IN THE

SUPREME COURT OF FLORIDA

MICHAEL SCOTT KEEN,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 71,358
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Michael Keen was the Defendant and the State of Florida was the Prosecution in the Circuit Court of the Seventeenth Judicial Circuit of Florida. The Parties will be referred to by name or as Appellant or Appellee.

The following symbols will be used:

"1R"	Record on Appeal of First Trial
"2R"	Record on Appeal of Second Trial
"1SR"	First Supplemental Record of Second Trial
"2SR"	Second Supplemental Record of Second Trial
"IB"	Initial Brief of Appellant
"AB"	Answer Brief of Appellee

STATEMENT OF THE CASE

Appellant relies on the Statement of the Case in the Initial Brief.

STATEMENT OF THE FACTS

Appellee's Statement of the Facts violates Rule 9.210(c), Florida Rules of Appellate Procedure. The comments to the rule note it strictly requires appellees to omit a statement of the facts except to the extent appellee disagrees with the intitial brief's version. In this case, Appellee merely stated that it did not accept Mr. Keen's Statement of the Facts and proceeded to include its own 22 page counter-statement. Appellee never specifies its disagreements with Mr. Keen's Statement of the Facts. This Court should disregard Appellee's Statement of the Facts as it violates the rules.

Assuming, arguendo, that this Court may consider Appellee's Statement of the Facts, Mr. Keen would point out the following inaccuracies and/or ommissions in Appellee's Statement of the Facts. Appellee asserts that Shapiro stated he testified "to do justice." AB 8. However, Appellee neglects the following portion of the cross-examination of Shapiro.

> Q. My question, sir, was you knew that you needed to cooperate with the police to get yourself out of trouble?
> A. There was a time when I felt that way, yes.
> Q. Okay. And, in fact, you have never been arrested for murder in connection with this incident; have you?
> A. No.
> Q. You have never been arrested for any crime in connection with this incident; correct?
> A. That's correct.
> Q. You've never been charged by the State Attorney's Office with murder in connection with your involvement in this incident; have you?
> A. No, sir.
> Q. And you've never been charged by the State Attorney's Office with any crime because of your involvement in this incident; is that correct?
> A. That's correct ...
> Q. Are you aware that the prosecutor's office has indicated to your attorney that they were placed in an either/or position of either prosecuting you or Mr. Keen, and they opted to prosecute Mr. Keen?
> A. Yes.

2R 544-546. Appellee points out the testimony that continued payments after death "is consistent with" attempting to create an appearance of lack of knowledge of death. AB 9. However, it fails to point out that the policy holder is obligated to continuing making payments until a declaration of death, which

had not occurred. 2R 607. Appellee points out that (former) Officer Mimoso at first stated that in his police experience that people in shock are excited, unless they are unconscious. AB 11-12. However, Mimoso limited his comments, saying "most of the time" he was involved with people in shock, "they were very excited". 2R 674. Appellee states that Mr. Keen discussed the possibilty of giving a statement to make Shapiro less important to the State's case, thus making it less likely that he will get immunity. AB 13-14. This is somewhat misleading. Officer Scheff actually testified:

> Mr. Keen was somewhat perturbed by that and we had a conversation back and forth regarding the possibility of obtaining a statement from him so that Ken Shapiro might not have quite as important a role in the case; and therefore, the State Attorney's Office might be less likely to grant him immunity if they did not, you know, need his - Ken Shapiro's statement as much. (Emphasis supplied).

2R 743. Appellee asserts that the Amabile handwritten statement includes an "admission" that Keen discussed the insurance money after Anita's disappearance. AB 15. This is somewhat misleading. The following is the actual colloquy:

> Q: "Earlier in your first statement, didn't you tell me and Rich - and I quote - 'I'm not going to deny that the insurance money was discussed after Anita disappeared.'"
> A: "If I said that, it came out of an emotional state. My whole life, my ambiance was down the drain. I gave things away, sold things, let things get repossessed and went to California. I didn't care about anything then. I was flat broke when I got back.
> "Q: What I'm asking, Mike, you told Rich and myself that the money, insurance, was discussed."
> A: "By Kenny, such as what are we going to do with it, but that was discussed long after that day."

2R 712-713 (e.a.).

Mr. Keen never stated that "everything" contained in the Amabile handwritten statement is false. AB 20. He stated that "a lot" was taken out of context. 2R 1029. Mr. Keen did not say that Hickey went through his case file, when he was out of the cell, rather he said that Hickey could have learned about his case this way. 2R 1043.

ARGUMENT

FOR ALL POINTS NOT DISCUSSED BELOW, APPELLANT RELIES ON THE ARGUMENTS AND AUTHORITIES IN HIS INITIAL BRIEF.

POINT I

THE TRIAL COURT ERRED IN FAILING TO DECLARE A MISTRIAL AFTER THE MEMBERS OF THE JURY READ A HIGHLY INFLAMMATORY MAGAZINE ARTICLE IN THE JURY ROOM, DURING DELIBERATIONS

Appellee relies almost completely on the jurors' statements that the unauthorized materials did not affect them. AB 38-40. The trial judge also seemed to employ this analysis. 2R 1370-1372. This is contrary to this Court's opinion in State v. Hamilton, 574 So.2d 124 (Fla. 1991). In Hamilton this Court condemns "the improper inquiry into the thought processes of jurors," including basing harmless error on the juror's thought processes, as in Doutre v. State, 539 So.2d 569 (Fla. 1st DCA 1989). In Doutre, the court relied on statements of the jurors that they only relied on the law and the evidence and the unauthorized material did not affect them to reach a finding of harmless error. 539 So.2d at 570. This is precisely what the trial court did here. The application of Hamilton (especially Hamilton's disapproval of Doutre) to this case mandates a new trial.

The analysis employed in Hamilton goes to two questions: (1) whether any jurors actually read the material; (2) the material's content. In Hamilton, this Court found there was no evidence that any juror actually read the magazines, and they were automobile magazines which were unrelated to any legal or factual matter in the case. Hamilton, 574 So.2d at 130-1. Thus, the error was harmless. However, this Court stated, "Obviously, this conclusion might be different if the magazines dealt with legal or factual matters that might be deemed to have some relevance to the case." Id. at 131 n.9.

The application of the Hamilton analysis to the present case reveals that two jurors took great interest in the material and that the material is highly prejudicial. Appellee's summary of the jury misconduct leaves out several important aspects of the jurors' testimony. AB 38-40. Juror Fischetti stated that he found portions of the article dealing with the tactics of criminal defense lawyers to be "interesting". 2R 1312. He bracketed and underlined the parts he found to be "most interesting". 2R 1312. This was the only article in any magazine that he marked. 2R 1312-1314. He initially denied showing the magazine to Juror Rodriguez, but later admitted doing this. 2R 1312-1314, 1349. He also stated, "I assume you have the books back there for us to read. If it was that big of a deal, I don't understand why the book was there." 2R 1354. He

clearly thought the Court had approved reading the article. Appellee falsely states Fischetti "unequivocally stated" his verdict and Rodriguez' were the same when Rodriguez handed him the marked article. AB 39. Fischetti actually said:

> DEFENSE COUNSEL: At that point in time was Mr. Rodriguez's position on the verdict different than yours?
>
> MR. FISCHETTI: I don't think so.

2R 1350. This is hardly unequivocal.

Juror Rodriguez stated that he and Fischetti "debated back and forth on the points in the article" in the presence of the other jurors during deliberations. 2R 1327, 1330. Appellee asserts that Rodriguez testified that he had reached his verdict before he saw the article. AB 40. This is very misleading. He was asked about this on two occasions. The following occurred:

> THE COURT: Had your vote already been in on the case when - before you saw this article?
>
> MR. RODRIGUEZ: No.
>
> THE COURT: Had it been in?
>
> MR. RODRIGUEZ: We had taken polls, but we hadn't come up with a conclusive poll as to a verdict. This is before the sentence. We had - we had -- I mean. I had reached a decision, however, you know. I mean, it wasn't a final decision I don't think.

2R 1328. (Although the juror mentioned the sentence, it was clear from all the testimony that the jury misconduct took place during the guilt phase deliberations.)

Juror Rodriguez was again asked about the status of his verdict when he received the highlighted article.

> MR. WILLIAMS: You had already arrived at the verdict that you were going to reach?
>
> MR. RODRIGUEZ: Not my final verdict, no.

2R 1330. A fair reading of Mr. Rodriguez's testimony is that he may have had a tentative leaning, but had not reached a "final verdict".

Rodriguez also stated that he "believed" that Fischetti was using the article to convince him that the case "doesn't have to be proved to all conclusiveness". 2R 1329. It is clear that Rodriguez believed that Fischetti was using the article to alter his evaluation of the evidence and to affect his

view of reasonable doubt. Hamilton specifically disapproved of the portion of Doutre which held to be harmless error material which could have affected the jury's understanding of the term "reasonable doubt". 574 So.2d at 127 n.6.

The content of the article is highly prejudicial. Appellee's description of the article is incomplete and inaccurate. Appellee states that the article only dealt with the Hanson and Levin cases and only with the trial technique of attacking the victim's credibility on the stand. AB 43. Both of these assertions are false. The article also discusses the case of Bonnie Garland, where the defense attorney first made a name for himself by winning "a lesser charge of manslaughter". 2R 1478. It discusses the John Gotti trial:

> During the recent federal racketeering trial that ended in the acquittal of alleged Mob Boss John Gotti, defense lawyers launched savage personal attacks against Prosecutor Diane Giacalone; they even made wild charges that Giacalone had given her underwear to a prospective witness to testify.

2R 1478. A New York University professor says: this "represents a break down in the last thread of civility." 2R 1478. It discusses the Bernhard Goetz case, asserting defense attacks on victims and witnesses in that case were improper. It states Goetz's "attorney has relentlessly highlighted the criminal intentions of the four (who were both victims and state witnesses)." 2R 1478. Time opines the American Bar Association and judges are powerless to stop these abuses.

The article also criticized much more of criminal defense practice than merely the practice of attacking victims' credibility on the stand. The subtitle of the article is "Defense lawyers raise hackles by attacking victims and prosecutors". 2R 1478. The article dealt with not only attacking living victims as witnesses, but also dealt extensively with creating sympathy for homicide victims, especially female homicide victims who are killed by their lovers. Indeed the Levin and Garland cases both involve this type of case. 2R 1478. The article goes on at great length about the need for victims' rights legislation and the crusades of the "grief stricken fathers" of female homicide victims killed by their lovers. It quotes Ed Koch, then Mayor of New York City, in support of such legislation. The article also quoted an official of the National Organization for Women that many of the attacks on women victims are "very

sexist". It also highlighted the "savage personal attacks" made on the prosecutor in the Gotti case, including charges of improper benefits given to a witness to testify. The article also points out how the ABA and individual judges are powerless to stop these abuses, even though they are "morally wrong". It quotes a Los Angeles attorney concerning the fact that judges consistently err on the side of the defense in order to avoid giving rise to appellate issues. 2R 1478. Time states that "the only palliative seems to be public protest". 2R 1478. This article goes far beyond the narrow scope which Appellee attempts to impose on it. It is a broad based attack on the ethics and techniques of the criminal defense bar.

Appellee asserts that the article was not inflammatory. AB 38, 43. This is absurd. How else can you describe an article which discusses such things as a charge that a prosecutor gave a witness her underwear in exchange for his testimony, quotes a prominent law professor that current criminal defense tactics "represent a breakdown in the last thread of civility", describe a defense lawyer's attempt to obtain a homicide victim's diary to show "her kinky and aggressive sex life", and which describes criminal defense tactics as "morally wrong" and "sexist"? Inflammatory is certainly accurate, if not understated.

Appellee alleges that the trial court analyzes the content of the article. The only thing mentioned in the Court's order is the jurors' statements that the article had no affect on them. 2R 1370-1372. It is true that at one point during the evidentiary hearing the judge commented on the content of the article. 2R 1346-1347. However, these comments were in a dialogue with defense counsel, were not the Court's ultimate findings, and are very confusing. See Boynton v. State, 473 So.2d 703, 707 (Fla. 4th DCA 1985) (en banc), aff'd 478 So.2d 351 (Fla. 1985) (comments "tossed out orally in a dialogue" are not reliable). The trial court's ultimate findings only discussed the jurors' self-assessments the article did not affect them; it did not analyze article's content. 2R 1370-2. This is precisely what Hamilton condemns in Doutre.

Appellee also relies on the fact that the jury was given an instruction

on reasonable doubt to render any error harmless. AB 44. If this was correct, all jury misconduct in criminal cases would be harmless. This is not the law in Florida. See Hamilton, supra.

None of the cases relied on by Appellee are dispositive here. In Bottoson v. State, 443 So.2d 962, 966 (Fla. 1983) the unauthorized materials merely reproduced admitted testimony. In Clark v. State, 443 So.2d 973, 976 (Fla. 1983) the jury requested to see a jacket which had been excluded from evidence. The trial court denied the request and gave the jury an instruction to "not draw any inferences from anything said about the jacket, nor should it speculate as to why the jacket was not in evidence." Id. at 976. This is very different from the present case where jurors where actually highlighting and debating unauthorized material, which at least one thought the Court had approved, and which had no limiting instruction of any sort. Doyle v. State, 460 So.2d 353, 356-357 (Fla. 1984) involved a juror's comment to defense counsel after the close of the state's case, "Good luck. You're going to need it." Id. at 356. The judge gave a curative instruction approved by defense counsel. This is very different from inflammatory material being debated by jurors, during deliberations, without any cautionary instruction. Perry v. State, 200 So. 525, 527 (Fla. 1941) concerned an improper question to a witness, where the defense objection was sustained and a curative instruction was given. This case does not even involve jury misconduct.

The Federal cases relied on by Appellee are also distinguishable. Smith v. Phillips, 455 U.S. 209 (1982) involved a juror's job application to be an investigator in the prosecutor's office. This is very different from considering inflammatory materials during deliberations. Rushen v. Spain, 464 U.S. 114 (1983) involves ex parte communications between the judge and a juror during the evidence. This is different from misconduct during deliberations. (Both of the cases involve Federal habeas petitions. Thus, the standard is the minimum under the Federal Constitution. Of course, this Court is free to set a higher standard under the Florida Constitution. See Walls v. State, ____ So.2d ____, 16 F.L.W. S254 (Fla. April 11, 1991); Haliburton v. State, 514 So.2d 1088 (Fla. 1987).

However, even under the Federal standard this case must be reversed.) Adjmi v. United States, 346 F.2d 654 (5th Cir. 1965) involved jurors looking at newspaper headlines during the course of a trial and then not reading the articles. Id. at 659. This is different from the current situation, where jurors highlighted and debated inflammatory materials during deliberations. In United States v. Boatwright, 446 F.2d 913 (5th Cir. 1971) there were law books in the jury room. Id. at 915. Although the opinion is somewhat cryptic,it appears that the jury did not actually read the books. This is very different from the present case. Appellee cites no case with jury misconduct similar to the present case. Appellee has also made no attempt to reply to the numerous Federal and out-of-state cases, cited by Mr. Keen, which deal with analogous situations and which hold a new trial is required.

Appellee asserts that the article is harmless, as the defense did not use any of the techniques discussed in the article. (1) This is factually incorrect. (2) Even if this were true, the error would still be harmful, as the article contained emotional appeals for victim sympathy, especially for female homicide victims who are killed by their lovers; it is a generalized attack on the ethics and credibility of the criminal defense attorneys; it talks about how judges and the ABA are powerless to stop these abuses, thus encouraging jurors to do the job; and it specifically mentions the appellate process and how judges bend over backwards to rule for the defense in order to avoid appellate reversal.

An analysis of the content of the article reveals the impossibility of Appellee showing the error to be harmless beyond a reasonable doubt. During deliberations, after the jury had twice indicated deadlock, two jurors discussed the article, "Whose Trial Is It Anyway?: Defense Lawyers Raise Hackles by Attacking Victims and Prosecutors." Portions of the article were underlined by juror Fischetti which "were some of the points that interested me the most." 2R 1312. One highlighted portion criticizes defense counsel in the nationally publicized murder of Jennifer Levin for seeking, unsuccessfully, to obtain the victim's diary to show her aberrant sex life.

> By that time, however, Levin's character had been impugned and the anguish of her father amply replenished. Her grief-stricken father

has appeared in court wearing a JUSTICE FOR JENNIFER button.

In the next highlighted section, the article tells the same defense attorney had won a "lesser charge of manslaughter" in a case involving a man killing his girlfriend with a hammer.

> It was suggested" said her (victim's) father Paul bitterly, "that she was a manipulative, rich, spoiled person who didn't treat this lovely man who murdered her nicely.

He now works for victim's rights legislation. The final underlined portion emotionally pleas for victim sympathy, especially for female homicide victims killed by their lovers. It states the justice system is biased towards the defense, denies "victim's rights," and permits "morally wrong" criminal defense tactics. 2R 1478.

The non-highlighted portions of the article are equally inflammatory. They describe public revulsion over defense tactics in the highly publicized razor blade slashing of Marla Hanson, another young female victim, noting the spate of victim's rights editorials inspired by that case. Mr. Keen's guilt and penalty defenses were prejudiced contrary to the Eighth and Fourteenth Amendments. Evidence or argument designed to create sympathy for a homicide victim is irrelevant and improper. Rowe v. State, 120 Fla. 649, 163 So. 22 (1935); Melbourne v. State, 51 Fla. 69, 40 So. 189 (1906); Garron v. State, 528 So.2d 353, 358-9 (Fla. 1988). It constitutes a Fourteenth Amendment violation. See Payne v. Tennessee, 59 U.S.L.W. 4814 (U.S. June 27, 1991); Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989). The logic of these cases applies equally to victims as a class creating an unacceptable risk of arbitrary action by an inflamed jury. This article urged the jury to use Michael Keen to avenge all victims, especially female homicide victims.

The article specifically mentions the fact that judges bend over backwards to rule for the defense in order to avoid to avoid appellate reversal and that "the only palliative seems to be public protest". 2R 1478. (Although this was in the context of cross-examining the victim, the comment carries the potential for much broader application by a juror.) This portion of the article is harmful error in several respects. Both this Court and the United States Supreme Court

have held that references to appellate review which diminish the jury's sense of responsibility are reversible error. Caldwell v. Mississippi, 472 U.S. 320 (1985); Pait v. State, 112 So.2d 380, 383-384 (Fla. 1959); Blackwell v. State, 76 Fla. 124, 79 So. 731, 735-736 (Fla. 1918). Additionally the thrust of this portion of the article is to encourage jurors to make up for the inactivity of judges. This may well have pushed a deadlocked jury to conviction.

The error in this case is clearly harmful. Both Appellee and the trial court did exactly what the Hamilton opinion condemned in Doutre; ignore (and distort) the content of the article and rely almost solely on the jurors statements of "no effect". The timing of the article also demonstrates its harmful nature. The jury had deliberated for a day and sent back two indications of deadlock. Then two jurors discussed this highly inflammatory article, which one had highlighted. Juror Rodriguez stated that he did not have his "final verdict" when Fischetti tried to use the article to show that the case "doesn't have to be proved to all conclusiveness". This Court has previously noted the close nature of the evidence. Keen I. The error was clearly harmful in both the guilt and penalty phases. (The penalty verdict was only 7-5. Virtually anything could have tipped the balance.) Reversal for a new trial is required.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO RELEASE OR INSPECT IN CAMERA THE GRAND JURY TESTIMONY OF KEN SHAPIRO.

Appellee's reliance on the doctrine of the law of the case is misplaced; this Court did not discuss the issue of grand jury testimony in Keen I. Appellee assumes this Court found the issue to be without merit. AB 45-46. However, this assumption is no basis to invoke the doctrine of law of the case. The doctrine of law of the case is limited to "questions of law actually presented and considered on a former appeal." U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061, 1063 (Fla. 1983) (e.a.); see Coastal Petroleum v. American Cyanamid, 492 So.2d 339, 344 (Fla. 1986) (dicta in an opinion is not law of the case); Myers v. Atlantic Coast Line Railroad Company, 112 So.2d 263, 267 n.6 (Fla. 1959) (same); see also Prime Management Co. v. W & C Associates, 548 So.2d 696, 697 (Fla. 3d DCA 1989) (per curiam affirmance of trial court order granting a new trial on

several grounds is not approval of all the grounds). In this case, there is no discussion at all of the issue; law of the case does not apply since this Court has not considered the issue. Assuming, arguendo, that law of the case might apply, it still does not bar consideration of this issue. A court has the power to reconsider its ruling if it becomes convinced that the original ruling is erroneous. Beverly Beach Properties v. Nelson, 68 So.2d 604, 607-608 (Fla. 1953); Massie v. University of Florida, 570 So.2d 963, 974-976 (Fla. 1st DCA 1990). Intervening case law is grounds to reconsider a previous decision. United States v. Cherry, 759 F.2d 1196,1208 (5th Cir. 1985). In this case there has been substantial intervening caselaw. Miller v. Dugger, 820 F.2d 1135 (11th Cir. 1987) and Hopkinson v. Shillinger, 866 F.2d 1185 (10th Cir. 1989), modified 888 F.2d 1286 (10th Cir. 1989) (en banc) both were rendered after this Court's prior opinion. These are the first cases which applied the principles of Pennsylvania v. Ritchie, 480 U.S. 39 (1987) to grand jury testimony. Also subsequent to the prior opinion is Butterworth v. Smith, 110 S.Ct. 1376 (1990) in which the United States Supreme Court declared Florida's grand jury secrecy statute to be unconstitutional in certain circumstances. Thus, even if this issue were to be considered law of the case, there are very good reasons to reconsider it.

Appellee also relies on a series of cases from 1982 and earlier, as well as the grand jury secrecy statue. AB 45-46. It is questionable whether any of these are still the law, at least in terms of the denial of in camera review. Indeed, the grand jury secrecy statute has been declared unconstitutional, in certain circumstances, in Butterworth v. Smith. All of these cases are prior to Miller and Hopkinson. Miller and Hopkinson greatly expand the right to release or in camera review. Jent, relied on by Appellee, is the culmination of this line of cases. Jent cannot still be the law in light of subsequent decisions. Ritchie and Hopkinson both hold there is a right to an in camera review upon request for exculpatory or impeaching evidence, without pointing to any specific showing of exculpatory evidence. This is different from the standard in Jent. Jent itself was the companion case in Miller, supra. Miller overruled this Court's opinion in Jent and ordered in camera review of the testimony. The

Miller opinion explained the threshold required for in camera review is far lower than for ultimate release. 798 F.2d at 429-430. It states:

> Sometimes an in camera inspection is necessary to determine if a party has shown sufficient particularized need.

Id. at 429. The Jent opinion does not set forth this lower standard.[1]

Appellee's attempt to distinguish Dennis v. United States, 384 U.S. 855 (1966) is not persuasive. AB 46-47. Appellee relies on the fact that the government's brief stated:

> there is substantial force to petitioners' claims that the interest in secrecy was minimal in light of the oft-repeated testimony of the witnesses and that the arguments they now advance, if made at trial, might have suggested in camera inspection as an appropriate course.

Id. at 869. However, the opinion goes on to say: "But the Government argues that it was not error for the trial judge to have denied petitioners' motions. With this latter proposition we disagree, and we reverse." Id. Thus, it is clear that the government's ultimate position in Dennis was that reversal was not required. However, the United States Supreme Court reversed. Furthermore, the reasons the Government partially conceded in Dennis apply here. The witness, Shapiro, had testified twice. There is no secrecy interest. There was a proper pre-trial motion. However, the ultimate issue is a defendant's entitlement to release or in camera review under the Florida and Federal Constitutions. Constitutional rights can never be dependent on the idiosyncracies of individual government attorneys. Appellee also pointed out that the Court in Dennis stated that the charge could not be proved without the four witnesses whose grand jury testimony that was ordered revealed. Id. at 872. However, this is a distinction without a difference. In the present case, this Court has recognized that the "evidence against Keen ... was primarily based on the testimony of Ken Shapiro". Keen, 504 So.2d at 397.

> It would be legerdemain to characterize the evidence as overwhelming; the real jury issue presented in this trial centered on the credibility of Shapiro versus the credibility of Keen.

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[1] The subsequent history of Jent must also be noted. In camera review revealed Brady material that had to be released. Both Jent and Miller ultimately received new trials and were freed after twelve years on death row. The earlier release or in camera review of the grand jury testimony may well have solved this unfortunate situation.

Id. at 401. Even with Shapiro's testimony, the jury deliberated for two days, and gave two indications of deadlock. It is clear that he was a critical witness. Appellee overlooks Dennis's most important fact; the United States Supreme Court reversed for a new trial due to the failure to release or review in camera the grand jury testimony. The Court also reaffirmed its prior statement from United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940) that: "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." Dennis, supra at 870.

Appellee's attempt to distinguish Pennsylvania v. Ritchie, 480 U.S. 39 (1987) is unpersuasive. AB 46-47. Appellee contends the confidentiality interests in grand jury testimony in question are greater than in the records at issue in Ritchie. Both the Eleventh Circuit and the Tenth Circuit have specifically held Ritchie applies to grand jury testimony. Miller v. Dugger, 820 F.2d 1135 (11th Cir. 1987); Hopkinson v. Shillinger, 866 F.2d 1185 (10th Cir. 1989), modified 888 F.2d 1286 (10th Cir. 1989) (en banc). Appellee's argument makes little sense. Ritchie involved a defendant who was accused of having raped his 13-year old daughter two or three times a week for the previous four years. 480 U.S. at 43. The confidential file which the defendant was seeking to obtain was the alleged victim's Children and Youth Services file concerning her sexual abuse. There was also no evidence in Ritchie that the child had ever told an inconsistent version. Here, Shapiro claimed to be a participant in murder and a lengthy cover up. Clearly, an innocent child-rape victim has a greater confidential interest in the intimate details of her sexual abuse than an admitted murder participant, who has already testified publicly, has in grand jury testimony.

POINT III

THE TRIAL COURT ERRED IN PERMITTING VARIOUS STATEMENTS OF APPELLANT TO BE INTRODUCED INTO EVIDENCE.

Appellee relies on the doctrine of law of the case for its response to most aspects of this issue. AB 47-48. Law of the case does not control disposition for several reasons. The doctrine does not deprive a court of the power to reconsider its ruling if it becomes convinced that the original ruling

is erroneous. Beverly Beach Properties v. Nelson, 68 So.2d 604, 607-608 (Fla. 1953); Massie v. University of Florida, 570 So.2d 963, 974-976 (Fla. 1st DCA 1990). Intervening caselaw is grounds to reconsider a previous decision. United States v. Cherry, 759 F.2d 1196, 1208 (5th Cir. 1985).

A. Article I, Section 9 and the Fifth Amendment

There have been two important cases which should cause this Court to reconsider this aspect of the issue. In Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987), in response to being told that he was charged with two murders, the defendant told police that he had no reason to make a statement. "What's the need of me saying anything then." 824 F.2d at 840. The Court noted that this constituted, at the very least, an equivocal request to stop questioning:

> Moreover, immediately after this second request to stop, and second unlawful continuation of the interrogation. Christopher made a third, albeit somewhat equivocal, request to stop ("Okay, then. What's the need of me saying anything then."). Once again the officers improperly failed to terminate the interrogation. Instead, Mills asked Christopher: "What are you upset about? Given the previous requests to stop, at this point there certainly was no need for clarification. Moreover, Mills' question was not a "clarification," Rather, it was interrogation because it invited a response from Christopher that was not restricted to the issue of whether Christopher wished to terminate the interrogation. Mills' response thus constituted yet another violation of Christopher's Miranda rights.

824 F.2d 843, n. 19. Mr. Keen's comment that there was no strategic reason to say anything is equivalent to Christopher's statement "what's the need of me saying anything then". In Owen v. State, 560 So.2d 207 (Fla. 1990) Owen said "I'd rather not talk about it," and "I don't want to talk about it." Id. at 211. The police ignored this equivocal requests for silence; this Court held admitting the confession error.

B. Fourth Amendment and due process

Appellant relies on the arguments and authorities in his Initial Brief.

C. Article I, Section 16, and the Sixth Amendment

This Court should reconsider the issue of Mr. Keen's request for counsel in light of Minnick v. Mississippi, 111 S. Ct. 486 (1990). Minnick rejects any police initiated interrogation after a request for counsel. Michael Keen clearly

requested counsel, when he asked him about a lawyer for bond. 1R 162. Thus, Minnick requires suppression of all subsequent statements.

D. Due Process - the statements were not free and voluntary.

Appellant relies on the arguments and authorities in the Initial Brief.

E. § 934.03(2), Florida Statutes, and the Federal and Florida Constitutions were violated by admitting the tape made from a phone tap.

Appellee's statement that Shapiro was not acting as a government agent belies common sense. Shapiro had just admitted participation in a first degree murder and was concerned about being charged when the police came to him and "asked" him to record Mr. Keen's conversations. He was totally dependent on the State to avoid being charged with first degree murder himself. This tape should have been suppressed on this ground alone.

The cases relied on by Appellee are all either distinguishable or of questionable relevance to this issue. Stewart v. State, 549 So.2d 171, 173 (Fla. 1989) involved the defendant's grandparents who had no role in the offense, thus had nothing to gain by working for the State. Here, Shapiro literally had life itself to gain. United States v. Paul, 614 F.2d 115 (6th Cir. 1980) and Pires v. Wainwright, 419 So.2d 358 (Fla. 1st DCA 1982) both explicitly stated tapping was allowed because done by correctional officials in their regular duties to maintain prison security. Here, the tap was orchestrated by deputies, specifically to aid a prosecution. In Odom v. State, 403 So. 2d 936, 939 (Fla. 1981) this Court specifically relied on the fact that the Fifth Amendment was not implicated as there was no custody. (This Court held the evidence to be inadmissible on other grounds.) Hoffa v. United States, 385 U.S. 293 (1966) and United States v. White, 401 U.S. 745 (1971) did not involve a defendant in custody.

F. An unauthentic transcript, containing purported statements of the defendant which he refused to adopt, contrary to the evidence code, and the Florida and Federal Constitutions.

Appellee did not address this issue. Reversal is required.

POINT IV

FUNDAMENTAL ERROR OCCURS WHEN A DEFENDANT IS TRIED BY A JUDGE WHO IS NOT IMPARTIAL.

The state misapprehends the comment made by the court below as a simple

statement that a person was dead. Judge Henning actually intimated her belief a killing crime had occurred, a belief formed when not a whit of evidence had been entered on the instant record to establish any crime against Anita Keen. The state argues the comment was taken out of context, but the 'context' provided adds nothing important; that the court expressed prejudgment during business before it rather than as a completely gratuitous statement does not change the statement's meaning.

Primarily, the state contends counsel's failure to utilize the rules to recuse Judge Henning bars relief on appeal. Scott v. State, 396 So.2d 271 (Fla. 1980)[2] concerns a judicial comment's effect on the jury. It does not control the situation when judicial comment shows actual prejudgment by the court, a situation requiring reversal regardless whether heard by a jury. See Walberg v. Israel, 766 F.2d 1071, 1076 (7th Cir. 1985); United States v. Holland, 655 F.2d 44, 45 n.2 (5th Cir. 1981) (court expressed displeasure outside jury's presence at retrial of defendant who obtained appellate reversal); Whitaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941) (judge's comments in colloquy with counsel showed bias).

When a defendant is tried by a judge who has prejudged the issues the error is fundamental and must be remedied even though no objection or motion raised that issue below. Fundamental error allows correction on appeal without objection below when it amounts to a denial of due process, or "the interests of justice present a compelling demand for its application." Ray v. State, 403 So.2d 956, 960 (Fla. 1981); see Smith v. State, 521 So.2d 106, 108 (Fla. 1988). Trial by a biased judge violates fundamental notions of due process. See State v. Steele, 348 So.2d 398, 403 (Fla. 3d DCA 1977); United States v. Sciuto, 531 F.2d 842, 845 (7th Cir. 1976) (citing cases); see also Arizona v. Fulminante, 111 S.Ct. 1246, 1295 (1991) (reaffirming that harmless error analysis should not be used when decision maker not impartial). Appellate courts will not bar relief simply for failure to follow a procedural rule when the decision maker reveals prejudgment. See Sciuto, 531 F.2d at 845 (refusing to address claim that brief

[2] The state refers to Scott as Ross v. State.

waived reliance on statute since judge's statements showed prejudgment of issue in probation revocation, contrary to due process); Walker v. Lockhart, 763 F.2d 942, 960-1 (8th Cir. 1985) (en banc), cert. denied 478 U.S. 1020 (1986) (new evidence showing bias of judge compelled reversal of previous en banc decision in order to serve the ends of justice); see also United States v. Mazzilli, 848 F.2d 384, 385 n.1 (2d Cir. 1988) (reversing when trial court examination of defendant undermined his credibility unfairly in jury's eyes even though no objection made); Carr v. State, 136 So.2d 28, 29 (Fla. 3d DCA 1962) (judicial statement before jury made without objection which assumed disputed fact true would be corrected in interests of justice). To serve the ends of justice in this case, in which the closeness of the evidence resulted in a day and a half of jury deliberation before returning a verdict of guilt and death was recommended by a bare 7 to 5 vote, and in which a fundamental due process right affecting both the fairness of the proceedings and integrity of the process is violated, this Court should reverse despite the lack of objection below.

The State's reliance on Moser v. Coleman, 460 So.2d 385 (Fla. 5th DCA 1984) is misplaced. In Moser, the district court held a judge ordering a second probation violation filed may sit on the case, just as judges who decide the evidence suffices to issue revocation warrants and are not thereby disqualified. However, if the judge in Moser had stated before the new hearing he had already determined the facts rather than found the facts warranted a hearing, relief would have been given: relief must be given in the instant case as well. Judge Henning had heard no evidence on the existence of a killing crime except that from a vacated trial. She was not called upon to make a preliminary determination of the evidence, instead stating her belief a killing crime occurred.

POINT VI

MR. KEEN MUST BE DISCHARGED AS HIS RETRIAL WAS CAUSED BY INTENTIONAL PROSECUTORIAL MISCONDUCT.

Appellee relies on LeCroy v. State, 533 So.2d 750 (Fla. 1988) and Haddock v. State, 192 So. 802 (Fla. 1940). However, both of these cases are distinguishable as the issue had been fully litigated and briefed on the prior appeal. This is the first chance Mr. Keen has had to argue this issue.

POINT VIII

THE PROSECUTION FAILED TO PROVE VENUE.

Appellee's reliance on law of the case is misplaced. This issue was not raised in Mr. Keen's first appeal and is not discussed in the first opinion.

POINT XIII

THE TRIAL COURT ERRED IN ALLOWING IRRELEVANT COLLATERAL OFFENSE EVIDENCE.

Appellee claims that the prosecution gave notice of the threats at issue. However, the only notice given involves the alleged solicitation of Hickey. 2R 1413. This issue involves Shapiro's testimony concerning alleged threats against him and (at least implicitly) against his grandparents well before Hickey came into the picture. This evidence was irrelevant and prejudicial.

POINT XV

THE TRIAL COURT ERRED BY ALLOWING HEARSAY TESTIMONY OF PATRICK KEEN.

Appellee claims that the testimony at issue does not contain the inference of inculpatory out of court statements condemned in Postell v. State, 398 So.2d 851 (Fla. 3d DCA 1981). AB 63-64. The testimony reveals the opposite. The prosecution first brought out the alleged role of Patrick Keen in its direct examination of Officer Amabile:

> Q. In August of 1984, did you come into contact with Patrick Keen?
> A. Yes, I did.
> Q. What address did you contact him at?
> A. An address in Orlando, Florida.
> Q. Do you have that address with you here today?
> A. Yes, I do.
> Q. And would you refresh your recollection from your reports as to what address you came into contact with him at?
> A. 907 South Crystal Lake Drive, Orlando, Florida.
> Q. In August of 1984, did the sheriff's department have an occasion to reopen what had previously been a missing person's case involving Lucia Anita Lopez Keen?
> A. Yes.

2R 681-682. This left the impression that Patrick Keen implicated Michael Keen.

The prosecution brought out further hearsay of Patrick Keen in direct of Mike Waddle.

> Q. Did he elaborate on what he meant by his brother was the reason he was arrested?
> A. He said his brother had talked to an insurance investigator and he was arrested.
> Q. Okay. What if anything else did he tell you about him and his brother.
> A. His brother was supposed to be in it with him and they were supposed to split the money. I don't know how much.

Q. Did he explain to you what he meant by the fact that him and his brother were supposed to be in it together?
A. Yeah, they had -- whatever it ws, they had planned it together and his brother wanted his money and it ws being delayed, so his brother went to the insurance company and talked to the investigator and Mike ended up in jail.

2R 902-903.

POINT XVI

THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF THE ESSENCE OF A PRIOR CONSISTENT STATEMENT OF KEN SHAPIRO.

Appellee asserts the record does not support this claim. Actually, Officer Amabile testified:

A. The Defendant was curious as to why he was under arrest for the murder of his wife some three years earlier.
Q. What did you tell him?
A. I told him we had evidence, we had statements that had been given to us that stated that it was not an accidental death, that it was not an accidental disappearance, that it was a planned murder.
Q. Did you mention the name Ken Shapiro to him?
A. Yes, I did.

2R 686. This was an improper hearsay recitation of the substance of Ken Shapiro's prior consistent statement.

Appellee also relies on Quiles v. State, 523 So.2d 1261 (Fla. 2d DCA 1988) as support for the idea that this was not an improper comment under Postell. However, in Quiles the conviction was actually reversed as the evidence was inadmissible. Here, as this Court previously noted, virtually the entire case rested on Shapiro's credibility. The bolstering is not harmless.

POINT XVII

THE TRIAL COURT ERRED IN ALLOWING IRRELEVANT EVIDENCE CONCERNING MICHAEL KEEN'S USE OF AN ALIAS.

Appellee states that the alias testimony was relevant to show intent; relying on Mercer v. State, 347 So.2d 733 (Fla. DCA 1977) and Cooper v. Wainwright, 308 So.2d 182 (Fla. 4th DCA 1975). These cases dealt with conduct strongly indicative of planning an offense before it occurred. Here, the use of an alias occurred years after the offense and after Mr. Keen had given a full police statement. This evidence contributed nothing to the issue of intent, but was designed to smear his character. Appellee also claims that this was relevant to rebut Mr. Keen's claim "that he had never been guilty of any fraudulent acts" (AB 66) and as to his credibility. Mr. Keen he never made such a claim; Appellee

gives no record cite for this. It is also well settled that a witness can not be impeached for specific acts of untruthfulness.

POINT XVIII

THE TRIAL COURT ERRED IN ALLOWING HEARSAY POLICE OPINION EVIDENCE.

Appellee asserts that this did not implicate police opinion evidence. However, Shapiro stated that he came forward as the police "really knew what happened." (i.e. Shapiro's version of events) 2R 518-519. This is improper.

POINT XXII

THE TRIAL COURT ERRED IN ALLOWING HEARSAY TESTIMONY REGARDING THE ACCURACY OF A TELEPHONE NUMBER.

Contrary to Appellee's assertion this issue is properly preserved as Mr. Keen specifically objected, stated his grounds, and obtained an adverse ruling. This testimony was hearsay and was prejudicial.

POINT XXIII

THE TRIAL COURT ERRED IN FAILING TO GRANT MR. KEEN'S MOTION FOR JUDGMENT OF ACQUITTAL AS THE PROSECUTION'S OWN EVIDENCE CREATED REASONABLE DOUBT AS A MATTER OF LAW.

The cases cited by Appellee all cite general sufficiency of the evidence law. AB 72. None of them deal with the issue raised here; that the State's own evidence created reasonable doubt as a matter of law, so the State is bound by its evidence. The State is bound by its own evidence; if that evidence creates reasonable doubt, a judgment of acquittal must be granted. D.J.S. v. State, 524 So.2d 1024 (Fla. 1st DCA 1987); Hodge v. State, 315 So.2d 507 (Fla. 1st DCA 1975); Weinstein v. State, 269 So.2d 70 (Fla. 1st DCA 1972). The conviction also violated the due process requirements of the Eighth and Fourteenth Amendments. Jackson v. Virginia, 443 U.S. 307 (1979). The State introduced Mr. Keen's police statement; in it he stated that he did not kill his wife, but that Ken Shapiro pushed him and his wife off the boat. 2R 706-707. The prosecution introduced this evidence and is bound by it. The prosecution's own evidence created reasonable doubt as a matter of law. D.J.S., supra; Hodge, supra; Weinstein, supra.

POINT XXIV

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT ON ANY NON-DEATH LESSERS.

Appellee relies on Harris v. State, for the proposition that the personal

waiver requirement only applies to Category One lessers. However, in the subsequent case of Mack v. State, 537 So.2d 109 (Fla. 1989) this Court reversed for failure to obtain a personal waiver "of the lesser included offenses". Id. at 110. The opinion is not limited to Category One lessers.

POINT XXVII

THE SENTENCE OF DEATH IS DISPROPORTIONATE.

The State implicitly concedes that the disparate treatment afforded Ken Shapiro together with the other aggravation and mitigation properly found require Mr. Keen be given a life sentence. The State neither discusses this, the primary argument for a life sentence, nor distinguishes the many comparable cases cited in the Initial Brief at 61-3.

POINT XXVIII

THE TRIAL COURT FAILED TO CONSIDER OR FIND PROPOSED MITIGATING CIRCUMSTANCES SUPPORTED BY UNCONTRADICTED EVIDENCE.

The State misconstrues the record, urges this Court to consider non-record evidence, and ignores the plain letter of the law in contending the trial court did not err in refusing to find or consider mitigating circumstances supported by uncontradicted evidence. The evidence did establish two mitigating circumstances as a matter of law. The State claims Shapiro was not equally culpable in this crime and that characterizing Shapiro as a participant is without record support. Shapiro, according to the State, "knew of the plan and did nothing to prevent its being carried out." AB at 79.

Appellant provides abundant record support for his characterization of Shapiro as a participant, via the State's own evidence, in the Initial Brief's Statement of the Facts, pages 1 to 3. Since Appellee disputes Appellant's shorter restatement of them in this point, Mr. Keen will summarize with citations, Shapiro testified he and Mr. Keen had many "conversations" about finding a woman for an insurance killing. 2R 489-491. Shapiro planned to pretend to meet the Keens at a bar on the canal because Anita would want to be alone with Michael and would not have gone out with Michael and Shapiro from the house. 2R 496-7. Shapiro followed through with his part of this plan. 2R 497.

Shapiro testified, soon before dark when it was still barely light enough to see, 2R 509, Mr. Keen pushed Anita overboard. 2R 504, 508.

Q. After the Defendant pushed his pregnant wife overboard, what happened next?
A. He looked at me and told me to go up on top and engage the boat and pull it out of her range.
Q. And did you do that?
A. Yes.

2R 505-6. Mr. Keen then took over. Ibid. The men had a "conversation" while returning to port on what to say. 2R 511. Shapiro called the Coast Guard to report Anita missing. 2R 512. A deputy interviewed both men that night, November 15, 1981, and testified Shapiro wanted to do the talking, answering the questions the deputy directed to Mr. Keen. 2R 667. Throughout this interview, Shapiro stuck by the story the men had agreed to tell, that they discovered Anita missing after docking. Shapiro repeated this tale in a sworn statement to police a week later. 2R 513. He gave another sworn statement to the same effect to Mr. Keen's attorney. 2R 517-8. Shapiro testified he and Mr. Keen went to California in a motor home. Shapiro stayed; Mr. Keen returned to Florida. Shapiro returned a week later. 2R 513-5. Shapiro then went to New York, later returning to Florida.

In August 1984, two detectives took Shapiro to their offices. They accused him of involvement in a murder and threatened to prosecute. 2R 541-2. They claimed to know Anita had been killed for insurance money. 2R 519. Shapiro stuck by his original tale for six hours of questioning. 2R 541.

Shapiro told police his role extinguished a $3000 debt he owed Mr. Keen.[3] 2R 548-9. Shapiro claims Mr. Keen had threatened him and his grandparents, and he acted in fear but offered no details of the supposed threats. 2R 503-4, 514, 548, 563. Shapiro minimized his involvement after his 1984 police interview when he told his family what was going on. 2R 579-81. Shapiro admits he told his family what he wanted them to hear, but varied the story "Only in that particular instance." 2R 580. After Mr. Keen was arrested, Shapiro said he felt sorry for Mr. Keen and fondly remembered the times they had together, strange sentiments towards one supposedly threatening the lives of oneself and grandparents. 2R 533. Shapiro did say he had been scared, but not that Mr. Keen

[3] Shapiro denied that he acted to extinguish the debt and that he killed anyone, saying his "being there" extinguished the debt. 2R 549.

had threatened him.[4] Shapiro's claim he was in fear of Mr. Keen deserves no more weight than that of the codefendant in Harmon v. State, 527 So.2d 182 (Fla. 1988). Harmon's codefendant, Bennett, like Shapiro, minimized his role in the robbery killing although he shared in its proceeds. Bennett claimed he was scared of Harmon, but passed up numerous opportunities to leave him. This Court held the jury could reasonably consider Bennett's disparate treatment. Id. at 189. Shapiro's transparent attempt to avoid responsibility for this crime deserves no more credit. Particularly telling is the fact he refused to tell the police what happened for six hours although the police were plainly willing to arrest Mr. Keen at that point. The State's claim the record lacks support for characterizing Shapiro as a participant in the murder - especially when Shapiro himself testified he was the one who pulled the boat away from Anita Keen - is ludicrous.

This Court clarified long ago what qualifies as 'equally' culpable for disparate sentences to be a mitigating factor, case law cited in Appellant's Initial Brief and ignored by Appellee's Answer. In Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984), the court discussed the concept at length.

> [W]e have reversed the judge's decision to override the recommendation when the accomplice was a principal in the first degree; [cites omitted] when the accomplice was the actual triggerman; [cites omitted] when the evidence was equivocal as to whether the defendant or the accomplice committed the actual murder ...

Ibid. The codefendant in Eutzy was not equally culpable because she was not at the crime scene and constructive presence was not shown; "There is no evidence

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[4] The reported transcript of the tape quotes Shapiro:

> I had hoped that - I had hoped that I could have prevented it from the start, but I got cold feet and I chickened out, couldn't do it. 2R 529;
> And there were times during the three years that I wanted to do something but felt - felt in fear, felt that if I had said something, that I wouldn't be believed. 2R 531;
> I'm going to continue cooperating in the manner that I should have three years ago when I had the opportunity and didn't take advantage of it because - because I - I was scared and I - I didn't know where to go, and I - I couldn't think straight. 2R 532;
> What I should have said from the beginning was that you were planning to do someone in terribly and maybe taking my chances that you were going to come after me. Maybe you - you weren't, I don't know, but I sure did the wrong thing ... . 2R 538.

which would show that she aided, abetted, counseled, hired, or otherwise procured the offense." Id. at 760. In contrast, Shapiro meets all three ways for an accomplice to be equally culpable, any one of which would so qualify him. Shapiro assisted planning of what he knew would be a murder and acted to carry out that plan. He was a principal in the first degree, the first way to be equally culpable under Eutzy. Since he at least pulled the boat away from Anita Keen after she was in the water, he was a 'triggerman' in the sense he acted to cause her immediate death, meeting the second alternative for equal culpability under Eutzy. Another State witness testified Mr. Keen had said that Shapiro actually pushed the Keens into the water. 2R 821-2. Thus, the State's own evidence conflicted on the degree of culpability between Shapiro and Keen, the third test for equal culpability under Eutzy.

The cases of Salvatore v. State, 366 So.2d 745 (Fla. 1979) and Smith v. State, 365 So.2d 705 (Fla. 1978) cited by the State discussed the related but separate issue whether the constitution allows imposition of the death penalty on one when a codefendant has not been so sentenced. These two cases distinguished Slater v. State, 316 So.2d 539, 542 (Fla. 1975) in which this Court indicated equal protection might require life sentences when codefendants do not get death, regardless of other aggravators or mitigators. Slater has instead been interpreted to require disparate treatment be considered as a mitigator. Nor do these cases refute Mr. Keen's proportionality claim in Point XXVII. The State does not distinguish the many cases cited at IB 61-2 in which defendants with more aggravation and codefendants less culpable than Shapiro have been given life. As a matter of this Court's proportionality review, comparing all mitigating and aggravating factors with other cases, this Court must grant a life sentence.

The State argues that the trial court was justified in not finding Mr. Keen's adjustment to incarceration as a mitigator because it was not weighty enough to require a life sentence. This argument simply ignores the numerous cases cited in the Initial Brief which hold the trial court must first determine mitigating circumstances and then weigh them. The distinction is important: even

if the trial court does conclude mitigators cannot outweigh aggravators, the existence of mitigation affects harmless error and proportionality analysis on appeal. Reliance on an order of this sort, when the trial court does not specify what mitigation exists, especially when the evidence of mitigation is undisputed, would violate the need for meaningful appellate review, mandated by the Eighth Amendment. See Parker v. Dugger, 111 S.Ct. 731 (1991). It is the kind of error made in Bouie v. State, 559 So.2d 1113 (Fla. 1990) which required a life sentence be given.

The court did not even calculate the length of Mr. Keen's incarceration correctly. The stipulation entered, 2R 1464, states Mr. Keen has received no disciplinary reports for three years, not two as stated in the order. 2R 1489. The court said nothing about the real mitigating value of this record, Mr. Keen's ability to adapt to prison, instead stating some good behavior cannot outweigh a murder and so refusing to consider whether the evidence established a mitigator. 2R 1489. In this regard, the State claims Mr. Keen was in more secure detention than he would be if he had a life sentence and so his record does not establish future good conduct. No evidence supports this contention: the State cites nothing to show Mr. Keen was kept in close confinement while in the Broward jail. This Court cannot base its decision on unproven, nonrecord allegations. See Jackson v. State, 575 So.2d 181, 193 (Fla. 1991).

The State claims nothing in the record shows Mr. Keen overcame childhood adversity, claiming the family had a large land development. AB at 77. This contention misstates the record and misapprehends the issue. Mr. Keen testified his father abandoned the family when he was a young child which would have been in the 1950s. 2R 922. Later, in the 1970s, Mr. Keen helped his mother build some cabins in North Carolina; he testified his mother had asked about the insurance money on Anita Keen because this venture was in financial trouble. 2R 1083-4.

The State urges that Campbell v. State, 571 So.2d 415 (Fla. 1991) should not be applied retroactively. Appellant notes that shortly before Appellee's brief was filed, this Court decided Gilliam v. State, 16 F.L.W. S292 (Fla. May 2, 1991) which held that Campbell could not be applied to require relief in that

case. For several reasons, Gilliam does not bar relief for Mr. Keen. First, the law that unreasoned judgment by a trial court requires a life sentence be imposed was created well before either Campbell or Grossman v. State, 525 So.2d 833 (Fla. 1988). In two decisions issued well before this sentencing, this Court ordered relief because the trial court failed to exercise reasoned judgment in imposing a death sentence. See Lucas v. State, 417 So.2d 250, 251 (Fla. 1982) (resentencing ordered when trial court stated case remanded previously to clean up sentencing order and order showed no attempt at reasoned judgment); Van Royal v. State, 497 So.2d 625, 627-8 (Fla. 1986) (granting life sentence when judge made no findings at sentencing). Requiring a trial court exercise reasoned judgment is both fundamental to the proper application of the death penalty and long the law of the state. That retroactivity concerns are not activated by this claim is shown by this Court's decision in Bouie v. State, 559 So.2d 1113 (Fla. 1990) as explained at I.B. 68-9. Gilliam does not overrule this Court's decision in Bouie and allow unreasoned judgment in imposing the death penalty before June, 1990. In Gilliam, the trial court made explicit findings on nonstatutory mitigating circumstances. Gilliam, 16 F.L.W. at S293. The failure of the trial court below to make any explicit findings on mitigating circumstances is much closer to the situation in Bouie and is controlled by the result therein: a life sentence should be ordered.

Second, Gilliam sets an extremely dangerous precedent, one not discussed in that opinion. It cites to Witt v. State, 387 So.2d 922 (Fla. 1980) - suggesting that Campbell may be read to require a life sentence when the sentencing order does not evaluate mitigating evidence[5] regardless whether other evidence shows the trial court exercised reasoned judgment - holding Campbell cannot be so applied retroactively because it is merely an evolutionary refinement of the law. However, Witt concerns the retroactive application of changes of law after conviction is final; it is the interest in finality that requires restricting use of changes in law. See Witt, 387 So.2d at 925; State

[5] In Campbell itself, the Court only ordered a judge resentencing, not a life sentence.

v. Glum, 558 So.2d 4, 7 (Fla. 1990). This Court consistently held, prior to Gilliam, that on direct appeal the appellate court must apply the law in effect at the time of the appeal. See State v. Castillo, 486 So.2d 565 (Fla. 1986); Dougan v. State, 470 So.2d 697, 701 n.2 (Fla. 1985); Wheeler v. State, 344 So.2d 244, 245 (Fla. 1977). To hold that some cases on direct appeal should receive the benefit of a change of law, while others not yet decided should not receive that benefit violates simple fairness and the constitutional guarantees of due process and the equal protection of the laws. See Griffith v. Kentucky, 479 U.S. 314, 327-8, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); Myers v. Ylst, 897 F.2d 417, 421 (9th Cir. 1990); see also James B. Beam Distilling Company v. Georgia, 59 U.S.L.W. 4735, 4737 (U.S. June 20, 1991) (plurality) (once court applies rule in civil case, it must apply that rule to all litigation not yet decided, relying in part on Griffith which "abandoned the possibility of selective prospectivity in the criminal context"). Applying Witt to all direct appeals would make many of them moot; our courts would be reduced to issuing advisory opinions.

Third, Gilliam overlooked Rogers v. State, 511 So.2d 526 (Fla. 1987), decided in July 1987, before this sentencing. Rogers urged error because the trial court failed to find proposed mitigating circumstances. This Court, noting the Federal Constitution requires consideration of all mitigators, held:

> [W]e find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment ... If such factors exist in the record at the time of the sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Id. at 534 (e.a.). This Court then reviewed the mitigating evidence at length, found error, but ruled it harmless. The holding in Campbell, imposing no greater duty on the trial court than that described in Rogers, is not 'new law,' at least from the time Rogers was issued.[6] See Cheshire v. State, 568 So.2d 908,

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[6] Indeed, since Campbell is based on the plain words of § 921.141(3), it is not new law at all, but this Court need not reach that issue since Mr. Keen's sentencing occurred after Rogers was issued.

912 (Fla. 1990) (Crime occurred in October, 1988: trial court was obliged by Rogers to discuss nonstatutory mitigation in its written order). This clear statement of the trial court's duties issued before this sentencing distinguishes the instant case from Johnson v. Dugger, 520 So.2d 565 (Fla. 1988). In Johnson, a post-conviction case, this Court held the trial court would be presumed to have followed his jury instructions to find and weigh mitigating evidence even though his order was silent on nonstatutory mitigation. However, this trial court ignored existing law on its duties in a death sentencing order. Since the trial court could not reasonably have ignored Rogers, it would serve no purpose not to review independently the record as in Rogers and order a life sentence as in Bouie or at least a resentencing as in Campbell. Relying on this order would violate the Eighth Amendment's requirement of meaningful appellate review. See Parker, supra.

POINT XXIX

THE TRIAL COURT MISAPPREHENDED THE MITIGATING EFFECT OF DISPARATE TREATMENT.

Appellant relies on the Initial Brief and the argument in the Reply at Point XXVIII, above, concerning the meaning of 'equal culpability' as a mitigator.

POINT XXX

THE TRIAL COURT USED THE WRONG STANDARD OF PROOF IN REJECTING PROPOSED MITIGATING CIRCUMSTANCES.

The trial court's description of her role in the absence of the jury is relevant to determining the standards the court used. Mr. Keen could hardly object to this failure of the trial court in its written order; such a requirement would be unprecedented. This Court has held such review may be had without objection. See Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla. 1989) (trial counsel need not object to findings on mitigating circumstances). The State cites no contrary case law and provides no reasoning for changing this law.

The court's jury instruction does not conclusively show the trial court used the correct burden, contrary to the State's contention. Although this Court equated the 'reasonably convinced' standard of that instruction with the 'greater weight of the evidence' standard in Campbell, 571 So.2d at 419 and

Nibert v. State, 574 So.2d 1059, 1061 (Fla. 1991), no case before those had done so. No presumption can be made that the court below knew this law when it had not been decided at the time of the sentencing hearing. In defining the phrase 'clear and convincing,' this Court said:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered ... The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief and conviction, without hesitation, as to the truth of the allegation sought to be established.

State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). A jurist who presumably knows this definition would likely take 'reasonably convinced' to mean the same. That Judge Henning did so take the phrase is shown by her own statement. 2SR 13. Such a burden of proof is more stringent than the greater weight test of Campbell and Nibert and so strict as to amount to an unconstitutional restriction of consideration of mitigating evidence. See Boyd v. California, 110 S.Ct. 1190 (1990) (instructions which restrict consideration of mitigation in reasonable probability, a level of certainty between the greater weight and mere possibility standards, violate the Eighth Amendment).

POINT XXXI

THE TRIAL COURT USED THE WRONG STANDARD OF PROOF IN FINDING THE AGGRAVATING CIRCUMSTANCES.

The State makes no attempt to distinguish Carter v. State, 560 So.2d 1166, 1169 n. (Fla. 1990) in which this Court flatly states a sentencing order which reveals an incorrect standard of proof was used to find aggravating circumstances is fatal error. Not only did the court incorrectly state the standard in the order, the court expressed uncertainty in her 'findings' making them doubly suspect. 2R 1487. The use of an incorrect standard of proof by the finder of fact in a criminal case is constitutional error not subject to harmless error analysis. See Jackson v. Virginia, 443 U.S. 307, 320 n.14, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); see also Rose v. Clark, 478 U.S. 570, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (jury trial denied by directed verdict not subject to harmlessness analysis); Cage v. Louisiana, 111 S.Ct. 328 (1990) (reasonable doubt standard a basic component of due process); Lawson v. State, 169 So. 739 (Fla. 1936) (holding harmless error analysis does not apply when charges allowed

proof without evidence establishing guilt beyond a reasonable doubt of all elements of offense as matter of state law). This Court should order resentencing without analysis of the error's harm, but even if harmless error analysis were used, prejudice is shown as argued in the Initial Brief.

POINT XXXII

THE TRIAL COURT RELIED ON IMPROPER CONSIDERATIONS AND SPECULATION IN FINDING THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE WHICH WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

The State misstates both the evidence and the finding below in an attempt to show that the evidence proves beyond a reasonable doubt that Anita Keen died in an especially heinous manner. There was no finding or credible evidence that Mr. Keen and Shapiro watched Anita for an hour. The sentencing order states, "How long the victim remained alive following her shove into the ocean was undetermined at trial." 2R 1487. The trial court accepts that she may have lived for a brief period of time, then speculated on what Anita was thinking. Ibid. The State presented two versions of events in its evidence. The court relies on that told by Shapiro at trial, finding Anita Keen was pushed off the boat by Michael. 2R 1487. The State's reliance on the story told by Hickey mixes his version with that of Shapiro.[7] In fact, Shapiro said nothing in his testimony about watching and circling for an hour,[8] instead saying Anita was pushed overboard as it got dark, 2R 502, 509, the boat was pulled away about 100 yards, 2R 509, 573, and they left Anita after darkness fell, 2R 510, reasonably possibly a short period of time after she was shoved overboard.

The State does not address the reasonable hypothesis of innocence advanced by Mr. Keen that Anita could have believed her husband and friend would pick her up, but could not see her in the near darkness, and so died with no knowledge she had been murdered and only a short period of foreknowledge of her death.

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[7] Hickey testified Mr. Keen told him Shapiro pushed the Keens off the boat and then the men watched for an hour and actually saw Anita drown. 2R 821-2, 872. The State maintains in its brief that Keen did the pushing, but then relies on Hickey's different story to claim the men watched her drown for over an hour.

[8] During cross, defense asked if Mr. Shapiro had previously said Anita had been in the water for an hour, but he testified he could not remember how long they watched nor remembered making such a statement. 2R 571-2.

This situation differs drastically from a strangulation death in which the victim feels physical pain and knows that the perpetrator intends her death.

The State in essence argues against using a beyond a reasonable doubt test for HAC, claiming one cannot know what victims think. On the contrary, this Court often finds sufficient evidence of victim awareness in HAC cases. See Gilliam, 16 F.L.W. S292 (HAC proven when victim had multiple, brutal injuries and heard screaming during murder); Nibert, 574 So.2d at 1061 (HAC proven by multiple stab wounds, some defensive); Farinas v. State, 569 So.2d 425, 431 (Fla. 1990) (HAC proven in part by victim's pleas for mercy). The State confuses the lack of evidence in this case with not finding sufficient evidence generally.

POINT XXXIII

THE TRIAL COURT IMPROPERLY DOUBLED ITS CONSIDERATION OF THE COLD, CALCULATED, PREMEDITATED AGGRAVATOR AND PECUNIARY GAIN AGGRAVATOR.

The State correctly points out that this Court has previously rejected this claim in Echols v. State, 484 So.2d 568 (Fla. 1985), but this Court's change in law since that rejection requires it to revisit the question. In 1988, this Court defined pecuniary gain as applying when "the murder is an integral step in obtaining some sought-after specific gain." Hardwick v. State, 521 So.2d 1071 (Fla. 1988); see Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). This definition excludes those instances when a defendant plans only a taking, e.g. a robbery, but then unexpectedly kills during that offense because such a killing is not an integral step in some sought-after specific gain. In Rogers, this Court struck the pecuniary gain aggravator since the killing occurred in a flight from a robbery, not as an integral step in furtherance of it. That Rogers and Hardwick changed the meaning of the pecuniary gain aggravator may be seen by comparing Hill v. State, 549 So.2d 179, 183 (Fla. 1990) (wallet taken after murder may have been afterthought and so pecuniary gain struck) with Lambrix v. State, 494 So.2d 1143, 1148 (Fla. 1986) (car taken after murder established pecuniary gain). The requirement that the murder be an integral step in obtaining a gain requires that the defendant have planned to gain by the murder. All such murders will entail the careful plan or prearranged design which marks them as cold and calculated. See Rogers, 511 So.2d at 533. Until the

'integral step to gain' definition was added to the pecuniary gain circumstance, which occurred after Echols was decided, virtually any robbery, burglary, or theft gone bad would trigger the pecuniary gain aggravator, even though the murder was not planned out. Thus, Rogers and Hendrix require this Court to revisit this issue and hold crimes with the pecuniary gain aggravator will virtually always entail CCP, and so CCP doubles pecuniary gain.

POINT XXXIV

THE TRIAL COURT ERRED IN NOT INSTRUCTING ON DISPARATE TREATMENT.

Mr. Keen relies in part on the argument in his Initial Brief and Point XXVIII of this brief, that Shapiro was 'equally culpable' in the meaning of this mitigating circumstance. The State relies on White v. Dugger, 523 So.2d 140 (Fla. 1988) to argue that no jury instruction on disparate treatment is required. However, White only discusses the harmfulness of an erroneous instruction. This Court noted disparate treatment had been argued and found the jury instruction error harmless. Id. at 141. Here, the prosecutor invited the jury to decide for themselves whether the mitigators argued by the defense are valid.

POINT XXXVI

MR. KEEN'S JURY WAS IMPROPERLY LED TO BELIEVE THAT THEY HAD NO RESPONSIBILITY FOR THE DEATH SENTENCE IN THIS CASE.

Appellee asserts that the Court was correct in denying Mr. Keen's initial motion for mistrial. However, a review of the content of the Court's comments show that the jury's sense of responsibility for the sentence had been hopelessly diluted. The judge improperly denigrated the jury's recommendation, stating:

> The other thing I want you all to know is that there is only one person who makes an ultimate decision in this case as to what sentence the Defendant will receive and that is me.

2R 142. The trial judge later said:

> THE COURT: Something else again that I wanted to discuss. Miss Graham had mentioned her concern about thinking a week or two weeks or a year down the road as to what she sentenced him to ...
>
> Regarding sentencing in any case, that sentencing is always up to the Judge. As I stated before, in a death penalty proceeding, we do go through an advisory recommendation. But let me remind you all again since it has once again been voiced since I have told you that the first time, that while your recommendation is given great weight by the Court, there is only one name that is put on any sentencing papers on the Defendant in this case.
>
> There is only one individual who is responsible for the

> sentence that the Defendant does or does not receive in this case, and that sentence may or may not agree with your jury recommendation. And that is me and that is a job that I have elected and selected to do. Yours is a recommendation to me. Yours is not a sentence.

2R 288-289.[9]

The judge's comments were improper and required a mistrial. A juror expressed concerns about the seriousness of the life and death decision, the judge responded by saying the judge alone took responsibility for the sentence. The trial court then compounded the error.

> THE COURT: However, I want you to understand what your recommendation means to the Court. If you recommend death, the Court itself reviews the facts, the aggravating and mitigating factors and other information that is legally before the Court, and the Court then determines what sentence it will impose, which may be a death recommendation, it may be overriding the recommendation in sentencing him to life.
>
> If you recommend a sentence of life imprisonment, then I may also override your recommendation but I can only do so if the facts suggesting a death sentence are so clear and convincing that virtually no reasonable person could differ, and I must find that the record is devoid of any mitigating circumstances.

2R 310-311. This told the jury a death recommendation is virtually meaningless, requiring de novo sentencing by the court, whereas a life verdict is virtually binding. It relieved the jury of responsibility for a death sentence, affirmatively encouraging a death sentence. It told the jury a vote for death is a vote to pass the buck. See Pait, 112 So.2d 380, 385 (Fla. 1959).

POINT XXXVII

THE COURT DENIED APPELLANT DUE PROCESS BY TELLING THE JURY THAT SIX VOTES WOULD BE EITHER A DEATH OR A LIFE RECOMMENDATION.

The State relies on Cave v. State, 476 So.2d 180 (Fla. 1985) to claim that the instruction below was not erroneous. However, in Cave, the panel reported it was "split" and the trial court instructed on the meaning of a 6 to 6 vote shortly after which the jury returned a 7 to 5 death recommendation. This Court held that the jury stating it was "split" was not a life recommendation since "split" could not be equated with a 6 to 6 vote. In this case, Mr. Keen's jury

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[9] Counsel immediately moved for mistrial, arguing these comments denigrated the jury's sense of responsibility. 2R 289-290. The trial court denied the motion. 2R 291-292. The prosecution also repeatedly described the jury's role as advisory or as a recommendation without any explanation of its significance. 2R 190, 214, 228, 229, 232, 236.

was not properly instructed on the meaning of a 6 to 6 vote. The fact that the jury in Rose v. State, 425 So.2d 521 (Fla. 1982) was given the erroneous charge after a request for further instruction does not relieve the court of properly instructing the jury at the outset. Prejudice for this misinstruction is shown by the 7 to 5 vote of the jury and explicit instruction a 6 to 6 vote could be either a life or death recommendation.

POINT XXXVIII

THE TRIAL COURT ERRED BY CONSIDERING A REPORT CONTAINING VICTIM IMPACT EVIDENCE, OPINION EVIDENCE THAT THE DEFENDANT SHOULD BE EXECUTED, HEARSAY, AND UNPROVEN ALLEGATIONS OF CRIMINAL ACTIVITY.

The State argues the trial court did not consider the Presentence Investigation (PSI). The record shows otherwise. The prosecutor below in response to arguments that some parts of the PSI should be struck stated "You know, the Court can consider whatever it wants to consider." 2R 1382. The Court stated it had specifically requested information contained in the report, indeed felt the information so important that she "delayed sentencing originally so I could get a complete report on him." 2R 1384. The Court explicitly stated she considered the statements of the victims. 2R 1385.

This explicit reliance distinguishes this case from Reed v. State, 560 So.2d 203 (Fla. 1990). Reed relies upon Grossman v. State, 525 So.2d 833, 845 (Fla. 1988) for its harmless error analysis and comparison with Grossman shows the error was prejudicial. First, Grossman relied in part on the absence of mitigating evidence, and here the court should have found mitigation. Second, this Court in Grossman relied on an untainted unanimous jury recommendation for death to say the judge clearly was not affected by the PSI; in contrast, Mr. Keen's jury recommended death by the slimmest of margins, 7 to 5. Third, Grossman relied on a presumption the judge considered only the statutory aggravating factors: however, this judge explicitly relied on the PSI and delayed the sentencing to obtain a complete PSI.

The State also argues Mr. Keen's hearsay contentions are "ludicrous" since all such reports contain hearsay. That other reports in capital cases may violate the hearsay rules and confrontation clauses of the Florida and Federal Constitutions hardly justifies error here.

Although Mr. Keen's counsel did not object to all portions of the PSI, such objections are not necessary to preserve every piece of evidence considered for review since the court made clear any objection to it would be futile by overruling the objection to the statements of Minor and Sutherland. 2R 1381, 1385. Trial counsel are not required to pursue futile motions to preserve issues for review. See Brown v. State, 206 So.2d 377, 384 (Fla. 1968); Cox v. State, 563 So.2d 1116, 1117 (Fla. 1990).

Mr. Keen notes that Booth v. Maryland, 482 U.S. 496 (1987) was overruled in part by Payne v. Tennessee, 59 U.S.L.W. 4814 (U.S. June 27, 1991). However, Payne does not control the result here. The majority in Payne explicitly stated it was not reaching the question whether victims' "characterizations and opinions about the crime, the defendant, and the appropriate sentence," outlawed in Booth would violate the Eighth Amendment. Payne, 59 U.S.L.W. at 4819 n.2. Justices O'Conner, White, Souter, and Kennedy also note this distinction in two concurring opinions. Id. at 4820 (O'CONNER, concurring); Id. at 4821 n.1 (SOUTER, concurring). The rationale of Payne, that evidence of the impact of a crime may be considered in determining punishment does not apply to opinions by the victim on the appropriate punishment. That opinion, from an obviously biased source and made without any showing of expertise or special knowledge of the law, usurps the function of the sentencer.

Victim impact testimony in a death sentencing still violates Florida law and the Florida Constitution. Justice O'Conner in Payne recognizes states can and should regulate the introduction of victim impact evidence. Id. at 4820 (O'CONNER, concurring) ("Trial courts routinely exclude evidence that is unduly inflammatory...."). Payne also recognizes such evidence can violate the due process clause. Id. at 4820.

Florida law on this point is clear:

> These same concerns were addressed by this Court on the issue of guilt well before Booth in Welty [v. State, 402 So.2d 1159 (Fla. 1981)]. Welty reasserted the well established rule that "a member of the deceased's family may not testify for the purpose of identifying the victim where nonrelated, credible witnesses are available to make such identification." Welty, 402 So.2d at 1162; see also Lewis v. State, 377 So.2d 640 (Fla. 1979); Rowe v. State, 120 Fla. 649, 163 So. 22 (1935); Ashmore v. State, 214 So.2d 67

> (Fla. 1st DCA 1968); Hathaway v. State, 100 So.2d 662 (Fla. 3d DCA 1958). Although the testimony is somewhat different from that which occurred in Booth, [footnote omitted] we conclude that the guilt phase identification of the victims by Brock's sister and brother and Perry's sister, in violation of Welty, created an equal risk of an arbitrary capital-sentencing decision.
>
> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.
>
> Here, none of the relative's testimony was necessary to establish the identity of the victims. It is apparent that such testimony was impermissibly designed to evoke the sympathy of the jury.

Jones v. State, 569 So.2d 1234, 1239 (Fla. 1990); see Owen v. State, 560 So.2d 207, 211 (Fla. 1990); see also Taylor v. State, 16 F.L.W. S469, S471 (Fla. June 27, 1991) (prosecutors argument on victim unfairly prejudicial). Trial courts also cannot help but be moved by sympathy for victims. They should not consider such statements in their sentencing decision. In Grossman v. State, 525 So.2d 833 (Fla. 1988), this Court construed §§ 921.141 and 921.143(2), Florida Statutes to conclude the latter section did not modify the former to allow victim impact evidence. § 921.141(3), Florida Statutes explicitly directs that the trial court consider only the aggravating circumstances listed in § 921.141(5). This Court finds error for the trial court to go beyond that list. See Walton v. State, 547 So.2d 622, 625 (Fla. 1989); Miller v. State, 373 So.2d 882, 885 (Fla. 1979); Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977). In Walton, this Court held testimony from a psychiatrist on why a child relative of the deceased who witnessed the killing could not testify was improperly admitted as establishing nonstatutory aggravation. This evidence is similar in effect to victim impact testimony. Also, § 921.143(2), Florida Statutes limits victim statements to the facts of the case and extent of harm, and does not authorize victim characterization of the defendant or opinion on punishment. In Floyd v. State, 569 So.2d 1225 (Fla. 1990), this Court held that a trial court properly excluded opinion by a deceased's relative on the appropriate punishment. The trial court erred in considering a like statement below.

Article I, § 17 of the Florida Constitution, prohibits cruel or unusual

punishments. Article I, § 9 requires due process before any person may be deprived of "life, liberty, or property." This Court may construe Florida's Constitution independently of the Federal. See In re T.W., 551 So.2d 1186 (Fla. 1989); State v. Glosson, 482 So.2d 1082, 1085 (Fla. 1985) (holding use of contingency fee agreements with informants violate Article I, § 9). Victim impact evidence encourages the weighing of the victim's worth against the defendant. Jurors and judges would be inclined to impose death sentences based on the social acceptance of the victims and the victim's relatives' opinions on the death penalty, a wholly arbitrary factor which will destroy rationality in the administration of the death penalty. As such, it trenches on the fundamental right to life and creates cruel or unusual punishment, contrary to Article I, §§ 9 and 17.

POINT XL

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

I. THE BURDEN OF PROOF FOR MITIGATION IS UNCONSTITUTIONAL.

This point is also supported by the case of Boyd v. California, 110 S.Ct. 1190 (1990) and the discussion contained in Reply Point XXX. The jury in this instance would as likely be misled by the 'reasonably convinced' instruction as the trial judge. Instead, they should be told, at most, that the burden for finding mitigators is reasonable probability, a certainty less than more likely than not and more than a mere possibility. Boyd, 110 S.Ct. at 1198. This Court must revisit this issue in light of Boyd. Neither Songer v. State, 365 So.2d 696 (Fla. 1978) nor Lightbourne v. State, 438 So.2d 380 (Fla. 1983) cited in the Answer Brief addressed the burden of proof question.

J. FLORIDA UNCONSTITUTIONALLY INSTRUCTS JURIES NOT TO CONSIDER SYMPATHY.

Contrary to the State's contention, the Supreme Court did not hold in Saffle v. Parks, 110 S.Ct. 1257 (1990) that an anti-sympathy instruction can stand when it prevents consideration of sympathy arising from mitigating evidence. Mr. Keen cites to the Tenth Circuit decision in support of his argument. See Parks v. Brown, 860 F.2d 1545 (1988) (en banc). The Supreme Court reversed this case but not the reasoning of the Tenth Circuit, applying the

federal habeas retroactivity principles of Teague v. Lane, 489 U.S. 288 (1989), and holding it improper to apply the Tenth Circuit's anti-sympathy holding in federal habeas court. Saffle, 110 S.Ct. at 1264. The Tenth Circuit holding in Parks should be adopted as argued in the Initial Brief.

CONCLUSION

For the foregoing reasons, Mr. Keen's conviction must be reversed, and his sentence of death vacated or reduced to life.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by Federal Express Mail to Giselle D. Lylen, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2d Avenue, Suite N921, Miami, Florida 33128 this 31st day of July, 1991.

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