IN THE SUPREME COURT OF FLORIDA

JAMES ERNEST HITCHCOCK
Appellant

v. CASE NO. 72,200

STATE OF FLORIDA
Appellee
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

AUTHORITIES CITED

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

The defense statement does not detail the findings of fact (B 1)[1]. The court found that the following four aggravating factors were proved beyond a reasonable doubt:

1. The defendant was under the sentence of imprisonment at the time of the murder, i.e., on parole.

2. The murder was committed while he was engaged in the commission of a sexual battery.

3. The murder was committed in order to avoid or prevent lawful arrest by way of witness elimination.

4. The murder was especially heinous, atrocious or cruel.

The defendant choked the victim three times, he hit her in the face more than once, and she was conscious and aware of what was occurring for several minutes while these acts took place. (R 1517 - 1518).

The court did not find "substantial evidence of mitigating factors and circumstances" (Cf. B 19, 21). Prior to stating its findings regarding the mitigating circumstances the court noted: "The Defense has presented substantial evidence of mitigating factors and circumstances for consideration by the jury and court." (R 1518, emphasis added).

The court found only the one statutory mitigating factor, the defendant's age, to be significant. The court found it to be insignificant standing alone, but significant when considered in

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[1] The parties are referred to as the defendant and the state. References to the record are indicated "(R and page)"; those to the initial brief are denoted "(B and page)".

conjunction with his lack of maturity, coping skills and emotional development (R 1518).

The court found two categories of nanstatutory mitigating circumstances. The first category was "Depravations", including extreme poverty, educational, emotional, and physical and mental abuse. The court found these to have been important in establishing age as a significant factor, but found them not to weigh heavily against the aggravating factors (R 1519).

The second category was "Positive Character Traits". The court found that Hitchcock worked out of necessity rather than out of willingness or because of a desire to excel. The court did not weigh heavily the evidence regarding the defense claim that the defendant is a good family person. Id. The testimony of the other death row inmates regarding acts of kindness by the defendant was not accorded much weight (R 1520).

The court found the defendant's ability as a mediator / peacemaker, his ability to succeed in the general prison population, future non-dangerousness, and self improvement while in prison to weigh more heavily than the specific good acts toward other prisoners, but less than the statutory mitigating factor of age. Id.

Added weight was given because of the defendant's use of alcohol and drugs before the murder, but little weight was given to his lack of history of violence, difficulty in controlling his emotions, lack of statements regarding intent, lack of a weapon, and his voluntary surrender. Id.

In concurring with the jury's recommendation that the death penalty be imposed the court specifically found that "the totality of the mitigating circumstances presented, both statutory and nonstatutory, are insufficient to outweigh the aggravating circumstances," (R 1521).

The state directly disagrees with the statement that the "[v]eniremen noticed the extensive security measures at the courthouse . . ." (B 12). There was no evidence whatsoever that the "extensive" security measures were noticed as such by any member of the venire. The only individual who detailed the "facts" underlying the **defense** claim that a number of jurors had witnessed the security measures was one of the defense attorneys who made the allegations while presenting the claim to the court (R 291 - 293). **The** court denied the defense motion to strike the panel, but allowed counsel to inquire of the jurors (R *296).* Before questioning anyone defense counsel renewed the motion. Id. The judge pointed out the following:

> Well, there is no demonstration that the prejudice is there because, number one, we don't know who saw it, number one, if anyone. Number two, we don't know if they know those are the prisoners versus a S.W.A.T. team exercise or whatever,

(R 296).

Prospective juror Webb was called at the request of the defense (R 296 - 297). He advised the court that he had spoken to a deputy as he was entering **the** court only in regard to the instruction by that officer as to which direction Mr. Webb was to proceed in (R *297 - 298).* He acknowledged that he had seen some

police cars, officers, and weapons (R 298). However, he said that he did not know what was happening at the time, and stated further that neither had he asked nor was he told what was taking place. Id. The defense did not call any other jurors or attempt to corroborate the claim by counsel in any other way.

SUMMARY OF ARGUMENT

Point One: Hitchcock's death sentence is proportional to similar cases which involved the murder of a child by strangulation,

Point Two: The trial court used the correct standard when it denied the defense motion to strike potential jurors for cause.

Point Three: The cumulative error argument advanced by the defense is without merit. There was no evidence whatsoever that Hitchcock was prejudiced by the security measures taken. Only one venireman was questioned about it and he placed no significance on what he observed. Any potential prejudice from pretrial publicity was obviated by individual voir dire. The defense contends the appropriate remedy was to strike the panel. Any statements during closing argument add nothing to the court's decision on a motion during voir dire.

Point Four: Hitchcock was allowed to present the relevant evidence of mitigating circumstances. If there was any error it was rendered harmless because equivalent evidence was presented through the testimony of other defense witnesses and / or the court found the mitigation.

Point Five: The contention is waived because the bases asserted now were not presented to the trial court. In any event the evidence was properly introduced into evidence.

Point Six: The contentions are barred from consideration because untimely objections were voiced which asserted different grounds than those now urged.

Point Seven: Evidence of Cynthia Drigger's personal characteristics were properly admitted to refute the defense theory that she had consented to sexual intercourse. Accepting, *arguendo*, that the prosecutor's statements were improper, they were limited in number and not so outrageous as to taint the validity of the jury's recommendation.

Point Eight: This claim is barred as to all of the inmates because no objection was voiced during the others questioning. If any error was committed it was harmless because the first inmate disclosed that he had been a death row inmate. However, the court correctly found the evidence to be relevant to show that the former and present death row inmates were biased regarding the imposition of the death penalty.

Point Nine: Any prejudice caused by the jury's knowledge of the defendant's prior sentence of death was negligible because it did not play a key role in the resentencing.

Point Ten: The claim was defaulted below because the grounds stated are different than those now advanced. The evidence of sexual battery was such that any error in instructing the jury on this aggravating factor was harmless.

Point Eleven: The judge correctly refused to give the requested instruction on the heinous, atrocious or cruel aggravating factor because the standard instruction is adequate,

Point Twelve: The murder of Cynthia Driggers by the defendant was heinous atrocious or cruel. She was fully conscious during the entire episode. The defendant first choked her in her own bedroom immediately after battering her sexually.

He choked her outside, hit her twice in the face, and then choked her yet a third time until she died. The total circumstances were sufficient to prove that the defendant had committed a sexual battery upon the victim by force and against her will. The defendant stated in his confession that he choked and beat the little girl to keep her from telling her mother. This strong evidence that the murder was committed to eliminate the victim as a witness establishes that the murder was committed to avoid lawful arrest. The defendant admits he was on parole. The aggravating circumstance was properly found despite the previous nomenclature contained in the death penalty statute.

Point Thirteen: The time which has passed between the original proceedings and the resentencing do not warrant the imposition of a life sentence. The delay neither prejudiced the defendant nor was it occasioned by actions of the state.

Point Fourteen: The assorted constitutional claims are barred because they were not presented to the trial court, Application of the heinous, atrocious or cruel factor because this court provides adequate guidance and the Florida process narrows the class of death eligible murderers as constitutionally required. The words "reasonably convinced" in the standard instructions does not prevent full consideration of the mitigating evidence, The weighing process is not analogous to a burden of proof standard. Even if it were the initial presumption would be that a life sentence has to be imposed because the state has to prove aggravating circumstances beyond a reasonable doubt before the jury can even consider recommending a sentence of death.

Point **Fifteen: The claim is barred because any claim of error was expressly waived by the** defense **when it requested** that **the instruction be given.**

ARGUMENT

Point One

THE SENTENCE OF DEATH IS PROPORTIONATE WHEN REVIEWED IN LIGHT OF SENTENCES IMPOSED IN SIMILAR CASES.

Contrary to the defense assertion (B 17), this is among the most aggravated and indefensible of crimes for which justice demands the imposition of the death penalty.

The trial court found four aggravating circumstances:

> 1. Hitchcock was under sentence of imprisonment, i.e., parole.
>
> 2. He was engaged in the commission of sexual battery upon the victim.
>
> 3. He murdered her for the purpose of avoiding arrest by way of eliminating the only witness to his criminal act.
>
> 4. The murder was especially heinous, atrocious or cruel. The defendant had first choked the victim while inside her home. She was conscious when he carried her outside. He choked her again once outside. He let up and then struck her more than once in the face. He then choked her until she was dead. The victim was awake and aware of what was occurring for several minutes prior to her death.

(R 1517 - 1518).

The trial court found that the defendant's statement of August 4, 1976, reflected what had occurred on the night that Hitchcock murdered his brother's 13 year old stepdaughter, Cynthia Ann Driggers (R 1516 - 1517; see R 1466 - 1471). It also found that the defendant had come to Florida from Arkansas and that he was on parole (R 1516 ; see state exhibit P-1; also R

534; 717; 1076). Prior to the murder the defendant went into Cynthia's room at approximately 2:30 a.m. and forced her to have sex. The court rejected the defense claim below, which remains a theme here, that the sexual intercourse was consensual. The court pointed to the record in refutation:

> The medical examiner testified that the victim had a fresh hymenal tear indicating she was virginal prior to her death. The Defendant's statement indicates the victim claimed to have been hurt by him (this occurring prior to the time he began choking or hitting her). The conclusion is she was hurt by the act of intercourse. The Defendant's violent action to prevent the victim from telling her mother of the sexual intercourse does not support the Defendant's claim of consent.

(R 1517 - 1518; see 566 - 567).

In Hitchcock's first appeal, Hitchcock v. State, 413 So.2d 741 (Fla. 1982), (hereafter Hitchcock I), the trial judge had also found that the defendant had sexually battered the victim. Upon review this court held that finding to be proper under the totality of the evidence. Id., 747. The underlying evidence was virtually the same at resentencing, and the finding that the defendant committed a sexual battery upon the victim remains valid as well.

The defendant's own statement corroborates many of the court's findings. After the defendant had committed the sexual battery upon Cynthia she told him that she was hurt and that she was going to tell her mother. When he would not let her get up she began to yell. He grabbed her by the neck to stop her. He picked her up and carried her outside with his hand over her

mouth. Outside he laid her down and told her that she could not tell her mother. She said that she was going to tell her because she had been hurt and because he hurt her again. She started screaming and he again began choking her. He let up and she continued screaming. He responded by hitting twice in the face. That did not stop her from screaming. The defendant explained his reaction, "so I choked her and I just kept chokin' and chokin' I don't know what happened I just choked and choked then I started to pick her up and I pushed her over in the bushes . . ." (R 1467; 1517).

The actions of the defendant after he killed her further reveal that his purpose was to eliminate a witness, as the court found (R 1518), rather than a panicked reaction to the events. The defendant threw the victim into dense vegetation (R 1469; see state exhibits 2 through 7). He went inside and showered and washed his shirt (R 1467; see state exhibit 8; R 489 - 490; 520). The defendant admitted to the police that he had attempted to cover up his connection with the murder by washing his shirt (R 1469).

Before addressing the substantive defense claims, an observation on its methodology is in order. In support of its contentions the defense cites cases with limited similarities to the instant case. Usually the cited cases and this case have one common factor. The defense then advances its argument by stating the factor in isolation. The shortcoming of this method in a proportionality review is that similar cases are appropriately looked to for comparison. Songer v. State, 544 So.2d 1010, 1011

(Fla. 1989); Marek v. State, 492 So.2d 1055, 1058 (Fla. 1986); Henderson v. State, 463 So.2d 196, 201 (Fla. 1985). As will be revealed infra, when this case is compared to similar cases it becomes clear that the death penalty is appropriate, Further, many of the defense contentions are surplusage because they address mitigating circumstances which were found by the trial court.

An invalid analogy is drawn by the defense between this case and those cases involving domestic killings that led to sentences of death which were reversed by this court (B 17 - 18). First of all:

> The mere fact that there was a familial relationship between the appellant and his victims is an insufficient basis on which to conclude the death penalty is unwarranted.

Wilson v. State, 493 So.2d 1019, 1025 (Fla. 1986).

All four cases upon which the defense primarily relies involved murders that occurred during angry domestic confrontations. In Garron v. State, 528 So.2d 353 (Fla. 1988), the defendant had shot and killed his wife and stepdaughter after a heated argument which resulted after another stepdaughter told his wife that he had made inappropriate sexual advances toward her. In Wilson v. State, 493 So.2d 1019 (Fla. 1986), the murders occurred after the defendant had become enraged when his stepmother told him to stay out of the refrigerator. The murder of the defendant's wife in Blair v. State, 406 So.2d 1103 (Fla. 1981), was the end result of an argument during which she had made a number of threats including one to *go* to the police with

her daughter to have her put in a home because he had been spending too much time with her. Id., 1106. In Ross v. State, 474 So.2d 1170 (Fla. 1985), the killing took place after an angry dispute between the defendant and his wife.

Those situations are not at all similar to the facts of the instant case. There was no dispute initially, heated or otherwise. The criminal episode began around 2:30 a.m. when Hitchcock violated the sanctity and security of the young girl's own bedroom by entering uninvited and forcing her to have sexual intercourse with him. Any dispute arose only after she told him that she was going to tell her mother. She was but an injured child who wanted only to be comforted by her mother, rather than an angry adversary. The defense mischaracterizes the state's theory. Hitchcock did not murder Cynthia out of panic as the defense suggests (B 17). To the contrary, the murder was a cold-blooded means by which he eliminated the one witness to his perverse crime. The trial court expressly and correctly found that to be the purpose for the killing (R 1518).

The defense unnecessarily contends that uncontroverted evidence of drug or alcohol use must be considered in weighing mitigating circumstances (B 18 - 19). The court below stated expressly that it had given added weight to this factor (R 1520). The defense also argues, incorrectly however, that "[i]ntoxication alone has been repeatedly considered by this court to mitigate a killing without reference to statutory mitigating factors" (B 19, emphasis added, citing Fead v. State, 512 So.2d 176 (Fla. 1987); Buckrem v. State, 355 So.2d 111 (Fla.

1977); Norris v. State, 429 So.2d 688 (Fla. 1983)). In Fead three other mitigating factors were found as well. Id., 178 - 179. The opinion stated expressly "that the jury reasonably could have concluded that Fead acted under extreme mental and emotional disturbance and duress, partly as a result of his alcohol consumption and partly because of his jealousy.'' Id., 179 (emphasis added). Likewise, in Buckrem v. State, 355 So.2d 111 (Fla. 1978), this court remanded for the imposition of a life sentence because a number of mitigating circumstances existed. This opinion, too, expressly stated that it was not based upon the intoxication factor alone: "He [Buckrem] had a previous altercation with Caylor and was obviously disturbed, as well as intoxicated." Id., 113 (emphasis added). In addition to his intoxication at the time of the murder the defendant's age and drug abuse problem weighed against the imposition of the death penalty in Norris v. State, 429 So.2d 688, 690 (Fla. 1983).

The defense distorts the findings by the court below. It writes: "But the court also found ' substantial evidence of mitigating factors and circumstances' R 1518." (B 19). Before stating its finding of mitigating circumstances the trial court observed: "The defense has presented substantial evidence of mitigating factors and circumstances for consideration by the jury and court." (R 1518, emphasis added). The trial court found only one mitigating factor to be significant. It found the defendant's age, insignificant in and of itself, to be significant when considered in conjunction with Hitchcock's lack of maturity, coping skills and emotional development (R 1518).

The court also considered the early life depravations of the defendant (poverty, lack of education, emotional neglect, and physical and emotional abuse). While the court found them to be important in establishing age as a mitigating factor, it specifically found that " . . . they do not weigh heavily against the aggravating circumstances of this crime." (R 1519, emphasis added). The court also found that the defense had failed to establish positive character traits in Hitchcock. The claim that he was a hard worker was rejected. The court found that he had worked out of economic necessity. Id. A3 to the claim that the defendant is a good family person: "The Court does not weigh these as significant mitigating circumstances." Id. The court found that the defendant had displayed acts of kindness to other death row inmates, but found that the acts fell short of establishing positive character traits. The judge explained:

> I do not demean his acts of kindness but I am not convinced the Defendant is truly a generous person, that he is a teacher of men, that he is generally helpful or there is a lack of racial prejudice. Giving full credit to the acts of kindness established, they do not weigh heavily against the existing aggravating circumstances.

(R 1520, emphasis added).

The court also found in mitigation that the defendant is capable of mediation, may succeed in the general prison population, is not likely to be dangerous in the future, and has worked at self-improvement. These were given mare weight than the acts of kindness but nonetheless found to be less than significant, i.e., less than the mitigating factor of age. Id.

Added weight was given because of the use of alcohol and drugs. Id. In sum the court found that " . . . the totality of the mitigating circumstances, both statutory and non-statutory, are insufficient to outweigh the aggravating circumstances." (R 1521).

Essentially the defense argument is a challenge to the weight given the mitigating circumstances by the trial judge. That is, similar mitigating factors in other cases are pointed to and presented out of context in isolation as a means of supporting the defense claim that these factors are therefore substantial here. While under the facts of a given case those circumstances may establish substantial mitigation, the trial court below found that they did not in this case. "It is within the province of the trial court to decide the weight to be given particular mitigating circumstances and whether they offset the established aggravating circumstances." Swafford v. State, 533 So.2d 270, 278 (Fla. 1988), citing Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984). Furthermore, "[m]ere disagreement with the force to be given such evidence is an insufficient basis for challenging a sentence," Echols v. State, 484 So.2d 568, 575 (Fla. 1985), citing Quince v. State, 414 So.2d 185, 187 (Fla. 1982). "So long as all the evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion.'' Hill v. State, 549 So.2d 179, 183 (Fla. 1989) (citations omitted). The written findings of the trial court reveal that all of the evidence offered as mitigation was considered.

Hitchcock's subjective conclusion that "[o]thers whose sentences have been reduced to life committed equally or more disturbing crimes" (B 21) is reached by comparing this case to dissimilar cases. As already discussed, this is inappropriate in a proportionality analysis, Only one case in which strangulation was the means by which the murder was committed is cited by the defense, Welty v. State, 402 So.2d 1159 (Fla. 1981). The case is readily distinguishable from the instant case. Welty was picked up by the victim when he was hitchhiking. The victim propositioned the defendant. They returned to the victim's condominium for the purpose of engaging in homosexual acts. After they had slept for a few hours the defendant got up and stole a stereo. Welty left and returned later with an associate, Upon entering the condominium he went directly to the bedroom and struck the victim several times in the neck before setting the bed on fire. Id., 1161. The medical examiner testified that the victim's larynx had been fractured by the repeated blows and that he died from manual strangulation. Further distinguishing Welty is the life sentence recommendation by the jury.

The instant case does not involve a murder preceded by a consensual sexual encounter between two adult males. Rather, the murder in this case, which occurred in the middle of the night, was preceded by a sexual battery upon a 13 year old child in her own bedroom by an uninvited adult male. The victim was first choked inside of her house. She was picked up by her neck and carried outside. Once outside she was choked again, hit twice in the face and then choked again yet a third time until she died.

She was acutely aware that **she** was going to die as it would have taken approximately two minutes for her to die after the defendant began choking her for the third time (R 1518; 573). The jury below, which was well advised of the evidence of mitigating circumstances, recommended that the death sentence be imposed.

The defense points also to Wasko v. State, 505 So.2d 1315 (Fla. 1987), which has in common with this case a child victim. Unlike Cynthia Driggers, Wasko's victim had not been strangled. Also, the defendant had not acted alone, and his accomplice was not going to be put to death because he had pled to second degree murder. Although Wasko is easily distinguished from this case it is **addressed** here because the majority opinion acknowledged that "[t]he killing of a child is especially despicable." Id., 1318. With that as a starting point of reference, the state will now proceed to its proportionality argument by considering the penalties imposed in cases which are similar to this one in that they involved the killing of a child by strangulation.

The case of Tompkins v. State, 502 So.2d 415 (Fla. 1986), in which this court unanimously upheld the imposition of the **death** penalty, parallels the instant case in many respects. The defendant knew the 15 year old victim and had ready access to the victim's home. There is one obvious distinction, however, Tompkins did not satisfy his perverse need by completing the sexual battery upon his child victim like Hitchcock did. Similarly, however, he **did** kill her at **her** own home. The medical examiner had determined that Tompkins' victim, like Hitchcock's,

had been strangled to death. The trial court in that case had found three aggravating factors: previous felonies involving the use or threat of violence to the person, attempted sexual battery while engaged in the murder, and the murder was especially heinous, atrocious, or cruel. The one mitigating circumstance found, age, is the same as the only mitigating factor found to be significant by the judge below. Id., 418; (R 1518).

Another case involving the strangulation death of a child is Adams v. State, 412 So.2d 850 (Fla. 1982). The eight year old victim knew the defendant and could have identified him, There was evidence to support the court's finding that the murder had been committed while Adams was engaged in rape and/or kidnapping. The trial court had found three aggravating circumstances: The murder was committed during a rape and/or kidnapping, to avoid lawful arrest, and it was especially heinous, atrocious, or cruel. The sentence was upheld despite the finding in mitigation that Adams was under the influence of extreme mental or emotional disturbance. Also, the use of the word "rape" rather than sexual battery was held not to require reversal (further detailed argument infra).

Another case with a number of similarities to the instant case is Doyle v. State, 460 So.2d 353 (Fla. 1984), although the victim's age is not revealed. The defendant was a neighbor and relative of his victim. He had committed a sexual battery upon the victim before strangling her to death. Doyle admitted to having sex with his victim but pointed to his intoxication at the time as mitigation. The death penalty was affirmed nonetheless,

Because this is a resentencing there exists of course a case with virtually identical evidentiary facts for comparison purposes. In Hitchcock I the trial court had found three of the four aggravating factors that were found upon resentencing. The court found that the murder: had been committed during the commission of a sexual battery, in order to eliminate a witness, and it was especially heinous, atrocious, or cruel. This court noted that it would have been proper for the trial court to have found the aggravating factor of under sentence of imprisonment because of the fact that Hitchcock was on parole, Id., 747, n. 6. This fourth factor was found upon resentencing (R 1517). The original trial judge found Hitchcock's age to be the only mitigating factor. Similarly, the resentencing court found age in conjunction with the defendant's lack of maturity, coping skills and emotional development to be the only significant mitigating circumstance (R 1518). This argument is not advanced to suggest that the a death sentence was required as law of the case because the prior sentencing is a nullity. Teffeteller v. State, 495 So.2d 744, 745 (Fla. 1986); King v. Dugger, 15 F.L.W. S11 (Fla. January 4, 1990). However, it is suggested that the resolution of the sentencing issues by this court on the first direct appeal certainly is extremely persuasive. This is particularly so because the nonstatutory mitigating circumstances found upon resentencing in addition to the statutory factor of age were found not to be substantial.

The propriety of finding all four of the aggravating factors in this case will be discussed at length infra. However, even if

this court should find that not all of the aggravating circumstances were properly found, the death sentence should nonetheless stand. A death sentence may be upheld despite the striking of aggravating factors. For example, in Cherry v. State, 544 So.2d 184 (Fla 1989), this court affirmed a death sentence despite the striking of one aggravating factor because of improper doubling. Two sentences of death were affirmed in Harvey v. State, 529 So.2d 1083 (Fla. 1988), on the basis of three aggravating factors despite the mitigating circumstances that the defendant had a low I.Q. and poor educational and social skills.

In short, the death penalty is proportional in this case. Hitchcock, who was on parole at the time, entered his 13 year old victim's bedroom in the middle of the night. He forced her to have sex. He began to choke her when she said that she was going to tell her mother. He carried her outside where he again choked her and hit her twice in the face. When she continued yelling he choked her yet a third time until she died. He then threw her body into heavy brush and went inside to shower and wash out his shirt. The death penalty has been affirmed in similar cases and should be affirmed here.

Point Two

THE TRIAL COURT PROPERLY DENIED THE CHALLENGES FOR CAUSE.

The trial court properly denied the motions to strike the three potential jurors for cause. Before discussing the voir dire and the controlling law, it is necessary first to address the erroneous defense contention that the abuse of discretion standard does not apply here because the rule in Singer v. State, **109** So.2d **7** (Fla. 1959), was allegedly not applied by the court below (**B** 24). First of all, this assertion is purely conjectural because, as the defense acknowledges, the trial court did not state the legal basis for its ruling. **The** contention is founded upon imputing the prosecutor's argument to the court that potential jurors who opposed the death penalty should be excused. That, of course, is a completely separate issue from juror competency generally. Id.

Secondly, this particular argument was waived below.[2] "In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court." Bertolotti v. Dugger, 514 So.2d **1095, 1096 (Fla. 1987)** (citation omitted). The defense below did not argue that the court was failing to apply the Singer standard in its decision not to excuse for cause Hagey, Johnson, or Kemp. Singer v. State, 109 So.2d 7 (Fla. 1959). Counsel below argued in

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[2] Should this or any subsequent issue be found to be procedurally barred itis requested that a plain statement to that effect be included in the opinion so as to foreclose potential relitigation of the issue(s) in federal collateral proceedings. See, Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038 (1989).

general terms that Ms. Hagey had responded equivocally (R 62 - 64); that Ms. Johnson had been exposed to a victim impact statement on the television the preceding evening, and that she had said she thought it would be better if she did not serve on the jury (R 176 - 177); and that Mr. Kemp gave an equivocal response to the court's question to him whether he could serve fairly and impartially (R 88 - 89).

Procedural bar aside, the claim is without merit. As "[a] trial court ruling comes to a reviewing court with the same presumption of correctness that attaches to jury verdicts and final judgments", DeConingh v. State, 433 So.2d 501, 504 (Fla. 1983) (citations omitted), one should properly infer from the instant record that the judge applied the correct standard.

Even without such a presumption the defense claims fail. The Singer rule must be read together with the test stated in Lusk v. State, 446 So.2d 1038 (Fla. 1984). Hamilton v. State, 547 So.2d 630, 632 (Fla. 1989). The opinion in Lusk provided in relevant part:

> The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court.

Id., citing Singer.

The record simply does not support the defense contention. The judge posed questions to each of the challenged venire members that were consistent with this test. He at one point questioned Ms. Hagey: "Am I to understand then, you say you feel

you could make a fair decision; that you could set aside your feelings that a death deserves a death, and assess the evidence and apply it as I instruct you on the law?" (R 61; 57 - 62 generally). The court asked Ms. Johnson if she could set aside her feelings of sympathy and decide the case solely upon the evidence and instructions (R 174; 168 - 176). Similarly, the court inquired of Mr. Kemp: "You can disregard anything you have read up to this point and listen only to the evidence presented here and the law that I have instructed you on?" (R 88; 79 - 89). The record clearly reveals that the trial court applied the correct standard. Hence, the standard of review on this issue is whether or not the trial judge abused his discretion in not excusing for cause the above three individuals from the jury pool. The ruling can only be disturbed if there was manifest error. Singer, 22 (citations omitted). As will be explained immediately below, there was no error in the rulings.

Ms. Hagey said: "When I have been asked to voice a personal opinion, I felt that that [sic] in the case where a life had been taken, that a life should have been given." (R 57). Her equivocation was due not to any doubt that she had that she could be impartial, rather it was due to her lack of familiarity with the courts. She explained at one point:

> I, I didn't understand - - I really don't understand the judicial system enough to know how those decisions are made. I just know that I have always felt that that was, that would be just punishment. But I certainly would be reasonable enough to listen."

(R 59).

She stated directly that she felt certain that she could listen to the evidence to determine if there was evidence in aggravation or mitigation and if so to then weigh it (R 61). After questioning by counsel for both parties and the court she stated:

> I don't have the right to take the law in my own hands. I just know what I have heard as a citizen. And I would be willing to listen to the direction of someone who knows it better than I.

(R 62).

This court observed in Singer: "We realize that, to say the least, it is difficult, if not impossible, for any individual to completely put out of mind knowledge, opinions or impressions previously registered." Id., 24. A juror is impartial who can lay aside his opinion or impression and render a verdict based on the evidence presented in court. Bundy v. State, 471 So.2d 9, 20 (Fla. 1985) (citations omitted). Ms. Hagey was just such a juror. She did initially acknowledge that she favored the death penalty. Because her later replies showed that she was willing to deliberate in the appropriate manner her initial remark did not render her partial. Witherspoon v. Illinois, 391 U.S. 510, 519, 88 S.Ct. 1770, 1775 (1968). A juror's preconceived opinion may under certain circumstances render him or her impartial. In Hamilton, supra, for example, a juror was held to have been partial after she stated that the defendant would have to produce evidence to convince her that he was not guilty. Id., 633. Such is not the case here. Hagey's opinion extended to the appropriateness of the death penalty in general. She never

expressed an opinion as to whether or not she felt that Hitchcock was guilty or innocent. Furthermore, the trial court here, unlike the judge in Hill v. State, 477 So.2d 553 (Fla. 1985), did apply the appropriate rules of law. Cf. Pentecost v. State, 545 So.2d 861, 863 (Fla. 1989) (held no abuse of discretion when jurors who meet Lusk standard are not excused for cause). As a result there was no abuse of discretion in refusing to strike Ms. Hagey for cause.

The voir dire of Ms. Johnson does not show "a strong likelihood of partiality" as the defense contends (B 26). The defense correctly points out that the prosecutor and the court received more direct answers than did defense counsel. A close reading of the record reveals that this was due to the manner in which questions were worded (see R 168 - 175; note that Ms. Johnson was questioned by Ms. Cashman of the public defender's office while Hagey and Kemp were examined by Mr. Wesley of that office). Most of the questions asked by the court and the prosecutor were affirmative in nature, i.e., including such words as "will you . . .", "can you . . .", etc. Many of the questions posed by defense counsel, on the other hand, precipitated an equivocal response because they were framed in terms of "do you think . . ." Every question by Ms. Cashman which the defense quotes but one, which qualified a previous response, was asked in that fashion (B 26). Furthermore, the responses by Ms. Johnson were not solely dependent upon who was asking the question, She unequivocally told defense counsel that the newscast would not influence her in deliberating and that she was not inclined to vote for either a sentence of life or death (R 171).

Accepting, *arguendo*, that her statements revealed that she had been influenced by the television broadcast that she had seen the night before, that does not establish that she was unable to decide the appropriate sentence fairly, She indicated that after the broadcast she wondered why Hitchcock was being given a second chance when the victim was not (R 168 - 169). And she did say that it would take some evidence to change her opinion (R 172). Her statements reveal that she did not at that point understand why the defendant was having a resentencing. It is certainly not unusual for a lay person to be perplexed by the legal system. Nor did her statement that it would take some evidence to make her understand mean that she was partial either. She did **not** say that the defendant would have to produce evidence. Her responses merely indicated that until **she** was provided with additional information she could not comprehend why the resentencing was taking place. When asked if she thought that the broadcast wauld influence her in deliberations, she replied: "No, I think a lot of other things would come out in the trial that would sort of push that and bring other things to the forefront, really" (R 171). Contrary to the defense assertion (B 26), she did not admit bias toward the defendant. Her statements reveal that Ms. Johnson, like Ms. Hagey, simply does not comprehend the intricacies of legal procedure. The defense relies upon United State v. Williams, 568 F.2d 464 (5th Cir. 1978). While that court did reverse on grounds of prejudicial publicity, it is distinguishable from the instant case on a very fundamental level. The jury in Williams obtained the extrajudicial

information three days into the second trial. Here, of course, the exposure to the broadcast occurred before the resentencing began. The Williams court directly addressed this dichotomy of pretrial publicity and that which jurors are exposed to after the trial has begun, The opinion noted: "The 'during trial' cases, though fewer in number, contain greater opportunities for prejudice." Id., 468. In addition to the probability that information about the trial which a juror is involved in is far more likely to remain in his or her mind and the possibility that a juror may at that point be more inclined to seek out information, id., the voir dire process itself diminishes the potential for prejudice because it permits the parties to determine the extent of influence such publicity has on an individual before that person becomes a juror,

The defense exaggerates by contending that Mr. Kemp followed Hitchcock's story (B 27). Initially he thought the case involved a case in which a deputy was shot (R 80). He said that he knew nothing beyond the headlines regarding the case in which inmates were going to be brought to court to testify (R 81). Mr. Kemp had no recollection of any discussions regarding this case in his barber shop (R 82). When asked if he favored the death penalty he replied: "Not particularly this case. Any case." (R 84). As discussed above, that does not render him incompetent to sit on the jury. Later he was asked by defense counsel if he could be persuaded that a death sentence was inappropriate in this case, and he responded: "Oh, sure, yes." (R 85). The court followed up immediately after with questions consistent with the rules laid down in Singer and Lusk (R 85 - 86).

In sum, the trial court did not abuse its discretion by not excusing the three venire members discussed above for cause. The court applied the appropriate standard in evaluating these individuals, and their answers revealed that they were impartial.

Point Three

THIS CONTENTION IS BARRED BECAUSE IT WAS NEVER PLACED BEFORE THE TRIAL COURT. IN ANY EVENT, IT IS WITHOUT MERIT.

This defense contention was waived by the defense which never presented it to the trial court. The defense moved to strike the venire based upon the claim that the defendant had been prejudiced by the viewing by potential jurors of the increased security around the courthouse when the inmate witnesses arrived (R 291 - *293).* There was no motion to strike the venire panel on the other bases and there was no motion to strike it because of the cumulative effect. Because the issue is raised for the first time here it should not be **considered** by this court. Bertolotti, supra.

Further, the contention is internally inconsistent. In its desire to develop a cumulative error argument the defense lumps together three allegedly prejudicial factors: pretrial publicity, the viewing of extensive security measures by the venire, and improper argument. The defense concludes that the court should have stricken the jury **panel** when moved to do so during voir dire. However, as the **defense** acknowledges **(B 29,** n. 39), the prosecutorial comment now complained of was made in closing argument (reference to R 1214). Obviously an occurrence which takes place during the closing of a trial cannot support a claim of error which supposedly occurred when curative steps were not taken during a preliminary stage,

In any event, the claims of error are unfounded. First **of** all, "[t]he **mere** existence of pretrial publicity is not enough to

raise the presumption of unfairness of a constitutional magnitude." Bundy, supra, 19 (citation omitted). This particular issue was waived by the conduct of the defense. The defense was aware of the existence of pretrial publicity, yet no motion for change of venue was filed. Instead, the defense chose to counter the potential for prejudice by moving for individual voir dire (R 1422 - 1423). An " . . . appellant may not complain of the very situation he created at trial." Herrera v. State, 532 So.2d 54, 56 (Fla. 3d DCA 1988), citing White v. State, 446 So.2d 1031, 1036 (Fla. 1984). Furthermore, the trial court conducted individual voir dire in order to address the issue of pretrial publicity as the defense had requested (R 57 - 284). Other than the three individuals discussed in point two, all of whom were stricken (R 397; 398; 407), the defense does not claim that any other members of the panel were prejudiced against the defendant by pretrial publicity. Although the trial court denied the second defense request for additional peremptory challenges, the motion had nothing to do with perceived prejudice by any member of the panel. Rather, the defense sought additional challenges on the ground that: "This is a death case" (R 411; 413). In Parker v. State, 456 So.2d 436, 442 (Fla. 1984), the defense claimed an entitlement to additional peremptory challenges because of the serious nature of the case. This court rejected the claim because Parker had failed to establish an abuse of discretion. Similarly, there was no abuse of discretion below when the judge refused to grant additional peremptory challenges when the request was founded an such a general ground.

"Any claim that the jury was not impartial . . . must focus . . . on the jurors who ultimately sat." Ross v. Oklahoma, ___ U.S. ___, 108 S.Ct. 2273, at 2227, 101 L.Ed.2d 80 **(1988)**. Since the jurors who were allegedly prejudiced by pretrial publicity were removed from the panel the first element of the three-fold cumulative error argument is without merit.

The second element, the alleged "extensive" security is even more clearly meritless. The claim that the "[v]eniremen noticed the extensive security measures at the courthouse . . ." is without evidentiary support. There was no evidence whatsoever that the "extensive" security measures were noticed **as** such by any member of the venire. The only individual who detailed this defense claim was one of the defense attorneys **(R 291 - 293)**. Contentions made by an attorney during argument to the court are not evidence. L.W. v. State, 538 So.2d 523 (Fla. 3d **DCA** 1989). The court denied the defense motion to strike the panel, but nonetheless allowed counsel to inquire of the jurors (**R** *296).* Before questioning anyone defense counsel renewed its motion. Id. The judge pointed out the following:

> Well, there is no demonstration that the prejudice is there because, number one, we don't know who saw it, number one, if anyone, Number two, we don't know if they know those are the prisoners versus a S.W.A.T. team exercise or whatever.

(R *296).*

Prospective juror Webb was called at the request of the defense (R 296 - *297).* He advised the court that he had spoken to a deputy as he was entering the court only in regard to the

instruction of that officer as to the direction in which Mr. Webb was to proceed (R 297 - 298). He acknowledged that he had seen some police cars, officers, and weapons (R 298). However, he said that he did not know what was happening at the time, and stated further that neither had he asked nor was he told what was taking place. Id. In Hildwin v. State, 531 So.2d 124 (Fla. 1988), this court held that the trial court had not abused its discretion by denying a similar challenge. A juror had arrived early and saw the defendant being removed from a sheriff's van. Upon questioning by the court and counsel the juror said that he did not make much of the incident. See also Stewart v. State, 549 So.2d 171, 173 (Fla. 1989); Diaz v. State, 513 So.2d 1045, 1047 (Fla. 1987). The defense below did not call any other witnesses or attempt to corroborate the claim by counsel in any other way. Because there was no evidence to support the claim of prejudice due to observation of security measures, the claim does not contribute to the cumulative error argument of the defense. Even if there had been evidence presented to support the defense claim the impact upon the jury deliberations would have been negligible because the fact that many of the defense witnesses were convicted murderers came to the jury's attention during trial. Reasonable jurors would expect no less under the circumstances.

As pointed out above, the third element to the cumulative error claim does not support the defense contention that the jury panel should have been stricken during voir dire because the prosecutorial comments during closing argument came long after

the motion to strike the panel which was made during voir dire. Furthermore, any claim of error in this regard was waived because no contemporaneous objection was voiced by the defense when the comment was made, Jackson v. State, 522 So.2d 802, 809 (Fla. 1988) (citation omitted). Even if the issue had been preserved and accepting, *arguendo*, that it was improper, the isolated remark now pointed to by the defense is insignificant because it was not so outrageous that it would have tainted the validity of the jury's recommendation and:

> In the penalty phase of a murder trial, resulting in a recommendation that is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty phase trial.

Id. (citation omitted).

Stated simply, the trial court committed no error because the defense contentions under point three have no merit individually or jointly.

Point Four

THE TRIAL, COURT CORRECTLY EXCLUDED IRRELEVANT EVIDENCE. IF ANY ERROR OCCURRED IT WAS NONETHELESS HARMLESS BECAUSE THE EVIDENCE WAS INTRODUCED THROUGH OTHER WITNESSES AND/OR THE COURT FOUND MITIGATING CIRCUMSTANCES CONSISTENT WITH THE EXCLUDED EVIDENCE.

Despite the multifaceted defense contention that the trial court erred in excluding mitigation evidence, essentially the same type of evidence was admitted through other witnesses and was considered by the court. The mitigating circumstances to which the excluded evidence pertained were found by the court. The defendant's age at the time of the crime, in conjunction with his lack of maturity, coping skills, and emotional development, was found to be a mitigating circumstance (R 1518). Early life deprivations of extreme poverty, lack of formal education, emotional depravation, and physical and emotional abuse were also found in mitigation (R 1519). The court also found in mitigation that the defendant had acted positively in certain incidents, although the court found that these specific acts were inadequate to establish positive character traits. Id. The court found that while the evidence established that the defendant had worked hard, it was a result of economic necessity rather than out of willingness or a desire to excel. Id. The court also considered testimony presented to support the claim that the defendant was a good family person. The court noted in its findings the evidence that the defendant had saved his uncle's life, had come to Florida to help a relative recovering from surgery, and he writes two nieces on a regular basis, Id. Specific acts of kindness

toward other inmates were considered (R 1520). Also found in mitigation were the defendant's capability as a mediator during prison disputes, his ability to successfully exist in the general prison population, his lack of future dangerousness, and his strides to improve himself while in prison. Id.

The state agrees that all relevant mitigating evidence should be considered during the sentencing phase under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). The defense, however, incorrectly implies that virtually any evidence it wished to present was admissible. It argues that the United States Supreme Court permitted resentencing in this case " 'provided that [the State] does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available.' " (B 30, emphasis in initial brief, citing Hitchcock v. Dugger, 107 S.Ct. 1821, 1824). The emphasis is more properly under "relevant" because that word qualifies the words emphasized by the defense. Similarly, §921.141(1) provides in pertinent part that " . . . evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant . . ." Fla. Stat. (1987) (emphasis added). The standard on review of a judge's evidentiary ruling has been stated by this court in the following manner:

> A trial court has wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling

> regarding admissibility will not be disturbed.

Jent v. State, 408 So.2d 1024, 1029 (Fla. 1982).

A second issue must be addressed before directly responding to the assorted defense contentions. The trial court permitted the introduction of a considerable amount of other mitigating evidence. This is not to say, however, as the defense contends (e.g., B 19; 21), that the court found substantial mitigation (see point one, supra; R 1518 - the court noted that the defense has presented substantial evidence). The evidence that was introduced overall was such that if there was any error in the exclusion of evidence it was nonetheless harmless. A harmless error analysis is appropriate in analyzing Hitchcock claims. Alvord v. Dugger, 541 So.2d 598, 599 (Fla. 1989) (citations omitted). The harmless error test requires the examination of both the permissible and excluded evidence to determine whether any error affected the result. State v. Lee, 531 So.2d 133, 136 (Fla. 1988) (citation omitted). With relevancy, abuse of discretion, and harmless error in mind the defense assertions will now be addressed in the order that they were presented by the defense in its brief.

The trial court correctly found that the evidence proffered by Mr. Greene regarding the effect upon the defendant of the electrocution of David Washington to be irrelevant (R 875). Such evidence would be relevant only to show that the defendant was understandably empathetic. Even if excluding that evidence and the letter from the defendant to Greene was error it was harmless. Despite the exclusion the court found that Hitchcock

performed acts of kindness (R 1520). Furthermore, the underlying facts obviously were not considered to be of much significance by the defense below because the defendant did not testify to these matters when he took the stand.

The exclusion of opinion testimony by Greene regarding the "dramatic" development of Hitchcock in prison was similarly harmless. The court found that the defendant had shown acts of kindness, was capable of being a "mediator/peacemaker", and had taken strides to improve himself. Id. Essentially the same evidence was introduced later through the testimony of Dr. McMahon, a clinical psychologist (R 1135 - 1138). Among the things she testified to were her opinions that the defendant was maturing, he displayed enhanced empathy and compassion, and he was a better communicator.

The trial court properly prohibited Greene from testifying as to what three deceased persons had told him during his clemency investigation. The court did not abuse its discretion in determining that the evidence was inherently unreliable because it had been obtained during an investigation by Greene aimed at obtaining clemency for Hitchcock. In any event, the court found that the defendant had endured striking areas of deprivation, and considered evidence of his work habits and lack of dangerousness (R 1519 - 1520) after hearing comparable evidence which was introduced through other witnesses. Betty Augustine, the defendant's sister detailed the rough life they all shared when growing up which included a description of his early start in the cotton fields (R 888, et seq.). Another sister, Brenda Reed,

testified similarly (R 916, et seq. His cousin, Wayne Hitchcock told how the defendant had saved his father, the defendant's uncle (R 909 - 910, 914); how he had gone to Florida to help in Fay Hitchcock's recovery after surgery (R 911 - 912); and he described the defendant as a "good, hard worker" (R 915). The claimed nonviolent nature of the defendant was testified to by at least three of his fellow inmates (R 814; 819; 824).

The court also based the exclusion of the evidence regarding the statements of the three deceased persons upon the irrebuttable nature of the testimony. The defense interpretation of §921.141(1), Fla. Stat. (1987), is that the section does not require the defense to provide the state with a fair opportunity to rebut hearsay evidence offered by the defense (R 30; 33 - 34). Unquestionably the section expressly provides that the defendant must be given a fair opportunity to rebut hearsay statements. The problem for the defense in urging such a literal interpretation of the statute is that the probative evidence which is admissible under the section then has to be the probative state evidence. To be consistent with the defense view the section would have to read:

> Any such evidence [offered by the state] which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rule of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

§921.141(1), Fla. Stat. (1987).

The reason the admissible evidence would necessarily be state evidence is that the defense of course does not rebut its own

evidence. So, if the literal interpretation offered by the defense is accepted, the only party which may offer evidence under this section is the state and Hitchcock's evidence would have been inadmissible in any event. Obviously such a construction is unreasonable and therefore improper. Carawan v. State, 515 So.2d 161, 167 (Fla. 1987) (citations omitted).

The defense also asserts that " . . . the prosecutor had a fair opportunity to rebut because he had a detailed road map of potential defense testimony from five years of post-conviction and clemency litigation." (B 34). The defense then points to the fact that the state had knowledge of the testimony because of the "Motion to Preclude Imposition of Sentence of Death - Delay" and subsequent argument on the motion. The shortcoming with the present argument is that through the motion below the prosecutor and court were led to believe that the statements by the three deceased persons would not be introduced at the resentencing because the defense claim of prejudice was based upon the fact that their statements could not be introduced. The motion states explicitly: "The would-be contributions of these witnesses were detailed in the Motion to Vacate Judgment and Sentence filed with this Court on May 3, 1983. Obviously, the delay deprives the Defendant of the testimony of these three (3) witnesses" (R 1372 - 1373; see also 1294).

There was no error in excluding evidence proffered by Greene that another convict who had attempted to escape with the defendant had been resentenced to life. The defense contends spuriously that the same rationale should apply as in those cases

where a codefendant in a murder receives a life sentence. The distinction is obvious, those cases involve the crime for which the defendants could receive the death sentence, whereas this situation involves a disciplinary action not directly related to the murder. Even if one were to accept the strained analysis of the defense, there is nothing in this record which would support its predicate contention that Harvard and Hitchcock did in fact have similar prison records (B 33, n. 43). All this record indicates in that regard is that they were both participants in an attempted prison escape. Beyond that there is no other information about Harvard's prison record, One common experience does not establish that the two had similar prison records.

A defense observation under point thirteen in the initial brief focuses on a fundamental reason why excluding the testimony of Greene was harmless error, It is admitted that "[t]he credibility of the witnesses would be lost by the presentation of their statements via one who was the defendant's lawyer." (B 76, n. 93). The rationale extends with equal force regarding any matter to which he would have testified. That is, if the jury would have found his testimony incredible because of his prior relationship to the defendant in one context, the jury would have found testimony by this witness incredible in any other context because the witness' interest remains constant.

The proffered testimony of Brenda Reed and Martha Galloway to the effect that Richard Hitchcock had committed acts of physical and sexual violence upon them and others was properly excluded because the law of the case was decided on this issue in

Hitchcock I. This court held that the evidence was too remote in time to be relevant regarding the defense claim that Richard had committed the murder. Id., 744. The defense argues in part that "[t]he testimony here was relevant to show Richard's involvement in the murder and Mr. Hitchcock's lesser culpability, including his innocence of three statutory aggravators." (B 40). Even if the law of the case did not preclude consideration of this evidence, it could nonetheless not be properly considered on resentencing for the purpose of placing blame for the murder upon Richard because Hitchcock has no constitutional right to present "lingering doubt" evidence in an effort to establish mitigating circumstances. King, supra, 15 F.L.W. S11 (citations omitted). As to the defense contentions that the evidence should have been admitted, the exclusion was harmless because similar evidence was introduced through other witnesses. His sisters detailed a violent home life (R 895; 920), which the court found (R 1519). Significantly, however, Brenda Reed testified that although their stepfather did not like the defendant, he did not hit him. His mother, as well, said that although her second husband would beat her when he got drunk, he never hit her in front of the children (R 1164). Some confusion on the part of the defense is apparent regarding who was testifying at one point and the significance of the witness' testimony:

> Mr. Hitchcock presented evidence of his violent, chaotic, and impoverished upbringing as mitigation; one witness to his early life was Carroll Galloway, and she testified she had no criminal record . . . Even in the face of the state introducing evidence of the lack of

> criminality of Carroll Galloway, the court **accepted** the prosecutor's contention that evidence of Richard's violence against his sisters was inadmissible . . .

(B *36*).

The defense contentions in the above regard are unfounded in fact as well as law because the testimony of this witness was unrelated to the defendant's home life. It dealt instead with the hard work in the cotton fields and the fact that the three witnesses that the defense claimed it wanted to call had died (**R 834** - 840). More to the point, however, Carroll Galloway is not the defendant's sister, in fact there was no testimony that they are related. Furthermore, Mr. Carroll Galloway is not female. The defense apparently has confused him with the defendant's sister, Marshy Galloway (R 1012).

Martha Galloway later proffered testimony outside of the jury's presence that she had been sexually battered by Richard Hitchcock when she was young (R 1015 - 1017) and Richard had shot at two individuals on different occasions who had angered him (R 1018). Brenda Reed also testified that she had been sexually battered by Richard when she was a child (R 1013 - 1014). While these assertions could be relevant as "lingering doubt" evidence, and therefore inadmissible, the evidence was irrelevant as to mitigating circumstances in the defendant's early life experiences because no nexus was established between those alleged occurrences and the defendant. That is to say, neither sister testified that the defendant had witnessed or was aware of the violent acts that they claimed had been committed by Richard Hitchcock.

The defense claim that the court erred in excluding portions of the transcripts which contained the testimony of two police officers given during the guilt phase is unfounded. The court did not exclude the evidence. The court preferred live testimony, *so* it instructed the prosecutor to attempt to contact deputy Hanson (R 714) and ruled as to the prior testimony of the other officer: "I would, at this time, restrict the introduction until you have at least made a, an inquiry as to whether Doss is available to testify." (R 715). The state succeeded in locating Hanson, who came to the courthouse and was available to the defense (R 782 - 783). The prosecutor advised the court that Doss was employed with a law enforcement agency in Hillsborough County. The court instructed: "See if you can get in touch with him between now and the time we'll present his testimony. See if he's available." (R 790). The defense now points out that " . . . whether he was contacted by either party is unclear from the record." (B 41, n. 49). The reason it is unclear is that the defense never subsequently sought either to call him or introduce his earlier testimony in the event of his absence. Despite the fact that the state had secured Hanson's presence, the defense never called him either. As a consequence of its own inaction, the claim the defense now wishes to advance was waived below. Procedural bar aside, the fact that Doss had earlier testified that the defendant turned himself in was put before the jury during the questioning of Detective Nazarchuk, Defense counsel pointed the testimony out to the detective in an effort to refresh his recollection whether the defendant had turned himself

in (R 531). Further, it is clear by the written findings that the court considered the defendant's voluntary surrender (R 1520).

The trial court properly limited the testimony of a sociologist, Dr. Michael Radelet. The court permitted the witness to not only give his opinions but to testify to the underlying bases (R 729). The prosecutor objected to the testimony by the witness that the murder was not premeditated (R 732). The court properly sustained the objection because it was the law of the case that the murder was premeditated as Hitchcack stood convicted of first degree premeditated murder. The next objection was made to the witness testifying that the defendant had received a high school equivalency diploma (R 735). Although the court sustained the objection, it noted that the testimony was in and it did not strike it. A copy of the diploma itself was introduced into evidence in any event (defense exhibit P-1). Further, the defense claims that this evidence was relevant to establish the future nondangerousness of the defendant (B 43), but if there was any error it was harmless because the court found that to be a mitigating factor (R 1520).

The defense argument that the court erred in refusing to introduce the entire clemency report is facially invalid. It provides in relevant part:

> In examining McMahon, the prosecutor with her clemency report in hand asked her about a factor mentioned in the report to which she had not testified. . .
>
> This ruling violated the principle that an entire prior, inconsistent, written statement used

> in part to impeach must be admitted upon request of the opposing party . . .

(B 44, emphases added).

If the witness did not testify on a given issue, as the defense here admits, then a prior statement cannot possibly be inconsistent with any answer she may have given on the issue. However, contrary to the defense contention, the prosecutor was asking the doctor about something which she had testified to. His question was:

> Now, I am looking at your, at a copy of your 1983 report and wondering how the - - your mentioning in there of distancing the emotional components and I suspect that relates in here somewhere, but I am not sure. Would you advise me, please, ma'm?

(R 1145).

Much of her testimony regarded emotional distancing by the defendant, e.g., she said that Hitchcock's method to deal with **stress** " . . . was simply to avoid, avoid the emotional impact of what was happening to him." (R 1126). The question asked simply did not discredit the witness or her testimony in any way. Beyond that, the questions which followed show clearly that the prosecutor was merely referring to the report as a point of reference, he never once confronted the witness with the report claiming an inconsistency. The court correctly denied the defense request to introduce the psychologist's report because the prosecutor's questions represented quintessential cross examination and nothing more.

The trial court correctly excluded the introduction of the preferred study of Dr. McMahon's which compared the characteristics of samples of murderers who received the death penalty vis-a-vis those who received life. Parenthetically, i.e., because the court did not exclude the evidence on this basis, the defense contends consistently with the doctor's testimony below that her sample was representative (B 44; R 997). Although the sample size was limited to 30 death row inmates, who admittedly were not drawn at random, the doctor insisted it was a representative sample. The doctor pointed out that they " . . . had no reason to believe that it was not a random population.'' Id. She insisted that the sample was demographically representative and did not result from preconceived notions, However, anyone who has framed a hypothetical is aware that there is a tendency to frame an issue in such a way so as to prove up one's own theory. Be that as it may, the defense argues that the evidence was relevant because it related to the characteristics of the defendant and the need for death as a punishment. That portion of the argument which relates to the defendant's characteristics is procedurally barred because that ground was not presented to the trial court. Also, that information comprised much of this witness' testimony anyway. The other prong, the need for the death penalty was presented, but was correctly rejected by the trial court which ruled: "I think proportion [sic] review is a consideration, but it's not one for this trial court or the sentencing jury at this point.'' (R 1008). The proportionality review is a function of this court.

In Smalley v. State, the doctrine of proportionality was defined as ". . . a process whereby this Court compares the circumstances present before it to similar cases." 546 So.2d 721, 722 (Fla. 1989, emphasis added). Furthermore, employing a passage from the King, supra:

> "Nothing in this opinion [*Lockett*] limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id. at n. 12.* Testimony that [compared the sentences of murderers] is irrelevant to [Hitchcock's character, prior record, or the circumstances of the crime.

15 F.L.W. S12.

Evidence of a plea bargain offer of life imprisonment was properly excluded. The defense erroneously argues that §90.410 does not say anything about plea bargain offers made by the state (B 45). In material part it provides that "[e]vidence of statements made in connection with any pleas or offers is inadmissible, except when such statements are offered in a prosecution under Chapter 837 [perjury]." Obviously, the prosecutor who extends an offer has to make it by way of a statement. The defense argues also that even if the evidence code does bar the admission of this evidence that its admission was required under Lockett because it was relevant in that it undercut the state's argument for death. Even if that view is correct, the claim was waived below because the defense never attempted to introduce the evidence during the trial. The issue was argued prior by way of pretrial motion. This, however, was

insufficient to preserve the issue for review because the judge granted the state's motion in limine without prejudice to the defense seeking to introduce evidence of the plea bargain offer if it became relevant based upon the evidence introduced at trial (R 14). Cf. Provenzano v. State, 497 So.2d 1177, 1181 - 1182 (Fla. 1986); Thomas v. State, 424 So.2d 193, 194 (Fla. 5th DCA 1983). In any event, the trial court did not abuse its discretion in excluding the evidence of a plea bargain offer. The action was proper because the evidence involve any aspect of the defendant's character, his record, or any circumstances of the offense. King, supra.

The evidence proffered through Michael Radelet that it would cost more to execute Hitchcock than to keep him in prison for the rest of his life, his execution would have no deterrent effect, a life sentence was adequate retribution, and there was lingering doubt were properly excluded. None of these are relevant to the defendant's character or prior record. Only lingering doubt may be relevant to the circumstances of the crime, but it is not proper evidence of mitigating circumstances. King, supra. As a result, there was no error.

The defense cannot prevail on its assorted claims under this point because the court ruled correctly and many of the grounds were waived. Furthermore, even if the judge erred it is clear that the exclusion of evidence was harmless for a reason more fundamental than those already discussed. The judge rather than the jury is the sentencer in Florida. Grossman v. State, 525 So.2d 833, 839 (Fla. 1988). The judge below was exposed to all

of the evidence when proffered. He did nat even find it sufficiently relevant to introduce, so the excluded evidence unquestionably would not have affected his sentencing decision.

Point Five

THIS CONTENTION WAS WAIVED. THE GUILT PHASE TESTIMONY OF DIANE BASS WAS PROPERLY PRESENTED TO THE RESENTENCING JURY.

The argument presented to this court was waived below because it is not the argument which was presented to the trial court. The defense argument below was that the evidence was irrelevant in determining aggravating and mitigating factors (R 584, 585, 587, 588). One point which was raised below is echoed here. The defense claims that the state still had the relevant evidence. It is argued that the state could have retested it and presented live testimony (B 48, n. 55; R 584 - 585). Although the hair samples were still in the state's possession, there was no attempt by the defense to establish that a reliable comparison was still a viable possibility after eleven years. At no point did the defense argue that the defendant was denied his right to confrontation, as is argued now.

This defense claim is controlled by the holding of this court in Chandler v. State, 534 So.2d 701 (Fla. 1988), that guilt phase evidence may properly be presented through a different witness. In that case a detective recited during resentencing proceedings the guilt phase testimony of a police chief, another detective, and a state expert. The trial court there was held not to have abused its discretion by permitting presentation of the evidence in this manner. The opinion pointed out:

> Both the state and the defendant can present evidence at the penalty phase that might have been barred at trial because a "narrow interpretation of the rules of evidence is not to be enforced."

Id., 703 (citations omitted); see also Teffeteller v. State, 495 So.2d 744 (Fla. 1986).

The defense contends that the prosecutor failed to show that Diane Bass was unavailable (B 47). To the contrary, however, the prosecutor advised the court that she no longer worked for the crime lab and that a diligent search had been made for her (R 583 - 584).

The defense also argues that the defendant was denied his right to confrontation of an adverse witness. However, "[a] resentencing is not a retrial of the defendant's guilt or innocence." Chandler, 703 (citation omitted). In support of its contention the defense cites Rhodes v. State, 547 So.2d 1201 (Fla. 1989) [cited 14 F.L.W. 343]. However, that case is readily distinguishable because it involved the admission of one of Rhodes earlier victim's taped statements regarding the violent crimes he had committed upon her in Nevada. The evidence below was not hearsay related to a completely independent prosecution. It was evidence presented during the guilt phase of this very trial, during which the defense did in fact confront the witness for the state, Because the testimony of Diane Bass was repeated in its entirety the jurors at the resentencing were privy to the earlier confrontation, Stated simply, the trial court did not abuse its discretion in allowing its admission.

Point Six

THE CONTENTIONS MADE ARE BOTH PROCEDURALLY BARRED AND WITHOUT MERIT.

The defense contentions are barred because any objections voiced below were untimely. Further, the bases asserted now cannot be entertained because these were not the grounds presented to the trial court. Bertolotti, supra.

Prior to examining Detective Nazarchuk regarding the confession both counsel approached the bench at the prosecutor's request. He told the judge that he was not going to *go* into the voluntariness of the confession because this was a resentencing. The judge agreed, and no objection was voiced by the defense (R 520 - 521). After the witness began detailing a statement by the defendant defense counsel objected stating that the tape was the best evidence of what Hitchcock had said and he suggested that the state should proceed in that fashion. (R 522). However, the prosecutor pointed out that the witness was discussing an earlier statement. The state moved to publish the tape of the confession and the transcript of the tape to the jury (R 525 - 526). Waiver by the defense is clear by the exchange between the court and counsel:

> THE COURT; Defense wish to be heard on this motion to publish?
>
> MR. WESLEY; No, sir.

(R 526).

Even if the defense had not expressly waived any objection the confession was properly admitted without an independent determination by the judge below of the voluntariness of the

statement, In Chandler, supra, a similar challenge was rejected by this court which held that "[b]ecause the voluntariness question had been decided previously, it was not at issue in the new penalty proceeding." Id., 703. Beyond that the record reveals that the defendant had received the appropriate warnings under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and he himself testified that all of the police officers other than Detective Nazarchuk left when he made his statement so as not to pressure him (state exhibit SO; R 1086). Dr. McMahon, a defense expert, testified that Hitchcock would have been capable of understanding the Miranda warnings (R 1155 - 1156).

Any claim of error was defaulted regarding the letter which the defendant wrote to his mother. No objection was voiced by the defense when the defendant was examined regarding the letter. He acknowledged that he wrote one to his mother in which he admitted killing Cynthia Driggers (R 1084 - 1086). When the state moved to introduce the letter itself into evidence the defense did voice an objection; however, it was not related to the lack of a voluntariness inquiry as asserted now. The defense based its objection on the grounds that counsel had not seen it before, the state had to put on a showing of reliability, the state had to show that it had not been obtained in violation of the fourth amendment, and that the introduction of the letter would violate constitutional privacy rights (R 1087). The instant claim that the court erred because there was no inquiry regarding voluntariness in writing the letter is barred from

consideration here because it was not presented to the trial court. Bertolotti, supra.

Procedural bar aside, the claim is meritless. While the letter was clearly written while the defendant was in custody, there is no record support for the defense contention that the chaplain was a "state agent" (B 50). Once again the defense relies upon the contentions of defense counsel below to support its argument. Mr. Wesley contended that " . . . [t]he chaplain is on the staff of the sheriff" (R 1089). His assertions are not evidence. L.W., supra. No other evidence was presented to establish a nexus between the chaplain and the sheriff. It is impossible to tell from the record if the chaplain was serving in a paid or voluntary capacity. The record does not even reveal if his office was located within the institution, The defense implies by labeling the chaplain a state agent that there was something contrived about the way he dealt with the defendant. However, the record does not even hint at any impropriety. He merely expressed concern for the defendant and his mother (state exhibit P-2). Even if the court erred by not conducting an inquiry regarding voluntariness before allowing the letter into evidence despite the fact that the defense never voiced any objection on that basis, any error was clearly harmless because the defendant had already testified to the substance of the letter.

One collateral contention of the defense needs to be addressed before proceeding on to the next point, The defense states that after using the letter to impeach the defendant's

testimony the prosecutor " . . . later argued to the jury that Mr. Hitchcack had lied to them as a (nonstatutory) basis for a death verdict." (B 50). That simply is false. The prosecutor did say that the defendant had lied (R 1216). This was proper comment through which " . . , the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence." Craig v. State, 510 So.2d 857, 865 (Fla. 1987). The prosecutor below never suggested that the jury should view the fact that the defendant lied as an aggravating factor. The comment was made during his discussion of witness credibility which began with his statement:

> And another instruction that Judge Formet will give you to help you in your deliberations, tough deliberations, will be how to measure the credibility of all the witnesses you heard. Things that you can take into account in determining how much weight to give the different witnesses and the different items of evidence.

(R 1214).

This argument, too, was waived because no objection was voiced when it was made. Burr v. State, 466 So.2d 1051, 1053 - **1054 (Fla. 1985).**

Point Seven

THE EVIDENCE CONCERNING THE PERSONALITY TRAITS OF CYNTHIA DRIGGERS WAS PROPERLY ADMITTED TO REBUT THE DEFENSE THEORY THAT THE VICTIM HAD VOLUNTARILY ENGAGED IN SEX WITH HITCHCOCK. THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT DID NOT TAINT THE VALIDITY OF THE JURY'S RECOMMENDATION.

In its opening statement the defense said at least three times that the victim had consented to sex with the defendant (R 455-456). When the prosecutor asked the first question regarding the victim's personal characteristics the defense objected (R 482). In making its argument to the court the defense acknowledged that the alleged consensual nature of the sexual intercourse would be an issue (R 483). The defense points to three isolated comments made by the prosecutor during the closing argument which lasted almost one hour (R 1181 - 1219; see judge's statement on 1219). The prosecutor argued that Hitchcock's mother was lucky compared to the mother of Cynthia Driggers (R 1183), he asked how many years of the victim's life had been taken (R 1210), and he wanted to know who spoke for the victim (R 1218). The prosecutor's remarks after the judge overruled the defense objection went far beyond merely stating "you speak for her", as the defense implies (B 52). He explained to the jury:

> You speak for her. And you do that by following the law in this case . . .
>
> Not because of these other matters or because of emotion or because of sympathy for anyone. Not because of sympathy for anyone. Cindy or the defendant's relatives or anyone. . . .

(R **1218 - 1219).**

The defense acknowledges that the Court held in Booth v. Maryland, ___ U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), that "[s]imilar types of information may well be admissible because they relate directly to the circumstances of the crime." (B 51, citing id., 2535, n. 10). Additionally, the Court continued: "Moreover, there may be times that the victim's personal characteristics are relevant to rebut an argument offered by the defendant." Id. In Hitchcock I this court found this type of evidence to be relevant for the purpose of rebutting the defense theory.

> [T]he total circumstances, including the time of night, entry through a window, the victim's tender years, and medical testimony that the child was of previously chaste character, refuted Hitchcock's claim of consent.

Id., 745 (emphases added).

The reliance by the defense upon South Carolina v. Gathers, ___ U.S. ___, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989) (citation to 57 U.S.L.W. 4629), is misplaced. The Court quoted from Booth in holding that "[a]llowing the jury to rely on [information concerning personal characteristics of the victim] . . . could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill." Gathers, S.Ct., 2210. Gathers' victim was a stranger to him. Id., 2208. Hitchcock, on the other hand, was well aware of these factors because his victim was his stepniece in whose home he lived. Her chaste

character was highly relevant in his decision to kill her because he wished to avoid apprehension for the sexual battery that he committed upon her (see findings of fact, **R 1517 - 1518).**

In Jackson, supra, the prosecutor had made arguments to that jury similar to those advanced below. The prosecutor argued that the victims would not be able to read books, visit with their families, or see the sun rise in the morning like Jackson would. Id., 809. The prosecutor in this case said the defendant's mother was luckier than the victim's mother and he asked how many years were taken from the victim. He also asked who spoke for the victim, but that clearly was not said as an appeal for sympathy because he went on to explain, despite the fact that the court had overruled the defense objection, that sympathy was not a proper issue. As in Jackson the other two statements by the prosecutor were not " . . . *so* outrageous as to taint the validity of the jury's recommendation." Id. Even if there was error by the court it was harmless because none of these grounds were found in aggravation. (R **1517 - 1518);** Cf. Breedlove v. State, 413 So.2d 1, 9 (Fla. **1982);** Deaton v. State, **480** So.2d **1279, 1282** (Fla. **1985).**

Point Eight

THE CLAIM IS **BARRED AS** TO ALL OF THE CONVICTS BUT THE FIRST TWO TO TESTIFY. EVIDENCE THAT DEFENSE WITNESSES WERE SENTENCED TO DEATH WAS PROPERLY **ADMITTED.**

The first convict to testify, Darryl Hoy, was asked on direct examination how long he had known the defendant. He answered: "I spent some time with him on the row for about three years, but I'm no longer on death row (R 771). The prosecutor advised the court that he planned to ask the witness if he was a convicted murderer (R 772). The judge sustained the defense objection and told the prosecutor that he could not inquire of Mr. Hoy any further regarding the specifics of his case than he had testified to on direct (R 775 - 776). He specifically told him that he could not ask him if he **was** or had been on death row (R 776). The prosecutor abided by the ruling. He asked Hoy when he first met the defendant, and Hoy answered: "I was on death row." The prosecutor focused on the proper issue by asking again simply: "When?" (R 777). When the witness was asked if he knew anything about the defendant's background he said that he knew the defendant had been convicted of murder (R 778). The prosecutor advised him to just answer yes or no. The defense objected when the prosecutor asked the witness how he felt about the death penalty (R 779). The prosecutor argued that a person's feelings about the death penalty would be indicative of their motive for testifying. The court allowed the prosecutor to proceed with the line of questioning to determine whether or not the witness was biased because of his feelings about the death penalty (R 780).

The following exchange took place before the next convict testified:

> MR. PERRY: Point of clarification, your honor. I cannot establish if it's - - can I establish that he's a death row inmate? Any of these inmates that come in here that have resided on death row?
>
> THE COURT: At this point, subject to objection by the defense. It seems to me that's an area of inquiry that may be made. It was already established by this witness.
>
> MR. PERRY: Okay.
>
> THE COURT: But I won't let you go into the nature of the crime, itself.

(R 782, emphasis added).

Despite this express statement by the court that the state's inquiries were subject to objection, as the defense concedes (B 53, n. 62), there were no objections voiced when the prosecutor pursued his line of questioning on cross examination of the convicts who followed the second convict, Rutherford. As a result the claim as it applies to these other witnesses is barred. Bertolotti, supra. The fact that the defense objection was overruled when Rutherford was asked if he was a resident of death row did not mean that further objections would be futile. No grounds were stated for the second objection and there was no reference to the earlier objection. Because no legal ground was presented for the objection the instant defense claim is waived as to Rutherford as well. Bertolotti.

The defense tries to excuse Hoy's remarks by contending consistently with defense counsel below that Hoy is mentally

retarded (B 53, n. 62; R 773). First of all, there is no evidence to support this defense contention. More importantly, however, even if retardation is accepted, this was a defense witness whom the defense chose to put on before any of the other convicts. Certainly, the situation does nothing to support a claim of error because the situation was a creation of the defense. Cf., Herrera, supra.

The evidence that Hoy and the other convicts had been sentenced to death was properly admitted. A narrow interpretation of the evidentiary rules is not to be enforced during a resentencing and " . . . the admission of evidence is within the trial court's wide discretion." Chandler, supra, 703 (citation omitted). If the court deems the evidence to be relevant or to have probative value it is admissible under §921.141(1). Id. The court did not abuse its discretion by permitting questioning to determine if these past and present residents of death row were biased regarding the imposition of the death penalty upon their friend.

Point Nine

HITCHCOCK'S PRIOR DEATH SENTENCE DID NOT PLAY A KEY ROLE IN THE RESENTENCING AND ITS IMPACT UPON THE JURY WAS NEGLIGIBLE.

The defense requested a special instruction. Counsel stated in material parts:

> I think we need ta have some instruction by the court that these people are being called together to hear the complete side of mitigating evidence which was restricted previously.
>
> . . . If you will hear us on the instruction, our point is that previously, a full and complete and thorough and exhaustive and unlimited mitigation presentation was denied. This is the time, eleven years later, for that presentation.

(R 432 - 433).

The court correctly denied the motion and explained that the jury would be instructed to consider all of the mitigating circumstances. The court properly instructed the jury consistently with the standard jury instructions (R 447 - 448; 1238 - 1247; 34 Fla. Stat, Ann. 471 - 476). The defense argues that the special instruction "would have cured the jury's belief the courts vacated the sentence on a 'technicality'." (B 57). Undoubtedly it would have done that because as worded it clearly implies intentional improprieties in his original sentencing. There was no abuse of discretion by the judge in refusing to give such a slanted special instruction.

As discussed under point three, supra, the defense was aware of pretrial publicity and it did not move for a change in venue,

Instead, it attempted to negate any prejudice caused by extrajudicial knowledge of the case through individual voir dire. The court granted the motion. There is no indication in the record that any of the jurors who sat were partial as a result of the pretrial publicity, The three potential jurors whom the defense argued under point **two** were prejudiced against the defendant did not sit on the jury. As a result, the prior knowledge of the defendant's earlier sentence did not contribute to the defense claim of prejudice.

The case of Teffeteller v. State, 495 So.2d 744 (Fla. 1986), is controlling in this case on the issue of the references during the proceeding to the prior death sentence. This court held that " . . . a prior sentence should not play a key role in resentencing proceedings . . ." Id., 747. The prosecution below did not highlight the prior death sentence, In cross examination the prosecution did ask the convicts if they were death row inmates. However, this did not serve to focus attention on the prior sentence. Its purpose was to establish that the witnesses were biased (see point eight). In questioning the convicts the prosecutor tied in the question about death row with potential bias on their part by asking the convicts whether oK not they agreed with the death penalty (e.g., R 780, 786). Just as the defense in Teffeteller could not bootstrap its earlier expressed concern regarding mentioning of the prior sentence to " . . . alleviate the requirement of a contemporaneous objection" id., 747, the defense here cannot bootstrap the issue by relying on its pretrial motion in limine as preserving the issue as to the

questions asked of the convicts who followed Hoy and Rutherford. As already pointed out, not only did the defense fail to voice contemporaneous objections, but the court expressly stated that the evidence now complained of would be admissible subject to defense objection (R 782). The defense cannot now rely on statements which it failed to object to establish its claim of prejudice. Another indication that the prosecutor did not attempt to make the prior sentence a key feature of the proceeding is that he never alluded to it in any fashion during his closing argument (R 1181 - 1219). Further, as in Teffeteller, the jury below was never made aware of the prior jury's recommendation. Id., 747; see also Jennings v. State, 512 So.2d 169, 173 - 174 (Fla. 1987); Rose v. Duqqer, 508 So.2d 321, 324 (Fla. 1987). In the instant case a " . . . review of the record clearly shows that the prior sentence did not in any way play a significant role in this proceeding and was not prejudicial to the appellant." Teffeteller, 747,

Point Ten

CONSIDERATION OF THE DEFENSE CLAIM IS BARRED BECAUSE NO OBJECTION WAS VOICED REGARDING THE SEXUAL BATTERY AGGRAVATING FACTOR INSTRUCTION.

The defense objected to an instruction on sexual battery because it claimed that there was no evidence that a sexual battery had occurred (R 956) and that the instruction was improper on *ex post facto* grounds (R 957). The next day the proposed jury instructions were again discussed. The defense had a copy of the proposed instructions. The defense objected on the additional ground that it felt that it would be misleading to instruct the jury on an offense for which Hitchcock had not been convicted (R 1025). After the state responded to the defense contention the court asked the defense if it had any further argument (R 1026). Defense counsel indicated that she did not have any, Id. The state then focused on the wording of the proposed instruction by pointing out a typographical error. The judge then asked if these were any other corrections to be made. Defense counsel indicated that there were none and although her co-counsel then voiced some objections, they were unrelated to the sexual battery instruction (R 1026, et seq.). There was no objection voiced when the instruction on sexual battery was given (R 1240). Prior to excusing the jury for deliberations the following exchange took place:

> THE COURT: Defense, have I given the instructions as agreed?
>
> MS. CASHMAN: "I believe so, your honor. We have no objections other than what was previously noted."

> THE COURT: Okay. Any further instructions that you would like to give?
>
> MS. CASHMAN: None over [sic] than we previously requested.

(R 1248).

The defense concedes that no objection to the instructions was voiced on the basis it alleges now (B 59, n. 73). It then states that " . . . the omission of an essential element of a felony aggravator is plain error in violation of Florida law." Id. It is then erroneously claimed that "[t]his Court has left this question open. See James v. State, 453 So.2d 786, 792 (Fla.) . . . Id. That case addressed the substantive claim which James made regarding the omission of an instruction. The opinion did not address the effect of failing to voice an objection to an incomplete instruction. Contrary to the defense claim, the question has not been left open. "Normally, the failure to object to error, even constitutional error, results in a waiver of appellate review." D'Oleo-Valdez v. State, 531 So.2d 1347, 1348 (Fla. 1988) (citation omitted). More specifically, "[t]here can be no doubt that objection is required to preserve an error in instructions in a criminal trial" Darden v. State. 475 So.2d 217 (Fla. 1985) (citations omitted).

The defense compares the situation here with cases in which failure to instruct on the underlying felony in a murder prosecution based upon both premeditation and felony murder was held to have been fundamental error (B 59 - 60). However, in an opinion issued after those relied upon by the defense this court held that the failure to instruct on the underlying felonies of

sexual battery and kidnapping was harmless error when there was sufficient evidence to prove premeditation. Adams v. State, 412 So.2d 850 (Fla. 1982), cert. denied 459 U. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982). The court below expressly found that "[t]he defendant's statement indicates the victim claimed to have been hurt by him (this occurring prior to the time he began choking or hitting her)." (R 1517, emphases added). This finding was consistent with the defendant's statement which included the following: " . . . I went to Cynthia's room, I went in and uh, me and her had sex and she said she was hurt . . ." (R 1467). The court found also that Hitchcock first choked her to keep her quiet (R 1518). As the defendant began choking her immediately after having sexually battered her, the defendant's statement in conjunction with the other evidence is clearly sufficient to prove that force was used against this child. In Hitchcock I this court addressed this issue and ruled that there was sufficient evidence for the jury to have found that a sexual battery had been committed. Id., 745.

The Adams opinion observed that:

> . . . [I]t may have been defendant's counsel's strategy to avoid, at all costs, any unnecessary reference to the underlying felonies committed by the defendant during the perpetration of the murder. Perhaps that explains his failure to give an instruction or an objection to a failure to make any objection to the instruction.

Id., 853.

Likewise here, defense counsel may have decided to avoid challenging the sexual battery instruction in order to avoid

focusing the jury's attention on the nature of the sex crime which was committed against this child by her step uncle shortly before he choked her to death.

In short, the claim that the sexual battery instruction lacked necessary elements was waived by the failure of the defense to object despite numerous opportunities to do so. Furthermore, the evidence of sexual battery was sufficient to render any error harmless.

Point Eleven

THE TRIAL COURT CORRECTLY REFUSED TO GIVE THE SPECIAL JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR.

This court held that it was not necessary to give instructions on this factor beyond those that are contained in the standard jury instructions. Mendyk v. State, 545 So.2d 846, 850 (Fla. 1989). The defense erroneously contends that the aggravating factor that the murder was heinous, atrocious, or cruel is unconstitutionally vague (B 63). Essentially the same constitutional challenge was considered and rejected recently by this court in Smalley v. State, 546 So.2d 721 (Fla. 1989). The opinion pointed out that Florida's death penalty statute has withstood constitutional challenges in part because of the narrow construction given to this aggravating factor by this court. In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 913 (1976), the United States Supreme Court held that §921.141(5)(h) " . . . provides [adequate] guidance to those charged with the duty of recommending or imposing sentences in capital cases." S.Ct. at 2968. In Maynard v. Cartwright, ___ U.S. ___, 108 S.Ct. 1853, 98 L.Ed.2d 152 (1987), Oklahoma's capital sentencing process was held to be unconstitutional for virtually the same reason as Georgia's had been in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980):

> . . . [A]s a result of the vague construction applied, there was no principled way to distinguish this case, in which the death penalty was imposed from the many cases in which it was not.

108 S.Ct. at 1859.

Significantly, the Maynard opinion suggests Proffitt for comparison. In an earlier case, Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), it was observed:

> The court twice has concluded that Florida has struck a reasonable balance between sensitivity to the individual and his circumstances and ensuring that the penalty is not imposed arbitrarily ox discriminatorily.

In Lawenfield v. Phelps, ___ U.S. , 108 S.Ct. 546, 555; rehearinq denied ___ U.S. ___, 108 S.Ct. 1126, 99 L.Ed.2d 286 (1988), the court concluded that the constitution requires no more than that the process " . , . narrows the class of death eligible murderers and then at sentencing phase allows for consideration of mitigating circumstances and the exercise of discretion," The defense contention that the instruction as given was unconstitutional because it lacked narrowing language overlooks an important fact discussed by the Court in Proffitt. Automatic review is conducted by this court in all cases in which the death penalty is imposed. There is no constitutional requirement that the narrowing process be completed before the jury, it merely begins there.

Point Twelve

ALL FOUR AGGRAVATING FACTORS WERE PROPERLY FOUND BY THE TRIAL COURT.

HEINOUS, ATROCIOUS, OR CRUEL

The trial court found that the defendant had choked the victim three times. He also hit her in the face more than once. She was conscious of what was taking place for several minutes before dying. She would not have died for a minute or two after Hitchcock choked her for the last time. (R 1518). The events surrounding the murder were explained by Hitchcock in the following fashion:

> . . . [S]he said she was hurt, she was gone [sic] tell her mama. I said you can't. And she said I am. She started to get up and I wouldn't let her and she started to holler then. When she did that, I got up and grabbed her by the neck and made her quit hollerin' and I picked her up and I carried her outside and I had my hand over her mouth at the time and we got outside and we was layin' on the grass and I told her Cindy you can't tell your mama. She said I am, said I got to I'm hurt and you just hurt me again. She started to scream then and I got her by the throat and I was chokin' her and, she, I let up and she was screamin' and hit her again, hit her and I hit her twice, I think she was still hollerin' so I choked her and I just kept chokin' and chokin' I don't know what happened I just choked and choked . . .

(R 1467).

In Hitchcock I this court found there was sufficient evidence to support this factor. Id., 747. This factor has repeatedly been upheld in cases in which the victim is strangled to death,

The rationale was explained in Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986):

> We have previous y held that it is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable.

Id., 421, citing Johnson v. State, 465 So.2d 499, 507 (Fla.), cert. denied, U.S. ___, 106 S.Ct. 186, 88 L.Ed. 155 (1985); Adams [v. State], 412 So.2d [850] at 857; Alvord v. State, 322 So.2d 533, 541 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976).

Cynthia's murder involved foreknowledge of death because she was conscious while Hitchcock ". . . just kept chokin' and chokin' . . ." (R 1467). This little girl was subjected to indescribable anxiety and fear. Not only because she was aware that she was being murdered, but compounding her distress was the fact that the man who was killing her, shortly after having sexually ravished her, was her step uncle. No doubt she thought that she could trust him as he lived in her home.

The defense, without the benefit of supporting authority, argues that this aggravating factor does not apply because it is claimed that the evidence does not show a purpose on the defendant's part to cause unnecessary pain (B 64). That element is not included in the standard of analysis laid down by this court in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Even if it were necessary to show a purpose to cause unnecessary pain, the

hitting in the face twice and choking three separate times of a little girl by an adult male clearly reveals that there was a purpose to cause unnecessary pain, particularly when these facts are considered in conjunction with the aggravating circumstance that the murder was committed to eliminate her as a witness to the sexual battery. That finding by the court below (R 1518) negates the claim that "[h]e simply panicked, and impulsively, drunkenly reacted to a situation gone out of his control." (B 64). Also, the defendant's recall of minor detail during his confession to the police belies the claim that the defendant was not cognizant of his actions when he was killing the victim. In addition to specifying his every move and describing precisely what clothes the victim was or was not wearing at given points during the criminal episode, the defendant spontaneously offered a correction to a misconception by the detective near the conclusion of the interview:

> Q [detective]: I don't think I have any other questions.
>
> A [Hitchcock]: When I was chokin' her, I didn't have her like this, I had her like this.
>
> Q: Your [sic] indicating that your, uh, thumbs were together?
>
> A: Right.
>
> Q: Uh, with your hands back to back?
>
> A: Just like this.

(R 1470).

The defense comparison of this case to Rhodes **v.** State, 547 So.2d 1201 (Fla. 1989), is specious. It is true that this court

held that because of the conflicting evidence as to whether or not the victim was conscious at the time of the murder this factor had not been proven beyond a reasonable doubt, That, however, is not the case here, There was no conflict in Hitchcock's statements before trial. Not until he reached trial did he contradict his confessions, but even at trial he never claimed that the victim was unconscious or semiconscious. A mere self-serving denial of culpability at trial certainly is not akin to a situation such as in Rhodes where the underlying evidence contains numerous conflicts. Furthermore, the evidence at all times in this case is uncontradicted that Cynthia Driggers was fully conscious before Hitchcock squeezed the life out of this innocent young girl. And, as the defense concedes in a later point, "[S]trangulations are nearly per se heinous unless the victim may not have been conscious when strangulation began." (B 82). The murder of Cynthia Driggers was unquestionably especially heinous, atrocious or cruel.

SEXUAL BATTERY

The trial court found that the sexual intercourse had not been consensual. Cynthia had been virginal prior to the attack; the medical examiner found a fresh tear in her hymen, The court found that the defendant confessed that she had been hurt prior to the time he began choking her (R 1517). In his statement the defendant admitted that she told him during the sexual act that she was hurt (R 1468). In other words, she was hurt during the sexual battery. The defendant summarized the events leading up to the criminal incident this way:

> I came in about 2:30 [a.m.], I came in through the window in the dining room, went into my bedroom, then I went to Cynthia's room, I went in and uh, me and her had sex and she said she was hurt, she was gone [sic] tell her mama. . . .

(R 1467).

In Hitchcock I, this court addressed this question and held:

> . . . [T]he total circumstances, including the time of night, entry through a window, the victim's tender years, and medical testimony that the child was of previously chaste character, refuted Hitchcock's claim of consent and could be a basis to find that the sexual battery was committed on the victim by force and against her will . . .

Id., 745.

The same or equivalent evidence was presented at the resentencing. Therefore, this court's prior ruling is equally valid now.

The defense claim of an *ex post facto* application of the sexual battery aggravator to the defendant is without merit. The defense acknowledges that sexual battery was a crime when the defendant committed his offense (B 66). Although the aggravating factor was still designated "rape" when he committed the crime, it was proper nonetheless for the resentencing court to find in aggravation that the murder was committed while Hitchcock was engaged in the commission of a sexual battery. In Combs v. State, 403 So.2d 418, at 421 (Fla. 1981), this court upheld the finding of the cold, calculated, and premeditated factor despite the fact that it had been enacted by the legislature after Combs

had committed his crime. A challenge similar to that presented by Hitchcock was rejected by this court in Adams, supra, 856:

> The word "rape" in section 921.141(5)(d) had not yet been changed to "sexual battery". Due process requires only that the law give sufficient notice so that men may conform their conduct so as to avoid that which is forbidden. The act itself, rather than its nomenclature, constitutes the aggravating circumstances.

See also Tompkins, supra, 420.

The law provided sufficient notice to the defendant when the legislature changed the substantive crime to sexual battery in 1975. The fact that the label on the aggravating factor was not changed until after his original trial did not render invalid the finding of this aggravating factor on resentencing.

AVOIDING OR PREVENTING LAWFUL ARREST

The court below found that Hitchcock had murdered Cynthia Driggers to eliminate her as a witness (R 1518). This finding was based upon the facts that she knew him and that he confessed to choking and beating her in order to make her be quiet and not tell her mother what he had done to her. Id. The victim knew her murderer because she was his step niece (R 1047). The defendant explained during his confession why he killed Cynthia and the steps he took afterwards in attempting to conceal his involvement in the crime. As discussed above, he said that he began choking her when she told him that she was going to tell her mother. He carried her outside and ultimately choked her to death because she continued yelling and still said that she was going to tell her mother. His statement continued:

> . . . I don't know what happened I just choked and choked then I started to pick her **up** and I pushed her over in the bushes **and** I got up and left an [sic] I went back in the house went in an [sic] took a shower, washed my shirt an [sic] I went in bedroom and I laid down, at's [sic] all I can tell you. (R 1467).
>
> . . .
>
> Q: What was the reason for washing your shirt?
>
> A: I don't know, I tryin' to cover up I guess. (R 1469).
>
> Q: Okay, you say that you washed your shirt. What was the reason that you washed your shirt other than tryin' to coves up? Did you have something . . .
>
> A: Had blood on it.
>
> Q. Did you have blood on your face also?
>
> A: **Yes, I did. (R** 1470).

He testified consistently to the above statements (R 1053). He also said that he attempted to cover up his participation in the crime by pushing out the kitchen screen, leaving the window open and knocking a few things over, Id. He also testified that he carried out a charade the next day by pretending to help look for her body (R 1054 - 1055). This court considered this factor in Hitchcock I and held:

> In his post-arrest statement Hitchcock said that he choked and beat the child to keep her from telling her mother. In view of proof this strong, murder to eliminate a witness is properly considered in aggravation.

Id., 747.

The same statement provides the foundation for the instant finding. The proof has not diminished over time and, therefore, the factor was properly found below.

UNDER **SENTENCE OF IMPRISONMENT**

The defense concedes that Hitchcock was on parole (B 70, see R 534; 718 - 721; state exhibit P-1). In Hitchcock I this court noted that the original sentencing judge could have found this aggravating factor, Id., 747, n. 6. See also Carter v. State, 14 F.L.W. 525, 526 (Fla. October 19, 1989); Chandler, supra, 704.

The defense expressly waived any objection to the introduction of the documentary evidence of the defendant's parole status when counsel advised the court: "We do not have a good faith argument to the admission of those two documents." (R 694). Counsel again waived any claim of error by stating: "We cannot object, judge. We don't have a good faith basis." (R 695). After some other matters were discussed the defense explicitly waived objection yet a third time (R 717). During a conference on jury instructions the defense objected to an instruction on this factor because there was "[n]o proffer; no presentation; no proof made by the state. Law of the case waiver, estoppel, invited error should apply." (R 956). No objection was raised when the jury was instructed on this factor (R 1239) or after the instructions were completed, other than those previously raised (R 1248).

The various constitutional arguments regarding this factar were waived below because they were never presented to the trial court and they are not facial attacks on the statute. D'Oleo-Valdez; Bertolotti, supra. By definition the defense contention that the equal protection and cruel and unusual punishment aspects were facial attacks because of the construction given this section by this court is spurious (B 74, n. 91). The subsequent judicial interpretation obviously does not appear on the face of the statute. "The constitutional application of a statute to a particular set of facts . . . must be raised at the trial level." Trushin v. State, 425 So.2d 1126, 1129 -1130 (Fla. 1982). Because none of the bases now grounding the claim were ever presented to the trial court and because judicial construction affects the subsequent application of a statute this claim is barred from consideration now.

In the event that this court should find an aggravating factor was improperly found the death sentence should nonetheless stand. In Cherry v. State, 544 So.2d 184 (Fla. 1989), this court affirmed a death sentence after striking an aggravating factor and three aggravating factors remained. Similarly, should an aggravating factor be stricken the sentence should be upheld on the basis of the multiple remaining aggravating factors and because only the statutory mitigating circumstance was found to be significant.

Point Thirteen

THE DELAY IN RESENTENCING DOES NOT REQUIRE THE IMPOSITION OF A LIFE SENTENCE IN THIS CASE.

The defense incorrectly contends that speedy trial should apply to capital resentencings, despite acknowledging that this court has not ruled on the issue (B 74). The court in Lee v. State, 487 So.2d 1202, 1203 (Fla. 1st DCA 1986), held that speedy trial rights were not applicable, rather, any delay in the imposition of sentence was to be tested by due process standards. The defense also contends speciously that due process, fundamental fairness and the eighth amendment require that a life sentence be imposed because the delay was through no fault of his own (B 78). Parenthetically, the defense argues that the eighth amendment is implicated so " . . . that a defendant not suffer the added punishment of death when through no fault of his own, a delay prejudiced his case for life." Id. (emphasis added). In this case, of course, the death sentence does not represent additional punishment because Hitchcock was sentenced originally to death. Although the United States Supreme Court remanded for resentencing, none af the courts which have reviewed this case have held that the death penalty was unwarranted on the facts of this case. Furthermore, the delay was not occasioned by any impropriety by the state, His claims were being litigated after initiation of proceedings by the defense. The state, not surprisingly, advocated a contrary position and the courts ruled.

The defendant's claim fails because he was not prejudiced by the time which passed between the original proceedings and the

resentencing. The first contention of prejudice is that the defendant was subjected to additional restrictions on death row and he suffered anxiety during his lengthy wait for an execution (B 75 - 76). He also claims prejudice because he was in a position that required him to present death row inmates to testify in his behalf (B 77). As "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments", Henderson v. State, 463 So.2d 196, 200 (Fla. 1985), so, too, should child murderers expect to be lodged in a restrictive environment with those of similar kind. The operative ward in the defense contention is "wait". Because the death sentence is so obviously appropriate in this case it defies logic and common sense to claim that what has turned out to be an 11 year reprieve from his inevitable electrocution is prejudicial to Hitchcock.

There was no prejudice in excluding the testimony of Richard Greene because the trial court considered the mitigating circumstances by way of equivalent evidence introduced through the testimony of others. Also, the court found circumstances in mitigation based upon that evidence (see point four for extended discussion). Nor was he prejudiced because he was the only one that could testify that the burglaries he had committed in Arkansas all were committed on one evening (B 76). The court did not consider the crimes in aggravation (R 1517). The crimes were mentioned in the findings only to explain the reason that he was on parole (R 1516).

Hitchcock was not prejudiced because Detective Nazachuk could not remember whether or not the defendant had turned himself in. The court below considered that fact as though it had been established (R 1520). Furthermore, it is unlikely that this officer could have testified to that effect at any time. He explained to the defense attorney below that he had not been present when the defendant arrived at the Winter Garden police department (R 531). Defense counsel used a report by Sergeant Doss to try to refresh the detective's memary. Doss was one of the police officers whose guilt phase testimony the defense sought to introduce through the use of a transcript (R 716). However, the court preferred live testimony by Doss and the other officer whose testimony was sought in the same fashion, The other officer eventually was located and came to the courthouse. However, the defense never called him or again sought to introduce Doss' earlier testimony despite the fact that the trial court had not ruled it inadmissible (R 790).

The defendant was not prejudiced when the resentencing judge refused to instruct the jury on the voluntariness of his extrajudicial statements because the issue had been resolved in the guilt phase. Chandler, supra.

The delay did not prejudice the defendant because he aged over the 11 years (B 77, n. 94). The trial court found his age to be the only significant mitigating factor (R 1518).

Nor was the jury " . . . incurably prejudiced by the display of force in the court area, in response to the inmates' presence." There simply was no evidence whatsoever of any

prejudice caused by security measures (B 77, n. 95; see point three).

In sum, the length of time which has passed does not require the imposition of a life sentence because Hitchcock has not been prejudiced thereby. Further, as was the case in Lee, supra, there was no purposeful or oppressive delay occasioned by actions of the state.

Point Fourteen

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL.

The assorted challenges to the penalty are procedurally barred because they were never presented to the trial court. Bertolotti, supra. Althaugh the challenges are founded on constitutional grounds they can were waived because they are not facial attacks on the statute. D'Oleo-Valdez, supra.

APPLICATION OF THE HEINOUS, ATROCIOUS, OR CRUEL FACTOR

Review is not available on this contention. It was not presented to the court below. The argument by the defense is not a facial challenge to the statute which could be reviewed. Trushin, supra. Rather in essence it focuses on what it claims to be are inconsistent rulings by this court in previous death penalty cases.

The defense incorrectly argues that application of the heinous, atrocious, or cruel aggravating factor is unconstitutional, The statute is constitutional because it provides for the constitutionally required narrowing of those murderers who are subject to imposition of a death penalty (see point ten for extended discussion). Contrary to the defense contention, this court does provide guidance to the sentencing judge. Despite claiming inconsistencies, the defense points out that this aggravator has been applied consistently to stabbings (B 81), beating deaths (B 82), and strangulations, id. As with any rule, there are exceptions. The Cases cited by the defense reveal merely an evolution in the case law. Furthermore, there are always factual distinctions among all cases which lead to

differing results. The shortcoming of the defense assertions can be shown by pointing to the two cases which it claims . . . shows how meaningless this limitation has become." (B 84). Grossman, supra, is compared to Brown v. State, 526 So.2d 903 (Fla. 1988). Both cases have in common murders of law enforcement officers which were preceded by a physical attack. However, the rationale applied to both is consistent. The factor was found to be inapplicable in Brown because " . . . the fatal shots came almost immediately after the initial shot to the arm. . . . and the evidence disproved that it was committed so as to cause the victim unnecessary and prolonged suffering." Id., 907 (citation omitted). The finding of this aggravating circumstance was upheld in Grossman because:

> . . . [T]he murder was preceded by a brutal beating. Appellant's statements indicate that he struck the offices twenty to thirty times with a heavy-duty flashlight but was unable to beat her into unconsciousness or to subdue her despite his large size and the assistance of Taylor. The ferocity of the attack and the ferocity with which the officer defended herself, coupled with her knowledge that appellant was attacking to prevent a return to prison, lead inevitably to the conclusion that she knew she was fighting for her life and knew that if she was subdued or her weapon taken, her life would be forfeited.

Id., 840 - 841.

There is no material inconsistency in the holdings. The defense argument overall is advanced by focusing on common facts within the holdings, which are then viewed in isolation. The defense does not establish, indeed because it cannot, that the rulings of this court on this issue have no consistency.

"REASONABLY CONVINCED"

This claim should not be reviewed because i was not raised below. The words "reasonably convinced do not appear in the death penalty statute. Hence, this is not a facial attack on the statute.

The claim by the defense that the words "reasonably convinced" in the standard instruction " . . . encourages sentencers to ignore much of the most important mitigating evidence presented by the defense, creating an even greater inequity" (B 86) is tenuous at best. It points to the fact that "[t]his Court has not defined 'reasonably convinced"' (B 85). It then nonetheless argues that the Florida statute is unconstitutional on the authority of a federal court ruling which determined that Arizona's statute is unconstitutional because it requires that mitigating factors be proven by a preponderance of the evidence. Adamson v. Ricketts, 865 F.2d 1011, (9th Cir. 1988). By comparing "reasonable convinced" to "clear and convincing evidence", without any authority to suggest that the terms are comparable, the defense concludes that the standard in the Florida instruction " . . . is more restrictive than the Arizona law struck in Adamson." (B 86). As "reasonably convinced" has not been defined the defense contention is mere conjecture.

Furthermore, it is not even clear that the words establish a standard of proof. If that view of the standard instruction, which was quoted verbatim by the judge in instructing the jury (R

1245), is accepted, it does not serve to encourage the jury to ignore mitigating evidence. The instructions provide in material part:

> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.
>
> A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

34 Fla. Stat. Ann. 474 - 475 (emphasis added) (1989). See also subsequent instruction which includes the following: "Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence." Id., 475 (emphasis added); (R 1246).

The jury is instructed to consider all mitigating evidence. When the challenged language is not considered in isolation, but with the language that immediately precedes it, a "reasonable juror" would not have interpreted the charge as encouraging it to disregard relevant evidence in mitigation. Cf. Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 1971, 85 L.Ed.2d 344 (1985).

This leads to two other issues. Even if the instruction did so encourage the jury, the court is the sentencer. Grossman, supra. As a result, any misapprehension by the jury is

minimized, More importantly, however, is that the jury should properly consider only relevant evidence in making its determination whether or not to recommend a life or death sentence. Hitchcock v. Duqqer, supra, S.Ct., 1824. "Relevant evidence is evidence tending to prove or disprove a material fact." §90.401, Fla. Stat. (1987). Therefore, for evidence to be relevant it would have to reasonably convince a juror that it existed **before** a juror would consider it in mitigation if he or she were a reasonable juror,

The immediately preceding conclusion is not at odds with the holding in Adamson. The court objected to the Arizona statute in part because " . . . if facts are found relevant to mitigation, then those mitigating facts are indeed precluded from the weighing stage if the defendant is unable to meet the evidentiary burden imposed by the Arizona statute." Id., 1041, n. 46. Not only are juries in Florida explicitly instructed to consider all of the mitigating evidence, such consideration is inescapable because of the jurors' task of determining whether or not they are reasonably convinced that the mitigating circumstances exist. It can be argued that under the Arizona scheme the evidence must inescapably be considered in determining whether or not the mitigating circumstance has been proven by a preponderance of the evidence. One of the shortcomings by the **defense** in relying on Adamson is that the jury plays no role in the sentencing process. Therefore, any analogy is strained. A judge understands the esoteric "preponderance of the evidence" standard. However, it requires defining before a lay juror can apply it. "Reasonably

convinced", on the other hand, are common words which can be readily applied by a reasonable juror. More importantly, the Arizona jurors' are required first to determine if the evidence meets the threshold preponderance standard. Only if the evidence is found to meet the standard may the judge consider whether or not it establishes a mitigating circumstance. Florida juries, on the other hand, consider all of the evidence without any need to make preliminary determinations regarding the mitigating evidence.

The defense also argues that the judge should have instructed the jury that it could recommend life even if it found aggravators but no mitigators to ensure that the jury would consider all mitigating circumstances (B 86 - 87). First of all, there is no nexus between such an instruction and ensuring consideration of all mitigating circumstances. Furthermore, such an instruction would improperly lead the jury to believe that it could ignore the standard instruction on weighing the evidence. Secondly, as pointed out above, the standard instruction advises the jury to consider all of the evidence in mitigation. Since the jury is so instructed, the remaining issue is whether generally the trial court was required to give the type of instruction urged, This court has addressed that issue and held that this type of instruction need not be given. DuFour v. State, 495 So.2d 154, 163 (Fla. 1986) (citation omitted), cert. denied 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987).

PRESUMPTION

This, too, is barred for the same reason as the other contentions under this point. Although the death penalty statute does require a weighing of the evidence, it does not provide any presumptions. The defense argues that one is present as a result of the statutes construction by this court in other cases. That, however, does not make this a facial challenge.

The defense portrays the weighing process required under **8921.141,** Fla. Stat. (1987), as providing a presumption for death. (B 87). This contention conveniently bypasses the fact that initially there is a presumption that a life sentence is appropriate. Accepting, *arguendo,* that the burden of proof analogy is appropriate, it is upon the state which must first prove aggravating circumstances beyond a reasonable doubt before a death sentence may even be contemplated. **34** Fla. Stat. Ann. **474; (R** 1245). The jury is also instructed: "If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for 25 years. Id., **473;** (R 1240). This is the only situation under which the jury is instructed that it must impose a particular sentence. The standard instructions do not at any time instruct the jury to recommend a death sentence. The defense uses the word "impose" in making its point but, of course, the judge imposes sentence (B 87). Rather, the jury is instructed to consider whether there are mitigating circumstances that outweigh the aggravating circumstances. E.g., **34** Fla. Stat. Ann. 473 - 474 (R 1240). The language simply does not presume that death is appropriate or require its impasition.

The weighing process simply does not provide a presumption of death. The jury is instructed to consider all mitigating evidence and the judge is required to by §921.141(3), Fla. Stat. (1987). Furthermore, if the statute did not delineate the appropriate circumstances under which the death penalty could be imposed it would likely be held unconstitutional for failing to provide adequate guidance in reserving " . . . its application to only the most aggravated and unmitigated of most serious crimes." Dixon v. State, 283 So.2d 1, 7 (Fla. **1973).**

Contrary to the defense claim, the weighing process enhances the constitutionality of Florida's statute. The Supreme Court considered the process used by Florida and held that the statute focused the trial court's sentencing discretion on the circumstances of the individual murderer and his crime. Proffitt v. Florida, **428** U.S. 242, **96** S.Ct. 2960, **2969,** 49 L.Ed.2d **913** (1976). In Lowenfield, supra, **554,** the Court acknowledged that most states require **the** finding of at least one aggravating circumstance before a death sentence could be imposed. It found that the jury thereby narrowed the class of death eligible persons. Id. It went on to hold that the constitution requires no more than such a narrowing and for the consideration of mitigating circumstances and the exercise of discretion at sentencing. S.Ct., 555. Florida's capital sentencing process properly guides both the jury and judge. Its further enhanced by the automatic review of death sentences by this court.

Point Fifteen

THIS CLAIM IS PROCEDURALLY BARRED BECAUSE THE DEFENSE REQUESTED THE SYMPATHY INSTRUCTION.

Not only did the defense not move to strike the standard guilt phase sympathy instruction given as is conceded (B 90), the defense affirmatively requested it. Counsel stated at the charge conference: "**We** would request **2.05** rules for deliberation." (R *950).* The ensuing discussion is somewhat confusing as the court expressly stated that paragraphs five and six would be eliminated. It mentioned other paragraphs that would be given, but did not mention paragraph eight, which contains the sympathy instruction. (R 951; see Fla. Std. Jury Instr. (Crim.) 2.05). However, a portion of the instruction was read during the discussion (R 950). However, it is clear that the defense wanted the instruction because **no** objection was voiced when the instruction was given (R 1244). Also, after the jury charge the defense informed the court that it had no objections to the instructions as given other than those raised previously and had no request for additional instructions other than those previously requested (R 1248).

Because the **defense** created the situation at trial about which it now complains, its claim is barred from review. Herrera, supra. The defense implies that this issue has **been** preserved because it had requested instructions " . . . which would have helped cure the damaging instruction." (B *90).* That, however, does not save this issue for review because the specific ground had to be presented to the trial court. Bertolotti, supra.

CONCLUSION

The sentence of death imposed upon James Ernest Hitchcock should be affirmed.

Respectfully submitted,

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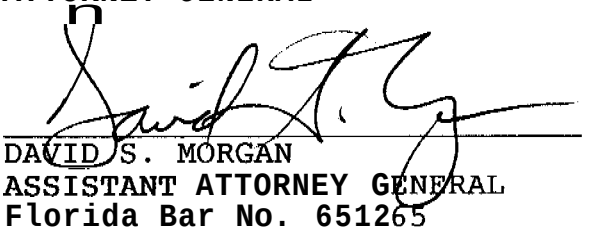
ATTORNEY GENERAL



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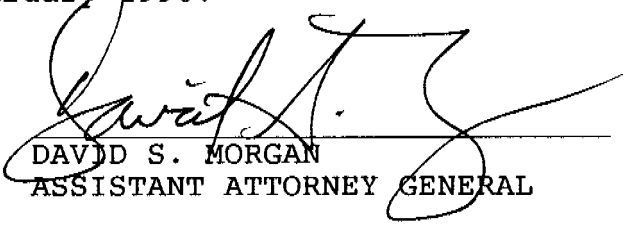
CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Steven H. Malone, Assistant Public Defender, the Governmental Center, 9th Floor, 301 N. Olive Ave., West Palm Beach, FL 33401, by mail delivery on this 24- day of February 1990.



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