IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,499

WILLIAM THOMPSON,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

INITIAL BRIEF OF APPELLANT WILLIAM THOMPSON

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STATEMENT OF THE CASE

The appellant, William Lee Thompson, was the defendant in the trial court and the appellee, the State of Florida, was the prosecution. The parties will be referred to as they appeased below. The symbol "R" will be used to designate documentary evidence and pleadings contained within the three volume record on appeal. "TR" represents the transcript of the hearing held pursuant to the defendant's resentencing. All emphasis is supplied unless otherwise indicated.

On April 14, 1976, the defendant and co-defendant Rocco James Surace, were charged by Indictment with the first degree murder, kidnapping, and involuntary sexual battery of Sally Ivester. [R. 1-21

Thompson initially plead guilty as charged. This Court allowed him to withdraw his plea an voluntariness grounds and remanded the case for further proceedings, Thompson v. State, 351 So.2d 701 (Fla. 1977). Thompson then entered a second plea of guilty. An advisory jury was enpaneled in the sentencing phase and recommended the death sentence which the trial court imposed. This Court affirmed the conviction and sentence in Thompson v. State, 389 So.2d 197 (Fla. 1980).

Thompson filed a 3.850 motion and this Court affirmed the denial of relief in Thompson v. State, 410 So.2d 500 (Fla. 1982). Thompson then petitioned for federal habeas corpus relief which was denied by the United States District Court. The Eleventh

Circuit Court of Appeals affirmed. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987).

Subsequently, Thompson presented a second 3.850 motion protesting the failure of the sentencing judge to allow presentation and jury consideration of non-statutory mitigating circumstances in the sentencing phase. The trial court denied relief but this Court reversed under the authority of Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and remanded for new sentencing proceedings. Thompson v. Dugger, 515 So.2d 173 (Fla. 1987).

On May 17, 1989, the new penalty proceeding commenced before a new sentencing jury and the Court. On June 6, 1989, the jury, by a vote of seven to five, returned an advisory sentence recommending the imposition of the death penalty.

By its order dated August 25, 1989, the trial court sentenced the defendant to death. [R. 758-7711 This appeal follows.

STATEMENT OF THE FACTS

The State introduced into evidence prior testimony of Barbara Garritz [Savage]. [TR. 1702, et. seq.; State's Exhibit 421 Garritz explained that she and Sally Ivester had worked together in Atlanta prior to their decision to move to Florida in March of 1976. [TR. 1703] Garritz, Ivester, Mary Lou Walden and Mr. and Mrs. Surace, Walden's parents, arrived in Miami and stayed at the Sunny Isles Motel. Walden's brother, Rocky Surace, was charged as Thompson's co-defendant. [TR. 1704] Garritz came to be Surace's girlfriend. [TR. 17061

After staying at the Sunny Isles Motel for approximately three days, the group moved to the apartment of one John O'Sullivan, Surace's roomate [TR. 1705-17071 at the Happenings Apartments. Shortly thereafter, Ivester told Garritz that she had met the defendant, Thompson. [TR. 17081 Ivester established a relationship with Thompson. [TR. 17101 Within days, Thompson met Surace and moved into the same apartment. Neither Surace, Thomspon, Ivester, or Garritz were employed. [TR. 17111

The quartet planned to move into their own apartment. Their plans to move to the "Michael's Apartments", where Ms. and Mrs. Surace and their daughter, Mary Lou, were living fell through. [TR. 1713-1714]

Garritz and Invester received their mail at the Surace's apartment and were expecting money orders from their parents,

[TR. 1715-17171 Surace told Ivester to call her parents for money and wanted two or three hundred dollars. Ivester was under the impression that she would only receive enough money for bus fare home to Georgia. [TR. 1717-1718] On March 30, 1986, Garritz received a money order for seventy-five dollars and Ivester received a twenty-five dollar money order. [TR. 1720-1721] Ivester's parents instructed her to take a bus from Miami to Atlanta where they would pick her up. Ivester was supposed to call her mother at 5:30 that afternoon. [TR. 17211

Because O'Sullivan's lease was about to expire, the quartet continued to look for an apartment. Surace suggested returning to the Sunny Isles Motel where they arrived at approximately 4:00 p.m. [TR. 1723-17241 Using their money orders, Ivester and Garritz rented a room for approximately eighty dollars. [TR. 1724]

The motel suite had a living room, kitchen, bedroom, and bathroom. [TR. 17271 Lying on the bed in the bedroom, Garritz heard Surace in the living room tell Ivester that she had lied to him. Ivester replied that she was afraid of what Surace would say and do if he found out her mother wasn't going to send the money that was asked for. [TR. 1728-17301 Garritz heard Surace strike a solid object with a raw hide type key chain with beads on it that he carried. [TR. 1731] Then Garritz heard Surace twice tell Ivester to take off her clothes. [TR. 1733-17341 She heard a "link chain" rattle that sounded like the chain that Surace wore as a belt, [TR. 17341 Garritz heard thumping sounds as if something was being hit with the chain. [TR. 17361

Thereafter, Thompson walked into the bedroom and said "something to the nature that he was so mad that he felt like killing Sally." [TR. 17371 He was obviously angry. Thompson said, ". . .He wasn't in the livingroom at that moment, because he was afraid he would get carried away." [TR. 17381 Thereafter, Surace told Thompson to get Garritz out of the bedroom. [TR. 17381

When Garritz entered the living room she saw Ivester standing completely nude. [TR. 1739] Surace stood in front of her with the chain in his hand, [TR. 1741] Surace hit Ivester around the head and shoulder area with the free end of the chain wrapped around his hand. [TR. 17421 Although Surace was not using all of his strength, he drew blood. [TR. 17431 Surace continually told Ivester that she had lied to him and she responded that she had been afraid of what he would do or say if her mother did not send the money she asked for. [TR. 1744] Thompson remained standing in the doorway from the living room to the hallway. [TR. 17441

Someone suggested finding "something to put inside Sally's vagina." [TR. 1741] Garritz looked for a suitable object but could not find one. [TR. 1745] She was afraid and made no attempt to leave because Surace had convinced her that he was a member of the "Hells Angels" motorcycle gang. [TR. 1746-17481 Surace told Thompson that he use could a chair leg from one of the chairs. [TR. 17491 Thompson took a chair, laid it on the floor, and broke a chair leg off with his foot. [TR. 1750] Thompson told Invester to lie on the floor and took the chair leg and inserted it into Ivester's vagina. After twisting it, he stood up and kicked the chair leg which flew out over hex

shoulder. [TR. 17511 Thompson retrieved the chair leg, reinserted it, and used his hand to hit the chair leg into Ivester. [TR. 17521 Ivester made no sound of any kind. [TR. 17541 Surace had told her if she screamed he would kill her. [TR. 17551 Ivester returned to her knees and Thompson hit her in the mouth with his fist, [TR. 1756, 17581 Thompson hit Ivester all over with the chair leg. [TR. 17611 At some point, Thompson hit Ivester approximately four times with the chain but stopped because he hit himself. [TR. 1766] Thompson told Ivester that she was going to call her mother later that afternoon and tell her to wire the money down in his name. [TR. 1762]

Ivester was told to take a shower, which she did. She returned with a towel and was told to clean the blood off the floor. [TR. 1765]

At the time, Ivester was menstruating but her Tampax had somehow been removed. [TR. 1769] Surace found the Tampax on the floor and told Ivester that she was supposed to hold it. When she didn't, Ivester was forced to eat it, [TR. 17701 Thereupon, Thompson kicked Ivester which caused her to hit the table and spill a beer. [TR. 17711 Thompson hit Ivester with the chair leg again because she had spilt the beer. Thompson told Ivester to lick the beer off the floor, which she did while Thompson hit her with the chair leg. [TR. 1774]

After making Ivester lick the beer, Thompson continued to hit her because she got blood on his hand and pants. [TR. 1775-17761 Thereafter, Thompson left the room momentarily and returned with a billy club. [TR. 17771

Thompson proceeded to use the billy club to hit Ivester. [TR. 17811 While Ivester lied on her stomach, Surace stomped the back of her head with his foot. [TR. 1782] Surace was wearing boots. Garritz heard a crack and Ivester's face hit the floor. Thompson told Ivester to roll over and spread her legs. When she did not spread them far enough, Thompson took one leg, Surace took the other, and they spread them apart. [TR. 17831 Thompson took the billy club and inserted it into Ivester's vagina. Ivester screamed and slapped herself on her mouth and called herself a dummy for screaming. [TR. 1784] Thompson walked away and Surace dropped his cigarette onto Ivester's stomach, when Ivester started to remove it, Surace told her she could not. [TR. 17841 Surace picked up the cigarette and put it against each of Ivester's nipples. Thompson returned with a cigarette lighter and burned Ivester in her vaginal area. [TR. 1784-1785] For the first time, Ivester spoke out. All she said was, "Please." [TR. 1786] Thereupon, the billy club was removed and Ivester was told to take a second shower. [TR. 1786] There was a large amount of blood on the floor and Ivester had a great deal of difficulty standing up. Neither Thompson nor Surace tried to help her. [TR. 17871

Surace told Garritz to clean to the blood off the floor which she did. [TR, 1787] Garritz had made no attempt to leave the motel room. Although she had not been threatened at any time, she was in fear for herself. [TR. 17881 While Ivester was in bed, Garritz was told to buy cotton and peroxide for Ivester's wounds and beer and cigarettes for Surace and Thompson. [TR.

17901 She made no attempt to call the police when she went to the store. Garritz cleansed Ivester's wounds with the peroxide. [TR. 1792] Both Surace and Thompson had been drinking. [TR. **17731**

Ivester **was** told to get out of bed in order to call her mother on the phone, **[TR. 1789, 17921** Surace told Ivester to call her mother and tell her to send the money down. He also told her that if **she said** anything to her of what had happened, that he would kill her. [TR. **17941** Thereafter, Ivester **left** the room with Surace and Thompson to go to a phonebooth. [TR. **1794-1795]** Garritz understood that Ivester's mother started asking a lot of questions so Thompson hung up the phone. [TR. **1796]**

Upon her return to the motel room, Ivester returned to bed. Thompson **said** he wanted another "mamma" and asked Surace where could find **one. [TR. 17971**

Later that night, Thompson and Surace entered the bedroom **and** tried to get Ivester to sit up. At Surace's direction, Garritz got the chain. when Ivester saw **it,** she passed out and fell back onto the bed. [TR. **18001** Surace used the chain and hit Ivester three more times across her stomach. Ivester no longer responded. [TR. 18021

Thereafter, Thompson left to ***go*** to Haulover Beach to find another mamma. [TR. 1802] when he returned at approximately 9:30 p.m. he said he had seen no one. [TR. **18031** Thompson and **Surace** tried to decide what to do with Ivester, discussing whether to take care of her and send her back home or throw her in a canal.

[TR. 1803] No decision was made that night. [TR. 18041

The next morning, a plan was reached whereby Garritz would explain that Ivester had been missing since the night before and had returned in her present condition. Garritz was to say that Thompson and Surace had been away at the time. [TR. 1804-1805] Garritz was to leave the motel room in order to avoid police questioning. [TR. 1805] Thompson would remain to call the emergency squad. [TR. 18051

The next day, Surace gave Garritz the chain and billy club and told her to put them in the garbage dumpster at the Happenings Apartments. Later, Garritz retrieved these items for the police. [TR. 17791

Garritz and Surace left the motel on Wednesday morning, March 31, They returned to O'Sullivan's apartment and told O'Sullivan falsely that Ivester was missing and that Thompson was in Hollywood picking up some of his things these. [TR. 18061

Garritz returned to the motel, cleaned the apartment, and at Surace's direction, gave Ivester a sponge bath and put peroxide on her wounds. [TR. 18071 As Ivester's condition worsened, the defendant monitored the victim's condition and pulse. [TR. 19501 Later, the defendant called 911 to summon the rescue squad and paramedics. [TR. 1555, 19521

Detective Carl Fogelgren, then on road patrol for the North Miami Beach Police Department, responded to an assault call at the Sunny Isles Motel at approximately 9:15 p.m. on March 31, 1976. [TR. 18261 According to Fogelgren, the motel predominantly catered to "bums." [TR. 18331 He met with the defendant and did

not recall having detected the odor of alcohol. [TR. 1833-18341 The defendant did not appear to be under the influence of drugs or alcohol. [TR. 1834] According to Fogelgren, the defendant identified himself as having called the police and indicated that Ivester, his "old lady" had come home all beat up, had gone into the bedroom, and that he had been unable to wake her. [TR. 18351 Fogelgren determined that Ivester was dead and had been for some time. [TR. 1839-1840] He observed bruising and the appearance of puncture wounds and possible bite marks before calling rescue, [TR. 18401 Fogelgren secured the apartment and called the homicide division. [TR. 18441

Surace and Garritz returned to Surace's apartment where they later told the police the alibi story of Sally being missing. Garritz learned that Ivester died. [TR. 1808]

After speaking to the police by telephone, Garritz returned to the motel where she was questioned by the police and told them the alibi story. [TR. 1811-1812] Later, Garritz was taken to the Public Safety Department building for questioning, There, after talking to Mary Lou Walden, Garritz decided to tell the truth, [TR. 1814-1815] The defendant was arrested. He offered no resistance. [TR. 1946] On the day of his arrest, Thompson wrote a letter in which he said, "I know 1 have done wrong and I am sorry that I did it. That's why I am pleading guilty and throw myself on the mercy of the court." [TR. 2546]

Garritz agreed with the characterization of Surace as "the leader of the gang." [TR. 18171 Thompson plead guilty while Surace plead not guilty and went to trial. [TR. 1817] Both

defendants had been drinking beer. [TR. 1819] According to Garritz, Thompson tried to copy and be like Surace. [TR. 18201

Betty Ivester testified that Sally was her daughter and that she died at the age of twenty-three. She explained how her daughter had lived with her prior to the time she came to Miami to live with her newfound friends. [TR. 1981-19821 Mrs. Ivester described her daughter's series of telephone calls requesting money. [TR. 1984-1989] She also described her last conversation with her daughter on March 30, 1976 where, obviously in some kind of distress, her daughter repeated her plea for money. [TR. 1993-1995]

The State introduced the defendant's prior testimony at the trial of co-defendant Surace. [TR. 1996 et. seq.] He admitted no prior felony convictions except a forgery charge in Broward County, He admitted his plea of guilty to the charges of first degree murder, kidnapping, and involuntary sexual battery in this case. [TR. 19971 Describing his association with Surace for approximately three years, the defendant recalled consuming alcoholic beverages on March 30, 1976. [TR. 19991 He described Surace as having drunk beer every day for a month and a case and a half on March 30, in addition to taking as many as a dozen tranquilizers at the same time. [TR. 2000-20011 Thompson denied remembering much of the events of the day but admitted that he started it. [TR. 20091 He further admitted hitting Ivester with the chain belt and battering Ivester with the chair leg and billy club. [TR. 2002-20041 Thompson confessed to the repeated beating of Ivester while denying Surace's participation. [TR. 2005-2014,

2021, 20231 Thompson said that Surace was drinking so much and taking so many drugs that he did not know what was going on around him. [TR. 20141

In his recorded testimony, Thompson admitted giving the police a contrary statement "after eight hours of being in a hole." [TR. 2030] In that statement, Thompson named Surace as an active participant in Ivester's beating. [TR. 2032-20381

Doctor Peter Lardizabal, a forensic pathologist, and Assistant Medical Examiner, could not remember anyone else in his experience beaten like Sally Ivester. [TR. 20561 From the condition of her body at the motel, Lardizabal estimated the time of death to have been at least twelve hours prior to his arrival. [TR. 20601 He described the "multiple evidence of blunt traumatic injuries from head to feet." [TR. 20621 He identified multiple lacerations to the scalp, bruises and lacerations to the face and ears ETR. 20651, bruises to the body, shoulders, arms and hands [TR. 2067-20691, burns to the areola, chain marks on the abdomen [TR. 20721, and blunt impact injuries to the hips, legs, and buttocks [TR. 20731. He described the evidence of hemorrhaging as unusual in degree and "inflicted with terrific force." [TR. 20761 Lardizabal described Ivester's vaginal area as markedly "reddened and swollen" and hemorrhagenic. The back portion of the vaginal canal suffered a laceration into the abdominal cavity. [TR. 20801 Lardizabal offered that Ivester's injuries would have caused great pain. [TR. 20861

An inspection of Ivester's stomach revealed a blood-soaked vaginal tampon. [TR. 20871 Lardizabal attributed Ivester's death

to "multiple injuries due to blunt trauma." He described the mechanism of death a5 fat embolism, hemorrhage, and shock due to pain. [TR. 20951

The defendant introduced into evidence the video taped testimony of Dr. Joyce Carbonal. [TR. 2131-2135; Defendant's Exhibit A; S.R.]

The defense called Harvey Lescalleet, the former pastor of the Mount Carmel Christian Community Church in a very small rural community. [TR. 2147] Lescalleet knew Thompson for several years as a teenager involved with church activities. [TR. 21501 He described Thompson as a slow learner and a follower who did not exhibit any violent or aggressive behavior. [TR. 2151-21521 He was quiet and non-assertive. [TR. 21551 As he stated, "The Bill Thompson I knew would not have done that." [TR. 21571

Arlen Rogers knew Bill Thompson through their church and youth group. [TR. 2159] The first elder and treasurer of the Mount Carmel Christian Church, Rogers described Thompson as "slow" and as [needing] "someone to lead him." [TR. 21601 He described Thompson as a typical teenager, "nothing unusual", and non-violent. [TR. 21611

Hazel Rogers, Arlen's wife, described Thompson as "very faithful" in attending church as a member of the youth group. She characterized Thompson as a non-aggressive follower. [TR. 21681

Bill Weaver, an elementary school principal, knew Thompson as an earlier high school student where he was "retained" in the eighth grade. [TR. 2173] Through Weaver, the defense introduced

into evidence the defendant's school records from elementary school where he was found to have an IQ of 75 and was recommended for a special education placement. He was, however, put in regular first grade which he failed. In second grade, Thompson was again tested by a psychologist and found to have an IQ of 74 and a classification of "mildly retarded," He experienced problems while being described as friendly, talkative, hyperactive, easily distracted, and suffering poor coordination. [TR. 21761 He had poor reading skills, poor general skills, and was inattentive. [TR. 21771 Thompson's grades through elementary school were generally D or failure. [TR. 21771 Thompson also had speech problems. [TR. 21791 He was in a special class for slow readers. [TR. 21801 By the second year of eighth grade, Thompson received grades of "F" in everything. [TR. 21821 At the age of eighteen, while still in the eighth grade, Thompson dropped out of school. [TR. 21831

what Weaver most recalled about Thompson was his need "to please everybody." He was definitely not a leader but "a follower." [TR. 21861 During Thompson's death row incarceration, Weaver corresponded with Thompson. His letters were always friendly, telling him about his children and describing himself as a "prison trust[ee]". [TR. 21881

Ruth Williams, Thompson's first cousin, testified about the "poor", "filth messy", environment that Thompson grew up in. [TR. 2207] Williams described how little Bill Thompson was "reprimanded severely" by his father. "The punishment was way overboard of what had happened." [TR. 22091 Williams described

Thompson's mother as not affectionate, "When she talked to hex kids, she talked down." [TR. 22091 Bill's family was a "sad situation." [TR. 2210]

Jean Marie Jackman, a matron at the Melford [Massachussetts] Police Department, another of Thompson's first cousins, remembered the very dirty house in which Thompson grew up. She saw feces on the floor and smelled urine. "The kids were not clean. No one loved or hugged or anything like that. There was no -- it wasn't the same, like with my family." [TR. 2221] The children always seemed to be afraid. [TR. 22221 Jackman was afraid of Thompson's parents, as well. [TR. 22241 Jackman saw Thompson being "manhandled." In later correspondence between Jackman and Thompson, Thompson expressed that he had been beaten. [TR. 22271

Donna Adams, the defendant's ex-wife for six years, had two children by him, then twelve and fourteen years old. [TR. 23281 Adams explained that Thompson was a "very loving, very gentle" husband who "cared." [TR. 23311 He was never physically violent or abusive. [TR. 23311 Adams admitted, however, that Thompson shoved her on occasion, one time resulting in her fall and an injury to her son. [TR. 23451 After time, however, Adams and Thompson separated and Adams decided to move to Ohio to live with Thompson's parents. [TR. 2332] She described the household as "haphazard", without love. Thompson's father would come into her bedroom after everyone else had gone to sleep and make advances to her. [TR. 23331 Adams described Thompson as slow mentally and as a follower. She "wore the pants" in the family. [TR. 23351

Thompson would drink to excess. Their marriage failed, in part, because of his alcoholism. [TR. 2337] The day of the homicide, Thompson wanted to see Adams but she refused. [TR. 2337] After his arrest, Thompson wrote Adams and said, "If you had seen me that day, I would have been with you and 1 wouldn't have been these and I'll get even." [TR. 2352] He appeared to Adams to be under the influence of alcohol. [TR. 2338] His voice was slurred, he wasn't forming words completely, and he rambled. He was drunk. [TR. 2339] Thompson was staggering and holding on to the banisters of the stairs while he walked. [TR. 2340]

The defendant's two children, Amy and Brian, love him. They chose to come to court. [TR. 2342]

Attorney Nicholas Trinticosta worked for the capital collateral representatives office and contacted Barbara Garritz by telephone when Thompson was previously "under warrant". They met and Garritz executed an affidavit which the defendant introduced into evidence in redacted form. [TR. 2364-2365, defendant's Exhibit D]

In that affidavit, Garritz described Rocky Surace as "an evil man" who "knew how to manipulate people and use them to his own advantage." [TR. 2473] She described Thompson as Surace's opposite, ". . .a big, easy going child who would do just about anything to please. It was hard to carry on a normal conversation with him. He just couldn't think quick enough to keep up and he never seemed to have an idea of his own." [TR. 2474] He was gullible and easily manipulated. [TR. 2474] Garritz described Thompson as "completely under Rocky's spell

. . .he was like Rocky's dog." [TR. 24751 "Rocky would give an order and Bill would do it, no questions asked." [TR. 24751

The defendant's brother, Tim Thompson, also described Thompson as non-violent, and as a follower. [TR. 23871 He said his parents afforded their children love and affection and denied that their home was filthy with feces and urine. [TR. 23901 The defendant's mother, Helen Thompson, explained that her husband would have testified but for his poor health. [TR. 23941 She denied knowing Thompson to be a violent or aggressive child. [TR. 23951 She did not want Thompson to die even though he had told her to stay away and that he didn't want to consider her his family any more. [TR. 2395-961

Donna Wells, a school system secretary, knew Bill Thompson as a neighbor and through church. [TR. 23991 She explained that, "Bill would do anything for recognition and he definitely was a follower rather than a leader." [TR. 24001 He was slow, had very few friends in school, and was placed in special education classes, [TR. 24011 He was tall, lanky, and uncoordinated, and "just didn't make friends." [TR. 24011 He was clumsy and unpopular. [TR. 24021 So needy for attention, Thompson volunteered to bring Christmas trees for all the classes. [TR. 24031

N. Joseph Durant, Jc., the presiding judge at the defendant's first sentencing hearing, testified that he was never presented any witnesses or evidence concerning mitigating factors on behalf of Thompson. [TR. 24571 The judge was not permitted to testify, as he proffered, that he would not have imposed the death penalty

had he been presented mitigating circumstances. [TR. 2434-2448] On cross-examination, the judge testified that he accepted Thompson's guilty plea and sentenced him to death. [TR. 2457-2458] The State established, through the judge's sentencing order, that it considered statutory mitigating circumstances including the youth of the defendant (twenty-four years old) and the fact Thompson had no significant history of prior criminal activity. [TR. 24581 On redirect examination, the defense was allowed only to establish that Judge Durant would have considered other mitigating evidence had it been presented. [TR. 24701 He was nat allowed to establish that that sentence would have been life imprisonment. [TR. 24671

The affidavit of Rebecca J. Black, the next door neighbor of the Thompsons, was also presented. [TR. 2478, et. seq.] The Thompsons "had a very stormy relationship". Black used to hear a lot of screaming and yelling coming from their house. [TR. 24781 She was concerned for the children because she would hear Thompson and his brothers and sister pleading with their parents not to hit them again. She heard things being thrown and lots of screaming and crying. Thompson seemed to be especially mistreated. He would get blamed for things he had not dane. She described Thompson as a nice, likeable boy who did not receive love or encouragement from his parents. "He was very mistreated. The family was not a very normal family. I never saw the parents displaying any love or affection to Bill.** [TR. 24791

Dr. Dorita Marina, a clinical psychologist, evaluated Thompson three times in November of 1988. [TR. 24971 To Marina,

the defendant described his abusive childhood where both of his parents beat him severely. [TR. 24991 He was "the battered child" of the family and on one occasion was chased down by a parent with a shotgun. [TR. 25001 He was a loner with no friends. [TR. 25011 He worked a series of non-skilled jobs which he invariably lost. [TR. 25021 He started drinking alcohol at age fourteen and by eighteen he was drinking very heavily. [TR. 25021 He used a lot of marijuana and had used hash and quaaludes. He reported episodes of blacking out and constant headaches. [TR. 2503-25041 Marina detected signs of brain damage by certain of Thompson's concrete answers to her questions. [TR. 25041 She characterized him as "an extremely depressed person who feels helpless and hopeless and he has no information that this is how he is." [TR. 2505] Thompson expressed little recollection or understanding of the incident giving rise to his conviction. [TR. 2507] He was "compliant." He wanted to please. [TR. 25081 His IQ was at the lowest possible level of low average. [TR. 2508] Marina found other evidence of brain damage in the way Thompson's test results were "scattered," [TR. 25101 She found evidence of tangential thinking and confabulation. [TR. 25101 She found defuse general damage and impairment. [TR. 2513-25141 In other tests he was either seriously deficient or mildly impaired. [TR. 25141 On at least one test, the MMPI, Thompson's answers were "so wild, so bizarre, crazy" that the results were invalid. [TR. 25181 This, too, was evidence of brain damage. [TR. 2519] Marina found that Thompson did not know what he was sexually, "his mind has not developed to the point

where he understands his own maleness,. . .". [TR. 2520-25221

Marina found the defendant to be brain damaged. [TR. 25231 His thinking and reality testing were extremely poor. He was unable to control aggressive impulses and had nearly killed himself by stabbing himself while in prison. [TR. 25241 He was emotionally impoverished and had not developed his sexual identity. [TR, 25241 She concluded that Thompson was not in control at the time of the incident with which he was charged. [TR. 25251

Marina described Thompson's touch with reality as so loose and fragile that she could not tell whether he was even aware of what he was doing or what was happening during the assault. [TR. 25261 Dr. Marina opined that Thompson "probably" did not know the difference between right and wrong, probably did not know what he had done, and was probably insane at the time, [TR. 25351

Psychiatrist Arthur Stillman examined Thompson in July of 1984. [TR. 25571 Stillman found Thompson to be suffering from sensorial defects affecting orientation, memory, intellect, judgment, impulsivity, frustration tolerance, and the ability to control himself, [TR. 25591 He considered the defendant retarded. [TR. 25921 Stillman found Thompson to be easily led and threatened by his co-defendant. [TR. 25641 Thompson was dominated by Surace. [TR. 26021 To Stillman, Thompson related his long time abuse of alcohol and drugs and the state of extreme toxicity at the time of the crime. [TR. 25651 He believed Thompson to be "a brain damaged person from the time he was a child, maybe at the time of birth." [TR. 25701 He believed at

the time of the offense, that Thompson was in the midst of a toxic psychosis, toxic insanity. [TR. 25721 He diagnosed Thompson as having organic brain syndrome, i.e., brain damage, suffered from a personality disturbance and a stress disorder, coupled with a homosexual personality problem. [TR. 2577-25791 Stillman concluded that during the offense, Thompson was in the midst of a toxic psychosis and was psychotic and legally insane. [TR. 25791

Attorney Lewis Jeppeway, Jr., represented Thompson in 1976 and 1977. [TR. 26171 Jeppeway found it impossible to convey to Thompson the procedural posture of the case after the reversal of his first conviction, due to his lack of intelligence. [TR. 26181

Dr. Robert T. Shebert, a neurologist, saw Thompson on October 19, 1988, [TR. 26221 His neurological test and electroencephalogram were abnormal, [TR. 26221 He suffered abnormalities of smell, eye movement, motor skills, all consistent with neurological disease. [TR. 26231 He concluded that Thompson suffered from chronic organic brain disease. [TR. 26301

Judge Arthur Rothenberg represented Thompson in 1975 or 1976. [TR. 26551 He described Thompson as immature, incapable of comprehending the gravity of his offense, and lacking any moral sense. [TR. 26551 Believing that the culpability of Surace equaled that of the defendant and that Thompson was the "passive participant by far", Rothenberg proffered that Surace's life sentence was inconsistent with Thompson's death penalty. [TR. 26571 He believed it should have been the other way around. [TR.

26581

In rebuttal, the State called Detective Greg Smith who testified that he located and spoke to Barbara Garritz in Georgia in June of 1988. [TR. 26791 He was able to contact Garritz telephonically prior to traveling to interview her. [TR. 26821 She indicated her willingness to honor a subpoena and return to Miami to testify. [TR. 26831 According to Smith, Garritz indicated that her testimony would be the same as her testimony in 1978. [TR. 26831 When confronted by her subsequent affidavit, Garritz explained that she had been approached by defense counsel with a pre-prepared affidavit and had relied on information supplied by those attorneys. [TR. 2684-26861

Rocco Surace testified that he had entered a guilty plea in 1976 and was sentenced to death. His conviction was overturned and a new trial ordered at which Thompson testified on his behalf. [TR. 2703-27051 Surace was found guilty of second degree murder, sexual battery, and false imprisonment and sentenced to consecutive terms totaling two hundred and three years. [TR. 27061 Surace denied directing Thompson's actions as well as the sexual battery of Ivester. [TR. 2708-27091 He explained he was drinking scotch and beer, smoking marijuana, and taking Seconals, a pain killer. [TR. 2711] He said Thompson did not drink as much as he did and did not recall whether Thompson was taking drugs or not. [TR. 27111 Although admitting that he hit Ivester with a key chain and a chain, he blamed Thompson principally for the attack. [TR. 2710, 2713] He explained that he weighed a hundred and twenty-four pounds at the time and was very sick with a

kidney stone. [TR. 27141 He denied that Thompson was drunk. [TR. 27171

Surace admitted that he confessed to the police upon his arrest [TR. 27231 and initially plead guilty. [TR. 27241 Surace admitted killing a boy with a gun, accidently, when he was thirteen years old. [TR. 2728-27291 He admitted the chain used to beat Ivester was his. [TR. 27251 He admitted one prior felony conviction and an undesirable military discharge. [TR. 27301 The defendant offered Surace's prior conviction in the United States District Court for the Eastern District of New York in Athens. [TR. 27341

Psychiatrist Charles Mutter evaluated Thompson in 1976. [TR. 27471 He found that Thompson could process information and that his memory appeared intact. [TR. 27531 His insight was nil. [TR. 27621 Mutter concluded that Thompson suffered from an "inadequate personality disorder. That he was sane and competent, but suffered a long standing behavior pattern of anti-social behavior and impulsiveness. "He may go along with the crowd. He knows what he's doing but he just doesn't care, . . .". [TR. 27631 In October, 1988, when Mutter returned to re-evaluate Thompson, Thompson refused to see him saying, "I saw you and two other doctors back in 1960, none of you believed me. I don't trust you and I have nothing to say to you." [TR. 27711 Mutter did not believe that Thompson acted under the substantial domination of Surace. [TR. 2791]

Dr. Albert Jaslow evaluated the defendant in 1976 on an emergency basis during his first trial. [TR. 28091 Although

Thompson's recollection of the incident was spotty, he told Jaslow that he and Surace were scared, they wanted to teach her a lesson, and they did not intend to kill her, [TR. 28231 He did not complain that he was forced to act. [TR. 28231 While Jaslow did not doubt that "there was tremendous anger, rage, aggression, and diminished control with the involvement of alcohol and. . . the number of drugs that were used,. . ." he did not feel that Thompson's conduct resulted from a mental disorder. [TR. 28301 Although he believed Thompson had the capacity to know what he was wrong, he did not think there was any thought of rightness or wrongness or possible consequences at the time of the occurrence. [TR. 28321

Dr. Lloyd Miller examined the defendant in November, 1988. [TR. 28881 Miller found no indication or organic brain damage nor any serious deficiencies in the defendant's ability to reason, understand, and know right from wrong. CTR. 29001 He found Thompson to possess average intelligence and found no evidence of major mental illness. Miller did not believe that Thompson acted under the influence of extreme mental or emotional disturbance. [TR. 2907] Nor did he believe the capacity of the defendant to appreciate the criminality of his conduct was substantially impaired or that he acted under the substantial domination of another, although admitting it was arguable. [TR. 2908-2909]

Psychologist Leonard Haber examined the defendant on May 20, 1989. [TR. 29421 Conceding that it was difficult to judge the defendant's mental state thirteen years earlier, Haber found

Thompson to have adequate communication skills, appropriate responses, and a generally good memory. [TR. 2943-29441 He found Thompson less than credible in certain areas and devious. [TR. 2965, 2967] He did not find Thompson to be overly suggestive. [TR. 29711 He found no evidence of major mental illness. [TR. 29801 He described Thompson as having an "anti-social personality." [TR. 29821 He did not find evidence that Thompson acted under the influence of extreme mental or emotional disturbance, that he acted under extreme duress or under the substantial domination of another person or that Thompson was substantially impaired in his ability to know the difference between right and wrong. [TR. 2984-2985]

Ultimately, the jury reached an advisory sentencing verdict and, by vote of seven to five, recommended the imposition of the death penalty. [TR. 31931

The following day, prior to the imposition of sentence, the defendant offered the testimony of attorney Michael L. Von Zamft, who represented Thompson in February of 1982. [TR. 3219-32201 While Von Zamft found Thompson easy to speak to, he never felt that he understood what he was telling him. [TR. 32213 Von Zamft believed that Rocco Surace was "a scary and very frightening man" under whose influence Thompson acted. He proffered that Thompson should not be sentenced to death, especially in light of Surace's life sentence. [TR. 32241

William Thompson addressed the Court. [TR. 32321 He described his "rotten" childhood. [TR. 32331 At the age of three, his mother broke his shoulder by throwing him against a

wall. He suffered more than the "usual beatings" and more than the rest of his brothers and sisters. He grew up with facial tics, including head jerking. His father took him to the basement and strapped a pointed wooden device to his head so that it would drive the points of a stick into his shoulder when he jerked his head. His parents and brothers ridiculed him by calling him "blinky" or "jerky", [TR. 32331 When the tics appeared, Thompson's father would backhand him across the room or throw things at his head, including knives, forks, spoons, glassware, and frying pans. If the glasses broke, he would be beaten. [TR. 32341

Thompson's grandmother, with whom he was very close, died the day before his ninth birthday. [TR. 3235] He was not allowed to attend her funeral. [TR. 32361 Thompson had no friends in school. [TR. 32361 He was not allowed to join any clubs like 4-H or Cub Scouts, like his other brothers were. [TR. 32351 He was tormented by school bullies. [TR. 32371

The last time Thompson talked to his mother or father was in 1977 when they stopped by the prison for about three hours. He was never shown affection, only beatings, yelling, and screaming. [TR. 3239-32401 At eighteen, Thompson was run out of the house at gunpoint by his mother. He came to South Florida with no money, no job, and no education. [TR. 32411 He "hussled" as a male prostitute. [TR. 32421 Later, he met Donna Wells and enlisted in the Marine Corps. The recruiting sergeant helped him pass the examination. [TR. 32421 Not wanting to go to Vietnam, Thompson said he was a homosexual and was dishonorably

discharged. [TR. 32431

Thompson returned to Hollywood, Florida, married Wells, and moved into her parents house. [TR, 32441 He got a security guard job. A month later he quit. [TR. 3244-32451 He worked as a short order cook and carnival worker. He drank alcohol, smoked marijuana and hashish, and experimented with quaaludes. [TR. 32451 He worked for two weeks as a roofer. [TR. 3245-3246]

At one point, he was convicted of uttering forged checks in Fort Lauderdale and served nine months in the Broward County Stockade after he violated probation. [TR. 3246-32471 He got out, returned to Donna, and lived with her and his new son in Davie. [TR. 32471

In March, 1976, Thompson met Surace, Ivester, and Garritz in Miami Beach. Surace was a tough biker who had beer and drugs. [TR. 32471 Thompson was "nothing." Surace had respect and "was something that [he] wasn't and [he] wanted to be." [TR. 32491

Three weeks later, Thompson found himself at the Sunny Isles Motel, [TR. 3249] Surace started to hit Ivester because he said she lied to him about the money, beating her with a key chain and a long chain he used for a belt. [TR. 32501 Thompson did not want to kill anyone. He did not know why he beat or tortured Ivester. He did not know why he did not stop. [TR. 32511 Although he knew what he was doing was terrible, he did not expect Ivester to die, [TR. 32541

Thompson testified that he drank approximately a half a case of beer, took two or three quaaludes, and smoked some "dope" on the day of the crime. [TR. 32731

At the time, he was afraid of Surace. He was afraid he would have started in on him. He did what he said to do to avoid getting beaten again. He had enough beatings in his life. He just wanted to be like Surace at the time. [TR. 3253-3254]

Thompson testified that when arrested, the police told him what to say. [TR. 3254] In 1978, when he was returned to court for a new trial, he plead guilty because Surace had put a contract out on his life. He testified and took the full blame for the crime and was sentenced to death again. [TR. 3257] While imprisoned, Thompson received a DR for having the barrel of a zip gun in his cell. Thompson insisted it was not his and he did not know what it was and received probation. [TR. 3284-3285] He tried once to escape by injuring himself. [TR. 3286] On two separate occasions, Thompson spent weeks on death watch awaiting his own execution. [TR. 3258]

SUMMARY OF THE ARGUMENTS

I.

The most important and damaging testimony against the defendant was that of eye-witness and uncharged accomplice Barbara Garritz. Garritz, however, did not testify in person or expose herself to this jury's evaluation or the defendant's cross-examination. Instead, when the State announced two days prior to the hearing that the witness was unavailable, the trial court allowed the State over vociferous objection to read Garritz's prior testimony to this jury. The trial court thereby committed error. The scope of cross-examination at the initial hearing (which was overturned by this Court due to a Hitchcock violation) was unduly restricted and the State at this hearing never established the requisite due diligence in its procurement of Garritz to justify its failure to secure her presence. In addition, the trial court compounded its error by failing to grant the defendant additional time requested to secure the attendance of the witness, himself. The sentence of death imposed against William Thompson must be reversed.

II.

During voir dire, this jury, and one particularly vocal juror in particular, expressed its deep concern that a life sentence recommendation might result in the defendant's release after as little as twelve years in light of the time he had already served

imprisoned. This concern suggested a very real bias in favor of a death penalty recommendation. The trial court's instruction to the jury to ignore the issue was insufficient to avoid the likelihood of prejudice. The trial court committed error in failing to conduct individual voir dire and in failing to grant the defendant's motion to strike the contaminated jury panel. The judgment and sentence of the trial court must be reversed.

111.

The trial court erred in permitting the State to introduce into evidence the defendant's prior false testimony given at the trial of co-defendant Surace which resulted in Surace's second **degree** murder conviction and avoidance of the death penalty, This particularly insidious tactic renders the defendant's death sentence constitutionally invalid for at least two reasons. If offered for the truth, i.e., that Thompson **was** solely responsible for the victim's death and Surace was innocent, the State deliberately used material **false** evidence to secure the defendant's death penalty. If such testimony was offered by the State, not for **its** truth, but to demonstrate the defendant's singular responsibility for Surace's avoidance of justice and his avoidance of the ultimate penalty due to Thompson's perjury, then the tactic of the State is even more insidious. This jury was invited to recommend Thompson's execution because Thompson let Surace avoid justice. As a non-statutory aggravating circumstance, the jury's consideration of such a factor invalidates the defendant's sentence, Reversal is compelled.

IV.

The trial court erroneously permitted the State to introduce into evidence the most excruciatingly gory photographs possible of the victim's disemboweled and excoriated stomach and vagina upon the dissection of the victim at the medical examiner's office. Neither the defendant's guilt, the cause of death, the identity of the victim, or any other fact demonstrated by these photographs was in issue. whatever **else** the defendant may have done, he did not eviscerate the victim. The photographs at issue were irrelevant, immaterial, gory, and offered for no conceivable reason but to inflame the jury even more than it already was. The conduct of the State and the error of the trial court rendered these sentencing proceedings unfair. The results of these proceedings must not be permitted to stand.

V.

The defense sought to offer the opinion testimony of various of the defendant's childhood acquaintences, family members, prior counsel, and even one of the defendant's previous sentencing judges to attest to their conviction that the execution of Thompson was inappropriate. The trial court not only refused to allow such testimony before the jury, but failed to consider such testimony in determining its sentence. **As** such, the trial court improperly restricted the defendant's ability to present a defense and to present non-statutory mitigating evidence. His failure to consider such testimony at all constituted a violation of Lockett v. Ohio **and** Eddings **v.** Oklahoma. The defendant's death penalty should be reversed.

VI.

The trial court's sentencing order erroneously determines that neither "youth" nor "no significant history of prior criminal activity" constituted applicable statutory mitigating circumstances. In fact, the two judges who had previously sentenced the defendant had both determined that these mitigating Circumstances did exist. Those determinations therefore constituted the law of the case and were established by collateral estoppel and res judicata. It was wrong for the trial court to revisit issues already decided in the defendant's favor, to reverse the findings, and to penalize the defendant for having won a new sentencing hearing.

For similar reasons, the trial court erroneously found the "cold, calculated and premeditated" and "financial gain" aggravating circumstances to exist. These aggravating circumstances had not been found to exist before. The mere fact of the defendant obtaining reversal of his prior sentence due to Hitchcock violations should not have afforded the State an opportunity to increase the number or weight of aggravating circumstances previously determined to exist.

In addition, the finding of the "cold, calculated and premeditated" aqgravating circumstance to exist cannot be comported with this record which fails to demonstrate beyond a reasonable doubt the heightened premeditation required. More important, this record fails to establish, and clearly suggests to the contrary, that the victim's death was neither premeditated nor even intended. Accordingly, the findings of the trial court

cannot be sustained nor can its conclusion be validly predicated upon those erroneous findings. Moreover, the trial court either failed to consider or failed to credit the defendant with numerous mitigating circumstances, both statuatory and non-statuatosy, to which he was entitled. The defendant's sentence should be reduced to life imprisonment without possibility of parole for twenty-five years.

ARGUMENT

I.

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO OFFER THE PREVIOUS TRIAL TESTIMONY OF ITS CHIEF PROSECUTION WITNESS WHERE THE SCOPE OF CROSS EXAMINATION WAS DIFFERENT, THE STATE FAILED TO ESTABLISH THE REQUISITE DUE DILIGENCE IN ATTEMPTING TO PROCURE THE ATTENDANCE OF THAT WITNESS, AND THE DEFENDANT WAS DENIED THE OPPORTUNITY TO OBTAIN THE WITNESS HIMSELF, THEREBY DENYING THE DEFENDANT HIS RIGHT OF CONFRONTATION AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Over strenuous defense objection, the trial court permitted the State to introduce into evidence the prior testimony of its chief prosecution witness, Barbara Garritz Savage. (TR. 1702, et. seq.; State Exhibit 42; R. 3571

There is a clear constitutional preference for in-court confrontation of witnesses. United States Constitution, Amendment VI: Ohio v. Roberts, 448 U.S. 56, 65, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597, 607 (1978); Article I, Section 16, Florida Constitution: State v. Dolen, 390 So.2d 407 (Fla. 5th DCA 1980). The purpose of the confrontation clause is to afford an accused the fundamental right to compel a witness "to stand face to face with the jury [or trier of fact] in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Barber v. Page, 390 U.S. 719, 721, 88 S.Ct. 1318, 1320, 20 L.Ed.2d 255, 258 (1968).

Against this right of confrontation and cross-examination, exceptions have been carved regarding unavailable witnesses under certain specific circumstances. Florida Evidence Code §90.804(e) creates an hearsay exception if a declarant "is absent from the hearing, and the proponent of his statement has been unable to procure his attendence or testimony by process or other reasonable means." Florida Rule of Criminal Procedure 3.640(b) provides:

> The testimony given during the former trial may not be read in evidence at the new trial unless it is that of a witness who at the time of the new trial is absent from the State, mentally incompetent to be a witness, physically unable to appear and testify, or dead, in which event the evidence of such witness on the former trial may be read in evidence at the new trial as the same was taken and transcribed by the court reporter. Before the introduction of the evidence of an absent witness, the party introducing the same must show due diligence on his part in attempting to procure the attendance of witnesses at the trial, and must show that the witness is not absent by consent or connivance of such party.

Even in instances where a witness cannot be found, before the witness will be declared unavailable, there must be a showing of a good faith effort to locate him. McClain v. State, 411 So.2d 316 (Fla. 3d DCA 1982), at 317, fn.3; Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). The mere reluctance of a witness to attend a trial - understandable or not - does not mean that the State is unable to procure his attendance. The proponent of the former testimony must establish what steps it took to secure the appearance of the witness. McClain v. State,

supra at 317; Government of the Canal Zone v. P (Pinto), 590 F.2d 1344 (5th Cir. 1979).

Similarly, in Palmieri v. State, 411 So.2d 985 (Fla. 3d DCA 19821, the State properly perpetuated a prosecution witness' testimony pursuant to Rule 3.190(j). At trial, the prosecutor announced that the witness was unavailable, that the witness had said he was going to Los Angeles and did not expect to be at the proceedings, that the prosecutor had given him his professional card instructing him to telephone if he returned to town, and that the State mailed a subpoena to the witness at his local address. Over objection, the deposition was allowed into evidence and the defendant was convicted. The District Court held that it was obvious that the State had not met its burden to procure the attendance of the absent witness. ——, Shreve v. State, 361 So.2d 221 (Fla. 1st DCA 1978). It further determined that the error complained of constituted a departure from the essential requirements of law. Dresner v. City of Tallahassee, 164 So.2d 208 (Fla. 1964).

The burden is clearly and directly upon the State to demonstrate that it was "unable to procure his attendance or testimony by process or other reasonable means." In Rivera v. State, 510 So.2d 340 (Fla. 3d DCA 19871, the District Court rejected the trial court's reliance on the fact that a co-defendant had threatened to kill the declarant in court if he testified, holding that that circumstances did not establish that the declarant was unavailable as a witness and that the witness could not be served with a witness subpoena or otherwise be

brought in as a witness in the cause.

The right to confrontation, guaranteed by the Sixth Amendment to the United States Constitution, is a fundamental right and applies to the states through the Fourteenth Amendment. Davis v. Alaska, 415 U.S. 308 (1974); Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965); Coco v. State, 62 So.2d 892 (Fla. 1952); Baker v. State, 150 So.2d 729, 730 (Fla. 3d DCA 1963). The Florida Constitution, Article I, Section 16 states, in pertinent part:

> In all criminal cases the accused shall. . . have the right. . .to confront at trial adverse witnesses. . .

"The right of confrontation and cross-examination is an essential and fundamental requirement for. . .(a). . .fair trial." Barber v. Page, supra at 721, and Douglas v. Alabama, 380 U.S. 415 (1965). "It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witnesses." Barber v. Page, supra, 390 U.S. at 725.

"Prejudice ensues from the denial of the opportunity to place (a) witness in his proper setting and to put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them." Smith v. Illinois, 319 U.S. 129, 131 (1968), citing, Alford v. United States, 282 U.S. 687 (1931). Thus, limitations on cross-examination go to the "heart of the fact finding process." Ohio v. Roberts, ___ U.S. ___, 100 S.Ct. 2531 (1980). One goal of effective cross-examination is to impeach the credibility of opposing witnesses. In Davis v.

Alaska, supra at 316, the Court observed that "the cross examiner is not only permitted to delve into the witness' story to test %he witness' perception and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." Similarly, in United States v. Williams, 592 F.2d 1277, 1281 (5th Cir. 19791, the court noted that cross-examination in "matters relevant to credibility ought to be given wide scope."

The "primary object of the (confrontation clause of the Sixth Amendment is). . .to prevent depositions or ex parte affidavits . . .(from) being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury." Barber v. Page, supra, 390 U.S. at 721 (19671, citing, Mattox v. United States, 156 U.S. 237, 242, 243 (18951. "A denial of cross-examination without waiver. . .would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." See Smith v. Illinois, supra, 319 U.S. at 131, citing, Brookhart v. Janis, 384 U.S. 1, 3 (1967).

In the similar context of depositions taken to perpetuate testimony, it is established that mote than a perfunctory attempt to contact the witness is required. Hope v. State, 441 So.2d 1073 (Fla. 1983). While the question of how far a party must go to satisfy the requirements of the rule will be susceptible to different answers depending on the circumstances of each case,

the party offering the deposition must show it has exercised due diligence in its search. See, e.g., Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); Palmieri v. State, 411 So.2d 985 (Fla. 3d DCA 1982); Layton v. State, 348 So.2d 1242 (Fla. 1st DCA 1977); Outlaw v. State, 269 So.2d 403 (Fla. 4th DCA 1972), cert. denied, 273 So.2d 80 (Fla. 1973).

By a motion filed October 20, 1988, seven months prior to trial, the State moved pursuant to Florida Statute §90.804(2)(a) to utilize the farmer sworn testimony of various witnesses, including two deceased law enforcement officers and Barbara Savage Garritz. [R. 1271 That motion recited, in pertinent part:

> Barbara Savage Garritz was located in June, 1988, in Georgia. She was subpoenaed on September 27, 1988, and the subpoena was returned. (See attached) Detective Greg Smith of the Metro-Dade Police Department can testify as to efforts made to locate this witness and her unavailability, She has also been subpoenaed as an out-of-State witness. We are unable to locate her at this time. (R. 1271

This record reflects a "certificate to secure the attendance of out-of-State witness" Garritz issued by the trial court on October 11, 1988. [R. 130-1311

A hearing was held on the State's renewed motion on May 18, 1989. The defense was not informed until May 17, 1989, the day before the hearing, of the existence of the affidavit and the purported continuing unavailability of Garritz. [TR. 9181 Reference was made to a purported affidavit [not appearing in the

record] signed by Ezram Jackson, criminal investigator for Norcross, Georgia. The defense objected that the document was not a proper affidavit, that it was not based on personal knowledge, that it was not properly sworn and subscribed to, and that it was hearsay. [TR. 9061 The affidavit, although acknowledged by a notary public an May 9, 1989, apparently contained no oath. [TR. 910] The State offered nothing other than the affidavit and subpoena. [TR. 9111

The defense proffered that its investigator Geller had recently contacted Garritz's mother who had indicated a visit from her daughter on Mother's Day, three or four days prior, and her attendance at a funeral two weeks before. Geller learned also that Garritz had children in public school. [TR. 906-907] The trial court ruled that the affidavit was "satisfactory". [TR. 909]

Geller, on other business in Atlanta, offered assistance to the defense while he was there. Working only Saturday and Sunday, Geller attempted to find Garritz at two prior addresses without success. [TR. 918-9201

Geller learned that Garritz lived in the Doraville/Norcross area of Atlanta. [TR. 921]

Geller testified that through an associate in Atlanta, Georgia, Garritz's mother had been located and contacted and had indicated that her daughter was still in the Atlanta area, that her children went to school, and that she frequently visited her mother's house. [TR. 913-9141 The mother had, in fact, been visited by Garritz on Mother's Day the week before. [TR. 9141

Geller explained that school records, while not available to the defense, are available to State investigatory agencies. [TR. 9151 Although the mother had the most information, she had apparently not been contact [by the State]. [TR. 921] No attempt was made by the State to locate Garritz through motor vehicle records, through the public school system, or through social security records.

Sometime after June, 1987, the Assistant State Attorney David Waksman and Detective Greg Smith flew to Atlanta, found Garritz, and spoke to her. Waksman left her his business card and "expected" her to call him the next day. [TR. 2251-22521

As the defense noted, Garritz's direct examination occupied more than one hundred pages of transcript but only five or six pages involved cross-examination, [TR. 9291 In addition, that cross-examination was improperly restricted by the former trial judge who sustained the prosecutor's objection to the question, "Were they taking any pills during the ongoing period of time?" [TR. 9291 Because Garritz's testimony would have gone directly to mitigating circumstances, the restriction of her testimony constituted a violation under Hitchcock. Where, as here, the defendant's prayer to escape the death penalty was based substantially on his mental condition at the time of the offense, such impaired cross-examination as was previously allowed cannot fulfill the constitutional requirements to permit the introduction of prior testimony. [TR. 9301

The trial court ruled against the defendant, finding that due diligence had been used by the State. [TR. 925] Its comments,

however, suggested that it held the defense to a burden when, in fact, it should have suffered none. ("However, if there's such a concern on the defense side, clearly some effort should have been made on defense to locate the witness.") [TR. 931] The defense correctly responded that the burden was the State's, alone, and that the first indication of the witness' current unavailability came but *two* days prior to the hearing. [TR. 934]

The defense requested of the Court the opportunity, i.e., the time and funds to locate and serve Garritz [Savage]. [TR. 990-992, 1625] Prior to trial, the defendant made and renewed an explicit request:

> For the record, we'd like to reiterate our position and ask for a continuance and/or the chance to have an investigator, at the State's expense, County's expense, with County money, go up and try to locate Ms. Savage. [TR. 990]

The trial court consistently denied the defendant's request. [TR. 991] The defense also sought leave to pursue a petition for writ of certiorari prior to trial. The trial court denied the defendant's requests. [TR. 1629, 1641]

It is fundamental that the right to the effective assistance of counsel includes the right to a reasonable period of time for the preparation of a defense. Solomon v. State, 138 So.2d 79 (Fla. 1st DCA 1962); McCray v. State, 181 So.2d 729 (Fla. 1st DCA 1966). As this Court pronounced in Christie v. State, 94 Fla. 469, 114 So. 450, 451 (Fla. 1927):

> Our country is committed to the doctrine that no matter what the crime one may be charged with, he is entitled to a fair and impartial trial by a jury of his peers. Such a trial

> contemplates counsel to look after his defense, compulsory attendance of witnesses, if need be, and a reasonable time, in the light of all the prevailing circumstances to investigate, properly prepare, and present his defense. When less than this is given, the spirit and purpose of the **law** is defeated.

The Supreme Court of the united States has similarly announced that where expedience and due process conflict, the former must give **way:**

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every **denial** of a **request** for more time that violates due process even if the party fails **to** offer evidence **or** is compelled **to defend** without counsel. [cite omitted] Contrariwise, a myopic insistence upon expeditiousness in the face of a iustifiable request for delay can render the right to defend with counsel an empty formality. [cite omitted] There are no mechanical tests for deciding when a denial of a continuance is **so** arbitrary as to violate due process. The **answer** must **be** found in the circumstances present in every **case**, particularly in the reasons presented to the trial judge at the time the request is denied. Ungar v. **Sarafite,** 376 **U.S. 575, 84 S.Ct. 841, 849-850 (1964).**

The defendant here **was** denied his right to due process of law, compulsary process of witnesses, effective assistance of counsel, the right of confrontation and cross-examination, and a fair trial by the actions of the trial court. The Court should not have permitted the State to use the prior recorded testimony of Garritz absent a sufficient demonstration of due diligence by the State in procuring its **purportedly** missing witness and showing that the scope of the prior cross-examination **was** sufficient to

fulfill the defendant's constitutional rights. Moreover, the trial court compounded its error by failing *to* afford the defendants sufficient opportunity to procure the missing witness himself in order that he protect his constitutional rights by his own actions. These errors go to the heart of the defendant's sentencing proceedings. His death sentence cannot be sustained.

II.

THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION TO STRIKE THE JURY PANEL AND IN FAILING *TO* AT LEAST CONDUCT INDIVIDUAL VOIR DIRE WHEN IT BECAME APPARENT THAT THE JURY WAS CONCERNED THAT THE DEPENDANT ON A LIFE SENTENCE COULD BE RELEASED AFTER AS LITTLE AS TWELVE YEARS IN LIGHT OF THE FACT THAT HE HAD ALREADY BEEN INCARCERATED FOR THIRTEEN, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL BY A JURY PRBDISPOSED TO IMPOSE A SENTENCE OF DEATH

This jury expressed a concern that, because the defendant had already served thirteen years in prison, that he might be eligible for parole and released in only twelve additional years if it recommended a sentence of life imprisonment. The defense counsel requested individual voir dire to explore the existence of the jurors' bias towards the death penalty because of this expressed concern. He also moved to strike the panel. When these requests were denied, he accepted the Court's jury instruction which avoided the issue altogether. By failing to allow individual voir dire and for failing to strike this contaminated panel, the trial court thereby erred. It failed to conduct adequate voir dire and its jury instruction was insufficient to cure the prejudice which obviously existed. The very real risk exists that this jury's seven to five vote recommending the imposition of the death penalty was improperly influenced by the fear that the defendant would rejoin society prematurely. The possibility of such bias renders the preceedings unreliable and the death penalty unlawful.

During jury selection, juror Garson repeatedly voiced his concern that the recommendation of a life sentence might mean the defendant's release to society in only twelve years:

> . . .So, in other words, he only has to go for twelve?
>
> * * *
>
> . . .Is he actually getting twenty-five years or twelve, the thirteen years he's been on the cooker? (TR. 13611

His questions were never answered, leaving the jurors to speculate and worry that a recommendation other than death would result in the defendant's premature release from custody. The trial court suggested that the question should not be answered. (TR. 13631 Defense counsel expressed his "well-founded fear" that the question had become a key issue among the jurors and that they would not be satisfied with instructions to "merely disregard" their concern. (TR. 13641 Counsel noted (provoking some disagreement from the State) that all of the jurors were laughing and expressed his fear that the jury possessed a bias against rendering a decision which might result in the defendant receiving only an additional twelve years imprisonment. (TR. 13651

Defense counsel expressed his belief that there had been "created a problem" [TR. 13681 and suggested that the jury should be voir dired as to whether they would have difficulty in recommending life being uncertain of what the status of the sentence is and whether they felt it might be an inadequate

sentence. [TR. 1369] The defendant moved to strike Garson for cause and suggested that Garson be questioned as to his bias and state of mind. [TR. 1373-1374] When the trial court expressed a reluctance to "open the door to a number of [other] questions", defense counsel renewed his causal challenge and requested individual voir dire on the issue. [TR. 1374-13771 The defense moved to strike the panel based on the questions and comments that had been made. [TR. 1383-1385] Ultimately, the trial court denied all the relief requested by the defense except to instruct the jury:

> Mr. Garson and all of the potential jurors, with regard to your question, it is irrelevant to your consideration. You are only to concern yourself with what punishment should be recommended to be imposed upon the defendant. That is a life sentence without the passibility of parole for twenty-five years or death. The parole consequences, if any, are not for your consideration. [TR. 13891

Not surprisingly, the Court's instruction did nothing to allay the fears of juror Garson who subsequently responded to the prosecutor's questioning:

> Mr. Garson: I have to be honest with you. I still feel that I'm asked to judge the two scales of justice and I have to know what's on those scales. Now, with all due respect, his answer did not answer my question.
>
> * * *
>
> Mr. Garson: Again, I go back to my question, which was never answered, that is: Is a twenty-five years from the point retroactive to the point he went in or is it retroactive from when he will be --

Mr. Waksman: We can't answer that question.

* * *

Mr. Garson: In other words, it is conceivable, it is possible he could go in twelve years and be out in twelve years? [TR. 1399-14001

The defendant renewed his request to voir dire the jury outside the presence of the others, moved to strike Garson for cause, and declared that his comments had "contaminated everybody in this room." [TR, 14011 Counsel commented, "Judge, you heard the demeanor of this, I asked that he be questioned about the question beforehand and that was denied." [TR. 14021 The defendant renewed his motion to strike the entire panel. ITR. 14031 The trial court denied the defendant's motion, reinstructed the juror as it had previously, and directed Garson to "not continue to ask that question with the idea of expecting an answer." [TR. 14061

Futher inquiry of Garson by the prosecutor exascerbated the contamination of the jury even more. Garson admitted he could not return a fair verdict because in order to do so he would have to know the consequences of his recommendation. [TR. 1407-14081 Garson was ultimately excused.

In the case at bar, the defendant's fundamental right to a fair and impartial trial by a jury correctly, clearly, and accurately instructed on the applicable law was violated. The trial court's instruction obfuscated an inherently important issue made all the more important by the jury's direct inquiry.

The primary purpose of jury instructions is to define with substantial particularity the factual issues, and clearly to instruct the jurors as to the principles of law which they are to apply in deciding the factual issues involved in a case before them. United States v. Hall, 417 F.2d 279 (5th Cir. 1969); United States v. Wolfson, 573 F.2d 216, 220-221 (5th Cir. 1978). It is error for a trial court to give erroneous, misleading, or incomplete jury instructions. Bass v. State, 50 So. 531, 58 Fla. 1 (1909); Barnes v. State, 348 So.2d 599 (Fla. 4th DCA 1977). It is universally recognized and a fundamental tenet of Florida jurisprudence that the giving of a jury charge stating contradictory or repugnant propositions is reversible error. Escambia County Electric Light and Power Co. v. Southerland, 61 Fla. 167, 55 So. 83 (1911); Casazza v. Emerson, 194 So.2d 643 (Fla. 1st DCA 1967).

The jury here was asked to decide the defendant's fate while being told by the Court's instruction that it could not be told the consequences of a life sentence. The instruction was thereby confusing. Confusing charges, made so by a contradiction which renders it doubtful or uncertain which of two or more rules of law the jury should apply to the facts in the case constitute reversible error. Key West Electric Company v. Albury, 91 Fla. 695, 109 So. 223 (1926).

By failing to give the jury the information it desired and needed, the Court's instruction was misleading. "[I]t is the duty of the Court to define to the jury the elements of the offense with which the accused is charged and such definition

must at least not be misleading." Croft v. State, 117 Fla. 832, 158 So. 454, 455 (1935).

Moreover, by failing to permit additional individualized voir dire, the trial court precluded the defendant from determining the jury's bias. Voir dire is not merely a necessity: it is a right. Fla.R.Civ.P. 1.431(b); Fla.R.Crim.P. 3.300(b). In Ellison v. Crib, 271 So.2d 174, 177 (Fla. 1st DCA 1972); accord, Minnis v. Jackson, 330 So.2d 847, 848 (Fla. 3d DCA 1976), the Court held:

> When the right to make an intelligent judgment as to whether a particular juror shall be challenged is lost or unduly impaired, the sight to a fair trial by an impartial jury is destroyed. When this occurs, the verdict should be set aside and a new trial granted.

The purpose of voir dire examination is to safeguard the right to jury trial which "guarantees to the criminal accused a fair trial by a panel of impartial, 'indifferent' jurors". Irvine v. Dowd, 366 U.S. 717, 722 (1961). It is established that a defendant has the right to examine jurors on the voir dire as to the existence of a disqualifying state of mind. Aldridge v. United States, 283 U.S. 308, 313 (1931). A defendant has the right to probe for the hidden prejudices of jurors. Lurding v. United States, 179 F.2d 419, 421 (6th Cir. 1950). A defendant is also entitled to be tried by an unprejudiced and legally qualified jury and the range of inquiry in the endeavor to empanel such a jury should be liberal. United States v. Napoleone, 349 F.2d 350, 353 (3d Cir. 1965).

Adequate questioning must be conducted to provide under the facts in the particular case some basis for a reasonably knowledgeable exercise of the right of challenge, whether for cause or peremptory. United States v. Jackson, 542 F.2d 403 (7th Cir. 1976). Indeed, "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Dennis v. united States, 339 U.S. 162, 171-172 (1950). As the Court held in united States v. Blount, 479 F.2d 650, 651 (6th Cir. 1973):

> The primary purpose of the voir dire of jurors is to make possible the empanelling of an impartial jury through questions that permit the intelligent exercise af challenges by counsel. [citations omitted] It follows, then, that a requested question should be asked if an anticipated response would afford the basis for a challenge for cause.

Here, too, the trial court erred in failing to grant the defendant's Motion to Strike the jury panel exposed to the contamination of juror Garson's dialogue with the State Attorney.

A jury panel will be disqualified if it is inadvertantly exposed to the fact that the defendant was previously convicted in a related case. United States v. McIver, 688 F.2d 726 (Fla. 5th Cir. 1982). While the exposure of the jury to such evidence here was probably unavoidable, the kind of prejudice that ensued from juror Garson's exposure of the issue of the sufficiency of a life sentence recommendation necessarily contaminated the jury in much the same way. No jury could reasonably be expected, as the trial court hoped, to ignore the issue and set aside their

apprehensions that the defendant might be eligible for early release if they did not recommend his death. The spectre of such bias pervading the jury's deliberations here is constitutionally unacceptable, The defendant should be granted a new sentencing hearing.

111.

TEE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE INTO EVIDENCE THE DEFENDANT'S PRIOR FALSE TESTIMONY GIVEN AT THE TRIAL OF CO-DEFENDANT SURACE WHERE SUCH TESTIMONY WAS NOT OFFERED FOR ITS TRUTH, BUT ONLY TO INFLAME THE JURY WITH EVIDENCE OF THE DEFENDANT'S PERJURY AND OBSTRUCTION OF JUSTICE BY HIS SUCCESSFUL EFFORT TO HELP HIS EQUALLY CULPABLE CO-CONSPIRATOR AVOID JUSTICE, THEREBY DENYING THE DEFENDANT DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The State knowingly offered the defendant's prior false testimony. It did so solely to enrage this jury by demonstrating that the defendant's perjury had allowed co-defendant Surace to avoid justice and, in fact, avoid a first degree murder conviction. This jury, therefore, was invited to recommend the execution of the defendant not only because of the murder he committed, but also because he had helped his equally guilty co-defendant avoid the death penalty and even a mandatory minimum sentence. This unconscionable tactic by the State was impermissible. The jury's seven to five death penalty recommendation is infected by an influence so insidious and inflammatory that a new sentencing hearing must be ordered.

This jury was called upon to decide whether or not Thompson should receive the death penalty or life inprisonment far his involvement in the murder of Sally Ivester. He was not charged with or convicted of perjury, obstruction of justice, as an accessory after the fact, or with being a miserable human being.

Nevertheless, the jury was improperly exposed to just such unfairly inflammatory evidence. In effect, the defendant was made to shoulder the blame for the fact that co-defendant Surace avoided a conviction for first degree murder and a suitable penalty. This jury was asked impermissibly to recommend Thompson's execution, not only for the offense of which he was charged and convicted, but also to vindicate Surace's avoidance of justice.

It is firmly established that the only permissible aggravating factors which a jury can consider are those specifically enumerated by Statute. Florida Statute §921.141; Elledge v. State, 346 So.2d 998 (Fla. 1977). The evidence presented clearly related to impermissible non-statutory aggravating circumstances.

By the same token, there exists the cardinal rule that the State shall not obtain criminal convictions (or, ipso facto, the death penalty) by the use of perjured testimony. The use of material false evidence by the State in a criminal prosecution violates due process, Giglio v. The united States, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 108 (1972); Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217, 1221 (1959); Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 341-42, 70 L.Ed. 791, 794 (1935).

Here, it is clear that the State at all times believed and knew that the defendant and Surace shared similar responsibility for the death of Ivester. "[Prosecuter] Yoss made it real plain he wanted both Rocky [Surace] and Bill [Thompson] to get the

electric chair. . .". [R. 509] Thompson's initial hand-written confession [R. 257-258; State's Exhibit 33], his subsequent stenographically recorded statement [R. 261-275; State's Exhibit 34], and the testimony of eyewitness Garrita [R. 357-463; State's Exhibit 42] were all consistent and described the active participation of both Surace and Thompson suggesting, in fact, that Surace may have exerted same psychological dominance over Thompson. Nevertheless, the trial court permitted the State to introduce the defendant's wholly inconsistent testimony at the Surace trial in which he exonerated Surace and took the entire blame. [TR. 1996, et. seq.] The State consistently took the position that Thampson lied in the hope of obtaining some future help from Surace.

To permit the State to benefit from the fruits of its own deceptions violates the due process clause of the Fourteenth Amendment and Article I, Section 9, of the Florida Constitution. See, Doyle v. Ohio, 426 U.S. 610 (1976), United States v. Hale, 422 U.S. 171, 182 (White, J., concurring); State v. Burwick, 442 So.2d 944 (Fla. Dec. 9, 1983).

Accordingly, whether the defendant's trial testimony was offered to this jury by the State as the truth or whether it was offered to demonstrate Thompson's responsibility for Surace avoiding the death penalty, an exquisite unfairness occurred. The jury was either deliberately misled by the State as to the truth or it was invited to recommend the defendant's execution for improper, non-statutory, reasons. In either case, the defendant's sentencing proceeding was fundamentally defective and

its reliability tainted by the misconduct of the State. A new hearing must be granted.

IV.

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE INTO EVIDENCE EXCRUCIATINGLY GORY PHOTOGRAPHS OF THE DECEASED TAKEN AT THE MEDICAL EXAMINER'S OFFICE DEPICTING HER POST-TRAUMA DISSECTION TKEREBY DENYING TBE DEFENDANT A FAIR AND IMPARTIAL TRIAL GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES COMSTITUTION

Over the defendant's vigorous objections, gory and gruesome photographs of the deceased were admitted into evidence despite the fact there existed no legitimate issue as to the victim's death, her identity, or the manner of death. Photographs taken at the medical examiner's office, after the commission of the crime and at a location other than that of the crime, were offered unnecessarily and gratuitously, solely to inflame the jury. These photographs, depicting the decedent's disemboweled stomach containing the tampon she was forced to eat and her dissected vagina, clarified nothing and intended only to graphically demonstrate the victim's already acknowledged violent death.

In Reddish v. State, 167 So.2d 858 (Fla. 19641, this Court reversed a first-degree murder conviction because the State placed in evidence photographs of two deceased victims taken at a morgue many miles from the scene of the homicides. As stated in Reddish, **supra**:

> The cause of death had been clearly established and there was no fact or circumstance in issue which necessitated or jusitified the introduction of the photographs of the dead bodies. At 863.

This Court went on to hold:

> We have consistently held that photographs which have potentials for unduly influencing a jury should be admitted only if they have some relevance to the facts in issue. Ordinarily, photographs normally classed as gruesome should not be admitted if they were made after the bodies have been removed from the scene unless they have some particular relevance . . .While the photographs (in the instant case) were not unusually gruesome, when measured by standards of others which have been allowed into evidence, we nevertheless fail to find any justifiable relevancy for their admissibility in the instant case. Reddish, at 863. (Emphasis added)

Similarly, in Dyken v. State, 89 So.2d 867 (Fla. 1956) this Court reversed the first-degree murder conviction of the defendant where the lower court admitted a photograph of the deceased lying on a mortuary slab. This Court held:

> The location of the wound was freely conceded and abundantly proved by other evidence. The photograph did not include any part of the locus of the crime and was too far in time and space therefrom to have any independent probative value. At 866-687.

A similar first-degree murder conviction was reversed by the Court in Beagles v. State, 273 So.2d 796 (Fla. 1st DCA 1973). Citing both Reddish and Dyken, the Court held:

> In this case, as appellant had admitted the victim's death, how her death occurred, her identity and that a bullet went into her brain and did not come out, there was no fact or circumstance in issue which necessitated or jusitified the admission of the numerous gruesome photographs in question. Reversible error was committed by admitting them. At 799. (Emphasis added)

The Court further stated:

> Photographs should be received in evidence with great caution and photographs which show nothing more than a gory or gruesome portrayal should not be admitted. At 798.

Here, the situation is worse than those described in Reddish, Dyken and Beagles. The introduction of photographs of the victim's various excoriated internal body organs cannot be justified. This Court tacitly reached the same conclusion in Thompson's previous appeal when, faced with a challenge to other of the photographs introduced, this Court remarked:

> The trial court was careful to admit only those photographs depicting the victim at the crime scene; photos of the victim taken at the medical examiner's office were excluded,

Thompson v. State, 389 So.2d 197 (Fla. 1980), at p.200. Only four photographs were introduced by the State at the first hearing. [TR. 15671

Here, the jury was exposed over and over again to the uncontroverted facts that the victim had been made to eat her tampon and that she suffered the rupture of her vagina by the insertion of blunt objects. [TR. 1770, 20871 The facts involved were utterly uncontested. The offer of the photographs was entirely gratuitous.

In the case at bar, the State offered photographs of the victim's nude body taken at the scene of the crime. [State's Exhibits 1, 2; R. 233-2341 It offered photographs of the crime scene, the objects used to assault the victim, and the gore which

resulted from her injuries. [State's Exhibits 6, 8, 11, 12, 14, 17; R. 238, 240, 243, 246, 249] The State also put into evidence numerous photographs of the deceased's dead body taken on a slab at the medical examiner's office. [State's Exhibit 1, 3, 4, 5, 13, 16, 37, 38; R. 233, 235-237, 245, 248, 464, 465] In addition, and at issue here, is the fact that the State was permitted to introduce into evidence additional photographs of the victim's eviscerated vagina [State's Exhibit 7; R. 2391 and stomach [State's Exhibit 39; R. 4661. The defense vigorously objected. [TR. 1560-1564]

After hearing argument pre-trial, the trial court initially reserved ruling an the introduction of these two photographs. [TR. 1586-15891 The court's subsequent decision to *expose* the jury to such overly prejudicial photographs constituted error. [TR. 20871.

V.

THE TRIAL COURT ERRED IN UNFAIRLY LIMITING THE TESTIMONY OF DEFENSE WITNESSES, PROHIBITING SUCH WITNESSES FROM OFFERING OPINION AS THE APPROPRIATE PENALTY, AND IN FAILING TO CONSIDER SUCH PROFFERED OPINIONS IN MITIGATION, THEREBY IMPROPERLY RESTRICTING THE DEFENDANT'S ABILITY TO PRESENT A DEFENSE AND EVIDENCE IN MITIGATION RESULTING IN A DENIAL OF DUE PROCESS AND A FAIR TRIAL AND THE IMPOSITION OF A CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH" EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Through each of the defendant's many defense witnesses, he sought to offer their conviction that William Thompson should not be sentenced to death. [TR. 2153, **2161, 2168,** 2192, 2211, 2225, **2434, 2616, 26591** The trial court consistently excluded any testimony from the **defense** witnesses that reflected their opinion that the death penalty was inappropriate for Thomspon. **It also** appears that the trial court refused to consider such testimony in mitigation. Accordingly, the trial court erred. It unfairly restricted the defendant's presentation of evidence in defense and mitigation and violated the mandates of Lockett v. Ohio, **438** U.S. **586, 98** S.Ct. **2954,** 57 **L.Ed.2d 973** (1978) and Eddings v. Oklahoma, **455** U.S. 104, 102 S.Ct. **869,** 71 **L.Ed.2d 1 (1982). The** defendant is entitled to a new sentencing hearing.

Florida Statute §921.141(1) provides, in pertinent part:

> In the [sentencing] proceeding, evidence may be presented **as** to any matter that the Court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). **Any**

> such evidence which the Court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, . . .

Juries, in light of Hitchcock and its progeny, are now directed by standard instruction to consider "any other aspect of the defendant's character or record, and any other circumstances of the offense." [Florida Standard Jury Instructions in Criminal Cases, p.81]

The trial court ostensibly excluded the defendant's proffered testimony as "opinion" testimony. Florida Statute S90.701 provides, however, for the admission of opinion testimony of lay witnesses:

> If a witnesses is not testifying as an expert, his testimony about what he perceived may be in the form of inference and opinion when:
>
> (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions and his use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
>
> (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

Here, the witnesses' belief that execution was inappropriate for Thompson in light of the circumstances of the case and his character, was probably admissible under either paragraph and certainly under paragraph (2).

The trial court was quite clearly reluctant to allow the defense to present opinion testimony on the "ultimate issue."

However, the Court's ruling overlooked the clear expression of Florida Evidence Code 590,703 (1979):

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.

This rule, promulgated in recognition of a growing number of cases excluding such testimony, embodies the current recognition of the old rule as unduly restrictive, difficult of application, and generally serving only to deprive the trier of fact of useful information. 7 Wigmore, Evidence §§1920, 1921 (3d Ed, 1940); McCormick, Evidence §12 (2d Ed. 1972). This Court, however, recognized the admissibility of such opinion evidence long before promulgation of the code. North v. State, 65 So.2d 77 (Fla. 1952), aff'd. per curiam, 346 U.S. 932, 74 S.Ct. 376, 98 L.Ed. 423 (1954).

It is of course, reversible error, in a sentencing proceeding in a capital murder prosecution to preclude defense counsel from presenting non-statutory mitigating circumstances. Hall v. State, 541 So.2d 1125 (Fla. 1989). Following the United States Supreme Court's Hitchcock decision, the improper restriction of the consideration of non-statutory mitigating circumstances by either the jury or the court entitles a defendant to a new sentencing hearing before a new jury. combs v. State, 525 So.2d 853 (Fla. 1988).

It may be, as the State suggested below, that the only time this Court has come close to reaching the precise issue presented

here was in Jackson v. State, 498 So.2d 406 (Fla. 1986). Even Jackson, however, is distinguishable. There, the defense sought to have the murder victim's eldest brother, a reverend, testify before the jury that the victim's family did not wish the appellant to receive the death penalty. First, although the jury was not allowed to hear the evidence, the trial court gave it "consideration and great weight in reaching its decision". Here, there is no indication that the trial court considered at all the sentiments of the numerous defense witnesses who sought to testify to the impropriety of imposing the death sentence on Thompson. Second, the trial court in Jackson determined that the reverend's attitude as to the sentence did not reflect the feelings of the entire family but reflected his consciously held religious beliefs.

This Court determined that its review of the record revealed that the judge, "who is the ultimate sentencing authority," considered the reverend's testimony, thereby meeting the requirements of Eddings and Lockett. Id. at 413.

Closer to the point is the en banc decision of the California Supreme Court in People v. Heishman, 753 P.2d 629 (Cal. 1988). Heishman sought to elicit from his former wife whether she thought the defendant should receive the death penalty. The Court held that the trial court erred in sustaining the State's objection and excluding such testimony:

> The question should have been allowed, since the answer would have exemplified the feelings held toward defendant by a person with whom he had had a significant relationship. (Id. at 6611

The Court reasoned, however, that the error was harmless since another witness with whom the defendant had also been romantically involved was allowed to testify that the defendant should not receive the death penalty and because the former wife's testimony was so supportive of the defendant that it was unlikely any juror could have infered that she would want to see him put to death. Here, the witnesses the defendant tried to elicit similar opinions from were not, with perhaps one exception, involved with the defendant romantically. They were individuals from various walks of life who had been acquainted with the defendant at various times from childhood to post-conviction, including childhood acquaintances to prior legal counsel, who believed for various reasons that the imposition of the death penalty regarding Thompson was inappropriate.

The Supreme Court of the United States has described the right to present a defense as an essential ingredient of due process of law. In Re Oliver, 333 U.S. 257 (1948). In Alexander v. State, 288 So.2d 538, 539 (Fla. 3d DCA 1974), the court expressed the rule:

> The right of a defendant to cross-examine witnesses and his right to present evidence in opposition to or in explanation of adverse evidence are essential to a fair hearing and due process of law.

The court has long recognized that a defendant charged with a serious crime should be able to produce evidence material to his case. Wilson v. State, 220 So.2d 426 (Fla. 3d DCA 1969). The crucial importance of the right to defend oneself is

indisputable, As the court held in Horton v. State, 170 So.2d 470, 474 (Fla. 1st DCA 1964):

> In our jurisprudence there are no rights more essential to a fair hearing or due process of law than the right to cross-examine witnesses and the right to present evidence in opposition to or in explanation of adverse evidence.

Indeed, the courts have consistently condemned any restriction of the defendant's right to present evidence relative to his or her defense, Jones v. State, 289 So.2d 725 (Fla. 1974) (psychiatric testimony); Norman v. State, 156 So.2d 186 (Fla. 3d DCA 1963) (character evidence).

Whether or not William Thompson should be sentenced to death was the only issue below. The fact that various people who had had contact with him, and who had come to know him in various contexts, believed that he should not be sentenced to death was clearly relevant. There exists no prohibition against the introduction of such relevant opinion testimony and, in fact, the Florida Evidence Code expressly endorses it. Accordingly, it constituted an abuse of discretion for the trial court to limit the defendant's presentation of evidence in defense and in mitigation. The trial court compounded its error by failing to consider, at all, such evidence thereby violating the mandate of Lockett and its progeny. The defendant's death sentence cannot be sustained.

VI.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A DISPROPORTIONAL, CRUEL AND UNUSUAL, PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A.

The Trial Court Erred in Failing to Determine the Existence of Statutory Mitigating Circumstances "Age" and "No Significant History of Criminal Activity" Where Such Factual Determinations had Already been Found in the Defendant's Favor, Such Findings Constituted the Law of the Case and were Established by Collateral Estoppel and Res Judicata

This record demonstrates that the first judge to sentence the defendant, Honorable N. Joseph Durant, Jr., determined that Thompson's youth (twenty-four years old) and the fact Thompson had no significant history of prior criminal activity were applicable statutory mitigating circumstances. [TR. 24581 After this Court reversed the defendant's conviction, Thompson v. State, 351 So.2d 701 (Fla. 1977), the defendant entered new guilty pleas and was sentenced again. At the defendant's second sentencing before the Honorable John A. Tanksley, "the trial court found as mitigating circumstances that appellant had no significant history of prior criminal activities and that he was twenty-six years old at the time of sentencing." Thompson v. State, 389 So.2d 197, 200 (Fla. 1980). There is no indication in

this record that these findings were ever challenged by the State an appeal. The fact that the defendant subsequently won a new sentencing hearing due to a Hitchcock violation, i.e., a failure to consider non-statutory mitigating factors, should not operate to deprive the defendant of statutory mitigating circumstances previously found to exist. Accordingly, the trial court's order, determining that neither of these statutory mitigating circumstances exist, is erroneous and cannot support the defendant's death penalty. [R. 764-765, 7681

The constitutional guarantee against double jeopardy embodies the rule of law known as collateral estoppel, Ashe v, Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), which is defined as meaning simply "that when an issue of ultimate fact has once been determined by a valid final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'' Id, at 1194; McDonald v. State, 249 So.2d 451 (Fla. 4th DCA 1971). The similar concept of res judicata bars a second action between the same parties on the same issue. Mercer v. Honda Motor Co., Ltd., 551 F.Supp. 233 (D.C. Fla. 1982). The purpose of the doctrine of res judicata is to prevent the relitigation of matters. Hinchee v. Fisher, 93 So.2d 351 (Fla. 1957).

By the same token, the original findings of the two prior trial courts as reflected by this Court's opinion, 389 So.2d at 200 and at TR. 2458, should be deemed the "law of the case." Cf., LeCroy v. State, 533 So.2d 750 (Fla. 1988). Points adjudicated by an appellate court on appeal become the "law of

the case" and are no longer open for discussion or Consideration. Haddock v. State, 192 So. 802, 141 Fla. 132 (Fla. 1940).

It was error for the trial court to revisit and reverse findings of fact and law already decided in the defendant's favor, especially where such findings were unrelated to the reasons for reversal and remand. The defendant should be credited with the mitigating circumstances, "no significant history of criminal activity" and "youth." Accordingly, this cause should at least be remanded for resentencing.

B.

The Trial Court Erred in Finding that the Homicide was Committed for Financial Gain and Committed in a Cold, Calculated and Premeditated Manner Without any Pretense of Moral or Legal Justification

For all the same reasons described in Issue VI (A) - collateral estoppel, res judicata, and law of the case, the trial court erroneously found the "cold, calculated and premeditated," and "financial gain" aggravating circumstances to exist. By this Court's previous opinion, 389 So.2d 197, it acknowledged the findings of the original trial court relative to aggravating circumstances and the determination that only "heinous, atrocious and cruel" and "felony committed while the defendant was engaged in kidnapping and involuntary sexual battery" applied. [Id. at 2001 The defendant's Hitchcock reversal should not operate to allow the trial court to consider additional aggravating circumstances which were already considered and determined

against the State in the defendant's favor. Accordingly, the trial court's findings relative to the applicability of aggravating circumstances "cold, calculated and premeditated" and "financial gain" must be reversed.

In addition, "cold, calculated and premeditated" as an aggravating circumstance is unjustified on the merits of this case. A review of the trial court's order reflects that the reasons given to justify this aggravating circumstance were virtually the same as those used to support heinous, atrocious, and cruel:

> "* * * This torture and beating occurred over several hours." * * * "During the several hours of torture, Sally Ivester was forced to lick beer up off the floor and beaten by the defendant as she did so. She was repeatedly beaten with the chair leg by the defendant for getting blood on his pants, shirt, and the floor. Although the evidence established that Rocco Surace initiated the beating, the defendant joined in with no prodding." [R. 762]

The trial court's conclusion that, "this beating and torture was so severe and continuous that the defendant must be held to have planned, calculated and premeditated the victim's murder, is both illogical and unsupported by this record. In fact, the principle defect in the trial court's conclusion is the irrefutable fact that nothing in this record supports a determination, particularly beyond a reasonable doubt, that either the defendant or Surace intended the victim to die. Indeed, the defendant testified to the contrary. [TR. 3254] Moreover, the circumstantial evidence clearly belied the claim of

premeditated murder. The battery of the victim clearly ended some time substantially before her death. Garritz was directed to attend to her wounds. [TR. 1790, 1807] The defendant monitored the victim's condition and pulse after she lost consciousness, [TR. 1950] When the victim's conditioned worsened, the defendant called 911 to summon the rescue squad and paramedics. [TR. 1555, 19521

Thus, while the defendant's conviction for first degree murder may be sustainable under a felony murder theory, there is little question that a premeditated homicide was never proved and certainly insufficient evidence was offered to support the heightened premeditation required to support the aggravating circumstance CCP. This factor generally is reserved for cases showing "a careful plan or prearranged design" to kill. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987).

Many times this Court has said that §921.141(5)(i) of the Florida Statutes (1987), requires proof beyond a reasonable doubt of "heightened premeditation." Heightened premeditation can be demonstrated by the manner of the killing, but the evidence must prove beyond a reasonable doubt that the defendant planned or prearranged to commit murder before the crime began. Hamblen v. State, 521 So.2d 800, 805 (Fla. 1988); Rogers v. State, 511 So.2d 526, 533 (Fla. 1987): Thompson v. State, 15 F.L.W. s347 (Fla. June 14, 1990).

The justification for executing a defendant depends on the degree of his culpability - not only what his actions were, but what his intentions and expectations were. American criminal law

has long considered a defendant's intention - and therefore his moral guilt - to be critical to "the degree of [his] criminal culpability." Mullaney v. Wilbur, 421 U.S. 684, 698, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). The United States Supreme Court has found the death penalty to be unconstitutionally excessive in the absence of intentional wrongdoing. Enmund v. Florida, 458 U.S. 782, 800, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

This Court's recent decision in Rivera v. State, 15 F.L.W. S235 (Fla. April 19, 1990) is illustrative of the principle involved here. In Rivera, involving the asphyxiation murder of an eleven year old girl, the evidence established that the defendant had admitted fantasizing raping young girls and prowelled neighborhoods in search of a victim. As this Court noted, however, "there was no evidence of any prior: intent to kill." As in the case at bar:

> Indeed, the only evidence on that question was to the contrary. For instance, witnesses testified that Rivera stated that he "didn't mean to kill the Stacy girl," he "just wanted to look at her and play with her"; he "had a notion to go out and expose [himself]"; and he choked her to death only after things got out of hand. The murder resulted only after the crime had escalated beyond its intended purpose. The record does not support the finding of the heightened premeditation necessary to prove this aggravating factor beyond a reasonable doubt. Id. at S236-237.

The same conclusion is compelled here.

C.

The Trial Court Erred in Failing to Acknowledge the Existence and Applicability of Numerous Additional Statutory and Non-Statutory Mitigating Circumstances

Thompson's advisory sentencing verdict was seven to five. [R 7581 By a mere single vote, Thompson failed to avoid the death penalty despite the jury's exposure to the improper and unfairly inflammatory evidence complained of elsewhere in this brief, the trial court's failure to afford the defendant the benefit of statutory mitigating circumstances already found in the defendant's favor (see subsection A, supra.), and the trial court's erroneous application of various statutory aggravating circumstances (see subsection B, supra.). Furthermore, the trial court rejected or failed to consider various other mitigating Circumstances, both statutory and non-statutory, which are supported by this record:

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. §921.141(6)(b), Florida Statutes. A series of expert psychiatric witnesses described the extraordinary nature and degree of Thompson's mental and emotional deficiencies. Doctor Joyce Carbonell described the defendant as mildly retarded and suffering from impoverished human relations. She related, among other things, Thompson's history of physical and emotional abuse. [S.R. 17,18,40,43] she described Thompson as "definitely

brain-damaged" and suffering from organic brain damage. [S.R. 28-30,40-42] Drugs and alcohol enhanced the negative effects of his brain damage. [S.R. 46]

Dr. Dorita Marina described Thompson's abusive childhood where both of his parents beat him severely. [TR 24991 The defendant started drinking alcohol at age fourteen and by eighteen he was drinking very heavily, [TR 25021 He used a lot of marijuana and had used hash and quaaludes. Thompson reported episodes of blacking out and constant headaches. [TR 2503-25041 Marina detected signs of brain damage. [TR 2504, 2510, 2513-2514, 2523] Thompson's answers on the MMPI test were "so wild, so bizarre, crazy" that the results were invalid. [TR 25181 Marina found that Thompson did not know what he was sexually, "His mind has not developed to the point where he understands his own maleness, ..." [TR 2520-25221 His thinking and reality testing were extremely poor. He was unable to control aggressive impulses and had nearly killed himself by stabbing himself while in prison. [TR 2524] He was emotionally impoverished and had not developed his sexual identity. [TR 25241 Marina concluded that Thompson was not in control at the time of the incident with which he was charged. She described Thompson's touch with reality as so loose and fragile that she could not tell whether he was even aware of what he was doing or what was happening during the assault. [TR 2526] Dr. Marina opined that Thompson probably did not know the difference between right and wrong, probably did not know what he had done, and was probably insane at the time of the offense. [TR 2535]

Psychiatrist Arthur Stillman found Thompson to be suffering from sensorial defects affecting orientation, memory, intellect, judgment, impulsivity, frustration tolerance, and the ability to control himself. [TR 25591 He considered the defendant retarded. [TR 25921 Stillman related Thompson's longtime abuse of alcohol and drugs and his state of extreme toxicity at the time of the crime. [TR 25651 Stillman believed Thompson to be "a brain-damaged person from the time he was a child, maybe at the time of birth. [TR 2570] He believed at the time of the offense, that Thompson was in the midst of a toxic psychosis, toxic insanity. [TR 25721 He diagnosed Thompson as having organic brain syndrome, i.e., brain damage, that he suffered from a personality disturbance and a stress disorder, coupled with a homosexual personality problem. [TR 2577-25791 Stillman concluded that during the offense, Thompson was in the midst of a toxic psychosis and was psychotic and legally insane. [TR 25791

Dr. Robert T. Shebert, a neurologist, concluded that Thompson suffered from chronic organic brain disease. [TR 26301 Thompson's mental deficiencies were corroborated by the testimony of his previous lawyers. Lewis Jeppeway, Jr. and Judge Arthur Rothenberg described Thompson as incapable of understanding his case due to his lack of intelligence and as incapable of comprehending the gravity of his offense. [TR 2618,2655] Thompson's elementary school teachers and his principal established Thompson's profound intellectual deficiencies. He had poor reading skills, poor general skills, and was inattentive. [TR 21771 His grades through elementary school

were generally D or failure. [TR 21771 Thompson had speech problems. [TR 21791 He was in a special class for slow readers. [TR 21801 By the second year of eighth grade, Thompson received grades of "F" in everything. [TR 21821 At the age of 18, while still in the eighth grade, Thompson dropped out of school. [TR 21831

Donna Adams, the defendant's ex-wife, explained that their marriage failed, in part, because of his alcoholism. [TR 23371 Adams, who saw Thompson on the day of the crime, saw Thompson staggering and holding on to the banister of the stairs while he walked. [TR 23401 His voice was slurred, he failed to form words completely, and he rambled. He was drunk. [TR 23391

while Drs. Mutter, Jaslow, Miller and Haber testified for the State against the defendant's claim of major mental illness and emotional disturbance, even they, for the most part, acknowledged the existence of at least some degree of mental illness ("inadequate personality disorder"; "insight was nil"; "there was tremendous anger, rage, aggression, and diminshed control with the involvement of alcohol and . . . drugs"; anti-social personality") [TR 2762-2763; 2830; 29821

2. The defendant acted under extreme duress or under the substantial domination of another person. §921.141(6)(e), Florida Statutes. Every lay witness having had any contact with the defendant at any time during his life described him as a "follower". [TR 2151-2152, 2160, 2168, 2186, 2335, 2387, 2400]

Garritz' affidavit testimony, albeit challenged by the State, described Rocky Surace as "an evil man" who "knew how to

manipulate people and used them to his own advantage." [TR 24731 She described Thompson as Surace' opposite, "...a big, easygoing child who would do just about anything to please...he just couldn't think quick enough to keep up and he never seemed to have an idea of his own." [TR 2474] He was gullible and easily manipulated. [TR 2474] Garritz described Thompson as "completely under Rocky's spell.. .he was like Rocky's dog." [TR 2475] "Rocky would give an order and Bill would do it, no questions asked." [TR 24751

In addition, Garritz' recorded trial testimony established her agreement with the characterization of Surace as "the leader of the gang." [TR 18171

Dr. Dorita Marina described Thompson as "compliant." He wanted to please. [TR 25081 Pschiatrist Stillman found Thompson to be easily led and threatened by his co-defendant. [TR 25641 Thompson was dominated by Surace. [TR 26021

The defendant's prior defense counsel, Von Zamft, believed that Rocco Surace was "a scary and very frightening man" under whose influence Thompson acted. [TR 32241 Thompson himself testified that he was afraid of Surace. He did what he said to do to avoid being beaten again. He had had enough beatings in his life. He just wanted to be like Surace. [TR 3253-32541

Although state expert Jaslow recounted that the defendant had not complained to him that he was forced to act [TR 28231, and Mutter and Haber did not believe that Thompson acted under the substantial domination of Surace [TR 2791,29841, even prosecution witness Dr. Lloyd Miller admitted that the issue was "arguable." [TR 2908-2909]

3. The capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. §921.141(6)(f), Florida Statutes. For all the same reasons advanced in paragraph (1) **supra**, this mitigating circumstance should have applied as well. The evidence overwhelmingly established the defendant's low IQ, mental disfunction, and drug and alcohol use. The trial court's reliance upon the defendant's post-arrest statement, "I know I have done wrong and I am sorry that I did it, That is why I am pleading guilty. I throw myself to the mercy of the court", to refute the defendant's claim of substantial impairment, is misplaced, Indeed, the defendant's statement to the police is entirely consistent with his pathological need to please and to say and do what is expected of him, especially by persons in authority, such as the police. Throughout this record, Thompson is consistently described as "needy fox attention", "compliant", and compulsive in his desire to please. [TR 2403,25081 What Thompson's elementary school principal, Bill Weaver, most recalled about Thompsonwas his need "to please everybody." [TR 2186]

4. Any other aspects of the defendant's character or record, and any other circumstances of the offense.

a. The defendant's history of emotional and physical abuse.

The defendant's childhood and adolescence were characterized by an unfathomable degree of emotional and physical violence and an absence of love. [S.R. 17] Ruth Williams, Thompson's first cousin, testified about the "poor", "filth messy", environment

that Thompson grew up in. [TR 22071 Williams described how little Bill Thompson was "reprimanded severely by his father. The punishment was way overboard of what had happened." [TR 2209] Williams described Thompson's mother as not affectionate. "When she talked to her kids, she talked down." [TR 22091 Bill's family was a "sad situation." [TR 2210]

Jean Marie Jackman, another of Thompson's first cousins and a police department employee, remembered the very dirty house in which Thompson grew up. She saw feces on the floor and smelled urine. "The kids were not clean. No one loved or hugged or anything like that. There was no--it wasn't the same, like with my family." [TR 22211 The children always seemed to be afraid. [TR 22221 Jackman was afraid of Thompson's parents, as well. [TR 22241 Jackman saw Thompson being "manhandled". In correspondence with Thompson, Thompson expressed that he had been beaten. [TR 22271 Only one person, one of the defendant's brothers, said his parents afforded their children love and affection and denied that their home was filthy with feces and urine. [TR 23901

By affidavit, Rebecca Black established that the Thompsons "had a very stormy relationship". Black used to hear a lot of screaming and yelling coming from their house. [TR 2478] She was concerned for the children because she would hear Thompson and his brothers and sister pleading with their parents not to hit them again. She heard things being thrown and lots of screaming and crying. Thompson seemed to be especially mistreated. He would get blamed for things he had not done. She

described Thompson as a nice, likeable boy who did not receive love or encouragement from his parents. "He was very mistreated. The family was not a very normal family. I never saw the parents displaying any love or affection to Bill." [TR 24791

Thompson, himself, prior to sentencing, described to the court how at the age of three, his mother broke his shoulder by throwing him against the wall. He suffered more than "usual beatings" and more beatings than the rest of his brothers and sisters. He described how he grew up with facial tics, including head jerking, His father took him to the basement and strapped a pointed wooden device to his head so that it would drive the points of a stick into his shoulder when he jerked his head - testimony corroborated by Dr. Carbonell. [TR 3233; S.R. 17] Thompson's parents and brothers ridiculed him by calling him "blinky" or "jerky" [TR 32331 When the tics appeased, Thompson's father would backhand him across the room or throw things, including glassware, at his head. If the glasses broke, he would be beaten. [TR 32341 Thompson described how he was never shown affection, only beatings, yelling, and screaming. [TR 3239-32401 He was tormented by school bullies. [TR 32371 At eighteen, Thompson was run out of his house at gunpoint by his mother.

If there is any truth to the notion that human beings are, at least in part, the products of their environment, there may thereby exist some degree of explanation for the events of March 30, 1976.

b. Thompson's abuse of alcohol and narcotics in the

years preceding the event and at the time of the commission of the crime.

Thompson testified that he drank approximately half a case of beer, took two or three quaaludes, and smoked some "dope" on the day of the crime. [TR 32731 Garritz testified that Thompson had been drinking. [TR 17731 Consistent with the defendant's testimony, there was beer at the scene, [TR 17741 Donna Adams, who observed the defendant on the day of the crime, testified that Thompson's voice was slurred, he wasn't forming words completely, he rambled. He was staggering and holding on to the banisters of the stairs while he walked. He was drunk, [TR 2338-23401 To Dr. Stillman, Thompson related his longtime abuse of alcohol and drugs and the state of extreme toxicity at the time of the crime. [TR 2565] Thompson's ex-wife blamed the breakup of their marriage on his alcoholism. [TR 23371

The fact that the defendant, at the time of the crime charged, was under the influence of alcohol or drugs is a legitimate non-statutory mitigating factor. Waterhouse v. State, 522 So.2d 341 (Fla. 1988). Alcohol or drug use can constitute a valid mitigating circumstance. Huddleston v. State, 475 So.2d 204, 206 (Fla. 1985); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983). In Amazon v. State, 487 So.2d 8 (Fla. 1986), this Court held improper an override where, among other mitigating factors, there was "some inconclusive evidence that [appellant] had taken drugs the night of the murders" along with "stronger" evidence of a drug abuse problem. Id. at 13. Similarly, the defendant's drug problem and claim of intoxication at the time of

the murder in Norris v. State, 429 So.2d 688 (Fla. 1983), resulted in the vacation of his death penalty sentence.

c. Thompson's prior history of non-violent behavior.

Harvey Lescalleet, a former pastor, described Thompson as quiet and non-assertive and as one who did not exhibit any violent or aggressive behavior. [TR 2151-2152,21551 Arlen Rogers described Thompson as non-violent. [TR 21611 Hazel Rogers characterized as a non-aggressive follower. [TR 21681 The defendant's brother, Tim Thompson, described the defendant as non-violent. The defendant's mother denied knowing Thompson to be a violent ox aggressive child. [TR 23951 Only the defendant's ex-wife, who thought enough of him to testify in his behalf, described a single incident where Thompson had shoved her resulting in her fall and an injury to her son. [TR 23451 Thompson's general character and consistent history of non-violent behavior, however, is well-established by this record.

d. Thompson's capacity for love.

Donna Adams, the defendant's ex-wife of six years and the mother of his two children, explained that Thompson was a "very loving, very gentle" husband who "cared." [TR 23311 He was never physically violent or abusive. [TR 23311 The defendant's two children, twelve and fourteen years old at the time of trial, love him. They chose to come to court for him. [TR 2328,23421 In the past, this Court has found that a defendant's qualities as a good father, husband and provider constitute valid mitigating factors. Thompson v. State, 456 So.2d 444, 448 (Fla. 1984); Fead v. State, 512 So.2d 176 (Fla. 1987). Close family ties may

constitute a mitigating circumstance. Cf., Hill v. State, 549 So.2d 179, 183 (Fla. 1989).

e. The disparate sentence of co-defendant Rocco Surace.

For whatever reasons, co-defendant Surace is serving consecutive 99-year prison sentences while Thompson has been sentenced to death. If nothing else, this record establishes that Surace was at least as responsible for Ivester's death as was the defendant. Judge Arthur Rothenberg expressed his belief that the culpability of Surace equaled that of the defendant and that Thompson was the "passive participant by far". Rothenberg proffered that Surace's life sentence was inconsistent with Thompson's death penalty. [TR 2657] He believed it should have been the other way around. [TR 26581 Likewise, Michael Von Zamft proffered that Thompson should not be sentenced to death in light of Surace's life sentence. [TR 32241 N. Joseph Durant, Jr., the presiding judge at the defendant's first sentencing hearing, proffered that had he been presented mitigating circumstances he would have sentenced Thompson to life imprisonment instead of death. [TR 2434-2448,24671 The inconsistent treatment of equally culpable defendant's is a factor this Court should, and must, consider in mitigation. See, Messer v. State, 330 So.2d 137 (Fla. 1976); Slater v. State, 316 So.2d 539 (Fla. 1975).

This elaborate and comprehensive record describes with awesome eloquence the pathology of a convicted killer. An understanding of William Thompson as a life-long victim himself begins to explain the unexplainable. William Thompson is not

merely the atrocious act committed against Sally Ivester on one day in March of 1976. He is the inevitable product of all that has happened to him. The trial court should have considered overwhelming evidence of various substantial mitigating circumstances, Because it did not, the sentence of death imposed against William Thompson should not be permitted to stand.

D.

The Death Penalty in Florida is Unconstitutional on its Face and as Applied to Defendant Thompson

The death penalty constitutes cruel and unusual punishment under any circumstances.

In Florida, the death penalty is arbitrarily applied. Its application is discriminatory on the basis of race, sex, and poverty of the victim as well as the offender.

The statutory aggravating circumstances "cold, calculated and premeditated'' and "heinous, atrocious and cruel" are interpreted in an unconstitutionally overbroad manner. Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

CONCLUSION

It is apparent that the most disturbing crimes provoke the most disturbing prosecutorial conduct and the greatest risk of constitutional violation. It is probably difficult too, for a trial court to remain dispassionate in an emotional trial arena. It is therefore that the unpopular perpetrators of unspeakable acts rely on the objectivity of this Court to adjudicate their legal claims. As this Court recently and boldly proclaimed in Garcia v. State, 15 FLW S445 (Sept. 14, 1990), "We must not allow our revulsion over the series of crimes, nor our interests in practicality, efficiency, expense, convenience, and judicial economy, to outweigh our constitutional obligation, to provide the defendant a fair trial."

Whether or not William Thompson deserves the death penalty, the process which has brought him to the gallows has failed. It is recognition of that failure by this Court which will vindicate not only the constitutional rights of a pathetic murderer, but of the rest of us, as well.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was forwarded to Michael Neimand, Esq., Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 22d day of October, 1990.

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