IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,161

DAVIDSON JOEL JAMES,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. James' motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied relief on all claims. No evidentiary resolution of the facts wae allowed. This appeal follows.

Citations in the brief shall be as follows: the record on appeal concerning the trial shall be referred to as "R. ____" followed by the appropriate page number. The record on appeal from the first Rule 3.850 proceedings shall be referred to as "PC-R1. ____." The record on appeal from the second Rule 3.850 proceedings shall be referred to as "PC-R2. ____." The Appendix from the first Motion to Vacate will be referred to as "App. ____." All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. James has been sentenced to death. The resolution of the issues in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. James accordingly requests that the Court permit oral argument.

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STATEMENT OF THE CASE AND THE FACTS

On October 30 at around 5:00 p.m. Felix Satey was closing up his business, A-1 Decal Printing and Sign Company, when two men entered through a side door (R. 364-365). One of the men, Larry Clark, pointed a gun at Satey and said, "Hold it right there" (R. 367-368, 393). Satey was familiar with Clark, because he had previously been employed at Satey's business (R. 377). The second man, whom Satey knew as Robert, and who had worked at A-1 Decal that same day, pulled down the garage type door to the side entrance (R. 369-370).

Satey said, "You got to be kidding," or, "What's up, man," whereupon Clark shot him once in the top of the head, and once in the right shoulder (R. 367-368, 397). The shot to Satey's head did not penetrate his skull, but went through his scalp (R. 390). The men then escorted Satey to another part of the building.

At trial Satey testified that his wallet and 70 or 80 dollars was taken from his pockets by the man without the gun (R. 370, 373). However, he had previously told Donald Johnson of the Tampa Police Department that his wallet was removed while he was lying on the floor, and he did not know which of the men took his wallet (R. 170). On another occasion Satey told Detective B.D. Fletcher of the Tampa Police Department that the man with the gun – Larry Clark – took the wallet (R. 427).

At some point after the two men entered the building, Satey's wife, Dorothy, called from the residence portion and asked, "What's wrong?" (R. 364, 371). Felix Satey asked the men not to hurt his wife (R. 371). The men moved off in the direction of the residence (R. 372).

When the men moved off, Felix Satey attempted to use a telephone to call the police, but someone snatched it from his hand and pulled the cord out (R. 374). Satey did not know who took the telephone from his hand, but that person then went to the back of the building (R. 375).

Satey crawled into a darkroom (R. 375-376, 975). At trial he testified he then heard one more shot, although he had earlier told Detective Fletcher

that the only two shots he heard were the two fired at him (R. 427-428). Satey then heard Mrs. Satey moaning and groaning (R. 376).

Satey heard some very faint voices, but could not hear what they were saying (R. 403). Larry Clark then came to the door of the darkroom where Satey was hiding and asked "Where is you?" (R. 376-377, 380). Satey did not respond (R. 380). The men departed using the same door through which they had entered (R. 380). Satey called the operator and said he had been shot, and requested the police and an ambulance (R. 380).

During the entire incident at A-1 Decal, Satey only saw one gun, which was in Larry Clark's possession (R. 393). At no time did Satey see the other man with a gun (R. 393-394).

Robert Gibbs had come to the A-1 Decal and Printing Shop on October 29 seeking work, and had filled out an employment application (R. 385, 401). At trial Satey testified he spent about 30 to 45 minutes with Gibbs wn that date (R. 401). However, he had said in deposition that he spent only 20 to 25 minutes with Gibbs (R. 402). Satey acknowledged at trial that he "didn't spend too much time" with the new employee on October 30 (R. 402).

After he was shot, and while he was in the hospital, Satey was shown a photopack by Detective Fletcher (R. 391). Satey did not have his eyeglasses, and so Fletcher held a magnifying glass to the pictures (R. 392-393). At trial Satey testified he selected one picture from the photopack, that of Larry Clark (R. 393, 398). However, in his deposition Satey had said he chose pictures of both Robert (Gibbs) and (Larry) Clark from the photopack (R. 399-400). Satey explained in hi5 trial testimony that he was perhaps confused about the names because he was "extremely under medication at the time" he viewed the photographic array (R. 400). However, in his deposition Satey had claimed that his mind was clear when he viewed the pictures (R. 400-401). At trial Satey identified Davidson Joel James as the man he employed on October 30 and the man who was with Larry Clark (R. 386-387, 396-397).

Detective B.D. Fletcher of the Tampa Police Department testified at trial concerning the photopack he showed to Satey at the hospital on October

31 (R. 410-411). The photopack contained no picture of Davidson Joel James or Robert Gibbe; the only suspect in it waa Larry Clark (R. 412). Satey selected pictures numbered "3" and "5" and said, "This looks like the guy,' or 'This looks like the guys'" (R. 413). Fletcher had no idea who was depicted in photograph "5", but it was not Davidson Joel James (R. 413, 425). Thie picture was a filler pulled at random from boxes of pictures at the police office (R. 413). Fletcher could not recall making any effort to identify the person shown in picture "5" (R. 426).

Fletcher made up two additional photopacks which he showed to Satey (R. 416, 419-420). Satey chose a picture of Larry Clark from the first of these photopacks as the man with the gun and the man who shot him (R. 416). From the second of these photographic arrays, Satey selected a picture of Davidson Joel James as "'the guy that was with the man with the gun'" (R. 419-422).[1] Satey described to Fletcher Robert's role in the events of October 30, 1981 as basically just standing around, "as if a supportive role type thing" (R. 428).

Two people who worked at A-1 Decal on October 30, 1981, Marilyn Reinbolt and Verna Tschappatt, testified that the new employee came into the shop several times during the day for a drink of water, and looked around inside the building (R. 195-196, 238). However, neither witness could positively identify Davidson Joel James as that new employee (R. 205-206, 240-241).

Another State witness who was employed at the printing shop on October 30, Noel Snyder, did identify Davidson Joel James as the person who began work on that date (R. 230-231). However, Snyder acknowledged that the new employee was wearing a welding mask which covered most of his face during part of the time Snyder was with him (R. 235). At trial Snyder said his contact with the new employee lasted for half an hour to an hour (R. 229, 233-234). In a deposition, however, Snyder had said this contact lasted for only about 15 minutes (R. 234).

Marilyn Reinbolt also described how an odd-colored green car containing

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'Picture number "5" from the initial photopack was not contained in either of the two subsequent photopacks shown to Felix Satey (R. 426).

a black man came into the A-1 parking lot, left, and then returned several times on October 30 (R. 200-203). This car was later linked to Larry Clark (R. 212, 253, 255, 259). The State produced several witnesses who testified they saw Larry Clark sitting on the porch of the Silver Dollar Saloon facing the nearby A-1 Decal Printing and Sign Shop on the afternoon of October 30 (R. 247, 276-278, 281).

Three witnesses testified with regard to fingerprints (R. 171-192, 206-219). Although Larry Clark's car and the A-1 Decal and Printing Shop were dusted for prints, no print was identified as belonging to Davidson Joel James (R. 174-192, 211, 212-214).

Doctor Charles Diggs testified concerning results of an autopsy he performed upon Dorothy Satey (R. 294-300). Diggs observed a single entrance gunshot wound over her right eyebrow (R. 297). He found no other wounds, trauma, or bruises (R. 299). There was no stippling or powder burning around the wound, thus indicating "a gunshot wound occurring from a distance" (R. 297). Diggs opined that this gunshot wound was the cause of Dorothy Satey's death (R. 299). This type of wound would generally cause a person to lose consciousness immediately, with death occurring within two hours (R. 299-300).

The prosecution and defense stipulated that Robert Sibert, an expert in firearms identification, would testify that the same gun fired both the bullet removed from Felix Satey's shoulder and the bullet removed from Dorothy Satey's head, and also fired a bullet fragment found in the dining room (R. 434-435). No conclusion could be drawn as to various other bullet fragments that were recovered (R. 435).

Davidson Joel James called five witnesses to establish that he was not at the A-1 Decal Printing and Sign Shop on October 30, 1981, but was instead in Bradenton visiting his mother, and was elsewhere in Tampa on that date (R. 435-467). The State presented no evidence in rebuttal (R. 467).

After deliberating for 50 minutes, the jury returned with the following question: "If we find the defendant guilty of first degree murder, do we recommend the sentence at this time?" (R. 566, 907). The court explained

that the sentencing recommendation would take place in a separate proceeding (R. 566). The jury deliberated for 14 additional minutes, and found Davidson Joel James guilty as charged in all three counts of the indictment (R. 567-568, 908, 909, 910).

At the penalty phase, the State introduced into evidence certified copies of documents showing that Davidson Joel James was convicted in 1971 of aggravated assaulted, resisting arrest with violence, and two robberies (R. 585-586).

The defense presented testimony of three witnesses at the penalty phase (R. 587-597). Frances George lived with Davidson James (R. 587-588). She testified to the financial support Mr. James had provided for her and her two children, who were not fathered by Mr. James (R. 588-589). Me. George testified that Mr. James had a high school education (R. 590). He was gainfully employed during the time Ms. George lived with him (R. 590). Ms. George had never seen Mr. James raise his hand in anger to anyone (R. 590).

Judy Sharrott was the 15 year old daughter of Frances George (R. 591-592). Mr. James had assisted her in her education, as well as financially, and had helped her grow up, to the point where Judy considered Mr. James like a second father (R. 591-593). She had never seen Mr. James raise his hand in anger to anyone (R. 593).

Gretta Bryant Walker was Mr. James' cousin (R. 594). She testified that Mr. James had tried to help his mother following the death of his sister (R. 595). When Mr. James was younger, Ms. Walker arranged special schooling for him, and considered him to be a very bright young man (R. 595-597). In the 33 years Ms. Walker had known Mr. James, she had never seen him act violently toward any person (R. 597).

The defenae also introduced into evidence a judgment and sentence showing that Larry Clark was convicted of first degree murder and sentenced to death (R. 598).

The court instructed the jurors that the aggravating circumstancee they could consider were any of the following which were estabiiehed by the

evidence (R. 624): (1) The defendant was previously convicted of a felony involving the use or threat of violence to the person. (2) The crime for which the defendant was to be sentenced was committed for the purpoee of avoiding or preventing a lawful arreet or in affecting an escape from custody. (3) The crime was committed for financial gain. (4) The crime was especially wicked, evil, atrocious or cruel. (5) The crime was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.

During his remarks to the jury in the penalty phase, the prosecutor told the jurors it would take seven of them to make a decision on the penalty recommendation (R. 600).

Although the court told the jurore they could return an advisory sentence of life in prison by a vote of six or more, the written verdict form he submitted to them indicated that a majority was required (R. 627, 923).

After deliberating for an hour and three minutes, the jury returned a recommendation that the court impose the death penalty upon Mr. James by a seven to five vote (R. 921).

Before the court sentenced Mr. Jamee on July 23, defense counsel advised the court of a lie detector test Mr. James took on January 6, 1982 (R. 732-733). Although he was untruthful in some of his answers regarding the Sateys, the results showed that Mr. James answered truthfully when he said he did not ehoot anyone on or about October 30, 1981, did not take any money from the Sateys on that date, and did not make any personal gain as a result of the robbery of the Sateys on or about October 30, 1981 (R. 732-733).

Counsel also called the court's attention to testimony which a Mr. Coleman gave at Larry Clark's trial (R. 730). Coleman testified that Larry Clark told him he (Clark) shot Felix Satey because he thought he was going €or a gun (R. 730).

The court adjudicated Davidson Joel James guilty of all three offenses charged in the indictment and sentenced him to consecutive terms of life in prison €or the robbery and attempted murder of Felix Satey, and imposed the

death penalty upon him for the murder of Dorothy Satey (R. 737, 936-941).

The court filed hie written sentencing order sentencing Mr. James to death on September 9, 1982 (R. 957-965). Five aggravating factors were found: 1) previous conviction of a violent felony, 2) in the course of a robbery or burglary, 3) €or the purpose of avoiding arrest, 4) the felony was heinous, atrocious or cruel, and 5) the felony was committed in a cold, calculated and premeditated manner. The judge found that the defense had failed to establish any mitigating factors (R. 957-965). The court did note under the statutory mitigating circumstances that the capital felony was committed by another, and Mr. James wae merely an accomplice, but found his participation not: to be "relatively minor" (R. 963).

On appeal to the Florida Supreme Court the death penalty was affirmed although the aggravating factor of heinous, atrocious and cruel was found to be invalid. James v. State, 453 So. 2d 786 (Fla. 1984). Certiorari review was denied. James v. Wainwright, 469 U.S. 1098 (1984).

The Governor signed a death warrant on February 20, 1986, setting Mr. James' execution for March 19, 1986. The Office of the Capital Collateral Representative then assumed Mr. James' representation, and on March 14, 1986, a Petition for Writ of Habeas Corpus was filed in this Court. The Court denied Mr. Jamea relief on that same date. James v. Wainwright, 484 So. 2d 1235 (Fla. 1986).

On March 16, 1986, Mr. James filed in the United States Supreme Court a Petition for Writ of Certiorari and Request for a Stay of Execution Pending a Review of the Petition for Writ of Certiorari. On March 18, Mr. James filed a motion to vacate judgments and sentences in the circuit court pursuant to Fla. R. Crim. P. 3.850, along with a motion for a stay of execution. The circuit court denied all relief. Mr. James filed a notice of appeal from this denial and on that same date this Court, with one justice dissenting, affirmed the denial of post-conviction relief and denied Mr. James' application for a stay of execution. James v. State, 489 So. 2d 737 (Fla. 1986).

Mr. James then petitioned the United States District Court for a writ of

habeas corpus and requested a stay of execution. On March 18, 1986, both the district court and the United States Supreme Court granted Mr. James a stay of execution. On June 23, 1986, the Supreme Court denied Mr. James' Petition €or a Writ of Certiorari.

The United States District Court denied Mr. James' federal habeae corpus petition on May 4, 1987. Mr. James appealed this denial to the United State8 Court of Appeals. The Eleventh Circuit heard oral argument in February of 1989. The federal action is currently pending before the United States Court of Appeals; no decision has been rendered.

A second motion €or post-conviction relief presenting a claim for relief under Hitchcock v. Dugger was filed in the state circuit court on July 31, 1989, pursuant to the requirements of Hall v. State, 541 So. 2d 1125 (Fla. 1989). The circuit court denied all relief on November 28, 1990. This appeal was then taken. Further facts pertinent to Mr. Jamee' claims for relief are discussed in the body of this brief as they relate to the individual claims presented.

SUMMARY OF ARGUMENT

I. Mr. James' sentence of death resulted from capital sentencing proceedings in which defenee counsel and the sentencers believed nonstatutory mitigating circumstances were not to be considered in determining what sentence should be imposed. Counsel's view of the law precluded investigation and presentation of a wealth of nonstatutory mitigation. Moreover, the trial the judge failed to consider the nonatatutory mitigation appearing on the record. As a result, the penalty phase proceedings violated Hitchcock v. Dugger, 481 U.S. 393 (1987).

II. Mr. James' right to a reliable capital sentencing determination was violated when the State urged that he be sentenced to death on the basis of nonstatutory aggravation and other impermissible factors, in violation of the eighth and fourteenth amendments.

III. Mr. James' sentence of death violates the fifth, sixth, eighth, and fourteenth amendments because the penalty phase jury instructions shifted the burden to Mr. James to prove that death was inappropriate and because the sentencing judge himself employed this improper standard in sentencing Mr. James to death.

IV. Mr. Jamea' death sentence is predicated upon the finding of an automatic, non-discretion-channeling, statutory aggravating circumstance, in violation of the eighth and fourteenth amendments.

V. Prosecutorial argument and inadequate jury instructions misled the jury regarding its ability to exercise mercy and sympathy and deprived Mr. James of a reliable and individualized capital sentencing determination, in violation of the eighth and fourteenth amendments.

VI. Mr. James' sentencing jury was given erroneous and misleading instructions at sentencing phase indicating that seven or more members must agree on a recommendation of life imprisonment, rendering Mr. James' sentences fundamentally unfair and unreliable.

ARGUMENT

ARGUMENT I

MR. JAMES' DEATH SENTENCE VIOLATES LOCKETT V. OHIO, EDDINGS V. OKLAHOMA *AND* HITCHCOCK V. DUGGER BECAUSE THE SENTENCING JUDGE LIMITED HIS CONSIDERATION OF MITIGATING FACTORS TO THOSE LISTED IN FLORIDA'S DEATH PENALTY STATUTE *AND* BECAUSE THE PARTICIPANTS OPERATED UNDER THIS SAME VIEW; AS A RESULT, MR. JAMES' SENTENCE OF DEATH WAS OBTAINED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The proceedings resulting in this sentence of death violate the constitutional mandates of Hitchcock v. Dugger, 481 U.S. 393 (1987). Mr. James' sentence of death resulted from the constitutionally improper restriction on the consideration of nonstatutory mitigating factors, and a constrained interpretation of the statute employed by the participants (e.g., defense counsel) in these capital proceedings. The sentencing court constrained itself from considering matters which mitigated against a sentence of death but which were not "enumerated" in the restrictive etatutory list (see Fla. Stat. sec. 921.141 (1973)). This restrictive statutory construction caused the sentencer to ignore nonstatutory mitigation. Mr. James' resulting sentence of death was neither individualized nor reliable, and violates Hitchcock v. Dugger and its progeny. The limiting construction applied by Mr. James' sentencing court violated Hitchcock. Davidson Joel James' sentence of death resulted from proceedings which were in every meaningful sense as unconstitutional as those in Hitchcock. Relief is appropriate.

The advisory jury here, in a vote of 7-5, recommended death. After this recommendation, the trial judge imposed a death sentence. As reflected in his sentencing order, the sentencing judge in Mr. James' case "assumed . . . a prohibition [against nonstatutory mitigation]," and constrained his review of nonstatutory mitigation. Hitchcock, 481 U.S. at 397. See also Thomas v. State, 546 So. 2d 716 (Fla. 1989). In its sentencing order, the court discussed the statutory aggravating factors it deemed applicable. Then, the court looked at, reviewed, and considered, only statutory factors €or mitigation.

The sentencer did not "consider," in any true and constitutional sense,

the nonetatutory mitigating factors present in the case. Neither the court nor defense counsel fairly took note of mitigating factors concerning the character of the offender and circumstances of the offense, Greaa v. Georgia, 428 U.S. 153 (1976), which mitigated against death but which were not in the statute. The Sentencing judge foreclosed his own review. As this court previously recognized, James "presented a considerable amount of evidence" in mitigation. James v. State, 453 So. 2d 786, 792 (Fla. 1984). Nonetatutory mitigation was available and should have been considered.

Because the court presiding at a capital sentencing proceeding is required to make specific findings in support of a death sentence, Fla. Stat. sec. 921.141 (3), we have a way of knowing what mitigating evidence was considered by the judge, as opposed to the jury. (R. 962-4). In arriving at his conclusion, the sentencing judge reviewed each of the seven mitigating circumstances contained in the statute, sec. 921.141 (6) (a)-(g), and articulated reasons for the non-application of each. Nonstatutory mitigation, however, was not considered. Indeed, nothing was said about such factors.

Fla. Stat. sec. 941.121 (3) requires the sentencing judge to make his findings of fact based "upon the records of the trial and the sentencing proceedings." A review of those records reveals that there was nonstatutory mitigating evidence which should have been considered. This mitigation was uncontested. Had the sentencing judge considered, in his own review of the record, evidence of mitigation other than that fitting precisely within the seven statutory categories to which he restricted his findings, the balance of life and death would have been significantly affected. However, not even a hint exists in the record that the Court took account of anything other than what tightly fit within the statute. The evidence was eimply not considered by the sentencing judge.

Important mitigating circumstances were contained in the record. The defense called three witnesses to testify in mitigation of punishment: Francis George, Lucy Sharrott and Gretta Bryant Walker. The unrebutted testimony of these witnesses estabiiehed that Davidson James contributed to

the financial and emotional support of this common-law wife (R. 589, 591-593), and her two children (R. 589-593). Moreover, none of the witnesses had ever seen Mr. James raise his hand in anger or behave in a violent manner (R. 590, 593, 597). Instead, Judy Sharrott described her loving and affectionate relationship with Mr. James, likening her feelings to those shared by father and daughter (R. 593). Gretta Walker, Mr. James' cousin, related to the judge and to the jury that Mr. James was a caring and sensitive man. Davidson had had a sister who was terminally ill; he was at her bedside daily (R. 595).

Despite the presentation of compelling evidence in mitigation, the court failed to fully consider this and other nonstatutory mitigating evidence either at the eentencing hearing of July 23, 1982 (R. 715-737) or in its written sentencing order. The limited scope of the court's review is exemplified by its analysis of the evidence of Mr. James' minimal participation in the offense. Although acknowledging that the capital felony was not committed by Mr. James, the court nevertheless believed itself constrained to address the defendant's minor role only in terms of whether the evidence presented by the defendant was sufficient to establish the statutory mitigating circumstances of whether the defendant was an accomplice in the capital felony committed by another person and whether his participation was relatively minor. Fla. Stat, 921.141 (6)(d). The court found that this level of proof was not obtained, and so did not consider any evidence relating to Mr. James' non-triggerman status and minimal involvement in the offense as nonstatutory mitigation. This is fundamental eighth amendment error. See Messer v. Florida, 834 F.2d 890, 894 (11th Cir. 1987)(the sentencing order "clearly indicates that the judge examined the [mitigating] evidence only for the purpose od determining whether [the evidence] satisfied the etatutory requirement"]; Harurave v. Dugger, 832 F.2d 1528, 1535 (11th Cir. 1987)(in banc). This claim was raised on direct appeal and there rejected pursuant to a pre-Witchcock analysis which this Court has itself now rejected. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988).

It is uncontroverted that Davidson James did not shoot Felix Satey. Nor did Davidson James shoot Dorothy Satey. The evidence failed to establish that Mr. James had anything to do with her death. Mr. Satey saw only one man with a gun -- Larry Clark (R. 393). Mr. Satey never saw the other man holding a gun, the man later "identified" as Davidson James (R. 393-394). In describing to the police the role played by this aeeond man, Robert Gibbs, Mr. Satey stated that Mr. James did nothing during the robbery; that he just stood there, "as if [in] a supportive role type thing" (R. 404, 428).

Further evidence was presented to the trial court to demonstrate Mr. James' minor participation in the offenae. After the jury had been excused, and prior to sentencing, defense counsel introduced into evidence the results of a polygraph test which had been administered to Mr. James:

Question One: On or about October 30, 1981, did you shoot anyone?

Anawer: No

Analysis: Truthful.

Question 2: Were you present when the Satey's were shot, on or about October 30, 19811

Answer: No

Analysis: Untruthful.

Question 3: Did you take any money from Mr. or Mra. Satey on or about October 30, 19817

Answer: No.

Analysis: Truthful. That is contrary to Mr. Satey's testimony at trial, though consistent with his statement to the police.

Question 4: Are you withholding information regarding the shooting and robbery?

Answer: No

Analysis: Untruthful

Question 5: Did you work for the Satey's on or about October 30th?

Answer: No

Analysis: Untruthful

Question 6: Did you make any personal gain as a result of the robbery incident involving the Satey'e at 6436 Ingraham on or about October 30, 19817

Anawer: No

Analysis: Truthful

(R. 732-733).

The trial court analyzed this evidence solely within the framework of the mitigating factors enumerated in Fla. Stat. §921.141 (6). Concluding that the proffered evidence did not comport with the statutory mitigating factor, the court discarded the evidence as unworthy of consideration. The judge's eummary rejection of this evidence is reflected in the sentencing order:

> D. THE DEFENDANT WAS *AN* ACCOMPLICE IN THE CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR. FACTS:
>
> 1. The surviving victim, Felix Satey, testified that he was shot twice by the defendant's accomplice immediately upon discovering the defendant and his accomplice standing outside the doorway.
>
> 2. Felix Satey further testified that he was then robbed of money by both the defendant and his accomplice -- one holding him and the other removing cash from his pockets.
>
> 3. Felix Satey further testified that after the robbery both the defendant and his accomplice went to another room where the capital felony and a burglary were committed.
>
> CONCLUSION:
>
> The defendant wae an accomplice in the capital felony committed by another person; however, his participation was not relatively minor.

(R. 963). It is evident that the court failed to consider that "[Mr. James'] own participation in the felony murder was so attenuated and since there was no proof that [James] had any culpable mental state, the death penalty was excessive retribution for his crimes." Tison v. Arizona, 481 U.S. 137, 149 (1987)(citations omitted).

The sentencing court, in limiting itself to consideration of only the mitigating circumstances listed in the statute, overlooked the nonstatutory mitigation contained in this record. Moreover, defense counsel's efforts were similarly constrained by the operation of state law and his perception of statutory constraints on consideration of mitigation. See Hall v. State, 541 So. 2d 1125 (Fla. 1989); Smith v. Dugger, 758 F.Supp. 688 (N.D. Fla. 1990). To the extent counsel's belief was not reasonable, Appellant submits that

counsel's view involved ineffective assistance of counsel which prejudiced Mr. James. As a result of counsel's view, a wealth of mental health and other nonetatutory mitigation never reached the jury and court charged with the task of determining Mr. James' fate.

Had defense couneel's efforts not been constrained, an investigation would have preeented Mr. James' jury with a substantial and compelling case in favor of life. It would have made Mr. James more human in the eyes of the jury and court, and presented a background which cries out for compassion.

Davidson James grew up in an atmosphere of abandonment, neglect, abuse, instability, confusion, and poverty. He was the third of three children born of a marriage characterized by verbal and physical violence, a marriage which ended with the husband abandoning the family when Davidson was only five years old. Davidson's life had no meaningful structure, and no member of his family was equipped or motivated to be a guiding force in his life.

Davidson was a child with some capacity for positive growth and learning, but he was never presented the opportunity to develop that capacity. In a family of women, he became marginal, with no one to pay attention to his particular needs ok tw significant and troubling events in his life. He had no one to look to a3 a stable influence or to meet his educational, social or physical needs. He was a child of black public housing projects and segregated schools, drifting aimlessly through a bewildering world in which no one provided a guiding hand.

From one environment of confusion, marginality and violence, Davidson moved to still others, spending nearly half of his life in state penal institutions. The boy who had no structure to his life sadly found that structure in a juvenile institution known for its lack of facilities and programs for black children, its degradation of black children, and its violence toward them. A few years later, he found himself in the state's most violent and uncontrolled prisons, subject to sexual assault because of his youth and so fearful that he spent most of his twenties locked in isolation. At the age of 30, after over 12 years of imprisonment, he

attempted to reenter a society he did not know, never having had the support necessary to learn its workings and pitfalls.

Davideon James was born to Theresa and Davidson James, Sr., on August 12, 1948, in Bradenton, Florida. The couple had two other children, Emma and Betty, twin sisters born in 1946. Davidson James, Sr., was 41 years old, (App. 11), and Thereaa James was 38 when Davidson was born. Theresa James had had four or five stillborn children before giving birth to her daughters. (App. 3 and 4).

Theresa James grew up in central Florida, raised by aunts and uncles because her mother refused to care for her. Theresa James' mother had two other children who she did keep at home and raise herself. At an aunt's home, Theresa James "was treated like a slave. She had to do all the work -- cooking, washing and ironing. If she didn't get something done, or if the family just felt like it, they would beat her." Mrs. James only attended school until the sixth grade. She and her mother were never close because of her mother's rejection of her and the abusive situation in which that rejection placed her. Mrs. James' children knew when they were very young that their mother "was like an outcast in her own family." (App. 2-4).

Mrs. James escaped her family and their abuse when she married Mack Butler, a good man who was reasonably well off. Mr. Butler died, however, leaving Mrs. James with a small inheritance. The inheritance soon disappeared, and Mrs. James was once again alone and isolated. (App. 3 and 4).

Davidson James, Sr., was a rough, violent man who drank continuously and gambled. (App. 2-4). He had repeated arrests for drunkenness in Bradenton. (App. 11). Mr. James made his living as a crew leader on farms, a profession known for its unscrupulousness and viciousness, much like the reputation of overseers in the time of legal slavery. Farmers hired crew leaders to harvest their crops, paying them a percentage of the price of the crop. The crew leader then hired laborers to do the harvesting. often, crew leaders refused to pay their laborers the promised wage. If the laborers protested this

unfair treatment, crew leaders beat them into submission. Davidson's father was no different from the average crew leader: "Davidson's father waa an ugly crew leader, ugly because of the way he was with the people he hired. He cussed people out all the time and treated them real bad, just as bad as any crew leader." (App. 2).

Mr. James' violence extended to his family. He and Mrs. James argued incessantly, arguments often ending in his attacking and beating Mrs. James. The beatings frequently occurred without apparent provocation, and once Mr. James knocked Mfs. James unconscious with a 2 x 4. Mrs. James suffered permanent damage from that blow, periodically passing out and requiring emergency treatment. The children, including Davidson, observed these violent outbursts, and were deeply disturbed by them. (App. 2).

The marriage finally ended with Mr. James deserting the family when Davidson was about five years old. Mr. James, Sr., literally disappeared from his children's lives, never providing them financial or emotional support. (App. 2-4). Betty Lou Shaw, a close family friend, remembers that although Mr. James left his own family and refused to participate in their lives, he remained in the same town and helped support another woman's children: "After he abandoned the family, Davidson's father didn't give them any money for support. We never gave them money for clothes or food, and didn't remember the children at Christmas or on their birthdays. He lived with another woman and helped raise her children, but did nothing for his own children." (App. 2).

Alcohol was more important to Mr. James than his children were: "He liked booze more than he liked the children, and never showed them any caring." (App. 2). If the children saw their father after he deserted them, he was drunk. Davidson's sister Betty remembers that their father "neglected us from the day we were born and then finally abandoned us completely. Our father was an alcoholic, always spending his money on whiskey, wine or beer. The few times we saw him after he abandoned us, he was drunk." (App. 3).

With Mr. James gone and with her family having ostracized her years

before, Mrs. James was utterly alone with three young children to raise and support. Her age, poor health, lack of education, and abusive childhood combined to frustrate her every attempt to provide a home and stability for her children.

The family's immediate problem was debilitating poverty. Mrs. James could obtain only low-paying, unskilled jobs, and no matter how hard she worked, was unable to provide financial security. She "did her best to support us, but it was more than she could handle. It is a very hard thing to raise children on your own. She worked in the fields, in restaurants, or in white people's houses trying to earn enough to feed us." (App. 3 and 4). In spite of her efforts, "Theresa never had enough money to take care of the children. She always worked real hard picking crops or cleaning for white people and tried to earn enough money, but never had enough." (App. 2).

At first, the mother and children lived in a dilapidated house infested with roaches, and which had no running water or electricity. Betty Lou Shaw recalls that they "lived in a real run-down house on 6th Street. They didn't have any indoor plumbing, running water, or electricity and the place was dirty and full of bugs." (App. 2). An important moment in Davidson's life occurred when the family was permitted to move into the public housing project in west Bradenton where they had running water for the first time. (App. 5).

The family was always in need of food and other essentials. Betty Lou Shaw remembers hearing the cries of hungry, malnourished children: "There were many times I heard the children crying because they didn't have enough to eat." Davidson needed eyeglasses, but the family could not afford them: "Davidson was supposed to wear glasses when he was a child but didn't get them for a long time because there was no money." (App. 2).

These financial hardships took a heavy toll on Mrs. James, who despaired over the family's poverty, "cry[ing] from being so depressed and tired." (App. 3). Her misery deeply affected her son, who desperately wanted to help her: "Davidson was a real compassionate person . . . . Theresa would be depressed and crying about not having things they needed -- real basic

things like food -- and Davidson would think he had to get them for her. He hated to hear his mother hurting and wanted to help her." (App. 2).

The hard, long hours she worked for little reward and her poor health so drained Mrs. James' personal resources that she was incapacitated as a mother. Mra. James once told Betty Lou Shaw, "I was too old to have a baby." (App. 2). She "didn't have the education or physical stamina to get a real good job or to keep up with three young children. She didn't go to school past elementary school, and she was a good bit older than most mothers with young children because her first marriage had been childless, and in her second marriage, she had 4 or 5 miscarriages before her twins were born." (App. 4). Her jobs so exhausted her that "[w]hen she got home from working, she'd go to bed right away so she could get up early the next morning." (App. 3).

The combination of fatigue and poor health made Mrs. James unable to be a guiding force in her children's lives, and the children realized from a young age that they could not expect any emotional support from her. she "wasn't able to give any guidance. . . . She didn't really talk to us and we couldn't go to her with a problem because we couldn't communicate." (App. 3). Stressful situations were particularly difficult €or Mrs. James. Because of her poor health, she was easily upset: "Her health was so poor -- what with the trouble she had after she got hit on the head -- that she couldn't handle stress or difficult situations. If the children had problems, she couldn't deal with them and the children learned that they couldn't tell her things that might upset her. Davidson used to tell me more about hi5 problems and bad things that happened to him than he told his mother becauee he knew she couldn't help him and would only get upset and sick." (App. 2).

Mrs. James' normal approach to any of the children's problems was to refuse to deal with the problem. Gretty Walker remembers that if Davidson had any trouble, his mother "would try to cover up for him or pretend there was no problem. 'I know my boy wouldn't do that,' she'd say. That was Theresa's usual way when her children had problems. Once Betty wrote a check on my checking account without permission, and when I told Theresa about it, she

said, 'I don't know anything about that. My child wouldn't do that.' Theresa never confronted problems and tried to help her children with them -- she just pretended they didn't exist." (App. 4).

The only way Mrs. Yames knew to discipline and guide her children was with severe physical punishment, the same way she had been brought up. The unceasing frustrations with her difficulties in life resulted in the children being slapped, punched, and beaten regularly. Betty Bradshaw remembers that when the frustration mounted, their mother would "beat us often with belts, ironing cords, strops, or switches." (App. 3). Gretty Walker saw Mrs. James "take her fists and hit on the children, knocking them in the head with her fist or slapping them with her open hand." That discipline "didn't make sense to the children," but "[s]he didn't know anything else to do and was only doing what had been done to her." (App. 3 and 4). All of the children, including Davidson, received "whippings and beatings." Indeed, Mrs. James felt that "you have to whip them to get them to behave. When I was growing up, I got beatings at home and school, and it didn't kill me." (App. 2).

In addition to physical abuse, Davidson was the victim of sexual abuse. When he was a young teenager, Davidson was sexually abused by the mother of a friend of his. (App. 5). Betty Lou Shaw remembers that Davidson came to her one day very upset about something that happened at a friend's house: "[H]e told me he'd been over to someone's house and a woman . . . came into the room he was in, She was completely naked and had him have sex with her. Davidson was real confused and embarrassed about this. He asked me if it was okay for women to get nude like that. . . . He stayed upset about that for a long time." (App. 2).

Davideon felt his father's desertion and the consequent lack of a male role model in his life very deeply. Tragically, Davidson knew very well that his father cared nothing about him: "Davidson felt like his father didn't want him -- and he was right. When Davidson's sisters would be going over to try to visit their father, it was so sad to hear that boy say, 'My daddy would be here with me if I had one.'" (App. 2).

Mr. James' desertion "made all of our lives, but especially Davidson's, a terrible struggle. . . . he was the only male in a family of women and had no one to teach him about anything." (App. 3). The combination of the father's desertion and the mother's resulting absence from the home working meant that Davidson "didn't have anyone to show him how to do things or guide him. He had no male figure in hie life, and his mother wasn't able to help him. He really got no supervision. . . ." (App. 4). Davidson never had anyone in his life offer, "if you have a problem, come to me." (App. 3).

Betty Bradshaw remembers "a boy who was completely on his own. . . . When I think about him, sometimes it's like he wasn't even there. Nobody paid enough attention to him." Davidson's invisibility within the family extended to the outside world, as well: "Davidson was alone in our family and alone outside of it. He never really had any close friends. . . . He didn't talk a lot because he had some kind of speech impediment that made him stutter all the time when he was young." (App. 3). Davidson was not "an outgoing child. He really was a loner without any close friends. He wasn't much of a talker at all and was kind of withdrawn." (App. 2).

The community, too, offered nothing in the way of structure or guidance to the troubled boy. Gretty Walker remembers the years of Davidson's youth as years when black children in the projects received no attention from social agencies or the business community. The children in the projects "just played out in the road after school or hung out, since there weren't any organized activities available. Back in the time when Davidson was growing up, after-school jobs for black children were unheard of, so children had little to do and nothing to organize their time." Courts and their representatives were similarly uninterested in a black child's problems. Once when Davidson had some legal difficulties, Mrs. Walker "went to the courthouse to talk to a lawyer or a judge. The meeting was awful, and I was terribly embarrassed when I left because of the way he talked to me. He talked down to me and wasn't interested in helping Davidson -- just in getting him out of the way so he didn't have to take up his time with him." (App. 4).

The constellation of abandonment, psychological and physical neglect, and physical and sexual abuse had serious and damaging effects on young Davidson. The damage had already begun by the time Davidson entered hi5 first year of school on September 12, 1954. He repeated the first grade, was withdrawn in the middle of the second grade when Gretty Walker took him to a school in Sarasota, and upon returning to Bradenton Elementary, repeated the third grade. (App. 6). His teachers' comments throughout elementary school are illuminating:

> Davidson is slow. Needs special attention.
>
> Davidson has shown some improvement. Be likes attention from the teacher.
>
> Davidson withdrew and went to Sarasota School on Jan. 23, 1957. He did fair work. Liked attention from teacher.
>
> Davison is a very slow learner. . . . Constant drill is needed in this case before Davison will do satisfactory work.
>
> He is slow in most all of his work.

(App. 6). Davidson was "slow," required "special attention," and, importantly, "likes attention from the teacher." When he received that attention, he showed "improvement" and "did fair work." Without that attention, however, Davidson just barely managed to stay in school, receiving C's and D's most of the time, until he left school in the tenth grade at the age of 17. (App. 6).

Teachers' observations of Davidson's "General Condition and Appearance," "Behavior," and "Health Habits" further illustrate the damage Davidson's environment was causing and his need for attention and help. In his two years of third grade and in the fourth grade, Davidson was "Moderately" or "Markedly Unsatisfactory" in the following areas:

> Tires Easily
> Poor Muscular Coordination
> Bad Posture
> Speech Defect
> Nervousness ok Restlessness
> Shyness
> Too Little Group Participation

The observations also indicated that he "Needs Attention" for "Lack of Emotional Control," (App. 6). These conditions suggest that Davidsan was

suffering from malnutrition, psychological trauma, and physical trauma, among other possibilities, and was in great need of support.

Without any guidance, structure, or superviaion in his life, Davidaon quite naturally began have problems in the community. His own family never taught him societal values and eociety itself aseigned him no significance. He was so deeply moved by his mother's despair over the family's poverty that he "got it into hi5 head that he had to help provide €or the family. He would hear our mother crying and moaning about the things we didn't have, and he'd think he had to get them for us. He wanted to help, but didn't know how, so he went out and stole things sometimes -- real basic things like meat and other food. I don't think anyone ever told him not to do that." (App. 3).

In a desperate search for peer acceptance and male companionship, Davidson associated with groups of boys who led him into difficulties in the community. In his early teens, "he hung around with other boys and that always seemed to get him in trouble. Davidson was always tagging along with someone else when he got in trouble." Davidson had no ability to discern who was or was not an appropriate companion: "Davidson couldn't tell very well what people were like. He couldn't pick the right people to be with and couldn't tell there were some people he shouldn't be with." (App. 2).

Davidson was not assertive. He was so quiet, withdrawn, and unskilled in dealing with others that he "could be talked into things . . . with just a little bit of coaxing. . . . (S)omebody was always leading him into things he shouldn't be doing." Davidson was "a weak person," and once involved in a group, "couldn't separate himself from people when they were doing something wrong." (App. 2). Davidson also was not physically skilled or courageous and "has never really been able to defend himself in the world. He was not a rough person and was not physically brave." (App. 4).

At the age of 14, Davidson James was sent to the Dozier School €or Boys in Marianna, Florida. For the first time in his life, Davidson came into contact with male authority figures, in an institution known €or its inadequate staffing, for its policy of segregation, which not only separated

black children from white children, but which also provided white children with significantly more services than it provided black children, and for its brutality.

Davidson was at the Dozier School from December 3, 1962, until December 18, 1963, and again from September 17, 1964, until September 28, 1965. (App. 12). The Dozier school, like many juvenile institutions, was overcrowded and understaffed. The result of this situation is that a child like Davidson, desperately in need of attention and counseling, is nothing more than part of a large "herd", according to Oliver Keller, a former Superintendent of the Dozier School:

> The very size of most training schools is at odds with treatment. The larger the institution, the more routinized it becomes. Delinquent children, who need attention and human contact desperately, do not receive the care they need in institutions. Congregate living is impersonal and anonymous. The mass herding of children from one building to another is not conducive to treatment.
>
> In large institutions the delinquent subculture of the inmates is at odds with staff goals. Even when some children want to 'do right,' other stronger inmates can discourage and threaten them. In most institutions the bullies among the inmatea really 'run' the cottages. They pressure weaker boys for sex, cigarettes, commissary items, and parcels from home.
>
> The chances of establishing treatment programs that truly change delinquent attitudes are minimal in institutions. Not only does the delinquent subculture work against staff efforts, but eufficient numbers of clinical people are rarely available.

(Oliver Keller, in James, Children in Trouble, 1969, pp. 172-3, App. 13).

Another former superintendent, Lenox Williams, who first came to Dozier in 1960, reports that in the 1960's, Dozier was continually plagued by a lack of resources:

> We have never had enough resources to work with in order to accomplish the things that really need to be done at the school. In my early years there, this shortage of funds could be seen in the most basic areas such as the lack of textbooks to teach the kids from. We even had to manufacture our own materials from hand-me-downs.

(App. 14).

In the early 1960's, the institution was segregated into two distinct sections, with the black boys living on the "North Side" and the white boys on the "South Side." The school ran a farm on which most of the work was done by the black boys. Andrew Bowers, a chaplain at the school from 1959 to 1963,

recalls that "[t]he black boys were made to sit up all night and just watch the sows to make sure they didn't roll over on top of the small pigs." Part of the time Davidson was there, he worked in the slaughterhouse, killing and butchering pigs. (App. 15-17).

Great disparities existed between the facilities and programs provided the black boys and those provided the white boys. Mr. Bowers describes the differences:

> Sometimes I would take the black boys from my side over to the white side and we would see the great difference between the way it was on the white side as compared to the black section. The whites had access to all kinds of equipment that the blacks didn't have. Mostly all they had on the black side for the boys was farming--milking cows, working in the processing plant and such as that. Also, they didn't have any psychologists for the black youngsters. As the chaplain for the colored section, I was really all the boys had as far as someone to talk to.

(App. 15).

Former superintendent Lenox Williams was also on staff during the years of segregation:

> In my early years at the training school we had an official policy of "separate but equal." In reality things were far from equal. I had particular occasion to appreciate this when I moved over to the Colored Department and observed, for example that psychological counseling was not available to the black youngsters. The furnishings in the cottages were not as good in the black section as in the white part of the echool. I can still recall the feeling I had seeing the black boys sitting on a bare concrete floor watching television.

(App. 14). Academic studies conducted on various questions pertaining to Dozier in the early 1960's systematically excluded blacks from their sample populations because, "Negro boys[']. . . program[s] differed from that of the white boys." (App. 18).

For most of its history, Dozier freely practiced flogging as a method of discipline, or as a matter of whim. Mr. Bowers remembers, "they would spank the boys when they did wrong or really whenever they wanted to. Some of them they treated pretty bad. Sometimes they'd spank the children until they couldn't sit down. They would have to lay on their stomachs for two or three days." (App. 15).

Many beatings were administered with a "weighted leather 'flogging

strap." (App. 13, p. 15). A witness to a flogging described them as "sickening":

> A young boy [wae] taken into a stark, bare, dimly lit room where he was compelled to lie on a small cot and receive licks with a heavy leather strap. At the time the strap was being wielded by a man who was at least six feet, three inches and weighed well over two hundred pounds. . . . The child quivers and writhes. . . .

(App. 13, p. 106). Another witness saw a child returning from a flogging and "bleeding profusely." (Id.). Floggings were not "officially" discontinued until 1968. (App. 16-V).

Ultimately, the crowded conditions, lack of staff and facilities, and beatings do nothing but return a child to society in worse condition than when he entered the institution:

> We are working in a terribly primitive field. Primitive. Punitive. Brutal. I don't like large institutions. I don't like what happens to children in them. One of my men says living in a training achool is as cozy aa living in a wash bay of a filling station. I agree. The child is returned to the streets with none of his family problems solved. And he's more sophisticated in crime.

(App. 13, p. 108).

After he left Dozier in 1965, Davidson returned to his family in Bradenton and attempted to continue school. He attended the tenth grade in the 1965-66 school year, doing poorly in most of his classes. At the end of the year, he left school and never returned. (App. 6). He attempted to work, once going with Betty Lou Shaw to Maryland to work in the fields, but found no stable employment. (App. 2).

Davidson lived in Bradenton for approximately two and one half years when he was again incarcerated for passing a worthless check. After serving his sentence, he was paroled, but was soon in prison again on a variety of charges. He remained there for the next seven years. From the time he was fourteen years old, Davidson had spent 12 of 16 years in a county or state penal institution. (App. 19).

Davidson found state prison a violent place in which he feared for his personal safety. Numerous reports in his Department of Corrections' file indicate that he was terrified of the other inmates and requested that he be

placed in "Administrative Confinement" (ieolation) as protection from them:

> Subject is currently housed on Administrative Confinement for hi0 own protection. . . . Subject insists that he can't live in population as the other inmates are putting too much pressure on him.
>
> Subject is currently housed on Administrative Confinement as he insist[s] the other inmates are putting too much preeeure on him (Homosexual). . . . This inmate is in administrative status on his own request and is not considered to be a disciplinary problem. . . . Subject insists that he can't live in [open] population as the other inmates are putting too much pressure on him. . . . A transfer to Union Correctional Institute will allow this man to come to population once again. . . .

(App. 20).

Davidson was transferred to Union Correctional, but his fears and inability to live in population continued:

> It is noted that subject was formerly a maximum security inmate at the Florida State Prison and was moved to this institution in hopes of a more favorable population adjustment. His adjustment to the UCI population has been . . . marked by frequent complainte of a need for greater protection from other inmates in the population. Such complaints have culminated in subject's preeent administrative confinement status.
>
> TRANSFER: UCI to FSP E-U for long term protective custody.

(App. 20). Davidson received "long term protective custody," remaining in confinement for most of his time in prison.

Davidson James told Betty Lou Shaw what he was afraid of -- sexual assault:

> He said that guards would try to make boys homosexual and would sell boys to men so the men could have sex with them. This happened to Davidson. Besides being sold, he was attacked and raped by men many times. There was no way he could do anything about this. If he said anything to anyone, he might be beaten. The rule was you better not say "no" or you would get a whipping. He said men would say, "Better take it, nigger" and "nigger, come and suck my dick." I'll never forget him sitting on my couch telling me that. I had tears running down my chin for the boy, and he just eat there and told me this horrible story.

(App. 2).

Davidson emerged into the world in May, 1978, in this psychologically precarious state, having lived in isolation and fear €or most of the previous 8 years. We came into the world with a criminal record that stalled his attempte to obtain employment, with a distrust of a world he did not understand, with a fear of men and an inability to function with them, and

with psychological trauma that showed itself in strange behavior.

On work release, Davidson met Frances George, and began living with her. Ms. George thought Davidson was "the kindest, gentlest person" she had met, "a perfect gentleman and very caring." (App. 17).

Davidson "spent a lot of time looking for jabs. . . . It was very difficult for him to get a steady job because of his prison record, but he never gave up trying. He would walk all the way from our house in eaet Tampa to the state employment office downtown looking for work. When he found work, he worked hard, but he got turned down a lot becauee of hie record." (App. 17).

Davidson spent most of his free time at home, reading, listening to music, or going for walks. Frances wished he would get out more, but he "wasn't a socializer. . . . [H]e didn't talk much if he was in a group -- he just stayed off to the side. He didn't have any close friends. . . . He felt safer around women than he did around men." Davidson "was very careful about other people. He said I was too trusting because I didn't know what he knew and I hadn't been in the situations he'd been in." (App. 17).

Ms. George was concerned about Davidson becauee he "sometimes acted a little strange":

> I remember one time I was upstairs in the house and I heard a conversation downstairs. I thought Davideon had company because I heard two different voices, two different laughs, two different people. When I went downstairs, Davidson was all alone, talking to himself with those voices. This happened quite a few times. Davidson also used to stay awake many nights, pacing back and forth in the house.

(App. 17).

Davidson suffered two enormous heartbreaks during theee years. The first occurred when Frances miscarried twin babies. Davidson "wanted children very badly. Very few men like kids as much as he did." When Davidson came to the hospital to see Frances after the miscarriage, "he came in the room and just looked at me, very calmly and with no reaction. In later years, he told me how terribly hurt he had been when we last the babies." (App. 17).

The most terrible blow came when Davidson's sister Emma died in March,

1981. Davidson was closer to Emma than he was to any other member of his family because "she was always the one who would go to him when he had troublee and the only family member who offered him any etability." When Emma was ill in the hospital, Davidson stayed in Saraswta to be near her. After her death, "[h]e came home one Sunday and told me Emma had died, and he cried and cried. At Emma's funeral he had to be held up because he passed out." Davidson "was so hysterical at Emma's funeral, he had to be carried out of the church. I don't think he ever got over Emma's death -- he mourned over her for months and months." (App. 3, 14 and 17).

Had defense counsel presented this background to a mental health expert to utilize in evaluating Mr. James, this would have resulted in expert testimony establishing significant non-statutory mitigating factors where none were found to exist:

> Based on the current evaluation and the information available to me, the following mitigating circumstances likely contributed to Mr. James' alleged actions at the time of the offense:
>
> 1). There is strong evidence that Mr. James suffers from organic brain damage or shows the residues of such a condition. Current psychological testing strongly supports such a conclusion and is consistent with the inmate's self-report of seizures, narcolepey, speech impediment and the described brain surgery when he was eleven.
>
> The evaluation finds that Mr. James suffers from an Organic Personality Syndrome in that he meets all the criteria required by the DSM-III (310.10). In that further evidence would be helpful in corroborating the organicity, it is recommended that a CAT Scan and EEG be obtained in addition to a more thorough review of Mr. James' earlier medical records.
>
> 2). The evaluation shows that Mr. James was the victim of sexual abuse as an adolescent. There is sufficient professional literature to demonstrate the potentially serious emotional sequellae of sexual abuse. Although Mr. James currently denies having been the victim of further sexual abuse in Marianna ok prison, the evaluation finds that he shows the characteristics of a sexually abused individual. His request to be placed in protective custody while incarcerated certainly lends support to this possibility.
>
> 3). Mr. James was under considerable emotional duress at the time of the alleged offense due to the recent death of his sister Emma with whom he had forged a close emotional relationship. This relationship was unusually close becauee of Mr. James' alienation from both parental figures. This loss, therefore, was particularly traumatic for Mr. James

> due to the lack of emotional eupport from other sources in hie life.
>
> 4). The evaluation finds Mr. Jamee to be a product of a chronic pattern of institutionalization. In that this individual had no strong, positive male role models in his life, his only opportunities to develop male identification were those provided while he was incarcerated. This evaluation depicts Mr. James as an individual who craved male attention but had difficulty being accepted because of his lack of obvious masculine traite and interests. This background information must be taken in conjunction with his lack of a father figure from an early age, and his demonstrated conduct in seeking protective custody in prison from others whom he fears.
>
> 5). A facet of Mr. James' Organic Personality Syndrome is impaired judgment. This fact, taken with hie other character deficits, suggeste he suffered a diminished ability to conform to the requirements of the law at the time of the offense. I would note in conjunction with this finding that Mr. James did not tell me he was involved in the offense, and in fact, told me quite the opposite.

(Report of Dr. Krop, App. 5).

It is clear that there was a wealth of non-statutory mitigation which could have been presented on behalf of Mr. James at penalty phase. It is apparent from the record that all participants in the sentencing process - the court, the prosecutor and the defense counsel - acted in accordance with the then-prevailing view that Florida's capital sentencing etatute did not permit consideration of non-statutory mitigation.

The sentencing order aptly demonstrates that the trial court ignored the nonstatutory mitigating value of the evidence presented by Mr. James. Rather, the court simply considered statutory mitigation, and went no further. It is clear that only statutory mitigating circumstances were considered. There is no reference to any other mitigation presented. This Court has specifically held that Hitchcock overturned the notion that "mere presentation" of nonstatutory mitigation was enough to satisfy the eighth amendment. Waterhouse v. State, 522 So. 2d 341 (Fla. 1988). This Court concluded that Hitchcock required the sentencer to actually consider the nonstatutory mitigation. The facts in Mr. James' case are virtually identical to those in Cheshire v. State, 568 So. 2d 908 (Fla. 1990). In Cheshire, this Court held that "the trial court may not constitutionally limit itself solely to

considering statutory factors, as the court below apparently did in its written order." Cheshire, 568 So. 2d at 912 citing Hitchcock. Though the trial court in Cheshire did mention nonstatutory mitigation in its oral statements at sentencing, there was no mention of nonstatutory mitigation in the written sentencing order. Mr. James' sentencing judge did not mention nonstatutory mitigation in either the oral pronouncements at sentencing or the written sentencing order.[2]

It matters not whether proper mitigation is before the sentencer -- the issue is whether that evidence was meaningfully and properly considered. Hitchcock requires reversal of a death sentence where the sentencer does not provide meaningful consideration and does not give effect to the evidence in mitigation. Penry v. Lynaugh, 109 S. Ct. 2934 (1989). It would be a remarkable exercise in speculation to conclude that the aggravating circumstances which were found in Mr. James' case, beyond a reasonable doubt, outweigh the substantial mitigating circumstances which should have been considered by the court. See Hall v. State, 541 So. 2d 1125 (Fla. 1989).

The circuit court summarily denied this claim (PC-R2. 74). This claim was properly before the court on its merits, and the allegations required evidentiary resolution. An evidentiary hearing and relief are proper.

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[2]The record is clear that the judge did not consider nonstatutory mitigation. However, even if the record reflects ambiguity as to the consideration the judge gave to nonstatutory mitigation, relief is proper: the very ambiguity renders the proceedings unreliable and the sentence unindividualized. This Court has granted relief pursuant to Hitchcock when "the record . . . leaves unresolved the question of whether the trial court considered nonstatutory mitigating evidence." Thomas v. State, 546 So. 2d 716 (Fla. 1989). It is "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978), that "require[s] us to remove any legitimate basis for finding ambiguity concerned the factors actually considered." Eddings v. Oklahoma, 455 U.S. 104, 119 (1982)(O'Connor, J., concurring).

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ARGUMENT II

MR. JAMES' RIGHT TO A RELIABLE CAPITAL SENTENCING PROCEEDING WAS VIOLATED WHEN THE STATE URGED TEAT HE BE SENTENCED TO DEATH ON THE BASIS OF NONSTATUTORY AGGRAVATION *AND* OTHER IMPERMISSIBLE FACTORS, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In his closing argument to the jury during the penalty phase, the prosecutor in Mr. James' case interjected prejudicial and inflammatory comments, denying Mr. James an individualized sentencing determination and rendering his sentence of death arbitrary, capricious and unreliable. For example, the state attorney argued:

> The testimony of those [defense] witnesses changes nothing, because emotion and sympathy is not a mitigating circumstance. Mr. O'Connor will suggest to you that you do not recommend a death sentence for Davidson James because he has loved ones.
>
> Well, I can grant you, as a matter of fact, that Dorothy Satev did. She cannot be here to testify today.

(R. 601)(emphasis added).

> Mr. O'Connor may go into graphic detail about death by electrocution. I am sure it's not pleasant. He may mention names like Charles Manson, the Son of Sam, Theodore Bundy. And as I stated, neither you nor I take great pleasure in this task. But our continued existence in a law-abiding society demands proper punishment for serious crimes, especially for senselese, cold-blooded, calculated murders.
>
> And I submit to you whatever graphic detail, if any, he goes into nothing is more graphic than this. And as I indicated yesterday, we can sit there and we can go through words about what happened I want to to stop now and visually picture this happening. The only difference between this happening and what the system ha3 done with Davidson James is he has been treated fairly. he had very competent counsel. He had twelve people of his own choosina to come in here and listen to the facts and decide his fate, which he did not give Dorothy Satev that opportunity. He decided every thing.

(R. 602-603)(emphasis added). Urging that a criminal defendant be sentenced to death becauee he availed himself of his constitutional rights is improper and unconstitutional. See Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991).

The prosecutor's argument was irrelevant and inflammatory -- it conveyed no information pertaining to the defendant's culpability. Instead, the state entreated the jurors to put themselves in the victim's place and use their ideas about what the victim experienced as a basis €or sentencing Davidson

James to die:

> No. 4, the crime was especially wicked, evil, atrocious, or cruel. Now, we have Mrs. Satey in the back crippled, aeventy-four years old. She hears shot. She calls to her husband, "What's wrong?" And now we get this mental picture of what happens when Davidson James and Larry Clark go to the back of the room and she watches after hearing gunshots. There is a man pointing a .38 caliber pistol to her head. Does she have any fear of death? What is her thought process at the time? This is aggravating circumstances No. 4.

(R. 609). This is sheer speculation and fantasy: There was no evidence to suggest that Davidson James was with Larry Clark when Clark shot Me. Satey. The prosecutor nevertheless argued this to the jury in support of a sentence of death.[3] This classic example of the long-condemned "Golden Rule" argument, see Adams v. State, 192 so. 2d 762 (Fla. 1966); Pait v. State, 112 So. 2d 380 (Fla. 1969), violated the eighth and fourteenth amendments.

The prosecutor concluded his argument with a final plea for a verdict of death, to vindicate the victim's and society's rights:

> When do we as a society stop worrying about Davidson James? When is the time that we stop worrying about him, he who continues time and time again to come through the criminal justice system, leaving heartache, injury and death, and when do we start becoming concerned about Dorothy Satey? What did she do? It's time to become concerned now.

(R. 610).

Mr. James was sentenced to death on the basis of impermissible arguments which thie Court has condemned as early as 1981 in Welty v. State, 402 So. 2d 1159 (Fla. 1981). Since Welty, this Court haa consistently held that arguments such as those presented here are inadmissible and deny the defendant "as dispassionate a trial as possible." Welty, 402 So. 2d at 1162. See Jones v. State, 569 So. 2d 1234 (Fla. 1990). Such argument clearly lies "outside the scope of the jury's deliberations." Taylor v. State, 583 So. 2d 323 (Fla. 1991)(citing Jackson v. State, 522 So. 2d 802 (Fla. 1988). The considerations in these cases are the same impermissible Considerations urged on the jury in Mr. James' case. See also Penry v. Lynaugh, 109 S. Ct. 2934, 2951

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[3] Trial counsel unreasonably failed to object to these nonrecord, irrelevant and prejudicial comments. In this regard, counsel provided ineffective assistance.

(1989)(death sentence cannot be premised on "an unguided emotional response").

The prosecutor's misrepresentations, character slurs, and implications that others wanted Mr. James die, denied Mr. James due process and the right to a fair trial as guaranteed by the Sixth, Eighth, and Fourteenth Amendments. See United States v. Young, 470 U.S. 1 (1985); Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977). All of the prosecutor's arguments violated the eighth and fourteenth amendments. See Cunninsham; Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985)(in banc); Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989).

These improper comments by the prosecutor obviously impacted on the jury's ultimate decision. The overwhelming effect that these comments had on the judge is evident in his sentencing order. He wholeheartedly embraced the impassioned ragings of the prosecutor in finding five aggravating factors and no mitigating factors. He concluded that death was the appropriate punishment. The trial court found:

> H. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.
> FACTS:
>
> 1. That Dorothy Satey, the victim of the capital felony, was a woman, 74 years of age, confined to a wheelchair.
>
> 2. That Dorothy Satey, at the time of her killing, was in her wheelchair in the living quarters of the building in a position where she could not see her husband, who was in the shop portion of the building where he could not see his wife.
>
> 3. That upon two shots being fired in the portion of the building where her husband was she called out "What's wrong? What's wrong?"
>
> 4. That Felix Satey said to the defendant and his accomplice after being shot. "If it's money that you want, here is it. But don't hurt my wife," and testified at trial: "I was pleading for them [the defendant and his accomplice] not to hurt my wife."
>
> 5. That the defendant's accomplice, who was known to Dorothy Satey, then went to where she was seated and shot her once in the forehead at close range with a .32 caliber pistol.
>
> 6. That Felix Satey, after he was shot, heard one shot and then heard his wife, Dorothy Satey, "moaning" while the desks were being ransacked.
>
> CONCLUSION:

The victim must have suffered immense mental agony in the second elapsing between hearing gunshots where here [sic] husband was and receiving the single shot to her own forehead. Essentially immobilized in her wheelchair and fearing the worst for her husband she saw the defendant's accomplice, her former employee, advance on here [sic] with a pistol leveled at her face. She surely reflected on what was to be her imminent fate the single .32 caliber slug did not immediately kill the victim according to Felix Satey who testified that, for some time after the single shot was fired, he heard the victim, his wife, "moaning" in the next room where the defendant and his accomplice were ransacking deek drawers. Based upon all the evidence introduced at trial the Court concludes that killing of Dorothy Satey was especially heinous, atrocious and cruel.

I. THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.
FACT:

The Court re-states the facts as set forth in Aggravating Circumstances D., E., and H., above with one additional fact as follows:

1. That after the victim Felix Satey was shot and the defendant had moved to the other portion of the premises, Mr. Satey crawled into a darkroom and hid under a table. The defendant's accomplice, just before he left the premises, opened the door of the darkroom and called, "Where is you? Where is you?

CONCLUSION::

The acts of the defendant reflect the highest degree of calculation and premeditation. The obvious plan of the defendant and his accomplice was to eimply shoot first and eliminate opposition and witnesses. The only flaw in the echeme as it developed was the accomplice's aim. Had he killed Felix Satey with the first shot the crime might have gone unsolved. The accomplice made the last attempt to dispose of the remaining witness before he and the defendant fled the scene. The Court finds that the capital felony was a homicide committed by the defendant, a5 an accomplice, in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R. 960-962).

Both the State and the court misrepresented the law and committed fundamental error. Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985). In addition, the prosecutor's statements improperly diminished the jury's sense of responsibility for its recommendation. The remarks by the prosecutor served to constrain the jury in their evaluation of mitigating factors in violation of Penry v. Lynaugh. This prevented them from allowing the natural tendencies of human sympathy from entering into their determination of whether any aspect of Mr. James' character required the imposition of a sentence other

than death. This undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. James.

The admission of repeated irrelevant and misleading evidence and argument by the State was error. The cumulative effect of these repetitive improprieties "was so overwhelming as to deprive [Mr. James] of a fair trial." Nowitzke v. State, 572 So. 2d 1346, 1350 (Fla. 1990). The prosecutor's improper argument rendered Ms. James' death sentence fundamentally unfair and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments.

Trial counsel rendered ineffective assistance by failing to object to or refute the State's misconduct. Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983); Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Kimmelman v. Morrison, 477 U.S. 365 (1986). Moreover, counsel's failure to object was deficient performance. Murphy v. Puckett, 893 F.2d (5th Cir. 1990). Mr. James was prejudiced. Had counsel objected, Mr. James would be entitled to relief. The ineffective assistance rendered the trial "unreliable" under the law of Penry v. Lynaugh. The Court should vacate Mr. James' unconstitutional sentence of death.

ARGUMENT III

TEE MURDER FOR WHICH MR. JAMES WAS SENTENCED TO DEATH WAS NOT COLD, CALCULATED *AND* PREMEDITATED AS DEFINED BY ROGERS V. STATE, AND THE APPLICATION OF THIS AGGRAVATING FACTOR VIOLATED THE EIGHTH *AND* FOURTEENTH AMENDMENTS BECAUSE NO LIMITING CONSTRUCTION WAS PROVIDED TO THE JURY OR EMPLOYED BY TEE SENTENCING JUDGE.[4]

In Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), this Court held that the "cold, calculated, and premeditated" aggravating factor requires proof beyond a reasonable doubt of "calculation," which consists of "a careful plan or prearranged design to kill." This Court has "defined the cold, calculated and premeditated factor as *requiring* a careful plan or prearranged design." Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988)(emphasis added).

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[4]This claim was presented on direct appeal and is presented now in light of the decision in Hitchcock v. Dugger, holding a Florida sentencing jury must receive accurate instructions which comply with the eighth amendment. This Court has previously held Hitchcock was a change in law.

A Florida capital jury must be correctly instructed at the penalty phase proceedings. Hitchcock v. Dugger, 481 W.S. 393 (1987). Nothing in the jury instructions, sentencing court's construction, or this Court's holding on direct appeal suggests the sort of "calculation," the "careful plan or prearranged design to kill," that is a neceesary predicate for the "cold, calculated, and premeditated" aggravating factor. No evidence in this case even suggests a plan or design to kill sufficient to meet the heightened level of premeditation required by this aggravating factor. Further, no limiting instruction was given to the jury to guide their deliberations. See Hitchcock v. Duaaer; Mavnard v. Cartwrisht, 108 S. Ct. 1853 (1988)(death sentence cannot stand where there is failure to apply limiting construction of broadly worded aggravating factor in order to channel and narrow sentencer's discretion); Zant v. Stephens, 462 U.S. 862, 877 (1983)(aggravating factor "must genuinely narrow the class of persons eligible for the death penalty"). The Court's holding on direct appeal fails to satisfy the standard that, under Rogers, is required before a death sentence can stand based on this aggravating circumstance.

The application of the "cold, calculated, and premeditated" aggravating factor by the sentencing court in Mr. James' case and the instructions provided to the jury all fall far short of what the eighth amendment requires. No limiting construction was applied. See Mavnard v. Cartwrisht, Moreover, there exist no facts in this case sufficient to support a proper finding -- required under Rogers -- of a "careful plan or prearranged design to kill." 511 So. 2d at 533.

It is not significant whether the trial judge would have imposed the death penalty in any event. Instructional error is reversible where it may have affected the jury's sentencing verdict. Rilev v. Wainwright, 517 So. 2d 656 (Fla. 1987). In Florida, the role of the sentencing jury is critical. In Mr. James' case, the sentencing vote was seven-five. One juror properly instructed could quite conceivably have concluded that the absence of the cold, calculated and premeditated aggravating circumstance made death

inappropriate and that the remaining aggravating factors were not sufficient to warrant a death sentence. This is particularly true in Mr. James' case, where the jury recommendation was 7-5. Such a change would have resulted in a binding life recommendation, and cannot be found to be harmless. The bottom line, however, is that this jury was unconstitutionally instructed, and that the State cannot prove harmlessness beyond a reasonable doubt. See Hitchcock.

Given the fundamental purpose underlying the courts' decisions in Hitchcock v. Dugger, Maynard v. Cartwriaht and Rogers, it would be arbitrary and capricious -- and a violation of the standards of the eighth and fourteenth amendments -- to apply the narrowing construction of Rogers and Cartwriaht to some cases but not others. Without uniform application, the result is caprice: that a defendant would be executed on the basis of a construction of an aggravating factor that has been flatly rejected by the courts. such a result cannot be squared with the well-recognized "requirement of reliability in the determination that death is the appropriate penalty in a particular case." Mills v. Maryland, 108 S. Ct. 1860, 1870 (1988).

The improprieties regarding this aggravating factor require resentencing. The "harm" before the jury is plain -- a jury's capital sentencing decision, after all, is not a mechanical counting of aggravatora and involves a great deal more than that. The error denied Mr. James an individualized and reliable capital sentencing determination. Kniaht v. Duaaer, 863 F.2d 705, 710 (11th Cir. 1989). The errors committed here can not be found to be harmless beyond a reasonable doubt. This is a claim of fundamental error. A new sentencing proceeding should be ordered.

ARGUMENT IV

MR. JAMES' SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. JAMES TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. JAMES TO DEATH.[5]

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a eentence could be given if the state showed the aggravating circumstances outweiahed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. James' capital proceedings. To the contrary, the burden was shifted to Mr. James on the question of whether he should live or die.

The jury instructions here employed a presumption of death which shifted to Mr. James the burden of proving that life was the appropriate sentence. This conflicts with the principles of Dixon. As a result, Mr. James' capital sentencing proceeding was rendered fundamentally unfair and unreliable. This error "perverted" the jury's deliberations concerning the ultimate question of whether Mr. James should live or die. Smith v. Murray, 106 S. Ct. at 2668. Mr. James therefore urges that the Court grant him the relief to which he can show his entitlement.

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[5]This claim is presented now in light of the decision in Hitchcock v. Dugger, holding a Florida sentencing jury must receive accurate instructions which comply with the eighth amendment. This Court haa previously held Hitchcock was a change in law.

ARGUMENT V

MR. JAMES' DEATH SENTENCE IS PREDICATED UPON THE FINDING OF AN AUTOMATIC, NON-DISCRETION-CHANNELING, STATUTORY AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.[6]

Mr. James was charged with premeditated and felony murder, pursuant to Fla. Stat. sec. 782.04. The State argued both theoriee and the jury returned a general verdict. The jury wae instructed at the penalty phase regarding an automatic statutory aggravating circumstance and Mr. James thus entered the sentencing hearing already eligible €or the death penalty, whereas other similarly (or worse) situated petitioners would not. Under these circumstances, Mr. James' sentence of death violated his sixth, eighth and fourteenth amendment rights.

The death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis €or conviction. Automatic death penalties upon conviction of first degree murder violate the eighth and fourteenth amendments, as the United States Supreme Court explained in Sumner v. Shuman, 107 S. Ct. 2716 (1987). As the sentencing order makes clear, felony murder was found as a Statutory aggravating circumstance. The sentencer was entitled automatically to return a death sentence upon a finding of guilt of first degree (felony) murder. Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumetance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and one which therefore renders the sentencing process unconstitutionally unreliable. Id. In short, if Mr. James was convicted €or felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate

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[6]This claim is presented now in light of the decision in Hitchcock v. Dugger, holding a Florida sentencing jury must receive accurate inetructions which comply with the eighth amendment. This Court has previously held Hitchcock was a change in law.

between who should live and who should die, and it violates the eighth and fourteenth amendments. See Lowenfield v. Phelps, 108 S. Ct. 546 (1988).

This error undermined the reliability of the jury's sentencing determination and prevented the jury from fully assessing the mitigation regarding Mr. James in this record. The Court ahould vacate Mr. James' unconstitutional sentence of death.

ARGUMENT VI

PROSECUTORIAL ARGUMENT *AND* INADEQUATE JURY INSTRUCTIONS MISLED THE JURY REGARDING ITS ABILITY TO EXERCISE MERCY *AND* SYMPATHY AND DEPRIVED MR. JAMES OF A RELIABLE *AND* INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.[7]

In a capital sentencing proceeding, the United Statee Constitution requires that a sentencer not be precluded from "considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); see also Witchcock v. Dugger, 481 U.S. 393 (1987). Because of the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case," the eighth amendment requires "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

In Mr. James' case, prosecutorial argument informed the jurors that they could not consider mercy in making their sentencing determination. One blatant example is found in the State's penalty phase argument. "The testimony of these [defense] witnesses changes nothing, because emotion and sympathy is not a mitiuatinu circumstance" (R. 601)(emphasis added). Additionally, the jury instructions did not adequately inform the jury that mercy or sympathy could be considered. This violated Hitchcock v. Dugger.

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[7]This claim is presented now in light of the decision in Hitchcock v. Duaaer, holding a Florida sentencing jury must receive accurate instructions which comply with the eighth amendment. This Court has previously held Hitchcock was a change in law.

The remarks by the State coupled with the court's instruction may have served to constrain the jury in its evaluation of mitigating factors.

There exists a substantial possibility that the jury may have understood that it was precluded from considering sympathy or mercy. This prevented Mr. James' jury from providing Mr. James the "particularized consideration" the eighth amendment requires. Undeniably, the presentation of evidence in mitigation of punishment involves the jury's human, merciful reaction to the defendant. See Peek v. Kemp, 784 F.2d 1479, 1490 and n.12 (11th Cir. 1986)(en banc)(the role of mitigation is to present "factors which point in the direction of mercy for the defendant"); see also Tucker v. Zant, 724 F.2d 882, 891 (11th Cir.), vacated for reh'g en banc, 724 F.2d 898 (11th Cir. 1984), reinstated in relevant part sub nom. Tucker v. Kemp, 762 F.2d 1480, 1482 (11th Cir. 1985)(en banc). Allowing the jury to believe that "mercy" may not enter their deliberations negates any evidence presented in mitigation, for it forecloses the very reaction that evidence is intended to evoke, and therefore precludes the sentencer from considering relevant, admissible (even if nonstatutory) mitigating evidence, in violation of Hitchcock v. Dugger; Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, and the eighth and fourteenth amendments. Because Hitchcock is a change in law, this claim is cognizable now.

Moreover, no tactical decision can be ascribed to counsel's failure to seek to have the jury made aware that sympathy and mercy were proper considerations. At no point did Mr. James' trial counsel argue that the evidence of the defense witnesses should properly be considered in mitigation. This failure of counsel to even mention the testimony of the defense witnesses coupled with the improper argument by the State effectively voided the testimony of the witnesses entirely. Counsel's failure deprived Mr. James of the opportunity to have the jury informed that the mercy and sympathy engendered by the mitigating evidence were a basis for returning a life recommendation. It would be beyond rational belief to find that this inaction by defense counsel was done for tactical or strategic reasons.

Mr. James' death sentence is fundamentally unreliable and violates the eighth and fourteenth amendments. Relief is appropriate.

ARGUMENT VII

THE JURY WAS MISLED *AND* INCORRECTLY INFORMED ABOUT ITS FUNCTION AT CAPITAL SENTENCING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS[8]

Mr. James' sixth, eighth and fourteenth amendments were violated by erroneous and misleading instructions at the sentencing phase. These instructions indicated to the jury that seven or more members muet agree on a recommendation of life imprisonment before declining to impose a sentence of death (R. 1709). The effect of these erroneous instructions was to render Mr. James' death sentence fundamentally unfair.

In Rose v. State, 425 So. 2d 521 (Fla. 1983), and Harich v. State, 437 So. 2d 1082 (Fla. 1983), this Court ruled that a majority vote was required only for a death recommendation. Accordingly, this Court held that a six-to-six vote by the jury is a life recommendation. The jury instructions provided at Mr. James' trial were therefore erroneous.

The instructions provided to Mr. James' jury created a substantial risk that the jury's sentencing verdict was the product of the erroneous instructions rather than the jury's consideration of the evidence. If the jury was ever deadlocked between life and death, that deadlock was a life recommendation; the instructions to the jury interfered with the jury's assessment of the appropriate Sentence.

The operation of these erroneous instructions thus violated the eighth and fourteenth amendments, for they created the substantial risk that the death sentence was imposed in spite of factors calling for less severe punishment. Relief is proper.

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[8]This claim is presented now in light of the decision in Hitchcock v. Duaaer, holding a Florida sentencing jury must receive accurate instructions which comply with the eighth amendment. This Court has previously held Hitchcock was a change in law.

ARGUMENT VIII

MR. JAMES' SENTENCE OF DEATH, VIOLATES THE EIGHTH *AND* FOURTEENTH AMENDMENTS BECAUSE THE JURY INSTRUCTIONS PROVIDED NO LIMITING CONSTRUCTION OF THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE AND THE TRIAL COURT APPLIED NO LIMITING CONSTRUCTION TO THIS AGGRAVATION.[9]

The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion. Jurors must be given adequate guidance as to what constitutes "especially heinous, atrocious, or cruel." Maynard v. Cartwriaht, 108 U.S. 1853 (1988).

Recently, the Supreme Court explained its holding in Maynard:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrev.

Walton v. Arizona, 110 S. Ct. 3047, *3056-57* (1990).

In Florida a jury in the penalty phase returns a verdict recommending a sentence. The jury's verdict is binding as to the presence and weight of aggravating circumstances as well as the sentence recommended unless no reasonable person could have reached the jury's conclusion. Hallman v. State, 560 SO. 2d 223 (Fla. 1990). See Ferry v. State, 507 So. 2d 1373 (Fla. 1987)("The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.") The Florida standard for an override is exactly the same standard that the United States Supreme Court adopted €or federal review of a capital sentencing decision. Lewis v. Jeffers, 110 S. Ct. 3092, 3102-03 (1990).

In Florida a capital jury and judge both act as sentencers in the penalty phase. Because the jury's factual determinations are binding so long as a reasonable basis exists, it must be regarded as a sentencer. In fact,

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[9]This claim is presented now in light of the decision in Hitchcock v. Dugger, holding a Florida sentencing jury must receive accurate instructions which comply with the eighth amendment. This Court has previously held Hitchcock was a change in law.

that wae the holding in Hitchcock V. Duqqer, 481 W.S. 393 (1987); Jackson v. Duqqer, 837 F.2d 1469 (11th Cir. 1988); Mann v. Duqqer, 844 F.2d 1446 (11th Cir. 1988) (in banc), cert. denied 109 S. Ct. 1353 (1989); and Hall v. State, 541 So. 2d 1125 (Fla. 1989).

The issue raised by Mr. James's claim is identical to that raised in Mavnard v. Cartwright, 108 S. Ct. 1853 (1988). Oklahoma's "heinous, atrocious, or cruel" aggravating circumstance was founded on Florida's counterpart, see Cartwriaht v. Mavnard, 802 F.2d 1203, 1219, and the Florida Supreme Court's construction of that circumstance in State v. Dixon, 283 So. 2d 1 (Fla. 1973), was the construction adopted by the Oklahoma courts. Under the Cartwriaht decision, Mr. James is entitled to relief.

Hers the jury was not told what was required to establish this aggravator. See Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Coehran v. State, 547 So. 2d 528 (Fla. 1989); Hamilton v. State, 547 So. 2d 630 (Fla. 1989). In the present case, as in Cartwriaht, the jury instructions provided no guidance regarding the "heinous, atrocious or cruel" aggravating circumstance. The jury was simply told: "the crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel" (R. 624). No further explanation of the aggravating circumstance was given. At sentencing, the trial judge found that "heinous, atrocious and cruel" applied.

Where an aggravating factor is struck in Florida, a new sentencing must be ordered unless the error was harmless beyond a reasonable doubt. Error before a sentencing jury must be reversed where the record contained evidence upon which the jury could reasonably have based a life recommendation. Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1988) ("It is of no significance that: the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation.") Mitigation was before the jury which could have served as a reaeonable basis for a life recommendation. Mr. James is entitled to relief under the standards of Mavnard v. cartwriuht.

CONCLUSION

On the basis of the argument presented herein, and on the basis of what was submitted to the Rule 3.850 trial court, Mr. James respectfully submits that he is entitled to an evidentiary hearing, and respectfully urges that this Honorable Court set aside his unconstitutional capital conviction and sentence of death.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February ___, 1992.

Respectfully eubmitted,

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