W00A

IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,641

THE STATE OF FLORIDA,

Petitioner,

-vs.-

ALUDIN JAEL MATUTE-CHIRINOS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

BRIEF OF RESPONDENT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33 125
(305) 545-1958

LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 0833320

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE(S)**

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTES (1997)

FLORIDA STATUTES (1993)

FLORIDA RULES OF CRIMINAL PROCEDURE

OTHER AUTHORITIES

INTRODUCTION

This is a proceeding for discretionary review of rulings made by the circuit court of the Eleventh Judicial Circuit of Florida during the penalty phase of a first-degree-murder case. In this brief the petitioner is referred to as the "state" and the respondent as "Mr. Chirinos" or the "defendant." The symbol "R." refers to the record filed by the clerk of the circuit court. The symbol "S.R." refers to the supplemental record, consisting of the transcript of the penalty phase.

STATEMENT OF THE CASE

On February 11, 1997, Mr. Chirinos was convicted of first-degree murder and aggravated child abuse. A penalty phase began in May 1997. After all the evidence had been presented, Mr. Chirinos moved to preclude jury instructions on the aggravating circumstances of heinous, atrocious or cruel (HAC), § 921.141(5)(h), Fla. Stat., and felony-murder (kidnapping), § 921.141(5)(d), on the ground that the evidence was insufficient to support these aggravators. At that time, HAC and kidnapping were the only aggravating circumstances sought by the state. The court indicated that it would grant the defense motion, but changed its mind after the prosecutor pointed out that the state could not appeal such a ruling because jeopardy had attached. The motion was denied.

At the conclusion of the penalty-phase charge conference, the defense renewed a previous motion for a mistrial of the penalty phase on the ground of prosecutorial misconduct during cross-examination of a defense expert witness. The prosecution stated that it would not object to a mistrial although it would not concede that the motion was well taken. (R. 116-17). The court observed that if a mistrial were declared, the case would proceed to a new penalty phase, and that the court would then be in a position to entertain a renewed defense motion to preclude the HAC and kidnapping aggravators. (R. 117). In denying the motion not to instruct the jurors on these aggravators, the court

had been impressed by the state's argument that it would be unable to appeal the ruling, since jeopardy had attached, but an order entered in a new penalty phase proceeding before selecting the new jury would allow the issues to be tested without prejudicing anyone. (R. 117). There was a recess while, in the court's words, the attorneys consulted "with higher beings to decide if there's going to be a mistrial, and there will be at some later point be an interlocutory appeal as to some certain legal issues." (R. 119). After these discussions, the defense stated that it felt that its motion for mistrial was well taken, and the prosecution again stated **that** it would not object. (R. 119-21). The motion for mistrial was granted and the jury was dismissed. (R. 121).

The defense filed renewed motions to preclude the HAC and kidnapping aggravators, on the ground that there was insufficient evidence to support these aggravating circumstances. (R. 130-47). The prosecution announced that it would now be seeking the additional felony-murder aggravator that the murder had been committed during an aggravated child abuse. The defense moved to preclude the child abuse aggravator as well, on the grounds that it violated the defendant's right to due process, and the guarantees against double jeopardy and ex post facto laws. (R. 149-50, 167-78).

On June 26, 1997, a hearing was held on the motions to preclude the aggravators. (R. 164-200). The court denied the motion to preclude the child-abuse aggravator, but granted the defense motions to preclude the HAC and kidnapping aggravators. (R. 57-58, 178, 190, 196). Defense counsel's motion for a sentence of life imprisonment was denied. (R. 200).

The state filed a petition for a writ of common-law certiorari in the Third District Court of Appeal, seeking review of the trial court's rulings that the HAC and kidnapping aggravators did not apply in this case. (R. 22-51). The state requested that the case be referred to this Court for resolution under Article V, section 3(b)(5), of the Florida Constitution. (R. 22-26). The Third

District Court of Appeal entered an order granting the state's request for referral to this Court. On November 12, 1997, this Court entered an order accepting jurisdiction.

STATEMENT OF THE FACTS

Background

Aludin Chirinos was originally from Honduras. He came to Miami in 1990, with the ambition of raising enough money to build a small house in Honduras for his family. (S.R. 271). He had two young children by Doria Fuentes, his common-law wife in Honduras. (S.R. 271). He worked at odd jobs and construction (he was an assistant plasterer) and regularly sent money home to support his children and to buy a piece of land and materials for the house. (S.R. 271). He had no prior felony convictions. (S.R. 324). His only arrest, either in Honduras or in this country, was for misdemeanor DUI in February 1994. (S. R. 324).

A year-and-a-half after coming to Miami, Mr. Chirinos learned that his wife had been having an affair with his brother-in-law. (S.R. 271-72,283). It was about this time, in early 1992, that he met Lesly Melendez, who was also from Honduras. She was eighteen years old; he was twenty four. Ms. Melendez had just arrived from Laredo, Texas, where she had recently given birth to a child, Lesly Marcella Melendez. (R. 205-6; S.R. 187).

Shortly after meeting Mr. Chirinos, Ms. Melendez moved into his small one-bedroom apartment. (R. 235; S.R. 85). Some time later, her mother (Florestilla Calix) and stepfather (Juan Enrique Enchaste) arrived from Honduras and came to live in the apartment. (R. 237). Also living in the apartment were two other men, Narciso Cruz-Jimenez and Ramon Rosales, whom Mr. Chirinos had taken in and given a place to stay. (R. 206). Ms. Melendez, Mr. Chirinos, and the child slept in the apartment's only bedroom. (R. 275). Ms. Melendez's mother and stepfather slept

in the kitchen. Mr. Cruz and Mr. Rosales slept in the living room. (R. 275). Everyone (except for Mr. Rosales, who was seriously ill) worked and contributed to paying the household expenses. (S.R. 85). Mr. Chirinos also did the cooking, the laundry, and the cleaning. (S.R. 158,446).

Ms. Melendez worked at a bar and restaurant as a waitress. Her shift was from seven o'clock in the evening until three o'clock in the morning. While she worked, the child would be taken care of by the grandmother (Ms. Calix) or by Mr. Chirinos. (R. 292-93).

Mr. Chirinos was always gentle and affectionate with the child. (R. 239). He loved her as if she were his own daughter. (R. 238264,293). His relationship with Ms. Melendez, however, was not going well. By June 1994, she was planning to leave him. (R. 214). He was excessively jealous and controlling. Although at home he did the laundry, the cooking, and the cleaning, and took care of the child, in the neighborhood bars this physically unimposing assistant plasterer (he was 5'2" tall) played the part of the domineering male, and bragged about his ability to dominate women. (S.R. 752-53). He would often come to the bar where Ms. Melendez worked and make her leave early, saying, "this is my wife and I'm taking her." (S.R. 753).

Male dominance was part of his cultural background (S.R. 183), but his exagerated public displays reflected a damaged sense of masculinity and a sense of personal inadequacy which had their origin in traumatic childhood experiences. (S.R. 419-26, 432-33, 438-40, 445-46, 627-31). When he was nine years old, his sister, who was also his primary care giver, was shot to death in his presence and that of other family members. (S.R. 258-60). At age eleven he had been brutally raped by a circus clown. (S.R. 264-66, 298-300, 385-86).

Aludin Chirinos was the last of eleven children born to Santos Chirinos and Clementina Matute. His father had twenty other children by several different women. They lived in a labor

camp for one of the Standard Fruit Company's banana plantations, in the municipality of Olanchito, Honduras. The nearest city, La Ceiba, was a two-hour drive away when the roads were clear. Santos worked as a laborer for the banana company, earning four dollars a week; Clementina cooked food for the children to sell. The family lived in a small two-room wooden shack with an outdoor kitchen; there was no electricity or running water. By the time Aludin was born, Clementina had become very depressed. She had many children to care for, was overworked, and her husband was unfaithful. She had little time for Aludin. He was cared for by his eldest sister Maria Teresa, who was like a second mother to him. (S.R. 184, 186-87, 190-91, 195-96, 246-58, 262, 354, 357-59, 628).

Then one afternoon, on October 10, 1977, a man came to the house and shot Maria Teresa to death in the presence of the family, including Aludin. Aludin was nine years old. The wake was held at home. Maria Teresa was laid out on the kitchen table for twenty-four hours and then buried. After this, the family entered into a state of great depression. (S.R. 200, 258-60).

A year after Maria Teresa's death, Aludin was sent to live with his sister Maria Elena, who lived in another labor camp. (S.R. 200-1, 261, 264-65, 294-96). He helped her out by selling the ice cream she prepared. (S.R. 264,297). On Sunday, May 4, 1980, when Aludin was eleven years old, a circus came to the area. Aludin went to the circus to sell ice cream. He returned to the house to give Maria Elena the money, but then returned to the circus, (S.R. 265-66,298). A clown said he would teach him how to tame snakes and led him into a field. (S.R. 299). The clown told him to pull down his pants. (S.R. 299). When Aludin refused, the clown slapped him about the face several times and then raped him. (S.R. 299). The clown tied his hands behind his back and left him lying in the field, but returned an hour later and raped him again. (S.R. 299-300). He begged for his life and was finally allowed to run away. (S.R. 300).

When he returned to the house Aludin was crying, shaking, and in shock. (S.R. 299-301). The only time Maria Elena had seen him like that was when Maria Teresa died. (S.R. 300). His face was red and swollen and his wrists were red. (S.R. 299). She insisted that he tell her what had happened. (S.R. 299). Maria Elena undressed him. There was blood on his pants and around the anus. (S.R. 301). She reported the rape to the authorities and the perpetrator was arrested. (S.R. 301). Two days later, Maria Elena took Aludin to La Ceiba, where he was examined by Dr. Maria Ramos. (S.R. 201). Dr. Ramos observed lacerations and of the anus and perianal region, as well as a lot of redness. (S.R. 385-86).

Eight days later Maria Elena returned Aludin to their parents' home because he would not stop crying, was unable to sleep, and would not eat. (S.R. 302). She did not tell her mother exactly what had happened because her mother was still grieving over the death of Maria Teresa. (S.R. 20 1, 268, 302-3). Aludin's father was never told anything about it. (S.R. 303). Aludin was very ashamed and sad. (S.R. 265). He felt he was "ruined." (S.R. 265). The incident was kept within the family because if people learned of the rape they would look down on him. (S.R. 201, 268-69).

When he was about nineteen, Aludin met Doria Fuentes who "gave him his life back." (S.R. 202,270). They had two children. (S.R. 270). He wanted to build a small home for his family, but could not get permanent work with the banana company until his father retired and left him his place. (S.R. 203, 271, 345-46, 349, 358-59). He went to Miami, where his older brother was living. (S.R. 203, 273, 304). A year-and-a-half later, he learned that Doria was having an affair with his brother-in-law. (S.R. 270-71, 283).

Of the traumatic experiences Aludin Chirinos had lived through, the rape was particularly damaging to his development. Dr. John Shaw, a professor and psychiatrist specialized in the field

of the effects of childhood trauma upon personality and development, and director of the University of Miami's Sexual Abuse Trauma Clinic in Jackson Memorial Hospital, explained **that** the long term consequences of a rape upon the development of a young boy arise from the impact the rape has on the victim's sense of identity and masculinity. (S.R. 438). The aggressive, violent intrusion of the rape leaves the victim with an overwhelming sense of helplessness, terror, and fear which leads him to question his competency and to doubt his masculinity. (R. 419-20,424). Because of the victim's uncertainty about his manhood, his capacity to relate to women is impaired, and he tends to be suspicious and to present affective instability. (S.R. 421-23). The damaged sense of masculinity predictably results in a pattern of failed relationships with women. (R. 446).

A violent rape also impairs self-control. (S.R. 420, 43 1). Children who have been sexually abused are less able to regulate their impulses and are more vulnerable to intense emotional experiences, "so they may act unpredictably in certain given situations." (S.R. 420). It was highly likely that a man with a life experience like that of Mr. Chirinos would react to being abandoned by a woman with overwhelming, uncontrollable rage. (S.R. 438-40, 445-46).

Ms. Melendez knew that to leave him might be dangerous. Mr. Chirinos had told her that if she left he would kill her or himself. (R. 215). But she had had enough of his jealousy, she did not need him, and she could afford to leave him. She was working and both her parents had jobs. Mr. Chirinos, on the other hand, did not always have work and would sometimes ask her for money to send to his children in Honduras. (S.R. 68). She planned to leave with her parents and the child without announcing the fact to Mr. Chirinos. (R. 280-81; S.R. 66). She was actively looking for an apartment. (S.R. 67).

The Homicide

On the night of June 2, 1994, Mr. Chirinos cooked dinner for everyone and then left. (R. 293). Ms. Melendez's mother and stepfather gave her a ride to the bar, then returned to the apartment. (R. 222, 281-82, 293). Ms. Calix put the child to bed in the bedroom at eight o'clock, and watched T.V. with her until midnight, when the child fell asleep. (R. 285-86, 293-94). The child was sleeping face down, as she always did. (R. 287). Ms. Calix then went to sleep with her husband in the bed in the kitchen, a few feet from the bedroom door. (R. 294-95). Mr. Cruz and Mr. Rosales were already asleep in the living room. (R. 294). All the lights in the apartment were off. (R. 297).

At about nine o'clock, Mr. Chirinos came to the bar and took Ms. Melendez to Robert's Drug Store to cash a check, because they needed to repay a loan to a relative. (R. 223-24, 240-41). He then drove her back to the bar, and left. (R. 241).

Between 12:30 and 1:00 a.m., Ms. Melendez received a phone call at the bar from Mr. Chirinos. He then came to the bar. (R. 224). He had been in two other bars that night. (S.R. 94, 726). He said he was going to play some pool and asked her for twenty dollars. (R. 224). He also asked her to serve him a beer. (R. 224). She told him to get someone else to serve him. (R. 225,242-43). He insisted, and became upset, so she brought him the beer. (R. 225,243). He went to sit at one end of the counter; she was sitting at the other end. (R. 225-26). He still seemed upset; they did not speak to each other. (R. 226).

The phone rang and she answered it. (R. 226). Thinking that the call was for Ms. Melendez, Mr. Chirinos ran in behind the counter and grabbed the phone to see who was on the line. (R. 227). He was upset. (R. 227). He hung up the phone and demanded that they go home. (R. 227). She told him that she had to finish her shift. (R. 228). He grabbed her by her hands and pulled her to where

the tables were. (R. 228). They struggled. He hit her with his fist, cutting the inside of her lip, (R. 228, 248). During the incident, she made clear that she was leaving him. (S.R. 87). As he was pulled out of the restaurant, he was yelling that she was his woman and he could do with her as he pleased. (R. 229).

Ms. Melendez phoned the police, but hung up because Mr. Chirinos told her that she would be sorry if she called the police. (R. 229). The police returned her call, and she explained what had happened. (R. 230). Mr. Chirinos was in the parking lot, yelling at her not to call the police. (R. 230). She went out and told him that she had already called the police. He wagged his finger at her, and drove off in his truck. (R. 230; S.R. 70).

Four police officers arrived at the bar at about 2:48 a.m. (R. 323). Ms. Melendez was nervous and crying, but she did not appear to require any medical treatment. (R. 307-8, 323-24). She asked the officers to take her home so that she could pick up her child and her belongings. (R. 324, 337). Ms. Melendez was driven home by officers Mendez and Campbell. (R. 337). Two other police vehicles also drove to the apartment building, which was a five-minute drive away. (R. 337). It was not perceived to be an emergency situation. (R. 324). Officer Piedra took time along the way to make a routine traffic stop, stopping a car that had an expired tag. (R. 356).

The first to arrive in the area of the apartment building were Officers Mendez and Campbell, accompanied by Ms. Melendez. (R. 338). Officer Lopez was right behind them in a separate vehicle. (R. 338). Officer Piedra arrived a few minutes later. (R. 356). The building was one-story high and contained five apartment units. (R. 207). The area was very dark. (R. 325).

When they arrived, Officer Mendez and Ms. Melendez saw Mr. Chirinos standing outside the building. After seeing the police, Mr. Chirinos ran to the apartment. Upon reaching the door,

he turned, ripped open his shirt, yelled something, and ran into the apartment. (R.232, 309). Officer Mendez and Ms. Melendez could not understand what he said. (R. 232, 309).

According to Mr. Cruz-Jimenez, who was sleeping in the living room, Mr. Chirinos had returned to the apartment several minutes earlier. (R. 403). He had gone into the bedroom for three or five minutes. (R. 378,403). He had then gone outside for about three minutes, come inside again for about four minutes, and was about to go out again when he saw that the police had arrived, (R. 378-79). At this time, according to Mr. Cruz-Jimenez, Mr. Chirinos yelled from the front door that Ms. Melendez "was going to cry tears of blood" and went back into the bedroom. (R. 379). Ms. Calix, who was sleeping in the kitchen, testified she awoke when Mr. Chirinos went into the bedroom. (R. 288). As he walked by her bed on his way to the bedroom, Ms. Calix could hear him talking to himself, but she could not hear what he was saying. (R. 288, 300). She did not hear him yell anything. (R. 296).

Officer Mendez testified that he entered the apartment with Ms. Melendez two or three minutes after seeing Mr. Chirinos run into the apartment. (R. 326). He let Ms. Melendez out of the police car and they walked to the apartment together. (R. 3 10). Because the door was closed, Officer Mendez asked Ms. Melendez to go in. (R. 310). She then invited the officers inside. (R. 3 10). Once inside, Officer Mendez shone his flashlight on each of the two men who were sleeping in the living room, and asked Ms. Melendez if either one of them was the man involved in the dispute. (R. 3 **11).** "She said no to each of them." (R. 311). They then proceeded to the kitchen area, where Ms. Melendez's mother and stepfather were sleeping. (R. 3 11). Officer Mendez pointed at the stepfather and asked if he was the man involved in the dispute. Ms. Melendez said he was not. (T. 3 11). They then went to the bedroom. The door was locked. (R. 312). The bedroom was dark. There were no

lights on at all. (R. 298, 328).

Ms. Melendez knocked on the door, called out Mr. Chirinos's name, and asked him to come out. (R. 3 12). The stepfather also knocked, and told Mr. Chirinos to "Just come on out . . . nothing is going to happen." (R. 3 **13).** Officer Mendez told Mr. Chirinos that he needed to go in and see how the child was, and that he did not care about the dispute between Mr. Chirinos and his wife. (R. 3 13). Officer Mendez, Ms. Melendez, and Ms. Calix testified that they could hear Mr. Chirinos weeping. (R. 328; S.R. 79, 159). According to Ms. Melendez, since they could hear him crying they thought he had already done something to the child. (S.R. 79). Officer Mendez banged on the door harder and harder. (R. 3 14). During this loud banging they could not hear anything at all. (R. 329). After he stopped banging on the door, Officer Mendez heard Mr. Chirinos "whining, and, in an almost crying voice, saying I am dead already, you might as well go ahead and kill me." (R. 3 15). Ms. Melendez and Ms. Calix testified that he was crying as he said this. (R. 234,298).

After radioing their supervising sergeant for permission, the officers broke down the bottom half of the door. (R. 289, 3 15-16). The room was pitch dark. (R. 3 17,328). The stepfather went in, unlocked the door, and turned on the lights. (R. 3 17). The proceedings at the bedroom door had taken only a few minutes; perhaps as much as three minutes according to the testimony of Officers Piedra and Lopez. (R. 348, 364). There was no testimony that anyone heard the child make any sound, either before or after Mr. Chirinos entered the bedroom.

Mr. Chirinos was standing in the bedroom. (R. 318). He was weeping. (S.R. 159). Officer Mendez grabbed both his hands by the wrists and pulled him out of the room, through the living room, and out of the apartment. (R. 3 18). He handcuffed Mr. Chirinos's hands behind his back, and placed him in the police car. (R. 330). Mr. Chirinos continued to weep as he was taken out of the

apartment and placed in the police car. (R. 331). Later that night, when Officer Mendez saw Mr. Chirinos in the interview room at the police station, he observed that Mr. Chirinos had a red substance on the palm of his hand. (R. 320,330). He had not noticed any blood on Mr. Chirinos's hands at the time he made the arrest. (R. 318, 329-30).

While Officer Mendez pulled Mr. Chirinos out of the apartment, Officers Piedra and Lopez went into the bedroom. They noticed what appeared to be a blood stain on the bed sheet. Officer Lopez pulled away the covers and discovered the child's body. She was lying face down in a pool of blood. (R. 341, 345, 361). It appeared that she had been in **that** position for a while. (R. 349).

The cause of death was a single, large wound to the neck. The child's neck had been cut all the way to the bone, with severance of the trachea, esophagus, left carotid artery, and left jugular vein. (R. 429). The child would have lost consciousness in 10 to 20 seconds as a result of blood loss; brain death would occur in three to five minutes. (R. 457, 473, 488, 490; S.R. 106).

The medical examiner, Dr. Erostin Price, testified **that** the child had been lying face down when she was killed. (R. 418). She would have been awake once the wound was inflicted, but it was not possible to say whether she was asleep or awake before that time based on the medical evidence. (R. 446-48). The time of death could not be detemined precisely by means of forensic evidence. It could have been anywhere between the time that the child was put to bed and the time that she was found dead, but was probably some time around three o'clock in the morning. (R. 423).

There were five small abrasions on the child's right shoulder, and two small cuts in the area of the chin. (R. 425,433). Dr. Price had no opinion as to what caused them. (R. 433,437). The abrasions could be scratches caused by fingernails, but they could be "anything" and she had no opinion as to what caused them. (R. 426-28, 437-38). They could have been caused by the defendant

placing his hand on **the** child's shoulder, or by a struggle, or by the child scratching herself, or by "anything in the world." (R. 441, 466, 471, 479). The abrasions and cuts could have been simultaneous with the fatal knife wound, or could have been made much earlier, but less than two days before. (R. 426, 445, 450-51, 469).

Consciousness and Unconscious Pain

During the trial phase, Dr. Price testified, over defense objection, that a person can feel pain even while unconscious. (R. 461). In her pretrial deposition, she had testified that she did not know the relationship between pain and consciousness, and did not think anyone knew -- "I don't think anybody knows that" -- but that it was a possibility. (R. 475-76). When asked how a person could feel pain without consciousness, she responded:

> How do you know you can't. Just because you are not conscious meaning I can't wake you up does not mean **that in** some subconscious level you are not feeling pain, I can't tell you that.

(R. 475). Confronted with this prior testimony during cross-examination, Dr. Price testified that she believed there were various degrees of consciousness, unconsciousness, and pain, and that in her opinion "[y]ou have to be totally brain dead not to feel pain," or at least no one could say anything to the contrary. (R. 477).

Before the penalty phase, defense counsel moved to redepose Dr. Price regarding her theory of unconscious pain and the length of time that the child had been unconscious. During redeposition, Dr. Price said that she could not express an expert opinion as to the time that the child would have remained conscious after the fatal knife wound, other **than** that it would take 10 to 20 seconds to lose consciousness as a result of the loss of blood. (R. 490-94, 527). Although Dr. Price had testified at the trial that it might take 45 seconds to lose consciousness, that was merely a possibility, and that

opinion was not based on a reasonable medical or scientific certainty. (R. 527).

As to the possibility of feeling pain while unconscious, Dr. Price testified in redeposition that she believed that unless there is direct trauma to the brain, a person can feel pain while unconscious. (R. 494-98). This view was based on her general training in medicine and on the fact that persons who are in a coma but not brain dead will react when pinched. (R. 496). She had not discussed this with any neurologists "because it is general knowledge that you feel pain." (R. 501). As far as she was concerned, the child felt pain until she died, and loss of consciousness would have had no impact on her suffering. (R. 489, 494, 500). However, she could express no opinion on the quality or degree of the pain, or describe the pain that the child actually felt, because "I am not her." (R. 513).

After redoposing Dr. Price, defense counsel filed a motion in limine to preclude medical testimony as to time of consciousness and as to pain and suffering after loss of consciousness. (R, 554). Regarding the unconscious pain testimony, defense counsel argued that the testimony was irrelevant to a determination of HAC under the existing case law, and that Dr. Price was not qualified to give an opinion on the matter. (R. 558-59). The prosecutor did not oppose the motion, stating that he did not plan to ask Dr. Price about unconscious pain. (R. 561). The trial court granted the motion to exclude this testimony. (R. 561-62).

As to the time of consciousness, defense counsel argued that Dr. Price's testimony would be totally speculative, since Dr. Price herself said she could not express an expert opinion on the subject. The prosecutor said he planned to elicit from Dr. Price that the time was 15 to 20 seconds, explaining that the defense expert, Dr. Wright, agreed with that time range, but believed that 45 seconds was not likely. (R. 563-66). The court ruled that there would be no mention of any time

range beyond 10 to 20 seconds, because anything else would be speculative. (R. 566-67).

During the penalty phase Dr. Price testified that the child would lose consciousness within 10 to 20 seconds. (S.R. 106). She did not testify about unconscious pain.

The Defendant's Mental State

After being taken to the jail, Mr. Chirinos was placed on suicide watch. (S.R. 733-35). He was in a state of emotional shock and presented symptoms of depression. (S.R. 734-36). His face was expressionless; he did not move his hands or head or any part of his body; his speech was vague and limited, as if he was talking about someone else and was unable to recognize himself as a part of the situation. (S.R. 734-36). He spoke of being possessed by a demon who could not be controlled. (S.R. 735).

Dr. Dorita Marina, a bilingual psychologist, did a complete psychological evaluation of Mr. Chirinos, interviewing him several times (five times in 1995, once in 1996, and twice in 1997) and administering a battery of psychological and intelligence tests. (S.R. 603-4). She diagnosed cyclothymia (a mood disorder similar to bipolar disorder, but of less intensity). (S.R. 6 1 O-l 4). Mr. Chirinos also had a dependent personality and a drinking problem. (S.R. 610-18). He could not bear the thought of being rejected and was prone to use the psychological mechanism of denial, the major defense mechanism associated with mania. (S.R. 615-18). He was unable to acknowledge or accept any psychological or emotional problems in himself. (S.R. 616,618, 742). He could not admit to himself that he had a drinking problem, or that he was upset by his wife's infidelity, or that his relationship with Ms. Melendez was anything but a marvelous romance, or that she actually wanted to leave him. (R. 693-95, 720-24). Because he was so dependent, the realization that Ms. Melendez was really going to abandon him was extremely stressful. (S.R. 627-29).

In Dr. Marina's opinion, Mr. Chirinos was under the influence of an extreme emotional disturbance at the time of the crime and his capacity to appreciate the criminality of his conduct and, especially, to conform his conduct to the requirements of law was substantially impaired. (S.R. 622). The crime occurred during a hypomanic episode in which Mr. Chirinos was so overwhelmed by rage that he could not control himself, despite the presence of the police. (S.R. 622-23, 630).

Dr. Leonard Haber, the state's psychologist, interviewed Mr. Chirinos through an interpreter shortly before the penalty phase, in the presence of the prosecutor. He did not see any diagnosable mental illness, but agreed that Mr. Chirinos used the psychological defense mechanism of denial and would be expected to minimize his symptoms. (S.R. 846, 866-67). In Dr. Haber's opinion, on the night of the murder Mr. Chirinos was not under the influence of an extreme emotional disturbance or unable to conform his conduct to the law, although he was jealous and enraged, and possibly under the influence of alcohol, (S.R. 850,853).

Dr. Haber observed that there were clear instances of **past** trauma -- the murder of Maria Teresa, and the rape -- but he did not see a "direct link" between them and the murder. (S.R. 848-49). To Dr. Shaw, on the other hand, the profound impact the rape had on Mr. Chirinos's personality development was evident from his life history and, in the situational context in which the murder occurred, powerfully contributed to his overwhelming rage on that night. (S.R. 426, 438-40, 445-46).

SUMMARY OF THE ARGUMENT

I. The murder was committed quickly, by a single knife wound which was inflicted without warning to the child and which caused unconsciousness within 10 to 20 seconds. There was no competent, substantial evidence that it was preceded by any torturous acts. It was committed in the heat of passion arising from a domestic quarrel, and there was no evidence of intent to cause unnecessary and prolonged suffering. These facts do not support application of the HAC aggravator.

The state's theory that the child suffered several minutes of pain while she was unconscious is speculative, irrelevant, and depends on testimony that, because it was speculative and irrelevant, was excluded by the court with the acquiescence of the prosecutor. The state's theories concerning the victim's perceptions during the seconds that she was conscious are both speculative and contrary to the evidence.

The cases upon which the state relies all involve much more than a quick, sudden murder and rapid loss of consciousness. Unlike here, each of those cases involved conduct -- such as beatings, repeated stabbings, strangulation, rape, abduction, or a combination of these -- which showed that the crime was unnecessarily torturous to the victim. Such torturous conduct was not present here. Under this Court's precedents, the facts of this case do not support the HAC aggravating circumstance. In following those precedents, the trial court did not err and did not depart from the essential requirements of law.

II. Because the state was unable to prove that the child was still alive when Ms. Melendez and the police came to the door, it could not prove a kidnapping, or that the murder had been committed in the course of the kidnapping. Locking the bedroom door where the child was sleeping could not impose any restraint upon the sleeping child and there was no evidence that locking the

door to the bedroom Mr. Chirinos shared with Ms. Melendez and the child was something he was not permitted to do. Accordingly, there could be no confinement until Mr. Chirinos refused to open the door. The evidence suggests that by that time the child was already dead. There was no competent, substantial evidence that she was still alive. There was therefore no proof of the confinement required to establish a kidnapping. Moreover, even if it is assumed *arguendo* that locking the door effected a confinement, such confinement was merely incidental to, or inherent in, the murder, and did not have independent significance. As the trial court correctly concluded, the evidence was insufficient to support a finding of the felony-murder aggravating circumstance of murder committed during a kidnapping.

ARGUMENT

I.

THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW IN CONCLUDING THAT THE HAC AGGRAVATOR DOES NOT APPLY IN THIS CASE.

Standard of Review

The standard of review in this proceeding is that which applies to a petition for a writ of common-law certiorari. The state must establish the existence of error so egregious that it constituted a departure from the essential requirements of law. *State* v. *Pettis*, 520 So. 2d 250 (Fla. 1988); Combs *v. State*, 436 So. 2d 93 (Fla. 1983); *Haines City Community Development v. Heggs*, *658* So. 2d 523 (Fla. 1995).

The HAC Aggravating Circumstance Does Not Apply in this Case

In *State* v. *Dixon*, 283 So. 2d 1 (1973), this Court explained the meaning of the HAC aggravating circumstance as follows:

> What is intended to be included arc those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Id. at 9. Under this Court's decisions interpreting these requirements, the HAC aggravator applies only if (1) the victim consciously suffered extraordinary mental or physical pain for more than a brief period of time, and (2) the defendant intended to cause the victim such pain and suffering:

The crime "must be *both* conscienceless or pitiless *and* unnecessarily torturous to the victim." *Richardson* v. *State*, 604 So.2d 1107, 1109 (Fla. 1992) (this Court's emphasis), *citing Sochor v.*

Florida, 504 U.S. 527, 536-37 (1992). The HAC aggravating circumstance "is proper only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference or enjoyment of the suffering of another," *Cheshire* v. *State,* 568 So. 2d 908, 912 (Fla. 1990), *citing Dixon.*

The HAC aggravator does not apply to a relatively quick murder, that, is, where the victim quickly loses consciousness, unless the murder is preceded by torturous acts. *E.g., Elam v. State, 636* So. 2d 1312, 1314 (Fla. 1994); *Maggard v. State,* 399 So. 2d 973, 977 (Fla. 1981); *cf. Preston v. State,* 444 So. 2d 939, 945-46 (Fla. 1984). Nor does it apply in the absence of evidence that the defendant intended to cause unnecessary and prolonged suffering, *e.g., Cheshire; Bonifay v. State,* 626 So. 2d 13 10, 13 13 (Fla. 1993), even where such suffering actually occurs, e.g. *Teffeteller v. State,* 439 So. 2d 840 (Fla. 1983); *Mills v. State,* 476 So. 2d 172, 178 (Fla. 1985). And it does not apply to relatively quick murders committed in the heat of passion, rather than intended to be deliberately and extraordinarily painful, *e.g., Cheshire; Porter v. State, 564 So.* 2d 1060 (Fla. 1990); *Santos* v. *State,* 591 So. 2d 160, 163 (Fla. 1991). In short, HAC applies only to intentionally torturous murders. It did not apply here. The facts were as follows:

After a heated quarrel with Ms. Melendez at the bar where she worked, Mr. Chirinos returned to their apartment. (R. 224-30, 242-43, 403). He went in and out of the bedroom which he shared with Ms. Melendez and her daughter. (R. 378,403). The child was sleeping face down on the bed in the darkened room. (R. 287, 297, 418). Shortly thereafter, Ms. Melendez arrived in the company of the police. (R. 337-38). Mr. Chirinos, who at that point was standing outside the apartment building, ripped open his shirt and shouted that Ms. Melendez would "cry tears of blood." (R. 232, 309,379). He then ran into the apartment and went into the bedroom. (R. 232, 309, 397). He was

talking to himself as he went into the bedroom. (R. 288,300). Ms. Melendez and the police entered the apartment and proceeded to the bedroom. (R. 3 10-12, 326). The door was locked. (R. 3 12). There were no lights on inside. (R. 298, 312, 328).

The officers, Ms. Melendez, and Ms. Melendez's mother and stepfather knocked on the door. (R. 3 12-13). The only sound from within the room was **that** of Mr. Chirinos weeping and asking Ms. Melendez why she had called the police. (R. 234,329; S.R. 79, 159). The police banged loudly on the door. (R. 3 14). Mr. Chirinos said, "I am dead already, you might as well go ahead and kill me." (R. 315). He was crying as he said this. (R. 234,298). The officers broke the door down. (R. 3 15-16). The room was pitch dark. (R. 317,328).

Mr. Chirinos was standing in the bedroom, weeping, (R. 3 18; S.R. 159). Officer Mendez pulled him out of the room. (R. 3 18). Mr. Chirinos continued to weep as he was taken out of the apartment and placed in the police car. (R. 331). Officer Lopez pulled the covers off the bed and found the child's body lying face down in a pool of blood. (R. 341, 345, 361).

The child's death was caused by a single, large knife wound to the neck, which caused unconsciousness within seconds, and brain death in three to five minutes, as a result of the loss of blood. (R. 429, 457, 488, 490; S.R. 106). Although the child would have been awakened by the infliction of the wound, she lost consciousness within 10 to 20 seconds. (R. 446-48; S.R. 106).[1] She had been killed while she was lying face down (R. 41 X), in the same position as when she fell asleep. (R. 287, 418). There were five small abrasions on the child's right shoulder, and two small

---

'Before the penalty phase, the trial court (with the acquiescence of the state) granted the defense motion to exclude (1) testimony of a period of consciousness beyond 20 seconds, because such testimony would be speculative, and (2) testimony concerning the possibility of pain during unconsciousness. (R. 554-67).

Superficial cuts in the area of the chin. (R. 425,433). The medical examiner had no opinion as to what caused them. (R. 433,437). The abrasions could be scratches caused by fingernails, but they could have been caused by "anything." (R. 425-28, 437-38, 441, 453, 465-71, 479). The abrasions and cuts could have been made in the same instant as the fatal knife wound, or hours before. (R. 426, 445, 450-5 1,469).

After being taken to jail, Mr. Chirinos was placed on suicide watch. (S.R. 733-35). He was in a state of emotional shock and presented symptoms of depression: there was no expression on his face, he did not move any part of his body, and his speech was vague and limited, as if he was talking about someone else and was unable to recognize himself as part of the situation. (S.R. 734-36).

As the trial court properly ruled, the evidence was insufficient to support a finding of the HAC aggravating circumstance. This was a relatively quick murder, committed by a single knife wound which was inflicted without warning to the child and caused unconsciousness within seconds; it was committed in the heat of passion, without evidence of intent to cause unnecessary and prolonged suffering; and there was no competent, substantial evidence that it was preceded by any torturous acts. These facts do not support application of the HAC aggravator.

First, the crime happened quickly and there was no evidence of prolonged conscious suffering or anticipation of death: There was a single wound, the child was sleeping face down in a dark room, there was no evidence that she awoke before the wound was inflicted, and she lost consciousness within 10 to 20 seconds. Under these circumstances, the HAC aggravating factor does not apply. There must be proof that the murder was "unnecessarily torturous to the victim," *Dixon*, 283 So. 2d at 9, that is, caused extraordinary mental or physical suffering for some substantial

period of time. The HAC aggravator does not apply in cases where the victim quickly loses consciousness and the murder is not preceded by torturous acts. E.g., *Elam v. State, 636 So.* 2d 13 12, 13 14 (Fla. 1994) (although the victim was beat to death with a brick and had defensive wounds, HAC did not apply because there was no prolonged suffering or anticipation of death: the attack took place in "a very short period of time" -- a minute or half a minute -- and the victim was unconscious at the end of this period); *Kearse v. State,* 662 So. 2d 677 (Fla. 1995) (HAC improperly found where, although the victim suffered multiple wounds, he was conscious only a short time); *Gorham v. State,* 454 So. 2d 556 (Fla. 1984) (insufficient evidence that victim who was shot twice in the back apprehended certain death "more than moments before he died"); *Maggard v. State, 399 So.* 2d 973, 977 (Fla. 198 1) (victim died quickly as a result of shotgun blast fired through a window and there was no evidence indicating that the victim *knew* **he was** going to be shot); *Williams v. State, 574 So.* 2d 136, 138 (Fla. 1991) (murder of bank guard who was restrained and then "shot with little delay" could not be deemed a torturous murder); *Burns v. State,* 609 So. 2d 600, 606 (Fla. 1992) (murder of officer not HAC where the struggle during which he was shot a single time was short, the wound caused rapid unconsciousness followed within a few minutes by death, and there were no additional acts that set it apart from the norm of capital felonies); *Jackson v. State,* 451 So. 2d 458 (Fla. 1984) (victim who remained conscious only a "few moments" was "incapable of suffering to the extent contemplated by this aggravating circumstance").

As will be set forth below in more detail (see p. 28-33), the state's factual arguments -- that **the** victim may have suffered "excruciating pain" while she was unconscious, that she may have known the identity of her attacker and thus suffered extreme fear, that she may have struggled with Mr. Chirinos -- are speculative and contrary to the evidence. The HAC aggravator cannot be based

on speculation regarding the victim's perceptions. *Hartley v.* State, 686 So. 2d 1316, 1323 (Fla. 1996); see *also Hardwick v. State,* 521 So. 2d 1071, 1075-76 (Fla. 1988) ("mere speculation derived from equivocal evidence or testimony" cannot support finding of an aggravating circumstance).

The cases upon which the state relies (see p. 33-44, below), all involve much more than a quick, sudden murder and rapid loss of consciousness. Unlike here, each of those cases involved conduct -- such as beatings, repeated stabbings, strangulation, rape, abduction, or a combination of these -- which showed that the crime was unnecessarily torturous to the victim. Where the fatal blow or wound was preceded by a beating, multiple stabbing, rape, abduction, or other torturous acts, the fact that death was relatively quick does not preclude a fmding of HAC. *E.g., Preston, 444 So.* 2d at 2d at 945-46 (although death by slashing of throat was instantaneous or near-instantaneous, the terror and fear suffered by the victim during the abduction which preceded the murder justified finding of HAC); *Adams v. State,* 412 So. 2d 850 (Fla. 1982) (fear and emotional strain of abduction and attempted rape on eight-year-old girl prior to death by strangulation was HAC); *Davis v. State,* 22 Fla. L. Weekly S701, 703 (Fla. Nov. 6, 1997) (child was raped and beaten and was conscious throughout the ordeal), However, relatively quick murders that are not preceded by such additional torturous acts are not HAC. E.g., *Elam, 636 So.* 2d at 1314; *Burns, 609 So.* 2d at 606. Here, the murder was committed quickly, by a single knife wound inflicted without warning and causing unconsciousness within seconds. There was no competent, substantial evidence that it was preceded by any torturous acts. This was not the unnecessarily torturous murder to which HAC applies.

Second, there was no evidence of torturous intent. For the HAC aggravator to apply, there must be proof that the defendant *intended* to inflict a high degree of pain or to cause prolonged and unnecessary suffering. *Cheshire,* 568 So.2d at 912 ("torturous murder" to which HAC applies is one

which is accompanied by additional acts which "evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference or enjoyment of the suffering of another"); *Bonifay*, 626 So. 2d at 13 13 (HAC not properly found where the record did not demonstrate intent on the defendant's part to inflict a high degree of pain or to otherwise torture the victim; fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find HAC absent evidence that the defendant "intended to cause the victim unnecessary and prolonged suffering"); Porter v. *State, 564 So.* 2d 1060 (Fla. 1990) (HAC not shown where the record was consistent with the hypothesis that the crime "was a crime of passion, not a crime that was *meant* to be deliberately and extraordinarily painful") (original emphasis); *Kearse*, 662 So. 2d at 686 (HAC aggravator was improperly applied where, although the victim suffered numerous gunshot wounds, there was no evidence that the defendant intended to cause the victim unnecessary and prolonged suffering); *Robertson* v. *State*, 611 So. 2d 1228, 1233 (Fla. 1993) (error to find HAC where the evidence did not establish that the defendant shot the victim "with the intention of torturing her or with the desire to inflict a high degree of pain or with the enjoyment of her suffering"); *Santos,* 591 So. 2d at 163 (HAC aggravator did not exist because "the murders happened too quickly and with no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victims").

Where proof of intent to cause unnecessary pain is absent, the HAC aggravator does not apply, even where the victim suffered a prolonged and painful lingering death. See *Mills v. State, 476 So.* 2d 172, 178 (Fla. 1985); *Teffeteller v. State, 439* So. 2d 840 (Fla. *1983).* In *Teffetteller*, the victim was killed by a shotgun blast to the abdomen. He suffered for more than two hours "in undoubted pain" and knowing he was facing imminent death. This Court set aside the trial court's

finding of HAC, explaining that the criminal act which caused the victim's death was a single sudden shot from a shotgun, and that horrible as the victim's suffering was, it "does not set this senseless murder apart from the norm of capital felonies." 439 So. 2d at 846. Subsequently, in *Mills*, which involved facts similar to those in *Teffeteller*, this Court explained that it is the "intent and method" employed that determines whether the MAC aggravator applies, not the "pure fortuity" of whether the victim lingered or died instantly. *476 So.* 2d at *178, See also Tedder v. State, 322 So.* 2d 908,910 (Fla. 1975) (the defendant shot his mother-in-law, then forcibly removed his wife from the premises and by doing so prevented the only persons present from providing aid; she died the next day; *held* HAC did not apply although "[i]t is apparent that all killings are atrocious, and that appellant exhibited cruelty, by any standard of decency, in allowing his injured victim to languish without assistance or the ability to obtain assistance").

Here, not only was there no evidence of torturous intent, the evidence was inconsistent with intent to torture or to cause prolonged suffering. The child's death was caused by a single, inevitably fatal, knife wound, which was inflicted without warning and caused unconsciousness within seconds. *See Teffeteller, 439* So. 2d at 846 (murder by single sudden shotgun blast to abdomen not HAC, despite fact that victim lingered "in undoubted pain" for more than two hours); *Mills, 476 So.* 2d at 178 (error to fmd HAC on facts similar to those of *Teffeteller* where the cause of death was a shotgun fired at close range); *Maggard*, 399 So. 2d at 977 (error to find HAC where the victim died quickly from a single gunshot blast fired through a window and there was no evidence that the victim was aware that he was going to be shot).

The evidence also showed that the crime was committed in the heat, or rage, of the moment. The fact that the murder occurred quickly and was committed in the heat of passion arising from a

domestic dispute negates the existence of the requisite intent to torture. *See Santos; Cheshire; Porter.* In *Santos*, the defendant chased down and shot to death his estranged wife and his child. As in the present case, the murders resulted from a highly emotional domestic dispute. This Court held unanimously that the factor of heinous, atrocious or cruel did not exist because "the murders happened too quickly and with no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victims." 591 So. 2d at 163. In *Cheshire,* the defendant murdered his former wife and her boyfriend. The neighbors heard a gunshot, a scream that lasted "just a few seconds," and another gunshot. The murders were the result of "a lovers' quarrel between Cheshire and his estranged wife." 568 So. 2d at 911. This Court held that the HAC factor did not exist because the evidence was consistent with "a quick murder committed in the heat of passion." 568 So. 2d at 912. In *Porter,* this Court held that HAC was not shown because the record was consistent with the hypothesis that the crime "was a crime of passion, not a crime that was *meant* to be deliberately and extraordinarily painful." 564 So. 2d at 1063 (this Court's emphasis).

Here, as in *Santos, Cheshire,* and *Porter,* the evidence shows a quick crime of passion or rage arising from a domestic quarrel, and is inconsistent with intent to inflict a high degree of pain or to otherwise torture the victim.

As the trial court correctly concluded (R. 196), terrible and senseless as the murder was, the evidence was insufficient to establish the torturous murder required to find the HAC aggravating circumstance under this Court's precedents. In following those precedents, the trial court did not err, and certainly did not depart from the essential requirements of law.

The State's Arguments are Contrary to the Facts and the Law

Unconscious Pain

While acknowledging that the victim lost consciousness within 10 to 20 seconds, the state argues that the HAC aggravator nevertheless applied because, according to the state, the victim suffered three to five minutes of excruciating pain *while she* was *unconscious.* (Brief of Petitioner at 13, 15, 18). This argument -- that the trial court departed from the essential requirements of law in not recognizing 'unconscious pain' as a basis for HAC -- is not preserved for review, is based on testimony which the court ruled was inadmissible in the penalty phase (a ruling which the state did not object to below and does not challenge now), has no legal support, and is contrary to the precedents of this Court.

The 'unconscious pain' argument was not made to the trial judge, and accordingly is not preserved for review and cannot be the basis for finding a departure from the essential requirements of law. In addition, the medical examiner's testimony on the subject of unconscious pain was excluded in the penalty phase, without objection by the prosecutor, as irrelevant and beyond the medical examiner's expertise. (R. 554-62).[2] Since the prosecution did not object to that ruling below, it cannot (and apparently does not) challenge it now. In view of that ruling, which made it

---

[2]At the same time, the trial court granted the defense motion to exclude testimony of a period of consciousness beyond 20 seconds, because, as the prosecutor acknowledged, in view of the deposition testimony of both the medical examiner and of the defense forensic expert any greater period of time would be speculative. (R. 565-67). Although in the argument portion of its brief the state recognizes that the probable period of consciousness was 10 to 20 seconds, it mentions, in its statement of the facts, that the medical examiner testified at trial that the child could have been conscious for 45 seconds to a minute. (Brief of Petitioner at 12). As the prosecutor acknowledged (R. 562-64), this testimony was speculative. The medical examiner clarified in redeposition that the 45-second figure was not an opinion given with a reasonable degree of medical or scientific certainty. (R. 527).

Unnecessary to call the defendant's forensic expert to testify, and in view of the fact that the argument was not made to the trial judge, it is misleading and unfair to assert that the trial judge departed from the essential requirements of law because the medical examiner testified "without contradiction" (Brief of Petitioner at 18) that a person can suffer unconscious pain. This argument is procedurally barred.

Moreover, there is no legal support for the state's 'unconscious pain' argument, and it is directly contrary to this Court's precedents. Unconscious pain and suffering (whatever that might mean) is not relevant to a determination of HAC. Numerous decisions of this Court hold that there must be conscious suffering for the HAC aggravating factor to apply. E.g., *DeAngelo* v. *State*, 616 So. 2d 440, 442-43 (Fla. 1993) (trial court did not err in declining to find HAC where the evidence was not clear that the victim was conscious during the ordeal); *Rhodes v. State, 547* So.2d 1201, 1208 (Fla. 1989) (HAC not properly found where victim may have been semiconscious at time of death); *Kearse*, 662 So. at 686 (HAC improperly found where, although the victim suffered several wounds, the medical examiner could not offer any information about their sequence and stated both that the victim could have remained conscious for a short time or rapidly gone into shock); *Jackson v. State*, 451 So. 2d 458,463 (Fla. 1984) (consciousness necessary for HAC); *Herzog v. State, 439* So. 2d 1372, 1380 (Fla. 1983) (evidence insufficient where victim may have been semi-conscious); *Burns v. State,* 609 So. 2d 600, 606 (Fla. 1992) (error to find HAC where wound caused rapid unconsciousness followed within a few minutes by death).

The state has not cited a single case, from any jurisdiction, in which unconscious pain is so much as mentioned, much less any case in which it has been held to support application of the HAC aggravator. The present case is particularly unsuited as a vehicle to go where no court has gone

before: Aside from the fact that the state's argument is procedurally barred, the unconscious-pain testimony was purely speculative. When asked in deposition how a person could feel pain without being conscious, the medical examiner replied:

> [Dr. Price:] How do you know you can't. Just because you are not conscious meaning 1 can't wake you up does not mean that in some subconscious level you are not feeling pain, I can't tell you that.
> * * * *
> [Defense counsel:] Is there any expert who can tell us that?
> * * * *
> [Dr. Price:] I don't know.
> * * * *
> [Defense counsel:] You, meaning, Doctor Price, have no knowledge about that, your relationship between consciousness and pain, you are just saying you can't rule out pain with loss of consciousness. * * *
>
> [Dr. Price:] Right.

(R. 475) (omitting brief prefatory comments by counsel).

The medical examiner also testified that it was not possible to describe either the quality or the degree of that pain. (R. 513-14). Contrary to the state's assertion that the medical examiner testified that the unconscious pain would have been "excruciating" (Brief of Petitioner at 13), the medical examiner in fact testified that she could express no opinion either as to the quality or the degree of the pain, and could not describe the pain that the child would have felt, because "I am not her." (R. 5 13).

The HAC aggravator could not be based on the nebulous and purely speculative concept of unconscious pain. If speculation concerning a conscious victim's perceptions cannot justify a finding of HAC, *Hartley* v. *State,* 686 So. 2d 1316, 1323 (Fla. 1996), speculation concerning unconscious feelings which no one can describe cannot be a basis for finding this aggravator.

Struggle with a Father Figure

In addition to the unconscious pain argument, the state supposes other purported facts which, according to the state, would render the 10 to 20 seconds of consciousness particularly terrifying and so justify a finding of HAC. These theories are both speculative and contrary to the evidence.

First, according to the state, the child would have known the identity of her assaillant and, because he was a father figure to her, she therefore would have experienced extreme fear during the 10 to 20 seconds that she was conscious. (Brief of Petitioner at 17). This theory is directly contrary to the evidence. The uncontradicted testimony of the state's own witnesses established that the child was killed while she was sleeping face down in a pitch dark room. (R. 287, 328, 349, 418, 446-48). Officer Mendez testified that the bedroom was dark, with no lights on at all. (R. 328). Officer Lopez testified that the bedroom was dark and that he could not remember seeing any lights. (R. 349). Ms. Calix testified that the child fell asleep face down, and that was how she always slept. (R. 287). The medical examiner testified that the child was killed while she was face down. (R. 418). There was no evidence to contradict any of this. In addition, there was no evidence that the child had been awakened before the fatal wound was inflicted. No one heard the child make a sound either before or after the defendant entered the bedroom. The medical examiner testified that while the child would have awakened as a result of the knife wound, it was not possible to say from the medical evidence whether or not she had been awake before the wound was inflicted. (R. 446-48). There is simply no evidence, none, to support the state's assertion that the child would have known the identity of her attacker. All the evidence is directly to the contrary.

Second, the state asserts that the five superficial abrasions on the child's right shoulder, and the two small superficial cuts in the chin area, evidenced a struggle. (Brief of Petitioner at 15). This

argument is pure speculation. The medical examiner testified that she could not determine what caused the superficial abrasions and cuts or when they were made. They could have been made at the same instant as the fatal knife wound, or hours before. (R. 426, 433, 435-45, 450-51). The abrasions could have been scratches made by fingernails (including those of the defendant or of the victim), but they could have been caused by "anything." (R. 425-27, 453, 465-71). The medical examiner had no opinion what caused them, and was also unable to determine what caused the two small cuts. (R. 433, 437-38). These injuries could have been caused by "anything in the world" (R. 441), and could have been made at the very same instant as the knife wound. The forensic evidence simply provides no basis, other than speculation, for concluding that there had been a "struggle." The other evidence was clearly to the contrary: the child had been sleeping face down, she was much smaller than the defendant, and no one had heard anything to indicate a struggle.

Finally, the state suggests that there was expert testimony -- that of the medical examiner -- that children are especially fearful by nature. (Brief of Petitioner at 17). In fact, however, the medical examiner, who did not pretend to have any expert knowledge of such matters, testified that she believed that "age and experience has nothing to do with it" and would have no impact on the child's suffering. (R. 523-26). The medical examiner further testified that she could not give an opinion as to the degree of the child's pain: "Pain is pain." (R. 5 13).

The facts established by the evidence are that the child was sleeping face down in the darkened room, and that she lost consciousness within 10 to 20 seconds. There was no evidence of torturous acts preceding the knife wound or that the child was awake before that wound was inflicted. Speculation regarding the child's perceptions or the quality or degree of her fear and pain cannot be the basis for a finding of HAC. *Hartley v. State*, 686 So. 2d 13 16, 1323 (Fla. 1996); see

also Hurdwick v. State, 521 So. 2d 1071, 1075-76 (Fla. 1988) (error to find aggravating circumstance based on speculation derived from equivocal evidence). As the trial court correctly concluded, under this Court's precedents, the facts of this case do not support application of the HAC aggravating circumstance. *Elam; Gorham; Maggard*; *Jackson*; *Santos; Cheshire; Porter; Burns; Kearse.*

The per se HAC Arguments -- Sleeping Child

The state argues that three of the facts of this case -- that the victim was a child, that she was in bed, and that the cause of death was a slash wound to the throat -- should each be deemed sufficient in themselves to find HAC. (Brief of Petitioner at 17-19). This argument is not supported by the cases cited by the state, it is not compatible with the definition of HAC established by the quarter-century of precedents beginning with *Dixon*, and it is contrary to the Supreme Court's understanding, in upholding the HAC aggravator, that this circumstance applies only to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Sochor v. Florida*, **504** U.S. 527, 536 (1992).

Unlike here, each of the cases cited by the state involved conduct -- such as beatings, repeated stabbings, strangulation, rape, abduction, or a combination of these -- which showed that the crime was unnecessarily torturous to the victim and that the perpetrator intended to cause such unnecessary pain and suffering, and which justified a finding of HAC regardless of whether the victim was a child or an adult, in bed or on the street, or killed by a knife or some other weapon. That torturous conduct was not present here. The trial court was not at liberty to follow the state's novel approach and to set aside the analytical framework established by this Court. In following this Court's precedents, the trial court did not depart from the essential requirements of law.

The state argues, first, that "the fear naturally engendered when a child is fatally attacked by

an adult has been held sufficient to warrant the finding of the HAC factor." (Brief of Petitioner at 17). The suggestion that HAC should be found whenever the victim is a child is in fact contrary to the case law; even when the victim is a child, HAC does not apply unless the evidence shows an intentionally torturous murder. *See,* e.g., *Wilson* v. *State,* 436 So. 2d 908,912 (Fla. 1983) (murder of child by stab wound to the chest was "clearly" not HAC); *Santos* v. State, 591 So. 2d 160 (Fla. 199 1) (murder of mother and child not HAC). In all of the cases cited by the state, the murder involved torturous conduct which would have been sufficient to uphold a finding of HAC regardless of whether the victim was a child or an adult (indeed, two of the cited cases did not involve young children):

In Davis v. *State,* 22 Fla. L. Weekly \$701, 703 (Fla. Nov. 6, 1997), the child was sexually battered, there were four separate blows to the head which caused cerebral hemorrhage, there was blood in various locations in the house, and the child had been conscious, and crying, throughout the entire ordeal. In *James* v. *State,* 22 Fla. L. Weekly S223 (Fla. April 24, 1997), the eight-year-old victim was picked up by the neck and strangled; James stared into her eyes and listened to the popping of her bones as he squeezed her neck until her eyes and tongue bulged out. James then had vaginal and anal intercourse with the child and threw her behind a bed. In ***Adams,*** the defendant abducted the child with the intent of raping her, removed her clothing, taped her hands behind her back, and then strangled her because she was screaming. In *Sanchez-Velasco v. State, 570 So.* 2d 908, 916 (Fla. 1990), the child was raped, then strangled with a T-shirt. In *Swafford* ***v. State,*** *533* So. 2d 270,277 (Fla. 1988), the victim was kidnapped from the store where she worked and taken to a wooded area, where she was raped, and then shot nine times, mostly in the torso and extremities; Swafford had to stop and reload at least twice. In *Parker* v. State, 476 So. 2d 134, 139 (Fla. 1985),

the eighteen-year-old victim was abducted from a store during a robbery and was told by the defendants that they were going to kill her so she could not identify them. In a thirteen-mile "death-ride" she continued to plead for them not to hurt her. She was dragged from the car by her hair, stabbed in the stomach, and then shot after she had fallen to her knees.

In the present case there was no rape (as in Davis, *Adams*, *Sanchez-Velasco*, and *James),* no abduction or death ride (as in *Adams, Parker,* and *Swafford*), no strangulation (as in *Adams, James,* and *Sanchez- Velasco),* no multiple wounding or beating (as in *Davis, Swafford,* and *Parker).* There were no torturous events and acts preceding the murder: The murder was committed by a single knife wound inflicted without warning while the victim was asleep, and the victim lost consciousness within 10 to 20 seconds. This case falls squarely within this Court's precedents holding that the HAC aggravator does not apply where a relatively quick murder is not preceded by torturous acts. *Elam, 636 So.* 2d at 1314; *Maggard, 399 So.* 2d at 977; *Gorham, 454 So.* 2d at 559; *Santos*, 591 So. 2d at 163.

Second, the state asserts that it is sufficient that "the victim is attacked in his or her own bed, as here, and stabbed or slashed, even where there was only one wound," citing *Rolling v. State, 695* So.2d 278 (Fla. 1997) and *Breedlove v. State,* 413 So. 2d 1 (Fla. 1982). (Brief of Petitioner at 19). However, both of those cases involved multiple knife wounds, as well as other circumstances showing that the crime was unnecessarily torturous to the victim and that the perpetrator intended to cause such unnecessary pain and suffering.

In *Rolling,* a serial killer murdered two college students after breaking into their apartment. The two young women were asleep in different rooms. After pausing to decide which of the two women he wanted to rape, Rolling attacked the first victim by stabbing her in the upper chest area

as she lay asleep. He then took a double strip of duct tape (which he had brought for the purpose) and placed it over her mouth to muffle her cries. Rolling then continued to stab her as she unsuccessfully attempted to fend off his blows, The victim was conscious for up to a minute and sustained several defensive wounds to her arms and leg. In upholding the trial court's finding of HAC, this Court explained that the victim suffered several defensive wounds as she struggled with her attacker, and cited several cases in which the victim was either strangled or repeatedly stabbed during the attack. The present case case does not involve multiple defensive wounds or other torturous acts before the single fatal knife wound, which was inflicted without warning and caused loss of consciousness within 10 to 20 seconds. As set forth above, there is only speculation to support the theory of a struggle. The medical examiner testified that the small abrasions on the child's shoulder and the small, superficial cuts in the area of the chin could have been made at the very same instant as the fatal knife wound, and she had no professional opinion as to what caused them. (R. 426, 433, 435-45, 450-51). Moreover, there was no evidence of the sadistic enjoyment of the victim's suffering *so* evident in *Rolling,* as well as in other cases relied upon by the state, such as *James, Parker,* and *Swafford.*

In *Breedlove,* the murder occurred during the course of a burglary, The victim was stabbed in the chest as he lay asleep in his bed, He also suffered defensive wounds on his hands, and drowned in his own blood as a result of the stab wound to the chest, which pierced his lung. 413 So. 2d at *8 -9 &* n. 12; *Breedlove* v. State, 655 So. 2d 74, 76 (Fla. 1995). "[A]lthough death resulted from a single stab wound, there was testimony that the victim suffered considerable pain and did not

die immediately." 413 So. 2d at 9.[3] This Court also found it significant that the victim had been attacked in bed, rather than in a public place. 413 So. 2d at 9; 655 So. 2d at 76. However, this Court did not suggest that that fact alone would have been sufficient to support a finding of HAC, in the absence of the considerable pain and suffering evidenced by the defensive wounds and the fact that the victim drowned in his own blood. It does not appear that this Court intended to lay aside the Dixon definition and to make every murder of a sleeping victim per se HAC. Indeed, in this Court's most recent opinion discussing Breedlove's case, it is the defensive wounds and the manner of death which are emphasized, not the fact that the victim was in bed. 655 So. 2d at 76.

The present case is clearly distinguishable. The evidence shows that the victim lost consciousness within seconds of the initiation of the attack as a result of the loss of blood. And this was not a case where the victim drowned, suffocated, or was strangled. The medical examiner testified in redeposition that although the child aspirated a "[m]inute amount" of blood, which would have been an irritant, she was "breathing fine" and did not drown in her own blood. (R. 518-20). Unlike in *Breedlove,* the child lost consciousness quickly and did not suffer defensive wounds. The murder was quick and unforewarned; it was not preceded by torturous acts and there was no evidence of intent to cause prolonged and unnecessary suffering. This was not the torturous murder to which the HAC aggravator applies. *Elam*; *Maggard*; *Santos*; *Burns.*

---

[3]In fact, although the opinion does not disclose these facts, the victim survived the initial stab wound to the point where he was able to leave the bedroom where the assault had occurred, go out of his house, and keep moving until he almost reached the street, where he collapsed and was later found dead by the police. (S.R. 941).

Per Se HAC Arguments: Use of a Knife -- State's Misstatement of the Holding in *Preston*

The state suggests that a finding of HAC may be upheld whenever death is caused by slashing the victim's throat. (Brief of Petitioner at 18). For that proposition, the state heavily relies on a misstatement of this Court's holding in *Preston v. State*, 444 So. 2d 939 (Fla. 1984). In its brief, the state recites, as if it were the holding of this Court, the following language from the trial court's order in *Preston:* "deliberate slashing of the throat of the victim from one side to the other with the force necessary to sever the jugular veins, trachea and main arteries is especially heinous, atrocious and cruel." (Brief of Petitioner at 18). However, that clearly was *not* the basis for upholding the finding of HAC, To the contrary, this Court's opinion makes clear that because the death was instantaneous or near-instantaneous, HAC would not apply, absent a showing of pain or suffering before infliction of the fatal wound. *Preston*, 444 So. 2d at 945.

In *Preston*, the night clerk of a convenience store was robbed and kidnapped during the early morning hours. She was taken to a field, where she was forced to walk at knifepoint for five hundred feet, forced to disrobe, and then murdered. (There were also numerous stab wounds, including injuries to the victim's breasts and vagina, inflicted after she lost consciousness.) This Court upheld the trial court's finding of HAC because, while the victim may have been killed instantaneously or near-instantaneously, she must have experienced great terror and fear during the series of events preceding the murder. *444 So.* 2d at *94546; Preston v. State, 607* So. 2d 404, 409-10 (Fla. 1992). It was those events -- the abduction followed by the forced walk at knifepoint through a dark field, "speculating as to her fate and undoubtedly cognizant of the likelihood of death at the hands of her abductor" -- not the fact that the murder was committed with a knife, which constituted the torturous acts required for a finding of HAC. 444 So. 2d at 945-46; 607 So. 2d at 409-10.

Similarly, each of the other cases cited by the state involved more than a single fatal knife wound to the neck followed by a rapid loss of consciousness. In each of those cases, the victim was either beaten, wounded numerous times, or abducted before being killed:

In *Ragsdale v. State,* 609 So. 2d 10 (Fla. 1992), the victim was badly beaten before his throat was cut. There was no rapid loss of consciousness: Although unable to talk, he was able, by moving his head to answer questions regarding the attack. He died en route to the hospital. In *Pittman v. State, 646* So. 2d 167 (Fla. 1994), both victims were stabbed numerous times. The throat of one of the victims was cut. This Court upheld the finding of HAC based on its previous holding that "numerous stab wounds will support a finding of this aggravator." 646 So. 2d at 173. In *Suggs* v. *State,* 644 So. 2d 64 (Fla. 1994), the victim was robbed, then taken to a secluded area where she was repeatedly stabbed in the neck and chest. There were three wounds to the neck which nearly severed her head. None of the wounds was instantly fatal and she would have felt the pain of each stab as she bled to death. She lived for several minutes. The whole incident was carefully planned, apparently with the assistance of a book entitled *Deal the First Deadly Blow.* In *Hooper v. State,* 476 So. 2d 1253 (Fla. 1985), the defendant murdered his sister-in-law and her nine-year-old daughter, and attempted to murder her twelve-year-old son. He first attacked the mother with a knife, stabbing and slashing her repeatedly. She had numerous defensive wounds; the fingers on one hand were almost severed from attempting to grab the knife. Her throat was slashed on each side, and there was also a third slash. Hooper then turned his attention to the daughter, who had witnessed the murder of her mother. He strangled her with a garrote made out of a dish towel; her neck had also been slashed. In *Hallman v. State, 305 So.* 2d 180, 1 81 (Fla. 1974), the defendant used a piece of broken glass to inflict multiple fatal cuts about the throat and neck of the victim and to slit her

throat. He then took the victim's money. In *Card* v. State, 453 So. 2d 17 (Fla. 1984), the defendant entered a Western Union office and attacked the clerk at knifepoint. She attempted to fend him off, and as a result her fingers on both hands were severely cut. Some of the fingers were almost completely severed from the hands. She was then taken eight miles to a secluded area, where the defendant cut her throat. 453 So. 2d at 22.

Unlike the present case, but like every other case cited by the state in its brief, these cases involved much more than a quick, sudden murder and rapid loss of consciousness. They do not stand for the proposition that a murder committed with a knife is *per se* HAC regardless of whether death occurred relatively quickly. If the death occurred fairly quickly, it is the events leading up to the murder, not the nature of the weapon used, which determine whether the HAC aggravator applies. *See Preston; see also Copeland v. State,* 457 So. 2d 1012, 1019 (Fla. 1984) (validity of WAC aggravator rests not on the actual method of killing but rather on the additional acts setting the crime apart from the norm of capital felonies). As stated in *James:*

> Although this Court also has explained that the HAC aggravator does not apply to most instantaneous deaths or to deaths that occur fairly quickly, fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.

22 Fla. L. Weekly at S225-26, *citing Wyatt* v. *State,* 641 So. 2d 1336 (Fla. 1994) *and Preston v. State,* 607 So. 2d 404 (Fla. 1992).

That the victim suffered great fear, emotional strain, and terror during the events leading up to the murder are facts that the state must prove, with competent, substantial evidence, not speculation. *Hartley, 686* So. 2d at 1323 ("Speculation that the victim *muy* have realized that the defendants intended more than a robbery when forcing the victim to drive to the field is insufficient

to support this aggravating factor."). Where, as here, the murder was sudden, unforewamed, and resulted in quick loss of consciousness, and there was no manifest intent to torture the victim, it is not HAC whether it was committed with a knife, *Wilson,* or a firearm, *Maggard*; *Santos*; *Porter; Cheshire,* or a brick, *Elam.*

The state's reliance, in pursuit of a *per* se HAC theory, on cases in which the death was caused by strangulation or suffocation *(e.g., James, Adams, Sanchez-Velasco, Breedlove)* is misplaced. The child was not strangled. Her death was not caused by choking or suffocation (the medical examiner testified that she was "breathing fine") but by the rapid loss of blood resulting from the knife wound. While both loss of blood and strangulation cause death by depriving the brain of oxygen, there is a significant difference in the distress experienced by a victim who is choked to death and one who dies as a result of cutting off the blood supply to the brain. See *Spitz and Fisher's Medicolegal Investigation of Death* at 448 (3rd ed. 1993). Moreover, in strangulation murders -- unlike in the present case, or in other cases where death is caused by a single, inevitably fatal wound, e.g., *Maggard*; *Mills* -- the perpetrator has full control over the victim's suffering during the entire ordeal, which might last for several minutes, or as long as the perpetrator desires. The sadistic enjoyment of the victim's suffering so often present in such murders is illustrated by cases such as *Hauser v. State,* 22 Fla. L. Weekly S595 (Fla. Sept. 18, 1997) and *James.* Hauser described in the following terms how he had strangled a woman he had lured to his room:

> I put only enough pressure so she could not scream. I wanted to watch the fear in her eyes. I let up so she could take a breath and just stared at her while she started to lose consciousness, then let her breathe again and said well this is it. 1 put as much pressure as I could and held it until she gave this shake and her body tensed up then went limp. To make sure she was dead I didn't let go for awhile.

22 Fla. L. Weekly at S595-96. Similarly, in *James* the murderer stared into the victim's eyes as he squeezed her neck so hard that bones were heard popping, and continued to stare into her eyes as her tongue and eyes bulged out. Following the strangulation, James further demonstrated his vicious intent by raping the child.

Facts like those of *Hauser* and *James* -- which are not present here -- show why strangulation murders are generally both torturous to the victim and give rise to an inference of torturous intent, so as to support a finding of HAC. See *Tompkins v. State, 502* So. 2d 415 (Fla. 1986). However, even strangulation murders are not per se HAC. Where the murder did not involve the suffering and the torturous intent usually associated with strangulation, the HAC aggravating circumstance does not apply. See *DeAngelo,* 616 So. 2d at 442-43 (although death was caused by both manual and ligature strangulation, which would have had to continue for five to ten minutes in order to kill the victim, and the murder was coldly planned rather than committed in an emotional frenzy or fit of rage, the trial court's refusal to find HAC was not error, where the victim may not have been conscious during the ordeal or may have rapidly lost consciousness); *Rhodes, 547 So.* 2d at 1208 (victim may have been semiconscious); *Herzog, 439 So.* 2d at 1380 (same).

Thus, no category of murder is *per* se HAC. Even strangulation murders must be analyzed within the framework set forth in *Dixon, Cheshire,* and their progeny, to determine whether the murder was intentionally torturous. In fact, the constitutional validity of the HAC aggravating circumstance depends on a consistent application of that framework. See *Sochor, 504* U.S. at 536-37. *In Proffitt v. Florida, 428* U.S. 242, 255-56 (1976), the United States Supreme Court upheld the HAC aggravating circumstance based on its understanding that, according to the definition given in Dixon, 238 So. 2d at 9, this circumstance applies only to "the conscienceless or pitiless crime which

is unnecessarily torturous to the victim." *Sochor*, 504 U.S. at 536.[4]

Here, as the trial court correctly recognized, horrible as the killing was, the evidence was insufficient to establish the torturous murder required for a finding of HAC under the framework established by this Court's precedents. (R. 196). This was a quick murder, committed by a single knife wound which was sure to be rapidly fatal, which was inflicted without warning, and which caused unconsciousness within seconds. There was no competent, substantial evidence that it was preceded by any torturous acts. It was committed in the heat of passion, and there was no evidence that the defendant intended to cause unecessary and prolonged suffering. These facts do not support a finding of HAC. *Elam*; *Gorham; Maggard*; *Jackson; Burns; Kearse*; *Cheshire; Porter; Santos.*

The court was not free to accept speculation as proof, *Hartley,* or to set aside the law established by this Court's precedents. After reviewing "scores of HAC cases," after carefully analyzing all the evidence, and after considering the arguments of counsel for both sides, the trial court followed the law. (R. 195-96). There was no error, and no departure from the essential requirements of law.

---

[4]Indeed, the Court also has held that the bare statutory language defining the HAC aggravating circumstance -- that the capital felony was "especially heinous, atrocious, or cruel," § 921.141(5)(h), Fla. Stat. -- is too vague and broad to satisfy the requirements of the Eighth Amendment, *Espinosa* v. *State, 505* U.S 1079 (1992), and that this constitutional infirmity is not cured by giving to the individual terms "heinous," "atrocious," and "cruel" meanings similar to those provided in Dixon and in Florida's Standard Jury Instruction, *Maynard v. Cartwright, 486* U.S. 356 (1988); *Shell v. Mississippi, 498* U.S. 1 (1990). In *Shell* the Court found unconstitutionally vague an instruction on HAC which, though otherwise identical to the Florida instruction, did not include the *Dixon* court's language limiting HAC to the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *See Breedlove,* 655 So. 2d at 76 n. 1. Obviously, it is the last sentence of the Dixon explanation which defines the meaning of HAC. That definition, and the case law construing it, should not be set aside lightly.

Standard for Instructing on an Aggravating Circumstance

The state suggests that the jury should be instructed on an aggravating circumstance whenever there is competent and credible evidence presented "in support" of it. (Brief of Petitioner at 16). That suggestion -- that aggravators must be submitted to the jury whenever there is any evidence adduced "in support" of them, regardless of whether that evidence is legally sufficient to support a finding -- is incorrect. To submit an aggravator to the jury where the evidence is legally insufficient to find that aggravator denies the defendant due process of law and his right to a fair and reliable capital sentencing proceeding, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, section 9 and 17 of the Florida Constitution.

As a matter of elementary due process -- whether the case be criminal or civil, and whether the matter to be decided is the imposition of the death penalty or the liability on a note -- a defendant is entitled to a verdict which is not based on speculation or conjecture, but on sufficient proof. This much is inherent in any requirement of a burden of proof.

Because the jury must not be permitted to draw inferences from insufficient data, it is not enough that the party with the burden of proof present some evidence "in support" of its position, the evidence presented must be legally sufficient to support a favorable verdict. See *Jackson v. Virginia, 443* U.S. 307,320 (1979) ("mere modicum" of evidence may satisfy relevancy requirement for admissibility but is plainly not enough to satisfy state's burden of proof in criminal case); *Anderson v. Liberty Lobby, Inc., 477* U.S. 242, 252 (1986) (in a "run-of-the-mill civil case" the "mere existence of a scintilla of evidence in support of the plaintiffs position will be insufficient" to overcome a motion for summary judgment or directed verdict; "there must be evidence on which the jury could reasonably find for the plaintiff "); McCormick on Evidence, § 338, at 433 & n. 1 (4th

ed. 1992) (a "scintilla" of evidence will not suffice to carry burden of production). As Judge Friendly observed *in United States v. Taylor, 464* F.2d 240,242 (2d Cir. 1972):

> It is of course fundamental of the jury trial guaranteed by the Constitution that the jury acts, not at large, but under the supervision of a judge. See Capital Traction Company v. Hof, 174 U.S. 1, 13-14, 19 S.Ct. 580, 43 L.Ed. 873 (1899). Before submitting the case to the jury, the judge must determine whether the proponent has adduced evidence sufficient to warrant a verdict in his favor.

464 F.2d at 242.

Where the evidence adduced is legally insufficient, the judge has not only the authority, but the duty, to take the case from the jury. Fla. R. Crim. P. 3.380 (a) ("If, at the close of the evidence for the state or at the close of all the evidence in the case, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the prosecuting attorney or the defendant shall, enter a judgment of acquittal."); *Hitchcock v. State,* 413 So. 2d 741, 746 (Fla. 1982) (trial courts should not reserve ruling on motions for judgment of acquittal presented at close of state's case); *McAllister v. Miami Daily* News, 17 So. 2d 613,614 (Fla. 1944) ("it is established law that where the manifest weight and probative force of the adduced evidence clearly requires a verdict for one party and the evidence is legally insufficient to support a verdict for the opposite party on the particular issue, it then becomes the duty of the trial court under the law to direct a verdict"); *Smith 's Bakery, Inc. v. Jernigan,* 134 So. 2d 519, 521 (Fla. 1st DCA 1961) ("it is elemental that at the trial the burden of proof rests on the plaintiff to establish by competent evidence each material fact essential to recovery and that upon failure to do so it is the duty of the trial court upon appropriate motion to take the case from the jury").

The state further suggests that the standard of proof is irrelevant to the question of whether

an aggravating circumstance may be presented to the jury. (See Brief of Petitioner at 16). This, too, is incorrect. "Implicit in the Court's recognition of varying burdens of proof is a concomitant duty on the judge to consider the applicable burden when deciding to send a case to the jury." *Taylor, 464* F.2d at 243. In a criminal proceeding, the case cannot be submitted to the jury unless the evidence presented is legally sufficient to sustain a verdict under the beyond-reasonable-doubt standard. See *Melendez* v. *State,* 498 So. 2d 1258, 1261 (Fla. 1986); *Jackson v. Virginia, 443* U. S. 307 (1979). The same principle, that in ruling upon the legal sufficiency of the evidence, the court must consider the standard of proof, also applies in civil cases. See *Anderson,* 477 U.S. at 252-53. In fact, the phrase "supported by competent substantial evidence" *means* that the evidence is sufficient to sustain a verdict under the applicable standard of proof. See *Melendez, 498 So.* 2d at 1261 ("[T]he jury's verdict is supported by competent substantial evidence. That is, a rational trier of fact could have found proof of guilt beyond a reasonable doubt.").

There is no reason that this principle should not apply in determining whether an aggravating circumstance should be submitted to the jury in the penalty phase of a capital case. In death penalty cases, higher, not lower, standards of due process and reliability apply. *See Mills v. Maryland, 486* U.S. 367, 376-77 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."); *Beck v. Alabama, 447* U.S. 625, 638 & n. **13** (1980) ("To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination."), *citing Gardner v. Florida, 430* U.S. 49 (1977); *Proffitt* v. *Wainwright,* 685 F.2d 1227, 1253 (1 lth Cir. 1982) ("Reliability in the factfinding aspect of

sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions.").

This Court has held that "aggravating circumstances must be proven beyond a reasonable doubt before they may properly be considered by judge or jury." *Atkins v. State, 452 So.* 2d 529, 532 (Fla. 1984); *State* v. Dixon, 283 So.2d 1, 9 (Fla. 1973). It cannot possibly be error, much less egregious error, to fail to instruct the jurors on an aggravator which cannot legally be found.

The state cites to *Hunter v. State, 660 So.* 2d *244,252* (Fla. 1995), *Banks v. State,* 22 Fla. L. Weekly S521 (Fla. Aug. *28,* 1997), and *Mordenti v. State,* 630 So. 2d 1080, 1085 (Fla. 1994), all of which hold that a judge should instruct a jury only on those aggravating circumstances for which credible and competent evidence has been presented, and that the judge's failure to find a particular aggravator in its sentencing decision does not mean that instructing on the aggravator was error. Those cases simply point out the familiar distinction between the court's role as factfinder at sentencing -- when it is the trial court's job to weigh the evidence and the credibility of witnesses, *see Willacy v. State,* 22 Fla. L. Weekly S219 (Fla. April 24, 1997) -- and its role in passing upon the legal sufficiency (rather than the weight and credibility) of the state's evidence in order to determine whether the matter should be submitted to the jury. They do not stand for the proposition that the determination of whether there is evidence to support an aggravator should be conducted without regard to the applicable standard of proof, much less that the sufficiency of the evidence has no bearing on whether an instruction should be given.

In any event, here, the evidence was insufficient under any standard of proof. Having, all the evidence before it, the trial court correctly concluded that the evidence did not support a finding of HAC, and properly ruled that this aggravator should not be submitted to the jury. There was no error and no departure from the essential requirements of law.

II.

THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW IN CONCLUDING THAT THE FELONY-MURDER AGGRAVATOR BASED ON KIDNAPPING DOES NOT APPLY IN THIS CASE.

After quarreling with Ms. Melendez at the bar, Mr. Chirinos returned to their apartment. He went into his bedroom, where the child was sleeping, and then came out again. (R. 378, 403). Several minutes later, the police and Ms. Melendez arrived at the apartment. (R. 337-38). Mr. Chirinos was standing outside. He ripped open his shirt, shouted something, then ran into the apartment and into the bedroom. (R. 232,309). Ms. Melendez and the officers were unable to hear what he said. (R. 232, 309). According to Mr. Cruz-Jimenez, Mr. Chirinos had shouted that Ms. Melendez would "cry tears of blood." (R. 379). He was talking to himself as he went into the bedroom. (R. 288,300).

The police did not rush after Mr. Chirinos. They did not perceive this to be an emergency situation. (R. 324). They had brought Ms. Melendez home so that she could pick up her child and her belongings. (R. 324,337). Officer Mendez let Ms. Melendez out of the police vehicle and they approached the apartment. (R. 3 10). Ms. Melendez went in and then invited Officer Mendez inside. (R. 3 10). According to Officer Mendez, they entered the apartment two to three minutes after seeing Mr. Chirinos run in. (R. 326).

Once inside the apartment, the officers and Ms. Melendez did not imediately proceed to the bedroom. First, Officer Mendez shone his flashlight on each of the two men who were sleeping in the living room, and asked Ms. Melendez if either one of them was the man involved in the dispute. (R. 3 11). "She said no to each of them." (R. 3 11). They then proceeded to the kitchen area, where

Ms. Melendez's mother and stepfather were sleeping. (R. 3 11). Officer Mendez pointed at the stepfather and asked if he was the man involved in the dispute. Ms. Melendez said he was not. (R. 311). Only then did they go to the bedroom.

The bedroom door was locked. They knocked on the door and told Mr. Chirinos to come out or to let them come in. (R. 3 12-13). They could hear him weeping. (R. 328; S.R. 79, 159). Ms. Melendez testified that because they could hear him weeping they thought he had done something to the child. (S.R. 79). Officer Mendez banged loudly on the door. (R. 314). Mr. Chirinos said "I am dead already, you might as well go ahead and kill me." (R. 3 15). He was crying as he said this. (R. 234,298). The officers radioed their supervising sergeant for permission to break down the door and then kicked in the bottom half of the door. (R. 289, 3 15-16). The entire proceeding at the door had taken about three minutes. (R. 348,364).

When the officers went in, the child was lying dead on the bed. (R. 341, 345, 361). She appeared to have been lying in that position for a while. (R. 349). The medical examiner testified that the wound would have caused unconsciousness within ten to twenty seconds and death within three to five minutes. (R. 457, 473, 488, 490; S.R. 106). She was killed while she was lying face down on the bed, in the same position as when she went to sleep. (R. 287, 418). There was no evidence that she had been awakened before the fatal knife wound was inflicted. (R. 446-48).

There was Insufficient Evidence of Confinement

To prove a kidnapping, the state had to establish that Mr. Chirinos confined the child and did so against her will. The kidnapping and false imprisonment statutes both provide that confinement of a child is against the child's will where "such confinement is without the consent of his parent or legal guardian." § 787.01 (l)(b), 787.02(1)(b), Fla. Stat. (1993). According to the state, the defendant

confined the child against her will by locking the door without the consent of the mother. However, because the child was asleep, and was asleep in the bedroom which the defendant, the child and her mother had been sharing for over two years, locking the door was not enough to effect a confinement since it did not actually impose any restraint upon the sleeping child and there was no showing that locking the door to their bedroom was something that Ms. Melendez did not permit him to do. There could be no confinement until Mr. Chirinos refused to open the door. There could also be no confmement if, as the evidence suggests, by the time he refused to open the door, the child was already dead. Because the state was unable to prove that the child was still alive when Ms. Melendez and the police came to the door, it could not prove a kidnapping, or that the murder had been committed in the course of a kidnapping.

The kidnapping and false imprisonment statutes are directed toward preventing the harm of actual restrictions on freedom of movement, and the distress which accompanies such involuntary constraint. See John L. Diamond, *Kidnapping: A Modern Definition,* 13 Am. J. Crim. L. 1, 31 (1985) ("it is the pain of confinement that creates a distinct harm worthy of the independent punishment for kidnapping"). There does not appear to be any case where locking of a door has been held to confine someone who remains asleep inside the room. Each of the cases relied upon by the state for the proposition that a confinement can occur in a bedroom or by locking a door, e.g., *Sanborn v. State,* 513 So. 2d 1380 (Fla. 3d DCA 1987); *Berry v. State,* 668 So. 2d 967 (Fla. 1996), involves victims who are awake. Since locking the door to a bedroom does not actually restrain the movement of someone who is sleeping, and obviously cannot cause any pain or distress, it cannot constitute a confmement, much less a confinement against the will of the sleeping person.

Moreover, since it was the defendant's own bedroom, which he shared with the child and her

mother, simply locking the door when the child was sleeping could not be presumed to have effected a nonconsensual confinement. Unlike in Gay ***v. State,*** 607 So. 2d 454,458 (Fla. 1st DCA 1992), in this case there is no indication that locking the door to his own bedroom was not within the degree of consent originally given by Ms. Melendez. This was a room he had been sharing with Ms. Melendez and the child for over two years. There was no ban on his being alone with the child in the bedroom. In fact, he often took care of her while Ms. Melendez was at work. Until Ms. Melendez actually was denied access to the child, locking the bedroom door could not constitute a confinement under the facts of this case. Before that time, neither the mother nor the child suffered the harm addressed by the kidnapping and false imprisonment statutes.

The state's argument that locking the door constituted a kidnapping because the defendant locked the door with the intent to commit murder and therefore "presumably" confined the child without her consent or that of her mother (Brief of Petitioner at 21 & n. 8), simply begs the question of whether locking the door actually confined the sleeping child. Locking the door had no significance until it either restrained the child's movements or denied access to the mother. If Mr. Chirinos had opened the door immediately when Ms. Melendez and the police came to the door, there could be no kidnapping or false imprisonment of the child sleeping within, regardless of how long, or with what purpose, the door had been locked before then.

Since it was the refusal to open the door which alone could effect a confinement on the facts of this case, the state could not prove a kidnapping, or a murder committed during the course of a kidnapping, unless it established that the child was still alive at the time that Ms. Melendez and the police came to the bedroom door. The evidence was insufficient to show that the child was still alive at that time; to the contrary, it strongly indicates that the murder had already taken place:

It took the officers and Ms. Melendez several minutes to get to the bedroom door after seeing Mr. Chirinos run into the apartment. In fact it took them two or three minutes to walk to the apartment and enter it. (R, 3 10). Once inside, they did not immediately go to the bedroom. Instead, Officer Mendez determined whether each of the two men in the living room and the man in the kitchen were involved in the dispute. (R. 3 11). Once they got to the bedroom door, the only sound they could hear within was that of Mr. Chirinos weeping and asking why Ms. Melendez had called the police, (R. 234,329; S.R. 79, 159). Because he was weeping, they thought that he had already done something to the child. (S.R. 79). When, three minutes later (R. 348, 364), they broke the door down, the child was already dead (R. 341, 345, 361). She was lying face down and appeared to have been in that position for a while. (R. 349). The knife wound would have resulted in death within three to five minutes. (R. 488; S.R. 106).

All of this evidence strongly suggests that the murder was committed before the police and Ms. Melendez got to the door, or even before they entered the apartment. There is no competent, substantial evidence proving the contrary. "[M]ere speculation derived from equivocal evidence or testimony" cannot be the basis for finding an aggravating circumstance. *Hardwick v. State, 521 So.* 2d 1071, 1075 (Fla. 1988).

In addition, Mr. Chirinos had arrived at the apartment some time before the police and Ms. Melendez and, during that time, had gone into the bedroom at least once according to Mr. Cruz-Jimenez, who was sleeping in the living room. (R. 378,403). The state argues that since Mr. Cruz-Jimenez did not see any blood on the defendant, the crime must have occurred after he went into the bedroom the second time. (Brief of Petitioner at 22-23). However, Mr. Cruz-Jimenez's failure to observe blood had no probative value because he was not in a position to observe it. The only blood

was on the defendant's palm, and Mr. Cruz-Jimenez, from his position on the bed in the living room could not possibly have seen it. Indeed, Officer Mendez, who actually grabbed Mr. Chirinos by the wrists and handcuffed him, did not observe any blood at that time. (R. 318, 329-30). It was only later, while the defendant was being questioned at the police station, that Officer Mendez saw the blood on his palm. (R. 320,330). Negative testimony -- that is, testimony that a fact does not exist -- has no probative value unless the witness had the opportunity to observe the fact and his attention was directed thereto, *Seaboard Air Line Ry. Co. v. Myrick*, 91 Fla. 918, 109 So. 193 (1926); *State* v. *Henderson*, 521 So. 2d 1113 (Fla. 1988); *Tyus v. Apalachicola Northern Ry. Co.*, 130 So. 2d 580, 585 (Fla. 1961); *Masker* v. *Smith*, 405 So. 2d 432,433 (Fla. 5th DCA 1981). Mr. Cruz-Jimenez's testimony that he failed to observe blood lacks probative value on both counts: he was not in a position to see it and he was not looking for it.

In any event, as set forth above, even if the crime occurred after Mr. Chirinos ran into the bedroom the second time, it could well have occurred immediately upon his entry into the bedroom, that is, several minutes before the police came to the bedroom door. There was no evidence to show that it did not. There was only speculation to support a finding of actual confinement. The trial court did not err in finding the evidence insufficient to support the kidnapping aggravator. See *Hardwick*, 521 So. 2d at 1075 (error to find that murder was committed during a kidnapping where there was no evidence that the victim was abducted and it was not clear whether the victim's hands had been tied or only held behind his back at the time he was shot).

Any Confinement was Incidental to the Murder

Assuming for the sake of argument that locking the door constituted the confinement against the will required by the statute, there was no evidence that it was anything but incidental to, or

inherent in, the murder, or that it had independent significance. Where, as here, the state alleges that the confinement was to facilitate another crime, it must establish that the confinement (a) was not slight, inconsequential and merely incidental to the other crime; (b) was not of the kind inherent in the nature of the other crime; and (c) had some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection. *Faison* v. *State,* 426 So. 2d 963 (Fla. 1983).

The state could not meet any of these requirements of *Faison*. Since the child was asleep, and the evidence was insufficient to prove that the murder did not occur before Ms. Melendez and the police came to the door, or even that it did not occur before the door was locked, the supposed confinement effected by locking the door was inconsequential, incidental, and without independent significance. *See Jenkins* v. *State,* 433 So. 2d 603 (Fla. 1st DCA 1983) (state failed to proved that confinement was not merely incidental to another felony, where the evidence was consistent with the supposition that the victim was murdered immediately); *see also Hardwick,* 521 So. 2d at 1075-76 (error to find that murder was committed during a kidnapping where evidence that victim had been bound was equivocal).

The state argues that the defendant probably would not have had time to kill the child, if the police had "been able to get into the room immediately" after they came to the door. (Brief of Petitioner at 25). This is not only speculative, it is contrary to the evidence. The police did not rush after the defendant when they saw him go into the apartment. It took them several minutes even to get to the bedroom door. The evidence indicates that by that time the murder had already taken place: there was no sound from the room other than the defendant weeping; when the door was broken down, three minutes after they began knocking, the child was already dead; she appeared to

have been dead for a while, and it would have taken three to five minutes for death to occur. Moreover, contrary to the state's argument, the sturdiness of the door could not prove that the confinement made it substantially easier to commit the murder, if the murder had already occurred.

And even assuming *arguendo* that the state could establish (which it could not) that the murder occurred after Ms. Melendez came to the door, such momentary confinement, which could only have lasted seconds and would have completely coincided with the murder itself, was inherent in the nature of the crime of murder. ***See Friend*** v. State, 385 So. 2d 696 (Fla. 1st DCA 1980) (confinement effected by ordering office employees into bathroom and shutting the door "was of minimal duration, without significant asportation or movement, and did not significantly lessen the risk of detection or make the robbery substantially easier to complete than would any alternative forcible restraint essential to the commission of a robbery").

The state also asserts that it does not matter whether the supposed confinement was incidental to the murder because the state also alleged that the defendant's intent was to inflict bodily harm or to terrorize, and, under ***Bedford*** v. Slate, 589 So. 2d 245, 25 1 (Fla. 1991), the test of *Faison* only applies when the alleged intent is that of committing or facilitating the commission of a felony. (Brief of Petitioner at 23). However, the circumstances of ***Bedford*** were very different from those of this case, and the state's interpretation of its holding is much too broad.

In *Bedford*, the defendant admitted that he planned to kidnap the victim for the purpose of scaring her. As the victim was being transported to the Everglades, she asked if she was going to be killed and began to struggle. Her body was found bound and there was evidence that she sustained numerous injuries to her head and legs prior to her death. Under these circumstances, the evidence showed that the defendant forcibly abducted and confined the victim against her will and

did so with the specific intent to do bodily harm or to terrorize her, and the *Faison* test had no application. This Court did not hold, however, that the requirements of *Fuison* do not apply whenever the crime can be characterized as committed with the intent to do bodily harm or to terrorize. Such a holding would render the *Faison* test meaningless because any forcible felony can be so characterized.

The *Faison* test reflects a determination that the legislature did not intend to punish as a kidnapping every criminal transaction "which inherently involves the unlawful confinement of another person, such as robbery or sexual battery." *Berry v. State*, 668 So. 2d 967,969 (Fla. 1996), *quoting Mobley* v. Slate, 409 So. 2d 103 1, 1034 (Fla. 1982). However, every such forcible crime can readily be characterized as committed with the intent to do bodily harm or to terrorize. It is not possible to commit a robbery without both confining the victim and putting him in fear. A battery rarely occurs without confinement and intent to do bodily harm. Such crimes always come within the literal terms of both section 787.01(1)(a)2 and section 787.01(1) (a)3. The *Faison* test would serve no purpose if it could be avoided by the simple device of recharacterizing the crime as a confinement committed with the intent to do bodily harm or to terrorize.

The *Bedford* case did not turn on such a recharacterization of the defendant's intent. Quite apart from whether he intended to eventually murder the victim, Bedford clearly, and admittedly, had abducted her for the purpose of terrorizing her. In such a case, there could be no occasion to consider whether the confinement was incidental to the murder; the concerns addressed by the *Faison* test simply did not arise.

By contrast, in the present case, any intent to do bodily harm or to terrorize was inseparable from the commission of the murder. Indeed, the state's whole argument that the defendant intended

to do bodily harm or to terrorize boils down to the assertion that the murder was motivated by his anger against Ms. Melendez and that the murder obviously caused bodily harm to the child. (See Brief of Petitioner at 21-22). The inference that the defendant intended to do bodily harm or to terrorize depends on the fact that he actually committed the forcible felony of murder. This is exactly the type of case which gives rise to the concerns addressed in *Fuison.* As set forth above, the state could not satisfy the requirements of the *Faison* test: Since the child was asleep, the locking of the door could have no independent significance, or be anything other than incidental to the murder, unless the murder was committed after the police and Ms. Melendez came to the door. This is precisely what the state was unable to prove.

Confinement which is Incidental to the Murder is not an Aggravating Circumstance

The *Faison* test was adopted because a literal interpretation of the kidnapping statute would transform into a technical kidnapping any crime which inherently involves confinement of the victim, and would lead to cumulative, or enhanced, punishment in circumstances not intended by the Legislature. See *Berry, 668 So.* 2d at 969. As numerous courts and commentators have recognized, without some such limitation upon its scope a kidnapping statute which applies to any confinement invites serious injustice by permitting the "inherent inequity" of prosecuting for kidnapping "those who in reality committed lesser or different offenses," and would otherwise be subject to less severe penalties. See, e.g., Government *of* Virgin *Islands v. Berry, 604* F.2d 221,226 (3d Cir. 1979). Among the worst forms of abusive prosecution for kidnapping is the use of this means to secure a death sentence for behavior that otherwise would not subject the defendant to such a penalty. Model Penal Code § 212.1, Comments (Tent. Draft No. 11, 1960).

The reasons for the *Faison* test apply with redoubled force when a supposed confinement is

used to justify the death penalty. Where confinement is merely incidental to the commission of the murder, such confinement cannot be the basis for finding the aggravating circumstance that the murder was committed during a kidnapping. *See Hardwick,* 521 So. 2d at 1075-76.

To avoid arbitrary and capricious punishment, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."' *Zant* v. *Stephens, 462* U.S. 862,877 (1983); *Lowenfield v. Phelps, 484* U.S. *23* 1,244 (1988); *Porter v. State,* 564 So. 2d 1060, 1063, 1064. A circumstance that is "incidental" to the murder, inherent in it, or without independent significance cannot serve this function. Such a circumstance obviously fails to "genuinely narrow" the class of those eligible for the death penalty and provides no principled basis for imposing a more severe sentence.

The trial court correctly concluded that the evidence was insufficient to support the felony-murder aggravator based on kidnapping, and properly ruled that this aggravator should not be submitted to the jury. There was no error and no departure from the essential requirements of law.

CONCLUSION

Based on the foregoing argument and authorities, the respondent requests this Court to deny the petition for discretionary review.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33 125
(305) 545-195s

By: Louis Campbell
Louis Campbell
Assistant Public Defender
Florida Bar No. 0833320

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to Assistant Attorney General RANDALL SUTTON, Office of the Attorney General, 444 Brickell Ave., Suite 950, Miami, Florida 33131 this 21st day of January 1998.

Louis Campbell
Louis Campbell
Assistant Public Defender