IN THE SUPREME COURT OF FLORIDA



ERNEST CHARLES DOWNS,

Appellant,

v.

CASE NO. **73,988**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DWAL COUNTY, FLORIDA

# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

This case is before this court because the trial court resentenced Earnest Downs to death for the second time. An amended indictment filed in the Circuit Court for Duval County on August 11, 1977 charged Downs with one count of first degree murder and one count of conspiracy to commit first degree murder (R 3-5). He was tried and found guilty of both offenses and sentenced to death (R 6-14), and this court affirmed the convictions and sentences.[1] Downs v. State,, 386 So.2d 788 (Fla. 1980). This court also affirmed Downs' subsequent motion for Post-conviction relief, Downs v. State, 453 So.2d 1102 (Fla. 1984), and his Petition for a Writ of Habeus Corpus. Downs v. Wainwright, 476 So.2d 654 (Fla. 1985).

In 1987, the governor signed a warrant for Downs' death, but this court stayed his execution. It vacated the sentence of death and remanded for a new sentencing hearing because the trial court had limited what the jury could consider in mitigation, a violation of Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987). Upon remand, Downs filed several motions relevant to this appeal:

1. A Motion that only two aggravating circumstances be read ot the jury (R 126). Denied. (R 194).

2. A motion to recuse the State Attorney's Office (R 128). Denied (R 191).

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[1]Downs received a concurrent 30 year sentence for the conspiracy conviction (R 7).

3. A motion to disqualify Honorable Judge Dorothy Pate (R 250). Denied (R 268).

4. A motion to challenge the P.S.I./confidential evaluation and for de novo report (R 255). Denied (R 269).

Downs also filed a notice that he intended to use the perpetuated testimony of a Bobby Jo Michael (R 123). He waived counsel (R 202), and the court, after conducting an inquiry, allowed Downs to represent himself (R 46-47).

Downs and the State presented evidence at the resentencing trial, and the jury, after hearing it recommended death by a vote of 8 to 4. The court followed that recommendation and sentenced Downs to death. Justifying that sentence, the court found three aggravating factors:

1. Downs had a prior conviction of a violent felony.

2. He committed the murder for pecuniary gain.

3. He committed the murder in a cold, calculated and premeditated without any pretense of moral or legal justification (R 312).

The court, in its sentencing order, never articulated what mitigation it found, although the order suggests it found some mitigation (R 312).

This appeal follows.

## STATEMENT OF THE FACTS

Ron Garelick wanted his business partner, Jerry Harris, dead so he could collect on the one half million dollar insurance policies written on Harris' life, which Garelick was the beneficiary (T 414). In April 1976 he found four men, John Barfield, Ricky Barfield, Gary Sapp, and Huey Palmer, who were willing to kill Harris (T 701).[2] Although they tried to kill him on at least three occasions, they never succeeded. (T 701-702).

### LARRY JOHNSON'S VERSION OF WHAT THEN HAPPENED.

On 18 April 1977, John Barfield approached Larry Johnson and Ernest Downs about killing Harris (T 703). There was some discussion about the money ($ 5,000), and either Downs or Johnson said they would kill Harris at the first opportunity (T 549, 704). Barfield told them they could get to Harris by calling him about doing some flying for a Joe Green (T 548).

On the evening of 23 April, Johnson called Harris, identified himself as Joe Green, and said he wanted to meet with Harris (T 555). He agreed to the meeting. According to Johnson, he did not want to kill Harris; instead Downs forced him to make the telephone call and go with him (T 555).

Downs dropped Johnson off at the end of a dirt road, gave him a .45 caliber machine gun, then went to pick up Harris

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[2] Sapp said he had bought a gun from Larry Johnson to use in killing Harris (T 447).

(T-556). When Downs and Harris returned, Johnson said his name was not Joe Green, that he had used it only as an alias (T 558). Downs then came out of the car and shot Harris with a .25 automatic pistol (T 559). Downs stumbled backward, and as he did so, he fired three more times, stumbled some more and fired another three shots (T 559). He fired another shot at Harris's head (T 560). Afterward, the two men dragged Harris' body into a wooded area nearby (T 566). Harris' identification was taken and Johnson took some money from the body (T 567). Johnson gave Downs another bullet, and he shot Harris a final time (T 567). They left the area but returned shortly to retrieve the gun Johnson said he had hidden (T 568). He threw the gun away sometime later (T 575).

The next morning Downs showed Barfield Harris' driver's license and told him he wanted the money (T 576). Barfield eventually paid him about $4200 and gave him a pool table (T 578). Johnson got a Corvette (T 579).

Over the next several weeks, Downs and Johnson went to the Florida Keys, Mexico, Texas, and Alabama (T 580). Johnson left Downs in Alabama and returned to Jacksonville. He eventually told a sheriff's detective that he knew something about Harris' disappearance (T 580-581). The State Attorney gave Johnson complete immunity from prosecution on the condition that he had not killed Harris (T 582).

DOWNS' VERSION OF WHAT HAD HAPPENED.

On 18 April 1977 Barfield approached Downs about whether he and Johnson wanted to kill Harris for $5,000 (T 949-950). Johnson was willing to kill Harris, and he suggested a couple of places to do it (T 951-952). Eventually, however, Johnson, Barfield, and Downs agreed that a particular dead end road would be the best place to kill Harris (T 954).

On 23 April, Barfield gave Johnson Harris' telephone number and told him Harris would be expecting a telephone call that night from a Ralph Green (T 955). By this time, Downs had second thoughts about murdering Harris. By chance, he had recently discovered dozens of pictures showing his wife having sexual relations with men and women (T 946). When he confronted her with those pictures, she refused to talk (T 946-947). A short time later, she left Downs, and he was spending all his time trying to find her (T 956).

Despite or may because of his pre-occupation with his wife, Downs agreed to help Johnson. After Johnson made the telephone call, he dropped Downs off at the end of the dirt road (T 957). Alone, Downs changed his mind about helping commit the murder, and went to his grandmother's house where Johnson found him (T 957). The next day Downs and Johnson saw Barfield, and Johnson showed him Harris' driver's license (T

958). He also had some money that he had taken off Harris' body.[3]

When Barfield was slow in paying the $5,000, Johnson became mad. Downs, to avoid anybody getting hurt, gave Johnson a Corvette, and he used the money he eventually got from Barfield to pay the loan on the car (T 960).

Afterward, Johnson and Downs went to the Florida Keys, Mexico, Texas, and Alabama. While in Alabama, the men had a falling out, and Johnson returned to Jacksonville. The same day, a policeman in Alabama stopped Downs and told him he had a tip Downs did not have proper registration for the car (T 965). Downs said he wanted to talk with somebody from the FBI, and when two agents showed up, he told them he had information about the disappearance of Jerry Harris (T 965). Downs admitted involvement in Harris' murder when questioned (T 425), and he waived any objection to his extradition. When he returned to Jacksonville he learned that Johnson had said he was the triggerman (T 966).

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[3] Johnson told Gary Sapp that he had "taken care of" Harris (T 452). John Barfield also said Johnson told him he had killed Harris (T 705, 707).

## SUMMARY OF THE ARGUMENTS

As expected, all of the issues in this brief deal with the sentence. Several deal specifically with imposition of a death sentence while others focus on various evidentiary rulings the court made.

In the first issue, Downs argued that the trial ignored a wealth of mitigating evidence when it sentenced him to death. He says this because the court's sentencing order makes only a cryptic reference to any mitigating evidence. Mentioning the mitigating evidence only in passing does not aid this court's review of the case.

The error becomes more apparent here because Downs presented a lot of evidence that mitigated his death sentence. From the evidence he presented emerged a portrait of a hard working, well respected man. Discovering his wife's bizarre infidelity demolished his emotional stability which contributed to him going along with the murder scheme.

When Downs' case is compared with other similar cases, Downs fares very well. In other contract killings, the defendant is particularly onerous, or the circumstances surrounding the crime justify a death sentence. Not so here. With Downs' good reputation and the lack of any other significant aggravation, this is not a death case.

It is also not a death case because Larry Johnson was as involved with the planning and execution as Downs, yet he received total immunity. The only distinction was that Johnson said Downs pulled the trigger, but such a minor distinction

should not justify such an extreme difference between the two men.

At the time of Downs' resentencing, Johnson could not be found. Johnson's testimony was critical to the State's case in Downs' **1988** resentencing, so it read his guilt phase testimony in Downs' **1977** guilt phase trial. But this testimony was inadmissible because Downs' motive to develop Johnsons' testimony for sentencing was greatly different than that for cross-examining him during the guilt phase of the trial. The trial court erred in admitting it.

Downs wanted to ask Ed Austin, the State Attorney who had granted Johnson immunity, why he had done so. The court refused to let him, and that refusal was error. It was error because in granting Johnson immunity, the state had, in essence, said it believed Johnson's version of what happened. Downs wanted to question Austin about the basis of his granting that immunity. Austin said, at the original sentencing hearing, he had granted Johnson immunity because he had passed a polygraph test. If Downs could have brought that fact to the jury's attention they may not have given Johnson's testimony as much weight.

The court also excluded Downs from introducing the perpetuated deposition of a Bobbie Jo Michael. She would have said that Downs was with her about the time Harris was killed. The court refused to let Downs present this evidence because it was relevant to his guilt, which was not an issue at sentencing. The court missed the point, though. The evidence was also

relevant to show Downs was not the triggerman, the crucial issue at the resentencing trial. Excluding Michael's testimony because it showed his innocence ignores its relevance to show he was not the triggerman.

The court also erred when it refused to tell the jury that it could consider any lingering doubts they might have that Downs was the triggerman as mitigating evidence. It refused to grant this instruction because it believed that opinions of this court and the U.S. Supreme Court precluded jury consideration of doubt as to quilt as a mitigating factor. This case did not present that scenario: instead it was doubt as to who was the triggerman, an entirely different issue, and one which the jury could have properly considered.

The court also erred in excluding several mitigating items of evidence. Downs wanted to present evidence that in **1977** Barfield had tried to kill Downs. This was relevant to show he had a bias against Downs in **1977,** and it would have explained why he implicated Downs directly in the murder of Harris in **1977.**

Downs also wanted to show that Larry Johnson was an alcoholic. Such evidence was relevant to Johnson's ability to remember and his propensity to use violence.

During its deliberations, the jury asked the court if Downs would receive credit for the time he had already spent in prison for the murder and conspiracy. The court, over objection, said he would. That was incorrect, because by doings so,

the court invited the jury to speculate about Downs' future dangerousness, an impermissible aggravating factor in Florida.

Finally, in sentencing Downs' to death, the court said he committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. That was an ex post facto application of the law.

## ARGUMENTS

### ISSUE I

THE COURT ERRED IN EITHER FAILING TO FIND ANY MITIGATION OR IN NOT STATING WITH UNMISTAKABLE CLARITY WHAT MITIGATION IT FOUND.

The court's sentencing order in this case is very short (R 312-313). It treated the mitigating evidence with a similar brevity, "The Court does not find mitigating factors to offset or overcome the aggravating circumstances in this case." (R 312). That short finding has two problems. First, its order lacks the unmistakable clarity this court requires, and second, it ignored the extensive mitigation presented at the resentencing hearing. Mann v. State, 420 So.2d 578 (Fla. 1981); Rogers v. State, 511 So.2d 526 (Fla. 1987).

In Mann this court said that a trial judge's findings regarding a death sentence "should be of unmistakable clarity so that [the Supreme Court] can properly review them and not speculate as to what [the trial court] found..." Id. at 581. Here, the court impliedly found some mitigation because the sentencing order said the mitigating factors did not outweigh the aggravating factors. What it specifically found is not apparent from the sentencing order or the sentencing hearing (T 1206-1207). It is also not apparent from the trial court's original sentencing order because it found nothing in mitigation then (R 9-11). The trial court, in short, has forced this court to speculate about what it considered in mitigation. To have placed this court in that position was error.

The court also erred in saying nothing about the extensive mitigating evidence Downs presented. In Rogers, supra, this court articulated a two step analysis a trial court should use to decide if mitigation exists and should be considered:

> [T]he trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual findings have been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed.

Id. at 534.

If the evidence supports a finding of some mitigation, the court must find it. Whether that mitigation outweighs whatever aggravating factors the court may have also found is a decision it must make, but the court cannot simply ignore the mitigating evidence or refuse to recognize what is patently present. Here, Downs presented an abundance of mitigating evidence the court should have considered. This evidence explained, if not excused, his uncharacteristic behavior.

THE MITIGATING FACTS

Since **1970** Downs had lived an honest life and worked hard. His unfortunate childhood was the result of his alcoholic father beating, abusing, and ultimately abandoning him and his family (T **867, 900).** Downs, being the oldest child, tried as best he could to support his mother, brothers, and sisters. In the mid-sixties, when he was sixteen years old, he joined the army (T **868, 903-904),** and the army did not discover his age

until it had ordered him to Vietnam (T 904, 931). It rescinded those orders and placed Downs in a "holding" status until it could discharge him (T 931).[4] Downs left the army without permission. While AWOL he robbed one person and tried to rob another when he had run out of money and was hungry and cold (T 932-933).[5] For those offenses he was given a suspended sentence of ten to twenty-one years with the condition that he spend three years on probation (T 933). He violated probation and was sentenced to prison. Downs violated probation when he left the foster home where he was living and returned to his mother and grandmother (T 935). He was released in 1970 and came to Jacksonville where he got a job as a common laborer (T 940).

From then until 1977, he lived a law abiding life. He held several jobs, mostly in construction. His employers uniformly liked, trusted, and respected Downs (T 796, 845). While in prison, he had taken courses in welding and drafting, and because of those skills Downs moved up in his world (T 941-942). Eventually he became a superintendent of a construction company (T 942), and that job ended only because the owner of the company died (T 942). From construction in Jacksonville, Downs went to Ripley's Believe it or Not in St. Augustine where he was a magician (T 942).

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[4] Downs was honorably discharged (see defense Exhibit 86).

[5] The weapon he used was a toy gun (T 932).

Downs returned to Jacksonville, and he started a construction company. By 1977 it was a success.

Downs got married and started a family. He was a good provider, and he worked hard to take care of his home (T 841). Although the marriage did not last (T 897), Downs provided child support for his daughter and visited her (T 841). At least once after he was sentenced to death, his ex-wife brought their daughter to the prison for him to see and to get some counseling. She had become difficult to handle (T 898), and as his ex-wife said at the resentencing, what he told her helped a lot (T 898). Throughout all that Downs has been through, he and his former wife have remained friends (T 841).

Downs, in short, was a hard working, ambitious man who was well liked and respected. Even when he was in prison, he made the best of a bad situation. He earned his GED; he took courses in welding, drafting, and mathematics (T 936).

If prison did not smother his ambition, it also did not dampen his inherent sense of decency. While in prison in Oklahoma, he protected a guard during a prison riot (T 938-940). Since being kept on death row, he provided Richard Dugger, then prison superintendent of Florida State Prison, valuable information regarding potential problems in the prison such as escapes. He also retrieved knives and escape paraphernalia (T 79-80, 685). On other occasions he has helped prevent inmate murders (T 80). He did this without any intent to get favorable treatment from Dugger (T 680-685), and by helping the

prison administration, he exposed himself to probable inmate retaliation (T 81).

Downs' law abiding spirit and efforts to make the best of a bad situation differ from most of the inmates in prison and on death row. He does not have the anti-social personality disorders, the mental illnesses, or the proneness to violence that characterizes most death row inmates (T 875). He is an anomaly among death row inmates. He did carry with him from childhood a latent insecurity about his manhood that his second wife, Robin, brought to the surface (T 887).

She had engaged in homosexual and other pornographic activities after she married Downs (T 870). Downs discovered this by chance when he found dozens of photographs showing her having sexual relations with other men and women (T 946). Mad and devastated by what his wife had done (T 887), he confronted her. She was vague about the pictures and refused to talk to him (T 946-947); instead, she disappeared, and Downs spent days trying to find her.

Robin's infidelity destroyed Downs. His confidence evaporated and was replaced by his latent feelings of inadequacy (T 887). The stress caused by his discovery impaired his judgment. His cognitive and emotional faculties were depleted (T 890). It was during this adjustment crisis, that Barfield approached him (T 948).

Downs had changed. He got a girl friend, and when Barfield approached him, he was initially interested (T 950).

Several mitigating circumstances arise from these facts. First, Downs' undisputed reputation for being a hard worker and good employee can mitigate a death sentence. Proffitt v. State, 510 So.2d 896 (Fla. 1987). When he was in prison, Downs sought to improve himself. Such a demonstrated capability to live productively while in prison is mitigation. Holsworth v. State, 522 So.2d 348 (Fla. 1988).

In Perry v. State, 522 So.2d 817 (Fla. 1988), this court recognized that Perry's situation at the time he committed a murder mitigated a death sentence. Until recently, Perry had been highly motivated and ambitious, but life had turned sour for him, and he began to see himself as a total failure. He did not have a job, his wife was pregnant, and they had no place to live. Such psychological stress mitigated the death sentence.

In Smalley v. State, Case No. 72,785 (Fla. July 6, 1989), an accumulation of irritations rubbed Smalley until he exploded, and he killed the daughter of his girlfriend. Smalley's mental state mitigated a death sentence.

Here, instead of several problems, a single, devastating discovery overwhelmed Downs. Perhaps if Robin had stayed around so Downs could have confronted her, Downs latent insecurity regarding himself could have been resolved. But when she disappeared, the wound could not heal, it could only fester, and it erupted in a single act of total criminality. Like the stress Perry suffered, the stress Downs' endured mitigated a death sentence.

Dr. Krop, the psychologist Downs called to testify about his mental condition, explained that Downs was particularly vulnerable to challenges to his manhood (T **870**). His wife's infidelity and the dozens of pictures showing it exposed this latent flaw in his character. Thus, the childhood trauma Downs suffered, which caused him to have this weakness, is a relevant mitigating fact Rogers v. State, 511 So.2d 526 (Fla. **1987**).

Despite this tragic flaw in Downs' character, Downs made contributions to whatever community he lived in to the best of his ability. Even when circumstances limited his ability to contribute, he did the most he could. For example, he wrote letters to his daughter and talked with her while in prison, and she benefitted from his counsel (T **897-898**).

Thus, the totality of Downs' life shows a man who has tried to rise above the limits and mistakes of his childhood. For the most part, he succeeded until a tragic crossing of marital infidelity, latent insecurities, and a coincidental opportunity resulted in this singular tragedy. The court should have considered all this in her order. What Downs has argued is valid mitigation, and he presented evidence to support that mitigation. According to the holding of Rogers, supra, the court should have considered it before it sentenced Downs. **As** argued in the next issue, this mitigation, when viewed in light of the aggravation, makes a death sentence unproportional to the crime Downs committed.

## ISSUE II

**UNDER A PROPORTIONALITY REVIEW OF THIS CASE, A DEATH SENTENCE IS NOT WARRANTED.**

As part of its review of death sentences, this court in recent years has shown an increasing willingness to reduce death sentences to life imprisonment despite a jury recommendation of death. It has done so because it has the obligation to review death sentences to insure that the sentence in a particular case is deserved when compared with other cases involving similar facts.

> Our function in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974)

Menendez v. State, 419 So.2d 312, 315 (Fla. 1982). Thus, this court will compare the facts of the case being considered with other cases involving similar situations and will decide if a death sentence is warranted. Proffitt v. State, 510 So.2d 896 (Fla. 1987). In this case, the proper cases to compare are those involving the pecuniary gain aggravating factor.

### COMPARISON WITH OTHER CASES

There are two general types of killings in which that factor applies. The first line of cases involves an underlying felony such as a robbery, kidnapping, shooting, or stabbing. The death is usually committed in a terrible manner. Bryan v. State, 533 So.2d 744 (Fla. 1988); Rutherford v. State, 545

So.2d **853** (Fla. **1989).** This case does not fall in that category.

The second type of killing in which pecuniary gain is a factor is the contract killing case, and this case fits that category. The fit is not close because in the similar cases the defendants had other aggravating factors that made the murder more than simply a contract killing.

For example, several contract killings also were committed in an especially heinous, atrocious, and cruel manner. Buenoana v. State, **527** So.2d **194** (Fla. **1988)** (Husband poisoned.): Byrd v. State, **481** So.2d **468** (Fla. **1985)** (Victim shot, stabbed, strangled): Thompson v. State, Case No. **69,352** (Fla. October **19, 1989)** (Victim shot, tied in chains, dumped into ocean. Victim killed professionally by an underworld crime boss.): Michael v. State, **437** So.2d **138** (Fla. **1983):** Hoffman v. State, **474** So.2d **1178** (Fla. **1985)** (Victim and wife stabbed). Others were committed during another felony. Thompson, supra.: Echols v. State, **484** So.2d **568** (Fla. **1985).**

Finally, other contract killers had convictions for prior violent felonies. Echols, supra,: Thompson, supra,: Buenoana, supra,: Kelly v. State, **486** So.2d **578** (Fla. **1986).** Downs, of course, had prior convictions for an attempted robbery and robbery. Those convictions had occurred twelve years before the murder in this case and when he was sixteen years old.

Since 1970, he has had no trouble with the law.[6] Also, the only reason he committed those crimes was that he was cold, hungry, and lacked money and he was far from home (T 933). Under such circumstances, Downs' prior violent felony carries little weight.

Thus, this case involves simply a killing for pecuniary gain. It has none of the additional aggravation that other similar cases have. Downs also has a wealth of mitigating evidence (See issue 11), which none of the other similarly situated defendants had. This case is, therefore, the least aggravated and most mitigated contract killing case this court has considered. In State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), this court said that death should be imposed for "only the most aggravated, the most indefensible of crimes." Here, what Downs did cannot be excused, but it is not the most aggravated contract killing case this court has seen. Downs also is not the most reprehensible defendant this court has considered. Under a proportionality review, this court should reduce Downs' sentence to life in prison without the possibility of parole for twenty-five years.

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[6] Downs used a toy gun in the robbery. The victim in the attempted robbery obviously saw through Downs' ruse because she told him "to get the hell out." (T 932). The other victim had to call Downs back as he was leaving to give him more money (T 932). Downs had apologized for taking the money (T 932).

COMPARISON WITH JOHNSON

Proportionality review also means that in a particular case, only the most culpable should die. Those whose culpability is equal to or less than a co-defendant who received a sentence less than death should not receive a death sentence. Slater v. State, 316 So.2d 539 (Fla. 1975). Here, the State Attorney gave Johnson immunity for the murder of Harris, and one of the grounds for that immunity was that he had not killed Harris (T 582). He was not the triggerman. If Johnson told the truth, that he was not the triggerman, his story still would not make him less culpable than Downs or less deserving of a death sentence. Both men could have received a death sentence, Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), and the trial court should not have imposed a death sentence on Downs when Johnson received no punishment. Slater, supra.[7]

In Tison, the Tison brothers helped their father and a Randy Greenawalt escape from the prison where they were incarcerated. Two days after the escape, the car they were driving, a Lincoln, had a flat tire. Raymond Tison, one of the sons, flagged down a car while the rest of the gang laid in wait. A

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[7]Sapp was involved in the conspiracy, and during the previous year, he and Ricky Barfield and Huey Palmer had tried on at least three occassions to kill Harris (T 444). Sapp agreed to plead guilty to conspiracy in exchange for a 5-year cap on his sentence (T 442). The state dropped the charges against Palmer in exchange for his testimony (T 506-507). Ricky Barfield was never arrested (T 449).

car stopped. The Tisons kidnapped the victims and they drove both cars into the desert with the victims. As the Tison brothers walked away from where the victims were standing, their father and Greenawalt killed them. The group then fled but were captured after a bloody gun battle in which Greenawalt and the Tison brothers survived. They were charged with and convicted of murder and sentenced to death.

The U.S. Supreme Court accepted jurisdiction in the case, and it affirmed the convictions and sentences of death though neither of the brothers had been present at the killing, had been the triggermen, or had the intent to kill the victims. The death sentences were upheld because each brother had showed a reckless indifference to human life. Both brothers had brought guns into the prison to help their father escape. They gave them to inmates, one of whom had a prior murder conviction for killing a prison guard. Raymond Tison flagged down the victims, and he entrusted their fate to known killers. The brothers then robbed the victims and guarded them at gunpoint. They also did nothing while the victims were killed in cold blood. Finally they helped the killers in their continuing efforts to escape. Both brothers were major participants in the murders and both had shown a reckless disregard for human life.

Here, Johnson was a major participant in this murder, and his actions also showed he had a reckless disregard for Harris' life. First, he participated in the plans to kill Harris (T **543-546, 553, 559),** and though he said he had no intent to kill

him (T 593), he agreed to the plan to murder Harris. He suggested using bombs, grenades and laying in wait for Harris (T 594). He went as far as to volunteer to kill Harris by himself (T 594), and he fired a gun several times, experimenting with various ways to muffle the sound (T 598). He made the telephone call to Harris, and he lured him out of his home to his death (T 595-596). When Downs dropped Johnson off at the end of the dirt road, he stayed there for ten or fifteen minutes while Downs picked up Harris. Alone, he made no effort to leave though he could have easily done so. While Downs shot Harris, Johnson stood by and did nothing. Instead, he gave Downs a bullet so he could shoot Harris again (T 600). After the murder, Johnson rummaged through Harris' pockets and took the money he found (T 596). He also helped hide the body (T 566), and he shared in the money for doing the killing.

From these facts, Johnson had as great a reckless disregard for human life as did the Tison brothers. His participation in this murder was as extensive as that of the Tisons. Johnson, therefore, could have received a death sentence.

The major distinction between Downs and Johnson is that Downs was the one who killed Harris. He was, according to Johnson, the triggerman.[8] The U.S. Supreme Court in Tison held that such a distinction does not preclude a death sentence from

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[8]The State conditioned its grant of immunity upon that distinction (T 582).

being imposed on the bystanders. This court has also affirmed a death sentence upon a defendant, who though a participant in subduing and intimidating the victims, did not do the actual killing. White v. State, 403 So.2d 331 (Fla. 1981).

Thus, if this court affirms Downs' sentence it can do so only because Downs was the triggerman. Except for killing Harris, Johnson was as fully involved in the planning and killing of Harris as Downs. But Johnson avoided a death sentence. Under the Slater rationale, Downs should not be executed.

To affirm because Downs was the triggerman converts that status to an aggravating factor. Florida courts, however, cannot consider non statutory aggravating factors in imposing or reviewing a death sentence. Miller v. State, 373 So.2d 882 (Fla. 1979).

Moreover, even if that was a valid aggravating factor, the evidence proving it was not established beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Only Johnson said Downs was the triggerman.[9] Downs denied he was the triggerman, and Barfield, Sapp, and Johnson's girlfiend supported that testimony (T 452, 705, 739). Downs also had other testimony that would have established he was at other places when Johnson said the murder occurred (T 917) (See Issue

[9]Barfield had implicated Downs in 1977, but at the resentencing hearing he changed his story (T 705).

IV). Even the jury at Downs' original trial questioned whether Downs was the triggerman, as this court recognized. Downs v. Dugger, **514 So.2d 1069** (Fla. **1987).**

Thus, with Johnson as culpable as Downs, yet receiving complete immunity, the trial court should not have sentenced Downs to death. This court should remand for the imposition of a sentence of life in prison without the possibility of parole for twenty-five years.

## ISSUE III

THE COURT COMMITTED A FUNDAMENTAL ERROR WHEN IT ADMITTED THE FORMER TESTIMONY OF LARRY JOHNSON AT THIS RESENTENCING.

The key testimony in this case was that of Larry Johnson, the man who helped plan the murder, and the one who stood by and did nothing while Downs killed Harris. He was the only one who saw the murder.

At the resentencing trial, Johnson was unavailable to testify. The State Attorney's office had tried to find him, but without success **(T 521-525).** Declaring him unavailable, the court let the state read Johnson's guilt phase testimony that said Downs killed Harris **(T 541-623).** The problem with admitting this testimony arose out of the dissimilar motive Downs' attorney had in **1977** to cross-examine Johnson in the guilt portion of the trial, and the motive Downs had in **1988** to develop mitigating evidence.

The motive Downs and his previous lawyer had to examine Johnson is the focus in this issue. Before Johnson's **1977**

trial testimony can be admitted as an exception to the rule against admitting hearsay at the 1988 sentencing trial, Downs must have had a similar motive at the guilt portion of the trial to develop the testimony as he would have at the sentencing trial.

> (2) Hearsay exceptions.- The following are not excluded under s. 90.802 [the hearsay rule], provided that the declarant is unavailable as a witness:
>
> > (a) Former testimony.- Testimony given as a witness at another hearing of the same or a different proceeding, ... if the party against whom the testimony is now offered, . . . had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination.

Section 90.804(2) Fla. Stats. (1988).

Here the question is whether Downs, during the guilt phase of his 1977 trial, had the same motive to cross-examine Johnson as he had in 1988 during the penalty phase of his resentencing. The answer is no for two reasons. Downs had a different motive for cross-examining Johnson during the penalty phase rather than the guilt phase of his trial. Second, his motive for cross-examination in 1977 to develop penalty phase evidence would have been different in 1988. That is, between 1977 and 1988, death penalty sentencing law has been significantly refined as this court's opinion in Downs v. Dugger recognizes.

During the guilt phase of the trial, Downs was interested in securing an acquittal, and his questions were aimed exclusively at that goal. Questions to mitigate a death sentence were irrelevant during that portion of his trial. This, of course, does not mean that what Johnson said during the guilt phase of

the trial lacked relevance during the penalty phase. Often it does, but typically the prosecutor relies upon that testimony during the sentencing trial not the defendant. But the defendant's focus changes after his conviction, and if Downs wanted to use Johnson during the penalty phase, he could have called him then. He would not have had a completely similar motive to develop evidence for a portion of a trial that might not occur.

The U.S. Supreme Court recognized this in Gregg v. Georgia, 428 U.S. 153, 190-191, 96 S.Ct 2909, 49 L.Ed.2d 859 (1976):

> Jury sentencing has been considered desirable in capital cases in order 'to maintain the link between contemporary values and the penal system - a link without which the determination of punishment could hardly reflect' the evolving standards of decency that mark the progress of a maturing society. But it creates special problems. Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question.... Those who have studied the question suggest that a bifurcated procedure-one in which the question of sentence is not considered until the determination of guilt has been made - is the best answer.

Of course Downs, during the guilt phase, sought to minimize his involvement in the murder. Evidence developed to show that may have been relevant at the penalty phase. On the other hand, Downs' theory at his 1988 resentencing was that, although he was guilty of the murder as a conspirator, he deserved to live because he was not the triggerman. It is not at all clear that he would have had the same motive to develop that theory during the guilt phase of his 1977 trial. Why should he? As part of the conspiracy to kill Harris, he was equally liable for his

death. Williams v. State, 383 So.2d 722 (Fla. 1st DCA 1980); (T 921). Thus, that he was not the triggerman was irrelevant at the guilt phase of his trial.

He also could have cross-examined Johnson regarding Downs' character. The men had been in prison together, he had hired Johnson, and the two men had worked together (T 937, 984).[10] That testimony would have had no relevance during the guilt phase of Downs' trial; it would have been very relevant during the penalty phase.

Downs' motive to develop mitigating evidence in 1977 was also much different than it was in 1988. As this court recognized in its opinion in Downs v. Dugger, the court, the prosecution, and probably everyone involved in this case believed that the only mitigating factors the court and jury could consider were those listed in $921.141. Downs lacked any motive to develop any nonstatutory mitigating factors because neither the court or the jury would have considered it. Cooper v. State, 336 So.2d 1133 (Fla. 1976). At his 1977 sentencing Downs presented an anemic case. He had his mother and ex-wife say he was a nice man. It was good evidence, but it was not compelling. In 1988 Downs presented a much stronger case. He first denied he was present at the time Johnson shot Harris. Second, he presented evidence to mitigate his prior

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[10] For some unexplained reason, counsel for Downs at his 1977 trial never impeached Johnson regarding his prior convictions.

convictions. Then, several employers and co-workers testified about Downs' work habits. In short, Downs presented a picture of a hardworking man who had escaped his past. In that context, the murder was an isolated event.

Downs' 1988 presentation reflects the development of the law since 1977. Since 1977, the law in capital sentencing has better defined the role of sentencing, particularly the role of mitigation. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Skipper v. South Carolina, 476 U.S. 1, 4, 90 L.Ed.2d 1, 106 S.Ct. 1669 (1986). Downs could not have anticipated these changes in the law, Knight v. State, 394 So.2d 997 (Fla. 1981), so his motive to develop the extensive mitigation, and to examine thoroughly or cross-examine Johnson in 1977 was missing.

Downs did not object to the use of Johnson's 1977 testimony on precisely these grounds, and it could be argued that he is now arguing an issue not presented to the trial court. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). That argument cannot prevail because the court had to be aware of that problem simply because of the nature of this resentencing (see T 916-917); Castor v. State, 365 So.2d 701 (Fla. 1978). The issue now raised was fundamental to a fair resentencing. Johnson's testimony was the state's case, and without it, the state would have had a hard time justifying a death sentence for Downs. His testimony formed the foundation of their case,

and it was fundamental error for the court to have admitted it. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970).

This court should reverse and remand for a new sentencing hearing.

## ISSUE IV

**THE COURT ERRED IN QUASHING DOWNS' SUBPOENAS OF THE STATE ATTORNEY SO HE COULD QUESTION HIM REGARDING HIS GRANTING LARRY JOHNSON IMMUNITY FROM PROSECUTION, A VIOLATION OF DOWNS' SIXTH AND FOURTEENTH AMENDMENT RIGHTS.**

The State granted Larry Johnson complete immunity from prosecution in this case, though he was present at the murder of Jerry Harris and had participated in luring him to his death. Under the U.S. Supreme Court's ruling in Tison v. Arizona, 481 U.S. __, 109 S.Ct. __, 95 L.Ed.2d 127 (1987), Johnson was as culpable as Downs though he was not the trigger-man. See, also White v. State, 403 So.2d 331 (Fla. 1981). Johnson had made the telephone call to Harris that prompted him to come to the deserted road. He knew Downs planned to kill him, yet he did nothing to stop the killing. He stood by while Downs shot Harris, and he gave Downs another bullet to shoot Harris with. Surely he had the reckless state of mind required to justify a death sentence, yet the state granted him complete immunity. Why? The state had also never arrested Ricky Barfield (T 449). It dropped charges against Huey Palmer in exchange for his truthful testimony (T 506-507), and it let Sapp plead guilty to conspiracy with a cap of 5 years in prison

(T 442). Downs received a 30-year sentence for the conspiracy in addition to the death sentence.

Why the State was so lenient is the question Downs wanted answered, yet the court prevented him from asking. The answer was important because the sole factual issue the jury had to resolve at the resentencing was who to believe, Johnson or Downs. The State, by granting Johnson immunity, bolstered Johnson's credibility because it had believed Johnson enough to grant him this immunity. While that bolstering may not be legally objectionable, it was a pervasive part of this case. The State, without testifying, was able to say that it beleived Johnson's testimony because it had granted him immunity. Apparently, the State granted Johnson immunity because he had passed a polygraph test.[11] Downs should have been allowed to attack the State's decision to grant Johnson immunity to show that it rested on questionable grounds. In short, Downs wanted to attack the State's credibility.

Downs sought to develop this attack by first deposing the State Attorney, Ed Austin, and two other attorneys. Austin was evidently the one who had granted Johnson immunity, and the

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[11] See Mr. Austin's statement at the original sentencing hearing in 1978 (T 18-26). What Austin said regarding Johnson passing the polygraph test may have been calculated to allay the court's concern about the jury's question focussing upon whether Downs was the triggerman.

argument on Downs' right to depose focussed on his right to depose Austin.[12]

At Downs original sentencing hearing in 1977, the State Attorney told the sentencing court that Johnson had passed a polygraph test. What Austin did not tell the Court and what was very significant was that Johnson had to take four polygraph tests. Downs v. Austin, 522 So.2d 931 (Fla. 1st DCA 1988). If Johnson was telling the truth, why did it take him four times to "prove" it. Downs sought to have the test data given to him for his expert to analyze, and he sued Mr. Austin to have them revealed. Downs v. Austin, 522 So.2d 931 (Fla. 1st DCA 1988).[13] The First District said the polygraph results should have been disclosed, but by then the State Attorney apparently could no longer find them (T 188).

Downs then sought to recuse the State Attorney's office from prosecuting this case because he wanted to depose Mr. Austin about the reasons he had used to justify granting Johnson immunity.[14] The court denied Down's motion and quashed

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[12]During the original sentencing in this case in 1977, Mr. Austin told the court he was the one who had granted Johnson immunity (See page 19-21 of the sentencing hearing).

[13]The reliability of polygraph results decreases the more times the test is taken, and the results may be totally unreliable after the second test. See Juris Cederbaums and Selma Arnold, Scientific and Expert Guidance in Criminal Advocacy (Practising Law Institute, New York; 1975) pp. 219-220.

[14]During the original sentencing in this case in 1977, Mr. (Footnote Continued)

his subpoenas because it believed that Downs "could develop the information that you are seeking to develop in relation to this case without going through the attorney's representing the State." (T 99-100) The court also refused Downs' proffer of Austin's testimony (T 100). The question thus presented is whether the court could prevent Downs from developing a viable defense. Could the court prohibit Downs from attacking the credibility of the state's decision to grant Johnson immunity.

Initially the question arose regarding disqualifying the State Attorney's officer because the State Attorney might become a witness. Merely deposing Austin or even calling him as a witness would not have necessarily disqualified his office from prosecuting Downs' case. Clausehill v. State, 474 So.2d 1189 (Fla. 1985); Meggs v. McClure, Case No. 88-2658 (Fla. 1st DCA Feb. 14, 1989) 14 FLW 484. In Messer v. State, 330 So.2d 137 (Fla. 1976) this court said the trial court had not abused its discretion in allowing the State Attorney to testify about why he had decided to seek the death penalty for Messer but not Messer's co-defendant. If the State Attorney in that case could testify without having his office recused, the State Attorney here could testify without recusing his entire office.

Besides, if having Austin testify meant his office could not prosecute the case, so what? The Public Defender's office

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(Footnote Continued)
Austin told the court he was the one who had granted Johnson immunity (See page 19-21 of the sentencing hearing).

regularly has conflicts forcing it to withdraw from cases. It is not a big deal. It happens and we deal with it. Here, the court could have appointed a special prosecutor to handle the case. Refusing to let Downs depose Austin because it might mean his office was recused is not a valid reason to deny his motion to recuse. More importantly it is not a valid reason to quash the subpoena of Austin. Nor was the court's response that Downs could develop what he needed through other sources adequate. It was not evident what those other sources would be, and what they said would have been hearsay. Austin was the one who had granted the immunity, and everyone else would have merely repeated what Austin had said. If the hearsay would have been admissible, the court would still have denied Downs his sixth amendment right to confront Austin or present his defense.

Recent U.S. Supreme Court cases have limited a trial court's ability to exclude relvant evidence that the defendant sought to introduce. In Crane v. Kentucky, 476 U.S. ___, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), the court said the trial court could not exclude, as irrelevant, testimony concerning the circumstances in which Crane confessed to a killing. Although the trial court had ruled Crane's confession voluntary as a matter of law, Crane wanted to present evidence showing the conditions in which he confessed. That evidence would form the basis for the argument that the confession lacked validity and credibility because of the circumstances under which Crane confessed. "[T]he Constitution guarantees criminal defendants a

`meaningful opportunity to present a complete defense.'" Id at 90 L.Ed.2d 645.

In Rock v. Arkansas, 483 U.S. ___, 107 S.Ct. ___, 97 L.Ed.2d 37 (1987), the Arkansas Supreme Court held that the use of hypnotically refreshed testimony of the defendant was "per se" inadmissible because it was unreliable. The U.S. Supreme Court rejected that holding, noting that the State "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony." Id. 90 L.Ed.2d at 48.

In both cases the Supreme Court said the defendants should have been able to develop their cases by presenting the excluded evidence. General rules of exclusion cannot be mechanically applied. Trial courts must articulate specific reasons why, in a particular case, the valid state ground for excluding such evidence, outweighs a defendant's right to present a defense.

Downs can perceive no valid reason for prohibiting his questioning Austin other than the inconvenience to him, and that cannot justify quashing Downs' subpoena. C.f. State v. Hassberger, 350 So.2d 1 (Fla. 1977): Fuller v. State, 485 So.2d 35 (Fla. 4th DCA 1986).[15] Even if, as a general matter, the

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[15]The court also erred in denying Downs' request to proffer Austin's testimony. (T 100, 636). See, Vann v. State, 85 So.2d 133, 136 (Fla. 1956); Green v. State, 377 So.2d 193 (Fla. 3rd DCA 1979) ("Whenever the state objects, as here, to

(Footnote Continued)

court can limit a defendant's right to question a witness, the court here made no specific findings why Downs' right to present a defense should be limited. The court justified its ruling with a nebulous suggestion that Downs had other ways to find what he wanted. It never said what those other ways might be, and its vague reference cannot satisfy the requirement of specificity required by the sixth and fourteenth amendments.

Also, the court's ruling denied Downs his right to confront Austin, a prime accuser, since he was the one who had granted Johnson complete immunity, never prosecuted Palmer, or arrested Ricky Barfield. It allowed Sapp to plead guilty to conspiracy with a 5-year cap on his sentence. The Sixth Amendment's Confrontation Clause has the primary purpose of ensuring the reliability of the truth finding process. Lee v. Illinois, 476 U.S. 503, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986). That in turn means the defendant has at least the right to cross-examine the state's witnesses, See, Dutton v. Evans, 400 U.S. 74, 94, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)(Harlan, concurring), such examination helps insure the reliability of the truth finding process. 5 Wigmore, On Evidence, 1367 ("Nevertheless, [cross-examination] is beyond any doubt the

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(Footnote Continued)
the production of documents under a subpoena duces tecum, the proper practice is for the trial court to examine the subpoenaed documents to determine their relevancy resolving any doubts in favor of their production.")

greatest legal engine ever invented for the discovery of truth.")

Here, the court denied Downs the right to cast doubt on the validity of Austin's decision to immunize Johnson. Downs could have presented evidence to support the theory that Johnson provided Austin with an expedient way to dispose of a troublesome case.

As Austin said at Downs' original sentencing, his staff had been working on the case full-time for several months without a break when Larry Johnson appeared out of nowhere and provided the first clue they had. (See original sentencing T **18-19).** Austin told him what he had to say to save his life and get immunity (T 582). Johnson accomodated him, but it took four times on the polygraph before Austin could say he was telling the truth. Downs v. Austin; supra.

Once Austin had Johnson's story, he went after Downs and Barfield and ignored others who had tried but failed to kill Harris. He also ignored Downs' offer to prove his innocence (T **189-190).**

Thus, Downs could have portrayed the prosecutor as having deluded himself (and deceived the trial court at the original sentencing) into believing Johnson had told the truth. He ignored the possibility that Johnson lied because he had already granted him immunity. He focussed on Downs to solve this troubling case.

By limiting Downs, the court precluded the jury from viewing Johnson's testimony in a clearer and brighter light.

It knew the state believed Johnson, but it did not know why. Had it known the state granted him immunity because he had passed a lie detector test only after taking it four times, it may not have put as much trust in Johnson's version of what happened.

This court should reverse the trial court's sentence and remand for a new sentencing hearing.

## ISSUE V

THE COURT ERRED IN EXCLUDING THE PERPETUATED DEPOSITION TESTIMONY OF BOBBIE JO MICHAEL, WHICH WOULD HAVE SHOWN THAT DOWNS WAS NOT THE TRIGGERMAN.

When Downs presented his case, he sought to introduce the deposition of a Bobbie Jo Michael (T **728).** Downs had taken it in 1982 to support his claim of ineffective assistance of counsel. Had trial counsel called her at Downs' **1977** trial, she would have said Downs was with her when the murder occurred (T **917,** SR 9, 13-16). This would have directly contradicted Johnson's version of the events. It also would have corroborated what Barfield and other witnesses said showing that Johnson rather than Downs was the triggerman. Finally, it would have strengthened Down's proportionality argument.

### THE RELEVANCY OF MICHAEL'S DEPOSITION

Who shot Jerry Harris was a major issue at this resentencing hearing. Downs admitted he had conspired to kill him, and the only significant discrepancies between Down's version of what happened and Johnson's version were the events at the

murder scene. Down's said Johnson dropped him off at the end of the dirt road and went to get Harris. He left when Johnson drove away (T 957). Johnson, on the other hand, says Downs dropped him off, and instead of leaving, he merely stood by, watched Down's kill Harris, and then gave him a bullet so he could shoot Harris a final time (T 567).

The court dismissed Downs' version of what happened because she did not believe what Barfield had said to corroborate his version. The question that this issue raises is whether she, and perhaps more importantly, whether the jury would have rejected Downs' version had they heard Bobbie Jo Michael's testimony.

Her testimony was relevant because it would have shown (or tended to prove, to use the language of S90.401 Fla. Stats. (1988)) that Downs was not the triggerman. That Downs was not the triggerman is relevant at sentencing because this court has reduced several death sentences to life in prison when the defendant was not the triggerman or the evidence was equivocal that the defendant was the triggerman. Herzoq v. State, 439 So.2d 1372 (Fla. 1983); Slater v. State, 316 So.2d 539 (Fla. 1975); Malloy v. State, 382 So.2d 557 (Fla. 1979). Such testimony also can support a jury's life recommendation. Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984).

Thus, Bobbie Jo Michael's testimony clearly was relevant to show that Downs was not the triggerman.

THE TRIAL COURT'S BASIS FOR EXCLUDING THE DEPOSITION

The State argued, and the court accepted that Michael's testimony proved only that Downs was not guilty. Because guilt was not an issue at the resentencing, the testimony was inadmissible (T 733-734, 921). In excluding this testimony the court adopted an unnecessarily narrow view of the relevancy of the testimony.

That is, testimony which is inadmissible for one reason can be admitted for another purpose. Section 90.107 Fla. Stats. (1988); Breedlove v. State, 413 So.2d 1, 6 (Fla. 1982).

The hearsay rule is the classic example of this. Hearsay which is inadmissible to prove the truth of what was said may be admitted to show, for example, an existing mental, emotional, or physical condition. §90.803(3) Fla. Stats. (1988). Also, similar fact evidence admitted under the rationale of State v. Williams, 110 So.2d 654 (Fla. 1959) can establish identity, intent, plan, or other relevant facts, but it is inadmissible to establish a defendant's bad character or propensity to commit crime.

Here, Downs repeatedly told the court that he was not seeking to use Michael's testimony to argue his innocence:

> [A] point of contention has been raised in this case after trial and after sentencing has been that Mr. Downs is not the trigger person and that's an item of mitigating evidence and circumstance that this jury should consider not as to his alibi as to not being part of the murder, because I think Mr. Downs has in effect presented testimony that he was involved in this murder and therefore he should be guilty of murder in the first degree but that he was not the triggerman, and that is the one factor this jury must consider as to whether or not it will return a

> recommendation of life imprisonment with a 25 year minimum mandatory sentence or death sentence.

(T 732)

The court never saw the relevance of Michael's testimony in those terms; she saw it only to prove Down's innocence (T 921). While Michael's testimony may have shown his innocence (and Downs questioned whether it would have exonerated him since he could have been found guilty of the murder under a conspiracy theory (T 921)), it also supported his resentencing argument that he was not the one who killed Harris. The court could very easily have admitted the testimony for the limited purpose of showing that Downs was not the triggerman. Courts regularly give limiting instructions, and the court here should have done so.

THE HARMLESSNESS OF THIS ERROR

Excluding this testimony affected the fairness of Downs resentencing, and it could not be harmless beyond all reasonable doubts. This conclusion follows from the nature of the issues resolved by the resentencing.

The most significant issue was who was telling the truth, Larry Johnson or Ernest Downs. The State presented no evidence to corroborate Johnson's version. Barfield and Sapp strongly implied that Johnson was the triggerman.[16] The court rejected

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[16]Even the jury in Downs' 1977 trial doubted Downs was the triggerman. See, Downs v. Dugger, 514 So.2d 1069 (Fla. 1987).

Barfield's testimony, and Sapp's testimony also could have been discounted because he was a conspirator.

Bobbie Jo Michael had little reason to lie for Downs. Unlike Johnson, whose life depended upon him claiming not to be the triggerman (T 582), Michael was the one witness who lacked a personal motive to testify for or against Downs. She would have been a credible witness, and one whose testimony the jury and judge should have heard and considered.

Michael's testimony would have bolstered the credibility of Downs' version with the jury. Because credibility is solely within the jury's domain to resolve, this court cannot say beyond a reasonable doubt that excluding this critical testimony to Downs' case was harmless.

In Zerquera v. State, Case No. 70,751 (Fla. September 28, 1989), the crucial question was whether Zerquera or the co-defendant, Puttkamer, fired the gun that killed the victim. The trial court excluded evidence that Puttkamer had some bullets that fit the murder weapon. This court said that excluding this evidence was not only error but harmful error because it was a substantial evidentiary fact supporting Zerquera's defense that he did not shoot the victim.

Here, Bobbie Jo Michael's testimony that Downs was at her house when the murder occurred was a substantial evidentiary fact supporting his defense that he was not the triggerman. The trial court erred in excluding it.

## ISSUE VI

THE COURT ERRED IN NOT INSTRUCTING THE JURY THAT THEY COULD CONSIDER ANY DOUBT THEY HAD THAT DOWNS WAS THE TRIGGERMAN AS A MITIGATING FACTOR, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

During the charge conference, Downs requested the jury to be instructed:

> However, if you have any lingering feelings of doubt about whether or not he [Downs] was the trigger person, you may consider that in weight the mitigating circumstances against the--"

(T 1028)

The State objected, citing opinions from this court and the U.S. Supreme Court that "a residual or lingering doubt is not an appropriate mitigating circumstance." (T 1029) King v. State, 514 So.2d 354 (Fla. 1987); Franklin v. Lynbaugh, 487 U.S. ___, 108 S.Ct. ___, 101 L.Ed.2d 155 (1988). The State said these opinions hold that a lingering doubt is not a mitigating circumstance (T 1030). The court sustained the state's objection (T 1030).

LINGERING DOUBT OF WHAT?

The problem with the state's objection is best clarified by answering the question: Lingering doubt of what is not a mitigating circumstance? What this court and Franklin hold is that a lingering doubt about guilt is not a mitigating factor.

> However, a "convicted defendant cannot be a'little bit guilty.' It is unreasonable for a jury to say in one abreath that a defendant's guilt has been proved beyond a reasonaable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy."

Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985).

Here Downs did not ask for an instruction regarding any lingering doubt about his guilt for the murder. He readily admitted that (T 968). The jury found him guilty of the murder, but their verdict did not find him guilty of being the triggerman. Downs could very well be guilty of first degree murder as an aider and abettor or as a coconspirator though he was not the triggerman or present when the murder was committed. To sentence him to death, though, requires greater culpability.

What he asked for was an instruction telling the jury they could use any lingering doubt they had he was the triggerman to mitigate a death sentence. That is, under this court's rulings, a jury could base their recommendation of life upon Downs not being the triggerman, Slater, Zerquera.

Unlike doubt about guilt, doubt as to who was the triggerman was not resolved by the general finding of guilt of murder.[17] The general verdict of guilt may have resolved Downs guilt, but it did not resolve the significant sentencing issue of who was the triggerman.

That issue was a main thrust of Down's defense. He presented several witnesses who said Johnson was the triggerman (T 452, 707, 716). He also sought to have the testimony of Bobbie Jo Michael introduced to establish that he was at not

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[17]The original jury evidently doubted Downs was the triggerman. See, Downs v. Dugger, 514 So.2d 1069 (Fla. 1988).

present when Johnson shot Harris (T 915). The court, therefore, erred in denying Downs' requested instruction because residual doubt cannot be a mitigating factor.

DOWNS' REQUESTED INSTRUCTION.

Regarding what instructions the court should give the jury, the law is clear. "The defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions." Hooper v. State, 476 So.2d 1253 (Fla. 1985). Here Downs' theory was that Johnson, not he, shot Harris, and he presented abundant evidence to support it. He argued that theory to the jury, and it was one the court should have told the jury was legitimate mitigation.

Now, this court has often said that the standard jury instructions regarding the aggravating and mitigating factors adequately informs the jury that it can consider non-statutory mitigating factors. See, e.g. Lemon v. State, 456 So.2d 885 (Fla. 1984); Parker v. State, 456 So.2d 436 (Fla. 1984). That law should not have prevented the trial court from instructing the jury on Downs' primary defense, especially when he presented extensive evidence to support it. To say the standard instructions adequately told the jury they could consider any non-statutory mitigating evidence, negates the law regarding the instructions on the defendant's theory of the defense. If the standard instructions were always adequate, there would be no need for special instructions on flight, voluntary

intoxication, alibi, or self defense. Each is a special comment on some aspect of the case the state is required to prove, yet the law says that such instructions are permissible.

So here, where Downs presented extensive evidence that Johnson was the triggerman, and he argued it as extensively (T 1111), the court should have told the jury specifically that they could consider Downs' not being the triggerman as a nonstatutory mitigating factor. It was an important and central part of Downs' case, and not to have instructed the jury denied Downs his right to a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

## ISSUE VII

THE COURT ERRED IN EXCLUDING SEVERAL MITIGATING FACTS FROM THE JURY'S CONSIDERATION WHICH DENIED DOWNS' A FAIR RESENTENCING AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Before and during Downs' resentencing, the court excluded Downs from presenting to the jury several mitigating facts for it to consider. Some of this relevant evidence went to show why the co-defendants got better deals from the prosecution than Downs, why Barfield tried to kill Downs in 1977, and that Johnson was an alcoholic and had an extensive criminal record. Other mitigating evidence the court excluded would have shown that immediately before the murder, Downs became a changed man after he discovered his wife's infidelity. The court also excluded evidence that Downs was civil to his lawyer during his

trial in 1977. Excluding this evidence unfairly prejudiced Downs.

THE STANDARD FOR ADMITTING MITIGATING EVIDENCE

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and more recently Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) established the standard for admitting evidence to mitigate a sentence of death.

> [T]he sentencer . . . must not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett, supra, at 604. As a corollary, the sentencer also may "not refuse to consider 'any relevant mitigating evidence.'" Skipper v. South Carolina, 476 U.S. 1, 4, 90 L.Ed.2d 1, 106 S.Ct. 1669 (1986). Thus, relevancy is the touchstone for admissibility. The question this court must answer here is whether any of the excluded evidence Downs, could have mitigated a sentence of death. Rogers v. State, 511 So.2d 526 (Fla. 1987).

THE RELEVANCY OF THE EXCLUDED EVIDENCE

The court severely limited Downs' defense when it excluded evidence regarding Johnson's alcoholism and Barfield's 1977 attempt to have Downs killed. Downs' primary argument was that he had not killed Harris, Johnson had. Johnson's alcoholism was relevant because it would have supported that argument. Alcoholics typically have aggressive or assaultive behavior after drinking even small amounts of alcohol. American

Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, p.132. Also, alcoholics typically have memory losses, and Johnson may simply have not remembered completely what happened. Id, at 169. Unable to remember precisely what happened but aware that something had happened, he may have made up a story to exonerate himself. C.f. Duncan v. State, 450 So.2d 242 (Fla. 1st DCA 1984). Presenting Johnson's alcoholism to the jury was therefore a relevant attack on his credibility.[18]

Also, the court erred in excluding evidence that Barfield tried to have Downs murdered in 1977 (T 830-834). At the resentencingl trial, the state impeached Barfield's testimony that Johnson had given him Harris' driver's license, implying that Johnson had killed Harris (T 708). At his trial, Barfield had said Downs was the person who had given him Harris' drivers' license (T 992). The testimony that Barfield had a "contract" out on Downs would have shown that in 1977 Barfield wanted to get back at Downs because Barfield blamed Downs for disclosing the murder (T 716). With such animosity toward Downs, Barfield would have also lied to implicate Downs in the murder. In short, if he could not kill Downs, perhaps the State would do it for him, and he was going to do his best to insure Downs was convicted. Hence, Barfield's efforts to kill

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[18]In Downs' 1977 trial the court prevented repeated efforts by Downs' attorney to delve into Johnson's alcoholism (See 1977 trial T 156-157).

Downs certainly would have tended to explain why he lied in 1977. It was relevant evidence and should have been admitted.

During the resentencing, Downs' mother testified about the effect of Downs' wife's infidelity had on him. She said:

> He was crying, wanting to know what was wrong with him, what he had done wrong, you know. In other words he didn't feel like a man like he had satisfied his wife and what was he doing wrong.

(T 778).

Immediately after that, the court sustained an objection to the question, "In other words I was a totally changed person at that time, is that correct?" (T 778-779) Such an opinion by Downs' mother was admissible because it was the total change that she saw in her son, and which was not easy to describe. Sec 90.701 Fla. Stats. (1988). She saw his emotional persona destroyed, and such observation, coming within a day or two of the murder was admissible lay opinion. See, Garron v. State, 528 So.2d 353, 356-357 (Fla. 1988).

Of course, she could point to specific examples, such as the crying and the self doubt, but that missed the essence of what she saw. It was the inarticulable yet fundamental change which the court precluded her from testifying about. The question was vital to Downs' defense because everyone in life suffers disappointments, hurts, and depression. Few people totally change because of them. Downs had, and he wanted to have his mother's observation presented to the jury so it could support Dr. Krop's analytical confirmation. He said Downs' discovery of his wife's extensive sexual perversion could have

caused Downs' to suffer a serious emotional upheaval (T 870-873).

Finally, the court prohibited Richard Brown, Downs' lawyer at his original trial, from saying

> [A]t all times that we met I never saw signs of violence and--or satanism or brutality or emotions in that regard as I had done quite a bit of criminal work and I had seen such people in the course of my criminal work, but in dealing with you during all those times I didn't see those same signs of brutality of psychiatric instability, things like that.

(T 807)

Brown's response was relevant mitigating evidence. Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). In Skipper, the Supreme Court said that evidence of Skipper's good behavior while he was in jail awaiting trial for the murder he had committed was valid mitigating evidence. Such evidence mitigated a death sentence because it was an indicator that Skipper could live peaceably in prison Id at 5.

In this case, Downs' respect for his lawyer and his civilized behavior support the picture he tried to convey of a man who, except for a very brief explosion of total criminality, was otherwise a peaceful and polite person. The evidence that he respected his lawyer mitigates a death sentence in the same way that Skipper's good behavior mitigated his death sentence. The court erred in excluding this testimony.

## ISSUE VIII

THE COURT ERRED IN IMPROPERLY INSTRUCTING THE JURY THAT DOWNS WOULD BE GIVEN CREDIT FOR THE TIME HE HAS ALREADY SERVED IN PRISON.

During its deliberations, the jury asked:

> Would the life sentence with no chance of parole for 25 years begin right now, or would the 11 years he's already spent in prison be subtracted from the 25 years?

(T 1144).

Counsel for Downs said he did not think the court could answer that question, but the State said it could by simply saying yes (T 1144-1145).[19] Over defense objection, the court told the jury that Downs "would receive credit for time served in this case on this charge (T 1146). The court erred because it instructed the jury on matters irrelevant to its determination of whether Downs should live or die.

That is, the purpose of the resentencing hearing was to decide if Downs should spend the rest of his life in prison or die. It was not to determine how soon he would be released from prison. That was not an option. The jury, by focusing on the mandatory 25 year term Downs must serve before becoming eligible for parole, evidently thought Downs would be released in 15 or 16 years (T 1149). The court's instruction compounded

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[19]During this argument, the court and counsel digressed into a discussion about the effect of the conspiracy conviction. The court resovled the problem of the sentence for that conviction by saying it was "not involved in this." (T 1146)

that error by letting them know he would receive credit for the time he has already served. Instead of telling the jury this, the court should have told them that whether he received credit for the time served was no concern of theirs. They should only weigh the aggravating and mitigating factors and decide the appropriate sentence. That Downs might someday be released is a speculative aggravating factor the jury should not have considered, which the court only encouraged by instructing the jurors as it did. Such an instruction was irrelevant to the jury's deliberations because it was not relevant to any aggravating factor, and it did not concern the defendant's character or the nature of the offense, the relevant concerns of mitigating evidence.

The jury's question shows that they were considering how much time in prison Downs would have to spend before being eligible for release into society. They were, in short assessing "whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society." California v. Ramos, 463 U.S. 992, 1003, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). In Ramos, the U.S. Supreme Court approved a jury instruction that the governor could "reprieve, pardon, or commut[e]" a death sentence. The Court approved the instruction because it "invited" the jury to assess the defendant's future dangerousness, apparently a possible aggravating factor in California. Id.

The court's response here violated state law because it also "invited" the jury to assess Downs' future dangerousness

to society. Such dangerousness is not a consideration the jury can legally consider in determining whether to recommend life or death. See, Hargrave v. State, 427 So.2d 713 (Fla. 1983). The court, in short, told the jury it could consider a non statutory aggravating factor in making its recommendation.

The court, therefore, erroneously instructed the jury. In stead, it should have simply refused to answer the question or told the jury that they should not be concerned with whether Downs will receive credit for the time already spent in prison. Their sole determination should be to weight the statutory aggravating factors against the mitigation present and return a recommendation of death or life in prison without the possibility of parole for twenty-five years.

This court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

## ISSUE IX

THE COURT ERRED IN NOT REQUIRING DOWNS' PRESENCE DURING THE DISCUSSION REGARDING A QUESTION THE JURY ASKED, A VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

During its deliberations, the jury asked a question regarding the time Downs would have to serve if it recommended he receive a life sentence. There is no evidence that Downs was present during the discussion the court had with counsel, and at sentencing, Downs' objected to his not being present (T 1201). The court did not respond to Downs' objection; instead it proceeded to sentence Downs to death. The court erred in not granting Downs' objection.

The law in this area is clear: The defendant has a right to be present at every critical stage of his trial. It is, after all, his trial, and he has the right to be present whenever decisions which will affect his future are made. Rule 3.180 Fla.R.Crim.P.; Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). This right includes being present when the court talks with the jury while it deliberates. Rogers v. United States, 422 U.S. 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975). Of course, the defendant may waive that right, as Allen did, but in this case there is no evidence Downs in any way indicated he did not want to be present.

The deliberations by the court and counsel represented a critical stage of this trial. The only issue the jury had to resolve was the sentence Downs should receive. Guilt or innocence was not the issue. Their question, thus went to the heart of what they were deciding. Should Downs live or die.

Apparently the jury wanted Downs to serve more time in prison than simply the remaining portion of twenty-five years. As argued earlier, that desire was irrelevant to the issue they had to consider. The court's response to the question played an important part in answering that question. It was also one the jury had not previously received. Therefore, it could not be harmless. United States v. Nelson, 570 F.2d 258 (8th Cir. 1978).

The court, therefore, erred by not having Downs present when it considered how to respond to the jury's question.[20]

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[20]For most of the trial Downs had represented himself, and he had done so well. Appointed counsel represented him only when he took the stand and during closing arguments. It thus was particularly unfair to answer the jury's question outside of Downs' presence when Downs had represented himself for the large majority of his trial.

## ISSUE X

THE COURT ERRED IN RETROACTIVELY APPLYING THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR TO THIS CASE.

The trial court found Downs committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (R 312), but she considered it to have "merged" with the pecuniary gain aggravating factor (R 312). The court also instructed the jury that it could consider this aggravating factor in determining what sentence to recommend to the court (R 290).

When Downs committed the murder in 1977, neither the judge or a jury could have considered the cold, calculated, and premeditated nature of the crime when they determined whether a defendant should live or die. The court that sentenced Downs to death could not consider the amount of premeditation or planning he used as an aggravating factor because section 921.141(5)(i) did not become effective until July 1, 1979. That section now allows the jury and judge to aggravate a murder because

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Section 921.141(5)(i), Fla. Stat. (1987).

Thus, the the court applied this aggravating factor after the fact when it used it to justify a sentence of death. Downs recognizes that this Court has previously rejected arguments concerning the ex post facto application of this aggravating factor, Combs v. State, 403 So.2d 418 (Fla. 1981); Smith v.

State, 424 So.2d 726 (Fla. 1982); Justus v. State, 438 So.2d 358 (Fla. 1983), but it should reconsider these opinions in light of recent federal court decisions. Also, but for the trial court's errors requiring resentencing, the court could not have found this aggravating factor. The trial court should not aggravate the sentence it imposed on Downs because of the mistakes it made.

In Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), the Supreme Court established the test for determining whether a statute is ex post facto. In doing so, the Court harmonized two prior court decisions, Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), and Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 1960, 67 L.Ed.2d 17 (1981), which also invlolved the retroactive application of the law:

> As was stated in Weaver, to fall within the ex post facto prohibition, two critical elements must be present: First, the law "must be retrospective, that is, it must apply to events occurring before its enactment" and second, it must disadvantage the offender affected by it.Id., at 29. We have also held in Dobbert v. Florida, 432 U.S. 282, that no ex post facto violation occurs if a change does not alter "substantial person rights," but merely changes "modes of procedure which do not affect matters of substance." Id. at 293.

Miller, supra, 101 S.Ct. at 2451.

The relevant "event" here was the crime that occurred over two years before the legislature enacted sec. 921.141(5)(i). As Miller explained, retrospectivity concerns whether a new statute changes the "legal consequence of acts completed before its effective date." Miller v. Florida, 107 S.Ct. at 2451

(citations omitted). The relevant "legal consequences" include the effect legislative changes have on the defendant's sentence. See Miller v. Florida, 107 S.Ct. ___, at 2451. In Stano v. Dugger, No. 88-425 Civ.Orl 19 (MD FLA May 18, 1988), the court held that retroactive application of the cold, calculated, and premeditated aggravating factor violated the ex post facto proscription:

> The United States Constitution contains two ex post facto clauses, one applicable to the states, article 1, section 10, clause 1, and one to the federal government, article 1, section 9, clause 3. In this case, the Court is called upon to address the ex post facto clause applicable to the states: "No state shall . . . pass any . . . ex post facto law."

The Supreme Court has held that three critical elements must be present to establish an ex post facto clause violation. First, the statute must be a penal or criminal law. Second, the statute must apply retrospectively. Finally, the statute must be disadvantageous to the offender because it may impose greater punishment. Weaver v. Graham, 450 U.S. 24 (1981); see also Miller v. Florida, __ U.S. __, 107 S.Ct. 2446, 2451 (1987). A law may violate the ex post facto prohibition even if it "merely alters penal provisions accorded by the grace of the legislature." Id. at 30-31. The challenged statute need not impair a "vested right" in order to be found violative of the ex post facto clause. Id. A law which is merely procedural and does not add to the quantum of punishment, however, cannot violate the ex post facto clause even if it is applied retrospectively. Id. at 32-33 & n. 17. See Dobbert v. Florida, 432

U.S. 282, 293 (1977) even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto."). With these principles in mind, the Court will consider whether Mr. Stano has stated an ex post facto claim.

In the instant case, Florida Statute sec. 921.141(5)(i) (1979) is clearly a penal or criminal statute since it deals with the quantum of punishment that may be imposed upon a person convicted of a capital felony. Section 921.141(5)(i) also operates retrospectively because it changes the legal consequences of acts completed before the effective date of July 1, 1979. That is, the change in the sentence statute allowed the trial judge to consider an additional aggravating factor that could increase the quantum of punishment from life imprisonment to death under Florida's sentencing scheme of weighing and balancing aggravating and mitigating factors. Finally, there is no doubt that the addition of new aggravating factor could disadvantage a criminal defendant on trial for his or her life. Under Florida's capital sentencing scheme the trial judge and sentencing jury must weigh and balance all aggravating and mitigating. Under such a delicate scheme, the presence or absence of an aggravating factor could be outcome determinative. Accordingly, this Court finds that Florida Statute sec. 921.141(5)(i) (1979), adding an additional aggravating factor to Florida's capital sentencing scheme, is unconstitutional as applied to Gerald Stano, whose crimes occurred before the statute's effective date. Id. (Fawsett, J.), slip op. at 37-40 (footnotes omitted).

In Miller, the Supreme Court examined both the purpose for the challenged enactment and the change it brought to the prior statute when it determined the new provision disadvantaged Miller. See also Stano, supra. Applying that analysis here, the sentencing statute with the new provision substantially increased the likelihood Downs would receive a death sentence, and it thus became "more onerous than the prior law." Dobbert v. Florida, 97 S.Ct. at 2299.

a. The legislature Intended To Disadvantage The Capital Defendant By Enacting A Law Creating A New Aggravating Factor

When the Legislature enacted Section 921.141(5)(i) it added the cold, clauculated, and premeditated aggravating factor to enhance the likelihood of a capital defendant receiving a death sentence. Why else would it have added it if not to enhance that possibility?

Before this aggravating factor became law, a finding that the defendant committed the murder in a cold, claculated, and premeditatied manner without any pretense of moral or legal justification, standing alone, could not have justified a death sentence. Id. Now, it can. See, State v. Dixon, 283 So.2d 1 (Fla. 1973). Thus, this aggravating factor increases the probability of a death sentence

b. The Change Which Sec. 921.141(5)(i) made On The 1977 Sentencing Statute Disadvantaged Downs.

In Downs' case, the trial judge considered the new aggravating factor when it determined that death was the appropriate

sentence. It is logical to presume the jury also considered it when it recommended a death sentence. If the court had followed the law in effect at the time of this offense, it could not have used the cold, calculated, and premeditated aggravating factor to justify a death sentence. It could consider only those aggravating factors listed in the §921.141(5). Miller v. State, 373 So.2d 882 (Fla. 1979). Under Miller, this Court's application of this aggravator is error.

If a new law causes only a purely speculative disadvantage, it is not onerous for purposes of ex post facto analysis. See Dobbert v. Florida, 97 S.Ct. at 2299 n. 7. This is not so here because the increased exposure to a death sentence is real under Florida's capital sentencing procedures. See Stano, supra, slip op. at 37-40. In Miller, the Supreme Court rejected the argument that a change in the sentencing statute of non-capital defendants must definitely increase his sentence. See Miller v. Florida, 107 S.Ct. at 2452 . Also,

> In assessing whether a provision is disadvantageous, courts must look to the challenged provision itself and ignore any extrinsic circumstances that may have mitigated its effect on the particular individual. Weaver v. Graham, 450 U.S. 24, 33 (1981); Dobbert v. Florida, 432 U.S. 282, 300 (1977). Ex post facto analysis is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred. Weaver, 450 U.S. at 30 n.13. In other words, the legislature must provide punishment for past conduct. See Fleming v. Nestor, 363 U.S. 603 (1960)

Stano, supra, slip op. at 39 n.18.

Similar to Miller, Downs had a greater likelihood of receiving a harsher sentence because of the new law. He presented substantial mitigation at his resentencing trial, yet the trial court and the jury rejected it and relied, at least in part, on this additional aggravating factor to justify a death sentence. Downs was therefore "substantially disadvantaged" by a retrospective application of the new aggravating factor.

c. The Change To The Capital Sentencing Statute Alters A Substantial Right

The third part of the Miller analysis requires examination of the sec. 921.141(5)(i) to decide if it alters a substantial right. Miller v. Florida, 107 S.Ct. at 2452. Because this court has limited what the judge and jury can consider as aggravating factors, the likelihood of an increase in the "quantum of punishment" a defendant may receive increases with the addition of this aggravating factor. As such, it obviously affects his very substantial right to live.

For these reasons, the court improperly considered the cold, claculated, and premeditated aggravating factor. It also erred in instructing the jury that it also could consider it in making its recommendation. Downs' death sentence is therefore invalid.[21]

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[21]At least two United States Supreme Court justices believe retroactive application of the section 921.141(5)(i)
(Footnote Continued)

d. This aggravating factor violates Article X, Section 9 of the Florida Constitution.

As an independent basis for reversal, the retroactive application of the new aggravating factor violated the Florida Constitution. Article X, Section 9 of the Florida Constitution provides:

> Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

This provision does not require that the change in the law disadvantage the defendant. As this Court said in Raines v. State, 42 Fla. 141, 28 So. 57, 58 (Fla. 1900):

> The effect of this constitutional provision is to give all criminal legislation a prospective effectiveness.

In Castle v. State, 330 So.2d 10 (Fla. 1977) this court denied Castle's claim that a legislative reduction of the punishment for distributing flammable substances with the intent to burn applied to him. At the time Castle committed the charged offense, the prison sentence for that crime was ten years. When he went to trial, it was five years. This court, agreeing with the Third District Court of Appeal's analysis, held the retroactive application of the new law was unconstitutional under Article X, Section 9 though the change was ameliorative.

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(Footnote Continued)
aggravating factor violates the ex post facto provisions of Article I, Section 10 of the United States Constitution. See Justus v. Florida, 465 U.S. 1052, 104 S.Ct. 1332, 79 L.Ed.2d 726 (1984), J. Marshall, dissenting.

Although this Court rejected a similar argument based in Justus v. State, 438 So.2d 358 (Fla. 1983), this case differs because Downs had already been tried and sentenced before section 921.141(5)(i) went into effect; Justus had not yet been tried. This court, therefore, should reverse the trial courts' sentence of death and remand for a new sentencing hearing.

## CONCLUSION

Based upon the arguments presented here, Ernest Downes respectfully asks this honorable court to:

1. remand for resentencing.

2. remand for resentencing before a new jury.

3. remand for imposition of a life sentence without the possibility of parole for twenty-five years.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Mr. James Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to Ernest Charles Downs, #063143, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 12th day of January, 1990.

DAVID A. DAVIS