IN THE SUPREME COURT OF FLORIDA

PAUL C. HILDWIN,

Appellant,

v. CASE NO. 89,658

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR HERNANDO COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State does not accept the abbreviated statement of the

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case and facts contained in Hildwin's brief, and relies instead on the following facts, in addition to such facts as are discussed in connection with specific claims contained in Hildwin's brief.[1]

This case returns to this Court after Hildwin's sentence of death was set aside in 1995. *Hildwin v. Dugger,* 654 So. 2d 107 (Fla. 1995). To place the resentencing proceeding in perspective, the State relies upon the following facts as found by this Court on Hildwin's initial direct appeal:

> Appellant was arrested after cashing a check purportedly written to him by one Vronzettie Cox, a forty-two-year-old woman whose body had been found in the trunk of her car, which was hidden in dense woods in Hernando County. Death was due to strangulation; she also had been raped. Evidence indicated she had been killed in a different locale from where her body was found. Her purse, from which some contents had been removed, was found in dense woods, directly on line between her car and appellant's house. A pair of semen-encrusted women's underpants was found on a laundry bag in her car, as was a sweat-stained wash rag. Analysis showed the semen and sweat came from nonsecretor (i.e., one who does not secrete blood into other bodily fluids). Appellant, a white male, was found to be a nonsecretor; there was testimony that white male nonsecretors make up eleven percent of the population.
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> The victim had been missing for four days when her body was found. The man she lived with, one Haverty, said she had left their home to wash clothes at a coin laundry. To do so, she had to pass a convenience store. Appellant's presence in the area of the store on the date of her disappearance had come about this way: He and two women had gone to a drive-in movie, where they had spent all their money. Returning home early in the morning, their car ran out of gas. A search of the roadside yielded pop bottles, which they redeemed for cash and

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[1] The citation form "R" refers to the clerk's record and the citation form "TR" refers to the transcript of testimony.

> bought some gasoline. However, they still could not start the car. After spending the night in the car, appellant set off on foot at 9 a.m. toward the convenience store near the coin laundry. He had no money when he left, but when he returned about an hour and a half later, he had money and a radio. Later that day, he cashed a check (which he later admitted forging) written to him on Ms. Cox's account. The teller who cashed the check remembered appellant cashing it and recalled that he was driving a car similar to the victim's.
>
> The check led police to appellant. After arresting him the police searched his house, where they found the radio and a ring, both of which had belonged to the victim. Appellant gave several explanations for this evidence and several accounts of the killing, but at trial testified that he had been with Haverty and the victim while they were having an argument, and that when Haverty began beating and choking her, he left. He said he stole the checkbook, the ring, and the radio. Haverty had an alibi for the time of the murder and was found to be a secretor.
>
> Appellant made two pretrial statements that are pertinent here. One was a confession made to a cellmate. The other was a statement made to a police officer to the effect that Ms. Cox's killer had a tattoo on his back. Haverty had no such tattoo, but appellant did.

Hildwin v. State, 531 So. 2d 124, 125-6 (Fla. 1988).

As to the evidence at the resentencing proceeding, the State relies on the following facts.

Tony Woodall testified that, on September 13, 1985, he was in a wooded area of Hernando County near a lake. (TR421-22). He saw a 1982 automobile that was stuck in a muddy area[2]. (TR423). A bad odor was coming from the car, and many flies were in the vicinity. *Id.* Mr. Woodall contacted the Hernando County Sheriff's Office.

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[2] At the time of the murder, the vehicle was almost new.

(TR424).

David Lee, of the Hernando County Sheriff's Office, was the first law enforcement officer on the scene. (TR425; 427). He met Mr. Woodall at the scene, and, during the course of investigating the abandoned vehicle, removed the back seat in an effort to look into the trunk. (TR427; 430). When he did so, he saw what appeared to be a human leg -- Deputy Lee secured the scene and called for detectives to respond. (TR431).

At the time of the discovery of the vehicle, Robert Haygood was a detective with the Hernando County Sheriff's Office. (TR432-33). He was dispatched to the location where the vehicle had been found -- when he arrived he suspected that the odor that he smelled was that of a human body. (TR435). Detective Haygood suspected a suspicious death because a T-shirt was wrapped tightly around the victim's neck and tied in a knot. (TR455). The victim was wearing no clothing when discovered, and the position of the ligature around the victim's neck was consistent with strangulation. (TR456-7).

Dr. Thomas Techman was an Associate Medical Examiner for the Fifth Circuit in 1985. (TR466-67). Dr. Techman, who has been a forensic pathologist for over 20 years, was accepted as an expert without objection. (TR468; 470). He performed an autopsy on the victim in this case on September 14, 1985. (TR471). The victim was a white female, 5 feet, 6 inches tall, weighing 88 pounds. Her body exhibited marked decomposition. (TR472). Dr. Techman observed

hemorrhaging in the victim's neck and upper thoracic region, and found that the victim's hyoid bone had been fractured. (TR475). Fracture of the hyoid bone is sometimes observed in strangulation deaths, and, in this case, was consistent with the application of pressure by the shirt found around the victim's neck. (TR475). The victim died as a result of strangulation. (TR476). It takes several minutes for death to occur as a result of strangulation, and, in a case such as this one where a wide ligature is used, loss of consciousness and death take place more slowly than in a case where a narrow ligature (or garrotte) is used. (TR476-77). The victim in this case would not have lost consciousness for several minutes. (TR487). Death by strangulation is a frightening and terrifying process for the victim. (TR478).

In most cases of strangulation, death actually occurs as a result of the blood supply to the brain being cut off. (TR482). The mechanism of injury typically does not involve collapsing the trachea (windpipe). (TR482). When the hyoid bone is broken, as in this case, that is indicative of a substantial amount of trauma being inflicted on the brain. (TR483).

Bernice Moore is the sister of the victim. (TR489-90). She filed a missing person's report on September 12, 1985, after the victim failed to return home as expected. (TR491). Ms. Moore identified a radio, a ring, and a purse that were the property of her sister. (TR493-95). William Haverty, who was the victim's boyfriend, also identified the ring and radio, in addition to

identifying the victim's car. (TR499-500).

Lois Black is employed by the State of Florida Department of Corrections Probation and Parole Services. (TR505). She was employed by that agency in 1985, and, at that time, was assigned to supervise Hildwin. (TR506). Hildwin was on parole status at that time, having been incarcerated in New York. (TR507). The State of Florida accepted Hildwin's supervision from the State of New York on May 27, 1985. (TR507).

Rebecca Harrington accompanied her grandmother to the First Savings Bank of Florida at Northcliffe and Highway 19 on September 9, 1985. (TR514-15). While she was in the bank, she saw Hildwin go through the drive-through teller lane driving the victim's automobile. (TR515-17).

Former Hernando County Sheriff's Office detective Danny Spencer assisted in serving a search warrant at Hildwin's residence. (TR522-23). During the course of that search, Detective Spencer located the victim's purse in the wooded area behind Hildwin's house. (TR528). Hernando County Sheriff's Deputies Royce Decker and Ralph Decker testified about their involvement in a search of Hildwin's residence. (TR556-58; 575-77). Both officers identified the victim's ring and radio, which were recovered during that search. (TR558; 577). Ralph Decker also testified that Hildwin confessed to him that he had forged the check drawn on Ms. Cox's

account. (TR578-79).[3]

Walter Rice was the chief bailiff during Hildwin's capital trial. (TR533). He identified the judgment of conviction for that offense, and identified Hildwin as the person convicted. (TR534). The document establishing that conviction was admitted without objection. (TR536).

Alisa Kiker was a bank teller at the First Savings Bank of Florida in Spring Hill on September 9, 1985. (TR539-40). She identified a check drawn on the victim's account which was cashed by Hildwin between 12:30 and 1:00 P.M. on that day. (TR543-45). She identified Hildwin as the person who cashed that check, and identified his driver's license, which he provided for identification. (TR545-46).

Helen Lucash was Hildwin's girlfriend in September of 1985. (TR561-2). On the evening of September 8, 1985, she and Hildwin attended a drive-in movie with another couple. (TR563-4). The group went to the movie in Hildwin's car. (TR564). After the movie was over, Hildwin dropped off the other male member of the group, and, between 11:30 P.M. and midnight, ran out of gas in front of the Lone Star Bar. (TR564). Hildwin collected soda bottles, intending to exchange them for cash to purchase gasoline, and, fortuitously,

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[3] Hildwin had initially claimed that the check was a loan to him from the victim. (R578). Hildwin also told Ralph Decker that the victim had loaned her radio to him because his car radio was broken and that he had found the ring in the garbage. (TR579-81). Hildwin's car radio was working properly. (TR582).

was able to get a ride to a nearby store with a friend who happened by. (TR565). Later, Hildwin returned and tried, unsuccessfully, to get his car running. (TR566). Ms. Lucash fell asleep in the car, and, when she woke up around 9:00 A.M., Hildwin was gone. (TR566). She did not know when Hildwin left, but did testify that he returned between 9:30 and 10:00 A.M. (TR567). Hildwin came from the direction of his house, and had cleaned up and eaten before returning. (TR567-8). Hildwin also had money. (TR568). Ms. Lucash identified the victim's ring as the one that Hildwin showed her and claimed to have found in the garbage. (TR571).

Investigator Robert Brenzel of the New York State Police identified Hildwin as the individual who was convicted in New York for the separate offenses of rape and attempted sodomy. (TR585-93). Royce Decker was accepted as an expert in fingerprint comparison, and testified that fingerprints taken from Hildwin following his first-degree murder conviction were an exact match with the fingerprints taken from Hildwin following his two New York convictions. (TR597-602).

During his case in chief, Hildwin presented the testimony of a number of witnesses. The State relies upon the following statement of facts with regard to that evidence. Violet and Henry Hoyt testified about their interaction with Hildwin when he was quite young. (TR618-26). They cared for Hildwin for six to eight months when he was about 13 years old. (TR619-20). Mrs. Hoyt described Hildwin as a polite, obedient child, and Mr. Hoyt

described him as “very nice.” (TR620; 625-6).

Clara McGill, who is Hildwin’s half-sister (TR629; 631), testified about Hildwin’s early life, and the death of his mother when he was two years old. (TR631).[4] Ms. McGill moved out of her father’s house about two years after the death of Hildwin’s mother, when the defendant was four years old. (TR654).[5] Ms. McGill had no contact with Hildwin from 1975 to 1985, and has no direct knowledge about his circumstances during that period of time. (TR655).

Patricia Hildwin is the defendant’s wife. (TR676).[6] She has known Hildwin since late 1971/early 1972, and used to baby-sit him. (TR664). Ms. Hildwin had no knowledge about Hildwin engaging in drug use (TR683), and stated that she never saw him “drink much.” (TR672). She described Hildwin’s early life, and further testified that she never saw him as having a quick temper or engaging in anything that could be described as bizarre behavior. (TR683-4).

John Hildwin is the defendant’s half-brother. (TR686). He last saw the defendant in 1971. (TR686). He described Hildwin’s early childhood (TR687-98), but has not lived in the same household with the defendant since 1962, when the defendant was two or three years old. (TR698-99). From the time that the defendant was two or three

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[4] Ms. McGill is 12 years older that Hildwin. (TR653).

[5] Ms. McGill’s mother is also Hildwin’s mother. (TR653).

[6] Hildwin was in prison in New York when he and Patricia married. (TR675-6).

years old until the time that he moved to Florida in 1972, John Hildwin saw his half-brother only a limited number of times. (TR699). John Hildwin did not hear from the defendant at all from 1971 until after the September 1985 murder of Ms. Cox. (TR699-700).

Dr. Michael Maher, a psychiatrist who examined Hildwin at the instance of the defense, testified that Hildwin suffers from "diffuse brain dysfunction." (TR716-21). Dr. Maher first saw Hildwin on June 5, 1991, five-and-one-half years after the murder. (TR755). He testified about the results of that evaluation in February of 1992, and did not see Hildwin again until June of 1996. (TR755). He prepared no written report of any of his evaluations. (TR756). Dr. Maher observed nothing in Hildwin's demeanor or behavior that was inappropriate given his circumstances. (TR756). None of the documents generated as a result of Hildwin's earlier mental state evaluations mentions (or even alludes to) any sort of brain damage or psychosis. (TR758-764). An evaluation of Hildwin in 1979 diagnosed him as Anti-social Personality Disordered. (TR764). In a report prepared in 1984, prepatory to Hildwin's release from prison in New York, the evaluators concluded that Hildwin had made a "good response to therapy." (TR765). Dr. Maher has testified in more than a dozen capital sentencing proceedings, always on behalf of the defendant. (TR773).

Dr. Robert Berland is a forensic psychologist who also evaluated Hildwin at the request of the defense. (TR784-5). Dr. Berland opined that Hildwin has "brain injury", but he cannot

determine the degree to which it "is or isn't diffuse." (TR846). During the course of his "evaluation", Dr. Berland spoke to no one who had contact with Hildwin after 1979. (TR855). Dr. Berland had "no idea" if there was any connection at all between his mental state diagnosis and the murder of Ms. Cox. (TR855). Dr. Berland had no opinion as to the extent and severity of Hildwin's "mental illness" at the time of the murder, and was unable to say whether the "mental disturbance" was "extreme" at the time of the murder. (TR857).

After due deliberation, the jury recommended that Hildwin be sentenced to death by a vote of 8-4. (R965). Judge Tombrink followed that recommendation, finding that the four aggravating circumstances[7] outweighed the mitigation.[8] (R464 *et seq*). The record was certified as complete and transmitted on April 4, 1997. (R515).

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[7] (1) The capital felony was committed by a person under sentence of imprisonment or placed on community control; (2) the defendant was previously convicted of another felony involving the threat of violence to the person; (3) the crime was committed for pecuniary gain; and (4) the capital felony was especially heinous, atrocious and cruel.

[8] The sentencing court found the following mitigating circumstances: (1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; and (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The Court found five non-staturory mitigators: (1) history of childhood abuse, including sexual abuse by his father; (2) history of drug or substance abuse; (3) organic brain damage; (4) ability to do well in a structured environment; and (5) his type of mental illness is readily treatable in a prison setting.

SUMMARY OF THE ARGUMENT

Hildwin's claim that the "committed for pecuniary gain" aggravating circumstance was improperly found to exist by the sentencing court is not a basis for relief. Hildwin conceded the existence of this aggravating circumstance during the resentencing proceeding, and cannot now complain that the aggravator does not apply. Moreover, even assuming that the challenge to the existence of the pecuniary gain aggravating circumstance is properly before this Court, the evidence at trial established the existence of this aggravator beyond a reasonable doubt.

Hildwin also argues that the heinous, atrocious, or cruel aggravating circumstance was improperly found. This claim is without merit because the evidence established, under settled Florida law, that this aggravating circumstance is present. The law is well-settled that strangulation murders are virtually *per se* heinous, atrocious, or cruel. Further, the evidence established that a significant amount of trauma was inflicted upon the victim, and that it would have taken several minutes for her to die as a result of the strangulation.

Hildwin's claim that the "prior violent felony" and the "under sentence of imprisonment" aggravating circumstances were improperly doubled is not a basis for relief for two reasons. This claim is procedurally barred because it was not preserved for appellate review by a contemporaneous objection. Moreover, this claim is

foreclosed by binding precedent.

Hildwin's claim that death is not a proportionate sentence is based upon the false premise that only one (or two) aggravating circumstances apply. The four aggravating circumstances outweigh the mitigation presented at the resentencing proceeding, and death is clearly the appropriate sentence. The sentencing court's findings are supported by competent, substantial evidence, and should not be disturbed.

Hildwin's claim that it was error to allow the reading of the prior testimony of an unavailable witness is not preserved by a proper specific objection, and, even had it been preserved, it would not provide a basis for reversal. The state established the predicate for admission of former testimony under the Evidence Code, and Hildwin's claim to the contrary is foreclosed by settled law.

ARGUMENT

I. THE SENTENCING COURT PROPERLY FOUND THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN

On pages 10-11 of his brief, Hildwin argues that the trial court erred in finding the "committed for pecuniary gain" aggravating circumstance. This claim is not a basis for relief for two reasons: first, Hildwin conceded the existence of the aggravator at the resentencing proceeding, and cannot now complain that the aggravator does not apply. Second, assuming Hildwin's claim that this aggravator does not apply is properly before this

Court, the evidence at trial established the existence of the pecuniary gain aggravator beyond a reasonable doubt.

During closing argument at the resentencing proceedings, Hildwin's attorney conceded the existence of three of the four aggravators argued by the State (and ultimately found by the sentencing Court). Specifically, counsel stated:

> We are not going to say that the State has not proven three of the aggravators. You can't stand up here and say those verdicts don't exist. They do. There were two crimes against women. We can't say that he was not on parole at the time. We cannot ignore the fact that he consented to a search of his house wherein some of this property was found.

(TR924-925). The only aggravating circumstance that was not conceded was the heinous, atrocious, or cruel aggravator, which counsel described as "their [the State's] most important factor." (TR926-929). Counsel went on to argue that, without the heinousness factor, "they're left with him being on parole for these crimes, **pecuniary gain**, and whether or not he -- and the charges that he had against those other ladies." (TR928-929).[9] Ultimately, counsel stated, as to the aggravating factors, "at this point I would say there are only three, not four. **They didn't prove H.A.C.**" (TR930). It makes no sense to suggest, as Hildwin does, that he may admit the existence of three aggravating circumstances, and nevertheless

[9] The focus of counsel's closing argument was that, without the heinousness factor, the three unchallenged aggravators did not justify a sentence of death. *See,* TR930.

argue on appeal that those aggravators should not have been applied to him. That result is contrary to any rational view, and should not be accepted by this Court. Hildwin is bound by his admission, and cannot now argue that the trial court committed error when it applied the pecuniary gain aggravator. By conceding the existence of the pecuniary gain aggravator, Hildwin waived appellate review of the application of that aggravator. That is a procedural bar, and this Court should deny relief on that basis. *See, Gudinas v. State,* 693 So. 2d 953 (Fla. 1997); *Cole v. State,* No. 87,337 (Fla., Sept. 18, 1997); *Steinhorst v. State,* 636 So. 2d 33 (Fla. 1994).

Even if this claim was not procedurally barred, it would not supply a basis for reversal of Hildwin's sentence because this claim is meritless. In finding that the murder had been committed for pecuniary gain, the sentencing court made the following findings of fact:

> This aggravator was originally conceded by the defense at the closing argument in the resentencing proceeding, but was later contested by the defense in their sentencing memorandum and at the resentence hearing. This Court will consider, for purposes of discussion, that the Defense does not concede this issue, based on their memorandum and on their arguments presented at the subsequent hearing.
>
> The testimony in this case clearly shows that the defendant was seen shortly after the time of the murder driving the victim's vehicle through a bank drive-through facility, and that the defendant cashed a seventy-five dollar ($75.00) check of the victim, after having forged her name. The testimony further shows that a distinctive pearl ring and a radio from the victim (Vronzettie Cox) were found in the defendant's bedroom shortly after the time of the murder. Additionally, a purse belonging to

Ms. Cox was found near the defendant's home, where it had been partially hidden under leaves and branches in the nearby woods. The evidence also showed that the defendant's car had run out of gas, and he had been stranded at the scene of the breakdown without even enough money to put gas in the vehicle. The evidence demonstrated that the defendant left the scene with a few soda bottles in an attempt to try to come up with enough money to purchase gas for his vehicle. The evidence indicated that the defendant was gone the balance of that night and returned at approximately 9:00 A.M. the following morning; and upon his return to the vehicle, he was flush with cash.

At the resentencing trial, Bernice Moore, the sister of the victim, testified and identified her sister's ring and her sister's purse. William David Haggarity testified at the resentencing trial and identified himself as the boyfriend of the victim at the time that she was first reported missing. He further identified through testimony the pearl ring and radio belonging to the victim that were found in the defendant's bedroom shortly after the murder. Rebecca Harrington testified and identified the defendant as the person she saw driving the victim's vehicle shortly after the time of the murder. Danny R. Spencer, formerly of the Hernando County Sheriff's Department, testified by written deposition that he had searched the area of the defendant's residence shortly after the victim's murder and found the victim's purse near the defendant's home; and that the purse was hidden under some leaves and branches in the nearby woods. Alisha Kirby, of First Savings Bank, testified at the resentencing trial by written deposition and identified the defendant as the person who had cashed the victim's check shortly after her murder. She also identified the defendant as the person driving the victim's vehicle shortly after the murder. Lt. Royce Decker, Hernando County Sheriff's Department, who assisted with the search of the Hildwin residence shortly after the murder, further identified the gold ring and portable radio as those items being taken from the defendant's bedroom after the murder.

Colin G. Locash [sic] testified at the resentencing proceeding that she was the girlfriend of the defendant at the time of the murder. She testified that on the way back from a drive-in movie with Paul Hildwin the night before the murder, that the defendant's car ran out of gas on U.S. 19 by the Lone Star Bar. She further

> testified that Paul Hildwin had no money with him and hitched a ride on a motorcycle to the JP store on U.S. 19 carrying pop bottles to sell to get gasoline. She ended up spending all night in the car while Paul Hildwin was gone. Sometime the next morning (after daylight), she awoke and defendant was not there, but he showed up after light some time later. At the time the defendant reappeared, he had cigarettes and money, and gasoline to get the car going. Later that evening the defendant bought some beer and shorts for himself. Further, Miss Locash testified that the defendant showed her a gold ring with a pearl and said he found it in the garbage. She identified the ring, the same ring later found in the defendant's bedroom. Ralph Decker, formerly with the Hernando County Sheriff's Department (now an investigator with the public defender's office), testified that he participated in the search of the defendant's home. He testified that during the search he found a ring and a radio in the defendant's bedroom, and both were identified during the court proceedings. He further testified that the defendant made several inconsistent and incriminating statements in regard to these items.
>
> The evidence presented during the resentencing trial, in regards to this aggravator, leads to only one conclusion. That is, that the defendant's primary motivation for the murder was to obtain items for pecuniary gain, specifically money necessary to get his car filled with gas and running again, so that he could get his girlfriend back to her home. This Court finds, beyond and to the exclusion of every reasonable doubt, that the crime of murder committed by the defendant on Vronzettie Cox was committed for pecuniary gain. This aggravator has been clearly demonstrated by the State and proved beyond a reasonable doubt.

(R468-70).

Florida law is settled that the "committed for pecuniary gain" aggravating circumstance is established when "the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain." *Finney v. State,* 660 So. 2d 674, 680 (Fla. 1995); *see also, Jones v. State,* 690 So. 2d 568, 570 (Fla.

1996); *Henyard v. State,* 689 So. 2d 239, 253 (Fla. 1996); *Ferrell v. State,* 686 So. 2d 1324, 1330 (Fla. 1996); *Allen v. State,* 662 So. 2d 323, 330 (Fla. 1995); *Gamble v. State,* 659 So. 2d 242 (Fla. 1995); *Larkins v. State,* 655 So. 2d 95, 99 (Fla. 1995); *Thompson v. State,* 648 So. 2d 692, 695 (Fla. 1994); *Clark v. State,* 609 So. 2d 613, 515 (Fla. 1992); *Scull v. State,* 533 So. 2d 1137, 1142 (Fla. 1988); *Medina v. State,* 466 So. 2d 1046, 1050 (Fla. 1985); *Peek v. State,* 395 So. 2d 492, 499 (Fla. 1980). As the evidence discussed in the sentencing order makes clear, the victim in this case was killed for the express purpose of obtaining money and property -- that is squarely within the settled application of this aggravating circumstance, and the trial court properly applied this aggravator in this case.

Even if there was some evidence to support the defendant's theory (whatever it may be), the trial court was not required to reject this aggravator because it is supported by competent, substantial evidence. *Lawrence v. State,* 691 So. 2d 1068, 1075 (Fla. 1997), *citing, Larkins v. State,* 655 So. 2d 95, 100 (Fla. 1995). When the evidence is reviewed in the light most favorable to the prevailing theory, as it must be, Hildwin's position is wholly inconsistent with the facts of this senseless murder. *See, e.g., Wuornos v. State,* 644 So. 2d 1012, 1019 (Fla. 1994). The pecuniary gain aggravating circumstance applies under settled Florida law, and the trial court should be affirmed in all respects.

II. THE SENTENCING COURT PROPERLY FOUND THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE

On pages 12-16 of his brief, Hildwin argues that the sentencing court erroneously found that the murder of Ms. Cox was especially heinous, atrocious, or cruel. This claim is meritless for the reasons set out below.

In finding that the heinousness aggravator applied to this case, the sentencing court made the following findings:

> Evidence in this case is that the victim's body was found with a wide band of ligature wrapped around the neck of her corpse. The ligature consisted of a shirt, presumably of the victim. Dr. Techman [the medical examiner] testified that the band of ligature would cause a slow death by strangulation, and that it would take several minutes to die. He further testified that such few moments before death would be a frightening, terrifying knowledge of impending death. Dr. Techman further testified that it would take several minutes to become unconscious.
>
> The facts of the case indicate one involving a needless act of murder committed with utter indifference and unnecessarily torturous to the victim. The victim's body was found completely nude except for the ligature wrapped around the neck. The nude body was bent and folded in the trunk of her own car, with her legs bent over her head. The shirt wrapped around the neck was tied in a knot. Dr. Techman testified that there were not any other apparent injuries outside the neck region, other than those associated with decomposition. Dr. Techman's testimony is totally consistent with injury caused by strangulation. The one and only inference makes it clear that this murder was conscienceless, pitiless, and unnecessarily tortuously [sic] to the victim; and was inflicted with utter indifference to the suffering of the victim. During the last moments of her life, the victim surely experienced pain, anxiety, fear, and knowledge of her death.
>
> . . . Considering the totality of the circumstances of

> the murder, as the Court must do, this Court finds that this murder was clearly one by strangulation that meets the legal requirement of heinous, atrocious and cruel. This aggravating circumstance has thus been proven by the State beyond and to the exclusion of every reasonable doubt.

(R470-71). Those findings are in accord with settled Florida law, and should be affirmed in all respects.

Under long-settled Florida law, strangulation murders are virtually *per se* within the scope of the heinous, atrocious, or cruel aggravator. This Court has specifically held:

> It can be inferred that "strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." *Tompkins v. State*, 502 So. 2d 415, 421 (Fla. 1986) (citations omitted), *cert. denied*, 483 U.S. 1033, 107 S. Ct. 3277, 97 L. Ed. 2d 781 (1987). *Accord Johnson v. State*, 465 So. 2d 499 (Fla.), *cert. denied*, 474 U.S. 865, 106 S. Ct. 186, 88 L. Ed. 2d 155 (1985); *Doyle v. State*, 460 So. 2d 353 (Fla.1984).

Sochor v. State, 580 So. 2d 595, 603 (Fla. 1991). Florida law is likewise settled that the “intent” argument found on pages 15-16 is spurious:

> . . . Orme contends that his mental state at the time of the murder was such that he could not form a "design" to inflict a high degree of suffering on the victim. Thus, argues Orme, the trial court erred in instructing the jury regarding, and in later finding, the aggravating factor of heinous, atrocious, or cruel. Our case law establishes, however, that strangulation creates a prima facie case for this aggravating factor; and the defendant's mental state then figures into the equation solely as a mitigating factor that may or may not outweigh the total case for aggravation. *Michael v. State*, 437 So. 2d 138, 142 (Fla. 1983), *cert. denied*, 465 U.S. 1013, 104 S. Ct. 1017, 79 L. Ed. 2d 246 (1984).

Orme v. State, 677 So. 2d 258, 263 (Fla. 1996). In addressing a similar "intent" issue in *Hitchcock v. State,* this Court stated:

> That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious, or cruel. This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's. *Stano v. State*, 460 So. 2d 890 (Fla. 1984), *cert. denied*, 471 U.S. 1111, 105 S. Ct. 2347, 85 L. Ed. 2d 863 (1985). Hitchcock stated that he kept "chokin' and chokin'" the victim, and hitting her, both inside and outside the house, until she finally lost consciousness. Fear and emotional strain can contribute to the heinousness of a killing. *Adams v. State*, 412 So. 2d 850 (Fla.), *cert. denied*, 459 U.S. 882, 103 S. Ct. 182, 74 L. Ed. 2d 148 (1982). As Hitchcock concedes in his brief, "[s]trangulations are nearly per se heinous." *See Doyle v. State*, 460 So. 2d 353 (Fla. 1984); *Adams*; *Alvord v. State*, 322 So. 2d 533 (Fla. 1975), *cert. denied*, 428 U.S. 923, 96 S. Ct. 3234, 49 L. Ed. 2d 1226 (1976). The court did not err in finding this murder to have been heinous, atrocious, or cruel.

Hitchcock v. State, 578 So. 2d 685, 692-3 (Fla. 1990). Under settled Florida law, the heinous, atrocious or cruel aggravator is present beyond a reasonable doubt.

To the extent that further discussion of this issue is necessary, Dr. Techman [the medical examiner] testified that the fracture to the victim's hyoid bone is an injury that is occasionally seen in strangulation deaths, and is an injury that is consistent with the strangulation having been performed with the shirt that was found tied around the victim's neck. (TR475). Dr. Techman described the strangulation as "wide ligature strangulation", which would have resulted in death taking several

minutes. (TR476). Wide-ligature strangulation is much slower than a strangulation in which a narrow ligature (such as a piano wire) is used. (TR477). The fact that the victim's hyoid bone was broken indicates that a significant amount of trauma was inflicted on her brain as a result of the strangulation. (TR483). Dr. Techman testified that, in his professional opinion, it would have taken the victim several minutes to die, and that it would have been a frightening and terrifying death. (TR476-477; 478; 487). The evidence at sentencing establishes the heinousness aggravator beyond a reasonable doubt, and the trial court should be affirmed in all respects.

III. THE PRIOR VIOLENT FELONY AGGRAVATOR AND THE UNDER SENTENCE OF IMPRISONMENT AGGRAVATOR WERE NOT "DOUBLED"

On pages 17-18 of his brief, Hildwin argues that the trial court impermissibly "doubled" the prior violent felony and under sentence of imprisonment aggravating circumstances. This claim is not a basis for reversal because it is procedurally barred for lack of a contemporaneous objection, as well as being foreclosed by binding precedent.

As set out at pages 14-16, above, Hildwin conceded the presence of these two aggravators. That concession operates as a procedural bar to litigation of this claim on appeal because no contemporaneous objection was ever made to the aggravators at issue being treated separately. Under settled Florida law, this claim is

procedurally barred because no objection was raised below. *See, Gudinas v. State,* 693 So. 2d 953 (Fla. 1997); *Cole v. State,* No. 87,337 (Fla., Sept. 18, 1997); *Steinhorst v. State,* 636 So. 2d 33 (Fla. 1994).

In addition to being procedurally barred because no objection was made, this claim is foreclosed by binding precedent. In *Bundy v. State,* this Court decided the precise issue raised by Hildwin.[10] This Court stated:

> The state contends that the test enunciated in *Blockburger v. United States,* 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) applies. We agree. In *State v. Hegstrom*, 401 So. 2d 1343, 1345 (Fla. 1981), this Court noted that in the absence of a clear contrary legislative intent the *Blockburger* test must be met before multiple punishments are permissible. Under *Blockburger* the same act violates two statutes only if each statutory provision requires proof of a fact that the other does not. 284 U.S. at 304, 52 S.Ct. at 182. **It is obvious that these two subsections, 921.141(5)(a) and 921.141(5)(b), each require proof of a fact that the other does not**. The trial court did not err in finding both aggravating circumstances.

Bundy v. State, 471 So.2d 9, 22 (Fla. 1985). [emphasis added].

In *Delap v. State,* 440 So. 2d 1242 (Fla. 1983), this Court expressly held that *Provence v. State,* 337 So. 2d 783 (Fla. 1976), does not stand for the proposition that the prior violent felony and under sentence of imprisonment aggravators "double":

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[10] In *Bundy*, the offense establishing the prior violent felony and under sentence of imprisonment aggravators was committed in Utah. *Bundy, supra.* In the case before the Court, the offense was committed in New York. There is no legal difference between the facts of *Bundy* and the facts of this case.

> The defendant argues that there was a doubling-up of the same aggravating circumstance, as the trial judge found that the capital felony was committed by a person under sentence of imprisonment and that the defendant was previously convicted of another felony involving the use of violence. He relies upon the principles set forth in *Provence v. State*, 337 So. 2d 783 (Fla. 1976), *cert. denied,* 431 U.S. 969, 97 S. Ct. 2929, 53 L. Ed. 2d 1065 (1977). In *Provence*, we held that the commission of a capital felony in the course of a robbery and the commission of a capital felony for pecuniary gain would constitute only one aggravating factor, since both aggravating factors referred to the same aspect of the defendant's crime. **However, the aggravating factors of being under sentence of imprisonment and being previously convicted of another felony involving violence do not cover the same aspect of the defendant's criminal history. The defendant could be under a sentence of imprisonment without having been convicted of a felony involving violence. Also, a defendant could be convicted of a felony involving violence without being under a sentence of imprisonment. These aggravating circumstances are separate, and including the two factors in the weighing process does not constitute a doubling of aggravating circumstances.**

Delap v. State, 440 So.2d at 1256. The claim contained in Hildwin's brief is procedurally barred and, alternatively, is meritless because it is foreclosed by binding precedent. The findings of the sentencing court should be affirmed in all respects.

IV. DEATH IS THE APPROPRIATE SENTENCE

On pages 19-24 of his brief, Hildwin argues that his sentence of death is disproportionate based upon the facts of this case. The premise of this argument is Hildwin's claim that only one, or at the most, two, aggravators apply, thereby making this "one of the least aggravated and one of the most mitigated of death

sentences ever to reach this Court." *Initial Brief,* at 20, 24. For the reasons set out at pages 19-24, above, four aggravating circumstances, not one or two, apply to this case.[11] When the four properly applied aggravators are compared to the mitigation, death is clearly proportionate.[12]

Florida law is settled that the "weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard." *Blanco v. State,* No. 85,118, slip op. at 4 (Fla., Sept. 18, 1997); *Elledge v. State,* No. 83, 321 (Fla., Sept. 18, 1997); *Cole v. State,* No. 87,337 (Fla., Sept. 18, 1997); *Campbell v. State,* 571 So. 2d 415, 420 (Fla. 1990); *Wuornos v. State,* 644 So. 2d 1012, 1019 (Fla. 1994). This Court articulated the abuse of discretion standard in the following way: "discretion is abused only where no reasonable man would take the view adopted by the trial court." *Huff v. State,* 569 So. 2d 1247, 1249 (Fla. 1990). *See also, Blanco, supra; Cole, supra; Elledge, supra.*

The Statutory Mitigation

The sentencing court found two statutory mitigating circumstances: that the murder was committed while the defendant

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[11] The applicable aggravators are pecuniary gain, prior conviction of a violent felony, murder committed while under sentence of imprisonment, and especially heinous, atrocious, or cruel.

[12] The jury recommended death by a vote of 8-4. (R464).

was under the influence of an extreme mental or emotional disturbance (§921.141(7)(b), *Fla. Stat.),* and that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (§921.141(7)(c), *Fla. Stat.).* (R472-3). Both statutory mitigators were given some weight by the trial court. *Id.* The court made specific findings with regard to each mitigator, which are set out below.

As to the §921.141(7)(b), mitigator, the trial court stated:

> Two witnesses were presented by the defense on this issue. The first was Dr. Scott Maher, M.D., a general psychiatrist. The second was Dr. Robert M. Berland, Ph.D., a forensic psychologist. Dr. Maher testified at great length, but the focus of his testimony was that the defendant suffered from a severe mental defect. Dr. Maher diagnosed the defendant as suffering from a brain injury/dysfunction, depression, and an affective disorder. Dr. Berland also believed that the defendant suffers from a brain injury. Dr. Berland also stated that the defendant suffers a major mental illness in the nature of psychosis. Dr. Berland likewise testified that the defendant was mentally ill at the time of the crime. Dr. Berland further opined that the defendant was under the influence of an emotional and mental disturbance at the time of the crime. Dr. Berland was not able to specifically categorize the disturbance as being extreme. In fact, Dr. Berland classified the defendant's psychotic condition as "mild to moderate." Nevertheless, the defense need only prove this mitigator by the greater weight of the evidence. Considering the totality of the circumstances, and all of the evidence presented, the Court finds that this mitigator was proven by the greater weight of the evidence. The Court gave this mitigator some weight.

(R472). During his testimony, Dr. Maher acknowledged that evaluations of the defendant which occurred closer in time to the

murder of Ms. Cox had determined that Hildwin is an individual with Anti-Social Personality Disorder. (TR764). Other records showed diagnoses of other character disorders and borderline personality disorder, but none of those reports suggest brain damage or psychosis. (TR764).[13] Dr. Maher also stated that the psychological records from Hildwin's incarceration in the State of New York indicated that he had made a "good response to therapy." (TR765). Dr. Maher first saw Hildwin more than five years after Ms. Cox was murdered, and next saw him on the Saturday before he testified in September of 1996[14] (TR473-474). Dr. Berland first saw Hildwin shortly before he testified in September of 1996. (R475; TR794).

In addition to not having evaluated Hildwin's mental status at a point in time arguably contemporaneous with the murder, the testimony of the two experts is internally inconsistent. Dr. Berland testified that Hildwin suffers from a "major mental illness", is psychotic, and that he was able to observe the manifestations of this "illness" during his interview with Hildwin. (TR848). Dr. Maher, on the other hand, saw no such evidence. (TR764). In any event, the opinions reached by Hildwin's hand-

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[13] Dr. Berland tried to explain this obvious inconsistency by saying that he is often able to find what other doctors miss. Dr. Berland did not examine the reports of those doctors, nor did he attempt to consult with them. Dr. Maher did not even try to explain away the inconsistency between his testimony and the contemporaneous reports. (TR755-765).

[14] This was eleven years after the murder. (R475).

picked experts are based largely on Hildwin's self-report to them. (TR757-758;771). Further, the evidence that was presented describing Hildwin's behavior in the months just prior to the murder is inconsistent with the testimony of the mental state witnesses about how a person with the mental condition[s] they diagnosed would behave. For example, Dr. Maher spoke with Hildwin's ex-girlfriend, who had known him for some time and was with him on the night of the murder -- she described Hildwin as "a nice guy." (TR766). That description is wholly inconsistent with the opinions of the mental state witnesses, who testified that Hildwin would be "obnoxious and difficult to be around" (TR813), would have "chronic and intense anger" (TR849), and would be "volatile", "explosive and over-reactive." (TR850). Dr. Berland stated that a person having Hildwin's mental status is not likely to be described as a "nice guy", and that "[p]eople who are this way are not typically much fun to be around." (TR850).

As set out at page 27, above, the standard of review that applies to mitigating circumstances is well-settled: 1)whether a particular circumstance is actually mitigating is a question of law that is subject to *de novo* review by this Court; 2) whether a particular mitigating circumstance has been established by the evidence is a fact question that is reviewed subject to the competent, substantial evidence standard; and 3) the weight accorded a particular mitigator is within the discretion of the

sentencing court and is reviewed for an abuse of discretion. *Blanco, supra, citing Campbell v. State,* 571 So. 2d 415 (Fla. 1990). The result of the sentencing court's weighing of aggravators and mitigators is reviewed under the competent, substantial evidence standard. *Campbell,* 571 So. 2d at 419 n. 4.

When the settled law is applied to the facts of this case, it is debatable whether the two statutory mitigators found by the sentencing court are supported by competent, substantial evidence. The testimony of the mental state witnesses, which is discussed in detail above, is weak, internally inconsistent, and at odds with much of the other evidence. Even when the evidence relating to the statutory mitigators is viewed in the light most favorable to the court's ruling, the most that can be said for that evidence is that it barely supports the existence of those mitigators. Because of the weakness of that evidence, the sentencing court did not abuse its discretion in assigning no more than "some weight" to the statutory mitigation. (R472-3). *Huff v. State,* 569 So. 2d 1247, 1249 (Fla. 1990) ("[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court."); *see also, Blanco, supra.*

The Non-statutory Mitigation

Hildwin also argued the following non-statutory mitigation: 1) history of childhood abuse, including sexual abuse by his father; 2) history of drug or substance abuse; 3) organic brain

damage; 4) ability to do well in a structured environment; and 5) his type of mental illness is readily treatable in a prison setting. (R473).[15] The sentencing court found that the enumerated non-statutory mitigation had been established by the greater weight of the evidence, and gave "some weight" to the non-statutory mitigators. (R474). Whether any of the non-statutory mitigation truly mitigates this murder is arguable -- each matter, to some degree, evokes some measure of sympathy for Hildwin. However, none of the non-statutory mitigation is in any way linked to the murder of Ms. Cox. Under any view of the evidence, the non-statutory mitigation was entitled to no more than some weight, which is what the sentencing court gave it. *See, e.g., Wuornos v. State,* 644 So. 2d 1012, 1019 (Fla. 1994). That is not an abuse of discretion, because it is not possible to say that no reasonable court would have reached the same result. *Huff, supra.* The weight assigned to the various mitigation does not provide a basis for reversal of Hildwin's sentence.

Death is the Appropriate Sentence

The premise of Hildwin's claim that death is a disproportionate sentence is that only one valid aggravator exists

[15] With regard to item 5, Hildwin had previously been treated in a prison setting, but, nonetheless, shortly after his parole he committed the murder at issue here. His receptiveness to treatment is, to say the least, open to question.

in this case.[16] However, that claim fails for the reasons set out at pages 14-16 of this brief -- four aggravating circumstances exist in this case. The mitigation found by the sentencing court was properly given only some weight. In weighing the aggravation against the mitigation, the court stated:

> As stated above, the Court has found that the State has proven four (4) aggravating factors beyond and to the exclusion of every reasonable doubt. The Court has further found that the defense has proven two (2) statutory mitigating factors and five (5) non-statutory mitigating factors by the greater weight of the evidence. The Court gives some weight to each of the mitigating factors so found.
>
> The issue for this Court is whether the aggravating factors so found outweigh the mitigating factors found. This Court, after careful consideration and deliberation, so decides, based on the discussion contained below.
>
> The testimony of the psychological experts is impressive, but it has to be considered in light of the fact that neither expert saw the defendant anywhere near the time of the commission of the crime. In fact, Dr. Maher initially saw the defendant over five (5) years after the crime. Dr. Berland did not see the defendant until shortly before his testimony of September, 1996. Neither doctor could speak with specificity as to the defendant's mental health at, or near the time of the commission of the crime, but could only opine and speculate based on their conclusions reached during the examination and testing they did of the defendant years after the crime. This lapse of time greatly diminishes, in the mind of the Court, the import and effect of the otherwise impressive testimony of the psychological experts.
>
> There is also the problem of not having talked to sufficient people who knew the defendant around the time

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[16] This aggravator, according to Hildwin, is the merged "under sentence of imprisonment/prior violent felony" aggravator. As set out at pages 23-26, above, that argument has no legal basis and is foreclosed by binding precedent.

of the crime. Dr. Berland testified that he had talked to no one who knew the defendant after 1979, and thus didn't talk to any people who had been around the defendant close to the time of the murder. John Hildwin, who presented perhaps the most emotional testimony as to the abuse his brother suffered as a child, indicated that he had not seen the defendant since 1971.

Next, it should be noted that the experts, though generally agreeing with each other, subtly differ with one another in their analysis. Dr. Maher opines that the defendant had an impaired ability to appreciate wrongness and conform his conduct based on a severe mental defect. Dr. Berland does not talk specifically about the defendant's ability to appreciate the wrongfulness of his actions and to conform his actions to the requirements of law, but is of the opinion that the defendant was mentally ill at the time of the crime. Dr. Berland believes that the defendant was under the influence of mental or emotional disturbance at the time of the crime; however, Dr. Berland was not able to say that the defendant was under the influence of "extreme" emotional disturbance at the time, but only classified the defendant as suffering from a "mild to moderate" condition. Dr. Maher says that the defendant was under the influence of an "extreme" mental or emotional defect at the time of the crime.

There is also a practical conflict between the opinions of the doctors, and the psychological picture they paint of the defendant, and with the way the defendant presented himself in court, as well as the way others who knew him close to the time of the crime described him. Dr. Maher spoke with a woman, Cynthia Wriston, who had known the defendant for some time and was with the defendant the night before the murder, who described the defendant as a "nice guy." Violet Hoyt described the defendant as "always polite." She further said that Paul was okay around her, and never gave her any trouble. Henry Hoyt said the defendant was very nice to him whenever he saw him. Patricia Lee Hildwin, who married the defendant while he was in prison, testified that she had never seen the defendant hit anybody and never saw the defendant with a quick temper. She said that she never observed any truly bizarre behavior from the defendant. Dr. Berland had testified that defendant would not have been fun to be around, and that he would have been an angry, irritable, volatile, explosive person. Moreover, this Court has had the opportunity to

observe the defendant's behavior in Court, and has even had the opportunity of having the defendant talk to him on several occasions in court proceedings. The Court heard the defendant testify at the resentencing hearing on November 15, 1996. At all times in court the defendant conducted himself appropriately, was courteous to the Court, polite to counsel, and behaved appropriately. Comments made by the defendant, in explaining various matters, and in testifying were articulate, intelligent, and made perfect sense when viewed from the defendant's perspective. In short, acknowledging that it has been approximately ten (10) years from the time of the murder, and that the Court is no expert in mental health, nevertheless the Court saw no evidence or indication that the defendant was truly "psychotic," so as to excuse or explain away his actions.

Accordingly, what the Court is suggesting is that as to any expert opinions as to what the defendant's state of mind was at the time of the murder, that these opinions would be based on extrapolation, speculation, and conjecture, though admittedly given by experienced professionals in their area of expertise. Furthermore, the court is also well aware that it is a weigher of the facts in this case, and that the Court has the right to accept or reject expert testimony, in whole or in part, as it applies to the facts of this case.

Finally, the Court is struck by the stark senselessness and pure needlessness of the murder. At the time of the murder, it would appear that the defendant was decently situated materially. He had gotten out of prison and had relocated to Florida. While true that he was on parole, he lived a fairly normal life. He had a girlfriend, and he lived with his father in a mobile home in the woods. He was living like a normal citizen. The evidence of this case indicated that the defendant enjoyed the things that most of us enjoy, the company of friends, movies, and so forth. Yet, the defendant was apparently not satisfied by this peaceful coexistence. For some strange reason, not nearly understandable, even given the intense psychological scrutiny to which the defendant has been subjected, the defendant decided to commit a senseless, wasteful and unnecessary murder, apparently motivated primarily for economic gain. He brutally killed a young woman merely to acquire some money with which to put gas in his car, and for a few personal possessions with which to stock his bedroom. This ruthless, savage, cruel and unnecessary murder cannot be lawfully justified under any

> circumstances present in this case, even considering the mitigating factors present, and giving them some weight. It is true that the childhood of the defendant was horrible; the defendant had a history of substance and drug abuse; that based on the psychological experts he suffered from organic brain damage; that he has the ability to do well in a structured environment; and that his type of mental illness is readily treatable in a prison setting. Nevertheless, these mitigating factors are greatly outweighed by the heartlessness and callousness of the murder of Vronzettie Cox.
>
> Accordingly, the Court has carefully considered and weighed the aggravating and mitigating factors found to exist in this case, being ever mindful that a human life is at risk in the balance. Upon this weighing consideration, this Court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present. The Court is thus of the opinion that under all the facts and circumstances of this case, that death is the appropriate, lawful sentence in this cause, and that it is proportionate.

(R474-478).

Contrary to Hildwin's repeated claim, this case is far from being one of the least aggravated and most mitigated cases ever to reach this Court. A fair review of the aggravating circumstances that apply to this case shows that the converse of that statement is true. The aggravation present in this case demonstrates a brutal and senseless strangulation murder, motivated by a desire for financial gain, that was committed by a defendant with a history of violence (against women) that was unaffected by previous attempts at rehabilitation. The mitigation, such as it is, is virtually non-existent when weighed against the heavy aggravation. Even giving the mitigation some weight, as the sentencing court did, the aggravation far outweighs it. None of the non-statutory mitigation

has any bearing on the murder of Ms. Cox -- while arguably entitled to some weight, it falls far short of outweighing the four aggravating circumstances. Death is proportionate in this case, and is the only proper penalty.

The trial court's decision that death is the appropriate sentence in this case is supported by competent substantial evidence, and should not be disturbed. When this case is compared to other cases in which the death sentence has been upheld, any claim that death is disproportionate fails. *See, Pope v. State,* 679 So. 2d 710 (Fla. 1996) (pecuniary gain and prior felony weighed against both mental mitigators and non-statutory mitigators); *Johnson v. State,* 660 So. 2d 648, 664 (Fla. 1995) (death sentence upheld when mitigation relatively weak and aggravation quite strong); *Davis v. State, No. 86,135 (Fla. June 5, 1997)* (death sentence upheld even though statutory mental mitigator given "great weight" and various non-statutory mitigation given "medium weight"); *James v. State,* 695 So. 2d 1229 (Fla. 1997) (mental mitigation found --death sentence upheld); *Lott v. State,* 695 So. 2d 1239 (Fla. 1997); *Geralds v. State,* 674 So. 2d 96, 105 (Fla. 1996) (death sentence upheld when substantial aggravation and no substantial mitigation); *Rhodes v. State,* 638 So. 2d 920, 927 (Fla. 1994) (death sentence upheld in case with two aggravators and "substantial mental mitigation"); *Sochor v. State,* 619 So. 2d 285 (Fla. 1993) (reversal not warranted because appellant reaches

different conclusion than judge about whether mitigator is proven); *Hitchcock v. State,* 578 So. 2d 685, 693 (Fla. 1990).

It is axiomatic that the weighing of aggravators and mitigators is more than a mere counting process. Contrary to the implication in Hildwin's brief, a single aggravator can be weighty enough to outweigh substantial mitigation. *See, Ferrell v. State,* 680 So. 2d 390, 391-392 n. 2 (Fla. 1996) (prior violent felony aggravator outweighed seven non-statutory mitigators); *Windom v. State,* 656 So. 2d 432, 435, 441 n. 3 (Fla. 1995) (prior violent felony aggravator outweighed three statutory and four non-statutory mitigators); *Hunter v. State,* 660 So. 2d 244, 254 (Fla. 1995) (prior violent felony and during-the-course-of-a-felony aggravators outweighed ten non-statutory mitigators); *Duncan v. State,* 619 So. 2d 279 (Fla. 1993). If death was not a disproportionate penalty in those cases, and that is the law, then death cannot be disproportionate in Hildwin's case, where there are **four** substantial aggravators juxtaposed against weak, non-specific mitigation. Death is the proper penalty in this case, and that sentence should be affirmed in all respects.

V. THERE WAS NO ERROR IN THE ADMISSION OF THE PRIOR TESTIMONY OF AN UNAVAILABLE WITNESS

On pages 25-27 of his brief, Hildwin argues that the trial court erred in the admission of the prior testimony of New York

investigator Robert Brenzel.[17] The testimony at issue established Hildwin's prior New York convictions for rape and attempted sodomy. Specifically, Hildwin claims that the State failed to establish that Investigator Brenzel was "unavailable." Even assuming that Hildwin's "confrontation clause" objection[18] served to preserve the claim that "unavailability" was not established, the claim that the requisite showing was not made collapses in the face of the precedent of this Court.

The law is settled that a specific objection is necessary to preserve an issue for appellate review. *See, e.g., Atlantic Coast Line R. Co. v. Shouse*, 83 Fla. 156, 91 So. 90, 95 (1922); §90.104(1)(a), *Fla. Stat.* At trial, Hildwin based his objection on the confrontation clause. (TR26-7). However, on appeal to this Court, Hildwin's claim is that the State did not establish the predicate required under §90.104 for the admission of prior testimony. Those two claims are simply not the same, and the confrontation clause objection (which fails under *Thompson v. State,* 619 So. 2d 261 (Fla. 1993), anyway) did not serve to call the trial court's attention to the new-found claim that the predicate was deficient. The claim contained in Hildwin's brief was

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[17] Hildwin has provided no record citations in connection with this argument.

[18] This objection was the one made at trial (TR21-28) -- it is insufficient to preserve the claim that the State did not establish the "unavailability" of the witness at issue.

not preserved below, and is, therefore, procedurally barred. *See, e.g, Steinhorst, supra; see also, Judd v. Rodman,* 105 F.3d 1339 (11th Cir. 1997).

Alternatively and secondarily, the State established the predicate necessary for the admission of former testimony under §90.804(2)(a). Specifically, the State established that Investigator Brenzel's testimony was taken in the course of a judicial proceeding (Hildwin's original penalty phase); that the party against whom the evidence is being offered was a party in the prior proceeding[19]; that the issues in the prior case are similar to those in the case at issue[20]; and a substantial reason is shown why the witness is unavailable. (R216-18). The only component of the predicate that is contested is the "unavailability" of the witness, and that claim was not preserved by a specific objection at trial.

In addressing the same issue in substantially the same context, this Court held:

> Hitchcock next claims that the court erred in allowing the state to read into evidence the trial transcript of a hair analyst's testimony because the state did not demonstrate her unavailability. **At the time of resentencing, the hair analyst no longer worked for the state, and the state advised the court that a diligent**

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[19] This factor is not contested -- Hildwin was obviously a party to the previous penalty phase.

[20] This factor is not contested, either -- the issue (the proper sentence) is identical in both proceedings.

> **search had failed to locate her.** We see no error in the court's finding this witness to be unavailable. Moreover, because the court admitted her entire testimony, including cross-examination, no confrontation clause violation occurred. *See Chandler v. State*, 534 So. 2d 701 (Fla. 1988), *cert. denied*, 490 U.S. 1075, 109 S. Ct. 2089, 104 L. Ed. 2d 652 (1989). Therefore, we find no merit to this issue.

Hitchcock v. State, 578 So. 2d 685, 691 (Fla. 1990). In this case, the State followed the same procedure that was approved in *Hitchcock* -- it attempted to locate the witness, and, when those efforts failed, it advised the Court of that fact in writing and during argument on the motion. (R216-18; TR21-28).[21] That is more than sufficient to establish the unavailability of the witness at issue, and Hildwin's argument fails on the merits.

The final reason that Hildwin's claim is not a basis for reversal is because the fact established by the testimony at issue (Hildwin's prior violent felony convictions) was conceded by Hildwin. (TR928; Vol. 6, R31-32). Because that is true, it makes no sense to argue that the prior testimony of Investigator Brenzel should not have been admitted. Obviously, a party may not stipulate to the existence of a fact, and then argue on appeal that relief should issue because the fact was not proven. However, that is what Hildwin has done -- he conceded the existence of his prior violent felony convictions, but argues to this Court that the prior violent

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[21] The State filed a motion to admit former testimony that set out the efforts made to locate the unavailable witnesses. (TR216-18). That is sufficient under *Hitchcock.*

felony aggravator was not proven.[22] This argument has no basis because it is contrary to all reason.[23] There is no basis for relief, and Hildwin's death sentence should be affirmed in all respects.[24]

CONCLUSION

Based upon the above, the trial court's decision should be affirmed in all respects. Respectfully submitted,

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[22] Hildwin conceded the prior violent felony aggravator before the jury and at the November 15, 1996, sentencing hearing. (Vol. 6).

[23] Because of the very nature of Hildwin's argument, the most that can be said against it is that nothing can be said for it. *See, e.g., McKoy v. North Carolina,* 494 U.S. 433, 466-67, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990) ("if petitioner should seek reversal of his sentence because two jurors were wearing green shirts, it would be impossible to say anything against the claim except that there is nothing to be said *for* it--neither in text, tradition, nor jurisprudence.") (Scalia, J., dissenting) (emphasis in original).

[24] Hildwin's reference to this Court's finding of ineffective assistance of counsel as to the initial penalty phase has no bearing on this issue -- there was no finding that implicated this part of that proceeding. In any event, Hildwin has not suggested how former counsel could have prevented the admission of this evidence. Because that is the case, there can be no error.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief of Appellee has been furnished by delivery in his box at the Fifth District Court of Appeal to Michael S. Becker, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114 , this _____ day of October, 1997.

_____
Of Counsel