IN THE

SUPREME COURT OF FLORIDA

JAMES ERNEST HITCHCOCK, Appellant, vs. THE STATE OF FLORIDA, Appellee.	)	CASE NO. 72,200

REPLY BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE AND FACTS

The state boldfacedly proclaims that "[t]he court did not find 'substantial evidence of mitigating circumstances'". A 1. (emphasis in original). The truth is to the contrary; this is what the trial court found, word for word:

> The defense has presented substantial evidence of mitigating factors and circumstances for consideration by the jury and court.
>
> The court inweighingthe variaus mitigating factors and circumstances assigns the greatest weight to those factors which most directly reflect on or tend to diminish the Defendant's culpability in the commission of the crime. These often are the statutory mitigating circumstances.
>
> The Court finds evidence to establish the following mitigating circumstances:
>
> > 1. DEFENDANT'S AGE IS A STATUTORY MITIGATING CIRCUMSTANCE.
> > The chronological age proven to be 20 years at the date of the crime, standing alone, has little significance but considered with the Defendant's lack of maturity, coping skills and emotional development testified to by Dr. McMahon his age becomes a significant mitigating circumstance.
> >
> > 2. NON-STATUTORY MITIGATING CIRCUMSTANCES.
> > Mitigating circumstances offered by the defense fall into two cat[e]gories:
> >
> > a. DEPRIVATIONS
> > The defense established four striking areas of deprivation suffered by the defendant:
> >
> > (1) A background of extreme poverty.
> >
> > (2) Lack of formal education.
> >
> > (3) Emotional depr[i]vation during his formative years.
> >
> > (4) Abuse, both physical and mental, observed and experienced as a child.

These were all important in assessing the Defendant's maturation and emotional development and were used in establishing age as amitigating circumstance. Individuallythey create sympathy but they do not weigh heavily against the aggravating circumstances of this crime.

b. POSITIVE CHARACTER TRAITS

The Defense offeredevidence of the Defendant's character. The evidence presented proved positive incidents in the Defendant's life but fell short of establishing positive character traits.

The Defense alleges the Defendant is a 'hard worker' when in reality the evidence showed that he worked hard out of economic necessity, not out of willingness or a desire to excel, which is usually expressed as being a 'hard worker'.

The Defense contends the Defendant is a good family person. Evidence was presented that the Defendant saved his Uncle from drowning; that he, together with his uncle and cousin, came to Florida to stay with and help Faye and Sonny Hitchcock while Faye recovered at home from surgery. While in prison Defendant writes his mother frequently, sending pictures and cards he has made. He writes two nieces on a regular basis. The Court does not weigh these as significant mitigating circumstances.

The Defense contends Mr. Hitchcock is a generous person, a teacher, a helpful person, has no racial prejudice and has acted as a mediator/peacemaker.

Evidence of these traits was presented by inmates of the Florida State Prison, who constitute this Defendant's community. Their testimony established specific limited incidents demonstrating these traits but fell short of establishing the traits themselves. I do not demean his acts of kindness but I am not convinced the Defendant is truly a generous person, that he is a teacher of men, that he is generally helpful or there is a lack of racial prejudice. Giving full credit to the acts of kindness established, they do not weigh heavily against the existing aggravating

Circumstances.

> The fact that the Defendant is now capable of being a mediator/peacemaker through improved verbal skills; that he has 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 while in prison are to his credit. These become more important the closer one is to imposing a sentence of life imprisonment. I weigh these heavier than the specific good acts that the Defendant has performed for various prisoners at Florida State Prison but less than the statutory mitigating factor of age.
>
> The Defense mentions in passing the use of alcohol, lack of a history of violence, difficulty in controlling emotions, lack of statements regarding intent, lack of a weapon, and the Defendant's voluntary surrender as mitigating circumstances recognized in Ross v. State, 474 So.2d 1170 (Fla. 1985) and Proffitt v. State, 510 So.2d 896 (Fla. 1987).
>
> The Court has considered at some length and given added weight to Mr. Hitchcock's use of alcohol and drugs prior to the murder in this case. The Court gives little weight in this case to the other factors gleaned from Ross and Proffitt.

R 1518-20.

The sentencing order speaks for itself against the state's minimalist misreading of its findings in mitigation.

V. ARGUMENT

POINT I

DEATH IS DISPROPORTIONATE.

Proportionality is shown, the state argues, by Tompkins v. State, 502 So.2d 415 (Fla. 1986), cert. denied 483 U.S. 1033 (1987) which "parallels the instant case in many respects." A 18. Since the death sentence was upheld for Mr. Tompkins, the state thinks it is a good case to compare. The reported facts in Tompkins show

the victim there was a 15 year old girl who was strangled after a failed sexual battery attempt. The defendant buried her body beneath her house, and made it look like she had run away. When the defendant was sentenced to death, three aggravators were found: prior violent felonies, killing in the course of an attempted sexual battery, and HAC. The defendant's age was found to be mitigating, but that was all. Tompkins, 502 So.2d at 417-18.

There are similarities, but Mr. Hitchcock's aggravators are not near as weighty. Mr. Tompkins' aggravating prior violent felonies starkly distinguish his circumstances from Mr. Hitchcock's: "Tompkins had been convicted of kidnapping and rape stemming fromtwo separate incidents in Pasco County which occurred after [the victim's] disappearance." Tompkins, 502 So.2d at 418. Tompkins' recent and repeated violent criminal episodes, which were similar to the crime for which he was being sentenced, provide powerful support for a death sentence. They stand in direct contrast to Mr. Hitchcock's record, which is totally devoid of any violent criminal history. See Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987). Also, unlike Tompkins, the trial court here found substantial evidence in mitigation, which tends to make disproportionate the punishment of death.'

The remainder of the state's argument is directed to convincing this Court that the death sentence is insulated from

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[1] The substantial mitigation found here, among other things, also distinguishes this case from the other two cited by the state, Adams v. State, 412 So.2d 850 (Fla.), cert. denied 459 U.S. 882 (1982) and Doyle v. State, 460 So.2d 353 (Fla. 1984).

proportionality review, but it isn't. Smalley v. State, 546 So.2d 720, 723 (Fla. 1989); King v. Dugger, 555 So.2d 355, 358 (Fla. 1990) ("resentencing [is] a completely new proceeding, separate and distinct from [the] first sentencing").

This Court should reduce Mr. Hitchcock's sentence to life.

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 State's argument ignores settled Florida law and the record in this case.

The State says that the trial court did not use the incorrect standard in deciding cause challenges, claiming we imputed "the prosecutors's argument to the court that potential jurors who opposed the death penalty should be excused." A 22. But the prosecutor below did not cite Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) in support of a claim that potential jurors who oppose the death penalty should be excused; rather he twice argued the Witt standard during challenges for cause to jurors who expressed a bias for the death penalty. R 59, 63 (Kemp), 152 (Smith). Witt's standard, designed to protect a defendant's Sixth Amendment right to an impartial jury, is not applicable in deciding other types of cause challenges. The prosecutor's use of Witt to argue against excusal of pro-death jurors was highly misleading.

Any doubt that the trial judge did not apply the correct standard is resolved by examining the trial court's refusal to

strike Sarah Jones for cause.[2] Ms. Jones revealed a deep bias against Mr. Hitchcock based on the televised interview with the victim's sister which Ms. Jones had watched the night before, and Ms. Jones's emotional attachment to children. R 246, 254. She told the court she was not sure whether her opinions would interfere with her ability as a juror. R 246. Ms. Jones equivocated when the prosecutor asked her if she could judge the case on the evidence and law: "Ms. Jones: I think I could." R 247. The prosecutor reminded her she was under oath and five times pressed her to say she could be impartial. R 248, 249, 250-1. Eventually, she stated she could follow the law. Even that answer came after a misleading question, i.e. whether she could return a life recommendation if the evidence showed only mitigating circumstances and no aggravating circumstances. R 251. Ms. Jones's words shows whose answer she was giving:

> Mr. Wallace [prosecutor]: Yes, ma'am. I'm just giving you an example.
>
> Ms. Jones: Yeah. I guess that's the answer.

Even after this repeated effort to lead Ms. Jones by the prosecutor, she was still equivocal. When the prosecutor asked if she could follow the law, Ms. Jones replied, "I would really try," and "Yes, I think I can do that." R 252. In response to questions from defense counsel, Ms. Jones indicated her strong feelings about children, R 257-8, and could not say whether she would be impartial. R 258. The prosecutor then led her to say she would base

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[2] Sarah Jones was ultimately struck as an alternate juror by the defense. R 416.

her decision on the evidence. R 259. The trial court denied defense's motion to strike for cause. R 261. It could not be clearer from this exchange, as well as the decisions on Kemp, Johnson, and Hagey, that the trial court did not apply cases requiring jurors be struck where doubt exists about their impartiality.

The State also claims the judge applied the correct standard by asking jurors if they could base their decisions on the law and evidence. A 24. Of course, the standard which the trial court ignored was the reasonable doubt standard to measure juror responses, not the requirement jurors follow the law based on the evidence.

The State's contention that waiver occurred because trial counsel did not object to the trial court's incorrect standard, if accepted, would substantially change the law concerning abjections. This Court has repeatedly stated the purpose of specific objections at trial is to give the trial judge notice and opportunity to correct error. See, e.g. Castor v. State, 365 So.2d 701, 703 (Fla. 1978). Counsel did so below, objecting on the grounds that the jurors were biased and reciting the correct legal standard, i.e. equivocation on impartiality required strikes. To further require yet another objection when the judge does not follow the correct standard puts the burden to make correct rulings on the lawyers, not the court. Such an expansion of the objection requirement has no precedent and no reason.

The State suggests leading questions by the court and

prosecutor are enough to rehabilitate a juror of doubtful impartiality. A 26. The law presumes the opposite. Leading questions by the court or prosecutor in the face of doubt about a juror's impartiality should not, and cannot, rehabilitate that juror. See Johnson v. State, 97 Fla. 591, 121 So. 793, 796 (Fla. 1929); Singer v. State, 109 So.2d 7, 23 (Fla. 1959); Price v. State, 538 So.2d 486, 489 (Fla. 3d DCA 1987); see also Hamilton v. State, 547 So.2d 630, 632-3 (Fla. 1989). The State argues that Juror Johnson's reply that other things in the trial would push aside her opinions shows she was free of bias. Logically, this statement mirrors saying evidence would be required to change one's opinion. Accepting Johnson's statement as a declaration of freedom from bias would turn the entire area of law on its head.

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 FAIR SENTENCING HEARING.

The Supreme Court directs courts look at the scene presented to the jurors in determining whether courtroom security has prejudiced a defendant's right to a fair trial. Holbrook v. Flynn, 475 U.S. 560, 572, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). The State constructs a straw horse argument, saying the pretrial publicity and improper summation are separate grounds far reversal, and answering that the publicity and summation were defaulted and cannot be raised. A 30. There is only one claim in Point III -- that the trial court erred in not striking the venire. A picture

of the scene presented to the jurors cannot be drawn, however, without detailing what the jurors knew when they saw this motorcade. The heavily guarded and well reported arrival could have not been connected to Mr. Hitchcock's case by the jurors except for the extensive publicity surrounding the case in general and the use of prisoners and security concerns raised thereby in particular. The breadth of juror knowledge from the pretrial publicity is demonstrated on the record and covered in the initial brief. B 11-13.

The State claims the record has no evidence to support the Appellant's claim the venire was poisoned. The State cites L.W. v. State, 538 So.2d 523 (Fla. 3d DCA 1989), claiming defense counsel's recitation of what he saw cannot be considered. L.W. apparently is a miscitation; the State meant to cite Brown v. State, 538 So.2d 523 (Fla. 3d DCA 1989), on the same page. However, Brown differs from what occurred below. In Brown, the attorney claimed that his client had been uncounseled, but such a claim was outside the attorney's knowledge, and no evidence supported the claim. The attorney below was a competent witness - he was describing what he had just seen -except he had not taken an oath. The State cannot complain now about the fact counsel was not put under oath, because no objection was made by the State below. So its argument has been waived. Walker v. State. 34 Fla. 167, 16 So. 80 (Fla. 1894). Even were the contention not waived, it would not be valid. The Assistant State Attorneys below made one correction to the defense counsel's statements -- that the Sheriff did not lead the

motorcade. The Assistant State Attorney confirmed that the motorcade did take place. R 295. The record shows that the jurors had been excused when the motorcade occurred and had been advised to move their cars closer to the courthouse. R 287, 291. Juror Webb confirmed he had seen some of the police described by counsel. R 298. Since there was no real dispute about Mr. Wesley's statements below, in the absence of contrary sworn testimony, this Court should accept them as true. See Centennial Insurance Company v. Fulton, 532 So.2d 1329, 1331 (Fla. 3d DCA 1988).

Second, the State insists Appellant must demonstrate prejudice on the record to obtain relief. The only people who could possibly testify about precisely what the jurors saw, whether they connected it to the Defendant, and how they felt about it were the jurors themselves. The defense could not question these jurors without calling further attention to the incident. R 296. Indeed, the trial court expressed uneasiness at such a procedure, Ibid. To accept the State's contention would put defendants who face similar problems in the future in the impossible situation of risking tainting potential jurors or allowing the state to put on a dog and pony media show in jurors' presence. Moreover, the rule Holbrook presumes inherent prejudice. No showing of actual prejudice is needed if the Holbrook test is met. See Bello v. State, 547 So.2d 914, 918 (Fla. 1989), and here it is.[3]

[3] Although the finding of inherent prejudice obviates the need for a harmless error analysis, harm for the error is shown by the improper and inflammatory argument of the prosecutor during summation explicitly connecting Mr. Hitchcock to the dangerousness of his witnesses. R 1214.

POINT IV

THE MULTIPLE EXCLUSIONS OF RELEVANT MITIGATING EVIDENCE BY THE TRIAL COURT WERE NOT HARMLESS.

The State contends that the erroneous exclusion of mitigating evidence below is subject to harmless error analysis; this Court has accepted that such analysis applies for ~~Hitchcock~~ error,[4] and its precedents compel reversal. Where the full mitigating evidence would suffice to allow a reasonable recommendation of a life sentence, then restriction of mitigating evidence is not harmless. See Hall v. State, 541 So.2d 1125, 1128 (Fla. 1989); ~~Meeks v. Dugger~~, 548 So.2d 184, 187 (Fla. 1989). The jury voted to recommend death by a single vote, 7 to 5, so virtually any restriction of mitigating evidence is harmful. See Morgan v. State, 515 So.2d 975, 976 (Fla. 1987) cert. denied 108 S.Ct. 2024 (1988); ~~Mikenas v. Dugger~~, 519 So.2d 601, 602 (Fla. 1988).

The excluded evidence is voluminous and touches on nearly every factor in mitigation presented by Mr. Hitchcock. First, Mr. Hitchcock tried to rebut the state's aggravating evidence. The State introduced evidence Mr. Hitchcock had been on parole at the time of the offense. Mr. Hitchcock tried to show that his prior

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[4] This Court should revisit this issue. When a sentencer is actually precluded from considering credible, non-statutory mitigating evidence, a new sentencing proceeding should be required. See Demps v. Dugger, 874 F.2d 1385, 1395 (11th Cir. 1989) (Clark, concurring). The decision to impose death is a question of judgment, a decision based on community standards, not simply a matter of fact. Harmful error analysis amounts to this Court imposing the penalty; such a decision is best left to the trial court advised by a fully informed jury. See Rilev v. Wainwright, 517 So.2d 656 (Fla. 1988). To impose death from a cold record violates the intent of 5921.141, Florida Statutes, due process and the prohibitions against cruel and unusual punishment.

criminal record was not serious and that he cooperated with police once he got into trouble. Hearsay evidence that he had been on parole only for several burglaries of businesses all occurring on the same night was excluded, Hearsay evidence that he had cooperated with police on that occasion was excluded. The trial transcripts of Officer Doss establishing that Mr. Hitchcock voluntarily surrendered himself on his parole violation was excluded.[5]

Mr. Hitchcock argued he had a lesser degree of culpability than his brother for the offenses; three of the four aggravators the trial court found applied to Mr. Hitchcock would not have been found had the triers of fact accepted that Mr. Hitchcock's brother bore primary responsibility for the crime.[6] The trial court refused to admit testimony that Richard Hitchcock attempted sexual violence

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[5] The State also contends the testimony of Doss was put before the jury during the cross examination of Detective Nazarchuk. A 44-5. Nazarchuk did not testify that Mr. Hitchcock surrendered himself. The jury never heard Doss's trial testimony that Mr. Hitchcock surrendered himself; the jury merely saw Nazarchuk review a transcript silently. R 531.

[6] The State argues that the evidence cannot be used to place blame on Richard Hitchcock because it would be lingering doubt evidence. Although Appellant does request this Court revisit the lingering doubt issue, B 39, the use of evidence to rebut evidence of guilt of statutory aggravators differs from using evidence to establish lingering doubt about guilt of the homicide. The State seems to suggest the verdict of guilt of the homicide can be used to bar any evidence rebutting the State's allegations as to Mr. Hitchcock's role in the murder. This position directly contradicts the holding of this Court in Cooper v. Dugger, 526 So.2d 900 (Fla. 1988), Downs v. Dugger, 514 So.2d 1069 (Fla. 1987), and O'Callaghan v. State, 542 So.2d 1324 (Fla. 1989). This Court has never held collateral estoppel bars a defendant from presenting a defense; to do so now would be a radical change in the law, a change not allowed by due process and the prohibition against cruel and unusual punishment.

on his sisters when they were at a similar age to Cynthia Driggers, one such attack occurring at the trailer where Driggers died at roughly the same period as the homicide. Such testimony would have supported Mr. Hitchcock's testimony that Richard actually killed Cynthia. Mr. Hitchcock moved a trial transcript of Officer Hanson into evidence which would have shown Hitchcock had no bruises or cuts on his hands within twenty-four hours of the homicide. The court excluded all this evidence.

Mr. Hitchcock tried to establish that he had an abused, violent, and impoverished upbringing, The hearsay statements of three dead declarants which confirmed that Mr. Hitchcock was badly shaken by the cancer death of his natural father, endured deep poverty along with his family, and knew of abuse of his mother by his alcoholic step-father were excluded.[7] Testimony that his brother attempted to rape his sisters when they were young teenagers was excluded.[8]

The trial court allowed the State to call into question some of the evidence which was introduced about Mr. Hitchcock's family

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[7] The State claims the testimony of witnesses Betty Augustine, Brenda Reed, and Wayne Hitchcock covers the same subject matter as the excluded statements of the declarants, Charlie Hitchcock, Lee Baker, and G.E. Motley. However, the three witnesses who testified were all members of Mr. Hitchcock's family. Such testimony is always open to question as biased. One of the deceased declarants, Baker, was a deputy sheriff. The exclusion of a policeman's statement confirming what family members say about a defendant is not harmless Hitchcock error. See Skipper v. South Carolina, 476 U.S. 1, 8, 106 S.Ct. 1669, 1673, 90 L.Ed.2d 1 (1986). Adding the statements of others who knew Mr. Hitchcock as he was growing up would increase the likelihood all the testimony would be accepted.

[8] No other evidence in the proceeding even hinted at this type of severe intra-family violence.

background, but then prevented Mr. Hitchcock from introducing evidence contrary to the State's rebuttal. An expert witness, Dr. McMahon, testified that the violent, impoverished background of Mr. Hitchcock severely hampered his normal development. The trial court then refused to allow in evidence of the doctor's clemency report after the prosecutor suggested the report contained statements to which she had not testified at trial. The prosecutor introduced evidence that a man who also grew up impoverished had not committed any crimes. The State argued this lack of criminality showed Mr. Hitchcock's background was not a strong causative factor for his criminal behavior. Yet, evidence that Mr. Hitchcock's brother, who grew up in the same family under the same circumstances, committed sexual assaults on young teenage family members was excluded.

Mr. Hitchcock also tried to establish that he had developed positive character traits before the crime even in the face of an abused childhood. Mr. Hitchcock was generally nonviolent. The three dead declarants all would have said they never saw Mr. Hitchcock be violent. Mr. Hitchcock was a hard worker. The three declarants all would have said either that Mr. Hitchcock worked hard or had a reputation for being a hard worker. These hearsay statements were excluded. Mr. Hitchcock bravely rescued his uncle from drowning, showing his courage and concern for his family. Hearsay testimony of his dead uncle's account of what occurred was excluded.[9]

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[9] The State claims the exclusion of all these hearsay statements was harmless because the witness who would have related them could have been impeached as biased. A 41. Speculations that the jury would not have accepted the testimony cannot show the exclusion was harmless beyond a reasonable doubt.

Mr. Hitchcock has undergone a remarkable transformation in the eleven years he has been in prison. Much of the evidence he wanted to present about this transformation was hidden from the triers of fact by the trial court, skewing the true picture of Mr. Hitchcock's present character.

The powerful, sympathetic reaction of Mr. Hitchcock to the execution of David Washington was, as the State admits, A 37, relevant to show empathy on Mr. Hitchcock's part. It was also relevant to show Mr. Hitchcock's lack of racism. The prosecutor below suggested that Mr. Hitchcock was lacking empathy and that this failing was common among criminals. R 1143-4. The trial court wrongfully excluded the evidence as irrelevant. Richard Greene would have testified that Mr. Hitchcock had undergone an exceptional transformation in comparison to other men on death row personally known by Greene. Greene knew Mr. Hitchcock for a number of years. The trial court prohibited this evidence.[10] The opinion of Michael Radelet that Mr. Hitchcock would not likely be dangerous in the future was admitted, but the doctor's opinion on the level of premeditation of the offense, one of the bases for his ultimate

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[10] Although Dr. McMahon testified along similar lines, Greene's opinion was not cumulative. Greene had personally known many men on death row and Mr. Hitchcock's progress was exceptional. Dr. McMahon made no such comparison. As a lay opinion, Greene's testimony was more accessible to the jury. It was also based on more extensive contact with Mr Hitchcock than the opinion of McMahon; the prosecutor impeached McMahon on the basis of her short contact with Mr. Hitchcock, R 1148, and questioned her judgment during summation, R 1215. The prosecutor also impeached McMahon as biased due to her opposition to the death penalty, R 1151. Where the State challenges the validity of evidence at trial, it cannot be heard now to say that excluded evidence was harmless as duplicative of the challenged evidence.

opinion on dangerousness, was excluded.

This exclusion of this evidence, in its entirety, crippled the case for life. Rebuttal evidence to all the aggravators was excluded; mitigating evidence for virtually every mitigator claimed was excluded.

The State contends that since the trial court found many of the mitigating circumstances, the exclusions were harmless. The trial judge did find substantial mitigators, including Mr. Hitchcock's immaturity at the time of the offense which resulted from his young age and deprived and abused upbringing, use of drugs and alcohol at the time of the offense, his present ability to be a peacemaker, likelihood to succeed in the general prison population, self-education, and unlikelihood of future violence. R 1518-9. The State's argument that any error in this section would be harmless because the judge is the actual sentencer and would give excluded evidence little weight when he thinks it irrelevant, A 49-50, cannot be accepted without overturning the numerous cases finding Hitchcock error harmful. Such an argument puts form over substance. Harmless error analysis considers prejudice to the ultimate result. Since a judge must accept a jury recommendation of life unless it is unreasonable, excluded evidence to which the judge gives little weight, but which the jury might find persuasive would still make a difference in the result and thus be harmful error whether the judge or jury is denominated the sentencer. In any event, the totality of the mitigation, found and excluded, more

than suffices to have upheld a life recommendation as reasonable.[11]

If the Court were to accept the idea that the jury found the same mitigators as the trial court, harm from the excluded evidence is apparent. No mention of empathy is found in the trial court order. The trial court's refusal to find that Mr. Hitchcock was not prejudiced, that he helped others financially and by teaching, and that he acted as a peacemaker show excluding opinion evidence that these traits existed prejudiced Mr. Hitchcock. Excluding evidence of empathy, upon which these traits depend also prejudiced Mr. Hitchcock. The trial court refused to find Mr. Hitchcock was a hard worker. It did not weigh heavily evidence of Mr. Hitchcock's nonviolence. Excluding evidence of these traits prejudiced Mr. Hitchcock. See Fead v. State, 512 So.2d 176, 179 (Fla. 1987); Cooper v. State, 526 So.2d 900, 902 (Fla. 1988); Mikenas v. Dugger, 519 So.2d 601, 602 (Fla. 1988).

The State argues that the prosecutor was misled by trial counsel's argument that delay caused the loss of the testimony of two of the declarants, depriving the State of an opportunity to rebut the hearsay. A 40. Defense counsel never stated he would not introduce the statements as hearsay, and anyway reasonable counsel would have anticipated the use of hearsay, especially since the statute plainly says hearsay can be used. The State had a fair opportunity to rebut.

This Court's decision on direct appeal is no bar to

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[11] Indeed, the evidence as a whole requires this Court reduce the sentence to life to maintain proportionality, see Point I.

introducing evidence that Richard Hitchcock sexually assaulted his sisters while they were young teenagers. First, this Court's ruling only addressed the exclusion of the evidence from the guilt phase as probative of Richard Hitchcock's guilt and Ernie Hitchcock's innocence. It says nothing about using the evidence to show intra-family violence, rebut state evidence and argument that those who grew up in circumstances like Ernie Hitchcock did not commit crimes, or as evidence of innocence to statutory aggravators. The variance in the questions presented take the issue outside the law of the case doctrine. See Riley v. Wainwright, 517 So.2d 656, 659 (Fla. 1988). Inasmuch as the prior decision concerns these issues, the decision cannot constitute the law of the case since the United States Supreme Court mandated a hearing be heldwithout restriction of mitigating evidence, thus reversing any ruling such evidence cannot be presented. Also, both the law and facts are different now than at the first sentencing hearing. In Heuring v. State, 513 So.2d 122 (Fla. 1987), this Court first explicitly recognized prior acts of sex with children are admissible Williams Rule evidence even though remote in time; Heuring was issued after the decision on direct appeal was final. Trial counsel below made a much more specific and probative proffer than at the original trial.[12] When

[12] The proffer at the original trial, in toto, was:

MR. TABSCOTT: My proffer will be to the effect, that I will call members of the family that I previously called to establish that they do know Richard Hitchcock to have a violent nature, and a violent reputation. And also, that Richard Hitchcock had made sexual advances towards two sisters. They would so testify, Brenda Hitchcock and Martha Hitchcock. Actually, Brenda Hitchcock Reed and

a subsequent trial develops different facts than the first, the law of the case does not apply. Steele v. Pendarvis Chevrolet, Inc., 220 So.2d 372, 376 (Fla. 1969). Where the law has changed, the trial judge is not bound by prior legal error. See Spaziano v. State, 433 So.2d 508, 511 (Fla. 1983), aff'd 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); see also Hall, 541 So.2d at 1126. Given the new facts and law, the exclusion of the evidence below cannot be justified by the law of the case doctrine.

The State argues that because Mr. Hitchcock was not shown to be aware of his brother's violence, it was not relevant as evidence of intra-family violence. This Court has never held that each instance of intra-family violence must be directly connected to a defendant. Having grown up with an older brother who committed such acts shows the strong likelihood of bad influences on Mr. Hitchcock when he was young and is admissible on this basis.

Contrary to the State's contention, A 44, the defense did move two transcripts of trial testimony by Doss and Hanson into evidence, but the trial court refused to admit them, demanding live testimony or at least a showing of unavailability:

> THE COURT: I just think it's, it would be best to present his [Doss's] testimony live, if he is available. If he

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> Martha Hitchcock got on the stand and testified yesterday. It would be my position that that would be relevant in light of what the Defendant testified to, who was the last witness.

1R 795. In contrast, the proffer below showed Richard attempted to shoot another relative, and sexually battered both girls when they were appraximately the same age as Cynthia Driggers, one such attack occurring in the same locale and roughly same time period as the homicide. R 1011-19.

is not, then I will reconsider admission of his testimony as I will on, on Detective Hanson.

R 716 (emphasis added). The State does not explain how the failure to call witnesses can act as a waiver of a claim of error for the refusal to admit valid, proper, reliable hearsay evidence. No waiver can be imputed. This Court has never required the State to call live witnesses as a preference over hearsay testimony in death sentencing proceedings. See Buenoano v. State, 527 So.2d 194, 198 (Fla. 1988). Failure to call live witnesses cannot then be considered to waive proffered hearsay statements.

Mr. Hitchcock did present to the trial court the "prong" of Dr. McMahon's study which related Mr. Hitchcock to the categories of life and death sentenced inmates. R 994. Because the expert testimony would "assist the trier of fact in understanding the evidence or in determining a fact in issue," S90.702, Fla.Stat. (1987), it was relevant and admissible under Florida's evidence code as well as the rule established by Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and its progeny.

The State argues that Mr. Hitchcock waived his contention that the trial court erred in excluding evidence of an assistant state attorney that the case merited a life sentence by not seeking to introduce such evidence after the judge ordered defense counsel not to introduce it. A 48-9. The State cites Provenzano v. State, 497 So.2d 1177 (Fla. 1986) cert. denied 481 U.S. 1024 (1987) and Thomas v. State, 424 So.2d 193 (Fla. 5th DCA 1983). Neither case applies when a judge orders the defense not to introduce evidence; Provenzano, concerns a motion for change of venue; Thomas, a

failure to object to introduction of evidence. However, requiring a defendant to seek introduction of testimony after the judge orders him not to introduce it would be pointless and farcical; Florida law does not require it. Bender v. State, 472 So.2d 1370, 1373 (Fla. 3d DCA 1985).

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 claims Mr. Hitchcock waived his contention that the confrontation clause requires a showing of unavailability of Diana Bass before reading Bass's trial testimony because defense counsel did not present that ground to the trial court. A 51. The prosecutor brought the Bass problem to the trial court's attention. He began by telling the court the State could not find her, using the terminology of Pope v. State, 441 So.2d 1073 (Fla. 1983). Pope itself cites Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Pope, 441 So.2d at 1076.

> MR. WALLACE: We have not been able to find her, have searched diligently for her and would move at this time, because of the relevance involved . . . to publish the testimony of Diana Bass . . . .

R 583. Mr. Hitchcock's counsel objected, in part on relevancy grounds, but also because the State had alternatives to introducing hearsay. R 584-5. Later, when Mr. Hitchcock attempted to introduce the testimony of Doss and Hanson, the state attorney argued a showing of unavailability was needed, referring to the Bass arguments and the trial court agreed to require a showing of

unavailability despite defense claims hearsay was admissible. R 711, 715. These exchanges show that the trial court was aware of the issue being raised and ruled with the relevant case law in mind. Where the counsel airs the concerns on the record, and the trial court recognizes that an issue is being raised, the objectives of the contemporaneous objection rule are met. See Williams v. State, 414 So.2d 509, 511-2 (Fla. 1982); White v. State, 547 So.2d 308, 309 (Fla. 4th DCA 1989); Pender v. State, 530 So.2d 391, 393 (Fla. 1st DCA 1988). "[M]agic words are not needed to make a proper objection." Williams, 414 So.2d at 512. In Tompkins v. State, 502 So.2d 415, 419 (Fla. 1986) cert. denied 483 U.S. 1033 (1987), this Court decided a confrontation clause claim in a death sentencing proceeding even though only a hearsay objection had been lodged in the trial court. In Rhodes v. State, 547 So.2d 1201 (Fla. 1989), the Court held the use of a recorded victim statement in the sentencing proceeding violated Rhodes's "fundamental right of confronting and cross-examining a witness against him." Id. at 1204. Since the judge was actually aware of the basis of the objection, since a hearsay objection suffices to raise confrontation concerns, and since the right is a fundamental one, the Bass issue is properly before this Court.

Moreover, Mr. Hitchcack has also raised the issue as a matter of Florida law. B 47. Pope requires a showing of unavailability as part of Florida law as well as an accommodation to the Confrontation Clause. The State also responds to Appellant's argument that another expert could have made the comparison and

eliminated any need to read the Bass transcript by arguing the burden to show the possibility of a comparison was on the defense. A 51. That argument flies against the well established rule that the proponent of hearsay has the burden to show unavailability. B 47.

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, 17, 21 AND 22 FLORIDA CONSTITUTION.

Appellant relies on his initial brief.

POINT VII

THE STATE'S EVIDENCE *AND* ARGUMENT VIOLATED THE EIGHTH AMENDMENT AND BOOTH V. MARYLAND.

The State argues that the mother of the victim could testify that Cynthia Driggers was blind in one eye, was not outgoing, and had gotten to the seventh grade of school because these items relate to the consent issue. The testimony was presented despite objection that live testimony would constitute victim impact evidence. The victim's schooling, physical problems and shyness had nothing to do with consent. The jury was invited to kill Mr. Hitchcock because of sympathy for the person he killed, not the circumstances of the offense or his own characteristics.

The State contends that the prosecutor's arguments to the jury which focused the jury's attention on the characteristics of the victim were not as serious as Appellant claims. A 57. The State has not disputed the prosecutor twice violated the dictates of Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987)

and South Carolina v. Gathers, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). However, the State claims Appellant quoted the third improper argument out of context, making it misleading. A full examination of the argument shows it was a flat out invitation to the jury to put Mr. Hitchcock to death based on their concern for the victim. It strongly suggested such a concern was a legal consideration, and falsely stated that future non-violence was not a legally valid mitigating circumstance.[13] Appellant's shorter

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[13] The prosecutor told the jury:

> MR. WALLACE: And remember that in issue here, a factor here is what's most reasonable to you. As a person with your lives' experiences, your knowledge, your abilities, your intellect, applying the law as instructed by Judge Formet, to the facts of this case.
>
> You know, all of the witnesses and the attorneys, the defense attorneys are here to speak for the Defendant. But who speaks for Cindy Driggers?
>
> [Defense objected and a bench conference was held.]
>
> MR. WALLACE: You speak for her. And you do that by following the law in this case, which you're sworn to uphold not on any theory of who's deterred, not on any theory of propensity far non-violent future behavior, and not on any theory of punishment in particular.
>
> But just because under the facts of this case, a case in which James Ernest Hitchcock came into this room before you even knew who he was, convicted of first-degree murder, by another jury who heard the evidence in the trial, just to apply the Florida law, as Judge Formet will explain it to you, to him for the proven crime.
>
> Not because of these other matters or because of emotion or because of sympathy for anyone. Not because of sympathy for anyone. Cindy or the Defendant's relatives or anyone. But because if you so find the facts are proved and were proved before we came into this courtroom, and the law which you're required to uphold, I submit to you, now compel you, if you follow your oath to deliberate and return to this courtroom with a recommendation to the court for the imposition of the death sentence.

recitation in the Initial Brief did not take the argument out of context.

The State also contends the Booth error during summation was not so egregious at to require relief, comparing the argument below to the argument in Clarence Jackson v. State, 522 So.2d 802, ~~cert.~~ denied 109 S.Ct. 183 (1988).[14] A 59. In Clarence Jackson, this Court, without the benefit of Gathers, evaluated a claim of ~~Booth~~ error during summation as if it were a prosecutorial misconduct/due process claim and required egregious error to vacate a sentence. However, Gathers shows this reliance is misplaced: ~~Booth~~ error which happens to occur in summation does not require a showing of egregious harm. In Gathers, the Supreme Court held that the prosecutor's summation which included arguments that the victim was religious and a registered voter, allowed the jury to rely on factors not relevant to any valid concern in a death sentencing proceeding. The Supreme Court found such argument required a new sentencing hearing; it creates the risk of an arbitrary and capricious death sentence, violating the Eighth Amendment. Gathers, 109 S.Ct. at 2211; see Booth, 482 U.S. 469, 502-3, 107 S.Ct. 2529, 2532-3. Gathers shows an Eighth Amendment claim that prosecutorial argument putting characteristics of the victim in issue are judged by Booth's Eighth Amendment standards, not by due process fairness standards which require egregious error. In this sense, a ~~Booth~~

R 1217-9.

[14] Appellant uses the first name of the defendant here to avoid confusion between this case and that of Andrea Jackson cited below.

error occurring in summation is like a comment on defendant's right to silence during summation: such comment is error whether egregious or not. See Wilson v. State, 294 So.2d 327 (Fla. 1974).[15] Where an error in summation violates some specific constitutional right independent of due process, then due process standards have no place in determining whether the error occurred.

The error above prejudiced Mr. Hitchcock's case for a life sentence. The State claims since the judge's sentencing order showed no evidence the judge considered victim impact, then the error was harmless. A 59. This Court has held that Booth error which occurred before only a judge was harmless in part because the judge's discretion after a jury recommendation of death was so narrow. See Grossman v. State, 525 So.2d 833, 846 (Fla. 1988), cert. denied 109 S.Ct. 1354 (1989). Where such error infects the jury recommendation, then the narrow discretion left to the judge demonstrably harms the defendant, especially since an override on the evidence below would not have been reasonable.[16] In Andrea Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989), this Court held that testimony that the victim had a good reputation as a police officer

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[15] Examining Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985), cited by the Court in Jackson for the proposition that argument urging jurors to consider matters not in evidence must be egregious, Jackson, 522 So.2d at 809, shows this Court's awareness of this distinction. This Court especially noted that the comment of the prosecutor on Bertolotti's right to silence was not error independent of a due process fairness claim because the right to silence did not apply to sentencing proceedings. Bertolotti, 476 So.2d at 133. Of course, Booth error applies to sentencing proceedings.

[16] See the argument at pages 11-19 above.

and his death had hurt the safety of the community was not harmless. Where the record reveals voluminous and powerful mitigation, the prosecutor actually tells the jury to speak for the victim, and such comment is sanctioned by the trial court, the error cannot be harmless.

POINT VIII

THE COURT ERRED BY ADMITTING EVIDENCE IN THIS CAPITAL RESENTENCINGPROCEEDING IN WHICH FUTURE NON-DANGEROUSNESS IS AT ISSUE THAT DEFENSE WITNESSES HAVE BEEN SENTENCED TO DEATH.

The State contends the error of the trial court in admitting evidence that seven inmates met Mr. Hitchcock on death row is barred. A 60-2. The replies of Daryl Hoy, the first inmate to testify he met Mr. Hitchcock on death row, are not attributable to the State as error, but neither do they constitute a waiver of the errors in admitting similar evidence from the remaining seven inmates.[17]

The State implicitly admits that if the defense objection to the second inmate, Rutherford, raised the grounds argued here, then continuing to object to the cross exams of the following six inmates would have been futile and unnecessary. A 61. Repeated objections after a judge has made a ruling admitting evidence does nothing to advance the purpose of requiring contemporaneous objections - to give the trial court notice of and an opportunity to correct error - and is not required. See Rodrisuez v. State,

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[17] Appellant mentions Mr. Hoy's retardation and the fact he had been instructed by defense counsel not to mention death row to show such admission was not intended by counsel, not to make out a claim for error by the trial court.

494 So.2d 496, 498 (Fla. 4th DCA 1986); Webb v. Priest, 413 So.2d 43, 46 (Fla. 3d DCA 1982); LeRetilley v. Harris, 354 So.2d 1213, 1214-5 (Fla. 4th DCA 1978).

Although defense counsel did not state her grounds at the time she made her objection to asking Rutherford if he was a resident of death row, R 786, the previous discussion at the bench during the testimony of Hoy adequately preserved the grounds argued here. Before trial, the court granted defense counsel's motion to restrict mention of Mr. Hitchcock's vacated sentence which motion was based on due process and prejudice outweighing probative value grounds. R 1367-8, 1277. When the prosecutor moved at the bench during Hoy's testimony to question him on his death row status, defense counsel objected to the question as both improper impeachment and a violation of the order not to mention Mr. Hitchcock's previous sentence. R 773. The court and counsel discussed the question obviously with the other inmates in mind. The trial court ultimately sustained the objection, but indicated to the prosecutor he could establish the inmates were on death row, although not repeat that evidence for Mr. Hoy since it had already come out. R 776-7. The court again stated the prosecutor could establish that Rutherford had resided on death row immediately before Rutherford took the stand. R 782. These facts show defense counsel clearly stated the grounds for her objection, and the court ruled with defense counsel's grounds in mind; the objection in these circumstances suffices to preserve the issues for review. See Williams v. State, 399 So.2d 999, 1001 (Fla. 3d DCA 1981); Harding

v. State, 301 So.2d 513, 514 (Fla. 2d DCA 1974); see also Johnson v. State, 537 So.2d 117, 120 (Fla. 1st DCA 1989) (motion to exclude physical evidence made pretrial and at beginning of trial preserved issue); Gaines v. State, 406 So.2d 523, 527 n.5 (Fla. 4th DCA 1981) (renewing pretrial motion when witness began testimony sufficient to preserve issue even though no objections to individual questions). No purpose would be served to require defendants to restate the obvious as the State suggests is required here.

Lastly, the State argues that the death penalty statute's wide scope of admissibility justifies admitting irrelevant evidence which prejudiced Mr. Hitchcock's case. This Court has consistently held that it must vacate a death sentence when prejudicial evidence not relevant to statutory aggravators is put before the trier of fact. See Douqan v. State, 470 So.2d 697, 701 (Fla. 1985), cert. denied 475 U.S. 1098 (1986); Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977).[18]

POINT IX

THE *JURY'S* KNOWLEDGE OF DEFENDANT'S PREVIOUS SENTENCE OF DEATH PREJUDICE THE DEATH RESENTENCING RECOMMENDATION, *AND* THE COURT COMPOUNDED THE ERROR BY REFUSING A CURATIVE INSTRUCTION TO EXPLAIN THE REASON FOR RESENTENCING.

The State argues that the use of Mr. Hitchcock's prior death sentence was not error because it did not play a key role in the proceedings. On seven occasions below, the prosecutor brought out through cross examination of defense witnesses that Mr. Hitchcock

[18] Limiting aggravating evidence is required by S921.141, Florida Statutes and the need for guided decision making guaranteed by the Eighth Amendment to the Federal Constitution and Article I, Section 17 of the Florida Constitution.

had been on death row. In summation, the prosecutor ignored the instruction of the trial court that the crimes for which the inmates had been put on death row were not to be mentioned and stated,

> And then there's all of the killers who came to the courtroom to tell you they like this defendant.
> And it's interesting, too, that we should discover in, what we may conclude from the evidence is a relatively small sample of people presently on death row, that even in this small sample, we saw folks who said I'm innocent. You know, they're always saying the jail's full of innocent people.

R 1214. If this record does not show that the prior death sentence played a major role, nothing does. The State's argument that the death sentences of the inmates were relevant to show bias is no more weighty than the argument of the State in ~~Jackson v. State~~, 545 So.2d 260 (Fla. 1989) that bringing out Jackson's prior conviction in that case in cross examination at retrial was permissible to correct a misimpression made in Jackson's testimony on direct.[19]

The State claims Mr. Hitchcock's proposed curative instruction was slanted to suggest intentional impropriety in the original sentencing. A 63. Nothing in the suggested instruction is inaccurate. It merely would have informed the jury that the presentation of mitigating evidence had been restricted, and the jury was called to rehear the case so that unrestricted mitigating evidence could be presented. The State may not like it, but that

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[19] Defense counsel did object to the cross-exam of the inmates on the basis of his motion to restrict mention of the previous sentence. R 773.

is what the Supreme Court said. The instruction was necessary to avoid the jury blaming Mr. Hitchcock for the resentencing, especially given the press coverage.[20]

POINT X

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

This Court has never decided the question whether an omission of an essential element of a felony aggravator in a death sentencing proceeding constitutes fundamental error. Neither D'Oleo-Valdez v. State, 531 So.2d 1347 (Fla. 1988) nor Darden v. State, 475 So.2d 217 (Fla. 1985) cited by the State concern this particular issue. Hence, the question is open.

Comparing this situation to the rulings of this Court when the trial court omits an essential element of a felony in a felony murder case shows that the failure to object to the omission does constitute fundamental error. B 60-1. The State's answer compares this case to the felony murder case of Adams v. State, 412 So.2d 850 (Fla.), cert. denied 459 U.S. 882 (1982). The State claims Adams holds that omitting an element of an underlying felony in a felony murder charge is harmless when there is sufficient evidence to support a premeditation theory. A 68. The State then makes a

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[20] The content of the news reports was actually known to the jury. The following jurors who sat for trial had heard or read of the case before coming to court: Hyatt, R 68-71; Covatta, R 90-5; Muhlan, R 130-2; Bowman, R 154-6; Van-Engelenburg, R159-64; Vause, R 164-8; and Sammis, R 182-5. Defense challenges for cause related to the publicity were denied for Hyatt, Covatta, and Muhlan. R 73, 96, and 132.

suspicious leap to say since the evidence is sufficient to find a sexual battery occurred, then any error would be harmless.[21] Actually, the Court in Adams simply applied conventional harmless error analysis and found omitting an essential element of an underlying felony in a felony murder case was harmless where evidence of an alternative theory of guilt - premeditation - was overwhelming. Adams, 412 So.2d at 853. Omitting an element for a felony aggravator differs, obviously, because there is no alternative theory of guilt which can justify finding a felony aggravator. Thus, the error in omitting the element cannot be harmless.[22] Moreover, nothing in Adams suggests this Court was abandoning the rule that error in criminal cases must be harmless beyond a reasonable doubt, see State v. Diquilio, 491 So.2d 1129 (Fla. 1986); State v. Guruanus, 451 So.2d 817, 823 (Fla. 1984), in favor of a sufficiency of the evidence rule as suggested by the State. Since the trial court, relying on Mr. Hitchcock's confession and the description of events argued by the State, did not find that force or threat of force occurred until after sex was

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[21] The State may also be claiming that since the error is harmless, it cannot be fundamental. See Dobbert v. State, 456 So.2d 424, 431 (Fla. 1984). If so, lack of harmlessness as argued below makes the error fundamental as well as harmful.

The evidence below was not sufficient to find the sexual battery aggravator existed beyond a reasonable doubt. See Point XII(b), B 65.

[22] This error cannot be harmless since omitting an element of the offense and informing the jury guilt can be found by other facts preclude consideration of the issue. See Rose v. Clark, 478 U.S. 570, 580 n. 8, 106 S.Ct. 3101, 3107, 92 L.Ed.2d 460 (1986).

complete[23], the failure to instruct that intercourse had to occur as a result of force or threat plainly harmed Mr. Hitchcock. The guilt phase trial judge also demonstrated the harmfulness of the error. After the State rested its case at trial, Mr. Hitchcock moved for a judgment of acquittal. The judge was so uncertain about the strength of the State's case for the uncharged crime of sexual battery that he reserved ruling on the felony murder theory. See State v. Hitchcock, 413 So.2d 741, 745 (Fla.), cert. denied 459 U.S. 960 (1982).

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.

The decision of the Supreme Court in Clemons v. Mississippi (U.S. Mar. 28, 1990) (No. 88-8873) requires this Court revisit the question decided in Mendyk v. State, 545 So.2d 846 (Fla. 1989) and hold that trial courts must give full, complete, and comprehensible instructions on the meaning of the heinous, atrocious, and cruel aggravating circumstance. It is elementary that jury instructions be full, complete, and accurate. See Shannon v. State, 463 So.2d 589, 590 (Fla. 4th DCA 1985). It is undisputed that the definitions of the heinousness aggravator contained in State v. Dixon, 283 So.2d 1, 7 (Fla. 1973) cert. denied 416 U.S. 943 (1974) and requested below are the law in Florida. It is apparent that the plurality opinion of Justice Stewart in Proffitt v. Florida, 428

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[23] See Point XII(b).

U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) is based on the idea that the jury itself would be given the guidance of Dixon's definitions.

> As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim" . . . [cites omitted] We cannot say that the provision as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

428 U.S. at 255-6 (emphasis added). This Court has, sub silentio, changed the law since Proffitt was decided on providing guidance to the jury, the body charged with recommending the sentence in capital cases. Prior to the change in standard jury instructions - which dropped Dixon's definitions without any apparent reason - Florida law required that the Dixon definitions be read to juries. See Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976) cert. denied 431 U.S. 925 (1972). Mr. Hitchcock requested the very instruction recited by Justice Stewart in Proffitt as saving the statute from a vagueness challenge. The trial court erred and rendered the sentencing recommendation dangerously unreliable by refusing to provide the requested guidance.

Furthermore, there exists some tension between Justice Stewart's plurality opinion in Proffitt and the decision of the Court in Mavnasd v. Cartwright, 108 S.Ct. 1853 (1988). The jury at the trial of Cartwright had actually been instructed on some of the Dixon definitions which had been incorporated into Oklahoma law. See Cartwright v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987), aff'd 108 S.Ct. 1853 (1988). However, Oklahoma did not

require its juries be told that the crime must be unnecessarily torturous to the victim. Id. The Tenth Circuit strongly suggested the unnecessarily torturous language would be a saving construction, just as it was by Justice Stewart in Proffitt. Id. at 1492. Apparently, that language distinguishes Proffitt from Cartwriuht. The denial of that instruction in particular created an unreliable recommendation. The Mississippi Supreme Court held the instructional error violated the Eighth Amendment. The Supreme Court agreed, implicitly, that such a failure was error. Clemons, p. 1, Slip Opinion by Blackmun (concurring and dissenting).

Lastly, the State argues that this Court's review function saves the statute even if the jury instructions failed to provide adequate guidance. The contention relates to a challenge to the statute as unconstitutional.[24] Certainly, review by this Court cannot render jury instruction error harmless, at least where heinousness is argued below. The problem with giving vague directions is that it allows the jury to consider virtually anything in aggravation. The fact that the crime may fit this Court's category for heinousness does not mean the jury was untouched by impermissible factors. For example, lack of remorse, how the defendant disposed of the body, and sympathy for the victim could have all played a role in the jury's deliberation given the

[24] This contention is discussed in the reply to Point XIV(a) below.

vagueness of the instructions given.[25] Such impermissible factors could well have swayed a juror to vote for death; given the 7-5 vote below, this misinstruction was prejudicial.

POINT XII

THE TRIAL COURT IMPROPERLY FOUND OR CONSIDERED ALL FOUR AGGRAVATORS.

The State's argument any errors would be harmless is based on Cherry v. State, 544 So.2d 184 (Fla. 1989); Cherry applies only when no substantial mitigation exists. Substantial mitigation exists here, see Point I, above.

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

This Court has long held that the heinousness aggravator is limited to situations which show, beyond a reasonable doubt, the crime was conscienceless or pitiless and which are unnecessarily torturous to the victim. Dixon, 283 So.2d at 7; Smallev v. State, 546 So.2d 720, 722 (Fla. 1989). Appellant suggests that an intent to torture as well as kill comports with such a definition and would suffice to cure the vagueness plaguing this aggravator.[26] Where, as here, a defendant kills in a panic and does so without any showing of intent that the victim should suffer, then the crime is not especially heinous, it is not a crime not set apart from the norm of capital felonies, it is not a crime unnecessarily torturous

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[25] The prosecutor argued victim sympathy was proper in considering this aggravator. R 1209.

[26] The argument that a purpose to torture element of the aggravator would help save the statute is set out in mare detail above at pp 34-5.

to the victim. See Hitchcock v. State, 413 So.2d at 748 (Fla. 1982) (McDonald, concurring and dissenting). The State also claims Mr. Hitchcock's allegedly clear memory of the event negates a claim that he reacted in a panic stricken manner. A 74. The argument is supported by neither evidence nor common sense. Nothing about impulsive reactions causes memory loss.

b. The court's findings do nat exclude a reasonable hypothesis of innocence to an element of the sexual battery aggravator and indeed makes 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.

The State misapprehends the claim that the evidence is not sufficient to show and the trial court did not properly find sexual battery. The State argues that this Court's ruling in Hitchcock I forecloses the issue of consent. Appellant argues that evidence is insufficient to show and the trial court failed to find the element of force or threat, an element entirely separate and distinct than that of lack of consent. The State makes no answer to the argument as written; apparently the State cannot think of one.[27] Moreover, the opinion in Hitchcock I confirmed a decision by a trial court and jury after the former instructed the latter during the guilt

[21] The State also twists the facts *to* suggest Mr. Hitchcock's entry inta the trailer, through a window apparently because he did not have a key, showed some evil intent. A 76. The evidence is undisputed that Ernie Hitchcock was residing in the trailer with his brother and the victim, Cindy Driggers when the death occurred. The State's own witnesses, the victim's mother and stepfather confirm this fact. R 478-9, 503-4. Since he lived there, the relevancy of his entry through a window, assuming he did so, is unclear.

phase that the jury must find force or threat beyond a reasonable doubt to find sexual battery established. No such instruction was given here; nothing indicates the court or jury had the slightest idea what the elements of sexual battery are. Even if Hitchcock I had directly considered this issue, the resentencing was a de novo proceeding; the prior decision could not be a bar. See King v. Dugger, 555 So.2d 355, 358 (Fla. 1989).

Mr. Hitchcock does contend that the expansion of the lack of consent element by the retroactive application of sexual battery instead of rape as an aggravator harmed his defense. If the State's answer means to say that this Court's decision in Hitchcock I forecloses arguing this point, it is incorrect. The prior opinion concerns the sufficiency of the evidence for consent, not the expansion of the lack of consent element from a retroactive application of the sexual battery statute. The ruling on an entirely different question cannot foreclose this issue. See Riley, 517 So.2d at 659.

The State answers Mr. Hitchcock's ex post facto argument by comparing the expansion of the rape aggravator to the retroactive application of the cold, calculated, and premeditated aggravator approved in Combs v. State, 403 So.2d 418 (Fla. 1981) cert. denied 456 U.S. 984 (1982). This argument is adequately addressed in the Initial Brief. B 68, n. 80.

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

The ruling in Hitchcock I that the evidence was sufficient

to find that Mr. Hitchcock killed to avoid arrest cannot control this appeal because intervening case law shows the evidence insufficient to find the aggravator beyond a reasonable doubt. All the cases except one cited in the Initial Brief were decided after Hitchcock I. The cases of Garron v. State, 528 So.2d 353 (Fla. 1988) and Cook v. State, 542 So.2d 964 (Fla. 1989) are the closest to the facts below; neither was decided at the time of the prior decision in 1982. Hitchcock I does not control since the proceeding below was de novo. See King, 555 So.2d at 358.

The State argues that Mr. Hitchcock's actions after Cynthia Driggers was killed show his intent at the time of the killing. A 78. The post-death actions do not contradict the reasonable hypotheses of innocence to the aggravator detailed in the Initial Brief: after his impulsive, panicked act, he calmed down enough to try to hide his guilt. As in Garron and Cook, the murder of one threatening to reveal a crime alone is not sufficient to find a dominant purpose to avoid arrest in the murder.

d. The application of the imprisonment aggravator *to* a parolee who *commits* a murder in 1975 violates due process/ex post fact principles, constitutes double jeopardy, violates the equal protection of the laws, and creates an unconstitutionally irrational aggravator.

The State says defense counsel's failure to object to evidence and jury instructions on the under sentence of imprisonment aggravator waived Mr. Hitchcock's claim the aggravator should not be considered at all. A 80. The State does not dispute that the pretrial motion to restrict aggravating factors raised both double jeopardy and due process as reasons to bar the imprisonment

aggravator. Once the court decided the aggravator should be used, it would have been futile and a waste of time to repeat objections to every piece of evidence and to jury instructions; lack of objections in these circumstances does not waive the objections made pretrial. See Webb v. Priest, 413 So.2d at 46; Rodriuuez v. State, 494 So.2d 496 at 498.[28]

Mr. Hitchcock's double jeopardy argument is also supported by the recent case of Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989). In Delap, the Eleventh Circuit held acquittal of felony murder barred finding the felony as an aggravator. Delap, 890 F.2d at 314-8. Where the trial court at Mr. Hitchcock's original trial found the imprisonment aggravator not proven, its use now is barred.

Mr. Hitchcock claims the irrational distinction between probationers and parolees created by this aggravator violate equal protection, substantive due process, and the prohibition against cruel and unusual punishment. The State answers that since the argument alleges the irrational distinction was created by case law rather than appearing in the written words of the statute, then the claim does not make a facial attack on the statute. A 80. Since it is not a facial attack, says the State, it must be an attack on the application of the statute and so not fundamental error.

That the unconstitutionality of §921.141(5)(a), Florida Statutes resulted from an interpretation of the meaning of the

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[28] In any event, a claim of double jeopardy is fundamental error and can be raised here even had there been no objection at all below. See State v. Johnson, 483 So.2d 420 (Fla. 1986); Park v. State, 528 So.2d 524 (Fla. 2d DCA 1988).

statute makes it no less a facial attack than if the Legislature had explicitly written that parolees would be eligible for the death sentence but probationers would not. This Court has accepted the proposition that fundamental error can appear on the face of the statute as interpreted by case law. In State v. Papp, 298 So.2d 374 (Fla. 1974), this Court vacated the decision of the Fourth District Court of Appeal; this Court held that §847.011, Florida Statutes (1969) was not unconstitutionally vague. The Fourth District had reached the vagueness question on appeal even though the issue had not been raised at trial or in the briefs to the District Court. Papp v. State, 281 So.2d 600, 602 (Fla. 4th DCA 1973). The Fourth District held that case law making the statute specific enough to pass a vagueness challenge had not been decided at the time of Papp's offense and hence the statute was too vague at that time. The Florida Supreme Court disagreed, ruling case law before Papp's offense sufficed to cure the vagueness of the statute as written. Papp, 298 So.2d at 376. The Florida Supreme Court never questionedthat the issue was properly before the appellate courts. It is apparent that attacks on the facial validity of statutes include attacks on statutes as construed. This Court has accepted that attacks on statutes similar to the one Appellant makes here are attacks on the facial validity of the statute. See Potts v. State, 526 So.2d 104 (Fla. 4th DCA 1987), opinion adopted, 526 So.2d 63 (Fla.) cert. denied 109 S.Ct. 178 (1988) (substantive due process attack on statute aggravating crime committed while defendant under indictment can be raised without objection below).

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 State contends Mr. Hitchcock was not prejudiced in this case, in part, because the wait was simply a delay of the inevitable. A 82. Such an argument is a fatuous ipse dixit: Mr. Hitchcock was not harmed in presenting his case for life because the trial (based on the delay-skewed picture) resulted in a death sentence.

The State makes no answer to Appellant's arguments on why this Court should accept that speedy trial applies to sentencings. The State merely cites to Lee v. State, 487 So.2d 1202 (Fla. 1st DCA 1986) and says speedy trial should not apply. The Initial Brief distinguishes Lee, B 75; the State does not dispute the distinction raised. Apparently, the State can think of no reason why the speedy trial right does not apply to sentencings.

The State also does not dispute Appellant's characterization of the delay in the case as egregious. The State's failure to answer the argument shows this factor is beyond dispute.

The State's arguments that Mr. Hitchcock failed to establish prejudice are weak; the Initial Brief adequately outlines the prejudice suffered. B 76-7. A brief reply is in order. First, the claim that some of the missing evidence was cumulative does not hold water. The evidence which the State claims duplicates this missing testimony was testimony from family members; such testimony

can always be rejected as biased. Where one of the deceased witnesses was a policeman, the loss of his testimony was prejudicial. See Skipper, 476 U.S. at 8, 106 S.Ct. at 1673. Second, although Mr. Hitchcock's crimes were not improperly used below, he was entitled to show that the reason for his parole was not as serious as his convictions suggested. Such rebuttal to an aggravator was lost because the policeman who knew the circumstances of the case had died. Third, the decision of a court that the State has established a predicate of voluntariness does not preclude the jury from weighing evidence of involuntariness; however, this sentencing jury, unlike the guilt jury, never heard the evidence of involuntariness because of the loss of memory on the part of Detective Nazarchuk. The amount of lost evidence in total - the death of witnesses who knew Mr. Hitchcock during his formative years, including a policeman, the death of another policeman who cauld help rebut a statutory aggravator, the loss of memory on the part of the arresting officer which harmed Mr. Hitchcock's argument his confession was inaccurate, the aging of Mr. Hitchcock which hurt his argument his age at the time of the offense mitigates the crime, and the connection of Mr. Hitchcock to dangerous cellmates - affected virtually every part of Mr. Hitchcock's fight to rebut the aggravators and present mitigators. The delay in this case requires a life sentence be imposed.

POINT XIV

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

The State disputes that the challenges to Florida's death

penalty statute in this section are facial challenges constituting fundamental error. As discussed above, attacks on statutes as unconstitutional based in part on case law construing the statute axe still facial attacks. See Point XII(d). The errors axe fundamental and need no objection below.

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.

The State does not dispute that Florida currently provides no guidance to juries in applying the heinous, atrocious, or cruel aggravating circumstance. Florida currently does not require courts instruct sentencing juries on the definitions of Dixon, 283 So.2d at 7. Mr. Hitchcock requested these instructions below, and included a citation to Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) which struck a vague aggravator similar to Florida's heinousness aggravatar on cruel and unusual punishment grounds. The State answers that case law can guide the trial judges in sentencing. Since jury recommendations are to be accorded great weight and since the vague instructions invites the jury to consider all manner of aggravation not proper in considering the heinousness aggravator, the decision of a judge does not cure this infirmity to the statute.

The State's argument that the heinousness aggravator has been applied consistently recites categories and cases in which heinousness was found. The inconsistency which appears in this Court's decisions is the inability to rationally distinguish

between crimes which are especially heinous, atrocious, or cruel, and those which are not. Focusing on cases in which heinousness is found reveals nothing about the line between (1) cases in which heinousness is found and (2) when it is not. The Initial Brief demonstrates that there is no rationally drawn line between the categories. The State falls into a common trap by ignoring the factors in Brown v. State, 526 So.2d 903 (Fla. 1988) which, in other cases, would have led to the Court approving the heinousness finding. The trial court found in Brown:

> During the course of this arrest, Morris Lavon Brown, assaulted the police officer, fought him to the ground. During the course of the struggle, the Defendant Morris Brown shot James Arthur Bevis in the arm with his own service revolver. According to the testimony of the medical examiner, this shot left the victim virtually paralyzed on that side of his body. The arm that was shot was useless in defending himself . . . Brown . . . after having shot James Bevis in the arm and knocking him to the ground, stood over him and pointed his service revolver at him. This Court can barely conceive the agony that James Bevis must have been going through at this point . . . As he looked into the barrel of his own gun, he pleaded for his life, "Please don't shoot me, please don't shoot me."

Brown, 526 So.2d at 906 n.11. In Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, 109 S.Ct. 1354 (1989), the Court depended on the beating the officer received and on the fact the officer must have known she was struggling for her life to find heinousness. Why does a struggle which includes a shooting rendering the victim helpless followed by the victim begging for his life not render the shooting especially heinous when a struggle which includes a beating with a flashlight during which the victim must have known she was fighting for her life does render the

shooting especially heinous? The events before the initial shot, the begging of the victim, and the helplessness of the victim in other cases justify heinousness; in Brown, they did not. The State does not even attempt to answer the other inconsistencies in the Initial Brief. The inability of this Court to provide genuine guidance, due to the inherently vague nature of the aggravator, requires this section of the statute be struck as unconstitutional.

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.

This Court ruled in Brown v. State, No. 70483 (Fla. Mar. 22, 1990) against this issue. It should reconsider. The State's answer to Appellant's contention that the burden of proof placed on defendants at capital sentencing violates Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) depends upon a misstatement of Florida law and a breathtaking dissembling of Florida's Standard Jury Instructions in death sentencing proceedings.

"One of the shortcomings by the defense in relying on Adamson is that the jury plays no role in the sentencing process." A 89. The State cites no authority for this proposition; Florida law has long been directly contrary. The jury recommendation in Florida is crucial: unless the facts demanding death are so clear and convincing that no reasonable person could differ, the trial court must abide by it. See Riley v. Wainwright, 517 So.2d at 657-8; See,

Tedder v. State, 322 So.2d 908 (Fla. 1975). Misinstructing the jury on mitigation was precisely what caused the Supreme Court to vacate the death sentence in this case; to declare that the jury has no role in sentencing is a dizzying misstatement of the law. Denominating the judge as sentencer and dismissing the misinstruction as not important would be a convenience, but not justice.

The State also contends that the jury instructions taken as a whole, could be read by a reasonable juror to consider all mitigating evidence, The issue is not whether there is a reasonable construction of the instructions that would meet constitutional requirements, but whether there is a reasonable likelihood that the jury has construed the instructions to preclude consideration of mitigating evidence. See Bovd v. California, 58 USLW 4301, 4304 (U.S. March 5, 1990) (No. 88-6613). Such a standard does not put the burden on defendants to show that mare likely than not the improper construction was adopted by the jury, but there must be more than a mere possibility that such occurred. Ibid. Although the instructions do include statements that the jury should consider all the evidence, the instructians overall have a very different meaning:

> You are instructedthat [this evidence] is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify imposition of the death penalty and, second, whether there are mitisatins circumstances sufficient to outweigh the aggravating circumstances, if any . . . you will be instructed on the factors in aggravation and mitigation that you may consider . . .
>
> [I]t is your duty to follow the law . . . based upon your

> determination as to whether sufficient aggravating circumstances exist to justify imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating . . .
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitisating circumstances you may consider, if established by the evidence, are: . . . .
>
> If you are reasonably convinced that a mitigating Circumstance exists, you may consider it as established.

It is not only reasonable, but natural to conclude from these directions that before considering mitigating evidence, one must first decide whether it establishes a mitigating circumstance. If reasonably convinced the evidence does establish the circumstance, the evidence will be weighed against aggravators. If not, then the evidence will not be considered further. Jurors who understand the instructions this way have been directed not to consider mitigating evidence which is not reasonably convincing. Cf. McCoy v. North Carolina, 58 USLW 4311, 4313 (U.S. March 5, 1990) (No.88-5909).

Furthermore, the State does not dispute Appellant's arguments that this Court's directions to the trial courts allows consideration only of mitigators found by a reasonably convincing standard of proof. The law is clear: a burden of proof restricts consideration of mitigating evidence.

The State also argues that since this Court has not defined 'reasonably convinced,' then any attempt by counsel to define it is speculative. Contradictorily, the State also argues 'reasonably convinced' "are common words which can be readily applied by a reasonable juror." A 90. The State does not itself say what it

thinks 'reasonably convinced' could mean. This Court's definition of a similar phrase, see B 86, confirms what should be obvious: "convinced" suggests a high degree of certitude.

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,

Appellant relies on his Initial Brief.

POINT 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.

Appellant relies on his Initial Brief.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by United States mail to David Morgan, Assistant Attorney General, 125 North Ridgewood Avenue, Daytona Beach, Florida, this 29th day of March, 1990.

_____
Of Counsel