IN THE SUPREME COURT OF FLORIDA

CURTIS W. BEASLEY,	)	
	)	
Appellant,	)	
	)	
vs.	)	APPEAL NO. 93, 310
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

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

REPLY BRIEF OF APPELLANT

ROBERT A. NORGARD
ATTORNEY AT LAW
FLORIDA BAR NUMBER 322059

P.O. BOX 811
BARTOW, FL 33831
(863)533-8556

ATTORNEY FOR APPELLANT

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PRELIMINARY STATEMENT

Petitioner will be responding to Issues I, II, IV, V, and VII as set forth in the Initial Brief and Answer Brief. Petitioner will rely upon the arguments and citations of authority as presented in the Initial Brief for Issues III and VI.

The Reply Brief is presented in Times New Roman, 14 point, a font that is not proportionally spaced.

ARGUMENT

ISSUE I

THE CRICUMSTANTIAL EVIDENCE FAILED TO EXCLUDE A REASONABLE HYPOTHESIS OF INNOCENCE AND IS THEREFORE INSUFICIENT TO SUPPORT THE CONVICTIONS IN THIS CASE.

The State in its Answer Brief suggests that this Court should not consider the question of the sufficiency of the evidence in this case and ignore the dictates of State v. Law, 559 So. 2d 187 (Fla. 1990) and hundreds of appellant cases dating back to 1856 which have applied the circumstantial evidence rule. See, Joe v. State, 6 Fla. 591 (1856); Whetson v. State, 31 Fla. 240, 12 So. 661 (1893). Utilizing the standard set out in these cases for testing the sufficiency of evidence protects against the improper compounding of inferences and the danger of an improper conviction on nothing stronger than a suspicion. Brown v. State, 428 So. 2d 250 (Fla. 1983); Diecidue v. State, 131 So. 2d 7 (Fla. 1961); Moffat v. State, 583 So. 2d 779 (Fla. 1st DCA 1991); Weeks v. State, 492 So. 2d 719 (Fla. 1st DCA 1986); Williams v. State, 713 So. 2d 1109 (Fla. 2d DCA 1998).

Appellant acknowledges that the State is entitled to inferences from the evidence in favor of the State's position. However, the State is not free to omit facts and take

facts out of context in order to reach a favorable inference. Many of the facts relied upon by the State in their Answer Brief were reached through the omission of facts, taking facts out of context, or are merely assertions.

For example, on page 10, the State asserts that Mr. Beasley claimed to have left in the victim's car that night. There were no facts to support this and no statements by Mr. Beasley that he was in the car that night. There are no facts to support the State's assertion that Mr. Beasley was in the home after 7:00 p.m. There are no facts to establish what time Mrs. Monfort arrived home or specifically establish what time she was killed. There were no facts that support the State's assertion that Mr. Beasley attempted to give Mr. Robinson one of the $100 bills that Mr. Rosario had given to Mrs. Monfort. There were no facts to support the State's inference that the presence of Mr. Beasley's cigarette butts in the ashtray proved that he took the car after he killed Mrs. Monfort.

The State argues that the review of the facts in the Initial Brief is "a nice closing argument", but that it does not dilute the evidence which supports the State's theory. The State, however, cannot simply dismiss facts which do not support their version of events. For example, it was undisputed that Mr. Beasley was driven around by Mrs. Monfort in her car, thus providing a non-incriminating explanation for the presence of cigarette butts in the car ashtray. The State cannot ignore the fact that Mr. Beasley had

already planned to the leave the area before the homicide. The State cannot ignore the

Robinsons' inability to testify that Mr. Beasley was at their home on the night of the murder.

The State's case at trial and their position in the Answer Brief creates nothing but a chain of inferences to suggest that Mr. Beasley was the killer. A close examination of this chain shows that it is full of gaps and is not a well-connected chain of facts. The State failed to prove its case, and the trial court erred in not granting Mr. Beasley's motion for a judgment of acquittal. Mr. Beasley now asks this Court to reverse his convictions.

ISSUE II

THE CIRCUMTANTIAL EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF FIRST DEGREE MURDER (AND ROBBERY) PREMEDITATED OR

While the State's recitation of the law defining premeditation is correct, the argument fails to address the burden placed upon the state in proving premeditation by circumstantial evidence. The burden upon the state is to put forth evidence which must be inconsistent with every other reasonable hypothesis except guilt. The State in this case failed to meet that burden. While the evidence may be consistent with a premeditated murder and a robbery, it is not inconsistent with a second degree murder and a taking of property as an afterthought.

The evidence in this case was purely circumstantial. Thus, the standard of review set forth in Davis v. State, 90 So. 2d 629, 631 (Fla. 1956), is applicable to this case:

> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain a conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves

> uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is

> sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise inconsistent with a reasonable hypothesis of innocence.

As noted in both the Initial and Answer Briefs, the courts have looked to several types of evidence from which the presence or absence of premeditation can be inferred. Contrary to the State's conclusions on page 15 of the Answer Brief , the evidence in this case did not establish that the attack was prolonged, such as in a strangulation death. All the factors in this homicide point to a killing aminating from a rage or frenzy. The cases relied upon by Mr. Beasley in the Initial Brief support his position that the evidence did not exclude a reasonable hypothesis that this murder was not premeditated.

Other courts and commentators have grouped the types of evidence from which premeditation can be inferred into three categories: (1) facts showing planning activity directed toward a killing purpose; (2) facts from which a motive to kill could be inferred, and (3) facts about the nature of the killing from which it may be inferred "the manner of killing was so particular and exacting the defendant must have killed

according to a preconceived design." See W.R. LaFave & A.W. Scott, 2 Substantive Criminal Law, s. 7.7, at 238-240 (1986):

> Illustrative of the first category are such acts by the defendant as prior possession of

> the murder weapon, surreptitious approach of the victim, or taking the prospective victim to a place where others are unlikely to intrude. In the second category are prior threats by the defendant to do violence to the victim, plans or desires of the defendant which would be facilitated by the death of the victim, and prior conduct of the victim known to have angered the defendant. As to the third category, the manner of the killing, what is required is evidence (usually based upon examination of the victim's body) showing the wounds were deliberately placed at vital areas of the body.

The facts in this case show absolutely no planning activities by Mr. Beasley to accomplish the murder of Mrs. Monfort. There was no evidence that showed prior possession of the murder weapon, or a surreptitious approach of Mrs. Monfort, or the taking of Mrs. Monfort to a location where others would be unlikely to intrude.

The facts in this case show absolutely no evidence of prior threats by Mr. Beasley toward Mrs. Monfort, any plans or desires of Mr. Beasley which would have been facilitated by her death, or any conduct by Mrs. Monfort which had angered Mr. Beasely. The evidence was to the contrary.

Nor does the nature of the murder suggest that it was a "particular and exacting" murder or one of "preconceived design". The evidence, including an examination of Mrs. Monfort's body, portrays a killing that occurred in a spontaneous rage.

Mr. Beasley disputes that State's assertion that whether or not the evidence supports a conviction for robbery/felony murder was not preserved in the trial court. The defense at trial was that Mr. Beasley was not the killer. Counsel would not be expected to concede guilt to preserve the sufficiency of the evidence as to this theory of the State's case. When moving for a judgment of acquittal, defense counsel specifically argued to the trial court that the State had failed to meet the burden of proof as it relates to circumstantial evidence. (Vol.XXV,T3589-3590;Vol.XXVI,T3591-3592) Counsel did argue that Mr. Beasley did not take any property belonging to the victim and that he was not the killer. Counsel specifically pointed to deficiencies in the State's case. It was not, as the State suggests, simply a perfunctory, bare bones motion for judgment of acquittal on the grounds that the evidence was not sufficient. Counsel clearly presented to the court an argument that the evidence was not sufficient to sustain a conviction under the applicable standard of review governing the case. The judgment of acquittal complies with Bertolotti v. State, 514 So. 2d 1095 (Fla. 1987) in order to preserve this claim for review.

This case is distinguishable from those cited by the State. For example, in

Young v. State, 579 So. 2d 721 (Fla. 1991), Young and three companions decided to steal a car. They went to Young's house where Young got a sawed-off shotgun. Young told his companions that he would shoot anyone who pointed a gun or shot at him.

Young was in the process of breaking into a car when the owner of the car arrived. The owner of the car ordered Young to lay on the ground at gunpoint, at which time Young took the shotgun and fired a shotgun blast that was the first and final shot fired. Under these facts, there was ample evidence of a planned burglary that clearly was in progress and had not ceased at the time of the murder, as well as the prior expression of an intent to shoot someone. That is not what the evidence established in this case. The State failed, as set forth factually in the Initial Brief, to rebut a reasonable hypothesis that the car was taken as anything but an afterthought. The State also failed to show that the money was taken at all, or assuming it was taken, rebut the reasonable hypothesis that it was taken as an afterthought.

In Roberts v. State, 510 So. 2d 885 (Fla. 1987), cert. denied, 485 U. S. 943 (1988), Roberts came upon the victim and two women in a car on the causeway near Key Biscayne. Telling them he was a police officer, Roberts began to fondle Michelle Rimondi while allegedly "frisking" her. The victim, a man, was beaten to death by Roberts when he questioned whether or not Roberts was a cop. Roberts then raped Rimondi twice. Under these facts, that the fondling happened prior to the murder and

one uncompleted rape was attempted near the deceased's body, this Court concluded that the murder was done in furtherance of Robert's intent to rape. By contrast, in this case there was no evidence to suggest that Mrs. Monfort was killed while her money was

being taken, in an argument over the taking of the money, or for any reason relating to the money.

Neither of these cases relied upon circumstantial evidence to prove whether or not the crime had been committed, and its related standard of proof. However, that is the applicable standard in this case, and the State simply cannot meet their burden of proof.

In Scull v. State, 533 So. 2d 1137 (Fla. 1988), the defendant was convicted of two counts of first degree murder and several other offenses, including robbery with a deadly weapon, armed burglary, possession of a weapon while committing a felony, arson, and possession of cocaine. The brief facts in that opinion are that the bodies of two women were found in a burning room. They had been beaten to death, probably with a baseball bat. A bat found in the room had the Scull's fingerprint on it. A car belonging to one of the women was involved in a collision on I-95 and Scull's fingerprints were on the window. The opinion contains no information about the cocaine, nor does it link any of the facts to the other convictions. The most the opinion notes is that these other convictions were contemporaneous and do not preclude the

finding of an aggravating factor. This case does not support the proposition that the State implies in their brief at page 19. It does not support any sort of argument as to whether or not the evidence of Scull's other convictions were sufficient to support a felony murder theory of prosecution, nor did this case have anything to do with the State's

argument that Appellant had "confused the evidence required to support the pecuniary gain aggravating factor with that necessary to support a robbery, and consequently felony murder, conviction." State's Brief, p. 18.

Neither does Randolph v. State, 463 So. 2d 186 (Fla. 1984), cert. denied, 473 U.S. 907 (1985), support the State's position. In that case the Randolph's girlfriend testified conclusively that after her "john" was shot by the defendant, Randolph asked her if he had any money. At least $80.00 was unaccounted for that the victim was known to have had. In this case, there was no evidence to conclusively establish that at the time of her death Mrs. Monfort had any money, or that Mr. Beasley knew she had any money, or that he had taken any money.

Contrary to the State's assertion, the evidence did not establish that Mr. Beasley had money problems, thus providing a motive or intent for him to steal from Mrs. Monfort. While there was evidence that Mr. Beasley owed a small amount of money to the Robinsons, there was no evidence that this was a problem to them, that there was any ongoing attempt to collect it, or even any bad feelings over it. Although, Mr.

Beasley asked Jane O'Toole for some money, there was no evidence that this was due to any pressing financial need. Mr. Beasley simply asked to be paid for the work that he had just done for her. There was not a scintilla of evidence in the record to suggest that Curtis had any need for money, let alone that he needed to murder Mrs. Monfort so

that he could steal her car or her money.

The evidence in this case is insufficient to support a conviction for premeditated murder and also is insufficient to support a conviction for felony murder predicated upon robbery. The convictions must be reversed.

ISSUE IV

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

It is Mr. Beasley's position that the aggravating factor HAC should not have been applied by the trial court in this case. The State relies upon several cases where HAC was affirmed to support their position to the contrary. These cases are distinguishable from this case.

In Penn v. State, 574 So. 2d 1079 (Fla. 1991), the defendant did not challenge the finding of HAC, and this Court determined that HAC was properly found. The victim, Penn's mother, suffered 31 separate wounds, most of them to the head. The victim had defensive wounds and the medical examiner estimated that it could have taken up to 45 minutes for her to die. In contrast, there were at least half the number of wounds in this case and death was likely instantaneous.

Chandler v. State, 534 So. 2d 701 (Fla. 1988), dealt with a double homicide- the killing of an elderly married couple. Both were repeatedly hit in the head and they were killed in each other's presence. Both were frail and the opinion focused on the trauma they must have felt by being surprised in their own home and dying in front of each other. The case at bar was not a double homicide, and did not have the other

factors focused on by this Court to support HAC.

In Lamb v. State, 532 So. 2d 1051 (Fla.1988), Lamb planned to burglarize a home. Angry at the poor "take" from the home, Lamb decided to stay and wait for the

victim. According to the co-defendant, Lamb had brought one weapon to the scene and had discarded it favor of another weapon that was better suited to his plan. Lamb struck the elderly victim at least six times in the head with a claw hammer. According to the eyewitness, the victim was upright and moaning, so Lamb pulled the victim's feet out from under him. The victim moaned, holding his head until Lamb kicked him in the head. Lamb also refused to call an ambulance for the victim. The case at bar does not contain the pitiless, torturous conduct that Lamb indisputably inflicted on his victim.

The case of Atwater v. State, 626 So. 2d 1325 (Fla.1993), is also distinguishable from this case. In Atwater the defendant killed a 64 year old man by inflicting 9 stab wounds to his back, 11 incised stab wounds to the face, 6 incised stab wounds to the neck, 1 to the left ear, 1 to the right shoulder, 1 to the thumb, 9 stab wounds to the chest , heart, and lungs, 2 superficial puncture wounds to the abdomen, a scalp laceration, and numerous abrasions which included a fractured thyroid cartilage and multiple rib fractures. According to the medical examiner, most of the wounds occurred while the victim was alive, and death would not have come until one to two minutes after the heart injury. The heart wound was likely inflicted last. In this case,

death or unconsciousness was likely to have occurred very soon, and Mrs. Monfort was not injured to the extent that occurred in Atwater.

Neither does Bogle v. State, 655 So. 2d 1103 (Fla. 1995), support a finding of

HAC in this case. In Bogle the victim was badly beaten and struck on the head seven times with a cement block with such force that her head was flattened and the ground under her head was depressed. According to the medical examiner, the victim was alive for most of the wounds. The last blows inflicted were what caused death.

The State hinges part of its argument regarding HAC based on the blood in the dining room. The blood in the dining room was a small quantity on the door jambs. It was not established by any of the evidence that it was left there by the victim due to a struggle throughout the house, despite the State's claim to that effect. It could well have been left by the killer. There was no other evidence to substantiate a struggle in any other part of the house.

The aggravating factor HAC is not supported by the evidence. It should be stricken.

ISSUE V

THE TRIAL COURT ERRED IN FINDING THE FELONY MURDER

(ROBBERY) AGGRAVATOR / PECUNIARY GAIN AGGRAVATOR

The State bases its rebuttal to this Issue on incorrect facts. On page 36 of the Answer Brief, the State alleges that Mr. Beasley was in possession of a large sum of cash. There is no evidence to support this statement. At most, the Robinsons said they saw Mr. Beasley with a one hundred dollar bill at an unspecified date in relationship to the murder. When Mr. Beasley arrived in Miami the day after the murder is believed to have occurred, he had no money. Also, the State did not establish that the money given to Mrs. Monfort by Mr. Rosario was missing. Although the money was not found on her person when the body was discovered, not a single witness testified that the money had not been recovered, that it had not been found elsewhere, or that Mrs. Monfort had not put the money in a secure location that was not discovered.

Mrs. Monfort's car was not discovered until several months after Mr. Beasley's arrest. It is mere conjecture and speculation that "someone" who was friends with Mr. Beasley might have put the car there after his arrest. Notably, the State was unable to present any evidence to support this scenario. The car was found in a highly traveled area of Orlando and could not have been in that location prior to Mr. Beasley leaving

the Central Florida area and his subsequent arrest. The presence of Mr. Beasley's cigarette butts in the car would have been the "smoking gun" in this case if Mr. Beasley

had not been known to have been in the car with Mrs. Monfort prior to her murder with her permission as she drove him to work. Speculation by the State that Mr. Beasley murdered Mrs. Monfort for her money or the car is not supported by the record and this aggravating factor is not proven.

Those cases which are cited by the State on pages 35 and 36 as being factually similar to this case are not. For example, the State relies upon Finney v. State, 660 So. 2d 674 (Fla. 1995), as a case that is factually similar to this case. Finney was convicted of murdering a young women who lived in his apartment complex. To support the robbery conviction and the pecuniary gain aggravator, the State presented evidence that Finney pawned the victim's VCR for cash shortly after her murder, that the victim's bedroom had been ransacked and her jewelry box was missing, and that the contents of her purse had been dumped out. In the case at bar the facts were just the opposite. There was no evidence that Mr. Beasley disposed of any of Mrs. Monfort's property, the house was not ransacked, all her jewelry was in the house, including jewelry found on her body, and cash was found in the house.

In Atwater v. State, 626 So. 2d 1325 (Fla. 1993), Atwater was known to have taken money from the victim in the past, the victim was afraid of Atwater, and the

victim had made statements that he would not give Atwater money any more. The victim was known to have had money in his pants pockets just before his death, yet when the

body was discovered the pants pockets were turned inside out and the money was missing. There is no evidence of any prior difficulties between Mrs. Monfort and Mr. Beasley, no evidence that she feared him or had loaned him money before, and no conclusive evidence that she had cash on her at the time of her death.

In Bruno v. State, 574 So. 2d 76 (Fla.), cert. denied, 116 L. Ed. 2d 81 (1991), Bruno and his son went to the home of the victim. After drinking, Bruno pulled a crowbar from under his shirt and beat the victim on the head with it. While the victim begged for his life, Bruno shot him twice in the head with a gun. Bruno had made prior statements that he intended to kill the victim to obtain the stereo equipment up to two weeks before the murder. After killing the victim, Bruno made several trips in and out of the apartment to remove the stereo equipment. Under these facts, the pecuniary gain/robbery aggravator was held to be applicable. There is no evidence in the record in this case similar to those in Bruno.

In Floyd v. State, 569 So. 2d 1225 (Fla.), cert. denied, 111 S.Ct. 2912 (1991), Floyd made admissions to a fellow inmate that he had broken into the victim's home to burglarize it and that she had "surprised" him during the course of the burglary. In addition to the admission, the evidence indicated that in the days immediately following

the homicide, Floyd cashed several checks drawn on the victim's checking account. There is no evidence in this case that Mr. Beasley used any of Mrs. Monfort's property

to his financial advantage. There is no evidence that he attempted to sell the car or anything else belonging to Mrs. Monfort. There is no evidence that he cashed checks on her accounts. There is also no admission from Mr. Beasley that he was burglarizing Mrs. Monfort's home, or committing any other crimes.

The cases cited on page 36 by the State in support of their argument that pecuniary gain factor should apply because the murder was committed to obtain the car do not apply to this case. In those cases, the clear desire of the defendant was to obtain an automobile. For example, in Jones v. State, 690 So. 2d 568 (Fla. 1996), Jones had purchased a car from a car dealership with a bad check. When he went back to the dealership to straighten it out, he first had a discussion with the owner. Jones then went to the car, returned with a gun and first shot and killed the owner's daughter. He then shot the dealer. Jones then took the paperwork for the car from the owner's desk and fled in the car. Nothing in the facts in this case suggest that a similar situation occurred. Nothing suggests that the car was not taken as a means of escape as an afterthought to the killing.

In the second Jones case cited by the State, Jones v. State, 612 So. 2d 1370 (Fla. 1992), there are no facts in the opinion. A footnote indicates that the facts are reported

in Jones v. State, 569 So. 2d 1234 (Fla. 1990). The case cited by the State only states that Jones, seeking to steal a vehicle, killed two people asleep in it. The prior opinion sets forth these additional facts: Jones and a codefendant were in a rural area when their car

broke down. An unknown individual told them to seek help from a pickup parked a short distance away. According to the co-defendant, he and Jones got to the truck and found the occupants sleeping. Jones discussed killing the occupants to get the truck. At one point Jones walked away and returned with a shotgun. Jones then shot the sleeping victims, dumped their bodies, and took the truck. There is no similarity between the facts in Jones and this case. There is no evidence in this case to indicate that Mr. Beasley killed Mrs. Monfort to obtain her car. There was no showing in the record that Mr. Beasely needed a car.

In Medina v. State, 466 So. 2d 1046 (Fla. 1985), Medina killed the victim in order to obtain her car. The record established that Medina had an obsession for cars and a tremendous desire to own one. Shortly after the murder, Medina attempted to sell the car in Tampa. This Court upheld the pecuniary gain aggravator based upon the stealing coupled with the attempt to sell. In the present appeal, there is, again, no indication that Mr. Beasley ever obtained a profit from the auto, or that he ever attempted to sell it.

The evidence fails to support the pecuniary gain aggravator. It should be stricken from consideration and Mr. Beasley should be resentenced.

ISSUE VII

THE SENTENCE OF DEATH IS DISPROPORTIONATE

The trial court found two aggravating circumstances in this case, HAC and Pecuniary Gain. The trial court also found one statutory mitigator and 38 other mitigating

factors. In the Initial Brief, Mr. Beasley argued that his case, when compared to other death penalty cases, was not among the least mitigated and most aggravated. In response, the State cited various cases in support of their argument in opposition. Each of these cases is distinguishable from this case and do not support a death sentence in this case.

In Robinson v. State, 24 Fla. L. Weekly S393 (Fla. Aug. 9, 1999), a case which was decided after the filing of the Initial Brief, this Court affirmed a death sentence imposed on Robinson for the murder of his girlfriend. While the State supplied the facts of the murder in the Answer Brief, the brief fails to outline the specific aggravators and mitigators relied upon to support the sentence. This Court held that three aggravators were established: (1) pecuniary gain, (2) a murder committed to avoid arrest, and (3) CCP. There were two statutory mitigators, extreme emotional distress and substantial impairment. Seventeen additional non-statutory mitigators were found. The case at bar differs significantly in that there is one less aggravator and twice as much mitigation. Clearly, when compared to Robinson, this case is less

aggravated and more mitigated. Factually, the cases differ significantly. Robinson confessed to his crime and in doing so admitted to substantial premeditation. Robinson intentionally laid out a hammer and waited for his girlfriend to fall asleep. Robinson, after striking her in the head, intentionally stabbed her in the chest because she was still breathing. Nothing in the record suggests that the murder of Mrs. Monfort was carried

forth in such a deliberate fashion. This important distinction, coupled with more mitigation and less aggravation in this case supports the imposition of a life sentence.

A death sentence was found to be proportional in Foster v. State, 654 So. 2d 112 (Fla.), cert. denied, 516 U.S. 920 (1995), but again, the facts differ significantly from this case. Three aggravating factors were found, HAC, CCP and felony murder-robbery. In Foster fourteen non-statutory mitigators were found and given little weight. According to the facts set forth in the opinion, Foster severely beat the victim. The victim did not die instantaneously. Foster then took out a knife and threatened to kill the victim. Foster then stabbed the victim in the throat. While the victim was still alive, Foster grabbed his genitals. When the victim groaned, Foster stabbed him again, severing his spine. There was evidence that the victim asked Foster not to stab him the second time. Foster then dragged the victim, who was still alive, into the bushes. The victim probably lived 20-30 minutes after the stabbing and 3-5 minutes after his spine was severed. While not intending to diminish Mrs. Monfort's death, the record in this

case does not contain evidence of the type of torture that Foster forced his victim to endure. Once again, in comparison, a death sentence is disproportionate.

Sliney v. State, 699 So. 2d 662 (Fla. 1997), cert. denied, 118 S.Ct. 1079 (1998), was essentially a three aggravator case. The trial court found that two aggravators existed, a murder to avoid arrest and a murder during the commission of a felony. This Court

noted that although not found by the trial court, HAC could have been found. The victim was stabbed, his back broken, and he was hit with a hammer during a jewelry store robbery. Age and no significant criminal history were the statutory mitigators found, and five non-statutory mitigators were found and given little weight. Again, far more mitigation exists in this case and less aggravation is present.

Another case relied upon by the State, Gamble v. State, 659 So. 2d 242 (Fla. 1995), cert. denied, 516 U. S. 1122 (1996), is also distinguishable from this case. Gamble beat his landlord to death with a hammer and there was clear evidence of premeditation. The co-defendant testified that he and Gamble planned the murder ahead of time, discussed what weapon to use, and Gamble searched the garage ahead of time for the weapon. In addition to beating his victim, Gamble also choked him with a cord. Two aggravators, CCP and pecuniary gain were found, but only age and four non- statutory mitigators were present. Mr. Beasley's case is far more mitigated than Gamble and does not contain the same level of aggravation.

Freeman v. State, 563 So. 2d 73 (Fla. 1990), cert denied, 501 U.S. 1259 (1991), is a case where two aggravators were present. Pecuniary gain and burglary of a dwelling were merged to establish one aggravator. The other aggravator was a prior first degree murder that Freeman had committed three weeks before the homicide that was the subject of his appeal. Only four non-statutory mitigators were found. Again, there is far

more mitigation present in Mr. Beasley's case and the aggravation in this case is less significant than Freeman's prior murder.

Likewise, Smith v. State, 641 So. 2d 1319 (Fla. 1994), cert. denied, 513 U.S. 1163 (1995), had far less mitigation than this case. Only several unspecified nonstatutory mitigators and one statutory mitigator, no significant prior criminal history, were found.

In Owen v. State, 596 So. 2d 985 (Fla.), cert. denied, 506 U. S. 921 (1992), death was held to be a proportional penalty where four aggravators were found, prior conviction of a violent felony (a homicide), murder committed during a sexual battery, HAC, and CCP. Little mitigation was present. Owen had broken into a home of a Boca Raton woman, bludgeoned her to death with a hammer and then sexually assaulted her. According to the opinion, the victim awoke screaming and struggling. Her neck bones were broken from strangulation and her vagina was torn by a foreign object, likely a hammer handle. The victim lived for several minutes to an hour after

the assault. Owen is not at all similar to the facts established in this case.

Two of the cases cited by the State differ significantly from Mr. Beasley's case because they involved assaults on more than one individual. Cherry v. State, 544 So. 2d 184 (Fla. 1989), was a double homicide with three aggravators, two of which were merged into one. The opinion does not set forth what mitigation was present. Thus, because of the great factual disparity and the absence of sufficient facts in the opinion, it

cannot be used for comparative purposes to this case. Brown v. State, 565 So. 2d 304 (Fla.), cert .denied, 498 U.S. 992 (1990), involved two victims, both of whom were shot. One died and the other survived. The evidence suggested that the crime was preplanned and not impulsive. Brown is a three aggravator case with only four minor nonstatutory mitigators.

This case is far more mitigated that other cases where the death penalty has been upheld. For example, in Floyd, at 569 So. 2d 1225, the aggravators were pecuniary gain and HAC. There was no mitigation. Mr. Beasley's case is far different in the amount of mitigation present. A death sentence in Medina, at 466 So. 2d 1046, was upheld where the HAC and pecuniary gain aggravators were found, but only one statutory mitigator, that of no significant prior criminal history, was found. It would be grossly disproportionate to affirm a death sentence in this case when it is compared with Floyd and Medina.

The instant case is more similar to those in which this Court has reversed a sentence of death, including Songer v. State, 544 So. 2d 1010 (Fla. 1989). The State has failed to demonstrate that death is a proportionate penalty in this case. The sentence must be reversed.

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 sent by U.S. Mail to the Office of the Attorney General, 2002 N. Lois Ave., Suite 700, Tampa, Florida 33607, this ___ day of November, 1999.

ROBERT A. NORGARD
Attorney at Law
P.O. Box 811
Bartow, FL 33831
(863)533-8556
Fla. Bar. No. 322059