IN THE FLORIDA SUPREME COURT

CURTIS W. BEASLEY,

Appellant,

vs. Appeal No. 93,310

STATE OF FLORIDA,

Appellee.
_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

Amended
INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The record on appeal consists of 29 volumes. The citations to the record in this Brief will use the Arabic numeral as opposed to the Roman numeral. Documents supplied by the clerk, pretrial hearings, and all matters pertaining to sentencing are contained in Volumes 1 through 4, and are numbered pages 1 thru 653. This portion of the record will be referenced by the letter " R" in this Brief. The trial transcripts are contained in Volumes 5 through 29, and are numbered pages 1-4260. This portion of the record will be referenced as "T" in the brief. The two volume supplement will be referenced a "S". The Appellant, Curtis W. Beasley, will be referred to as Appellant or Curtis.

The type font used in this brief is 14 point New Times Roman.

STATEMENT OF THE CASE

Appellant, Curtis Wilkie Beasley, was Indicted on February 1, 1996 by the Grand Jury for the Tenth Judicial Circuit, Polk County, Florida, for the First Degree Murder of Carolyn Monfort. (Vol.1,R3-6) Appellant was also charged with Robbery with a Weapon and Theft of a Motor Vehicle. (Vol.1,R4) The Indictment alleged that the crimes occured between August 21 and 24, 1995. (Vol.1,R3-6) A Notice of Intent to Seek the Death Penalty was filed on February 15, 1996. (Vol.1,R16)

Appellant was initially represented by attorney Ed Leinster of Orlando. Leinster withdrew at the State's suggestion of conflict and the Public Defender was appointed. (Vol.1,R17;20-28;63-64;86-90) The Public Defender withdrew due to conflict and undersigned counsel was appointed to represent Appellant. (Vol.1,R112-114) Co-counsel, Byron Hileman, was also appointed. (Vol.1,R135-136)

Numerous pre-trial motions were filed with respect to the death penalty and jury selection, as well as a motion to Exclude DNA Evidence. (Vol.2,R176-336) The State filed a Motion in Limine and a Motion for Disclosure of Psychological Evaluation After the Guilt Phase. (Vol.2,R337-339) Hearings on the motions were held with the Honorable Cecelia Moore, Circuit Judge, presiding. (Vol.2,R195-263)

The court denied the Motion to Exclude DNA Evidence. (Vol.2,R197-

198;Vol.3,R343) A substantial hearing was held in another case regarding the statistical calculations with respect to the DNA test results and judicial notice was taken of that hearing in this case. (Vol.2,R197) The hearing is transcribed in Volume 2 of the supplement. The motions relating to jury peremptories were denied without prejudice. (Vol.2,R210,216; Vol.3,R345-348); The motions relating to the death penalty were denied (Vol.2,R219-224;Vol.3,R397-412) The State's Motion in Limine was granted. (Vol.3,R414)

Appellant was tried by a jury from January 26 through February 18, 1998, with the Honorable Cecelia Moore, Circuit Judge, presiding. (Vol. 4 through 29) On February 18, 1998 the jury returned a verdict of guilty as charged. (Vol. 3,R455-456)

The penalty phase of the trial was conducted on February 25 through February 26, 1998 with the Honorable Cecelia Moore, Circuit Judge, presiding. (Vol.27-29) The jury recommended a sentence of death by a vote of 10-2. (Vol.29,T4145-4147)

A Spencer hearing was held on April 20, 1998. Dr. Henry Dee and Dr. Thomas McClane testified for Appellant. (Vol.3,R457-513;Vol.4,R514-527)

Sentencing memorandums were filed by both the State and Appellant. (Vol.4,R528-588) The sentencing hearing in this case was held on May 22, 1998. (Vol.4,R590) The court found the following aggravating factors: murder committed in the course of a felony- robbery (little weight); murder committed for financial gain

(merged with the felony murder aggravator), and the murder was especially heinous, atrocious, or cruel (given very great wieght). No statutory mitigating factors were found. The following non-statutory mitigating factors were considered by the court as statutory mitigating factors by virtue of statutory changes: failure to complete college and failed marriage (little weight); good manners and good personality (little weight); good son (little weight); good student, athlete, and active in extracurricular activities in school (little weight); good citizen, military service (some weight); good worker (some weight); good friend (little weight); good brother (little weight); good musician (little weight); church participation (little weight); substance abuse disorder (some weight); suicide of friend (little weight); poor/rural background (not found); self-sufficient, self-reliant (little weight); financial responsibility in general (little weight); periodic financial instablility due to drug use (little weight); no criminal convictions for violent crimes (some weight); maintains contact with children and grandchildren (some weight); alcohol problem for two years following divorce (little weight). Nonstatutory mitigation was not found with respect to the death of Appellant's father and residual doubt. (Vol.4,R604) Psychological mitigating factors were found to not meet the level of statutory mitigation, but were found to constitute nonstatutory mitigation and given some weight. (Vol.4,R605) Mitigating factors presented at the Spencer hearing relating to Appellant's ability to live satisfactorily in prison were found to be

nonstatutory mitigation and given little weight. (Vol.4,R606) Remorse was not found based on the fact that Appellant maintained his innocence. (Vol.4,R606-607) Post-incident behavior, including behavior while incarcerated was found to be nonstatutory mitigation and was given some weight. (Vol.4,R607-608) A continuing claim of innocence was rejected as a mitigating factor. (Vol.4,R608)

The court found that the aggravating factors far outweighed the mitigating factors and sentenced Appellant to death. (Vol.4,R609) A written sentencing order was also filed at the time of sentencing. (Vol.4,R617-623)

On May 27, 1998, Appellant was sentenced to fifteen years in prison on the Robbery with a Weapon, and five years on the Theft of a Motor Vehicle, to run concurrent with the sentence of death. (Vol.4,R634;639-645)

A timely Notice of Appeal was filed on June 18, 1998. (Vol.4,R646)

STATEMENT OF THE FACTS

Jane O'Toole is the daughter of the decedent, Carolyn Monfort. (Vol.20,T2602) In late August, Jane became concerned because she had not spoken to her mother for several days despite repeated attempts and messages left on her mother's voice mail. (Vol.20,T2623-2615) Jane had last seen and spoken with Mrs. Monfort on August 21, 1995. (Volume 20, T2625) Jane also called Curtis' mother to see if she might know where Curtis was so that Jane could contact Curtis to see if he knew where her mother was. (Vol.20,T2629) Curtis' mother had not heard from him in awhile. (Vol.20,T2628)

On Thursday, August 24th, Jane drove to her mother's home in Dundee. (Volume 20, T2625). When she arrived, she found the garage closed and several newspapers lying outside. (Vol.20,T2618) The doors were locked. (Vol.20,T2618) Jane let herself in with a key. Once inside the house she called for her mother, but got no answer. Jane walked through the house and found it to be immaculate with nothing out of place. Being thirsty, she headed toward the laundry room to get a coke from the garage. (Vol.20,T2618)

When Jane got to the laundry room she opened the door slightly and saw her mother's head lying on the floor. (Vol.20,T2618) She ran screaming from the house and went to a neighbor's house. (Vol. 20,T2624) The police; Jane's husband, Neal

O'Toole; and other family members were called. (Vol.20,T2625)

Jane O'Toole knew Appellant, Curtis Beasley. She had known him since high school. She had been previously married to Byron Hunt, a good friend of Appellant. (Vol.20,T2608) Curtis had been staying with Mrs. Monfort at her home, while he did some work for Mrs. Monfort and Neal O'Toole. (Vol.20,T2609) On August 21st, after speaking with her mother, Jane had driven over to her mother's house around noon and got Curtis to help her move some of her grandmother's furniture. (Vol.20,T2611) While they were moving the furniture, Curtis mentioned that he was going to be leaving soon to go to Alabama. (Vol.20,T2631) Curtis asked Jane what he could give Mrs. Monfort as a gift to show his appreciation for her letting him stay at the house. (Vol.20,T2631) Curtis also asked Jane if she could pay him for the work he had done for her husband, but Jane said Neal would pay him later. (Vol.20,T2613) Jane had never seen Curtis drive her mother's car. (Vol.20,T2630) In August, Curtis did not have a beard. (Vol.20,T2636)

According to the witnessess who testified at trial, Mrs. Monfort was last seen on August 21, 1995. Jackie Ferguson cleaned Mrs. Monfort's house on August 21st. (Vol.17,T2078) She had been cleaning for Mrs. Monfort for three years. (Vol.17,T2078) Jackie saw Curtis and Mrs. Monfort at the house when she cleaned on August 21st. (Vol.17,T2080) Curtis was watching T.V. when she arrived, and Mrs.

Monfort arrived a short time later. (Vol.17,T2083) After talking to her daughter on the phone, Mrs. Monfort and Curtis left. Mrs. Monfort was driving Curtis to work in her car. (Vol.17,T2083) According to Jackie, Curtis was wearing a blue knit pullover shirt. (Vol.17,T2083) Mrs. Monfort had on a three piece pantsuit with a solid brown top, a light colored jacket, and striped pants. (Vol.17,T2084) Mrs. Monfort was wearing the solid brown top and the striped pants when her body was dicovered. (Vol.17,T2084)

Jackie was still at the house when Mrs. Monfort returned around 10:30 A.M. .(Vol.17,T2085) Jackie left the house around 11:30 A.M.. (Vol.17,T2086) Jackie cleaned the bedroom in which Curtis was staying. She did not do laundry that day. She noticed there was a shirt lying on the little chest at the foot of the guest bed, and that there was a pair of boots in the laundry room. (Vol.17,T2088) Jackie testified that Exhibit 168 could have been the shirt on the chest. (Vol.17,T2099) Jackie did not make any food items that day and none were delivered while she was there. (Vol.17,T2090)

Mrs. Monfort worked for Colony Homes. (Vol.17,T2106) According to the office manager, Rebecca Hansford, and the Vice-president, Rob Goodwin, Mrs. Monfort attended a weekly office meeting during the morning of August 21st. (Vol.17,T2110)

Tomas Rosario called Mrs. Monfort on August 21st to rent an apartment from her .(Vol.17,T2133) Mr. Rosario and his wife met Mrs. Monfort at the apartment at around 2:00 P.M. (Vol.17,T2133-34) Although work was being done at the apartment, Mrs. Monfort promised Mr. Rosario that it would be ready to live in soon, so Mr. Rosario said he would rent it. (Vol.17.T2135) Mr. Rosario and Mrs. Monfort made arrangements to meet back at the aparment at 5:00 P.M., so he could give her $800. The rent was $400, and the other $400 was for a deposit. (Vol.17,T2136)

Mr. Rosario returned to the apartment at 5:00 P.M. (Vol.17,T2137) He waited a short time for Mrs. Monfort to arrive. (Vol.17,T2138) While he waited, he looked in the apartment and saw a lady and two men inside. One of the men was painting and the lady and the other man were cleaning. (Vol.17,T2138)

When Mrs. Monfort arrived, she and Mr. Rosario met by her car. (Vol.17,T21390) Mr. Rosario gave her eight $100 bills, and she gave him a receipt. (Vol.17,T2139) Mr. Rosario also decided to buy some bedroom furniture from Mrs. Monfort. While they were exchanging the money, the men from inside the apartment came outside. One of the men appeared to have blood on his leg. (Vol.17,T2142-2146) The man put his leg on the bumper of a nearby truck and was trying to bandage it. (Vol.17,T2182) The other man came out of the apartment and walked to a car. (Vol.17,T2187) He said "Hello" to Mrs. Monfort. (Vol.17,T2197) One of the men

was big, with a beard and a bald spot on the top of his head, and the other was smaller and skinny. (Vol.17,T2216) There was also a third man in another apartment. He was short and skinny. (Vol.17,T2218)

Mr. Rosario found out Mrs. Monfort had been killed when he went to the apartment to get his furniture, and discovered the police there. (Vol.17,R2147-2158) Mr. Rosario told the police about the three men, but he was never asked to try to identify them from pictures or anything. (Vol.17,T2222) He never identified Curtis as being one of the men at the apartment.

Crime Scene Technician Laurie Ward of the Polk County Sheriff's Office and Detective Ann Cash directed the processing of the crime scene at Mrs. Monfort's residence. Ward arrived at the house around 10:50 A.M. on August 24th. (Vol.21,T2653) Ward had twelve years experience in crime scene work. She acknowledged the importance of preserving the crime scene and properly collecting the evidence, so as to ensure a proper chain of custody and to ensure the reliability of the evidence collected. (Vol.22,T2921-2933) Ward was assisted by Susan Smithkey. They spent around 10 hours processing this scene. (Vol.22,T2933;Vol.25,T3535)

Ward collected a newspaper from a coffee table with a phone number written on it. (Vol.21,T2672) Mrs. Monfort's car was missing from the garage, and there was no sign of forced entry.

Mrs. Monfort's house had two bedrooms. According to Ward, both bedrooms should have been thoroughly searched. (Vol.22,T2954) In the guest, or second bedroom, she collected cigarettes and buisness cards belonging to Curtis from a nightstand beside the bed, and a shaving kit and shaving creme from the adjoining bathroom. (Vol.21,T2692) The carpeting in this bedroom was white, new, and not dirty.(Vol.22,T2953) Ward observed no blood in this room, including none on the carpet. (Vol.22,T2953) Ward and Smithkey did not look under the bed. (Vol.22,T2959;Vol.25,T3537)

Ward found suspected blood on a dining room wall, a table, and a china cabinet which was adjacent to the laundry room. (Vol.21,T2697) The laundry room where Mrs. Monfort was found had a large amount of blood on the floor and walls. (Vol.21,T2704) Ward collected a pair of sneakers from the floor. She also collected a broken-off hammer head and a broken hammer handle. (Vol.21,T2705) The two hammer pieces were later determined to belong together. (Vol. 21,T2871) A towel was lying by Mrs. Monfort's head and the hammer head was inside the towel. The towel appeared to have been damaged by the hammer. (Vol.21,T2709) A drinking glass with a lime inside it and a folded napkin under it was found by Mrs. Monfort's feet.(Vol.21,T2710) Mrs. Monfort's purse was also in the laundry room. (Vol.21,T2766) Hairs were also collected from the laundry room.

On cross, Ward acknowledged that the crime scene photos showed a laundry basket with items in it on top of the appliances in the laundry room. (Vol.22,T2966) She did not collect the contents of the laundry basket, or inventory them. (Vol.22,T2968) Smithkey did not process the laundry basket either. (Vol.25,T3543) At the end of the crime scene work, Ward released the house to the family that night. (Vol.22,2969)

Detective Cash testified that as part of the investigation she obtained Mrs. Monfort's phone records. Michael Psalmonds, a security officer with GTE, identified both Mrs. Monfort's phone number and that of Neal O'Toole. (Vol.19,T2536) Psalmonds testified that on the night of August 21 there were 7 calls to the United Kingdom. (Vol.19,T2538) At 4:37 P.M. a call was placed to the O'Toole home. At 4:30 P.M., 5:00 P.M., and 5:08 P.M. phone calls were placed to O'Toole's office. (Vol.19,T2538-40) At 6:58 P.M. and 7:01 P.M. there were two phone calls placed to an Orlando number. (Vol.19,T2541) Four other calls to Orlando numbers, including Ed Leinster, were placed between 4:50 P.M. and 5:13 P.M. (Vol.19,T2421,2542)

James "Bud" Stalnaker, Jr. , Mrs. Monfort's son, is a banker living in Zephyrhills. (Vol.24,T3309) After finding out about his mother's death, Bud arranged to be present at her house on August 25th. (Vol.24,T3311) Bud, Bud's wife, and Neal O'Toole met at the house to inventory the contents. They had planned to meet

Detective Cash there as well. (Vol.24,T3311)

Bud did not have a key, so he and his wife waited a few moments for Neal to arrive. The three then went into the the living room of the house. After talking a few moments, Neal left to go get some boxes that they would need for packing. (Vo l.24,T3310) While Bud and the others were there, a cleaning crew, which the family had hired, arrived and began to work in the laundry room. (Vol.24,T3335)

Bud did not go into the laundry room. He began to search the bedrooms for valuables.(Vol.24,T3314) In the guest bedroom he found a pair of sneakers under the bed and a balled up shirt. (Vol.24,T3315) Suspecting it was important evidence, Bud called Neal on the mobile phone. (Vol.24,T3316) Neal told him to leave the shirt alone, and that he and the Detective were coming. (Vol.24,T3316) Bud denied placing the shirt under the bed. (Vol.24,T2317)

Detective Cash confirmed that she had prior arrangements to meet the family on August 25th. (Vol.24,T3343) The plan was that the family would call her when they arrived at the house, because her office was only a few minutes away. She received a call from Neal O'Toole who told her that they had found something that "she might need as evidence". (Vol.24,T3384)

When Cash arrived at the house she saw Bud, his wife, Neal, and the cleaning crew. (Vol.24, T3343) She could hear talking in the laundry room area and assumed

it was the cleaners. (Vol.24,T3378) Cash went into the second bedroom and looked under the bed. (Vol.24,T3344) She saw shoes and a balled up shirt. (Vol.24,T3344-3349) She removed the shirt and discovered apparent blood on it. (Vol.24,T3349) She packaged both items. (Vol.24,T3350)

Cash ordered no testing on the carpet where the shirt was found, and performed no tests to detect the presence of blood on the carpet. (Vol.24,T3999-3401) The carpet was white, and she did not see any blood. (Vol.24,T3401)

Although Cash denied looking under the bed on August 24th, she had directed the crime scene technicans to recover some small pieces of copper wire. She had observed the small pieces of wire in the carpet right next to the bed. (Vol.24,T3406)

Laurie Ward later learned about the shirt that was found at the scene by Mrs. Monfort's family on August 25th.. (Vol.22,T2973) This was very embarrassing and she believed that this was the only time in her experience that an important item of evidence had been apparently missed by law enforcement and then discovered by the victim's family. (Vol.22,T2975) Thomas Brown, a crime scene supervisor, was also at the crime scene when it was first processed on August 24th, and he did not find the shirt. (Vol.24,T3300-3305) He could not vouch for the reliabiltiy of the scene once it is released by the Sheriff's Office. (Vol.24,T3307)

Bud also found that several items of personal jewelry were missing.

(Vol.21,T3331)

He also found a bank bag with less than $100 in it under the mattress in Mrs. Monfort's room.

Neal O'Toole testified that Mrs. Monfort was his mother-in-law. (Vol.25,T3468) Mr. O'Toole is an attorney in Bartow, but also had real estate interests that Mrs. Monfort managed for him. (Vol.25,3469) Mr. O'Toole described Mrs. Monfort's drinking habits to the extent that he was familiar with them. According to O'Toole, Mrs. Monfort always had a drink, a vodka tonic, after work. (Vol.25,T3472) She would always use a small napkin around the glass. (Vol.25,T3472) It was not at all unusual for Mrs. Monfort to carry her drink in the car with her, or if she was visisting the O 'Toole family in Bartow, to fix herself a drink for the road and take it with her. (Vol.25,T3473) Mrs. Monfort would drink red wine with dinner. She would occasionally have a vodka drink after dinner. (Vol.25,T3473) Mr. O'Toole was not often with Mrs. Monfort in the evenings, so he could not say if she drank at home in the evening. (Vol.25,T3471)

Dr. Alexander Melamud performed the autopsy on Mrs. Monfort. (Vol.25,T3432) He observed four lacerations on the back of her head and abrasions behind her left ear. (Vol.25,T3428) He noted bruising on the rear of both her arms and noted that the backs of both hands had lacerations and bruising, which indicated

defensive wounds. (Vol.24,T3428;3421) The left temporal bone had a fracture that formed a figure 8 pattern. (Vol.25,T3432) The fracture matched the diameter of the hammer head. (Vol.25,T3432) The left half of the face and head were severly injured. (Vol.25,T3433) There was a laceration that extended from the top of the head to the mouth, a big bruise, and a laceration on the left ear. There were bruises on both eyes, right cheek, and a laceration on the forehead. (Vol.25,T3434) There was a fracture of the cheek and jaw. (Vol.25,T3434) In total, Dr. Melamud estimated that Mrs. Monfort had been struck with a blunt object between 15 and 17 times. (Vol.25,T3453) The blows caused lacerations and hemmoraghing in the brain. (Vol.25,T3453) These injuries were caused by blunt trauma. (Vol.25,T3429)

In Dr. Melamud's opinion, all of the injuries were inflicted before death. (Vol.25,T3434) Dr. Melamud could not determine the order of the blows. (Vol.25,T3456) He could not tell precisely when death occured. (Vol.25,T3461)

Dr. Melamud found aproximately 50cc of semi-digested food in the stomach.(Vol.25,T3457) He was able to identify rice and some type of meat. (Vol.25,T3458) The average time to digest food is 2 to 4 hours. (Vol.25,T3458) Mrs. Monfort's blood alcohol level was .054, although this could be caused by alcohol and decomposition combined. (Vol.25,T3460) That alcohol level would equal about three drinks. (Vol.25,T3465)

Gloria Malcolm lives in Miami. (Vol.18,T2370) She has known Curtis a long time. (Vol.18,T2371) On August 22nd, she received a call from Curtis at her job. (Vol.18,T2372) Curtis said that he had arrived in Miami by bus, that all his luggage had been lost by the bus company, including his traveler's checks, and that he had no money. (Vol.18,T2373) Gloria picked Curtis up and took him to her home. (Vol.18,T2373-4) It had been almost a year since she had heard from him. (Vol.18,T2374) Curtis said he had come there for a vacation. (Vol.18,T2383) Curtis never got his clothes back from the bus company, nor did he receive any compensation. He did say that a check for the lost traveler's checks had been sent to his mother by mistake and that she had sent it to him through Federal Express, but that it never came. (Vol.18,T2384)

When Curtis arrived in Miami he was wearing a bright colored shirt, jeans, and dress shoes. (Vol.18,T2374) The clothes looked new. He had no luggage. (Vol.18,T2376) Curtis stayed with her about a week. At that time Gloria's husband, Harold Malcolm, was incarcerated in a halfway house. (Vol.18,T2379)

Curtis then went to stay at Gloria's mother- in- law's house. (Vol.18,T2380) Her mother-in-law, Mrs. Mary Bennis, was going out of town, so Curtis was going to paint her house while she was gone. (Vol.18,T2382) Curtis had keys to the house and used Mrs. Bennis' car. (Vol.18,T2381)

Harold Malcolm confirmed that he was in a halfway house when Curtis came to Miami. (Vol.19,T2397) He had known Curtis for fifteen years. (Vol.19,T2400) They had lived together for awhile in the early 80's, and had a mutual friend named Ed Leinster, an attorney. (Vol.19,T2403) Harold thought it had been three years since he had talked to Curtis. (Vol.19,T2405) Curtis told Harold that he had been in Ft. Myers. Curtis also said that he decided to come to Miami and that his clothes and wallet were lost on the bus. (Vol.19,T2404-5)

In October 1995, Harold and Curtis had a disagreement. (Vol.19,T2408) Harold beat up Curtis, and Curtis left Miami. (Vol.19,T2410) After Curtis left, Harold learned that there was a large telephone bill at his mother's house. (Vol.19,T2411) According to Bell South records, beginning on September 6, 1995 there were numerous phone calls from Mrs. Bennis' phone to the United Kingdom, which totalled $301.72. (Vol.19,T2356-2357) There were also calls to Michael Thomas, Carol Negoshian, George Murphy, and Mr. Vickers. (Vol.18,T2359 -2364)

John Holmes is an attorney in Orlando. (Vol.19,T2425) He had shared office space with Ed Leinster, and knew Curtis through Ed. (Vol.19,T2427) He received a phone call in August 1995 from Curtis asking him for Ed's home phone number but Holmes would not give it to Curtis. (Vol.19,T2434) A call to Holmes was made at 5:02 P.M. on August 21st from Mrs. Monfort's home. (Vol.18,T2542)

Ed Leinster testified that he is an attorney in Orlando. (Vol.19,T2547) He knew Curtis socially in the 1980's. (Vol.19,T2546) In August 1995 he was staying at Pine Island for three weeks. (Vol. 19,T2347) He made many collect calls back to the office during that stay. (Vol.19,T2547)

Telephone records indicated that there were 25 collect calls made to Leinster's office number between August 17th and 21st. There were 7 collect calls from Pine Island on August 21st. (Vol.19, T2419-2423) There were three calls to Leinster's office from Mrs. Monfort's house on August 21st between 4:30 P.M. and 5:08 P.M.. (Vol.19,T2542)

Michael Thomas testified that Curtis had been married to his wife's sister. (Vol.19,T2441) Thomas and his wife live at 1220 Poinsietta in Orlando. (Vol.19,T2441) He did not recall any phone calls from Curtis in August 1995, and he thought it had been 15 years since they had spoken. (Vol.19,T2443) Phone records reflected a call to Thomas' house from Mrs. Monfort's house on August 21st. There was also a phone call to the Thomas house from the Bennis house. (Vol.19,T2541)

Karen Thomas is married to Michael. (Vol.23,T3159) E.W. Vickers is Karen's father.(Vol.23,T3160) Karen has a sister named June Hunt. (Vol.23,T3161) June and Curtis were once married. (Vol.23,T3161) Karen had last seen Curtis over 10 years earlier. (Vol.23,T3161) Karen had no phone contact with Curtis in 1995. The last time

she had telephone contact with him was in 1997, when her mother died. (Vol.23,T3162) Curtis' son currently lives with Mr. Vickers. (Vol.23,T3165)

Carol Negoshian is a nurse at the Heart of Florida Hospital. (Vol.21,T2856) Ms. Negoshian knew Curtis through a job he had done at the hospital. (Vol.21,T2857) Ms. Negoshian did not know Mary Bennis or the Malcolms and did not recall speaking to Curtis in September 1995. (Vol.21,T2859)

George Murphy has lived in Haines City for the last fifteen years. (Vol.21,T2861) He has known Curtis since high school. (Vol.21,T2863) Mr. Murphy had last seen Curtis five or six years earlier, when he ran into him in a video store. (Vol.21,T2863) He did not know the Malcolms or Mrs. Bennis. (Vol.21,T2864)

William Robinson and his brother Dale Robinson live in Haines City. (Vol .22,T3044,3065) Sometime in late August Curtis called William between 8:30 P.M. and 10:00 P.M., saying that he had some money that he owed Dale. (Vol.22,T3068) William could not be certain of the exact day Curtis called.

Later that night Curtis came over with the money and attempted to give Dale a $100 bill. (Vol.22,T3046) Curtis owed Dale the money because of a loan Dale had made to Curtis to help him purchase a vehicle. (Vol.22,T3047) Dale observed Curtis driving a light colored car. Curtis told Dale that the car belonged to a woman friend of his that he had been staying with while he did some work for her. (Vol.22,T3048)

Dale told Curtis to go get them something to smoke. Curtis then used the bathroom, and left. (Vol.22,T3049) Dale did not see him again. (Vol.22,T3049) Dale could not recall the exact day Curtis came by.

Officer Leo Dwight Pierson saw Curtis in Lake Hamilton on August 20, 1995, the day before Mrs. Monfort was killed. (Vol.23,T3209) Curtis had on a long-sleeved, multi-colored shirt. He identified the shirt that was found under the bed with blood stains on it as being the shirt Curtis was wearing on August 20, 1995. (Vol.23,T3211) During their conversation, Curtis said that he was getting ready to leave town. (Vol.23,T3214) Curtis mentioned "kinsfolk in Alabama." (Vol.23,T3214)

Lieutenant Butch Jones of Ozark, Alabama received a fugitive warrant for Curtis in January 1996. (Vol.22,T3002-3) He had information that Curtis might be driving a burnt orange/red car with Florida plates. (Vol.22,T3005) Jones located the car in a motel parking lot and arrested Curtis without incident. (Vol.22,T3007) Curtis identified himself as Curtis Beasley. He had a beard. (Vol.22,T3007) Curtis told Jones that he knew that he was in trouble because he had gone back to the house and seen that it was surrounded by FBI agents. (Vol.22,T3010)

Jewel Bodiford testified that she works for an electrical contractor in Dothan, Alabama. (Vol.22,T2988) In December 1995, she hired a person by the name of William Benson, as evidenced by the employment application, W-2, and signed

payroll checks in December 1995 and January 1996. (Vol.22,T2902-03)

Teresa Stubbs is a document examiner with Florida Department of Law Enforcement. (FDLE) (Vol.18,T2295) She examined the employment documents from Jewel Bodiford. (Vol.18,T2317) She compared the signature of "William Benson" with Curtis' handwriting. (Vol.18,T2319) She determined that the signature of Benson was written by Curtis. (Vol.18,T2319) Stubbs also concluded that Curtis had written the phone number on the newspaper that was found on a coffee table in Mrs. Monfort's house . (Vol.18,T2313)

Mary Cortese, is a serologist with FDLE. (Vol.20,T2567-69) She performed tests on numerous items submitted by the Polk County Sheriff's Office in connection with this case. (Vol.20,T2569) These included blood samples of Mrs. Monfort, fingernail scrapings, the hammer head and handle with apparent blood on it, and the shirt that was found under the bed that had apparent blood on it. (Vol.20,T2569-2591) Cortese was able to determine that the blood on the shirt was consistent with Mrs. Monfort's blood. (Vol.20,T2595) She examined the shoes found under the bed and determined that there was no blood on them. (Vol.20,T2596) Two separate FDLE serologists performed DNA testing on various samples, including the shirt. (Vol.22,T3070-3080;Vol.23,T3100;3150-3155) Both confirmed through DNA analysis that the blood on the shirt had the same DNA characteristics as Mrs. Monfort's blood.

(Vol.23,T3112;3156) Dr. Martin Tracey, a professor at Florida International University in Miami, also examined one of the FDLE reports generated by the DNA testing procedures and concluded that all the samples of blood matched that of Mrs. Monfort with a high degree of probability. (Vol.23,T3280-3286)

Eleven hair samples of comparison value were found in the laundry room.(Vol.21,T2880) FDLE testing concluded that all the hairs could have come from Mrs. Monfort, but that the hairs could not have come from Curtis. (Vol.21,T2884)

Officer Jack Thurber of the Orlando police department received a report on May 1, 1996, that a car had been parked in the Howard Johnson parking lot at Colonial and Westmoreland for the last two weeks. (Vol.23,T3233-3236) Thurber discovered the car parked across from Room 104 of the motel, slightly in front of an oak tree. (Vol.23,T3237;32362) The tag was expired and the doors were locked. (Vol.23,T3240;3267) Thurber learned the car was reported stolen, so he contacted Detective Cash. (Vol.23,T3240) Thurber had the car towed to a police lot. (Vol.23,T3242)

The intersection of Colonial and Westmoreland is one of the busiest intersections in Orlando. (Vol.23,T3249) The approximate distance from where the car was found to the law office of Ed Leinster was 2.1 miles. (Vol.23,T3246) The approximate distance from where the car was found to the bus station was 2.5 miles.

(Vol.23,T3246)

Detective Cash testified that the car was Mrs. Monfort's . When the car was found, the dome light had been removed, and the odometer had 7,319 miles on it. (Vol.21,T2736) Mrs. Monfort's receipt book was still in the car. (VoL.21,T2738-39) Four cigarette butts were in the ashtray of the car. The cigarette brand was Doral. (Vol.21,T2743)

The cigarette butts were subjected to DNA testing. (Vol.23,T3111) Saliva on the butts was consistent with Curtis'. (Vol.23,T3111) The car was dusted for prints, but no prints suitable for comparison purposes were found. (Vol.23,T3217-3224)

PENALTY PHASE

The State introduced two autoposy photographs through Dr. Melamud. (Vol.27,T3930) The pictures depicted Mrs. Monfort's skull at the autopsy. (Vol.27,T3930) The photographs showed dark red spots that indicated bruises. (Vol.27,T3931) In the photograph Mrs. Monfort was lying on her back and a skull fracture was visible on the left. (Vol.27,T3931) This was the only skull fracture. (Vol.28,T3933) The brain had a lacaeration under that fracture as well. (Vol.28,T3938) The wound was consistent with the head being in an immobile position, such as on the floor, at the time of the impact with the blunt object. (Vol.28,T3938) Dr. Melamud could not say that the head was in this position at the

time of impact beyond a reasonable medical certainity. (Vol.28,T3940) He could not render an opinion as to the relative position of Mrs. Monfort at the time any of the blows were struck. (Vol.28,T3940) Dr. Melamud could not say when the blow that caused the fracture and laceration to the brain was rendered. (Vol.28,T3940) He could not determine the sequence of the injuries. (Vol.28,T3940) Dr. Melamud could not say how many blows occured before Mrs. Monfort was unconscious. Any number of the blows could have caused her to lose consciousness, and she could have been unconscious very soon after she began to be struck. (Vol.28,T3941)

The State then called Jane O'Toole. Jane O'Toole testified that she has five children. (Vol.28,T3947) One child, Byron, is eleven. (Vol.28,T3947) Mrs. Monfort was Jane's best friend and she missed her very much. (Vol.28,T3948) Mrs. Monfort had worked at Disney and knew a lot about antiques. (Vol.28,T3948) She was the queen of a fraternity in college, she could arrange flowers, and was in the Garden Club as a young woman. (Vol.28,T3948) She sewed and quilted and taught Jane and her brothers things like etiquette. (Vol.28,T3949)

Jane and Mrs. Monfort had regular contact until her death. (Vol.28,T3949) They ate lunch together, and Mrs. Monfort babysat her children frequently. (Vol.28,T3949) They spoke daily. (Vol.28,T3949)

Jane's brother Bill could not be in the courtroom during the trial because of the

emotionanl impact the situation had on him. (Vol.28,T3950) He could not work for a long time after his mother's death and began to drink. (Vol.28,T3950)

Jane's son, Byron, wrote about Mrs. Monfort for school when he was asked to write about his favorite older person. (Vol.28,T3950-51) He was 10, and in the fifth grade. (Vol.28,T3951) The essay was read to the jury by the court. (Vol.28,T3960-61) Telling her children about their grandmother's death was the hardest thing Jane ever had to do.

The Defense then presented a number of witnesses. Vincent Jarvis, a bailliff for the Polk County Sheriff's Office, testified that Curtis did not give him any problems during the trial, either in or out of the courtroom. (Vol. 28,T3973-74)

Anthony Goss, another bailiff assigned to this trial, also testified that Curtis had caused no problems during the trial. (Vol.28,T3977) Curtis had thrown something in the holding cell as a reaction to the testimony of one of the witnesses, but had not damaged anything and presented no problems. (Vol.28,T3977-78)

Midge Lessor is a small farmer in Immokalee. (Vol.28,T3980) She called Curtis "George" to distinguish him from another worker on the farm named Curtis. (Vol.28,T3981) Ms. Lessor has know Curtis since 1987. (Vol.28,T3982) Curtis had worked for her in the past. Curtis helped her drive to Conneticut when her mother died and she needed a second driver. Curtis was very supportive of her and her family

during this difficult time period.(Vol.28,T3983)

Lucy Beasley testified that Curtis is her son. (Vol.28,T3986) Curtis had a normal childhood. He went to school at the right time, and progressed normally through the various grades. (Vol.28,T3988-89) She and her husband had no serious problems with him. He was gregarious and got along well with others. (Vol.28,T3989-90)

In elementary school he was a safety patrol, and had perfect attendance. (Vol.28,T3980;4001) He was on Honor Roll. (Vol.28,T4002) He attended the Church of Christ and went to bible camp. (Vol.28,T3991) Curtis played a lot of baseball, and his father would often take him to games. (Vol.28,T3992) They both liked country music. (Vol.28,T3993)

Curtis entered the Youth Fair in 1963. (Vol.28,T4000) He took second place for his rabbits. (Vol.28,T4000)

Curtis was active in high school activities, and he worked at a T.V. repair shop. (Vol.28, T3994) He was involved in Thespians and was president of his Senior Class. (Vol.28,T3994)

Curtis went to college at Troy State for two years. (Vol.28,T3995) Curtis married in 1969, and dropped out of college. (Vol.28,T3996) He then served in the Army for two years and some odd months and was honorably discharged. (Vol.28,T3997;4007) Curtis had two children, a son and a daughter. (Vol.28,T3997)

Curtis has three grandchildren. (Vol.28,T3998)

Curtis wrote his father a letter from jail in May 1996. (Vol.28,T4006) His father died in August 1996. (Vol.28,T4007) The letter was read to the jury by the court. (Vol.28,T4013-4)

Judy Beasley Bostrum testified that she is Curtis' sister. (Vol.28,T4021) Judy is 20 months older than Curtis. (Vol.28,T4023) They went to school together. She described Curtis as a good student who made good grades, did a lot in school, and had a lot of friends. (Vol.28,T4023) Curtis played the guitar and had a little band in high school. (Vol.28,T4025) They were close growing up and have remained so over the years. (Vol.28,T4036)

Derrell Burnham is a private investigator that worked for the defense on this case. (Vol.28,T4038-9) He testified that Curtis waived extradition to Florida. (Vol.28,T4046) He also testified that Curtis was very polite in his letters. (Vol.28,T4046) Mr. Burnham obtained Curtis' jail records which indicated that Curtis was despondent over his father's death, that he was under alot of stress, and that he asked to be kept by himself. (Vol.28,T40 47) Curtis had no disciplinary reports in his jail file. (Vol.28,T4047)

SPENCER HEARING

A Spencer Hearing was held before the Honorable Cecelia Moore, circuit judge,

presiding , on April 20, 1998, with the following testimony being presented by the Defense:

Dr. Henry Dee, a licensed neuropsychologist performed a clinical evaluation of Curtis. (Vol.3,R465) Curtis was interviewed and administered several psychological tests. (Vol.3,T466) A report was prepared and entered into evidence. (Vol.3,R469)

Dr. Dee determined that Curtis showed an obvious indicia of brain damage, probably due to chronic drug use. (Vol.3,R469) There was no evidence of malingering on any of the tests. (Vol.3,R470-473) On the Hare PCLR test, which screens for psychopathy and future dangerousness, Curtis' performance suggests that he has no propensity for violence and did not reveal any psychopathic tendencies. (Vol.3,R470-471)

Dr. Dee did find organic personality syndrome beyond a reasonable psychological certainity. (Vol.3,R472-3) Curtis showed clear and undeniable evidence of drug addiction on two-separate tests. Drug use could have caused the brain damage. (Vol.3,R473) Curtis' job as a painter could also have contributed to the brain damage, because of the risk of anoxia from working in poorly ventilated areas. (Vol.3,R475) Brain damage manifests itself in every day life by forgetfulness, lack of attention to detail, a lack of prudence in behavior, poor impluse control, and boldness in social settings. (Vol.3,R488;495)

Dr.Dee found it mitigating that Curtis had no history of violent acts. (Vol.3,R474) He believed that Curtis would be able to function well in prison and would be a good prisoner. (Vol.3,R474) It was significant that Curtis had received no disciplinary reports in jail, as almost no one accomplishes that. (Vol.3,R475)

Dr. Thomas McClane is a physician specializing in psychiarty and psychopharmacology. (Vol.3,R499) His pupose in testifying was to discuss the effects of certain drugs on humans. (Vol.3,R502) He described cocaine as a disinhibitor. (Vol.3, R503) It decreases normal inhibitions with respect to aggressiveness, increases impulsivity, and decreases normal inhibitions regarding things normally kept under wraps. (Vol.3,R503) People become dose dependent and there is probably a dose level at which anybody can become psychotic with cocaine. (Vol.3,R503) Attention, alertness, judgment and the ablitly to reason are impaired. Memory is distorted and harmful impulses are not suppressed with cocaine usage. (Vol.3,R504) Paranoid thinking is often common with high dosages. (Vol.3,R505) According to Dr. McClane, a small percentage of absolutely normal people will develop paranoid psychosis with delusions and visual hallucinations with cocaine ingestion. (Vol.3, R505)

Long term cocaine usage is associated with a deterioration of personality function. (Vol.3,R508) Long term usage can lead to brain damage. (Vol.3,R509) The

most common long term effects are memory loss, attention defecits, impaired judgment, and impaired ability to reason and plan. (Vol.3,R510) In most cases the cessation of the drug usage will resolve the symptoms. (Vol.3,R512) Crack is much more addictive than powder cocaine. (Vol.3,R513)

Cocaine abusers will often steal or sell drugs to obtain more. (Vol.4,R517) They will often have absenteeism at work and not finish work.(Vol.4,R517) Weight changes and hygiene changes are common. (Vol.4,R519) Addicts will often loose contact with family members. (Vol.4,R519) Curtis spoke briefly. Curtis stated that he did not kill Mrs. Monfort and he did not steal her car or her money. (Vol. 4,R523)

SUMMARY OF THE ARGUMENT

The State failed to meet its burden in establishing the guilt of Appellant beyond a reasonable doubt. Relying wholly on circumstantial evidence for the convictions, the State failed to refute a reasonable hypothesis of innocence that someone other than Appellant committed the crimes. The convictions must be set aside.

The evidence in this case fails to establish first degree murder, (either by premeditation or felony murder) and robbery. An analysis of the evidence utilizing the factors commonly considered in determing whether or not premeditation exists establishes that the murder was a second degree murder. Also, the evidence does not support a theory of felony murder because the underlying felony, Robbery with a Weapon, was not proved. There was insufficient evidence to show that the property alleged to have been taken was taken. In the alternative, there was insufficient evidence to show that the taking of the property was not taken as an afterthought. The conviction for Robbery with a Weapon must be set aside, or in the alternative, a conviction for Theft imposed instead. The conviction for first degree murder must be reversed and a second degree conviction imposed.

The court abused its discretion in permitting certain family members to remain in the courtroom during the trial. These persons were not only critical state witnesses, but they had in the past demonstrated their inability to follow directions regarding this

case. Appellant's constitutional rights outweigh the interest of the witnesses in this case.

The trial court erred in finding that the murder was especially heinous, atrocious, or cruel . There was no evidence to support the State's argument that the killing was accomplished in such a way so as to set it apart from the norm of all capital felonies. The evidence was insufficient to establish that the murder was consciouseless or pitiless, and that it was unnecessarily torturous. The court improperly relied upon facts not supported by the record in finding that this aggravator was established, and also based the findings on speculation and conjecture. For these reasons, the aggravator must be stricken or the case remanded to the trial court for reconsideration of this factor and the weight to be assigned to it.

The evidence in insufficient to support the felony murder aggravator for robbery, because the evidence is insufficient to support a conviction for robbery. The pecuniary gain aggravator is also unsupported by the evidence for the same reasons.

The trial court erred in failing to find that certain mitigating circumstances had been proven in this case. Remand for consideration of these factors and the weight to be afforded them is required.

The sentence of death is disproportionate in this case. If both aggravators are stricken, a life sentence is required. If only one aggravator is stricken, a life sentence

is the appropriate sanction. Even if both aggravators are found to be applicable, this in not the most aggravated and least mitigated of capital felonies. There was substantial mitigation which, when weighed against the aggravators, requires a life sentence. The death sentence must be reversed.

ARGUMENT

ISSUE I

THE CIRCUMSTANTIAL EVIDENCE FAILED TO EXCLUDE A REASONABLE HYPOTHESIS OF INNOCENCE AND IS THERFORE INSUFFICIENT TO SUPPORT THE CONVICTIONS IN THIS CASE

An issue in this case was who committed these crimes. The State claimed that Curtis Beasley committed the crimes, and in prosecuting him relied only on circumstantial evidence. Curtis maintained his innocence at all times. At the close of the State's case, the defense moved for a judgment of acquittal, arguing that the State had failed to carry their burden of proof that Curtis committed the crimes. It was specifically argued at the motion for judgment of acquittal that the circumstantial evidence was not legally sufficient to support any convictions. (Vol.25,T3586-3590;Vol.26,T3591-3593) The trial court's denial of this motion was error.

A "special standard" of review regarding the sufficiency of the evidence applies where convictions are wholly based on circumstantial evidence. Jaramillo v. State, 417 So. 2d 257 (Fla.1984). In numerous cases, this Court has taken great pains to explain how circumstantial evidence is to be evaluated. For example, in State v. Law, 559 So. 2d 187, 188 (Fla. 1989), the standard was described as "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a

conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." In Law this Court also firmly established that a judgment of acquittal should be granted in a circumstantial evidence case if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. In Gordon v. State, 704 So. 2d 107,112-113 (Fla. 1997), this Court reaffirmed the holding in Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974), that a judgment of acquittal "should not be granted unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law." The judge must determine if there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences.

Perhaps one of the best explainations of the "special standard" that applies to circumstantial evidence is found in Golden v. State, 629 So. 2d 109, 111 (Fla. 1993). In commenting on circumstantial evidence, this Court explained that "By its very nature, circumstantial evidence is subject to varying interpretations. It must, therefore, be sufficient to negate all reasonable defense hypotheses as to the cause of death and show beyond a reasonable doubt that the death was caused by the criminal agency of another person."

In Barwick v. State, 660 So. 2d 685 (Fla. 1995), this Court stated that a judgment of acquittal should be granted if the State fails to present evidence from

which the jury can exclude every reasonable hypothesis except that of guilt. Most recently, this Court affirmed its continued support of these holdings in Woods v. State, 24 Fla. L. Weekly S183 (Fla. April 15, 1999).

In analyzing the circumstantial evidence in the instant case against the "special standard" governing the sufficiency of the evidence in circumstantilal evidence cases, it is clear that the State failed to exclude every reasonable hypothesis except that of guilt. The evidence relied upon by the State was essentially as follows:

The State's theory was that Curtis killed Mrs. Monfort in her home just after 7:00 p.m. on August 21st in order to take $800 from her that she had received that day from soneone renting an apartment from her. The State's evidence was that Mrs. Monfort was killed in her home in the laundry room area adjacent to the garage and dining room. She was killed by blows from a hammer. When she was killed she was wearing the same clothes she had on August 21st. There was a glass with a napkin on it by her feet. Her purse was in the laundry room as well. There was no sign of forced entry into the house and the house was not ransacked.

At the time of Mrs. Monfort's death Curtis was living in her home while he worked for her. The last outgoing long distance phone call made from her house was at 7:01 P.M.. Later, phone calls that had been made from Mrs. Monfort's home to certain phone numbers showed up on another telephone bill where Curtis stayed after

the murder.

During the crime scene investigation of Mrs. Monfort's home, personal items belonging to Curtis were found in the guest bedroom. Later, a shirt belonging to Curtis was found by a family member under the bed in the guest bedroom. It had Mrs. Monfort's blood on it.

Curtis left the night of the murder and his whereabouts were unknown to law enforcement for several months after the killing. Through the testimony of Curtis' friends it was established that Curtis was in Miami the day after the murder. Curtis told these friends that he was vacationing, and that his clothes and traveler's checks had been lost by the bus company. Curtis stayed and worked in the Miami area for several months, during which time he called various people in the Haines City and Orlando areas that he had not had contact with for several years. He was eventually arrested in Alabama, where he was working under a false name. After leaving the Miami area, he had grown a beard. Upon his arrest he made a statement that he knew he was in trouble because he had gone to the house and saw the FBI there.

Mrs. Monfort's car was found and recovered in Orlando after Curtis was already in custody. It was found in a location that was within 2 miles of a social friend of Curits and his former sister-in-law. It was 2.5 miles from the nearest bus station. Cigarette butts found in the car had been smoked by Curtis.

Curtis' friends, Dale and William Robinson, either saw or spoke with Curtis sometime in late August. Curtis offered Dale a $100 bill as partial payment on a debt. Curtis was driving a car that he said belonged to the lady he was staying with. The Robinsons could not be certain of the exact day of the visit by Curtis, although it was possibly on August 21st.

This circumstantial evidence that the State relied upon to convict Curtis, when closely examined, fails to exclude the reasonable hypothesis that someone other than Curtis killed Mrs. Monfort. Careful examination of these facts reveals the following:

MOTIVE

The State's theory was that Curtis killed Mrs. Monfort for the $800 that she received from Mr. Rosario at the apartment. However, there is nothing in the evidence to suggest that Curtis knew that she had received any money. In fact, Mr. Rosario's testimony clearly points the finger at others. According to Mr. Rosario, he met with Mrs. Monfort in the afternoon and agreed to meet later that day at five o'clock. Around five o'clock, while Mr. Rosario was paying Mrs. Monfort for the deposit and some furniture at the apartment, there were other workers present. Two of these men closely observed the transaction. The descriptions of these men as provided by Mr. Rosario did not match any physcial description of Curtis and Mr. Rosario did not identify Curtis as being present at this monetary transaction. Nothing in the record

indicates that these other individuals were ever questioned or investigated by the police.

According to the phone records, and other evidence presented by the State, Mr. Beasley was at Mrs. Monfort's home placing phone calls at the time Mr. Rosario gave Mrs. Monfort the money. There was not one scintilla of evidence that showed that Curtis had any knowledge that Mrs. Monfort was coming into a large amount of cash.

Further, the State's evidence showed that Curtis had good feelings toward Mrs. Monfort. On the day of the incident, while helping Mrs. Monfort's daughter move furniture, he inquired about purchasing a gift for Mrs. Monfort.

There is also no evidence to suggest that Curtis was in need of money. The evidence showed that he was working, and that Curtis had minimal financial obligations.

OPPORTUNITY

The State's case hinged on Mrs. Monfort being killed on or before 7:01 P.M., because that was the last time that any phone calls were made by Curtis from the residence. This was especially important to the State's theory since Curtis had told at least two people he was leaving the Polk County area. (According to the State, Mrs. Monfort had to have been killed before dinner due to the drink glass found by the body and the lack of evidence of food preparation in the house.)

According to the medical examiner's autoposy result, partially digested food (rice

and meat) was found in Mrs. Monfort's stomach.

The evidence does not preclude a reasonable hypothesis of innocence that Mrs. Monfort was killed much later on in the evening, long after Curtis left to go to Miami. The State's evidence fails to consider the reasonable alternative that Mrs. Monfort ate dinner out that evening and was killed upon her return.

This type of food is consistent with an evening meal. There was also evidence that Mrs. Monfort always had a vodka drink before dinner, and that if she was traveling she took her drink with her. The empty drink glass on the floor containing the peel was consistant with Mrs. Monfort having carried an empty glass in from the car after having consumed a drink on her way to dinner. Mrs. Monfort's purse was also in the laundry room which suggests that she did not get far into the house before she was attacked.

A far more reasonable hypothesis is that the killer entered the garage when Mrs. Monfort returned from dinner, followed her into the laundry room, and attacked her there. The killer could have easily followed Mrs. Monofort from the apartment to discover where she lived or as her employee at the apartments already know where she lived. At that point the killer or killers only needed to wait for an opportunity to strike. This scenario logically and reasonably explains the locked front door and the lack of forced entry.

PHYSICAL EVIDENCE- IN GENERAL

The discovery of the missing car also points far more strongly to an unknown perpetrator. The car did not appear in Orlando until a significant perod of time after Curtis had been arrested. The car was found in a parking lot that had recently be paved. Although the car was found in an area where some aquaintainces of Curtis lived, it was also found in the area of one of the busiest intersections in Orlando. Ed Leinster, an attorney, and the Thomas' denied having any contact with Curtis. The suggestion that the phone calls to them and the car being placed there by one of them five months after Curtis' arrest is simply not supported by the evidence, and is mere speculation.

The presence of cigarrette butts smoked by Curtis in the car is also not indicative of guilt. Although this would be the case if the killer had no connection to Mrs. Monfort, the testimony of Jackie, Mrs. Monfort's cleaning lady, showed that Curtis rode in the car with Mrs. Monfort. Even though Jane O'Toole did not have any knowledge of Curtis driving the car, there was no evidence to suggest that he did not drive the car with Mrs. Monfort's permission when she was not in need of it.

The physical evidence found at the home also supports a reasonable hypothesis of innocence. By all accounts, the laundry room was where Mrs. Monfort was killed. However, there was no transfer of hair from Curtis to this scene. In fact, hairs found

at the secne did not come from Curtis, but it could not be ruled out that those 11 hairs did not come from the killer.

No fingerprints were found in the laundry room area or more importantly on the hammer. Curtis to the murder weapon.

The house was not ransacked, suggesting that the killer or killers knew what they wanted. According to the evidence presented, the only individuals who had knowledge that Mrs. Monfort had received a large amount of cash that day were the workmen at the apartment.

PHYSICAL EVIDENCE- SHIRT

The State's theory was that Curtis had to be the killer because of the bloodstains on his shirt which was found under the bed. However, the total picture surrounding the shirt also points to other reasonable hypotheses. According to the police officer, Curtis was seen in the shirt at least a day before the murder. Jackie Ferguson, the maid, saw a shirt similar to that one lying on a chest in the in Curtis's bedroom on the morning of August 21. She also noted that she did not wash Curtis' clothes. Jackie also observed Curtis to be wearing a different shirt on the day of the incident. Under the State's theory, Curtis would have had to change out of the shirt he was wearing, then put on a dirty shirt, then kill Mrs. Monfort, then discard the shirt in a careless ball under the bed, then put on another shirt for the purpose of fleeing the area.

The circumstances and events surrounding the discovery of the shirt cast serious doubts as to the reliablilty and evidentiary value of the shirt as evidence. According to Laurie Ward and the other crime scene techinicians, they saw a laundry basket in the laundry room with laundry in it. They did not inventory the contents, so there is no way to conclusively determine that the dirty shirt had not been placed in the dirty laundry basket. The laundry room contained a great deal of blood. It is reasonable to conclude that blood could have been transferred to items in the laundry basket at the time of the killing.

How the shirt was discovered gives rise to many questions. According to the crime scene technicians, they cannot vouch for the reliablitly and crediblilty of evidence recovered after the crime scene is released. After processing the scene for ten hours, at least four Polk County Sheriff's Office personnel insisted that they were so careless that they forget to look under the bed, even though they did observe and collect some tiny wire fragments next to the bed.

After the scene was released to the family, the shirt is discovered the next day under a bed by the victim's son who was looking through the house for valuables. Supposedly without having removed the shirt or knowing anything about it, Detective Cash is told that some evidence she will need has been found. Why this was believed to be such an important discovery by the family is not reasonably explained. The

family knew that Curtis was living in the house and had personal belongings in the guest bedroom. At the time the family "found" the shirt, they would have not known the shirt had blood on it (unless, of course, they had placed the shirt there). According to Cash, the shirt was all balled up and she did not notice the blood until she removed it and started to open it up.

It was clear that the family in this case took an unusually active role in investigating the crimes. The family was asked more than once by the police to stop their activities. These activities included Neal O'Toole interviewing Curtis' friends, and having a cousin, who had been a deputy, investigate as well. Obviously the family not only wanted to find the killer, but on their own decided that Curtis was the killer. A reasonable conclusion regarding the discovery of the shirt is that it was planted by a family member or members of Mrs. Monfort so as to implicate Curtis. As Laurie Ward noted in her testimony, she does not know of any other situation in over twelve years of crime scene experience where law enforecment has overlooked an important item of evidence, and then have it be found by family members after the crime scene was released by law enforcement.

MISCELLANEOUS BEHAVIOR OF APPELLANT

The State's theory was that after the crimes Curtis drove Mrs. Monfort's car to William and Dale Robinson's residence and offered Dale Robinson a hundred dollar

bill that he had stolen from Mrs. Monfort. The evidence, however, does not prove this theory to the exclusion of other reasonable explainations. The greatest failure of this testimony is that neither of the Robinsons knew when these events occured. Dale could only say that it happened in late August and it was before the police came to see him. Had Dale Robinson been able to state that Curtis had come to his house on the night of August 21st, it would have strongly supported the State's theory. But that is not the case. Also, there was no evidence at trial that Curtis did not have money of his own. The testimony was that he was working and being paid for that employment. There was not any conclusive evidence that Curtis did not, on occasion, drive Mrs. Monfort's car with her permission.

Curtis' absence immediately after the murder is also not indicative of guilt. According to a police officer, Curtis had indicated at least a day before the murder that he was going to be leaving town for awhile. According to Jane O'Toole, Curtis indicated on the day of the murder that he was leaving town.

Curtis' continued abscence is not proof beyond a reasonable doubt that he committed the crimes. Guilty people are not the only people who seek to avoid arrest. Given that Curtis had a history with the local police and believed that he would not be treated fairly offers a reasonable explaination for his continued absence, and the use of the false name in Alabama, and growing a beard. In Curtis' statement to the police in

Alabama, he indicated there was FBI around the house. This is the type of observation that could reasonably lead Curtis to conclude the authorities were looking for him, even if he had done nothing wrong.

In Golden, the defendant was accused of killing his wife to receive insurance settlements. Golden was the last person to see his wife alive, and she drowned in her car. Golden was in serious financial straits, and shortly before his wife's death Golden forged his wife's signature on several insurance policies. Noting that the "finger of suspicion" pointed heavily at Golden and that a reasonable juror "could conclude that it was more likely than not " that Golden had killed his wife, this Court, nonetheless, reversed and vacated the sentence of death, and ordered Golden released from prison. Likewise, while a reasonable juror may have concluded that Curtis might have committed these crimes, the circumstantial evidence did not meet the heavier burden of proof beyond a reasonable doubt. As in Golden, the circumstantial evidence in this case is insufficient to overcome the reasonable hypothesis that an unknown person or persons killed Mrs. Monfort and robbed and stole from her. As such, the convictions must be reversed and the sentences vacated.

ISSUE II

THE CIRCUMSTANTIAL EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF FIRST DEGREE MURDER (EITHER PREMEDITATED OR FELONY MURDER) OR ROBBERY

Assuming that Curtis killed Mrs. Monfort (an assumption that is not supported by the evidence in this case as noted in Issue 1), the circumstantial evidence is insufficient to support a conviction for First Degree Murder based on either premeditation or felony murder. Rather, the evidence would support the finding that the murder meets the legal standard for Second Degree Murder. The evidence is also insufficient to support a conviction for Robbery with a Weapon.

Premeditation is the essential element that distinguishes first degree premeditiated murder from second degree murder. Coolen v. State, 696 So. 2d 738 (Fla. 1997), quoting, Wilson v. State, 493 So. 2d 1019 (Fla. 1986). Premeditation may be proven by circumstantial evidence, however, in doing so the evidence relied on by the State must be inconsistent with every other reasonable inference. Hoefert v. State, 617 So. 2d 1046 (Fla. 1997) If the State's evidence cannot exclude a reasonable hypothesis that the homicide occured other than by premdeitated design, a verdict of first-degree premeditated murder cannot be sustained. Coolen, at 741.

Premeditation is defined as "more than a mere intent to kill; it is a fully formed conscious purpose to kill. The purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act". Coolen, at 740. Many different factors are looked at in order to determine if premeditation exists. Some factors which are relied upon include the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. Spencer v. State, 645 So. 2d 377 (Fla. 1994); Holton v. State, 573 So. 2d 284, 289 (Fla. 1990), cert. denied, 114 L.Ed.2d 726 (1991).

For example, in Spencer, this Court found that the facts supported premeditation where the victim and the defendant had been married, and there had been previous violent altercations and prior threats by the defendant to kill the victim. On the day of the murder, the defendant beat his wife in front of her teenage child, ignored pleas to stop, and threatened to harm the child if he intervened. The victim was stabbed to death and had defensive wounds. During the attack the defendant wore gloves and had brought a steak knife with him in his pocket.

In Taylor v. State, 583 So. 2d 323 (Fla. 1991), premeditation was sustained where the victim was not only brutally beaten, but was also choked. She also suffered

injuries that were inconsistent with the defendant's version of consensual sexual intercourse between them.

Premeditation was also found to exist by the nature of the murder in DeAngelo v. State, 616 So. 2d 440 (Fla. 1993), where the victim was manually strangled for at least five to ten minutes. The victim was also choked with a ligaturel.

In contrast, this Court in Kirkland v. State, 684 So. 2d 732 (Fla. 1996), found that the State's evidence did not support a finding of premeditation. In Kirkland the defendant killed the victim by inflicting a severe wound to her neck, which caused her to bleed to death. The wound was caused by many slashes and there were other injuries that suggested blunt trauma. There was evidence indicating a knife and cane were used in the attack. There was also some evidence of friction between the defendant and the victim. Despite the nature of the wounds, this Court rejected premeditaion, finding that the defendant had never expressed , exhibited, mentioned or even possessed an intent to kill the victim at any time prior to the homicide. There were no witnessess to the events immediately preceding the murder. There was nothing to suggest the defendant obtained a weapon in advance, and no evidence to establish that there was any type of preconcieved plan.

In Hoefert, supra., premeditation was rejected in a strangulation death, even though the evidence had established that the defendant had strangled other women,

though not to the point of death, that the victim was found in Hoefert's house, and that he tried to conceal the death.

Premeditation was not found in the murder/robbery in Terry v. State, 668 So. 2d 954 (Fla. 1996). In this case the defendant and another man looked for a convenience store to rob, obtained guns and ski masks ahead of time, and the co-defendant confessed as to the details of the murder. While upholding felony murder, this Court found that there was an absence of evidence regarding premeditation to commit the murder.

This case is very similar to the facts in Kirkland. The facts in the instant case do not suggest a premeditated killing by Curtis. Comparing the factors utilized by this court with the facts in this case, there is clearly an absence of evidence to support premeditation.

There was no history of ill will or animosity between Curtis and Mrs. Monfort. In fact, the evidence suggests just the opposite. They had been friends for seventeen years. Curtis was staying with Mrs. Monfort at her invitation and working for her. Jane O'Toole testified that on the day her mother died she had a conversation with Curtis during which he expressed much thankfullness for Mrs. Monfort's kindness to him and expressed his desire to buy her a gift before she left. There is simply no evidence to suggest he planned to kill her.

The murder weapon was a hammer which is, a common household item. The prosecutor in his closing argument even called it a "weapon of opportunity". People who plan murders, as the prosecutor noted, do not use hammers. They obtain guns, get knives, use bombs, resort to poison, etc. The fact that a hammer was used in this case supports that this was a spontaneous act.

The nature of the wounds and the type of attack also suggests that this was an irrational killing. As in Kirkland, the multiple wounds imply a sudden and thoughtless attack, as opposed to an act that was committed with deliberation and reflection.

The evidence taken as a whole supports second degree murder, as opposed to a premeditated killing. The most reasonable hypothesis to this unwitnessed murder was that for some reason a violent argument erupted between Curtis and Mrs. Monfort during which Mrs. Monfort was killed. A reasonable hypothesis is that they had an argument regarding work or over some problem with his living there. In any event, this incident has none of the hallmarks of a premeditated murder.

The evidence regarding first degree felony murder and robbery with a weapon is also insufficent. Although the State's theory was that the killing was done in order to rob Mrs. Monfort, the facts again, do not exclude a reasonalble hypothesis of Curtis' innocence as to first degree felony murder and robbery.

The evidence was insufficient to show that there was a taking of the $800.

Although the $800 given to Mrs. Monfort by Mr. Rosario was not in her purse, there was no evidence that this was where Mrs. Monfort put the money. Given the large amount of cash, it is reasonable to assume that Mrs. Monfort would have immediatley put the money into a more secure place, such as at her office. There was no evidence that she had not done so prior to her murder. Thus, the evidence for robberry is insufficient.

There is also nothing in the evidence to suggest that the murder happened in the course of a robbery. Even if the evidence is sufficient to show money was taken, a reasonable hypothesis is that the money was taken as an afterthought, just like the taking of the car (which was charged as a theft). If Curtis was in need of money and was so inclined as to obtain it by a criminal act, he had ample access to the house and the valuables in the house. The house, however was not ransacked. The family found other money and Mrs. Monfort's jewelry in the house. Mrs. Monfort's body was found with her watch and rings. If obtaining money was the Curtis' goal , he certainly could have cleaned out the house, and done it without having to confront Mrs. Monfort.

There is also no evidence to suggest that Curtis knew that Mrs. Monfort would have $800 with her that evening. A more reasonable scenario (assuming he did the killing and that the $800 was in fact with Mrs. Monfort) is that after a spontaneous murder, he quickly searched for the car keys in her purse, found the cash, took it and

the keys and then fled in her car. Since it was never established that the money was even in the purse, a reasonable hypothesis is that the money was placed in the receipt book that was in the car, and taken from the receipt book as an afterthought to the murder.

Because the evidence in this case does not establish either premeditation or felony murder, the conviction for first degree murder and the death sentence must be set aside. A conviction for second degree murder should be entered instead, with a resentencing in accordance with the applicable law. The robbery conviction and sentence must also be set aside, or in the alternative a conviction for theft entered with a resentencing in accordance with the applicable law.

ISSUE III

THE TRIAL COURT ERRED IN DENYING COUNSEL'S REQUEST TO INVOKE THE RULE OF SEQUESTRATION WITH REGARDS TO MEMBERS OF THE VICTIM'S FAMILY WHO WERE ALSO CRITICAL WITNESSES

At the beginning of the trial the defense sought to have family members, who would also be key witnessess, excluded from the courtroom until after they had testified. The court denied this request, and allowed the family members to be present for all the testimony. Appellant submits that under the unique facts of this case, this was reversible error.

In 1992, Fla. Statute §90.616 (2)(d) was added to the rules of evidence as a codification of Article I, Section 16(b) of the Florida Constitution. While permitting family members of the victim to be present during all crucial stages of the proceedings, the constitutional provision also provides that the right to be present cannot interfere with the constitutional rights of the accused. See, Gore v. State, 599 So. 2d 978, 985-986 (Fla. 1992), cert. denied, 121 L.Ed.2d 545 (1993); Sireci v. State, 587 So. 2d 450 (Fla. 1991), cert. denied, 117 L.Ed.2d 639 (1992). Whether or not to allow the witness to remain in the courtroom is a matter of discretion for the trial judge, and the applicable appellate standard of review is whether the decision constituted an abuse of

discretion.

The rule of sequestration is designed to prevent a witness from altering or changing his testimony in such a way as to make it conform to other evidence that has already been admitted and to avoid the coloring of testimony. Counsel was especially concerned with family members being present, because their testimony was critical regarding Mrs. Monfort's behaviors, which the State, was relying on to establish the time of death and was critical in that a family member "found" an item of evidence which circumstantially linked Curtis to this crime- the shirt under the bed.

Although the court admonished the family about their responsibilities as witnessess, the record shows they had not been particularly good about following directions regarding their behavior with respect to this case. Eventhough they had been warned more than once by the police to stop conducting their own investigation and talking to witnessess, they had failed to heed these warnings. During the course of the trial, counsel repeatedly brought to the court's attention disruptions caused by family members. (Vol.17,T2227-2229; Vol. 20,T2599-2600; Vol.23,T3276, Vol.24,T3318) Witness sequestration was especially important in this case, since there were no reasonable means for the defense to monitor discussions between the O'Tooles and Mr. Stalnaker outside of the courtroom.

Under the circumstances of this case, the family members should have been

excluded, from the courtroom in order to protect the constitutional rights of the accused both under the Florida and Federal Constitution. These rights include the right to a fair trial, due process, effective assistance of counsel, right to confront witnesses, and the reight to be protected from cruel and/or unusual punishment.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The aggravating factor of heinous, atrocious or cruel (HAC) 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 to or enjoyment of the suffering of another. Guzman v. State, 721 So. 2d 1155 (Fla. 1998); Kearse v. State, 662 So. 2d 677 (Fla. 1995); Chesire v. State, 568 So. 2d 908 (Fla. 1990), State v. Dixon, 283 So. 2d 1 (Fla. 1978). The evidence must establish that the murder was both consciousless or pitiless and unnecessarilly torturous to the victim. Richardson v. State, 604 So. 2d 1107 (Fla. 1992). There must be factors which separate this killing from the norm of all capital felonies. Appellant submits that the evidence in this case does not support the aggravating factor of HAC by competent, substantial evidence.

The evidence in this case shows that Mrs. Monfort was killed by blunt trama to the head that was consistent with hammer blows. According to the medical examiner, Mrs. Monfort was sturck between 15 and 17 times. (Vol.24,T3434) Mrs. Monfort's cheek and jaw were fractured and there was one skull fracture which caused bruising

to the brain. (Vol.27,T3931; Vol.28,T3933) There was also bruising on the arms consistent with defensive wounds. According to the medical examiner, the order of the blows or the position of Mrs. Monfort could not be established beyond a reasonable degree of medical certainity. (Vol.28,T3941) Although the medical examiner could not say at what point Mrs. Monfort became unconscious, a number of the blows could have caused unconsciousness, and based upon the injuries, she may have been rendered unconscious very soon. (Vol.28,T3941) In Guzman, supra at 115, the evidence presented at trial was that the victim , Mr. Colvin, was "hacked, cut, and stabbed a total of 19 times. Colvin suffered eleven incised and hack-type wounds to his face and skull, four stab wounds to his back and neck, three stab wounds to his chest, and one defensive wound to his hand. The blows to Colvin's head were administered with such force that the skull was fracutured and a bone fragment was separated from the head. Colvin's cause of death could not be attributed to any one wound, but resulted from a loss of blood attributable to all of the wounds. Further, despite his intoxication, Colvin was conscious for at least part of the attack.... Moreover, Cronin and Rogers both testified that Guzman confessed that Calvin was conscious when the attack began." In contrast, although Mrs. Monfort suffered numerous blows, there was no testimony to establish that she was conscious during a significant portion of the attack. Unconsciousness would have been brought about by

the blows themselves, as opposed to the loss of blood over time as in Guzman. There is no evidence to suggest that any defensive wounds suffered by Mrs. Monfort occurred other than at the same time or almost the same time as the blow causing unconsiousness . Here, there is no evidence that there was a desire to inflict a high degree of pain or that there was an utter indifference to the suffering of another. There is also a lack of evidence regarding any fear and emotional strain of the victim.

In Kimbrough v. State, 700 So. 2d 634 (Fla. 1997), HAC was found to apply where the victim was raped and beaten. The victim suffered three blows to the head that caused her skull to fracture, there was blood all over the room, and numerous items were strewn around the room indicating a protracted struggle. Based on this evidence, this Court determined that the murder did not happen quickly. It should also be noted that the victim was still alive when paramdics arrived at the scene.

In Cole v. State, 701 So. 2d 845 (Fla. 1997), the victim was forcibly subdued, restrained, and removed from his sister. The victim's statements to his sister indicated that he knew that death was imminent. The victim was beaten severly on the head and his throat was cut. The victim was conscious while he slowly bled to death . The victim died as a result of the head injuries and bleeding. In the instant case there is no evidence of abduction, or awareness of impending death.

In Hoskins v. State, 702 So. 2d 202 (Fla. 1997), an 81-year-old woman was

attacked and raped in her home. The victim was severly beaten, bruised, and battered from the top of her head to her feet, including a broken cheek bone and two massive blows to her head. She had been bound and gagged. She had numerous defensive wounds. She was eventually killed by strangulation. Under these circumstances, HAC was approved. In the instant case, although there were a number of blows, unconsciousness could reasonably have occurred very soon after the attack began.

In the instant case the trial court in its sentencing order recited the findings regarding HAC as follows:

> Three. The capital felony was especially heinous, atrocious, or cruel. Carolyn Monfort sustained numerous brutal and savage hand, arm, face, and head injuries. The "defensive injuries" to her hands and arms clearly indicate attempts by her to protect herself from the hammer being wielded by Defendant. Blood was found in a room adjacent to the room where the victim was found. The blood in the adjoining room indicates the victim attempted to flee from her attacker but was caught and beaten to death in the next room of her home. Dr. Melamud, the medical examiner, testified that Carolyn Monfort sustanied over 15 blows. The injuries were consistent with having been inflicted by a hammer. The head of a hammer with a broken handle was found near the victim's body. The medical evidence supports the conclusions that the victim's head was against the floor in the laundry room and then while in an immovable position was struck at least two times resulting in fracturing her skull and pushing large bone fragments into her brain. The murder of Carolyn Monfort was both a consciousles and pitiless crime and was unnecessarily torturous to the victim. (Vol.IV,R595-596).

The trial court's conclusions regarding the evidence used to support the aggravating factor of HAC are erroneous and, at times, conjecture on the part of the court. While circumstantial evidence may be used to establish an aggravating factor, that evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor. Woods v. State, 24 Fla. L. Weekly S183 (Fla. April 18, 1999). Thus, the sentencing order on this aggravating factor is deficient.

For example, Dr. Melamud testified that he could not tell beyond a reasonable degree of medical certainity what position Mrs. Monfort's head was in when it was struck. The prosecutor hypothesized that she was immobile and Melamud said that could have been true, but he also clearly stated that there were many different possibilities. (Vol.28,T3940) The trial court's conclusion that the medical evidence supported the conclusion that Mrs. Monfort's head was held immobile on the floor was not correct according to the record. That was only one of many possibilities, according to Dr. Melamud.

The court's determination that Mrs. Monfort was attacked in another part of the house, that she fled, and was killed in the laundry room is also conjecture. While small amounts of blood were found in the adjacent dining room area, there is no evidence which suggested that they got there as a result of a struggle in the dining room or flight by Mrs. Monfort. The evidence does not support this theory. In fact, the evidence

contradicts the theory that a struggle occured in any other room in the house.

According to Jane O'Toole the home was immaculate and there was no evidence of a struggle. The blood in the dining room was so minute that she failed to notice it while walking by it on her way to the laundry room. Also, the amount of blood in the laundry room suggests the attack took place in that area alone. It is quite reasonable to assume that blood got into the dining room through splatters coming through the open door during the attack, or that it was deposited in the dining room by the attacker.

The trial court's order may not use speculation and conjecture to support the finding of an aggravating factor. In Knight v. State, 721 So. 2d 287 (Fla. 1998), this Court struck a finding of HAC where the evidence did not support the trial court's conclusions. The opinion notes that the trial court's description of the victims' ordeal during the time they were abducted and including the time they were murdered was largely conjecture and speculation. Noting that while the trial court's speculation as to what took place may well have occured, there was simply no evidence in the record to fill the void and rule out other possible scenarios. While the trial court's speculations in the instant case also might have occured, there is no evidence to show what precipitated this murder or how it was carried out. Other scenarios cannot be ruled out.

The trial court also abused its discretion in affording this aggravating factor "very

great weight". The facts of this murder suggest that it was one commited in a brief, impulsive, unplanned and irrational manner. The use of a hammer, a weapon of opportunity, and the number of blows suggests a sudden killing precipated by a storm of rage or anger. There is nothing in the record to suggest that the murder happened over a long period of time or was artificially prolonged. See, for example, Jones v. State, 332 So. 2d 615 (Fla. 1976); Huckaby v. State, 343 So. 2d 29 (Fla. 1979); Holsworth v. State, 522 So. 2d 348 (Fla. 1988).

Because the trial court relied upon conclusions that were not supported by the record, the HAC aggravator must be stricken. Scull v. State, 533 So. 2d 1137 (Fla. 1988). Because the trial court relied on only two aggravating factors, and HAC was the only one which was given "very great weight" (Vol.IV,R618), the death sentence must be reversed. In the alternative, this case should remanded to the trial court for reconsideration of the existence of HAC and the weight it should be afforded.

ISSUE V

THE TRIAL COURT ERRRED IN FINDING THE FELONY MURDER (ROBBERY) AGGRAVATOR/ PECUNIARY GAIN AGGRAVATOR

At trial the State's theory was that the murder occured during the course of a robbery and that it was committed so Curtis could obtain the $800 that Mrs. Monfort had recieved as a rental deposit. The trial court in the sentencing order found that the capital murder was committed while the defendant was engaged in the commission of a robbery and that the crime was committed for financial gain. The court found that these two aggravating circumstances involved aspects that were the same, so these aggravators were merged and treated as one factor. This single factor was assigned "some weight" by the sentencing court. (Vol.4,R594;617-618)

The standard of proof regarding circumstantial evidence which has already been adressed in Issues I, II, and IV also applies to the evidence regarding this aggravator. Relying on those cases previously argued in Issues I, II, and IV, the State failed to exclude a reasonable hypothesis of innocence with respect to the crime of robbery with a weapon and thus the use of the aggravator which relies upon that conviction is improper. Based on the argument in Issue II regarding why the evidence of robbery is insufficient, the evidence in support of felony murder is also insufficient.

In Scull v. State, 533 So. 2d 1137 (Fla. 1988), the aggravating factor of pecuniary/financial gain was stricken even though the defendant had taken the victim's car following the murder where it had not been shown beyond a reasonable doubt that the primary motive for the killing was pecuniary gain. As this Court noted, it was possible that the car was taken to facilitate an escape rather than as a means of improving the defendant's financial worth.

There was no evidence that Curtis was later found in possession of any personal items belonging to Mrs. Monfort, such as in Brown v. State, 644 So. 2d 52 (Fla. 1994). There was also no evidence of significant advance preparation, such as procuring a gun or other weapon, as in Mungin v. State, 689 So. 2d 1026 (Fla. 1995).

Because the State failed to prove a robbery, the aggravating factor which utilized the robbery conviction must also be stricken, as well as the pecuniary gain aggravator that involves aspects that were the same as the felony murder (robbery) aggravator.

ISSUE VI

THE TRIAL COURT ERRED IN REJECTING SEVERAL FACTORS AS MITIGATING IN THIS CASE

The trial court improperly rejected several factors submitted by the defense as mitigation in this case. These include the mitigating factors that Curtis grew up in a poor/rural background (Vol.4,R621), the death of Curtis's father and its impact on him while he was incarcerated (Vol.4,R622), sorrow regarding the victim's death and expressions of gratitude for her kindness to him, while still maintaining his innocence (Vol.4,R623-624), and good behavior during trial (Vol.4,R624). The trial court's rejection of these factors as mitigation requires reconsideration of the sentence imposed.

The standard of review for mitigating factors is set forth in Campbell v. State, 571 So. 2d 415 (Fla. 1990). Campbell holds that whether a paticular factor is truly mitigating in nature is a question of law for this Court to decide. Whether it has been established by competent, substantial evidence and the weight that it is assigned is a question of fact to be determined by the trial court and subject to review utilizing an abuse of discretion standard. It is Appellant's position that the trial court erred as a matter of law with respect to these mitigating factors and abused its discretion in

failing to find these factors as mitigating.

Under both Florida and Federal law any part of a defendant's character or background must be considered as mitigating if proved. The fact that a criminal defendant had a positive background has been accepted as a mitigating factor. See, Jones v. State, 690 So. 2d 568 (Fla. 1996) It was error for the trial court to reject these facts as mitigating.

The death of Curtis' father and its impact on him as evidenced by the jail records, his relatives, and the letter he wrote to his father is mitigating in nature. It established that Curtis was capable of deep emotion for another human being and that he appreciated and was grateful to his father. Such factors are appropriatley considered as non-statutory mitigation.

The trial court's rejection of Curtis' claim of innocence coupled with her rejection of Curtis' sadness at the death of Mrs. Monfort and his appreciation of her kindness to him is problematic and confusing. Certainly, the record demonstrated that Curtis was grateful to Mrs. Monfort. These feelings were expressed to Jane O'Toole. It was error for the court to not find this mitigating factor established.

Likewise, the trial court's failure to find Curtis' remorse or sorrow regarding the death as mitigation is also error. If a person can cause an individual's death through a criminal act, profess sorrow for that death, and then have that sorrow considered in

mitigation for punishment, it should also be a mitigating factor in situations where an individual expresses sorrow over a death but at the same time maintains their innocence. To do otherwise punishes those who maintain their innocence. A person can feel genuine sorrow over a death regardless of whether or not they are responsible for that death. It is unfair to deny a criminal defendant a mitigating factor in this type of situation unless he gives up his claim of innocence.

The trial court should not be allowed to use a continuing claim of innocence, as a basis to reject sorrow as a mitigating factor. A lack of remorse has no place in the consideration of aggravating factors and it should have no place in the rejection of mitigating factors.

The trial court's failure to consider and find these mitigating factors requires that the sentence be reversed and remanded for reconsideration. See, Spencer v. State, 645 So. 2d 377 (Fla. 1994).

ISSUE VII

THE SENTENCE OF DEATH IS DISPROPORTIONATE

Under Florida law, the death penalty is reserved only for the most aggravated and least mitigated of homicides. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); DeAngelo v. State, 616 So. 2d 440, 443 (Fla. 1993); Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993). In addition, the 8th and 14th Amendments to the United States Constitution require that capital punishment be imposed fairly and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U.S. 104 (1982). This Court's independent appellate review of death sentences is crucial to ensure that the death penalty is not imposed arbitrarily or capriciously. Parker v. Dugger, 498 U.S. 308 (1991). This requires an individualized determination with respect to the appropriate sentence on the basis of the character of the defendant and circumstances of the offense. Id.

To meet these constitutional requirements, this Court conducts proportionality review of every death sentence to prevent the imposition of cruel and unusual punishment, which is prohibited by the 8th Amendment to the U.S. Constitution and

Article I,Section 17 of the Florida Constitution. Kramer, 619 So. 2d at 277; Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). "A high degree of certainity in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly." Fitzpatrick, 527 So. 2d at 811. Becuase death is a uniquely irrevocable penalty, death sentences require more intensive judicial scrutiny than lesser penalties.

Proportionality review is not just a counting of the aggravating and mitigating circumstances. "While the number of aggravating and mitigating factors do not in themselves prohibit or require a finding that death in nonproportional, " this court is "required to weigh the nature and quality of those factors as compared with other similar reported death appeals. Kramer , 619 So. 2d at 277. Proportionality review must be thoughtful and deliberate and requires this court to "consider the totality of the circumstances in a case and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstamces." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). "Proportionality review is a unique and highly serious function of this Court." Urbin v. State, 714 So. 2d 411, 416-417 (Fla. 1998). It is a stringent standard of review. Cave v. State, 24 Fla. L. Weekly S17, dissenting opinion at S20 (Fla. December 24, 1998).

This case is certainly not among the most aggravated murder cases in the State

of Florida. While the trial court found two aggravators, the trial court also found 38 mitigating factors. (Although grouped by the trial court in such fashion as 4a-f, if each factor found is counted separately, the total is 38).

With respect to the weight given these mitigating factors the trial court gave very little weight to one factor, #13, that Curtis was a good musician. The court assigned "little weight" to 17 factors, #'s 1,2,3,4,5,6,7,8,11,12,14,16,18,19,20,21, and 24. The court assigned "some weight" to #9, military service; #10, good worker; #15, substance abuse; #22, no history of criminal convictions for violent crimes; #23, contact with children and grandchildren, #3a-3f (six factors), relating to the psychological testimony presented at the Spencer hearing; and #6a-f (six factors), relating to good behavior since arrest. In total, 17 factors were given some weight. (Vol.IV,R618-625) Similar mitigation has been referred to as "substantial" in Woods v. State, 24 Fla. L. Weekly S186 (Fla. April 15, 1999).

The court found two aggravating factors. The court assigned some weight to financial gain/ in the course of a robbery, and very great weight to HAC. (Vol.4,R617-618)

As previously asserted in Issues IV and V, the trial court erred in finding these aggravators. If this Court agrees that these aggravators should be stricken, a reversal for a life sentence is mandated, because of the absence of any aggravating factors.

If this court determines that only the HAC aggravator should be stricken, reversal is still required. This Court would then be left with a single aggravator and substantial mitigation. This Court has rarely approved a death sentence with a single aggravator and substantial mitigation. See, Woods v. State, 24 Fla. L. Weekly S183, S187 (Fla. April 15, 1999), and the cases cited therein. Clearly, if this court agrees that the HAC aggravator should be stricken, a life sentence is requried.

If this Court finds HAC to be the sole aggravator, a life sentence is still required. For example, in Nibert v. State, 574 So. 2d 1059 (Fla. 1990), a death sentence was reversed with a finding of HAC as the sole aggravator. The victim had been stabbed 17 times. This Court found that the large quantum of uncontroverted mitigating factors outweighed the aggravator and held that a death sentence was disproportionate.

Likewise, in the instant case, the mitigating factors found by the court were uncontroverted. Based on this mitigation alone, a sentence of death is disproportionate. When the mitigation that was found by the Court is added to the mitigation which the court improperly failed to consider and weigh, a sentence of death is overwhelmingly disproportionate.

Even if this Court holds that both aggravators were established by competent, substantial evidence and properly found and considered by the trial court, a sentence of death still does not comport with constitutional requirements and cannot pass the

stringent standard of proportionality review.

This case is very similar to two cases in which this Court ruled that death was not a proportionate penalty in one of the cases, and in the other returned the case to the trial court for a new sentencing proceeding- DeAngelo v. State, 616 So. 2d 440 (Fla. 1993) and Scull v. State, 533 So. 2d 1137 (Fla. 1988). In DeAngelo the victim was a family friend of the defendant and his wife, and had even allowed them to stay in her home. The DeAngelos moved out after a short period of time, but the victim then moved in with them in their home. According to the defendant's confession, he and the victim got into an argument and he grabbed her chin. The victim died from asphyxiation due to manual and ligature strangulation. She also had scrapes and bruises on her head. CCP was found as an aggravator and HAC was rejected as an aggravator, largley due to the probable unconsciousness of the victim. In mitigation, the defendant presented evidence that there was an ongoing quarrel between the victim and defendant, that the defendant served as a volunteer firefighter that he had been in the military, and that he confessed. There was also mental mitigation, which had been rejected by the trial court as having reached the level of a statutory mental mitigator. This Court reversed the death sentence, finding it disproportionate.

In the instant case the HAC aggravator is similar to the CCP aggravator in DeAngelo in that both of these aggravators have been found by this Court to be

significant evidence of aggravation. The instant case shares much of the same mitigation as in DeAngelo , and in fact, has far more mitigation. As in DeAngelo, Curtis served in the military. The trial court in the instant case found that there were mental health issues and drug addiction, and assigned them some weight.

This instant case also has a significant amount of mitigation that was not present in DeAngelo. Curtis had no prior criminal convictions for any violent crimes. Psychological testimony indicated he exhibited no future dangerousness and would adapt well to prison. Curtis has strong family ties. Curtis' death sentence should also be found disproportionate.

In Scull two women were found dead in their burning home, after having been beaten to death, probably with a baseball bat. The trial court found six aggravators: great risk, felony murder, (burglary), avoid arrest, pecuniary gain, HAC, and CCP. On appeal, this Court found that HAC applied to only one of the murders and that the only other aggravator supported by the evidence was that the capital felony was committed during a burglary. Only two mitigators were found: the defendant's age and that he had no significant prior criminal history. The sentence of death was not affirmed, but instead, the case was reversed for a new sentencing hearing.

Given the far greater mitigation present in this case and the questionable applicability of the two aggravators, the death sentence should not be upheld. A life

sentence is the appropriate disposition.

CONCLUSION

Appellant submits that the convictions for first-degree murder, robbery with a weapon, and theft of a motor vehicle be set aside. The evidence fails to support these convictions. In the alternative, a conviction for second-degree murder and theft should be imposed.

The sentence of death should be reversed and the case remanded for a new sentencing proceeding before a jury and/or the trial court. In the alternative, a life sentence should be imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, 2002 N. Lois Ave., Suite 700, Tampa, Florida 33607, this 8th day of June, 1999.

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