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IN THE

SUPREME COURT OF FLORIDA

JAMES ERNEST HITCHCOCK,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 72,200

AMENDED INITIAL BRIEF OF APPELLANT

(On Appeal from the 9th Judicial Circuit
In and For Orange County, Florida)

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III. STATEMENT OF THE CASE AND FACTS

A. Statement of the Case.

James Ernest Hitchcock was indicted for premeditated murder in the death of Cynthia Ann Driggers. R 1357. He was convicted as charged and sentenced to death. This Court affirmed the conviction and sentence. Hitchcock v. State, 413 So.2d 741 (Fla. 1982), cert. denied 459 U.S. 960 (1982). A Motion to Vacate Judgment and Sentence was denied, and this Court affirmed in Hitchcock v. State, 432 So.2d 42 (Fla. 1983). Mr. Hitchcock filed a habeas corpus petition in the United States District Court, which denied relief. A panel. of the Eleventh Circuit affirmed that denial, Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1985). The en banc court vacated the panel's decision, but then affirmed. Hitchcock v. Wainwriuht, 770 F.2d 1514 (11th Cir. 1985) (en banc). The Supreme Court granted certiorari and vacated the death sentence, ordering the writ to be granted unless Florida reaentenced Mr. Hitchcock in a constitutional proceeding or imposed a sentence less than death. Hitchcock v. Dugger, 107 S.Ct 1821 (1987).

The trial court heard several defense motions before the sentencing proceeding.[1] The sentencing hearing was held before jury, which recommended death by a vote of 7 to 5. R 1473. On February 24, 1988, after hearing additional evidence, the trial court sentenced Mr. Hitchcock to death. R 1498.

The court found four statutory aggravating circumstances and numerous mitigating circumstances, R 1517-1519, and imposed the sentence of death. Mr. Hitchcock filed a Notice of Appeal on March 23, 1988. R 1522.

B. Statement of the facts.

1. The Character of Mr. Hitchcock.

i. Life of James Ernest Hitchcock before the death of Cynthia Driggers.

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[1] The Court granted the defense Motion in Limine - Previous Sentence. R 1367-1368, 1277. The Court denied the defense Motion to Preclude Imposition of Sentence of Death - Delay. R 1371-1373, 1302, and the defense Motion to Reetrict Potential Aggravating Factors. R 1374-1375, 1313. The Court quashed a subpoena for Assistant State Attorney Micetich and ordered no mention of plea bargaining be made and denied a defense motion to prohibit the state from arguing the case merits a death sentence. R 13. The Court granted a defense motion to prohibit victim impact testimony, R 16, but denied a defense motion to restrict the state from arguing the jury's role was merely advisory. R 19.

James Ernest "Ernie" Hitchcock[2] was born in 1956 in Osceola, Arkansas and was raised in a town called Manila. R 908, 1034. The area was severely under-developed, the local economy dependent almost entirely on growing cotton. R 837-8, 887, 894. Even by the 1980's, indoor plumbing had not been installed in his mother's house. R 887. Picking and chopping (weeding) cotton did not become mechanized until the 1970's. R 836, 892. Children would work and dropped out of school at a young age to support their families. R 836, 891, 894. They married and began new families as young teenagers. R 1049.

For Mr. Hitchcock, hard times began at age seven when his father died of facial cancer after a long illness. R 890-1, 1034, 1161. The youngster was strongly affected by this death. R 894. The family, which then had six or seven dependent children, R 893, lost a major source of income, and Mr. Hitchcock's mother was hard pressed to make ends meet. R 918, 1161. She continued working in the cotton fields. R 1035, 1161. She made her children clothing out of flour sacks. R 1165. The house had no indoor plumbing; the family had to put cardboard on its walls in an effort to keep out the cold. R 923. When the seasonal cotton jobs ended, the family got by on social security of $60.00 a month. R 1165.

Although the local schools timed classes to coincide with the cotton season, Ernie Hitchcock was not able to stay in school past the seventh grade. R 1034, 1165. He began picking cotton at age eight or nine and chopping it at ten or eleven. R 1035, 1166. Much of his money went to the support of his family. R 1161, 1162. Manila was an all white town, but Mr. Hitchcock attended largely black schools. R 1038. He often worked with black people; he never showed signs of racial prejudice. R 1037-8.

When Mr. Hitchcock was thirteen, his mother married Ed Galloway, an alcoholic who verbally abused'and beat Mr. Hitchcock's mother, especially when he was drunk. R 895-6, 918, 1035, 1163. The beatings were severe and at leaet once resulted in injuries to his mother which should have been treated, but were not. R 1163. Mr. Hitchcock became angry and distressed and left home around age thirteen. R 921, 1035-6, 1164. Through his teenage years, he stayed with various family members including his Uncle Charlie Hitchcock, sonny Hitchcock and his

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[2] James Ernest Hitchcock has a brother named James H. "Sonny" Hitchcock. For clarity's sake, this brief will refer to James Ernest Hitchcock as Mr. Hitchcock or Ernie Hitchcock and James H. Hitchcock as Sonny Hitchcock.

wife, Richard and Judy Hitchcock, and his grandmother. R 897, 909, 924, 1036.[3]

Elizabeth McMahon, an expert in forensic psychology, R 1114, testified that a life sentence was appropriate €or Mr. Hitchcock. She had provided sixteen clemency recommendations in the past, but only recommended clemency in three, including Mr. Hitchcock. R 1140. she conducted a clinical interview and administered formal psychological tests upon Mr. Hitchcock. R 1114-5. McMahon testified that Mr. Hitchcock suffered from emotional neglect as a child. R 1121. The death of his father at an age when most children internalize parental discipline contributed to later immaturity. R 1123. His mother was emotionally abeent because of financial difficulties. R 1124. Mr. Hitchcock only remembered his stepfather for his abuse of his mother and for taking him to a bar. R 1125. He lacked role models to show how to handle anger and stress. R 1122. His reactions to social problems were immature: he would run away, repress, avoid, and deny. R 1122. Richard was hie primary male role model. R 1125. By the time he was twenty, Ernie Hitchcock depended on avoidance and had no other coping mechanism for anxiety. R 1129. He was likely to take the blame for others, especially Richard, and had low self-worth. R 1130.[4]

Mr. Hitchcock worked hard, although not continually, after leaving home. R 1036, 1042. He contributed money to the family members with whom he lived and took care of his sisters' children. R 897, 912. Mr. Hitchcock testified he was a good worker. R 1042.[5] During this time, Mr. Hitchcock saved the life of his

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[3] The defense proffered testimony of Martha Galloway and Brenda Reed, sisters of Richard and Ernie Hitchcock, that Richard Hitchcock sexually and physically assaulted them when they were youngsters. R 1012-3, 1015-7. The trial court excluded evidence of Richard's violence against his sisters as irrelevant. R 1099-1101. However, the State was allowed to establish that Carroll Galloway, a defense witness who resides in Arkansas, did not have a criminal record, R 840-3, and argue Mr. Hitchcock's upbringing did not reduce his culpability since those raised in like circumstances were law abiding. R 1213.

[4] On cross, the State brought out the doctor's belief that as a young man, Mr. Hitchcock might have sudden reactions if his avoidance did not work. R 1147. He might exercise poor judgment. R 1150.

[5] A gaod deal of testimony about Mr. Hitchcock's work habits was lost due to the delay in hearing his case. The defense proffered hearsay testimony to attempt to make up for this loss. Two declarants, Charlie Hitchcock (Ernie Hitchcock's uncle) and G.E. Motley (a farmer in Arkansas) both of whom are dead, had said Ernie Hitchcock worked under their supervision and was an excellent worker. R 846, 850. A police officer, also deceased, would have confirmed that Ernie Hitchcock had a reputation for hard work in his community. R 849. His supervisors told how Mr. Hitchcock got along well with the other workers and did not get into fights. R 849, 850-1. The State objected that the proffer was unrebuttable hear-

uncle, Charlie Witchcock, at some risk to his own. His uncle fell into a canal and could not swim. R 910. Mr. Hitchcock jumped in and managed to get him out. Ibid. The jury heard about the incident through Wayne Hitchcock, Mr. Hitchcock's cousin, but the uncle had since died. R 911. The Court refused a hearsay proffer of the uncle's version of what happened. R 851, 874, 942.

One night, when he was seventeen, Mr. Hitchcock and a friend began daring each other, and Mr. Hitchcock and another broke into five businesses. R 1038-9. They were caught and the property was returned. R 1039. Mr. Hitchcock was found guilty of the crimes and sent to prison. R 1040. After prison Mr. Hitchcock could not find work, so he and his cousin came to Florida to pick fruit. R 913, 1040. This move violated the terms of his Arkansas parole; he was on parole at the time of the offense. R 695, State Exhibit P-1.

ii. Mr. Hitchcock's future non-dangerousness, ability to succeed in prison, and improvements in character while in prison.

a. Mitigating circumstances allowed in evidence.

Two experts testified to Mr. Hitchcock's current social abilities and character. Elizabeth McMahon had recently reinterviewed Mr. Bitchcock and found significant changes in him compared to her earlier evaluation. While there were remnants of avoidance and dependency needs, he had much better interpersonal skills. R 1133. He could verbalize better, modulate his emotions, R 1134, and be empathetic. R 1133. Being a mediator was consistent with his new skills and made violence less likely. R 1135-6. He was introspective and more philosophical. R 1136. McMahon stated Mr. Hitchcock should do well in the general prison population and be an asset due to changes in his character and partly based her recommendation on that conclusion. R 1139.[6]

Michael Radelet was accepted as an expert in sociology to testify to the future non-dangerousness of Mr. Hitchcock. R 725.[7] Radelet testified that the probability of future dangerousness by Mr. Hitchcock was minuscule. R 738. His

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say and in most respects repetitious. R 862. The trial court sustained the hearsay objection. R 873-5, 942.

[6] The prosecutor asked McMahon about a portion of her clemency report. The trial court denied a defense motion to introduce the entire document. R 1145.

[7] Radelet has a Doctorate in Sociology and some post-doctorate education in psychiatry. R 723. He currently teaches at the University of Florida. R 722. He has testified numerous times and published widely. R 724-5.

opinion was based on a series of statistical categories[8] relating known variables of Mr. Hitchcock's history to future dangerousness.[9]

The defense presented witnesses to establish Mr. Hitchcock's character development since entering prison. Eight death-row blockmates testified to positive acts by Mr. Hitchcock. Darryl Hay told how Mr. Hitchcock helped him get a radio after hie was stolen, shared canteen with him, and helped him study for his graduate equivalency degree. R 771-2. Arthur Dennis Rutherford testified how Mr. Hitchcock helped him adjust to life in prison. R 785-6. Amos Robinson testified that Mr. Hitchcock treated black inmates fairly despite racial tensions at the prison. Mr. Hitchcock also bought Robinson tennis shoes when he had none. R 793. James Morgan told how Mr. Hitchcock helped him read letters and taught him to read and write. R 798-9. Jerry White affirmed Morgan's testimony and added that Mr. Hitchcock never treated black people differently because of their color. R 810. Charles Kenneth Foster said Mr. Hitchcock talked him out of at- tacking a corrections officer. R 814. Jim Eric Chandler had seen much violence in prison, but never saw Mr. Hitchcock be violent; Mr. Hitchcock tries to help people. R 819. Gregory Kokal told how Mr. Hitchcock calmed two inmates about to fight. R 824.[10]

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[8] More education means less likelihood of future violence. R 734. Where violence occurs at a older age, future violence is less likely. R 735. No mental hospitalization correlates with future non-violence. R 736. Community ties make an inmate easier to control and less likely to commit violence while in prison. R 736. Homicides cammitted against family members are less likely to indicate Euture violence than homicides against strangers. R 737. A long history of violence getting progressively worse strongly indicates future violence. R 738. Degree of premeditation also correlates with future dangerousness. R 732.

[9] The court sustained a State objection to questioning whether Radelet believed the crime at bar wae especially premeditated, R 733, or whether Mr. Hitchcock was well educated under the education category. R 735. Radelet did testify his opinion was based on his beliefs that Mr. Hitchcock had no significant history of mental hospitalization, R 736, had community ties, R 737, and no previous arrests for violent behavior. R 738.

[10] All of the inmates admitted to felony convictions on direct exam. R 772, 785, 793, 799, 809, 814, 818, 823. On cross, the Court allowed the prosecutor to bring out that the witnesses had received death sentences over defense objections. R 777, 787, 794, 807, 811, 815, 821, 825. Most opposed the death penalty. R 780, 795, 807, 811, 816, 821, 826. Rutherford, Robinson, Kokal suggested they were not guilty of the crimes for which they were convicted. R 780, 795, 827. The prosecution brought out that the inmates did not know of Mr. Hitchcock's background and the crimes he committed except what he told them or what the newspapers said. R 778-9, 707, 795, 807, 811, 820, 825. Foster had read Mr. Hitchcock's trial transcript. R 815. Kokal admitted Florida State Prison was a closely supervieed environment. R 825.

Richard Greene, Mr. Hitchcock's clemency attorney, proffered testimony in various areas, part of which was refused as set out below. Greene did testify that Mr. Hitchcock got his graduate equivalency degree in 1981. R 884. Mr. Hitchcock's mother testified that this GED was the family's first high school graduation in the family. R 1166. Greene related that Mr. Bitchcock began to read widely. R 884. He spoke about the 1984 elections and exhibited mare self-awareness and insight. R 885. His letters show increased verbal skills, R 006, and he continues to take college level correspondence courses. R 885.

Mr. Hitchcock's relatives testified he kept a regular correspondence with them, taking an interest in their affairs and trying to cheer them up. R 901-3, 904-6, 908, 1167-72. He often draw5 cards and pictures to his mother, R 1169-71, and does not complain of his own situation. R 902, 906, 1172.

Mr. Hitchcock himself testified about his development since entering prison, confirming much of the above. He said that after he and William Harvard tried to cut some bars in 1980 and were caught, he realized that he needed to change in prison. R 1065. He began educating himself and maturing. R 1062, 1066. Despite racial tensions in prison, he does not discriminate on the basis of race. R 1066. He has had seven disciplinary reports in eleven years. R 1058. Aside from the escape report, they included disobeying an order by refusing to come off the yard, R 1058, not shaving, R 1059, refusing a regulation haircut, R 1060, and unacceptable hygiene (found invalid due to his illness at the time). R 1063. He also destroyed state property when he took a panel off a door. R 1059. He was found guilty of disorderly conduct by unauthorized contact with a female visitor. R 1062.[11]

b. **Mitigating circumstances kept out of evidence.**

The defense proffered mitigating testimony concerning Mr. Hitchcock's present character which was excluded by the trial court. Richard Greene was not allowed to testify that Mr. Bitchcock had undergone a tremendous change relative to other death row inmates with whom Greene had contact or that he showed

[11] The prosecutor claimed over objection that the unauthorized contact with a female visitor which Mr. Hitchcock testified had occurred was masturbation. R 1073. Mr. Hitchcock denied masturbation had taken place. Ibid. Mr. Hitchcock also testified on direct that he was disciplined for the 1980 escape attempt, and that he never would have gotten out. R 1061. On cross, he admitted being forced by prison authorities to return a writing correspondent's money, but denied he had misled the person into sending it. R 1074-6.

maturity and self-reflection. R 856. The court ordered Greene not to testify Mr. Hitchcock displayed sympathy toward others and excluded his testimony about Mr. Hitchcock's friendship with David Washington and the effect of Washington's execution on Mr. Hitchcock. R 860. Mr. Hitchcock showed his sympathy for others in a powerful letter to Greene after Greene witnessed an execution. Id. The State's objection to this evidence was sustained over the defense contention that it was relevant to Mr. Hitchcock's character. R 865-6, 870, 871, 875.

The trial court and state accepted a speaking proffer as to other testimony by Greene, R 1099, that William Harvard, who was punished along with Hitchcock for cutting bars at the prison, had been sentenced to life, R 1100, but the trial court excluded the evidence as irrelevant. R 1101.

The court: excluded transcript testimony from the guilt phase of the officer to whom Mr. Hitchcock surrendered attesting that he had done so voluntarily. The court ruled defense counsel had not made a showing of unavailability.

The defense proffered Elizabeth McMahon's testimony about a study she had conducted comparing life-sentenced and death-sentenced inmates. The defense argued the testimony was relevant to give the jury an overview of who receives death sentences, R 1007-8; the court denied the proffer. R 1008.

The court accepted a memorandum by Radelet as a proffer of testimony. R 698, Court exhibit 1, Supp.R. Five of the six areas mentioned were excluded.[12] In addition, Radelet was not allowed to testify fully to the basis for his opinion that Mr. Hitchcock would not be dangerous in the future. R 733, 735.

2. The circumstances of Cynthia Driggers' murder.

The parties presented diametrically different versions of the murder of Cynthia Driggers. The State argued, in short, that Mr. Hitchcock sexually battered the girl and then strangled her to avoid detection and arrest. Mr. Hitchcock maintained that his brother found Cynthia and him after they had just finished voluntary sex, and that Richard lost his temper and strangled Cynthia

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[12] The trial court forbade testimony that Mr. Hitchcock's execution would not deter others. Radelet was prohibited from testifying about the cost of executing Mr. Hitchcock (one veniremember had expressed concern about the cost: of keeping defendants in prison for life, R 85), lingering doubt where the confession was retracted, and the conditions Mr. Bitchcock would face if sentenced to life and how those conditions would constitute retribution. The trial court sustained relevancy objections to these matters. R 705-6.

in a rage. Mr. Hitchcock helped his brother hide the body and made a false statement, in part, to spare his brother from prison.

i. The State's evidence.

On the night in question, the family was watching television. R 504. Cynthia, age thirteen, was the eldest of five children there. R 478-9. Mr. Hitchcock, who was residing at the home, went out drinking; the family retired with Cynthia going to bed before Richard, who locked up with Ernie not yet: home. R 505. The next morning, Judy Hitchcock could not find Cynthia. R 506. Richard testified he searched the neighborhood and drove around the area. R 506-7. Ernie Hitchcock was asleep and woke up later, Ibid, going with Richard to search the road. Richard eventually dropped him off to search in town. R 508. Richard returned home and found the body in some bushes in the backyard later that afternoon. R 509.

Richard denied involvement in his stepdaughter's death. R 512. He testified he had arthritis and that at the time of the crime, his spine was in a C shape, rendering him unable to lift Cynthia. R 510-1.[13] He testified that he cooperated with the police and voluntarily gave hair and blood samples. R 513-4.

The police collected a wet shirt belonging to Mr. Hitchcock from the clothesline at Richard's house, R 490, *520,* and a pair of jeans from the floor of the room Ernest Hitchcock used which (an expert later stated) had human blood of Cynthia's type. R 672. The medical examiner testified Cynthia Driggers was strangled and hit on the face and head, and died from strangulation. R 565. It would have taken one to three minutes for her to have died, R 572, and she would have passed out before death. R 574. The blows to the head happened before death. R 573. Several hairs were found on her body and vagina. R 488, 568. Testimony from the original trial by a hair expert, Diane Bass, was read to the jury over hearsay objections. R 592. The testimony was play acted with Steve Platt, the blood analyst now chief of operations Jacksonville Regional Crime Laboratory, R *663,* reading the part of Diane Bass. According to that testimony, the hairs were consistent with those of Ernie Hitchcock or the victim and not

[13] On cross, he testified a subsequent accident and operation had straightened his spine. R 516.

consistent with those of Richard Hitchcock. R 631, 635-6, 636-8, 641.[14] Semen retrieved from the vagina of Cynthia Driggers was from a blood secretor type consistent with Ernest Hitchcock's blood type. R 567.

The State published a custodial statement by Mr. Hitchcock taken by Det. Nazarchuk. At the time, Mr. Hitchcock was under arreat far violation of parole. R 534. A tape of the statement was played while the jury followed a transcript signed by Mr. Hitchcock within a few days after making the tape. The published recording was not reported; the transcript appears at R 1466-71.

According to the statement, Mr. Hitchcock came home about 2:30 a.m., discovered the doors were locked, and entered through a window. He went to his bedroom, then Cynthia's room. They had sex. He denied using force or threats. Afterward, Cynthia said she was hurt and would tell her mother. Mr. Hitchcock restrained her, and she began to yell. He grabbed her by the neck and took her outside. He insisted she not tell her mother, but Cynthia said she was hurt and would tell. When she began to scream again, he choked her, but ehe continued to scream. He hit her twice and choked her and then pushed her in the bushes, then went inside and washed his shirt. R 1467.[15]

ii. Mr. Hitchcock's evidence.

a. Rebuttal testimony allowed in evidence.

In contrast to the latitude allowed the prosecution, Mr. Bitchcock was the only defense witness permitted to testify about circumstancee relating to the offense.[16] Two witnesses whose teetimony would have corroborated Mr. Hitchcock in establishing reasonable doubt on the heinousness, avoid arrest, and sexual battery aggravators were not allowed to present that testimony. Guilt phase testimony of a police officer eupporting the defense was also excluded.

Mr. Hitchcock testified he arrived home that night about 2 a.m., stoned on marijuana and drunk on beer. With no keys to get in, he knocked on Cynthia's

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[14] The hair expert could not remember any of the details of the microscopic comparisons she performed. R 651. Her report indicated she did not compare a pubic hair on the victim with Richard Hitchcock's pubic hair, but rather with his head hair. R 648. She claimed the report was in error on that point. R 649.

[15] Mr. Hitchcock showed the interrogators how he held his hands while choking Cynthia Driggers. R 1470.

[16] His cousin, Wayne Hitchcock, did testify that Richard Hitchcock was fit enough to do mechanical work part time during 1975. R 913.

door which opened to the outside. R 1047. He took advantage of Cynthia and had sex with her (they had engaged in sex play before, but not intercourse). R 1048. Cynthia did so willingly, but Ernie admitted she was too young to understand fully. R 1049. While he was still in bed with her, Richard came in, grabbed Cynthia, and took her outside. R 1049-50. Mr. Hitchcock dressed, went out, and found Richard throttling Cynthia. He tried to break Richard's grip, but could not; Richard had plenty of strength in his arms. He stopped Richard by kicking him in the back. R 1050. Cynthia was dead. R 1051. Richard cried and worried about going to prison. R 1052. Ernie told Richard to go to bed and say nothing; Ernie Hitchcock hid the body, washed his shirt, and pushed the screen out to make it look like a break in. R 1052-3.

The next day, Ernie and Richard drove around, pretending to look for Cynthia. R 1054. Richard had seen the body that morning, but waited until he was with other people in the afternoon to pretend to discover it. R 1055.

Mr. Hitchcock gave the statement to police because he loved Richard, who was a father figure to him. R 1045. He knew he was going to prison for the parole violation, but felt Richard would never survive in prison. R 1044-5. He felt responsible because his acts had triggersdthe killing, and he helped cover it up. Id. After giving his statement, Mr. Hitchcock was taken from isolation and other prisoners and his family persuaded him not to take the blame. R 1055, 1056.

The State attempted to impeach Mr. Hitchcock's credibility in several ways. Mr. Hitchcock admitted sending a confession to his mother at the urging of the jail chaplain on the same day he confessed to the police. R 1084, 1092. The State put the document in evidence after Mr. Hitchcock identified part of it as the letter written by him. R 1084-1088.[17] [18]

b. Rebuttal testimony kept out of evidence.

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[17] This letter had not been admitted at trial; no showing of voluntariness or Miranda warnings was made.

[18] The prosecutor also claimed Mr. Hitchcock lied by telling the jury he had pled guilty to the crimee in Arkansas. R 1069, 1070. On direct, Mr. Hitchcock had not testified whether he pled guilty to those crimes, just that he went to court because of his pleading. R 1039. He admitted telling the police twice before his confession that he had no involvement in Cynthia's death. R 1081. He denied confessing because he was told evidence connected him to the crime. R 1081. other impeachment concerned Mr. Hitchcock's prison record as set out above.

Mr. Hitchcock proffered teetimony corroborating his disputed version of the killing. Brenda Reed, sister to Richard and Ernie Bitchcock, would have testified that Richard attacked and sexually abused her starting when she was five and ending when she was fourteen (when she last had seen him). R 1015. The last attack occurred in the house where Cynthia lost her life; Richard grabbed her, but ehe got away from him. R 1016. Richard also tried to get Brenda to help assault a twelve year old daughter of his girlfriend; she heard Richard attacking her sister Martha. R 1017. Richard tried to shoot his Uncle Charlie, but was prevented by his mother. R 1018.

Martha Galloway, another sister, would have testified that Richard was physically and sexually violent to her. He beat her when she was a child until she left home at the age of fourteen, R 1012, and forced her to have sex when she was a small child and again when she was thirteen. R 1013.

The State objected that the sisters' testimony was irrelevant and that this Court had previously ruled on the issue. R 1099. The defense unsuccessfully argued it was relevant in part to prove Mr. Hitchcock's version. R 1099, 1101. The trial court also denied Mr. Hitchcock's proffered guilt phase testimony of an officer who retrieved his ring the night after the homicide, R 707-16, and had testified he saw no wounds on Mr. Hitchcock's hands. R 422.

3. Extra-evidentiary influences on the sentencers.

i. Influences of pretrial and trial publicity on jurors.

The press gave extensive and prominent coverage to this sentencing hearing as attested to by members of the venire. Of the 54 people questioned to sit on the jury, 31 admitted some knowledge of the case.[19] Answers in voir dire indicate news reports conveyed the following. The sister of the victim gave an emotional interview televised the night before jury selection, R 97, 123, 138, 168, 189, 218, 245, 254, 266, stating she felt it unfair that Mr. Hitchcock was getting a second sentencing hearing since her sister never got another chance. R 123, 168, 190, 267. Many veniremen knew this was a resentencing. R 74, 97, 112, 141, 168, 192, 195, 266. The reports stressed that eight death row inmates were

[19] R 64, 68, 73, 79, 90, 96, 111, 127, 130, 133, 138, 141, 154, 157, 159, 164, 168, 177, 182, 185, 189, 194, 197, 214, 217, 234, 242, 245, 261, 266, 276.

coming to Orlando to be "character" witnesses for Mr. Hitchcock,[20] and use of death row inmates as character witnesses was a topic of talk in the courthouse and among the venire. R 70, 76, 163, 183. Veniremen noticed the extensive security measures at the courthouse which had been a feature of some news reports. R 76, 93, 94, 131, 165. 234-5. Judge Formet granted 9 defense challenges for cause[21], denied 11 defense challenges for cause[22], granted 2 state challenges for cause[23], and excused one person sua sponte without objection[24].

Pretrial publicity created bias against Mr. Hitchcock in the minds of members of the venire. Juror Kemp: "What I have heard from the story is I would say he's guilty and I would go with the death penalty." R 84. Juror Restituto: "My feelings, okay, through the judicial system, the person was charged, convicted, and this sentence should have been carried out is the way I look at it." R 112. After stating she saw the victim's sister say on television the previous evening that it was unfair to give the defendant a eecond chance since her sister did not get one, Juror Johnson agreed with her: "I wondered the same thing. I will be perfectly frank with you." R 168-9.[25]

The Court discovered that a reporter for the Orlando Sentinel had approached a venirewoman and asked whether she felt secure.[26] After the individual questioning was complete, the judge let the jurors break to move their cars and eat, warning them not to discuss the case. R 289. The Court went

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[20] R 64, 68, 73, 81, 91, 111, 127, 130, 133, 142, 154, 160, 165, 178, 183, 185, 189, 197, 218, 235, 261, 272.

[21] Restituto, R 125; Smith, R 153; Williams, R 194; Myers, R 197; Nabors, R 212; Frana, R 216; Holcombe, R 234; Ratay, R 242; Boyd, R 284.

[22] Hagey, R 64; Aroian, R 68; Hyatt, R 72; Kemp, R 89; Covatta, R 96; Muhlhan, R 132; Johnson, R 177; Jones, R 261; Cook, R 265; Walker, R 275.

[23] Murphy, R 103; Musselle, R 189.

[24] Moore, R 243.

[25] Venireperson Williams also saw the televised interview,"...and the sister of the little girl that was murdered, not having any--where was her justice; what was she getting out of this." R 189. Venireperson Walker noted, "Well, it was, from what I understood from the sister, that the person should get the death penalty." R 267. other venirepeople said they had formed opinions about the credibility of death row inmates which ranged from caution to outright disbelief that anybody would call such witnesses. R 122, 198-9, 207, 218, 235-6, 272.

[26] She refused to give her name to the reporter. R 95. The Court admonished the reporter not to interview prospective jurors. R 104-106.

into recess from 5:15 until 6:05 p.m. R 291. During that period, the prisoner witnesses from Florida State Prison arrived at the jail next to the courthouse. Deputies were on the roof; about six armed deputies ranged about the street sallyport. Ten vehicles with sirens blaring, carrying the prisoners, accompanied by four motorcycles pulled into the sallyport. Defenas counsel saw at least four jurors witness this arrival; others were in the area and could have seen it. R 291-2. Neither the Court nor defense counsel had notice. R 294, 295.[27] A prosecutor was speaking with the Sheriff before and during the arrival. R 295.[28] One venireman was questioned; he spoke briefly with a deputy, but did not: know what was happening. R 298. The court refused to strike the panel. R 296.

The venire was reassembled and the attorneys questioned them as a group. At the conclusion of this questioning, the defense unsuccessfully made four additional cause challenges. R 393-6. The defense exhausted its peremptory challenges; the court granted each side an additional challenge. R 411. The defense used its challenge; the court denied any more. R 413.

ii. Prosecutorial arguments.

The prosecutor argued victim impact testimony to the jury during summation despite an order in limine prohibiting use of such evidence and a representation by the prosecution that none would be used. R 16, 1183-4, 1210, 1217-1218. Defense objections to the first two improper arguments were sustained. The trial court overruled a third objection and denied a motion for mistrial.

iii. Victim impact testimony.

The sister of the victim also made a statement to Judge Formet before he imposed sentence. R 1348-1349. No objection was made then, but the court had granted the defense motion in limine to prohibit such evidence. R 16.

IV. SUMMARY OF THE ARGUMENT

Death is disproportionate for this crime. Even accepting the aggravators as found, the trial court found such significant mitigation as to require a life sentence. The killing occurred in the course of an intra-family conflict by one who was drunk and drugged. It was a spontaneous reaction by a man of 20 years

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[27] The press, however, was notified and on hand to report. R 295.

[28] Sheriff Lamar was then running €or state attorney.

whose socialization had been completely disrupted by his impoverished, chaotic, violent upbringing. The trial court found this set of circumstances to be strong mitigating evidence. In addition, since the aggravators have not been proven beyond a reasonable doubt or should not have been considered, the case becomes even more compelling for a reduction to a life sentence. The close vote of the jury to recommend death, seven to five, also indicates a life sentence is appropriate.

Prejudicial, non-evidentiary influences played a major role in the resentencing. Pretrial publicity infected the venire, causing many members to decide for the death penalty before hearing the evidence. The trial court ignored reasons to doubt the impartiality of several veniremen, applying an improper standard to challenges.

During voir dire, veniremen saw the spectacular arrival of eight death row inmates who testified €or the defense. Courthouse security together with pretrial publicity emphasized security concerns, and in summation the prosecutor sought to connect the dangerousness of the inmates with Mr. Hitchcock. The show of force undercut evidence Mr. Hitchcock would not likely be dangerous in the future.

The trial court erred in excluding proffered defense evidence, despite the constitutional mandate that all relevant mitigating evidence be admitted.

The court let the state use prejudicial and unreliable evidence. It permitted play acting of the trial testimony of the state's hair analyst, Diane Bass, to establish that Richard Hitchcock's hairs were not on the victim. The state neither established the unavailability of Bass nor attempted to find another expert to analyze the evidence and so denied Mr. Hitchcock the right to confront witnesses against him.

The court allowed use of custodial statements by Mr. Hitchcock without requiring a predicate of voluntariness, in violation of constitutional principle that voluntariness be shown before admission of the defendant's custodial statement.

other non-evidentiary influences affected the trial. The prosecutor argued victim impact evidence in summation despite a court order not to use such evidence. The jury learned that Mr. Hitchcock had received a previous death

sentence; the prosecution used this irrelevant and prejudicial information, over objection, and the trial court refused a curative instruction. The court misinstructed the jury on the heinous, atrocious or cruel aggravating circumstance by refusing to instruct on the definition contained in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). It failed to instruct on the essential, disputed element of force or threat of force when it defined sexual battery. It failed to instruct the jury it must find each element of sexual battery proven beyond a reasonable doubt. It refused to instruct the jury that aggravators must outweigh mitigators to impose death, that the jury could recommend a life sentence even if aggravators but no mitigators were found, that the weighing process involved a character analysis of the defendant to determine if death is appropriate, that a single aspect of the offense cannot be used to establish multiple aggravators, and that lack of intent to kill is a mitigator. It directed the jury to disregard sympathy, restricting full consideration of mitigating circumstances.

The trial court improperly considered or found all four aggravatora. Since Mr. Hitchcock's conflicting accounts give rise to a reasonable doubt he actually strangled the victim, the heinousness, sexual battery and avoid arrest aggravators should not have been found. Even accepting the state's theory, the aggravators were improperly found. The heinous, atrocious or cruel aggravator was not proven beyond a reasonable doubt absent a subjective purpose to cause unnecessary pain, a construction of the aggravator necessary for it to pass vagueness challenge. The killing was not proven beyond a reasonable doubt to have been made to avoid arrest since Mr. Hitchcock may well have reacted out of fear of being ejected from hie temporary home and shamed before his family rather than fearing trouble with the law. The evidence at worst shows an impulsive reaction to the situation, not a calculated plan required for the aggravator to apply. Sexual battery was not proven: there was no evidence that force or threat was used to have sex. Failure of the court to instruct on that element and failure to make any findings supporting it show the aggravator was improperly found. The court applied sexual battery rather than rape law although the statute at the time of the offense made rape, not sexual battery, the relevant aggravating circumstance. This violates the ex post facto clause since

sexual battery expands the lack of consent element, and Mr. Hitchcock could not have been found guilty of rape under the findings of fact by the trial court. The under sentence of imprisonment aggravator was also applied retroactively in violation of ex post facto/due process principles. Mr. Hitchcock was a parolee at the time of the offense, but Florida law in 1976 restricted the aggravator to prisoners and did not cover parolees until 1977. The imprisonment aggravator was not found by the trial court in 1977; finding it now constitutes double jeopardy. Applying it to parolees but not probationers violates equal protection and the reasoned application of the death penalty required by the Eighth Amendment.

Speedy trial, due process, and freedom from cruel and unusual punishment will not allow a death sentence to stand under the circumstances of this case. Mr. Hitchcock was denied an opportunity to present all his mitigating evidence from his direct appeal after his 1977 trial until the Supreme Court granted relief on the issue in 1987. Witnesses died who could have established his excellent work habits and strongly bolstered his evidence of an impoverished and violent upbringing. Witnesses who testified could not remember details which could have helped rebut aggravators. The defendant aged considerably and became associated with death row inmates, both of which worked to his disadvantage in establishing mitigation. The trial court did nothing to cure the prejudice. Mr. Hitchcock cannot now receive a fair hearing; this Court should reduce his sentence to life.

The statute under which Mr. Hitchcock was sentenced is unconstitutional. The construction given to the heinous, atrocious or cruel aggravator has not, in practice, narrowed the vague words of the statute. Since heinousness can be applied to any first degree murder, it violates the Eighth Amendment. Florida's statute does not allow unrestricted consideration of mitigating evidence since it requires a high standard of proof before mitigating evidence may be considered by the jury and because the statute presumes death to be the appropriate sentence once any aggravator is found by the jury.

V. ARGUMENT

POINT I

DEATH IS DISPROPORTIONATE.

"Any review of the proportionality of the death penalty in a particular caee must begin with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988). Its application is reserved solely for "the most aggravated, most indefensible of crimes," Dixon v. State, 283 So.2d I, 8 (Fla. 1973), and this is not one of them.

While not falling neatly into the category, the circumstances of this crime bear most of the features of domestic killings which this Court has virtually exempted from the death penalty. See Garron v. State, 528 So.2d 353, 361 (Fla. 1988) and Wilson v. State, 493 So.2d 1019 (Fla. 1986). At the time of the killing, Ernie Hitchcock was sharing the household with his brother and his family. After he and Cynthia Driggers had sexual intercourse,[29] she threatened to tell her mother, and according to the state's theory, he panicked and killed her to prevent that from happening.

This Court has long recognized that the powerful emotions unleashed in a family dispute makes the death penalty for resulting killings inappropriate. In Wilson, the dispute arose when the defendant's stepmother told him to keep out of the refrigerator. In a rage, he began striking her with a hammer, and his father came to her aid. The two struggled. Wilson's five-year old cousin was stabbed to death, apparently accidentally, with a pair of scissors during the struggle. The defendant ended up killing his father by shooting him in the head after beating him with the hammer. He then tried to ehoot his stepmother to death as she hid in a closet. While finding the killing of his father was heinous, because he was "brutally beaten while attempting to fend off the blows before he was fatally shot,"[30] id. at 1023, this Court reduced the death sentence because it was "the result of a heated, domestic confrontation and ...the killing, though premeditated, was most likely upon reflection of ehort duration."

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[29] There was undisputed testimony the two had engaged in "sex play" in the paet.

[30] The Court also upheld the aggravator of conviction of a prior violent felony. Id. at 1023. There were no mitigating circumstances found in the case.

Id. at 1023.

In Ross v. State, 474 So.2d 1170 (Fla. 1985), thia Court found the defendant's beating and killing of his wife with a blunt instrument, though heinous, atrocious or cruel, was probably spontaneous. That circumstance as well as the defendant's drinking at the time of the crime and difficulty in controlling his emotions, required the sentence be reduced to life. Id. at 1174. In Blair v. State, 406 So.2d 1103 (Fla. 1981), the dispute arose between Mr. Blair and his ex-wife because she thought the defendant and her daughter were spending too much time together. She threatened to go to the police over it. Though the defendant appeared to have planned the killing by digging a burial site and arranging for others to be away when he shot his ex-wife, Id. at 1105, this Court found death disproportionate under the circumstances. Id. at 1109.[31]

This case falls within the rationale of the domestic killing cases. There was no plan to kill. A heat of the moment reaction to the threat[32] to tell the mother about the sexual encounter spurred the killing, not mature reflection.

No one disputes Ernie Hitchcock was drugged and drunk that night. While the killing is a tragedy, it was not committed by one presently possessing a capacity to make rational judgments. "[T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant." California v. Brown, 107 S,Ct. 837, 841 (1987) (O'Connor, J., concurring). "[E]vidence that lessens the defendant's degree of culpability ... [bears] strongly on the degree to which the defendant was morally responsible for her crime." Skipper v. South Carolina, 106 S.Ct. 1668, 1675 (1986) (Powell, J., concurring). Evidence of "reduced capacity for considered choice ... bear[s] directly on the fundamental justice of imposing capital punishment." Id. at 1675-76.

For these reasons this Court has required that "evidence [of drug or

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[31] Other domestic killings reduced to life were triggered by jealousy or sexual infidelity, whether perceived or real. See Amoros v. State, 531 So.2d 1256 (Fla. 1988), Irizzarry v. State, 496 So.2d 822 (Fla. 1986), Ross v. State, supra, Kampff v. state, 371 So.2d 1007 (Fla. 1979), and Halliwell v. State, 323 So.2d 557 (Fla. 1975).

[32] Even where the defendant and victim are not members of the same family, the fact that a killing was preceded by a quarrel has convinced this Court that life is the appropriate sentence. Buckrem, supra; Neary v. State, 384 So.2d 881, 885-886, 888 (Fla. 1980). See also, Banda v. State, 536 So.2d 221 (Fla. 1988).

alcohol abuse] muet be considered in mitigation, Fead v. State, 512 So.2d 176, 178 (Fla. 1987); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983); Buckrem v. State, 355 So.2d 111, 113-14 (Fla. 1987), especially where established by evidence uncontroverted in the record." Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988). Intoxication alone has been repeatedly considered by this court to mitigate a killing without reference to statutory mitigating factors. Fead; Buckrem; Norris v. State, 429 So.2d 688, 690 (Fla. 1983). It has played a huge role in this court's conclusion that only a life sentence is appropriate in many cases, both where the jury recommends death, Smalley v. State, 14 F.L.W. 342, 343 (Fla. July 6, 1989), Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987), Ross v. State, and where it recommends life. Buckrem; Fead; Burch v. State, 522 So.2d 810 (Fla. 1988); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Masterson v. State, 516 So.2d 256, 258 (Fla. 1987). The drug and alcohol intoxication of Ernie Hitchcock played a significant part in this killing, and is a substantial reason for reducing his sentence to life.

This Court has reduced death sentences as disproportionate when there was substantial mitigation and it struck aggravators, Livingston v. State, 13 F.L.W. 187 (Fla. 1988), Rembert v. State, 445 So.2d 337, 340 (Fla. 1984); Blair v. State, 406 So.2d 1103, 1409 (Fla. 1981), or where the "entire picture of mitigation and aggravation ... does not warrant the death penalty." Smalley v. State, 14 F.L.W. 342, 343 (Fla. July 6, 1989); Sonaer v. State, 14 F.L.W. 262 (Fla. May 25, 1989); Proffitt v. State, 510 So.2d 896 (Fla. 1987).

The trial court found four aggravating factors: (1) under sentence of imprisonment (parole), (2) felony murder, (3) avoid arrest, and (4) heinous, atrocious or cruel. R 1517-18. But the Court also found "substantial evidence of mitigating factors and circumstances" R 1518. First, the trial court found Ernie Hitchcock's age of 20 years at the time of the crime, "considered with [his] lack of maturity, coping skills and emotional development" was a "significant [statutory] mitigating circumstance." R 1518. Turning to non-statutory mitigation, the trial court found "four striking areas of deprivation suffered by the defendant:

(1) A background of extreme poverty.
(2) Lack of formal education.
(3) Emotional deprivation during his formative years.
(4) Abuse, both physical and mental, observed and experienced as a

child."

R 1519. While rejecting the contention that the defense had proved "positive character traits" the Court found the evidence presented proved positive incidents in the defendant's life, including the fact Mr. Hitchcock was a "hard worker," though the court found that factor weighed less because he had to do so out of "economic necessity." R 1519. The court also found as mitigating, though not significant, that Ernie Hitchcock: had saved his uncle from drowning; had come to Florida to help Fay and Sonny Hitchcock while Fay recovered from surgery; while in prison writes his mother frequently, sending pictures and cards, and writes his two nieces regularly.

Respecting prison conduct, the trial court did not find the evidence rose to proving positive character "traits", but did find the testimony of other death row inmates "established specific limited incidents demonstrating" generosity, acts of kindness, teaching others, helpfulness, and an absence of racial prejudice. R 1520. The court also found nonstatutory mitigation that "the fact that the defendant is now capable of being a mediator/peacemaker through improved verbal skills; that he ha5 the ability to succeed in the general prison population; that he will not be dangerous in the future and that he has taken strides to improve himself." R 1520. Finally, the court gave "added weight" to use of alcohol and drugs prior to the murder, R 1520.

We brief below the impropriety of each of the aggravating circumstances found by the trial court. If any one of the aggravators are stricken, it is clear that Ernie Hitchcock's sentence should not be death.[33] But even if no aggravators are stricken, the "entire picture" of aggravation and mitigation compels reduction to a life sentence. The "gravity" of the aggravating factor of being "under sentence of imprisonment" at the time of the crime "is somewhat

[33] This court has reduced the sentence to life where aggravators were stricken, and there was a death recommendation. Livingston v. State, 13 F.L.W. 187 (Fla. 1988) (after striking an aggravating circumstance, court determines mitigation it found "counterbalanced" the remaining aggravators); Rembert v. State, 445 So.2d 337, 340 (Fla.1984) (where court struck aggravating factors and there was "considerable" nonstatutory mitigation not found by the trial judge, sentence reduced to life); Blair v. state, 406 So.2d 1103, 1109 (Fla. 1981) ("because of the existence of a mitigating factor, and the improper inclusion of several aggravating factors, we must reduce to life"), and Kampff v. State, 371 So.2d 1007 (Fla. 1979). See also Amoros v. State, 531 So.2d 1256 (Fla. 1988) and Banda v. State, 536 So.2d 221 (Fla. 1988) (death disproportionate after striking all the aggravating factors).

diminished by the fact that [Hitchcock] did not break out of prison" but was merely on parole. Songer v. State, 14 F.L.W. 262, 263 (May 25, 1989). The other three aggravators are modulated by Ernie Hitchcock'e age, immaturity, upbringing, and impairment by marijuana and alcohol at the time of the crime.

There is also substantial mitigation found by the trial court and supported by the record. The mitigation showing Mr.Hitchcock's adjustment to prison life, status as a conciliator at the prison, and future nondangeroueness, are substantial reasons for reducing a sentence to life. Songer v. State, 14 F.L.W. 262, 263 (Fla. May 25, 1989) Cooper v. Dugger, 526 So.2d 900, 902 (Fla. 1988). See Holsworth v. State, 522 So.2d 348, 355 (Fla. 1988) (death is a "total rejection of the poaaibility of rehabilitation.") See also Skipper v. South Carolina, 106 S.Ct. 1669 (1986) and Valle v. State, 502 So.2d 1225, 1226 (Fla. 1983). Ernie Hitchcock's impoverished and traumatic childhood, continuing devotion to family members and kindness toward others are reasons for reducing his death sentence. Songer; Spivey v. State, 529 So.2d 1088, 1095 (Fla. 1988); Brown v. State, 526 So.2d 903, 905 (Fla. 1988); Holsworth, 522 So.2d at 354; Caruthers v. State, 465 So.2d 496, 498-99 (Fla. 1985). The youth of the defendant at the time of the crime, a statutory mitigating factor found hare, coupled "with the defendant's lack of maturity, coping skills and development" R 1518, has also been found to be a significant factor in reducing a death sentence. Livinsston, 13 F.L.W. at 188; Huddleston v. State, 475 So.2d 204, 206 (Fla. 1985); Swan v. State, 322 So.2d 485, 488 (Fla. 1975).

Others whose sentences have been reduced to life committed equally or more disturbing crimes. In Banda v. State, 536 So.2d 221 (Fla. 1988), a dispute over borrowed money resulted in the victim's death by "several crushing blows to the skull," and possibly strangulation. This Court reduced the sentence, finding "death would not be proportionate in this instance." Id. at 225. In Irizarry v. State, 496 So.2d 822 (Fla. 1986), the defendant wae jealous because he thought his former wife was seeing another man, and killed her with a machete, the fatal injury being a "four-inch wound across the front of the neck, extending through to the spinal column and producing near decapitation". Id. at 823. Though there were four aggravating circumstances, including HAC, this Court reduced to life: "the jury recommendation of life imprisonment is consistent with cases involving

similar circumstances." Id. at 825. See also, Halliwell v. State, 323 So.2d 557 (Fla. 1975)("Appellant grabbed a 1-inch breaker bar and beat the husband's skull with lethal blows and then continued beating, bruising and cutting the husband's body with the metal bar after the first fatal injuries to the brain. That conduct alone justified a finding of premeditated murder, but we see nothing more shocking in the actual killing than in a majority of cases decided by this Court." Sentence reduced to life.) Rembert v. State, 445 So.2d 337 (Fla. 1984) (robbery-murder victim beaten to death, sentence reduced to life), and Swan v. State, 322 So.2d 485 (Fla. 1975)(victim's "hands, neck and left foot were tied so that any efforte she might have made to free herself could have choked her to death," and "death resulted from the severe beating". Swan was nineteen at time of crime; sentence reduced to life.)

In a number of life override cases[34] this Court has reduced death sentences where the circumstances of the offense and background of the defendant were comparable to or more aggravated than Mr. Hitchcock's. Appellants whose crimes were especially heinous, atrocious or cruel have received life sentences in this state where the method of killing was by strangulation, Welty v. State, 402 So.2d 1159 (Fla. 1981), stabbing, Holsworth v. State, 522 So.2d 348 (Fla. 1988), Burch v. State, 343 So.2d 831 (Fla. 1977), or a combination of the two. Huddleston v. State, 475 So.2d 204 (Fla. 1985) ("Huddleston then began to strangle the victim ... Huddleston stabbed the victim repeatedly in the chest, neck and back. During this stabbing, the victim asked, 'Why are you stabbing me? I'm already dead.' Huddleston only stopped when the knife bent." Id. at 205); McKennon v. state, 403 So.2d 389 (Fla. 1981). ("McKennon allegedly murdered hie employer by beating her head against the floor and wall, strangling her, slicing her throat, breaking ten of her ribs, and stabbing her.") Even brutal beatings resulting in death from "cerebral and brain stem contusions" have qualified for life sentences. Chambers v. State, 339 So.2d 204 (Fla. 1976).

In Burch, the defendant tried to rape the victim before stabbing her to death. His sentence was reduced to life. In Wasko v. State, 505 So.2d 1314 (Fla.

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[34] In conducting its proportionality review, this Court has occasionally looked to life override cases as a comparison. E.g., Fitzpatrick v. State, 527 So.2d 809, 812 (Fla. 1988); Amoros v. State, 531 So.2d 1256, 1261 (Fla. 1988). This is appropriate, because though decided under a different standard, the facts of life override cases provide a-relevant point of reference.

1987), the defendant was convicted of armed burglary and attempted sexual battery in addition to the first degree murder of a ten-year old girl. Though the "jury found that he committed a heinous, repulsive, senseless crime," (Ehrlich, J. concurring), Mr. Wasko will not be put to death €or it.

Mr. Hitchcock's crime was first-degree murder. But it is surely not among the most aggravated and least mitigated of murders. A death sentence is not proportional here.

POINT II

THE COURT DENIED CAUSE CHALLENGES TO PARTIAL JURORS, CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, 21 AND 22 FLORIDA CONSTITUTION.

The trial court refused defense cause challenges to veniremen whose responses left a reasonable doubt that they could judge the case on the evidence presented.

The standards €or bias or impartiality challenges were set out in Singer v. State, 109 So.2d 7 (Fla. 1959). The impartiality of a juror must be free from reasonable doubt, Id. at 23; Will v. State, 477 So.2d 553, 555 (Fla. 1985); Moore v. State, 525 So.2d 870, 872 (Fla. 1988), or the purity of the tribunal as an impartial fact finder is called into question. Singer, at 23. When a veniremen expreaaes doubt about his impartiality and states it would take substantial evidence to change a preconception about the case, reasonable doubt exists even if he subsequently declares freedom from bias. Singer, 109 So.2d at 23. A declaration by the juror that he oK she is competent and can follow the law is not determinative if other atatementa give rise to a reason to doubt the juror's competency. Singer, 109 So.2d at 24; Bee Hill, 477 So.2d at 555-556; Hamilton v. State, 14 F.L.W. 403, 404 (Fla. July 27, 1989); Graham v. State, 470 So.2d 97, 97-98 (Fla. 1st DCA 1985)(no error to exclude juror who knew defendant's mother but stated she could be impartial). A promise to try to follow the law does not erase reasonable doubt. Robinson v. State, 506 So.2d 1070 (Fla. 5th DCA 1987). Answers to leading questions by the court and prosecution do little to alleviate doubt. In Price v. State, 538 So.2d 486, 489 (Fla. 3d DCA 1989), the court wrote:

> We have no doubt but that a juror who is being asked leading questions is more likely to 'please' the judge and give the rather obvious answers indicated by the leading questions, and as such

> these responses alone must never be determinative of a juror's capacity to impartially decide the cause to be presented.

See Singer, 109 So.2d at 23. The same rules apply to penalty juries in a death case. Hill, 477 So.2d at 556.

Abuse of discretion occurs when the record reveals reasons to doubt impartiality. This record shows the reasonable doubt standard was not applied by the trial court, so this court should review challenges strictly. Competency of a juror is a mixed question of law and fact and the trial court's discretion will not be respected if the error is manifest. Singer, 109 So.2d at 22; see Hill, 477 So.2d at 556 (Fla. 1985); Lonashore v. Fronrath Chevrolet, Inc., 527 So.2d 922, 923 (Fla. 4th DCA 1988). However, abuse of discretion is found when the record gives rise to a reasonable doubt of impartiality. See Singer; Moore and Hamilton. If the record reveals failure to apply the Singer rules to challenges on partiality, a stricter standard of appellate review must be used. In Hill, the trial. court did not use the Singer rules in deciding a challenge €or cause on bias grounds. "Consequently, his discretionary authority is not in issue in thia proceeding." Hill, 477 So.2d at 556.

This record shows the trial judge did not apply Singer, so his discretionary authority is not at issue. The court never cited the legal basis for its rulings. However, the prosecutor twice cited the standard in Wainwriaht v. Witt, 469 U.S. 412, 105 S.Ct 844 (1985) for excusing jurors who oppose the death penalty, namely whether the jurors' preconceived ideas would prevent or substantially impair performance of their duties. The prosecutor did not mention any of the applicable Singer rules. R 63, 152-3. Counsel for Mr. Hitchcock did argue that equivocation was ground for dismissal given a predisposition for death, see R 62-3, a correct statement of the law. Hill, 477 So.2d at 556. The rulings on jurors Johnson, Kemp, and Hagey show the judge did not apply Singer.

a. There was reasonable doubt about juror impartiality.

1. Responses of Paula Hagey.

Paula Hagey said she was predisposed to impose death for any murder. R 57. The court explained how capital sentencing works and asked if she could follow the law on mitigating and aggravating circumstances. She replied:

> I probably could. 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 enough punishment. But I certainly would be reasonable enough to listen. R 58-9.

The prosecutor asked if she could be impartial, and she replied:

> To be, in all honesty to you, I think I would have to say I would have to wait and see what I hear. I, I feel like I have to -- my feelings now are death is deserved. Now, I would have to see what I hear. R 59 (emphasis added).

She asserted she could follow the law based on the facts heard in court, R 59-60, but upon further questioning by defense, she said:

> I will try. I will do my best to be fair in any situation as I could. I just, I have to, I just have to say that I, that it would be baaed on what I have felt in the past. R 61 (emphasis added).

She assured the judge she could follow his instructions, but even under leading questions by the court, she equivocated:

> The Court: And if the mitigation outweighs the aggravation, you could could come back in this case with a verdict of life imprisonment rather than death?
> Ms. Hagey: I think I could, mm-hmm. I feel, I feel that I could.
> The Court: All right.
> Ms. Hagey: It's so hard to know withaut ever having first hand experience. R 62.

Comparison of these responses with those where courts have found manifest error shows reversible error here. Hagey began by flatly announcing: "my feelings now are death is deserved." R 59. Her promise to try to be fair was not enough after such a strong statement of bias. See Robinson. The statements she could judge the case on the evidence presented were made in response to leading question5 by the prosecutor and court, R 59-60, 61, 62, and even some of these answers were equivocal. Favorable replies, even declarations of freedoms from bias, are not sufficient when in response to Leading questions by the court or prosecutor when other responses give rise to doubt. See Singer; Price. The defense cause challenge should have been granted.

2. Responses of Billy Johnson.

Billy Johnson saw the victim's sister on television the previous night:

> The Court: What do you recall from that, what was the substance of that report as best as you can recall?
> Ms. Johnson: She thought it was unfair that there was being another trial because her sister didn't get a second chance. R 168.

She felt it unfair that Mr. Hitchcock was getting a second hearing. R 169. The televised interview stirred her emotions. R 170, 174. Asked her if her feelings would interfere with her ability to serve as a juror, she replied: "I honestly don't know." R 169. Asked her to repeat her answer she said: "I said I honestly

don't know. I think it might." R 169. The trial court let the proaecutor try to rehabilitate her. R 169-70. After a string of yes sirs and no sirs in response to the prosecutor's questions, Ms. Johnson gave an equivocal anawer to defense counsel:

> Ms. Cashman [defense couneel]: And then the proaecutor asked you do you think you could be impartial?
> Ms. Johnson: I think I could be. R 171.
> . . .
> Ms. Caahman: No? Do you think it would take some evidence to change you from agreeing with what said on the news last night?
> Ms. Johnaon: Yes, it would.
> Ms. Caahman: It would? Okay. Ma'am, do you think it would be better if you didn't serve on that jury because of the fact that you aaw that news program last night?
> Ms. Johnson: I think it would be. R 172.

Questioned by the court and prosecutor, Ms. Johnson who again reversed herself and said she would be impartial and set aside the matters ehe heard outside the courtroom. R 172-174. Then she again equivocated.

> Me. Cashman: ...And there are times that we see things on t.v. that are very emotional and that we react to and that we then carry with us. And you have indicated that you identified with what you saw last night.
> Do you think you would carry that with you through this sentencing phaae this week, if you were chosen as a juror?
> Ma. Johnson: I don't think so. I would think there would be other pertinent facts.
> Ms. Cashman: But you can't say €or aure you wouldn't --and I'm not trying to put words in your mouth. I just --
> Me. Johnson: I just don't think I would, no.
> Ms. Cashman: You don't think so?
> Ms. Johnson: No.

This voir dire shows a atrong likelihood of partiality by Ms. Johnson. What she remembered most vividly from the emotional televised interview waa that Mr. Hitchcock had already been sentenced to death. As one court put it in a similar context: "Indeed, we are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged." United States v. Williams, 568 F.2d 464, 471 (5th Cir. 1978) (holding that jury discovery of prior conviction gained during trial is grounds for mistrial).[35] Ms. Johnson admitted her own bias against Mr. Hitchcock for getting a second chance.

Ma. Johnson's responses depended entirely on who was asking. She began by declaring her bias. When the court or prosecutor interrogated her, she said she

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[35] See also Caldwell v. Mississippi, 472 U.S. ____, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (suggestion that responsibility for jury determination of death lies with appellate courts makes death sentence unreliable).

was free of bias. When defense counsel questioned her, she became equivocal. The declaration that she could judge the case impartially was not determinative since there are other statements on the record giving reason to doubt her impartiality. See Singer, 109 So.2d at 24; Hill, 477 So.2d at 555-556. The reason to doubt grows stronger since the declarations of impartiality were made in response to leading questions by the court and prosecutor. See Price, 14 F.L.W. at 298; see also Singer, 109 So.2d at 23 (declaration of bias contradicted under skillful questioning cannot be free from doubt as to impartiality).

"A juror is not impartial when one side must overcome a preconceived opinion in order to prevail." Hill, 477 So.2d at 556; see Hamilton, 14 F.L.W. at 404. Mr. Hitchcock would have had to overcome just such a preconception. Ms. Johnson said so in her statements that she thought her opinion would be displaced by evidence at trial and her admission it would take evidence to change her opinion. Ms. Johnson's admission that she needed evidence to change her opinion, the nature of the information she received, and her equivocal answers and statement she probably should not be on the jury all reveal a biased juror. The trial court's refusal to excuse Ms. Johnson €or cause was error. As argued above, the failure of the trial court to apply the Singer rules makes this an even more compelling reason to reverse.

3. Responses of Marcus Kemp.

Marcus Kemp followed Mr. Hitchcock's story and formed an opinion about the case. "What I have heard from the story is I would say he's guilty and I would go with the death penalty." R 84. The trial court asked Mr. Kemp leading questions concerning how the death sentencing process works. Mr. Kemp agreed he could follow those rules. R 86. Asked if he could give the evidence a fair and impartial hearing, he replied: "I would try to, yes sir." R 86.

This equivocal response reveals a reasonable doubt as to Mr. Kemp's impartiality under Robinson, 506 So.2d at 1072. Mr. Kemp's assurances he could follow the law were in response to leading questions by the trial court and so cannot be used to determine his impartiality. Price, 538 So.2d at 489. The trial court did not apply the rules of Singer and so the abuse of discretion standard daes not apply.

b. The errors in refuaing to excuse the veniremen were not harmless.

The trial court denied challenges for cause for Hagey, Johnson, and Kemp. R 63, 89, 176. Defense counsel was forced to use peremptory strikes to excuse them. R 397, 398, 407. The trial court granted one additional peremptory at the defense's request, R 411-412; Mr. Hitchcock's second request €or additional peremptory challenges after exhausting his strikes was refused. R 413. Under these circumstances, the trial court's errors cannot be harmless, Moore v. State, 525 So.2d 870, 073 (Fla. 1988), Hill, 477 So.2d at 556, particularly where the jury returned a recommendation only one vote short of life.

POINT III

THE VIEWING BY POTENTIAL JURORS OF **THE** HEAVILY GUARDED ARRIVAL **OF** DEFENSE **WITNESSES, TOGETHER WITH PRETRIAL** PUBLICITY EMPHASIZING *THE* **DANGEROUSNESS** OF **THE** WITNESSES *AND* **IMPROPER ARGUMENT THAT THE DEFENDANT** ASSOCIATED WITH KILLERS DEPRIVED THE DEFENDANT OF A PAIR **SENTENCING HEARING.**

Many members of the venire read or saw news reports that death row inmates would testify for Mr. Hitchcock.[36] The reports emphasized security risk. Special security measures were taken in the courthouse, and several jurors were exposed to an unnecessary and extensive show of force directed at several of Mr. Hitchcock's witnesses.

The viewing of the extensive and heavily armed security around defense witnesses together with pretrial publicity over security concerns and extensive security measures at the courthouee prejudiced the jury against Mr. Hitchcock. The defense presented evidence and argued that Mr. Witchcock had adjusted to prison and offered little chance of being dangerous in the future. Yet, he could have no fair hearing on the issue after the venire witnessed such a sensationalistic event as the arrival of the inmate/witnesses.

In Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed. 525 (1986), the Court held the presence of four uniformed security guards sitting quietly behind the defendant did not create an unfair trial,[37] but wrote:

> Central to the right of a fair trial...is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial,

[36] Record citations for what media information contaminated the venire is contained in the Statement of the Facts.

[37] The viewing in the case at bar violated both due process and the heightened reliability required of procedures used to impose death sentences under Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

and not on the grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'

475 U.S. at 567. "[U]nder certain conditions" security measures might 'create the impression in the minds of the jury that the defendant is dangerous or untrustworthy'" Id. A court must "look at the scene presented to the jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial . . . ." Id. at 572. Id. It must then determine whether the scene was intimately related to a legitimate state interest. Id. at 571-2.

The state action affecting the venire did not merely cast suspicion that Mr. Bitchcock poeed a threat to society. It appears deliberately designed to evoke popular fear, hatred, and revulsion against the witnesses, and, by association, against Mr. Hitchcock. Whether the state actors responsible intended the venire to witness the event cannot be conclusively determined from the record; but at least, they were guilty of failing to correct a representation made to the court on when the witnesses would be moved.[38]

Suggestions to the jury via courthouse security that a capital defendant is dangerous prejudice his chances for a life sentence. See Elledge v. Dugger, 823 F.2d 1439, 1452 (11th Cir.), modified 833 F.2d 250 (1987). The prejudice harmed Mr. Hitchcock's claim that he had adjusted to prison life and would not be a threat in the future.[39]

The state had a legitimate interest in guarding death row inmates, but there was no reason to have the venire view the heavy security. Reading the record in a light favorable to the state shows that this was, at best, a mistake. Had the trial court granted the motion to strike the venire when made,

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[38] The court was told the move would be made later that week. R 294. If the Court reverses on this issue, Mr. Hitchcock moves this Court allow the trial court to hold a hearing on whether the responsible party intended to influence the proceeding and the proper remedy if intentional interference is found.

[39] The prejudice was increased by improper prosecutorial argument. Although the prosecutor persuaded the court to allow evidence that the inmates were under death sentences to show bias, the court ruled the prosecutor could not ask whether they had been convicted of murder. R 777. Even so, the prosecutor argued in summation: "And then there's all of the killers who came to the courtroom to tell. you they like this defendant." R 1214. Whether the prosecution was responsible for the viewing of the inmate's arrival cannot be stated from this record. Regardless, the prosecutor capitalized on it by associating the defendant with the dangerousness of his witnesses.

only slightly over five and one half hours of time would have been lost.[40] The prejudice of the viewing, the ease of a remedy, and the absence of any reason for the viewing compel the conclusion the trial court violated due process and the prohibition against cruel and unusual punishment by not striking the venire.

POINT IV

MR. HITCHCOCK WAS PREVENTED FROM PRESENTING MITIGATING EVIDENCE, AND HIS SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 9, 16, 17, 21 AND 22 FLORIDA CONSTITUTION, THE MANDATE OF THE UNITED STATES SUPREME COURT, AND SECTION 921.141, FLORIDA STATUTES.

In Lockett v. Ohio, 438 U.S. 586 (1978) (plurality), Eddinas v. Oklahoma, 455 U.S. 104 (1982), and Skipper v. South Carolina, 476 U.S. 1 (1986), the Court held it error to exclude any evidence relevant to the circumstances of the offense or character of the offender. The refusal to consider mitigating evidence risks arbitrary and capricious application of the death penalty since the sentencer will not have conaidered "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." Eddings, 455 U.S. at 112, n.7.

when the Court decided this very case, it condemned the jury instructions at trial preventing consideration of mitigating factora. Hitchcock, 107 S.Ct. at 1824. It allowed resentencing, "'provided that [the State] doea so through a new sentencing hearing at which petitioner is permitted to preaent any and all relevant mitigating evidence that is available.'" Hitchcack, 107 S.Ct. at 1824 (e.s.). Exclusion of relevant mitigating evidence below violates not only well eatabliahed principles of the Eighth Amendment, but also the explicit mandate of the Supreme Court.

Such exclusions also violate Section 921.141(1), Florida Statutes, which provides:

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

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[40] Jury began that day at 10:25 a.m. R 25. The court was in recess from 12:05 p.m. to 1:20 p.m., R 107, and then continued voir dire until 5:15 p.m.

The plain words [41] of the Legislature mirror the requirements of the Eighth Amendment: all relevant, mitigating evidence must be admitted.

a. **Testimony of Richard Greene was improperly excluded.**

The defense proffered testimony by Richard Greene about the sympathy, concern and Lack of prejudice in Mr. Hitchcock, which the trial court wrongfully excluded as irrelevant. He told how Mr. Hitchcock became cloee to David Washington, a black inmate executed in 1984. Mr. Hitchcock showed sadness at the execution and spoke of his concern for Washington's family. R 860. When Greene himself witnessed an execution, Mr. Hitchcock wrote him a comforting letter asking after his well-being. R 861. The prosecutor successfully objected to this evidence as irrelevant. R 875.

Also proffered was testimony by Greene that the changes he saw in Mr. Hitchcock's development were dramatic and one of the most tremendous changes he had seen in a prisoner. R 856, 858. Greene saw maturity and self-refleetion in Mr. Hitchcock. R 856. The prosecutor objected to this testimony as improper opinion both because Greene was not qualified as an expert and because the traits could be described by reference to the facts on which the opinion was based. R 864. The trial court excluded this as opinion testimony. R 875.

The proffered testimony by Greene consisted in part of hearsay statements by G.E. Motley, Lee Baker and Charlie Bitchcock, uncle of James Ernest Hitchcock. Motley, Baker and Charlie Hitchcock are now deceased. R 837, 839. The statements were obtained during Greene's preparation for clemency hearings on Ernie Hitchcock's behalf. R 845.

Baker, a retired deputy sheriff, knew Mr. Hitchcock well. R 047. Baker said the father's death greatly affected Ernie Hitchcock and left the family in severe financial straits. R 847-8. Mr. Hitchcock told Baker how he would help the family out; Baker never saw Mr. Hitchcock be violent. R 848. Ernie knew his stepfather was violent and it upset him. R 848. Mr. Hitchcock had a reputation

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[41] Where the words of a statute are plain and unambiguous, that meaning will be given effect. See Graham v. State, 472 So.2d 464 (Fla. 1985).

> There should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or to any other matter except illegally seized evidence.

Alvord v. State, 322 So.2d 533, 539 (Fla. 1975), cert. denied, 428 U.S. 923 (1976).

€or hard work in the community. R 849.

Motley owned a farm on which Ernie Hitchcock worked and stated he wae a hard worker. R 846. Ernie began work at a young age to support his family. R 851. Motley never saw Ernie Hitchcock fight with his fellows. R 849.

Charlie Hitchcock said the death of Ernie Hitchcock's father devastated him and the family, and Ernie tried to help out. R 850. Charlie had supervised Mr. Hitchcock at a farm and Ernest Hitchcock worked hard, got along well with his co-workers and never fought anybody. R 850-1. Charlie Hitchcock explained how Ernie Hitchcock saved Charlie's life while risking his own. R 851.

The trial court upheld the objections to this testimony as irrebuttable hearsay and said Richard Greene was inherently unreliable. R 873-5. The court noted that the defense had not given the state notice so that the state could investigate for rebuttal evidence. R 875.

After Mr. Hitchcock had testified he had been disciplined along with William Harvard for an escape attempt, R 1061, the defense proffered testimony by Greene that Harvard had been resentenced to life despite that infraction. R 1100. The trial court denied this proffer a0 irrelevant. R 1101.

1. Excluding opinion and Occurrence evidence concerning Mr. Hitchcock's character violated Florida's law of evidence.

The trial court relied on Shriner v. State, 386 So.2d 525 (Fla. 1980), cert. denied, 449 U.S. 1103 (1980) in ruling irrelevant evidence of the effect of Washington's electrocution on Mr. Hitchcock and the sympathy he displayed after Greene witnessed an execution. "Relevant evidence is evidence tending to prove or disprove a material fact." 590.401, Fla. Stat. In Shriner, this Court held irrelevant a descriptive account of an electrocution. The proffer below never went into the barbarities involved in an actual execution; instead it addressed the effect of the execution of a close black friend on Mr. Hitchcock, and how Mr. Hitchcock was able to show sympathy and concern to Greene after Greene witnessed the execution. This evidence showed the positive traits Mr. Hitchcock developed while in prison. Testimony about the physical aspects of execution at issue in Shriner do not relate to character as did the proffer here. As relevant evidence of mitigating factors, exclusion denied Mr. Hitcheoek a fair sentencing proceeding under Florida law.

Greene's opinion that Mr. Hitchcock showed more improvement than virtually

any prisoner he had seen and showed maturity and self-reflection were admissible.[42] Where character is a direct issue, actual incidents showing character become material. under section 90.405. Opinion as to what these incidents show is admissible under section 90.701, just as lay opinion on sanity and competency is admissible. See Garron v. State, 528 So.2d 353, 356-7 (Fla. 1988); Rivers v. State, 458 So.2d 762, 765 (Fla. 1984). Similarly, the fact that experts can voice opinions on one's character traits does not make lay opinion on the same incompetent.

The observable facts fail to adequately convey Greene's opinion. Character cannot be observed directly and must be deduced. To allow evidence of the observable words and acts without giving the opinion as to what they represent suggests to the trier of fact that the Character trait does not in fact exist. Where the articulable facts do not adequately convey the thing observed, Lay opinion testimony does not invade the province of the jury. Kelsev v. State, 73 Fla. 032, 74 So. 983, 985 (1917). Indeed, below, the trial court allowed expert testimony on character traits. R 1105-1157.[43]

2. The exclusion of opinion, Occurrence and hearsay testimony violated Florida statute 921.141 (1).[44]

Even if the opinion and occurrence evidence were inadmissible under the law of evidence, section 921.141(1), which governs death penalty proceedings, requires its admission. Section 921.141(1) allows hearsay testimony in death proceedings when offered by defendants, even if it is not fairly rebuttable by the state. Second, even if the "not fairly rebuttable" requirement applies to defendants, this hearsay was fairly rebuttable.

Hearsay is admissible by the plain words of the statute, unless the

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[42] Although section 90.405(2) does not mention opinion testimony as a means of proof when character is at issue, in Gardner v. State, 480 So.2d 91 (Fla. 1985), this Court held there was no error to allow the opinion8 of a police officer on an accomplice's character and personality.

[43] The fact that Harvard received a life sentence even though he and Mr. Hitchcock were both prevented from escaping was also relevant. This Court has long held that disproportionate sentences received by co-defendants responaible €or the capital offense is relevant mitigating evidence. See Messer v. State, 330 So.2d 137, 141-2 (Fla. 1976). Disproportionate sentences based on similar prison records should also be admissible under the same rationale.

[44] The exclusion of hearsay testimony also compounded the prejudice to Mr. Hitchcock due to the delay in this case. See Point XIII.

defendant has no fair opportunity to rebut. See Perri v. State, 441 So.2d 606, 608 (Fla. 1983). This Court has never held the "fairly rebuttable" requirement applies to defense evidence.

Even if our law required a fair opportunity to rebut the hearsay by the state, the state had such an opportunity. The fact that the witness was an attorney gathering information on behalf of his client does not make the hearsay unrebuttable. See Buenaano v. State, 527 So.2d 194 (Fla. 1988) (prosecutor may testify to hearsay details of previous crime). The prosecutor argued the testimony shauld be excluded as repetitive. R 863. Insofar as other witnesses were available who could testify along the same lines, it was fairly rebuttable since the state could question those witnesses to clarify facts and introduce rebuttal evidence, if it had any to offer. See Kina v. State, 514 So.2d 354, 359 (Fla. 1987).

More fundamentally, the prosecutor had a fair opportunityto rebut because he had a detailed road map of potential defense testimony from five years of post-conviction and clemency litigation. Further, nearly two weeks before the sentencing hearing, the prosecutor received Mr. Hitchcock's Motion to Preclude Imposition of Sentence of Death - Delay pointing out that Baker and Charlie Hitchcock were dead, referring to the details of their testimony contained in the Motion to Vacate Conviction and Sentence filed May 3, 1983 by Richard Greene. R 1372-3. At the hearing on this motion, defense counsel mentioned the loss of Baker and Charlie Hitchcock. R 1294-5. The Motion to Vacate also details the statements by Motley. The prosecutor was or should have been aware of the theme of much of this testimony as well as many of the specifics.[45]

3. The exclusion denied an individualized sentencing determination,

Even if the exclusion were proper as a matter of state law, it violates Florida and Federal guarantees againet cruel and unusual punishment. The error

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[45] A fair opportunity to rebut should not be read to require the party offering hearsay to hand rebuttal evidence to their opponents. Had the State wished, it could have sent investigators to Arkansas. Further, Sonny and Fay Hitchcock were amenable to process and friendly to the state. Richard Hitchcock was available and testified. They were familiar with the period in question and could have presented rebuttal evidence. Where the State had actual knowledge of the subject matter and friendly witnesses who could testify to rebuttal evidence, a fair opportunity exists. In fact, the State did little to contest the accuracy of the statements made by those who did testify to Ernie Hitchcock's early life. The lack of any rebuttal evidence in these circumstances does not mean the state was deprived of an opportunity to find it: it means none exists.

in excluding occurrence testimony by Greene of Mr. Hitchcock's lack of racism, sympathy, and concern for othere violates the holding of the Supreme Court. As evidence of positive character traits which suggest Mr. Hitchcock will get along well in the prison environment, they mitigate against a penalty of death. See Skipper, 106 S.Ct. at 1671. Excluding evidence that Harvard was resentenced to life despite the escape attempt also violates Lockett.

In Green v. Georgia, 442 U.S. 95 (1979), the Court ruled unconstitutional the exclusion of defense hearsay evidence in capital sentencing. Although Green was couched in due process terms, it has been viewed as baaed on the Eighth Amendment. See Washington v. Watkins, 655 F.2d 1346, 1376 n. 58 (5th Cir. Unit A 1981); Tucker v. Kemp, 762 F.2d 1480, 1487 (11th Cir. 1985) (en banc), vacated on other arounds 474 U.S. 1001 (1985). States cannot mechanically use evidentiary rules to exclude mitigating evidence. See Dutton v. Brown, 812 F.2d 593, 601 (10th Cir.) (en banc), cert. denied 108 S.Ct. 116, 197 (1987). The evidentiary ruling that the evidence was excludable hearsay was mechanistic where the witnesses were dead and a better alternative existed to the complete exclusion of the evidence. That the hearsay was gathered in the course of a clemency proceeding could certainly have been brought out on cross exam of Green; but that goes to the weight, not admissibility of the testimony. The exclusion of relevant mitigating evidence on hearsay grounds violated Lockett.

b. Testimony about Richard Hitchcock's prior acts of violence toward family members was improperly excluded.

Mr. Hitchcock proffered the testimony of Brenda Reed and Martha Galloway of physical and sexual violence by Richard Bitchcock toward them and an act of homicidal violence toward Charlie Hitchcock. R 1011-1019. Ms. Reed testified that Richard attempted to force her to have sexual relations with her in his Winter Garden home when Ms. Reed was about 14. R 1016. Ms. Reed was 27 when ehe testified in 1988, R 917; the incident occurred at the same place and roughly the same time as the death of Cindy Driggers in 1976. The trial court excluded the evidence as irrelevant. R 1099.

1. The excluded evidence was relevant to material issues in the sentencing proceeding and admissible as a matter of Florida's law of evidence.

The prior acts of violence by the defendant's brother buttressed evidence of intra-family violence and rebutted the argument that others who grew up in

like circumstances did not display like behavior.

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 in response to the prosecutor's inquiry. The court accepted the prosecutor's contention that Galloway's lack of criminality rebutted Mr. Hitchcock's early life history a8 mitigation since one who grew up in similar circumstances did not commit crimes. R 842. The prosecutor argued in summation that other poor people and the defendant's family in particular grew up with like problems without turning to crime. R 1213. 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 since Richard's character was not at issue. R 1099.

When a party introduces evidence which misleads the jury by painting only part of the true picture, the court errs by excluding evidence which corrects that misimpression. See Parker v. State, 476 So.2d 134, 139 (Fla. 1985). Even otherwise inadmissible evidence, such as the details of a defendant's prior convictions, becomes admissible when the opposing party opens the door by misinforming the jury. See Dodson v. state, 356 So.2d 858, 879 (Fla. 3d DCA 1983); Nelson v. State, 395 So.2d 176, 178 (Fla. 1st DCA 1981).

As the trial. court ruled when the criminal record of Galloway was in question, the criminality of those growing up in circumstances similar to the defendant throws light on his own character. Letting the state show that one person from Mr. Hitchcock's home area was law abiding while excluding evidence of his brother's severe acts of violence against helpless females warped the jury's picture.

The evidence of intra-family violence also added another dimension to Mr. Hitchcock's picture of his chaotic, violent home life. Although Mr. Hitchcock presented unrebutted evidence that his stepfather was an abusive alcoholic, he was prevented by the court's ruling from showing that his brother abused his sisters. Evidence of family violence is relevant mitigating evidence in Florida. See Holsworth v. State, 522 So.2d 348, 353 (Fla. 1988). To support Mr. Hitchcock's claim that his family background mitigatedthe offense and rebut the

prosecutor's argument, the trial court should have admitted the evidence.

Mr. Hitchcock testified his brother Richard came into Cindy's room after Mr. Hitchcock and the teenager had finished consensual sex, and strangled Cindy in a fit of rage. R 1048-1050. The trial court forbade evidence corroborating Mr. Hitchcock's version. R 685. The court sustained the prosecutor's objections to the proffer of Reed and Martha Galloway as irrelevant. R 1099. The trial court ultimately found three aggravatora based on the State's version of events placing sole blame for the crime on Mr. Hitchcock. R 1517-8. The actions of Richard the night of the homicide are relevant as a defense to the sexual battery, avoid arrest, and heinousness aggravators, and to establish Mr. Hitchcock acted in a less culpable capacity generally than presented by the state. See Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); Cooper v. Dugger, 526 So.2d 900 (Fla. 1988). In Cooper, this Court held exclusion of evidence of the codefendant's violent reputation violated Lockett when the defendant claimed the codefendant played a more culpable role. The evidence was relevant in part "to the circumstances of the offense." Cooper, 526 So.2d at 902.

The evidence which the court prevented Mr. Hitchcock from presenting to the sentencera has even greater probative value than the evidence in Cooper. First, it corroborated the testimony of a witness whose credibility was under attack. Evidence of prior bad acts when a witness relates a similar crime but has his credibility attacked is admissible to corroborate the testimony. See Heuring v. State, 513 So.2d 122, 125 (Fla. 1987); Beasley v. state, 518 So.2d 917, 918 (Fla. 1988). In Heuring, the defendant was charged with sexually battering his stepdaughter. This Court upheld the use of evidence that the defendant had sexually battered his daughter twenty years before when she was at an age similar to his stepdaughter:

> We find that the better approach treats similar fact evidence as simply relevant to corroborate the victim's testimony, and recognizes that in such cases the evidence's probative value outweighs its prejudicial effect.

Heuring, 513 So.2d at 124-5.

Mr. Hitchcock testified that his brother committed acts which the state claimed the defendant had commited. The State attacked Mr. Hitchcock's credibility. The evidence of prior acts of physical and sexual violence by

Richard toward his young sisters when they were at a similar age to the victim and when one such attack occurred in the same locale as that on the victim, corroborated Mr. Hitchcock's testimony and were relevant on that basis.[46]

Richard's attack on Brenda Reed occurring roughly contemporaneous with the murder also showed his physical condition was not so disabling as to prohibit him from attacking Cindy Driggers. The State introduced evidence of Richard's condition and argued it prevented hie attacking his thirteen year old step-daughter. R 512-513, 1196. The attempted rape of fourteen year old Brenda Reed during the same time period showed him fit enough for his purpoee. The proffered testimony was relevant to show the identity of the attacker. Most cases deciding use of prior bad acts for identity involve use of the evidence against the criminal defendant. There evidence of prior bad acts can be relevant to identity if the bad acts are sufficiently similar to the act in question. "Like crimes, committed against the same class of persons, at about the same time, tend to show the same general design and evidence of the same is relevant and may lead to proof of identity." Talley v. State, 36 So.2d 201, 205 (Fla. 1948). Familial relations between a class of victims and the perpetrator especially add probative value to similar bad act evidence. See Stevens v. State, 521 So.2d 362 (Fla. 5th DCA 1988); Cotita v. State, 381 So.2d 1146, 1148 (Fla. 1st DCA 1980). Identity of locale adds to the probative value of the similar fact evidence. See Holsworth v. State, 522 So.2d 348, 352 (Fla. 1988). Here, the proffer showed that Richard Hitchcock committed acts of physical and sexual violence against his sisters in the home when they were teenagers and younger. It also showed he attempted to shoot his uncle. This testimony that Richard reacts violently, even homicidally, toward immediate members of his family in the home tends to prove that Richard committed the violence against Cindy Driggers. Especially compelling is the evidence of an attack on Brenda Reed in the same house at roughly the same time period as the attack on Cindy Driggers.

Even if the prior bad acts lacked sufficient similarity to the instant offense under the usual Williams rule analysis, they should be admissible when introduced by a criminal defendant to show another person committed acts

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[46] The evidence shows Richard Hitchcock's violence towards girls of that age, not that he had sex with Cynthia Driggers.

attributed to him. Prior bad act evidence, if relevant, is admissible unless some specific reason for exclusion exists. See Williams v. State, 110 So.2d 654 (Fla. 1959). "Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission." Moreno v. State, 418 So.2d 1223, 1225 (Fla. 3d DCA 1982).

The prior acts of violence by the defendant's brother help establish the mitigating circumstance of lingering doubt about guilt. This Court has held that lingering doubt of guilt is not a proper mitigating circumstance. See King v. State, 514 So.2d 354, 358 (Fla. 1987), cert. denied, 108 S.Ct. 2916 (1988); Sireci v. State, 399 So.2d 964 (Fla. 1981). A plurality opinion of the United States Supreme Court in Franklin v. Lynaugh, 108 S.Ct. 2320, 2326-7 (1988) auggeat lingering doubt is not a proper mitigating circumstance unless recognized as such by state law. Mr. Hitchcock continues to argue that lingering doubt about guilt is a legitimate mitigator which sentencers must consider under the Sixth, Eighth and Fourteenth Amendments, and Article I, Sections 9, 16 and 17 of the Florida Constitution. This Court should revisit the question of lingering doubt at least in resentencing proceedings.[47]

2. The exclusion of relevant evidence violated due process and constituted cruel and unusual punishment contrary to the Florida and federal constitutions.

Even if the evidence were not admissible under Florida law, its exclusion violates the guarantees of due process and freedom from cruel and unusual punishment.[48] Evidence which goes to show a chaotic, violence-filled family upbringing - such as the testimony showing Mr. Hitchcock's older brother, the eldest male in the household beat and sexually abuaed their young sisters - must be admitted in death penalty proceedings. See Eddings, 455 U.S. at 107.

The United States Supreme Court held in Green v. Georgia, 442 U.S. 95 (1979) that Lockett required admission of a codefendant's atatement that he killed the victim while the defendant waa on an errand. This evidence supported

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[47] See King v. Strickland, 748 F.2d 1462, 1463 (11th Cir. 1989); Geimer and Amsterdam, "Why jurors vote life or death: Operative Factors in Ten Florida Death Penalty Cases," 15 Am.J.Crim.L. 1, 27-34 (1988).

[48] These rights are guaranteed by Article I, sections 9, 16 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the Federal Constitution.

Green's argument in the sentencing phase that he was not present when the killing occurred and did not participate in it. Id. at 96. See also Chaney v. Brown, 730 F.2d 1334, 1351-2 (10th Cir. 1984) (state's withholding evidence of others' involvement not cause €or reversal of conviction, but requires death sentence be vacated because it shows lesser culpability). The 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. As relevant mitigation, the trial court erred in excluding it.

The right to present a defense and compel production of witnesses also requires admission of the evidence, even if state evidentiary rules bar it. See Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

> Fundamental standards of relevancy, subject to the discretion of the court to exclude cumulative evidence and to insure orderly presentation of a case, require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged.

United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980) (opinion by Kennedy, J.); see Pettijohn v. Hall, 599 F.2d 476, 482 (1st Cir.), cert. denied, 444 U.S. 946 (1979). Where the defense makes a showing of a nexus between the third party perpetrator and the crime, then due process requires the admission of evidence showing that person committed the crime unless it is unreliable. See Cikorka v. Dugger, 840 F.2d 893, 898 (11th Cir. 1988); Perry v. Rushen, 713 F.2d 1447 (9th Cir. 1983), cert. denied, 469 U.S. 838 (1984).

Mr. Hitchcock testified that Richard Hitchcock committed the acts which the trial court attributed to him to find three aggravating circumstances. No strong state interest in excluding the evidence exists. The court let the state present a thorough case to rebut Mr. Hitchcock's version. A hair analyst's trial testimony showing Richard Hitchcock's hairs were not found on the victim was read to the jury. Richard Hitchcock denied involvement. The involvement of Richard was not collateral to the case, it was key. Since Richard has been connected to the acts by substantial evidence, excluding collateral bad act evidence which supporting the defense theory exculpating him of aggravators denies Mr. Hitchcock due process.

c. Trial phase testimony of two police officers was improperly **excluded.**

The defense proffered the trial testimony of two police officers which the trial court refused to admit unless the defense made a showing of unavailability.[49] R 707-716. At the guilt phase, Detective Hanson had testified Mr. Hitchcock voluntarily gave Hanson his ring and hair samples for analysis. 1R 438, 441-2. Hanson saw no bruises or cuts on Mr. Hitchcock's hands on the night of July 31, within 24 hours of the strangulation of Cynthia Driggers. 1R 442. Sergeant Dawes testified that Mr. Hitchcock voluntarily surrendered himself earlier that same day. 1R 726-9. Exclusion by the trial court deprived Mr. Hitchcock of evidence rebutting the state's theory and supporting relevant mitigating factors. The absence of wounds on Mr. Hitchcock's hands tended to show he had not used them to strangle Cynthia Driggers the previous night, supporting his claim that hi5 brother strangled her. His cooperation with police showed his ability to respond well to authority while in custody and face up to the consequences of his parole violation and possible murder charges. Florida accepts that success as a prisoner is relevant mitigating evidence. <u>See</u> <u>Harmon v. State</u>, 527 So.2d 182 (Fla. 1988).

By excluding relevant, mitigating evidence, the trial court violated <u>Lockett</u> and <u>Green v. Georgia</u>. Under section 921.141(1), hearsay evidence is admissible in death penalty proceedings.[50] Requiring a predicate of unavailability when a defendant seeks to use hearsay violates the plain words of the statute and its construction by this Court.[51] The fair opportunity to rebut requirement does not apply to defendants, but even if it did, since the State itself used these witnesses at trial, it cannot be heard to complain now that their testimony was somehow unrabuttable. <u>See</u> <u>Buenoano v. State</u>, 527 So.2d 194 (Fla. 1988) (prosecutor's recounting of detaile of prior felonies not unrebuttable since defense counsel had represented client for those felonies). Further, at least Detective Hanson was available to testify for the state if it wished to rebut something from his guilt phase testimony.

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[49] Hanson was later present at the courthouse. R 782. Dawes apparently no longer worked in the Orlando area; whether he was contacted by either party is unclear from the record. R 789-90.

[50] See the argument in Point 3, B, 2, <u>supra</u>.

[51] See Point 3, A, <u>supra</u>.

d. Expert testimony on the basis for his opinion that: a defendant will not be dangerous in the future was improperly excluded.

Dr. Michael Radelet opined that the likelihood of future violence by Mr. Hitchcock was minuscule. R 738. He reached that conclusion based on a statistical study correlating seven variables with future violence of criminals, including the degree of premeditation of the subject's crime and the educational level of the subject. R 735-6. When defense counsel asked what was the degree of premeditation of Mr. Hitchcock's offense and what educational level Mr. Hitchcock had obtained, the court sustained prosecution objections to the testimony as irrelevant and not "admissible from this witness." R 732, 735. No voir dire exam occurred and no request for a limiting instruction was made.

The opinions upon which Radelet based his conclusion that Mr. Hitchcock would not be dangerous in the future were admissible to explain the basis for that conclusion. The court below accepted Radelet as an expert based on a statistical study itself based on just such judgments of educational levels and degrees of premeditation of crimes by the study's subjects. Section 90.705 lets an expert testify "in terms of opinion or inferences and give his reasons without prior disclosure of the underlying facts or data." §90.705(1). Subsection 90.705(2) places the burden on the opposing party to show that the expert's opinion is not based on sufficient facts. See City of Hialeah v. Weatherford, 466 So.2d 1127, 1129 (Fla. 3d DCA 1985). The State made no showing the opinion was excludable on this ground.

Although exclusion of such testimony without any effort by the opposing party to establish insufficient facts may be upheld if the record makes it apparent that the opinion was not relevant or competent, see Husky Industries, Inc. v. Black, 434 So.2d 988, 993 (Fla. 4th DCA 1983), that is not the case here. Future non-dangerousness is a relevant mitigating circumstance in Florida. See Cooper v. Dugger, 526 So.2d 900, 902 (Fla. 1988) (rehabilitation is relevant mitigator); Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987) (future behavior as model prisoner). Degree of premeditation and level of education categories were necessary factors for Radelet to reach his opinion. Experts may explain the reasons for their opinions and how they arrived at them. §90.705(2); see Wilmington Trust Co. v. Manufacturers Life Insurance Co., 749 F.2d 694, 698 (11th Cir. 1985) (interpreting similar federal rule to let jury hear what

inferences experta rejected to reach ultimate opinion). Facts were introduced to show Mr. Hitchcock's level of education. R 883-4, 1064-5. There is no reason an expert could also not competently classify a crime as premeditated upon knowing the facts. The trial court erred in excluding the testimony. The exclusion of an expert's basis for his conclusion that a subject would not be violent in the future violated the wide scope of mitigating evidence allowed in death sentencing proceedings, due process and the prohibition against cruel and unusual punishment.

Exclusion of testimony by a defense witness implicates due procese and the right to compel the production of witnesses and present a defense.

> [T]he Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury.

Washington v. Texas, 388 U.S. 14, 20, 87 S.Ct. 1920 (1967). A situation similar to that below arose in Boykins v. Wainwright, 737 F.2d 1539 (11th Cir. 1984), cert. denied, 470 U.S. 1059 (1985). The defendant presented a psychiatrist who opined in response to a hypothetical that Boykins was insane at the time of the offense. The trial court excluded the psychiatrist's testimony he had treated Boykins previously and diagnosed him then as a paranoid schizophrenic. Since Boykins' sanity was at issue, the Eleventh Circuit held the evidence was crucial, critical and highly significant. Similarly, the future dangerousness of Mr. Hitchcock was at issue below. Although Radelet was allowed to opine to the ultimate issue, as was the psychiatrist in Bovkins, preventing Radelet from explaining all the bases for his opinion denied Mr. Hitchcock crucial, critical and significant evidence. The jury never heard the connections between the defendant's ease and the categories of premeditation and education Radelet used to determine non-dangerousness. Radelet's opinion had its legs cut out from under it by the ruling. The exclusion denied Mr. Hitchcock due process. It also violated Lockett and section 921.141(1), as an evidentiary ruling excluding competent, relevant evidence. See Skipper, 476 U.S. at 8.

e. The **clemency report** of an **expert cross-examined** on a **section** of the report was improperly excluded.

Dr. Elizabeth McMahon, a clinical psychologist, examined Mr. Hitchcock in preparation €or clemency and then again shortly before testifying and opined

that Mr. Hitchcock should be given a life sentence.[52] In cross examining McMahon, the prosecutor with her clemency report in hand asked her about a factor mentioned in the report to which she had nat testified. The trial court refused the defense motion to allow the entire report into evidence. R 1145.

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 to correct any prejudice arising from the impeachment. See Hernandez v. State, 22 So.2d 781, 784 (Fla. 1945); Kaminsky v. Travelers Indemnity Company, 474 So.2d 287, 288 (Fla. 3d DCA 1985); American Motors Corporation v. Ellis, 403 So.2d 459, 463 (Fla. 5th DCA 1981); King v. Califano, 183 So.2d 719, 723-4 (Fla. 1st DCA 1966). The prosecutor was suggesting that the expert had not been entirely forthcoming with the jury in her testimony; refusing to let the jury compare her entire testimony with her clemency report gave the prosecution an unfair advantage. This exclusion not only violated Florida's rules of evidence, it also trenched on the Eighth Amendment's anti-exclusionary rule. McMahon's clemency report contained the test results and conclusions to which she testified: as relevant opinion evidence on Mr. Hitchcock's character and childhood, the report was admissible under Lockett.

f. A study comparing characteristics of life-sentenced murderers and opinion that Mr. Hitchcock's characteristics more closely matched those sentenced to life was excluded.

Dr. McMahon also proffered a published study comparing the demographic and psychological characteristics of a representative sample of life-sentenced and death-sentenced murderers in Florida and her opinion that Mr. Hitchcock's characterietics more closely matched those receiving life sentences. R 992-1007. The trial court sustained the prosecutor's relevancy objection. R 1008.

This evidence related the characteristics of Mr. Hitchcock, deduced by McMahon from her interviews, to the need €or death as a punishment. It was relevant, mitigating evidence whose exclusion violated Loekett. That the expert witness would have testified to the ultimate conclusion of law does not make it any less admissible under Florida law, much less so under Lockett's wide scope of admissibility for mitigating evidence. See S90.703.

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[52] The doctor had performed sixteen clemency studies and recommended a life sentence in only three, including Mr. Hitchcock. R 1140.

g. The opinion by the prosecutor evidenced by a plea offer that the case deserved a life sentence was excluded.

The trial court quashed a defense subpoena for an Assistant State Attorney and granted a state motion in limine to prohibit any mention of plea bargaining. R 1434-5, 13. The defense introduced an affidavit signed by Micetich that the State had offered to recommend a life sentence in exchange for a plea of guilty. R 1436.

The State arguedthe evidence would be irrelevant and that section 90.410, prohibits mentioning plea offers by the State. This section reads:

> Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any pleas or offers is inadmissible, except when such statements are offered in a prosecution under Chapter 837.

By its plain language, this statute covers only pleas of guilt or nolo contendere or offers of the same. It says nothing about offers by the state to recommend a sentence in return for a plea.

In any event, the offer to recommend a life sentence was relevant, mitigating evidence and admissible under Lockett whether a statute calls for its exclusion or not. The prosecutor was an expert who examined the facts of the case, and using his judgment decided that Life would be appropriate. Certainly, if the prosecutor told the jury at the sentencing phase he recommended a life sentence, it would be relevant. The problem with the proffered evidence is not that it is irrelevant, but that it is too relevant. It undercuts credibility of the state in arguing for death. To prevent mention of this highly favorable recommendation by the prosecution violates Lockett.

h. Evidence that executing a defendant would coat more than a life sentence, that it would not deter others, that a life sentence would satisfy the need for retribution, and that lingering doubt frequently plays a role when a confession has been retracted was excluded.

Michael Radelet proffered testimony which would have aided the jury in deciding difficult capital sentencing issues. There was no objection below to Radelet testifying as an expert in these areas; the State contended the issues were irrelevant. R 700-704.

The Memorandum of Planned Testimony, accepted by the court as a proffer, R 698, details the testimony. Court Exhibit I, Transcript of Record Evidence.

Radelet would have testified that executing Mr. Hitchcock, given the nature of his crime, would have no deterrent effect, that executing him would coat more than keeping him in prison €or life, that lingering doubt often plays a role when the primary evidence against a defendant is, as here, a retracted confession, and that a life sentence and the conditions Mr. Hitchcock would face under such a sentence would be adequate retribution given his character and family ties. At least one member of the venire expressed concern at the coat of life imprisonment. R 84.

The testimony would have related the crime and the defendant with the proper punishment. Florida's rules wf evidence allow an expert to testify to any subject which will aid the jury in its understanding or evaluation of the evidence. "[T]he opinion is admissible only if it can be applied to evidence at trial." 590.702. Radelet's testimony would have helped the jury and was applicable to the facts of the case, and it was admissible under 90.702. It also constituted independent mitigating evidence relating Mr. Hitchcock's character and the crime to relevant sentencing considerations offered by the defense. The exclusion of relevant mitigating evidence violates Lockett.

POINT V

READING **TESTIMONY FROM** A PREVIOUS PROCEEDING DENIES A **DEFENDANT THE** RIGHT **TO CONFRONT THE WITNESS** WHEN **THE** STATE **MAKES** NO SHOWING OF **UNAVAILABILITY AND WHEN THE** EVIDENCE CONSISTS OF OPINIONS WHICH **COULD** BE **OFFERED** BY **ANOTHER** EXPERT.

The State, defenee counsel, and Steven Platt read a transcript of the trial teatimony of hair analyst Diane Bass. R 595-661. On February 15, two days before the start of the resentencing, the State told the court it planned to recreate the offense for the jury but could not find the hair analyst. R 1300. At reaentencing, the State told the trial court it could not find Diane Bass after searching diligently and looking "high and low" for her. R 583-584. Defense counsel objected to reading the teatimony. R 584-5.[53]

[53] In the hearsay testimony, Diane Bass opined that pubic and head hairs found on the victim or with other physical. evidence collected at the scene were consistent with the victim's hairs or James Ernest Hitchcock's hairs, but not consistent with Richard Hitchcock's hairs. R 631, 635-6, 637-8. Bass could not remember and did not record any of the microscopic comparisons between the samples which she claims to have made. R 651-3, 656. Bass claimed to have compared pubic hairs found on the victim with Richard Hitchcock's pubic hairs, but the report indicates she compared them to Richard's head hair. R 647-8. Bass chimed the report wae erroneous. R 648-9.

The prosecutor failed to show that Diane Bass was unavailable, denying Mr. Hitchcock the right to confront the witness in court. "The proponent of the former testimony must establish what steps it took to secure the appearance of the witness, [cites omitted]." McClain v. State, 411 So.2d 316, 317 (Fla. 3d DCA 1982). Where a party seeks to offer a deposition of one claimed to be unavailable, this Court requires "more than a perfunctory attempt to contact a witness...the party offering the deposition must show it has exercised due diligence in its search." Pope v. State, 441 So.2d 1073, 1076 (Fla. 1984). Florida's requirements mirror those of the Federal Constitution when prior testimony by a witness is to be read into the record. To show unavailability, the state must show a good faith effort to obtain live testimony. See Ohio v. Roberta, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Representations by counsel without sworn testimony is insufficient. See United States v. Caauto, 758 F.2d 944 (3d Cir. 1985); Valenzuela v. Griffin, 654 F.2d 707 (10th Cir. 1981); contra United States v. Sindona, 636 F.2d 792 (2d Cir. 1980) (but noting affidavits preferable to counsel's representations and no reason to believe representations were false). The record must reveal what steps were taken. A naked claim of a search for a witness does not suffice.

The prosecutor below made no showing or explanation of what steps he took to find this ex-state employee. Mr. Hitchcock was denied his right to confront Diane Bass.

In Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified 706 F.2d 311 (1983), the court held the confrontation clause applies to capital sentencing proceedings. The use of a hearsay psychiatric report at Proffitt's trial did not meet the heightened reliability for death Sentencing proceedings which the Supreme Court requires. Id. at 1254; see also Moore v. Kemp, 824 F.2d 847, 854 (11th Cir. 1987) (en banc), vacated on procedural grounds, 109 S.Ct. 1518, cert. denied 109 S.Ct. 1764 (1989) (claim that hearsay testimony in condemned's presentence report violated confrontation clause should be considered on its merits). This Court agrees the confrontation clause applies to sentencing proceedings. See Rhodes v. State, 14 F.L.W. 343 (Fla. No. 67842,

July 6, 1989);[54] In Rhodes, this Court held the admission of a recorded statement by another of Rhodes' victims denied him the right to confront that witness. Similarly, admitting readings of Bass's testimony denied Mr. Hitchcock the right to confront her. See Coy v. Iowa, 108 S.Ct. 2798 (1988).

At bar, another expert witness, who was a person of some authority in the missing expert's laboratory, R 663, read her portion of the transcript. This procedure created the illusion of confrontation, but one which mads a mockery of real confrontation. Instead of seeing a witness who could remember little of what: she did and could not satisfactorily explain a crucial discrepancy on the reported findings, the jury saw one without a real interest in the testimony but with apparent authority, calmly reading it as his own.[55]

The error above prejudiced Mr. Hitchcock. See State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986). The evidence in favor of the three aggravators found by the court relating to the circumetances of the offense was close to equipoise and not overwhelming. The defense and prosecutorial theories differed sharply. Richard Hitchcock denied involvement; Ernest Bitchcock testified he played a lesser role to Richard's involvement, a role which would have led the jury to believe he was not guilty of sexual battery, murder to avoid arrest, and a heinous, atrocioue, or cruel murder and explained his prior statement was given to protect his brother. The physical evidence of Diane Bass tended to show Richard was not involved; little other evidence besides the testimony and impeachment thereof supported one side over the other. Given this equipoise, the jury likely relied on the physical evidence wrongfully included.[56] On this

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[54] See also Walton v. State, 481 So.2d 1197 (Fla. 1985); Engle v. State, 438 So.2d 803 (Fla. 1983); see also Tompkins v. State, 502 So.2d 415 (Fla. 1987) (assuming confrontation right applied, but finding error harmless); but see Chandler v. State, 534 So.2d 701 (Fla. 1988) (no error in admission of hearsay testimony describing what guilt phase witnesses had testified about in the defendant's reeentencing).

[55] Moreover, the State still had the relevant physical evidence in its possession. No showing was made that another hair analyst could not have done the comparisons and testified instead of Bass. This failure violates the "preference €or face-to-face confrontation at trial," Ohio v. Roberts, 448 U.S. at 63, established by the confrontation clause.

[56] Mr. Hitchcock would also argue that Bass's testimony was unreliable and impeachment evidence was withheld from the defense and sentencers. This evidence does not appear on the record, and this Court has refused to remand the case to develop that evidence. Appellant urges the Court to reconsider this order if such a remand would be necessary to a decision on this issue.

record, an error insulating the reliability of the evidence supporting the state's version cannot be harmless.

POINT VI

TWO STATEMENTS OF MR. HITCHCOCK WERE ADMITTED CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 57, 21 AND 22 FLORIDA CONSTITUTION.

a. The confession.

Due process requires at a minimum that the trial judge independently determine the voluntariness of a custodial statement prior to its introduction. Jackaon v. Denno, 378 U.S. 468 (1964); Sims v. Georgia, 385 U.S. 538 (1967); McDole v. state, 283 So.2d 553 (Fla. 1973); Land v. State, 293 So.2d 704 (Fla. 1974); Greene v. State, 351 So.2d 941 (Fla. 1977). The trial judge here conducted no hearing on the voluntariness of Mr. Hitchcock's confession, relying instead on the fact that it had been admitted some eleven years earlier in the guilt phase trial. R 520-21. "[A]ppellate review...is, as a practical matter, an inadequate substitute for a full and reliable determination of the voluntariness issue in the trial court" and due process requires procedures which are "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession..." Jackson, 84 S.Ct. at 1788. Blind reliance on a determination made long ago, by a different judge at a guilt phase trial is inadequate to comply with the requirement of Jackson v. Denno, and the sentence must be vacated.

b. The letter confession addressed to Mr. Hitchcock's mother.

During the cross-examination of Mr. Hitchcock, the state surprised the defense with a copy of a letter Mr. Hitchcock had written, and addressed to hie mother the day he initially confessed. In pertinent part, the letter says:

> ...Morn, I killed Richard's little girl Cindy. I didn't mean to I don't know how it happened but I did. I went in I think maybe I was drugged I don't know. But if not I don't know how it happened. Mama I didn't mean for me to go wrong again. I guess it was just meant to be.. ..

Ex. P-2, Transcript of Record, Evidence.

There is a notation at the bottom from the jail chaplain:

> I am writting [sic] to let you know that we here in the Chaplain's office will continue to talk to James and be of any assistance in spiritual matters that we can. Please pray for us as we seek to help James and for James as he goes through the court system. May God comfort you in this time of agony in your life.

Yours in His Matchless
Grace
/s/ Jerry R. Jordan
Chaplain.

Ex. P-2.

A further notation says: "Received August 12, 1976, Time - 9:30 p.m. Received by Judy Hitchcock -- Released to Det. Henson Aug. 30, 1976."[57]

The prosecutor pulled out this confession after Mr. Hitchcock testified his statement to the police was a fabrication to cover for the true killer, Richard Hitchcock. With it, he impeached Mr. Hitchcock's testimony and later argued to the jury that Mr. Hitchcock had lied to them as a (nonstatutory) basis for a death verdict. R 1216.

Over objection, R 1087-1088, 1089-90, the Court admitted the letter in toto. There was no evidentiary hearing on the voluntariness of this statement,[58] even though defense counsel brought to the Court's attention that it was (1) custodial, (2) written in a "coercive atmosphere," (3) at the direction of a state agent. R 1089. While statements to impeach need not meet Miranda's requirements, Harris v. New York, 401 U.S. 222 (1971) they nevertheless must be ehown to be voluntary. No such showing was made here. The admission of the statement absent a voluntariness inquiry requires reversal.

POINT VII

THE STATE'S EVIDENCE AND ARGUMENT VIOLATED THE SIXTH AND EIGHTH AMENDMENTS AND BOOTH V. MARYLAND.

Informing the jury of victim impact through testimony or argument injects considerations "irrelevant to a capital sentencing decision, and ....its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Booth v. Maryland, 107 S.Ct. 2529, 2533 (1987). Accord, South Carolina v. Gathers, 57 U.S.L.W. 4629 (June 12, 1989). Trial counsel filed a motion pre-trial to preclude victim impact evidence and argument, R 1318-19, and brought Booth to the Court's attention. R 15-16. Through teetimony and argument, the prosecutor played on the

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[57] Mr. Hitchcock's mother testified that she never received and had not previously seen the letter. R 1174.

[58] Neither did the Court instruct the jury on voluntariness. R 98-99.

background and character of the victim and placed before the jury reasons for imposing death which are irrelevant to that decision.

To start of€ the trial, the prosecutor put Cynthia Driggers' mother on the stand.[59] After introductory testimony and overruled objection, R 482-83, the prosecutor turned to a discussion of Cynthia Driggers' character:

> Q. Miss Hitchcock, what kind of little girl was Cindy?
> A. She wae a very quiet, shy girl.
> Q. What grade of schooling had she attained?
> A. 7th
> Q. Did she have any particular physical defects?
> A. She was blind in one eye.
> Q. Did you, as her mother, see that that affected her socialization with other people at all?
> A. Yes. She had a tendency not to be very friendly.
> Q. Was ehe outgoing in any way?
> A. Just around the family.
> Q. Bow about socializing with other kids her age or other people outside the family?
> A. No. She tended to stay away from that because of her eye.
> Q. As far as her relationship with their family members, including the defendant and anybody else that was considered a family member, did you ever note any, what you would regard as her mother, inappropriate sexual behavior between her and other individuals?
> Mr. Wesley: Object to the question, your honor.
> The Court: I will sustain the objection.
> Q. Miss Hitchcock, did Cindy, at the, at the age of thirteen, in any way present a behavior problem €or you?
> A. No.
> Q. Did she date?
> A. No.
> Q. She have any boyfriends?
> A. No.

R 484-85.

Evidence focusing the penalty phase jury on the pereonal characterietice of the victim violates Booth. The Supreme Court allowed one exception for such evidence in Booth, and the state here tried to fit it. The Court held in a footnote that "[s]imilar types of information may well be admissible because they relate directly to the circumstances of the crime." Id. 2535 n. 10. Arguing on the one hand the victim's character was placed in issue by the defense contention of consent (and on the other that the defense was precluded from presenting evidence to support its claim), the state here was able to admit evidence the victim was previouely chaete, completed only seventh grade, was blind in one eye, had no boyfriends, and wae quiet and shy. Letting the

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[59] The defense uneuccessfully moved to use the transcript of her trial testimony (with improper parts redacted) in lieu of her appearance to lessen the likelihood of presentation of victim impact statements. R 471.

prosecutor present such evidence is fundamentally unfair and should not have been allowed here because the defense was prevented from countering it. See Point IV, B and C. Its use at closing argument by the state also went directly to the point Booth forbids.

Comparing the suffering of Mr. Hitchcock's mother to that of the victim's, the prosecutor told the jury "Mrs. Galloway is a lucky woman. She is a lucky woman if you compare her to Cynthia Driggers' mom. The evidence was introduced in Court of cards and certain items and drawings that this defendant has." [60] This argument violates the second type of victim impact statements precluded by Booth, those relating to the emotional effect of the killing on the victim's family. An objection was sustained, R 1183-1185, but the prosecutor did not get the message. Returning to his victim impact theme, the prosecutor told the jury there was an:

> Interesting figure that's come up a couple time in this case. Thirteen was the age that we are told the defendant ran away from his problems. And coincidentally, seven years later, thirteen becomes the age of his victim. His stepniece.
>
> How long did she Buffer, what horror must have permeated her, that's important for you to consider in determining whether OK not the way this little girl was killed was particularly wicked, evil, atrocious or cruel.
>
> How many years of her life were taken?

R 1209-10. Objection was again sustained, R 1210-11, but the prosecutor once again argued only the jury could speak for the victim:

> You know, all of the witnesses and the attorneys, the defense attorneys are here to epeak for the defendant. But who speaks for Cindy Driggers?

R 1217. Objection was overruled, and a motion for mistrial based on the cumulative effect of the prosecutor's unlawful argument was denied. R 1217-18. The prosecutor answered his question, telling the jury "you speak for her."

Such argument is irrelevant to a capital sentencing, and the prosecutor knew it. By distracting the jury from the proper statutory aggravation and the defendant's "personal responsibility and moral guilt," Enmund v. Florida, 458 U.S. 702, 801 (1982), and riveting its attention instead on the personal characteristics of the victim and the emotional impact on her mother, the

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[60] The prosecutor is referring to evidence in mitigation that Mr. Hitchcock sent loving cards and drawings to his mother while he was in prison.

prosecutor plainly violated the Eighth Amendment. Booth; Gathers.[61]

POINT VIII

THE COURT ERRED BY ADMITTING EVIDENCE *THAT* DEFENSE WITNESSES HAVE BEEN SENTENCED TO DEATH.

Mr. Hitchcock presented the testimony of many men who had known him from death row to show positive instances of hie character. The trial court Let the prosecutor, over objection, impeach them as biaeed by bringing out in cross-examination that they had been sentenced to death.[62] R 772-773, 779-780, 782, 786. Admitting this evidence prejudiced Mr. Hitchcock.[63]

Florida law does not permit the introduction of details of convictions to impeach the credibility of witnesses. See Parks v. Zitnik, 453 So.2d 434, 437 (Fla. 2d DCA 1984); Reeser v. Boats Unlimited, Inc., 432 So.2d 1346, 1349 (Fla. 4th DCA 1983); Davis v. State, 397 So.2d 1005, 1007-8 (Fla. 1st DCA 1981). Fulton v. State, 335 So.2d 280 (Fla. 1976), involves a question similar to the one here. Fulton argued self defense to a second degree murder charge; a defense witness, Bartee, testified the victim had a reputation for violence in the community. The state on cross got the witness to admit he had also been charged with second degree murder in an unrelated incident. This Court ruled the evidence improper and wrote at page 285:

> We reject the State's contention that the *error* was harmless, inasmuch as Bartee's testimony to the heart of the petitioner's claim of self-defense...There is also the possibility of a 'spill-over' effect. The jury's perception of the defendant might have been colored by the knowledge of a friend's involvement in a collateral matter. The danger of 'guilt by association' is a real one which ought to be minimized whenever possible. The fact that the defendant and the witness were each charged with eecond degree murder, although the crimes were unrelated enhances the danger of a possible

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[61] At sentencing, the State's entire presentation consisted of testimony from Cynthia Driggers' sister "under the victim's rights statute" relating the emotional impact on the family. R 1348-1349. Though there was no objection, this also violated Booth. Patterson v. state, 513 So.2d 1257, 1263 (Fla. 1987).

[62] One defenee witness volunteered the information, R 771, but the inmate's mental retardation and apparent misunderstanding of counsel's instruction not to mention it, R 773, cannot be taken as a waiver of the issue by Mr. Hitchcock. Defense couneel did not repeat the objection for the six inmates after the second inmate wae crossed on his death sentence, but since the first objection was overruled, continuing to object would be futile and so the other errors are preserved. See Simpson v. State, 418 So.2d 984, 986 (Fla. 1982).

[63] This evidence also increasee the prejudice due to the delay in the case, see Point XIII, added to the prejudice of having the jury view the arrival of the witnesses while under heavy guard, Point III, and constituted intentional use of the previous death sentence, see Point IX.

'spill-over' effect.

The danger of guilt by association is greater and more unfair when a defendant in a capital resentencing hearing attempting to prove future nondangerouaness is tarred by association with the violence of the inmates with whom he has been housed. It is hard to understand what relevance to bias the death sentences of the inmates have. Assuming their death sentences somehow show bias, their prejudicial effect on this defendant far outweighed any probative value. The inmates admitted to numerous felony convictions on direct exam which properly called their credibility into question.[64] Letting the prosecutor point out the death sentences of seven witnesses maximized the danger of guilt by association. If there was any doubt that the prosecutor was intentionally emphasizing guilt by association, he removedthat doubt in his closing argument: "And then there's all the killers who came to the courtroom to tell you they like this defendant." R 1214. That the prosecutor neatly sidestepped the limited purpose in admitting this evidence proves the jury used it prejudicially as well. The prejudicial impact of the teatimony does not stop with guilt by association. It also put into evidence the inescapable conclusion that Mr. Hitchcock had previously been sentenced to death. As argued below, see Point IX, this knowledge prevents a fair sentencing hearing. The prejudice from guilt by association and from emphasizing the defendant's previous sentence compared to the minimal or nonexistent probative value of the evidence, shows the trial court erred in admitting the death sentences of defense witnesses.

This error so severely prejudiced Mr. Bitchcock's chances for a life recommendation that it violated the due process of law and freedom from cruel and unusual punishment. The use of a defendant's prior crimes to show propensity violates due process. See Panzavechia v. Wainwright, 658 F.2d 337, 341 (5th Cir. Unit B 1981). Jurors' knowledge and use of the prior vacated conviction in a case being retried violates due process. see Point IX. similarly, the use of the dangerousness of other inmates to inflame the jury unfairly tars the defendant by injecting knowledge of the prior sentence and suggesting the defendant, too, is dangerous. Its use violates the heightened reliability

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[64] The State never disputed the number of convictions to which the inmates testified.

required in death sentencing proceedings. See Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). It constitutes a prejudicial, non-statutory aggravator which causes the sentencing to focus an the character of defense witnesses rather than the character of the defendant.

POINT IX

THE *JURY'S* KNOWLEDGE OF **DEFENDANT'S** PREVIOUS SENTENCE OF **DEATH** WAS UNLAWFULLY PREJUDICIAL, *AND* THE **COURT COMPOUNDED** THE **ERROR** BY **RE-**WSING A **CURATIVE** INSTRUCTION **TO** EXPLAIN **THE** REASON **FOR RESENTENC-**ING.

The trial court granted Mr. Hitchcock's motion to restrict mention of Mr. Hitchcock's vacated death sentence, R 1367-1368, but denied Mr. Hitchcock's proposed curative jury instruction to the jury that it was rehearing the sentencing because the original jury was not told all the mitigation. R 432-433.

Before and during the sentencing proceeding, the jurors and potential jurors were exposed to the fact that Mr. Hitchcock had previously received a death sentence.[65] The jury was inatruetad that they were not to consider Mr. Hitchcock's guilt because that had already been determined. R 28, 424. The conclusion was inescapable for the jurors: he had already been sentenced to death.

This Court has held that mere knowledge of a previous sentence of death is not per se reversible error. See Teffeteller v. State, 495 So.2d 744, 746-7 (Fla. 1986). However, the Court's ruling was a narrow one: the Court recognized "A prior sentence...is a nullity...It offers the sentencing jury no probative information... and could conceivably be highly prejudicial to a defendant." Id. at 745. In Teffeteller, the Court noted that defense counsel waived challenges for cause based on knowing of the prior sentence and that statements in evidence containing the information did not emphasize the prior sentence and were made without objection. See Weber v. State, 501 So.2d 1379, 1384 (Fla. 3d DCA 1987).

The ruling in Teffeteller must be narrow: knowledge that another sentencer

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[65] Members of venire admitted knowledge of the previous trial and sentence. R 74, 97, 112, 141, 160, 168, 192, 194, 195, 214, 266-267. To establish his adjustment to prison and current attitudes, Mr. Hitchcock had to present evidence from those who knew him best, death-row blockmates. The prosecutor emphasized the death row connection in his cross exams, R 777, 787, 794, 807, 811, 815, 821, 825, despite a defense objection, R 782, 786. Many jurors and potential jurors were exposed to reports that death row inmates would testify as "character witnesses. R 64, 81, 91, 111, 127, 130-131, 133, 142, 154, 160, 165, 178, 182-183, 185, 189, 197-198, 218, 234-235, 272.

imposed death decreases a chance for a life sentence. The situation is similar to one in which a jury learns a defendant has been previously convicted of a crime for which he is on trial. "Indeed, we are hard pressed to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged." United States v. Williams, 568 F.2d 464, 471 (5th Cir. 1978). Knowledge that another sentencer imposed death is more damning. The decision to impose life or death is awesome, difficult, and subjective. The nature of the decision leaves the jurors more prone to external influences. Knowing that another sentencer already reached that decision would relieve the jurors of their sense of responsibility for recommending death. Cf. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (telling a jury that the reviewing court has responsibility for the sentence renders the decision unreliable). In effect, the sentencing jury below was given a poll of other members of the community who decided death is appropriate. This knowledge does incalculable harm to a defendant's chances of receiving a life recommendation.[66] In summation, the prosecutor disparaged the testimony of "all of the killers" and said:

> And it's interesting, too, that...we saw some folks who said, I'm innocent. You know, they're always saying the jails full of innocent people.

R 1214. The tactic of the prosecution was to inflame the jury against Mr. Hitchcock for demanding a fair sentencing hearing. Cf. Jackson v. State, 14 F.L.W. 278 (Fla. June 8, 1989) (prosecutor eliciting defendant's prior conviction in same case on cross to correct direct testimony was intentional presentation of prejudicial evidence). Teffeteller does not control; the role of the prior sentence was too prominent and the prejudice too great for this Court to ignore; its use violated due process and the Eighth Amendment.

Refusal to give a curative instruction denied Mr. Hitchcock a fair sentencing hearing. Weber v. State, 501 So.2d 1379 (Fla. 3d DCA 1987), involved a similar situation. Weber's conviction had been reversed. At retrial, the jury

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[66] Teffeteller is distinguishable from the case at bar. On voir dire trial counsel never waived challenges €or cause based on knowledge of the previous sentence and indeed tried to ferret out prejudice. R 123, 194. Defense moved in limine to prohibit mention of the sentence. R 1383. The prosecutor emphasized the death row connections of defense witnesses. R 777, 786, 794, 807, 811, 815, 821, 825.

sent the court a note stating it had learned that a prior conviction had been obtained and reversed on a technicality. The court denied a motion for mistrial, instructed the jury not to concern themselvee with the prior conviction, and individually polled the jurors to insure they would not be affected by the knowledge. The Third District Court of Appeal reversed.

> Courts which have confronted the discrete issue posed by the present case have uniformly concluded that the prejudice arising from the exposure of jurors to information that the defendant was previously convicted of the very offense for which he is on trial is so great that neither an ordinary admonition of the jurors nor the juror's ritualistic assurances that they have not been affected by the information can overcome it.

Id. at 1382; see Cappadona v. State, 495 So.2d 1207 (Fla. 4th DCA 1986); but see Jennings v. State, 512 So.2d 169 (Fla. 1987).

Mr. Hitchcock requested the court instruct the jury they would "hear the complete aide of mitigating evidence which was restricted previously". R 432.[67] The particular harm which the instruction would have cured is the jury's belief the courts vacated the sentence on a "technicality". This belief adds prejudice two ways: it increases the reliability of the previoue eentence in the minds of the jurors and it causes resentment against a defendant €or exercising his appellate rights. See Weber, 501 So.2d at 1383, 1384; United States v. Williams, 568 F.2d at 470. To remove the threat that the jury give weight to a previous sentence, the trial court should have told the jury why the previous sentence was vacated.[68]

This error not only violates state law, but also constitutes fundamental error in violation of the due process of law and constitutes cruel and unusual punishment.[69] In United States v. Williams, the court discussed the effect of the discovery by jurors that the defendant had previously been convicted of the same charge. The court held insufficient the standard admonishment to the jury not to consider that information, Id. at 471. United States v. Williams is bottomed

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[67] The court accepted an oral request and denied it on its merits. R 433.

[68] This procedure also lessens the possibility that the jury will feel the appellate courtn vacated the sentence on insubstantial grounds and given the defendant an unfair second bite at the apple. It helps cure the prejudice better than the standard admonitions condemned by the Third District Court of Appeal in Weber. The refusal of the trial court to give the instruction was error.

[69] These rights are guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments and Article I, sections 9, 16, 17 and 22 of the Florida Constitution.

on due process. See Williams v. Griswald, 743 F.2d 1533, 1537, n.4 (11th Cir. 1984).

The failure of the trial court below to cure the prejudice against the defendant by informing tho jury why Mr. Hitchcock's first sentencing was flawed denied him due process and a fair sentencing hearing.

POINT X

THE COURT'S INSTRUCTIONS ON THE SEXUAL BATTERY AGGRAVATOR OMITTED AN ESSENTIAL, DISPUTED ELEMENT OF SEXUAL BATTERY AND FAILED TO INSTRUCT THE JURY MUST FIND EACH ELEMENT PROVEN BEYOND A REASONABLE DOUBT.

Mr. Hitchcock disputed the State's theory of the case. This section accepts the facts in a light favorable to the State for the purpose of argument. The prosecutor argued and the trial court accepted that Mr. Hitchcock's statement to the police correctly described the events surrounding the murder.[70] The court instructed the jury it could find sexual battery as an aggravating factor. The instruction on sexual battery in its entirety was:

> The crime of sexual battery is committed when the sexual organ of the defendant penetrates or has union with the vagina of the victim, and the act is done without the consent of the victim.
>
> "Consent" means intelligent, knowing and voluntary consent and does not include coerced submission. R 1240, 1481.[71]

This specified no element which must be proven beyond a reasonable doubt.

The prosecutor argued in summation that the force used after sex, Cynthia's virginity, her shy character, and the locale of the act showed that sexual relations were not fully consensual. R 1198-1207. The prosecutor argued the jury could reasonably conclude his version was correct. R 1207.

The court's findings of fact state:

> The Defendant's contention that the victim consented to sexual

[70] In that statement, Mr. Hitchcock said he returned to his brother's house where he was living in the early morning hours. The doors were locked so he entered through a window. He went to Cynthia's room. They had sex. R 1517. Mr. Hitchcock never said he used force or threats against Cynthia. The medical examiner testified that Cynthia had a hymenal tear indicating she had recently lost her virginity. R 567. After sex, she told Mr. Hitchcock she was hurt and was going to talk to her mother. R 1517. When she started to leave the room, he grabbed her by the neck and carried her outside. She again said she was hurt, that he had hurt her again and she would tell her mother; when she started to scream, Mr. Hitchcock hit her and choked her to death. R 1517.

[71] At the 1977 trial, the court did not explain what sexual battery was in the Sentencing phase, but had instructed on its elements as the underlying felony of felony murder in the guilt phase. 1R 968-970

intercourse is not supported by the record. The medical examiner testified the victim had a fresh hymenal tear indicating that ahe was virginal prior to the sexual intercourse occurring just prior to 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 ahe wae 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.

The record below does not reveal just what kind of sexual battery Mr. Hitchcock aupposededly committed; the record from the original trial showe that the state and trial court believed section 794.011(3) waa applicable.[72] The inatructions never mentioned the element of use of threat of deadly force needed to find this aggravator. The instructions never mentioned that lack of consent is an element requiring proof beyond a reasonable doubt.

The trial court found that no hitting or choking occurred until after the sex act when Cynthia said she was going to tell her mother. R 1517. The court found the victim said she was hurt during intercourse, but this Statement is entirely consistent with the tear in her hymen. Mr. Witchcock never stated in the confession relied upon by the court and prosecutor that he forced sex upon Cynthia; only that he used force after she threatened to tall her mother. The prosecutor argued to the jury that a lack of full consent standing alone amounted to sexual battery, calling attention to the incomplete instructions. R 1198-9. Thus, the jury would find sexual battery occurred even though it believed an essential, disputed element of the offense - force or threat used in committing the act - was not proven.[73]

Jury inatructions defining felonies underlying a charge of felony murder are closely analogous to those felonies as rentencing aggravators. This Court

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[72] Section 794.011(3) includes (1) lack of consent and (2) the uae of a deadly weapon or actual physical force likely to cause serious bodily injury or threat to use a deadly weapon as elements which must be proven beyond a reasonable doubt. §794.011(3), Fla. Stat. (1987); Fla. Std. Jury Instr. (Crim) Sexual Battery--Victim Twelve Years of Age or Qlder--Great Force --F.S. 794.011(3).

[73] Defense counsel did not object to the jury inatructions on this basis; however, the omission of an essential element of a felony aggravator is plain error in violation of Florida law. This Court haa left this question open. See James v. State, 453 So.2d 786, 792 (Fla.), cert. denied 469 U.S. 1098 (1984) (no error to omit instructions in penalty phase where jury instructed on and found underlying felonies in guilt phase for felony murder); see also Ruffin v. State, 397 So.2d 277 (Fla.), cert. denied 454 U.S. 882 (1981), overruled on other grounds 533 So.2d 1137 (Fla. 1988) (Sundberg, dissenting) (noting that failure to instruct jury on felony aggravatora requires resentencing).

ha5 held that failure to instruct on the underlying felony €or a prosecution €or murder based on both premeditation and felony murder is fundamental error. See Franklin v. State, 403 So.2d 975, 976 (Fla. 1981); State v. Jones, 377 So.2d 1163, 1165 (Fla. 1979); Robles v. State, 188 So.2d 789, 793-4 (Fla. 1966). Although the court need not instruct with the same specificity as required if the felony itself is charged, omission of an essential element denies a fair trial. See Robles 188 So.2d at 793; see also McCrae v. Wainwriaht, 422 So.2d 824, 827 (Fla. 1982), cert. denied 461 U.S. 939 (1983) (where jury hears essential elements of underlying felony in indictment, error is not fundamental); Vasil v. State, 374 So.2d 465 (Fla. 1979), cert. denied 446 U.S. 967 (1980) (court read all the elements of rape, no error).

Mr. Hitchcock was never charged with the felonies the State sought to prove as aggravatore. His sentencing jury never heard that sexual battery requires proof beyond a reasonable doubt that physical force or threat thereof was used in the proceaa of the sexual act.[74] Had this jury returned a verdict of guilty on felony murder after these instructions and arguments, the error would be plain. Similarly, this error in sentencing instructions is plain and requires the asntence be vacated.

Due proceaa requires reversal of the death sentence under Presnell v. Georgia, 439 W.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978). The jury did not find sexual battery because it was not told what constituted sexual battery. Such an error is similar to cases in which the jury returns a guilt verdict when an essential element of the offense is omitted. See Screws v. United Statea, 325 U.S. 91, 106-7 (1945) (plurality); Cole v. Younq, 817 F.2d 412, 423-4 (7th Cir. 1987); Hoover v. Garfield Heights Municipal Court, 802 F.2d 168, 174 (6th Cir. 1986), cart. denied 107 S.Ct. 1610 (1987); Potts v. Zant, 734 F.2d 526, 530 (11th Cir. 1984), vacated 475 U.S. 1068 (1986), reinstated in relevant part 814 F.2d 1512 (1987) ("the inadequacy of the trial judge's instructions at both the guilt/innocence and sentencing trials ... deprived the petitioner of the due process of law.").

Misinstructing the sentencing jury in a capital case implicates the

[74] Indeed, the prosecutor told the jury that an unintelligent act by the victim rather than a forcible act by the defendant constituted sexual battery.

prohibition against cruel and unusual punishment of the Eighth Amendment. A misinstruction omitting an essential element of a crime used to aggravate a death sentence fails to meet the heightened reliability standards of death cases and does not give the jury the guidance of reasoned community standards justifying a death sentence. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Stewart, concurring); Beck v. Alabama, 447 U.S. 625 (1980); Caldwell v. Mississippi, 472 U.S. 320 (1985).

In this case, Mr. Hitchcock had sex with a teenager. The age of the girl was close to a statutory minimum under which both lack of consent and force or threat thereof becomes irrelevant. See §794.011(2). Failure to instruct the jury that force or threat thereof wae a necessary element combined with the instruction on the lack of intelligent consent allowed the jury to vent their emotional reaction against sex with a teenager rather than making a reasoned judgment of existence of a statutorily defined aggravator. This misinstruction invited prejudice and emotion into the jury room. The death recommendation resulting from this misinstruction is unreliable and the sentence must be vacated.

Use of vaguely defined crimes as aggravators "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)." Maynard v. Cartwright, 108 S.Ct. 1853, 1958 (1988). Instructions omitting essential elements of an offense which serves as an aggravator in a death sentencing expand the aggravators without limit. Failure to limit aggravators by instructing the jury on their essential elements provides no guidance and allows unprincipled imposition of death penalties.

POINT XI

THE JURY RECOMMENDATION OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT WHEN THE COURT REFUSED SPECIAL JURY INSTRUCTIONS PROVIDING GUIDANCE IN APPLYING THE HEINOUSNESS AGGRAVATOR.

Mr. Hitchcock requested instructions to guide the jury's application of Florida's heinous, atrocious or cruel aggravator.[75] Defendant's Proposed Penalty Phaee Instruction No. 13 suggests instructing the jury that additional acts

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[75] §921.141(5)(h) Fla. Stat.

beyond the norm of capital feloniee such that the crime is a conscienceless or pitiless one unnecessarily torturous to the victim are required before heinousness applies. R 1460. Defendant's Propoaed Penalty Instruction 13A defines the terms of the aggravator as did this court in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974):

> Heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. R 1461.

The trial court denied theee instructions. R 982-3. The jury was instructed:

> The aggravating circumstances that you may consider are limited, limited to any of the following that are established by the evidence:...
>
> The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel. R 1239-40.

A unanimous Supreme court recently said of the nearly identical language of Oklahoma's heinousneee aggravator:

> First, the language...at issue -- "especially heinous, atrocious or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey.

Maynard v. Cartwriaht, 108 S.Ct. 1853, 1859 (1988). The use of the words wicked and evil in place of heinous are not a substantive change. See Melendez v. State, 498 So.2d 1258, 1261 n.2 (Fla. 1986). They add no meaning to the aggravator. All premeditated or felony murders, indeed all homicides, can fairly be described ae especially evil, wicked, atrocious or cruel. The instruction g'iven invites subjective, gut reactions in jury deliberations. It infects the sentencing recommendation with emotion leading to arbitrary application of death sentences rather than the reaeoned application required by the prohibition against cruel and unusual punishment. An instruction such ae the one below "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georqia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)." Cartwriqht, 108 S.Ct. at 1858.

In Smallev v. State, 14 F.L.W. 342 (Fla. No. 72785 July 6, 1989), this Court upheld the heinousness aggravator condemned in Cartwriqht on the ground that the definitions in Dixon served to narrow the circumstance. Mr. Hitchcock questions this holding below. Nonetheless, Smallev states the salvation of

Florida's statute is in the terminology in Dixon which the trial court refused below. The implication cannot be ignored: instructing an heinousness without defining the terms by reference to Dixon's definitions or some other narrowing worde results in an unconstitutionally vague aggravator. The jury instructions given ware not adequate to guide the jury's discretion. See Cartwright, supra; see also Penry v. Lynaugh, 109 S.Ct. 2934 (1989) (instructions inadequate to guide jury in applying mitigator.) Its sentencing recommendation was flawed by the failure to instruct as the defendant requested.

POINT XII

THE TRIAL COURT IMPROPERLY FOUND OR CONSIDERED ALL FOUR AGGRAVATORS.

If the evidence does not exclude a reasonable hypothesis of innocence, the state has not met its burden to prove an aggravating factor beyond a reasonable doubt. See Eutzy v. State, 458 So.2d 755, 757-8 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985). Comparison of the facts in this case with Rhodes v. State, 14 F.L.W. 343 (Fla. July 6, 1989), shows the trial court failed to apply this standard. The victim in Rhodes had been strangled. Rhodes gave conflicting accounts of the incident, some of which suggested that the victim had been semi-conscious from drinking when the murder occurred. This Court found the evidence insufficient to prove the heinousness aggravator beyond a reasonable doubt since the victim may have been semi-conscious and did not suffer greatly. It held alternately that no acts setting the crime apart from the norm of capital felonies had been shown.

At bar, the trial court adopted a custodial statement to police by Mr. Hitchcock as the true version of events. R 1517. But Mr. Hitchcock gave a conflicting version of the events at trial showing he was not responsible €or the actual choking of the victim. Instead, his brother discovered him and Cynthia after they had sex, and strangled her in a rage. R 1049-51. If this statement were believed, Mr. Hitchcock could not be found guilty of the heinousness, purpose to avoid arrest, or sexual battery aggravators. As in Rhodes, since conflicting statements by the defendant give rise to a reasonable doubt of guilt, the trial court erred in finding the aggravators. The following sections detail additional reasons why all four aggravators were improperly applied, accepting arguendo the state's theory of the case.

a. A court erred in finding the heinousness aggravator when the evidence reveals no purpose to inflict unnecessary pain.

The trial court erred in finding the heinousneee aggravator because the evidence does not show a purpose by Mr. Hitchcock to inflict unnecessary torture on Cynthia Driggers so as to set this crime above the norm of capital felonies. This Court emphasizes the narrow scope of the heinousness aggravator:

> Indeed, once this Court has continued to limit the finding...to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim.

Smalley v. State, 14 F.L.W. 342, 343 (Fla. July 6, 1989).

Although the trial court found that the victim suffered pain before death, there was no finding of purpose to cause pain. No direct evidence of such purpose exists. It is not only reasonable, but probable, accepting the trial court's version of events, that Mr. Hitchcock never formed a purpose to cause the victim extra pain. When he carried Cynthia outside the house, Mr. Hitchcock still tried to dissuade her from telling her mother about the sexual encounter. He did not even intend to kill her at that point; else why speak to her and give her a chance to call €or help? Even assuming that Mr. Hitchcock formed an intent to murder,[76] there is no evidence that he chose choking because it would cause extra pain. Mr. Hitchcock had no weapon he put aside to choke her. He simply panicked, and impulsively, drunkenly reacted to a situation gone out of his control. This evidence did not show a purpose to cause unnecessary pain.

b. The court's findings do not exclude a reasonable hypothesis of innocence to an element of the sexual battery aggravator and indeed make no findings supporting that element and the court retroactively applied the sexual battery aggravator to an offense occurring when the statute made rape, not sexual battery, an aggravator.

There is a reasonable doubt whether Mr. Hitchcock used force or threat thereof in the commission of the sexual battery; the record shows Mr. Hitchcock had sex with Cynthia, who had not had sex before, and used force only after she decided to tell her mother. Force or threat is an element of the sexual battery aggravator. See Point X, supra. Cynthia was surprised by the act and felt pain from her first intercourse, but had not been subject to actual physical force or threat of deadly force.

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[76] The statement of Mr. Hitchcock does not reveal direct evidence that he formed even this intent; at his guilt trial, the State proceeded on both premeditation and felony murder theories, and the jury was instructed on both. 1R 854, 855, 965.

Mr. Hitchcock never said he used force or threat to have sex with the victim. The prosecutor argued and the court accepted that the beating and choking occurred after sex was complete. The body showed no evidence of genital injury, aaide from a tear in the hymen which occurred only because she lost her virginity. R 577. The court did find that Cynthia said she had been hurt during sex. R 1517. It is not only reasonable, but probable, that the girl felt pain from the tear in her hymen and her first intercourse. No other evidence points to force or threat in having sex.

The court and prosecutor accepted Mr. Hitchcock's statement as an accurate description in other respects, but ignored it on this critical point.[77] Nothing in the sentencing order shows awareness of the element: the finding Cynthia said she was hurt concerned her consent to the act, not use of force or threat by the defendant. The trial court erred in finding sexual battery and the sentencing order does not even show the trial court found all the elements of the offense,

Use of the sexual. battery (as opposed to rape) aggravating circumstance is an ex post facto application of the law, violating Article I, Section 10 of the United States Constitution and Article I, Section 10 and Article X, Section 9 of the Florida Constitution.[78] The Ex Post Facto Clause applies to:

> Every law that aggravates a crime, or makes it greater than it was, when committed...Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.

Calder v. Bull, 3 Dall. 386, 391 (1798); see Miller v. Florida, 107 S.Ct. 2446, 2450 (1987); Higginbotham v. State, 101 So.233, 235 (Fla. 1924). The interpretation of the clause by the Supreme Court reveals a three part test for ex post facto claims. The law must: be applied to events before its enactment, disadvantage the defendant, and alter substantive personal rights, rather than procedure. If the law does all three, it violates the Constitution. See Miller, 107 S.Ct. at 2451.

The court below applied the sexual battery aggravator to events before its enactment. In 1972, the Florida Legislature revised the death penalty atatute

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[77] Moreover, the failure to instruct on threat or force as an element indicates that the trial court did not understand such a finding was necessary.

[78] Mr. Hitchcock objected to use of sexual battery law below as an ex poet facto application of the law; the trial court overruled the objection. R 957-958.

and included a list of aggravating circumstances to be considered. One of these was whether the capital offense occurred during the commission of a rape. Ch. 72-72, §1, Laws of Fla. When this statute was passed, Florida criminalized rape, not sexual battery; not until 1974 did Florida enact a modern sexual battery statute. Ch. 74-121, §1 and 2, Laws of Fla. Although the underlying felony of felony murder was changed to sexual battery from rape in 1975, Ch. 75-298, the Legislature did not change the aggravating circumstance to sexual battery until 1983. Ch. 83-216, 5177, Laws of Fla.

Thus when the statute was passed in 1972, the Legislature meant rape, not sexual battery was the aggravator since there was no such thing as sexual battery in Florida at the time. Since the legislature did not change the law until 1983, passing an opportunity to amend it when the felony murder statute was reformed in 1975, the statute in 1976 made rape, not sexual battery an aggravating circumetance. Nor can this Court change the elements of the rape aggravator without running afoul of the Ex Post Facto Clause. See Wilson v. State, 288 So.2d 480 (Fla. 1974) (interpreting old rape statute to include males as victims violated, inter alia, the ex post facto clause). The federal courts agree that judicial expansion of statutory language can violate the ex post facto prohibition.[79]

The law applied below disadvantaged Mr. Hitchcock because lack of consent under the sexual battery statute is a wider concept than lack of consent under the rape statute. Using this expanded aggravator harmed Mr. Hitchcock by depriving him of a correct and more favorable statement of the law regarding a disputed issue of this aggravating circumstance. The prosecutor argued below:

> I don't think we can question, however, that there can be a significant difference between a voluntary, consensual (sic) sex ae opposed to shocked or unrealizing submission. And I believe that his Honor will instruct you and define sexual battery and consent as it applies to sexual battery. ROA 1198-1199.

This argument put the quality of consent by the victim squarely at issue. The sentencing order also noted that consent was at issue, ultimately finding a lack of consent under the sexual battery statute. R 1517-1518.

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[79] See Bouie v. City of Columbia, 378 U.S. 347, 353-4, 84 S.Ct. 1697 (1964); Devine v. New Mexico Dept. of Corrections, 866 F.2d 339, 345 (10th Cir. 1989); Robino v. Lvnaugh, 845 F.2d 1266, 1272-3 (5th Cir. 1988); Batiste v. Blackburn, 786 F.2d 704 (5th Cir. 1986) (instruction expanding element of offense violates ex post faeto clause).

The elements of rape were the ravishment and carnal knowledge of a female by force or against her will. See Askew v. State, 118 So.2d 219 (Fla. 1960). Failure to instruct that the jury must find the act forcible and against the will of the victim was error. See Christie v. State, 114 So. 450 (Fla. 1927). Lack of consent under the rape statute was not shown by protests or unwillingness alone. See Hollis v. State, 27 Fla. 387, 9 So. 67 (1891); Johnson v. State, 118 So.2d 806 (Fla. 2d DCA 1960); O'Bryan v. State, 324 So.2d 713 (Fla. 1st DCA 1976). The sexual battery statute gives a more restricted meaning of consent-- it must be knowing, intelligent, voluntary and not coerced -- which expands the scope of criminalized behavior. Bufham v. State, 400 So.2d 133, 135 (Fla. 5th DCA 1981) ("'consent' is a relative term to be viewed under the circumstances of each case, but by the standards established by the new statute, rather than the old...."). Whether a 14 year old's lack of objection to sex is knowing and voluntary would be a jury issue under the new statute. However, consent under rape law required more than a mere lack of objection despite the age of the victim. Hollis, 9 So. at 69-70; Johnson, 118 So.2d at 809. In both Hollis and Johnson, teenagers had sexual relations despite their protests and told their mothers about it soon after. In both cases, this Court held that the evidence was insufficient to prove the acts were against the will of the complaining witnesses. If the judge and jury believed Mr. Hitchcock's statement of August 4, they could not have legally found lack of consent under the old rape statute. No protests by Cynthia appear in the record and threatening to tell her mother was insufficient to find a rape occurred. However, use of consent under the sexual battery etatute expanded the aggravator to encompass a 'shocked' submission to sex by the child; even if the jury believed Mr. Hitchcock's statement, they still could have found this element of sexual battery. Thus, the consent element of sexual battery was retroactively applied in this case.

Aggravators must be found to sentence a defendant to death and in weighing againet mitigating evidence to determine if death is appropriate. Expansion of an aggravator on a disputed element thus widens the scope of death eligibility

and makes death more likely.[80]

The expanded aggravator also affects substantive, not procedural, rights. Obviously, the change which allows imposition of death or increases its likelihood is not procedural. Increasing the scope of death eligibility and the chance to be condemned has more substantive effect than the changes in how the length of prison terms are determined held substantive in Miller. See Miller, 107 S.Ct. at 2453. Use of this expanded aggravator not only violates the federal Ex Post Facto Clause and Article I, Section 10 of the Florida Constitution, it also contravenes Article X, section 9 of the Florida Constitution, which prevents retroactive application of criminal laws and punishments, regardless in whose favor the law falls. See Caetle v. state, 330 So.2d 10 (Fla. 1976). Where the legislature changes the nature or degree of punishment, it cannot be applied retroactively.[81] Since expansion of thie aggravating factor changes the degree of punishment for Mr. Hitchcock's behavior, the 1983 change of law should not have been applied to an event occurring in 1976.

c. The evidence of purpose does not exclude a reasonable hypothesis of innocence of the purpose to avoid arrest aggravator.

The trial court relied on several factors to find that Mr. Hitchcock committed the murder "for the purpose of avoiding oK preventing a lawful arrest." §921.141(5)(e). It found he had committed a sexual assault and that the victim knew him, R 1518, and found that he beat and choked her with the immediate purpose to keep her quiet and to prevent her from telling her mother that they had had sex. Id.

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[80] This expansion of an aggravator differs from the situation in Combs v. State, 403 So.2d 418 (Fla. 1981) in which this Court rejected an ex post facto challenge to applying the cold, calculated and premeditated aggravator retroactively, In Combs, the Court reasoned that the new aggravator inured to the benefit of the defendant since it limited consideration of premeditation, a factor already found in the jury's conviction of the defendant, to heightened premeditation. Id. at 421; see Justus v. State, 438 So.2d 358, 368 (Fla 1983), cert. denied 465 U.S. 1052 (1984); Preston v. State, 444 So.2d 939, 946 (Fla. 1984). In contrast, the new definition of coneent had expanded the scope of conduct the judge and jury can consider in aggravation. The retroactive application of sexual battery law disadvantages Mr. Hitchcock.

[81] See State v. Jefferson, 340 So.2d 1189 (Fla. 4th DCA 1976) (sentencing should proceed under first degree murder statute after change in felony murder statute redefined defendant's crime as second degree murder); Allen v. State, 383 So.2d 674 (Fla. 5th DCA 1980)(statute providing for punishment as youthful offender could not be retroactively applied); Lovett v. State, 33 Fla. 389, 14 So. 837 (1894)(statute eliminating degrees from offense of manslaughter and changing penalties could not be retroactively applied).

When a victim is not a police officer, evidence must show "that the dominant or only motive for the murder was the elimination of witnesses." Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979); see Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988). Death and ability to identify the defendant are not enough. Bates v. State, 465 So.2d 490, 492 (Fla. 1985). The State must prove aggravating circumstances beyond a reasonable doubt: where the evidence shows a reasonable hypothesis of innocence, the State has not met that burden. See Eutzy v. State, 458 So.2d 755, 757-8 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985).

The eentencing order found Mr. Hitchcock was drunk and atoned and had a low level of maturity when he had sex with Cynthia. R 1520. Nothing in Mr. Hitchcock's statement to police or trial testimony indicated he forced Cynthia to have *sex;* the eentencing order made no finding that force or threat was used. Mr. Hitchcock testified she was willing, but did not fully understand the act because of her age. R 1466, 1049. He testified it was common where he grew up for teenagers to marry and start families. R 1049.

The State has not disproven a reasonable hypothesis of innocence to this aggravator. To move from the idea that Mr. Hitchcock desired to prevent Cynthia from yelling and telling her mother he had sex with her to finding a purpose to avoid arrest unlawfully pyramids inferences. First, Mr. Hitchcock must have had a subjective awareness that he had committed a crime, not just done something which would anger his brother and sister-in-law. "Not even 'logical inferences' drawn by the trial court will suffice to support a finding of a particular aggravating circumstance when the state's burden has not been met." Clark v. State, 443 So.2d 973, 976 (Fla. 1984). Given his immaturity, intoxication and life experience, it was reasonable for him not to have realized he committed a sexual battery, assuming that he in fact did. Without that subjective awareneee, he could not have formed a purpose to eliminate a witness. Actual, subjective awareness by the accused of an impending arrest must be proven beyond a reasonable doubt. In Garron v. State, 528 So.2d 353, 360 (Fla. 1988), proof that the victim was actually trying to call the police when killed was insufficient absent a showing the defendant knew the purpose of the call or had the dominant motive to stap the call in killing the victim.

Second, the trial court would have to infer that Mr. Hitchcock did not act

impulsively to the yells of Cynthia, but rather with a calculated plan to eliminate her as a witness in some future criminal case. The sentencing order's findings show no such plan. They reveal at the worat that Mr. Hitchcock reacted in a panic, fearing disgrace and ejection from his temporary home when he was destitute. As this Court stated in the recent case of Cook v. State, 14 F.L.W. 187, 189 (Fla. No. 68044 April 6, 1989), the defendant's:

> atatement that he shot her 'to keep her quiet because she was yelling and screaming' was insufficient to support the trial court's findings. We agree. The facts of the case indicate that Cook ahot instinctively, not with a calculated plan to eliminate Mr. Betancourt as a witness.

The facts here indicate a similar instinctive reaction, one brought on by Mr. Hitchcock's panic, immaturity and intoxication. The trial court erred in finding this aggravator exists beyond a reasonable doubt.

d. The application of the imprisonment aggravator to a parolee who commits a murder in 1976 violates due process/ex post fact principles, constitutes double jeopardy, violates the equal protection of the laws, and creates an unconstitutionally irrational aggravator.

Mr. Hitchcock was a parolee from Arkansas at the time of the offense. R 695. In 1977, the trial court did not find the imprisonment aggravator, but the court below found that the parole status sufficed to apply it.[82] R 1517. The court denied the Defense's Motion to Restrict Potential Aggravating Factors, based in part on due process and double jeopardy. R 1374-5, 1424.

The application of the aggravator to a crime which occurred in 1976 violates ex post facto principles as applied to judicial expansion of the law by due process. The trial court followed a construction of the atatute first applied by this Court in Aldridge v. State, 351 So.2d 942 (Fla. 1977), cert. denied, 439 U.S. 882 (1978). Aldridge was decided in June 1977 and rehearing denied in December. No Florida post-Furman ease before Aldridge had applied or construed the imprisonment aggravator to include parolees. In State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), this Court rejected an attack on section 921.141 and announced constructions of the aggravators to insure they were constitutionally.

> Considered in that vein, Fla. Stat. Section 921.141(6), subsections (a) and (b), F.S.A., prescribe the death penalty for a capital felony committed by a prisoner or by one previously convicted of a

[82] The capital felony was committed by a person under sentence of imprisonment. Paragraph 921.141(5)(a), Fla. Stat. (1987).

capital felony.

Id. at 9 (emphasis added). This Court has consistently followed a narrow construction of the aggravator after Dixon. In Swan v. State, 322 So.2d 485 (Fla. 1975), the Court noted without disapproval that the trial court had rejected the aggravator when the defendant had pled guilty to a separate Crime, committed the murder in question, and then was sentenced. Although the Court approved use of the aggravator for escapees in Songer v. State, 322 So.2d 481 (Fla. 1975), no decision as of July 1976 construed the imprisonment aggravator to apply to people who did not have the legal status of prisoner.[83] In the face of this body of law that the aggravator applied to "prisoner" and no suggestion from the cases that the aggravator would apply to parolees, the trial court in January 1977 refused to find the aggravator, interpreting the statute not to include parolees.[84] Retroactive application of the 1977 construction to an offense occurring in 1976 violated the ex post facto prohibition of Article I, section 10 of the Federal Constitution and Article I, section 10 of the Florida Constitution. Although the words of the prohibitions apply only to legislatures, due process extends the protection to judicial enlargements of statutes. Bouie v. City Columbia, 378 U.S. 357, 353-4 (1964); Marks v. United States, 430 U.S. 188, 192 (1977); Wilson v. State, 288 So.2d 480, 482 (Fla. 1974).

Judicial expansion is unforeseeable and hence a violation of ex post facto/due process principles when it overrules prior case law on the topic. Marks.[85] The 1977 construction this Court gave to the imprisonment aggravator was unforeeeeable. The authoritative construction of Dixon in the face of an attack on the statute for vagueness was that it applied to "prisoners." Dixon,

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[83] In Darden v. State, 329 So.2d 297 (Fla. 1977), cert. dismissed, 430 U.S. 704 (1974), the defendant was on furlough from prison at the time the crime was committed; even if the trial court found the imprisonment aggravator, this Court would still have applied it to one who had prisoner status.

[84] Judge Formet noted this change of law occurred after the original trial in his sentencing order. R 1517. On direct appeal this Court stated the trial court "would have been justified" in finding the aggravator, citing Aldridge. Bitchcock v. State, 413 So.2d 741, 747 n.6 (Fla. 1982).

[85] In Marks, the Supreme Court held its test for obscenity articulated in Miller v. California, 413 U.S. 190 (1973) was an unforeseeable change of law given the interpretation of the plurality opinion obscenity standards of Memoirs v. Massachueetts, 383 U.S. 413 (1966) by the lower courts. Marks, 430 U.S. at 194.

283 So.2d at 9. The trial court took the Dixon definition at face value, evidencing that this Court's later construction was unexpected. Accordingly, the construction provided in Aldridae that the statute applied to parolees implicates ex post facto principles as incorporated by the due process clause.[86] Since this expansive construction after the crime decreased Mr. Hitchcock's substantive rights by increasing the likelihood of a death sentence, it constitutes an ex post facto application of the law contrary to due proceee. See Miller v. Florida, 107 S.Ct. 2446, 2450-1 (1987); Higqinbotham v. State, 101 So.2d 233, 235 (Fla. 1924).

The imprisonment aggravator also should have bean excluded on double jeopardy grounds. Where the sentencer found the imprisonment aggravator did not apply at the original sentencing, its use now gives the State an unfair second bite at the apple. Although double jeopardy usually does not bar resentencing, capital sentencing proceedinge are sufficiently trial-like to implicate double jeopardy. See Arizona v. Rumsev, 467 U.S. 203, 209-210 (1984); Bullinqton v. Missouri, 451 U.S. 430, 444-6 (1981); Brown v. State, 521 So.2d 110, 112 (Fla. 1988). In Rumsey and Bullinqton, the Court held that, when a court made a finding equivalent to an acquittal in guilt/innocence trials, the State could not seek to resentence the defendant to death. This Court applied the eame rule in Brown.

Double jeopardy prevents a state from retrying a defendant on a greater charge after a verdict of guilt for a lesser offense is reversed. See Price v. Georqia, 398 U.S. 323 (1970); Green v. United States, 355 U.S. 184 (1957). Since the first trial judge found the evidence insufficient to find the imprisonment aggravator, letting the court find it now would be the same as putting Mr. Hitchcock in jeopardy again on an 'element' of the offense.[87] The double jeopardy

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[86] Even if the change of law were 'foreseeable,' it would violate ex post facto/due process principles. Legislative changes are not allowed retroactive application whether the legislative change was foreseeable or not since fair notice is not the only value protected by the ex post facto prohibition. See Miller v. Florida, 107 S.Ct. 2446, 2451 (1987). No reason exists to treat judicial expansions of criminal statutee any differently. See Rubino v. Lynaugh, 845 F.2d 1266 (5th Cir. 1988) (ex post facto/due process principles protect not only fair notice concerns, but also prevent judicial arbitrariness and vindictivenese); see also North Carolina v. Pearce, 395 U.S. 711, 725-6 (1969) due procese protecte against even the appearance of judicial vindictiveness).

[87] See Adamson v. Ricketts, 865 F.2d 1011, 1029 (9th Cir. 1988), pet. for cert. filed, 57 U.S.L.W. 3655 (U.S. March 20, 1989) (No. 88-1553); Bee also Dixon, 283 So.2d at 9 ("The aggravating circumstances...actually define those

analogy to elements of offenses should bar consideration of aggravating circumstances in a resentencing not found by the original sentencer.[88]

This Court has construed the aggravator to exclude probationers, including those who had served time as a condition of probation before release on probation. See Peek v. State, 395 So.2d 492, 499 (Fla. 1981). Thus, probationers who have served time before probationary status and commit a murder are not, without more, eligible for a death penalty while parolees in the same circumstances are. This arbitrary and irrational classification violates the equal protection and due proceee.[89]

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Generally, legislative classifications will be held invalid if not "rationally related to a legitimate state interest." Id. at 440. Although punishment of crime is a legitimate state interest, treating parolee murderers and probationer murderers differently is not rational. The Supreme Court recognized the essentially equal status of the two by requiring nearly identical procedures for parole and probation revocation. See Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Drastically different punishments of similarly situated classes without any reason cannot stand even deferential scrutiny under the equal protection clause.

This arbitrariness also constitutes cruel and unusual punishment.[90] When an aggravator as applied injects arbitrariness into death sentencing proceedings, the sentence must be vacated. See Maynard v. Cartwright, — U.S. ,, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). The arbitrariness of distinguishing proba-

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crimes...to which the death penalty is applicable in the absence of mitigating circumstances.").

[88] But see Poland v. Arizona, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986) Spaziano v. State, 433 So.2d 508, 571 (Fla. 1983), aff'd 468 U.S. 447 (1984); ; Delap v. State, 440 So.2d 1242, 1256 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984); contra Davis v. Kemp, 829 F.2d 1522, 1532-3 (11th Cir. 1987), cert. denied, 108 S.Ct. 1099 (1988).

[89] The Fourteenth Amendment, and Article I, section 9 of the Florida Constitution protect against arbitrary classifications.

[90] Both the Eighth Amendment, and Article I, section 17 of the Florida Constitution prohibit cruel and unusual punishment.

tioners who have been to prison before release to probationary status and parolees is patent. Basing a death sentence on such a distinction does not comport with the reasoned use of the penalty required by the Eighth Amendment. See McCleskey v. Kemp, 107 S.Ct. 1756, 1774 (1987) (states must establish rational. criteria to guide sentencers).[91]

POINT XIII

SPEEDY TRIAL, DUE PROCESS, AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT REQUIRE A SENTENCE OF LIFE IN PRISON BE IMPOSED WHEN A DEFENDANT LOSES VITAL EVIDENCE AND SUFFERS ELEVEN YEARS OF DEATH ROW CONFINEMENT WHILE AWAITING A CONSTITUTIONAL SENTENCING HEARING.

The long delay in giving Mr. Hitchcock an adequate sentencing hearing violates his speedy trial and due process rights, and constitutes cruel and unusual punishment.[92] It requires this Court to reduce Mr. Hitchcock's death sentence to life.

This offense was committed in July 1976. Trial was had in January 1977. In July 1978, the Supreme Court decided Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) which threw Florida's capital eentencing scheme into doubt. Direct appeal, clemency, and state and federal collateral attacks were taken, eventually culminating in 1987 with the Supreme Court decision vacating Mr. Hitchcock's death sentence under Lockett. The resentencing hearing below occurred in February 1988, eleven years six months after the offense and ten years six months after Mr. Hitchcock's right to present all mitigating evidence first clearly arose. At every etage of the appellate process, he pointed out that this right had been violated.

This Court has not spoken to whether speedy trial rights apply to sentencing generally or death sentencing proceedings in particular. The right

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[91] Although no objection below was raised to this aggravator on equal protection or cruel and unusual punishment grounds, this Court must reach the merits of the claim. The claim that the aggravator as Construed creates an arbitrary distinction makes a facial attack on the constitutionality of the statute which may be heard on appeal without abjection below. See Trushin v. State, 425 So.2d 1126, 1129 (Fla. 1983); Alexander v. state, 477 So.2d 557, 559 (Fla. 1985) (Noting that lower court had reached constitutional validity of statute without objection below and going on to itself reach merits of constitutional claim).

[92] These rights are guaranteed by the Fifth, Sixth, Eighth, Fourteenth Amendments to the Federal Constitution and Article I, sections 9, 16, 17 and 21 of the Florida Constitution.

to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution extends to sentencing. See Pollard v. United States, 352 U.S. 354 (1957) (assuming speedy trial right encompasses sentencing without deciding issue); Burkett v. Cunningham, 826 F.2d 1208 (3d Cir. 1987); Perez v. Sullivan, 793 F.2d 249, 253 (10th Cir. 1986), cert. denied, 479 U.S. 936 (1986)(collecting cases); contra Lee v. State, 487 So.2d 1202 (Fla. 1st DCA 1986) (holding due process, not speedy trial governs sentencing delays). The Fifth Circuit has specifically held so. See United States v. Howard, 577 F.2d 269, 270 (5th Cir. 1978); United States v. Campbell, 531 F.2d 1333, 1335 (5th Cir. 1976), cert. denied, 434 U.S. 851 (1977).

Even if this Court decides speedy trial does not apply to sentencing generally, it should apply it to capital sentencing. In Lee, the court stated that since sentencing proceedings are not severely handicapped by faded memories and misplaced evidence, speedy trial should not apply. Lee, 487 So.2d at 1203. But capital sentencing more closely resembles guilt trials. It *is* trial-like enough to implicate double jeopardy principles, see Bullington v. Missouri, 451 U.S. 430, 444-6 (1981), and require confrontation of state witnesses, see Rhodes v. State, 14 F.L.W. 343 (Fla. No. 67842 July 6, 1989). A defendant suffers greater prejudice at capital sentencing than at trial since the defense must produce evidence of mitigators. The rationale of Lee holds no weight when a capital sentencing is delayed.

The right to a speedy trial depends on the circumstances of the individual case; four factors usually guide decisions on when the right is violated: the "[l]ength of the delay, the reason for the delay, the defendant's assertion of hie right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); see Ferris v. State, 475 So.2d 201, 203-4 (Fla. 1985).

The delay between Mr. Hitchcock's arrest and the sentencing hearing staggers belief. The Third Circuit Court of Appeals in Burkstt characterized as 'egregious' delays in sentencing a fraction of the eleven years in this case. Burkett, 826 F.2d at 1223-4 (and cases cited therein).

The prejudice factor includes anxiety and interference with rehabilitation. Moore, supra, Ewell, supra. A convict on death row is kept in a single

cell and is restricted from most prison rehabilitation programe since he is not expected ever to Leave On his feet. The anxiety caused by a lengthy wait for an execution is great. See e.g. Koon v. State, 513 So.2d 1253 (Fla. 1987), cert. denied, 108 S.Ct. 1124 (1988) (heinous crime when victim spent long period knowing he would die).

"Perhaps the greatest evil which the Sixth Amendment speedy trial right proposes to counter is the potential for a witness's memory to lapse in regard to material matters...." Howell v. State, 418 So.2d 1164, 1168 (Fla. 1st DCA 1982). Equally prejudicial is where a witness dies or disappears altogether. Mr. Hitchcock has shown such actual prejudice that this factor together with the length of the delay requires this Court find speedy trial violated.

First, Richard Greene proffered a hearsay vereion of three dead witness's which was refused by the trial court.[93] The witnesses would have told about Ernie's early life experiences, his work habits, and a time when he risked his life to save his uncle from drowning. One witness was a former police officer and another a non-family member. Their testimony would have been especially valuable to add credibility to the evidence preeented, most of which came from the defendant's family. In addition, in the hearing on the defense Motion to Preclude Imposition of Death - Delay, defense counsel related that Gene Finley, the officer who arrested Mr. Hitchcock for his Arkansas offenses, had died. Finley would have testified to the details of the offenses and that Mr. Hitchcock cooperated with police. At resentencing, only Mr. Hitchcock himself was able to testify he had broken into several unoccupied business in one evening. R 1038-40.

The lead detective in the homicide investigation, Det. Nazachuk, testified but he could not remember whether Mr. Hitchcock had turned himself in. Nor could he remember that Mr. Hitchcock had been detained several days before making his statement in an isolation cell. R 529-31. The evidence in the 1977 was sufficient to instruct the jury on voluntariness of out-of-court statements. 1R 916, 955-6. But the court below refused to instruct the jury on voluntariness, in

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[93] A full version of this testimony is covered in Point IV, A. Even if this Court decides the proffer should be admitted, it cannot cure the prejudice to Mr. Hitchcock's speedy trial right. The credibility of the witnessee would be lost by the presentation of their statements via one who was the defendant's lawyer.

part because of the lack of evidence on involuntariness. R 948-50. The contradictions between the taped statement and Mr. Hitchcock's trial testimony was the primary factual dispute in the hearing.[94]

Mr. Hitchcock was also prejudiced because by the time he got a resentencing, those who knew him best were death row blockmates. The prosecutor intentionally played up the dangerous nature of these acquaintances in his cross examinations and in closing argument.[95] "And then there's all of the killers who came to the courtroom to tell you they like this defendant." R 1214. Mr. Hitchcock was prejudiced because the jury knew he had been sentenced to death before and the prosecutor emphasized the delay, implying that Mr. Hitchcock should be blamed for it. R 452-3. All of these problems materially and severely hampered Mr. Hitchcock in presenting his case for a life sentence.

The reason for delay does not weigh in Mr. Hitchcock's favor, but neither does it weigh against him. speedy trial claims are not per se invalid when appeals cause delay. See United States v. Loud Hawk, 474 U.S. 302 (1986) (applying Barker when delay due to interlocutory appeals). Some responsibility here must be borne by the state. Mr. Hitchcock continually raised the Lockett issue from the time that case was decided, and the fact that his meritorious claim was not recognized for over ten years should not weigh against him now.

The severity of the prejudice, the extreme length in the delay, and the continual demand of Mr. Hitchcock for a fair hearing all weigh heavily in favor of imposing a life sentence. A comparison with the application of the factors in Barker and in United States v. Ewell, 383 U.S. 116 (1966) shows the speedy trial right was violated. In Barker, the Court held the factors did not show a speedy violation, but that the case was close. 407 U.S. at 533. The five year delay in Barker was "extraordinary," but prejudice was minimal and Barker had not demanded a speedy trial. In contrast, the delay here was over twice as long

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94 Mr. Hitchcock also suffered prejudice because his physical appearance after eleven years on death row was considerably more aged than it would have been. Trying to persuade jurors the defendant was too young to be fully culpable €or the murder was made impossible by his changed appearance. The trial court refused to instruct the jury that they must consider age as a mitigator in order to cure this prejudice. R 968-9.

95 Mr. Hitchcock also challenges his sentence on the grounds the jury was incurably prejudiced by the display of force in the court area, in response to the inmates' presence. See Point II.

as in Barker; Mr. Hitchcock has shown substantial prejudice to presenting his case and in awaiting a final conclusion to the litigation; and he has always demanded a fair hearing since the unfairness of it first became apparent. The remedy requested here is a life term. As oppoaed to Barker in which the remedy was discharge, this remedy does not much trench on state interests. A life term is severe punishment; it protects society; it is the moat usual sentence €or the crime.

Due process concerns are implicated where long delay has prejudiced the ability to present a case. see United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497 (1982). Since this is a death sentencing, the cruel and unusual punishment prohibition requires heightened reliability. See California v. Brown, 479 U.S. 538, 107 S.Ct. 837 (1987); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976). Fundamental fairness and the Eighth Amendment demand that a defendant not suffer the added punishment of death when through no fault of his awn, a delay prejudicied his case €or life. Exclusion of mitigating evidence €or any reason violates the Eighth Amendment. See Hitchcock, 107 S.Ct. at 1824; Skipper v. South Carolina, 476 U.S. 1 (1986); Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988). Excluding Mr. Hitchcock's evidence by delay violates this principle. The severity of the prejudice requires a life sentence be imposed.

POINT XIV

FLORIDA'S **DEATH PENALTY** STATUTE IS **UNCONSTITUTIONAL.**

a. Florida's inconsistent application of its heinousness aggravator results in unguided death sentencers, a class of death eligible as wide as the class of all murderers, and no rational basis for review of death sentences,

Cruel and unusual punishment[96] results when a sentencer condemns a defendant to death without consistently applied standards to determine the appropriateness of the penalty. The Supreme Court has found a lack of consistently applied standards improper because the class of death eligible is not narrowed;[97] the discretion of the aentencers is not guided;[98] and the meaning-

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[96] Such punishment is prohibited by both the Eighth Amendment to the Federal Constitution and Article I, section 17 of the Florida Constitution.

[97] See Godfrey v. Georgia, 446 U.S. 420, 422, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

[98] See Maynard v. Cartwriaht, 108 S.Ct. 1853 (1988).

fulness of appellate review becomes questionable.[99]

Florida's aggravating Circumstance that the crime was especially heinous, atrocious or cruel[100] on its face provides no limits or guides to imposing a death sentence. It is identical to the Oklahoma aggravator struck in Maynard v. Cartwriaht, 108 S.Ct. 1853 (1988). "Especially heinous, atrocious or cruel" standing alone gives no real guide to a sentencer:

> First, the language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious or cruel"-- gave no more guidance than the "outrageously or wantonly vile, horrible ox inhuman" language that the jury returned in its verdict in Godfrey. The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous" does not, is untenable. To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustifiable, intentional taking of human life is "especially heinous."

Examination of Florida cases reveal no consistently applied standards to guide, limit, and narrow the aggravator in a constitutional manner. In Smalley v. State, 14 F.L.W. 342 (Fla. No. 72785 July 6, 1989), this Court distinguished Cartwright on the grounds that Florida limited the aggravator in State v. Dixon, 283 So.2d 1, 9 (1973), cert. denied, 416 U.S. 943 (1974), noting that the Supreme Court upheld a challenge to the facial validity of the statute based on Dixon's construction in Proffitt v. Florida, 428 U.S. 242, 254-6, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). This Court found that the aggravatar had been limited to "conscienceless or pitiless crimes which are unnecessarily torturous to the victim." Smalley, 14 F.L.W. at 343. However, this Court must revisit the issue because it did not perform the careful analysis mandated by Cartwright, or give proper weight to the effect of jury recommendation in Florida.

Oklahoma adopted the Dixon construction of its statute, but in applying that construction so expanded it as to render the aggravatar overly vague. Cartwright v. Maynard, 822 F.2d 1477, 1487-1491 (10th Cir. 1987) (en banc), affirmed, 108 S.Ct. 1853 (1988); see Adamson v. Ricketts, 865 F.2d 1011, 1031-1037 (9th Cir. 1988) (en banc), pet. for cert. filed, 57 U.S.L.W. 3655 (U.S. March 20, 1989) (No. 88-1553) (rejecting validity of Arizona's limiting

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[99] See Godfrey, 446 U.S. at 432-3.

[100] §921.141(5)(h), Fla. Stat.

construction). A detailed review to determine if the narrowing construction has been consistently applied must be performed by this Court as the Tenth and Ninth Circuit Courts of Appeals have done. This examination reveals that Florida's application of the aggravator suffers from the same faults found in the Oklahoma and Arizona heinousness aggravators.

The sheer number of cases in which heinousness becomes a factor evidences the use of the aggravatar as a catch-all.[101] See Adamson, 865 F.2d at 1031. This wide use comes about because this Court has been unable, despite its best efforts, to provide any comprehensible, consistently applied limitations on the vague wording of the statute. Indeed, the cases are so fraught with inconsistencies and irrational distinctions that analysis itself becomes difficult.[102]

one frequent statement in heinousness cases is that (1) a single gunshot or quick volley of shots (2) which causes quick death and (3) is not preceded by a lengthy period during which the victim knows of hi5 impending doom does not amount to an especially heinous killing.[103] But this rule does not consistently narrow the aggravator and has not been consistently applied.[104]

The history of the instantaneous gunshot death rule shows hopeless confusion in the law. Sometimes, this Court states that lingering on after a

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[101] From 1984 to 1988, this Court decided 209 death cases on direct appeal from conviction and sentence or resentencing. The opinions positively reveal the trial court found the heinousness aggravator in 113 of them. The number in which the circumstance was found is higher: many opinions do not specify the aggravators found. Even so, the trial court found heinoueness in at least 54% of recent Florida caees. Moreover, jury instructions including the heinous aggravator were read in many of the other cases, meaning the aggravator was a consideration in nearly all the cases.

[102] Much of this analysis is borrowed from Mello, Florida's "Heinous, Atrocious, or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller, 13 Stetson L.Rev. 523-554 (1984).

[103] This Court cited this reason in 17 of the 20 cases between 1984 and 1988 in which it found the aggravator invalidly applied.

[104] The most glaring example of inconsistency can be seen in David Raulerson's case. In Raulerson v. State, 358 So.2d 026, 834 (Fla.), cert. denied, 439 U.S. 959 (1978), the Court held that awareness of the policeman/victim that an armed robbery was in progress justified a finding that the murder was heinous even though death came quickly from a volley of shots. After the death sentence was vacated by a federal court and reinstated after resentencing, this Court overturned the trial court's heinousness finding. Raulerson v. State, 420 So.2d 567, 571-2 (Fla. 1982), cert. denied, 463 U.S. 1229 (1983). The second opinion did not mention the opposite result in the first.

shooting cannot be used to find heinousness.[105] In other cases, it depends on such suffering to uphold the aggravator.[106] The awareness of impending death element pro-duces completely contrary results in application. This Court has stated it doee not require complete unawareness by the victim,[107] yet it upheld the aggravator where the only evidence of foreknowledge was that the victim raised his hand towards the gun at the moment of the shot. See Huff v. State, 495 So.2d 145, 153 (Fla. 1986). Huff cannot be rationally distinguished from Parker v. State, 458 So.2d 750, 754 (Fla. 1984), cert. denied, 470 U.S. 1088 (1985) in which the victim was taken to see her boyfriend's body and upon realizing what had happened, fell to her knees, covered her face, and then was shot. Yet, the aggravator was upheld in Huff and struck in Parker. When the victim attempt6 to flee, it shows awareness of death; sometimes the Court upholds the aggravator on this basis[108] and sometimes not.[109]

Even if some explanation for these inconsistent results exists, the instantaneous death by gunshot limitation on the aggravator does not save it from a vagueness challenge. With very few exceptions, a like limitation does not apply when the means of causing death is not gunshot. Stabbings are usually found to be heinous.[110] However, in Demps v. State, 395 So.2d 501 (Fla.), cert. denied, 454 U.S. 933 (1981), the Court overturned a heinousness finding even though the victim had been stabbed repeatedly, left to die, and expired only after being taken to three hospitals. Whether a quick death limitation was

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[105] Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984); Mills v. State, 476 So.2d 172, 178 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986)("Whether the victim lingers and suffers is pure fortuity.")

[106] Phillips v. State, 476 So.2d 194, 196-7 (Fla. 1985); Troedel v. State, 462 So.2d 392, 398 (Fla. 1984); Squires v. State, 450 So.2d 208, 212 (Fla.), cert. denied, 469 U.S. 892 (1984) (Murder so as to cause unnecessary pain where victim wounded and then fatally shot).

[107] Sea, e.q., Gorham v. State, 454 So.2d 556, 559 (Fla. 1984), cert. denied, 469 U.S. 1181 (1985).

[108] Phillips v. State, 476 So.2d 194 (Fla. 1985).

[109] Amoros v. State, 531 So.2d 1256 (Fla. 1988)(Distinguishing Phillips on the grounds that Phillips reloaded his weapon during the chase).

[110] Flovd v. State, 497 So.2d 1211, 1214 (Fla. 1986); Lusk v. State, 446 So.2d 1038, 1043 (Fla.), cert. denied, 469 U.S. 873 (1984) (victim stabbed three times); Morqan v. State, 415 So.2d 6, 12 (Fla.), cert. denied, 459 U.S. 1055 (1982).

applie is unclear; no reasoning accatnpanied this determination. Even death from a single stab wound can be heinous,[111] although the Court has overturned one heinousness finding given a single stab wound.[112] Beating deaths are almost always declared heinous,[113] although inexplicably, in three cases, it was not enough.[114] Strangulations are nearly per se heinous[115] unless the victim may not have been conscious when strangulation began.[116]

Thue, unless the victim is shot, it is rare to see a heinousness finding overturned. Where stabbings, beating and strangulations deaths are determined non-heinous, the principlee used are completely hidden from view. The one limitation that death be near instantaneous, by gunshot, and with little or no foreknowledge by the victim turns the guidance function of the aggravator on its head. Unless the defendant chooses a gun as a murder weapon, no hints can be derived from Florida case law on what constitutes a heinous crime.

Other guidea appearing in opinions are applied with equal inconsistency. Sometimes, this Court suggests helplessness of the victim adds to the heinousness of the crime,[117] but has also held heinoueness should not be based on lack of resistance of the victim.[118] The Court has overturned a heinousness finding even though the victim was incapacitated, heard her husband shot, and moaned after being fatally wounded.[119] The Court also states evidence that the victim

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[111] See Proffitt v. State, 315 So.2d 461 (Fla. 1975), aff'd, 428 U.S. 242 (1976), facts at Proffitt v. Wainwright, 685 F.2d 1227, 1264 (11th Cir. 1982).

[112] Wilson v. State, 436 So.2d 908, 912 (Fla. 1983).

[113] See e.g. Cherry v. State, 14 F.L.W. 225, 226 (Fla. April 27, 1989)

[114] Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975); Rembert v. State, 445 So.2d 337 (Fla. 1984); Scull v. State, 533 So.2d 3137, 1142 (Fla. 1988).

[115] See e.g. Doyle v. State, 460 So.2d 353, 357 (Fla. 1985).

[116] Rhodes v. State, 14 F.L.W. 343 (Fla. No. 67842 July 6, 1989); Herzog v. State, 439 So.2d 1372 (Fla. 1983).

[117] Kokal v. State, 492 So.2d 1317, 1318 (Fla. 1986) (hitchhiker robbed, begged for life then killed); Brown v. State, 473 So.2d 1260, 1268 (Fla.), cert. denied, 474 U.S. 1038 (1985) (Heinousness partly based on victim's invalid status); Jones v. State, 411 So.2d 165, 169 (Fla. 1982), cert. denied, 459 U.S. 891 (1985)(victim pled for life, then executed).

[118] Gorham v. State, 454 So.2d 556, 559 (Fla. 1984), cert. denied, 469 U.S. 1181 (1985).

[119] James v. State, 453 So.2d 786, 789, 792 (Fla.), cert. denied, 469 U.S. 1098 (1984)

fought back proves heinousness.[120] Cases suggest if the victim is elderly, the crime is more heinous.[121] But in Clark v. State, 443 So.2d 973, 977 (Fla.), cert. denied, 467 U.S. 1210 (1984), the age of the victim was insufficient to find heinousness. Cases suggest where the victim and defendant were strangers, the crime was more heinous.[122] But, the Court has found heinousness partly based on blood relations between victim and defendant.[123]

A more general way to judge heinousness might be to focus on the defendant's mental state. This Court sometimes focuses on that factor. Mills v. State, 476 So.2d 172, 178 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986), ("The intent and method employed by the wrongdoers is what needs to be examined."; HELD, lingering death following gunshot did not make the killing heinous because it did not reflect on the defendant's culpability). In other cases, the mental state of the defendant as one factor to consider in finding heinousness. See Card v. state, 453 So.2d 17 (Fla.), cert. denied, 469 U.S. 989 (1984) (fact that defendant enjoyed killing one consideration). But in Pope v. State, 441 So.2d 1073, 1078 (Fla. 1984), this Court rejected using the defendant's mental state to show heinoueness, and held remorse not a heinousness issue.

The mindset of the victim is another way in which the aggravator might be narrowed. This Court has said that awareness of death by the victim suffices to establish the aggravator due to the mental anguieh it causes.[124] Conversely, events occurring after the victim's death or unconsciousness cannot be used to find heinousness.[125] But inconsistencies abound in applying victim awareness as

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[120] Roberts v. State, 510 So.2d 885, 894 (Fla. 1987), cert. denied, 108 S.Ct. 1123 (1988) (citing cases).

[121] Chandler v. State, 534 So.2d 701, 704 (Fla. 1988); Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988); Johneton v. State, 497 So.2d 863, 871 (Fla. 1986).

[122] Scott v. State, 494 So.2d 1134, 1136 (Fla. 1986); Barclay v. State, 343 So.2d 1266, 1269 (Fla. 1977), aff'd, 463 U.S. 939 (1983), sentence vacated on other grounds, 470 So.2d 691 (Fla. 1985).

[123] Buff v. State, 495 So.2d 145, 153 (Fla. 1986).

[124] Harvey v. state, 529 So.2d 1083, 1087 (Fla. 1988) (Killing discussed in front of victims, one of whom tried to escape); Tompkine v. State, 502 So.2d 415, 421 (Fla.), cert. denied, 107 S.Ct. 3277 (1987)(awareness during strangulation suffices); Parker v. State, 476 So.2d 134 (Fla. 1985)(Mental anguish from fear of death not negated by quick killing).

[125] See n.127, supra; Jackson v. State, 451 So.2d 458, 463 (Fla. 1984), after remand, 522 So.2d 802 (Fla. 1988), cert. denied, 109 S.Ct. 183 (1988).

a limitation.[126] Comparing Brown v. State, 526 So.2d 903 (Fla. 1988), cert. denied, 109 S.Ct. 371 (1988) and Grossman v. State, 525 So.2d 833 (Fla. 1988) shows how meaningless this limitation has become. In Brown, the defendant jumped a police officer trying to arrest him and a codefendant and struggled with him. The codefendant heard a shot and then heard the officer begging Brown not to shoot him, but Brown did so. In Grossman, the officer stopped Grossman and another; Grossman attacked her and shat her with her revolver in the struggle. This Court approved the heinousness aggravator in Grossman because the officer knew she was struggling for her life. 525 So.2d at 840-1. The court disapproved the aggravator in Brown despite a finding by the trial court that: the officer had been shot in the arm and pleaded for his life. 526 So.2d at 906-7, n.11. Even the post-death, post-unconsciousness limitation has not been consistently followed. In Jennings v. State, 453 So.2d 1109 (Fla. 1984), vacated 470 U.S. 1002, revereed on other grounds, 473 So.2d 204 (1985) this Court accepted that the victim had been unconscious during the incident. Victim suffering is relevant to heinousness, but:

> As important is the totality of the circumstances of the incident and whether they reflect that this was a conscienceless, pitiless and unnecessarily torturous crime that sets it apart from the norm of capital felonies.

Id. at 1115.

This refusal - shown in Jennings and the history of the aggravator detailed above - to specify any necessary findings by the sentencer matches Oklahoma's law an heinousness that the federal courts struck.

> The jury at Cartwright's trial had been instructed that "the term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others." On appeal the court noted the statute is written in disjunctive language ... The court then held that while torture is sufficient to satisfy this aggravating circumstance, it is not necessary. [cites omitted].

Cartwright, 822 F.2d at 1488. The Tenth Circuit declares that 'wicked, shocking and vile' are as vague as the terma they purport to define. Id. at 1489. Although the definition of cruelty is more certain,

> [T]here are two reasons why this definition does not now serve as an adequate standard. First, the Oklahoma court has clearly rejected the argument that the suffering of the victim is the major factor

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[126] See n. 117-120, supra and accompanying text.

> to be considered ... Second, because the Oklahoma court has emphasized that a murder need only be heinous, atrocious or cruel, see Cartwright v. State, 695 P.2d at 544, even if the definition of cruel was adequate, the vague definitions of atrocious and heinous would still allow a sentencer to rely upon an unconstitutionally vague standard.. ..

Id. at 1489-90. Refusal to specify any particular findings and resort to a totality of the circumstances test creates unconstitutional vagueness.

> The discretion of a sentencer who can rely upon all the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in Furman. No objective standards limit that discretion.

Id. at 1491. A unanimous supreme Court agreed. Cartwright, 108 S.Ct. 1853, 1857. This Court must declare Florida's section 921.141 unconstitutional for the failure to provide objective, consistently followed, limiting standards to the heinousness aggravator.

b. Florida denies capital defendants an individualized sentencing determination when it forbids consideration of mitigating evidence not meeting a reasonably convincing standard of proof and a court errs by refusing to instruct the jury that not finding mitigation does not preclude a life recommendation.

Florida requires jurors be "reasonably convinced" of a mitigator's existence before weighing it. Fla. Std. Jury Instr. (Crim.) Penalty Proceedings --Capital Cases; see Floyd v. State, 497 So.2d 1211, 1216 (Fla. 1986). Where there is a death recommendation the trial judge must make findings of fact in the same manner as did the jury. §921.141(3). The judge must first find if the evidence supports mitigators, and weigh only the mitigators "found" against the aggravators. Rogers v. State, 511 So.2d 526 (Fla. 1987); Lamb v. State, 532 So.2d 1051 (Fla. 1988). The trial judge cannot consider evidence unless he feels it is factually supported under the reasonably convincing standard of proof. This Court has not defined "reasonably convinced." Sentencing juries do not return special verdicts so their findings of fact cannot be reviewed. The Court has left the decision whether to find evidence up to the discretion of the trial judge. See, e.g. Mills v. State, 462 So.2d 1075, 1081 (Fla.), cart. denied 473 U.S. 911 (1985); and Deaton v. State, 480 So.2d 1279 (Fla. 1986).

"[W]hether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom v. Montana, 442 U.S. 510, 514 (1979)' see Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988). The jury here was instructed:

> 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 cansider it as established.

R 910. The word "convinced" instructs the jury to disregard much of the evidence vital for an individualized sentencing hearing. In defining a similar phrase, this Court has noted:

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

State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). Much of the evidence in mitigating a capital crime consists of the life history of the defendant. See Eddings v. Oklahoma, 455 U.S. 104, 115 (1982). The witnesses who most often testify to these circumstances are usually family members or old friends. Their testimony is open to impeachment as biased. Instructing the sentencer not to consider such evidence unless "convinced" that the testimony establishes "a mitigating circumstance" severely restricts the defendant in presenting a ease for life.

In Adamson v. Ricketts, 865 F.2d 1011, 1041 (9th Cir. 1988) (an banc), petition for cert. filed, 57 U.S.L.W. 3655 (U.S. Mar. 20, 1989) (No. 88-1553), the court struck down an Arizona statute forbidding consideration of mitigating evidence unless the defendant proved by a preponderance of the evidence the existence of a mitigating factor. In Mills, the Court held that jury instructions which could be read to require unanimity on a mitigator violated Lockett. The question whether the preponderance of the evidence standard violates Lockett will be before the Supreme Court in McKoy v. North Carolina, 57 U.S.L.W. 3550, 3580 (U.S. Feb. 21, 1989) (No. 88-5909).

Florida's statute, requiring a reasonably convincing standard of proof, is more restrictive than the Arizona law struck in Adamson. Adamson teaches that a preponderance standard violates the Eighth Amendment requirement of an individualized sentencing determination. Florida's higher standard of proof encourages aentencers to ignore much of the most important mitigating evidence presented by the defense, creating an even greater inequity.

The trial court refused to instruct the jury it could recommend life even if it found aggravators but no mitigators. R 1453, 979. This instruction would

have cured the standard instructions which may reasonably be read to require findings of mitigators before considering mitigating evidence. see State v. McKoy, 372 S.E. 2d 12, 33 (N.C. 1988), cert. granted, 57 U.S.L.W. 3550 (U.S. Feb. 21, 1989) (No. 88-5909) (similar instruction cured Mills error). This failure to instruct the jury in a manner which comports with the requirement all mitigating evidence must be considered was error requiring reversal.

c. Florida denies capital defendants an individualized sentencing determination by imposing a presumption for death in the sentencing phase and so instructing the jury that mitigators must outweigh aggravators is error.

Florida's death penalty statute describes the jury's responsibility to weigh the aggravators and mitigatore as:

> (b) whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and (c) based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

§921.141(2) (emphasis added). In imposing a death sentence, the judge must explain in writing "[t]hat there are insufficient mitigating circumstancee to outweigh the aggravating circumstances." §921.141(3)(b) (emphasis added). This Court has described this weighing function in terms of a shifting burden of proof. First, the jury or judge must find aggravators to be established beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

> When one or more of the aggravating circumstances is found, death is preeumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Florida Statutes, Section 921.141(7), F.S.A.

Id. (emphasis added) See Alford v. State, 307 So.2d 433, 444 (Fla. 1975); Jacobs v. State, 396 So.2d 1113, 1119 (Fla. 1981). This Court has often invoked this presumption for death in declaring that a judge's mistakes in finding aggravators were harmless where the trial court found no mitigators.[127] It has cited the presumption for death in holding a death sentence proportional. See Jackson v. State, 502 So.2d 409, 413 (Fla. 1986), cert. denied 107 S.Ct. 3198 (1987). The Standard Jury Instructions thrice instruct the jury to impose death if it finds at least one aggravator unless the mitigators outweigh the aggravators. Fla. Std. Jury Instr. (Crim) Penalty Proceedings -- Capital Cases; Jackson v.

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[127] See, e.g., Cooper v. State, 492 So.2d 1059, 1063 (Fla. 1986), cert. denied 479 U.S. 1011 (1987); Blanco v. State, 452 So.2d 520, 526 (Fla. 1984), cert. denied 469 U.S. 1181 (1985); White v. State, 446 So.2d 1031, 1037 (Fla. 1984).

Wainwright, 421 So.2d 1385, 1388-1389 (Fla. 1982), cert. denied 463 U.S. 1229 (1983). The statute's words, this Court's use of the presumption for death, and the jury instructions all show that such a presumption does exist at the level of the sentencer in Florida.

A presumption €or death in weighing aggravating and mitigating circumstances denies a capital defendant an individualized Sentencing and due process of law. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir.), cert. denied 108 S.Ct. 2005 (1988); Adamson, 865 F.2d at 1043.

In **Adamson**, the Ninth Circuit struck a statute similar to Florida's:

> [I]n the situation where the mitigating and aggravating circumstances are in balance, or, where the mitigating circumstance give [sic] the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death and thus precludes the individualized sentencing required by the Constitution.

Adamson, 865 F.2d at 1043. The United States supreme Court will consider a closely related issue in Blystone v. Pennsylvania, 57 U.S.L.W. 3635 (U.S. Mar. 27, 1989)(No. 88-6222) (order granting cert) and Boyde v. California, 57 U.S.L.W. 3792, 3834 (U.S. June 5, 1989)(No. 88-6613)(order granted cert.) See also Penry v. Lynaugh, 109 S.Ct. 2934 (1989) (instructions which require death sentence if three questions answered yes violate Lockett).

Florida's presumption for death found its way into the jury instructions below, R 1239, 1290, and the trial judge who imposed death used it. R 1521. The state attorney argued that the mitigating factors had to outweigh the aggravating. R. 1187, 1211, 1217. Mr. Hitchcock requested a special jury instruction that the aggravating factors had to outweigh the mitigating factors, R 1445, which the trial court denied. R 974. Given the close vote for death, the misinstruction cannot be harmless. Although no motion to declare the statute unconstitutional on thoee grounds was made, an attack on the facial constitutionality of the statute may be heard on appeal without an objection below. See Trushin v. State, 425 So.2d 1126, 1129 (Fla. 1983); Alexander v. State, 477 So.2d 557, 559 (Fla. 1985). The failure to instruct properly serves as an independent basis for review by this Court. This Court must declare Florida's statute unconstitutional or at leaet reverse and grant Mr. Hitchcock an individualized sentencing before a properly instructed jury.

POINT XV

XV. **THE** TRIAL COURT **ERRED** BY **DENYING MR. HITCHCOCK AN** INDIVIDUALIZED **SENTENCING DETERMINATION WHEN** IT REFUSED **PROPER SENTENCING** *JURY* INSTRUCTIONS DESCRIBING THE *JURY'S* TASK **AND WHAT** IT **MUST** CONSIDER AS **MITIGATING FACTORS.**

The court gave the jury a catch-all mitigating factor instruction:

> Among the mitigating circumstances you may consider are theee:
>
> The age of the defendant at the time of the crime.
> Any other aspects of the defendant's character or record, any other circumstances of the offense. R 1240-1.

But the court also instructed the jury not to consider feelings of eympathy using the standard guilt phase instruction:

> Feelings of prejudice, bias or sympathy are not legally reasonable doubte, and they should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence, and on the law contained in these instructions. R 1244.

One clear principle of post-Furman death penalty jurisprudence is that a sentencer may not be precluded from considering mitigating matters relevant to the character of the offender or circumstances of the offense. Mills v. Maryland, 108 S.Ct. 1860 (1988)(citing cases). In Penry v. Lynaugh, 109 S.Ct. 2934 (1989), the Court found penalty jury instructions which failed to advise the jury it could consider retardation as mitigaton violated this principle. In Mills, the Court held that instructions which could reasonably be taken to require jury unanimity before considering a mitigating circumstance violate the Constitution. Mills and Penry show that jury instructions which can reasonably be read to deny consideration of mitigating evidence violate Lockett.

The jury instructions given below denied coneidaration of mitigating evidence. The anti-sympathy instruction standing alone violates Lockett. In Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), cert. sranted sub nom. Saffle v. Parks, 57 U.S.L.W. 3704 (U.S. April 24, 1989) (No. 88-1264), the Court held that jury instructions which emphasize that sympathy should play no role violates the Lockett principle. The Tenth Circuit distinguished California v. Brown, 479 U.S. 538 (1987) (holding constitutional instruction prohibiting consideration of mere sympathy), writing that sympathy arising from mitigating evidence is a valid concern, so that while mere eympathy unconnected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Parks, 860 F.2d at 1553. The instruction given above also states that sympathy should play no role in the

process. Such an instruction has a proper rule in guilt proceedinge, but not where the issue is limited solely to a life or death recommendation. The prosecutor below, like the prosecutor in Parks, argued that eympathy should have no role in the proceeding. R 1218. A reasonable jury could well have believed that much of the weight of the early life experiences of Mr. Hitchcock should be ignored.

Although Mr. Hitchcock did not move to strike the instruction given, he did request jury instructione which would have helped cure the damaging instruction. Defendant's Proposed Penalty Phase Instruction No. 14 would have instructed the jury that if it found the defendant did not deliberately intend to kill his victim, the jury could consider that factor in mitigation, R 1462, but the trial court denied it. R 984. Another special instruction that the jury could grant mercy and recommend a life sentence even if it found aggravators but no mitigators was also denied. R 1453, 979. The court denied a special instruction that the purpose of the weighing process was to engage in a character analysis to see if death is appropriate. R 1450, 977.

By instructing the jury on the mitigating circumstance of lack of intent to kill, the court would indicate to that juror that he should consider his sympathetic comparison of his own experience with irrational behavior with that of the defendant as weight to be given the mitigating circumstance. Without the specific instruction, the juror would believe such a reaction was not proper to mention in jury deliberations. In Penry, the failure of the court to specifically instruct that the jury should consider the mental retardation of the defendant as mitigation together with instructions that future dangerousness should be considered as aggravation denied an individualized sentencing determination. Here, the no-sympathy instruction and the lack of a specific mitigating factor instruction to downplay and relevant mitigating evidence, denying an individualized sentencing determination.

The failure to instruct that the purpose of the weighing process was to engage in a character analysis failed to focus the jury's attention and failed to cure the no-sympathy instruction. The jury was left with a vague catch-all circumstance which did not distinguish proper mitigating circumstances from improper feelings of sympathy. The failure to grant these special instructions

resulted in a jury instructed contrary to Lockett's requirements. The Supreme Court will decide similar issues next term in Boyde v. California, 57 U.S.L.W. 3729 (U.S. June 5, 1989)(No. 88-6613)(order granting cert.) and **Parks**.

The special instruction that the jury could consider mercy and still recommend a life sentence despite finding aggravators but no mitigators would have also cured the anti-sympathy instruction. It would have countermanded the prejudicial effect by instructing that mercy can be baaed on sympathies arising from mitigating evidence. Such a saving instruction caused the North Carolina Supreme Court to rule that its death penalty proceeding which was otherwise nearly identical to that of Maryland did not violate Mills. See State v. McKoy, 372 S.E.2d 12, 33 (N.C. 1988), cert. granted, 57 U.S.L.W. 3550 (U.S. February 21, 1989) (No.88-5909). Failure to cure the anti-sympathy instruction given was error; the sentence should be vacated so that a properly instructed jury can give full consideration to mitigating evidence.

V. Conclusion

Mr. Hitchcock's sentence of death should be vacated, and this cause remanded for a new eentencing proceeding, or reduction to life in prison.

Respectfully submitted,

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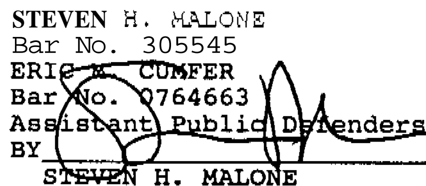

BY ______________________
STEVEN H. MALONE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by ~~courier~~ Federal Express to David Morgan, Assistant Attorney General, 125 North Ridgewood Avenue, Daytona Beach, Florida, this 7th day of September 1989.

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Of Counsel