IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,706

CLARENCE EDWARD HILL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of Mr. Hill's death sentence, imposed after resentencing. Citations in this brief shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "T. ___" followed by the appropriate page number. The record on appeal of the resentencing shall be referred to as "R. ___." All other references shall be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Hill has been sentenced to death. The resolution of the issues in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Hill accordingly requests that the Court permit oral argument.

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STATEMENT OF THE CASE

In 1983, Mr. Hill was convicted of first degree murder and sentenced to death. On direct appeal, this Court affirmed the conviction but ordered a resentencing before a new jury. Hill v. State, 477 So. 2d 553 (Fla. 1985). Mr. Hill was resentenced to death, and this Court affirmed. Hill v. State, 515 So. 2d 176 (Fla. 1987).

In 1989, under a pending death warrant, Mr. Hill filed a Fla. R. Crim. P. 3.850 motion in the trial court, which denied relief. This Court affirmed and denied habeas corpus relief. Hill v. Dugger, 556 So. 2d 1385 (Fla. 1990).

Mr. Hill then filed a federal petition for a writ of habeas corpus in the United States District Court for the Northern District of Florida. That court stayed Mr. Hill's execution and later issued an order granting in part and denying in part Mr. Hill's habeas corpus petition. Hill v. Singletary, No. TCA 90-40023-WS (N.D. Fla. Aug. 31, 1992) (hereinafter "Order"). The State initially appealed the district court's grant of relief, but later dismissed its appeal. Mr. Hill's appeal of the district court's denial of relief is presently pending before the United States Court of Appeals for the Eleventh Circuit.

Although the district court's order directed that habeas relief was granted "unless the State of Florida, within a reasonable period of time, initiates appropriate proceedings to reconsider Hill's death sentence," Order at 85, the State took no action to initiate reconsideration of Mr. Hill's death sentence

in the state courts. Accordingly, Mr. Hill filed a motion in this Court to establish a briefing schedule and reopen Mr. Hill's direct appeal from his resentencing. The State filed no opposition to this motion, and this Court granted the motion. This appeal follows.

STATEMENT OF THE FACTS

In its order granting habeas corpus relief, the district court found that the trial court and this Court ignored evidence of uncontroverted mitigating circumstances in imposing and affirming Mr. Hill's death sentence, in violation of Parker v. Dugger, 111 S. Ct. 731 (1991) (Order at 65-74). The district court also found that this Court's review of Mr. Hill's death sentence after striking an aggravating factor was constitutionally inadequate, in violation of Clemons v. Mississippi, 494 U.S. 738 (1990), because this Court failed to consider the uncontroverted mitigation in the record (Order at 75-83).

As to the uncontroverted mitigation in the record, the district court found:

> Without question, Hill presented evidence of nonstatutory mitigating circumstances. In fact, with the exception of the testimony regarding his drug use and domination by Jackson, Hill presented uncontroverted evidence of nonstatutory mitigating factors. For example, Hill's sentencers learned of the following circumstances, each of which has been recognized under the law as a valid mitigating circumstance:
>
> (1) Hill was known by his neighbors and family to be a caring and nonviolent person.

TrR, Vol. III at 530, 535, 542, 553, 560. See Jones v. Dugger, 867 F.3d 1277, 1280 (11th Cir. 1989) (Hitchcock error was not harmless where jury was precluded from considering evidence that prior to his recent scrapes with the law, defendant was a "very nice person [who] got along well with people [and] was never no trouble").

(2) While he was a teenager, Hill volunteered to spend time on a couple of occasions with the brain-damaged child of a family friend, thereby giving relief to the child's mother. TrT, Vol. VIII at 1351. In addition, Hill frequently helped a disabled, seventy-nine-year-old neighbor by taking her to church, running errands for her, and helping her around the house. TrR, Vol. III at 536. See Blake v. Kemp, 758 F.2d 523, 534 (11th Cir.) (counsel's failure to present valid mitigating evidence -- namely that defendant was "a man who was respectful toward others, who generally got along well with people and who gladly offered to help whenever anyone needed something" -- constituted ineffective assistance), cert. denied, 474 U.S. 998, 106 S.Ct. 374, 88 L.Ed.2d 367 (1985).

(3) Hill had a trouble-free history throughout his years in school, at home, and in his neighborhood, which made his involvement in two crimes at the age of twenty-three very surprising to people who had known him throughout his youth. TrR, Vol. III at 532, 560. See Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987) (evidence of nonviolent history properly considered a mitigating circumstance).

(4) Hill held steady employment as a cook from the time he was in the ninth grade until he turned to drugs and crime at the age of twenty-three. TrR, Vol. III at 541 & Vol. IV at 605-06. See Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) (Hitchcock error not harmless where there was record evidence of defendant's steady employment), cert. denied, 489 U.S. 1071, 109 S. Ct. 1353, 103 L.#d.2d 821 (1989); Aldridge v. Dugger, 925 F.2d 1320 (11th Cir. 1991) (but for a Hitchcock error, defendant could have

presented valid mitigating evidence that he worked long and hard before turning to a life of crime).

(6) Hill consistently helped his parents, doing chores around the house and contributing some of his earnings toward the support of his large family. TrR, Vol. III at 547, 558-59. Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987) (writ issued where defense counsel failed to present valid mitigating evidence that defendant worked hard during his early years to supplement his family's income); Rogers v. State, 511 So. 2d 526 (Fla. 1987) (recognizing that "evidence of contributions to family, community, or society reflects on character and provides evidence of positive character traits to be weighed in mitigation"), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

(7) Hill attended school into the twelfth grade but never progressed beyond a fourth or fifth grade level in reading and verbal ability. TrR, Vol. III at 513. See Hargrave, 832 F.2d at 1534 (Hitchcock error not harmless where there was evidence of petitioner's below-average intelligence and steady employment).

(Order at 65-67) (emphasis in original).

As the district court's order reflects, substantial mitigation was presented at Mr. Hill's resentencing. Mr. Hill's family members and friends testified about Mr. Hill's life. The testimony of Ms. Lucille Tilly from Mr. Hill's prior penalty phase was read to the jury (R. 528). Ms. Tilly met the Hill family nineteen years earlier (T. 1349), when Mrs. Hill babysat Ms. Tilly's children (T. 1350). Clarence was a small child then and played with Ms. Tilly's children (T. 1350-51). Ms. Tilly's son Robert had a serious illness at age 12 which caused brain damage (T. 1351). After Robert's illness, Clarence would come to

visit and ask whether he could do anything to help Ms. Tilly with Robert, who required constance care (Id.). Clarence "would sit and talk with Robert" (Id.). Clarence was always "real nice," and Ms. Tilly "never knew of Clarence getting into a fight in the neighborhood" (T. 1353-54).

Ms. Peggy Petway, who had known the Hill family since 1968, testified that she knew Clarence Hill as "Lucky" and that since he was a small child, he had never been a problem in the neighborhood (R. 529-31). The Hill family members were hardworking, nice people (R. 531). When she heard about Mr. Hill's arrest, Ms. Petway was shocked because Mr. Hill had never gotten into trouble (R. 532).

Ms. Grace Singleton testified that she had known Clarence Hill since he was a child as they were both from the same community (R. 535). According to Ms. Singleton, Mr. Hill was a nice man and an honest child who never had any problems in school or in the neighborhood (Id.). Because of this, Ms. Singleton could not believe it when she heard Mr. Hill had been arrested (Id.). As a child, Mr. Hill took Ms. Singleton to church, did chores for her, went to the store for her, and cleaned up for her (R. 536). Ms. Singleton would allow Mr. Hill to cash checks for her, and he always brought the money right back (R. 537). Mr. Hill "always tried to wait for his honest nickel" (R. 537), and Ms. Singleton never saw any side of Mr. Hill other than that he was a good boy (R. 538). Ms. Singleton cannot get around because she has only one leg, and Mr. Hill was always willing to do

things for her and get things that she needed in town (R. 539). Mr. Hill would do just about anything that she asked him to do for her (Id.).

Ms. Patsy McCaskill testified that she was Mr. Hill's sister-in-law and had known him for about six years (R. 540). When Mr. Hill visited, he was a nice, pleasant person to be around (Id.). Mr. Hill used to work for a fast food store in the same chain which employed Ms. McCaskill and was well liked by his fellow employees (R. 541). Mr. Hill was a good worker (Id.). Ms. McCaskill never knew Mr. Hill to be someone who would hurt another (R. 542). Due to a State's objection, Ms. McCaskill was not permitted to explain her reaction to Mr. Hill's arrest (Id.).

Mrs. Octavia Hill, Mr. Hill's mother, testified that Clarence was one of nine children (R. 546). Mrs. Hill stayed at home taking care of her children and also cared for other children (R. 547-48). Due to a State's objection, Mrs. Hill was not permitted to explain how many children she cared for (Id.). As a child, Clarence worked at the house and helped care for the home (Id.). Clarence was a good child, worked around the house, and was a nice boy (R. 548). Clarence lived with his mother his whole life except for one brief period (Id.). Clarence worked outside the home at a restaurant and then at a company which manufactured doors and windows (R. 549). Mrs. Hill knew that Clarence had been charged with committing a robbery in Mobile, but is sure that he was home at the time of the robbery (R. 549-50). Mrs. Hill was at a loss to explain her son's conduct but

had heard in the neighborhood that Clarence was using "dope" (R. 551). Even as an adult, Clarence was incapable of making independent decisions and throughout his life, with one exception, always relied on the advice of others before making a decision about anything (R. 552).

Mr. Edna Hill, Clarence's father, testified that Clarence worked around the house when he was growing up (R. 558). The father was not permitted to describe what kind of work he did when Clarence was a child (Id.). The father would leave chores for Clarence to do when the father went off to work, and when he returned from work, Clarence had always done what was asked (Id.). Clarence worked at a restaurant as a cook and also did roofing work (R. 559). Clarence gave portions of his salary to pay for household expenses (Id.). All of the children were living at home, and Clarence helped support the whole family (Id.). The father never knew Clarence to be mean and did not understand how Clarence could have committed the crime (R. 560).

Cliff Jackson, Mr. Hill's co-defendant, testified that the pair began to use drugs on the early morning of October 19, 1982 (R. 573). After the pair walked to Mobile, Jackson grew tired and decided to steal a car (R. 573). Jackson further testified that the pair continued to use cocaine throughout the morning and were doing lines of cocaine in the stolen car en route to Pensacola (R. 573). Upon arriving in Pensacola, Jackson decided they should rob a bank (R. 574). Jackson then decided the pair needed a disguise and purchased sunglasses for both Hill and

himself (R. 575). Jackson testified that the pair entered Freedom Savings, where he approached a teller and asked about opening an account. Jackson testified he was directed to another teller where he continued the pretextual dialogue about opening an account and then signaled to Mr. Hill that the robbery should commence (R. 576). At that point Jackson walked behind the barrier separating the tellers from the lobby and stood behind a teller using his finger to simulate the barrel of a gun (R. 576). Jackson then instructed Mr. Hill to "get those two women" who Jackson believed were attempting to activate the silent alarm (R. 577, 578). Mr. Hill complied with Jackson's instructions and placed the women behind the counter on the floor (R. 577, 591). Jackson then asked the tellers the location of the vault and when there was no reply threatened all the employees by saying, "If don't nobody know where the safe is then this woman here, she goes." (R. 577). When there was no immediate reply, Jackson instructed Mr. Hill to grab a maintenance man who Jackson believed to be the bank manager. Again, Mr. Hill complied with Jackson's orders (R. 577). When a teller told Jackson she could open the vault, Mr. Hill accompanied her. A telephone rang during the course of the robbery and Jackson instructed the teller he was holding to "answer the phone and act normal" (R. 578). Jackson heard the caller state that the police were out front and told Mr. Hill to come out of the safe (R. 578). Jackson then grabbed a plastic trash bag and placed the money in it. Jackson and Mr. Hill then proceeded out the back door. When

some of the money was dropped on the floor, Jackson stopped to pick it up. Mr. Hill, who did not see Jackson stop to retrieve the money, proceeded to exit through the back door (R. 579). Jackson, upon seeing a police car at the back door, decided to exit via the front door where he was apprehended by two officers (R. 579). Jackson was lying in a prone position when he heard someone yell "halt," followed by gunfire (R. 580). Jackson then got up and saw one of the officers approaching him with his gun drawn. There was a struggle for the weapon which Jackson ultimately gained control of. Taking aim at the officer, Jackson attempted to fire the weapon (R. 581). On cross-examination Jackson testified that he told Mr. Hill which car to steal in Mobile (R. 585-86) and that Jackson was the leader of the robbery.

Clarence Hill testified that since age 16, he had been employed and contributed to the financial support of his parents, siblings, and extended family members up to and including shortly before his arrest. He went to school up to the twelfth grade, which he did not finish (R. 604). He got his first job in the ninth grade at J.C. Penney's (Id.). After that, he was a cook at a restaurant, did roofing work and worked for a door company (R. 605). He worked at the restaurant for five or six years (Id.). He worked at the door company until the time of his arrest (R. 606). Although he moved out of the family home right after high school, he moved right back in because "it was just best to stay

around the house with the family, you know, help out there" (R. 606).

Mr. Hill also testified that he did not commit the doughnut shop robbery in Mobile on March 4, 1982 (R. 607). At the time of that robbery, he was six feet two and one-half inches tall and weighed about 200 pounds (R. 608). The store clerk testified that the person who committed the robbery was about five feet seven inches tall and weighed about 120 pounds (R. 608). The clerk's testimony was the only evidence against Mr. Hill, as there were no fingerprints or other evidence (R. 609). Because of that arrest, Mr. Hill lost his job and got involved in the instant offense (Id.).

Mr. Hill also testified that he had been "snorting" cocaine throughout the day of October 18, 1982, into that night, and began using cocaine again on the morning of the 19th up until the time of the instant offense (R. 610). The morning of the 19th, he ran into Mr. Jackson, who wanted to find a car to ride around in (R. 610). They stole a car and began driving, without any plan of what they were going to do (Id.). Mr. Hill testified that cocaine was something new to him and that it made him feel "like [he] could do just about anything" (R. 611). Mr. Hill and Mr. Jackson continued snorting cocaine while they drove around in the car (R. 611). When they got to Pensacola, they did not talk about a bank, but when they drove by a bank, "somebody said, 'Rob a bank,' you know. We never planned on doing anything like that" (Id.). Mr. Hill described the bank robbery and the ensuing gun

battle (R. 612-16). Mr. Hill never planned to hurt anyone (R. 617).

Prior testimony of Paul Wilson, a former classmate, and friend of Mr. Hill who testified at trial was read to the jury (R. 527-28). Mr. Wilson testified that Mr. Hill used marijuana in his presence on prior occasions (T. 1367) and only a few days prior to the instant offense Mr. Wilson had seen both Mr. Hill and Jackson and that Mr. Hill "looked like he was . . . on something." (T. 1368). On rebuttal, the State introduced the testimony of Officer Eddie Ragland who had arrested Mr. Hill in 1982. Officer Ragland testified that a search of the vehicle that Mr. Hill was driving disclosed a bag of marijuana under the front seat (R. 656).

Dr. James Larson, a forensic psychologist, testified that he interviewed Mr. Hill, conducted various psychological tests, interviewed some members of Mr. Hill's family, reviewed jail and school records, and reviewed records regarding the offense (R. 504). Mr. Hill could not read well enough to take the Minnesota Multiphasic Personality Inventory (MMPI), which requires a sixth grade reading ability, so the test had to be read to him (R. 507). Mr. Hill's profiles on the psychological tests were valid, and there was no sign that he was malingering (R. 508). Intelligence testing showed Mr. Hill to have a full scale I.Q. of 84, which is in the "very low part of the average range" (R. 508). This score put Mr. Hill into the 16th percentile, meaning that "about 84 percent of the people that took that test[] would

measure more higher than he did" (Id.). Significantly, while Mr. Hill received an I.Q. score of 101 on the performance part of the intelligence testing, his verbal I.Q. was 76, corresponding to the 7th percentile and meaning that "about 93 percent of the normal population in his age group would score more highly on those tasks than he did" (R. 509). Mr. Hill's verbal score indicates "[b]orderline intelligence, meaning one step above being retarded" (Id.). The difference between Mr. Hill's verbal and performance scores "means specifically that he has some very major deficits in terms of verbal skills. His information about the world, for example, is deficient. . . . He basically doesn't handle symbolism or abstractions or verbal information as well as we would expect a[n] average person to handle it" (R. 509). Mr. Hill's school records reflect that "overall his academic performance is quite low" (R. 510). Dr. Larson also testified that a California test of mental maturity administered in school when Mr. Hill was twelve years old reflected a score of 67 "which falls in the retarded range" (R. 510). Dr. Larson testified that Mr. Hill's profile on the MMPI "found indications of [Mr. Hill] being the type of individual who would readily use drugs, as the sort of person who could be impulsive, this sort of person would enjoy the experience of being intoxicated or enjoy the experience of being high" (R. 512).

Before and during the resentencing, the defense objected to the jury being informed that Mr. Hill had been convicted of premeditated murder because such information would confuse the

jury about the application of the "cold, calculated and premeditated" aggravating circumstance. In a Motion in Limine, the defense argued, "a finding of premeditation with regard to guilt or innocence is not analogous to a finding of premeditation for the purposes of aggravating in penalty phase" (R. 820). During trial, the defense objected when the jury was informed that Mr. Hill had been convicted of premeditated murder (R. 289). The defense also contended that the jury should not be instructed on both the "avoiding arrest" and "hindering law enforcement" aggravating factors because this constituted impermissible doubling of aggravating factors (R. 659).

The "cold, calculated and premeditated" aggravating circumstance was the feature of the State's case for a death sentence. The State's opening argument concentrated most heavily on this aggravating factor (R. 273-76). The defense opening argument also concentrated on this aggravating factor (R. 279-84). The State was allowed to introduce evidence of collateral crimes, such as the testimony of the victim of the Mobile auto theft, because "the defendant's state of mind at the time is material to the issue. He's challenged--made it an issue in opening statement as to the cold, calculated, premeditated things" (R. 300). The State argued that it was offering evidence of the auto theft "to prove the circumstances that the robbery, murder and all were done in a cold, calculated and premeditated manner" (R. 464). The defense argued that the auto theft was irrelevant to this aggravator (R. 464). In closing argument, the

State again made the "cold, calculated and premeditated" aggravating factor a feature of its argument (R. 679-81), as did the defense closing (R. 696-99). When the defense attempted to inform the jury of the kind of crimes to which the legislature intended the "cold, calculated and premeditated" aggravator to apply, the State objected, and the court sustained the objection (R. 698-99).

Regarding aggravating circumstances, the jury was instructed as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: The defendant has been previously convicted of another capitol [sic] offense or of a felony involving the use or threat of violence to some person; the crime of robbery is a felony involving the use of or threat of violence to another person; the defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons; the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of a crime of robbery.
>
> In order to prove robbery, the State must prove the following elements beyond a reasonable doubt: That Clarence Hill took the money or property from the bank personnel and taking was by force, violence or assault, or by putting those persons in fear; the property taken was of some value; that Clarence Hill took the money or property from the bank personnel or custody of the bank personnel, and at the time of the taking intended to permanently deprive the persons of the money or property.
>
> In order for the taking of property to be a robbery, it's not necessary that the person robbed be the actual owner of the property. It's sufficient if the victim has custody of the property at the time of the

> offense. The taking must be by the use of force or violence or by assault so as to overcome the resistance of the victim or by putting the victim in fear so that he does not resist. The law does not require the victim of the robbery resist to any particular extent or that he offer any actual physical resistance if the circumstances are such that he is placed in fear of death or great bodily harm if he does resist. But unless presented by fear, there must be some resistance to make the taking one done by force or violence.
>
> The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. The crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R. 704-05). During deliberations, the jury asked to be provided a list of the aggravating circumstances and was given a written copy of the jury instructions (R. 712-14).

In imposing death, the trial court found in aggravation: (1) Mr. Hill had a previous conviction for a violent felony (R. 835); (2) Mr. Hill created a great risk of death to many persons (R. 836); (3) the crime was committed during the course of a robbery (R. 837); (4) the crime was committed for the purpose of avoiding arrest (R. 837); (5) the crime was committed in a cold, calculated and premeditated manner (R. 838). The court specifically declined to find that the crime was committed for the purpose of hindering law enforcement because this circumstance duplicated the avoiding arrest aggravating

circumstance (R. 838), although the jury had been instructed to consider both of these aggravating factors. As to mitigation, the court concluded, "The Court is of the opinion that the age of the Defendant may have been a factor, but there has not been established sufficient mitigating factors to outweigh the aggravating factors" (R. 842). The court considered the mental health testimony only as it related to the statutory mitigating factors of capacity to conform conduct to the requirements of law and age (R. 839-41). As to nonstatutory mitigation, the court recited only that the various witnesses had known Mr. Hill, but did not know about the Mobile doughnut shop robbery, and, therefore, "[t]he Court is of the opinion that this evidence is insufficient to support this mitigating circumstance" (R. 842).

In review of Mr. Hill's death sentence, this Court determined that the evidence did not satisfy this Court's limiting construction of the "cold, calculated and premeditated" aggravating circumstance:

> The evidence indicates that appellant's actions were committed while attempting to escape from a hopelessly bungled robbery. We find an absence of any evidence that appellant carefully planned or prearranged to kill a person or persons during the course of this robbery. While there is sufficient evidence to support simple premeditation, we conclude as we did in Rogers v. State, 511 So. 2d 526 (Fla. 1987), that there is insufficient evidence to support the heightened premeditation necessary to apply this aggravating circumstance.

Hill v. State, 515 So. 2d at 179. This Court nevertheless affirmed Mr. Hill's death sentence without adverting to the

nonstatutory mitigation contained in the record, to the fact that the jury had also been instructed to consider another inapplicable aggravator (hindering law enforcement), or to the fact that "cold, calculated and premeditated" was a feature of the State's case and argument for death:

> Given the[] four remaining aggravating circumstances, and the one mitigating circumstance, we find the erroneous consideration of the aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner is not such a change under the circumstances of this sentencing proceeding that its elimination could possibly compromise the weighing process of either the jury or the judge.

Id.

SUMMARY OF ARGUMENT

1. The "cold, calculated and premeditated" aggravating factor was erroneously applied because the evidence did not satisfy this Court's limiting construction of the aggravator. This Court has defined the vague and overbroad statutory language of this aggravator to include only murders accomplished by a "careful plan or prearranged design." There was no evidence of such a plan in this case. Thus, error occurred when the judge considered and the jury was instructed upon this aggravating factor. This error was not harmless in light of the State's emphasis on this factor, the fact that the jury was instructed on another inapplicable aggravating factor, and the fact that the record contains substantial unrebutted nonstatutory mitigation. Mr. Hill's death sentence violates the Eighth and Fourteenth Amendments, and he is entitled to resentencing.

2. Mr. Hill presented evidence of numerous nonstatutory mitigating factors. Most of this evidence was entirely unrebutted by the State. The evidence established mitigating factors which this Court has recognized as valid. However, the trial court failed to find or weigh any of these unrebutted mitigating factors, contrary to this Court's precedents and to the Eighth and Fourteenth Amendments.

3. Over objection, Mr. Hill's jury was instructed to consider both the "avoiding arrest" and "hindering law enforcement" aggravating factors. The trial judge determined that both of these factors could not be applied because they were duplicative. The trial court's denial of the defense objection to the jury being instructed on both of these factors violated this Court's precedents and the Eighth and Fourteenth Amendments. The error was not harmless in light of the facts that the jury was instructed on another inapplicable aggravating factor and that the record contains substantial unrebutted nonstatutory mitigation.

4. The State's introduction of irrelevant and inflammatory evidence resulted in the arbitrary and capricious imposition of the death penalty, in violation of this Court's precedents and the Eighth and Fourteenth Amendments. The State was permitted to present evidence of Mr. Hill's theft of an automobile in Mobile prior to the bank robbery, although Mr. Hill had not been charged with this offense. The evidence was not relevant to any issue at

the resentencing and served only to create unfair prejudice and bias. Mr. Hill is entitled to resentencing.

5. The trial court overruled defense objections to the prosecutor's use of peremptory challenges to excuse black prospective jurors solely on the basis of race, although the prosecutor offered either a pretextual reason or no reason for the excusals. The trial court erred, and Mr. Hill is entitled to resentencing.

6. The trial court erred when it responded to questions from the jury and refused to disclose the questions to Mr. Hill and his counsel, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

7. The trial court's exclusion of mitigating evidence and refusal to instruct the jury on the substantial domination mitigating factor violated the Eighth and Fourteenth Amendments.

8. The trial court's refusal to excuse for cause jurors who expressed a clear and unequivocal bais in favor of imposing a death sentence deprived Mr. Hill of his rights to a fair and impartial jury and to a reliable capital sentencing decision.

9. The penalty phase jury instructions and the standard relied upon by the judge shifted the burden to Mr. Hill to prove that death was inappropriate, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

10. Mr. Hill's jury was misled by comments and instructions which unconstitutionally and inaccurately diluted its sense of responsibility for its capital sentencing task.

11. Informing Mr. Hill's jury that he had been convicted of premeditated murder infringed upon the jury's duty to decide independently whether Mr. Hill should be sentenced to death or life.

ARGUMENT

ARGUMENT I

APPLICATION OF THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE IS CONTRARY TO THIS COURT'S PRECEDENTS LIMITING THE APPLICATION OF THIS VAGUE AND OVERBROAD AGGRAVATING FACTOR, AND THE JURY'S AND JUDGE'S APPLICATION OF THIS FACTOR WAS NOT HARMLESS

This Court's precedents establish that the cold, calculated and premeditated aggravating factor applies only to murders exhibiting "heightened premeditation," which is a "careful plan or prearranged design" to commit the murder. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). As the Court has explained, this definition is necessary in order to cure the facial vagueness and overbreadth of this aggravating factor:

> To avoid arbitrary and capricious punishment, [the cold, calculated and premeditated] aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983) (footnote omitted). Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise it would apply to every premeditated murder. Therefore, section 921.141(5)(i) must apply to murders more cold-blooded, more ruthless, and more

> plotting than the ordinarily reprehensible crime of premeditated first-degree murder.
>
> The Court has adopted the phrase "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first-degree murder. See, e.g., Hamblen v. State, 527 So.2d 800, 805 (Fla.1988); Rogers v. State, 511 So.2d 526, 533 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990). This Court finds error in the application of this aggravating factor when the evidence does not satisfy the "heightened premeditation" requirement. See, e.g., Rogers; Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988); Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988). Further, when this Court determines that this aggravating factor is inapplicable, the Court orders a resentencing before the jury and judge. Lawrence v. State, 614 So. 2d 1092, 1096 (Fla. 1993) ("we cannot find the error in instructing the jury on and finding these inapplicable aggravators to be harmless"); White v. State, 616 So. 2d 21, 25 (Fla. 1993) ("We agree with White that the trial judge erred in instructing the jury on and finding that this murder was committed in a cold, calculated and premeditated manner"); Padilla v. State, 618 So. 2d 165, 170-71 (Fla. 1993) (resentencing ordered where jury was instructed to consider inapplicable "cold, calculated and premeditated" aggravator).[1]

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[1]This Court also orders resentencing before the jury and judge when other inapplicable aggravating factors are considered. In Archer v. State, 613 So. 2d 446 (Fla. 1993), "[a]t the penalty-phase charge conference Archer argued that the jury should not be instructed on the heinous, atrocious or cruel

In Mr. Hill's case, the "cold, calculated and premeditated" aggravating factor does not apply under this Court's limiting construction of the factor. Even assuming for the sake of argument that the State's evidence established that Mr. Hill planned the bank robbery and that the murder was premeditated, in order for this aggravator to apply, the evidence must show a "careful plan and prearranged design" to commit the murder. Here, there is no such evidence. The evidence shows only that after robbing the bank, Mr. Hill and Mr. Jackson were attempting to flee the scene and that the murder occurred only because of the unanticipated presence of the police. No evidence shows that Mr. Hill and Mr. Jackson anticipated that the police would become involved or that they planned for that contingency. On the contrary, the evidence shows that they did not think about the police at all and thus did not anticipate the police appearing at the scene. Clearly, the State did not meet its burden of proving the limiting construction of the "cold, calculated and premeditated" aggravator beyond a reasonable doubt, and thus this aggravator was erroneously applied.

Application of a vague and overbroad aggravating factor violates the Eighth Amendment, which requires that vague aggravating factors be defined in order to assure that the sentencers' discretion is properly guided and channeled.

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aggravator because that aggravator could not be applied vicariously to him." Id. at 448. Resentencing was ordered because "[o]n the facts of this case we are unable to say that the error in instructing on and finding this aggravator is harmless." Id.

Espinosa v. Florida, 112 S. Ct. 2926 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). "An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 2742-43 (1983). As this Court pointed out in Porter, the "cold, calculated and premeditated" aggravating factor does not perform this narrowing function without a limiting construction. Further, reliance upon an inapplicable aggravating factor violates the Eighth Amendment. Sochor v. Florida, 112 S. Ct. 2114 (1992).

In Maynard v. Cartwright, the Supreme Court held that "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 108 S. Ct. at 1858. There must be a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, 446 U.S. 420, 433 (1980). In Mr. Hill's case, the judge did not apply and the jury was not instructed as to the limiting construction of the "cold, calculated and premeditated" aggravating circumstance. This error was compounded by the jury's being informed that Mr. Hill had been convicted of premeditated murder, which indicated to the jury that this aggravator applied. See Porter v. State.

The error in applying the "cold, calculated and premeditated" aggravating factor requires resentencing, for the

State cannot establish that the error was harmless beyond a reasonable doubt. In order to establish that the error was harmless, the State must establish that the error did not contribute to the sentencing decision. See Clemons v. Mississippi, 494 U.S. 738 (1990); Chapman v. California, 386 U.S. 18 (1967); State v. DeGuilio, 491 So. 2d 1129 (Fla. 1986). The State cannot make that showing in Mr. Hill's case.

First, the "cold, calculated and premeditated" aggravating factor was a feature of the State's case for death. The State focused on this aggravator in both its opening and closing arguments (R. 273-76, 679-81). As a result, the defense arguments also focused heavily on this factor (R. 279-84, 696-99). The State introduced evidence of collateral crimes for which Mr. Hill had not been convicted just to attempt to prove this aggravating factor (R. 300, 464). The jury was informed that Mr. Hill had been convicted of premeditated murder, which in effect told the jury that this aggravator had been established.

Second, the jury was improperly instructed that it could consider both the "avoiding arrest" and "hindering law enforcement" aggravating factors, although the judge specifically found that both of these factors could not be applied because they were duplicative. See Argument III. Thus, not only was the jury instructed on the inapplicable "cold, calculated and premeditated" aggravator, but also the jury was instructed on an additional inapplicable aggravator.

Finally, there was substantial nonstatutory mitigation in the record. Thus, without the inapplicable aggravators, the balance of aggravation and mitigation would have been substantially altered. The unrebutted evidence established that Mr. Hill was known by his neighbors and family to be a caring and nonviolent person. The unrebutted evidence established that Mr. Hill was helpful to others. While he was a teenager, Mr. Hill volunteered to spend time with the brain-damaged child of a family friend, which was a great help to the child's mother. Mr. Hill frequently helped a disabled, elderly neighbor by taking her to church, running errands for her and helping her around the house. The unrebutted evidence established that Mr. Hill caused no trouble throughout school, at home and in his neighborhood, which made his involvement in two crimes at the age of twenty-three very surprising to people who had known him throughout his life. The unrebutted evidence established that Mr. Hill was steadily employed from the time he was in the ninth grade until his arrest in 1982. The unrebutted evidence established that Mr. Hill always helped his parents and siblings, doing chores around the house and contributing part of his salary toward the support of the family. The unrebutted evidence established that Mr. Hill attended school into the twelfth grade but never progressed beyond a fourth or fifth grade level in reading or verbal ability. There was also evidence that Mr. Hill had recently become involved in drugs, that his judgment was impaired by the use of cocaine at the time of the offense, and that co-defendant

Jackson was the primary instigator of the bank robbery. All of this evidence establishes valid nonstatutory mitigating factors. See Argument II.

The judge and jury erroneously considered the "cold, calculated and premeditated" aggravating factor. The error was not harmless, and Mr. Hill is entitled to a resentencing.

ARGUMENT II

THE TRIAL COURT ERRED IN FAILING TO WEIGH THE NUMEROUS UNREBUTTED NONSTATUTORY MITIGATING FACTORS ESTABLISHED BY THE EVIDENCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

As is clear from the Statement of the Facts, Mr. Hill presented evidence of numerous nonstatutory mitigating factors. Much of this evidence was entirely unrebutted by the State. However, the trial court failed to give this evidence any weight. The trial court's failure to consider and weigh this evidence violated this Court's precedents, as well as the Eighth and Fourteenth Amendments.

Regarding the nonstatutory mitigation, the trial court stated only:

> Any other aspect of the Defendant's character or record and any other circumstances of the offense - several witnesses, James Wilson knew the Defendant for 19 years and was a school mate; Lucille Tilley knew the Defendant and his family for 19 years; Mrs. Petway knew the Defendant and his family for a number of years in Mobile since 1968; Grace Singleton, 79 years old, knew the Defendant when he was a little boy; Patsy McCaskill, his sister-in-law, knew him about six years; and the father and mother of the Defendant testified as to particulars of his character when he was a boy for honesty

> and peacefulness. On cross-examination, Tilley didn't know the Defendant had been arrested for robbery in Mobile as did Petway; Singleton was not aware of the robbery; McCaskill did know about the robbery. The Court is of the opinion that this evidence is insufficient to support this mitigating circumstance.

(R. 841-42). The trial court did not reject the evidence of nonstatutory mitigation as incredible. The judge did not say that he found the evidence of nonstatutory mitigation was outweighed by the aggravating factors. The judge indicated that he believed that all of the evidence of nonstatutory mitigation could only be considered as one mitigating factor: after summarizing the witnesses who testified, the judge stated, "this evidence is insufficient to support this mitigating circumstance" (R. 842) (emphasis added). The judge did say that this evidence did not amount to mitigation at all (Id.).[2]

Refusing to weigh uncontroverted mitigating evidence violates the Eighth and Fourteenth Amendments. Parker v. Dugger, 111 S. Ct. 731 (1991). "To find that mitigating circumstances do not exist where such mitigating circumstances clearly exist returns us to the state of affairs which were found by the Supreme Court in Furman v. Georgia to be prohibited by the Constitution." Magwood v. Smith, 608 F. Supp. 218, 228 (M.D. Ala. 1985), aff'd, 791 F.2d 1438 (11th Cir. 1986).

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[2]The judge appears not to have understood the nature and function of nonstatutory mitigation. When disallowing what he thought was cumulative character evidence, the judge said that "character is character" and that a defendant is not entitled to introduce repetitive evidence about his character (R. 562-64). See Argument VII.

Further, a refusal to weigh uncontroverted mitigating evidence violates this Court's precedents explaining how trial judges are to assess mitigation. As this Court has explained, "When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. . . . The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) (citation and footnotes omitted). This Court has reiterated, "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Knowles v. State, 19 Fla. L. Weekly S103, 105 (Fla. Dec. 16, 1993), quoting Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). A trial court may reject a mitigating circumstance only when "the record contains 'competent substantial evidence to support the trial court's rejection of these mitigating circumstances.'" Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990), quoting Kight v. State, 512 So. 2d 922, 933 (Fla. 1987). See also Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990) (Florida Supreme Court is not bound to accept a trial court's findings concerning mitigation if the findings

are based on a misconstruction of undisputed facts or a misapprehension of law).

Here, numerous nonstatutory mitigating factors were more than "reasonably established by the greater weight of the evidence." There is no "competent substantial evidence" to support rejection of these mitigating factors. The evidence was unrebutted. The unrebutted evidence established that Mr. Hill was known by his neighbors and family to be a caring and nonviolent person. The unrebutted evidence established that Mr. Hill was helpful to others. While he was a teenager, Mr. Hill volunteered to spend time with the brain-damaged child of a family friend, which was a great help to the child's mother. Mr. Hill frequently helped a disabled, elderly neighbor by taking her to church, running errands for her and helping her around the house. The unrebutted evidence established that Mr. Hill caused no trouble throughout school, at home and in his neighborhood, which made his involvement in two crimes at the age of twenty-three very surprising to people who had known him throughout his life. The unrebutted evidence established that Mr. Hill was steadily employed from the time he was in the ninth grade until his arrest in 1982. The unrebutted evidence established that Mr. Hill always helped his parents and siblings, doing chores around the house and contributing part of his salary toward the support of the family. The unrebutted evidence established that Mr. Hill attended school into the twelfth grade but never progressed beyond a fourth or fifth grade level in reading or verbal

ability. There was also evidence that Mr. Hill had recently become involved in drugs, that his judgment was impaired by the use of cocaine at the time of the offense, and that co-defendant Jackson was the primary instigator of the bank robbery.

All of this evidence establishes valid nonstatutory mitigating factors. This Court has held that "[c]ontribution to community or society as evidenced by an exemplary work, military, family, or other record" is valid mitigation. Campbell, 571 So. 2d at 419 n.4; Rogers v. State, 511 So. 2d 526 (Fla. 1987). Likewise, evidence of "[c]haritable or humanitarian deeds" establishes valid mitigation. Id. Evidence of a nonviolent history establishes valid mitigation. Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987); Douglas v. State, 575 So. 2d 165, 167 (Fla. 1991); Bedford v. State, 589 So. 2d 245, 253 (Fla. 1991). Evidence of a disadvantaged childhood establishes valid mitigation. Brown v. State, 526 So. 2d 903, 908 (Fla. 1988). Evidence of low intelligence establishes valid mitigation. Duboise v. State, 520 So. 2d 260, 266 (Fla. 1988); Morris v. State, 557 So. 2d 27, 30 (Fla. 1990). Evidence of steady employment establishes valid mitigation. Stevens v. State, 613 So. 2d 402, 403 (Fla. 1992); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988); Fead v. State, 512 So. 2d 176, 179 (Fla. 1987); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987); McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Buckrem v. State, 355 So. 2d 111, 113 (Fla. 1978). Evidence of contributing to the support of

others establishes valid mitigation. Washington v. State, 432 So. 2d 44, 48 (Fla. 1983) (defendant helped support family); Thompson v. State, 456 So. 2d 444, 448 (Fla. 1984) (defendant attempted to provide for family). Evidence of a "good family background" established valid mitigation. Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987); McCampbell v. State, 421 So. 2d 1072, 1075-76 (Fla. 1982). Evidence that the defendant was a good family member or good person establishes valid mitigation. Washington 432 So. 2d at 48 ("good person"); Thompson, 456 So. 2d at 448 ("good son"); Bedford v. State, 589 So. 2d 245, 253 (Fla. 1991) (good son). Evidence that a defendant is "kind, good to his family and helpful around the home" establishes valid mitigation, Perry v. State, 522 So. 2d 817, 821 (Fla. 1988), as does evidence that the defendant exhibited "good qualities as a hardworking man." Dolinsky v. State, 576 So. 2d 271, 275 (Fla. 1991). Evidence of "positive character traits as showing potential for rehabilitation and productivity within the prison system" also establishes valid mitigation. Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988), citing Fead; McCampbell.

The evidence of nonstatutory mitigating factors presented by Mr. Hill was uncontroverted, and the evidence established recognized, valid mitigating factors. The trial court thus erred in failing to find the mitigating factors and in failing to give

those factors any weight. Campbell. The Eight Amendment requires that a capital sentencer "may not refuse to consider or be precluded from considering any relevant mitigation." Eddings v. Oklahoma, 455 U.S. 104, 114 (1982). In Mr. Hill's case, the trial court violated these precepts, and Mr. Hill was deprived of a reliable and individualized capital sentencing decision.

ARGUMENT III

MR. HILL WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE JURY WAS NOT PROPERLY INSTRUCTED CONCERNING THE IMPROPER DOUBLING OF AGGRAVATING FACTORS.

This Court has consistently held that "doubling" of aggravating circumstances is improper. See Richardson v. State, 437 So. 2d 1091 (Fla. 1983); Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980); Welty v. State, 402 So. 2d 1139 (Fla. 1981). In Mr. Hill's case the trial court told his co-sentencer that they could consider the two aggravating circumstances of "avoiding arrest" and "hindering law enforcement." Mr. Hill's counsel objected to the court instructing the jury on these two aggravating factors because they involved unconstitutional doubling (R. 659). The court overruled the objection stating that both aggravators would apply in this case (R. 659). Thus, the jury was instructed that they could consider both of these aggravating circumstances in determining the appropriate sentence (R. 705). The jury, a co-sentencer, was allowed to rely upon both of these aggravating factors in reaching a recommendation for death. The jury is a co-sentencer in Florida, and must be given adequate jury

instructions. Johnson v. Singletary, 991 F.2d 663 (11th Cir. 1993); Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992).

Mr. Hill's jury was allowed to consider two aggravating circumstances which were supported by "the same essential features" of Mr. Hill's crimes and which had been held to amount to improper doubling in a similar situation. Kennedy v. State, 455 So. 2d 351, 354 (Fla. 1984). Even the trial court itself later acknowledged that this was error:

> The Court is of the opinion that this circumstance [hindering law enforcement] should not be applied as an aggravating circumstance because it in many respects is a duplication of circumstance #4 [avoiding arrest].

(R. 838).

This type of "doubling" renders a capital sentencing proceeding fundamentally unreliable and unfair. See Welty; Clark. It also results in an unconstitutionally overbroad application of aggravating circumstances, Godfrey v. Georgia, 446 U.S. 420 (1980), and fails to genuinely narrow the class of persons eligible for death. The result is an improper capital sentence.

Under no circumstances can the State show the error to be harmless beyond a reasonable doubt. The fact that the victim was a police officer was integral to the State's case at sentencing. Scarcely a moment passed during the presentation of the State's case without some mention being made of this fact. The State's inflammatory and improper closing argument centered on the, albeit false, allegation that this was the cold, calculated

execution of a police officer. (R. 673, 677-680). The State intentionally took advantage of the trial judge's error by specifically arguing both of these mitigating factors separately. (R. 678-679). Additionally, there was substantial unrebutted nonstatutory mitigation presented. See Argument II. Thus, the balancing of aggravation and mitigation would have been significantly altered without the duplicative aggravating factor. Under these circumstances, the State simply cannot demonstrate that this gross Eighth amendment error was harmless beyond a reasonable doubt. Clemons v. Mississippi, 110 S. Ct. 1441 (1990). Mr. Hill is entitled to relief.

ARGUMENT IV

THE INTRODUCTION OF IRRELEVANT AND INFLAMMATORY EVIDENCE SO PERVERTED THE SENTENCING PHASE OF MR. HILL'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

When then faced with a challenge to Florida's capital sentencing scheme, the Supreme Court found it passed constitutional muster:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating

> circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Proffitt v. Florida, 428 U.S. 242, 250 (1976). Thus, aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979). This Court has indicated:

> We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.
>
> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

Miller, 373 So. 2d at 884. See also Riley v. State, 366 So. 2d 19 (Fla. 1979), and Robinson v. State, 520 So. 2d 1 (Fla. 1988).

Florida's Evidence Code provides for the introduction of evidence regarding other crimes, wrongs, or acts if that evidence is relevant to prove a material fact in issue. Sec. 90.404, Florida Evidence Code. See Williams v. State, 110 So. 2d 654 (Fla. 1959). Before a defendant's extraneous criminal acts may be introduced, there must be a demonstrated connection between the defendant and the collateral occurrences, and the probative value of the evidence must be weighed against its prejudicial

effect. Section 90.403. If the evidence is deemed admissible after this analysis, the jury should be given a cautionary instruction at the time the evidence is introduced and in final jury instructions, if requested.

In Castro v. State, 547 So. 2d 111 (Fla. 1989), the Florida Supreme Court held that the introduction of evidence of collateral misconduct is subject to special scrutiny in a capital case:

> Because we find error, we must consider whether the state has met its burden of showing that the error here can be deemed harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla.1986). As we have noted above, the improper admission of this irrelevant collateral crimes evidence is presumptively harmful. Peek, 488 So.2d at 56; Straight, 397 So.2d at 908. Moreover, we recognize that it is not enough to show that the evidence against a defendant was overwhelming. Error is harmless only "if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error." Ciccarelli v. State, 531 So.2d 129, 132 (Fla. 1988).

Id. at 115 (emphasis added).

In the guilt phase of the trial, over defense objection and motion for mistrial (T. 1053-57, 1059), the State introduced the testimony of Janet Pearce. Mrs. Pearce testified that around noon on October 19, 1982, in downtown Mobile, Alabama, Mr. Hill, accompanied by another man, dragged her out of her car, placed a sharp object at her back, stole her purse, and drove off in the car (T. 1056-59). According to Pensacola police officer Gregory Moody, the car was recovered in downtown Pensacola, on the evening of the robbery of Freedom Savings, about a block away

from the bank (T. 1047-51). The trial court overruled the defense's objection, apparently on the theory that the testimony would be relevant to the issue of premeditation; "that would indicate the possibility that he had to calculate his actions in order to go retrieve his buddy when he apparently had made a clean break" (T. 1055).

In the penalty proceeding on remand, the State sought to introduce the prior testimony of Janet Pearce before the newly impaneled penalty jury (R. 300-01, 463- 65). Defense counsel objected, contending once again that the robbery of Mrs. Pearce and the theft of her vehicle was irrelevant (R. 300, 463-65). The State again took the position that Mrs. Pearce's testimony was relevant to premeditation, specifically to the "cold, calculated, and premeditated" aggravating circumstance (R. 300-01, 464). At the beginning of the hearing, the issue was discussed as follows:

> MR. TERRELL (defense counsel): I ... object to the introduction of State's Exhibit 44, the testimony of Janet Pearce, because it goes to an alleged crime for which the defendant has not been convicted, that being the alleged robbery from her or theft from her of her car in Mobile on the date of the incident. She has no knowledge of the incident here.
>
> MR. ALLRED (prosecutor): There's two reasons for its admissibility, that were already indicated and covered in the brief on appeal, that is, one, that it's admissible and notice was given of it to show Williams rule. Another is to show that the defendant's state of mind at the time is material to the issue. He's challenged -- made it an issue in opening statement as to the cold, calculated, premeditated things. He said they were on drugs; they are not these desperadoes. This shows -- her

testimony shows they began planning things hours before by carefully planning to have a stolen car to use to come over to Pensacola. Not only that, but the witness will testify that some sharp instrument was put in her back, that the defendant was the one that did that, indicating that he had a weapon hours before; that the weapon wasn't obtained in any kind of happenstance, he had it when he came to Pensacola. He robbed her of the car. So it's relevant for both of those purposes. It was part of the facts and circumstances at the trial, should be part of the facts and circumstances for this jury today. And it also goes to the state of mind of the defendant for the cold, calculated, premeditated --

THE COURT: Anything further?

MR. TERRELL: No.

THE COURT: Overruled.

(R. 300-01).

Immediately prior to the introduction of the challenged testimony, the following further discussion took place:

MR. TERRELL: Your Honor, I believe that this is, Miss Pearce's deposition, which is State Exhibit 45, I think. We're objecting to the reading of that deposition because it refers to collateral crimes that are not charged in the indictment in this case, but refers to an alleged theft and robbery of a vehicle from Miss Pearce in Mobile.

MR. ALLRED: This is the same objection we heard yesterday, which was overruled.

THE COURT: I know, but the materiality is the cause of the --

MR. ALLRED: Cold, calculated and premeditated.

THE COURT: <u>It's also material to bolster the fact that the defendant has committed prior felonies</u>.

MR. ALLRED: Well, this is not one in which he was tried and convicted. This is one that we're offering to prove the circumstances that the robbery, murder and all were done in a cold, calculated and premeditated manner. It was planned in advance; it began with the robbery of this automobile in Mobile, hours before the bank robbery. That's how it's tied up. It was admitted at the trial last time, and it was part of the sentencing consideration last time. It's properly so this time, too.

MR. TERRELL: Your Honor, that's irrelevant and improper characterization that it must be cold, calculated and premeditated. And it does not go to the question of a robbery. It goes to the question of a killing.

MR. ALLRED: State of mind for both.

THE COURT: Overruled.

(R. 463-65).

Contrary to the State's purported justification, the evidence concerning the robbery of Mrs. Pearce in Mobile, Alabama was completely irrelevant to the issue of whether the murder of Officer Taylor was premeditated or not. Similarly, the robbery of Mrs. Pearce and theft of her vehicle were utterly without relevance to the question of whether the "homicide ... was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." See Fla. Stat. sec. 921.141(5)(i). This Court ultimately struck this aggravating factor on direct appeal of the resentencing. Nor was the challenged evidence relevant to any other fact in issue in the trial. The State's presentation of Mrs. Pearce's testimony

served no purpose other than to show Mr. Hill's bad character and propensity to commit crimes.

In the original trial and penalty proceeding, the State's theory of the case was that after the bank robbery was interrupted by the police, Mr. Hill had made a clean escape out the back door and was headed back to the car.[3] (See T. 1419). When Mr. Hill looked back and saw that an officer had his companion, Cliff Jackson, on the ground, he doubled back, came up behind the officers, and (according to the State) deliberately fired, killing Officer Taylor and wounding Officer Bailly. Mr. Hill's version of the incident was the same, up to the point where the shots were fired. Thus, it is apparent that Mr. Hill's identity as the person who committed the bank robbery and shot Officers Taylor and Bailly was not at issue. Similarly, there was no issue as to whether or not the robbery was premeditated,

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[3]In the new penalty phase, in his opening argument, the prosecutor told the jury that the evidence would show that the keys to the automobile were found in Cliff Jackson's pocket (R. 272-73). The prosecutor further suggested that Mr. Hill's motive for trying to free Jackson was because he needed the car keys to make good his escape (R. 273). In the proceedings which followed, no evidence whatsoever was presented that the keys were found in Jackson's pocket. [Nor was any such evidence presented in the guilt phase or the earlier penalty proceeding]. The reasonable inference from the evidence which was presented was that Mr. Hill had the keys, since Mr. Hill was the one who was driving the car, and since (as the prosecutor made a point of on cross-examination) Mr. Hill was the one who parked it pointing toward the Interstate two blocks away (R. 594, 596, 97, 633). Nevertheless, in his closing argument, the prosecutor twice stated as a fact that the car keys were in the pants pocket of Clifford Jackson (R. 672, 673), and argued that this was Mr. Hill's motivation for doubling back and shooting the police officers (R. 672-73). The prosecutor's improper argument as to motive and calculation, based on a "fact" entirely outside of the evidence, resulted in a fundamentally unfair penalty proceeding.

since Mr. Hill admitted that it was, and since premeditation of the robbery cannot be automatically transferred to a murder which occurs during the course of the robbery. Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984). As recognized in Hardwick, "the fact that a robbery may have been planned is irrelevant to [the] issue" of whether the homicide was committed in a cold, calculated, and premeditated manner. In the guilt phase of trial, the only issue for the jury to decide was whether the murder of Officer Taylor was premeditated, which in turn depends on Mr. Hill's state of mind -- whether he intended, as he testified, to free his companion without bloodshed, or whether he intended to kill the officers. The fact that the car used in the bank robbery was forcibly stolen from Janet Pearce hours earlier in Mobile has absolutely no bearing on this question. In the present case, there was not any evidence -- there was not even any reasonable inference -- that Mr. Hill and his co-defendant, Cliff Jackson, had any idea, at the time they robbed Janet Pearce in Mobile and drove off in her car, of the events which would unfold later in the day. The State introduced no evidence to contradict the testimony of Mr. Hill and Jackson that they decided to rob a bank, more or less on the spur of the moment, after they arrived in Pensacola and decided they needed some money (R. 574-75, 611-12).

There is no version of the evidence in this case which would support even an inference that the robbery of Janet Pearce and theft of her vehicle was part of a premeditated plan to kill

Officer Taylor or anyone else. Mr. Hill and Jackson obviously were hoping to rob the savings and loan without being recognized (hence the shades), and be gone before the police were called. It was only their incompetent and inexperience as bank robbers which caused them to inadvertently set off the alarm and activate the cameras. Bank manager Sparr's phone call alerted the robbers to the arrival of the police -- a development which they had obviously not anticipated (see R. 332), and which caused them to leave the bank in a hurried and disorganized manner (See R. 578-79). Certainly the robbery of Janet Pearce that morning in Mobile does not even begin to support such an inference. Mrs. Pearce's testimony concerning these uncharged crimes, therefore, had no valid probative value in the guilt phase, and certainly none in the death penalty proceeding.[4]

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[4]The Janet Pearce robbery was plainly not within the "res gestae" of the charged crimes. To be admissible as part of the res gestae, a collateral matter "must be so connected with the main transaction as to be virtually and effectively a part thereof." Skipper v. State, 319 So. 2d 634, 637 (Fla. 1st DCA 1975), quoting 22A C.J.S. Criminal Law sec. 662(1)(1961). Matters are not necessarily admissible as part of the "res gestae" even if they are contemporaneous with the main event. Skipper v. State, supra. (Here, of course, the collateral crime did not occur at the same time or even in the same state as the main event.) See also Smith v. State, 311 So. 2d 775, 777 (Fla. 3d DCA 1975)("res gestae" includes words, declarations, and acts "so closely connected with a main fact in issue as to constitute a part of the transaction"); cf. Wheelis v. State, 340 So. 2d 950, 952 (Fla. 1st DCA 1976)(evidence would be admissible as "res gestae" to show acts "occurring at the same time and place and which were integral to the conduct for which [defendants] were prosecuted." Nor is this a case where it would have been "impossible to give a complete or intelligent account of the crime charged without referring to the other crime." See, e.g., Tompkins v. State, 386 So. 2d 597, 599 (Fla. 5th DCA 1980).

The "collateral crime" testimony which the State insisted on presenting, over defense objection, to both juries in this case was irrelevant to any valid aggravating circumstance, and irrelevant to rebut any statutory or nonstatutory mitigating circumstance.[5] This evidence was improperly allowed to enter into the penalty phase, thus compromising the jury's weighing process and tainting its penalty recommendation.

The fourteenth amendment to the United States Constitution guarantees that the State of Florida cannot deprive an individual of life, liberty or property without due process of law. This guarantee has been read to focus increasingly upon the concept of fundamental fairness. Immigration and Naturalization Service v.

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[5]The State may attempt to argue, as the prosecutor did in his closing argument to the jury, that the "Williams rule" evidence was relevant to rebut the testimony of Mr. Hill's parents and neighbors concerning his family background and his upbringing; that, as the prosecutor paraphrased it, "he was a good boy growing up and was never violent in the neighborhood" (R. 676, see R. 670, 676-77). Such a contention, if made, will be unavailing. Other violent felonies of which a defendant has been convicted may be used for the purpose of showing propensity to commit crimes, as an element of a defendant's character. Fla. Stat. sec. 921.141(5)(b); Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977). Crimes for which the defendant has not been tried or convicted may not be so used. Elledge v. State, supra, at 1002; Provence v. State, 337 So. 2d 783 (Fla. 1976). Mr. Hill in this case did not request or receive an instruction on the statutory mitigating circumstance of "no significant history of prior criminal activity," nor did he attempt to argue that circumstance to the jury. Therefore, the State was not entitled to "rebut" it by introducing evidence of prior criminal activity not resulting in a conviction. The prosecutor's use of the "Williams rule" evidence in closing argument, not to show "heightened premeditation" as he had represented, but to infect the jury's weighing process with what amounted to a nonstatutory aggravating factor, demonstrates further the prejudicial effect of the error in admitting the testimony.

Lopez-Mendoza, 468 U.S. 1032 (1984); Engle v. Issac, 456 U.S. 107, 131 (1982); Smith v. Phillip, 455 U.S. 209, 219 (1982). It is generally recognized as best explained in Rochin v. California, 342 U.S. 165 (1952), where the United States Supreme Court observed:

> Regard for the requirements of the Due Process Clause inescapably [requires] an exercise of judgment upon the whole course of the proceedings leading to the conviction in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offense. [Citations omitted] These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those person immunities which, as Mr. Justice Cardozo twice wrote for the Court, are so rooted in the traditions and conscience of our people as to be ranked as fundamental, or are implicit in the concept of ordered liberty.

Id. at 169. (Citation and footnote omitted).

In United States v. Biswell, 700 F.2d 1310, 1319 (10th Cir., 1983), the Tenth Circuit Court of Appeals considered whether the admission of evidence of other "alleged earlier wrongs" was proper under Rules 403 and 404(b), W.R.E. The challenged evidence was summarized by that court as follows:

> Thus, at different times repeated references were made connecting Biswell with "ongoing investigations," with being "handled" for possession stolen property, with "[g]ambling, stolen property, things like that . . . and he was by implication placed in a group "involved in some kind of criminal activity."

700 F.2d at 1316.

The court concluded that this evidence had been improperly admitted and that a new trial was necessary. In so doing, the court stated:

> On careful consideration of the record here we are convinced that the evidence of other crimes and misconduct as interjected was not justified under Rule 404(b). In any event we must hold that any probative value it had was also substantially outweighed by the danger of unfair prejudice so that its admission was an abuse of discretion under Rule 403. Moreover, "[i]mproper admission of evidence of a prior crime or conviction, even in the face of other evidence amply supporting the verdict, constitutes plain error impinging upon the fundamental fairness of the trial itself." United States v. Parker, 604 F.2d 1327, 1329 (10th Cir. 1978); see also United States v. Gilliland, 586 F.2d 1384, 1391 (10th Cir. 1978).

Here, the prosecution introduced evidence regarding bad acts supposedly committed by Mr. Hill which had no bearing on any material issue and whose probative value was clearly outweighed by its potential for prejudice. The introduction of such evidence constituted plain error under Biswell, which impinged upon the fundamental fairness of the trial and sentencing. Cf. Johnson v. Mississippi, 108 S. Ct. 1981 (1988)(consideration of materially inaccurate evidence violated eighth and fourteenth amendments).

Mr. Hill objected to the State's improper attempt to introduce this non-statutory aggravating evidence, but was ignored. He is now entitled to relief.

ARGUMENT V

THE PROSECUTOR PEREMPTORILY EXCUSED BLACK PROSPECTIVE JURORS SOLELY BASED UPON THEIR RACE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION SIXTEEN OF THE FLORIDA CONSTITUTION.

At Mr. Hill's resentencing, the defense objected that the State was using peremptory challenges to excuse black prospective jurors solely on the basis of race ((R. 165-67). The State volunteered reasons for the excusals, and the court overruled the defense objection (Id.). The State's reasons for the excusals were pretextual and/or nonexistent, and Mr. Hill was denied his rights under the Sixth, Eighth and Fourteenth Amendments.

This Court has long recognized that article I, section 16 of the Florida Constitution prohibits improper bias in the selection of juries. State v. Neil, 457 So. 2d 481 (Fla. 1984). It has also consistently affirmed the enforcement of this important guarantee of an impartial justice system:

> We today reaffirm this State's continuing commitment to a vigorously impartial system of selecting jurors based on the Florida Constitutions explicit guarantee of an impartial trial. See Art. I, Sec. 16, Fla. Const.

State v. Slappy, 522 So. 2d 18 (Fla. 1988) cert. denied, 108 S. Ct. 2873 (1988).

In a series of cases, this Court has evolved a set of standards for the enforcement of the prohibition against the exclusion of jurors based upon race. In Neil, this Court held that the defendant must make a prima facie showing that there is

a substantial likelihood that peremptory challenges have been exercised because of racial bias. Once this showing is made, the burden shifts to the State to establish an independent basis for excusing the juror.

However, where the defense makes an objection and the court proceeds to hear a proffer of justification for the challenge from the State, the burden is in fact shifted:

> Reed argues that the procedure in this case unfairly did not allow the burden to shift from the defense. We disagree in that the prosecutor accepted the burden by going forward and, indeed, did everything he would have done had the judge found that the defense had made a prima facie case. More to the point is whether any jurors were struck for purely racial reasons.

Reed v. State, 560 So. 2d 203 (Fla. 1990). See also Kibler v. State, 546 So. 2d 710 (Fla. 1989). This is particularly true where the defendant is of the same class as the jurors who are being struck. Kibler, supra.

Finally, the State is restricted to the reasons actually given by the State for striking a juror as opposed to other reasons which may appear in the record:

> In its brief, the state refers to other portions of the voir dire which reflect reasons unrelated to race that might have been a legitimate basis to excuse Mr. Williams and Mr. Jones. However, the Neil inquiry must necessarily focus on the reasons given by the prosecutor for making the challenge.

Kibler, supra.

Even if a single juror is struck because of racial bias, it will constitute reversible error:

> We know, for example, that number alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternative. United States v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987); United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986); Fleming v. Kemp, 794 F.2d 1478 (11th Cir. 1986); Neil, Pearson; Floyd. Indeed, the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other. This is so because the striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even then there are valid reasons for the striking of some black jurors.

Gordon, 817 F.2d at 1541. Accord David; Fleming; Pearson; Floyd. As the Eleventh Circuit has stated:

> Batson restates the principle that "'[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions." Batson, supra, 106 S.Ct. at 1722, quoting Arlington Heights v. Metropolitan Housing [Development] Corp., 429 U.S. 252, 266 N. 14, 97 S.Ct. 555, 564 N. 14, 50 L.Ed.2d 450 (1977).

Fleming, 794 F.2d at 1483. Accord Pearson. State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988).

When these standards are applied to Mr. Hill's case, it is clear that the State assumed the burden of showing an independent basis and that the reasons given were not sufficient:

> At this juncture, Neil imposes upon the other party an obligation to rebut the inference created when the defense met its initial burden of persuasion. This rebuttal must consist of a "clear and reasonably specific" racially neutral explanation of "legitimate reasons" for the state's use of its peremptory challenges. Batson, 476 U.S. at 96-98 & n. 20, 106 S.Ct. at 1722-24 & n. 20.

Slappy, supra, 522 So. 2d at 22.

Under Batson, the threshold prime facie showing the defense is required to make to establish discrimination in the exercise of preemptory challenges is even less stringent then the requirements of Neil.

Under Batson, a defendant need only show:

> 1. That they are members of a cognizable racial group.
>
> 2. That the prosecutor has exercised peremptory challenges to move from the venire members of the defendant's race.
>
> 3. That from these first two facts established by the defendant and other relevant facts, there is raised an inference that the prosecutor has used peremptory challenges to exclude his veniremen from the petit jury solely on account of their race.

Batson at 90 L.Ed.2d 87-88.

The standard set forth in Batson was further explained by this Court in Slappy, supra. The court reasoned that the Constitution prohibits the exclusion of a juror based on race. The defense need not show a systematic exclusion of blacks. Slappy, 522 So. 2d at 21. The Court explained in Slappy that the challenge to a juror is suspect if the State did not question the juror regarding the issue asserted as the reason for his exclusion. Id. At Mr. Hill's trial, the court employed the systematic exclusion standard set forth in Swain v. Alabama, 380 U.S. 202 (1965) and failed to correctly assess the prosecutor's use of peremptory challenges.

The State fails to meet their burden when the explanation for excluding a particular juror is based on a pretext not legitimately related to the issues at trial or a factor revealed by the answers to questions posed during voir dire. Justice Marshall explained that unconscious racism influences the explanation for a challenge when the State characterizes a juror based on instinct:

> Nor is outright prevarication ... the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." ... A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.... [P]rosecutors' peremptories are based on their "seat-of-the-pants instincts." ... Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels.

Batson v. Kentucky, 476 U.S. at 106, 106 S.Ct. at 1728 (Marshall, J., concurring)(citations omitted). Batson is applicable to this case during this direct review of Mr. Hill's sentence. Griffith v. Kentucky, 107 S. Ct. 708 (1987). The trial court did not apply Batson or the procedures established by this Court pre-Batson in State v. Neil, 457 So. 2d 481 (1984), to deny Mr. Hill's objection to those unconstitutional tactics at trial.

Clarence Hill was resentenced to death for the murder of a white police officer in a racially charged atmosphere. Racial animosity was apparent, vengeance ruled the community and a fair and impartial trial was impossible. From the outset, Clarence Hill, was deprived of an impartial jury by the under-representation of blacks on the Escambia County voter registration lists from which the venires in this case were drawn (T. 1484)(Motion to Dismiss Indictment based on Under-representation of Blacks and Other Minorities). The prosecutor ensured the State would reap the full benefit of this unconstitutional advantage by intentionally excluding those black potential jurors who were seated on the actual panel for no other reason than the color of their skin.

Mr. Hill's defense counsel noted the prosecutor's unconstitutional use of peremptory challenges against prospective black jurors. He invoked the inquiry mandated by this Court into the State's use of peremptory challenges:

> MR. TERRELL [DEFENSE COUNSEL]: Your Honor, for the record, I need to voice a objection. The three black people on the panel who have been challenged, one was Mr. Belland, the other was Ms. Baker, who indicated she was slightly for the death penalty. Now we've got Ms. Lowe who has a back ground in criminal law enforcement, and feel that the circumstances, the State has started to selectively strike blacks from the panel.
>
> MR. ALLRED [ASSISTANT STATE ATTORNEY]: Your Honor, Ms. Lowe just gave some answer about whether or not if it was of any importance to her if it was a law enforcement officer when I asked her those questions. It was of no great concern to her, and of

course, one of aggravating circumstances is that the law enforcement officer -- anyway, I was not satisfied with her answers to those questions in that regard. And I'm using a peremptory challenge. I'm not saying blatant enough to strike her for cause, the grounds for me, not regarding race. I've still got -- Mr. Green is still on there. I'm satisfied with him as a juror, you know, and he's a black. And that's not what I'm doing here.

THE COURT: Motion denied.

MR. ALLRED: In addition, [Assistant State Attorney] Schiller's notes say Ms. Lowe says she doesn't believe in the death penalty.

THE COURT: Says she was neutral.

MR. ALLRED: That's what his notes say. I thought she said she was neutral.

THE COURT: I've got neutral.

MR. TERRELL: Yes, sir. That's what my notes show.

Bench conference concluded.)

MR. ALLRED: We tender, Your Honor.

(At the bench:

MR. TERRELL: Your Honor, so that the record may accurately show my objection on the issue we've just been discussing, technically I'm objecting and moving that the panel be struck and under the Neilson [sic] case, based on prosecution selective peremptory challenges of blacks.

THE COURT: Strike the panel? You've still got -- we've got blacks out there.

MR. TERRELL: Yes, sir. I think I have to make that objection under the Neilson case.

THE COURT: Now wait a minute, what's the Neilson case?

MR. ALLRED: He just needs to make the record. Technically he's got to move to strike.

THE COURT: McNeal, not Neilson.
MR. ALLRED: One of them. The first one that came out was Neal.

THE COURT: Neal, that's it.

(R. 165-67).

With respect to prospective juror Lowe, the prosecutor's entire inquiry with respect to the importance of the victim's status as a law enforcement officer is as follows:

MR. ALLRED: Greta Lowe.

THE COURT: There you go.

MR. ALLRED: Ms. Lowe, who is it that you are either close friends or related to in law enforcement?

PROSPECTIVE JUROR: I have two uncles, one in Detroit and one in New York City.

MR. ALLRED: And what do they do?

PROSPECTIVE JUROR: They're deputy sheriffs.

MR. ALLRED: All right. Are you close to those uncles?

PROSPECTIVE JUROR: They're not really -- one of them is married -- divorced from my aunt. And the other, he's my mother's brother-in-law. We're not close.

MR. ALLRED: Okay. Not closely related anymore because of divorces and that sort of thing?

PROSPECTIVE JUROR: Right.

MR. ALLRED: Did either of them have any influence upon your decision to go into criminal justice?

PROSPECTIVE JUROR: No.

MR. ALLRED: What was it exactly you were studying at West Florida?

PROSPECTIVE JUROR: Criminal justice.

MR. ALLRED: Do you feel that you may be influenced at all when you start beginning to consider in some detail evidence that the deceased in this case was a law enforcement officer on active duty in the performance of his duties, shot?

PROSPECTIVE JUROR: No.

MR. ALLRED: Okay. Does that have any impact upon you at all?

PROSPECTIVE JUROR: No. No. I'm sorry that he's dead, yes.

MR. ALLRED: Do you feel anything extra because he was a law enforcement officer?

PROSPECTIVE JUROR: No.

MR. ALLRED: Is it of interest or worthy of your consideration that this is a case involving a law enforcement officer as a deceased, as opposed to some other citizen?

PROSPECTIVE JUROR: You mean do I weigh it more?

MR. ALLRED: Yes.

PROSPECTIVE JUROR: No.

MR. ALLRED: That's all I have. Thank you.

(R. 164-65).

Significantly, not only did the prosecutor fail to advise prospective juror Lowe that the victim's status was relevant to determining aggravating factors, when she had previously stated she was able to follow the court's instructions (R. 18), but, she

was the only prospective juror the prosecutor singled out for such voir dire questioning, notwithstanding the presence of other prospective jurors with relatives in law enforcement or who were former law enforcement officers themselves. See (R. 204)(prospective juror Davis' son law enforcement officer in Georgia); (R. 6)(prospective juror Colley former officer with Pensacola Police Department); (R. 89)(prospective juror Hicks former military police officer). Clearly the prosecutor's voir dire of prospective juror Lowe constituted a "singling [] out for special questioning designed to evoke a certain response," Reed, supra, after the juror had already demonstrated her ability to follow the court's instructions. Furthermore, a relation to a law enforcement officer would be to the state's advantage, not detriment. Thus the prosecutor's first justification for exercising a peremptory challenge failed to demonstrate that the challenge was exercised solely because of the prospective juror's role. Furthermore, the prosecutor's second justification, that prospective juror Lowe did not believe in the death penalty was squarely rejected by the court which found her to be "neutral" on the question of capital punishment (R. 166).

While the prosecutor's explanation with respect to the preemptory strike against prospective juror Lowe was unbelievable, the prosecutor's explanation for the preemptory strike exercised against prospective juror Carter was nonexistent. Here the prosecutor conducted absolutely no individual voir dire. The only questions that were put to

prospective juror Carter, were put by defense counsel regarding her exposure to pretrial publicity and her answers thereto consisted of a mere three lines of transcript:

> MR. TERRELL: Ms. Carter?
>
> PROSPECTIVE JUROR: Newspaper at the time of the incident, and this morning I saw the headlines. I didn't get a chance to read it.

(R. 69-70). Nothing else distinguished this black prospective juror from her white counterparts. The record reveals 35 out of the 44 prospective jurors had also been exposed to pretrial publicity in this case. As this Court has made clear, it is not what appears in the record but rather, what explanation the prosecutor offers upon which the exercise of a preemptory strike against a black juror must be evaluated. Kibler, supra. Here there was none. The defense having made a prima facie case of discrimination by the State in the exercise of preemptory challenges and the prosecutor having voluntarily assumed the burden, by going forward, it was incumbent upon the State to provide valid non-racial reasons for why jurors Lowe and Carter, both black prospective jurors, were struck. Reed, supra.

Even under the Neil threshold, the State failed to establish non-discriminatory exercise of its peremptory challenges and relief is therefore proper. The reasons offered by the State for challenging the blacks excused were superficial and pretextual. Defense counsel and the trial court noted that the reasons for the exclusion were unsubstantiated. Under Batson and Neil, Mr.

Hill is entitled to a new sentencing before a jury untainted by the discriminatory exclusion of black jurors.

ARGUMENT VI

THE TRIAL COURT ERRED WHEN IT RESPONDED TO QUESTIONS FROM THE JURY AND REFUSED TO DISCLOSE TO MR. HILL AND HIS COUNSEL THE QUESTIONS ASKED, IN VIOLATION OF MR. HILL'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

During Mr. Hill's resentencing proceedings, and before deliberations commenced, the trial court received two questions from the jury. The record reflects the following colloquy between the court, the jury and Mr. Hill's counsel:

> THE COURT: Good morning, everyone. All right, I have two questions, and I don't think I can tell you. Those questions where we couldn't comment on directly. They are within the confines of the evidence and you weigh the evidence as you see it and take it by what you believe has been presented. That's all I can tell you. We can't tell you yes, this has been done and no, this hasn't been done.
>
> MR. TERRELL: Your Honor, may I see the questions?
>
> THE COURT: No, because I'm not commenting on them. Call you next witness, Mr. Allred.

(R. 374). The questions were never disclosed to counsel and were not made part of the record.

Under Rule 3.410 Florida Rules of Criminal Procedure, once deliberations begin, any requests from the jury concerning instructions and evidence must be dealt with only after giving notice to the prosecuting attorney and to counsel for the defendant. This Court has held:

> Any communication with the jury outside the presence of the prosecutor, the defendant, and defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless.

Ivory v. State, 351 So. 2d 26 (Fla. 1977). The Court further explained that:

> [i]t is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request. This right to participate includes the right to place objections on record as well as the right to make full argument as to the reasons the jury's request should or should not be honored.

Id.

Communications between the court and jury prior to deliberations are governed by Rule 3.180, Florida Criminal Procedural Rules. Rule 3.180a(5) ensures the defendant's presence "at all proceedings before the court when the jury is present." When the court has a discussion with the jury in violation of Rule 3.180 the courts have held that it is reversible error. See Adkins v. Smith, 197 So. 2d 865, 867 (Fla. 4th DCA 1967); Loudermilk v. State, 186 So. 2d 16, 817 (Fla. 4th DCA 1966), Deans v. State, 180 So. 2d 178, 180 (Fla. 2nd DCA 1965). As the court in Adkins explained:

> Although the better practice is to require counsel for the defendant and the state to be present while any conversation takes place between the jury and the court, a casual conversation or exchange of remarks is not reversible error unless it violates the provisions of F.S.A. section 914.01.

Adkins, 197 So. 2d supra at 867. Any communication other than casual conversation or exchange of remarks unrelated to the proceedings is reversible error.

In Mr. Hill's case the jury communicated privately with the court through written questions. Although the Court obtained the communication in the physical presence of Mr. Hill and his counsel, that communication remained private and was never disclosed to the defense despite their requests to be allowed to see the questions. The court however responded to the questions and instructed the jury that the matters were "within the confines of the evidence" and that they should "weigh the evidence as they see it." Despite the disclaimer, the court did comment on the questions.

Although Mr. Hill and counsel were physically present, without knowledge of what the questions were they could no more intelligently determine if Mr. Hill's rights were being protected than if they were actually absent. Mere presence alone is nothing without the defendant and counsel being given basic due process rights: notice of the subject matter and an opportunity to be heard on the matter. Mr. Hill's rights under Rule 3.180 were abrogated under these circumstances. Mr. Hill's counsel requested notice of what the questions were and that request was denied. The result was no better than if Mr. Hill and counsel were absent.

In the present case, the circumstances surrounding counsel's representation of Mr. Hill -- the court's refusal to disclose the

questions asked by the jury -- "prevented [him] from assisting the accused during a critical stage of the proceedings." See, United States v. Cronic, 466 U.S. 648, 659 (1984). The court's action deprived Mr. Hill of his right to the effective assistance of counsel, and under Cronic, prejudice must be presumed based upon counsel's inability to give advice. See, Stano v. Dugger, 901 F.2d 898 (11th Cir. 1990). Mr. Hill is entitled to resentencing.

ARGUMENT VII

THE SENTENCING COURT VIOLATED THE PRINCIPLES OF HITCHCOCK v. DUGGER, 107 S. CT. 1821 (1987), AND LOCKETT v. OHIO, 438 U.S. 586 (1978), WHEN IT PRECLUDED MR. HILL FROM PRESENTING, AND THE JURY FROM CONSIDERING, EVIDENCE OF MITIGATION, AND WHEN IT REFUSED TO INSTRUCT ON THE SUBSTANTIAL DOMINATION MITIGATING FACTOR, IN DEROGATION OF MR. HILL'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION, AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

There can be no doubt that the proceedings resulting in Clarence Hill's sentence of death violated the constitutional mandate of Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), Lockett v. Ohio, 438 U.S. 104 (1978), and Skipper v. South Carolina, 106 S. Ct. 1669 (1986). Mr. Hill's sentencing jurors were never allowed to hear compelling nonstatutory mitigation which would have demonstrated that a sentence less than death was proper. When counsel sought to present it, the trial court simply ordered that he was not to do so. Moreover, the jurors were prohibited from considering statutory mitigation by the trial

court's refusal to instruct on the statutory substantial domination mitigating factor. The trial court thus precluded the jury's consideration. Such judicial actions or instructions, precluding a capital sentencing jury's consideration of evidence in mitigation of sentence, starkly violate the Eighth Amendment. See Hitchcock; Lockett; Skipper. Mr. Hill's jurors were unconstitutionally precluded. Relief is proper.

In Lockett v. Ohio, 438 U.S. 586 (1978), the Court held that "the sentencer [must] not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604 (emphasis in original). The United States Supreme Court has consistently reaffirmed Lockett. See, e.g., Skipper, supra. Most recently, the United States Supreme Court did so in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), holding that "the exclusion of [nonstatutory] mitigating evidence . . . renders the death sentence invalid." Id. at 1824 (emphasis added).

During testimony at Mr. Hill's resentencing proceeding, defense counsel tried to present questions and evidence regarding the home environment of Mr. Hill, who grew up with fourteen siblings in a small house in Tominville, Alabama. Specifically, defense counsel sought to elicit from Mr. Hill's father evidence regarding his frequent and extended absences from the home throughout Mr. Hill's formative years. Defense

counsel also sought to elicit evidence demonstrating that Mr. Hill's mother was completely overwhelmed by the responsibilities attendant to raising fourteen children leading to a complete lack of parental supervision, care, or affection ever being expressed in the home. The State objected to this questioning concerning Mr. Hill's family background and home life while he was growing up (R. 547- 48, 557-58).

Defense counsel attempted to explain to the court the relevance of the testimony and requested the opportunity to proffer to the court the excluded testimony:

> MR. TERRELL: Judge I have basically three things. No. 1, I would like to make an offer of proof with regard to the questioning that I was doing regarding Mrs. Hill and Mr. Hill yesterday in the areas where the State objected. The questions that I was requesting as to Mrs. Hill were going to the circumstances of their home including her having some -- I believe her sisters present who had their children there, and that Clarence was involved during his working years in helping to support not only his family, but the other family.
>
> THE COURT: Well, isn't that all character?
>
> MR. TERRELL: Yes, sir, and it's entitled to go -- the defense is entitled to --
>
> THE COURT: How many times?
>
> MR. TERRELL: That's a different aspect from what we were talking about.
>
> THE COURT: Character is character. Now, I know you have a more liberal situation, but I was sitting here thinking because this is a penalty aspect of this proceeding, ostensibly we could be put to the task, if you want to bring all of Theodore [sic] or all of Mobile in here to tell you what a fine fellow somebody was ten years ago.

I don't think it changes that much, Mr. Terrell. I think you're allowed to get your punch in. I think you're allowed to, in any event, have the opportunity to establish or prove whatever you may have been trying to prove, but I don't think the law, in any event, allows or should allow someone to just repeatedly put on the same thing over and over. There was five people that came on here before the mother and father came on, and all they were establishing was character. As I told you when Mr. Allred finally made his objection, I was going to question it myself, because I thought it was too repetitive, too redundant. And after all, how long do we have to hear the same thing? The jury has the benefit of it. It may be in the process they got the benefit of it from people other than those who may have known him more closely. But the overall situation is still the same. So they've that evidence.

MR. TERRELL: Your Honor, as to Mr. Hill, the offer of proof would be in two areas: No. 1, that he was recovering from a heart attack about a month ago and that explained kind of his low attitude.

THE COURT: We're not interested in that. We're not saying this unkindly, but we're not interested in Mr. Hill as part of this case. We may be sorry for him or for any of his problems, but his problems don't have anything to do with the mitigating circumstances of this defendant.

MR. TERRELL: It was to explain his appearance on the stand.

THE COURT: There again, his heart attack has nothing to do with it. Let the jury weigh that. You're trying to interject all sort of collateral matters that have nothing to do with the issue and is doing nothing but clouding the issue, really. And it may be tedious and boring to the jury and it may be -- I don't know this jury, I haven't seen them look that way, but I've seen juries get turned actually off and start getting their views before they ever got to the back of the room because of what was happening right out

here, and it was because of the way it was being conducted.

MR. TERRELL: Yes, sir. Your Honor, the other offer with regard to Mr. Hill was that during the time, especially in his later years at home, Mr. Hill worked his main job, I think, was with the railroad and then numerous other jobs, second and third jobs, and he was seldom home. And Clarence was given responsibilities of the home to follow up on chores and also help out with the other family situations that we mentioned with regard to Mrs. Hill.

THE COURT: Again, that's character. Apparently to the, he was a fine boy. That's what you expect them to say so. It you don't expect that, you know what I know, they wouldn't be here, as to that's the nature of the case.

(R. 561-64) (emphasis added). Ultimately, the trial court ruled that Mr. Hill could not present this relevant nonstatutory mitigation which dealt directly with his character. This evidence demonstrated that "[Clarence Hill] had been deprived of the care, concern and parental attention that children deserve." Eddings v. Oklahoma, 455 U.S. 104, 116 (1982). Had Mr. Hill's parents been permitted to testify regarding the family environment during Mr. Hill's childhood, they would have presented exactly the kind of evidence which Eddings held could not be excluded from a capital sentencer's consideration.

The trial court also precluded the jury's consideration of mitigation by refusing to instruct on the substantial domination mitigating factor. The testimony of codefendant Cliff Jackson established that it was Jackson who decided they needed money (T. 574); it was Jackson who decided they should rob a bank (T.

574); it was Jackson who expressed concern about being identified, and who bought sunglasses for himself and for Mr. Hill (T. 575); it was Jackson who gave the signal for the robbery to begin (T. 576); it was Jackson who directed Mr. Hill's movements within the bank during the robbery (T. 577-78); it was Jackson who called Mr. Hill back from the safe when he realized that something had gone wrong (R. 578); it was Jackson who was the leader, and Mr. Hill who was the follower (R. 595-96). This evidence goes directly to the planning of, and the actual commission of, the robbery which served both as the predicate felony for, and as an aggravating circumstance for, the murder.

During the charge conference, defense counsel requested that the jury be instructed on the statutory mitigating circumstance set forth in Fla. Stat. sec. 921.141(6)(e) (R. 661-62). This instruction would have informed the jury that they could consider as a mitigating circumstance, if they found it to be established by the evidence, that the defendant acted under extreme duress or under the substantial domination of another person (See R. 662-63). The trial court refused to give the requested instruction:

> THE COURT: No, I'm not giving that. He wasn't dominated by anyone. In fact, if you take the evidence from the side of the State, they completely refuted he [Jackson] was leading.
>
> MR. ALLRED [prosecutor]: I don't care if you give anything he asks, just to avoid any question.

THE COURT: I'm not going to give it, because he wasn't dominated.

MR. ALLRED: He's saying that he was and would suggest that, you see it's an alternative in that instruction. It says either under the domination of another or under extreme duress. This duress idea may flow from the cocaine thing, if we fail to give the instruction.

THE COURT: That's why you give them the other one.

MR. ALLRED: Under the doubling up thing, I guess.

THE COURT: Yeah, I'm giving that one because he said it. Whether they believe it or not, that's another matter, but he said, "I was high on coke, I didn't know what I was doing." So -- all right, you can give it, that's all. Let's see, we came up with No. 4, wasn't it?

MR. TERRELL [defense counsel]: Yes, sir. For the record, I note my objection regarding No. 5.

(R. 662-63)(emphasis added).

It is important to emphasize here that the trial court did not refuse the defense's requested instruction on the ground that there was no view of the evidence from which the jury could lawfully find or infer that Mr. Hill was substantially dominated by Cliff Jackson during the course of the robbery which culminated in the killing of Officer Taylor. To the contrary, the court refused to instruct the jury on this contested issue of fact, essentially because he did not believe Cliff Jackson's testimony. As the court put it ". . . if you take the evidence from the side of the State, they completely refuted he was leading" (R. 662). In so ruling, the trial court contravened

the basic and well- established principles of Florida law regarding a party's entitlement to have the jury fully and accurately instructed on the law applicable to the case. See, e.g., Robinson v. State, 487 So. 2d 1040, 1042-43 (Fla. 1986); Toole v. State, 479 So. 2d 731, 733-34 (Fla. 1985); Bryant v. State, 412 So. 2d 347, 350 (Fla. 1982); Holley v. State, 423 So. 2d 562, 564 (Fla. 1st DCA 1982). Moreover, the trial court's failure to inform the jury of a statutory mitigating circumstance proffered by the defense violated the eighth amendment under the principles recognized in Lockett v. Ohio, supra; Eddings v. Oklahoma, supra; and Skipper v. South Carolina, supra.

Eddings makes clear that "[t]he sentencer . . . may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration." 455 U.S. at 114-15. However, this is precisely what occurred here: the trial court excluded relevant mitigating evidence from the jury's consideration. This violates the Eighth Amendment. Here, where the trial court refused to instruct on a statutory mitigating factor, and then precluded Mr. Hill's jury from considering relevant credible nonstatutory mitigation regarding the complete lack of care, concern and parental attention that Clarence Hill endured as a child, the extent of the Hitchcock error in the instant case becomes patent. In Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989), the Eleventh Circuit found that precluding the

defendant's sister there from giving mere hearsay evidence regarding her brother's conduct in jail could not be held harmless. Certainly, in this case, precluding both parents from providing testimony as to Mr. Hill's upbringing and precluding the jury from considering statutory mitigation also cannot be found harmless. Mr. Hill is entitled to resentencing.

ARGUMENT VIII

THE TRIAL COURT'S REFUSAL TO EXCUSE FOR CAUSE JURORS WHO HAD EXPRESSED A CLEAR AND UNEQUIVOCAL BIAS IN FAVOR OF THE IMPOSITION OF A SENTENCE OF DEATH DEPRIVED MR. HILL OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The constitutional guarantees of juror impartiality are fundamental to due process and are particularly crucial in capital proceedings. A juror who expresses a predisposition toward the death penalty, and/or an unwillingness recommend a life sentence, cannot sit as a fair and impartial juror, and must be excused for cause. Morgan v. Illinois, 112 S. Ct. 2222 (1992).

A fair jury is a fundamental shield against unlawful convictions and executions. The petit jury plays a key role in the American justice system by acting as a safeguard for persons accused of crimes against "the arbitrary exercise of power by prosecutor or judge." Batson v. Kentucky, 476 U.S. 79 (1986). See also Duncan v. Louisiana, 391 U.S. 145 (1968); Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 12-13 (1986).

Once a juror expresses a predisposition in favor of a death sentence, a challenge for cause must be granted. General questions regarding a juror's ability to be "fair" are not sufficient:

> Witherspoon and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath. But such jurors -- whether they be unalterably in favor of or opposed to the death penalty in ever case -- by definition are the ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding.

Morgan v. Illinois, 112 S. Ct. at 2232-33. Furthermore, even one juror who is predisposed to give death requires a new sentencing. Morgan, 112 S. Ct. at 2232 n. 8.

Finally, a state such as Florida, which requires that the sentencing jury balance aggravating versus mitigating circumstances, requires even stronger application of Witherspoon principles:

> The balancing approach chosen by Illinois vests considerably more discretion in the jurors considering the death penalty, and, with stronger reason, Witherspoon's general principles apply. Cf. Turner v. Murray, 476 U.S. 28, 34-35 (1986)(WHITE, J., plurality opinion).

Morgan, 112 S. Ct. 2231 n. 6.

Mr. Colley was an objectionable juror, as was Dr. Angelo. Both jurors not only had expressed a predisposition in favor of imposing the death penalty, but also had substantial exposure to pre-trial publicity. Dr. Angelo even expressed an opinion

regarding guilt. Trial counsel was forced to use peremptory challenges to remove these obviously prejudiced prospective jurors. (R. 160). Mr. Pierce, another prospective juror, even went so far as to state that, "the Florida state law agrees with Biblical law about, you know, a man who murders another man, by man shall his blood be shed" and stated that the defense would have to convince him that the death penalty was not proper (R. 216). Still, the trial court denied Mr. Hill's trial counsel's motion to excuse Pierce for cause and forced Mr. Hill to use yet another peremptory challenge. (R. 218-19). Finally, the trial court refused to excuse Ms. Nicholson for cause (R. 253), notwithstanding the fact that she was not only a victim of another bank robbery, but had also stated that she would impose death where the victim was unable to defend himself, where the victim was old, where the victim was young, and apparently in other circumstances not involving self defense (none of which were aggravating factors under then current Florida law) (R. 251). Having earlier expended Mr. Hill's peremptory challenges, including three to exclude the afore-described prejudiced jurors, trial counsel requested yet additional peremptory challenges to remove Ms. Nicholson. This request was also denied (R. 253-256) and Ms. Nicholson, who had already decided that non-statutory aggravating factors could render death an appropriate sentence, took part in deciding Mr. Hill's fate. (R. 256).

Trial counsel satisfied all of the requirements to preserve Mr. Hill's objections for appeal. The record is clear that the

error that occurred here was properly preserved for appeal. When, as here, a trial court erroneously refuses to dismiss for cause even a single biased juror, thus forcing the defendant to use peremptory challenges, the defendant is entitled to relief.

ARGUMENT IX

MR. HILL'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. HILL TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. HILL TO DEATH.

At the penalty phase of trial, judicial instructions informed Mr. Hill's jury that death was the appropriate sentence unless "mitigating circumstances exist that outweigh the aggravating circumstances" (R. 706). The trial judge then imposed death because "there has not been established sufficient mitigating factors to outweigh the aggravating factors" (R. 842).

The standard upon which the judge instructed Mr. Hill's jury, and upon which the judge relied is a distinctly egregious abrogation of Florida law and therefore eighth amendment principles. See McKoy v. North Carolina, 110 S. Ct. 1227, 1239 (1990)(Kennedy, J., concurring)(a death sentence arising from erroneous instructions "represents imposition of capital punishment through a system that can be described as arbitrary or capricious"). In this case, Mr. Hill, the capital defendant, was required to establish (prove) that life was the appropriate sentence, and the jury's and judge's consideration of mitigating

evidence was limited to mitigation "sufficient to outweigh" aggravation.

In his penalty phase instructions to the jury, the judge twice instructed the jury that it was their job to determine if the mitigating circumstances outweighed the aggravating circumstances:

> You are instructed that this evidence is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify imposition of the death penalty and, second whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(R. 265). (emphasis supplied).

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 706)(emphasis supplied). This erroneous standard was also utilized by the judge later in imposing the sentence of death:

> This Court is of the opinion that the age of the defendant may have been a factor, but there has not been established mitigating factors to outweigh the mitigating factors.

(R. 842) (emphasis supplied).

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Hill's capital proceedings. To the contrary, the burden was shifted to Mr. Hill on the question of whether he should live or die.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Hill's jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 706). The court then employed this unconstitutional standard in imposing death (R. 842). Cf. Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988)(trial court is presumed to apply the law in accord with manner in which jury was instructed). This standard obviously shifted the burden to Mr. Hill to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard given to the jury violated state law. According to this standard, the jury could

not "full[y] consider[]" and "give effect to" mitigating evidence. Penry, 109 S. Ct. 2934, 2951 (1989). This burden-shifting standard thus "interfered with the consideration of mitigating evidence." Boyde v. California, 110 S. Ct. 1190, 1196 (1990). Since "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty," McCleskey v. Kemp, 481 U.S. 279, 306 (1987), the argument and instructions provided to Mr. Hill's sentencing jury, as well as the standard employed by the trial court, violated the eighth amendment's "requirement of individualized sentencing in capital cases [which] is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990). See also Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). The instructions gave the jury inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned.

There can be no doubt that both the judge and the jury understood that Mr. Hill had the burden of proving whether he should live or die. Mr. Hill is entitled to resentencing.

ARGUMENT X

MR. HILL'S SENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Hill's jury was repeatedly instructed by the court and the prosecutor that its role was merely "advisory". During voir dire and opening statement, the prosecutor informed the jury that its sentencing decision was "advisory" (R. 14, 30, 266), which meant "advising [the judge] what the jury feels, and leaving the actual decision in the hands of the judge" (R. 30). The jury had not even begun to hear evidence when the Court told them that their role was merely advisory and that he would be making the decision as to whether Mr. Hill should live or die:

> The final decision as to what punishment shall be imposed rests solely with the judge of this court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what sentence should be imposed on the defendant.

(R. 264). (emphasis supplied). Prior to their deliberations, the court again let the jury know that their recommendation was merely advisory:

> Ladies and gentlemen of the jury, it's now your duty to advise the Court as to what punishment should be imposed upon the defendant for this offense. As you've been told, the final decision as to what punishment shall be imposed is the responsibility of the judge.

(R. 703). Whether intentionally or unintentionally, this instruction reinforced the State's improper and outrageous

mischaracterization of the jury's responsibility during closing argument.[6]

> That advisory sentence means it's not your decision whether to impose life or death, life without parole for 25 years, or sit him on death row. That decision is made by His Honor, and that's all in accord with due process.

(R. 666) (emphasis supplied).

However, great weight is given the jury's recommendation the jury is a sentencer. Espinosa v. Florida, 112 S. Ct. 2926 (1992). In fact, the jury "is a co-sentencer under Florida law." Johnson v. Singletary, 18 Fla. L. Weekly 90 (Fla. 1993). Here the jury's sense of responsibility was been diminished by the misleading comments and instructions regarding the jury's role. The jury was not told it was a co-sentencer. This diminution of the jury's sense of responsibility violated the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985).

ARGUMENT XI

MR. HILL'S JURY RECEIVED IMPROPER INSTRUCTIONS RESULTING IN FUNDAMENTALLY UNFAIR CONVICTIONS AND SENTENCES IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Notwithstanding the fact that only one individual was killed, Mr. Hill's jury was instructed and returned verdicts of guilt on two counts of murder (R. 1267). The jury found Mr. Hill guilty of premeditated murder and felony murder robbery.

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[6]Simultaneously, the trial court denigrated defense counsel's more accurate description of the role of the sentencing jury. (R. 702).

Under Florida law, Mr. Hill could only be convicted and sentenced to one count of murder. Muszynski v. State, 392 So. 2d 63, 64 (Fla. 5th D.C.A. 1981). The ambiguity in the double convictions of murder when there was only one victim became a central issue in the resentencing hearing. The resentencing proceeding was held on March 24-27, 1986, before Circuit Judge William S. Rowley and a jury. Prior to the penalty trial, defense counsel filed a motion in limine seeking to prevent the newly impaneled jury from being informed of the original jury's finding of premeditation (R. 820). The motion was renewed immediately after the jury was selected and just before they were sworn (R. 259-61). The trial court ruled, over defense objection, that the prior jury's finding of premeditation would be disclosed to the new penalty jury (R. 260-261). Accordingly, the trial court began his preliminary instructions to the jury by stating that Mr. Hill "has been found guilty of first degree premeditated murder and felony murder" (R. 262). The State's first witness, William Spence, a deputy clerk of the circuit court, referring to the verdict form from the original trial, testified over objection that the jury found Mr. Hill "[g]uilty of both first degree premeditated murder and a felony murder" (R. 289). After presentation of the evidence, closing arguments, and jury instructions, the jury returned a recommendation that Mr. Hill be sentenced to death (R. 714, 834).

The sentencing hearing was held on April 2, 1986. Prior to the imposition of sentence, defense counsel once again argued, as

grounds why sentence should not be imposed, that the jury should not have been informed of the prior jury's finding of premeditation (R. 844-47). The trial court again overruled the objection (R. 845-47). The Court then, following the jury's recommendation, re-imposed the death penalty.

By disclosing to the newly impaneled penalty jury the original jury's finding that the homicide was premeditated, the trial court in effect instructed the jury to disregard Mr. Hill's testimony (see R. 614-17) that he did not intend to kill Officer Taylor or anyone else -- that he intended only to disarm the officers and free Cliff Jackson -- and that he began firing when Officer Bailly wheeled around and fired at him. The new jury should have been permitted to determine the question of premeditation, and to assess Mr. Hill's credibility, independently. The trial court's preliminary instruction to the jury, coupled with the testimony of court clerk William Spence which followed immediately thereafter (R. 289), deprived Mr. Hill of his constitutional right to have these critical issues of fact resolved by an impartial jury.

The guilt phase in this case clearly involved a substantial factual dispute as to whether or not the killing was premeditated. This, in turn, was a critically relevant issue with regard to penalty. As discussed above, the State argued that the "cold, calculated, and premeditated" aggravating factor applied to this crime. Because of the unchanneled response invited by the vague jury instruction, the jury could have

believed that the question (of whether the State's argument was correct) had already been decided adversely to Mr. Hill. It was thus prevented from considering Mr. Hill's testimony. Had the penalty jury believed that testimony, it would not have been required to recommend life, but it certainly would have been more favorably disposed toward rejecting, just as this court did, the "cold, calculated, and premeditated" aggravating factor. By informing the jury, through an instruction and through testimony, that the finding of premeditation had already been made, and by further instructing them that they were not to concern themselves with that question, the trial court prevented this critical issue of fact and credibility from being resolved by an impartial and fairly selected jury.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Hill. The instruction and testimony were strenuously objected to at trial and are now presented on direct appeal. The Court should vacate Mr. Hill's unconstitutional sentence of death.

CONCLUSION

For all of the reasons discussed hererin, Mr. Hill respectfully urges the Court to reverse the trial court and to order a resentencing before a newly empaneled jury.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 14, 1994.

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