factor would be appropriate in a conscienceless or pitiless crime which is unnecessarily torturous to the victim. In this case, defense counsel objected to the "heinous, atrocious and cruel" aggravating circumstance ("HAC") because the instruction was vague and did not sufficiently narrow the class of murders under which the death penalty may be imposed. The judge overruled his objection (9/1596-

97), and gave the standard jury instruction, as follows:

> "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and violent. "Cruel" means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. The kind of crime intended to be induced as heinous, atrocious, and cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(23/1399) Although the second sentence contained the "unnecessarily torturous" language approved in Sochor v. Florida, 504 U.S. 527 (1992) and Richardson v. State, 604 So. 2d 1107 (Fla. 1992), the definitions in the first paragraph rendered the instruction defective under Godfrey v. Georgia, 446 U.S. 420 (1980).

In Shell v. Mississippi, 498 U.S. 1 (1990), the United States Supreme Court found the Mississippi jury instruction used to define HAC unconstitutionally vague although it was identical to portions of the language approved in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), which in turn was approved by Proffitt v. Florida, 428 U.S. 242 (1976). Like "heinous" and "atrocious" themselves, the phrases "extremely wicked or shockingly evil" and "outrageously wicked and vile" could be used by a person of ordinary sensibility to fairly characterize almost every murder. See Arave v. Creech, 507 U.S. ___, 113 S.Ct. 1534, 123 L.Ed. 2d 188, 199 (1993).

In this case, the trial court read the standard jury instruction on HAC. After the Court approved this instruction in 1990, it referred it back to its Committee on Standard Jury Instructions (Criminal) for reconsideration. On reconsideration,

the committee recommended a different instruction which would have adequately defined the intent element of the aggravating circumstance:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. To be heinous, atrocious or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually, consciously suffered such pain for a substantial period of time before death.

The Court denied rehearing on May 29, 1991, declining to follow the committee's revised recommendation.[20]

To establish HAC, the State must prove beyond a reasonable doubt that the crime "was meant to be deliberately and extraordinarily painful." Porter, 564 So. 2d at 1063 (emphasis in opinion). Even if the language in the standard instruction defining "cruel" ("designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others") could be considered somewhat equivalent to the intent to cause extraordinary mental or physical pain, this would not save the standard instruction because it goes only to the definition of "cruel." The aggravator is framed disjunctively -- "heinous, atrocious, or cruel" -- and the instruction allows the jury to find

[20] Defense counsel also objected to the vagueness of the HAC instruction at sentencing (11/1862), and in his motion for new trial argument where he read into the record the instruction recommended by the committee. The judge found his objection on vagueness timely but his request for the instruction untimely. (11/1907)

it without proof of the requisite intent merely by finding that the crime was "heinous" or "atrocious." See Shell, 498 U.S. 1, 4-5 (1991) (Justice Marshall, concurring) (where definitions of "heinous" and "atrocious" were constitutionally inadequate, it is of no consequence that "cruel" was defined in arguably more concrete fashion, since aggravator was submitted to jury on alternative theories).

A defendant's intent to cause extraordinary mental or physical pain is an essential element of the HAC aggravator which must be proven beyond a reasonable doubt. When intent is an element of a criminal offense, and a challenged jury instruction relieves the state of its burden of proof on the critical question of the defendant's state of mind, the instruction amounts to constitutional error under the Fourteenth Amendment. Sandstrom v. Montana, 442 U.S. 510, 521 (1979). In the penalty phase of a capital trial, where the Eighth Amendment requires heightened standards of reliability, Lockett v. Ohio, 438 U.S. 586, 604 (1978), an instruction which relieves the State of its burden to prove the intent necessary to establish the aggravator is equally defective.

The error was not harmless. The jurors may have improperly found that factor based on the injuries to Mr. Gray, who testified briefly in rebuttal, rather than the murder of Mrs. Gray. The instruction could easily have made the difference between finding or not finding the HAC, which in turn may have made the difference

between the 8-4 death verdict and a recommendation of life.

Giving this instruction denied Hawk's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution. This death sentence must be vacated.

ISSUE VI

THE TRIAL JUDGE ERRED BY INSTRUCTING THE JURY ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATOR WHICH HE LATER DECLINED TO FIND ESTABLISHED.

In Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977), this Court noted that, "[w]e must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." In Atkins v. State, 452 So. 2d 529, 532 (Fla. 1984), this Court noted that "aggravating circumstances must be proven beyond a reasonable doubt before they may properly be considered by a judge or jury." In this case, the judge instructed on and allowed the prosecutor to argue an aggravating factor that he later found inapplicable as a matter of law.

The Court explained, in Griffin v. United States, 502 U.S. 46 (1991), that when jurors are left with the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. The opposite is true when they have been left with the option of relying on a factually inadequate theory because jurors are well

equipped to analyze the evidence. Id. (citing Duncan v. Louisiana, 391 U.S. 145, 157 (1968). Although Griffin dealt with a theory of conviction, the Court's reasoning also applies to a theory intended as aggravation in a penalty proceeding.

In this case, the trial court found that HAC was inapplicable as a matter of law. The judge was aware of this Court's many decisions limiting the applicability of HAC. To establish the existence of this aggravating factor, "[t]he State must prove that the defendant intended to torture the victim, or that the crime was meant to be deliberately and extraordinarily painful. See Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990); Omelus v. State, 584 So. 2d 563, 566-67 (Fla. 1991); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Robertson v. State, 611 So. 2d 1228, 1233 (Fla. 1993). Rejecting the HAC factor in Richardson v. State, 604 So. 2d 1107 (Fla. 1992), this Court cited Sochor v. Florida, 504 U.S. 527 (1992), in which the Court stated that the HAC factor would be appropriate in a conscienceless or pitiless crime which is unnecessarily torturous to the victim. Accordingly, the homicide must be both conscienceless or pitiless and unnecessarily torturous before HAC may be found and weighed. Richardson, 604 So. 2d at 1109.

The jury, however, did not have the advantage of the above case law. Although HAC was defined for them in the jury instruction, almost any first-degree murder would seem heinous, atrocious and cruel to an ordinary citizen who has not read this

Court's decisions narrowing this factor In this case, too, the jurors, who were not familiar with the legal standards, may well have erroneously considered the injuries to Mr. Gray in finding the homicide to be heinous, atrocious or cruel.

The prosecutor compounded this error by making a closing argument which was completely speculative, and was not supported by the evidence. (23/1301-08) He argued as follows:

> [Mrs. Gray] had wounds to her neck, she had wounds to her forehead, she had wounds to her mouth. Evidence that she's trying to move to get away from this hammer --
>
> She's struggling as best she can in her nightgown, in her own bed, to get away from this attacker. Struggling to somehow defend herself. What additional evidence is there that this struggle was not over in an instant, that she was not immediately unconscious? Take a look at that wound on her left forearm. Now, Dr. Davis said one thing about wounds; it's very difficult to tell their age. And he didn't stick his neck out and say with all certainty that was a defensive wound but he did say it's in a position where I would expect a defensive wound to be found.
>
> And isn't it coincidental, perhaps, that the wound was on her left wrist and the majority of the damage is to the left side of her forehead. Putting that wrist up in a vain attempt to ward off the blows by the vicious killer that you have found guilty of her murder.

(23/1377) The prosecutor then told the jury to remember the hair Malone testified about, which was forcefully plucked from the head of Robert Hawk. "When did that occur if the first blow knocked her out? Did it happen after first blow? Second blow? Tenth blow? You can look at the evidence in this case and establish whether or not this was a struggle between a defenseless 60-year-old woman and

a healthy, yet lazy 18-year-old man."[21] (23/1378)

At the end of closing argument, defense counsel requested a mistrial based on the prosecutor's inflammatory argument that Mrs. Gray was struggling during the attack. The State presented no evidence that Mrs. Gray struggled. Although she had a bruise on her arm, the medical examiner said it seemed older than the other injuries. (20/814, 819-21, 828) Although a hair found in Mrs. Gray's eye had been forcefully plucked and was consistent with Hawk's head hair, hair identification is not an exact science. (21/1048) Moreover, if it was Hawk's hair, there are many ways this hair could have been pulled from Hawk's head, other than during a struggle with Mrs. Gray. (See Issue III, supra.)

During charge conference, defense counsel strongly objected to the instruction of HAC, citing a number of cases decided by this court, narrowing the definition of HAC. He argued that a jury is unable to understand these distinctions, for example, that blood could have gotten into Mrs. Gray's lungs while she was breathing but unconscious, and that aggravators must be proven beyond a reasonable doubt; (23/1308-09). Moreover, the jury might well have improperly found the murder to be HAC, based on the

[21] The medical examiner testified that the victim may probably have lost consciousness subsequent to the first hammer blow to her head. Coupled with the lack of defensive wounds, it is reasonable to assume that the victim did not suffer extreme fear, emotional strain and terror leading up to her death. Due to the lack of evidence, the finder of fact must speculate as to whether she experienced extreme fear and emotional strain.

gruesome photos and on Mr. Gray's injuries, and their view of him when he testified in rebuttal, which cannot legally be considered by the jury.

If the jury recommendation upon which the judge must rely results from an unconstitutional procedure, the entire sentencing process is tainted. Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987). The jury's consideration of an improper statutory aggravating factor results in the same taint. If an additional and unwarranted aggravating factor is considered by the jury, more mitigation will be needed to counterbalance the presence of the aggravating factor. Thus, the improper factor skews the analysis in favor of death, which renders the death penalty arbitrary.

The burden is on the state to show beyond a reasonable doubt that this error did not affect the jury recommendation. See Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The jury undoubtedly considered what the State presented and argued during the penalty phase. Accordingly, the jury's recommendation is tainted and unreliable under the Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, Section 17, of the Florida Constitution. Because the judge gave great weight to the jury recommendation, his sentence of death is similarly tainted. Thus, if a new trial is not granted, and Hawk's death sentence is not reduced to life on proportionality grounds, his death sentence should be vacated and the case reversed for resentencing with a new jury. See Omelus v. State, 584 So. 2d

563 (Fla. 1991); Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993) (error to instruct on HAC even though judge did not find it established).

ISSUE VII

THE COURT'S FAILURE TO INSTRUCT THE JURY ON THE SENTENCING OPTION OF LIFE WITHOUT PAROLE, WHERE THAT PENALTY BECAME LAW AFTER THE CRIME BUT BEFORE TRIAL, VIOLATED DUE PROCESS, FUNDAMENTAL FAIRNESS, AND THE EIGHTH AMENDMENT.

The Florida Legislature abolished parole eligibility for persons convicted of first-degree murder as of May 25, 1994.[22] The sentencing options are now death or life imprisonment without the possibility of parole. §775.082(1), Fla. Stat. (1995). Hawk's trial took place in January of 1996; more than a year-and-a-half after parole eligibility was abolished. The crime occurred in February of 1993; over a year before the amendment took effect.

The Oklahoma Court of Criminal Appeals, in a line of capital cases arising from similar circumstances, has held that where the crime occurred before that state's "life without parole" statute went into effect, but where the sentencing occurred after that date, due process, fundamental fairness, and the Eighth Amendment require the judge to instruct the jury on the sentencing option of life imprisonment without possibility of parole. Bowie v. State, 906 P.2d 759, 765 (Okla. Cr. 1995); McCarty v. State, 904 P.2d 110, 129 (Okla. Cr. 1995); Cheatham v. State, 900 P.2d 414, 429-30 (Okla. Cr. 1995); Parker v. State, 887 P.2d 290, 299 (Okla. Cr.

[22] Parole was abolished in first-degree murder cases by Chapter 94-228, section 1, Laws of Florida (1994), effective May 25, 1994. Section 775.082(1), Florida Statutes, was further refined by Chapter 95-294, Laws of Florida (1995), which became effective October 1, 1995, to apply to all capital felonies.

1994); Fontenot v. State, 881 P.2d 69, 74 and n.2 (Okla. Cr. 1994); Solazar v. State, 852 P.2d 729, 736-41 (Okla. Cr. 1993); Hain v. State, 852 P.2d 744, 753 (Okla. Cr. 1993). In Hain, the court reasoned that:

> Given the gravity of the death penalty, we find that principals of fundamental fairness compel us to reverse this case for a new second stage trial. As discussed in Allen v. State, 821 P.2d 371 (Okl.Cr.1991), we find no constitutional prohibition to the application of this possible sentencing option in cases where the penalty became law in the period while the offender awaited trial. Quite simply, we cannot justify a decision which would act as a total bar to consideration of a punishment alternative to death merely because the crime giving rise to the trial occurred a short time before the effective date of previously enacted legislation.

Hain, 852 P.2d at 753; Cheatham, 900 P.2d at 429.

Because the amendment is procedural and the availability of a sentencing option which affords the jury a more palatable alternative to death is ameliorative in nature, see Dobbert v. Florida, 432 U.S. 282 (1977), the prohibition against ex post facto laws does not prevent application of the life without parole statute to a defendant tried after its effective date, whose crime occurred before it. See Solazar, 852 P.2d at 737-38. Moreover, the Oklahoma court held that the judge has a duty to instruct the jury sua sponte on the option of life without parole, and his failure to do so is fundamental error. Solazar, 852 P.2d at 74, n.2

> The trial court failure to provide proper sentencing instruction to a jury in a capital case is of critical importance. The death penalty is different from all other penalties in its severity and finality. "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.

> Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment.

Solazar. 852 P.2d at 78. Hawk should be granted a new penalty trial before a jury fully instructed on the sentencing options.

ISSUE VIII

THE TRIAL COURT ERRED BY INSTRUCTING ON AND FINDING THAT THE CRIME WAS COMMITTED FOR PECUNIARY GAIN.

In his sentencing order, the trial court found that the crime was committed for pecuniary gain -- to facilitate the theft of money and grand theft of the car (10/1711). In Chaky v. State, 651 So. 2d 1169, 1172 (Fla. 1995), this Court stated as follows:

> This aggravating circumstances applies "only where the murder is an integral step in obtaining some sought-after specific gain." Hardwick v. State, 521 So. 2d 1071, 1076 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988). See also Peterka v. State, 640 So. 2d 59 (Fla.1994), cert. denied, --- U.S. ----, 115 S.Ct. 940, 130 L.Ed.2d 884 (1995). Moreover, proof of this aggravating circumstance cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance. Simmons v. State, 419 So. 2d 316 (Fla.1982).

The sentencing judge cited Hill v. State, 549 So. 2d 179 (Fla. 1989), and Scull v. State, 533 So. 2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037 (1989), in his order, to support his finding, stating that Hawk's actions distinguished this case from Hill and Scull. (10/1711) Apparently, the judge did not read these cases carefully because both cases show conclusively that this aggravator is not applicable in Hawk's case.

Defendant Scull killed two women by beating them with a baseball bat, and burned their house. He took a car belonging to one of the victims and, that evening, was involved in a collision. Although he denied the killings, he admitted he was involved in a

cocaine deal with the women and borrowed the car. Scull was convicted and sentenced to death. 533 So. 2d at 1138-39.

In aggravation, the judge found that Scull (1) knowingly created a great risk of death to many people; (2) committed the murders while engaged in a burglary; (3) to avoid arrest or to effect his escape; and (4) for pecuniary gain; (5) and that the murders were HAC; and (6) CCP. 533 So. 2d at 1139. Remanding for resentencing, this Court noted that

> While several theories have been advanced as to why these murders took place, there is little evidence to support any of them. The trial court in its sentencing order seems to have accepted all of these theories, finding that they were committed for pecuniary gain, to eliminate witnesses, to effectuate escape, or as an underworld contract killing. Unfortunately, the trial court accepted these theories without the support of the record. Therefore, as aggravating circumstances, they must all be stricken . . .

533 So. 2d at 1142. Striking the pecuniary gain aggravator, the court noted that, although Scull took the victim's car, it was possible that he did so to facilitate his escape rather than as a means of improving his financial worth. Id.

Hawk's case closely resembles Scull as to the lack of a proven motive for the killing. Although Hawk probably did not take the Grays' car to facilitate his escape, it is clear that he did not take it to improve his financial worth either, because he abandoned it the next day. Moreover, he had to have known that he could not keep the car because it would be immediately recognized as belonging to the Grays (his neighbors), thus incriminating him for

the murder; and because he could not explain to his parents where he got the car. The first night, after visiting friends, he returned the car to the Grays' driveway. The following day, he drove it again and abandoned it nearby. He never even took it home.

Moreover, no evidence showed that anything was missing from the Grays' house. (18/621) Sergeant Campbell looked for money in the Grays' wallets and throughout the house, but was unable to find any, except for coins in a desk in Mr. Gray's bedroom. She found a screwdriver under the desk and pry marks on the top of the desk, but no evidence to connect Hawk to the screwdriver, and nothing to indicate that anything had been taken from the desk.[23] (18/602-06) Thus, she was not able to determine that anything was removed from the house. (18/621) Even if Hawk took money from the Grays' house, the State presented no evidence that this was Hawk's motive for the murder. See Hill, 549 So. 2d 179 (Fla. 1989) (that defendant took victim's money did not establish pecuniary gain aggravator because defendant committed sexual battery prior to murder; thus sexual battery may have been motive for murder; Jones v. State, 580 So. 2d 143, 146 (Fla. 1991) (taking billfold may have been afterthought).

While showing off the Grays' car to his friends, Hawk also showed them a wad of money. (17/515) He did not tell them where

[23] It is possible that Mr. Gray had lost the key to his desk and opened it with a screwdriver. Although some people might keep money in a desk, it would not be a likely place to look for money.

the money came from. Perhaps it was from his disability check and he was showing it off to impress his friends. He also bragged to his friends that he had shot some people, which was not true, and showed them the blood on his clothing. It seems, therefore, that his motive was not to improve his financial worth, but perhaps to show off to his friends. Perhaps, while he was telling his friends that his father bought him the car, he waved his own money around to further impress them. The State presented no evidence that this money was found in Hawk's possession at the time of his arrest, or in his house when it as searched.

As in Scull, it is unclear why Hawk attacked the Grays. He may have committed this crime merely to impress his friends. Evidence indicated that, several days earlier, he told two friends that he could "fuck up" old people, or that he could beat up old people. He did not say that he planned to rob or kill anyone. No evidence suggested that he was in any particular need of money. He received disability income due to his deafness, and lived with his parents. Although he did not have a car, he drove a moped.

Hawk may also have beat the Grays because he was angry with them. He had known them for some years because they were his neighbors and because, like him, they were deaf. At trial, he testified that he had done some work for them when he was younger, and that they had sexually abused him. Of course, Mr. Gray denied the allegations of sexual abuse. Even if the allegations of sexual abuse were not true, Hawk's testimony suggested that he may have

had some sort of grudge against the Grays. Thus, his motive may have been anger or revenge.

The trial judge specifically asked counsel how long Hawk had the Grays' car, indicating that he was basing his finding, in large part, on Hawk's use of the Grays' car. He stated in his order that his finding was that Hawk committed the murder to facilitate the theft of money and the car. (10/1711) This Court has found, repeatedly, that no financial gain is derived when the defendant takes the victim's car if the car may have been taken to facilitate escape rather than to improve the defendant's financial worth. See, e.g, Allen v. State, 662 So. 2d 323, 330 (Fla. 1995) (taking of victim's car did not support pecuniary gain aggravator where car was abandoned shortly after murder); Peek v. State, 395 So. 2d 492 (Fla. 1981) (taking car may have been merely to facilitate escape)

Defense counsel objected to the pecuniary gain instruction at charge conference because the State presented no evidence that Hawk committed the crime for, or that the crime resulted in, financial gain. As this Court has repeatedly held, in order to sustain the "committed for pecuniary gain" aggravating circumstance, it is not sufficient to show that property or money was taken incidental to the homicide; 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. Allen, 662 So. 2d at 330; Finney v. State, 660 So. 2d 674 (Fla. 1995); Elam v. State, 636 Fla. 1312, 1314 (Fla. 1994) (theft completed before murder negates

pecuniary gain motive): Clark v. State, 609 So. 2d 513, 515 (Fla. 1992) (pecuniary motive where Clark killed victim to get his job); Scull, 533 So. 2d at 1142; Rhodes v. State, 547 So. 2d 1201, 1207 (Fla. 1989); Hill, 549 So. 2d at 183; Jones, 580 So. 2d at 146; Peek, 395 So. 2d at 499. 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," the pecuniary gain aggravator cannot be sustained. See Hill, 549 So. 2d at 183, and other cases cited above. This 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 v. State, 419 So. 2d 316, 318 (Fla. 1982); see also Hill, 549 So. 2d at 183; Geralds, 601 So. 2d at 1163; Eutzy v. State, 458 So. 2d 755, 757-58 (Fla. 1984).

Cases in which the pecuniary gain aggravator has been upheld show a definite financial motive for the murder. See, e.g., Finney, 660 So. 2d at 680; Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990) (pecuniary gain aggravator upheld where, prior to the murder, as the victims slept, Jones discussed killing them to obtain their pickup); Floyd v. State, 569 So. 2d 1225, 1230, 1232 (Fla. 1990) (defendant admitted to cellmate that he had broken into woman's

home and was "ripping her off" when she surprised him; and cashed a $500 check on her account within hours of murder). 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 Hawk did not form the intent to take the car (or anything else) until afterwards.

In Finney, the Court sustained this aggravator because the evidence showed that Finney pawned the victim's VCR within hours of her murder; her jewelry box was missing; her bedroom was ransacked and the contents of her purse dumped on the floor. 660 So. 2d at 680. In this case, no evidence showed that Hawk took anything from the Grays' house. If he took the car keys, it was not for any financial gain, but to enable him to drive the car. Although he drove the Grays' car, he did not sell it or even keep it. The house was not ransacked and, although, no money was found in the house, no evidence showed that the Grays' had any money in the house prior to the homicide. He did not take the TV, VCR or any other items from the house.

Why Hawk committed this crime is a mystery. If he had taken and sold items, or had made lavish expenditures after the homicide, it might be assumed that pecuniary gain was the motive. This was not the case, however. Hawk may have committed the crime because he was angry with the victims, or because he was bored and high on drugs and wanted some excitement. He told friends several days earlier that he could "fuck up old people," so perhaps he just

wanted to prove that he could commit such a crime. He may have craved attention so badly that he committed this crime to get the attention of his "friends." While this is not logical, it must be remembered that Hawk had mental problems. It is probable that Hawk did not fully comprehend the seriousness and cruelty of his actions because of his mental and emotional problems.

The court's finding of the pecuniary gain aggravator could only be derived by drawing unwarranted inferences from the circumstances in violation of Robertson, 611 So. 2d at 1232. Circumstantial evidence will not support a finding of pecuniary gain unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance. Simmons, 419 So. 2d at 318 (no evidence that money or car defendant expected to receive would come from murder); Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988) (killing during flight was not a step in furtherance of sought-after gain).

Because elimination of this unproven aggravating factor leaves only one aggravator, and because the jury heard (and the judge found and gave weight to) a number of 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. 2926, 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 reduce his conviction to second degree murder, it should reverse the death sentence and reduce the sentence to life imprisonment on proportionality grounds. (See Issue IX)

ISSUE IX

A SENTENCE OF DEATH IN THIS CASE IS DISPROPORTIONATE WHEN COMPARED TO OTHER CASES IN WHICH THE COURT HAS REDUCED THE PENALTY TO LIFE.

Part of this Court's function in capital appeals is to compare the case with other decisions to determine whether the punishment is too great. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied sub. nom., 416 U.S. 943 (1974). 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 aggravating factor, and then only when there was very little or nothing in mitigation. The instant case does not fall into that category. Moreover, this is not one of the most aggravated first-degree murder cases.

The trial court found only two aggravating factors -- that Hawk committed a prior violent felony; namely, the contemporaneous

attempted first-degree murder of Matthew Gray, to which he gave great weight, and that the murder was committed for pecuniary gain -- to facilitate the theft of money and grand theft of the car. (10/1710-11). As discussed in Issue VIII, supra., the State did not prove the pecuniary gain aggravator beyond a reasonable doubt.

The trial court found two statutory mitigators and six non-statutory mitigators. Although both statutory mental mitigators were supported by testimony, and the trial judge considered and weighed both of them, he found one to be a statutory mental mitigator (impaired capacity) and the other to be a nonstatutory mitigator (mental and emotional distress), because he felt it did was not "extreme." As statutory mitigators, he found:

> (1) That Hawk's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (2) Hawk's age (19), although he gave it little weight because Hawk had made many decisions and abused drugs and alcohol.

As non-statutory mitigation, the judge considered:

> (3) Hawk's hearing loss to which he never fully adjusted; (4) His lack of father figure and physical abuse by father; 5) His mental deficiencies, as evidenced by many psychological evaluations indicating possible brain damage, low self-esteem and impulsive behavior; (6) That Hawk could receive life with a 25-year minimum mandatory and a consecutive thirty years for attempted murder; (7) Hawk's disadvantaged childhood, abusive parent, lack of education and training; and (8) Some, as opposed to extreme, mental distress.

(10/1712-13) He considered the spinal meningitis, which caused Hawk's hearing loss and brain damage, and its rippling affect, as non-statutory mitigation to which he accorded **some weight**. He

found it to be consistent with the impaired capacity mitigator. Although he did not find the emotional and mental disturbance, he considered this factor in finding that Hawk had impaired capacity and, because he considered that statutory mitigator, did not give it much weight as a nonstatutory mitigator. He said that the remainder of the nonstatutory mitigation was considered and construed in the light most favorable to Hawk, and was not given great weight. He considered proportionality and, citing Porter v. State, 564 So. 2d 1060 (Fla. 1990), found that aggravator (1) alone outweighed the totality of the mitigation.[24] (10/1714)

The judge's finding that the first aggravator would alone outweigh the mitigation (10/1713-14) indicates that he had his mind made up. This Court has refused to rely on such "alternative findings." See Geralds v. State, 674 So. 2d 96 n.14 (Fla. 1996) (even though trial judge stated in sentencing order that he would impose death even without CCP aggravator, this Court independently examined surrounding facts and circumstances and did not base its conclusions on subjective opinion of trial judge). Thus, the trial

[24] The judge may have cited Porter only for its discussion of the need to consider proportionality. If he intended to compare this case with Porter, however, Porter does not support imposition of the death penalty in this case. Porter killed a former lover and her current boyfriend, after a number of threats. Thus Court sustained **three** aggravators, including CCP, as the woman's murder, for which Porter was sentenced to death. The Court mentioned **no** mitigation at all, although Justice Barkett, in a separate opinion, noted that Porter was very drunk at the time and that this was a domestic murder. The case at hand bears no resemblance.

judge's "boiler-plate" language does not preclude this Court's independent analysis and determination.

Bobby Hawk was born when his mother was sixteen and his father was eighteen. The young family moved around constantly. Most of the time they were on public assistance. They never had their own home, but lived with other families and acquaintances. (23/1346-49)

At age three, Bobby became ill with spinal meningitis. While in the hospital, he "went back to being a baby." He was bottle-fed and back on diapers. When Bobby returned home from the hospital, he was deaf. (23/1353) His father could not tolerate Bobby's deafness. Because of his abuse, Mrs. Hawk left her husband when Bobby was four-and-a-half. Two months later, Mr. Hawk located them in Chicago, abducted Bobby, and took him back to Missouri. After returning to his mother, Bobby had no further contact with his natural father. (23/1353-54)

Bobby was first evaluated at age five when HRS was called in because he was bruised from discipline and having problems at school. (11/1837) HRS determined that he was severely emotionally disturbed and needed psychological help. He received psychiatric help once or twice a week for several years. (11/1838)

In 1982, Bobby's mother married her current husband, Glenn Sarley. They moved to Pinellas County, Florida. Bobby was eventually expelled from the public schools, and his parents enrolled him in the Florida School of Deaf and Blind in St. Augustine, where he stayed for several years. (23/1156-58) While

there, he saw a psychologist affiliated with the school. Bobby returned to Pinellas County at age fifteen. He was evaluated and found to be severely emotionally disturbed. (11/1839-41) His mother said that, after Bobby returned home, he did not mature at all. (23/1359)

Dr. Berland found that Hawk suffered from brain damage. His MMPI profile showed delusional paranoid thinking and schizophrenia with hallucinations. Hawk's mania score was extremely high, which would cause Hawk to act upon whatever bizarre or aggressive impulse he had. His MMPI profile was very energized and very disturbed. It reflected a biologically determined mental illness associated with a defect in brain functioning. Because Hawk became deaf as a result of spinal meningitis, which causes brain damage, his brain impairment would seem to have resulted from that. (11/1821-23)

The Wechsler Intelligence Scale indicated a low score in communications which Berland believed to result from Hawk's lack of intelligence. His scores showed brain injury in both hemispheres. If all of his subtest scores were at the level of the lowest (comprehension) his IQ would be 71 (nearly retarded). If all of his scores had been at the level of the highest, his IQ would have been 138 (superior), a difference of four standard deviations, which is clinically and dramatically significant. (11/1826-29) Dr. Berland did not testify as to Hawk's overall IQ, although he said Hawk's low score in comprehension indicated low intelligence rather than a problem understanding the questions. (11/1825-26)

Hawk's mother testified that Bobby began to have a problem with alcohol and drugs at age sixteen. (23/1358-59) Bobby Hawk testified that, at the time of the homicides, he was drinking two quarts of beer, using LSD twice and pot fifteen times each day. (21/1104) He did not remember anything about that time because he was constantly high and drunk. Because he was high on drugs, he did not remember what he told Detective Madden after his arrest. (21/1106) Dr. Berland testified that the use of drugs and alcohol would intensify Hawk's existing mental illness.

Mental mitigation must be accorded a significant amount of weight. See Larkins v. State, 655 So. 2d 95 (Fla. 1995); Santos v. State, 629 So. 2d 838 (Fla. 1994); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Nibert v. State, 574 So. 2d 1059 (Fla. 1990). In this case, the judge found both mental mitigators established, although he found that Hawk's mental and emotional distress was not extreme. He considered Hawk's spinal meningitis, deafness and resulting brain damage in finding the impaired capacity"mitigator, so did not accord it much weight as a nonstatutory aggravator. Although it stands to reason that such problems would impair ones capacity, brain damage is often used to support the mental and emotional distress mitigator. In addition, the court failed to consider Hawk's abuse of alcohol and drugs at the time of the crime,[25] although it was reasonably established by the testimony of

[25] The judge must have agreed that the evidence reasonably established that Hawk had a drug and alcohol problem because he

Hawk, his mother, and Luis Valles who thought Hawk smelled and acted drunk the night of the homicide. The evidence showed that Hawk had been severely emotionally disturbed since he was a small child, and that his problems resulted primarily from his spinal meningitis and resulting deafness and brain damage, over which he had no control. Perhaps, then, the judge should have accorded additional weight to the totality of the mental mitigation.

The judge considered Hawk's age, 19, but gave it little weight. (11/1712-13) This Court has observed that "age is simply a fact, every murderer has one." Mungin v. State, 22 Fla. L. Weekly S107, 109 (March 6, 1997); Echols v. State, 484 So. 2d 568, 575 (Fla. 1985), cert. denied, 479 U.S. 871 (1986); see also Campbell v. State, 679 So. 2d 720, 726 (Fla. 1996) Evidence of mental incapacity such as that described above, have been found to make age of a mitigating nature. See Terry v. State, 668 So. 2d 954 (Fla. 1996) (age may be mitigating when the defendant's mental and emotional age is less than his chronological age); see also, Sims v. State, 681 So. 2d 1112, 1117 (Fla. 1996) (no evidence that mental, emotional or intellectual age lower than chronological age; without more, age twenty-four is not mitigating).

"If age is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime

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used it as a reason not to give much weight to Hawk's age. Such evidence supports the "impaired capacity" mitigator. See Stewart v. State, 588 So. 2d 972 (Fla. 1991). (See discussion of age, infra.)

such as immaturity or senility." Echols, 484 So. 2d at 575. In Campbell, 679 So. 2d at 726, the Court held that the trial judge should have instructed the jury to consider Campbell's "relatively young age" of twenty-one (at the time of the crime) which was linked to his emotional immaturity. His psychiatric expert testified that he functioned somewhere in the "adolescent range."

In the case at hand, Hawk was nineteen. Despite the judge's finding to the contrary, he was very immature for his age. When Bobby had spinal meningitis at age three, he was in the hospital for thirteen days, where he reverted to being a bottle-fed baby in diapers, and lost his hearing. Bobby lived at home and received a disability check, could not keep a job, and abused alcohol and drugs. He had never been on his own. Testimony suggested that he spent his time hanging out at his parents' skating rink, and hanging out with his friends, some of whom were also deaf. Hawk's testing indicated that he was not very intelligent, especially in the area of comprehension. Bobby's mother did not believe that he ever matured. (11/1844) Compare Hawk's lifestyle with a young man of nineteen who is married with a child, working regularly to provide for his family, while attending night school and engaging in civic and family activities.

A defendant in his late teens or early twenties may or may not receive the benefit of the age mitigator, "depend[ing] upon the evidence adduced at trial and at the sentencing hearing." Mills v. State, 476 So. 2d 172, 179 (Fla. 1985). In this case, the judge

abused his discretion by failing to give Hawk's young age, combined with his obvious immaturity, more weight. The court improperly found that Hawk's use of drugs and alcohol was a decision that showed his maturity. This "decision" showed his immaturity. Moreover, this Court has repeatedly found that substance abuse is a mitigating factor. See e.g., Besaraba v. State, 656 So. 2d 441 (Fla. 1995). In this case, the trial judge used it improperly to rebut a mitigator -- Hawk's age. Thus, the court erred in not giving more weight to Hawk's age.

There is but one valid aggravating factor in this case -- the prior violent felony aggravator. (See Issue VIII, supra, as to why the pecuniary gain aggravator is inapplicable.) Bobby Hawk was convicted of the contemporaneous attempted first-degree murder of Matthew Gray. This aggravator admittedly deserves great weight. Nevertheless, it is not so significant that it outweighs the substantial mitigation in this case. Even a prior homicide does not automatically mandate the death penalty. See e.g., Kramer v. State, 619 So. 2d 274 (Fla. 1993) (defendant killed another man in a similar fashion, but was convicted of attempted murder before victim died of his injuries); Cochran v. State, 547 So. 2d 928 (Fla. 1989) (killed man during drug deal four days earlier).

This Court has affirmed death sentences supported by one aggravating circumstance "only in cases involving 'either nothing or little in mitigation.'" White v. State, 616 So. 2d 21 (Fla.

1993).[26] In the vast majority of cases where this Court sustained only one aggravating factor, it reduced the sentence to life. See, e.g., Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); Thompson v. State, 647 So. 2d 824, 827 (Fla. 1994); Knowles v. State, 632 So. 2d 62 (Fla. 1993); Santos v. State, 629 So. 2d 838 (Fla. 1993); White v. State, 616 So. 2d 21 (Fla. 1993); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Clark v. State, 609 So. 2d 513 (Fla. 1992); Klokoc v. State, 589 So. 2d 219 (Fla. 1991); McKinney v. State, 579 So. 2d 80 (Fla. 1991); Douglas v. State, 575 So. 2d 165 (Fla. 1991); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Penn v. State, 574 So. 2d 1079 (Fla. 1990).[27]

Although defense counsel did not ask the court to consider

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[26] Even in cases in which the defendant killed more than one person, this Court has accorded great weight to mental mitigation when the crime was committed by a defendant suffering from a mental disorder rendering him temporarily out of control. See e.g., Santos v. State, 629 So. 2d 838 (Fla. 1993); Maulden v. State, 617 So. 2d 298 (Fla. 1992); Garron v. State, 528 So. 2d 353 (Fla. 1988); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Amazon v. State, 487 So. 2d 8 (Fla. 1986).

[27] We have found not a single case in which this Court affirmed a death sentence with only one aggravator where the mitigation was as substantial as Hawk's. Although this Court has affirmed several death sentences with only one aggravator, these cases are clearly distinguishable. See, e.g., Ferrell v. State, 680 So. 2d 390 (Fla. 1996) (defendant committed prior similar murder and nonstatutory mitigation merited little weight); Lindsay v. State, 636 So. 2d 1327 (Fla. 1994) (killed live-in girlfriend and her brother, had prior second-degree murder conviction and almost no mitigation); Duncan v. State, 619 So. 2d 279 (Fla. 1993) (prior axe murder of fellow inmate); Cardona v. State, 641 So. 2d 361 (Fla. 1994) (Cardona's three-year-old son systematically tortured, abused and finally beaten to death).

Hawk's lack of substantial criminal history, the trial court should have considered that Hawk's criminal history was minor. In 1991, when Bobby Hawk was seventeen, he was involved in the burglary of a Winn-Dixie Store. Several boys entered the closed store through a space between some plywood and the store where a new addition was being added to the store. Hawk allegedly held the plywood boards back while the other boys entered to steal beer and cigarettes.

The following year, fifteen year old Amy Wells, a deaf student at Seminole High School, told her teacher that, a day earlier, she had sex with Bobby Hawk during their lunch break, in the barn at Hawk's grandmother's house. Although Amy reported that Hawk forced her to have sex, her teacher said she appeared to be fine when she returned from lunch, and did not act upset. She participated in class and laughed during a movie that afternoon. The school's deaf interpreter reported that Amy told her that she had done something bad the day before; she had sex with Robert Hawk during the lunch break. Amy told the detective from Crimes Against Children that she considered Hawk her boyfriend. She said Hawk said "please" and that he loved her. After kissing her, he had sex with her for fifteen minutes, after which she told him that was enough. He pushed her back down and they had sex for five or ten minutes more.

Hawk's former convictions resulted from plea agreements. The burglary was only to steal beer, cigars and cigars, and Hawk only held open the plywood for the other boys to enter the store. The store was not open and the crime was nonviolent. The other boys

were not charged or convicted, suggesting that Hawk was less sophisticated than were the other boys who escaped prosecution. Hawk's second conviction for carnal intercourse with an unmarried person under the age of eighteen who apparently consented -- was a crime rarely reported or prosecuted.

It is difficult to compare this case with other capital cases as to proportionality because of its unusual nature. Undersigned counsel was unable to find any case **factually** similar to this case. Like Knowles v. State, 632 So. 2d 62 (Fla. 1993), however, this crime was "bizarre" because Hawk had no apparent motive.

In Knowles, the defendant shot and killed a ten-year-old girl he had never met. Knowles then shot and killed his father and left in his father's truck. The trial court found only one aggravator in connection with the murder of the child and three in connection with the murder of Knowles' father. The trial court rejected the statutory mental mitigators, but found that Knowles had a limited education, had on occasion been intoxicated on drugs and alcohol, had two failed marriages, low intelligence, poor memory, and inconsistent work habits. This Court struck two of the aggravating factors as to the murder of Knowles' father, and found that the court erred in failing to find uncontroverted mitigation, including the mental mitigators. Based on the "bizarre circumstances" of the murders and the substantial unrebutted mitigation established, this Court found death not proportionately warranted. Hawk's case is comparable because only one aggravator remains, and both Hawk and

Knowles had substantial mental mitigation. Moreover, Hawk's attack on the Grays was also bizarre because he had no apparent motive to attack the victims, and had little if any history of violence.

Comparison with Kramer v. State, 619 So. 2d 274 (Fla. 1993), in which this Court vacated the death penalty and remanded for a life sentence, also shows clearly that the death penalty is not proportionately warranted in the instant case. In Kramer, the trial judge found two aggravating factors: a prior violent felony and that the murder was "heinous, atrocious and cruel." 619 So. 2d at 276. The prior violent felony was a prior attempted murder conviction for beating another victim with a concrete block within two hundred feet of where the second beating took place. The first victim also died from the beating, but only after Kramer's conviction for attempted murder. 619 So. 2d at 278 (Grimes, J., dissenting). The jury recommended death by a vote of nine to three. 619 So. 2d at 275-76. This Court remanded Kramer for a life sentence even though the defendant had committed a **prior similar murder**.

The judge found that Kramer was under the influence of mental or emotional distress and that his capacity to conform his conduct to the requirements of law was severely impaired, but did not think the problems were serious enough to meet the two statutory mental mitigators. 619 So. 2d at 276, 287 (Grimes, J., dissenting). He found that Kramer suffered from alcoholism and was a model prisoner and a good worker. 619 So. 2d at 276.

In contrast, the attempted murder of which Hawk was convicted occurred contemporaneously and, unlike the victim in Kramer, Mr. Gray did not die from the assault at a later date, despite his serious injuries. In Kramer, the court found two aggravators, as in this case. In this case, however, the "pecuniary gain" aggravator, was not established and, thus, cannot be sustained. (See Issue VIII) Hawk's sentencing judge specifically rejected the HAC factor which was found by the court in Kramer, and is considered to be one of the weightier aggravators. Although Kramer's victim was drunk and may have felt less pain because of the alcohol, we do not know whether Hawk's victim was even awake or conscious when killed. Little evidence suggested a struggle, and none proved it.

In both cases, the judges considered both mental mitigators. In Kramer, the judge did not believe that either one reached the statutory level. In Hawk's case, the court found one of the statutory mental mitigators established, and considered the other as nonstatutory mitigation. Thus, Hawk's judge found stronger mental mitigation than did Kramer's. Hawk testified that he was an alcoholic, as was Kramer, and that he used drugs. His mother and Luis Valles substantiated this testimony. Moreover, Hawk had a serious mental disorder. When compared to the Kramer case, it becomes clear that Robert Hawk's sentence of death is not proportionately warranted.

Even when a jury recommends the death penalty, the presence of

uncontroverted, substantial mitigation removes the case from the category of "the most aggravated and least mitigated of serious offenses." See e.g., Penn v. State, 574 So. 2d 1079, 1083-84 (Fla. 1991); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). Because of the significant unrebutted mitigation in Hawk's case, the death penalty is unwarranted. The psychiatric testimony that Hawk was severely disturbed, and the myriad of statutory and nonstatutory mitigation, outweigh the single valid aggravating factor.

Executing someone who cannot control his behavior accomplishes nothing. Hawk probably did not even know about the death penalty in Florida, and certainly did not consider it before committing this crime for which he was almost certain to be apprehended. Hawk was not a hard core criminal. Executing a deaf, mentally ill man with limited intelligence, who was nineteen when he committed the crime, does not satisfy society's desire for deterrence. Moreover, because mentally ill offenders have disturbed thought patterns and emotions, and a reduced ability to think rationally, they do not have the highly culpable mental state that the Eighth Amendment requires to justify the retributive punishment of death. Sentencing the mentally ill to death does not measurably contribute to the penological goals that capital punishment is intended to achieve.

To summarize, Hawk's sentence should be reduced to life for the following reasons:

1. There is only one valid aggravating factor and substantial

mitigation, including statutory mental mitigation, and Hawk's age, which was nineteen at the time of the offense.

2. Despite the judge's finding, the evidence did not prove that the crimes were committed for pecuniary gain. There was no conclusive evidence that Hawk took anything of value from either of the victims, or from their house. Although he drove their car, he returned it and later abandoned it a block or so away.

3. Bobby Hawk committed the crimes because of serious mental problems resulting from spinal meningitis and deafness, which were beyond his control. The mental mitigation was supported by Dr. Berland whose diagnosis was brain damage.

4. Subtests of the Wechsler Intelligence Scale showed that he had limited comprehension, and damage to brain tissue. (11/1826-29)

5. He was a chronic user of drugs and alcohol which can be expected to worsen pre-existing brain damage.

6. He had a traumatic, emotionally isolated childhood, caused by his unstable natural father who abused him, and by spinal meningitis and the resulting deafness and brain damage.

7. He did not graduate from high school and could not hold a job or support himself.

8. He had never lived apart from his parents except while residing at the Florida School for the Deaf and Blind.

9. As a child and teenager he received mental health treatment at various facilities, but his behavioral problems did not improve.

10. The crimes were not highly premeditated, and may have resulted from an involuntary rage that Hawk could not control, caused by his mental disorder and exacerbated by alcohol and drugs.

11. The homicides were not contract killings or mafia hits; Hawk was not involved in organized crime or drug-related activities.

12. Neither of the victims was tortured or mutilated by the defendant. Cf. Branch v. State, 685 So. 2d 1250 (Fla. 1996) (sexual torture). There was no evidence that Hawk enjoyed the killing.

13. As discussed in Issues V, VI and VIII, supra, the jury recommendation was tainted by the jury's consideration of two invalid aggravating factors -- HAC and pecuniary gain. In addition, the jury did not hear Dr. Berland's testimony which strongly supported the mental mitigators, as did the judge.

Nevertheless, **four jurors found enough mitigation to recommend a life sentence.**

14. If Hawk's sentence is reduced to life in this case, he will serve a mandatory minimum of 25 years in prison, followed by 30 years for the attempted first-degree murder.

"The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring); accord Dixon, 283 So. 2d at 7 (appropriate that legislature "has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes"). The arbitrary and capricious imposition of the death penalty violates both the United States and Florida Constitutions. Furman, 408 U.S. 238; Dixon, 283 So. 2d 1.

This Court should resolve the numerous problems in this case by vacating Hawk's death sentencing and ordering it reduced to life. As discussed above, this Court has affirmed death sentences supported by one aggravating circumstance only in cases involving little or nothing in mitigation. Nibert, 574 So. 2d at 11. This is not one of the "unmitigated" first degree murder cases for which death is the proper penalty. Cf. Dixon, 283 So. 2d at 7. Hawk's moral culpability is simply not great enough to deserve a sentence of death.

CONCLUSION

For the above reasons, if Hawk's conviction and sentence are not vacated and the case remanded for a new trial, his sentence should be reduced to life in prison.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Office of Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of April, 2001.

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