IN THE SUPREME COURT OF FLORIDA

ROBERT HAWK,

Appellant,

vs. : Case No. 88,179

STATE OF FLORIDA, :

Appellee. :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Appellee's abbreviated Statements of Facts is basically correct, except for a few exceptions, and the omission of the sentencing hearing, including Dr. Berland's psychological testimony. Appellee's description of the homicide (brief of Appellee at 2) fails to mention that the medical examiner suspected that the wound on Mrs. Gray's wrist was an old wound rather than a defensive wound. (20/814, 819-21) He said that it appeared to be older than the injuries to her head. (20/828) Appellee also failed to mention that Mrs. Gray may have been unconscious when she took a few breaths after the fatal wound. (20/823-24) The medical examiner stated that, although he could not determine the sequence of the wounds, once the injury to the left side of her head occurred, she would have been immediately unconscious. Death would have occurred within seconds. (20/827)

Appellee states that Hawk flashed a wad of money in front of his friends "saying that he got the money from shooting someone." (Brief of Appellee at 4) Although Hawk showed the wad of money to various friends, he never "said" where he got the money. He did, however, hold up the wad of money after one friend asked him why he shot the people. This friend did not sign and of course Hawk could not hear his question; thus, his alleged response may not have been to the question asked. (17/452)

Appellee states that Detective Madden and interpreter Nancy Freeland testified that Hawk was not high on alcohol or drugs when he gave his statement to law enforcement. (Brief of Appellee at 6) Actually, both testified only that they did not observe any

evidence that Hawk **was** intoxicated or on drugs. (22/1144-46, 1156-57) Clearly, they could not be certain by mere observation.[1]

ISSUE I

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

The issue in this case is not whether Hawk's Miranda rights were properly translated, but whether he understood them and comprehended their significance. When Madden asked Hawk whether, with his Miranda rights in mind, he wanted to talk to him, he had to ask the question five times before receiving an affirmative response. 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 knew nothing about the "incident," it is equally likely he meant what the words imply. Hawk's waiver was based upon an interpretation of "yes" which may have been a head nod, two questions after he said he did not know what was going on.

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[1] Bobby 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) His mother testified that he started using alcohol and drugs at age sixteen. (23/1858-59) One of his friends testified that, whenever they partied, both he and Bobby drank and smoked marijuana, and that Bobby's eyes were red and he smelled like alcohol the night of the homicide. (17/425-26)

Further evidence of Bobby's use of alcohol and drugs is provided by the PSI, which the trial court read prior to sentencing. The probation officer who authored the PSI, reported that, in April of 1995, while Hawk was incarcerated, he was evaluated by the PAR program, at which time he told them he had a substance abuse problem with LSD and THC. The evaluator felt that Hawk should seek treatment in a secure facility. In February of 1996, Hawk's mother said that her son had admitted to using LSD and THC prior to his incarceration. He also told her he had been using crack cocaine and marijuana in the Pinellas County Jail. (10/1730)

Although Appellee argues that these responses were taken out of context, a reading of the entire Miranda inquiry shows no other context. (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 often unclear whether "yes" meant he agreed or understood the question. (See transcript of statement in Appendix A of Appellee's brief). Although Nancy Freeland thought Hawk understood Madden's questions, if what Hawk said is unclear from the transcript, it was no clearer to Freeland unless she's also a mind reader. Hawk did not understand too well because, when Madden said he wanted to ask 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)

Appellee notes that Hawk was not intoxicated or incompetent or on drugs. Although Madden and Freeland did not think Hawk appeared to be under the influence of anything, they had no **way** of knowing for certain. 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 Miranda rights, he could have had Hawk read and sign a written waiver. Madden could also have taken the time to obtain video equipment to record Hawk's signing. Although he audiotaped the interview, sign language cannot be heard; thus, Hawk's actual responses were not recorded. Sign language is not an exact science. Had the questioning been videotaped, an independent interpreter could have verified the interpretation.

As Appellee points out, this Court adopted the holding in Davis v. United States, 512 U.S. 452 (1994), that when a suspect makes an ambiguous or equivocal request for counsel, cessation of questioning is no longer required. Owen v. State, 22 Fla. L. Weekly S246a (Fla. May 8, 1997). The Owen opinion came out about the time Appellant's initial brief was filed; thus, Appellant was not yet aware of it. Thus, the analogy between an equivocal request for counsel (which formerly needed to be clarified) and an equivocal request to terminate questioning, is no longer applicable. Nevertheless, the real issue in this case is not an equivocal request for counsel, nor even an equivocal request to terminate questioning, but Hawk's understanding of his rights.

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.

PREMEDITATION

Appellee asserts that Appellant argued that he may have only intended to "knock out" Mrs. Gray. (Brief of Appellee at 24) This is an inaccurate interpretation of our argument. Appellant argued that Hawk may have intended only to beat rather than to kill the victims. (See Initial Brief of Appellant, Issue II)

Appellee inaccurately states that Hawk admitted "he was shocked when he saw the wounded Mr. Gray alive." What Hawk really said was that, when he went into the Gray's home on the day following the murder, he saw the wounded Mr. Gray and was shocked.

(20/923-24) His obvious meaning was not that he was shocked because Gray was alive, but that he was shocked that Gray had been attacked and injured. He said that he did not want to touch him, to explain why he left him there.

If Appellee is suggesting that Hawk attacked Gray again the day after the original attack, no such evidence was presented at trial. Certainly law enforcement officers who found Gray shortly thereafter would have been able to tell if Mr. Gray had been recently beaten. Although the blood stain expert noted that blood was cast on the wall of Gray's bedroom after other blood had clotted, suggesting that the beating was interrupted and resumed (21/996, 999), the implication was that Hawk was diverted from the beating briefly. It would take very little time for blood splatter on a wall to clot. Had Hawk attacked Gray again the next day, he would have had blood on his clothing, and the hospital personnel and would have noticed if twelve or more hours separated two beatings. If this possibility were even suggested by the evidence, the prosecutor would have argued it at trial.

FELONY MURDER

Appellee twice asserts that, prior to the homicide, Hawk was "formerly destitute." (Brief of Appellee at 27) This is contrary to the evidence in the case. Hawk was supported by his parents and also received social security disability benefits. (10/1728-29) Friends testified that he usually carried his money in a money clip (17/452), thus showing that he had money. He drove a moped. (20/915) There was no evidence that he needed money.

Appellee charges that Appellant's facts concerning Hawk's

taking of the car key are wrong, (Brief of Appellee at 26-27) We acknowledge that Hawk told Detective Madden that the keys were in the front door in a deadbolt. (20/927) Because of the number of varying accounts of the facts, Appellant based the statement objected to by Appellee on the belief that the keys in the deadbolt were, at least arguably, outside of the house. Upon further review of the record, however, it appears that Appellee is correct in stating that there is evidence that the keys were on the inside of the door. Nevertheless, the taking of the Grays' car may have been an afterthought, rather than a reason for the attack. Perhaps Hawk saw the keys in the door and it then occurred to him that he could drive their car. It defies logic that Hawk attacked the victims only to "borrow" their car for a joyride to the homes of his friends. Moreover, if the Grays, who were deaf, were in bed in their bedrooms, Hawk could easily have taken the keys from the front door without even disturbing them, and returned it before morning.

Appellee argues that cases holding that the felony **was** an afterthought are robbery cases. (See Brief of Appellee at 28) Nevertheless, the felony murder statute clearly states that the murder occurred while the defendant **was** engaged in the perpetration of the felony or in an attempt to perpetrate a felony, or while the defendant was trying to escape. See §§ 812.13; 782.04(1)(a)2, Fla. Stat. (1997). In this **case,** the totality of the evidence suggests that, for an unknown reason, Hawk went into the Grays' house and beat them, after which he **saw** the car keys in the front door and decided to show off the car to his friends.

Mr. Gray's wallet remained in his pants and Mrs. Gray's purse in the closet. Although pry marks were found on Gray's desk, there is no evidence they were made by Hawk. Deputy Jewett observed that the side garage door appeared to have been pried open, but that the prior marks appeared old; thus, the Grays may have locked themselves out before. (10/1723) There was no evidence anything was removed from the house. (18/602-06,621)

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 the money came from. He did hold up the wad of money after one friend asked him why he shot the people. This friend did not sign so Hawk could not hear his question; thus, his alleged response may not have been to the question asked. (17/452) Another friend who was present at the same time gave no such testimony. (17/441-48) Hawk testified that he did not read lips well, and that he understands by lip reading about 25 percent of the time. (21/1095-97) The State presented no evidence that this money was found in Hawk's possession at the time of his arrest or in his house afterwards. As in Scull, it is unclear why Hawk attacked the Grays. He did not say that he planned to rob or kill anyone. No evidence suggested that he was in need of money. Thus, the State proved neither felony nor premeditated murder.

ISSUE III

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

Appellant relies on the cumulative error in this case to

support the harmfulness of the prosecutor's comments. Although defense counsel objected to the comments in this **case,** the Fourth DCA recently agreed that, even when there is no contemporary objection, the defendant is entitled to a reversal and a new trial when the prosecutor is guilty of numerous acts of misconduct of such **a** nature and character that the collective effect rises to the level of fundamental error. DeFreitas v. State, 22 Fla. L. Weekly D2462 (Fla. 4th DCA Oct. 22, 1997) (three errors constituted fundamental error). There are many errors in this case.

It is improper for the prosecutor to call the defendant names. Perez v. State, 22 Fla. L. Weekly D243 (Fla. 3d DCA Jan. 22, 1997); Lopez v. State, 555 So. 2d 1298 (Fla. 3d DCA 1990). In this case, the prosecutor called Hawk names and attacked his character over and over and over again:

(1) The prosecutor said in opening argument that Hawk was an **"amoral, vicious cold-blooded killer."** (17/375-76) No evidence could prove that Hawk was "amoral" or "cold-blooded" as this is a subjective determination. It is improper for a prosecutor to express a personal belief in the guilt of the accused, or in the veracity of the state's witnesses. Jones v. State, 449 So.2d 313, 314 (Fla. 5th DCA), review denied, 456 So.2d 1182 (Fla. 1984).

(2) When Hawk testified in his own defense that he **was** sexually abused, the prosecutor objected on the grounds that, "**It's just outrageous!**" (21/1098) The prosecutor then asked:

> 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?

(21/1125-27)[2] Appellant had a right to fair consideration of his own testimony unimpeded by unfair prosecutorial tactics. Cf. Washington v. Texas, 388 U.S. 14, 19 (1967) (a basic element of due process is "the right to present a defense, the right to present the defendant's version of the facts. . .").

(3) During his guilt phase closing, the prosecutor accused Hawk of lying:)

> 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)[3]

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[2] Appellee objects to our characterization of the prosecutor's comment, "It's just outrageous," as an exclamation, and notes that defense counsel did not refer to it as an "outburst." In our opinion, when the prosecutor says, in front of the jury, that the defendant's testimony is "just outrageous," it is an exclamation and an outburst. We are not attempting to "misrepresent the record," but only describing the prosecutor's comments in the manner they appear to have been said, It seems unlikely that the prosecutor called the testimony outrageous in a calm, casual nonchalant fashion, (21/1098-99) Moreover, the prosecutor told the judge that he "should bring in Matthew Gray now to rebut these outrageous allegations." This comment suggests that the prosecutor was angry and seeking revenge, and not very calm.

Appellee also argues that the prosecutor's objection was based on relevance. (Brief of Appellee at 36) Although the prosecutor eventually said that his objection **was also** based on relevancy, his initial ground for the objection was that it was "just outrageous." (See testimony set out by Appellee at 36-37)

[3] Appellee cites Craig v. State, 510 So. 2d 857, 865 (Fla. 1997) (brief of Appellee at 40), for the proposition that is all right for the prosecutor to call the defendant a liar when it is clear that he is characterizing the defendant's testimony. In Craig, the Court considered only two of thirteen remarks by the prosecutor because the other eleven were not preserved. Here, we have an accumulation of such remarks, most of which were merely mud-slinging derogatory terms. See also, Washington v. State, 687 so. 2d 279 (Fla. 2d DCA 1997) (unquestionably improper for prosecutor to state that **a** defendant has lied); Pacifico v. State, 642 So. 2d 1178, 1183-34 (Fla. 1st DCA 1994) (exhorting jury to convict because defendant lied constitutes an open invitation to jury to convict for a reason other than defendant's guilt of the crimes charged).

(4) During his penalty closing, the prosecutor argued that

> **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)

Thus, the prosecutor twice called Hawk a "savage killer," practically in the same breath.

(5) Later in his closing argument, the prosecutor argued:

> **Robert Hawk . . . 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)

This was another 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. As noted in DeFrietas, 22 Fla. L. Weekly at 2468 (Pariente, J., concurring in result only), such arguments urge the jury "to convict the defendant for a reason other than his guilt of the crimes charged." Northard v. State, 675 So. 2d 652, 653 (Fla. 4th DCA 1996).

(6) Again during his penalty phase closing, the prosecutor commented, "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. . , .** (23/1377-78)

(7) Still another time, the prosecutor engaged in name-calling during his penalty phase closing argument:

> 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)

Here, we have seven epithets, all rude and uncalled for name-calling by the prosecutor. Defense counsel objected to these comments and in some cases the objections were sustained and curative instructions given. In others, the judge did nothing except perhaps to warn the prosecutor to be careful. Even if one of these comments, or maybe two, were not harmful, the cumulative effect of the prosecutor's constant name-calling could not help but affect the jury.

Additionally, an important mitigator (like a defense) in the penalty phase was Hawk's brain damage and lifelong mental and emotional problems. (See Issue IX, infra.) The prosecutor tried to denigrate this defense throughout his penalty closing by calling Hawk a lazy high-school drop out living off his parents, and a vicious and savage killer. These were the prosecutor's personal opinions. Such terms as "vicious" and "savage," as applied to a person, are subjective and cannot be proven by evidence. The evidence did not reflect that Hawk dropped out of high school but, rather, that he was expelled from school due to his emotional and behavioral problems. No evidence proved that he was lazy, although he had a short attention span and was unable to keep a job. Dr. Berland found that Hawk had serious mental problems which included paranoia, delusions and hallucinations. (See Issue IX, infra.)

* * * * *

In addition to these attacks on Hawk, the prosecutor made numerous other objectionable arguments. He told the potential jurors, even before selected and sworn, that "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," thus biasing the jurors before the trial began. (16/247-48)

The prosecutor later insinuated that, because Hawk did not tell Madden about the Grays' sexual abuse, he was lying, which was a comment upon Hawk's right to remain silent at the time of arrest. The prosecutor's questions regarding whether Hawk told Madden about the abuse, however, are harmless because the jury heard the entire taped statement. The objection is to the prosecutor's insinuations as to what Hawk did not say before and after his taped statement when his fifth amendment right to remain silent applied. Agreeing to make a statement does not waive a defendant's right to remain silent before the statement.

Reversing in Lee v. State, 422 So. 2d 928 (Fla. 3d DCA 1982), the court held that the prosecutor's closing argument -- that the defendant would have told someone at the hospital or the police if he had been beaten up, was a comment on the defendant's post-arrest silence. The court held that, as a matter of state constitutional law, it is not permissible to comment on a defendant's post-arrest silence whether or not the silence was induced by Miranda warnings. 422 So. 2d at 931. More recently, in Hoggins v. State, 689 So. 2d 383 (Fla. 4th DCA 1997), the court reversed, holding that a prosecutor may not comment on a defendant's custodial pre-Miranda silence as impeachment when he testifies in his own behalf. Id. This was a case in which the prosecutor asked the defendant at trial why he had not told this story when the police came to the apartment where, which is very similar to the case at hand. Citing Traylor v. State, 596 So. 2d 957, 961 (Fla. 1992), the court held

that a comment on a custodial defendant's pre-arrest silence violates the due process clause of the Florida Constitution, reasoning that the ruling protects all suspects equally no matter when Miranda rights are given, 687 So. 2d 386.

Appellee asserts that defense counsel failed to preserve the objection to the prosecutor's argument that Mrs. Gray struggled with the defendant. (Brief of Appellee at 49) This is not true. Defense counsel objected during the argument and moved for a mistrial at the close of the prosecutor's argument. A motion for mistrial made at the conclusion of closing argument is timely. State v. Cumbie, 380 So.2d 1031, 1033 (Fla. 1980). It need not be made in the next breath following an objection to an offensive remark. Nixon v. State, 572 So. 2d 1336, 1340-41 (Fla. 1990) This rule avoids interruption in the continuity of the argument and gives counsel a chance to evaluate the prejudicial nature of the remark. Id.

In this case, after several objections, the judge advised counsel to only make objections when absolutely necessary. (23/1371) The prosecutor then made the following argument:

> [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. . .
>
> 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? . . . 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. He correctly argued that the State introduced no evidence to support the argument. After his initial objection, he would not have been expected to continue to object throughout the argument, especially in light of the judge's admonition against making unnecessary objections during closing. Counsel requested a mistrial before the jury was instructed or released to deliberate, as required by this Court in Cumbie. He was denied a mistrial or curative instruction. (23/1378)

During his penalty phase closing argument, the prosecutor also made a "message to the deaf community" argument. He told the jurors that if they recommended life merely because Hawk was deaf, "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) The judge denied the motion for mistrial and request for curative instruction. (23/1390)

Appellee cited Jones v. State, 552 So. 2d 346 (Fla. 1995), in which this Court found a comparison between Ford and Thomas, who

were raised in foster homes and turned out well, and the defendant, to be "unfortunate" but not sufficiently harmful to merit a new trial. Nevertheless, 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. 1985) ("drugs in the schools" closing argument). Although the prosecutor's commentary might not affect the verdict by itself, it is but another of the objectionable comments that produced reversible error collectively.

In Sandoval v. State, 22 Fla. L. Weekly D705, D706 (Fla. 3d DCA 1997), the court quoted Judge Cross in Kirk v. State, 227 So. 2d 40, 43 (Fla. 4th DCA 1969), as follows:

> The prosecuting attorney in **a** criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case [the prosecutor] represents the great authority of the State of Florida. [The prosecutor's] duty **is not to obtain convictions but to seek justice,** and he [or she] must exercise that responsibility with the circumspection and dignity the occasion calls for . , . . Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client.

ISSUE IV

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

Although defense counsel did not ask for a competency hearing, he did question Gray's competency to testify. (22/1135) In fact, defense counsel requested a proffer, to which the prosecutor objected. The judge asked the prosecutor whether Gray was competent to testify. The judge represented, **as** an officer of the court, that Gray was able to communicate. 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)

Defense counsel was not requesting a full-blown competency hearing. He was merely objecting because the witnesses competency was questionable, and asking that the trial court question the witness and make a determination as to whether he was able to testify. Matters of competency are not determined by asking counsel calling the witness to represent to the Court that the witness is competent to testify. Moreover, it is clear that the prosecutor did not know because he did not even realize that Mr. Gray had been found legally incompetent.

After Gray's brief but inflammatory comment about Hawk, defense counsel moved for a mistrial and again argued that Gray should have been qualified and his competency determined outside the presence of the jury. The judge denied the motion for mistrial based on the prosecutor's representation as to Gray's competency. (22/1162-63) The issue is adequately preserved.

That Gray could communicate through interpreters is not the issue. The issue is whether he was competent to testify. No one even asked about his memory of facts that occurred prior to the homicide. Even if defense counsel did not specifically request a competency determination until Gray began to testify, it was not too late to stop and look into competency. Moreover, defense counsel did not need to raise the issue earlier because the judge had already raised it after he requested a proffer.

Although Gray may have looked competent, the prosecutor had

already told the court that he might not remember the attack and might blurt out something about Hawk. (22/1135) That in itself was reason to question his competency. That the judge abused his discretion in not at least questioning Gray himself before allowing the testimony is shown by the fact that, as it turned out, Gray had been found incompetent by a court of law. (10/1687-94) Although this did not automatically make him ineligible to testify, it certainly mandated a competency determination.

Appellee argues that the incompetency order was an order determining total incapacity and that "[n]othing in this order suggests **any** mental infirmity on the part of Mr. Gray." 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. (10/1687-94) Impaired mental confusion and disorientation as to time, place and person evidence mental infirmity. The order of "total incapacity" meant that he was incapacitated both mentally and physically.

As noted by Appellee, the prosecutor gave defense counsel an order of partial restoration of competency at the motion for new trial hearing. (11/1902) Although the order returned some of Gray's rights, it did not change the original diagnosis, and was insufficient to establish competency. Thus, Appellee's assertion that, at the time of the trial, Gray's incapacities were largely a nonissue is meritless. Gray's inflammatory comment, especially after being previously warned by the prosecutor, shows clearly that he did not understand the obligation to testify truthfully.

Appellee states that our reliance on cases concerning the competency of children is misplaced. Appellee then defines the primary test for competency of children, under Florida law, as "his or her intelligence, rather than his or her age, and in addition, whether the child possesses a sense of obligation to tell the truth." (Brief of Appellee at 49, citing Griffin v. State, 526 So. 2d 753 (Fla. 1st DCA 1988). If age is not the determining factor, why would this not be an appropriate test for adults too? Certainly, intelligence and a sense of obligation to tell the truth are essential criteria for all witnesses. Another criteria which should apply to all witnesses is the ability to remember the facts to which he or she is testifying.

These errors affected the penalty phase of the trial as well. It is especially important to avoid errors affecting the penalty of a capital trial where the Eighth Amendment requires heightened standards of reliability, Lockett v. Ohio, 438 U.S. 586, 604 (1978). Reversal is required.

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.

That defense counsel was unable to fashion an instruction which would cure the vagueness problem with the HAC instruction does not invalidate his objection. 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 HAC aggravator. He did not know of any language that would overcome the problems with the HAC factor. (23/1319-20, 1333) Because the

legislature has tried for years to properly define this aggravator, and run into continual problems in the courts, see e.g., Shell v. Mississippi, 498 U.S. 1 (1990); Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), counsel should not be expected to come up, with the ideal definition for an inherently vague aggravator.

ISSUE VI

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

Appellee argues that the jury will not be misled by an instruction that is not supported by the facts. (Brief of Appellee at 56) Although this may be true in some cases, here there is a great risk that the jury will erroneously consider the injuries to Mr. Gray, whom the prosecutor called to testify in front of the jury in rebuttal, in finding this factor.[4] Moreover, because Appellee continues to include the alleged "fact" that a sexual battery occurred, despite the trial court's finding that this was not supported by the evidence, the jury may too have based its recommendation of death on that erroneous finding. If so, it was clear error as there is no way that a sexual battery could be proven beyond a reasonable doubt when the medical examiner found no evidence of it. "No evidence" includes the fact that no sperm was

[4] To compound this error, the prosecutor argued to the jury that, "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)

found on Mrs. Gray or on the defendant's clothing, in addition to the obvious lack of evidence of any attempted penetration. See Jones v. State, 569 So. 2d 1234, 1238-39 (Fla. 1990) (Court reversed because the jury permitted to consider HAC despite lack of evidentiary support, and jury may have erroneously believed the defendant's sexual abuse of corpse supported the factor). If the jury considered sexual battery, it was error.

Appellee reiterates the alleged "facts" of this murder, including some that were not shown by the evidence. Appellee includes "a sexual assault," as though it were clearly established, despite the trial court's repeated refusal to allow the prosecutor to even suggest it, and the lack of evidence to support it. Appellee's recitation of the unpleasant facts of this case, some of which are more accurate than others,[5] only confirms the fact that the jury probably relied on this factor despite its inapplicability. The factor is inapplicable because Mrs. Gray may have been unconscious during the attack, and because no evidence suggests that Hawk intended a torturous death, See Teffeteller v. State, 439 So. 2d 840, 846 (Fla. 1983) (State must prove that defendant intended to torture the victim, or that crime was meant to be deliberately and extraordinarily painful); accord Robertson v. State, 611 So. 2d 1228, 1233 (Fla. 1993); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Omelus v. State, 584 So. 2d 563, 566-67 (Fla. 1991).

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[5] Another misleading inclusion is that Mrs. Gray sustained a defensive wound. The medical examiner testified that although the location was consistent with being a defensive wound, he had a problem with the age of the bruise. It looked older than the head injuries. (20/814-21, 828)

The HAC factor is most apt to be erroneously found by a jury because, to **a** lay person, almost every first-degree murder seems heinous, atrocious and cruel, especially if **a** lot of blood is shown to them in photos and videos, as in this case. Because the untrained jury would not have been able to appropriately determine the legal applicability of this factor, it was error for the judge to give the jury this instruction.

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.

Appellant relies on the argument in its Initial Brief as to this issue.

ISSUE VIII

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

Appellee asserts that Hawk admitted stealing money from the Grays. Although Hawk showed several of his friends a wad of bills, he did not say where they came from. The only testimony that might suggest that money was his motive was that of his friend, Benjamin Vjiorak, who testified that he asked Hawk why he shot the people and that Hawk held up a wad of bills. This friend did not know sign language. Because Hawk **was** deaf, he did not hear the question. That he held up the wad of money does not necessarily mean that he was responding to the question as to motive. (17/452) Moreover, another friend who was present at the same time **gave** no such testimony. (17/441-48) Hawk testified that he did not read

lips well, but if the speaker were close to him and spoke slowly, he could probably understand. Generally, he understands about 25 percent when lip reading. (21/1095-97)

Even if Hawk **was** responding the question, the likelihood that this **was** really his motive is not great. The rest of the story he told his friends was not true. He said he had shot one or two people; and that his father had bought him a car. He may well have brought some of his own money or taken it from his parents' house to impress his friends."

Contrary to Appellee's assertion, Hawk was not "destitute" prior to the homicide. (Brief of Appellee at 27) Hawk was partially supported by his parents who owned and operated a roller skating rink, and also received social security disability benefits. (10/1728-29) Friends testified that he usually carried his money in a money clip (17/452), indicating that he usually had money.

Cases cited by Appellee, such **as** Melton v. State, 638 So. 2d 490, 492 (Fla. 1985), are distinguishable because the defendant was in the process of robbing a store when the murder occurred. A

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[6] It is fairly obvious that Hawk is a pathological liar, which is consistent with descriptions of his serious mental and emotional problems. (See Issue IX -- mental mitigation evidence) Hawk's mother stated that her son was emotionally disturbed as a result meningitis, and was a pathological liar. (10/1731) This is evidence by the numerous differing stories Hawk told Madden and his friends. Moreover, his friends all testified that they did not believe him when he told them he shot some people. (See Statement of Facts) Dennis Copenhaver, age 23, remembered seeing Hawk at the skating rink about the time of the homicide. When Hawk told him that a couple people were killed in his neighborhood, Copenhaver did not believe Hawk because Hawk was known for telling stories. (19/746-49)

financial motive is apparent when the defendant kills a shopkeeper and takes items from the store. In Melton, the defendant shot the clerk at a pawn shop during a robbery. Melton had also been convicted of a prior first-degree murder and robbery. Unlike the instant case, it was clear that his motive was financial gain -- he was in the process of stealing items from a pawn shop when the murder occurred.

Similarly, in Lawrence v. State, 691 So. 2d 1068 (Fla. 1997), cited by Appellee, this Court affirmed the finding of the pecuniary gain factor because the defendant admitted entering the Magic Market to rob it, and because $58.00 was missing from the cash register. Moreover, unlike the case at hand, Lawrence was convicted of robbery in the same case. Id. at 1075.

Here, Hawk's motive is not apparent. The only thing that the State proved was that Hawk took victims' car. His motive for taking the car was apparently that he wanted to drive it around and show off to his friends, because of his insecurity. He told his friends that his father bought the car for him. He made no effort to sell it and abandoned it near his home. He had to have known he could not take the car home because his parents would know it belonged to the Grays, and it would tie him to the murder.

Appellee argues that the circumstances of Hawk's possession of the wad of money supports a reasonable inference that it was stolen from the Grays. A reasonable inference is not enough to support an aggravating factor that must be proven beyond a reasonable doubt. Moreover, other evidence indicates that no one knew whether money was missing. (18/570) Mr. Gray's wallet remained in his pants

pocket and Mrs. Gray's purse in the closet. (See Statement of Facts) No fingerprints were found on them.

Detectives found a screwdriver under a desk in Mr. Gray's room, and pry marks on top of the desk, but no tools with blood on them. (18/605-06) No one testified as to whether the pry marks appeared old or new. If Hawk's fingerprints had been on the screwdriver, the State would have introduced this evidence at trial. The desk was open which is not unusual; in fact, it seems unusual that someone would put all his money in a desk and lock in when he went to bed at night. The officers were unable to find that anything was removed from the house. (18/602-06, 621)

Appellee argues that Hill v. State, 549 So. 2d 179 (Fla. 1989), does not govern because, in that case, the defendant previously stated his intention to beat and rape the victim, suggesting that the taking of her billfold was an afterthought. (Brief of Appellee at 62) It is ironic that Appellee makes this argument because the State argued in this case that Hawk's prior statement to friends that he could "fuck up" or beat up old people showed his guilt and premeditation for the instant crime. If the State is right, this negates the pecuniary gain motive.

The fact that Hawk did not take the car to effect an escape, as in Scull v. State, 533 So, 2d 1137 (Fla. 1989), is immaterial; any motive for the taking other than for pecuniary gain negates the aggravator. No financial gain is derived when the defendant takes the victim's car if the car may have been taken for some reason other than to improve the defendant's financial worth. See, e.g, Allen v. State, 662 So. 2d 323, 330 (Fla. 1995). 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). Proof beyond a reasonable doubt cannot be "inferred" 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).

As a final argument, Appellee argues that, if the Court finds this aggravator inapplicable, it should just substitute another aggravator that the trial court did not find, but which might be found upon a resentencing. (Brief of Appellee at 63) These other aggravators were not proposed or argued by the prosecutor, or considered by the judge and jury. This Court has refused to apply an additional aggravator that the trial court did not instruct on or find, and which the State did not cross appeal. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993) (refused to find defendant's contemporaneous murder conviction).

Clearly, this Court cannot now uphold an erroneous finding based upon speculation that, upon resentencing, new aggravators might be applicable, as suggested by Appellee. This is not the law and would be a clear violation of due process. Moreover are not asking the Court to remand for resentencing but, instead, to strike the pecuniary gain aggravator and remand for a life sentence. (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,

Although the nature of the crime is considered in determining and weighing aggravating factors, there are many other considerations in determining proportionality that are just as important.[7] Mitigation, if great enough, may mandate a life sentence in even the most aggravated of murders. See e.g., Santos v. State, 629 So. 2d 838 (Fla. 1991) (mentally disturbed defendant stalked and killed live-in girlfriend and two-year-old child); Garron v. State, 528 so. 2d 353 (Fla. 1988) (killed wife and step-daughter in stormy domestic scene); Ferry v. State, 507 So. 2d 1373 (Fla. 1987) (mentally ill defendant killed five people in grocery); Irizarry v. State, 496 So.2d 822 (Fla. 1986) (defendant murdered ex-wife with a machete and attempted to murder lover); Amazon v. State, 487 So. 2d 8 (Fla. 1986) (mother and eleven-year-old daughter stabbed and sexually battered).

Appellee cited a total of ten cases for comparison as to proportionality. Of these cases, five -- exactly half of them, are cases in which the defendant had a prior murder conviction. See Melton v. State, 638 So. 2d 927 (Fla. 1994); Duncan v. State, 619 so. 2d 279, 281 (Fla. 1993); Clark v. State, 613 So. 2d 415 (Fla.

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[7] Some of the "facts" to which Appellee refers (see brief of Appellee at 65), in detailing the unpleasant "facts" of the crime, are speculative; for example, that Hawk "ransacked the Grays' desk in search of cash" and that he took a wad of cash. The desk was not in disorder, and the State presented no evidence that anything was missing from it. (18/602-06, 621) The State did not prove that Hawk broke into the desk or that the wad of cash came from the Gray's house. (See Issue VIII, supra.)

1992) ; Owen v. State, 596 So, 2d 985 (Fla. 1992); Freeman v. State, 563 So, 2d 73, 75 (Fla. 1990). This clearly distinguishes these cases as to comparison value.

Moreover, Appellee neglects to mention that these defendants had **prior murder convictions.** In discussing Duncan, Appellee omitted the fact that Duncan's prior violent felonies included a contemporaneous attack on the victim's daughter and the prior axe murder of a fellow inmate who was sitting on the commode. Appellee also misleadingly related that the judge found fifteen mitigating circumstances, of which this Court struck only three. (Brief of Appellee at 65)

What really happened in Duncan is that this Court determined, on the **State's** cross-appeal, that neither of the mental mitigators applied because the record contained **a** total lack of evidence to support them. The mental mitigators were included in the list of fifteen. The Court also found no support for the mitigator that the defendant was intoxicated when the murder occurred. In light of its finding no support for some of the mitigators, this Court was not certain whether the trial court purported to "find" the fifteen potential mitigators listed, a number of which were merely the negation of statutory aggravating factors, or whether the judge just listed, considered and rejected the mitigation suggested by the defense, in accord with Campbell. Duncan, 619 So. 2d at 283. Thus, it is misleading to say that this Court approved all but three of the fifteen nonstatutory mitigators when, in fact, the court found little support for any mitigation at all. In Hawk's case, the defense established substantial mitigation including

unrebutted mental impairment which existed all of his life,

Owen v. State, 596 So. 2d 985 (Fla. 1992), involved burglary and the first-degree murder and **sexual** battery of a young mother whose children found her body when they got up for school. Owen confessed to committing numerous crimes including a similar murder in Delray Beach. See Owen v. State, 560 So. 2d 207 (Fla. 1990). Although the Delray Beach conviction **was** later reversed, the aggravator **was** also supported by a prior conviction of attempted first-degree murder.

The trial judge in Owen found four valid aggravating factors including HAC (the bludgeoned victim awoke, struggled and lived for a period of several minutes to an hour), CCP, that the crime **was** committed during a sexual battery, and the prior violent felonies. 596 So. 2d. at 987 n.1, 990. The court considered in mitigation that Owen was raised in foster homes where he was sexually and otherwise abused, that his mind "snapped" during the murder, and that he had enlisted twice in the army. 596 So. 2d at 987 n.2. Owen apparently did not even raise proportionality as an issue. This Court approved the four aggravating factors and affirmed the sentence. 596 So. 2d at 990. Thus, Owen certainly cannot be considered comparable to this **case**.

In Clark, 563 So. 2d 73, the Court upheld two aggravators, one of which **was** a **prior first-degree murder,** and found no mitigation at all. This is clearly distinguishable from this case for obvious reasons. In Freeman, the defendant beat a man over the head with a blunt object. The victim died several hours later from profuse bleeding. Freeman had been convicted of a prior first-degree

murder, armed robbery and burglary of a dwelling with an assault, which were committed just three weeks before the second homicide. The trial court found two valid aggravators and no statutory mitigators. This Court found that the nonstatutory mitigators (low intelligence, abuse by stepfather, artistic ability and enjoyed playing with children) were not compelling. This is clearly distinguishable from the instant **case** which involved no prior murder and substantial mental mitigation.

In Melton v. State, 638 So. 2d 927 (Fla. 1994), the defendant shot the clerk at a pawn shop during a robbery. Melton had also been convicted of **a prior first-degree murder** and robbery. Unlike the instant case, his motive was clearly financial gain. The only mitigation was that Melton exhibited good conduct while awaiting trial, and had a difficult family background. This Court observed that there were no statutory mitigators and the non-statutory mitigation was not compelling. Id. at 930. This clearly distinguishes Melton from the case at hand.

The other five cases cited by Appellee are clearly distinguishable because the aggravators are weightier and the mitigation much less compelling. In Jones v. State, 652 So. 2d 346 (Fla. 1995), for example, the defendant, an employee of the victims, killed both the husband and wife in a robbery. Jones stabbed the wife in the back and left her in the bathroom to die. He then stabbed her husband in the chest. The husband did not die immediately and was able to run to his office, call for help and pull his gun, shooting five shots at the defendant.

Jones had a prior conviction for armed robbery. The trial

court found three valid aggravators and no mitigation. A case involving a total absence of mitigation cannot be compared with this case in which the trial court found two statutory mitigators, one of which was the "impaired capacity" mitigator,[a] and six non-statutory aggravators, including the mental and emotional distress mitigator (not extreme), the defendant's spinal meningitis, which caused deafness and resulting brain damage, and rippling affect, lack of education and training, abuse by natural father, and lifelong psychological problems.

In Watts v. State, 593 So. 2d 198, 204-05 (Fla. 1992), also cited by Appellee for comparison, the Court weighed three valid aggravators against one statutory mitigator (age 22) and one nonstatutory mitigator (low IQ). Watts had no mental mitigation as did Hawk. In addition to the mental mitigation, Hawk also established the two mitigators found in Watts; he was not too bright or educated and was an immature nineteen-year-old.

Watts made the victim and his wife disrobe at gunpoint, and sexually abused the victim's wife in front of him. He killed the husband when he tried to intervene to protect his wife who escaped during the struggle. In the case at hand, the judge specifically

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[a] The trial judge admittedly used evidence supporting the mental and emotional distress mitigator in finding the impaired capacity; he found the mental and emotional distress factor not to be extreme and gave it less weight. The mental and emotional disturbance aggravator has been defined by this Court as "less than insanity, but more emotion than the average man, however inflamed." Duncan v. State, 619 So, 2d 279, 283 (Fla. 1993). The mental mitigation testified to by Dr. Berland, and that included in the PSI discussed infra, certainly puts Hawk within this definition. The mitigation presented in this case is as great, if not greater, than that which this Court found to establish both mental mitigators in Spencer v. State, 645 So. 2d 377 (Fla.1994).

found, as a matter of law and fact, that the State presented no affirmative evidence of a sexual battery.

In Brown v. State, 565 So. 2d 304 (Fla. 1990), the defendant was convicted of armed burglary, first-degree and attempted first-degree murder for breaking in and killing a seventeen-year old girl and wounding her friend. He had just committed an armed robbery and shooting at a convenience store, The court found three valid aggravating circumstances, including CCP. The trial court found mental mitigation, social and economic disadvantage and a non-violent criminal past. The mental mitigation was that Brown was under severe mental strain from trying to support the victim's mother and her children, whom HRS **was** threatening to take away. Thus, Brown did not involve long term mental illness, as in this case, but, rather, short term problems resulting from family pressure that is common to many people. This mitigation is not compelling when compared to the mitigation in Hawk, which includes brain damage, deafness and ongoing psychiatric problems.

In Hudson v. State, 538 So, 2d 829 (Fla. 1989), the defendant broke into his former girlfriend's house, armed with a knife, and, when the girlfriend was not there, stabbed and killed her roommate instead. He dumped the body in a drainage ditch. The court found two aggravators, one of which **was** a prior violent felony. The opinion does not tell the nature of the violent felony. Although the court considered the mental mitigators and defendant's age (22), it gave them little weight. As the opinion does not describe any of the mental mitigation, it is unclear whether it is at all compelling. This Court approved the judge's findings and affirmed

the death penalty, with three justices dissenting. It is difficult to compare this case because the weight of the evidence cannot be discerned from the facts set out in the opinion. In this case, however, the judge properly gave the "impaired capacity" mitigation more than "a little weight."

In Slinev v. State, 22 Fla. L. Weekly S419 (Fla. July 17, 1997), the last of the ten cases cited by Appellee, the defendant and an accomplice killed the proprietor of a pawn shop during a robbery. The victim had facial injuries caused by blunt trauma, which occurred first, three stab wounds to the neck, one of which still contained a pair of scissors, followed by three blows to the head, and, finally, broken ribs and backbone. The defendant, who was arrested while attempting to sell guns obtained from the robbery, admitted that he killed the victim while his companion cleaned out the shelves in the pawn shop.

The trial court found two valid statutory aggravators and two statutory mitigators -- the defendant's age (little weight) and no significant prior criminal history. He gave some weight to Sliney's good behavior as a prisoner but little weight to his politeness, and that he was a good neighbor, caring person and had a good school record and gainful employment. Significantly, Sliney had no history of mental or emotional problems, abuse, childhood problems, or physical disabilities or illnesses. This distinguishes the case from Hawk's case.

The majority affirmed the death sentence in Sliney. As in Hudson, three justices dissented on the issue of proportionality. Justice Kogan pointed out that the majority relied on its own

factual finding that this **was a** brutal murder, although the trial judge did not find the "heinous, atrocious and cruel" aggravator. He pointed out that this Court may not consider an aggravator that the trial court did not find. Sliney, 22 Fla. L. Weekly at S419 (Kogan, J., concurring in part and dissenting in part).

Appellee repeatedly argues that this Court should consider aggravating factors not found by the trial court despite this Court's refusal to allow a belated cross-appeal of these issues of fact. (Brief of Appellee at 68-69) This Court has refused to apply an additional aggravator that the trial court did not instruct on or find, and which the State did not cross appeal, no matter what the evidence showed. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993)(contemporaneous murder conviction). Furthermore, the Court will not apply an additional aggravating factor not found by the judge (even if properly preserved by cross-appeal) unless it was unquestionably established on the record and subject to no factual dispute. DeAngelo v. State, 616 so. 2d 440, 443 (Fla. 1993) (evidence of HAC arguable because state failed to prove victim conscious during killing).

Although Appellee attempted to cross-appeal fifteen months after the notice of appeal, and this Court granted Appellant's motion to strike the State's cross-appeal, Appellee continues to argue strenuously that this Court should belatedly apply the HAC and "committed during a sexual battery" aggravators. (Brief of Appellee at 68-69) Appellee relies on Sliney, 22 Fla. L. Weekly S419, in which this Court noted that the murder was brutal, despite the trial court's failure to find the HAC aggravator. We do not

believe that this Court's language in Sliney in any way indicates that this Court will consider aggravators not found by the trial court in a proportionality determination. Cf. Kormondy v. State, 22 Fla. L. Weekly S635, 638 (Fla. Oct. 9, 1997) ("our turning of a blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute"). Moreover, Appellee's statement that Hawk's "propensity for violence" compels the imposition of the death penalty is clearly wrong. All first-degree murders are violent. Furthermore, Hawk committed no prior crimes of violence. Even more importantly, a propensity for violence is not a statutory aggravator in this state. See § 921.141, Fla. Stat. (1997).

In addition, Appellee now urges this Court to apply the "committed during a burglary" aggravator if the pecuniary gain aggravator is struck, even though this aggravator was never proposed by the prosecutor or submitted to the jury.' The State's indictment charged Hawk with killing Mrs. Gray during the commission of a theft. He was not charged with either burglary or theft. (1/6-7) The prosecutor did not ask for an instruction on felony murder with burglary or theft as felony. (23/1311) Appellee cannot expect this Court to rely on an aggravator that the State

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[9] Appellee states that our facts concerning a possible theft are "simply wrong." To clarify, what we argued was that the State failed to prove that Hawk got the wad of money from the Grays' house, or that he got the car key from inside the house. A review of the record confirms that the State did introduce evidence that Hawk got the key from the key ring in the deadbolt. There is no evidence, however, that he committed the murders for the purpose of taking the Grays' car. Appellee's statement that Hawk "walked away from the Gray home with a 'wad' of cash" is speculative. (See Issues II and XIII, supra.)

never even proposed. Cannady, 620 So. 2d at 170. Appellee could not tried to cross-appeal this issue in a timely or untimely fashion because it was not argued at trial nor considered by the judge.[10]

The trial judge refused to find HAC as a matter of law and as applied to the facts of the case. Although the crime was indeed horrible, the evidence suggests that much of the attack on Mrs. Gray occurred after she was unconscious, if not dead. Dr. Davis testified that, once the injury to the left side of Mrs. Gray's head occurred, she would have been immediately unconscious, and death would have occurred within several seconds. (20/827) Also, no evidence suggests that Hawk intended a torturous death.

As to the "committed during a sexual battery" aggravator, the trial judge refused to allow the prosecutor to argue to the jury

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[10] We could also point out mitigation that the trial court failed to consider, and which was supported for the record. For example, Hawk wrote a letter to the judge asking forgiveness and for a life sentence. He said he was sorry, wanted to give his life to the victims, was embarrassed and ashamed of his behavior, and wanted to be a good man. (10/1695-96) Thus, the trial court should have considered remorse in mitigation. Also, although Hawk's counsel did not request it, the judge, who is required to review the entire record for mitigation, could have considered the lack of significant criminal history mitigator because Hawk's prior crimes were minor.

Although the prior violent felony aggravator was applied in the case at hand because of the contemporaneous attack on Mr. Gray, Hawk had no prior violent felony convictions. In fact, he had very little criminal history. When Bobby was seventeen, he was involved in the burglary of a Winn-Dixie Store with several other boys who left Bobby to take the blame. Bobby only held the plywood boards back while the other boys entered the closed store to steal beer and cigarettes. The following year, Bobby was charged with having sex with a fifteen-year-old deaf student who claimed Bobby was her boyfriend, and apparently consented. The conviction was for carnal intercourse with an unmarried person under the age of eighteen -- a crime rarely prosecuted. Hawk's PSI indicated that the girl was doing well. (10/1726-27)

that a sexual battery occurred,[11] or to instruct the jury on this factor, because the medical examiner was unable to find any evidence of a sexual battery. In fact, during the guilt phase of the judge prohibited the prosecutor from asking the State's witnesses to speculate as to whether a sexual battery occurred based on the medical examiner's negative findings. Speculation cannot support an aggravating factor. See Hamilton v. State, 547 so. 2d 630 (Fla. 1989) (CCP not supported by judge's speculation and conjecture) ; accord Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992).

* * * * *

The most compelling mitigation in this case, and the most compelling reason why the death penalty is disproportionate, is Hawk's brain damage and mental illness, apparently caused by spinal meningitis at the age of three. From the age of five, Bobby was under psychiatric care most of the time. Every evaluation he had showed that he was severely emotionally disturbed. (11/1837-41; 23/1356-59) Every test Dr. Berland performed showed brain damage

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[11] Prior to trial, defense counsel filed a motion in limine asking the judge to prohibit the State from arguing that Hawk committed a sexual battery. The medical examiner found no evidence of a sexual battery. (17/350-51) When the State's blood stain expert (Mr. Edel) testified that an unidentified left palm print was located six to eight inches from the head area of the victim, on the floor, the prosecutor renewed his request to argue that Hawk committed sexual battery. (21/946-47) The judge did not allow the questioning and refused to rule that the evidence would support an instruction on sexual battery. (21/954)

Edel said the primary bloodshed was on the bed. (21/987) This indicated that Mrs. Gray was killed while on the bed and pulled or fell off the bed post-mortem. Thus, the unidentified palm print would have been made after her death if made while she was on the floor. Accordingly, if any sexual activity had occurred, it would have been after Mrs. Gray was dead.

and mental illness. Hawk's mental illness was compounded by his deafness, immaturity, lack of education and training (recognized by the trial judge as mitigation), and by his use of drugs and alcohol which intensify existing mental illness. (23/1356-59)

Dr. Berland, the only mental health expert who testified, diagnosed Hawk as suffering from brain damage, delusional paranoid thinking and schizophrenia with hallucinations. Hawk's mania score on the MMPI was so extremely high that it would cause him to act upon whatever bizarre or aggressive impulse he had. He was very energized and disturbed. Testing reflected a biologically determined mental illness associated with a defect in brain functioning. Because Hawk became deaf as a result of spinal meningitis, his brain damage probably also resulted from that illness. (11/1821-23)

This conclusion is supported by Bobby's mother's testimony that, when Bobby was in the hospital with meningitis, at age three, he "went back to being a baby." He was bottle-fed and put back on diapers. (23/1353) This reversion may have been a result of the brain damage, and may account for Hawk's almost child-like behavior and lack of impulse control as a young adult.

Hawk's mother reported to the probation officer who compiled information for the PSI that Hawk received psychotherapy twice weekly when he was nine years old and living in Chicago. His childhood problems included setting fires, throwing things, impulsivity, and becoming easily upset and hyper. (10/1729) His mother testified that her son had an attention span of about thirty minutes so would quit after awhile. (23/1358-59)

The PSI reveals that, after Bobby Hawk moved to Florida at

about age ten, evaluations conducted by the Pinellas County School System recommended continued psychotherapy. An evaluation in August of 1985, when Hawk was about twelve, showed that he exhibited identity problems, feelings of inadequacy and a well-developed defense system; insecurity, limited self-concept in relation to significant others, and lack of insight regarding his behavior and subsequent negative events. Long-term individual psychotherapy was recommended.

While in the Pinellas County School system, Hawk received hearing impaired services and communication disorders services. In April of 1986, an updated psychological evaluation revealed that Hawk **was** socially maladjusted and emotionally disturbed. Of special concern were his lack of inner controls, low frustration tolerance, impulsivity and an inability to perceive cause and effect relationships. He exhibited manipulative behavior and a lack of sensitivity to the needs of others.

In June of 1992, Dr. Mark Justice completed a psychological evaluation. This evaluator concluded that Hawk's problems were primarily the result of his hearing loss and lack of consistent socialization and control of emotional functioning. Although Hawk's probation officer referred him for sex offender treatment because he was on probation for carnal intercourse with an unmarried person under 18, he was advised that Hawk was not an appropriate subject because he was not a typical sex offender. His probation officer intended to have him evaluated by a therapist at Charter Hospital, but Hawk was arrested for this offense ten days later. (10/1730)

This Court has reduced sentences to life in numerous cases

with weightier aggravation and less mitigation than that found in this case. The mental mitigation is especially weighty in this case because Hawk, due to spinal meningitis at age 3 and his resulting deafness and brain damage, was unable to adjust and conform his behavior to societal demands. For reasons beyond his control, he committed a terrible act for which he should receive a sentence of life in prison rather than the death penalty.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 23rd day of January, 1998.

Respectfully submitted,

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